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Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer (with R. Ladenson)

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Articles

Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the *Steelworkers Trilogy* to *Gilmer*†

by
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I. Introduction

Labor arbitration has been hailed as one of the most successful innovations to result from collective bargaining. Arbitrating claims arising under a collective bargaining agreement is cheaper, faster, and less formal than litigating them in court. Furthermore, the parties control the arbitration procedure and can tailor it to meet their needs. The use of arbitration as the final method for adjudicating disputes has become almost universal practice in collective bargaining agreements.[1]

In contrast to the relatively low cost, speed, efficiency, and informality of collectively bargained arbitration systems, litigation tends to involve procedural complexity, delay, and substantial expense.

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1. The Bureau of National Affairs estimates that 98% of collective bargaining agreements provide for arbitration of grievances. BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 37 (12th ed. 1989).

Dissatisfaction with these characteristics of litigation has led to a burgeoning alternative dispute resolution (ADR) movement, which accords a significant role to arbitration. Traditionally, courts had refused to enforce agreements to arbitrate. Recently, however, with the growing popularity of ADR, courts have abandoned their traditional hostility toward arbitration and openly embraced agreements to arbitrate.[2]

The role of collective bargaining as the dominant regulator of the workplace has declined steadily during the past twenty years.[3] Accompanying this decline has been a continuing increase in external legal constraints on employer actions. These external constraints have involved statutes and common-law causes of action that subject employers to potentially costly multiple causes of action, capable of being litigated simultaneously in several forums.[4] Hoping to duplicate many of the advantages found in arbitration under collective bargaining agreements, an increasing number of employers have established arbitration systems for resolving disputes in the nonunionized workplace.[5]

The decline of collective bargaining and the accompanying rise of nonunion employment arbitration has fostered debate over whether, and if so to what extent, arbitration can be imported from the unionized to the nonunionized workplace.[6] The labor arbitration profession itself is divided over whether to embrace arbitration in the absence of a collective bargaining agreement.[7]

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2. *See, e.g.,* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (overruling Wilko v. Swan, 346 U.S. 427 (1953)).

3. The percentage of all workers in the United States who are union members has declined from a high of 35.5% in 1945 to a low of 15.8% in 1992. As of 1992, only 11.5% of workers in the private sector were union members. *Proportion of Union Members Hits 15.8 Percent* [1 Analysis/New & Background Information], LAB. REL. REP. (BNA) No.142, at 180-81 (Feb. 15, 1993) (reporting on data released by the U.S. Department of Labor, Bureau of Labor Statistics).

4. *See* Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7 (1988).

5. One study found that 17% of nonunion businesses had third-party arbitration systems for manufacturing and production employees, 24% had such systems for clerical employees, 21% for professional and technical employees, and 20% for managers. David Lewin, *Grievance Procedures in Nonunion Workplaces: An Empirical Analysis of Usage, Dynamics, and Outcomes*, 66 CHI.-KENT L. REV. 823, 824-25 (1990).

6. *See, e.g.,* Samuel Estreicher, *Arbitration of Employment Disputes without Unions*, 66 CHI.-KENT L. REV. 753 (1990); Matthew W. Finkin, *Commentary on "Arbitration of Employment Disputes Without Unions,"* 66 CHI.-KENT L. REV. 799 (1990); Samuel Estreicher, *Reply to Professor Finkin*, 66 CHI.-KENT L. REV. 817 (1990); Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916 (1979); G. Richard Shell, *ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509 (1990).

