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Articles

Integrity Review of Statutory Arbitration Awards

by
CALVIN WILLIAM SHARPE*

> The integrity of the upright guides them,
> but the crookedness of the treacherous destroys them.
> *Proverbs* 11:3.

Introduction

In 2001, the Supreme Court opened up the possibility that arbitration, rather than adjudication, would become the standard means of resolving statutory employment disputes for most American workers. A decade earlier, the Court had decided in *Gilmer v. Interstate/Johnson Lane Corp.*,[1] that the Federal Arbitration Act

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1. 500 U.S. 20 (1991). The high stakes involved in *Gilmer* unleashed an avalanche of commentary. *See, e.g.*, Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381 (1996); Mark Berger, *Can Employment Law Arbitration Work?*, 61 U.M.K.C L. REV. 693 (1993); Mei Bickner et al., *Developments in Employment Arbitration*, 52 DISP. RESOL. J. 68 (1997); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344 (1997); David E. Feller, *Putting* Gilmer *Where It Belongs: The FAA's Labor Exemption*, 18 HOFSTRA LAB. & EMP. L.J. 253 (2000); Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical*

("FAA") made an employee's arbitration agreement at the time of hire enforceable as a waiver of his right to sue his employer for age discrimination under a federal statute in federal court.[2] But many believed that *Gilmer's* impact would be limited by the FAA's exemption of "workers engaged in . . . interstate commerce."[3] The Supreme Court dashed those hopes in *Circuit City Stores, Inc. v. Adams*, by narrowly interpreting the exemption to apply "only to contracts of employment of transportation workers."[4] And even though the Court ruled recently in *EEOC v. Waffle House, Inc.*,[5] that an employee's arbitration agreement does not preclude the Equal Employment Opportunity Commission from suing for an injunction as well as victim-specific relief on behalf of such an employee, this

Clarification, 17 BERKELEY J. EMP. & LAB. L. 282 (1996); Robert A. Gorman, *The* Gilmer *Decision and the Private Arbitration of Public Law Disputes*, 1995 U. ILL. L. REV. 635 (1995); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 HOFSTRA LAB. L.J. 1 (1996); Ira F. Jaffe, *The Arbitration of Statutory Disputes: Procedural and Substantive Considerations*, 45 N.A.A. PROC. 110 (1993); Pierre Levy, Gilmer *Revisited: The Judicial Erosion of Employee Statutory Rights*, 26 N.M. L. REV. 455 (1996); Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of* Gilmer, 40 ST. LOUIS U. L.J. 77 (1996); Lewis Maltby, *Paradise Lost—How the* Gilmer *Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1 (1994); Calvin William Sharpe, *Adjusting the Balance Between Public Rights and Private Process:* Gilmer v. Interstate/Johnson Lane Corporation, 45 N.A.A. PROC. 161 (1993); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).

2. Section 2 of the FAA reads in part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2000).

The statute proscribing age discrimination is the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–34 (1967).

3. Section 1 of the FAA reads in part, "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (2002). *See, e.g.*, Finkin, *supra* note 1 (offering a historical basis for a broad interpretation of the exemption).

4. 532 U.S. 105, 119 (2001). Of the 132,000,000 employees on nonfarm payrolls in February 2001, only 4,593,000, or 3%, are transportation workers. *See* UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, THE EMPLOYMENT SITUATION: FEBRUARY 2001, *available at* ftp://ftp.bls.gov/pub/news.release/History/empsit.03092001.news (last visited Oct. 20, 2002); *see also* Estreicher, *supra* note 1, at 1363–72 (predicting the Supreme Court's narrow reading of the exemption and discussing the consequences of alternative readings of the exemption).

5. 534 U.S. 279 (2002).

ruling will have a limited effect on the use of arbitration to adjudicate disputes involving employee statutory rights.[6] This Article addresses the range of concerns raised by the private adjudication of public rights and the important remaining question yet unanswered by the Supreme Court in this area: What standard of review should govern the courts' scrutiny of arbitration awards in cases involving employee statutory rights?

Given the Court's holding in *Circuit City*, which extends the reach of arbitration under the FAA and *Gilmer*, arbitration is likely to become the norm for resolving not only labor and private disputes under employment contracts, but also employment disputes involving federal statutory rights.[7] This is troubling, because it means that employees lose the right to have courts adjudicate their rights under federal employment law. Instead, they are left to press their public law claims in private, employer promulgated arbitration systems.[8]

Even though the Court in *Gilmer* pronounced arbitration an effective means of adjudicating statutory disputes and arbitration has a history of effectively resolving a broad range of contractual labor issues, concerns persist about the fairness and appropriateness of private adjudication in statutory disputes.[9] Unlike federal courts,

6. *See id.* at nn.2, 7 (noting the minuscule percentage of employment discrimination lawsuits filed by the EEOC and saying the following: "Surely permitting the EEOC access to victim-specific relief in cases where the employee has agreed to binding arbitration, but has not yet brought a claim in arbitration, will have a negligible effect on the federal policy favoring arbitration").

7. Mei L. Bickner et al., *supra* note 1 (reporting an increase in the use of arbitration in nonunion workplaces); Michael H. LeRoy & Peter Feuille, *Private Justice in the Shadow of Public Courts: The Autonomy of Workplace Arbitration Systems*, 17 OHIO ST. J. ON DISP. RESOL. 19 (2001) (reporting a groundswell of employment arbitration awards reviewed since 1999).

8. *See* Alleyne, *supra* note 1 (comparing employment arbitration forums to labor and other arbitration forums).

9. *See, e.g.*, Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the* Steelworkers Trilogy *to* Gilmer, 44 HASTINGS L.J. 1187 (1993). Since the *Gilmer* decision the lower courts have been sensitive to questions of fairness in administering employer-promulgated arbitration systems. *See, e.g.*, Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299 (9th Cir. 1994) (holding that statutory remedies were not knowingly waived where the claimants were not permitted to read the U-4 form, were told that by signing the form they were applying to take a test that was necessary for employment, and were not told anything about arbitration); Nelson v. Cyprus Bagdad Copper Corp., 119 F.3d 756 (9th Cir. 1997) (holding that arbitration provision in employer's unilaterally promulgated handbook did not waive a judicial determination of statutory rights); Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999) (where the Court refused to enforce the arbitration agreement on the grounds that its biased procedures constituted a breach).

Also, organizations of suppliers and users of arbitration have instituted reforms designed to protect the interests of grievants. *See, e.g.*, Self Regulatory Organizations;

whose judges are appointed by the President with the advice and consent of the Senate,[10] arbitrators are selected by one or more of the parties to the dispute.[11] Arbitrators cannot serve without the parties' consent, and they depend for their livelihoods upon their acceptability to the parties.[12] Unlike Article III judges, who are sworn to uphold the Constitution and laws of the United States, arbitrators are creatures of contract with no sworn public duty.[13] And while litigants may gain access to the courts and the services of a federal judge for a minimal filing fee, parties to an arbitration may be required to pay substantial arbitrator fees in order to participate in a hearing and secure a final decision.[14] While judicial proceedings must

National Association of Securities Dealers, Inc.; Order Granting Approval to Proposed Rule Change Relating to the Arbitration of Employment Discrimination Claims, 63 Fed. Reg. 35299, 35303 (June 22, 1998) (approving proposed rule change effective January 1, 1999, to eliminate mandatory NASD arbitration of statutory employment discrimination disputes); *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship*, 50 DISP. RESOL. J. 37 (1995), *available at* http://www.naarb.org/protocol.html (developed by a task force of twelve representatives of the labor-management community to provide guarantees of representational rights, mediator and arbitrator qualifications for membership and requirements for training, a fair selection procedure, protection against conflicts of interest and a limited scope of review); Arnold M. Zack, *The Evolution of the Employment Protocol*, 50 DISP. RESOL. J. 36 (1995); *Statement and Guidelines of the National Academy of Arbitrators*, *available at* http://www.naarb.org/guidelines.html (1997) (stating the NAA's opposition to "mandatory employment as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights" and in light of *Gilmer* setting forth guidelines for deciding upon case acceptance, pre-hearing consultation, hearing procedures, and the opinion and award).

10. U.S. CONST. art. II, § 2, cl. 2.

11. FAIRWEATHER'S PRACTICE AND PROCEDURE IN LABOR ARBITRATION 62–72 (Ray J. Schoonhoven ed., 3d ed. 1990) (exploring selection procedures in labor arbitration); Alleyne, *supra* note 1, at 409 (comparing labor and employment arbitration selection procedures and noting the unilateral selection process in securities industry arbitration).

12. *See* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP. POL'Y J. 189 (1997).

13. Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny*, 75 MICH. L. REV. 1137 (1977) (describing the arbitrator as the parties' contract reader).

14. *See* Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 89–92 (2000) (where the Court refused to invalidate an arbitration agreement on the grounds that the prohibitive expense of arbitration would force the purchaser to forgo her rights under the Truth in Lending Act, where her failure to produce evidence of such expenses made her claim too speculative). While the Court in *Green Tree* acknowledges that arbitration costs "may well . . . preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum," it could not evaluate the claim in that case because of the absence of evidence. *Id.* at 90. On the validity of fee sharing compare *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997) (holding that the reasonable access to a neutral forum sanctioned by *Gilmer* precludes an agreement requiring the employee to

conform to the Constitution, the Federal Rules of Civil Procedure and the Federal Rules of Evidence, which guarantee due process to litigants, the procedural and evidentiary requirements of arbitration are much less demanding.[15] Moreover, the factual and legal determinations of lower courts are fully reviewable by the appellate and supreme courts, but arbitral decisions are subject to only limited judicial review.[16] Finally, these pre-dispute arbitration agreements are seen as involuntary, since typically they must be signed as a condition of employment.[17]

Some suggest that we reverse course and address these concerns by making pre-dispute employment arbitration agreements unenforceable.[18] But such a reversal is unlikely, and in any event, arbitration has certain advantages over litigation that should not be ignored. Many cite the characteristics of arbitration that distinguish it from court adjudication as attributes that make it a more attractive alternative.[19] Arbitration is thought to furnish greater access to rights

pay part or all of the fee); *Shankle v. B-G Maintenance Management of Colorado Inc.*, 163 F.3d 1230 (10th Cir. 1999) (concluding that an arbitration agreement was unenforceable because the requirement that the employee pay one-half the arbitrator's fees made the arbitral forum inaccessible, undermining the remedial and deterrent functions of the federal anti-discrimination laws); and *Armendariz v. Foundation Health Psychcare Services*, 6 P.3d 669 (Cal. 2000) (agreeing with *Cole* and holding that the imposition of substantial forum fees is inconsistent with public policy and that an arbitration agreement cannot require an employee to bear any type of expense that would not be borne in a judicial forum). *But see* Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 556 (4th Cir. 2001) (rejecting *Cole's* per se rule against fee splitting in favor of a case-by-case inquiry that considers the "claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims"); Williams v. Cigna Fin. Advisors Inc., 197 F.3d 752 (5th Cir. 1999) (finding that the claimant did not demonstrate that the requirement that he pay one-half of the forum fees amounting to $3,150 effectively prevented his access to an adequate substitute for a judicial forum).

15. *See* Schoonhoven, *supra* note 11, at 117, 231–33, 235–37; ELKOURI & ELKOURI, HOW ARBITRATION WORKS 403–10 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997).

16. *See* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2585 (2d ed. 1995); *infra* notes 42–46, 69–85 and accompanying text.

17. *See* Stone, *supra* note 1, at 1036 (noting the non-consensual nature of employment arbitration and arguing that it is tantamount to a yellow dog contract).

18. Three months after the decision in *Circuit City*, five members of Congress introduced a bill that would amend the FAA to make pre-dispute arbitration agreements unenforceable. *See* Susan J. McGolrick, *House Democrats Introduce Legislation to Overturn High Court's* Circuit City *Ruling*, 119 DAILY LAB. REP., June 21, 2001, at A-3, *available at* http://pubs.bna.com (describing the proposed amendment to the FAA as designed "to make employment arbitration agreements unenforceable unless the employee and employer both voluntarily consent to arbitrate a claim after it has arisen").

19. *See, e.g.*, STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION—NEGOTIATION, MEDIATION, AND OTHER PROCESSES 233–37 (3d ed. 1999).

adjudication, because it is less expensive, less formal, and faster than court adjudication.[20] Also, since an arbitrator's decision (award) is final, binding and subject to limited judicial review, arbitration has greater finality than court litigation. Finally, arbitration offers the advantage of privacy, and in specialized fields the expertise of the arbitrator as decision-maker can be pivotal.[21]

Therefore, we should accept arbitration as a significant part of how employment disputes will be resolved in the future, but we should try to preserve the best of both worlds by imposing a serious judicial review standard. Much of the concern underlying scholarly and judicial commentary—as well as congressional action—is the fear that the finality of arbitration permits courts to abdicate the enforcement responsibility assigned to them by congressional enactments designed to protect public values in employment relations.[22] While courts retain some oversight of the arbitration process, they have traditionally exercised a narrow scope of review of arbitration awards in order to preserve the attributes of speed, informality, economy, and finality. This narrow scope of review is at the heart of worries about judicial abdication of enforcement responsibilities in statutory employment disputes.[23] A standard of review that would preserve arbitration's potential for greater access to statutory enforcement while assuring the appropriate supervisory involvement of the courts would lead to a net gain in the protection of public workplace values.

The purpose of this Article is to propose an approach to judicial review of arbitration awards that seeks to preserve the best of both arbitral and judicial treatment of statutory employment issues. This approach is informed by the history of labor and employment arbitration, the context of public policy, the positive attributes of arbitration, the role of courts, and the laboratory experience of the

20. *See id.*; Harry T. Edwards, *Advantages of Arbitration Over Litigation: Reflections of a Judge*, *in* ARBITRATION 1982 CONDUCT OF THE HEARING: PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS 16 (James L. Stern & Barbara D. Dennis eds., 1983); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 45 (1998) (arguing based on empirical evidence that employees have greater access to justice and better outcomes in arbitration than in litigation).

21. *See* GOLDBERG, *supra* note 19.

22. *See infra* notes 49–52 and accompanying text. *See, e.g.*, *Cole*, 105 F.3d 1465; Alleyne, *supra* note 1; Malin & Ladenson, *supra* note 9; Maltby, *supra* note 20, at 41–42 (characterizing limited appeal rights as making employees arguably worse off in arbitration than in litigation); Norman S. Poser, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 BROOK. L. REV. 471 (1998); Stone, *supra* note 1.

23. *See* authorities cited *supra* note 22.

new arbitration system in South Africa. It promises a system that makes both arbitrators and courts more accountable to the public policy requirements of employment statutes and promotes greater access to the enforcement of worker rights under such statutes.

Part I of the Article will discuss the history of arbitration against the backdrop of the Alternative Dispute Resolution ("ADR") movement with an emphasis on public policy cases. Part II will focus specifically on judicial review, closely examining the standards of review problem in employment cases. Part II will also propose a substantive integrity standard of review and demonstrate its application. Part III will discuss the laboratory results of the South African experiment, which support the current proposal for reviewing arbitration awards in statutory employment cases. The Article will conclude that the substantive integrity standard of review may offer employees the best access to enforcement of important statutory rights.

I. The Tension Between Arbitration and Public Policy

A. Arbitration and Public Policy

(1) Labor Arbitration as a Model

Arbitration is a primary alternative dispute resolution ("ADR") process that takes the final outcome of the dispute out of the hands of the parties.[24] It is softer on the parties' relationship than litigation, and it gives them a measure of control over the process that they cannot exercise in litigation.[25] Early in the history of collective bargaining, representatives of management and organized labor recognized the cost, efficiency, finality, informality, and privacy advantages of arbitration over litigation in settling contractual disputes.[26] Labor arbitration was a salutary process that offered an

24. GOLDBERG, *supra* note 19, at 3–13 (giving a brief history of the ADR movement and comparing the fundamental ADR processes).

25. *See* Benjamin Aaron, *Labor Arbitration and Its Critics*, 10 LAB. L.J. 605, 607 (1959) (referring to party control over the process).

26. *See* Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Maturing Years*, 35 U. FLA. L. REV. 557, 623–24 (1983) (describing the changes in arbitration during and after World War II). *See generally* R.W. Fleming, *The Labor Arbitration Process: 1943–1963*, 52 KY. L.J. 817 (1964); SUMNER H. SLICHTER, JAMES J. HEALY & E. ROBERT LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 804–06 (1960).

expert factfinder who controlled the process. It also minimized casualties by presenting a peaceful alternative to economic warfare.[27]

The United States Supreme Court recognized the benefits of arbitration in labor disputes in the *Steelworkers Trilogy*—three cases involving the same labor union decided on the same day in 1960.[28] The *Trilogy* announced as national labor policy the preeminence of arbitration as the means of settling disputes arising under collective agreements between employers and unions. Under this policy, courts are not to decide a contractual dispute or examine the merits of an arbitration decision, even if the courts are convinced that the case can be decided in only one way and that the arbitrator's award is wrong.[29] This strong pro-arbitration policy requires the contracting parties to clearly indicate their choice of some dispute resolution process other than arbitration if they want the courts to honor this preference.[30]

The scope of review of an arbitration award under the *Trilogy* is very narrow. In *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, the Supreme Court reversed the Fourth Circuit's refusal to enforce an arbitration award based on its disagreement with the arbitrator's remedial order.[31] Concerned about the finality of arbitration awards, the Supreme Court said that "the refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements."[32]

However, freedom of contract notions constrained this pro-arbitration posture. In *Enterprise Wheel*, the Court also stated that the arbitrator "does not sit to dispense his own brand of industrial justice" and that "the award is legitimate only so long as it draws its

27. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) (noting that parties' primary objective in using arbitration is to "further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs").

