

2003

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Recommended Citation

Laura J. Cooper, *Teaching ADR in the Workplace Once and Again: A Pedagogical History*, 53 J. LEGAL EDUC. 1 (2003), available at https://scholarship.law.umn.edu/faculty_articles/305.

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Teaching ADR in the Workplace Once and Again: A Pedagogical History

Laura J. Cooper

During the summer there was a conference in Ann Arbor, sponsored by the Association of American Law Schools, to address whether law schools could better prepare students to represent the interests of employees and employers. The conference planners took care to include as participants not just law school teachers, but also practitioners who could more accurately describe the role of attorneys in representing worker and employer interests and how students could best be educated to serve those roles. Conference participants concluded that current law school courses were inappropriately focused on the adversarial role of lawyers in litigation. They decided that courses should instead emphasize lawyers' roles in more amicable means of conflict resolution, such as arbitration and mediation. Teachers at the conference outlined innovative pedagogies that they had been employing successfully in their classrooms to teach these new roles, including simulated mediated negotiations and arbitrations. They debated the potential advantages and disadvantages of simulation-based pedagogy.

Did you assume that this conference happened last summer? It actually happened in the summer of 1947! Why did these law teachers reach such conclusions in 1947? Was their vision of what and how to teach about resolution of workplace conflicts abandoned for the next fifty years, or have we simply forgotten a more complicated history of law school pedagogy? What are the antecedents of our contemporary focus on workplace ADR and our modern use of simulation-based teaching methods? What can examination of

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This history of law school pedagogy is told in significant part through developments reflected in the work of the Labor Law Group because this organization's more-than-fifty-year history, collected in archival documents and transcripts of several major teaching conferences, offers a unique and unusually detailed contemporaneous and continuous record of law teachers' thoughts and actions about workplace pedagogy. Some preliminary observations about this research were presented to the Section on Employment Discrimination at the 2001 annual meeting of the AALS. See Laura J. Cooper, *Alternative Resolution of Employment Discrimination Claims: American and Australian Experiences*, Proceedings of the 2001 Annual Meeting, Association of American Law Schools Section on Employment Discrimination Law, 5 *Employee Rts. & Emp. Pol'y J.* 603, 604 (2001).

I am grateful for the advice of Dennis R. Nolan and the extraordinary bibliographic support of Suzanne Thorpe in the preparation of this article.

this history tell us, more generally, about law teachers' power to define our conception of law and the role of lawyers by making both active and passive choices about curriculum and pedagogy?

The 1940s

In December 1946 W. Willard Wirtz, then a professor of law at Northwestern University (later to be secretary of labor in the Kennedy and Johnson administrations), delivered a provocative paper at the Chicago annual meeting of the AALS.¹ Wirtz, after reviewing the three leading labor law casebooks of the time,² concluded that they focused on the “breakdown of labor relations”—including many cases on strikes, boycotts, picketing, injunctions, and breaches of contract.³ He thought that the focus on labor litigation would lead students, when they became attorneys, to aggravate differences between the parties and to fail to foster productive working relationships. Wirtz blamed this misguided focus on the case method of instruction. He said, “We emphasize those aspects of labor law on which there are ‘cases’ that will facilitate our classroom attempts at socratic dialogue, and we ignore those aspects of the subject which are not illustrated by similarly convenient materials.”⁴ He noted that judges never see a healthy employment relationship and so, with the case method, neither do the students. He defined the lawyer’s role in labor relations much more broadly than simply serving as an aggressive advocate in times of conflict: “[T]he lawyer’s function today includes doing whatever someone else cannot do better toward establishing and maintaining satisfactory relationships between individuals and groups of individuals.”⁵

Wirtz, in his talk, offered some specific suggestions for improving both the substance and the pedagogy of labor law courses. He thought far greater attention should be given to the functioning of peaceful labor relations in such processes as collective bargaining and grievance arbitration. Reading materials should include not simply cases, but essays on economics, sociology, and politics. Casebooks should include primary materials such as legislative committee debates, handbills, and collective bargaining agreements. Students, he thought, should not be taught simply by the case method, but also by what he called a problem method, with problems drawn from real-life situations. Wirtz proposed not merely the kind of casebook that he thought ought to be created, but also, significantly, the method by which it should be created. He suggested a group approach—never tried before—to this pedagogical task: a large number of experienced teachers of labor law, working collaboratively with the guidance of practicing labor relations attorneys, to create course materials to educate students for their true roles as workplace problem

1. On Teaching Labor Law, 42 Ill. L. Rev. 1 (1947) (subsequently Nw. U. L. Rev.).
2. Alexander Hamilton Frey, *Cases on Labor Law* (Chicago, 1941); Milton Handler, *Cases and Materials on Labor Law* (St. Paul, 1944); James M. Landis & Marcus Manoff, *Cases on Labor Law*, 2d ed. (Chicago, 1942).
3. Wirtz, *supra* note 1, at 3.
4. *Id.* at 5.
5. *Id.* at 3.

solvers. At the end of his talk, the approximately 200 law teachers present voted unanimously to recommend to the AALS that a conference be called for the purpose of collectively creating a new substantive and pedagogical approach to the teaching of labor relations. The AALS accepted the recommendation, funding was secured from the Carnegie Corporation of New York, and the conference was convened.

On the morning of June 16, 1947, approximately thirty labor law teachers, along with fifteen other professionals, including representatives of labor and management, settled into their “splendid dormitory arrangements” at the University of Michigan in Ann Arbor for a ten-day conference.⁶ It began with an orientation to the field of labor relations through talks from academics in other disciplines such as economics as well as presentations from practitioners representing unions and employers.

Many of those speakers, both practitioners and academics, drew lessons from their experience with labor relations during and immediately after World War II, when they had served on such bodies as the War Labor Board, the National Wage Stabilization Board, and the postwar President’s Labor-Management Conference. Economist George W. Taylor, of the Wharton School at the University of Pennsylvania, spoke about the critical role of arbitration and mediation in achieving peaceful labor relations during World War II and the continuing need for arbitration and mediation in postwar labor relations.⁷ William H. Davis, a New York attorney, said that employers will necessarily seek out lawyers to assist them in amicable dispute resolution, in arbitration, and in mediation, and so law students must be trained in the skills that will permit them to fill these roles. Using presumptions of gender characteristic of the times, Davis observed, “[T]he time has gone by when any professional man can content himself with learning how to cure—he must learn how to prevent. That is as true of a lawyer as it is of a doctor.”⁸ Herbert S. Thatcher, the associate general counsel of the American Federation of Labor, concurred that unions, just like employers, would look to attorneys to represent them in mediated negotiations and in arbitrations and that law schools were thus obliged to train law students to function in these roles.⁹

Harvard Law School contracts law professor Lon Fuller sought to place the pedagogical issues in labor law in the broader context of legal education. While Fuller recognized the value of the case method in the lawyer’s intellectual development, he thought that it needed to be supplemented by a problem method in which future lawyers had experience in planning and in solving real problems. He thought students should gain experience in gathering facts, and he spoke favorably about the method of instruction in use at the

6. Transcript of Proceedings, Round Table Council on Labor Law, Association of American Law Schools, Conference on Training of Law Students in Labor Relations, 1 (1947) [hereinafter Conference Transcript] (remarks of Robert Mathews). The conference was held at the University of Michigan Law School, June 16–26, 1947.
7. *Id.* at 56–57, 69–70.
8. *Id.* at 101.
9. *Id.* at 174, 178.

Harvard Business School, where students were presented with packets of background information and asked to identify problems and their solutions. Fuller was aware of experimental pedagogies in law schools, including field-work and simulations of arbitrations, but he believed such methodologies were too wasteful of time and demanded too low a faculty-student ratio to be capable of widespread implementation in American law schools.¹⁰

Harvard Law School labor law professor Archibald Cox (later solicitor general in the Kennedy and Johnson administrations and Watergate special prosecutor) was somewhat more sanguine than Fuller about the potential for using simulations in the labor law course. With regard to the substance of an ideal labor law course, Cox said that grievance procedures and arbitration “should be made the heart of this whole subject” because the real expertise of lawyers is developing procedures for settling disputes. Cox suggested employing imaginative pedagogical devices to train lawyers in the necessary extralegal skills. He described, for example, an exercise he had used, of having four students represent the union and four the company, while he served as mediator in negotiations over a union security provision. He thought that the two or three hours devoted to such negotiations could yield insights into both the substance of union security and the process of collective bargaining that could not be gained by more conventional methods. He described a class conducted by one of his colleagues that simulated a Senate committee hearing on proposed amendments to the Fair Labor Standards Act in which Cox and Harvard economics professor John Dunlop had testified, and in which students later participated in actual drafting of and voting on amendments. Cox also recognized the challenges of simulation-based teaching, posing questions that might occur to a professor considering simulation-based teaching methods today. Must an excessive amount of time be spent in the logistics of arranging for the simulation? In a large class, if only a small number of the students will be directly involved in the simulation, how will the others remain engaged?¹¹

At the conclusion of a series of presentations on the lawyer’s role in the collective bargaining process, the law teachers met in smaller groups to try to reach consensus on the appropriate substantive focus and pedagogical techniques for their model course in labor relations. In the area of collective bargaining, they thought case law should be supplemented with such matters as history, economics, congressional hearings, illustrative realistic problems from a particular industry for which background economic information would be furnished, and material about how labor relations issues were handled in other countries. With regard to pedagogy, they encouraged the use of problems, observations of workplaces and of NLRB hearings, and the use of role-playing and mock proceedings.¹²

10. *Id.* at 299–300.

11. *Id.* at 325–26, 330–32. For some possible contemporary answers to these questions, see the Conclusion of this article.

12. *Id.* at 525 (Report No. 1, *Compilation of Group Discussions on the Lawyer’s Function in the Facilitation of Collective Bargaining*).

Other sessions were devoted to the lawyer's role in the grievance and arbitration process. William E. Simkin, a nonlawyer arbitrator, spoke about lawyers both as arbitrators and as advocates in arbitration. He addressed what lawyers need to "unlearn" in order to become arbitrators, including rules of evidence and insistence on formal procedures,¹³ as well as the ideal characteristics of lawyers serving as advocates in arbitration, including when to act like a lawyer and when not.¹⁴ Addressing the pedagogy appropriate to the training of law students for these roles, Simkin advised the reading of arbitration awards and opportunities for students to observe arbitration hearings and to write mock awards based on those observations.¹⁵ Yale Law School professor and labor arbitrator Harry Shulman emphasized that the administration and enforcement of the collective bargaining agreement is not an end in itself, that the objective is not to observe the contract to the letter, but rather to achieve "just and harmonious operation of the entire enterprise."¹⁶ Shulman addressed the importance of an arbitrator's knowing when it is more appropriate to mediate,¹⁷ and suggested that the sort of training a lawyer needed to be an arbitrator included training in "tolerance and sympathetic listening."¹⁸ He also raised doubts about simulations which might resonate with a twenty-first-century critic. He said, "You can't get over the fact that you are playing," that you cannot simulate the kind of pressure one would feel in an actual negotiation.¹⁹ And he feared that faculty who had the skills to teach legal doctrine might not have the ability to model or to teach effective negotiation skills.²⁰

In another session, participants addressed the utility of mediation, neutral fact-finding, and compulsory arbitration in resolving disputes over the terms of collective bargaining agreements. W. Ellison Chalmers, program director of the U.S. Conciliation Service,²¹ described the nature of a conciliator's typical interventions in the course of parties' negotiations in language that would be no different from a contemporary description, but for the substitution of *mediator* for *conciliator*. The conciliator gathers background facts from the parties, moderates joint discussion to diminish emphasis on personalities, conducts independent confidential caucuses with each side to identify barriers to agreement and encourage compromise, clarifies misunderstandings

13. *Id.* at 636–41.

