to Caroline Manchot, who gathered the bulk of the data used in this study, and to Tracey MacCorquodale and Chris Morin, who coded arbitration cases. We are greatly indebted to the many arbitrators who participated in our questionnaire pre-tests and the Canadian region of the National Academy of Arbitrators for its members' participation in this study.

III. Judicial Review of Awards in Mandated Employment Arbitrations: Are We Getting It Right?

Robert J. Rabin*

Guiding Principles

"By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. . . . 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."[1]

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*Professor of Law, Syracuse University College of Law. Member, NAA. I thank Camille Castro and Dan Goode, Syracuse College of Law students of the class of 2010, and Melissa Mead, class of 2011, for their invaluable help in preparing this paper. From the very inception of the project until her graduation, Camille helped me with the basic outline of the project and with research on the cases reviewing arbitration awards. Dan provided excellent research on cases initiated in the district courts and with the Board's deferral doctrine. His work could have been the basis of separate papers. Melissa helped to get the paper in final shape, and handled some of the difficult footnoting that we kept putting off until the end. Camille, Dan, and Melissa all took labor law with me at different times, and Camille even suffered through contracts with me as well. It was a pleasure to work with these three wonderful students. I am also grateful to Dean Hannah Arterian for her support and encouragement of this project. Thanks to NAA Member Howell Lankford for administering the Invited Papers portion of the NAA program in 2010 and for inviting me to present this paper. I thank Wayne Outten, Esq., a nationally known plaintiffs' lawyer based in New York City who represents employees in litigation of statutory and other employment claims, including those in which arbitration is mandated, and Cliff Palefsky, a prominent lawyer who does the same sort of work based in California, for their helpful insights and suggestions. Thanks also to Tim Garrigan, a plaintiffs' lawyer based in Texas, for his observations about the *Williams* litigation, discussed later in the paper. Neil Currie, a Vice President with the American Arbitration Association, was very helpful in providing statistics on AAA case handling of these cases. Raymond Peeler and Peggy Mastroianni of the Equal Employment Opportunity Commission kept me posted on EEOC developments.

[1]Gilmer v. Interstate/Johnson Lane, 500 U.S. 20, 26, 32 n.4 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) *and* Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 232 (1987)).

"Big people, small people, matter of fact, all people! Everyone makes mistakes, so why can't you?"[2]

The Setting

The situation is a familiar one. An employer tells his employee that if he wants a job he must agree that he will arbitrate all claims that the employer has violated any of his statutory employment rights. He may not bring such claims in court. In polite company, this is referred to as mandatory arbitration, though in the circle of plaintiffs' lawyers they are sometimes called "cram down" arbitrations.[3]

The Supreme Court squarely upheld the arrangement in the *Gilmer* decision, referenced in the opening lines of this article, and a few years later in the *Circuit City*[4] decision put to rest any remaining doubts about its viability.

There is no indication that the Court will change its mind about mandatory arbitration of these disputes. And in light of current legislative gridlock, it is unlikely that there will be a statutory correction of the doctrine, for example, through the Arbitration Fairness Act.[5]

Employees have attempted to avoid mandatory arbitration by arguing unconscionability, picking up on references in *Gilmer* that suggest that agreements to arbitrate may be struck down if unconscionable.[6] The California courts have been pioneers in using the doctrine of unconscionability to negate mandatory arbitration.[7]

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[2]Joe Raposo and Jeff Moss, "Everyone Makes Mistakes," *Sesame Street* (1971).

[3]Wayne Outten, a well-known plaintiffs' lawyer based in New York City whose firm handles countless cases involving employee claims of statutory violations says he invented the phrase. E-mail from Wayne Outten to the author in author's file, July 17, 2010.

[4]Circuit City Stores v. Adams, 532 U.S. 105 (2001).

[5]Arbitration Fairness Act of 2009, H.R. 1020, 111th Congress (2009). This bill, if enacted, would do away with mandatory arbitration.

[6]Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991). The reference is to § 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 2, which says that arbitration agreements shall be valid, irrevocable, and enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." Unconscionability could be one such ground.

[7]Armendariz v. Foundation Health Psychcare Servs., Inc., 24 Cal. 4th 83, 114, 118 (Cal. 2000). The *Armendariz* court observed, "Given the disadvantages that may exist for plaintiffs arbitrating disputes, it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification for such one-sidedness based on 'business realities.'" As has been recognized "unconscionability turns not only on a 'one-sided' result, but also on an absence of 'justification' for it."(quoting A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d 473, 487 (1982)). The court stated further that "because unconscionability is a reason for refusing to enforce contracts generally, it is also a valid reason for refusing to enforce

However, it appears that unconscionability challenges succeed only when specific provisions of the agreement are one-sided and not because of inequality of bargaining power and lack of choice as to the underlying agreement itself.[8] These latter factors were not enough to knock out the agreement to arbitrate in *Gilmer*.[9] In its recent decision in *Rent-A-Center, West v. Jackson,*[10] the Supreme Court upheld a provision in an arbitration agreement that empowered the arbitrator to determine whether the arbitration agreement was unconscionable.[11] The Court referred to this as a "delegation provision." The Court provided no guidance as to the factors that an arbitrator should take into account in determining whether the arbitration agreement was unconscionable, nor did it indicate what scope of review should apply to the arbitrator's determination on that score.[12] The employee, Jackson, had challenged the overall agreement and not specifically the delegation clause. Had he directed his attack specifically to the arbitration clause, the Court would have addressed the issue of unconscionability. Justice Stevens's dissent contends that the distinction drawn by the Court as to when an unconscionability claim may be raised before a court perpetuates an already untenable line of cases.

I accept mandatory arbitration as a given fact of workplace life, and do not question it in this paper. Indeed, there are respectable arguments in favor of allowing mandatory arbitration. For example, Professor St. Antoine argues that this may be the only effective way for an employee to have his case heard, for it is difficult to convince a lawyer to take such a case to court.[13]

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an arbitration agreement under Code of Civil Procedure section 1281, which, as noted, provides that arbitration agreements are 'valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.'"

[8]Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.D.C. 1997). This influential decision by Judge Harry Edwards states, "Obviously, *Gilmer* cannot be read as holding that an arbitration agreement is enforceable no matter what rights it waives or what burden it imposes. Such a holding would be fundamentally at odds with our understanding of the rights accorded to persons protected by public statutes like the ADEA and Title VII. The beneficiaries of public statutes are entitled to the rights and protections provided by the law." *Id.* at 1482.

[9]*See generally* Gilmer v. Interstate/Johnson Lane, 500 U.S. 20, 33 (1991). The Court stated that "mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." The Supreme Court will have more to say about unconscionability, and perhaps about the preemptive force of the FAA, in the pending case of AT&T Mobility v. Concepcion, Docket No. 09-893. As of press time, the Court had heard oral argument on the matter.

[10]Rent-A-Center, West, Inv. v. Jackson, No. 09-497, 2010 U.S. LEXIS 4981, at *1 (U.S. June 21, 2010).

[11]*Id.* at *4.

[12]*See generally id.* at *1.

[13]Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 812 (2008); a slightly revised version of the article appears in the

There is no reliable way to measure how many employers mandate arbitration as a condition of employment or how many claims actually reach arbitration under mandatory arbitration systems. The American Arbitration Association (AAA) advises that in the last three years it has administered between 1200–1300 such cases per year.[14] Many employers designate the AAA to administer their mandatory arbitration systems, which includes providing the panels of arbitrators, setting forth rules under which the arbitration is conducted, and determining whether, for purposes of allowing the parties to utilize the appropriate fee scale, the employer is in compliance with the due process protocol.[15] Who knows how big an iceberg lies below the AAA statistics? One commentator has asserted that mandatory arbitration agreements cover about as many employees as are represented by unions.[16]

The Limited Inquiry of This Paper

I limit my discussion to those situations in which an employee is required as a condition of employment to submit his statutory employment claims to arbitration. I do not question the well-settled narrow judicial review of arbitration agreements that parties enter into on a consensual basis, especially those involving commercial parties of relatively equal bargaining power. I embrace

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proceedings of the Academy in Theodore J. St. Antoine, *Mandatory Arbitration, Why It's Better Than It Looks*, PROCEEDINGS OF 62ND ANNUAL MEETING OF NAA 99 (2010). *See also* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559 (2001) The Employment Due Process Protocol takes no position on the validity of mandatory arbitration agreements; *see* Due Process Protocol Item A. Estreicher argues that unions should be empowered to enforce employees' statutory rights through arbitration, and perhaps even compromise them, "to reflect local realities," Estreicher, "*Think Global, Act Local": Employee Representation in a World of Global Labor and Product Market Competition*, 24 LABOR LAWYER 253, 264 (2009). Maybe mandatory arbitration is on the wane; *see* Charles D. Coleman, *Is Mandatory Employment Arbitration Living Up to Its Expectations? A View From the Employer's Perspective*, 25 ABA J. LABOR & EMP. LAW 227 (2010). Coleman suggests that arbitration may be more expensive and take longer than conventional litigation. He also points out that the employer on the losing end of an arbitration award has limited recourse because of the narrow scope of judicial review.

[14]Telephone conversation with, and follow up e-mail from, Neil Currie, Vice President, American Arbitration Association, on May 19, 2010. Professor St. Antoine reports in his article cited in the previous footnote that an average of 18,500 civil rights employment claims are filed in federal court each year, St. Antoine, *supra* note 13, PROCEEDINGS OF 62ND ANNUAL MEETING OF NAA 99, 105 n.25 (2010). Based on these numbers, it is fair to say that AAA alone processes some 6–7 percent of the discrimination claims that might otherwise be initiated in court. Another private agency, JAMS (originally known as Judicial Arbitration and Administrative Services), also processes these cases, but I have been unable to obtain statistics from them.

