COMMENT
The Prospective Effect of Arbitration*

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If the respective strengths of parties in a collective bargaining relationship are unequal, the stronger party may find it advantageous to violate the agreement repeatedly, thereby forcing the weaker party to expend resources on continual and ineffectual arbitrations. This Comment analyzes courts' attempts to curb such recidivistic behavior, finding that judicial efforts result in usurpation of the arbitrator's role of interpreting the agreement. The Comment concludes that there may be no easy solution to recidivism so long as the parties remain unequal.

I
INTRODUCTION

Flexibility is an essential quality of labor arbitration. Because arbitration must remain as flexible as the dynamic labor relation it is designed to interpret, an arbitrator is not bound to follow a prior arbitrator's interpretation of this relation. The arbitrator is free to reject prior interpretations that are erroneous or no longer accurate due to changing conditions. Thus this flexibility allows a party to challenge outdated or erroneous prior awards by rearbitrating the same issues when they occur again. This flexibility, however, also permits a party of rearbitrate the same issues continually in order to eventually gain a favorable award or to bankrupt the opposing part in the process. Pre-

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4. Id.; see Mead Corp. 43 Lab. Arb. (BNA) 391, 394 (1964) (Hawley, Arb.).
cisely because an arbitration award does not bind future arbitrators, the party could force repeated arbitration by continually committing the same type of violation. A conflict arises, thus, between the need to allow parties to challenge erroneous or outdated prior awards and the need to deter the recidivist party who in bad faith ignores prior awards.

A further conflict arises when the aggrieved party, frustrated by the arbitrator's inability to deter the bad faith recidivist, turns to the court to enforce the award so that it is binding on subsequent disputes. The party may bring an action under section 301 of the Labor Management Relations Act (LMRA). This action requires the court to decide whether the arbitration award was meant to cover the later dispute. This decision requires interpretation of the collective bargaining agreement, however, and such an interpretation is the sole prerogative of the arbitrator, not the court. The court is, thus, faced with the conflicting choice between giving the aggrieved party an effective weapon against recidivism or following the policy established in the Steelworkers Trilogy—that a court should not interpret the agreement.

This Comment analyzes the conflict between the need to maintain the arbitrator's flexibility and freedom from judicial interference and the need to deter bad faith recidivism. First, it discusses the precedential value which arbitrators give to prior arbitration awards. Second, it describes the standards developed by several courts to guide the judicial determination of the effect of prior arbitration awards on subsequent disputes. Third, it analyzes these judicial standards, concluding that none of these standards successfully resolves the conflict and that judicial review of the precedential effect of arbitration awards is inherently problematic. Finally, it presents other means by which the parties to an agreement can themselves address the problem of bad faith recidivism.

II

THE PRECEDENTIAL VALUE OF ARBITRATION AWARDS:
STANDARDS WHICH GUIDE THE ARBITRATOR

When a dispute arises concerning issues identical to those decided in a previous arbitration award, the traditional approach is to grieve

5. See Mallinckrodt Chem. Works, 50 Lab. Arb. (BNA) 933, 935 (1968) (Goldberg, Arb.).
6. See generally Oil Workers Local 4-16000 v. Ethyl Corp., 644 F.2d 1044 (5th Cir. 1981); United Electrical Workers v. Honeywell, Inc., 522 F.2d 1221 (7th Cir. 1975).
this subsequent dispute through the grievance procedure. If the dispute cannot be resolved through the grievance procedure, it may then be submitted to an arbitrator. Analysis of this traditional approach is necessary to understand and compare the alternative approach of seeking a court order declaring that the present dispute is covered by the prior award. When the parties submit the dispute to arbitration rather than seek court enforcement of the prior award, the critical issue is the effect of the prior award on the subsequent dispute. The arbitrator must, therefore, determine the precedential value of the prior award.

Although the prior arbitration award may not expressly order a party to desist from future violations, the award is based on the prior arbitrator's interpretation of the parties' contractual relation. For example, the arbitrator may have ordered a worker reinstated with backpay where this worker was discharged after being tardy only once. Although this award is restricted to this particular worker, it is based on a broader interpretation of the contractual relation: one instance of tardiness is not cause for discharge. The reasoning upon which the award is based, i.e., the interpretation of the contractual relation, is analogous to the ratio decidendi of a judicial case.\(^\text{10}\)

According to the judicial doctrine of stare decisis, the ratio decidendi becomes "binding precedent in the same court, or in other courts of equal or lower rank within the same jurisdiction, in subsequent cases where the very point is again presented."\(^\text{11}\) In contrast to the judicial doctrine of stare decisis, an arbitrator's interpretation of the contractual relation is not technically binding on a future arbitrator.\(^\text{12}\) Instead, the arbitrator must exercise independent and impartial judgment in each case.\(^\text{13}\)

10. Ratio decidendi is defined as "[t]he ground or reason of decision. The point in a case which determines the judgment." \textit{BLACK'S LAW DICTIONARY} 1135 (5th ed. 1979).

11. Chamberlain, \textit{The Doctrine of Stare Decisis as Applied to Decisions of Constitutional Questions}, 3 \textit{HARV. L. REV.} 125, 125 (1889-90). Stare decisis is based on "[d]ue regard for the prior work of a court and the stability of the law." Von Moschziker, \textit{Stare Decisis in Courts of Last Resort}, 37 \textit{HARV. L. REV.} 409, 412 (1923-24) (discussing application of stare decisis by ultimate courts of appeal to their own decisions). Stare decisis does not, however, require "absolutely rigid adherence to precedents." \textit{Id.} at 414. A court may overrule its prior precedent or the precedent of a court of equal or lower rank if the court decides that the precedent is incorrect. But stare decisis is strictly applied when the precedent arises from a decision of a higher court; a court is bound to follow the precedent of a higher court.


A serious problem can develop if one party is hostile to the other party and has greater financial resources. In this situation, the stronger party has little incentive to comply with an adverse arbitration award because of greater resources to re-arbitrate the same issues in the future with the possibility of a favorable award. The stronger party may even find it profitable to repeatedly re-arbitrate the same issues in order to sap the resources and morale of the weaker party. If the stronger party is the employer, continual rearbitration could become a weapon for discrediting the union in the eyes of the employees.

To promote stability and to discourage a party from re-arbitrating the same issues to reach a favorable result, arbitrators will generally follow a prior arbitrator's interpretation, even though they are not strictly bound to do so. When specific language in the agreement has been interpreted in a prior award, most arbitrators agree that the parties are bound by that interpretation unless they change that language in the agreement. An award interpreting a collective bargaining

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14. See Oil Workers Local 4-16000 v. Ethyl Corp., 644 F.2d 1044, 1049 n.8 (5th Cir. 1981).

15. Id.

16. See Mallinckrodt Chem. Works, 50 Lab. Arb. (BNA) 933, 937 (1968) (Goldberg, Arb.). In Mallinckrodt, Arbitrator Goldberg observed that a typical employee might wonder, “What good is the Union if the Company can ignore the Union contract whenever it wishes and the Union can’t do anything about it?” The Supreme Court in Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975) noted that “one would hardly expect an employer to continue an employment practice that routinely results in adverse arbitral decisions.” Id. at 57. The above observations of the Fifth Circuit in Ethyl Corp. and Arbitrator Goldberg in Mallinckrodt have shown, however, that quite the contrary is true—an employer has many incentives for continuing an employment practice that results in repeated arbitration over the same issues.