28. United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960); *Warrior & Gulf*, 363 U.S. 574; United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960).

29. *Am. Mfg.*, 363 U.S. at 568.

30. *See Warrior & Gulf*, 363 U.S. at 584–85; AT&T Techs., Inc. v. Communications Workers, 475 U.S. 643, 647 (1986) (reiterating the *Warrior & Gulf* holding and making it clear that the question of substantive arbitrability is to be decided by the courts unless the parties expressly provide otherwise); Howsam v. Dean Witter Reynolds, Inc., 123 S. Ct. 588, 592–93 (2002) (holding that the procedural arbitrability challenge of the investment firm under the NASD Code of Arbitration Procedure was appropriately decided by the arbitrator and reiterating the presumption that substantive arbitrability questions are decided by the court).

31. 363 U.S. 593, 597–98 (1960); *see also* St. Antoine, *supra* note 13.

32. *Enterprise Wheel*, 363 U.S. at 596.

essence from the collective bargaining agreement."[33] Additionally, conscious of the need for procedural fairness in the administration of arbitrations, the courts will not condone an arbitrator's bias, fraud, corruption, misconduct, or exceeding contractually defined powers.[34] Where this kind of misconduct can be shown, the parties are deprived of the legitimate and well-defined arbitration process for which they negotiated and courts will vacate resulting awards. However, when the arbitrator is faithful to the obligation to interpret the contract within the limitations contained in its provisions, the award cannot be set aside simply because the court disagrees with the arbitrator on the merits. This narrow scope of review advances the cause of finality in the settlement of labor disputes by preventing the loser in arbitration from successfully seeking recourse in the courts.

(2) Concerns About Public Policy

This system has worked well. Virtually every labor contract has an arbitration provision for resolving disputes that the parties are unable to settle,[35] and ADR generally has gained wide acceptance.[36] But even as the ADR movement has exploded, its praises have not been sung by a universal chorus. Perhaps the most influential discordant voice has been Yale Law Professor Owen Fiss.

Professor Fiss argued in a 1984 *Yale Law Journal* article that settlement in lieu of litigation is inappropriate in the majority of cases for four reasons.[37] First, the terms of a settlement may reflect the disparity in resources between the stronger and weaker party rather than the predicted outcome at trial.[38] Second, since many cases

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33. *Id.* at 597.

34. *See* 9 U.S.C. § 10(a) (2000); *see also* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 40 n.9 (1987) (noting that federal courts have often looked to the FAA for guidance in labor arbitration cases in light of section 301 empowering federal courts to fashion a common law remedy enforcing the collective-bargaining agreement); Margetta v. Pam Pam Corp., 501 F.2d 179, 180 (9th Cir. 1974) (referring to the restrictive rule for reviewing arbitration awards and noting fraud as an exception to that rule); St. Antoine, *supra* note 13, at 1144–46.

35. AMERICAN ARBITRATION ASSOCIATION 1999 ANNUAL REPORT 12, *available at* http://www.adr.org/upload/LIVESITE/About/annual_reports/000525ab.pdf.

36. *See* GOLDBERG, *supra* note 19, at 6–9 (noting the evolution of ADR from experimentation to institutionalization).

37. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

38. *Id.* at 1076; *see also* IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 5 (1992), saying the following:

> These so-called alternative methods are generally vastly more efficient and effective than are State dispute resolution processes. As to the justice of their outcomes, they are extensions of the nondispute relations of the participants.

involve representatives speaking on behalf of others, the agreement may reflect the interests of the representatives rather than the clients.[39] Third, courts are better suited than a settlement mechanism to supervise continuing public policy disputes that may arise during the remedial phase of a case.[40] Fourth, there may be a need for justice rather than peace.[41] Judges are public officials using public resources under the authority of public law, accordingly:

> Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.[42]

One way to appreciate this argument is to consider whether public policy would have been better served by having *Brown v. Board of Education*[43] decided by a court or settled privately by the parties. *Brown*, of course, removed the legal basis for racial segregation by striking down the "separate but equal" doctrine and introduced an era of broad scale social reform in the United States.[44]

Fiss's observations on the problems associated with settlement raise two important issues relating to statutory employment arbitration under the FAA. First, Fiss describes the aforementioned drawbacks of settlement efforts *voluntarily* entered into by the parties as an alternative to court litigation.[45] Such efforts occur where the parties have information about the nature of the dispute and a present, post-dispute, choice about the most effective forum.[46] The element of volition creates less cause for concern about the final outcomes of settlement efforts than when a party is deprived of such a choice, as in a pre-dispute employment agreement.[47] Mandatory arbitration under pre-dispute agreements sanctioned by *Gilmer* may compound Fiss's concerns about the untoward impact of settlement,

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They thus tend to yield justice more or less commensurate with the justice of the relations themselves.

39. Fiss, *supra* note 37, at 1078.

40. *Id.* at 1082.

41. *Id.* at 1085.

42. *Id.*

43. 349 U.S. 294 (1954).

44. *Id.* at 298.

45. *See* Fiss, *supra* note 37, at 1075 (discussing the prototypical settlement as a consensual accommodation between neighbors that is preferable to a judgment).

46. *See, e.g.*, Kevin C. McMunigal, *The Cost of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. REV. 833, 844–47 (exploring the competing views in the debate about settlement).

47. *See infra* notes 73–79 and accompanying text.

since they may exacerbate the problem of unevenness and undermine the ends of justice.[48]

Second, even if the arbitration is voluntary, Professor Fiss's arguments raise the question of whether arbitrators should decide public policy issues. Despite the advantages noted earlier, arbitration, like all human institutions, is imperfect. For example, given the selection procedures that are available, arbitration does not guarantee a competent arbitrator.[49] In addition, finality may disserve the parties since the losing party may have no recourse against an erroneous decision and the arbitrator may have less incentive to do her best in the absence of the threat of judicial review.[50] Informality is a "two-edged sword," since it may simply translate into a poorly administered hearing featuring extraneous materials.[51] Furthermore, informality ceases to be a benefit where one or more parties are poorly represented, where the arbitrator lacks expertise, or where fair and adequate procedures do not properly protect private or public interests. The loss of discovery procedures, which presents a particular challenge in the digital age,[52] is an example of how the informality of arbitration may lead to less protection of public or

48. *See supra* notes 38–43 and accompanying text regarding Fiss's first and fourth arguments. This is true of arbitration agreements under section 2 of the FAA. These contracts are typically executed at the time of hire. Under these circumstances the unconsenting employee's only choice is to forego the job. *See* Alleyne, *supra* note 1, at 420 (describing the unilateral characteristics of employment arbitration); Stone, *supra* note 1 (likening the *Gilmer* arbitration to a yellow dog contract). The newly hired employee stands to lose important statutory protections under the employer's unilaterally promulgated arbitration system. *See, e.g.*, Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999) (holding that the employer's one-sided arbitration rules so undermined the neutrality of the proceeding as to constitute a breach of the arbitration agreement).

49. *See* Edward Brunet, *Questioning The Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1, 24 (1987) (comparing the imprimatur of competency that judges have based on a public examination of competence to the absence of such a process for arbitrators).

50. *See* ROBERT J. MARTINEAU, MODERN APPELLATE PRACTICE—FEDERAL AND STATE CIVIL APPEALS § 1.8 (1983) (noting that appellate review can serve as "error prevention" in preventing judges from consciously committing reversible error and causing them to "exercise greater caution to prevent unintentional error").

51. *See* Robert Coulson, *Away from Informality*, N.Y. L.J., Oct. 1, 1992, at 3 (describing arbitration's trend toward greater formality with the use of transcripts, post-hearing briefs, and expert witnesses).

52. *See* Jamie Roberson, *Lawyers Urged to Keep Up with Technology to Provide Best Assistance to Their Clients*, 1 DAILY LAB. REP., July 25, 2001, at C-1, *available at* http://pubs.bna.com.

private interests.[53] This Article advances the view that effective judicial review is one way of allaying these concerns.

B. Collective Bargaining Cases Involving Public Law and Policy

In labor arbitration cases, the law has been skeptical about arbitration's suitability to resolve matters of public law and policy. In a 1974 case, *Alexander v. Gardner-Denver Co.*, the United States Supreme Court expressed the skepticism generated by the potential defects in arbitration by holding that an employee was entitled to a full trial in federal court on his claim that his discharge was motivated by race discrimination, even though an arbitrator under a collective bargaining agreement had found that the employer discharged him because of poor performance.[54] In the Court's view, the employee's earlier resort to arbitration had not constituted a waiver of judicial relief, the employee was not required to elect between contractual and judicial remedies, and the employee's federal claim was not subject to a deferral rule.[55] The Court also cited a number of factors making arbitration inferior to the judicial process for resolving statutory disputes, noting particularly that the arbitrator's competence was limited to the norms of industrial relations—the law of the shop.[56] Contrasting this limited competence with the requirements of statutory interpretation, the Court declared:

> On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.[57]

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53. *See Due Process Protocol*, *supra* note 9, § B.3 (acknowledging that "[o]ne of the advantages of arbitration is that there is usually less time and money spent in pre-trial discovery" and calling for "[a]dequate but limited pre-trial discovery" giving claimants "access to all information reasonably relevant to mediation and/or arbitration of their claims"); Michael Hunter Schwartz, *From Star to Supernova to Dark, Cold Neutron Star: The Early Life, the Explosion and the Collapse of Arbitration*, 22 W. ST. U. L. REV. 1, 13–14 (1994) (discussing the process flaws including the dearth of discovery in arbitration); Brunet, *supra* note 49, at 30 (comparing the prodiscovery tone of judicial discovery with the "antidiscovery spirit" of arbitration); *cf.* Teresa Snider, *The Discovery Powers of Arbitrators and Federal Courts Under the Federal Arbitration Act*, 34 TORT & INS. L.J. 101, 114 (1998) (extolling the broad discovery powers of arbitrators even over nonparties).

54. 415 U.S. 36, 59–60 (1974).

55. *Id.* at 51–57. The Court said: "In sum, Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement." *Id.* at 49.

56. *Id.* at 56–57.

57. *Id.* at 57.

Not stopping there, the *Alexander* Court elaborated as follows:

> Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.... And as this Court has recognized, "[a]rbitrators have no obligation to the court to give their reasons for an award." ... Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.[58]

However, even in *Alexander* the Court recognized a place for arbitration in Title VII cases by permitting courts to give arbitration awards their appropriate weight.[59]

Public policy considerations also crept into judicial review of awards involving the law of the shop. In *W.R. Grace & Co. v. Rubber Workers Local 759*, decided in 1983, the Court expanded the narrow scope of judicial review of arbitration awards under *Enterprise Wheel* to include an examination of whether the award violated public policy.[60] However, even in public policy-based review, the Court announced a standard that balanced the need to preserve the autonomy of arbitration against the demands of public policy. In *W.R. Grace*, the Court recognized its special function of protecting the interest of a public that is not represented in private collective bargaining, even if the arbitrator does not exceed her authority under the agreement.[61] It announced that "a court may not enforce a collective-bargaining agreement that is contrary to public policy."[62] But by articulating the following standard the Court was careful to control judicial overreaching under the guise of deciding questions of public policy:

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58. *Id.* at 57–58 (quoting United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 598 (1960)).

59. *Id.* at 60 n.21; *see also* Collins v. New York City Transit Authority, 305 F.3d 113, 119 (2nd Cir. 2002) (affirming a district court's granting of summary judgment against an employee, finding that a reasoned decision, based on substantial evidence by an independent, neutral, and unbiased arbitration board furnished additional probative evidence of a legitimate business reason for the employee's discharge and heightened the plaintiff's burden of proving a causal link between his discharge and a retaliatory or discriminatory motive).

60. W.R. Grace & Co. v. Rubber Workers Local 759, 461 U.S. 757 (1983).

61. *See* United Paperworkers v. Misco, Inc., 484 U.S. 29, 42 (1987).

62. *Id.*

> [T]he question of public policy is ultimately one for resolution by the courts.... Such a public policy, however, must be well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests."[63]

Under this difficult standard, the company in *W.R. Grace* was unsuccessful in attempting to have the award set aside on public policy grounds.[64]

The Court has resisted efforts to broaden the scope of judicial review most recently in *Eastern Associated Coal Corp. v. United Mine Workers of America, District 17.*[65] In *Eastern Coal*, the Court cabined public policy review by limiting it to the question of whether the award (rather than the employee's conduct) violated public policy.[66]

In collective bargaining cases, the *Enterprise Wheel* and *W.R. Grace/Misco/Eastern Coal* decisions combine to place two general issues before the reviewing court faced with suits to vacate arbitration awards: (1) Is the award within the arbitrator's authority under the agreement? and (2) Does it violate public policy?[67] Only a violation of one of these narrow standards will lead to vacatur of the award on the merits.

63. *W.R. Grace*, 461 U.S. at 766 (citing Muschany v. United States, 324 U.S. 49, 66 (1945)).

64. *Id.* at 771-72.

65. 531 U.S. 57 (2000); *see also Misco*, 484 U.S. at 43 (where the Court rejected a broad power to set aside arbitration awards, saying that an explicit conflict with "laws and legal precedents" rather than an assessment of "general consideration of supposed public interest" was required (quoting *W.R. Grace*, 461 U.S. at 766)).

66. *Id.* at 63. The Court in *Eastern Coal* addressed the positive law issue specifically left open by the *Misco* court. In this case, where an award reinstated a truck driver who had twice tested positive for marijuana, the Court distinguished two questions: (1) whether the employee's *drug use* violated public policy and (2) whether the *award* reinstating him did so. *Id.* at 62-63. Only the latter question is relevant under the public policy standard of review. *Id.* at 63. While leaving open the possibility "in principle" that the public policy exception is not limited to whether the award violates positive law, the Court said that the district court "correctly articulated the standard set out in *W.R. Grace* and *Misco*" when it asked whether the award violated positive law. *Id.* Moreover, the Court scrutinized the award in light of Department of Transportation regulations and found none of them violated by the award. *Id.* at 65-66. *Eastern Coal* makes clear that refusals to enforce arbitration awards based on public policy will be quite rare.

67. *See generally* Stephen L. Hayford & Anthony V. Sinicropi, *The Labor Contract and External Law: Revisiting the Arbitrator's Scope of Authority*, 2 J. DISP. RESOL. 249 (1993).

C. The Emergence of Employment Arbitration Under the FAA

Until 1991, virtually all employee-employer disputes resolved by arbitration occurred in the context of collective bargaining.[68] Arbitration provisions contained in collective bargaining agreements were enforceable under section 301 of the Labor Management Relations Act.[69] That section embodied not only the courts' jurisdiction over enforcement actions, but also spawned the common law of collective bargaining agreements as reflected in the *Trilogy* and other cases.[70]

Although commercial arbitration, sanctioned under the FAA, has coexisted on a parallel track with labor arbitration, commercial disputes settled in arbitration typically involved business relationships other than employment.[71] The two fields of commercial and labor arbitration converged in the frequently-discussed 1991 Supreme Court decision, *Gilmer v. Interstate/Johnson Lane Corp.*, which addressed the arbitration of an employee's public law claim.[72]

In *Gilmer*, the Supreme Court held enforceable under the FAA an agreement to arbitrate "[a]ny controversy . . . arising out of

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68. *See* David Lewin, *Grievance Procedures in Nonunion Workplaces: An Empirical Analysis of Usage, Dynamics, and Outcomes*, 66 CHI.-KENT L. REV. 823 (1990) (reporting empirical evidence suggesting a substantial incidence of grievance procedures but a low percentage of arbitration in the nonunion sector).

69. Section 301 of the LMRA states in part:

> (a) Venue, amount, and citizenship
>
> 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.

29 U.S.C. § 185 (2000).

70. *See* Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) (holding that section 301 authorized federal courts to fashion a common law of the collective bargaining agreement which includes the specific enforcement of arbitration agreements); *see also* cases cited *supra* note 28.

71. *See, e.g.*, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (customers' action against broker under Securities Act of 1933); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (customers' suit against brokerage firm under Securities Act of 1934 and RICO); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (car dealer's counterclaim against a car manufacturer under the Sherman Act); Wilko v. Swan, 346 U.S. 427 (1953) (customer action against partners in a securities firm under the Securities Act of 1933); *see also* MACNEIL, *supra* note 38, at 57–58 (espousing the view that Justice Whittaker's attempt to have the Court treat labor and commercial arbitration interchangeably in his dissent in *Warrior & Gulf* hastened the demise of commercial arbitration's unfavorable treatment in the courts).

72. 500 U.S. 20 (1991); *see* sources cited *supra* note 1.

employment or termination of employment."[73] The agreement was an individual agreement rather than a collective bargaining agreement, and the employee claimed that his discharge constituted age discrimination in violation of the Age Discrimination in Employment Act.[74] Importantly, the Court in *Gilmer* made it clear that the enforcement of agreements to arbitrate statutory claims was a waiver of the judicial forum only and not of the substantive rights conferred by statutes.[75]

Regarding the discussion in *Alexander* about the competency of arbitration to handle such statutory issues, the Court distinguished the two cases on the grounds that unlike *Gilmer*, *Alexander* did not involve an agreement to arbitrate statutory claims.[76] And to the suggestion in *Alexander* that arbitration is inferior to the judicial process for resolving statutory disputes, the Court responded by quoting one of its earlier post-*Alexander* decisions discrediting the notion of arbitral inferiority: "We are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[77]

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73. *Gilmer*, 500 U.S. at 23. Section 1 of the FAA excludes from the coverage of the Act: "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (2000). The Court in *Gilmer* was able to avoid this issue by finding that the U-4 registration form that bound the employee to arbitration was not an employment contract. 500 U.S. at 40. In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), the Supreme Court narrowly interpreted this exemption to permit coverage of most American workers.