7. *See, e.g.,* REPORT OF THE COMMITTEE TO CONSIDER THE ACADEMY'S ROLE, IF

The Supreme Court gave employment arbitration a large boost in its decision in *Gilmer v. Interstate/Johnson Lane Corp.*[8] The Court held that a securities broker was bound to arbitrate his claim under the Age Discrimination in Employment Act (ADEA) because he had, as part of his registration application with the securities exchanges, agreed to arbitrate all claims arising out of his employment. The Court held that the Federal Arbitration Act's policy favoring enforcement of agreements to arbitrate compelled arbitration of Gilmer's ADEA claim.[9] The Court refused to find in the ADEA, and by implication in other federal equal employment opportunity statutes, a policy against compelling arbitration or otherwise waiving the right to litigate.[10]

An expansive reading of *Gilmer* would enforce agreements to arbitrate found in any employment contract with respect to any statutory or common-law cause of action. It would give employers a powerful incentive to require all employees to enter agreements to arbitrate. Arbitration would enable employers to consolidate several potential claims that otherwise could be litigated in multiple forums into one relatively cheap and quick proceeding.[11]

Scholars have cautioned against the wholesale arbitration of statutory claims. They question the wisdom of privatizing the adjudication of issues involving public law. Public forums, they urge, protect basic legal values, whereas private forums, such as arbitration, may resolve disputes on the basis of nonlegal social mores. Moreover, many issues of public law require choosing between conflicting public values, a task that should be reserved for judges and other public officials who are charged with making law in the public interest.[12]

ANY, WITH REGARD TO ALTERNATIVE LABOR DISPUTE RESOLUTION PROCEDURES (Nat'l Academy of Arbitrators), Apr. 29, 1992.

8. 111 S. Ct. 1647 (1991).

9. *Id.* at 1652.

10. *Id.* at 1653.

11. *See* Saari v. Smith Barney, Harris Upham & Co., 968 F.2d 877 (9th Cir.), *cert. denied*, 113 S. Ct. 494 (1992) (requiring arbitration of claims under federal Employee Polygraph Protection Act, state polygraph protection act, and state defamation law). Some employer lawyers are advocating, in light of *Gilmer*, that employers adopt mandatory predispute arbitration or other ADR systems for resolving potential claims. *See* Frank C. Morris, Jr. *Arbitration After Gilmer*, PRAC. LAW., June 1992, at 76-80; Evan J. Spelfogel, *New Trends in the Arbitration of Employment Disputes*, ARB. J., Mar. 1993, at 6; *Costs of Litigation, Gilmer Decision Encourage Alternative Dispute Resolution*, DAILY LAB. REP. (BNA) No. 243, at A-8 (Dec. 18, 1991); *Lawyer Says Use of Arbitration for Non-Union Employees Will Grow*, DAILY LAB. REP. (BNA) No. 99, at A-5 (May 22, 1990).

12. *See, e.g.*, Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1 (1987); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 671-72 (1986) [hereinafter Edwards, *Panacea or Anathema?*].

This Article looks to jurisprudential theory for answers to the concerns over the privatization of justice. Part II develops the role of arbitration and the rationale behind a policy favoring labor arbitration (*i.e.*, arbitration under collective bargaining agreements). Part III contrasts the role of and policies regarding employment arbitration (*i.e.*, arbitration in the nonunion setting). Whereas policies favoring labor arbitration are premised on its role as an instrument of workplace self-governance, policies favoring employment arbitration are premised on concern for efficiency in dispute resolution. Part IV reviews three well-known jurisprudential theories about the nature of law: Legal Realism, H.L.A. Hart's version of Legal Positivism, and Ronald Dworkin's conception of Law as Integrity.

Part V uses these theories about the nature of law to develop theories of personal and institutional constraints on the adjudicatory role in labor and employment arbitration. This Article argues that Legal Realism provides the best normative and descriptive theory of the adjudicatory role of labor arbitrators. It considers and rejects the case for extending the Legal Realist model to employment arbitration. It contends, instead, that H.L.A. Hart's version of Legal Positivism provides the best jurisprudential theory for analyzing the personal constraints on employment arbitrators. The analysis suggests that employment arbitrators should place predominant weight on judicial caution when interpreting employment statutes. It also suggests a more active role for courts in reviewing employment arbitration awards than in reviewing labor awards. This Article advocates an approach to judicial review that seeks to preserve the efficiency gains of employment arbitration without sacrificing the public justice goals of statutory and common-law regulation of the employment relationship.