18. Res judicata does not apply when the event and the employees are different, even though the parties—the union and the employer—are the same. Carbon Fuel Co., 67 Lab. Arb. (BNA) 1038, 1041-42 (1976) (Cantor, Arb.). As Arbitrator Jones has explained in National Distillers Prods. Co., 53 Lab. Arb. (BNA) 477 (1969) (Jones, Arb.): “the Union is charged with the responsibility of representing each and every employee in the bargaining unit and for the Union to be precluded by the doctrine of res adjudicata from representing one employee because it has previously represented another employee would be contrary to this responsibility.” Id. at 480. Brewers Bd. of Trade, Inc., 62-2 Lab. Arb. Awards (CCH) ¶ 8584 (1962) (Turkus, Arb.); O & S Bearing Co., 12 Lab. Arb. (BNA) 132, 135 (1949) (Smith, Arb.). See O. FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 573-79 (2d ed. 1983). Fairweather applies the label of “res judicata” to an award’s precedential effect on a later dispute involving the same parties and issues, but a different event. Fairweather, however, recognizes that a strict definition of res judicata describes only an award’s preclusive effect on later arbitration involving the same event as well as the same parties and issues. Id. at 577.

This Comment uses the more restrictive definition of res judicata, not the broad definition applied by Fairweather. In this Comment, res judicata describes an award’s preclusive effect on any arbitration over the same event and the same employees.

agreement "usually becomes a binding part of the agreement and will be applied by arbitrators thereafter."\(^2\)

Although the prevention of recidivism will usually motivate arbitrators to follow a prior interpretation, countervailing factors may sometimes influence arbitrators to reject a prior interpretation. Arbitrators may reject a prior interpretation because they find that the prior arbitrator reasoned incorrectly\(^2\) or that new and relevant facts have arisen since the earlier award was made.\(^2\) Furthermore, changing conditions may render a prior contractual interpretation unsuitable and irrelevant. As the labor relationship develops and changes, the meaning of the collective bargaining agreement also changes. Arbitrators may, thus, reject a prior outdated interpretation in response to these types of changes.\(^2\) Finally, arbitrators may reject a prior interpretation where a full and fair hearing was not provided in the prior arbitration.\(^2\)

Thus, the need to deter recidivism may conflict with the need to reject incorrect, outdated arbitration interpretations. On the one hand, requiring the arbitrator to rigidly adhere to a prior arbitrator's interpretation might reduce recidivism, but only at the risk of constraining parties to an erroneous or irrelevant interpretation of their agreement. On the other hand, allowing the arbitrator the flexibility to reject earlier arbitral interpretations can lead to the danger of continual rearbitration over the same issues.

 Arbitrators generally resolve this dilemma by overturning a prior arbitrator's interpretation only if the award is clearly erroneous.\(^2\) A mere difference in opinion is usually not a sufficient reason for rejecting a prior interpretation—most arbitrators will follow a prior interpretation even if they would have reached a different conclusion in the ini-

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20. F. ELKOURI AND E. ELKOURI, HOW ARBITRATION WORKS 377 (3d ed. 1973). The tendency to follow a prior arbitrator’s contractual interpretation on identical issues is even stronger in industries employing a single umpire, rather than an ad hoc arbitrator. See Goodyear Tire & Rubber Co., 36 Lab. Arb. (BNA) 1023, 1025 (1961) (Killingsworth, Arb.). Because umpires are more familiar with the parties and the industry than ad hoc arbitrators are likely to be, their decisions are “expected . . . to consider the long-range implications of particular decisions and the overall working relationship between the parties.” R. GORMAN, supra note 12, at 542.


22. Id.

23. Id.


PROSPECTIVE EFFECT OF ARBITRATION

This precedential value that arbitrators give to prior interpretations by other arbitrators is similar to the precedential value courts give to the decisions of other courts of equal rank but of different jurisdictions. According to the judicial doctrine of stare decisis, courts of equal rank must demonstrate "due regard for the prior work of a court and the stability of the law." Yet if a court decides that its prior precedent or the precedent of a court of equal rank is incorrect, the court may overrule that precedent. Stare decisis, thus, does not require rigid adherence to precedent between courts of equal rank.

Although the precedential value of arbitration awards is flexible enough to allow arbitrators to reject irrelevant awards, it does not adequately solve the problem of repeat offenders. A recidivist could continue to commit the same violations and seek to rearbitrate these violations under the pretense that an exception for not following the award exists—that the award was incorrect, that new facts have arisen, or that conditions are different. Frustrated with the limited ability of arbitration to deter recidivism, the aggrieved party may turn to the court.

III
THE PROSPECTIVE EFFECT OF ARBITRATION AWARDS:
STANDARDS WHICH GUIDE THE COURT

When a dispute arises over issues similar to those decided in a prior award, the aggrieved party may file an action under section 301 of the Labor Management Relations Act (LMRA) to enforce the prior

27. See Von Moschzisker, supra note 21, at 414.
28. Id. at 412.
29. Id.
30. The Supreme Court in W.R. Grace & Co. v. Local 759, Int'l Union of the United Rubber Workers, 103 S. Ct. 2177 (1983), held that, in an action under § 301 of the Labor-Management Relations Act, courts must defer to an arbitrator's conclusions concerning the precedential value of a prior award. The Court based its conclusions on the review standard established in the Steelworkers Trilogy: A court is bound to enforce the award and is not entitled to review the merits of the dispute unless the arbitral decision does not draw its essence from the collective bargaining agreement. A court may not vacate an arbitration award simply because the court believes that its own interpretation would be better. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960). See Westinghouse Elevators v. S.I.U. de Puerto Rico, 583 F.2d 1184, 1187 (1st Cir. 1978).
31. Labor-Management Relations Act of 1947 § 301 states:
(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
award. The party might then argue that, since section 301 of the LMRA grants the court jurisdiction to enforce the prior award and since the prior award prohibited subsequent violations, the court may enjoin this subsequent violation. According to this argument, the court can enjoin the subsequent violation because the prior award is binding on this dispute. The critical issue here is whether the court has the authority to determine the prospective effect of the prior award on the present dispute or whether such a determination is for the arbitrator alone to make.

The Seventh Circuit and the Fifth Circuit Courts of Appeals have formulated different standards for resolving this question. The following two subsections discuss these standards in detail. The third subsection describes the ways other courts have expanded the Fifth Circuit standard.

A. The Honeywell Standard

In United Electrical Workers v. Honeywell, Inc., four arbitrators had previously decided that the collective bargaining agreement prohibited Honeywell from "assigning work normally performed by bargaining unit employees to supervisors, foremen, and all others outside of the bargaining unit" except in certain specified situations. Despite these four arbitration awards, Honeywell continued to assign supervisors to work normally performed by bargaining unit employees.

The union finally brought suit under section 301 of the LMRA against Honeywell for violation of the collective bargaining agreement, rather than continue to arbitrate grievances concerning assignment of supervisors. The complaint sought declaratory, injunctive, and monetary remedies. The district court granted the company's motion to dismiss on "the rationale that the dispute fell within the arbitration clause of the collective bargaining agreement and, therefore, could not be litigated."

