brethren did during the early post-*Trilogy* period. But the composition of the judiciary changes quickly. President Carter appointed over half the federal judges who were active at the end of his four years in office. President Reagan has (or shortly will have) appointed over half the currently active federal judiciary. For reasons I hope I have made fairly clear, the continually changing complexion of the federal courts has a significant effect on the relationship between arbitrators and courts. The attitude of the next President, and those around him, toward judicial appointments, as well as their basic political and social philosophy, will probably have more to do with the nature of the future relationship of arbitrators and courts than any other single factor.

Then again, arbitration has proven itself to be a safe, solid, productive, and acceptable institution. As in the case of the judiciary, its ways are becoming set and its practices will not be easy to change. Like an upper-middle-aged couple that has somehow surmounted all the obstacles to permanent togetherness, arbitrators and judges will continue to undergo frustrating and uneasy periods, will quarrel and complain about each other from time to time, but will soon arrive, if we haven't already, at a modus vivendi that neither finds ideal; yet, given the human condition, it is as good a one as either party could reasonably hope for or expect.

II. AFTER THE ARBITRATION AWARD: THE PUBLIC POLICY DEFENSE

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My topic is an old problem[1] which has recently been highlighted by a series of discordant decisions,[2] including the *Misco* case[3] now pending before the Supreme Court.

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[1]*See Black v. Cutter Laboratories*, 43 Cal. 2d 788, 278 P.2d 905, 35 LRRM 2391 (Cal. 1955), *cert. denied*, 351 U.S. 292, 38 LRRM 2160 (1956); *Electrical Workers, IUE, Local 453 v. Otis Elevator Co.*, 314 F.2d 25, 52 LRRM 2543 (2nd Cir.), *cert. denied*, 373 U.S. 949, 53 LRRM 2394 (1963).

[2]*See infra* text accompanying and immediately following notes 15, 17, and 20.

[3]*Misco, Inc. v. Paperworkers*, 768 F.2d 739, 120 LRRM 2119 (5th Cir. 1985), *cert. granted*, 107 S. Ct. 871 (1987). The facts of *Misco* are set forth *infra*, note 32.

For background, we begin, of course, with that morale building ode to labor arbitration, the *Steelworkers Trilogy,*[4] and particularly with the Court's celebrated, if elusive, requirement in *Enterprise Wheel* that an award, to be judicially enforceable, must "draw its essence" from the agreement.[5] I'll skip varying formulations of the essence of the essence test.[6] The following statement is reasonably accurate: The arbitrator, under a standard arbitration clause (which covers all disputes over the interpretation or application of the agreement), is restricted to interpreting or applying the agreement; he is not to dispense his own private brand of justice.[7] Accordingly, courts generally decline to enforce an award which they view as lacking any rational basis in the agreement.[8] For such awards, even though ostensibly grounded in the agreement, are viewed as violating strictures against personal, rather than contractual, standards of justice. In short, under the *Trilogy,* arbitrators have jurisdiction to be wrong but not to be goofy. Judges, experienced as they are with judicial, arbitral, and academic writing, appreciate the haziness of that distinction.

The public policy defense, at first blush, seems quite removed from a challenge based on an award's irrationality under the agreement. For the crux of that defense is that the arbitrator's award, no matter how faithful to the agreement, should not be enforced because the parties' private contract should be overridden by social ends.[9] The rub is, of course, the unruly character of such ends and the difficulty of defining the proper scope of the

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[4]*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

[5]*Supra* note 4 at 597.

[6]*See generally* Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review,* 80 Colum. L. Rev. 267, 270-77 (1980); Morris, *Twenty Years of Trilogy: A Celebration,* in Decisional Thinking of Arbitrators and Judges, Proceedings of the 33rd Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara E. Dennis (Washington: BNA Books, 1981), 331, 355–72.

[7]*See, e.g., Miller Brewing v. Brewery Workers Local 9,* 739 F.2d 1159, 1162–64, 116 LRRM 3130 (7th Cir. 1984).

[8]*See* cases cited by Kaden, *supra* note 6, at 270. *See also Hill v. Norfolk and Western Ry.*, 814 F.2d 1192, 124 LRRM 3057 (7th Cir. 1987); *Roberts & Schaefer Co. v. Mine Workers Local 1846,* 812 F.2d 883, 124 LRRM 2794 (3d Cir. 1987). On the convergence of the standards for judicial review under the Railway Labor Act and §301 of the Labor-Management Relations Act, 1947, *see Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry.*, 768 F.2d 914, 921, 120 LRRM 3022 (7th Cir. 1985). *See also Devine v. White,* 711 F.2d 1082, 114 LRRM 2348 (D.C. Cir. 1983) (award upheld even though court confessed its own inability to "fathom any coherent line of reasoning in his long and rambling opinion" or "to identify a glimpse of reasoned consideration.").