II. Arbitration Under Collective Bargaining Agreements

The typical collective bargaining agreement provides that claims arising under the agreement must be submitted to a multi-step grievance procedure. Although the number of steps varies with the needs of the parties, the procedure usually provides for consideration of the claim at successively higher levels within the union and employer structures. If the parties are unable to resolve the claim through these successive levels of negotiation, they may submit it to a mutually selected third party for binding arbitration.[13]

13. *See* BASIC PATTERNS IN UNION CONTRACTS, *supra* note 1, at 33.

The initial judicial reaction to grievance arbitration was hostile because the courts regarded it as substituting a private adjudicator for a court in the determination of contract rights. Courts refused to enforce agreements to arbitrate when they believed that the claim lacked merit, reasoning, "If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate . . . ."[14] Similarly, courts reviewed de novo the merits of arbitration awards when asked to enforce them. They justified de novo review, reasoning that if, in the court's view, the award misinterpreted the contract, the award exceeded the arbitrator's authority by effectively amending the contract.[15]

In *Textile Workers Union of America v. Lincoln Mills*,[16] the Supreme Court federalized the law of grievance arbitration by interpreting Section 301 of the Labor-Management Relations Act[17] as a mandate for the development of a federal common law of collective bargaining agreements. Three years later in the *Steelworkers Trilogy* (*The Trilogy*),[18] the Court broadly swept aside the judicial hostility toward grievance arbitration and required courts to give broad deference to arbitral decisions. Specifically, the Supreme Court held that a court may not substitute its view of the merits of a grievance for the arbitrator's. The court must enforce the arbitration award as long as it draws its essence from the collective agreement.[19] Furthermore, to avoid unnecessary entanglement in the merits of the grievance, a court must enforce agreements to arbitrate unless it can be said with positive assurance that the dispute is not arbitrable.[20] A court must never premise a refusal to order arbitration on its view of the merits of the grievance, even if it believes the grievance to be patently frivolous.[21]

Courts and scholars have offered many reasons to support the limited role *The Trilogy* established for courts in reviewing labor grievances.

14. International Ass'n of Machinists v. Cutler-Hammer, Inc., 67 N.Y.S.2d 317, 318 (N.Y. App. Div.), *aff'd*, 74 N.E.2d 464 (N.Y. 1947).

15. *See, e.g.*, Western Union Tel. Co. v. American Communications Ass'n, 86 N.E.2d 162, 165 (N.Y. 1949); Screen Cartoonists Guild Local 852 v. Disney, 168 P.2d 983, 984 (Cal. Ct. App. 1946).

16. 353 U.S. 448, 456-59 (1957).

17. 29 U.S.C. § 185 (1988).

18. United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

19. *Enterprise Wheel*, 363 U.S. at 597. For a discussion of lower court implementation of the "draws its essence from the contract" standard, see Lewis B. Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 COLUM. L. REV. 267, 285-89 (1980).

20. *Warrior & Gulf*, 363 U.S. at 582-83.

21. *American Mfg.*, 363 U.S. at 568.

They have observed that because parties usually select arbitrators for their expertise in labor relations, arbitrators are better suited than judges to adjudicate labor grievances.[22] They have also urged that the speed and cost-effectiveness of arbitration depend on its finality as a dispute resolution process.[23] If judicial reversal is too readily available, arbitration will lose its finality and, with it, its comparative efficiency advantages over litigation.

While these systemic advantages support the judicial embrace of labor arbitration, they are not the primary reason for it. Rather, the relative roles of court and arbitrator articulated in *The Trilogy* result from the recognition that grievance arbitration is not comparable to litigation of traditional contract rights, but is a part of the collective bargaining process that governs the workplace.