On appeal the union argued that where the employer "wilfully and persistently" refuses to follow "the clear dictates of a prior award," the court should intervene so that the union will not be forced to rearbi-
According to the union, the arbitrator's award of damages was inadequate to remedy the irreparable harm caused by the employer's recidivism. The union argued that in granting the relief sought—including issuing an injunction requiring the company to follow prior awards in subsequent cases—the court would reaffirm and effectuate the arbitration process.

The Seventh Circuit, however, reasoned that the court intervention urged by the union would supplant the arbitration process. Such judicial intervention, according to the court, would permit a party to bring a dispute to the court for relief rather than submit the dispute to the "arbitration procedures which it is contractually bound to follow." Nevertheless, the court admitted that "particularly egregious circumstances" might exist which would relieve the parties of the contractual duty to arbitrate. In these cases, judicial intervention might further arbitration rather than repudiate it.

The Seventh Circuit formulated three requirements that must be met before "a court could undertake to supplant the arbitration process." First, the party must have sought, unsuccessfully, to aggregate its grievances in a single proceeding challenging the other party's course of conduct. Second, the party must have sought and found unavailable from the arbitrator the relief it asks from the court. Finally, the party must show that "the factual basis" of the prior arbitration award is "substantially identical to the facts in the other grievances not yet presented for arbitration." The facts of these later disputes must be "so nearly identical" to the facts underlying the prior award that the offending party's conduct "constitutes wilful and persistent disregard of the arbitration awards." According to the court, a strict factual identity must exist between grievances in order for the arbitral equivalent of res judicata to preclude any subsequent arbitration over later grievances.

The Seventh Circuit indicated that there might be additional requirements, not enumerated in its opinion, that a party must meet before it can bypass the arbitrator and submit a dispute directly to the

39. Id. at 1225.
40. Id.
41. Id.
42. Id.
43. Id.
44. Id.
45. Id.
46. Id. at 1225-26.
47. Id. at 1226.
48. Id.
49. Id.
50. Id. at 1227.
51. Id. at 1228.
court for relief.\textsuperscript{52} The court concluded, however, that the union in the instant case had failed to allege at least the three requirements which were "basic to any judicial relief from a contractual duty to arbitrate."\textsuperscript{53} Therefore, the court affirmed the order to dismiss because the union had failed to state a claim upon which relief could be granted.\textsuperscript{54} The court left open the possibility, however, that "an exception to the holding of the \textit{Steelworker's Trilogy} might exist where an employer "deliberately persists in conduct in clear violation of a prior arbitration award, which leaves a union without an appropriate remedy."\textsuperscript{55}

\subsection*{B. The Ethyl Standard}

The Fifth Circuit in \textit{Oil Workers, Local No. 4-16000 v. Ethyl Corp.},\textsuperscript{56} faced an employer recidivism problem similar to that involved in \textit{Honeywell}. The Fifth Circuit, however, developed a material factual identity test different from the strict factual identity test of \textit{Honeywell}.

The dispute in \textit{Ethyl} concerned the assignment of supervisors to work ordinarily performed by bargaining unit employees. An article of the collective bargaining agreement "basically prohibited the company from placing supervisors in hourly rate jobs, except when such placements are necessary to preserve plant safety, provide instruction to the employees or conduct research and development."\textsuperscript{57} An arbitrator found that Ethyl had violated the collective bargaining agreement by assigning a supervisor to perform work ordinarily performed by hourly-rated employees. The arbitrator ordered Ethyl to "desist from violations such as that involved here." The award section repeated the order that Ethyl "hereafter . . . desist from like violations."\textsuperscript{58}

Despite this arbitration award, Ethyl continued to use supervisors in hourly rated positions. Finally, when Ethyl informed the union that it would again assign supervisors to perform hourly work, the union filed a section 301 action seeking court enforcement of the prior arbitration award.\textsuperscript{59}

\begin{itemize}
  \item \textsuperscript{52} \textit{Id.} at 1225.
  \item \textsuperscript{53} \textit{Id.} at 1228.
  \item \textsuperscript{54} \textit{Id.}
  \item \textsuperscript{55} \textit{Id.}
  \item \textsuperscript{56} 644 F.2d 1044 (5th Cir. 1981).
  \item \textsuperscript{57} Article XI of the collective bargaining agreement provided:
    Supervisory and salaried employees will not be authorized to perform work on an hourly rated job, except in the following types of situations:
    a. When it is necessary for the supervisor or foreman to act for the safety of personnel or equipment,
    b. Instruction or training of employees, and
    c. Performance of necessary experimental, special mechanical, or research and development work deemed necessary by the Company.
  \item \textsuperscript{58} 644 F.2d at 1047.
  \item \textsuperscript{59} \textit{Id.}
\end{itemize}
The district court followed the reasoning of the Seventh Circuit in *Honeywell* and required the union to show a strict factual identity between the prior facts and the facts underlying the present dispute. At the close of the union's case-in-chief, the court ruled that no strict factual identity existed. Therefore, the court held that it could not enforce the prior award by enjoining the company's subsequent action. The district court dismissed the suit and the union appealed.

The Fifth Circuit reversed the judgment largely because the district court had relied on the strict factual identity test. The Fifth Circuit rejected the *Honeywell* test for two reasons. First, the court reasoned that it is impossible for strict identity to exist in its purest sense between the facts underlying the prior award and the facts of any subsequent dispute. Due to the passage of time, no set of subsequent facts can be identical to the set of prior facts; the time factor, at the very least, is different. Since strict factual identity never truly exists, any decision to apply this label to a particular situation is arbitrary. Therefore, the court concluded that the strict factual identity standard, being essentially arbitrary and meaningless, is unable to guide judicial intervention.

The court's second reason for rejecting the strict factual identity test is less clear. The court noted that strict factual identity has the same minimal appeal to logic as the terms "semi-strict factual identity," "semi-loose factual identity," and "loose factual identity." Without explanation, the court concluded that none of these terms distinguishes those grievances which should be judicially enforced from those which should be resolved by arbitration. This simply repeats the court's first and predominant reason for rejecting the *Honeywell* test: strict factual identity is useless as a guideline because it is meaningless.

The Fifth Circuit recognized that the recidivist poses two serious problems. On the one hand, if the court cannot intervene to make an award binding on a future dispute, then the same type of dispute might be submitted to the arbitration process again and again. The recidivist could force the other party to endure the time and expense of arbitration—with the result being an award binding only on that particular dispute. The parties might thereby expend thousands of dollars and

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60. *Id.* at 1047, 1053.
61. *Id.*
62. *Id.* at 1047-48.
63. *Id.* at 1055.
64. *Id.* at 1054.
65. *Id.* at 1054-55.
66. *Id.* at 1055.
67. *Id.*
68. *Id.* at 1054.
many years of effort to correct single violation. The court noted that the possibility that an employer will continually violate the collective bargaining agreement depends on many factors, including:

1) the degree of the employer's hostility toward the union; 2) the relative resources available to the employer and to the union for use in arbitration proceedings; 3) the length and cost of each arbitration proceeding; 4) the possibility of a prior award being judicially enforced; and 5) the remedy that will likely result from an adverse arbitral decision.

The court reasoned that recidivism will be advantageous to a large employer which is hostile to a weaker union if arbitration proceedings take many years and result in an unenforceable injunction. Thus, the court concluded that when the arbitrator orders a party not only to stop committing the violation in dispute, but also to stop all like violations in the future, the court must enforce this award and prevent all like violations. To do otherwise would render the arbitration award meaningless. By refusing to enforce this award, the court would leave the hapless party facing a hostile recidivist to a vicious, endless cycle of arbitration.