[9]*Cf.* Fried, Contract as Promise (1981), 3.

pertinent public policy. Corbin approved Professor Winfield's extraordinarily open-ended formulation. Public policy, Winfield observed, is "a principle of judicial legislation or interpretation founded on the current needs of the community."[10] The public policy defense thus seems to be related to the rule that an award should be denied enforcement if it calls for an illegal act.[11] But the greater pliability of the public policy defense, as compared to the illegality defense, poses a much greater risk to arbitral finality.

Before I turn to illustrative cases, a word about the Supreme Court's general observations in *W.R. Grace and Company v. Rubber Workers*[12] is appropriate. The Court, placing public policy review of labor arbitration awards within the framework that had evolved for other contract disputes, said:

> *As with any contract,* however, a court may not enforce a collective-bargaining agreement that is contrary to public policy. See *Hurd v. Hodge,* 334 U.S. 24, 34–35 (1948). [The arbitrator's] view of his own jurisdiction precluded his consideration of this question, and, in any event, the question of public policy is ultimately one for resolution by the courts. See *International Brotherhood of Teamsters v. Washington Employers, Inc.,* 557 F.2d 1345 (CA 9 1977); *Local 453 v. Otis Elevator Co.,* 314 F.2d 25, 29 (CA 2), cert. denied, 373 U.S. 949 (1963). If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it. 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."[13] (Emphasis added.)

Lower courts have invoked *W.R. Grace* in support of quite divergent approaches. Under what I will call the limitist view, the public policy defense is inapplicable unless the disputed award is illegal or calls for action that would violate a rule of positive law. By contrast, under what I will call the broader view, public policy has more scope, but exactly how much depends on the care with which it is applied, case by case.

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[10]*See* 6A Corbin on Contracts §1375, n.15 (1962); 14 Williston on Contracts §1628 (3d ed. 1972).

[11]*See, e.g., Postal Workers v. United States Postal Serv.,* 682 F.2d 1280, 110 LRRM 2764 (9th Cir. 1982) (court enforcement denied to an award reinstating employee who had struck against government, because compliance would violate 5 U.S.C. §7311).

[12]461 U.S. 757, 113 LRRM 2641 (1983).

[13]*Id.* at 766.

The Court's citations in *W.R. Grace* and its language, as distinguished from its result, are, I believe, incompatible with the limitist view. First, in two of its own opinions[14] invoked in *W.R. Grace,* the Court had first considered whether the disputed agreements violated a statute and then considered, alternatively, whether the agreements should be denied enforcement as repugnant to public policy. Furthermore, in *Grace,* the Court's extensive discussion of the compatibility of the disputed back pay award and public policy would have been wholly unnecessary under the limitist view. No rule of positive law would have been violated by compliance with that award. It called for back pay to senior male employees laid off in violation of the collective agreement while junior female employees were retained in accordance with a conciliation agreement between the EEOC and the employer. (The union was not a party.) The Court, however, in the circumstances of *W.R. Grace,* rejected the applicability of the public policy defense. Consequently, the Court did not have to confront the tension between the goals of the *Trilogy* and the view of public policy that goes beyond the limitist view.

That tension is illustrated by the decision of the First Circuit in *United States Postal Service v. American Postal Workers.*[15] An arbitrator had ordered reinstatement, without back pay, of a window clerk, fired after his guilty plea and conviction of embezzling postal assets. The arbitrator, noting the grievant's unblemished seven-year record, as well as mitigating factors, held that the Service lacked just cause for discharge but approved suspending and transferring the grievant to a job away from stamps and cash. The district court vacated the award as violative of "an important public policy against embezzlement of Government money."[16] The Court of Appeals affirmed, rejecting the union's argument for enforcement based on the contention that public policy did not bar the Service from employing convicted embezzlers.

The court, after lip service to the need for a clearly defined public policy, found it in the pertinent positive law and that grab bag of intuitions—"common sense." The positive law included

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[14]*Hurd v. Hodge,* 334 U.S. 24, 34-35 (1948); *Muschany v. United States,* 324 U.S. 49, 66 (1945). In addition, the view of public policy set forth in *Otis Elevator,* cited approvingly in *W.R. Grace,* was broader than the limitist view. The significance of this point is, however, diminished because *Otis* rejected that defense.

[15]736 F.2d 822, 116 LRRM 2870 (1st Cir. 1984).

[16]*Id.* at 824.

the statutory requirement of a "prompt, reliable and efficient postal service," as well as the Service's statutory monopoly over first class mail. "Common sense" encompassed the adverse impact of reinstatement on employee incentives to be honest, on public confidence in the Postal Service, and, indeed, in the entire federal government. Nonetheless, the court, nodding to the rehabilitative ideal, expressly disclaimed any public policy against the Postal Service's voluntary hiring of an ex-convict, as distinguished from its being coerced to reinstate a recent embezzler.

