David Feller: Teacher

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A number of us went to law school in the 70’s to acquire skills to further progressive goals. We were educated in the civil rights and anti-Vietnam struggles of the previous decade. The choices of practice areas to pursue were limited: criminal defense, poverty law generally defined, and the beginnings of interest in environmental issues. David Feller led some of us into representing unions.

Feller came to Boalt in 1967. He was unique on that faculty in that he was unrepentingly a union labor lawyer who believed in the union as a progressive institution. Feller was immensely proud of his progressive roots. He told the story of when he received a book prize during his undergraduate time at Harvard. The College allowed him to chose any book to be bound in leather and he chose a three volume set of Das Kapital. His family proudly displayed the volumes at the recent memorial for Feller at the Berkeley campus.

Feller’s teaching style was a like that of an advocate. Those who never got interested in labor law may have found him slightly pompous. But his teaching style was like that of his brief writing. His was certain, direct, clear, compelling and he convinced his students he knew exactly what he was talking about. In reading his published writings, you imagined you were reading a powerful brief. His use of text and references from collective bargaining agreements reminded his students that there was a real economic class struggle behind labor law. There was no better way to prove the common law of the shop than to make students read dog eared copies of collective bargaining agreements, all printed with a union label!

Feller’s teaching and speaking style was designed to convince an appellate judge that his position was both practical and grounded in the law. But his style would have played equally well with the executive board of a union or a mass membership meeting. Those of us who later decided to practice labor law (and this includes some who now represent management) enjoyed this teaching style; after all, labor law forces you to chose sides. Even those who did not share his passion for the union movement could not

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object when he proclaimed where his loyalties lay. "I make no pretense of a lack of bias."

For those of us who went on to represent unions, there was one principle which was established through his self-assuredness. This principle surfaces most directly in *Vaca v. Sipes*, the last case Feller argued to the Supreme Court. I still remember his reminding us that the case wasn't about Robert Owens. Feller emphasized that *Vaca* was about protecting the collective decision-making of a union from review and control by individual members. Although Feller argued that the individual's claim should be preempted and that, if not preempted, the remedy should be an order compelling arbitration, the real victory of *Vaca* was in the recognition of how a union functions at the grievance level. The Court recognized that "the individual employee has no absolute right to have his grievance arbitrated under the collective bargaining agreement . . . ." Thus *Vaca* saved the basic principle of collective action from individual control.

Some of us initially had trouble reconciling the interests of individuals with those of the collective union. Feller never had any doubt about this. He understood that through collective action the lives of workers and their families could be improved. He understood the union is not always a perfect institution but is one worth fighting for. And I, for one, have never regretted for one minute having taken that lesson to heart in now more than 30 years of law practice on behalf of unions.

Yet Feller's career as one of the nation's premier union lawyers before he began teaching also reflected the intense and sometimes destructive conflicts within the labor movement. Indeed, Feller's work embodied these conflicts. Most of us who chose to represent unions come to the calling with very progressive politics. Yet, while the institutions we represent are usually militant on issues affecting their membership, they are often not as

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3. Owen—for those of us haven't read the case for a long time—was the grievant who had died before the case came to the Supreme Court. Sipes was the executor of his estate. The employer had terminated Owens after its doctor had determined that his blood pressure was too high even though Owens had certificates from his treating physician and another doctor that he could return to work. Today, the union would have to look to the Americans with Disabilities Act, 29 U.S.C. § 706 et seq., the Family and Medical Leave Act, 29 U.S.C. § 2601 et seq., any state workers' compensation law and coordinate state laws to determine if there is a remedy.
4. 386 U.S. at 195.
5. Two years after I graduated I participated as a judge in Feller's moot-court which used *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1973). In that case, the Court held that an employer could discipline employees who engaged in picketing in face of the collective no-picketing language of their union's contract even though the purpose of the picketing was to protest racial discrimination. With Feller's lesson in mind, judging the case was easy.
progressive on social issues. It has taken people like Feller to influence their clients in progressive ways. Two examples illustrate this point.