14. *Id.* at 646–57.

15. *Id.* at 658–59.

16. *Id.* at 663.

17. *Id.* at 712.

18. *Id.* at 715.

19. *Id.* at 738.

20. *Id.* at 738–39. For some possible remedies to this concern about skill acquisition, see the Conclusion of this article.

21. Before the Taft-Hartley Act's creation of the Federal Mediation and Conciliation Service as an independent agency, the U.S. Conciliation Service existed within the U.S. Department of Labor. Labor Management Relations Act, 1947, ch. 120, §202(d), 61 Stat. 136, 153 (codified at 29 U.S.C. § 172(d) (2000)).

between the parties, provides necessary factual information, and suggests possible compromises.²²

The final session of the 1947 conference was devoted entirely to pedagogy. Jean T. McKelvey, professor at the then new and pioneering School of Industrial and Labor Relations at Cornell University, explained that there, in some courses, the principal method of instruction was “role-playing,” a technique critical for teaching what she described as the “social skills” of “sensitivity to the emotional responses and behavior responses of other people.”²³ Here’s how she described the process:

‘Role-playing’ requires the selection of a situation, a snapshot of one stage in a continuous stream of events. With a brief sketch of the nature of the situation, of preceding events and of the characteristics of the persons involved, each participant is asked to take the role of one of the persons in the situation.²⁴

McKelvey said it was especially useful if the simulation were enacted by two different teams, so that class members could compare different methods and determine which were successful and why. She amplified the earlier observation of Archibald Cox that simulations not only can teach skills but can deepen one’s understanding of theory: “What might very easily have been merely a passing incident is thrown against certain basic concepts of human behavior and critically appraised. By such means, theory becomes really a tool of analysis and understanding of the theory itself is strengthened.”²⁵ McKelvey also mentioned using mock negotiations, including mediation, in collective bargaining classes and having students play the role of advocates in mock arbitrations in courses in labor arbitration.²⁶

While McKelvey had described Cornell’s current use of role-playing as “experimental,” Columbia law professor and labor arbitrator Paul Hays said that he had been using the technique since 1936. Hays suggested that you could minimize the students’ sense of unreality in role-playing by confining students to the roles of lawyers and having the teacher play the role of client or witness. Unlike the simulations that McKelvey used, in which students were given brief summaries of the relevant facts, Hays preferred to design simulations in which fact gathering itself was a central part of the students’ task. He would simply assign the students to their respective roles, as advocates for the employer or the union, and then have them come to him, playing the role of the client, to ask appropriate questions to gather the information they would need for their advocacy. Playing the role of a nonlawyer client, Hays wouldn’t volunteer relevant information but would instead wait for the student to ask the appropriate questions, often in subsequent interviews after the student

22. Conference Transcript, *supra* note 6, at 878–81.

23. *Id.* at 1213.

24. *Id.* at 1214. The pedagogical device described by McKelvey as “role-playing” is generally in this article called “simulation.”

25. *Id.* at 1215.

26. *Id.* at 1215–16.

had done additional research to determine what questions were relevant. Although employing this role-playing technique, which Hays referred to as the “problem method,” he was uncertain about its ultimate effectiveness. He thought that its principal utility was psychological—that students would believe they were learning a lot and so would invest more energy in the effort and therefore perhaps ultimately learn more.²⁷ He mentioned as another advantage the way in which students vividly see the relevance of substantive knowledge to the actual representation of clients. But Hays thought the technique, generally, was “over-rated.” In language foreshadowing some concerns that might be uttered by a twenty-first-century critic, Hays said, “It takes too much time; it takes too much of the professor’s time; it takes too much of the student’s time for the amount that can be gotten out of it. It should not be allowed to spread.”²⁸

The 1950s

Following the conference, participants decided to implement Wirtz’s initial vision of a textbook created collaboratively with a focus on the lawyer’s role in promoting constructive working relationships between unions and employers. Teaching materials were written, tested through classroom use, and then revised. Ultimately thirty-one law teachers and labor practitioners, now organized as the Labor Law Group, participated in creating the textbook *Labor Relations and the Law*, published by Little, Brown and Company in 1953.²⁹ True to the initial vision, most of the book was devoted to cooperative relations between unions and employers in collective bargaining and labor arbitration, while matters reflecting a breakdown in relations, such as strikes, picketing, and litigation, played a subordinate role.³⁰ From a distance of fifty years it is

27. *Id.* at 1243–46.

28. *Id.* at 1247.

29. *Labor Relations and the Law*, ed. Robert E. Mathews (Boston, 1953). The Labor Law Group was organized under a trust agreement which provided that the royalties earned from this publication, and from any future projects, would be held by the group to be used for further publications and other educational projects. Today West Group publishes five Labor Law Group casebooks. They address labor law, employment law, employment discrimination, government employment, and ADR in the workplace. Collaborative authorship and collegial review by an editorial committee continue to be characteristic of Labor Law Group casebooks.

30. Robert E. Mathews in his Foreword clearly articulated the group’s mission:

[T]his volume reflects a conscious and deliberate attempt to shift the weight of discussion from the breakdown in labor relations to the constructive working program that today, happily, is vastly more characteristic of this relationship. That this is the only true emphasis is well substantiated by the 75,000 or more collective bargaining agreements currently in operation, renegotiated annually and usually without strife, and periodically interpreted by hundreds of arbitrators whose final awards are seldom questioned. Casebooks and law-teaching too often have been directed to the peripheral area of legal pathology, rather than to the healthy core of practical working cooperation.

It is the aim of this book, then, to rectify that historic unbalance and to develop in the student’s mind a realistic sense of his functions as a lawyer in working with and playing his part in this long-established cooperative practice.

Id. at viii. In a contemporaneous review of the book, Gerard D. Reilly, a practicing attorney and former member of the NLRB, quoted this same language from the Foreword and then

difficult to determine whether and to what extent the textbook's vision of cooperative relations actually redirected the focus of labor law courses in the nation's law schools. According to one of the book's authors, looking back after nearly thirty years, the book was "widely adopted" and had a "profound effect" on the teaching of labor law.³¹

Of the variety of pedagogical techniques discussed at the Ann Arbor conference, only the problem method was evident in the 1953 casebook. The authors created a fictitious Enderby Rubber Company and a Rubber Workers Union, and throughout the text, at appropriate points, they presented problems in the relationship between them (recognition of the union, negotiations, operation of the grievance procedure, and arbitration).³² The textbook did not, however, employ the Enderby case as a basis for simulations. Instead this problem method provided the students with a factual description and then asked questions designed for class discussion.

Although the Labor Law Group's initial casebook did not actively promote simulation pedagogies, such methods continued to be used to some extent in law school classrooms in the early 1950s, although they continued to be viewed as experimental. Herbert L. Sherman Jr., later a member of the Labor Law Group, described in a 1951 article a variety of teaching techniques, including simulations, in a course in collective bargaining. Sherman's course included a mock arbitration hearing in which students played the roles of parties, attorneys, and arbitrators; review of transcripts of actual collective bargaining sessions and arbitration hearings; practitioner guest speakers; and a recorded arbitration hearing.³³ In a 1954 article, "Report on an Experiment in Teaching Labor Law," Rankin Gibson described an introductory labor law course at the University of Toledo in which he identified as a primary focus "persuasion of the student that litigation is not the foremost task of the labor lawyer." He thought it important in such a course to stress "the importance of negotiation

remarked, "This thesis in my opinion is highly questionable." Book Review, 67 *Harv. L. Rev.* 532, 534 (1954). In Reilly's view, the lawyer's role was to invoke enforcement of the law, not to encourage the use of arbitration and mediation to promote private dispute resolution. *Id.* at 535.

31. Benjamin Aaron, Remarks to a Conference of the Labor Law Group 10 (1982) (unpublished manuscript on file with author). Aaron's summary followed a detailed history of the origins of the 1953 volume. Another of the book's authors, however, described the 1953 book as "little used." The Park City Papers, Labor Law Group, Conference on Labor and Employment Law, 193 (1985) (remarks of Clyde W. Summers) [hereinafter Park City Papers]. The conference was held at Park City, Utah, June 29–July 1, 1984. Summers's observations about the usage of the 1953 book were part of a brief introduction to a talk urging the Labor Law Group to direct its attention away from collective bargaining and toward the rights of nonunion workers. We do know that the 1953 book, in its draft form, was used by its coauthors in 17 law schools in 1948 and 1949. *Labor Relations and the Law*, *supra* note 29, at vi.
32. A practicing attorney who reviewed the book found the Enderby problems a "useful pedagogical device." Theodore R. Iserman, Book Review, 54 *Colum. L. Rev.* 302, 303 (1954).
33. The Law Student and Collective Bargaining, 3 *J. Legal Educ.* 445, 446–47 (1951). Sherman thought it would have been useful for the students to participate in additional arbitration simulations, but he found it difficult to find appropriate teaching materials. *Id.* at 447.

and counseling to prevent litigation.”³⁴ Gibson described a simulated unfair-labor-practice proceeding and recommended using mock arbitrations.

Others writing about labor law pedagogy in the 1950s, however, sought to redirect the course more into the mainstream of legal education, with its traditional focus on litigation, case law, and legal analysis. Morris D. Forkosch, writing in 1951, explicitly rejected collective bargaining as the appropriate focus of the labor law course. Rather, he thought an effort should be made to analyze cases “from a point of view which permitted some degree of conclusive exactness.”³⁵ For example, he recommended devoting considerable course attention to the labor injunction, perhaps the most extreme example of the breakdown in relations between labor and management. He provided an outline of his recommended course that covered in detail such topics as strikes, boycotts, and picketing, but did not include any attention to either collective bargaining methods (as opposed to the laws governing collective bargaining) or arbitration.