In a later and discordant Postal Service case,[17] the District of Columbia Circuit, in an opinion by Judge Harry Edwards, a former member of our Academy, rejected the First Circuit's pliable public policy defense. The D.C. case also involved an attack, successful in the district court, on an award reinstating, without back pay, an employee discharged for alleged dishonesty. The arbitrator, relying on a contract provision requiring a discharge to be consistent with applicable laws and regulations, had excluded evidence of the grievant's statements, on the ground that the warning required under the *Miranda* rule[18] had not been given in timely fashion. That lapse had also led to the court's exclusion of those statements in the grievant's criminal trial, which had resulted in an acquittal.

Judge Edwards observed that under *W.R. Grace,* the public policy defense was to be extremely narrow and that it failed in the case before him because neither the reinstatement of the grievant nor the arbitrator's view of *Miranda,* even if erroneous, violated the law.[19] Judge Edwards' limitist approach to public policy coincided with the position advanced by Judge Easterbrook, concurring in *E.I. DuPont Co. v. Grasselli Employees Ass'n,*[20] recently decided by the Seventh Circuit.

In *DuPont,* my colleagues, Judge Posner and Judge Easterbrook, did not agree on the proper approach to public policy concerns. Accordingly, my discussion of that case must be at least as tactful as the average faculty meeting.

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[17]*Postal Workers v. United States Postal Serv.,* 789 F.2d 1, 122 LRRM 2094 (D.C. Cir. 1986).
[18]*Miranda v. Arizona,* 384 U.S. 436 (1966).
[19]789 F.2d at 8. *See also Northwest Airlines v. Air Line Pilots,* 808 F.2d 76, 124 LRRM 2300 (D.C. Cir. 1987).
[20]790 F.2d 611, 122 LRRM 2217 (7th Cir.), *cert. denied,* 107 S. Ct. 186, 123 LRRM 2592 (1986). Previously, this view had been ably advanced by Dunau, in *Three Problems in Labor Arbitration,* 55 Va. L. Rev. 427, 441–47 (1969).

An arbitrator had reinstated, without back pay, an employee who had gone berserk and had, without provocation, assaulted his supervisor and another employee and had tried to create a potentially damaging chemical reaction.

The district court vacated the award, on two principal grounds: First, the arbitrator, by stressing the grievant's lack of fault while failing to give equal consideration to workplace safety, had enforced his own notions of equity rather than the agreement. Second, the award conflicted with public policy regarding workplace safety. The Seventh Circuit rejected each of these grounds and upheld the award.

A majority of the panel, consisting of Judge Cummings, who wrote for the court, and Judge Posner, stressed, however, that the highly deferential review for contractual issues, under *Enterprise Wheel,* was not appropriate for public policy concerns.[21] Nonetheless, the majority in *DuPont* also observed that courts must be cautious in upholding that defense because it involves less deference to arbitration awards and more danger to arbitral finality.[22]

The different focus of the irrationality and public policy defense, respectively, also led the Seventh Circuit to suggest different procedural arrangements. In *DuPont,* the court identified two components of the issue of workplace safety: first, the arbitrator's factual finding that a recurrence of the grievant's rampage was extremely unlikely; and second, the arbitrator's judgment that this remote chance of harm did not require a dismissal of the grievance.[23] The court, although not disturbing the particular factual findings, broke new ground by suggesting the need for a less deferential standard of review for an arbitrator's finding of fact interwoven with a public policy defense, such as the clearly erroneous standard embodied in Federal Rule 52(a).[24] By contrast, the arbitrator's act of judgment, that is, his weighing of the remoteness of the danger against the pertinent public policy, was to get de novo review.

Judge Easterbrook, in his concurrence, forcefully espoused the limitist position, reasoning this way: The award should have been treated exactly like a contractual provision permitting the

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[21]790 F.2d at 617.

[22]*Id.* at 615.

[23]*Id.* at 616–617.

[24]*Id.* at 617. *But cf. Meat Cutters, Local 540 v. Great Western Food Co.,* 712 F.2d 122, 123, 114 LRRM 2001 (5th Cir. 1983) (while vacating an arbitration award reinstating a truck driver who had imbibed intoxicating liquor shortly before an accident, the court declared that it would not review the arbitrator's factual findings or merit determinations).

retention of an employee who had gone on one rampage but was unlikely to go on another.[25] Unless such a provision would violate positive law, an award in effect reading such a clause into the contract should not be defeated on public policy grounds. A more open-ended public policy approach would be too sweeping; it would conflict with the "real" public policy embodied in the federal Arbitration Act,[26] under which an award must be enforced if the arbitrator's reading of the contract is "permissible" rather than a frolic of his own. Consequently, there is no basis either for a public policy defense not based on outcome-illegality or for less deferential judicial review of factual findings entwined with a broader view of that defense.[27]

Need I say in this forum that Judge Easterbrook's position is appealing? I wish I found his authorities as powerful as his emphasis on the value of arbitral finality and autonomy. The federal Arbitration Act,[28] even if it is generally applicable to labor arbitration,[29] cannot, in my opinion, bear the weight that he puts on it. The public policy defense is not foreclosed merely because the Arbitration Act fails to list it as a ground for vacating an award. After all, an award that calls for illegal conduct will be vacated even though the Act does not specifically provide for that result. That result is axiomatic; courts must not enforce private bargains or arbitral awards contrary to positive law.

