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David Feller - Remembrance

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David Feller introduced me to Labor Law in the spring of 1972. I was one of more than a hundred students in his class—in those days, unlike now, labor law was a popular subject, regarded as part of the standard law school curriculum. But Professor Feller's class was not a standard law school class, and Professor Feller's impact on his students was far from standard. Many, like me, decided after exposure to David's brand of labor law to try to follow in his enormous footsteps and engage in the practice of union-side labor law. We imbibed from his class both an appreciation of the intellectual complexity of the subject, especially the economic model that was its underpinning, and the faith that workers deserved the very best representation available, the kind David Feller and his law firm colleagues—Arthur Goldberg, Elliot Bredhoff, Michael Gottesman and Jerry Anker—had provided.

Professor Feller, indeed, began his labor law class by confessing a certain bias not so much toward union representation as toward the form of industrial self-governance available in a mature collective bargaining relationship. Our very first reading assignment—quite different from any other reading assignment I had in law school—was the Steelworkers/U.S. Steel collective bargaining agreement. What we were supposed to observe, it turned out, was that the document was more than a contract, it was a lengthy, detailed code, the governance compact of a mini-society, the industrial workplace. Professor Feller then proceeded to explicate over the

\[\text{Judge, United States Court of Appeals for the Ninth Circuit.}\]
following weeks and months a vision of labor law as a balanced system of governance, one providing both dignity to workers and economic viability to employers.

The class of neophytes did not appreciate at the outset, but came to understand, that Professor Feller was being, somewhat uncharacteristically, modest in allowing us to think that he had been just some union lawyer. What made the class so special was that, as we leaned as the term proceeded, David Feller had been, before coming to academia, the leader of a group of lawyers who helped to create, somewhat out of whole cloth, the law governing arbitration and mature collective bargaining. So we were learning about the insights and ideas now second nature to labor law practitioners—the federal character and enforceability of collective bargaining agreements, announced by the Supreme Court in *Textile Workers Union v. Lincoln Mills*,¹ briefed largely by David Feller; the key role of arbitration, briefed and argued by David Feller in the *Steelworkers Trilogy*;² and the safety valve of the duty of fair representation, elucidated as it effects arbitration in *Vaca v. Sipes*,³ briefed and argued by David Feller—not with the air of inevitability often conveyed in law school classes but with a sense of the process by which these ideas were teased out of the terse statutory materials by David and his colleagues and presented with his supreme advocacy skills to the Supreme Court.

As I first encountered David as his student, I never had the opportunity to work directly with him once I took up a practice not unlike the one he had engaged in—representing the interests of the labor movement in the appellate courts, principally the Supreme Court. I did work, however, with all of his former partners except Arthur Goldberg, and with other superb lawyers who had learned their approach to appellate representation of labor unions under David Feller's tutelage. David remained, twenty and thirty years after he had left the active practice of law, the gold standard, the person all his former colleagues would quote to younger lawyers like me. Thus, I was told, time and again: "As Dave Feller says, a brief should be written so tightly that the first sentence of each paragraph can become the summary of argument." Or: "You have to figure out what you want the Court to decide before filing a petition for certiorari. Once some UAW lawyers succeeded in getting the Court to grant certiorari on a statute of limitations questions, and then called a meeting of lawyers for affected unions to ask whether a short or a long statute would be better. Perhaps it would have been better to figure that out before convincing the Court to

¹. 353 U.S. 448 (1957).
hear the case,” opined David. Or: “One often has to give the Supreme Court practical reasons to favor the union positions.” That’s why David Feller convinced the AFL-CIO to file a brief amicus curiae in Vaca v. Sipes, the last major case David argued before the Supreme Court, providing statistics showing that the Steelworkers and the UAW process tens of thousands of grievances a year but arbitrate only a handful.\(^4\) The point was to show that the union’s duty of fair representation must include broad authority to decide not to process grievances through arbitration; otherwise, the whole system of grievance arbitration would collapse. The Court understood the point and so ruled.

David was often called upon as well to impart his wisdom when groups of union lawyers got together, and he was never afraid to tell us what he thought we needed to know, heresy though it may be. Being a bit of a provocateur in order to open his listener’s mental channels was not beyond David. Once he came to speak to a group of union general counsel, long committed to keeping labor issues in the general federal court system. It was time, Professor Feller informed them, to consider whether it would not be better to support the development of a labor court, to hear the myriad of employment cases then beginning to flood the federal courts. The union lawyers were set in their ways, and as far as I know, David never pursued the issue vigorously. But, it turned out, he was prescient at least in recognizing that the general federal courts would resist the litigation onslaught—and resist it they did—by permitting what has become the privatization of much employment litigation through employer-imposed arbitration. Almost definitely a well-conceived labor court would have been better.

Reading Professor Feller’s briefs in the key cases—principally, Lincoln Mills, the Steelworkers Trilogy, but also eight or nine others—and then the resulting opinions, one is struck by how some of the opinions read as simple-minded versions of his briefs, lacking their depth and grounding in the realities of the industrial workplace. This lost-in-translation quality is probably the result of the advocacy skills that Professor Feller later conveyed to hundreds to students in his Appellate Advocacy class at Boalt: the briefs were so clear, well-organized and persuasive that the analysis often seemed obvious, when in fact it was original and complex.