[15]*Id.*

[16]Colvin, Alexander J.S. "Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?" *National Academy of Arbitrators Research Conference*, 405–47, 411, Chicago, IL, April 2007.

the notion that truly consensual arbitration is premised on the autonomy of the parties,[17] and that they have the right as consenting parties to buy into any system of dispute resolution that they choose, including one that has extremely limited judicial review. Admittedly, the Supreme Court's decision in *Hall Street Associates* places this latter proposition in some doubt.[18] In *Hall Street*, the Court refused to allow the parties to expand the bases of judicial review beyond those enumerated in the FAA, thus circumscribing their authority to make their own deal.

It is no easy matter to draw the line between consensual and mandatory arbitration agreements. The AAA attempts to do so in its rules by categorizing mandatory arbitrations as those arising under an employer-promulgated agreement as opposed to one individually negotiated by the employee.[19] For the purposes of this paper, I leave it at that.

Nor do I seek to address the standard of review in arbitration cases involving unions and employers. Section 301 of the LMRA governs these situations. The standard of review in those cases, as developed in the *Steelworkers Trilogy* and its later incarnations,[20] is extremely narrow. However, the narrowness of that review reflects in part the special needs of the labor management institution in which finality in arbitration is an essential part of the collective bargaining process. In underscoring this point, the AFL-CIO stated in its brief in the *Trilogy* cases that these cases are about labor law, not arbitration law.[21]

The line between the arbitration of statutory disputes and labor disputes that arise under collective bargaining agreements is now complicated by the Supreme Court's *Pyett* decision,[22] which holds

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[17]Edward Brunet, Richard E. Speidel, Jean R. Sternlight, and Stephen J. Ware, *Arbitration Law in America, A Critical Assessment* (Cambridge University Press, 2006), at pp. 3–7.

[18]Hall Street Associates v. Mattel, Inc., 552 U.S. 576 (2008).

[19]American Arbitration Association Employment Arbitration Rules (2008). The rules provide that "[i]nitially the AAA shall make an administrative determination as to whether the dispute arises from an employer-promulgated plan or an individually-negotiated employment agreement or contract." That determination is subject to final review by the arbitrator. Neil Curry, an AAA vice president, advises me that the former category is one in which the employee has no opportunity to negotiate; telephone conversation with the author, notes on file with the author.

[20]United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987); Eastern Associated. Coal Corp. v. United Mine Workers, 531 U.S. 57 (2000).

[21]United Steelworkers of America v. American Manufacturing, Co., Appellate Brief, 1960 WL 98475 *1, at *30 (1960).

[22]Penn Plaza v. Pyett, 2009 U.S. LEXIS 2497, at ***1, ***49 (U.S. 2009).

that with appropriately clear language a union and employer may agree to submit statutory disputes to arbitration under their collective bargaining agreements. Presumably, any arbitration decided under such a submission, including one that involves statutory issues, will be subject to the narrow review of Section 301 of the LMRA. Depending upon whether unions are willing to take on the burden of trying statutory issues exclusively through arbitration systems in collective bargaining agreements, this may turn out to be a limited universe of situations. In this paper I do not discuss the wisdom of the *Pyett* decision.

On Judicial Review

When the Court upheld mandatory arbitration in *Gilmer*, it stated that judicial review would be sufficient to ensure that arbitrators comply with the requirements of the applicable statutes.[23] I read this as a critical qualification of the decision, even though the statement is cryptic and carried in a footnote. Later courts on both the federal and state level have picked up this reference by the Court and incorporated it as an integral requirement of mandatory arbitration.[24] The Court's reference to sufficient judicial review makes sense in the context of its observation that it is not depriving an employee of his rights under the statute but merely confining his claims to another forum. I am sure the Court would not allow an employer to condition employment upon the employee's total renunciation of her statutory employment

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[23]Gilmer v. Interstate/Johnson Lane, 500 U.S. 20, 32 n.4 (1991).

[24] *See* Cole v. Burns Int'l Sec. Servs., 105 F. 3d 1465, (D.D.C. 1997) ("the Supreme Court has assumed that arbitration awards are subject to judicial review sufficiently rigorous to ensure compliance with statutory law," *id*. at 1469; the assumptions in *Gilmer* are valid "only if judicial review under the 'manifest disregard' standard is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law," *id*. at 1487); Armendariz v. Foundation Health Psychare Servs. Inc., 99 Cal. Rptr. 2d 745, 750, 762; 24 Cal. 4th 83, 90–91 (Cal. 2000); Pearson Dental Supplies v. Superior Court, 48 Cal. 4th 83, 106–07 (Cal. 2010) ("we have also indicated that the scope of judicial review may be somewhat greater in the case of a mandatory employment arbitration agreement that encompasses an employee's unwaivable statutory rights," *id*. at 1). The *Pearson* court reiterated its position in *Armendariz* that there must be judicial review "sufficient to ensure the arbitrators comply with the requirements of the statute," *id*. at 12 (quoting language from *Armendariz* in turn taken from *Gilmer;* Armendariz v. Foundation Health Psychare Servs. Inc., 99 Cal. Rptr. 2d 745, 750, 762; 24 Cal. 4th 83, 106 (Cal. 2000)); The Due Process Protocol has a cryptic one-sentence comment on judicial review: "The arbitrator's award should be final and binding and the scope of review should be limited." Item D of Due Process Protocol. I read this to mean that some judicial review, albeit limited, must be provided.

rights.[25] If statutory rights cannot be waived, there must be some judicial review to ensure that the arbitrator interpreted and correctly applied the statute. The Court's cryptic reference to judicial review in *Gilmer* could mean merely that we know that the scope of judicial review is narrow but we do not care. The better reading is that the Court acknowledges that it must develop the scope of review in such a way that it adequately preserves statutory rights.

"Manifest Disregard" and Its Cousins

The Federal Arbitration Act, enacted in 1925, is the statutory basis for authorizing and enforcing agreements to arbitrate employment disputes.[26] The FAA lists four grounds for vacating an award, all quite narrow.[27]

A fifth standard of judicial review, "manifest disregard," emerged as a judicial creation. It first appeared as a throwaway line in the relatively ancient arbitration case of *Wilko v. Swan*.[28] That case involved a dispute between a customer and a stockbroker over the broker's advice.[29] The Court refused to compel arbitration, a position that it reversed in later years.[30] Part of its rationale was that if the case went to arbitration under the FAA, there would be no meaningful review for errors of law, save in instances of "manifest disregard." The Court did not explain what it meant by this term, nor did it have to think hard about its application, as the case was not sent to arbitration. The phrase began to appear in later

[25] *See* Cole v. Burns, *supra* note 24, at 1483.

[26] Federal Arbitration Act, 9 U.S.C. § 1 et seq. (2010). The FAA was enacted in 1925. The question unanswered in *Gilmer* and later resolved in *Circuit City* is whether the text of the FAA reaches employment agreements; the Court ultimately held in Circuit City that it does. Arbitration agreements between unions and employers are addressed by § 301 of the National Labor Relations Act. Almost every case that I reviewed uses the FAA as the statutory rubric for enforcement and review of arbitration awards in employment cases.

[27] Federal Arbitration Act, 9 U.S.C. § 10 (2010). The statutory grounds are "where the award was procured by corruption, fraud, or undue means; where there was evident partiality or corruption in the arbitrators, or either of them; 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; or 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."

[28] Wilko v. Swan, 346 U.S. 427 (1953).

[29] *Id.* at 429.

[30] Rodriguez de Quijas v. Shearson/American Exp., Inc., 490 U.S. 477 (1989).

cases,[31] and for a substantial period it was the operative framework for reviewing arbitration awards.

The "manifest disregard" standard has lost some of its cachet as a result of *Hall Street Associates LLC v. Mattel, Inc.*[32] In that case, the Court refused to allow parties, even commercial parties of equal bargaining power dealing at arms' length, to expand the scope of judicial review beyond the enumerated statutory grounds in the FAA.[33] Given the Court's jealousy about guarding the integrity of the narrow enumerated grounds for review in the statute, you would think that the Court would have no use for the judicially created manifest disregard standard. Yet the Court hedged, oscillating between accepting the standard, rejecting it, or considering it merely a convenient judicial shorthand for the existing specific statutory terms, specifically that the arbitrator exceeded his powers.[34]

After *Hall Street*, some circuit courts, notably the Fifth Circuit, rejected the manifest disregard standard in its entirety, limiting review to the enumerated statutory grounds.[35] Subsequent to *Hall Street*, the Court decided *Stolt-Nielson*, a case dealing with whether the court or an arbitrator has the power to determine if the arbitration agreement embraces class actions. In *Stolt-Nielsen*, the Court observed that it was still an open question whether the "manifest disregard" standard remains viable.[36]

At the heart of this paper is a series of case studies on how the courts review awards under mandatory arbitration systems. Some

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[31] *See, e.g.,* Three S. Delaware, Inc. v. Dataquick Info. Sys., Inc., 492 F.3d 520, 527 (4th Cir. 2007); B.L. Harbert Int'l, LLC v. Hercules Steel Co., 441 F.3d 905, 910 (11th Cir. 2006); Black Box Corp. v. Markham, 127 Fed. Appx. 22, 25 (3d Cir. 2005); Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C., 430 F.3d 1269, 1275 (10th Cir. 2005); Brabham v. A.G. Edwards & Sons Inc., 376 F.3d 377, 381 (5th Cir. 2004); Duferco Int'l Steel Trading v. T. Klaveness Shipping, 333 F. 3d 383, 389 (2d Cir. 2003); Hoffman v. Cargill Inc., 236 F.3d 458, 461 (8th Cir. 2001); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros, 70 F.3d 418, 421 (6th Cir. 1995); Advest, Inc. v. McCarthy, 914 F.2d 6, 8–9 (1st Cir. 1990).