On the other hand, the court in *Ethyl* realized that it must avoid adjudicating the merits of a grievance subject to arbitration. In the dispute before the court, the company's practice of assigning a supervisor to a wage roll position did not constitute a per se violation of the agreement since the agreement authorized the company to do so in certain exceptional situations. Before the court could conclude that the company had violated the agreement again, the court would be required to find that the company's practice violated the general prohibition and did not fall into any of the exemptions listed in the agreement. By assessing the applicability of the agreement's prohibitions and exemptions to the new fact situation, the court would subvert the role of the arbitrator as the exclusive interpreter of the agreement. The court determined that it could not interpret the agreement under the pretense of enforcing an earlier award.

In *Ethyl*, the Fifth Circuit presented a standard that it claimed would avoid the "twin evils" of either rendering a prior award meaningless by sidestepping the award or usurping the arbitrator's role by interpreting the collective bargaining agreement. This standard re-
quires, first, a material factual similarity between the disputed conduct and the conduct prohibited in the previous arbitration. Conduct is materially or substantially similar if it differs only in form. Prohibiting conduct materially similar to that condemned by the prior arbitration award would prevent the evil of a party's sidestepping that award. The court claimed to avoid the evil of usurping the arbitrator's role by requiring, second, that the evidence show that the subsequent conduct is not even "arguably permissible" under the agreement. If the defendant can conceivably assert that the disputed conduct does not violate the agreement, then it is not clear that the defendant is sidestepping the award. In such a case, the court must defer the question of whether the conduct violates the agreement to the arbitrator. The ultimate burden of proving that the conduct is not arguably permissible rests with the plaintiff.

C. Development of the Ethyl Standard

1. Rohm & Haas: A Tripartite Classification

Ethyl concerned the enforcement of an explicitly prospective award since the arbitrator's award explicitly prohibited similar violations in the future. In Ethyl, the Fifth Circuit did not indicate whether a court could apply the material factual identity test when the award does not explicitly apply prospectively. It addressed this issue one year later in Oil Workers Local 4-367 v. Rohm & Haas. In this case, an arbitrator had directed the company to pay employee Brown for lost overtime resulting from the company's change of procedure in filling temporary shift vacancies. The arbitration award was explic-
The union thereafter brought a section 301 suit to enforce the arbitration award. The union did not allege that the company refused to pay overtime to Brown; rather, the union alleged that the company refused to pay overtime to other employees who, like Brown, lost the opportunity to earn overtime because of the new vacancy-filling procedure. The union sought a court injunction directing the company to pay overtime to these employees.

The district court refused to issue an injunction, reasoning that "to do so would usurp the function of the arbitrator and violate the rule that awards may be enforced only as written." According to the court, the Ethyl standard applies only when the award explicitly applies to similar cases. If the scope of the award is ambiguous, however, then the arbitrator, not the court, must determine its scope. If the award clearly restricts itself to one discrete incident, then the parties must bring a subsequent dispute to the arbitrator, not to the court. The Fifth Circuit affirmed, stating that in this case the award clearly restricted itself to one incident.

The Fifth Circuit's analysis thus divides arbitration awards into three categories: 1) awards explicitly prospective in scope, 2) awards explicitly restricted to a discrete grievance, and 3) awards ambiguous in scope. Only if the award falls into the first category, can the court determine if the subsequent dispute is covered by the award. If the award falls into the second or the third category, the court must decline to review whether the award applies to the subsequent dispute. Such a determination is for the arbitrator, not the court. Under this analysis, however, the initial determination of whether the award is ambiguous or clearly prospective or not prospective is made by the court. Implicit in the Fifth Circuit's discussion in both Ethyl and Rohm & Haas is the assumption that it is the court, not the arbitrator, who decides if the award is explicitly prospective, explicitly restrictive or ambiguous.

84. Id. at 493.
85. Id. at 494.
86. Id. at 493.
87. Id. at 494. This rule was established in New Orleans Steamship Ass'n v. General Longshore Workers, 626 F.2d 455, 468 (5th Cir. 1980), aff'd on other grounds sub nom. Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, 457 U.S. 702 (1982).
88. Rohm & Haas, 677 F.2d at 495.
89. Id. at 493.
90. Id. at 495.
91. See id. at 494-95.
92. Id. at 494.
93. Ethyl, 644 F.2d at 1054; see Rohm & Haas, 677 F.2d at 493.
2. Boston Shipping: *Inherently Prospective Awards*

The *Ethyl* standard was further developed by the First Circuit in *Boston Shipping Association v. International Longshoremen's Association*. Here, the arbitration award stated that a certain area of the terminal facility was part of a specified work area. Consequently, the employer could use this area without assigning additional employees. The arbitration award was made after the expiration of the contract under which the dispute arose. The union refused to follow the award because there was a new contract and the employer sought enforcement of the award. The district court ordered the arbitration award enforced during the new contract period and the union appealed.

The First Circuit noted that it confronted the same type of dilemma as the Fifth Circuit had encountered in *Ethyl*. The union argued that the award was limited to the contract under which it arose and that to give the award prospective effect during the new contract period would necessarily involve interpretation of the agreement. According to the union, the court could not interpret the agreement without usurping the arbitrator's role. The employer in turn argued that if the court did not enforce the award to cover the new contract term, the award would be completely meaningless. The employer pointed out, and the union conceded, that no relevant contract term or custom had changed since the award was issued and that the parties did not bargain over this issue during ensuing negotiations.

Before applying the *Ethyl* material factual identity standard, the First Circuit considered whether the prior award in question was explicitly prospective in scope. The court noted that the award was not explicitly directed at future similar violations. It reasoned, however, that an award need not be expressly directed at future similar viola-

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94. 659 F.2d 1 (1st Cir. 1981). *See also* Derwin v. General Dynamics Corp., 719 F.2d 484 (1st Cir. 1983).
96. Id. at 3.
97. Id.
98. See id. at 1-2.
99. Id. The First Circuit vacated the sections of the district court's order which gave the arbitration award "mandatory precedential effect." Id. at 5. The court held that it was improper to give the award precedential effect when the original award did not contain such a provision and the parties had not submitted the issue of the award's precedential effect to the arbitrator. Id. at 2. The court reasoned that when enforcement requires an interpretation of an arbitration award, a court should not resolve ambiguities in the award, even when such resolution would seem consistent with the parties' intentions, but should remand to the arbitrator for clarification. Id. at 3.
100. Id. at 4.
101. Id. at 3.
102. Id. at 3-4.
103. Id. at 4.
tions to have clear prospective effect. The court concluded that this award was "inherently prospective" because it applied not to a discrete historical incident, but to a definition of a physical location.

Thus, the First Circuit expanded the Rohm & Haas triparte classification by adding a fourth category: awards which are inherently prospective. The four categories are: 1) awards explicitly prospective in scope, 2) awards explicitly restricted to a discrete grievance, 3) awards ambiguous in scope, and 4) awards inherently prospective in scope. If the award falls into the first or fourth category, the court can then apply the material factual identity test to determine if the future dispute is covered by the prior award.