The 1956 annual meeting of the AALS highlighted, in sharp relief, the two contrasting visions of the appropriate objectives of the labor law teacher. Herbert Sherman, who had written before on his use of simulations, now described a course that was entirely simulation based. In Sherman’s collective bargaining course, students were assigned to be in one of two law firms, one representing a steel company and the other representing an independent union seeking to organize the company’s employees. In those roles the students participated in the union-organizing process, preparation for collective bargaining, negotiation of a collective bargaining agreement, and a labor arbitration hearing. Sherman said that he did not assign students to read a single case from a court, administrative agency, or arbitrator. He noted, “Extremely little law, as such, is discussed in the seminar; instead non-legal problems frequently faced by lawyers are explored.” Sherman embraced the thesis of Harry Shulman that “the law should be kept out of labor relations, but not the lawyers.” Sherman rejected “considering cases from a narrowly legalistic standpoint” and instead called upon students to “explore problems in the context of human, social, and psychological factors.”³⁶

Jerre S. Williams, speaking on the same AALS program as Sherman, strongly advocated a more traditional approach to labor law. Although Sherman had used simulation-based techniques for teaching statutory-based subjects, such as union organizing and unfair labor practices, as well as for other labor

34. 6 *J. Legal Educ.* 574, 575 (1954).

35. *Planning and Teaching a Course in Labor Law*, 3 *J. Legal Educ.* 587, 589 (1951).

36. Herbert L. Sherman Jr., *New Approaches in the Teaching of Collective Bargaining*, 10 *J. Legal Educ.* 105, 106 (1957). Although Sherman’s article provided no citation to the source of Shulman’s statement, he was apparently referring to Shulman’s talk that ranks as one of the most-cited law review articles of all time. See *Reason, Contract, and Law in Labor Relations*, 68 *Harv. L. Rev.* 999, 1024 (1955) (“When their autonomous system breaks down, might not the parties better be left to the usual methods for adjustment of labor disputes rather than to court actions on the contract or on the arbitration award? I suggest that the law stay out—but, mind you, not the lawyers.”); see also Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 *Cal. L. Rev.* 1540, 1551 (1985).

subjects less tied to the law, such as collective bargaining and labor arbitration, Williams sought to relegate role-playing to advanced courses in the latter subjects. In words that could not have been more different from those chosen by Sherman, Williams said that the objective of the labor law course was “the teaching of the *law*, to prepare the students to work as *lawyers* in a field of the law.” Williams’s words seemed to condemn pedagogical innovation:

[W]hatever innovations in legal teaching are indicated in other phases of the Labor Law course, there are no great differences between the teaching of the statutory labor material and the teaching of other law courses. It follows that in teaching this portion of the course, the approach is now, and should remain, pedagogically conservative.

He sought, instead, to steer the labor law course into the mainstream of law school courses that were devoted to hard-core legal analysis: “Teaching the statute in the Labor Law course gives us the best opportunity in the entire law school curriculum for the teaching of substantive Legislation. And it also gives us one of the best places, if not the best, to teach substantive Administrative Law.”³⁷

The profession of labor law teachers, even from the time it had first showcased the potential benefits of simulation-based teaching at the 1947 Ann Arbor conference, had recognized its risks and challenges. Now, lured by the promise of respectability within the law school world as mainstream teachers of legal analysis, labor law professors marginalized simulation pedagogy. Other factors may have contributed to diminishing the use of simulations in labor law teaching. As the following paragraphs describe, the substantive focus of the basic labor law course began to shift in the late 1950s and early 1960s from peaceful labor relations, including arbitration and mediated collective bargaining, to conflict in labor relations, including strikes and litigation. Collective bargaining and arbitration would now largely be relegated to advanced courses and seminars, and the accompanying pedagogy of simulation would be used there, if at all.³⁸

The 1960s

These changes in the substantive conception of the basic labor law course occurred within the Labor Law Group itself, which had only recently embraced the vision of labor peace as the organizing theme of the course. When the group began to consider a revision to its textbook in the spring of 1958, it was Williams’s vision of the role of the labor lawyer and of the nature of the labor law course that prevailed.³⁹ The lawyer’s role in peaceful workplace

37. Teaching the Labor-Management Relations Act in the Basic Labor Law Course, 10 *J. Legal Educ.* 69, 70 (1957).

38. See notes of interviews of labor law professors from the 1950s and 1960s, Dennis R. Nolan, Sept. 2000, on file with author. Although Hays had reported using role-playing techniques for teaching labor law as far back as 1936, even in 1969 professors were still describing teaching labor law through simulations as an “experiment.” Denton R. Moore & Jerry Tomlinson, The Use of Simulated Negotiation to Teach Substantive Law, 21 *J. Legal Educ.* 579, 579 (1969).

39. Williams, who was also a member of the Labor Law Group, chaired one of the groups of law teachers who prepared a section of the new text.

relations, which had been the focus of the first edition, was now abandoned. The Labor Law Group was fully aware that it was changing course. In their Foreword to the second edition, group cochairs Donald H. Wollett and Benjamin Aaron said that social and legal developments now made it appropriate for the course to concentrate on substantive labor law and the lawyer's role in labor conflict. They identified two reasons for this change. First, there now simply was more labor law. Material from the first edition represented only about ten percent of the material in the second edition. Second, the increasing activism of labor unions and the body of statutory and case law that developed in response made it appropriate now to devote attention to the very subjects the first edition had sought to deemphasize—the “pathology” of labor relations, to wit, strikes, boycotts, and picketing.”⁴⁰

The years between the 1947 Ann Arbor conference and the 1960 publication of the group's second edition had indeed been years of significant legal development in labor law, as well as social and political changes in the strength and conduct of unions. The first textbook had been written at a time when the National Labor Relations Act was relatively new and many doctrines were yet to be developed by the courts and the National Labor Relations Board. By 1960 there was more labor law in existence, and therefore more law to be reflected in a labor textbook. These years saw the enactment of the Taft-Hartley Act, which, for the first time, recognized that unions, like employers, could also commit unfair labor practices and undermine the nation's vision of labor peace.⁴¹ In deciding cases, the NLRB and the courts necessarily described, and thus made vivid, the strikes, boycotts, and picketing by unions that constituted unfair labor practices. Congressional hearings leading to the 1959 Labor-Management Reporting and Disclosure Act highlighted new kinds of union misconduct that demanded identification as unfair labor practices, as well as casting the nation's gaze, for the first time, on some unions' abuses of their own members.⁴² It became harder to limit one's attention to peaceful

40. *Labor Relations and the Law*, eds. Donald H. Wollett & Benjamin Aaron, 2d ed., ix (Boston, 1960). In a 1982 talk, Aaron described the change of emphasis in the second edition with some regret: “[A] majority now felt that the objective situation required more detailed attention to what had earlier been referred to as the ‘pathology’ of labor relations. In retrospect, I’m not sure that this shift in emphasis was wise.” Remarks to a Conference of the Labor Law Group 10 (1982) (unpublished manuscript on file with author).

41. The amendment specifically noted:

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

Labor Management Relations Act, 1947, ch. 120, § 1, 61 Stat. 136, 137 (codified at 29 U.S.C. §151 (2000)).

42. Congress specifically found,

from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of

labor relations in a year when unions were at what turned out to be the peak of their strength in the American economy, and when they were conducting an extraordinary number of strikes, some of them among the longest in the nation's history.⁴³

Apart from these legal and social changes that affected the Labor Law Group's rejection of peaceful relations, mediation, and arbitration, as the core of the labor law course, changes in the nature of the people who prepared teaching materials also may have influenced the shift. Many of the law teachers who had gathered in Ann Arbor and who went on to participate in the writing of the group's first textbook had, by virtue of the dislocations of World War II, personally worked in labor relations at a time when wartime circumstances promoted peaceful labor relations and encouraged the use of mediation and arbitration.⁴⁴ As time passed, people with such practical experience in times of labor peace were less likely to be among those creating labor law teaching materials. Moreover, the pedagogical role of active practitioners also diminished. One of the unusual characteristics of the 1947 conference and the Labor Law Group's first edition was the participation of nonacademics, practitioners concurrently engaged in representing workers and employers. Several such practitioners had attended the 1947 conference, and five of the thirty-one contributing editors of the first edition were practitioners. The twenty-six editors of the second edition were all law teachers.

Substantive law developments following publication of the second edition in 1960 caused labor law teachers again to consider redefining the labor

employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, §2(b), 73 Stat. 519, 519 (codified at 29 U.S.C. §401(b) (200)).

43. Bureau of the Census, U.S. Dep't of Commerce, *Historical Statistics of the United States: Colonial Times to 1970*, at 178-79 (Washington, 1975). Union membership included more than 30 percent of the nonagricultural workforce from 1943 to 1961. In 1959 there were 3,708 strikes involving more than 1.8 million workers, who lost an average of 24.6 workdays due to strikes. The same circumstances influenced a similar evolution in the academic discipline of industrial relations. Bruce E. Kaufman, *The Origins and Evolution of the Field of Industrial Relations in the United States* (Ithaca, 1993). Industrial relations programs at universities were typically founded in the last decade of the 1940s, initially focused on problem solving, and included courses in human relations in industry, as well as collective bargaining, mediation, and arbitration. *Id.* at 66. Like labor law, industrial relations was also fundamentally shaped by academics who had had personal experience in the wage stabilization and dispute resolution activities of government agencies during World War II. *Id.* at 87. Postwar labor unrest and labor violence redirected the attention of industrial relations scholars from human relations to economics and led to the institutionalization of industrial relations as an academic field of study. *Id.* at 61-63, 87.
44. Within two weeks of the attack on Pearl Harbor, the nation's unions and employers entered into an agreement for the duration of the war prohibiting strikes and lockouts, and providing for a government body to assist in the resolution of disputes that could not be resolved through negotiations; unions and employers agreed to seek resolution of disputes through collective bargaining. By May 1942 the body created by that agreement, the War Labor Board, had a thousand part-time appointees to engage in mediation, fact-finding, and arbitration. Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Maturing Years*, 35 U. Fla. L. Rev. 557, 564-65 (1983). See also Nelson Lichtenstein, *Labor's War at Home: The CIO in World War II* (New York, 1982).

curriculum. There had been some interest even earlier in including aspects of employment law beyond the collective bargaining relationship. Following the 1947 conference, participants had begun to compile teaching materials on other common law and statutory employment doctrines. Group members circulated and used in their classrooms, in mimeographed form, a textbook that covered such topics as compensation for unemployment and for workplace injuries, equal opportunity legislation, and social security.⁴⁵ A textbook based on those materials was published in 1957.⁴⁶

The notion of expanding the curriculum to include courses about employment law beyond the collective bargaining relationship did not, however, receive widespread attention until after the U.S. Congress began enacting statutes significantly broadening employment rights. Congress initially focused on the problem of employment discrimination. Statutory activity began in 1963 with the Equal Pay Act⁴⁷ and was soon followed by the far more significant enactment of Title VII of the Civil Rights Act of 1964,⁴⁸ prohibiting discrimination in employment on the basis of race, color, religion, sex, or national origin.