[32] Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008).

[33] *Id.* at 592.

[34] *Id.* at 590–92. Justice Souter suggests that "maybe the term 'manifest disregard' was meant to name a new ground for review, but maybe it merely referred to the Sec. 10 grounds collectively, rather than adding to them." Alternatively, the term "may have been shorthand for Sec. 10(a)(3) or Sec. 10 (a)(4)…." Justice Souter winds up his opinion with the cryptic statement that "it makes more sense to see the three provisions, Secs. 9–11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." Just what is that "limited review"?

[35] Citigroup Global Markets, Inc. v. Bacon, No. 07-20670, 2009 WL 542780, at *6 (5th Cir. 2009).

[36] Stolt-Nielsen S.A. et al. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1768 (2010). "We do not decide whether 'manifest disregard' survives our decision in Hall St. Associates."

of the cases continue to use the term "manifest disregard," others reject it, and still others hedge their bets.[37] Those courts that do not use the manifest disregard standard usually revert to the fourth statutory ground, that the arbitrator exceeded his powers. This seems a bit of a stretch, but the theory appears to be that an arbitrator exceeds his powers if he confronts statutory authority and ignores it. That is different, so those courts say, from merely making a mistake of law. For purposes of this paper, I treat all these cases as involving the manifest disregard standard, understanding that the term itself is not viable in many jurisdictions. Yet, as a practical matter, manifest disregard describes the common elements of the various formulations used by the courts.

Manifest disregard is an ineffective reviewing tool, as the specific examples later will show. In its typical formulation, manifest disregard means that the parties made the arbitrator aware of the applicable law but he openly chose to ignore it. This is a virtually useless test, as it is rare that an arbitrator will confront a statute and deliberately disregard it. In most cases, the arbitrator simply makes a mistake about the meaning of the statute and its application. This is not grounds for reversal under the manifest disregard standard, as the later case examples will show.

I recently watched a baseball game on television between the Mets and the Yankees in which a Yankee batter hit a ball that struck a painted yellow line on the outfield wall. The umpire signaled that the ball was in play and not a home run. The Yankee manager leaped out of the dugout and argued that the ball was a home run because it hit the yellow line. The umpires reviewed the call through a video replay, which, in a bow to modern technology, is the current way of reviewing certain kinds of calls.[38] For my purpose, the video replay is the equivalent of appellate review of an arbitrator's decision.

What was the proper test of the video review of the umpire's decision? Surely it was not manifest disregard. The question was

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[37] I will show this in the specific cases that follow in this paper.

[38] In contrast, in the notorious case in which an umpire called a Cleveland batter safe at first when he was clearly out, and deprived the Detroit pitcher of a perfect, no-hit game, the call on the bases is not subject to video replay review. MLB Official Rules § 9.02 (2008); Jason Beck, *Missed Call Ends Galarraga's Perfect Bid: Tigers Righty Loses Perfect Game on 27h Hitter*, MLB.com, June 3, 2010, *available at* http://mlb.mlb.com/news/article.jsp?ymd=20100602&content_id=10727590.

not whether the umpire knew the rule and decided to ignore it but whether he made the correct call.[39]

By the same token, an employee who has been forced to arbitrate her statutory claims is entitled to a correct call on whether the employer violated the law. The premise in *Gilmer* of sufficient judicial review to make arbitration a reasonable alternative forum requires that there be honest and thorough judicial review of questions of law.[40] Such an approach compromises finality, one of the fundamental tenets and values of arbitration. However, I believe we must look at these cases more through the lens of employment law than through the lens of arbitration law.[41] The need to adequately protect a litigant's statutory rights may override the concerns for finality that underscore traditional, consensual arbitration agreements.

The Studies

A number of studies have been written on the success rate of employees who are forced to arbitrate their statutory claims of discrimination, as contrasted with those claims that may be initiated in court. I had the pleasure of moderating the Feuille/LeRoy paper at the NAA meeting three years ago.[42] Those authors demonstrated that the rate of judicial reversal of arbitration awards is very low. Michael LeRoy's separate paper[43] established that the rate of judicial reversal in arbitrations is roughly 5 percent, while in statutory disputes initiated in court, District Court decisions are reversed 12 percent of the time. Other authors have pointed out the weaknesses in these studies, including the lack of a good database and the inability to control for various other factors.[44]

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[39]The baseball call was a combination of a question of law: At CitiField the ground rule is that the ball must hit above the line to be a home run, as well as a question of fact: Did the ball actually hit the line? The video replay showed that the ball hit on the line, not above it, and was not a home run.

[40]Gilmer v. Interstate/Johnson Lane, 500 U.S. 20 (1991).

[41]This is analogous to the rationale for narrow judicial review under the *Trilogy*, in which the particular needs of labor law controlled more than the needs of arbitration law. As indicated *supra*, note 23, the AFL-CIO brief in the *Trilogy* recognized this by asserting this is a case about labor law, not arbitration law.

[42]Robert J. Rabin, Moderator, *Where Is the New* Enterprise Wheel*? Judicial Review of Employment Arbitration Awards*, 60TH ANNUAL PROCEEDINGS OF NATIONAL ACADEMY OF ARBITRATORS 339 (2007), Presentations by Peter Feuille and Michael H. LeRoy and comments by Judith Droz Keyes and Sharon R. Vinick.

[43]Michael H. LeRoy, *Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review*, 29 J. DISPUTE RESOL. 3 (Spring, 2009).

[44]*E.g.,* Feuille and LeRoy, *supra* note 42; LeRoy, *supra* note 43; David S. Schwarz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247 (2009); Professor

Perhaps the lower rate of reversal for arbitrators shows that arbitrators are better than courts at getting it right the first time.

My Approach

I see no point in adding to the already excellent literature that attempts to analyze the problem quantitatively. I take a different approach in this paper. With the help of my research assistants, I collected and read a number of cases in which courts reviewed a mandated arbitration award. I attempted to determine whether these cases demonstrate a need for more intensive judicial review than afforded by the manifest disregard standard or its cousins. My review reveals a handful of cases that cry out for correction. These mostly involve situations in which the arbitrator reached an erroneous or at least questionable conclusion of law. In some cases, the reviewing court explicitly stated that despite its reservations about, or even downright disagreement with, the arbitrator's conclusions, it was powerless to reverse the award under prevailing standards of judicial review.

Most of the cases that courts review are traditional factual disputes that focus on motive. For example, the employee claims the company fired her because of her race. The employer says it terminated her for reasons other than race. The trier of fact has to decide whom to believe. It is largely a matter of credibility.[45] The review of these cases raises a difficult issue, and I will discuss these cases separately later on.

I offer a collection of problematic cases in which a court reviewed an arbitration award in a mandatory arbitration situation. After putting those settings before the reader, I offer some general conclusions.

Schwartz takes the blunt position that mandatory arbitration is unfair because it imposes a procedure that systematically favors corporate interests. In his view the statistical debate about outcomes is mostly beside the point. He also skewers the "egalitarian" argument that arbitration is better for the little guy because it is more accessible. Colvin, Alexander J.S., "Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?" National Academy of Arbitrators Research Conference, Chicago, IL, April, 2007. Sherwyn, Estreicher, and Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557 (2005).

[45]The reader should understand that in the District courts there are very precise procedural rules about the order and burdens of proof in moving forward in these cases, as set out in the landmark case of McDonnell Douglas v. Green, 411 U.S. 792 (1973). But once the parties get past the procedural stages, the case is then tried on the merits, and the same pattern applies of a claim of discrimination, a defense of a nondiscriminatory explanation, and a claim that the defense is pretextual.

The Case Studies[46]

I. Determining and Applying Legal Tests

Case Study 1—Determining and Applying the Standards of Sexual Harassment: How Pervasive Must the Conduct Be? A female employee claimed that a male employee sexually harassed her, and that when she complained about it to a supervisor, the company demoted her in retaliation.[47] The arbitrator found several instances of inappropriate behavior by the fellow worker, but concluded that the harassment was not sufficiently pervasive and regular under applicable legal tests and had not detrimentally affected the complainant.[48] The reviewing court "believes that the arbitrator misapplied the law regarding pervasiveness to the facts as she found them."[49] Yet the court did not overturn the award. While the court thought the "highly offensive" conduct met the legal test of harassment, "the court cannot conscientiously conclude that the arbitrator literally ignored or paid no attention to applicable legal prin-

[46]We culled these case studies from a sample of some 50 cases that my research assistants pulled and reviewed over a period of about a year. The list is available from the author. We also pulled and reviewed a similar sample of some 60 cases in which an employee was not required to go to arbitration, and instead initiated her case in the Federal District Court. We examined and compared the approach to appellate review in these cases as well. Appellate courts reviewing District Court decisions were not constrained by the manifest disregard standard. They could look at the basis of the lower court's factual findings and could decide issues of law de novo. We found a reversal rate of about 15 percent. In almost every case in which an appellate court disagreed with the lower court's factual determinations, it was in a procedural setting in which the lower court granted the employer's motion to dismiss on the basis that there were no disputed issues of fact. The appellate court reversed this finding in some ten cases, and remanded the case for trial. We did not trace how these cases worked out after remand. We had originally planned to add a section to this article summarizing the scope of judicial review in these cases, but space considerations precluded this. For representative examples of cases we looked at, see McCulloch v. University of Arkansas for Medical Services, 2009 WL 736004 (8th Cir., 2009), and Snooks v. Duquesne Light Co, 2009 WL 449154 (3rd Cir., 2009). A list of the cases we reviewed may be obtained from the author.