3. Baldwin Piano: Modification in the Scope of Judicial Intervention

The analysis described above was developed further by the District Court for the Northern District of Mississippi in Baldwin Piano & Organ Co. v. International Chemical Workers Union Local 800. Baldwin brought an action pursuant to section 301 of the LMRA to vacate several arbitration awards concerning absenteeism and seniority. The union counterclaimed to enforce the awards and to apply these awards to grievances still pending. Applying the analysis of Rohm & Haas and Boston Shipping, the district court in Baldwin noted that only explicitly or inherently prospective awards could be held binding on future grievances.

The court then expanded the category of inherently prospective awards by concluding that awards which "construe the meaning of contractual provisions rather than merely decide factual matters" are inherently prospective "when read in conjunction with the contract provision declaring the arbitrator's decision 'final and binding.'" Although the district court did not explain the rationale for this conclusion, it seemed to be applying the general rule that an award interpreting the collective bargaining agreement becomes a binding part of the agreement. Under this rule, it is recognized that the parties generally

104. Id.
105. Id.
108. Id. at 1264.
109. Id. at 1264, 1270.
110. Id. at 1271.
111. Id.
112. See F. ELKOURI and E. ELKOURI, supra note 20 and accompanying text.
do not undergo the time and expense of arbitrating a grievance simply because they wish to settle that particular grievance. Instead, the purpose of arbitrating a dispute is to receive an interpretation of the agreement that will guide future conduct.\textsuperscript{113} Therefore, according to the Baldwin court, a court should find that an award which interprets the agreement is binding on future disputes, since the very purpose of such an award is to guide future conduct. In order to prevent an arbitration award from failing in this purpose, therefore, a court should prospectively enforce any awards which purport to interpret the agreement.\textsuperscript{114}

The Baldwin court went on to develop a novel analysis of the courts’ role in enforcing an inherently prospective award.\textsuperscript{115} The court reasoned that the question of whether a party had violated a prior award’s ruling in a later dispute is for the arbitrator, not the court, to decide.\textsuperscript{116} In sharp contrast to the Ethyl standard permitting the court to determine if the party violated the prior award’s interpretation,\textsuperscript{117} the Baldwin standard requires the court to remand this issue to the arbitrator in order to avoid usurping the arbitrator’s role as interpreter of the agreement.\textsuperscript{118}

Under the Baldwin analysis, however, while only the arbitrator may determine if the parties actually violated a prior interpretation, the court may order that in future arbitrations the parties adhere to a prior interpretation.\textsuperscript{119} By applying this analysis, the court can give an award binding effect similar to the binding effect under the judicial doctrine of collateral estoppel. The collateral estoppel doctrine prevents a party from relitigating issues which have already been determined in a prior action between the parties.\textsuperscript{120} Similarly, under the

\textsuperscript{114} See Baldwin, 564 F. Supp. at 1271.
\textsuperscript{115} This analysis is novel in the sense that it differs greatly from the material factual identity standard, first developed in Ethyl and later refined in Rohm & Haas and Boston Shipping, which allows a court to enjoin a labor dispute which has not yet been submitted to an arbitrator. In accordance with the material factual identity standard, if the facts of the dispute are materially identical to the facts underlying an award which was expressly or inherently prospective, the court can issue an injunction making the award binding on this dispute. Ethyl, 644 F.2d at 1055; see Rohm & Haas, 677 F.2d at 495; Boston Shipping, 659 F.2d at 5. Thus, if the situation satisfies the material factual identity standard, then a party can seek enforcement directly from the court without first turning to the arbitrator. The district court in Baldwin, however, presents a quite different analysis. For a similar application of the Ethyl standard, see IBEW Local 199 v. United Tel. Co., 112 LRRM 2666 (M.D. Fla. 1982).
\textsuperscript{116} Baldwin, 564 F. Supp. at 1272.
\textsuperscript{117} Ethyl, 644 F.2d at 1055.
\textsuperscript{118} Baldwin, 564 F. Supp. at 1272.
\textsuperscript{119} Id.
\textsuperscript{120} RESTATEMENT (SECOND) OF JUDGMENTS § 45 (1980); F. JAMES and G. HAZARD, CIVIL PROCEDURE 563 (2d ed. 1977).
Baldwin analysis, the court may prevent a party from arguing over a contractual interpretation which has already been determined in a prior arbitration between the same parties involving materially identical facts. In sum, the district court in Baldwin held that the court may determine the collateral estoppel effect of an award, but only the arbitrator may determine if a party actually violated the award in a subsequent dispute.

IV
ANALYSIS OF JUDICIAL STANDARDS REGARDING THE PROSPECTIVE EFFECT OF ARBITRATION AWARDS

A. The Problems with Judicial Interpretation of the Collective Bargaining Agreement

The Steelworkers Trilogy established that the arbitrator, not the court, should interpret the collective bargaining agreement. Important policy considerations underlie this established principle. First, the resolution of labor disputes requires knowledge of the customs and practices of the work environment as reflected in the collective bargaining agreement. Specialized, technical knowledge is often needed to understand the factors involved in a particular labor dispute. A judge who hears cases in several different areas of the law is not expected to develop the same degree of expertise in labor relations as is an arbitrator. For this reason, the judge must defer to the arbitrator's specialized knowledge.

Second, the court is external to the collective bargaining relationship, while the arbitrator is part of the internal system of industrial self-government. Arbitration is a substitute for the strike. However, like

121. Baldwin, 564 F. Supp. at 1272. The district court applied the Ethyl material factual identity standard and concluded that the prior arbitral interpretations governed the pending, uncompleted grievance. Accordingly, the court ruled that the defendant must comply with the prior arbitration rulings, id. at 1271, but remanded the pending grievances in each case for actual resolution. Id. at 1273.
122. Id. at 1271-72.
126. Warrior & Gulf Navigation Co., 363 U.S. at 582; Enterprise Wheel & Car Corp., 363 U.S. at 596.
a strike, the arbitration process allows parties to settle their differences themselves. The arbitrator discerns the practices, customs, and agreed standards of the labor relationship, while the court imposes the rules of external society. The policy of industrial self-government requires that labor disputes be settled by arbitrators appointed by the parties themselves, rather than by courts established by society.

Third, the flexibility of the arbitration process allows the parties to quickly educate an arbitrator on an unfamiliar point. The arbitrator can question the parties directly and the parties can respond informally, unfettered by rigid evidentiary rules. The judge, on the other hand, must follow rigid rules of procedure and evidence and cannot clarify points with the ease of the arbitrator.

Fourth, arbitration is less expensive than judicial adjudication. As Fifth Circuit Court of Appeals Judge Alvin B. Rubin has stated: “even the most formal arbitration proceeding is much faster, less expensive, and more responsive to industrial needs than the best-run courts available today.”

B. The Problems with the Honeywell and Ethyl Standards

1. Usurpation of the Role of the Arbitrator

Under both the Honeywell and Ethyl standards, a party may bypass the arbitrator in certain circumstances and bring a dispute concerning the agreement directly to the court for relief. The Seventh Circuit in Honeywell noted that certain “egregious circumstances” might relieve the parties of the contractual duty to arbitrate, provided that strict factual identity requirements are met. The Fifth Circuit in Ethyl noted that conduct which differs merely in form from the conduct condemned by the prior award “cannot serve as an excuse for instituting new arbitration proceedings” and may be directly prohibited by the court. In these special cases, a party could render the arbitration award meaningless through wilful and persistent violations of the ruling, unless the court can prospectively enforce the award in subsequent proceedings.