74. *Gilmer*, 500 U.S. at 23–24.

75. *Id.* at 26.

76. In distinguishing *Alexander* from *Gilmer* the Court said the following:

> There are several important distinctions between the *Gardner-Denver* line of cases and the case before us. First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case. Finally, those cases were not decided under the FAA, which, as discussed above, reflects a "liberal federal policy favoring arbitration agreements." Therefore, those cases provide no basis for refusing to enforce Gilmer's agreement to arbitrate his ADEA claim.

500 U.S. at 35 (quoting *Mitsubishi*, 473 U.S. at 625).

77. *Id.* at 34 n.5 (quoting *Mitsubishi*, 473 U.S. at 626–27).

Petitioner Gilmer also raised the issue that is the central focus of this Article. He argued that judicial review of arbitration decisions is too limited to permit arbitrators to decide statutory issues.[78] The Court rejected this claim, again quoting from an earlier decision: "We have stated . . . that 'although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute' at issue."[79]

This statement reveals the *Gilmer* Court's contemplation of judicial review sufficient to protect statutory rights—namely that courts ensure arbitral compliance with statutory requirements. Part II addresses the problem of judicial review in employment arbitration.

II. Judicial Review

A. Civil Standards of Review

As Table I, *infra*, illustrates, civil standards of review vary depending upon the tribunal and judicial function being evaluated in the federal system.[80] The most restrictive standard, represented by the tallest bar, is the labor arbitration standard developed under the *Trilogy*. Under that standard, as already noted, an award may not be set aside, no matter how clearly erroneous its factual and legal determinations, unless it fails to draw its essence from the collective bargaining agreement or violates a clearly defined public policy.[81] Next in degree of restrictiveness is the "sufficient evidence" standard of review applied to jury verdicts. In jury cases, appellate courts must view the evidence in a light most favorable to the appellee, assume

78. *Id.* at 31 n.4.

79. *Id.* (quoting Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 232 (1987).

80. Generally, in criminal cases the double jeopardy clause and the constitutional right to a jury trial make review of acquittals unavailable to prosecutors; however criminal defendants may challenge convictions through direct attacks on convictions, collateral attacks on convictions, and trial motions. The general standard of review for direct and collateral attacks is whether there was sufficient evidence at trial to convince a reasonable factfinder of guilt beyond a reasonable doubt considered in a light most favorable to the prosecution. *See* Jackson v. Virginia, 443 U.S. 307 (1979); Wright v. West, 505 U.S. 277 (1992) ("This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.").

A motion to acquit must be granted if a reasonable mind must conclude based on all of the evidence that a reasonable doubt existed. *See* United States v. Mariani, 725 F.2d 862, 866 (2d Cir. 1984). *See generally* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 1487–93 (6th ed. 2000).

81. *See supra* notes 32–35 and accompanying text.

that all conflicts were resolved in favor of the appellee, and draw all inferences in favor of the appellee.[82] Only when the evidence cannot reasonably support a jury finding can the trial court or an appellate court set aside a verdict.[83] The third most restrictive standard is the "substantial evidence" standard that is applied to administrative agency fact-finding.[84] This standard requires more than some support in the record; it mandates substantial support in light of the record as a whole—the parts that both support and detract from the finding.[85] However, the standard respects agency choice between "fairly conflicting views even though the court would justifiably have made a different choice had the matter been before it de novo."[86] Fourth is the "clearly erroneous" standard for reviewing nonjury district court factual findings.[87] Under this standard the district judge is not favored with the presumptions enjoyed by the jury. Rather, as articulated by the Supreme Court in *United States v. United States Gypsum Co.*: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[88]

The "substantial evidence" and "clearly erroneous" standards are quite close, however, unlike the "substantial evidence" standard, the "clearly erroneous" standard seems to permit reversal based upon the reviewing court's disagreement with the trial court on the merits.[89]

82. *See* WRIGHT & MILLER, *supra* note 16, § 2585.

83. *See* Fed. R. Civ. P. 50(a) (providing for a directed verdict and judgment notwithstanding the verdict where "no legally sufficient evidentiary basis for a reasonable jury [finding]" exists; *see also* Galloway v. United States, 319 U.S. 372, 389 (1943) (rejecting an argument that a directed verdict violated the Seventh Amendment right to a jury trial saying that "the contention has been foreclosed by repeated decisions made here consistently for nearly a century").

84. *See* 5 U.S.C. § 706(2)(E) (2000).

85. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951), and FCC v. Allentown Broad. Corp., 349 U.S. 358, 360 (1955) (both noting the importance of trial examiner findings when evaluating agency findings).

86. *See Universal Camera*, 340 U.S. at 488.

87. Fed. R. Civ. P. 52(a) provides in part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 .... Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

FED. R. CIV. P. 52(a). *See generally* WRIGHT & MILLER, *supra* note 16, § 2585.

88. 333 U.S. 364, 395 (1948).

89. *But see* WRIGHT & MILLER, *supra* note 16, § 2585 (footnote omitted), equating the "substantial evidence" and "clearly erroneous" standards as follows:

> The appellate court, in reviewing findings, does not consider and weigh the

Each of these four standards recognizes the superior position of the initial decision-maker to pass upon questions that may turn on the dynamics of the hearing or, in the case of the arbitrator, the parties' contractual relationship.[90] By giving preeminence to that decision-maker, these four standards facilitate administrative efficiency, instill in the litigants confidence in the fact-finding process, and contain the costs and delays associated with appeals.[91]

On the other hand, the more expansive standards of review recognize the appellate court's equal competence to consider questions of law and of mixed law and fact. Where the correctness of legal interpretation or application—rather than factfinding—is at issue, the initial decision-maker has no advantage over the reviewing court. The second most expansive standard comes from administrative law and is sometimes characterized as the "hard look" standard.[92] Because Congress often charges agencies, under the watchful eyes of appellate courts, with interpreting statutes and making policy, the relationship between courts and agencies has been described as follows: "The process thus combines judicial supervision with a salutary principle of judicial restraint, an awareness that agencies and courts together constitute a 'partnership' in furtherance of the public interest, and are 'collaborative instrumentalities of justice.'"[93]

For this reason, if the agency has engaged in reasoned decision-making, the court will not set aside an agency action, even if the court

> evidence de novo. The mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the district court's findings aside.` It may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or induced by an erroneous view of the law. Insofar as a finding is derived from the application of an improper legal standard to the facts, it cannot be allowed to stand.

If a finding is not supported by substantial evidence, it will be found to be clearly erroneous.

90. *See id.* § 2586; JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 621 (3d ed. 1999) (making the point that the restriction of fact determination review giving greater deference to the factfinder is necessary, "[s]ince the entire trial cannot be recreated on appeal").

91. *See* Lyons v. Board of Educ., 523 F.2d 340, 347–48 (8th Cir. 1975) (expounding upon the reasons for permitting the trial court to resolve factual issues). *See generally* WRIGHT & MILLER, *supra* note 16, § 2585.

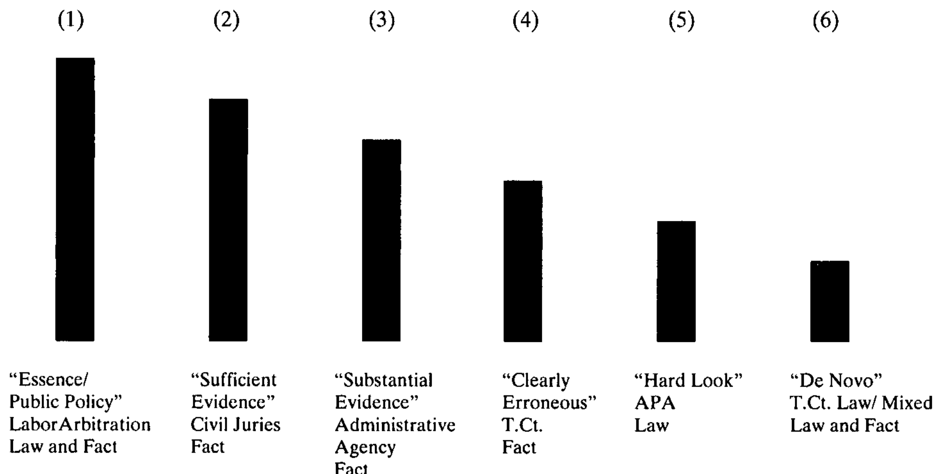
92. *See* Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850–53 (D.C. Cir. 1970).

93. *Id.* at 851–52 (citing United States v. Morgan, 313 U.S. 409, 422, (1941)).

would have made different findings or promulgated different standards.[94]

The most expansive standard is "de novo" review. Under this standard the reviewing courts set aside erroneous interpretations or applications of the law.[95] Reflecting the difficulties involved in characterizing issues upon review as factual, legal, or mixed, the courts have inconsistently applied these distinctions in a broad range of cases.[96]

Table 1
Standards of Review



This bar graph depicts the degrees of restrictiveness of standards of review as a function of the showing required to set aside the findings of lower tribunals. The shorter the bar the less stringent the required showing.

94. *Id. See also* Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837, 865 (1984) (deferring to the EPA's plantwide interpretation of the term "stationary source," because it "represent[ed] a reasonable accommodation of manifestly competing interests . . . the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies").

95. Fed. R. Civ. Pro. 52(a) provides that "[f]indings of fact . . . shall not be set aside unless clearly erroneous . . . ." *See* WRIGHT & MILLER, *supra* note 16, § 2585 (stating that: "The appellate court, in reviewing findings, does not consider and weigh the evidence de novo . . . . The mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the district court's findings aside."); *see also id.* at § 2588, asserting that:

> Rule 52(a) describes the very narrow appellate review that may be given to findings of fact. It is silent about legal conclusions. This silence has been correctly interpreted as meaning that the 'clearly erroneous' restriction is not applicable and that the trial court's rulings on questions of law are reviewable without any comparable limitation.

96. WRIGHT & MILLER, *supra* note 16, §§ 2588–91.

B. Standards of Review in Employment Arbitration

The court in *Gilmer* strongly endorsed the use of arbitration to deal with statutory issues by stating that a party agreeing to arbitration does not forgo substantive statutory rights.[97] *Gilmer* also affirmed the adequacy of judicial review, but it did not directly address the posture that courts should take in reviewing arbitration awards.[98] What standard of review would assure statutory protection? Should courts be restrained in setting aside an award as long as the arbitrator engaged in no misconduct, such as bias or the denial of a party's full opportunity to present its case (a narrow scope of review)? Or should courts be free to set aside awards where the arbitration decision is simply wrong, even though the arbitrator engaged in no misconduct (a broad standard)? Should the standard vary depending upon the characteristics of the case?[99]

The need to preserve the positive attributes of arbitration—such as speed, informality, economy, and finality—suggest a narrow scope of review. Challenges to arbitration awards in judicial proceedings give courts, rather than arbitrators, the last word by allowing courts to change the arbitral outcome. They also formalize and prolong the settlement process and entail additional expense to achieve a final resolution. Moreover, even though the actual reversal rate might be quite low under a broad review standard, the perceived opportunity for judicial relief may motivate the parties to seek review in marginal cases and commensurately escalate their costs. These additional transaction costs add to the expense of doing business and to the burden of rights enforcement.

On the other hand, justice, fairness, and protecting public policy as embodied in public laws would seem to call for a broader standard allowing courts to review the merits of awards. The Constitution, statutes, and the common law embody the values of procedural and substantive justice and fairness, and the rights reflecting these values are applicable to the entire polity. The courts, as political institutions established to protect the public interest, have a special responsibility

97. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26, 28 (1991).

98. *See* Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 202–03 (2d Cir. 1998); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1486–87 (D.C. Cir. 1997) (arguing that the non-waiver of substantive rights discussion in *Gilmer* condoned judicial review of the merits of arbitration); *see also infra* notes 146–59 and accompanying text.

99. *See* Stephen L. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come*, 52 BAYLOR L. REV. 781 (2000) (advocating a unified contractual approach to vacatur standards in both labor and employment arbitration).

to adjudicate disputes involving public rights. This responsibility should not be abdicated to private institutions, whose allegiances run to their sponsors rather than the public.[100] Even though private tribunals may appropriately hear cases involving public policy issues in the first instance, the courts must monitor in a supervisory capacity the substantive quality of such proceedings.

(1) Commercial Arbitration

In commercial arbitration cases, which may involve employer to employee as well as business to business and business to consumer disputes,[101] section 10(a) of the FAA sets forth the following four narrow statutory grounds for vacating an award:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[102]

In addition, all twelve federal circuit courts of appeals, but not the Federal Circuit, have cited the following six non-statutory grounds for vacating arbitration awards: "manifest disregard,"[103]

100. *See* Fiss, *supra* note 37, at 1075.

101. *See generally* Stephen Hayford & Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RESOL. 343 (1995).

102. 9 U.S.C. § 10 (2000); *see also* Eric Lucentini, *Taking a Fresh Look at Vacatur of Awards Under the Federal Arbitration Act,* 7 AM. REV. INT'L. ARB. 359, 370 (1996) (observing that the parties "are often tempted to shoehorn themselves artificially within the ambit of the statute" by asserting a ground such as "evident partiality," when they are really dissatisfied with an arbitrator's decision on the merits).

103. *See, e.g.,* Wilko v. Swan, 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); First Options v. Kaplan, 514 U.S. 938 (1995); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930 (2d Cir. 1986); San Martine Compania de Navegacion v. Saguenay Terminals Ltd., 293 F.2d 796 (9th Cir. 1961).

"public policy,"[104] "arbitrary and capricious award,"[105] "completely irrational award,"[106] "essence of the agreement,"[107] and "mistake of fact."[108] Of the six nonstatutory grounds "manifest disregard" is mentioned most frequently, and the three cases setting aside statutory arbitration awards have applied the "manifest disregard" standard.[109]

a. The "Manifest Disregard" Standard

The Supreme Court has announced neither the applicability of the "manifest disregard" standard nor the meaning of the standard as it might be applied to the review of awards in employment cases involving statutory disputes. The Court made its first reference to the standard in *Wilko v. Swan*[110], a case decided thirty-eight years before *Gilmer*. *Wilko* involved a dispute between a client and the partners in a brokerage firm about misrepresentations in connection with the sale of stock.[111] The court of appeals had reversed the district court's finding that the arbitration clause in the parties' margin agreement

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104. *See, e.g.*, Ariz. Elec. Power Coop., Inc. v. Berkeley, 59 F.3d 988 (9th Cir. 1995); Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775 (11th Cir. 1993); Seymour v. Blue Cross/Blue Shield, 988 F.2d 1020 (10th Cir. 1993); Revere Copper & Brass, Inc. v. Overseas Private Inv. Corp., 628 F.2d 81 (D.C. Cir. 1980); Diapulse Corp. of Am. v. Carba, Ltd., 626 F.2d 1108 (2d Cir. 1980).

105. *See, e.g.*, *Rauscher*, 994 F.2d 775; Ainsworth v. Skurnick, 960 F.2d 939 (11th Cir. 1992).

106. *See, e.g.*, French v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 784 F.2d 902 (9th Cir. 1986); Swift Indus., Inc. v. Botany Indus., Inc., 466 F.2d 1125 (3d Cir. 1972).

107. *See, e.g.*, Employers Ins. v. Nat'l Union Fire Ins. Co., 933 F.2d 1481 (9th Cir. 1991); *Seymour*, 988 F.2d at 1020; Anderman/Smith Operating Co. v. Tenn. Gas Pipeline Co., 918 F.2d 1215 (5th Cir. 1990); Inter-City Gas Corp. v. Boise Cascade Corp., 845 F.2d 184 (8th Cir. 1988); John T. Brady & Co. v. Form-Eze Sys., Inc., 623 F.2d 261 (2d Cir. 1980).

108. *See, e.g.*, Valentine Sugars, Inc. v. Donau Corp., 981 F.2d 210 (5th Cir. 1993); Siegel v. Titan Indus. Corp., 779 F.2d 891 (2d Cir. 1985); Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 764–801 (1996) (describing the courts' use of each of these standards in relation to the statutory standards).

109. *See, e.g.*, LeRoy & Feuille, *supra* note 7 (confirming the prevalence of the "manifest disregard" standard in a study of both labor and employment arbitration between 1991 and 2001).

Courts disagree on whether the parties can vary the standard of review by agreement. Compare, for example, *Lapine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997) (holding that the court must honor such agreements) and *Gateway Technology, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993 (5th Cir. 1995) (accord) with *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001) (holding inappropriate party attempts to "determine how federal courts review arbitration awards" and the threat to the arbitration process that would be posed by permitting the parties to alter the standard of review.)

110. 346 U.S. 427.

111. *Id.* at 428–29.

could not properly deprive the claimant of a judicial forum.[112] However, the Supreme Court refused to enforce the arbitration provision, in part because the narrow scope of arbitral review prevented the "exercise of judicial direction to fairly assure [the] effectiveness" of the Securities Act's protective provisions.[113] In the Court's view, this limited role for courts in an arbitration regime would constitute a waiver of rights in violation of section 14 of the Securities Act.[114] The Court alluded to the standard of review that accounted for this limited judicial role as follows:

> While it may be true . . . that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would "constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act," that failure would need to be made clearly to appear. In unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.[115]

Justice Jackson concurred, primarily because the arbitration agreement preceded the dispute.[116] He found it unnecessary "to decide that the Arbitration Act precludes any judicial remedy for the arbitrators' error of interpretation of a relevant statute."[117] Dissenting, Justice Frankfurter declared that "[a]rbitrators may not disregard the law."[118] He agreed with Chief Judge Swan of the Second Circuit that arbitrators are "bound to decide in accordance with the provisions of [the Securities Act]" and said further, "[o]n this we are all agreed."[119] This colloquy among the Justices suggests that they may not have understood the "manifest disregard" standard as erecting a high barrier to judicial scrutiny of the merits of an award.