In a separate comparative inquiry, we looked at a sampling of cases illustrating the NLRB's deferral doctrine, the rule that says that if a charging party files a claim under the National Labor Relations Act that could also be resolved through arbitration under an existing collective bargaining agreement, the charge will be deferred to arbitration and the arbitration award will be upheld unless it is "clearly repugnant" to the NLRA. Our investigation showed that in many of these cases the NLRB in fact overturned the arbitration award if it concluded that the award was wrong as a matter of law, without imposing the higher hurdle that the award not only must be wrong, but must be "clearly repugnant." *See, e.g.,* In re US Postal Service, 332 NLRB 630 (2000); 110 Greenwich Street Corp., 319 NLRB No. 47 (1995) The institution of arbitration appears to have survived despite the challenges to arbitral finality imposed under the deferral doctrine. Once again, space constraints prevent us from discussing these cases in this article. A list of the cases we reviewed may be obtained from the author.

[47]Smith v. PSI Services II, No. CIV A. 97-6749, 2001 WL 41122, at *1 (E.D. Pa. 2001).

[48]*Id.* at *1.

[49]*Id.* at *2.

ciples or that her decision exceeded all bounds of rationality."[50] The court observed that the question of detrimental effect of the harassment was based largely on credibility findings that could not be overturned.[51]

Observation: Though a short opinion, it appears to carefully examine the award and thoroughly canvas the applicable law. The court is constrained by the manifest disregard standard: "[I]t is reserved for situations where an arbitrator recognizes a clearly governing principle and then proceeds to ignore or pay no attention to it."[52] If the parties had initiated this case in court, the appellate court's finding that the harassment was sufficiently pervasive under applicable law should have resulted in a reversal of the lower court and judgment for the employee. On the other hand, the arbitrator made a factual finding that the plaintiff was demoted because of a company reorganization, and not in retaliation for complaining about harassment. This piece of the case, which involves credibility, is more difficult for an appellate court to resolve. *Smith v. PSI Services,* 2001 WL 41122 (E.D. Pa., 2001).

Case Study 2—Demanding Closer Scrutiny of a Claim of Racial Harassment. An employee, appearing pro se on his appeal but represented at the arbitration, claims he has been a victim of a racially hostile work environment.[53] This is a difficult and emerging body of law.[54] The court's initial reaction to the arbitrator's decision is a concern that she failed to appreciate the dynamics and extent of the offensive conduct:

> Plaintiff's objections relating to his hostile work environment claim are more troubling. The transcript of the arbitration proceedings contains a substantial quantity of evidence relevant to a hostile work environment claim. Specifically, there was evidence of racial slurs, graffiti, horseplay involving nooses, fears that coworkers would tamper with his lunch or drop a tool on his head, and suspicion that drug tests on the job site were racially motivated. The arbitrator's decision does not discuss several items of that evidence specifically, and it disposes of the hostile work environment claim in terse, cryptic, conclusory language. This raises an initial specter of failure to fully consider the evidence (a

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[50] *Id.*

[51] As with most of these studies, I did not track down the arbitration award itself but relied upon the reviewing court's summary of the award. In many of the reports of the cases it was difficult to determine the names of the counsel involved, and the passage of time made it unlikely that anyone would be able to find and provide me the award. One significant exception is the *Williams* case, discussed later on.

[52] *Smith,* No. CIV A. 97-6749, 2001 WL 41122, at *1.

[53] Reynolds v. Brown & Root, No. 1:03-CV-545, 2004 WL 3733401, at *1 (E.D. Tex. 2004).

[54] Jerome R. Watson and Richard W. Warren, *I Heard It Through the Grapevine: Evidentiary Challenges in Racially Hostile Work Environment Litigation,* 19 Labor Lawyer 381 (2004).

> legal error), and possibly bias. Hence, the court examines this objection carefully.[55]

Despite these misgivings, the court upheld the arbitrator's award. It devoted a paragraph to analysis of each of the arbitrator's conclusions and indicated how the arbitrator acted within her discretion when she arrived at certain conclusions. The court said, "while the court may have reached a different conclusion," its limited role in reviewing an arbitration award does not allow for a reweighing of the facts.[56]

The court also refused to disqualify the arbitrator even though the arbitrator's daughter had worked five years earlier as a summer associate for the law firm representing the employer.[57] The court concluded that the arbitrator had fully disclosed this to the parties.

Observations: This is a case that cries out for close scrutiny. The court's own characterization of the arbitration award makes us wonder if the award was fair. Aroused by its own initial concerns, the court appears to have carefully examined the arbitrator's award and concluded that the decision was permissible based on the facts. I would have more confidence in the court's decision if it dealt with the arbitrator's conclusions on the merits and not through the lens of a narrow standard of judicial review. The bias issue is also troubling. The fact that the arbitrator disclosed the situation and the parties accepted her makes it difficult to later question the acceptability of the arbitrator, yet the conceded relationship of the arbitrator's daughter to the prevailing law firm casts doubts upon the award. *Reynolds v. Brown & Root,* 2004 WL 3733401 (E.D. Tex. 2004).

Case Study 3—Is It Enough That the Arbitrator Paid Attention to the Law Even Though He Got It Wrong? The arbitrator ruled against the employee on her ADA claim, finding that she did not meet the statutory standard of disability under applicable law, as defined in the *Toyota* decision.[58] The court resolved a threshold issue of whether it could even hear the employee's appeal, given that it was based solely on the "manifest disregard" standard, which the employer argued was not grounds for vacating the award.[59]

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[55] *Reynolds*, No. 1:03-CV-545, 2004 WL 3733401, at *2.
[56] *Id.* at *3.
[57] *Id.* at *1.
[58] Luong v. Circuit City Stores, 368 F.3d 1109 (9th Cir. 2004); Toyota Motor Mfg., Inc. v. Williams, 534 U.S. 184 (2002).
[59] *Luong,* 368 F.3d at 1111–12.

The court allowed review under this standard, which it characterized as a "nonstatutory escape valve" from the otherwise limited grounds for review under the FAA.[60] On the merits, though the employee claimed the arbitrator had extended the meaning of Toyota, the court concluded that "without expressing a view one way or the other on whether the arbitrator got Toyota right, it is clear that the arbitrator did not ignore it. . . . Virtually every line of the opinion and award discussed Toyota and how it plays out on the facts. . . . That cannot amount to 'manifest disregard of federal law.'"[61]

The court also ruled that the employee's appeal was not frivolous, and thus denied the employer's claim for costs based upon applicable court rules.[62]

Observation: Had the parties initiated the case in court, the employee would have been entitled to a full review of the legal question of whether she met the statutory standard of disability under applicable law. Under that scope of review, the issue would be whether the lower court correctly applied the Toyota standard and not whether she considered it but got it wrong. *Luong v. Circuit City Stores,* 368 F.3d 1109 (9th Cir. 2004).

Case Study 4—Should There Be Judicial Reversal Only When the Arbitrator Wears Blinders? DiRussa was a branch manager demoted to account executive, claiming this was the result of age discrimination.[63] The arbitrators ruled in his favor, awarding more than $200,000 in compensatory damages.[64] The arbitrators denied DiRussa's claims for punitive damages and counsel fees.[65] DiRussa appealed, claiming the arbitrators engaged in "manifest disregard" of the law.[66] The Second Circuit rejected this position, saying there must not only be an error of law but it must have been "obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator."[67] Not only that, but the challenger must show that the "arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it."[68] Rendering judicial review even

[60] *Id.* at 1112.
[61] *Id.*
[62] *Id.*
[63] DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818, 820 (2d Cir. 1997).
[64] *Id.* at 820.
[65] *Id.*
[66] *Id.*
[67] *Id.* at 821.
[68] *Id.*

more illusory in these cases, the court said that "the arbitrators did not state their reasons" for denying counsel fees, "nor were they required to do so."[69]

DiRussa argued that this narrow standard of review should only apply to "typical commercial or labor disputes" and not to disputes involving federal statutes.[70] He did not argue for a different rule in mandated employment arbitrations. Since DiRussa, a branch manager, was a high-level employee, I would not include him in the universe of employees whose arbitration agreements are "mandated" and entitled to greater judicial scrutiny on review.

Observation: This Second Circuit decision is a foundational case in developing the manifest disregard standard. It is the rare case where the arbitrator openly flouts existing law. In most cases, the arbitrator will simply be mistaken. An employee with a statutory claim is entitled to proper application of the law. It should be the responsibility of the arbitrator to know the law, even if counsel or a pro se litigant does not do a good job of highlighting it.[71] The court said it was not its job to make sure arbitrators know the law about attorney's fees. If the parties had initiated the case in court, the District Court's failure to properly follow the statutory provision for counsel fees, in this case ADEA Section 626(b), would have been grounds for reversal. Even if the award of counsel fees was discretionary, the arbitrator should be required to provide a justification for his exercise of discretion and that explanation should be reviewable. The court noted but declined to address the question whether it should apply a "less deferential" standard of review in cases involving federal statutory rights.[72]

Case Study 5—Judicial Review of the Arbitrator's Ruling on Time Limits. What is the court's appropriate role when the arbitrator dismisses the case on the basis of time limits stated in the arbitration agreement, where those time limits are more restrictive than the time limits of the statute on which the underlying claim is based? In *Pearson Dental Supplies*,[73] Luis Turcios, an employee of

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[69] *Id.* at 822.