129. See id. at 578.
130. See id. at 581-82; Enterprise Wheel & Car Corp., 363 U.S. at 596.
131. See Newark Stereotypers’ Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 599, (3rd Cir.), cert. denied, 393 U.S. 954 (1968) (arbitrator was able to consider whether refusal of witness to testify was due to company pressure); see also Rubin, supra note 127, at 31; O. Fairweather, supra note 18, at 264.
132. See Newark Stereotypers’ Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 599, (3rd Cir.), cert. denied, 393 U.S. 954 (1968) (arbitrator was able to consider whether refusal of witness to testify was due to company pressure); see also Rubin, supra note 127, at 31; O. Fairweather, supra note 18, at 264.
134. Rubin, supra note 127, at 35; O. Fairweather, supra note 18, at vi.
136. Ethyl, 644 F.2d at 1050.
disputes.\textsuperscript{137}

Although court enforcement of a prior award according to these standards might solve the problem of the flagrant recidivist, it concomitantly usurps the arbitrator's role. Regardless of whether strict factual or material factual identity is required, the court cannot avoid interpreting the collective bargaining agreement in order to compare the past and present factual situations. For example, if the agreement prohibits all employees within a specific job classification, irrespective of their work grade, from operating in a certain area, then all employees within that job classification are materially identical, regardless of work grade. But if the agreement prohibits employees within a specified job classification and a specific work grade from operating in a certain area, then these employees are materially different from other employees within the same job classification but in different work grades. The collective bargaining agreement determines which employees belong to what job classification and work grade. The court must inevitably refer to the collective bargaining agreement to determine if the facts are strictly or materially identical. But by interpreting the collective bargaining agreement, the court violates the well-established principle that the arbitrator is the sole interpreter of the agreement.\textsuperscript{138}

The Seventh Circuit in \textit{Honeywell} expressly recognized that judicial enforcement of an award in subsequent disputes "supplant[s] the arbitration process."\textsuperscript{139} The Fifth Circuit in \textit{Ethyl} sought to avoid this judicial infringement on the arbitrator's jurisdiction by placing a heavy burden on the plaintiff.\textsuperscript{140} Under the \textit{Ethyl} analysis, the court can conclude that the defendant's conduct is materially identical to conduct condemned by the prior award only if the plaintiff proves that the agreement did not arguably permit such conduct.\textsuperscript{141} If the plaintiff fails to meet its burden, then the defendant is not clearly sidestepping the award and the court must then defer to the arbitrator on the question of whether the defendant actually violated the agreement.\textsuperscript{142}

Yet, in evaluating the defendant's conduct in light of the agreement, the court still renders an interpretation of the agreement. The various tests proposed by the courts fail to prevent judicial usurpation of the arbitrator's role.

2. \textit{Failure to Provide Clear Guidelines}

Not only do the \textit{Honeywell} and \textit{Ethyl} standards permit judicial
usurpation of the arbitrator's role, but they also fail to provide clear
guidelines for the judicial intervention that they encourage. In addi-
tion to reducing the judiciary's traditional deference to labor arbitra-
tion, the standards fail to set forth any coherent limits on judicial
intervention, giving courts an open invitation to further invade the ar-
bitrator's domain.

The Fifth Circuit in Ethyl observed that strict factual identity be-
tween disputes is an impossibility; thus, the Honeywell standard, which
requires such identity, fails to delineate those situations requiring judi-
cial intervention. The Ethyl court adopted the material factual iden-
tity standard, noting that, in contrast to strict identity, material identity
is a condition which actually occurs.

While this point may have some theoretical merit, in application
the material factual identity standard is as inconsistent and confusing
as the strict factual identity standard. The court's definition of materi-
ally identical conduct as "substantially similar" is tautological, while
the definition of "differs in form" is simply vague. Defining materi-
ally identical conduct as conduct that is not "arguably permissible" under the agreement ultimately translates into any conduct which the
court will not permit. Whenever the court believes that the conduct is
not permissible, material identity will be found. Thus, the material
factual identity standard fails to provide a consistent restraint on judi-
cial intervention. More importantly, both tests fail to indicate the type
of conduct the parties must avoid to escape judicial sanctions.

Because the interactions between the employees and the employer
and among the employees themselves are so complex, it is impossible to
devise a clear standard describing all types of conduct that are similar
to the conduct prohibited by the arbitrator. The determination that
conduct is similar must be made on a case-by-case basis, taking into
account all the complex factors which might distinguish the two ac-
tions. The Ethyl and Honeywell courts have attempted to provide an
intelligible solution to a difficult problem, but because no formula can
describe all the complex factors which determine whether conduct is
similar, any standard necessarily leaves broad discretion to the court.
To exercise this discretion, the court must interpret the labor relation-
ship and the collective bargaining agreement, thus further invading the
province of the arbitrator.

143. Ethyl, 644 F.2d at 1054-55.
144. See id. at 1055.
145. Id. at 1050.
146. Id.
147. Id. at 1051.
3. **Requirement of an Unduly Rigid Interpretation**

In addition to the problems of usurpation of the arbitrator’s role and failure to provide clear guidelines for such intervention, the *Honeywell* and *Ethyl* standards are flawed because they require the court to apply a rule more rigid than the one ordinarily applied by the arbitrator. Since arbitrators can refuse to follow a prior arbitration they believe is erroneous, they are not bound by a prior arbitration even though its facts are materially or strictly identical to the present disagreement.\(^\text{148}\) The judicial standards, on the other hand, deny the court this flexibility.\(^\text{149}\)

For example, although the *Baldwin* analysis correctly defers to the arbitrator on some issues, it nevertheless sacrifices arbitration’s essential flexibility by allowing the court to give collateral estoppel effect to an award. Under the *Baldwin* analysis, a court may prevent a party from arguing for a different contractual interpretation\(^\text{150}\) even though the prior award was clearly a case of bad judgment.

### C. Deferral to the Arbitrator

Any standard that allows the court to prohibit conduct similar to conduct previously condemned by the arbitrator also permits the court to interpret the collective bargaining agreement, thereby usurping a role for which it is unsuited. The court, therefore, should not determine the prospective effect of the arbitration award on subsequent disputes, but should defer this issue to the arbitrator.

This approach was taken by the Fourth Circuit in *Little Six Corp. v. Mine Workers Local 8332.*\(^\text{151}\) In this case, a mining company had shut down and terminated all its employees. Little Six then hired several of the younger employees.\(^\text{152}\) Senior union members filed a grievance alleging that the two companies “were in fact the same employer.”\(^\text{153}\) After Little Six began mining near the site of the former

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\(^{149}\) The material factual identity standard does allow the court to refuse to enforce an award when conditions have changed or new facts have arisen, since the conduct condemned by the prior award will no longer be materially identical to the conduct now in dispute.

\(^{150}\) *Baldwin*, 564 F. Supp. at 1271.

\(^{151}\) 701 F.2d 26 (4th Cir. 1983); see also *IUE Local 103 v. RCA Corp.*, 516 F.2d 1336 (3rd Cir. 1975) (although the collective bargaining agreement included a provision barring rearbitration of questions or issues that were previously the subject of arbitration, the court held that the arbitrator should decide whether the same question or issue was presented for rearbitration); *UMW District 5 v. Consolidation Coal Co.*, 666 F.2d 806, 811 n.7 (3d Cir. 1981) (court followed *IUE v. RCA* but maintained that an application of the *Ethyl* standard would have led to the same result).