Similar reasoning should foreclose judicial enforcement of either (1) an award that enforces a contract clause that is, on its face, contrary to public policy or (2) an award that, although based on a facially valid clause, is itself contrary to public policy. In such situations, public policy, like positive law, reflects a judgment that a private bargain must be limited in order to protect societal interests. It would be odd, indeed, if the parties could escape such a limitation merely by including a provision for enforcing the otherwise offensive agreement by arbitration. Nothing in the Arbitration Act or its background warrants the result. The Act was directed primarily at commercial contracts

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[25]790 F.2d at 618.
[26]9 U.S.C. §9 (1982).
[27]790 F.2d at 620.
[28]*Supra*, note 26.
[29]For the controversy regarding this question, *see Textile Workers v. Lincoln Mills*, 353 U.S. 448, 466-67, 40 LRRM 2113 (1957) (Frankfurter, J., dissenting); *Miller Brewing Co. v. Brewery Workers Local 9*, 739 F.2d 1159, 1162, 116 LRRM 3130 (7th Cir. 1984). For a survey of conflicting cases on applicability of the Arbitration Act, *see Note, Judicial Review of Labor Arbitration Awards: Refining the Standard of Review*, 11 Wm. Mitchell L. Rev. 993, 1003–06 (1985).

and, as the Supreme Court explained, "was designed to overcome an anachronistic judicial hostility to agreements to arbitrate which American courts had borrowed from English common law."[30] The Act was, in short, designed to place arbitration agreements "upon the same footing as other contracts,"[31] and not to give them special immunities.

Admittedly, it is fairly arguable that a broader public policy defense should give way in the context of labor arbitration because that defense clashes with the values behind the *Trilogy* and because those values, in turn, get added strength from the role of labor arbitration as a substitute not only for litigation but also for the strike. But the *Trilogy's* primary focus is on the collective agreement and its grant of jurisdiction to the arbitrator. By contrast, the public policy defense concentrates, as we have seen, on whether the parties' private purposes embodied in their agreement, coupled with the public policy favoring labor arbitration, should be subordinated to competing public policies.

Furthermore, to assume a clash between the parties' general commitment to arbitral finality and the public policy defense involves the risk of bootstrapping. For a pervasive and commonly accepted public policy defense has been part of the legal background for all contracts. Accordingly, that background could be the basis for concluding that the parties to a collective bargain had implicitly agreed to public policy as a limitation on finality, just as finality is implicitly limited by external law or the *Enterprise Wheel* irrationality test.

Our academy, in its amicus brief in *Misco*,[32] proposed a

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[30]*Mitsubishi Motors Corp. v. Soler Chrysler Plymouth*, 473 U.S. 614, 105 S. Ct. 3346, 3354, n.14 (1985); *see also Standard Magnesium Corp. v. Fuchs*, 251 F.2d 455, 457 (10th Cir. 1957).

[31]*See Consolidated Rail Corp. v. National R.R. Passenger Corp.*, 657 F. Supp. 405, 408 (D.D.C. 1987), quoting from S. Rep. No. 536, 68th Cong., 1st Sess. (1924), 2; Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 Va. L. Rev. 1305, 1308–12 (1985).

[32]*See* Brief of National Academy of Arbitrators, as amicus curiae, filed in the Supreme Court in *Paperworkers v. Misco* (No. 86-651, Oct. 1986 term). In *Misco, supra* note 3, while police were finding marijuana in the grievant's home, another policeman, during break time on the grievant's night shift at the plant, saw him enter another employee's car, with several co-workers. The latter, however, left the car before the grievant was apprehended in the car's back seat, while a lighted marijuana cigarette was burning in the front ashtray. A search of the grievant's own car on the plant premises revealed a plastic scale containing marijuana residue. That evidence was not known to the employer when it fired the grievant for violating a plant rule against employees' bringing marijuana into, or consuming it on, the plant premises. The arbitrator found against the alleged violation and reinstated the grievant with back pay. The court of appeals (with one dissenter) affirmed the district court's vacatur of the award as contrary to a well defined public policy. The reviewing court expressed its puzzlement concerning the arbitrator's view of the evidence

custom-tailored limitist approach as an alternative ground for reversing the decision below that had overturned a reinstatement award on public policy grounds. The Academy's position is that, even though a broader public policy defense might be justified elsewhere, the limitist approach should govern a challenge to an arbitration award reinstating an employee on the ground that his discharge lacked just cause.