Four years after *Gilmer*, the Supreme Court again mentioned "manifest disregard" in *First Options of Chicago v. Kaplan*, a case involving a dispute between an investment company and its two principals, on the one hand, and a stock trading firm on the other.[120] Also, unlike *Gilmer*, the issue in the *First Options* arbitration was contractual rather than statutory.[121] The question addressed by the

112. *Id.* at 429–30.
113. *Id.* at 437.
114. *Id.* at 438.
115. *Id.* at 436–37 (citing Wilko v. Swan, 201 F.2d 439, 445 (1953)).
116. *Id.*
117. *Id.* at 439.
118. *Id.* at 440.
119. *Id.*
120. First Options of Chicago v. Kaplan, 514 U.S. 938 (1995).
121. *Id.* at 941.

Court was who should decide the arbitrability of the dispute—the arbitrator or the court.[122] The Court referred to the narrow scope of review of arbitral awards to explain the pivotal significance of the question and held that, in the absence of the parties' clear agreement to submit the question to arbitration, the courts decide.[123]

The lower courts have taken these references in both *Wilko* and *First Options* to mean that the "manifest disregard" standard applies in employment disputes involving statutory issues.[124] Those courts have also entered the breach to supply content to the standards in the face of virtually no guidance from the Supreme Court.[125] Courts will not set aside awards under this standard—even if arbitrators misinterpret or misapply a federal statute—unless the law is totally *clear*, the arbitrator *understood* the law, and *chose* to ignore it.[126] Predictably, under this interpretation of "manifest disregard," awards are rarely set aside.[127]

An example of such a rarity can be found in *Halligan v. Piper Jaffray, Inc.*, where Theodore Halligan, hired in 1973 by Piper as a salesman of equity investments for financial institutions, was required at the time of his employment to sign the National Association of Securities Dealers ("NASD") U-4 form containing an agreement to arbitrate any future dispute.[128] Halligan claimed that a new CEO and his immediate supervisor forced him from his job in December of 1992 because of his age.[129] In Halligan's October 1993 arbitration, continued by his wife following his death, Halligan submitted evidence of his continuing high performance as a salesman at the time of his termination as well as statements such as the following indicating a discriminatory motive: "you're too old," "our clients are young and they want young salesmen," and "we want you out of here quickly."[130] Halligan also produced witnesses who testified to Piper's

122. *Id.*

123. *Id.* at 943–44. See *Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588, 592–93 (2002), for the Court's most recent reiteration of this standard.

124. *See supra* note 109.

125. *Id.*

126. *See, e.g.,* DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818 (2d Cir. 1997); *see* Katherine Van Wesel Stone, 77 N.C. L. Rev. 931, 955 (1999) (desribing "[t]he manifest disregard standard and the lack of an obligation for arbitrators to write opinions [as having] made arbitral awards virtually bulletproof").

127. *Id.*; LaPrade v. Kidder, Peabody & Co., 94 F. Supp. 2d 2 (D.D.C. 2000).

128. 148 F.3d 197, 198 (2d Cir. 1998); *see also* Montes v. Shearson Lehman Bros., 128 F.3d 1456 (11th Cir. 1997).

129. *Halligan*, 148 F.3d at 198.

130. *Id.* at 198–99.

expressed intention to fire Halligan because of his age.[131] Company witnesses contradicted this evidence, and the arbitration panel issued a written award setting forth the claims and defenses of each party and denying relief to the Halligans without explanation.[132] Mrs. Halligan petitioned the district court to vacate the arbitration award under section 10(a) of the FAA, arguing that the strong evidence of age discrimination and the clear description of the law presented to the arbitrators showed a manifest disregard of the law.[133] The district court, considering the conflicting evidence on discrimination, the absence of a written opinion, and the arbitration panel's apparent crediting of the employer's witnesses over Halligan's, concluded that the panel did not manifestly disregard the law.[134]

Acknowledging that the "manifest disregard" standard "means more than error or misunderstanding with respect to the law,"[135] the Second Circuit nonetheless reversed, citing the strong evidence that Halligan's discharge was because of his age and the panel's awareness of the applicable law. The court also considered the panel's failure to explain its decision as supporting the inference of "manifest disregard."[136] While noting the non-existence of an obligation to explain an award, the court argued that it was entitled to consider the panel's failure to explain the award where the evidence tended to support the conclusion that the panel manifestly disregarded the law.[137] The court concluded: "In view of the strong evidence that Halligan was fired because of his age and the agreement of the parties that the arbitrators were correctly advised of the applicable legal principles, we are inclined to hold that [the arbitrators] ignored the law or the evidence or both."[138]

Another rare example of the setting aside of an award under the "manifest disregard" standard can be found in *Montes v. Shearson Lehman Bros.*[139] In that case, an arbitration panel found that an employee, Montes, who had worked in excess of forty hours per week, was not entitled to overtime pay, even though the Fair Labor Standards Act ("FLSA") required the payment of overtime to

131. *Id.* at 199.
132. *Id.* at 200.
133. *Id.*
134. *Id.*
135. *Id.* at 202.
136. *Id.*
137. *Id.*
138. *Id.*
139. 128 F.3d 1456, 1464 (11th Cir. 1997).

covered employees who worked more than forty hours per week.[140] The employer had argued that Montes was an exempt employee, not covered by the FLSA.[141] Additionally, the employer's counsel had encouraged the arbitration panel in opening statement and closing argument not to follow the FLSA, should it find that Montes was a non-exempt employee.[142] The Eleventh Circuit vacated and remanded the arbitration award to a different arbitration panel, finding that the panel deciding the case had manifestly disregarded the law.[143] In reaching this conclusion, the court considered the "absence of any stated reasons for the decision," the "marginal evidence" before the panel, and counsel's encouragement of the panel to disregard the law.[144] The court observed that there was nothing in the "record to refute the suggestion that the law was disregarded . . . [n]or does the record clearly support the award."[145]

While reaffirming the *Wilko* dictum that arbitrators are not obligated to explain their reasons for an award, the court in *Montes* nonetheless treated the absence of stated reasons as supporting an inference that the law had been ignored and pointed to the record as containing "nothing . . . that refute[d] the inference."[146] In reaching the conclusion that the factual record did not support the arbitral ruling, the court reviewed the evidence that Montes was exempt from the FLSA and found that his primary duties were not exempted.[147] This finding, along with counsel's urging the arbitration panel to disregard the law and the absence of evidence that the panel rejected this plea, led to the Court's order vacating the award and remanding the case to a new arbitration panel.[148]

DiRussa v. Dean Witter Reynolds, Inc. is a more typical case, in which a reviewing court found no manifest disregard despite clear error.[149] In *DiRussa*, a forty-two-year branch manager for Dean Witter Reynolds—and registered representative of the NASD who signed the U-4 form—challenged a demotion as violative of the Age Discrimination in Employment Act ("ADEA").[150] Ultimately,

140. *See* 29 U.S.C. § 207(a) (1) (1998).
141. *Montes*, 128 F.3d at 1459.
142. *Id.*
143. *Id.* at 1464.
144. *Id.* at 1461–62.
145. *Id.* at 1462.
146. *Id.* at 1461 n.8.
147. *Id.* at 1464.
148. *Id.*
149. 121 F.3d at 827–28.
150. *Id.* at 820.

Raymond DiRussa arbitrated the claim before a NASD panel, which upheld the claim and awarded DiRussa damages but failed to award him attorney's fees as mandated by the ADEA.[151] Despite finding a "well-defined, explicit and clearly applicable" mandate in the ADEA for attorney's fees, the district court denied DiRussa's motion to modify or vacate the award for violating the mandate because DiRussa had not argued to the arbitration panel that the award of attorney's fees was mandatory under the ADEA.[152] The Second Circuit affirmed, noting that DiRussa's failure to communicate the applicable law to the arbitration panel defeated the claim of "manifest disregard," even though the law was well-defined and the panel's ruling was clearly erroneous.[153]

b. Critical Commentary

Courts and scholars have expressed a variety of views on the appropriate review standard in statutory arbitration cases. In *Cole v. Burns*, the District of Columbia Circuit Court of Appeals affirmed the district court's dismissal of an employee's Title VII complaint filed following his discharge from the company.[154] The dismissal was based on an agreement that the employee signed at the time of hire to arbitrate any claims arising from the termination of his employment and to waive his right to a jury trial.[155] The court, speaking through Chief Judge Harry Edwards, an eminent labor law scholar and former arbitrator, addressed Cole's claim that the agreement was unconscionable because the arbitrator's interpretation of the statute would not be subject to judicial review.[156] The court rejected Cole's claim based on the existence of statutory and non-statutory grounds of judicial review under the FAA.[157] While it conceded the limited scope of review of collective bargaining awards, the court opined that a broader standard of review would be more appropriate in statutory

151. *Id.*

152. DiRussa v. Dean Witter Reynolds, Inc., 936 F. Supp. 104, 106–07 (S.D.N.Y. 1996); *cf.* DeGaetano v. Smith Barney, Inc., 983 F. Supp. 459 (S.D.N.Y. 1997) (holding that the arbitration panel acted in manifest disregard of the law in failing to award attorneys fees in a Title VII case where the parties "unequivocally" notified the panel of the "governing legal principles").

153. *DiRussa*, 121 F.3d at 822–23; *cf.* *DeGaetano*, 983 F. Supp. 459 (where the court found manifest disregard in the refusal to award attorney's fees, because the arbitration panel was given notice of the attorney's fees provision of the statute).

154. 105 F.3d 1465 (D.C. Cir. 1997).

155. *Id.* at 1467–68.

156. *Id.* at 1460.

157. *Id.* at 1486.

cases in light of *Gilmer's* pronouncements about the retention of substantive rights in statutory arbitration and the sufficiency of judicial review.[158] In the court's view, the "manifest disregard" standard should be defined to permit "[a] focused review of arbitral legal [as opposed to factual] determinations . . . to ensure that [an arbitrator's] resolution of public law issues is correct."[159]

Professor Norman S. Poser perceives the "manifest disregard" standard as inadequate to protect important statutory rights and notices a shift toward greater scrutiny in some courts' treatment of awards under the standard.[160] In light of these considerations he has proposed the following standard: "An award should be vacated or modified if it shows an extraordinary lack of fidelity to established legal principles or an egregious departure from established law."[161]

This broader standard would focus on whether the arbitrator had properly interpreted and applied the law. Poser believes that this standard would encourage arbitrators to find out what the law is, and it does not penalize parties who fail to bring the law to the attention of the arbitrator.[162]

In Professor Poser's view, the Second Circuit in *Halligan* and the District of Columbia Circuit in *Cole* have already adopted a new standard of review; *Halligan* by vacating an award as against the weight of the evidence rather than in manifest disregard of the law, and *Cole* by expressly requiring that review be "sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law."[163] Moreover, unlike the court in *Cole*, Poser argues that this broader standard of review should apply to all awards, statutory and non-statutory.[164]

In an article that thoughtfully incorporates contemporary jurisprudential ideas, Professors Martin H. Malin and Robert F. Ladenson have also proposed a change in the manifest disregard standard.[165] However, they recognize the peculiar history and purpose of labor arbitration and the threat to the finality and efficiency of

158. *Id.* at 1487.

159. *Id.*

160. Norman S. Poser, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 BROOK. L. REV. 471, 473–74 (1998).

161. *Id.* at 518. Poser reaches this conclusion in part by examining the definition of disregard, "lack of thoughtful attention or due regard," and clarifying the court rather than the arbitrator as the tribunal to whom the disregard must be manifest. *See id.* at 510.

162. *Id.* at 515.

163. *Cole*, 105 F.3d at 1487.

164. Poser, *supra* note 160, at 518.

165. *See* Malin & Ladenson, *supra* note 9, at 1190.

arbitration that expansive judicial review of the merits would pose.[166] Accordingly, they suggest a continuation of the narrow scope of review of labor arbitration awards that the Supreme Court has sanctioned in *Enterprise Wheel* and *W.R. Grace/Misco/Eastern Coal* (the public policy cases).[167] For employment arbitration, Malin and Ladenson propose a standard of "broad deference to arbitral factual findings and de novo review of arbitral legal conclusions."[168] Positing that most of the expense and delay associated with litigation derives from factfinding, they argue that most of the efficiencies of arbitration will be preserved by a rule that establishes finality in factfinding.[169] Professors Malin and Ladenson believe that reserving *de novo* review for arbitral interpretations of the law "will have minimal impact on . . . [the] finality of employment arbitration[,] . . . [while providing] the legitimacy that would otherwise be lacking in the privatization of public workplace justice."[170]

Professor Stephen Hayford has exhaustively surveyed the developing law on judicial standards for vacatur of commercial arbitration awards, both statutory—under section 10(a) of the FAA—and non-statutory.[171] He argues that the statutory standards of vacatur set forth in section 10(a) advance the FAA's public policy of giving effect to agreements to arbitrate.[172] In Hayford's words:

> Win or lose, the agreement to arbitrate reflects an enforceable contractual commitment by the parties to forego resort to the

166. *Id.* at 1192.

167. *Id.* at 1196.

168. *Id.* at 1238. The court in *Cole* specifically adopted this position as articulated in Malin, *supra* note 1. *See Cole*, 105 F.3d at 1487.

169. *Id.* at 1290.

170. Malin & Ladenson, *supra* note 9, at 1238. In their view employment arbitration without appropriate judicial review loses legitimacy, because legitimacy in the enforcement of public law comes with political accountability. *Id.* at 1237. They articulate this view as follows:

> To ensure that public law continues to develop in accordance with public justice values as articulated by publicly accountable judges constrained by the principle of integrity, arbitral legal conclusions must be subject to de novo judicial or administrative review. Only the judge has the legitimacy conferred by the legislature to authoritatively continue the chain novel based on a balancing of Dworkin's dimensions.

Id.

171. Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443 (1998) [hereinafter *New Paradigm*]; Stephen L. Hayford, *Reigning in the "Manifest Disregard" of the Law Standard: The Key to Restoring Order to the Law of Vacatur*, J. DISP. RESOL. 117, 128–32 (1998) [hereinafter *Reigning in*]; Hayford, *supra* note 108.

172. Hayford, *supra* note 108, at 741–43.

> courts in order to secure the benefits of arbitration. The parties can expect no more than that for which they have bargained. A party dissatisfied with the outcome of a commercial arbitration proceeding 'may not seek a second bite at the apple simply because (it) desires(s) a different outcome.' Dissatisfaction with the results of the arbitration tribunal is not a good reason for the loser to seek vacatur of the award. . . . The public policy reflected in the Federal Arbitration Act is intended to give effect to the bargain just described and to hold the parties to it by enforcing the agreement to arbitrate and making it very difficult to secure judicial vacatur of objectionable arbitration awards.[173]

Under this policy, the courts are not to assess the merits of arbitration awards; rather, they are to "monitor the procedure that leads to the commercial arbitration award in order to assure the award's essential fairness and the arbitrator's neutrality."[174]

Based on the statutory framework, Hayford argues that the "manifest disregard" standard should not be applied to reverse an award based on an erroneous interpretation of the law; rather, it should be narrowly interpreted as a form of arbitral misconduct "captured" by section 10(a)(3) of the FAA.[175] Only if an arbitrator engaged in the misconduct of understanding the law and ignoring it should the award be vacated.[176] Excluding "public policy" review, which inheres in a court's common law power to refuse to enforce any contract that violates public policy and does not require an inquiry into the merits, Hayford regards the other non-statutory grounds as applicable to labor arbitration and inapposite to commercial arbitration.[177] He argues that the statutory grounds contained in section 10(a) of the FAA as supplemented by "public policy" should be exclusive in order to "stabilize the law of vacatur [and] return it to its true origin."[178] Professor Hayford also observes that an untoward consequence of the non-statutory grounds of vacatur is the unwillingness of commercial arbitrators to write reasoned awards, which are more susceptible to review on the merits.[179] Since the

173. *Id.* at 741–42 (footnotes omitted).

174. *New Paradigm*, *supra* note 171, at 500.

175. *Id.* at 475.

176. Hayford, *supra* note 108, at 817.

177. *Id.* at 814–15.

178. *Id.* at 841.

179. *New Paradigm*, *supra* note 171, at 501. Hayford argues that the current system (termed the current paradigm) with no reasoned awards and review on non-statutory grounds disserves the parties, since the virtually non-existent vacatur rate under non-statutory standards makes the guarantee of justice by judicial review illusory. *Id.* at 500. And, perhaps, relying upon judicial review the parties,

> [b]y failing to make a rigorous effort at the front end, pre-award stage of the

dearth of reasoned awards in commercial arbitration disserves the parties, Hayford advocates a regime of reasoned commercial arbitration awards coupled with a narrow scope of review limited to the statutory grounds of section 10(a), as well as "manifest disregard" and "public policy," both narrowly construed.[180]

In his most recent work, Professor Hayford reviews case law development in both the labor and commercial arbitration fields, points out their common heritage, and advocates a unified approach to questions of enforceability, arbitrability, and vacatur in both areas.[181] He points out that such an approach would not involve a radical departure from the virtual identity of judicial treatment of both sets of arbitration issues.[182] Viewing the vacatur issue as troubling in both the labor and commercial arbitration arenas, Hayford proposes unification of vacatur standards under section 10(a) of the FAA, augmented by the "manifest disregard" and "public policy" non-statutory standards narrowly interpreted.[183]

(2) The Standards Vacuum

None of these views of judicial review fully captures the competing concerns reflected in both the cases and the literature. Vacatur based on the degree of error committed by the arbitrator makes arbitration a surrogate trial court and diminishes its essential advantages—finality, informality, speed, and affordability. Hence, Professor Poser's "extraordinary lack of fidelity/egregious departure" standard, Professors Malin's and Ladenson's and *Cole's* bifurcated *de novo* review approach, the courts' manifest disregard standard broadly construed, and other non-statutory standards all pose an unacceptable threat to arbitration. On the other hand, Professor Hayford's advocacy of statutory grounds only, augmented by the "manifest disregard" and "public policy" standards narrowly construed, gives insufficient recognition to legitimate reasons for judicial scrutiny of the merits and vacatur of the awards in some cases.