\(^{152}\) *Id.* at 27.

\(^{153}\) *Id.*
mining company, senior union members filed another grievance alleging that the company had violated their seniority rights.\textsuperscript{154} The company sought an injunction forbidding the arbitration of the latter grievance,\textsuperscript{155} arguing that it was not obligated to arbitrate because the same issues had already been decided in the prior arbitration.\textsuperscript{156}

The district court denied the company's motion for an injunction and the Fourth Circuit Court of Appeals affirmed, reasoning that the preclusive effect of an award is for the arbitrator, not the court, to decide.\textsuperscript{157} The Fourth Circuit concluded that the company could not "escape from its agreement to arbitrate disputes" but must submit the question of the preclusive effect of the former award to the arbitrator.\textsuperscript{158}

V

OTHER APPROACHES TO DETERRING RECIDIVISM

Although judicial deference to the arbitrator may resolve the problem of usurpation of the arbitrator's role, it leaves unresolved the problem of repeated arbitration of the same issues. The \textit{Honeywell} and \textit{Ethyl} standards were developed to rectify the inability of arbitration to deter recidivism. This section will explore other possible approaches to deterring recidivism.

\textbf{A. Arbitration Awards of Punitive Damages}

Arbitrators generally do not award punitive damages, but award only the relief "necessary to make the injured party whole."\textsuperscript{159} Some arbitrators, however, have awarded punitive damages when a party has deliberately and repeatedly violated the agreement.\textsuperscript{160} Whether arbitrators have the authority to award punitive damages to deter recidivism is determined by the limitations of the arbitrator's function.

Professor Theodore St. Antoine in his 1977 address to the National Academy of Arbitrators described the arbitrator as "the parties' official designated 'reader of the contract.'"\textsuperscript{161} According to St. Antoine, a court should consider an arbitration award "exactly as if it were a writ-

\begin{thebibliography}{16}
\bibitem{154} Id.
\bibitem{155} Id.
\bibitem{156} Id.
\bibitem{157} Id. at 29.
\bibitem{158} Id.
\bibitem{160} Mallinckrodt Chemical Works, 50 Lab. Arb. (BNA) 933, 939 (1968) (Goldberg, Arb.); M. \textsc{Hill} & A. \textsc{Sinicropi}, Remedies in Arbitration 189 (1981); F. \textsc{Elkouri} & E. \textsc{Elkouri}, supra note 20, at 356-57.
\bibitem{161} St. Antoine, \textit{supra} note 113, at 30.
\end{thebibliography}
ten stipulation by the parties setting forth their own definitive construction of the labor contract.” Not only is the arbitrator the interpreter of the agreement, but the Supreme Court in Enterprise Wheel & Car Corp. established that this is the sole function of the arbitrator: “an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice.” The arbitrator does not have unlimited discretion to fashion any remedy that will enforce the agreement. As Professor David Feller has stated: “the arbitrator’s sole remedial function is to interpret and apply what the agreement says about remedy.”

Although the arbitrator is restricted to awarding remedies found in the agreement, those remedies need not be explicit in the agreement, but may be found implicitly. In the Steelworkers Trilogy, the Supreme Court stated that the arbitrator may look to “the industrial common law” since this is “equally a part of the collective bargaining agreement though not expressed in it.” The arbitrator may award a remedy consistent with the practices and customs of the industry even though such a remedy is not explicit in the agreement.

A collective bargaining agreement may explicitly authorize the arbitrator to award punitive damages. However, because arbitrators view punitive damages as inimical to an ongoing labor relationship, most arbitrators will refuse to award such damages unless the language is “clear, definite and positive.” The party who argues that the agreement authorizes punitive damages has the burden of proving that the parties had the “unmistakable intention” of authorizing penalties when they negotiated the agreement.

162. Id.
163. Enterprise Wheel & Car Corp., 363 U.S. at 593.

Although Arbitrator Emanuel Stein argued that arbitrators have the same powers as an equity court in awarding remedies, he stressed that there is “a great difference between the possession of power and the occasion for its exercise.” According to Stein, an arbitrator should not award novel remedies, even though an arbitrator might have the power to do so. Id. at 46.

165. Feller, supra note 163, at 130.
Even if the collective bargaining agreement does not explicitly authorize punitive damages, some arbitrators have awarded such damages when a party has deliberately and repeatedly violated the agreement. The justification for these awards is that the arbitrator has the authority to award remedies according to "the commonly accepted standards to which the parties are assumed to have agreed." The arbitrator may award remedies consistent with the parties' reasonable expectations since these expectations are part of the industrial common law incorporated in the agreement. Where a party deliberately engaged in conduct condemned in a prior award, some arbitrators have argued that the parties reasonably expect a punitive damages award: "monetary damages regardless of the absence of showing of loss." Just as the award of punitive damages to deter the recidivist, if not explicitly authorized by the agreement, must be consistent with accepted industrial practice, so also the amount of punitive damages, if not explicitly specified, must be defined by accepted practice. In Mallinckrodt Chemical Works, Arbitrator Goldberg persuasively argued that penalties to deter knowing, repeated violations are consistent with the parties' reasonable expectations, but he stressed that the arbitrator does not have unlimited discretion to award such penalties. Goldberg reasoned that he was authorized to award punitive damages in the dispute before him because the amount of such damages was determinable by the amount of work wrongfully assigned, and thus the amount could be based on a compensatory damages theory. Although the amount of damages awarded did not correspond to any monetary loss, it still corresponded to the employees' reasonable expectation that they would be compensated for work wrongfully assigned. Goldberg distinguished the dispute before him from those disputes which "leave the arbitrator at large to impose damages according to his notions as to how substantial an award would constitute... a satisfactory deterrent to future violations." An arbitrator who bases the amount of the penalty on the amount calculated to deter the recidivist, rather than on accepted custom or practices, violates the principle of the Steelworkers Trilogy that the arbitrator "does not sit to dispense his

175. See Warrior & Gulf Navigation Co. 363 U.S. at 581-82; Mallinckrodt Chemical Works, 50 Lab. Arb. (BNA) at 939; Feller, supra note 164, at 135.
176. Bethlehem Steel Co. II, 37 Lab. Arb. (BNA) at 824; Bethlehem Steel Co., 3 Lab. Arb. (BNA) at 225; Mallinckrodt Chemical Works, 50 LA at 939; contra Stein, supra note 164, at 47.
178. Id.
179. Id.
own brand of industrial justice.”

Thus, both the award of punitive damages and the amount of those damages must be authorized either explicitly by the agreement or implicitly by custom or practice. As Arbitrator Emanuel Stein has observed: “arbitration was designed for the parties, not they for it . . . . [A]wards ought to reflect the expectation of the parties, and their notions of propriety, rather than an abstractly conceived notion of the best way of dealing with a problem.”

B. Explicit Remedy Provisions for Repeated Violations

The arbitrator is restricted to awarding damages explicit in the agreement or implicit in industrial custom or practice. Industrial custom or practice might not permit the arbitrator to award remedies severe enough to deter a financially powerful party bent on violating the agreement. A party facing a recidivism problem could therefore negotiate for an explicit clause in the agreement providing for progressive damages for repeated violations. Such a clause could impose increasingly greater damages each time a party committed the same type of violation. Since these progressive damages could be explicit in the agreement, the arbitrator, as reader of the agreement, would be authorized to award them.