[70] *Id.* at 821.

[71] Lawyers have an ethical "duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party." *See* MODEL RULES OF PROF'L CONDUCT R. 3.3 (4) (2010).

[72] *DiRussa*, 121 F.3d at 825. Courts in the Second Circuit have occasionally backed away from the approach in *DiRussa,* insisting on more intensive review, *e.g.,* DeGaetano v. Smith Barney, 983 F. Supp. 459 (S.D.N.Y. 1997); *and* Halligan v. Piper Jaffray, Inc., 148 F.3d 197 (2d Cir 1998). *See also* Carpenter v. Potter, 91 Fed. Appx. 705 (2d Cir 2003).

[73] I am grateful to Cliff Palefsky, Esq., a California plaintiffs' lawyer, for putting me on the track of this case and providing helpful insights.

Pearson, signed an arbitration agreement requiring him to submit statutory disputes to arbitration within one year of the dispute arising or within one year from the time he first becomes aware of the facts giving rise to the dispute.[74]

When Pearson terminated Mr. Turcios, he filed an age discrimination claim in the Los Angeles Superior Court.[75] In a story that raises eyebrows, it appears that neither Mr. Turcios and his lawyer nor the company and its lawyers realized that Mr. Turcios had signed an arbitration agreement.[76] Or maybe they did realize it, and each side kept quiet in order to gain some strategic advantage. In any event, after the litigation process had meandered on for more than a year, including discovery, the employer for the first time invoked the arbitration agreement and insisted that the case go to arbitration. In its motion to compel arbitration, the employer did not point out that it intended to argue in arbitration that the time limits for arbitration had already expired.

When the case finally got to arbitration, the arbitrator granted summary judgment for the employer, ruling that the demand for arbitration was not timely under the one-year limitation in the parties' agreement.[77]

The case made its way to California's highest court after the lower court overturned the arbitrator's award and an intermediate court reinstated it. The intermediate court noted that the test of review of an arbitrator is extremely narrow: "[W]e cannot review the decision for errors of law and fact, even when the decision causes substantial injustice."[78] The intermediate court made this statement in the face of its own concession that the arbitrator had misapplied the rules for tolling a time limit.

The California Supreme Court reversed the intermediate court and overturned the arbitrator's ruling.[79] It began its opinion by noting the normally narrow scope of judicial review of arbitration awards based on errors of law.[80] However, it amplified its earlier statement that "the scope of judicial review may be somewhat greater in the case of a mandatory employment agreement that

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[74] Pearson Dental Supplies, Inc. v. Superior Court, 48 Cal. 4th 665, 670–71 (Cal. 2010).
[75] *Id.* at 670.
[76] *Id.*
[77] *Id.* at 671–72.
[78] Pearson Dental Supplies, Inc. v. Superior Court, 166 Cal. App. 4th 71, 87 (Cal. App. 2008).
[79] *Pearson*, 48 Cal. 4th at 669 (Cal. 2010).
[80] *Id.*

encompasses an employee's unwaivable statutory rights."[81] The court specifically grounded its 4–3 decision on the narrow basis that the arbitrator's clear error of law on the timeliness point had deprived the employee of a hearing on the merits of an unwaivable statutory employment claim.[82] The specific error was the arbitrator's failure to correctly apply the rules on tolling. The Supreme Court held that the arbitration time limits should have been tolled while the case was pending in the courts and until the court compelled arbitration.[83] The case was brought under a California statute prohibiting discrimination, and was decided under California law.[84]

Building upon its earlier *Armendariz* decision, the Court reiterated its view that a mandatory arbitration agreement—one it characterized as an "adhesive" contract—could not serve as a vehicle to waive statutory rights.[85] The Court continued that arbitration of statutory claims is subject to certain minimal requirements, including a written arbitration decision and judicial review "sufficient to ensure the arbitrators comply with the requirements of the statute."[86] The court attributed that language to *Armendariz*.[87]

The court was careful to decide *Pearson* on narrow grounds. It observed that the parties did not call upon it to confirm an arbitration award, and would not articulate precisely what standard of judicial review would apply in such cases to ensure that arbitrators comply with the requirements of a statute.[88] "All we hold today is that in order for such judicial review to be successfully accomplished, an arbitrator in a FEHA case must issue a written arbitration decision that will reveal, however briefly, the essential findings and conclusions on which the award is based."[89]

Case Study 6—A Case That Turns on Motive and on the Facts. An African American woman started out as a waitress in a restaurant chain and worked her way up to assistant manager and then to general manager of the store.[90] She performed well in all these

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[81] *Id.*
[82] *Id.* at 670.
[83] *Id.* at 675.
[84] *Id.* at 670.
[85] *Id.* at 677.
[86] *Id.*
[87] *Id.* Of course, the language found in *Armendariz* in turn builds upon language in *Gilmer*.
[88] *Pearson*, 48 Cal. 4th at 677.
[89] *Id.* at 677–78.
[90] Williams v. Mexican Restaurant, Inc., No. 1:05-CV-841, 2009 U.S. Dist. Lexis 16561, at *1, *6 (E.D. Tex. 2009).

positions. However, she found the general manager job too burdensome, and sought to "step down" to her old waitress job.[91] The Company refused her request to step down, and terminated her when there was no other job for her to perform.[92] The Company explained that there is an unwritten company policy against allowing managers to step down to waitress positions in the same restaurant.[93]

The employee filed a Title VII claim with EEOC, alleging racial discrimination. The agency made a finding of probable cause. The employee then brought a Title VII action in District Court, but the court directed the matter to arbitration under the terms of a pre-employment agreement.[94] The arbitration was held under the auspices of the American Arbitration Association.

As the litigation unfolded, first before the EEOC, then in an unemployment hearing, the Company shifted its position: First, it said that the employee had resigned, then that she had performance problems, and finally that she had refused training.[95] All of these explanations were refuted or abandoned along the way.

The employee claimed that the company denied her request to step down on account of her race.[96] She said that another manager, who is white, had been allowed to step down. In support of her claim of racial discrimination, the grievant said that another manager had referred to her as a "Black woman."[97] Confronted with the allegation that it had applied its no step-down policy on a discriminatory basis, the Company gave changing and inconsistent explanations of its application to various employees.[98] When those explanations did not pan out, the Company finally latched on to the defense that it had to allow the white employee to step down as an accommodation under the ADA and FMLA.[99]

What the arbitrator concluded: While the Company was "ineffective in its handling" of the claim and its "proffer of multiple unsupported and inconsistent reasons for its actions. . . . obscured the truth and needlessly complicated the issues involved," the Company validly applied its step down policy.[100] The situations of the

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[91] *Id.*
[92] *Id.* at *7.
[93] *Id.* at *8.
[94] *Id.* at *2.
[95] *Id.* at *8–*10.
[96] *Id.* at *2.
[97] *Id.* at *6–*7.
[98] *Id.* at *8–*10.
[99] *Id.* at *11.
[100] *Id.*

two women were different because of the need to accommodate the other employee, and the different treatment of the two women was not based on race.

The employee sought to vacate the award in District Court, apparently before the same judge who sent the case to arbitration. The judge farmed the case out to a Magistrate.

What the Magistrate thought: The Company's final explanation should have been seen as pretextual in light of "an embarrassingly long string of evolving reasons" that were all rejected at various stages of the case.[101] "Logic and common sense would lead anyone to distrust . . . [a company that would wait] to reveal its true and innocent explanation until first exhausting a host of phony reasons."[102] The Magistrate said that "[m]any judges and most jurors might have accepted such gross and repugnant pretext evidence as affirmative and sufficient evidence of . . . discrimination."[103] The Magistrate thought that the explanation that an accommodation was made for the white employee "borders on preposterous."[104] Although the Magistrate summarized portions of the award that support the arbitrator's decision, such as his finding that all witnesses credibly testified that the employer had a long-established no-step-down policy, that another minority employee was denied the right to step down, and that these policies are customary in the industry, and although the Magistrate concluded that the arbitrator was not required to draw an inference of discrimination,[105] the Magistrate skewered the arbitrator's award, calling it, among other things, "astonishing" and "eye popping."[106]

The District Court Upholds the Magistrate. The District Court upheld the decision of the Magistrate to whom it had referred the case.[107] The court reviewed recent 5th Circuit authority that held that the manifest disregard standard no longer applied as a standard of review in light of observations in the Supreme Court's recent *Hall Street Associates* case.[108] Nevertheless, under the narrow

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[101] *Id.* at *13.
[102] *Id.*
[103] *Id.* at *34.
[104] *Id.* at *13.
[105] *Id.* at *11–*15.
[106] *Id.* at *32.
[107] *Id.*
[108] *Id.* at *13–*20 (*citing* Citigroup Global Markets, Inc. v. Bacon, No. 07-20670, 2009 WL 542780, at *6 (5th Cir. March 5, 2009)).

scope of review under applicable law, the Magistrate was correct in concluding there was no basis to overturn the arbitrator.[109]

The standard of review. The Magistrate was working with a standard of review that he characterized as "among the narrowest known to the law."[110] The Magistrate observed that wholesale disregard of evidence is not grounds for vacating an award; a court must confirm a "wrong call" on the law so long as there is a "colorable justification" for it; and that "incorrect, even wacky, legal interpretations" must stand.[111] The only window for overturning an award is "an arbitrator's explicit rejection of controlling precedent or willful flouting of governing law or some similar egregious impropriety."[112] The award stood.