> process (in negotiating the arbitration agreement, selecting the arbitrator, evaluating arbitral performance, fashioning the case-in-chief in a manner that takes full advantage of the presence of a sophisticated, mutually selected expert adjudicator, and the like), the parties greatly increase the likelihood that the result reached at the end of the process will be unsatisfactory.

Id. at 501.

180. Hayford, *supra* note 108, at 841–42.

181. Hayford, *supra* note 99.

182. *Id.* at 926–27.

183. *Id.*

A standard that permits judges to reverse arbitration awards based on error alone would unduly undermine the finality of the process and eventually lead to the diminution or extinction of the institution of arbitration. Over time the parties may become unwilling to invest in a system that cannot deliver on the promise of finality, informality, speed, and economy. The diminished utility of arbitration may lead to less access to rights enforcement under protective legislation. On the other hand, the total absence of scrutiny in public law cases would constitute abdication of the courts' responsibility to protect the public interest and lead to a dilution of statutory protections, a result of arbitration that the Supreme Court disavowed in *Gilmer*.[184]

The Supreme Court's confidence in arbitration, expressed in *Gilmer* and other recent cases under the FAA, contemplates a process capable of fairly hearing and deciding statutory issues. Hence, the question that defines the standard of review in the United States should be whether the arbitration process worked as contemplated. What is contemplated depends upon whether the arbitration was private (contractual) or public (statutory). In contractual arbitration it is expected that the arbitrator will be independent, impartial, fair, and responsive to contractual limitations on arbitral authority and the obligation to issue an intelligible award. The arbitrator's reading of the contract is what the parties bargained for, and it should be final even if it is wrong.[185]

The federal common law and the FAA appropriately limit judicial intervention to set aside arbitration awards in private contractual matters. The law of labor arbitration has long contemplated the possibility of error in arbitration awards. Yet the *Steelworkers Trilogy* does not permit courts to set aside labor arbitration awards on the basis of error alone.[186] As long as the award draws its essence from the agreement, the courts must enforce it.[187] Similarly, commercial arbitration awards in private contractual

184. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 n.4 (1991). In *Gilmer*, the Court, in rejecting the contention that judicial review of arbitration awards is too limited, said: "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute at issue." *Id.* (citing Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987))

185. *See* St. Antoine, *supra* note 13, at 1140 (describing the arbitrator as the parties' contract reader).

186. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960).

187. *Id.*

matters have been largely insulated from judicial review.[188] In private arbitration, courts should review awards for *procedural integrity*. If an award has not been procured through fraud, procedural irregularity, or arbitral misconduct, it should be enforced under the FAA.[189]

In statutory arbitration, mere procedural integrity is not sufficient. Arbitration is also expected to satisfy the public interest in enforcing a statute of general applicability—for example, by protecting citizens from discrimination on the basis of race, gender, religion, age, or disability. The public policy that justifies the overturning of an offending labor or commercial arbitration award also warrants judicial review of an award that interprets public laws designed to advance important public values.[190] These policies compete with the FAA's policy of giving effect to arbitration agreements.[191] And unless Congress has mandated the supremacy of

188. *See* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 203 n.4 (1955) (noting the narrow scope of review in commercial arbitration cases); Alleyne, *supra* note 1, at 421 (comparing the greater frequency of vacatur in labor than commercial arbitration).

189. FAA section 10 grounds for vacatur of arbitration awards captures this procedural integrity. At one level arbitral integrity is procedural. The parties choosing the arbitral forum expect it to supply certain minimum values, such as a neutral process where the outcome is uninfluenced by fraud, corruption, arbitral partiality, or misconduct in the administration of the hearing. This level of integrity may be thought of as procedural integrity.

190. *See supra* notes 69–85 and accompanying text. Some courts have interpreted public policy review in this fashion. For example, in *Seymour v. Blue Cross/Blue Shield*, 988 F.2d 1020 (10th Cir. 1993), the Tenth Circuit found that there was no clear violation of Utah public policy prohibiting the modification of insurance contract without the agreement in writing of the party against whose interest the modification runs. In reaching this conclusion the court examined the evidence showing that the insureds had been reissued a contract containing the modification, acknowledged receipt, and continued to pay premiums. *Id.* at 1025. Based on these facts the court found that "[t]he arbitrators could have reasonably construed the facts of this case to meet the requirement . . . that a modification be 'in writing and agreed to by the party against whose interest the modification operates.'" *Id.* at 1024. (quoting UTAH CODE ANN. § 31A-21-106 (1985)). Similarly, the Eighth Circuit in *Paine Webber Inc. v. Argon*, 49 F.3d 347 (8th Cir. 1995), found that an arbitration panel's refusal to uphold the discharge of a Vice President and Registered Representative for signing a customer's name on an IRA account was not a violation of the public policy of honesty in the securities industry as reflected in the company's rules. The court reviewed the panel's findings in light of the evidence and found no violation of public policy. *Id.* at 352. Professor Hayford criticizes this view of public policy, because it permits the reviewing court to focus on the correctness of the arbitrator's interpretation and application of the law. Hayford, *supra* note 101, at 925–26.

191. In his *Postscript* on the history of American arbitration law Professor Macneil predicts that "major fault lines run through the law, along which tensions exist or will build up." MACNEIL, *supra* note 38, at 175. Specifically, he says: "[T]ension is inevitable

one statute over another, courts have a responsibility to reconcile the two.[192] Moreover, given the FAA's predating of modern anti-discrimination legislation, it is difficult to argue that FAA policy

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between the freedom of arbitrators to make final decisions and the need for judicial oversight when their decisions concern important regulatory legislation." *Id.*

In *Wilko v. Swan*, the Court recognized the clash between competing policies of enforcing arbitration agreements and protecting investors in the following terms:

> Two policies, not easily reconcilable, are involved in this case. Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment.... On the other hand, it has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights. Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act.

346 U.S. 427, 438 (1953). See also the reference in *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826 (2d Cir. 1968), to the following "clash of competing fundamental policies ... the conflict between federal statutory protection of a large segment of the public, frequently in an inferior bargaining position, and encouragement of arbitration as a 'prompt, economical and adequate solution of controversies.'" (citing *Wilko*, 346 U.S. at 438).

Though the Court overruled *Wilko* in *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989), it did not intend to signal an end to the clash of competing public policies. Rather, it simply found the tension insufficient to justify refusing to enforce pre-dispute arbitration agreements. *Id.* However, the Court's pronouncements in *Gilmer* make it clear that this tension requires the continuing involvement of the courts in the form of judicial review. *See supra* note 184 and accompanying text. For example, in *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 820 (2d Cir. 1997), a post-*Gilmer* case brought to vacate or modify an arbitration award, the court began its decision as follows: "This case implicates the possible clash between two important federal policies: deference to arbitration awards in order to promote that important method of dispute resolution and enforcement of the remedial provisions of a federal statute—the Age Discrimination in Employment Act of 1967. ..."

192. *See, e.g.*, NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984) (resolving the tension between the policy of rehabilitation under the bankruptcy laws and the enforcement of collective bargaining agreement under the labor laws); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 893 (1984) (where the Court sanctioned the NLRB's application of the unfair labor practices provisions to undocumented aliens as an effort to reconcile the NLRA and the Immigration and Nationality Act). It should be noted that the Court in *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 290–91 (2002), rejected the Fourth Circuit's effort to reconcile the FAA and Title VII by preventing the EEOC from suing for victim-specific relief because the arbitration agreement did not bind the EEOC and Title VII gave the EEOC authority to seek such relief. The suggested reconciling of the two statutes under the integrity review proposal does not disserve the FAA policy of putting arbitration agreements on the same footing as other contracts or the Title VII policy of protecting the public from employment discrimination. Rather, it serves both policies by bringing to statutory arbitration awards the same kind of public policy scrutiny that the courts have effected in other arbitration contract cases and increasing the protection of rights under Title VII by increasing the quality of arbitrations.

should trump other subsequently enacted substantial congressional pronouncements.[193] When commercial arbitrators, such as the one in *Gilmer,* are called upon to interpret the provisions of Title VII barring employment discrimination based on race, sex, age, religion, national origin, and disability, for example, the judiciary must act in the public interest by exercising some oversight of the merits of the award. The crucial issue in reconciling the competing policies of the FAA and statutes like Title VII is how much oversight will give adequate effect to one without unduly undermining the other.[194]

In public arbitration cases, courts should review arbitration awards not only for "procedural integrity" but for integrity in the arbitrator's substantive deliberations as well. This necessarily involves a consideration of the merits, but not a reversal simply because the court would not have reached the result that the arbitrator reached. Rather, this examination of *substantive integrity* entails a review of the arbitrator's reasoning process to determine whether the arbitrator's reasons plausibly lead to the decision.

C. Integrity

In *Gilmer*, the Supreme Court's confidence in the preservation of statutory protection under an arbitral regime was premised in part on the belief that arbitrators are capable of adequately adjudicating statutory issues and in part on the adequacy of judicial review.[195] Assuming that this faith in arbitrators is warranted, the judicial scrutiny of the merits of arbitration awards might be properly limited to an inquiry into whether the arbitrator was faithful to the obligation to adjudicate the dispute. This standard reflects a concern about arbitral integrity.

The Oxford English Dictionary defines *integrity* in two senses that are particularly relevant to this discussion:

> 1. The condition of having no part or element taken away or wanting; undivided or unbroken state; material wholeness, completeness, entirety.
>
> . . . .
>
> 3b. Soundness of moral principle; the character of uncorrupted

193. *See* William Nichol Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

194. This classical statement of a balancing test was made famous by the court in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956) (saying that the accommodation between organizational and property rights "must be obtained with as little destruction of one as is consistent with the maintenance of the other").

195. *See* 500 U.S. 20, 35 (1991).

> virtue, esp. in relation to truth and fair dealing; uprightness, honesty, sincerity.[196]

These definitions suggest that integrity is a unity between deeply held values and human activity, where the former is consistently demonstrated through the latter.[197]

Integrity is also a virtue that permeates the activity of human decision-making. Whether the decisional choices are small, such as the issue of whether to lie to a friend about the attractiveness of a new hair style, or momentous—like the question of whether to cast a congressional vote in favor of the death penalty or funding stem cell research—the decision is informed by some reference to a set of values held by the decision maker. Integrity determines the extent to which the decision conforms to those values.[198]

Adjudication is formalized decisionmaking practiced by courts, administrative agencies, and arbitrators.[199] The values that inform adjudication are those incorporated in decisional rules that must be applied as well as those that dictate an approach to decision-making. Values to be applied—decisional rules—are embodied in the law as manifested in statutes, the common law, contracts, principles, and policies.[200] The process of determining how the values reflected in the law should shape the outcome in specific cases—the decisional

196. THE OXFORD ENGLISH DICTIONARY 1066 (2d ed. 1989).

197. *See* MARTIN BENJAMIN, SPLITTING THE DIFFERENCE: COMPROMISE AND INTEGRITY IN ETHICS AND POLITICS 54, 59–74 (1990) (describing integrity as "largely a formal notion . . . [that] regulates the connections among values, words, and deeds and suggesting that the complexity of competing values might warrant moral compromise"); STEPHEN L. CARTER, (INTEGRITY) 7 (1996) (defining integrity as involving the following three steps: "(1) discerning what is right and what is wrong; (2) acting on what you have discerned, even at personal cost; and (3) saying openly that you are acting on your understanding of right from wrong") (emphasis omitted).

198. *See* G. RICHARD SHELL, BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE 18, 205 (1999) (describing "a commitment to personal integrity in negotiation" as follows: "effective negotiators can be counted on to negotiate consistently, using a thoughtful set of personal values that they could, if necessary, explain and defend to others").

199. *The Oxford English Dictionary* defines "adjudicate" as follows:

> ADJUDICATE . . . To adjudge; . . . to try and determine judicially . . . .
>
> . . . .
>
> ADJUDGE . . . To settle, determine or decide, judicially . . . .
>
> . . . .
>
> JUDICIALLY . . . After the manner of a judge; with judicial knowledge and skill; critically.

THE OXFORD ENGLISH DICTIONARY, *supra* note 196, at 158, 157, 297.

200. *See* STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 1 (2d ed. 1995).

approach—involves applying the law to a set of facts through legal reasoning.[201]

Arbitration as a species of adjudication has been described as "principled adjudication," a process of applying arbitral standards through legal reasoning.[202] As a practical matter, legal reasoning entails: (1) identifying the law applicable to a legal problem, (2) considering all of the relevant evidence that bears upon the problem, (3) focusing on the purposes of legal rules where appropriate to determine the important facts, (4) using analogical and deductive reasoning to reach a legal conclusion on those facts, and (5) explaining how the law as applied to the facts leads to the conclusion reached.[203] These components of legal reasoning may be thought of generally as law-finding, fact-finding, and law-applying. In the case of adjudication, *integrity* is the unity of values and activity inherent in this professional approach to decision-making.[204] *Substantive integrity* should be thought of as fidelity to this approach. *An arbitrator's*

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201. In a text designed to introduce beginning law students to legal reasoning Professor Burton says the following:

> [Judges] should apply the law to the facts of a case to yield *legal reasons*, which are reasons for action by law-abiding people. For example, a red light plus a rule requiring motorists to stop at red lights is a legal reason for Mitchell Motorist to stop. It is also a reason for a lawyer to predict that a judge would fine Mitch if he did not stop, a reason for a prosecutor to urge a judge or jury to convict him, and a reason for a judge or jury to do so. *Legal reasoning* is the process of using legal reasons in legal arguments.

Id.

202. Roger I. Abrams, *The Nature of the Arbitral Process: Substantive Decision-Making in Labor Arbitration*, 14 U.C. DAVIS L. REV. 551, 555 (1981).

203. *See* BURTON, *supra* note 200, at 25–115. Discussing labor arbitration, Dean Abrams says:

> Labor arbitration is a process of principled adjudication. Arbitrators make decisions in cases presented to them on the basis of an established body of arbitral jurisprudence.... Once questions of fact are resolved, the labor arbitrator selects appropriate adjudicatory standards from the body of arbitral jurisprudence and applies those standards by reasoning from the facts to a conclusion. The process of decision-making in labor arbitration is essentially rational and principled. Arbitrators customarily explicate the basis for their decisions in the form of a written opinion, which follows a standard form.

Abrams, *supra* note 202, at 554–55 (footnotes omitted).

204. Referring to the parties' mutually determined choice of rules to govern their workplace, Dean Abrams speaks as follows of integrity in labor arbitration as requiring the arbitrator to apply those rules rather than the arbitrator's personal views as manager of the parties' needs: "[h]owever, the arbitration process contemplates a less expansive role [than manager]. Fidelity by an arbitrator to the choices made by the parties supports not only the integrity of the bargaining process, but also, on a larger scale, the entire autonomous system of industrial self-government." Abrams, *supra* note 202, at 554–55 (footnotes omitted).

failure to apply the applicable law through legal reasoning would warrant a finding that an erroneous decision should be vacated as lacking substantive integrity.[205]

However, even fidelity to each of the elements of legal reasoning may not lead to a particular outcome that the reviewing court would regard as correct. This is particularly true in cases involving weighing evidence, applying a flexible standard such as "reasonableness," or interpreting unsettled law. Such cases leave room for the exercise of judgment which might vary within some reasonable range among adjudicators. Under this view, a decision may have substantive integrity yet still be regarded by the reviewing court as incorrect. Under the proposed standard, such an award should be enforced.

Table II includes the *substantive integrity* standard in the ranking of degrees of restrictiveness of review standards set forth in Table I. The integrity standard ranks second most restrictive after the labor arbitration standard and ahead of the "sufficient evidence" standard. Like the essence/public policy standard of labor arbitration, the integrity standard constrains review of the merits; however, unlike the labor arbitration standard, an erroneous decision is not respected under this standard unless it reflects a reasoned approach to decision-making. This standard is deemed more restrictive than the "sufficient evidence" standard, since the arbitrator's reasoning, based on perhaps less evidence than the directed verdict threshold, may sustain an award.[206]

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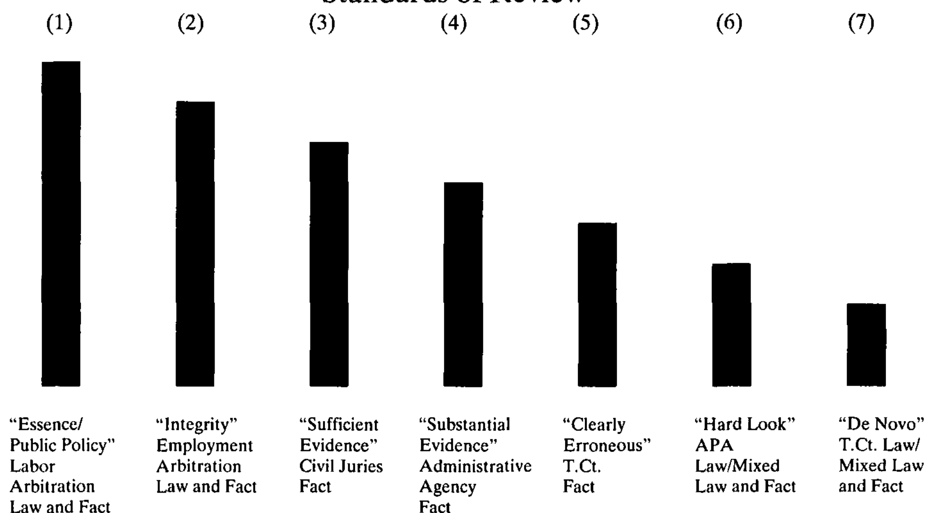
205. When the result is correct, setting it aside based on faulty reasoning is inappropriate. The arbitrator's intuition may have led to the result, and to not uphold it would be needlessly to undermine the finality, informality and efficiency of arbitration. *See* Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 951 (1923); *cf.* Solomon v. CCMA, (1999) 20 I.L.J. 2960 (LC) (S. Afr.), *available at* http://www.legalinfo.co.za (where the reviewing court set aside a correct arbitration award because of the faulty reasoning).