The critical question is whether a court will enforce a remedy clause for repeated violations of the collective bargaining agreement. In Retail Clerks Union v. Food Employers Council, Inc., the agreement prohibited the employer from permitting nonemployees to perform work normally performed by union store employees. The agreement also provided for an increase in damages for every repeated violation of this provision within a six-month period.

The California Court of Appeal found that these provisions for progressive damages for repeated violations were invalid. Such a penalty could not be imposed, according to the court’s reasoning, because it violated California statutes prohibiting liquidated damages except

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181. A.O. Smith Corp. 33 Lab. Arb. (BNA) at 366.
182. See supra note 173 and accompanying text.
183. Stein, supra note 164, at 47.
185. This question is distinguishable from the question of whether a court can award punitive damages in a § 301 action when the collective bargaining agreement is silent concerning such damages. For a discussion of this separate issue, see Wanzer & Son, Inc. v. Milk Drivers Union, Local 753, 249 F. Supp. 664 (N.D. Ill. 1966) and Butler v. Local Union 823, Int'l Bhd. of Teamsters, 514 F.2d 442 (8th Cir.), cert. denied, 423 U.S. 924 (1975).
187. Id. at 288, 149 Cal. Rptr. at 429-30.
188. Id. at 288-89, 149 Cal. Rptr. at 430.
when "it would be impracticable or extremely difficult to fix the actual damages."\textsuperscript{189} Since there was no evidence that the parties had ever discussed, let alone concluded, that it was impracticable or extremely difficult to fix the actual damages, the court held that only the actual wages lost could be awarded.\textsuperscript{190}

The California Court of Appeal, however, failed to recognize that a remedy clause for repeated violations in a collective bargaining agreement is fundamentally different from a liquidated damages clause in a commercial contract. The court mistakenly applied traditional contract law to a labor law issue.

A collective bargaining agreement is more than a contract;\textsuperscript{191} it is an effort to create a system of industrial self-government guiding the ongoing relation between the employer, the union, and the employees.\textsuperscript{192} When the arbitrator formulates a remedy, the arbitrator does not look to principles of contract law, which are external to the agreement between the parties, but only to the collective bargaining agreement itself.\textsuperscript{193} The award is legitimate only so long as it draws its essence from the collective bargaining agreement.\textsuperscript{194} A remedy expressly contained in the agreement is the result of negotiation between the employer and the union. The arbitrator is limited to interpreting and applying this remedy and does not have any authority to devise some other brand of industrial justice.\textsuperscript{195}

In sharp contrast, the remedy for a breach of a commercial contract is fashioned according to principles applicable to all contracts and external to the particular agreement between the parties.\textsuperscript{196} The parties are not completely free to establish their own remedies for contract. Under modern contract law, external policies control and limit the parties' autonomy to set their own agreed penalties for breach of their con-

\textsuperscript{189} The applicable sections of the California Civil Code read as follows:

Section 1670: Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section.

\textsc{Cal. Civi. Code \S\ 1670 (West 1982)}.

Section 1671: The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case it would be impracticable or extremely difficult to fix the actual damage.

\textsc{Cal. Civi. Code \S\ 1671 (West 1982)}.

190. \textit{Retail Clerks Union}, 85 Cal. App. 3d at 291, 149 Cal. Rptr. at 431.
192. \textit{Id.} at 580.
194. \textit{Id.}
195. \textit{Id.}
tract. In light of these external public policies, it is recognized that a liquidated damages provision in a commercial contract may not reflect the intent of the parties. Thus, in order to prevent economic over-reaching, the use of a liquidated damages remedy is regulated.

Such public policies are not applicable to a remedy clause in a collective bargaining agreement since this clause is the result of negotiation between the parties and reflects the intent of the parties. A collective bargaining remedy clause should be enforced, regardless of its relation to actual damages, because it is a remedy negotiated by the parties themselves.

**Conclusion**

The most effective deterrent for recidivism is an explicit clause providing for progressive damages for repeated violations of the collective agreement. This clause permits the arbitrator to impose increasingly greater damages for each repeated violation. There is a danger, however, that the economic imbalance which permits recidivism will also prevent a party from successfully negotiating a remedy clause providing for progressive damages. A party facing a hostile, financially strong recidivist may lack the bargaining power necessary to negotiate an effective remedy against repeated violations. A recidivist bent on subverting the collective bargaining agreement through repeated violations will not easily agree to a provision penalizing recidivism.

A party facing a determined recidivist, unable to negotiate an explicit remedy clause for recidivism, may find itself without an adequate remedy. A review of the alternatives available to such a weaker party makes this point clear. Under one alternative a court may make an arbitration award binding on subsequent disputes. As this comment has argued, however, a court cannot do so without usurping a role for which it is ill-suited. Thus, a party must turn to the arbitrator for a remedy which will deter repeated violations of the agreement. The arbitrator, however, is not empowered to fashion a remedy conforming to her own notion of what will deter the recidivist. The arbitrator is restricted to awarding remedies explicit or implicit in the agreement between the parties. If the industrial practice implicit in the agreement does not allow the arbitrator to award a remedy sufficient to deter the recidivist, the aggrieved party's final resort is to negotiate an explicit remedy against recidivism. As noted above, it may be impossible for a weaker party to secure such a clause.

The remedy for recidivism remains, ultimately, in the bargaining

197. *Id.*
199. *Id.* at 85-86.
strength of the aggrieved party. As Arbitrator Emanuel Stein has stated:

the parties must not only be willing to live together, they must also be willing to bargain collectively: that is, to make earnest efforts to resolve difficulties and disputes by themselves rather than passing them on to an arbitrator. Sometimes, the question whether arbitration is a substitute for litigation or for the strike seems less relevant than the question whether it is a substitute for collective bargaining. For the behavior of the parties sometimes gives rise to the suspicion that they have abdicated their responsibilities to resolve their difficulties by negotiation and have deposited them in the lap of the arbitrator in the expectation that he will provide the answer towards which they were either unwilling or unable to strive.\textsuperscript{200}

When the difficulty is an imbalance of power which permits the stronger party to repeatedly violate the agreement, however, that very imbalance of power may prevent the weaker party from negotiating an adequate solution. In short, collective bargaining cannot remedy recidivism if repeated contract violations arise from unequal bargaining power in the first place.

This Gordion knot is inherent in the American labor system in which the ultimate responsibility for accommodating the needs of the employees, the union, and the employer remains with the parties themselves. In most Western European countries, public law regulates the substantive terms and conditions of employment.\textsuperscript{201} The American labor system, however, has developed into a system of industrial self-government in which the parties negotiate the terms of employment within broad statutory guidelines.\textsuperscript{202} Consistency with this system of self-government requires that the remedy for recidivism be found within the collective bargaining relation itself. If a solution to recidivism cannot be found within the relation, there may not be a solution. Collective bargaining may not be able to cure the recidivist when there is a serious imbalance in the labor relationship itself.

\begin{itemize}
\item \textsuperscript{201} Feller, \textit{The Impact of External Law Upon Labor Arbitration} in \textit{The Future of Labor Arbitration in America} 84 (1976).
\end{itemize}