With the blessing of the Academy's President,[33] I am going somewhat rashly to express reservations about the Academy's novel position. Let me begin with the reasons for a special limitation in the just-cause context. Agreements incorporate "just cause," presumably, in part, because that term is elastic enough to permit arbitral consideration of developing, as well as established, norms and values of the community, including those embodied in statutes, the Constitution and other sources of public policy.[34] To be sure, an arbitrator generally lacks authority to implement external law or public policy, as such. Nonetheless, in applying a just-cause standard, he must take account of them because they shape standards of justice in the plant as well as in the larger community. Accordingly, under the broader view of the public policy defense, a court would essentially be rehashing the arbitrator's award on the just-cause issue. Vacatur would tend to invite further litigation and accompanying threats to the basic values of arbitration: its finality, speed, and economy. An open-ended public policy defense poses a special risk to those values in the just-cause context and should, accordingly, be rejected. In that context, at least, Judge Edwards and Judge Easterbrook have it right.

Despite the characteristic skill and persuasiveness with which that position was developed by Dave Feller, Bill Murphy, and Jan Vetter, I have difficulties with it. One difficulty arises from the implications of *Alexander v. Gardner-Denver*[35] and related cases.[36] In *Gardner-Denver*, the arbitrator had resolved essen-

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and also criticized his "narrow focus" on the grievant's procedural rights. This focus and its emphasis on the employer's lack of knowledge of the marijuana residue at the time of the discharge, the court concluded, contributed to an award contravening Louisiana's serious and well defined policy against the operation of dangerous machinery by employees under the influence of drugs.

[33]William P. Murphy.

[34]*See* Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. Chi. L. Rev. 30, 31-32 (1971); Meltzer, *Labor Arbitration and Discrimination: The Parties' Process and the Public's Purposes*, 43 U. Chi. L. Rev. 724, 728 (1976).

[35]415 U.S. 36, 7 FEP Cases 81 (1974).

[36]*Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 24 WH Cases 1284 (1981); *McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 115 LRRM 3646 (1984); *Atchison, Topeka & Santa Fe*, 107 S. Ct. 1410, 124 LRRM 2953 (1987).

tially the same factual issue under essentially the same substantive standard that would obtain in a later court proceeding.[37] Nonetheless, the Supreme Court authorized courts under Title VII, in effect, to override an award rejecting a claim that a discharge involved racial discrimination.[38] The Court emphasized that arbitration is primarily an instrument of the parties' private purposes rather than a means for achieving public purposes reflected in the law of the land.[39] It is true that *Gardner-Denver* and its progeny involved external law rather than a free-floating public policy defense. But, as we have seen, that defense, like external law, reflects societal interests and the interplay between them and private contracts. It is also true that *Gardner-Denver* and its progeny involved an award rejecting a grievance rather than granting it. But that consideration goes to whose ox is gored and not to the differences in the institutional responsibilities and comparative advantages of judge and arbitrator with respect to societal interests, on the one hand, and the parties' bargain, on the other. It is those differences that presumably led the Supreme Court in *W.R. Grace* to say generally that the public policy defense is to be resolved ultimately by a court, rather than an arbitrator.

Respect for those differences is important for protecting arbitral finality in its proper sphere. As Professor Kaden has reminded us,[40] the judicial urge to override outrageous awards is unlikely to be repressed by incantations about finality. But courts may be moved by an understanding of the special role and contributions of the grievance-arbitration process. Such under-

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[37]415 U.S. at 55. The Court recognized that the same question may arise under Title VII and a collective bargaining agreement when an agreement's provisions track those of Title VII of the Civil Rights Act of 1964, as amended. *Id.* It is not clear, however, that the Court also recognized that such an identity of issue might arise solely from broad contractual provisions, such as "just cause." See Meltzer, *The Impact of Alexander v. Gardner-Denver on Labor Arbitration*, 27 N.Y.U. Ann. Conf. on Labor Proc. (1975), 189, 191–92; *cf. Electronic Reproduction Serv. Corp.*, 213 NLRB 758 (1974).

[38]In *Alexander v. Gardner-Denver*, the Court said that a Title VII action by an employee whose claim was rejected by an arbitrator is not "seeking review of the arbitrator's decision . . . [but] is asserting a statutory right independent of the arbitration process." 415 U.S. at 54. The Court is, of course, correct as a formal matter; but, functionally, the de novo action under Title VII overrides the arbitrator's award when, for example, a court imposes liability for a discharge previously upheld by an arbitrator. The Court's explicit rejection, under Title VII, of the NLRB's deference to an arbitration award (*id.* at 55-60) is further evidence of the functional similarity between judicial review of an award and a de novo Title VII action that imposes liability for employer conduct previously upheld by an arbitrator.