206. This borrows from the "hard look" approach articulated by Judge Levanthal in *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), where he described the court's function in reviewing administrative agency decisions as "assur[ing] that the agency [give] reasoned consideration to all the material facts and issues" and insisting "that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts." *Id.* at 851. Describing its supervisory function more generally, Judge Levanthal said:

> Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a "hard look" at the salient problems, and has not genuinely engaged in reasoned decision-making. If the agency has not shirked this fundamental task, however, the court exercises restraint and affirms the agency's action even though the court would on its own

Table II
Standards of Review



This bar graph depicts the degrees of restrictiveness of standards of review including the "integrity" standard as a function of the showing required to set aside the findings of lower tribunals.

D. Substantive Integrity Applied

(1) Illustration

Substantive integrity should be reflected in the three general phases of adjudicative analysis—law-finding, fact-finding, and law applying. An example will illustrate this point. Consider a case where an employee—the manager at an equipment rental company—quits her job because, she claims, the employer created a sexually

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> account have made different findings or adopted different standards. Nor will the court upset a decision because of errors that are not material, there being room for the doctrine of harmless error. If satisfied that the agency has taken a hard look at the issues with the use of reasons and standards, the court will uphold its findings, though of less than ideal clarity, if the agency's path may reasonably be discerned, though of course the court must not be left to guess as to the agency's findings or reasons.
>
> The process thus combines judicial supervision with a salutary principle of judicial restraint, an awareness that agencies and courts together constitute a "partnership" in furtherance of the public interest, and are "collaborative instrumentalities of justice."

Id. at 851–52.

The *substantive integrity* standard, however, is careful about the balance between supervision and restraint, tilting more toward restraint with arbitral findings of fact and mixed law and fact and more toward supervision with interpretations of law.

hostile work environment. She has worked for the employer for one year and during the last six months of her employment the company president has made several inappropriate comments to her. On one occasion he threw a dime in front of her and asked her to bend over and pick it up. On another occasion he offered, in a sexually suggestive manner, to negotiate her raise at the Holiday Inn. And on a third occasion he asked her whether she had promised a customer sex in order to close a deal. Following these three incidents, which were spaced approximately two weeks apart, the employee resigned and filed a grievance under the employer's arbitration procedure alleging a violation of Title VII.

Assume that the arbitrator issued the award in this case before the Supreme Court's 1993 decision in *Harris v. Forklift Systems, Inc.*[207] The Supreme Court has decided *Meritor Savings Bank, FSB v. Vinson*, which defined Title VII's anti-discrimination provision as not "limited to economic or tangible discrimination" but as directed as well to the disparate treatment of men and women in the workplace in the form of a hostile or abusive environment.[208] The *Meritor* Court termed as hostile or abusive: "discriminatory intimidation, ridicule, and insult... [that is] sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[209]

Following the *Meritor* case, the Circuits split on whether actionable work environment harassment needed to be so serious as to cause psychological injury or only sufficiently serious to interfere unreasonably with work performance or alter the conditions of employment.[210] In *Harris*, decided after the hypothetical award, the Supreme Court adopted the latter interpretation.[211]

If the arbitrator found the "psychological well-being test" to be appropriate, rather than the "objectively hostile or abusive environment test" adopted after the arbitrator's award by the Court in *Harris,* the award could not be found to lack substantive integrity.

207. 510 U.S. 17 (1993).

208. 477 U.S. 57, 64 (1986); *see also* 42 U.S.C. § 2000e-2(a)(1) (1994) providing:

(a) EMPLOYER PRACTICES

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin . . . .

209. *Meritor*, 477 U.S. at 67.

210. *See Harris*, 510 U.S. at 20.

211. *Id.* at 21.

The arbitrator would be merely adopting one of two plausible legal standards growing out of the *Meritor* precedent and supported by Circuit Court interpretation.[212]

Equally sacrosanct should be the arbitrator's factual finding that the grievant did not establish by a preponderance of the evidence that two of the three incidents actually occurred. The arbitrator's evaluation of the evidence produced by both the grievant and the company president about whether the three incidents occurred, based on any corroborating evidence and the credibility of witnesses, should be upheld under a *substantive integrity* standard. As long as the arbitrator's decision reflects some evaluation of the weight to be given to the evidence in reasoning to the factual conclusion, the arbitrator has performed the task as expected and the Court should not reverse a decision that it views as erroneous.[213]

Under the *substantive integrity* standard, manifest disregard would be the easiest case. Where the arbitrator understands the law and chooses to ignore it, the erroneous decision would lack substantive integrity since the arbitrator would have consciously abandoned reason to reach an unsupported conclusion. However, under the *substantive integrity* standard, if the arbitrator's ignorance of the law results in no reasoning on the point and an erroneous conclusion, the decision would also lack substantive integrity even in the absence of manifest disregard. Similarly, if an arbitrator chooses the wrong law to apply and reaches a conclusion that would have been wrong under the applicable law, the conclusion, though reasoned, is tantamount to the absence of reasoning under the applicable law and therefore lacking in substantive integrity.[214] However, where the arbitrator chooses the correct law and applies it through legal reasoning, the reviewing court could not properly set aside the award based on a disagreement with the outcome.[215] For

212. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984) (where the court supports an administrative agency's choice between plausible interpretations of a statute); *see also* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930 (2d Cir. 1986) (in which the court approved the arbitration panel's refusal to follow an SEC rule where the panel doubted the rationality of the rule in light of the language, purpose, and history of the statute and no definitive court ruling on the issue).

213. Indeed, under all of the less restrictive standards set forth in Table II a factfinder's conclusions are likely to be given such deference.

214. For example, if the arbitrator had selected a "mere offensiveness" rule, clearly contrary to the Court's "severe or pervasive" standard in *Meritor*, to find that a single comment by the president created an abusive working environment, the conclusion would lack *substantive integrity*.

215. Though the conventional standard permits de novo review on these mixed questions of law and fact, as noted in WRIGHT & MILLER, *supra* note 16, § 2589, such an

example, changing the illustration slightly, in applying the "objectively hostile or abusive environment" test to the same facts *after* the *Harris* decision, the arbitrator's determination that the one proven comment and other evidence produced by the rental company equipment manager were insufficient to meet the hostile environment test should not be disturbed, as long as the arbitrator set forth some rational basis for the conclusion.

If an arbitrator's decision is wrong on the merits and there is no reasoned written decision, the award would presumptively lack substantive integrity and be subject to vacatur in the absence of rebuttal evidence showing the outcome to be reasonable under some interpretation and application of the law.[216] Similarly, if no reasoned decision could possibly lead to the arbitral outcome, substantive integrity would be missing.[217] However, if the reviewing court's review of the record shows that the award is correct, it should be enforced even if the arbitrator's law-finding, fact-finding, and law-applying are faulty. *Substantive integrity* favors substance over form, and in this situation the purpose of the statute is well-served where the award fully protects the rights of the claimant.[218]

To summarize the proposal:

An arbitrator's failure to apply the applicable law through legal reasoning would warrant a finding that an erroneous decision should be vacated as lacking substantive integrity.

(1) Under the proposed standard, the court looks independently at the record to first determine whether the arbitrator's decision is correct; a correct decision ends the inquiry.

(2) If the decision is incorrect, the court closely examines the arbitrator's law-finding for correctness.

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expansive standard would render the arbitrator indistinguishable for a trial court and eliminate many of the advantages of arbitration.

216. Professor Hayford correctly observes the weak inference of knowledge of the law and conscious disregard created by an arbitrator's incorrect interpretation of the law and the absence of a reasoned award. *See Reigning in*, *supra* note 171, at 128–32. However, under the broader proposed standard of substantive integrity an incorrect decision combined with the absence of a reasoned award creates a strong inference that the arbitrator did not reason in good faith from the evidentiary materials in the record to the decisional outcome.

217. A "reasoned decision" is distinguishable from a perfunctory one, since the latter (but not the former) may describe the parties facts and evidence without analytically applying the law to the facts to reach a legal conclusion. This standard is similar to the "arbitrary and capricious" standard used by some courts.

218. *Cf.* Solomon v. CCMA, (1999) 20 I.L.J. 2960 (LC) (S. Afr.), *available at* http://www.legalinfo.co.za (where the judge set aside an award, even though he conceded correctness, because the Commissioner's reasoning was faulty).

(3) Wrong choices of law or ignoring the law results in the setting aside of an erroneous decision.

(4) If the law is correctly selected, the court evaluates the arbitrator's fact-finding and law applying only to determine whether the arbitrator's conclusions have been reasoned from the materials in the record.

(5) Reasoned conclusions are entitled to deference, even though the court would have reached a different result.

(6) The court may draw a negative inference regarding the rationality of an erroneous award in the absence of a reasoned written opinion.

This approach addresses the need to reconcile the public policy of enforcing arbitration agreements contained in the FAA with that reflected in statutes designed to protect workers. It also acknowledges the responsibility of courts to protect the statutory rights of the public and the propensity of courts to violate more restrictive standards in order to respond to justice concerns created by erroneous decisions in public policy cases.[219]

(2) The Importance of a Written Opinion

Particularly in public law cases, appellate review is necessary for three reasons. First, courts are the primary guardians of public rights granted by congressional enactments.[220] Second, where private arbitrators replace lower courts as the initial decision-makers in statutory cases, judicial review permits higher courts to fulfill their

219. *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998), is an example of the latter tendency, where the arbitrators may have been quite wrong even though they may not have manifestly disregarded the law in ruling against the Halligans. *See also* Hayford, *supra* note 108, at 764–74 (bemoaning the courts' setting up nonstatutory standards of review).

The "integrity review" standard suggests that in the debate among the circuits about the permissibility of altering the standard of review by agreement, it would be inappropriate for the parties to lower the standard of review. Moreover, in light of the delicate balancing of FAA and statutory concerns the *Bowen* court's decision rejecting even heightened judicial scrutiny of arbitration awards would seem to have the better of the argument. *See supra* note 104.

220. *See, e.g.*, Securities Act of 1933, 15 U.S.C. § 77v(a) (2000) (conferring jurisdiction concurrently on district courts of the United States, state, and territorial courts); Age Discrimination in Employment Act of 1998, 29 U.S.C. § 626 (1998) (authorizing judicial enforcement through the Fair Labor Standards Act); Fair Labor Standards Act, 29 U.S.C. § 216(b) (1998) (conferring jurisdiction in federal and state courts to enforce rights under the statute); 42 U.S.C. § 2000e-5(f)(3) (1994) (conferring jurisdiction in United States courts over unlawful employment practices).

enforcement obligation through appropriate supervision.[221] Third, the specter of review should enhance the level of care and quality practiced by arbitrators in statutory arbitrations.[222] These factors make judicial review of employment arbitration awards essential to the protection of statutory rights.

The written opinion is the vehicle that facilitates judicial review.[223] In it, the arbitrator must state and justify the factual findings and legal conclusions that resolve the dispute.[224] Opinion-writing also provides many individual, institutional, and public benefits that make it worthwhile for reasons other than judicial review.[225] However, at the forefront of its institutional and public rewards are the quality of decision-making and meaningful judicial

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221. *See* MARTINEAU, *supra* note 50, §§ 1.8, 1.9 (describing two functions of appellate courts as error correction and law development including enforcing "the law as declared by both judicial and legislative bodies").

222. *Id.* § 1.8 (noting a function of appellate review as preventing "a judge from consciously acting in a manner that would constitute reversible error" and "caus[ing] a judge to exercise greater caution to prevent unintentional error"); *see also* Christopher B. Kaczmarek, *Public Law Deserves Public Justice: Why Public Law Arbitrators Should Be Required to Issue Written, Publishable Opinions*, 4 EMP. RTS. & EMP. POL'Y J. 285, 317–18 (2000) (noting the motivational effect of having to justify an award in an opinion).

223. *See* Wilko v. Swan, 346 U.S. 427, 439 (1953) (Frankfurter, J., dissenting) (where Justice Frankfurter argued that since an arbitrator's failure to follow the law would be grounds for vacating the award, "appropriate means for judicial scrutiny must be implied, in the form of some record or opinion, however informal, whereby such compliance will appear, or want of it will upset the award"); Gorman, *supra* note 1, at 667 (setting forth the view that the FAA's requirement of vacatur for "evident partiality" and "exceeding their powers" assumes "that at least the barest of findings and reasons should be set forth in an arbitral award").

224. *See* Abrams, *supra* note 202, at 585–87 (setting forth the elements of the arbitral opinion).

225. *See* Kaczmarek, *supra* note 222, at 314–25 (discussing the individual, institutional and public benefits of written opinions). South African Labour Court Judge Marcus, in *Dairybell (Pty) Ltd. v. CCMA*, 1999 (10) BLLR 1033 (LC), *available at* http://www.legalinfo.co.za, cited the following about the importance of written reasons for arbitration awards under the South African Labor Relations Act of 1995:

> There is a strong case to be made for the giving of reasons as an essential element of administrative justice. The need for it has been sharply exposed by the expanding law of judicial review now that so many decisions are [likely] to be quashed or appealed . . . on grounds of improper purpose, irrelevant consideration [sic] and errors of law of various kinds. Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not and so he may be deprived of the protection of the law. A right to reasons is therefore an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it since the giving of reasons is required by the ordinary [person's] sense of justice. It is also a healthy discipline for all who exercise power over others.

Id. ¶ 16. *See generally infra* text and accompanying notes 265–81 (discussing judicial review under the 1995 Labour Relations Act of South Africa).

review. The opinion-writing process focuses an arbitrator's concentration on determining the legal rules for decision, sorting out the facts made relevant by such decisional rules, and reasoning to the conclusions to be drawn by applying the appropriate rules to the facts.[226] This deliberation requires a discipline that produces greater clarity and better reasoned decisions than the simple oral or written pronouncement of conclusions.[227] The benefits of this painstaking work go to the arbitrator and the parties, and in statutory arbitration, to the public as well.[228]

Despite these considerable benefits of opinion-writing, a requirement that arbitral opinions be written remains uncertain and controversial. Before the Court extended FAA coverage to employment contracts in *Gilmer*, the Court had said more than once that arbitrators were not obligated "to give [the court] their reasons for an award."[229] In *Gilmer*, one of the employee's arguments against the enforcement of the pre-dispute arbitration agreement was the arbitral practice of not writing awards. This resulted, Gilmer argued,

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226. Anecdotal evidence including the experience of the writer suggests that arbitrators are often surprised at how writing the opinion changes the initial impressions of the case. *See* Abrams, *supra* note 202, at 585 n.88 (saying that "[t]he very activity of expressing the basis for decision channels an adjudicator's mind along rational lines" and noting the following quote attributed to Felix Frankfurter: "we all feel much more responsible if we have to sit down and write out why we think what we think"). These views are reinforced by self-regulation theory in psychology, which holds that accountability is "another variable that increases the importance of making the right decision". *See* ROY F. BAUMEISTER ET AL., LOSING CONTROL—HOW AND WHY PEOPLE FAIL AT SELF-REGULATION 92 (1994) (defining accountability as "any pressure on the person to defend his or her decision or to personally accept bad consequences for making a wrong choice" and elaborating "when people expect to have to justify their judgments, or even if they merely think that their decisions will be made public, they try harder to be thorough . . . [t]hus, various forms of accountability make people pay more attention, process information more thoroughly, and hence reach more informed decisions and resist bias.")

227. *See* Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 782 (1983) (describing her conviction that every appellate decision "requires some statement of reasons," because "[t]he discipline of writing even a few sentences or paragraphs explaining the basis for the judgment insures a level of thought and scrutiny by the court that a bare signal of affirmance, dismissal, or reversal does not").

228. *See* Kaczmarek, *supra* note 222, at 321–25 (noting these arguments and pointing out that they are either overblown or outweighed by offsetting gains to the public).

229. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960) (expressing the concern that "requir[ing] opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions" and noting that "a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement"); Barnhardt v. Polygraphic Co. of Am., 350 U.S. 198, 203 (1956) (making the point that arbitration as a forum is radically different from a court in part because arbitrators need not give their reasons for their results).

in "a lack of public knowledge of employers' discriminatory policies, an inability to obtain effective appellate review, and a stifling of the development of the law."[230] Rather than affirming the arbitral practice of not writing opinions, the Court responded to this argument by implicitly acknowledging the ill-effects of the practice and pointing out that the New York Stock Exchange ("NYSE") imposed a writing requirement upon arbitrators and required public access to the awards.[231] Because the extent of any writing requirement contemplated by the Court in *Gilmer* is not clear, arguably the *Gilmer* decision extending the FAA to statutory cases both raises new grounds for requiring a written opinion and fails to preclude reviewing courts from considering the absence of such opinions in reaching vacatur decisions. A written opinion requirement or negative inference in the absence of an opinion would create an incentive for arbitrators to write reasoned awards to improve their chances of passing muster under the *substantive integrity* standard, rather than to eschew written reasoned awards in order to avoid scrutiny under the stricter "manifest disregard" standard.[232]

Though written opinions have been a part of the norm in labor arbitration,[233] they have been an anomaly in commercial arbitration.[234] Written opinions are thought to compromise the confidentiality of the proceeding, increase the cost and decrease the efficiency of arbitration, and threaten finality by increasing the probability of vacatur.[235] However, labor arbitrators have traditionally written opinions without substantially compromising confidentiality, cost effectiveness, efficiency, or finality,[236] and, in any event, in this new

230. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991).

231. The NYSE requirement of written awards, names of the parties, and a summary of the issues is not an opinion-writing requirement. Unlike the award, the opinion sets forth the arbitrator's reasoning. *See* Alleyne, *supra* note 1, at 414 (noting the distinction between awards and opinions).

232. Note that this approach chooses the stick of increasing the probability of setting aside an award in the absence of a written decision rather than Professor Hayford's carrot of refraining from applying non-statutory standards in order to encourage arbitrators to write reasoned decisions. *See Reigning in*, *supra* note 171, at 140; *New Paradigm*, *supra* note 171, at 501–02. *See generally* Kaczmarek, *supra* note 222.

233. *See* Alleyne, *supra* note 1, at 412 (noting that "[o]pinion-writing is part of labor arbitration's culture, its accepted unwritten rules").

234. *See* GABRIEL M. WILNER, DOMKE ON COMMERCIAL ARBITRATION § 29.06 (rev. ed. 2000)

235. *See* Kaczmarek, *supra* note 222, at 325–30; Gorman, *supra* note 1, at 667–68.

236. *See* LeRoy & Feuille, *supra* note 7, at 19 (showing that district courts confirmed approximately 72% of the awards from 1960–1991 and 70% during 1991–2001, while appellate courts confirmed approximately 71% of the award in the earlier period and 66% in the later period).

era of arbitrating public rights, some sacrifice of confidentiality may be warranted.[237]

Moreover, many distinguished and thoughtful observers and practitioners have argued that opinion-writing by arbitrators deciding statutory cases is essential.[238] Because the *substantive integrity* standard requires a showing of justifiability, an appellate court may not be able to perform its reviewing function under the standard without a written opinion. For example, consider an arbitrator's decision denying the equipment manager's claim of "hostile or abusiveness environment" after the Supreme Court's *Harris* decision. If the arbitrator simply announces that the company is not liable without giving reasons for this conclusion, it may be impossible for the reviewing court to determine that in reaching this decision the arbitrator incorrectly identified and applied the pre-*Harris* rule that a psychological injury must be shown. In this event, contrary to the assurances of *Gilmer,* review would not be "sufficient to ensure that [the arbitrator complied] with the requirements of the statute."[239]

(3) The Decided Cases

Contrary to the Second Circuit's decision, the *substantive integrity* standard cuts in favor of vacatur in *DiRussa,* where the arbitrators awarded damages but erroneously declined to award

237. *See* George Nicolau, *Scrutiny of Arbitration Forums Focuses on Fairness,* NAT'L L.J. B7 (Oct. 5, 1998) (opining that written opinions will soon be the standard in employment cases); Gorman, *supra* note 1, at 668; Kaczmarek, *supra* note 222, at 326 (arguing that public law trumps confidentiality).

238. *See, e.g.,* Nicolau, *supra* note 237 (explaining that the guidelines go beyond the protocol by recognizing that written opinions are even more important in statutory disputes, "because they enable claimants, prospective claimants, the public and administrative agencies charged with enforcing anti-discrimination statutes to know *how* the arbitrators reached their conclusions and to understand whether the rights at issue have been vindicated" (emphasis added)); Zack, *supra* note 9, ¶ C.5 (providing that an arbitrator should issue an opinion); STATEMENT AND GUIDELINES OF THE NATIONAL ACADEMY OF ARBITRATORS, GUIDELINES ON ARBITRATION OF STATUTORY CLAIMS UNDER EMPLOYER-PROMULGATED SYSTEMS ¶ IV (adopted May 21, 1997), *available at* http://www.naarb.org/guide-lines.htm. (last visited August 11, 2001) (providing for an opinion that "recite[s] findings of fact and the reasoning for conclusions of law contained in the opinion and award" and urging the arbitrator to "identify and deal with all statutory issues raised, being mindful of the standards of review which may apply"); COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS—FINAL REPORT, U.S. DEP'TS OF COMMERCE AND LABOR, *available at* http://www.ilr.Cornell.edu/library/e_archive/gov_reports/default.html (last visited August 11, 2001) (recommending "a written opinion by the arbitrator explaining the rationale for the result; and sufficient review to ensure that the result is consistent with the governing laws").

239. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 n.4 (citing Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987)).

attorneys fees despite the statutory mandate.[240] The arbitrators did not heed the employee's argument that he was "entitled to" attorneys fees under the statute, nor did they give reasons for denying it.[241] In that case, three possibilities account for the decision: (1) the arbitrator knew and ignored the law, (2) the arbitrator did not know the law but engaged in reasoning on the point, or (3) the arbitrator did not engage in reasoning, since no legitimate reasoning could have produced the outcome. Under either possibility (1) or (3) the award would lack substantive integrity, since the arbitrators would not have attempted reasoning in either case. Under possibility (2) the combination of an erroneous decision plus the absence of written reasons create a strong inference that the arbitrator did not reach the decision to deny attorneys fees through reasoning under the applicable law.[242]

Halligan is a different story. In that case there was no evidence of manifest disregard.[243] Though the record before the arbitrators contained strong evidence of age discrimination, the company had also produced evidence supporting its claim that it had been motivated by Halligan's performance problems.[244] Indeed, the district court judge, whose refusal to vacate the award was reversed by the Second Circuit, said:

> I cannot conclude that the panel did in fact disregard the parties' burdens of proof.... Crediting one witness over another does not constitute manifest disregard of the law [and] this Court's role is not to second-guess the fact-finding done by the Panel. Because there is factual as well as legal support for the Panel's ultimate conclusion, I determine that the Panel did not manifestly disregard the law.[245]

Had the arbitrators in *Halligan* written a reasoned decision based on their analysis of the evidence in the record, vacatur would probably have been improper under the *substantive integrity* standard. A reasoned decision might have produced the outcome in *Halligan*, even if a majority of judges might have disagreed with it.[246]

240. DiRussa v. Dean Witter Reynolds, Inc., 936 F. Supp. 104, 106–07 (S.D.N.Y. 1996).

241. *Id.* at 106.

242. Evidence that DiRussa indicated his entitlement to attorneys fees several times during the arbitration including his statement of claims received into evidence, his opening statement, and his brief reinforce this inference. *Id.*

243. *See* Poser, *supra* note 161, at 481–82 (arguing that the Second Circuit only paid lip service to the manifest disregard standard in *Halligan*, basing its holding instead on an erroneous finding of fact).

244. *Id.*

245. Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 200 (2d Cir. 1998).

246. STEPHEN BURTON, JUDGING IN GOOD FAITH 35 (Jules Coleman ed., 1992).

(4) Substantive Integrity Compared

The standards proposed by Professors Malin and Ladenson, Poser, and Hayford fail to fully accommodate the need to balance FAA and statutory policies. Unreasoned arbitral fact-finding may undermine public policy as much as unreasoned statutory interpretation. For example, in *Halligan* the Second Circuit vacated the award denying relief to the grievant for age discrimination finding manifest disregard in the arbitrator's ignoring the law, the evidence or both.[247] In light of the strong evidence of age discrimination the court found the arbitrator's factfinding erroneous.[248] In the court's view, the effect of this error was to deny the employee the protection of the ADEA.[249] An approach that would leave an arbitrator's factfinding unreviewable in every statutory case—such as the one suggested by Professors Malin and Ladenson—may undermine public policy.[250]

On the other hand, looking at the arbitral outcome without reference to reasoning would usurp the arbitral function. By imposing a *mens rea* component, manifest disregard—unlike the *substantive integrity* standard—deems the public interest reflected in statutes adequately served with the assurance that the arbitrator is not deliberately behaving irresponsibly. However, it does not account for the harm to public values that derives from the arbitrator's inadvertent failure to perform the essential reasoning function of the job. The answer is not to focus on the outcome alone as Professor Poser would have it, but to ensure that the award was reasoned. Even though insisting on reasoning does not guarantee a correct result, it greatly increases the odds. The remaining margin of error may be an accommodation to FAA policy that statutory policy must make.[251]

247. *Halligan*, 148 F.3d at 204.

248. *Id.*

249. *Id.* Even though one might disagree with the Court in *Halligan*, as suggested above in the text and note 247, the Court's finding illustrates a potential problem with arbitral factfinding that may require setting aside the award.

250. It might be argued that such scrutiny of arbitral factfinding will undermine finality. However, this claim is subject to the rejoinder that the protection of important public rights justifies the sacrifice of some finality.

251. *See* Gorman, *supra* note 1, at 673 (citing the courts' power to vacate awards on public policy grounds under *Misco*, the "clearly repugnant" standard in NLRB deferral cases, and deference to a permissible reading of a statute by an administrative agency and saying: "Although there may be nuances of difference in these formulations, they all express the idea that courts will tolerate a margin of error in the application of law—in part due to the presumed capabilities of the initial decision maker, but also due to considerations of litigative efficiency").

While Professor Hayford has made a Herculean effort to limit courts to section 10(a) review and the manifest disregard and public policy standards narrowly construed, his approach does not recognize the coexistence of FAA and other statutory policies or accede to the Courts' determination to guarantee some modicum of justice in public policy cases. The *substantive integrity* standard balances competing public policies by preserving a judicial role that advances statutory policy while giving reasoned arbitral outcomes the finality contemplated by national labor policy.[252]

III. The South African Experiment

A. The "Justifiability" Standard of Review

The South African Labour Appeal Court's treatment of judicial review of arbitration awards under the 1995 Labour Relations Act ("LRA") supports the notion of a distinction between statutory and contractual cases. The LRA is a forward-looking piece of legislation that sought to cull the positive features of labor law systems throughout the developed world and integrate them into a world class statute governing labor and employment law in democratic South Africa.[253]

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252. *See id.* at 669, pointing out the following:

> It is one thing when an arbitrator deciding a grievance under a collective agreement makes a foolish error in interpreting or applying the contract terms; it is unlikely that a significant public policy will be impaired and, in any event, the parties are free to attempt promptly to rectify the error through private dealings at the next contract renegotiation. When the arbitrator's error relates to statutory interpretation or application, there is legitimate concern that a larger public objective has been frustrated. It is also clear that the balancing called for where public policies compete is not appropriate where the labor and employment claims are contractual. Yet, as already noted, it is well-settled that even where purely contractual claims are before the arbitrator, the court will exercise its common law power to refuse to enforce contracts as interpreted in arbitration awards that violate public policy or law.

Cf. Hayford, *supra* note 108. It should be noted that there is no uniformity of views among arbitrators about whether it is appropriate for an arbitrator to decide questions of public policy that are not incorporated into the contract. In those cases where the arbitrator has a more narrow jurisdictional view, it is possible for the award to draw its essence from the agreement and still be set aside on public policy grounds. Public policy cases may have more to do with the validity of the contract as read by the arbitrator than with any defect in the arbitrator's reasoning process. They do require the reviewing court to examine the contract independently as interpreted to prevent its violation of public policy.

253. *See* Calvin William Sharpe, *Judicial Review of Arbitration Awards Under the New South Africa Labour Relations Act of 1995*, 33 CASE W. RES. UNIV. J. INT'L L. 277 (2002).

One of these features is a right enjoyed by all employees not to be unfairly dismissed and to have any dispute about the fairness of a dismissal referred to the Commission for Conciliation, Mediation, and Arbitration ("CCMA").[254] When a dispute is referred, the CCMA (through one of its approximately 400 commissioners located throughout South Africa's nine provinces) must first attempt to mediate the dispute and if the parties fail to reach a settlement it must then arbitrate the dispute.[255] Because of the breadth of coverage under the LRA, the CCMA receives approximately 80,000 cases annually, of which approximately 14,000 go to arbitration.[256] These numbers are staggering in a relatively small country of approximately forty-four million people and a workforce of approximately seventeen million.[257]

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254. Sections 185 and 191 provide as follows:

> 185 Right Not To Be Unfairly Dismissed
>
> Every employee has the right not to be unfairly dismissed.
>
> . . . .
>
> 191 Disputes About Unfair Dismissals
>
> (1) If there is a dispute about the fairness of a dismissal the dismissed employee may refer the dispute in writing within 30 days of the date of dismissal to—
>
> . . . .
>
> (b) the Commission . . . .

Labour Relations Act 66 of 1995 §§ 185, 191, 4 JSRSA 2-165, 2-215, 2-216 (1998).

255. Section 191 further provides:

> (4) The Commission must attempt to resolve the dispute through conciliation.
>
> (5) If . . . a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved—
>
> (a) the . . . Commission must arbitrate the dispute at the request of the employee if—
>
> (i)the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity[;] . . .
>
> (ii)the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable; or
>
> (iii)the employee does not know the reason for dismissal; . . . .

Labour Relations Act 66 of 1995 § 191.

256. *See* Sharpe, *supra* note 253, at 5–6.

257. *See* Economic and Financial Data for South Africa *at* http://www.resbank.co.za/economics/zaflink1.html; Economically Active Population Estimates and Projections: South Africa *at* http://wwwlaborsta.ilo.org. Compare EEOC's receipt of approximately 81,000 charges of employment discrimination in 2001 in the United States, population of approximately 280 million and workforce of 141 million. U.S. Equal Employment Opportunity Commission, Enforcement Statistics and Litigation *at* http://www.eeoc.gov/stats/enforcement.html (last visited March 9, 2002); U.S. Census Bureau, Population Estimates *at* http://eire.census.gov/popest/estimates.php.

The Labour Court has jurisdiction to review arbitration proceedings conducted by the CCMA,[258] and the Labour Appeal Court is the highest court with jurisdiction over labor matters.[259] Two sections of the LRA bear upon judicial review of arbitration awards. One is quite similar to federal law in the United States. It permits setting aside an award because the Commissioner committed misconduct or gross irregularity, the Commissioner exceeded her powers, or the award was improperly obtained—what might generally be called, arbitral misconduct.[260] This is a narrow standard of review. The other section expressly provides that despite the first provision, the Labour Court can review any act of the CCMA on "any grounds that are permissible in law" including the South African Constitution.[261]

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258. Section 157 provides as follows:

> (1) Subject to the constitution and section 173 [defining the jurisdiction of the Labour Appeal Court], and except where *this* Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of *Act* or in terms of any other law are to be determined by the Labour Court [e.g., § 145].

Labour Relations Act 66 of 1995 § 157, 4 JSRSA 2-210 (1998).

259. Section 167 provides in part:

> 167 Establishment and Status of Labour Appeal Court
>
> . . . .
>
> (2) The Labour Appeal Court is the final court of appeal in respect of all judgments and orders made by the Labour Court in respect of the matters within its exclusive jurisdiction.

Labour Relations Act 66 of 1995 § 167, 4 JSRSA 2-212.

260. Section 145 provides as follows:

> 145 Review of Arbitration Awards
>
> Any party to a *dispute* who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award—
>
> . . . .
>
> (b) if the alleged defect involves corruption, within six weeks of the date that the applicant discovers the corruption.
>
> A defect referred to in subsection (1), means—
>
> (a) that the commissioner—
>
> committed misconduct in relation to the duties of the commissioner as an arbitrator;
>
> committed a gross irregularity in the conduct of the arbitration proceeding; or
>
> exceeded the commissioner's powers; or
>
> that an award has been improperly obtained.

Labour Relations Act 66 of 1995 § 145, 4 JSRSA 2-207.

261. Section 158 of the Labour Relations Act reads as follows:

> 158 Powers of Labour Court
>
> (1) The Labour Court may
>
> . . . .
>
> (g) despite section 145, review the performance or purported performance

A strongly held view among South African lawyers and Labour Court judges had been that the second provision permitted a broader review of the merits of the arbitration award, while the first called for a narrow scope of review.[262] Even though considerable pressure existed among lawyers and Labour Court judges to read the second section as requiring a broader standard of review, the Labour Appeal Court took a different approach. In *Carephone (Pty) Ltd. and Marcus NO*, the Labour Appeal Court interpreted the two sections together in a way that suggested a scope of review based on whether the arbitration was public or private.[263] Under this approach if the award resulted from a private, voluntary arbitration under section 33 of the Arbitration Act of 1965,[264] the scope of review would be narrow. On the other hand, if a CCMA commissioner issued the award under the LRA of 1995, where arbitration is compulsory, the standard of review would be broader in order to further the public purposes of the LRA. The CCMA commissioner would not only have to refrain from misconduct but her award would have to be "justifiable."

The narrow standard under section 33 of the Arbitration Act, like section 10(a) of the FAA, is concerned only about procedural integrity. It does not permit the reviewing court to set aside an award on the basis of error alone. *Carephone's* broader justifiability

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> of any function provided for in the Act or any act or omission of any person or body in terms of this Act on any grounds that are permissible in law . . . .