The first is the conflict within the CIO during the late 1940s over Communist officials and locals. Feller was a clerk for Chief Justice Vinson when Arthur Goldberg hired him to staff his office in Washington. Feller came along with two other attorneys who became renowned lawyers in their own regard: Elliot Bredhoff and Thomas Harris. Yet we cannot forget that Goldberg became General Counsel for the CIO in 1948 as the result of the purge of the communists from the CIO. One of the first victims of this purge was Lee Pressman, who had been General Counsel to the CIO since its founding in 1935 and by all regards had been its brilliant legal strategist and advisor. He was also a Communist. When Pressman announced his support of Henry Wallace for President in 1948, Phil Murray, then President of the CIO, fired him. Goldberg was Pressman’s successor. Goldberg helped engineer the trials that began in 1949 of the various leaders of the CIO affiliates who were Communists. This ultimately led to the purging from the CIO of its most militant and effective unions. Feller did acknowledge in class his involvement in those proceedings, which lasted into 1950. The lot of the union lawyer is often to orchestrate internal union struggles.\(^6\)

Yet, while the office of the General Counsel of the CIO was involved in the internal struggles over the left wing unions, the same office also fought against the notorious non-communist affidavit of Taft-Hartley. One of the provisions of Taft-Hartley Act in 1947 was section 9(h), which disallowed unions from using the process of the National Labor Relations Act unless all of its officers and all the officers of its International union signed an oath that he/she was not a member of the Communist Party or affiliated with the party.\(^7\) The oath required the official to include a statement that he or she did not believe in or support any organization which believed in or supported the over-throw of the government by force, illegal or unconstitutional means. A false oath was especially subject to a perjury charge.

The CIO and the Steelworkers challenged section 9(h) in the Courts. The cases came to the Supreme Court during 1949 in a case entitled American Communications Association v. Douds (ACA v. Douds) and United Steelworkers of America v. National Labor Relations Board.\(^8\) The unions challenged the oath on various grounds including First Amendment

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6. There is a compelling argument that the expulsion of the Communist lead unions from the CIO was an “American Tragedy” because they were the most democratic and effective industrial unions after World War II. JUDITH STEPAN-NORRIS and MAURICE ZEITLIN, LEFT OUT: REDS AND AMERICA’S INDUSTRIAL UNIONS (2003).


and Bill of Attainder grounds. The ACA, which had been purged from the CIO, was represented by Victor Rabinowitz, one of the leading lawyers for the Communist Party and left wing unions. The Steelworkers were represented by Thomas Harris and the Goldberg firm. They took divergent views in the Court. The ACA argued that the government had to show a clear and present danger in the joining of the Communist Party or in espousing the beliefs of the party, while the Steelworkers took the more conservative approach of arguing that the government would have to prove that political strikes, the substantive evil at which the oath was aimed at, presented a clear and present danger. Neither approach carried the day and the Court upheld the oath. Here the lawyers for the CIO were certainly out in front of their clients, who were simultaneously purging Communists from their ranks.\(^9\)

Another example of the conflicts within labor that confronted Feller in his early career involved the important role placed by the CIO lawyers in confronting the legal underpinnings of segregation. Feller loved to tell the story of *Henderson v. United States*.\(^10\) In brief, three cases\(^11\) came to the Supreme Court in the same term as *ACA v. Douds*. Those cases challenged Jim Crow’s “separate but equal” doctrine. In each of these cases, the Court carefully avoided overruling *Plessy v. Ferguson*\(^12\) and did not reach the question of whether separate but equal facilities were constitutional. In each case the Court found that the facilities were not equal. *Henderson*, however, involved the question of whether orders of the Interstate Commerce Commission prohibited separate dining facilities on rail cars. The Court so held. In these cases the CIO and Goldberg’s office filed briefs *amicus curiae* urging an end to segregated facilities and urging that *Plessy* be expressly overruled.

Feller recalls that when *Henderson* was decided along with the other two cases on June 5, 1950, he drafted a press release for the Steelworkers applauding the Court’s decisions. He included in the press release a statement that the Steelworkers did not support segregated facilities or meetings. Unfortunately, Phil Murray was headed at the time to Birmingham, Alabama, to attend a large meeting of members of the union which was to be segregated, consistent with local practice. When Murray

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\(^9\) As a side note, the *ACA v. Douds* case was scheduled for argument during the 1948-49 term. At the request of Phil Murray, the ACA agreed to a postponement so the Steelworkers case could be argued with it. As Victor Rabinowitz points out, “disaster struck” during the summer of 1949 when Justices Rutledge and Murphy died and Justice Douglas fell off a horse so that he could not participate thus losing three probable votes for the unions. \(^1\) *The Cold War Against Labor* 308-309 (A. Ginger & D. Christiano, eds. 1987).