[39]*Id.* at 52-54.

[40]*See* Kaden, *supra* note 6, at 274, 297. *See also* Meltzer, *Ruminations About Ideology, Law and Labor Arbitration*, 34 U. Chi. L. Rev. 545, 553-54 (1967).

standing is likely to enhance judicial willingness to allow arbitrators to serve as the proctor of the bargain.[41] But, by the same token, arbitrators, among others, should recognize the institutional responsibility of courts for the public interest in the just-cause context, as elsewhere. In short, courts are more likely to respect the arbitrator's special responsibility for the parties' private purposes if there is a reciprocal recognition of the plenary judicial responsibility for public purposes.[42]

The risks involved in disregarding these institutional considerations do not seem warranted by the likelihood that a limitist rule would significantly increase compliance with reinstatement awards. In just-cause cases, the essence test of *Enterprise Wheel* and the public policy defense often are virtually interchangeable. Thus, parties challenging reinstatement awards on public policy grounds typically have also invoked *Enterprise Wheel.* Indeed, as Judge Easterbrook in *DuPont* indicated, broader public policy concerns complement the *Enterprise Wheel* test by providing a guide "to the sorts of provisions that will not appear in contracts" and that, accordingly, cannot properly be inferred by an arbitrator.[43] Thus, a party barred from overturning a troublesome reinstatement award on broader public policy considerations would presumably urge those considerations in support of an irrationality contention under *Enterprise Wheel.*[44] Similarly, a court, moved by broader public policy concerns, might well be attracted to a loose irrationality test as a handy stick for striking down an unpalatable award.

In addition, the law of torts may provide special incentives for challenging a reinstatement award that is seen as undercutting the public policy in support of safety in the workplace or on the highways even though the disputed award does not call for illegal conduct. An employer concerned about liability or punitive damages for retaining hazardous employees[45] would

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[41]*See* Kaden, *supra* note 6.

[42]For problems surrounding this private-public distinction, *see* Meltzer, *supra* note 34, 43, U. Chi. L. Rev. at 724–25.

[43]*Supra* note 20, 790 F.2d at 720. *See also Philadelphia Housing Auth. v. Union of Security Officers,* 500 Pa.2d 213, 455 A.2d 625 (1983) (denying enforcement of award reinstating a housing authority security officer who had defrauded elderly tenant he was paid to protect; employer could not have intended that result.)

[44]*Cf. S.D. Warren Co. v. Paperworkers Local 1069,* 815 F.2d 178, 125 LRRM 2086 (1st Cir. 1987) (enforcement of award reversed as contrary to both *Enterprise Wheel* test and public policy defense; concurrence, while agreeing with first ground, declined to join in "unnecessary public policy review."). *See also Teamsters Local 249 v. Consolidated Freightways,* 464 F. Supp. 346, 100 LRRM 2699 (W.D. Pa. 1979).

[45]*See* Prosser & Keeton on Torts, §33, especially p. 203 (5th ed. 1984).

presumably want to avoid the charge of failure to exhaust judicial remedies. Indeed, a tort plaintiff might well invoke the familiar suggestion that an award should be treated as if both parties had incorporated it into the collective agreement, that is, as if the employer had expressly agreed, for instance, to retain a truck driver awarded reinstatement even though he had driven his rig while under the influence of alcohol.[46] In a tort action, that contention would be patently mechanical, an out-of-context fiction. Nonetheless, fear of its impact might well be another factor in an employer's decision to resist an award.

I want now to illustrate difficulties that are likely to result from the application of the limitist rule by trudging through several situations, beginning with the Seventh Circuit's decision in *Jones Dairy*.[47] There, an arbitrator had upheld a meatpacker's blanket rule barring employees from reporting unsanitary conditions to the government. The court upheld the invalidation of the award, reasoning that the rule was overbroad because it did not provide for exigent circumstances. Hence, it contravened the public policy of insuring sanitary meat production, reflected in the federal Meat Inspection Act.[48] There was, however, no suggestion that the disputed rule violated a provision of positive law.[49] Accordingly, under the limitist approach, neither that rule nor an arbitrator's award upholding its validity could have been disturbed on the basis of public policy. And yet, discharge of an employee for breach of that rule might well result in the employer's liability for a dismissal held to be wrongful on the ground that it contravened federal or state public policy.[50] It would be odd if a court, under Section 301 of the Labor-Management Relations Act, 1947, could not properly consider whether an arbitration award upholding the disputed rule was repugnant to the public policy that could be a source of wrongful dismissal liability.