Although the collective bargaining agreement is judicially enforceable, labor arbitration does not function primarily as a litigation alternative. Instead, arbitration is an alternative to the strike.[24] Courts regard the arbitration provision as a quid pro quo for a no strike clause.[25] This rationale acknowledges that the collective bargaining agreement does not confer rights in the same way as a traditional contract. Instead, it provides a generalized code governing terms and conditions of employment.[26] The provisions of the agreement take on meaning only as applied to particular situations. Thus, in the collective agreement, parties agree to be bound by the general principles they articulate, but leave the refinement of those principles into specific contract rights to case-by-case negotiation through the grievance procedure. If, however, grievance negotiations do not produce agreement, instead of relying on strikes and other economic weapons to settle the dispute, parties provide that they will be bound by the settlement awarded by an arbitrator.

22. *Warrior & Gulf*, 363 U.S. at 582.

23. *See, e.g.*, FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 9 (4th ed. 1985) (observing that speed and reduced expense are two of many advantages of arbitration); Tim Borenstein, *Introduction to the System of Labor and Employment Arbitration, in* LABOR AND EMPLOYMENT ARBITRATION at § 1.01 (Tim Borenstein & Ann Gosline eds., 1992) (including same observations).

24. In *Warrior & Gulf*, the Court observed that Wilko v. Swan, 346 U.S. 427 (1953) (overruled by Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989)), discussed *infra* at text accompanying notes 85-89, and similar cases were reluctant to enforce commercial agreements to arbitrate, and found such cases inapplicable to grievance arbitration. The Court reasoned that commercial arbitration is a substitute for litigation, but grievance arbitration is a substitute for industrial strife. 363 U.S. at 578.

25. *See* Boys Market, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235, 249 (1970).

26. *Warrior & Gulf*, 363 U.S. at 578.

The ability to defer specification of contract rights to case-by-case negotiations facilitates the reaching of collective agreements in many ways. Such deferral enables the parties to resolve diametrically opposite positions on certain issues peacefully by agreeing on contract language without agreeing on what the language means. The meaning of the language is deferred to case-by-case negotiation through the grievance procedure, with arbitration as a substitute for the strike if negotiations reach impasse.[27]

For example, consider the issue of promotions within the bargaining unit. The union often initially demands that seniority strictly govern promotions or that seniority govern among all bidders meeting the minimum qualifications for the position. The company often demands that it have the right to unreviewable discretion in filling vacancies or that promotions be governed strictly by merit. The modified seniority clause, providing that seniority will govern when candidates' qualifications are relatively equal, is a common compromise.[28] When the parties agree to this compromise, they recognize that they do not agree on what it means. The company recognizes that the union will emphasize the word "relatively" and the union recognizes that the company will emphasize the word "equal" in deciding whether competing employees' qualifications are "relatively equal" so that seniority will govern the promotion. Both parties recognize that the union will seek to limit and the company will seek to expand the company's ability to select a junior employee.

The modified seniority clause does not represent the conferral of specific contractual rights, or even expectations. Rather, it represents a company-union decision to defer resolution of their differences over the relative roles of qualifications and seniority to case-by-case negotiations through the grievance procedure, and to substitute arbitration for strikes and lockouts as the method of resolving impasses in those negotiations.

27. *See generally* Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1491 (1959) (stating that parties often agree to language "although each knows that the other places a different meaning upon the words and they share only the common intent to postpone the issue and take a gamble upon an arbitrator's ruling if decision is required"); Claire B. McDermott, *An Exercise in Dialectic: Should Arbitration Behave As Does Litigation?*, PROC. 33D ANN. MTG. NAT'L ACAD. ARB. 1, 6 (1980) (illustrating how union and management agree to language that would allow them to argue for their position when and if arbitration becomes necessary); Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1004 (1955) ("Since the parties earnestly strive to complete an agreement, there is almost irresistible pressure to find a verbal formula which is acceptable, even though its meaning to the two sides may in fact differ.").

28. The Bureau of National Affairs estimates that 25% of all collective bargaining agreements contain such modified seniority clauses governing promotions. BASIC PATTERNS IN UNION CONTRACTS, *supra* note 1, at 88.