\(^12\) 163 U.S. 537 (1896).
complained to Arthur Goldberg, according to Feller, Goldberg told Murray he was “stuck” and Murray conducted the meeting on a non-segregated basis without incident.\textsuperscript{13} Feller was proud of this achievement, just as he was especially proud of his involvement over the years in the NAACP Legal Defense Fund and his assistance to Thurgood Marshall in the \textit{Brown v. Board of Education}\textsuperscript{14} litigation.\textsuperscript{15}

There is more history which illuminates the internal conflicts of the union movement and ties together the communist purge, the non-communist oath, and the racial struggles of unions in the post Taft-Hartley period. One bastion of unionism in Alabama was the Mine, Mill and Smelter Workers which represented 5,000 ore miners and foundry workers in Red Mountain which was a central part of the steel industry in Alabama. Not only was the Mine, Mill and Smelter Workers a Communist Union but also a racially integrated and militant union. In May, 1949, the CIO under Murray formed Local Independent Unions to raid the union and through racist and Communist baiting tactics defeated the Mine, Mill and Smelter Workers. Because of Murray’s refusal to sign the non-communist affidavit, however, the Steelworkers could not be on the ballot.\textsuperscript{16} We do not know if Murray was headed to Birmingham a year later to attend a meeting of those particular members, but it reflects the cross current of politics which swirled around Feller. It also reflects the contradictions which progressive union lawyers sometimes face in representing unions.

Feller will, of course, be best remembered for helping to remake the law of labor arbitration. Feller’s genius as a lawyer was to turn laws designed originally to weaken unions into effective tools for furthering the interests of the union movement. The \textit{Steelworkers Trilogy}\textsuperscript{17} and \textit{Lincoln Mills}\textsuperscript{18} took a statute written by Congress to hobble unions and turned it into the principal weapon against employers in the federal labor statutes. And Feller accomplished this in the 13 years from the enactment of Taft-Hartley to the \textit{Steelworkers Trilogy}!
When Congress enacted the Taft-Hartley Act, one of the central provisions was section 301. It was specifically designed as a weapon for employers against unions to enforce collective bargaining agreements largely in the context of strikes. There is no doubt it was designed by an anti-labor Congress to be used as a weapon against unions, not the reverse. As Feller concluded: "A meticulous search of the legislative history in both houses can uncover no hint that anyone in the Congress believed that legislation was necessary to deal with employer violations of collective bargaining agreements."20

 Arbitration did, of course, play a prominent role in the strategy of labor prior to these cases.21 Strikes often resulted in agreements to arbitrate the terms of contracts. Indeed, the impetus for many of the great strikes of the early twentieth century was often a failed or successful effort to obtain not the terms of an agreement, but rather an agreement to submit to arbitration the union's basic demands, such as recognition and wage increases. What was missing however, was the basic ability to consistently enforce the union's rights under arbitration provisions. The ability of unions to enforce the provisions depended on the vagaries of state law and very unfriendly state court judges.

 The initial cases filed by Goldberg's firm were inauspicious. Feller lost Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., one of the first cases that he argued to the Supreme Court (five years after he joined Goldberg).22 Feller had hoped to establish the primacy of federal law in enforcing collective bargaining agreements, but the Court held only that individual contracts had to be enforced under state law.

 However, two years later in Lincoln Mills, which Goldberg argued, and Goodall-Sanford,23 which Feller argued as the companion case, the Court held that section 301 required the application of federal law in enforcing collective bargaining agreements. Feller was primarily responsible for the briefs. Three years later in the Steelworkers Trilogy, the Court confirmed that not only that federal law would apply but that that federal law firmly favored arbitration. Feller's victory was complete! Arbitration as a substitute for the strike was now established as the central principle of labor

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21. The American Railway Union, for example, had sought arbitration as a way of ending the great Pullman strike of 1894. ALMONT LINDSEY, THE PULLMAN STRIKE 224-225 (1942). In 1900, twenty-two states had enacted legislation providing for voluntary arbitration of labor disputes. JOSEPH RAYBECk, A HISTORY OF AMERICAN LABOR 182 (1966).
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Feller recognized the tension between the reliance on arbitration made feasible by the Steelworker’s Trilogy and union mobilization and militancy. However, since Taft-Hartley had taken away labor’s most effective weapons such as the secondary boycott, the closed shop and recognition picketing, the use of arbitration was very arguably necessary. The Steelworkers Trilogy was a brilliant use of a statute designed as a weapon for management, but it was a victory within the confines of the labor laws. Since then, union lawyers have looked beyond the labor laws to benefit unions as institutions. Those most creative and innovative efforts have come from taking laws and principles designed to protect capitalist institutions and using them to enhance the pressures which unions can bring to bear on employers. Many of us have used such statutes and concepts as RICO, corporate governance and shareholder rights, unfair competition laws, environmental regulation, land use regulation, and investment strategies to further the collective efforts of unions and to pressure employers to provide better conditions for working people and their families. Feller’s accomplishment in turning section 301 on its head is a shining example of the kind of creativity we need in a legal environment increasingly hostile to unions.