It was no wonder to those familiar with his work as a practitioner extraordinaire that when Professor Feller turned to academic writing, he produced nothing less than A General Theory of the Collective Bargaining Agreement.\(^5\) David’s wife, Gilda, told me recently that he originally wrote a


much less ambitious work that disappeared in a stolen briefcase in those
days before computer backup, and went on to the General Theory because
he was too bored to reproduce his more pedestrian work. His resulting
magnum opus, edited by the California Law Review the year I was one of
the Articles Editors (although not the one assigned to Professor Feller’s
piece), was perhaps the longest the Law Review has ever published. The
article sat beside my desk the whole time I was in practice, for consultation
whenever the intricate connections among parts of the labor law web began
to escape me. There is simply nothing else like this piece in the world of
labor law commentary, both for the grace of its writing and for the manner
in which it weaves together diverse strains of statutory and case law into a
coherent whole—considerably more coherent than the hodgepodge created
by the much less orderly exegesis that has taken place in the courts over the
years.

Like many labor law practitioners, I was the beneficiary in the years
after law school of Professor Feller’s advice and counsel in both of the
areas in which he specialized, the substance of labor law and the art of
appellate advocacy. There was the day, for example, that I was asked to
write a Supreme Court brief amicus curiae on behalf of the AFL-CIO in a
case called Gilmer v. Interstate/Johnson Lane Corp.,6 concerning the
problem of whether an agreement by an employee to arbitrate a statutory
right to be free of discrimination could be enforced under the Federal
Arbitration Act.

As was not unusual, particularly where the case concerned arbitration,
my colleagues on the brief advised that I consult Dave. As the Fellers were
my next door neighbors for the past fourteen years, that was easy: I
knocked on the Fellers’ front door one night (the knocker is a giant brass
fish, a gift to the former owner, Admiral Nimitz) and asked what he knew
about the contract of employment exemption in the Federal Arbitration Act.
“Andrew Furuseth!” he exclaimed, with his usual delight in confounding
his students before enlightening them. “You have to know something about
Andrew Furuseth to answer that question.” David went on to recount the
story of the President of the International Seamen’s Union in the 1920’s
who, according to Professor Feller, went on a one-man crusade to ensure
that individual workers would not be shackled by employer-imposed
arbitration. The Andrew Furuseth story, it turned out, had played an
important role in the briefs in Lincoln Mills, the key case concerning the
enforcement of collective bargaining agreements under § 301 of the Taft-
Hartley Act.7 An alternative theory in that case, developed by Professor
Feller (but not adopted by the courts), maintained that the “contracts of

employment" Mr. Furuseth had in mind were not collective bargaining agreements but articles of indenture and other individual employment contracts, and that the Federal Arbitration Act therefore covered collective bargaining agreements.

It turned out that the problem presented in *Gilmer*, and variants thereof, occupied much of David Feller's intellectual energy in his later years. Long the progenitor of much of the law of labor arbitration, he became immersed as well in questions concerning non-union employment arbitration. Sadly, he lived to see a world of unintended consequences of his work favoring arbitration in the union context and limiting review of arbitration awards, as the courts resisted the direction that they should keep hands off labor arbitration awards yet developed law favoring arbitration of statutory causes of action for individual employees, never within Professor Feller's theories concerning the benefits of arbitration to the industrial regime. That the inside-out result frustrated him enormously is clear from his later writing, and from numerous conversations with those engaged in trying to deflect the Court from its apparent path.

Professor Feller played one final role as mentor to latter-day labor law practitioners: He was always ready to organize a moot court at Boalt for important cases, presiding as Chief Justice. When I was the advocate he was aiding, after twenty years of practice I was still his eager student. He made sure to pay attention not only to the thrust of what I was saying but also to the form and style, correcting my diction as well as my logic. I suspect that Professor Feller let me think I had something to do with winning the cases for which he was Chief Justice of the moot court but secretly thought, as I did, that I could not have succeeded without his help.

So David Feller influenced the development of labor law in the Supreme Court long after the seminal cases he briefed and argued himself so brilliantly were accepted wisdom—by training young lawyers at Boalt; through his disciples at what became Bredhoff & Kaiser, at the AFL-CIO, and at other labor law firms and in-house legal departments; by consulting with leading union lawyers when the occasion arose; but mostly, and most lastingly, by the example of excellence—including candor, clarity of presentation, logical consistency, planning, preparation, and complete and careful research which led to union victories in the Supreme Court far beyond what one would expect. That example became a tradition and, despite the contraction of the labor movement, each year, a few of the best young lawyers decide to follow in David's wake. It has been a sorrow to me that in my new role as judge I could not consult David in person (although I am aware of at least one judicial colleague who did some years ago).

I will miss David Feller for his wisdom, his enthusiasm, his love of a good story (sometimes the same good story he told you last time), and, not
least, for his hearty smile across the back hedge.