Deferral of consideration of specific contract rights to case-by-case negotiations also facilitates agreement when a condition of employment governs such a wide variety of potential situations as to make specificity in the collective agreement infeasible.[29] For example, consider the typical collective agreement provision limiting discipline and discharge by requiring just cause. It would be impossible to specify all of the circumstances that might arguably give rise to discipline or to specify what discipline would be appropriate in each situation. Instead, the parties set forth a general principle in their collective agreement that limits management's discretion in imposing discipline, but also leaves management free to act when justified. The specifics of what amounts to "cause" and what level of discipline is appropriate are left to case-by-case negotiation through the grievance procedure and, in some cases, to a pre-disciplinary conference in which the union participates. If the union believes that a particular dispute can not be resolved through negotiation, rather than strike, the union has the option of challenging the disciplinary action in arbitration.[30]

Thus, the typical collective bargaining agreement does not confer legal rights in the same manner as a traditional contract. The legal rights conferred by a collective bargaining agreement are procedural. The employer gains the right to prevent the union from striking and the union gains the right to force the employer to arbitration.[31] Within the context of these procedural rights, the parties negotiate the substance of their contract rights on a case-by-case basis, substituting arbitration for strikes as their ultimate impasse resolution tool.[32] Of course, the parties are still free to decide against using arbitration as their dispute resolution process. Occasionally they do, and the union retains the right to strike.[33] Such instances are rare, and the law encourages the trade-off of a no strike clause for binding arbitration.

29. Dean Harry Shulman referred to such provisions as those providing "more or less specific standards which require reason and judgment in their application." Shulman, *supra* note 27, at 1005.

30. *See id.* at 1006-07.

31. *See* David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663, 742 (1973).

32. We do not mean to imply that all provisions of the typical collective bargaining agreement are as vague or indefinite as those governing discipline and promotions. Some provisions are quite specific, such as those setting forth the wage scale, holidays, and vacation accruals. When provisions are specific, disputes are less likely to arise. When they do arise, however, they are resolved in the same manner—subjected to the continuing process of collective bargaining with arbitration as the ultimate method of resolving a bargaining impasse. For an example of such a dispute, see Ceres Terminals, Inc., 92 Lab. Arb. (BNA) 735 (1989) (Malin, Arb.).

33. *See* Groves v. Ring Screw Works, 498 U.S. 168 (1990).

This understanding of the collective bargaining agreement as establishing generalized principles, which are translated into specific contract rights through case-by-case negotiations and of grievance arbitration as the substitute for strikes in resolving negotiation impasses, underlies the Court's rulings in *The Trilogy*. The frivolity of a grievance is irrelevant to its arbitrability because the purpose of arbitration is to resolve a dispute in case-by-case negotiations. Even if the union's position is frivolous, the fact that the union continues to assert its position after the pre-arbitration steps of the grievance procedure have been exhausted indicates that the dispute remains alive and arbitration is appropriate.[34]

The use of arbitration as a strike substitute in grievance negotiation impasses also requires extremely narrow judicial review of arbitration awards. As long as the award falls within the broad parameters set forth in the collective bargaining agreement's generalized code or, in the words of *The Trilogy*, as long as the award draws its essence from the agreement, the arbitrator has performed her role as impasse resolver and a court may not intervene. The parties agreed to substitute binding arbitration for strikes and they receive what they bargained for when the arbitrator renders an award resolving their dispute. Furthermore, although the award is final as far as the courts are concerned, it need not be final for the parties. A party who considers the award to be too erroneous can try to correct the error in negotiations with the other party.[35]

Consequently, courts give labor arbitrators extremely broad discretion in fashioning their awards. Arbitral fact-finding is completely off limits to a reviewing court. "[I]mprovident, even silly, factfinding . . . is hardly a sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts."[36]

Arbitrators have extremely broad discretion in deciding whether, and to what extent, to consider positive law external to the collective bargaining agreement in resolving the grievance. An arbitrator may rely on the doctrine of impossibility of performance to refuse to enforce a collective bargaining agreement provision violating external law, but

34. As the Court noted in *American Mfg.*, there is generally no exception in the no strike clause for frivolous grievances. 363 U.S. at 567.