As case law interpreting Title VII was rapidly developing, the Labor Law Group gathered again for a general conference. It met in the summer of 1969, this time in Boulder, Colorado.⁴⁹ Participants sought to reflect, as they had in 1947, on what they should teach and how they should teach it. One of the speakers at the conference was Columbia University professor Michael I. Sovern, who had recently published perhaps the first compilation of teaching materials on employment discrimination, designed for fifteen hours of instruction on race discrimination.⁵⁰ Sovern's materials had been published both in paperback form and as part of a hardbound casebook on poverty law.⁵¹ While Sovern liked the idea of including employment discrimination materials in a course on poverty law, because it afforded an opportunity to demonstrate to the more radical students who would enroll in such a course the

45. Foreword, *The Employment Relation and the Law*, eds. Benjamin Aaron & Robert E. Mathews, vi (Boston, 1957).

46. *Id.* In calendar year 1970 this text was being used at only six law schools. Letter from Jerome Stone, Manager, Law School Division, Little, Brown and Company, to Professor (William P. Murphy), Feb. 5, 1971, Labor Law Group Archives. A textbook addressing many of the same topics as the Labor Law Group's book, but focusing more broadly on social legislation, including topics such as public housing and general assistance to the poor, had been published earlier. Stefan A. Riesenfeld & Richard C. Maxwell, *Modern Social Legislation* (Brooklyn, 1950).

47. 29 U.S.C. § 206(d)(1) (2000), Pub. L. No. 88-38, § 3, 77 Stat. 56 (1963).

48. 42 U.S.C. § 2000e (2000), Pub. L. No., 88-352, Title VII, § 701, 78 Stat. 253 (1964).

49. Conference on the Teaching of Labor Law, *The Labor Law Group (1969)* [hereinafter *Boulder Conference*]. The meeting was held at the School of Law, University of Colorado, Boulder, June 8–14, 1969.

50. *Cases and Materials on Racial Discrimination in Employment* (St. Paul, 1969).

51. *Cases and Materials on Law and Poverty*, ed. Paul M. Dodyk (St. Paul, 1969). In addition to Sovern's chapter on race discrimination in employment, the hardbound book also included chapters on income maintenance, housing, and consumer credit, and problems in family law and poverty.

“value of law in effectuating social change,” he encouraged the attendees to include employment discrimination as a topic in the basic labor law course.⁵²

Another speaker at the Boulder conference addressed the lawyer’s role in arbitration and mediation in much the same tone as that of the 1947 Ann Arbor conference. Saul Wallen, an experienced labor arbitrator then serving as president of the New York Urban Coalition, asked whether current law school courses were equipping students with the knowledge and skills they would need to represent clients in workplace dispute resolution. Wallen highlighted the extent to which the civil rights movement had complicated workplace dispute resolution, and thus the task of the lawyer, by involving additional contestants, such as civil rights organizations, government agencies, and workplace minority groups, in what had previously been two-party labor-management disputes.⁵³

Some of the discussion at Boulder concerned innovative teaching techniques, although only brief mention was made of techniques for teaching mediation and arbitration skills.⁵⁴ Charles J. Morris of Southern Methodist University described having students work with a local union in presenting actual arbitration cases and described an extended simulation in which students played the roles of union and management representatives negotiating an initial collective bargaining agreement in a fictitious food-processing firm. At the end of the negotiations, Morris brought in a federal mediator and an experienced advocate for labor and for management to critique the contract clauses students had negotiated. Morris described this negotiation exercise apologetically as a “mickey mouse” “fun and games period.”⁵⁵ Some thought the exercise Morris described had sufficient substantive content to make the “mickey mouse” label inappropriate.⁵⁶ Others raised pedagogical doubts about such a simulation, echoing concerns expressed at the 1947 conference. Donald Wollett thought a simulation could never offer the reality of negotiations in which actual union members must be satisfied with the outcome, and in which

52. Boulder Conference, *supra* note 49, at 56, 58. Sovern also thought the material could be taught as an independent one-credit course. *Id.* at 59. Alvin Goldman of the University of Kentucky commented that rather than situating the course in such a way as to reach the radical students, he would prefer to situate the race discrimination material in a course that would reach those who had supported the presidential candidacy of George Wallace. *Id.* (George C. Wallace, as governor of Alabama, had been a vocal opponent of racial integration. As a third-party candidate for president in 1968, he had received 13.5 percent of the national vote. Michael Barone & Grant Ujifusa, *The Almanac of American Politics 3* (Washington, 1996).)

53. Boulder Conference, *supra* note 49, at 13–16.

54. Methods discussed included showing of films, reviewing sample documents, requiring students to research the bargaining history of provisions that appeared in actual collective bargaining agreements in the community in which the law school was located, having students undertake a field study of procedures of an equal employment opportunity agency, conducting mock legislative hearings, identifying illegal provisions in collective bargaining agreements and union campaign materials and drafting lawful alternative provisions, having students interview lawyers about the impact of a state supreme court decision, and writing a fact-finding report in a public employment case. See generally *id.* at 97–108.

55. *Id.* at 109.

56. *Id.* at 110 (unattributed discussion).

a strike might result if no agreement was negotiated.⁵⁷ Jerry R. Anderson worried whether a labor law teacher would have the expertise to teach negotiation skills.⁵⁸ James B. Atleson, who also used simulated collective bargaining negotiations in his course, thought the technique highly effective in promoting student learning, and he said that it was all right if the negotiations were “fun and games” since enjoyment had a role to play in education.⁵⁹

In addition to the substantive presentations on employment discrimination and dispute resolution, participants at the Boulder conference were truly overwhelmed with diverse ideas for materials that might be included in the labor relations curriculum. Other speakers addressed such topics as collective bargaining, individual worker rights, labor standards, public employment, manpower planning, the professional responsibility of labor lawyers, and the labor laws of other countries.⁶⁰ Attendees found it hard to draw from these disparate topics a common conception of what should be taught. There was an even more fundamental uncertainty. Was their task to define what should be included in a single “labor law” course, or to decide which independent courses would together constitute a labor law curriculum?⁶¹ Was labor law to be transformed from a single law school course into a subsection of the curriculum?

Faced with so many competing ideas about the future direction of labor law and the labor curriculum, the conference participants developed an innovative solution. Instead of creating a single casebook whose authors would define the components of a standardized course of study, the Labor Law Group decided to leave course design to the teacher. The group would write a series of individual paperback books, each with fewer than 200 pages, on twelve discrete topics, and teachers could select from among them to create a course.⁶² The topics initially proposed included several related to the collective bargaining relationship (history, union organization, collective bargaining negotiations, and administration of the agreement, including arbitration), as well as internal union affairs, public employment, employment discrimination, the unorganized worker, labor standards (protection against physical and economic risks), manpower planning, professional responsibility, and comparative labor relations. Looking back on that proposal in the twenty-first century, one of the conference participants described the idea as “anticipat[ing] the electronic casebook by a few decades.”⁶³

57. *Id.* at 110.

58. *Id.* at 111. For some contemporary answers to the challenge of developing appropriate practical and pedagogical skills, see the Conclusion of this article.

59. *Id.* at 111.

60. *Id.* at 8–9.

61. *Id.* at 89 (remarks of Herbert L. Sherman).

62. *Id.* at 90 (remarks of Herbert L. Sherman).

63. John E. Dunsford, *In Praise of Casebooks (A Personal Reminiscence)*, 44 *St. Louis U. L.J.* 821, 827 (2000).

The 1970s

As the multiple-unit concept became a reality, dispute resolution subjects took an especially prominent role, ultimately becoming the subject of three of the group's first eight units. The group identified, among its objectives for the series, two educational innovations: teaching skills ("the art and techniques of negotiation") and demonstrating "the adaptability of conflict resolution techniques in the labor field to other areas of social conflict."⁶⁴ The first group of books appeared in the 1971–72 academic year, six independent units and a supplement of statutes and documents. These books, published by the Bureau of National Affairs,⁶⁵ included the subjects addressed in Labor Law Group books from the beginning—unionization, collective bargaining, and social legislation—as well as new works on the emerging areas of employment discrimination and public employment. One book tested traditional assumptions of labor law through empirical research. One of the first six books was on negotiation.

The negotiation book, prepared by University of Washington professor Cornelius J. Peck, was unusual in several respects. Although it had "Cases and Materials" in its title, it included only two cases of the conventional legal sort—a court of appeals decision and a portion of the opinion of an NLRB trial examiner.⁶⁶ Most of the materials in the book were essays on the theory and skill of negotiation and factual problems (cases) designed for discussion. Consistent with the objective of demonstrating the utility of labor conflict resolution mechanisms for resolution of nonlabor problems, the book included materials on negotiation of tort settlements, will contests, and divorce property disputes. With the publication of the negotiation book, the group also promoted simulation-based pedagogy by offering, to each teacher who adopted the book as a required text, a free set of three negotiation simulation problems.⁶⁷

64. Foreword, Cornelius J. Peck, *Labor Relations and Social Problems: A Course Book, Unit Five: Cases and Materials on Negotiation* viii (Washington, 1972). Other units in the series published in 1971 and 1972 included the same Foreword from the Editorial Committee.

65. The group initially intended to update the books annually and inquired of the publisher whether that process might be facilitated by using a computer. The publisher replied:

In our experience the use of a computer in producing printed matter is advantageous primarily for material that is being cumulated over a period of time. Indexes are the best example. Advances in this area are being made all the time, of course, and in a few years it may well be that composition by computer will offer great savings in time and money, but we do not believe that this is the case at present.

Letter from Donald F. Farwell, Manager, BNA Books, to William P. Murphy, Labor Law Group Chair, June 4, 1969, Labor Law Group Archives.

66. Peck, *supra* note 64.

67. Release, The Bureau of National Affairs, Inc., Apr. 28, 1972, Labor Law Group Archives. The problem supplement offered three cases (a divorce action, a lawsuit on a life insurance policy regarding a missing person, and a personal injury case), none in the labor setting. *Id.* The authors granted permission for teachers to use the problems in courses using Peck's case-book. The book of negotiation exercises included confidential information for role-players, documents, a data bank of information, and instructions for use of the problems. Robert L. Fletcher & Cornelius J. Peck, *Negotiation Problems* (1971) (in the collection of Gallagher Law Library, University of Washington).

In the fall of 1972 two additional books were added to the series, one on conflict resolution and one on arbitration, further implementing the group's objective of bringing lessons of dispute resolution from the labor context to other areas. University of Kentucky professor Alvin L. Goldman prepared the group's book on conflict resolution.⁶⁸ Goldman explained in the book's Introduction that all lawyers make use of, and counsel clients regarding, diverse mechanisms for conflict resolution, but that labor lawyers are uniquely self-conscious about assessing the comparative benefits of alternative conflict resolution methods.⁶⁹ Goldman explained that the book sought to foster this heightened consciousness not only in future labor practitioners, but also in lawyers in other settings: "This Unit is designed to provide some of the labor lawyer's insight into the nature, utilities, and disutilities of four nonjudicial processes for resolving conflicts: self-help, voting, negotiation, and arbitration."⁷⁰ For example, the book compared the labor movement's use of the strike weapon to other uses of self-help mechanisms to address contemporary social issues, such as tenant complaints about a landlord, college student protests against the Vietnam War, and corporate race relations.⁷¹

The second of the group's unit books published in fall 1972 addressed arbitration, but, like the negotiation and conflict resolution books, it sought to explore the role of this dispute resolution mechanism both within and beyond the labor context.⁷² Although most of the book focused on the procedure and substance of labor arbitration, the volume also included materials on building skills of arbitration advocacy and on the use of arbitration in other settings, including disputes concerning commercial and consumer matters, international questions, civil rights, housing, student and faculty issues, and political campaign practices. The book very briefly addressed then experimental programs to assess whether arbitration might be used to reduce court backlogs.⁷³

By 1976 the Labor Law Group felt it necessary to reexamine its idea of producing independent units from which individual teachers could constitute their own courses. The scheme of short independent books, frequently updated, proved unprofitable for the publisher.⁷⁴ John E. Dunsford, a group

68. *Labor Relations and Social Problems: A Course Book, Unit Seven: Processes for Conflict Resolution: Self-Help, Voting, Negotiation, and Arbitration* (Washington, 1972).