Williams v. Mexican Restaurant, Inc., 2009 U.S. Dist LEXIS 16561 (E.D. Texas 2009). The Magistrate's decision was confirmed in Williams v. Mexican Restaurant Inc., 2009 WL 747141 (E.D. Texas 2009).

This case got me started on this paper. It seemed as stark an example as you could find of a court concluding that an arbitration award was wrong, yet finding itself powerless to overturn it. The arbitrator was the principal partner in a small litigation firm in St. Antonio, Texas, who engaged in arbitration and mediation as a small part of his practice.[113] He has since retired from his law practice. Earlier in his career he had worked for the NLRB, and for many years was an adjunct professor of law.[114] I communicated with him by e-mail, and he sent me a copy of his award.

The arbitrator told me that he was shocked at the Magistrate's characterization of his award. The arbitrator said that this was primarily an issue of credibility. Four of the five witnesses who testified for the Company had left its employ by the time of the arbitration hearing and had no apparent motive to testify in the Company's favor. Based on the totality of the testimony, the arbitrator concluded that the Company had a valid no-step-down policy that it applied consistently in all cases, including this one. The arbitrator

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[109]Williams v. Mexican Restaurant, Inc., No. 1:05-CV-841, 2009 U.S. Dist. Lexis 16561, at *32 (E.D. Tex. 2009).

[110]*Id.* at *15 (quoting Pro-Fit Worldwide Fitness, Inc. v. Flanders Corp., No. 2:00 CV 0985 G, 2006 U.S. Dist. LEXIS 26011, at *1 (D. Utah Apr. 20, 2006)).

[111]*Williams*, at *39.

[112]*Id.* at *18.

[113]Letter from the arbitrator to the author, February 25, 2010, and e-mail response from the arbitrator, March 4, 2010, in author's files.

[114]Lawyers.com, *Randolph P. Tower,* www.lawyers.com/Texas/San-Antonio/Randolph-P-Tower.

could not understand how the court, which had no transcript to review, could question his credibility findings.[115]

The arbitration award is fairly short. On its face, it makes a reasonably convincing case for denying the claim of discrimination. My only reservations are that it does not adequately explain the Company's shocking parade of changing explanations, nor does it explain why, after all these shifting reasons, the arbitrator found persuasive the final reason, accommodating the white employee.

The evidence of racial animus is in any event quite thin. The only factor the Magistrate mentions in his decision is that another supervisor referred to the plaintiff as a "Black woman." No further context is given for that remark. As the Magistrate points out, the use of that term does not necessarily show hostility based on race.[116] Even if the Company's explanation for allowing the white employee to step down was a pretext, it was not necessarily a cover up for racial discrimination. Perhaps the Company had yet another undisclosed reason, based on reasons other than race, for not letting the plaintiff return to her old job.

The Magistrate who reviewed the award had served in that position for many years.[117] The Magistrate's decision provides a lengthy and very detailed analysis of the facts and the applicable law. It is well written, and the Magistrate appears to have a solid grasp of applicable Title VII law. The decision obviously required considerable time and thought, and undoubtedly consumed substantial judicial resources.

I spoke at some length by phone with the plaintiff's attorney.[118] He said that the AAA's panel of proposed arbitrators included only candidates with promanagement credentials, careers, and reputations. The plaintiff's lawyer thought there was adequate evidence of racial bias presented in the record and that the arbitrator did not require the employer to explain what he called "its wildly shifting explanations." He advised me that the discrimination was by Hispanic and white management in a company that is majority Hispanic. Finally, he told me that during the time his cli-

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[115]All of this information is contained in an e-mail from arbitrator to author, on March 4, 2010. Notes in author's files.

[116]Williams v. Mexican Restaurant, Inc., No. 1:05-CV-841, 2009 U.S. Dist. Lexis 16561, at *40 (E.D. Tex. 2009).

[117]According to his law clerk, he has served as a Magistrate since 1983; telephone conversation with Chambers of Magistrate Earl S. Hines, November 4, 2010.

[118]Telephone conversation March 11, 2010, and e-mail from Plaintiff's attorney April 9, 2010. Notes in author's files.

ent worked there, the Mexican Restaurant was reputed to be the best restaurant in Jasper, Texas.[119]

The defendant's lawyer did not answer my request for information about the case. He does trumpet his victory on his firm's website.[120] He points out that in the county where this case took place, there had recently been a notorious lynching of a black man. The inference that I assume he asks us to draw is that in any litigation in that county a judge or jury would be hard put to find against a black claimant. He asserts that is why the EEOC found probable cause. The Company's lawyer congratulates himself on keeping the case out of the courts by requiring the employee to arbitrate her claim.[121]

Observations: The arbitrator is quite right that this is largely a matter of credibility. As I went through the cases, I was struck by how many of them turn on the same basic question of motive. For all the discrete legal issues that eventually make their way to the Supreme Court, most ordinary cases usually come down to a core, underlying theme: The plaintiff thinks she was fired because of race, the employer gives a race-neutral explanation, and it is up to the trier of fact to determine whom to believe. Viewed narrowly, this inquiry raises no question of law.[122]

There might have been a question of law in this case. At various stages in the development of the law on the proof of discrimination, there was a view that if the employer put forth a series of explanations that all turned out to be wrong, judgment would have to be entered for the employee as a matter of law. This position was rejected by the Supreme Court in *Reeves*.[123] A strong dissent by Justice Souter asserted that if the employer exhausted his list of explanations, the only remaining plausible inference was racial motivation.[124] An opposite position argued that the employee could not prevail solely by drawing an inference from the fact that all the employer's reasons were shot down, but would have to come up with independent evidence of discrimination. In the *St. Mary's* decision, the court wisely rejected that automatic approach

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[119] *Id.* The author also confirmed some of this information in a subsequent e-mail to the author. Note in author's files.

[120] *See generally* Monty Partners, L.L.P., *available at* http://www.montypartners.com.

[121] *Id.*

[122] I drew a similar conclusion when I reviewed a sample of claims that were not forced into arbitration but were initiated in the Federal District Courts and then reviewed by a Circuit Court of Appeals. Most of the cases involved this same factual issue. *See supra* note 45.

[123] Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000).

[124] St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

and concluded that it was up to the trier of fact to draw inferences when the employer's explanations did not hold water.[125] In that light, the arbitrator in *Williams* decided the question of law correctly. Had the arbitrator taken one of the positions I just summarized, that would raise issues of law that in my judgment are grounds for judicial review.

The *Williams* case surely raises credibility questions about the Company's explanations. The Magistrate may be correct that most people hearing this case would discredit the employer simply based on the number of changing reasons it gave, and would draw as the only remaining plausible inference that race was the motivating factor. But, as the Magistrate points out, the arbitrator was free to draw a different conclusion.

If a case like *Williams* convinced me that judicial review of the fact finding were required, I would suggest a very narrow test, such as whether the arbitrator's findings lacked any support in the record. The arbitrator's findings in *Williams* would pass this test. However, as I will indicate later, judicial review of fact finding may not be worth the cost of impairing arbitral finality.

Case Study 7—Dealing With Unsettled Issues of Law: Advancing a New Associational Theory. A father and son, both terminated, brought age discrimination claims against their employer. Although the opinion is not clear, the briefs indicate that arbitration was mandated as a condition of employment. The ADEA protects the father, but not the son, who is under age 40. The son claimed that he was entitled to protection under the ADEA under an "associational status."[126] He contended that when his father refused to sign a confidentiality agreement as part of the resolution of an age discrimination claim, the company fired both father and son in retaliation.[127] There is scant legal authority under the ADEA on this question. The arbitrator ruled in favor of the son.[128] The court applied the extremely deferential scope of review in the 10th Circuit, characterizing it as "among the narrowest known to law."[129] Yet, the court engaged in a very thorough and careful review of the arbitration award. The court said that under the 10th Circuit's "manifest disregard" ground for reversal, the challenger must

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[125] *Id.*

[126] Morrill v. Wright Marketing, No. 04-CV-01744-MSK-BNB, 2006 WL 2038419, at *1, *2 (D. Colo. 2006).

[127] *Id.* at *1.

[128] *Id.*

[129] *Id.* (quoting U.S. Energy Corp. v. Nukem, Inc., 400 F.3d 822, 830 (10th Cir. 2005)).

show that the arbitrator "knew what the binding authority was and explicitly disregarded it."[130] Since there is no settled applicable law, the court could not see how an arbitrator could manifestly disregard the law. The court also reminds us that in the 10th Circuit, arbitral fact finding is beyond judicial review.[131]

The court considered sanctions against the employer's counsel for appealing the arbitrator's ruling, but did not apply them.[132]

Observation: As the court points out, the manifest disregard standard theoretically precludes reversal of an arbitrator where the law is unsettled. If there is no clear rule of law, the arbitrator is on his own, and there is nothing that he can disregard. But the law books are filled with names of plaintiffs who made new law by pursuing their claims. If the arbitrator had ruled against the plaintiff in this case, shouldn't he have the opportunity to convince a reviewing court, and perhaps even the Supreme Court, that he has a cause of action? *Morrill v Wright Marketing,* 2006 WL 2038419 (D. Colo. 2006).