35. The possibility that the parties will nullify an award by mutual agreement appears to be quite real. One study of reactions to 400 awards in the midwest found that unions sought to modify the collective bargaining agreement in reaction to the award in more than one of every five cases, and in 58% of cases involving subcontracting. Donald J. Petersen, *Consequences of the Arbitration Award for Unions*, 21 LAB. L.J. 613, 614-15 (1970). Under appropriate circumstances, the parties even retain the legal right to nullify an award retroactively. *See* Strick Corp., 241 N.L.R.B. 210, 217-20 (1979).

36. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 39 (1987).

need not do so.[37] Arbitrators hold a broad range of views concerning the appropriateness of considering external law when fashioning grievance awards.[38] Furthermore, when an arbitrator does consider external law in resolving a grievance, a court may not overturn the award even though the arbitrator's view of the law was erroneous.[39] United States Court of Appeals Judge Harry Edwards, a noted labor law scholar and former arbitrator, has articulated the rationale:

> When construction of the contract implicitly or directly requires an application of "external law," *i.e.*, statutory or decisional law, the parties have necessarily bargained for the arbitrator's interpretation of the law and are bound by it. Since the arbitrator is the "contract reader," his interpretation of the law becomes part of the contract and thereby part of the private law governing the relationship between the parties to the contract. Thus, the parties may not seek relief from the courts for an alleged mistake of law by the arbitrator. . . . The parties' remedy in such cases is the same remedy they possess whenever they are not satisfied with the arbitrator's performance of his or her job: negotiate a modification of the contract or hire a new arbitrator.[40]

The only time that external law may serve as a basis for judicial refusal to enforce a grievance arbitration award is when the award itself, rather than the arbitrator's reasoning, creates an express conflict with a well-defined and dominant public policy as articulated in statutes or judicial precedent.[41] The narrowness of this public policy review is itself attributable to the role of arbitration as an extension of the collective bargaining process.[42]

If the potential for judicial review provides only minimal constraints on arbitral discretion, are there any other sources of binding constraints? It is frequently said that arbitrators apply the "common law of the shop" in resolving grievances. That is to say, the accumulated decisions of labor arbitrators in thousands of cases over the past half-century have generated a body of decision-making rules arbitrators may rely upon in resolving cases. Does the common law of the shop constrain arbitral

37. *See* W. R. Grace & Co. v. Rubber Workers Local 759, 461 U.S. 757, 767 n.10 (1983).

38. *See, e.g.*, Robert G. Howlett, *The Arbitrator, the NLRB and the Courts, in* PROC. 20TH ANN. MTG. NAT'L ACAD. ARB. 67 (1967); Bernard D. Meltzer, *Ruminations About Ideology, Law and Arbitration, in* PROC. 20TH ANN. MTG. NAT'L ACAD. ARB. 1 (1967); Richard Mittenthal, *The Role of Law in Arbitration, in* PROC. 21ST ANN. MTG. NAT'L ACAD. ARB. 43 (1968); Michael I. Sovern, *When Should Arbitrators Follow Federal Law, in* PROC. 23RD ANN. MTG. NAT'L ACAD. ARB. 29 (1970).

39. American Postal Workers Union v. United States Postal Serv., 789 F.2d 1, 6 (D.C. Cir. 1986).

40. *Id.*

41. *See Misco*, 484 U.S. at 42; *W.R. Grace*, 461 U.S. at 766.

42. Harry T. Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain*, 64 CHI.-KENT L. REV. 3 (1988).

decision making? And if so, how does it constrain arbitral decision making?