69. A lawyer representing a union, for example, might advise the client on whether to seek resolution of a dispute by striking, by bringing a lawsuit, by negotiating with an employer, by pursuing arbitration under a collective bargaining agreement, or by submitting a complaint to an administrative agency.

70. Goldman, *supra* note 68, at 1.

71. *Id.* at 21–32.

72. Edwin R. Teple, *Labor Relations and Social Problems: A Course Book, Unit Eight: Arbitration as a Method of Resolving Disputes* (Washington, 1972).

73. *Id.* at 258.

74. LRSP (Labor Relations and Social Problems) Balance Sheet (undated), Labor Law Group Archives. The chart of the publisher's income and expenses from 1971 to 1981 appears, from its placement in the archive files, to have been prepared by Mary Green Minor, director, BNA Books, for distribution to group members at a meeting in St. Louis in June 1982. The chart shows a net loss to the publisher, over the decade, of \$43,806.

member, reflecting afterwards on the group's abandonment of this approach, thought that the idea had "obvious flaws":

For one thing, the need to keep the units short enough imposed restraints on the adequacy of the coverage. As a consequence, the burden placed on the classroom user to flesh out the core elements in the units fell with particular force on the shoulders of the relatively inexperienced teachers (the old teachers would welcome the freedom to teach last year's notes or a recent article to supplement the printed materials in the unit). Thus, the commercial feasibility of the project was doomed in advance. Since new teachers in the field were still building up their repertoire, they would naturally tend to choose casebooks of the traditional type that had meaty, rather than sparse, coverage.⁷⁵

The group decided in 1976 to reorganize its ten different titles into six volumes.⁷⁶ It abandoned the idea of trying to limit book length to approximately 200 pages. Returning to the conventional norm, a single book would provide adequate material for a full course.

The group also reconsidered its earlier objective of producing books that would make methods of workplace dispute resolution models for other areas of social conflict. Records of group book sales in the 1970s indicate that units emphasizing mainstream administrative and judicial dispute resolution in the workplace were the best sellers, rather than the more innovative works promoting labor models of dispute resolution beyond their labor origins.⁷⁷ In the new series of six books, the negotiation book remained; the arbitration and conflict resolution books were, at least in title, merged into a single volume. The group no longer declared that a primary objective of the series was to demonstrate the utility of labor conflict resolution tools outside the labor conflict.⁷⁸ The two new books on dispute resolution largely separated dispute resolution in the labor setting from dispute resolution elsewhere. The negotiation book addressed negotiation theory and skills generically in a variety of contexts, with no special focus on the workplace or on negotiation skills

75. Dunsford, *supra* note 63, at 828.

76. Foreword, Edwin R. Teple & Robert B. Moberly, *Arbitration and Conflict Resolution, Unit Six of Labor Relations and Social Problems: A Course Book* viii (Washington, 1979). The six books in the new series were titled *Collective Bargaining in Private Employment*, *Social Legislation, Discrimination in Employment*, *Collective Bargaining in Public Employment*, *Negotiation*, and *Arbitration and Conflict Resolution*. *Id.*

77. LRSP (Labor Relations and Social Problems) Sales Summary (undated), Labor Law Group Archives. The chart of book sales from 1971 to April 1982 appears, from its placement in the archive files, to have been prepared by Mary Green Minor, director, BNA Books, for distribution to group members at a meeting in St. Louis in June 1982. The chart permits determination of the following number of copies of each book sold from 1971 to 1978: *Unionization and Collective Bargaining* (13,724); *Discrimination in Employment* (8,101); *Collective Bargaining in Public Employment* (7,188); *Cases and Materials on Negotiation* (3,100); *Arbitration as a Method of Resolving Disputes* (2,572); *Processes for Conflict Resolution* (2,152).

78. Although the Editorial Committee's Foreword that was included in the 1979 publications repeated nearly all of the group's objectives articulated in the Foreword included in its 1971 and 1972 publications, the 1979 version omitted the earlier statement that the series demonstrated "the adaptability of conflict resolution techniques in the labor field to other areas of social conflict." Compare Foreword, Teple & Moberly, *supra* note 76, at viii, with Foreword, Peck, *supra* note 64, at viii.

specific to labor relations.⁷⁹ Despite including “Conflict Resolution” in its title, the new labor arbitration book, *Arbitration and Conflict Resolution*, omitted all of the broad coverage of conflict resolution that had been the subject of the earlier conflict resolution text, and instead focused more narrowly and in great depth and detail on the procedure, substance, and legal context of labor arbitration.⁸⁰

Apart from these changes in substantive focus, the Labor Law Group, also in 1976, reassessed its pedagogical direction. Robert J. Rabin, of Syracuse University College of Law, chaired a subcommittee asked to consider publication of a problem set to accompany the group’s other books. Rabin had circulated within the group a draft set of problems, but few teachers used the problems and those who did reported only “modest success.”⁸¹ Rabin’s report relied in part on a letter from Benjamin Aaron, professor at the University of California, Los Angeles, School of Law. Aaron had made the most extensive use of the draft problems among group members, and he was not pleased with the result. He was personally uncomfortable using the role-playing methodology in his class and troubled by the “strongly negative” reaction of students who were not themselves participating in the role-playing and found it “impossible to become involved vicariously.”⁸² Aaron’s experience with role-playing persuaded him not to make further attempts to integrate it into his course, and he decided to return to a more traditional textbook and pedagogy.⁸³ Rabin reported that other members of the group reported similar discomfort in using the role-playing method. Rabin concluded that any thought of publishing the problems should be abandoned.⁸⁴

The 1980s

The Labor Law Group’s conception of the diffusion of labor and employment law into a few discrete subtopics came in for reconsideration in the 1980s. Although new courses had been added in the 1970s, courses addressing the NLRB’s regulation of the collective bargaining relationship had contin-

79. Cornelius J. Peck, *Cases and Materials on Negotiation: Civil and Criminal Litigation, Business and Commercial Transactions, Labor Relations, Miscellaneous Disputes*, 2d ed. (Washington, 1980). The breadth of the title and the subordination of the labor material within it indicate how far the text departs from a labor relations focus.

80. Teple & Moberly, *supra* note 76. The book has 582 pages of text, of which approximately 35 are devoted to arbitration in nonlabor contexts.

81. Report of Chairman of Committee on Problem Set, Labor Law Group, Mar. 26, 1976, Robert J. Rabin, Labor Law Group Archives [hereinafter Report of Chairman].

82. Letter from Benjamin Aaron to Robert J. Rabin, May 19, 1975, Labor Law Group Archives. The challenge of engaging nonparticipants in simulation-based instruction and the problem of teachers’ lacking necessary skills for simulation-based instruction had been noted by speakers at the 1947 conference that led to the founding of the Labor Law Group. See the Conclusion of this article for some suggestions for effective use of role-playing in large classes.

83. *Id.*

84. Report of Chairman, *supra* note 81. Rabin suggested that the group might consider maintaining a mimeographed collection of problems and promoting education in role-playing and problem-method teaching through a teacher’s manual or workshop. *Id.*

ued to be the curricular centerpiece. Looking out on the legal landscape of the 1980s, labor law teachers could see the proportion of the workforce represented by unions continuing to decline⁸⁵ while employment discrimination litigation was rapidly expanding⁸⁶ and new attention was being given to the status of the nonunion worker.⁸⁷ By 1978 the American Bar Association had recognized that the labor law discipline had broadened in scope; it changed the name of its discipline-based subgroup from the Section of Labor Law to the Section of Labor and Employment Law.⁸⁸ Should these developments lead law teachers to displace the traditional labor law course from its historic preeminence? Should one of the new areas of labor or employment law assume that position? Or was there some conceptual or pedagogical umbrella that could bring together the apparently disparate threads of labor and employment law? Might workplace dispute resolution provide that common theme?

The Labor Law Group gathered in Park City, Utah, in the summer of 1984 to consider these questions. With a nod to the group's intellectual origins, it asked Willard Wirtz, then practicing law in Washington, D.C., to give the opening address. Wirtz, in part, continued his theme from nearly forty years before, saying that an ideal labor law casebook should "include as much regarding the principles of labor-management collaboration as those governing conflict."⁸⁹ But Wirtz now proposed that law schools replace the traditional Labor Law I course addressing only the unionized workplace with a new course that would continue to cover collective bargaining and arbitration, but would also include a broad history of employment and labor law,⁹⁰ consideration of the variety of statutes regulating the workplace,⁹¹ and a vision of what the law of the workplace ought to be.

Wirtz suggested that this normative portion of the course could focus on varieties of "procedural invention" that might effectively and efficiently draw together multiple aspects of labor and employment law.⁹² In explaining the

85. Park City Papers, *supra* note 31, at 1–2 (remarks of Willard Wirtz).

86. At the conference Willard Wirtz noted that the annual total charges filed with the Equal Employment Opportunity Commission had reached 112,000 and that Title VII cases were the largest category of cases among federal court filings. *Id.* at 14.

87. See, for example, the landmark article, Clyde W. Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 Va. L. Rev. 481 (1976).

88. William F. Joy & Robert M. Segal, History of the Section of Labor and Employment Law: 1946–1996, 12 Lab. Law. 1, 2 (1996). The parallel section within the AALS did not change its name from Section on Labor Relations Law to Section on Labor Relations and Employment Law until 1989.

89. Park City Papers, *supra* note 31, at 5–6.

90. Wirtz suggested including early American employment law, slavery, gender discrimination, distinctions between uncompensated work in the home and work in the marketplace, the history of judicial responses to collective action, and statutes and court decisions from other countries, as well as the Communist Manifesto and papal encyclicals on work. *Id.* at 4–5.

91. Wirtz sought here to emphasize the pluralistic nature of employment law, including regulation of compensation, workplace safety and health, worker participation, employment discrimination, and protection from unjust discharge. *Id.* at 8–10.