Case Study 8—Judicial Review of an Arbitrator's Resolution of Procedural Issues: Expanding the Claim. Can you expand the claim that is submitted to arbitration? Seven black employees claimed racial discrimination; their claims were sent to arbitration under a mandatory agreement.[133] Two of the claimants prevailed in arbitration, with the arbitrator awarding damages of $25,000 to each employee for emotional damages arising out of a hostile work environment.[134] The employer contended that the arbitrator went beyond the scope of the submission, as no claim had been filed about a hostile work environment.[135] The court upheld the award, reasoning that the allegation of race discrimination and harassment reasonably contemplated a claim of hostile work environment. Under a "highly deferential" third circuit standard of review, the award must stand.[136] It was "rationally derived" from the parties' submission.[137] Despite the brief opinion, the court appears to have considered the award in considerable detail.

The court rejected the employees' claims that the arbitration agreement had been coerced. It said, "unequal bargaining power

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[130] *Id.* at *2.
[131] *Id.*
[132] *Id.* at *5.
[133] Brennan v. Cigna Corp., 282 Fed. Appx. 132, 133 (3d Cir. 2008).
[134] *Id.* at 135.
[135] *Id.* at 136.
[136] *Id.* at 137.
[137] *Id.* at 136.

is not alone enough to make an agreement to arbitrate a contract of adhesion."[138]

Observation: What if the arbitrator had come out the other way, and determined that the employees' claim was not fairly encompassed by their submission to arbitration? The deferential approach in this case favored the employees, who prevailed in arbitration. But should an arbitrator be permitted, without any meaningful judicial review, to close off the only avenue of redress for a statutory violation because he concludes that the claim is beyond the scope of the submission? *Brennan v. Cigna,* 282 Fed. Appx. 132 (3d Cir. 2008).

Case Study 9—Another Procedural Issue: Going Beyond What Was Presented to the EEOC. A female employee claimed her employers terminated her because of her gender, and that they subjected her to a hostile work environment.[139] The descriptions in the arbitrator's award paint an overwhelming picture of harassment.[140] The arbitrator ruled in the employee's favor and granted $64,000 in backpay, $50,000 in compensatory damages, and awarded attorney's fees of $31,000.[141] The employer sought review, claiming among other things that the employee was required to exhaust all her claims before the EEOC and that she did not place before EEOC some of the claims she made in arbitration. The court upheld the arbitrator's award.[142]

Observation: The court applied the narrow standards of review of the fourth circuit, which essentially follows the "manifest disregard" test.[143] On the issue of whether an employee is required to put all her claims before the EEOC before taking them to arbitration, the court concluded the law was unsettled.[144] It treated the issue as one left to the arbitrator in the first instance. The court says that where the law is unsettled, the arbitrator cannot possibly "manifestly disregard" it.[145] However, as I indicated in Case Study 7, unsettled issues invite judicial review so that the law may properly evolve.

Case Study 10— How the "Manifest Disregard" Standard Makes a Difference. Several female waitresses succeeded in their arbitra-

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[138] *Id.* at 136.
[139] Caci Premier Technology, Inc. v. Faraci, 464 F. Supp. 2d 527, 530 (E.D. Va. 2006).
[140] *Id.* at 530–32.
[141] *Id.* at 531–32.
[142] *Id.* at 536.
[143] *Id.* at 532.
[144] *Id.* at 533.
[145] *Id.* at 532.

tion action against their employer for alleged sexual harassment by the chef.[146] After a seven-day hearing, the arbitrator awarded each employee $7,000–$10, 000 in damages for emotional pain and mental anguish, and awarded $87,000 in attorney's fees.[147] The parties had stipulated in their arbitration agreement that the scope of review would be the same as for appellate court review of a decision of a district court judge sitting without a jury.[148] Using that more expansive scope of review, the District Court overturned the arbitrator's award for errors of law.[149] The District Court said the arbitrator applied the wrong legal theory when she concluded that one employee was subjected to quid pro quo conduct by her supervisor, when the arbitrator should have applied a hostile work environment standard.[150] The remaining employees failed to take advantage of mechanisms set up by the employer to rectify sexual harassment and so should be barred from recovery.[151]

The employees appealed, and the 5th Circuit ruled that after *Hall St. Associates*, parties are not permitted to expand the scope of review beyond what is provided in the FAA, and that the appropriate scope of review is the "manifest disregard" standard.[152] The 5th Circuit remanded, and, using that standard, the District Court concluded it had no choice but to reverse itself and uphold the arbitrator's award.[153]

Observations: In this case, the employees' victory in arbitration was preserved by the court's imposition of the manifest disregard standard. Under traditional appellate review of lower court decisions, the standard chosen by the parties, the award would have been overturned because it committed an error of law. This sequence of opinions shows starkly how the manifest disregard standard can make a difference in the outcome of a case. Under the manifest disregard standard, the award stands; under the traditional scope of court review, agreed upon by the parties, it was reversed. *National Resort Management Corp. v. Cortez,* 278 Fed. Appx. 377 (5th Cir. 2008), *aff'd*, 319 Fed. Appx. 313 (5th Cir. 2009). *See*

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[146]National Resort Mgmt. Corp. v. Cortez, 470 F. Supp. 2d 659, 661 (N.D. Tex. 2007).
[147]*Id.*
[148]*Id.*
[149]*Id.* at 662–65.
[150]*Id.* at 662.
[151]*Id.* at 663.
[152]National Resort Management Corp. v. Cortez, 319 Fed. Appx. 313, 313 (5th Cir. 2009).
[153]National Resort Management Corp. v. Cortez, 278 Fed. Appx. 377, 377 (5th Cir. 2008).

also Hall St. Assocs., LLC., v. Mattel Inc., 196 Fed. Appx. 476 (9th Cir. 2006).

II. Should the Narrow Standard of Review Be Preserved When It Protects Employees Who Prevail in Arbitration?

Employees prevailed in a large number of the case studies I have presented—in case studies 4, 7, 8, 9, and 10.[154] In the overall universe of cases that we considered, but did not report on in this article, employees won about 25 percent of the time.[155] Are employees better off with the narrow test of review under the manifest disregard standard? Plaintiffs' lawyers point out that the appeals process generally favors the party with the deeper pockets, and that is usually the employer. So the plaintiffs' bar in these cases has to be careful about what it wishes. These are practical and tactical considerations that only those in practice can resolve. From my vantage point, it seems that even with the very narrow standard of review currently in effect, employers are not shy about appealing those cases they lose. Even if the employer loses its appeal,[156] it delays the outcome and it imposes additional costs on the employee in a way that may deter employees from pursuing cases in the future.

One might suggest, to use the Yiddish expression, that it is the height of chutzpa for an employer to impose arbitration upon an employee and then try to overturn the award when the employee wins. No court to my knowledge has suggested or even considered the proposition that the employer who imposes a system of arbitration should be foreclosed from challenging an arbitration award under it. Symmetry suggests that the same test of review be applied whether the employer or the employee challenges the award, and it should be a review of whether the arbitrator correctly applied the law.

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[154]Out of 11 cases analyzed, 5 had favorable decisions for the employee: DiRussa v. Dean Witter Reynolds, Inc., 121 F. 3d 818 (2d Cir. 1997); Morrill v. Wright Marketing, 2006 WL 2038419 (D. Colo. 2006); Brennan v. Cigna Corp., 282 Fed. Appx. 132 (3d Cir. 2008); Caci Premier Technology. Inc. v. Faraci, 464 F. Supp. 2d 527 (E.D. Va. 2006); *and* National Resort Management Corp. v. Cortez, 470 F. Supp. 2d 659 (N.D. Tex. 2007).

[155]*See generally supra* note 45.

[156]The employer's appeal was unsuccessful in every case study we used in this article.

III. How Does the Narrow Standard of Review Affect Sanctions for Taking an Appeal?

Case Study11. The employee claimed his employers fired him in retaliation for seeking further medical treatment under a workers' compensation claim.[157] The employee joined his retaliation claim—a tort claim under Kansas law—with a Title VII claim,[158] and submitted both to arbitration under a mandatory dispute resolution agreement.[159] The company contended that it fired the employee because he violated the Company's weapons policy.[160] The arbitrator ruled for the company, concluding that the Company's proffered reason was not pretextual.[161] Though the arbitration agreement permitted the arbitrator to impose costs upon the losing party, the arbitrator declined to do so.[162] The employee, apparently concluding that direct review of the arbitration award was futile under the prevailing narrow scope of review, brought a new action under state tort law. The employer moved to dismiss under a theory of claim preclusion,[163] contending that the arbitration award already decided the issues in question. The 10th Circuit had no trouble concluding that the claim was precluded. It also rejected a claim that the arbitration award violated public policy.[164]

The employer moved for sanctions against the employee's attorney.[165] The court noted that in arbitration cases, where the standard of review is so narrow, sanctions are warranted if the arguments are "completely meritless."[166] The court quoted authority that where a losing party "drags the dispute through the court system without an objectively reasonable belief it will prevail, the promise of arbitration is broken. Arbitration's allure is dependent upon the arbitrator being the last decision maker in all but the most unusual cases."[167] The court declined to award sanctions. It

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[157] Lewis v. Circuit City, 500 F.3d 1140, 1142 (10th Cir. 2007).
[158] *Id.*
[159] *Id.* at 1143.
[160] *Id.*
[161] *Id.* at 1144–45.
[162] *Id.* at 1145.
[163] *Id.*
[164] *Id.* at 1148.
[165] *Id.* at 1152.
[166] *Id.* at 1153.
[167] *Id.*

said that the arguments were "complex," and though "meritless, we can not characterize them as completely frivolous."[168]

Observations. This appeal did not seem to have had a prayer of succeeding. Yet the employee's lawyer went ahead and appealed, and may have been lucky to escape sanctions. Several other case studies discussed in this paper involve appeals that were fairly hopeless under the narrow standard of judicial review.[169] Since the prospect of sanction is real, it may serve as a deterrent for appealing arbitration awards under the narrow standards that presently apply. A broader standard of review, one that considers whether the law was properly applied, would give losing parties more leeway to appeal without fear of sanctions. This is desirable if we are relying on private plaintiffs to secure compliance with the various workplace statutes. *Lewis v. Circuit City,* 500 F.3d 1140 (10th Cir. 2007).