Labour Relations Act 66 of 1995 § 158, 4 JSRSA 2-211. *See infra* note 265 and accompanying text.

262. *See, e.g.*, Shoprite Checkers (Pty) Ltd. v. CCMA, 1998 (19) I.L.J. 892, 899 ¶ 27.8–28 (LC) (referring to section 33 of the Constitution as a ground permissible in law, PJ Pretorious AJ held that Commissioners performed administrative actions that were constitutionally required to be "justifiable in relation to the reasons given for it").

263. 1998 (19) I.L.J. 1425 (LAC).

264. Section 33 of the Arbitration Act 42 of 1965 reads as follows:

> (1) Where—
>
> (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
>
> (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
>
> (c) an award has been improperly obtained,
>
> the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting award aside.
>
> (2) An application pursuant to this section shall be made within six weeks after the publication of the award to the parties: Provided that when the setting aside of the award is requested on the ground of corruption, such application shall be made with six weeks after the discovery of the corruption and in any case not later than three years after the date on which the award was so published.

Arbitration Act 42 of 1965, 1 JSRSA § 33, 2-10 (1998).

standard, informed by section 158 of the LRA and section 33 of the South African Constitution, expressed a broader concern; but did it mean that the commissioner's award has to be "right" on the merits, requiring a reviewing court to set aside an erroneous decision?

Applying section 33 of the Constitution, the *Carephone* court held that the merits should be considered only to determine whether the outcome is rationally justifiable in terms of the reasons given for it.[265] Spelling out the "justifiability" standard, the court formulated the following test: "[I]s there a rational objective basis justifying the connection made by the [arbitrator] between the material properly available to him and the conclusion he or she eventually arrived at?"[266]

The court was not to consider the merits of the award to substitute its opinion on the "correctness thereof" in the case of a decision it deemed incorrect.[267] Thus, *Carephone* created a subtle

265. Section 33 of the South Africa Constitution reads as follows:

> Section 33 Just Administrative Action
>
> (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
>
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
>
> (3) National legislation must be enacted to give effect to these rights, and must—
>
> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
>
> (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
>
> (c) promote an efficient administration.

CONST. OF S. AFR. § 33 (1997), *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gilbert H. Flanz ed., Inter-University Associates, Inc. trans., 1997).

Judge Froneman makes the point in *Carephone* that sections 33(1) and (2) should be read as incorporating item 23(2) of Schedule 6 of the Constitution until the legislation envisaged in sections 33(3) is enacted. Item 23(2) reads:

> Every person has the right to–
>
> (a) lawful administrative action where any of their rights or interests is affected or threatened;
>
> (b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;
>
> (c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and
>
> (d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.

CONST. OF S. AFR. *supra*, § 23(2); *see also Carephone*, 19 I.L.J. at 1431 ¶ 16.

266. 19 I.L.J. at 1435 ¶ 37.

267. The following language captures the Court's view:

> In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the "merits" of the matter in some way or another.

distinction that asked courts to look at the merits, not in order to rule on them but only to ensure that Commissioners were issuing reasoned awards. The former would be an *appeal*, not permitted under the LRA, while the latter is permissible as *review* under the statute.[268]

Though the *Carephone* justifiability standard has been challenged both in the Labour Appeal Court and the Labour Court,[269] the problem may lie more in the Labour Court's application of the standard in some cases than the standard itself.[270] Indeed, both the Labour Appeal Court and the Labour Court have interpreted the "gross irregularity" standard of section 145(2)(a)(ii) of the LRA in a way that seems virtually indistinguishable from the Labour Appeal

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> As long as the judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.

Id. ¶ 36.

268. *See infra* note 271.

269. *See* Toyota S. Africa Motors (Pty) Ltd. v. Radebe, 2000 (3) BLLR 243 (LAC), *available at* http://www.legalinfo.co.za. See also *Shoprite Checkers (Pty) Ltd. v. A Ramdaw NO*, (2000) 21 I.L.J. 1232 (LAC), in which Wallis AJ quoted Nicholson JA in *Toyota South Africa Motors* directly:

> I intend dealing briefly with the last mentioned ground, namely the justifiability of the award, as I have certain misgivings about whether it constitutes an independent ground upon which an award can be attacked. As such it is not part of section 145, which restricts an applicant to misconduct, corruption, gross irregularity and the excess of powers. I am not sure that Froneman DJP was importing the last mentioned ground into section 145 and I believe the mention of it in the passage above was in any event an *obiter dictum*. I have two difficulties with importing this ground into the Act. The first relates to the difference between appeals and reviews and the second relates to the constitutional implications of section 145.
>
> . . . .
>
> The reference by Froneman DJP [in *Carephone*] to the constitutional provisions must be seen in the context of the specific grounds or review in section 145. My misgivings relate, therefore, to the notion that the grounds set out in that section are not the only avenue open to a party to challenge an award. It was not suggested in this case that the grounds set out in section 145 were unconstitutional and they are fully operative until declared unconstitutional. If there was such a constitutional challenge the court would have to evaluate whether the creation of the CCMA and the other machinery of the Act provides sufficient justification for the limitation of the rights of administrative justice provided in the constitution. Although, as I have mentioned, it is not necessary for the purposes of this judgment to decide the issue, I have grave doubts that the concept of an award being justifiable as to the reasons given is an independent ground of review.

Shoprite, 21 I.L.J. at 1243–44 ¶¶ 41–42.

270. *See* Metcash Trading (Pty) Ltd. v. Sithole NO, 1998 (4) BLLR 351 (LC), *available at* http://www.legalinfo.co.za; Sharpe, *supra* note 253 (discussing "misapplication" cases).

Court's articulation of the justifiability standard in *Carephone*.[271] Both the "justifiability" and the "gross irregularity" standards pivot upon the arbitrator's reasoning—in South African parlance whether the arbitrator "applied the mind."

B. The Cases

Confirming the workability of the *Carephone* standard and the one proposed in this Article, the South African Labour Courts have successfully applied the "justifiability-gross irregularity" standard despite the subtlety of the distinction between review and appeal. Not surprisingly, the vast majority of awards are upheld on review under the *Carephone* standard. They tend to fall into three categories. First, in the *easy* cases, the decision is correct and the Labour Court dismisses the application or the award is not justifiable and is set aside. Second, in the *harder* cases the award is wrong but justifiable. Third, in the *misapplication* cases, right or wrong, the Court sets aside the award because it misapplies the standard.

Though the easy cases abound,[272] one example will demonstrate the Labour Court's approach in such cases. In *Dairybell (Pty) v.*

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271. For example in *Radebe* the Labour Appeal Court set aside an award as grossly irregular because the Commissioner believed either that "a clean disciplinary record and long service always precluded dismissal as an appropriate sanction for misconduct or that the existence of some other lesser sanction, for example suspension or demotion, excluded the appropriateness of dismissal." *Shoprite*, 21 I.L.J. at 1232 ¶ 94. The *Radebe* court was described as saying that "[t]his approach was so deficient in law, logic and sound labour relations practice that it was said to be 'indefensible on any legitimate ground.' . . . There was 'a yawning chasm between the sanction which the court would have imposed and that which the commissioner imposed.'" *Id.* (internal citations omitted).

Though Wallis AJ rejected *Carephone*'s conclusion that arbitrating commissioners are engaged in administrative action and refused to apply the justifiability standard, he adopted the same standard for gross irregularity in *Shoprite* as the Labour Appeal Court did in *Radebe*. *Id.* In *Shoprite*, the judge contested the inferences drawn from the presence or lack of evidence and considered his conclusions wrong. Yet, he recognized that the commissioner was in a better position than he to rule on credibility and that he had weighed the evidence in reaching his conclusion, making it inappropriate of the Labour Court to conclude "that no reasonable commissioner could in the proper exercise of his functions have made that award." *Id.* ¶ 96. The judge also opined that the award lacked "justifiability" and would have set aside under that standard. *Id.* ¶ 95. However, gross irregularity as interpreted in *Radebe* and *Shoprite* seems the same as *Carephone* review, i.e., "[n]o reasonable commissioner could in the proper exercise of his function have made the award" sounds the same as "whether the award was justifiable on all the materials before the commissioner." If a reasonable commissioner properly exercising his function could have made the award, it would be justifiable under *Carephone*. Under both standards the only concern should be whether there was a legitimate reasoning process.

272. *See, e.g.*, Aitken v. Khoza, 2000 (9) LC 1.11.17 (LC) (Stein AJ); Gqibela v. W. Driefontein Mine, 2000 (9) LC 1.11.6 (LC) (Loxton AJ); Waverly Blankets Ltd. v. CCMA, 2000 (9) LC 1.11.28 (LC) (Mpofu AJ); Abrahams v. S. African Cultural History Museum,

CCMA, the arbitrator, without furnishing reasons, ordered the company to compensate the employee for the equivalent of six months salary, despite the arbitrator's finding that the employee had engaged in misconduct.[273] The Labour Court set aside the award, because it could not comprehend the arbitrator's ruling without reasons (however brief) demonstrating the rational relationship between the materials before the arbitrator and the conclusion reached.[274] Elaborating, the court reasoned:

> A consideration of the Commissioner['s] reasons makes it impossible to ascertain precisely what misconduct was found to have been proved and why the employee was acquitted of other charges. The Commissioner's discussion of the appropriate sanction suggests that he found some misconduct to have been proved but the precise nature of that misconduct is nowhere stated. Where, as in the present case, there are several charges of misconduct, each ought to be separately dealt with and the arbitrator's analysis and conclusions in relation to each count ought to be clearly set out. It is only in this way that the arbitrator's reasoning and conclusions will be comprehensible. In my view, the standard of justifiability has not been met in the present matter.[275]

Because the Commissioner reached an apparently wrong decision and did not supply reasons, he deprived the court of a means of evaluating whether a rationally objective basis supported the conclusion.[276] The court noted facilitating judicial review, educating citizens, and establishing the legitimacy of the administrative process as important purposes for supplying reasons supporting the award.[277] Like *Dairybell,* other easy cases reveal a straightforward application of the "justifiability-gross irregularity" standard.[278]

1999 Case No C89/98 (LC), *available at* http://www.legalinfo.co.za; E. Rand Gold & Uranium Co. v. CCMA, 1999 Case No. J1351/97 (LC), *available at* http://www.legalinfo.co.za; Pritchard Cleaning Servs. v. Lebea, 1999 Case No. J2341/98 (LC) (Ngwenya, AJ); Purefresh Foods (Pty) Ltd. v. Dayal, 1999 (8) LC 1.11.23 (LC) *available at* http://www.legalinfo.co.za; Themba Mtshali v. CCMA, 1999 Case No. J3103/98 (LC), *available at* http://www.legalinfo.co.za; University of the N. v. Nobriega, 1999 (8) LC 1.11.33 (LC); OD Zaayman v. CCMA, 1999 (20) I.J.J. 412 (LC).

273. 1999 (10) BLLR 1033 (LC), *available at* http://www.legalinfo.co.za.

274. *Id.* ¶¶ 17, 19.

275. *Id.* ¶ 17.

276. On the importance of supplying reasons, see Judge Marcus's remarks, *supra* note 225.

277. *Id.*; *see supra* notes 234–54 and accompanying text.

278. *See* Reutech Def. Indus. (Pty) Ltd. v. Govender, 2000 (9) BLLR 1101 (LC), *available at* http://www.legalinfo.co.za (where the Commissioner's ignoring a positive lab test and inexplicably not awarding full back pay despite a finding that the company failed to prove intoxication led to the setting aside of the award under the *Carephone* standard); Malelane Toyota v. CCMA, 1999 (6) BLLR 555 (LC), *available at* http://www.legalinfo.co.za (where the Court set aside an award in favor of an employee dismissed for fraud

The harder cases provide more assurance that Labour Court judges appreciate the distinction between the *Carephone* standard of review and an appeal. In these cases, judges avoid the pressure to set aside awards that they believe are both justifiable and wrongly decided. For example, in *Metro Cash & Carry Ltd. v. Le Roux*, the Commissioner found that the employee's dismissal was an excessive sanction, even though the employee had used undue force in assaulting a customer and had failed to defuse the escalating hostilities.[279] The Commissioner's decision was premised upon the customer's provocation of the employee and the award ordered a six-week suspension. The Labour Court relied on *Carephone* to dismiss the company's application for review and revealed an acute awareness of the distinction between a review and appeal:

> The conclusions reached by the [Commissioner] . . . in making his arbitration award [are] such that I do not necessarily agree on the correctness of the outcome thereof.
>
> However, in reviewing arbitration awards of the CCMA the Labour Court must leave some room for differing opinions, as long as those opinions are justifiable in relation to the reasons given for [them].
>
> This is not an easy test but I believe that the Labour Court should heed the warning by the Labour Appeal Court and not enter the merits of such arbitration award with a view to substitute the Court's opinion on the correctness thereof.[280]

The Labour Court showed similar restraint in *City Lodge Hotels Ltd. v. Gildenhuys NO*.[281] In that case, the Commissioner ordered the reinstatement of an employee who had been terminated for improperly removing company property.[282] The award was based on a record containing conflicting evidence on the issue of guilt, and the company's application cited evidence supporting the guilt of the employee.[283] Nonetheless, the Labour Court dismissed the application saying that the weighing of evidence is a matter for the Commissioner rather than the court unless the decision gives "manifestly excessive or manifestly inadequate weight . . . to a

issued under the mistaken belief that the Commissioner could only consider the company's evidence submitted at its internal disciplinary hearing and not the more complete evidence establishing the fraud at the arbitration hearing).

279. 1999 (4) BLLR 351, (LC), *available at* http://www.legalinfo.co.za.

280. *Id.* ¶¶ 12–14.

281. Case No. J3054/98 (LC), *available at* http://www.legalinfo.co.za.

282. *Id.* ¶ 4.

283. *Id.*

relevant consideration."[284] In reaching this conclusion the court acknowledged the difficulties "in interfering on review with decision-making functions involving matters of judgement and evaluation."[285] Ultimately, the court was faithful to its obligation not to interfere with the award on review, "notwithstanding factors pointing to a suspicion of misconduct on the part of [the employee]."[286]

In this category of cases, judges have shown an ability to distinguish between *justifiability* and *correctness*. They have been able to limit their consideration of the merits to the *Carephone* question of whether the outcome is "rationally justifiable." The South African experiment provides evidence that careful judges are capable of applying the standard of *substantive integrity* proposed in this Article.[287] It also reinforces the significance of written opinions in ensuring the successful application of the standard.

Conclusion

The sharp turn in the last decade from judicial to arbitral enforcement of statutory rights can lead to either an enhancement or a diminution of statutory protections.[288] Two keys to the eventual outcome will be the quality of arbitral performance in this new area of responsibility and the effectiveness of judicial monitoring. These factors are symbiotically related, since arbitrators are likely to be more careful if their work product is subject to more than perfunctory judicial scrutiny. Yet, the enhancement of statutory protections turns on the greater access to enforcement that arbitration can provide. Such access depends upon preserving the cost, informality, speed, and

284. *Id.* ¶ 33. It should be noted that the Labour Court's observation about excessively over or undervaluing the weight of evidence as a basis for vacatur supports the current proposal that both the arbitrator's factfinding and lawfinding should be subject to integrity review.

285. *Id.* ¶ 34.

286. *Id.* ¶ 35.

287. Of course, some judges are more capable than others, and the category of *misapplication* cases demonstrates the point. *See, e.g.*, Metcash Trading (Pty) Ltd. v. Sithole NO, 1998 Case No. J1079/97 (LC), *available at* http://www.legalinfo.co.za (where the judge set aside an award, because the arbitrator applied a plausible interpretation of the applicable law that was different from the one that the judge thought should be applied); Solomon v. CCMA, 1999 (20) I.L.J. 2960 (LC), *available at* http://www.legalinfo.co.za (where the judge set aside an award, even though he conceded correctness, because the Commissioner's reasoning was faulty); and Eddels SA (Pty) Ltd. v. Sewcharan, 2000 (21) I.L.J. 1344 (LC) (where the judge set aside the award as too legalistic).

288. The consequences of a qualitative forum change brought on by *Gilmer* make "no change in the status quo" an unlikely third choice.

finality advantages of arbitration over litigation. Judicial review should be effective but not so overbearing as to negate these advantages.

In this Article, I have proposed a *substantive integrity* standard of review that accomplishes effective monitoring of arbitral performance while preserving the advantages of arbitration as a forum for enforcing statutory employment rights. Under this standard, the court looks independently at the record first to determine whether the arbitrator's decision is correct; a correct decision ends the matter. If the decision is incorrect, the court closely examines the arbitrator's law-finding for correctness. If the law is correctly selected, the court evaluates the arbitrator's fact-finding and law applying only to determine whether the arbitrator's conclusions have been reasoned from the materials in the record. Reasoned conclusions are entitled to deference, even though the court would have reached a different result. I have argued that an appropriate level of judicial scrutiny is possible only when a written opinion explains the arbitrator's reasoning; thus, the absence of a such an opinion supports a negative inference regarding the rationality of an erroneous award.

This Article demonstrates first that this approach is grounded in the professional integrity of the arbitrator. Second, it is informed by the need to reconcile the sometimes competing policies of the FAA and employment statutes. Third, it recognizes the judicial responsibility and predisposition to protect public values embodied in congressional enactments. Finally, it offers empirical support for the workability of the proposed standard on a grand scale in South Africa under the Labour Relations Act of 1995.

My hope is that the *substantive integrity* review standard will help courts and arbitrators to appreciate each other's roles in meeting their shared responsibility to enforce statutory rights in the employment setting. Under this approach, American workers in this new era are more likely to realize the protections intended by Congress in a broad range of statutes designed to promote fairness in the workplace.

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