92. *Id.* at 11–12.

background for this suggestion, Wirtz introduced the audience to a new abbreviation, ADR:

[O]ne of the largest concerns in the minds of responsible lawyers today is reflected in a catch-phrase that has already been reduced to an acronym: ADR—alternative dispute resolution. In an increasing number of areas the realization is growing that traditional adversarial litigation in the courts is becoming too slow, too expensive, burdensome, inefficient and ineffective.⁹³

He thought that labor law offered a special opportunity to direct students' attention to this general problem within the law as a whole, and that labor law was especially well suited to address the problem of dispute resolution because it had already had "so much experience in developing alternative procedures for resolving controversies of various kinds,"⁹⁴ including arbitration and mediation.

Clyde W. Summers of the University of Pennsylvania offered the Park City conference an alternative vision of the labor and employment law curriculum. Summers said that it was time to abandon the hope that the collective bargaining process would provide protection for the majority of the American workforce. Instead, legal educators needed to ask: "What form and direction should the law take to protect those who do not have the protection of collective agreements?"⁹⁵ Summers recognized the risk that such a course might just be a "grab bag of miscellaneous problems which gain no coherence or illumination from each other." He suggested that the integrating theme ought to be the "role of the law in aiding the weaker party."⁹⁶ He went on to outline the topics that he thought ought to be included in a course on legal protections for individual employees. The topics he described all addressed substantive rights. Although eight years later (discussed below, page 28) Summers would become a forceful advocate for the centrality of procedural issues to the enforcement of substantive rights, in this 1984 talk he made no mention of the procedural concerns that Wirtz had considered critical. Although Summers offered, as one of the justification for this new course, preparing students for the problems they would confront in their careers, he did not address whether these new problems would require of the future lawyers new skills or of the law schools new pedagogies.⁹⁷

Labor Law Group chairman Robert N. Covington, in his Foreword to the published Park City papers, applauded Wirtz and Summers for their call to rethink the labor and employment curriculum, but expressed concern that they had left the conference participants uncertain of the next step: "[E]ven these two eminent and distinguished scholars have some difficulty in setting out just what is to be substituted for present courses, and seem a bit tentative about what is wrong with the existing offering."⁹⁸

93. *Id.* at 11.

94. *Id.*

95. *Id.* at 194.

96. *Id.* at 195.

97. *Id.* at 194.

98. *Id.* at v.

In the fall of 1985 the AALS held a workshop on labor and employment law.⁹⁹ Wirtz and Summers were among the featured speakers. They largely repeated here, to this larger audience, what they had said the year before at the Labor Law Group meeting. Summers said again that a new employment law course, with a focus on law's role in aiding the weaker party, should replace the traditional labor law course. Wirtz again described his proposed new course that would highlight labor law as a topic within which students could explore the art of efficient and constructive resolution of controversies. He thought that in this course students should study existing ADR techniques and reflect on possible improved methods for dispute resolution. University of Michigan professor Theodore J. St. Antoine thought a strong case could be made for retention of the traditional labor law course as the basic course, but he mentioned other curricular alternatives including mixing part of the traditional course with aspects of employment law, together focusing on the nature of the employment contract and job security, as well as offering separate labor law and employment law courses. In a luncheon address Harry T. Edwards, formerly a professor at the University of Michigan Law School, then serving as a judge on the D.C. Circuit, strongly cautioned teachers not to abandon or alter the traditional labor law course as the basic course. Edwards acknowledged a decline in the proportion of the workforce represented by unions, but he emphasized the continuing role of unions in protecting workers. He said that statutory employment law and new common law rights would never provide workers with the same range of rights or the same access to effective enforcement as did the process of collective bargaining. He said that the traditional course had vital links to other parts of the curriculum and that new courses in ADR would draw heavily on the history of arbitration and collective bargaining.

Although most of the 1985 AALS workshop addressed research and curriculum issues, one session was focused on pedagogy. Charles Craver of the University of Illinois encouraged labor law teachers not to think of simulations as "different" and to abandon the traditional bifurcation of classroom and clinical teaching. He described a variety of simulations he used in his labor and employment law courses, including negotiation of provisions of a collective bargaining agreement, drafting union election campaign literature, presenting a mock arbitration case, writing arbitration awards, drafting a personnel policy, and interviewing job applicants. Robert Rabin of Syracuse University presented a videotape of his students performing a simulation in which an attorney interviewed an employer who had been charged with an unfair labor practice for discharging a union organizer who had been publicly critical of the employer's operation.¹⁰⁰ Simulation pedagogies that had been used

99. Audiotape: Workshop on Labor and Employment Law, held by the Association of American Law Schools, Washington, D.C., October 17-19, 1985 (in the collection of the University of Santa Clara Law Library) [hereinafter 1985 AALS Conference].

100. A revised version of the problem used in that videotape appears in Robert J. Rabin et al., *Labor and Employment Law: Problems, Cases and Materials in the Law of Work*, 3d ed., 340-42 (St. Paul, 2002).

by labor law teachers in the 1930s were still being described as innovative in the 1980s.

As for curriculum, in the middle of the 1980s labor law academics found themselves in a period of reexamination, but nevertheless one of uncertain direction. Teachers recognized that the traditional labor law course ignored the circumstances of the majority of American workers, yet they found themselves continuing to cling to its familiarity. The traditional course was consistent with their professional experience and expertise as lawyers and legal educators. It was what Robert Covington called a “good course,” successfully merging intellectual challenge and compelling real-world stories.¹⁰¹ Basic inertia, uncertainty about the appropriate content of a new course, and doubt that any new course could succeed as well as the traditional one, all worked against significant curricular change.¹⁰²

While labor academics in the mid-1980s seemed somewhat uncertain of their pedagogical direction, another part of the legal academy was experiencing a flurry of excitement about new courses and teaching methods—activity that would later have some influence upon the teaching of labor and employment law. The initiative toward alternative dispute resolution that had, a few years earlier, caught the attention of litigators and courts was, in typically delayed fashion, now being reflected in the academy.¹⁰³ In 1983 the ABA commenced publication of a series of directories of law school courses in dispute resolution.¹⁰⁴ A new AALS Section on Alternative Dispute Resolution held its first meeting in 1984.¹⁰⁵ Also in 1984 the *Journal of Legal Education* published a symposium, Alternative Dispute Resolution in the Law School

101. Park City Papers, *supra* note 31, at vi. With greater hyperbole Theodore St. Antoine described the traditional labor law course as having “Mozartian perfection.” 1985 AALS Conference, *supra* note 99.

102. A survey of law school catalogs in 1989–91 found 173 of 175 schools offering a course in labor law, 90 percent with a course in employment discrimination, and only 40 percent with a course in employment relations law. Stephen Howard Kropp, Rethinking the Labor and Employment Law Curriculum: Legal Education’s Belated Response to the Demise of Collective Bargaining and the Rise of Individual Rights, 60 U. Cin. L. Rev. 433, 444 (1991). For a vigorous argument that labor law is more critical for inclusion in the curriculum than employment law, despite the small proportion of union membership within the workforce, see Wilson McLeod, The Importance of Traditional Labor Law in the Legal Curriculum, 43 J. Legal Educ. 123 (1993) (“The standard labor law course is a politically charged study of jurisprudence that can give insight into the basic nature of law, in a way that the rest of the traditional curriculum rarely succeeds in doing.” *Id.* at 124).

103. Historians of the modern interest of the legal system in ADR tend to date its development from the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, a joint conference of the Judicial Conference of the United States, the Conference of Chief Justices, and the American Bar Association, held in St. Paul, Apr. 7–9, 1976. 70 F.R.D. 79 (1976). See, e.g., Carrie Menkel-Meadow, Introduction: What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR, 44 UCLA L. Rev. 1613, 1614 (1997).

104. American Bar Association, 1983 Law School Directory of Dispute Resolution Programs, ed. Kevi Brannelly (1983).

105. Frank E. A. Sander, Alternative Dispute Resolution in the Law School Curriculum: Opportunities and Obstacles, 34 J. Legal Educ. 229, 235 (1984).

Curriculum, that offered an initial description of the history, rationale, theory, and proposed curriculum and pedagogy for ADR in the law schools.¹⁰⁶

Harvard professor Frank E. A. Sander, an ADR pioneer, commented in the symposium on some of the obstacles to and benefits of bringing ADR teaching to the law school classroom. His list would have been familiar to those who had heard presentations about simulation-based teaching at the 1947 Ann Arbor conference on labor relations. Sander thought that the largest impediment to the use of simulation exercises was the reluctance of teachers to “venture into unfamiliar territory.”¹⁰⁷ While he thought that simulation-based teaching would provide students with critical skills and offer a “welcome change of pace from purely doctrinal discussions,” he thought teachers interested in pursuing such methods would find it difficult to master the necessary skills and to find appropriate teaching materials.¹⁰⁸ He also worried that teachers of ADR skills would struggle for status within the academic establishment, that they would, “like their clinical counterparts, lead a somewhat isolated existence,” and that they would need to develop their own support system.¹⁰⁹ Carrie Menkel-Meadow, in later years reflecting on the beginnings of her work in ADR, described how, in the 1980s, professional colleagues discouraged her from pursuing research in dispute resolution because it was “not about law” and “there was no theory there.”¹¹⁰

Sander, in the symposium, also addressed the question of how courses in ADR might be structured. He thought they could be organized to provide an overview of ADR processes, to examine dispute resolution from an interdisciplinary perspective, to focus on a single dispute resolution method, or to embed dispute resolution within an existing substantive course. As an example of the latter, he mentioned an existing course in collective bargaining and labor arbitration at one law school.¹¹¹

There was remarkably rapid growth in ADR courses in American law schools in the 1980s. While 25 percent of law schools reported having such courses in 1983, just three years later ADR courses were offered in 63 percent of the schools.¹¹² In the general course offerings in ADR in the 1980s, simula-

106. Symposium, *Alternative Dispute Resolution in the Law School Curriculum*, 34 *J. Legal Educ.* 229 (1984).

107. Sander, *supra* note 105, at 234.

108. *Id.* at 233, 234. In the same symposium Gerald R. Williams commented that simulated exercises in negotiation, mediation, and arbitration are more difficult to design, conduct, and evaluate than more traditional simulations in moot court and trial practice because ADR takes place in private, has few substantive or procedural rules, and lacks a well-established body of supporting legal literature. Using *Simulation Exercises for Negotiation and Other Dispute Resolution Courses*, 34 *J. Legal Educ.* 307, 307 (1984). For current ideas about sources of skills training and teaching materials, see the Conclusion of this article.

109. Sander, *supra* note 105, at 235.

110. Menkel-Meadow, *supra* note 103, at 1614. That was not the first time that teachers of lawyering skills struggled for legitimacy within an academic community that prized abstract legal theory and analysis. In the 1950s teachers of labor law had had the same problem.

111. Sander, *supra* note 105, at 230–31.

112. American Bar Association, *Directory of Law School Dispute Resolution Course and Programs*, ed. Anne Clare, 2 (Washington, 1988). Much of the next paragraph is derived from the Directory.

tion was a predominant teaching method. Although Sander had outlined alternative paths along which ADR pedagogy might develop, including fusing ADR with a substantive topic, it was the overview courses that tended to prevail and grow.