Central to Feller’s vision of labor arbitration was the supremacy of the arbitrator in interpretation of the collective bargaining agreement. Our office once sought to vacate an arbitration award on the theory that it was not a plausible reading of the contract language setting forth an important provision of the National UPS-Teamster Agreement known as the “cardinal sin” rule. Under the language of the agreement, employees would remain on the rolls—that is, working—until their case was heard except, in certain enumerated situations in which they had committed one what were known as the cardinal sins. If UPS asserted that one of those sins was committed, the employee could be immediately removed from the rolls, subject to back pay, if the process later determined that no cardinal sin was committed, or

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24. The Supreme Court turned this doctrine against labor and further suppressed militancy by implying a no-strike obligation wherever a grievance is resolvable through arbitration. Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962).
28. When I was in my third year at Boalt Hall, I took Feller’s Labor Law Seminar and wrote a paper for him railing against what he had accomplished. I argued that his view of the collective bargaining agreement in *A General Theory of the Collective Bargaining Agreement* was flawed because it reduced the militancy of labor. My paper began: “This paper will attempt to demonstrate that the preference expressed by the so-called ‘national labor law’ has had serious detrimental consequences for the relationship between the union and its rank and file members.” I am now willing, however, to agree that section 301 served labor for many years in preserving the grievance and arbitration procedure and preserving union power.
alternatively, the discharge could be sustained but with an award of back pay only for the period up to the hearing. Additionally, an employee could not be terminated without having received one written warning unless the employee committed a "cardinal sin." The Ninth Circuit first vacated the award on precisely the theory that the arbitrator's decision was not a plausible interpretation. Feller was, needless to say, very annoyed with me over this.

Feller had the last laugh. He wrote an amicus brief in Major League Baseball Players Association v. Garvey on behalf of the National Academy of Arbitrators and the Supreme Court, following Feller's lead, unceremoniously reversed a decision by Judge Stephen Reinhardt vacating an arbitrator's award. This per curiam decision is probably the high water mark of the Supreme Court's most recent jurisprudence on review of arbitration awards. Thus, when the panel adjudicating the UPS-Teamster agreement vacated its earlier decision and confirmed the arbitrator's award, the matter was ended and Feller's view of arbitration preserved.

In the end, Feller came to recognize that the Federal Arbitration Act may actually have been a better regime for preserving arbitration under collective bargaining agreements. The result he so brilliantly achieved under section 301, he recognized, in the long run may have been a mistake:

So I return to my original thesis. The 80th Congress surely did not intend by enacting Section 301 to elevate labor arbitration to exalted status. The Supreme Court surely did. But the Court subsequently did the same and more for commercial arbitration under the FAA. Messrs Taft and Hartley have been vindicated; they can be acquitted retroactively of creating by inadvertence a result they did not intend. We can now say, looking backward, that because of the Supreme Court's recent embrace of arbitration under the Federal Arbitration Act the law governing labor arbitration would be more favorable to labor arbitration and to unions if

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31. 243 F.3d 447 (9th Cir. 2000). Judge Reinhardt is a former union lawyer!
32. Haw. Teamsters & Allied Workers Union, Local 996 v. United Parcel Serv., 241 F.3d 1177 (9th Cir. 2001).
33. To be wholly accurate, the decision of the panel to reverse itself was issued two months before Garvey. With Garvey, we had no choice but to tell our clients that a petition for certiorari would be denied.
35. 9 U.S.C. §§ 1-16.
Section 301 had never been passed.36

Feller, of course, also lived to see the Supreme Court’s result in *Circuit City v. Adams.*37 It is up to us to find ways to use the FAA to benefit organizing and unions.38 I am confident we will find ways, as Feller did with section 301.

38. See Stephen Hayford, *The Federal Arbitration Act: Key to Stabilizing and Strengthening the Law of Labor Arbitration,* 21 BERKELEY J. EMP. & LAB. L. 521 (2000). Unions will have to look beyond the application of the FAA to collective bargaining agreements. For example union organizers will have to learn to invoke employer mandatory arbitration provisions for workers. This will be a no lose tactic: If the union representative is unsuccessful in the employer’s unilateral procedure, it will demonstrate the need for a collectively bargaining arbitration procedure. If the union representative is successful, it will prove to the employees that the union can be effective.