Exploration of a variation of the situation in *Jones Dairy* will also suggest that the limitist approach is unduly narrow. Suppose that the employer fired the employee for breach of the anti-

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[46]*See Meat Cutters Local 540 v. Great Western Food Co.*, 712 F.2d 125, 114 LRRM 2001 (5th Cir. 1983), invoking "public policy", in overturning an arbitrator's reinstatement award, in similar circumstances.

[47]*Meat Cutters Local P-1236 v. Jones Dairy Farm*, 680 F.2d 1142, 110 LRRM 2805 (7th Cir. 1982).

[48]*Id.* at 1145.

[49]Later, in *DuPont*, a majority of the court stated explicitly that no such violation had been involved in *Jones Dairy*. *See* note 20, *supra*, 790 F.2d at 616.

[50]*Cf. Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 421 N.E.2d 876, 879 (1981).

whistleblowing rule and that the discharge was upheld by the arbitrator. Would a federal court under Section 301 have grounds for upsetting the award? Maybe yes, at least if the court could find that an award upholding the dismissal sanctioned conduct tortious under state law, that the award was therefore contrary to the state's positive law, and that law was not preempted or, indeed, was absorbed into the federal common law developed on the basis of Section 301.

Jones Dairy and its hypothetical sequel make several points for me. Had the court, because of the limitist approach, not invalidated the disputed anti-whistleblowing rule, the employer might well have enforced it by discharge. If the arbitrator upheld the discharge, his award could again be challenged on public policy grounds. The challenger would contend that the award authorized a discharge that would be tortious under state law. That contention would raise legal questions especially difficult for federal courts confronting an unstable and changing body of state law. Nonetheless, under the limitist view of public policy, such issues are likely to proliferate. It is not easy to see why the resultant burdens would be warranted.

On the other hand, the need for nice analysis of state law issues could be avoided by giving more breathing room to the public policy defense. It is, of course, arguable that state law, as such, could more appropriately be decided by state courts. But such a result would scarcely promote genuine finality of arbitration awards. Furthermore, courts acting under Section 301 are entitled to absorb state values into the body of federal law governing collective bargaining agreements.

The difficulties presented by the limitist approach are also illustrated by *Garcia v. NLRB*.[51] In *Garcia*, a United Parcel Service (UPS) rule required an employee, stopping to make a delivery, to tap his horn. Garcia rejected that message, explaining (accurately) that honking was against the law. After his discharge was reduced to a 10-day suspension, a grievance objecting to the suspension was denied by a joint committee on the ground that UPS had agreed to pay any resultant fines. The NLRB, deferring to the arbitration award, dismissed an unfair labor practice complaint. The Ninth Circuit reversed and chastised the Board,

[51]785 F.2d 807, 121 LRRM 3349 (9th Cir. 1986).

indignantly declaring that punishing an employee for refusing to violate the law—any law—was contrary to public policy as well as the NLRA.[52]

I leave the analysis of the Board's decision for another time. Instead, I will assume that Garcia's union, invoking Section 301, had asked a court to vacate the award. If the UPS tapping rule had actually been agreed to by the union, it could, I assume, be invalidated under the limitist approach as a conspiracy to violate or to bring about a violation of the law. But suppose that UPS had promulgated the rule unilaterally, relying on a broad management-rights clause. Would an award upholding that rule satisfy the limitist test? Not on the ground that it aided or abetted a violation by Garcia. It was Garcia's refusal to violate the law that spawned the litigation. To be sure, the indemnity agreement and the company rule are designed to aid, abet, and induce a violation by other employees. But until they commit a violation, the company rule in and of itself does not seem to violate a rule of positive law, however repugnant it may be to public policy. Of course, under an expansive view of the law of attempts, the company rule could be viewed as illegal, in and of itself, but I understand that the pertinent law is quite fuzzy. What does seem clear from *Garcia* and its radiations is that a bit more breathing room for the public policy defense would reduce the need for fine spun speculations about state law that do not seem of great moment in the grievance context. The same suggestion is implicit in *Simpson v. APA Transport Corp.*[53]

In *Simpson,* a discharge for theft was upheld by an arbitrator, who received into evidence the admissions of thefts predating those under investigation that the grievant made to a lie-detector operator immediately after he had administered a lie-detector test forbidden by a state statute. The court upheld the award, urging that, because of the absence of a clear-cut state court determination of whether the statute barred the use of post-polygraph admissions, there was no pertinent public policy. The court recognized that the employer might be liable to the griev-

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[52]*Id.* at 811–12. *But cf.* with *Garcia, Bevles Co. v. Teamsters Local 986,* 791 F.2d 1391, 1393–94, 122 LRRM 2666 (9th Cir. 1986), upholding award reinstating two undocumented aliens notwithstanding plausible claims that employment involved a violation of federal law by the employees and unpreempted state law by the employer. One judge dissented, urging that the arbitrator had violated the policy of reconciling labor law and immigration law. The majority indicated that the award should not be vacated unless it was in "manifest disregard of the law." It is difficult to see why the quoted standard should be controlling rather than illegality, whether or not manifest, of the conduct called for by the award. See the passage from *W.R. Grace,* quoted *supra,* in text following note 13.