The burgeoning general interest in ADR teaching and its simulation teaching method had only modest effect upon the teaching of labor and employment law. To the extent that law school courses addressing workplace dispute resolution were offered, they were exclusively traditional courses in labor arbitration, often joined with the subject matter of collective bargaining negotiations. None addressed nonunion dispute resolution. Of the ADR course listings in 1986, only two courses mentioned mediation in the labor setting as part of the subject matter and, unlike the general ADR courses, a significant number of the labor arbitration courses used non-simulation-based methodologies, such as lecture and discussion. Teachers of labor and employment law generally continued to focus on substantive analysis¹¹³ without noticing the potential utility of ADR as a construct through which to view the problems of labor and employment law and its enforcement.¹¹⁴ A valuable fusion of ADR and labor and employment pedagogies did not occur until years later, in the 1990s, when legal developments in procedures for enforcement became so central to the practice of employment law that even the slow-acting academy, in its relatively passive reactive mode, found it necessary to respond.

The 1990s

Between 1960 and 1990 more than two dozen major federal statutes were enacted concerning employment conditions, regulating such matters as age, race, gender, and disability discrimination; workplace safety; pension security;

113. A miniworkshop on labor relations law, held in conjunction with the AALS annual meeting in 1986, addressed substantive legal developments without any discussion of curriculum or pedagogy. Several of the substantive issues discussed, however, related to arbitration and mediation of workplace disputes, including an empirical study of employment discrimination issues considered in arbitration under collective bargaining agreements, a prediction that the nature of labor arbitration would remain substantially unchanged, a proposal that labor arbitrators organize themselves into firms, the possible use of arbitration to decide nonunion wrongful discharge cases in California, and the use of mediation in the resolution of disputes under collective bargaining agreements. Audiotape: Labor Relations Law Section Mini-Workshop, held by the Association of American Law Schools, New Orleans, Jan. 1986 (from the Archives of the University of Illinois).

114. I count myself among those who failed to see this opportunity until years later. I was the coauthor of a 1994 casebook that addressed labor arbitration almost entirely within the context of collective bargaining agreements between unions and employers. Laura J. Cooper & Dennis R. Nolan, *Labor Arbitration: A Coursebook* (St. Paul, 1994). The 554-page book included one page of material discussing arbitration in the nonunion setting (*id.* at 23–24) and one-half page devoted to grievance mediation in the unionized workplace (*id.* at 26). While a course in labor arbitration was itself consistent with Sander's model of a course embedding dispute resolution in a substantive topic, a labor arbitration course limited to the resolution of problems arising under collective bargaining agreements and limited to arbitration, alone among dispute resolution methods, failed to gain the insights, both about substantive employment rights and about dispute resolution generally, that would have been possible in a course of broader scope.

and family and medical leave.¹¹⁵ State courts recognized new common law causes of action allowing employees to challenge termination and other employer actions.¹¹⁶ Other courts recognized a variety of constitutionally based causes of action available to government employees.¹¹⁷ The creation of these new causes of action, along with changes in the socioeconomic nature of American employment,¹¹⁸ caused what has been repeatedly described as an “explosion” of employment litigation:

The number of employment suits in federal court increased by 430% between 1971 and 1991. The four following years witnessed another jump of 128%. In the last thirty years, the amount of employment litigation has grown at a rate almost ten times greater than the rate of increase in other types of civil litigation. Due to this explosion, court dockets have become overwhelmed with litigation. In May of 1999, there were approximately 25,000 wrongful discharge and discrimination cases pending nationwide.¹¹⁹

While the rapid growth in volume of these cases was viewed as problematic by both courts and regulatory agencies, employers faced the additional problem of cost—both the cost of paying judgments to successful plaintiffs and the litigation costs of both successful and unsuccessful claims. An empirical study of employment claims reported average awards of nearly \$700,000 for plaintiffs who prevailed at trial; defense costs in such cases could exceed \$250,000.¹²⁰

115. David B. Lipsky & Ronald L. Seeber, *Resolving Workplace Disputes in the United States: The Growth of Alternative Dispute Resolution in Employment Relations*, 2 *Alternative Disp. Resol. Emp.*, Fall 2002, at 37, 37; Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 *B.C. L. Rev.* 351, 378–80 (2002).
116. See, e.g., *Wooley v. Hoffman-LaRoche, Inc.*, 491 A.2d 1257 (N.J. 1985) (terms in an employment manual may contractually bind the employer); *Tameny v. Atl. Richfield Co.*, 610 P.2d 1330 (Cal. 1980) (recognition of tort action for a discharge offending public policy); *Mitford v. De Lasala*, 666 P.2d 1000 (Alaska 1983) (employment agreements contain implicit covenant of good faith and fair dealing).
117. Befort, *supra* note 115, at 383–85 (causes of action based on the First Amendment and the due process and equal protection clauses).
118. *Id.* at 385–93 (discussing circumstances such as increased disparities of bargaining power between employee and employer as a result of growth in the size of employing entities, the growth of a contingent workforce, and a rise in employee expectations of nondiscrimination and fair treatment).
119. *Id.* at 399–400 (footnotes omitted).
120. James N. Dertouzos & Lynn A. Karoly, *Labor-Market Responses to Employer Liability* 35 (Santa Monica, 1992). A 1995 study found a median award of \$234,957 and an average award of \$432,951 in wrongful discharge cases tried before juries in California. *Average Punitive Award Down in 1995 According to California Verdicts Study*, *Daily Lab. Rep.* (BNA) No. 97, at C-1 (May 1, 1996). Of course, the vast majority of employment cases, as with other civil cases, terminate in settlement rather than judgment. The Dertouzos and Karoly study, at 36, concluded that, in employment cases resolved by settlement, employers paid an average of \$25,000 to plaintiffs and \$15,000 in legal costs. See also Stuart H. Bompey et al., *The Attack on Arbitration and Mediation of Employment Disputes*, 13 *Lab. Law* 21, 22 (1997). While studies showing high average awards likely influenced employers’ desire to change litigation management practices, the studies are somewhat misleading because they combine punitive and compensatory damages and do not include in the averages the relatively significant proportion of cases in which employers prevail. See David J. Jung & Richard Harkness, *The Facts of Wrongful Discharge*, 4 *Lab. Law* 257, 260–61 & 261 n.13 (1988) (reporting employers prevailing in 30 percent of the verdicts reported in one source and plaintiffs prevailing in only 45 percent of wrongful discharge cases resolved in California and 46.5 percent nationwide in the authors’ study).

Less easily calculated are the additional costs of diverting otherwise productive employee time and emotional energy to participation in litigation defense.¹²¹

Eager to avoid such costs, employers in the 1990s searched for alternatives that might reduce the number of claims being litigated and limit the cost of their resolution. The use of ADR processes, which had begun to attract the attention of the civil litigation system generally in the early 1980s, was now embraced enthusiastically by many of these employers.¹²² While corporations reported using mediation and arbitration in approximately equal measure,¹²³ the attention of the courts, and then later of the teachers of employment law, was drawn to arbitration much more than mediation because arbitration, posing such questions as the enforceability of agreements to arbitrate, raised issues of a traditionally legal nature.

As had been true in Willard Wirtz's critique of law school casebooks in the 1940s, when cases were decided, academics taught them, even if the cases didn't reflect fully the true diversity of employer-employee relations and dispute resolution. When the U.S. Supreme Court decided the case of *Gilmer v. Interstate/Johnson Lane Corp.*,¹²⁴ holding that an employee's federal statutory claims could be subject to binding arbitration under a predispute arbitration

121. Befort, *supra* note 115, at 400.

122. David B. Lipsky & Ronald L. Seeber, In Search of Control: The Corporate Embrace of ADR, 1 U. Pa. J. Lab. & Emp. L. 133 (1998). The authors' 1997 survey of more than 600 corporate general counsel for Fortune 1000 companies found widespread use of arbitration and mediation. Among the principal reasons respondents gave for the rapid increase in the use of ADR methods in the 1990s were cost reduction and frustration with the legal system, particularly with regard to employment claims. Respondents said that when competitive pressures within corporations caused them to reexamine the cost of their legal affairs, they found that in many cases the cost of resolving disputes through litigation far exceeded the amount of the ultimate settlements. Some corporate counsel believed that the sharp increase in the number of employment cases had overwhelmed courts and administrative agencies, resulting in intolerable delays. *Id.* at 141–43. Some employer representatives were less sanguine about arbitration of employment claims because of such arbitration features as limited judicial review and discovery, and the uncertain availability of summary disposition. Bompey et al., *supra* note 120, at 35–36. Some advocates of employee interests also recognized that high litigation costs had the effect of limiting employee access to counsel, especially for lower-income employees, and limiting the amount of employer funds available for payment of settlements to employees. See, e.g., Clyde Summers, Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals, 141 U. Pa. L. Rev. 457, 467–69 (1992) (“This is scarcely a legal remedy process but rather a redistribution device which enriches lawyers at the expense of both the employer and the employee.” *Id.* at 469.).

123. In the same survey discussed in note 122 *supra*, 88 percent of corporate counsel reported having used mediation at least once in the previous three years, and 80 percent reported having used arbitration during that period. The depth of use for each of the two methods was approximately equal as well, with about 20 percent using the method frequently or very frequently, 30 percent using the method rarely, and 40 percent using the method occasionally. Lipsky & Seeber, *supra* note 115, at 41–42.

124. 48 500 U.S. 20, 48 (1991). The narrowness of the Court's holding in *Gilmer*, relying on the plaintiff's arbitration obligation arising from a stock exchange registration application and declining to decide whether a provision in an employment agreement would be equally binding, 500 U.S. at 25, n.2, for a time left some doubt whether employees outside the securities industry might be similarly bound by predispute pledges to arbitrate. Those doubts were eliminated when the Supreme Court, in *Circuit City*, held that the arbitration provisions in most employment agreements were enforceable under the Federal Arbitration Act. *Circuit City Stores v. Adams*, 532 U.S. 105 (2001).

agreement, academics took notice. Employment law and employment discrimination textbooks that had previously made little or no mention of alternative means of enforcement of employment claims, in their post-*Gilmer* editions summarized or included the case along with questions about the policy issues surrounding compulsory arbitration. But the scope of their discussion of arbitration was extremely modest, and none of the books informed students of the increasingly widespread use of mediation by employment attorneys.¹²⁵

With powerful evidence, Clyde Summers demonstrated in the 1990s that existing remedies for enforcement of employment rights were so “seriously lacking” and sometimes “distressingly meaningless” that the need for “remedies to make those rights real” had probably surpassed in significance the need to define those substantive rights.¹²⁶ Nevertheless, textbooks continued in the 1990s to focus on substantive rights almost exclusively, and teachers of labor and employment law did not generally seek to incorporate in their courses the valuable perspectives and pedagogies that had become commonplace in more general courses in ADR.¹²⁷ When the AALS conducted a Workshop on Labor and Employment Law in 1992, the presentations were remarkably similar to those that had been made at the AALS workshop in 1984.¹²⁸ Apparently little influenced by the substantial growth in ADR both in legal practice and in legal education, speakers at the 1992 conference offered various schemes for teaching a basic course that would look at collective bargaining, government regulation, and individual rights litigation as alternative legal constructs. There were no suggestions that it might have become necessary to provide students with theoretical background and practical skills appropriate for resolving employment disputes in arbitration and mediation.