Concluding Observations

I address only those cases in which an employee is required as a condition of employment to arbitrate his or her statutory workplace disputes. For cases involving employees of relatively equal bargaining power, who have some choice in the matter, I do not seek to disturb the well-established narrow grounds of judicial review. As I said at the outset, arbitration is a consensual process, and those who voluntarily buy into the system must understand that the grounds for judicial review are extremely limited, as finality is normally a hallmark of arbitration.

But for those who have no choice in the matter, and are forced to arbitrate their statutory disputes, there must be more intensive judicial review to ensure that the applicable statute has been properly applied. That, in my judgment, is the premise of the landmark *Gilmer* decision, quoted at the outset of this paper, which upheld mandatory arbitration. The Court said that it does not deprive such employees of their statutory rights but merely confines them to a particular forum, and that judicial review, while narrow, must be sufficient to protect those statutory rights.

At the same time, I acknowledge that finality is a defining characteristic of arbitration. If judicial review is too intrusive, arbitration

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[168] *Id.* at 1154.

[169] See case studies 3, 7, and 11, all of which involved appeals that had little chance of success and in fact failed.

loses one of its relative advantages. The task is to find a balance between preserving the institution of arbitration and guaranteeing the protection of statutory rights.

In studying some 50 decisions that review arbitration awards in mandatory settings, including the 11 case studies covered in this paper, several conclusions jump out.

First, despite the recitation of a narrow scope of review, these courts for the most part engage in very extensive review of the arbitration award. They set out the facts in great detail and discuss the applicable law fully. If you did not know that the court was reviewing an arbitration award, you might think from the extensive discussion of the decision below that the appellate court was reviewing a case initiated in the lower courts. Courts seem to expend as much of their resources reviewing an arbitration decision as they do reviewing a case initiated in the district courts, so the narrow standard does not appear to conserve judicial resources.

Second, the narrow standard of review gives the appellate court an easy way out of saying that while it gave the review its best efforts, it is powerless to do anything about the award. The narrow standard of review does not force a court to make difficult judgments about the applicable law.

Third, the current formulation is an illusory standard of review. What arbitrator will consider a statutory requirement and choose to ignore it? Like our baseball umpire, most arbitrators take seriously their task of applying the statute. They may simply get it wrong. Under the prevailing approach, that is not enough to justify overturning the award. This sends a bad message to litigants about our judicial system: The court is really saying, we considered your case and we think the arbitrator got it wrong. Yet we cannot do anything to correct it.

Fourth, the courts walked away from unsettled issues of law. Under the narrow manifest disregard standard, where there is no consensus on the rule of law, it is hard to say that the arbitrator disregarded it.

Fifth, the majority of cases we looked at, though not the majority in the selected case studies, involved factual issues, primarily about motive. Case Study 6, involving the manager who wanted to step down to her old waitress position, is a paradigm example. As we saw when looking at that case study, it is very difficult for a reviewing court to arrive at a more reliable conclusion than the person who observed the demeanor of the witnesses and lived with

the facts. The problem of review is compounded because transcripts are not required in most arbitrations, and in my experience the majority of arbitrations do not have them. As the Magistrate pointed out in the waitress case, and as the arbitrator underscored in his discussion with me, it is very difficult for a court to review the facts without a transcript.

Sixth, employees win a large number of these arbitrations. In the cases we reviewed, employees prevailed in arbitration nearly 25 percent of the time—the percentage is even higher in the case studies reported here. For those employees, finality is a virtue, at least after they win their case in arbitration. Plaintiffs' lawyers point out that the appeals process favors the party with the deeper pockets. One could argue that simply to preserve the victories that employees gain in these arbitrations, we should be wary of providing for an expanded scope of judicial review. However, as I discussed earlier, employers, with the deeper pockets, are likely to appeal their losses whatever the standard of review. A broader standard of review might encourage employees to appeal more often.

Conclusions and Proposals

As I indicated at the outset of this paper, I don't see strong prospects right now for legislation that would abolish mandatory arbitration. Nor would legislation that might define the scope of judicial review be very high on a political agenda. Still, I offer these suggestions on the chance that Congress considers the matter.[170]

Even if the legislative avenue is currently closed, litigants could advance these proposals in pending cases. While the Supreme Court has indicated that there must be sufficient judicial review, it has not had the last word on what should be the appropriate scope of judicial review.

I propose the following:

First, the manifest disregard standard and its cousins are a manifest embarrassment. If we are going to have sufficient judicial review, as prescribed in *Gilmer,* it should be an honest review of whether the arbitrator got the law right. It should not impose the hopeless test of whether the arbitrator deliberately ignored

[170]In their book on arbitration, Speidel and others suggest that the FAA is in need of overhaul and should be amended to incorporate their various suggestions for reform. Edward Brunet, Richard E. Speidel, Jean R. Sternlight, and Stephen J. Ware, *Arbitration Law in America, A Critical Assessment,* 1–2 (Cambridge University Press, 2006).

the law, for, like the example of our baseball umpire, this is not the way arbitrators work. The due process protocol, to which the Academy subscribes, states that while limited, there should be meaningful judicial review.

Second, employers in all mandated arbitrations should be required to arrange and pay for a reporter and a transcript. Without a transcript, meaningful judicial review is limited and, in factual cases, virtually choked off.

Third, courts should review arbitration awards for clear errors of law on issues that make a difference to the outcome of the case.

Fourth, there should be judicial review on important questions of law that are currently unresolved. Think of all the plaintiffs who made history in the courts and changed the law—Percy Green, Willie Griggs, Lily Ledbetter, Brian Weber, Ann Hopkins, Beth Ann Faragher, Robert Murgia, Karen Sutton. Some of these plaintiffs took positions we might not necessarily think are correct, some lost their cases, and at least one, Lily Ledbetter, inspired Congress to change the law.[171] Plaintiffs like these should not be relegated to the silence of the arbitration process or to a system of review in which the court has no opportunity to apply the law correctly.

Fifth, there should be review to ensure that the arbitration comports with the fundamental elements of the due process protocol. There is a general consensus among the major organizations that play a role in the management of mandatory arbitration cases—including the AAA and the Academy—that the due process protocol, which is a response to *Gilmer*, should be treated as a prevailing minimal standard for according plaintiffs rights under applicable statutes.

Sixth, in cases that turn primarily upon factual findings, particularly the elusive issue of motive, the arbitrator's conclusions resulting from his direct observations of the testimony are generally more reliable than the second-hand considerations of a reviewing court. Case study 6, involving the store manager who wished to step down to her old position, is a good example. Judicial review

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[171] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007); United Steelworkers of America v. Weber, 443 U.S. 193 (1979); Price Waterhouse v. Hopkins, 490 U.S. 228 (2989); Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); *and* Sutton v. United Airlines, 527 U.S. 471 (1999).

of the facts would strain arbitral finality without providing significantly greater reliability in protecting statutory rights.

Under my proposed standard of review, a court has adequate opportunity to backstop egregiously poor fact finding. For example, in applying the statutory definition of disability, the court has some opportunity to review the underlying facts. Further, the existing, narrow statutory grounds, as well as the requirements of the due process protocol, would allow review of factual errors that are the result of misconduct, bias, or failure to apply the safeguards of the protocol.

Creative lawyers and judges can fashion an expeditious way to handle these appeals. This would minimize the costs of appeal and impose minimal burdens on the courts. Review that is limited to clear errors of law can be initiated on the basis of motions, with the arbitration award and the transcript before the court, accompanied by arguments in a brief.

I urge consideration of a system of discretionary review, along the lines of a petition for certiorari in the Supreme Court. The challenging party could put forth the award and the transcript and submit a brief setting forth alleged errors of law. The challenging party could respond in the same fashion. The court could review this limited record, and if it determines that there has been a possible error of law on an important issue of statutory law, it could set down the matter for more thorough briefing and argument.[172]

I understand that an expansive scope of judicial review jeopardizes finality, a vital aspect of arbitration.

But as the Supreme Court made clear in *Gilmer,* we must consider employment law as well as arbitration law. Getting it right as a matter of employment law may be more important than finality under arbitration law.

I know you cannot have both absolute finality of awards and full scale meaningful judicial review. But, as a modern poet, A.R. Ammons, said, "One can't have it both ways, and both ways is the only way I want it."[173]

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[172]Early in my academic career, I took on a last-minute assignment over the summer as a clerk for a newly elected judge on our state's highest court. This court entertained appeals from lower appellate courts on a discretionary basis. I do not know how this is done today, but in my time the parties submitted briefs that had tight page limits. The process of reviewing these applications was speedy and efficient. I would summarize the briefs and record and make recommendations to the court. The judge reviewed all my submissions and made his own decisions.

[173]The poem consists of just the single line quoted in the text of the article. The Ammons poem is the basis of the title of a recent collection of short stories by Maile Meloy, BOTH WAYS IS THE ONLY WAY I WANT IT (Riverhead Books 2009).