[53]108 LRRM 2754 (D.N.J. 1981).

ant for wrongful dismissal but urged that that issue was for the state court. Furthermore, the plaintiff's failure to request relief under state law obviated the need for the federal court to consider whether there would have been pendent jurisdiction over the state-based claim.

The arbitrator's understandable failure to consider the state public policy was complemented by the court's questionable failure to do so. As a result, the award was upheld without explicit consideration, at any stage of the proceeding, of whether the court's decision created incentives for employers in the future to undercut the policies underlying the statute.[54]

The foregoing cases suggest that adoption of the limitist approach in a Section 301 action attacking an arbitration award denying relief to a discharged employee is unlikely to promote finality of arbitration awards. Instead, state courts will become the battleground for contentions that the discharge was tortious because it violated public policy. Furthermore, a parsimonious view of public policy in the Section 301 context may contribute to a determination by a state court, relying on public policy, that the discharge was wrongful. It may also contribute to a decision that a state remedy was not preempted by Section 301 or the contractual arbitration award.

One of the significant labor law developments of our time has been the limitation, based on public policy concerns, of the employment-at-will doctrine. In light of that development it seems anomalous that, under the limitist view, similar public policies could not properly be considered by a court exercising jurisdiction under Section 301.

Even if one rejects the limitist view, one is not, of course, driven to the overexpansive view of public policy underlying decisions such as *Misco*[55] or the First Circuit's *Postal Workers*[56] case. A preferable approach is embodied in Sections 178 and 179 of the Restatement of Contracts,[57] read in light of *W.R. Grace.*

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[54]For similar questions of whether an arbitration award should be denied enforcement as contrary to the policy of the NLRA although not necessarily illegal, *see Lithographers Local One v. Stearns & Beale, Inc.*, 812 F.2d 763, 124 LRRM 2809 (2d Cir. 1987); *cf. Masters, Mates & Pilots v. Trinidad Corp.*, 803 F.2d 69, 123 LRRM 2792 (2d Cir. 1986).

[55]*See supra* note 3.

[56]*See supra* note 15.

[57]These sections provide as follows:

§178. When a Term is Unenforceable on Grounds of Public Policy.

(1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is

Under that approach, finality and the other values stressed in the *Trilogy* would be weighed against any special and carefully limited countervailing public interest.

The Restatement's approach, like all balancing tests, is ill-defined and difficult to apply. It is also difficult to prevent that approach from becoming the avenue for an end run around the *Trilogy*. But similar uncertainties and risks to important values, such as freedom of contract, surround the application of public policy so as to bar enforcement of other contracts. In the wider tradition of contract law, such risks generally are the price paid for flexibility in judicial efforts to safeguard public welfare under changing conditions, mores, and values.[58]

In the end, then, precedents, general principles of contract law, and practical considerations operate, in my view, against completely exempting actions to enforce labor arbitration awards from limitations on contractual freedoms imposed by courts in other contexts. That observation, even if accepted, does not, of course, necessarily answer the question about the public policy defense to labor arbitration awards. Instead, it enlarges the question to cover public policy concerns throughout the whole area of contract law as well as wills and trusts. That large question is business for another time. Meanwhile, it serves once again to remind us that recourse to the coercive power of courts in relation to labor arbitration awards cannot wholly escape the wider traditions of the law.

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clearly outweighed in the circumstances by a public policy against the enforcement of such terms.

(2) In weighing the interest in the enforcement of a term, account is taken of (a) the parties' justified expectations, (b) any forfeiture that would result if enforcement were denied, and (c) any special public interest in the enforcement of the particular term.

(3) In weighing a public policy against enforcement of a term, account is taken of (a) the strength of that policy as manifested by legislation or judicial decisions, (b) the likelihood that a refusal to enforce the term will further that policy, (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and (d) the directness of the connection between that misconduct and the term. ¶179. Bases of Public Policies Against Enforcement.

A public policy against the enforcement of promises or other terms may be derived by the court from

(a) legislation relevant to such a policy, or

(b) the need to protect some aspect of the public welfare, as is the case for the judicial policies against, for example, (i) restraint of trade (¶¶186-188), (ii) impairment of family relations (¶¶189-191), and (iii) interference with other protected interests (¶¶192-196, 356). 2 Restatement of the Law Second, Contracts Second, pp. 6–7 (1979).

[58]*See* 6A Corbin on Contracts ¶¶1374, 1375, pp. 6–8, 10–14 (1962).