125. For example, one of the first employment law texts, published in 1989, included a one-paragraph note on the possible use of arbitration to resolve nonunion disputes. Matthew W. Finkin et al., *Legal Protection for the Individual Employee* 291 (St. Paul, 1989). The second edition of the same text, published in 1996, included the *Gilmer* case and related questions for discussion, covering nine pages. Matthew W. Finkin et al., *Legal Protection for the Individual Employee*, 2d ed., 133–42 (St. Paul, 1996). The only mention of arbitration in a 1988 employment discrimination text discussed the relationship between an arbitrator’s award under a collective bargaining agreement and a consent decree resolving a litigated claim under Title VII. Arthur B. Smith Jr. et al., *Employment Discrimination Law: Cases and Materials*, 3d ed., 939–43 (Charlottesville, 1988). In the next edition the authors included a summary of the *Gilmer* case and some notes for discussion. Arthur B. Smith Jr. et al., *Employment Discrimination Law: Cases and Materials*, 4th ed., 793–95 (Charlottesville, 1994). See also Mack A. Player et al., *Employment Discrimination Law: Cases and Materials*, 2d ed., 690, 740–41 (St. Paul, 1995) (only brief discussions of *Gilmer* and arbitration as late as 1995). None of these textbooks addressed the role of mediation in the resolution of employment claims.

126. Summers, *supra* note 122, at 545.

127. Surveying law school courses in 2002, the ABA found that 157 of 183 law schools offered survey courses in ADR, nearly all using simulations, while only 26 schools offered courses related to workplace ADR, with perhaps only half using nontraditional pedagogies. In all, the survey found a total of 830 ADR courses offered nationally. Foreword, *American Bar Association Directory of Law School Dispute Resolution Courses and Programs* Foreword, eds. Jack C. Hanna et al. (Washington, 2000) [hereinafter *ABA Directory*].

128. Audiotape: Workshop on Labor and Employment Law, held by the Association of American Law Schools, Washington, D.C., Apr. 9–11, 1992 (in the collection of the University of Santa Clara Law Library).

It was only at the very end of the 1990s and the start of next decade that the labor and employment academy seemed to heed, even modestly, the entreaties of Wirtz and Summers, and to focus on dispute resolution as a critical analytical component in the assessment of employment rights, as well as to begin to teach the skills that might prepare students for an employment law practice enmeshed in ADR. Employment law textbooks began to devote some serious attention to ADR,¹²⁹ and course offerings began to appear that examined ADR in the nonunion as well as the union workplace and, for the first time, recognized the significant role of mediation in the resolution of workplace disputes.¹³⁰

Conclusion

Members of the labor law academy, meeting in Ann Arbor in the summer of 1947, recognized that workplace rights were and would be enforced through means other than litigation, and that law schools needed to provide students instruction in the skills appropriate for client representation in those alternative procedures. Implementation of their insight, though, was limited in breadth and duration. Although the centrality of enforcement mechanisms to the realization of employment rights became even more significant in the 1980s and 1990s, labor and employment teachers largely continued to focus on substantive rights and to neglect in their courses those changes in employment practice that were not reflected in court decisions, as well as the skills that students would need to practice in that new environment.

It is not that the labor and employment academy lacked prophets who could see and articulate an alternative vision of a more comprehensive curriculum and pedagogy. Willard Wirtz in the 1940s, and again in the 1980s, reminded academics that legal rights had little meaning in the absence of an effective enforcement mechanism, that procedures other than litigation did and could offer both employers and employees better means for the resolution of workplace disputes, and that students needed to learn necessary skills for those alternative processes. Clyde Summers, in the 1990s, reminded lawyers and law teachers that the rights of the worker were meaningless in the absence of effective access and enforcement.

129. A 38-page chapter entitled "Alternative Dispute Resolution," devoted entirely to arbitration of employment claims, was included in a 1999 Labor Law Group employment discrimination text. Robert Belton & Dianne Avery, *Employment Discrimination Law: Cases and Materials on Equality in the Workplace*, 6th ed., 876–914 (St. Paul, 1999). In 2000 another group textbook was devoted entirely to ADR in the workplace and included material on union and nonunion settings as well as arbitration, mediation, and other dispute resolution mechanisms. Laura J. Cooper, Dennis R. Nolan & Richard A. Bales, *ADR in the Workplace* (St. Paul, 2000). Although I am a coauthor of the book, credit for development of the materials on nonunion ADR belongs to coauthor Richard A. Bales. The book was accompanied by a book of simulations including guidance for teachers in their use. Laura J. Cooper & Carolyn Chalmers, *Workplace ADR Simulations and Teacher's Guide* (St. Paul, 2000). See also Samuel Estreicher & Michael C. Harper, *Cases and Materials on Employment Discrimination Law* 1138–65 (St. Paul, 2000) (27 pages on arbitrating statutory claims) and Michael J. Zimmer et al., *Cases and Materials on Employment Discrimination* 966–89 (New York, 2000) (23 pages of material on arbitrating discrimination claims).

130. ABA Directory, *supra* note 127.

Nor is it the case that teachers of labor and employment law had no models of alternative curriculum and pedagogy. Over a period of fifty years, there were always some teachers who were concerned about procedures for the enforcement of employment rights and who were teaching students ADR skills using simulation-based teaching methods.

Nor is it the case that simulation-based teaching was tried and rejected because it proved unsuccessful in achieving its pedagogical objectives. Throughout the years, teachers who have used simulation have observed that it teaches critical lawyering skills, helps to motivate students, permits them to understand substantive law concepts and theory better, allows them to integrate skills and knowledge, provides some reality testing of legal doctrine, and adds enjoyment to the educational experience.

Sometimes teachers, recognizing these benefits, have expressed a desire to adopt new simulation teaching methods but have nevertheless declined to adopt them, contending that they lacked appropriate materials, or that they lacked the practice skills they would want the students to learn, or that the method would inevitably result in the dissatisfaction and noninvolvement of students, particularly in larger classes, who they assumed could not be involved personally in the simulation.

There are, however, quite satisfactory responses to these purported problems. There are many published sources of simulation materials.¹³¹ Teachers can cocreate their own materials with academics experienced in the method or with practicing attorneys.¹³² There are many opportunities to learn new skills. Teachers can observe practicing arbitrators and mediators or can engage in occasional practice themselves.¹³³ Continuing education courses on arbitration and mediation skills are offered in abundance.¹³⁴ Arbitrators and mediators are available in university communities, sometimes without cost, to coteach courses or sessions with faculty. Various instructional designs allow

131. See, e.g., Cooper & Chalmers, *supra* note 129 (includes simulations for arbitration and mediation of employee discipline, compensation, and sexual harassment and disability claims, along with detailed guidance for instructors inexperienced in simulation-based teaching). The Center for Dispute Resolution at the Willamette University College of Law has for some years conducted an annual competition for materials for simulation exercises and published a volume of the winning exercises.

132. American Bar Association Coordinating Committee on Legal Education, *Team-Teaching of Substantive Law and Practice Skills in Substantive Law Contexts: A Manual for "Learning-by-Doing" Exercises in Law School Courses and Continuing Legal Education Workshops* (Chicago, 1996). Based on the model developed by the National Institute for Trial Advocacy, this book explains and promotes teaching practice skills in substantive law courses by teams of law teachers and practicing attorneys. The simulations in Cooper & Chalmers, *supra* note 129, were created by a law teacher and a practicing attorney-mediator.

133. The AALS accreditation standards consider limited outside professional activities of full-time faculty members to be appropriate when the work "coincides with the full-time teacher's major fields of interest as a teacher and scholar" and when the work is "a source of novel and enriching experience that can be directly utilized in the person's capacity as teacher and scholar." Bylaws of the Association of American Law Schools (2000).

134. The Law Faculty Scholars program of the Straus Institute for Dispute Resolution at the Pepperdine University School of Law permits faculty members to participate in ADR training courses tuition free.

comprehensive involvement for all students in a class in a role-playing exercise, regardless of class size.¹³⁵

Why is it, then, that issues of dispute resolution still receive relatively modest treatment in contemporary employment law textbooks and that simulation-based teaching is still viewed as innovative?

Perhaps teachers of labor and employment law have sought academic respectability among their peers by distancing themselves from the reality of ordinary workplaces and focusing instead on matters of doctrine and theory. Over these fifty years there were several periods in which members of the academy discouraged and even condemned those who explored an alternative pedagogical vision. Perhaps academic reward systems that most highly value theoretical scholarship persuaded teachers, as “rational economic actors,” that their time was not profitably spent on developing skills and materials for simulation-based teaching.

Certainly it is easier for teachers to derive materials for their courses from decided cases than to engage in a more challenging effort to understand the reality of employment law practice and the enforcement of workplace laws. Offering students textbooks made up entirely of judicial opinions reflects those parts of employment law that are easiest to see and document. Such opinions do not give students a true picture of the lawyer’s role in workplace law, or prepare a student for it.

If one were to accept a vision of employment practice that included serious attention to the issues of dispute resolution, one also would have to accept the need to provide students with the lawyering skills required for enforcing rights in arbitration and mediation. That would require law teachers, selected for their success in traditional legal analysis, to themselves become students of new skills and teaching methods. Law teachers have been reluctant to abandon their areas of proven success for areas where they might find mastery more elusive. Had we been less intent on enforcing a narrow standard for academic status and more willing to try new things, we might have embraced and encouraged, rather than isolated, those pioneers among us who struggled over the years to learn the skills and to develop the materials for simulation-based teaching.

The ABA’s Standard 301 for the accreditation of law schools states that the objectives of a law school include maintaining an educational program that “prepares its graduates to deal with current and anticipated legal problems.”

135. Cooper & Chalmers, *supra* note 129, provides several examples. When only a few students are participating directly in a mediation role-playing exercise, other students may be assigned individually or in groups to write a short paper in advance explaining what their objectives would be in the mediation and what techniques they would use to accomplish them. Or students may be assigned as observers of particular participants in the role-playing and expected to comment about their performance in the discussion following the role-playing or to write a commentary following the exercise. In an arbitration exercise, all of the students not involved in presenting the case may be asked to serve as the “arbitrator” for purposes of writing an award at the conclusion of the presentation. In some exercises, all of the students in the class may be simultaneously engaged in mediation in multiple small groups.

Can we say that we, the teachers of labor and employment law, have so far truly satisfied that objective?

More than fifty years ago our predecessors took time for reflection about what they were teaching and how they were teaching, and whether they were offering their students an accurate picture of the world of employment practice and the skills it required. We would do well to do the same today.