The common law of the shop is not binding on arbitrators in the same way that the common law is binding on judges. There is no rule or principle of stare decisis in grievance arbitration. Although arbitrators commonly consider prior awards interpreting comparable contract language, they are not bound by those awards and frequently assert an obligation to review the issues presented independently.[43] Arbitrators are not even legally bound to follow prior decisions interpreting the same contract language between the same parties,[44] although most arbitrators

43. *See supra* note 31. *See generally* FAIRWEATHER'S PRACTICE AND PROCEDURE IN LABOR ARBITRATION 374-77 (Ray J. Schoonhoven ed. 3d ed. 1991) (discussing the influence of stare decisis in the arbitration process) [herinafter FAIRWEATHER]; Carlton Snow, *An Arbitrator's Use of Precedent*, 94 DICK. L. REV. 665, 672-74 (1990) (same); David E. Feller, *Relationship of the Agreement to External Law, in* LABOR ARBITRATOR DEVELOPMENT: A HANDBOOK 33, 44-48 (Christopher Barecca et al. eds., 1983) (same) [herinafter LABOR ARBITRATOR DEVELOPMENT].

44. The alleged stare decisis effect of an arbitration award can arise in a variety of contexts. First, an employer who won an issue in arbitration may resist arbitration of a subsequent grievance raising the identical issue. Courts reject such arguments and order the employer to arbitration on the subsequent grievance. They reason that the effect of the prior award is for the arbitrator to decide. International Bhd. of Elec. Workers Local 199 v. United Tel. Co., 738 F.2d 1564, 1571 (11th Cir. 1984); Little Six Corp. v. United Mine Workers of Am. Local 8332, 701 F.2d 26, 29 (4th Cir. 1983). The employer's argument is essentially that the union's claim is frivolous in light of the first arbitration award. Even frivolous grievances are, however, arbitrable and a court should order the employer to arbitrate. *American Mfg.*, 363 U.S. at 567.

Second, the union may have won a prior grievance in arbitration and, when an identical situation arises under the same contract, may seek to rely on the prior award to base an action in court under § 301 of the Labor Management Relations Act. 29 U.S.C. § 185 (1988). In such circumstances, courts hold that the applicability of the prior award to the current situation is itself a question for the arbitrator and require the union to process its claim through the grievance procedure. *See, e.g.*, Local 1545 United Mine Workers of Am. v. Inland Steel Coal Co., 876 F.2d 1288, 1296 (7th Cir. 1989); United Paperworkers Int'l Union Local 1206 v. Georgia Pacific Corp., 798 F.2d 172, 173 (6th Cir. 1986); Oil, Chemical & Atomic Workers Int'l Union Local 4-367 v. Rohm & Haas, Texas, Inc., 677 F.2d 492, 495 (5th Cir. 1982); United Mine Workers Dist. 5 v. Consolidation Coal Co., 666 F.2d 806, 811 (3d Cir. 1981). Courts will grant the union's claim only when the prior award, either by its own terms or by the inherent nature of the award, required the employer to cease and desist similar conduct in the future. In such cases, the court is not giving stare decisis effect to the prior award in a new dispute. Rather, it is enforcing the prospective portion of the prior award itself. *See* Boston Shipping Ass'n v. International Longshoremen's Ass'n, 659 F.2d 1, 2-3 (1st Cir. 1981); Oil, Chem. & Atomic Workers Int'l Union, Local 4-16000 v. Ethyl Corp., 644 F.2d 1044, 1051 (5th Cir. 1981).

Third, two different arbitrators may render conflicting awards under the same contract. In such instances, courts do not hold that the second arbitrator is bound by the first award. Rather, the extent to which the first award constrains the second arbitrator is an issue for the arbitrator and not the court. *Grace*, 461 U.S. at 764-65; Hotel Ass'n of Washington, D.C. v. Hotel Employees Union Local 25, 963 F.2d 388 (D.C. Cir. 1992). This is so even when the

usually follow them.[45]

The common law of the shop does not constrain arbitral decision-making in the way that legal rules and principles may constrain judges. The primary constraint on arbitral decision-making is the parties themselves. The parties can broaden or narrow the arbitrator's discretion with broad or explicit language in their agreement.[46] The parties may nullify an award by mutual agreement.[47] Moreover, the parties select the arbitrator and through the selection process, unions and employers collectively restrain arbitral discretion.

Parties select arbitrators who they believe will resolve grievances in a manner consistent with the parties' expectations.[48] In turn, arbitrators,

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conflicting awards were issued by the same arbitrator, Hotel Employees Int'l Union Local 54 v. Adamar, Inc., 682 F. Supp. 795, 797 (D.N.J. 1987), and when the court is presented with both conflicting awards and each party asks the court to render a definitive interpretation of the contract. Graphic Arts Int'l Union, Local 97-B v. Haddon Craftsmen, Inc., 489 F. Supp. 1088, 1098 (M.D. Pa. 1979).

Fourth, a court or agency, in resolving an issue of public law, may have to interpret a collective bargaining agreement's provision which has been the subject of prior arbitration awards. For example, in Metropolitan Edison Co. v. NLRB, 663 F.2d 478 (3d Cir. 1981), *aff'd*, 460 U.S. 693 (1983), the company disciplined two union leaders more harshly than it disciplined other employees, all of whom participated in an illegal strike. The National Labor Relations Board (NLRB) found that such disparate treatment violated Sections 8(a)(1) and (a)(3) of the National Labor Relations Act. *Id.* at 481 (citing Metropolitan Edison Co., 252 N.L.R.B. 1030 (1980)). In appealing the NLRB's decision, the company argued that the union, in the collective bargaining agreement, had waived the right of its officers not to be subject to harsher discipline when the officers failed to use every reasonable effort to end the illegal strike. Although the contract contained no express language to that effect, the company relied on two prior arbitration awards that had sustained harsher discipline imposed on union officers than other employees for failing to make every reasonable effort to end two prior illegal work stoppages.

The court held that the union had not waived its officers' rights not to be subject to harsher discipline for participating in illegal work stoppages. *Id.* at 482-83. It refused to give the prior awards stare decisis effect, reasoning that arbitration is a dispute resolution process for specific grievances. *Id.* at 483-84. The Supreme Court affirmed. 460 U.S. at 693. It implicitly agreed with the Third Circuit's refusal to give prior awards stare decisis effect. It reasoned that a clear pattern of prior awards coupled with the renegotiation of the contract and the retention of the same language might evidence an intent to waive the right to equal disciplinary treatment. *Id.* at 708-09. It found, however, that two prior awards were insufficient to establish the waiver in the case before it. *Id.* at 709.

45. *See generally* FAIRWEATHER *supra* note 43 at 377-82 ([A]rbitrators are willing to follow prior awards even though they might not have rendered the same award if they had heard the prior case.").

46. For an extreme example of party control, see Ralph Seward, *The Special Role of an Arbitrator in* LABOR ARBITRATOR DEVELOPMENT *supra* note 43 at 8 (relating a case between the Steelworkers and a major steel company in which the parties gave the arbitrator two draft decisions and required him to sign one of the two as his award).

47. *See supra* note 31.

48. *Cf.* David E. Bloom & Christopher L. Cavanaugh, *An Analysis of the Selection of Arbitrators*, 76 AM. ECON. REV. 408 (1986) (study of actual selections of interest arbitrators in

who want to work again, generally do not disappoint them. Arbitrators look to prior awards interpreting comparable contract language because a consistent pattern of prior decisions often provides strong evidence of the probable expectations of the parties to the dispute before the arbitrator.[49] Arbitrators usually apply prior awards between the same parties because they recognize that, beyond the particular dispute before the arbitrator, the parties expect a strong measure of continuity and consistency in contract administration.[50] Thus, the constraints that the common law of the shop impose on arbitral decision-making are self-enforcing and do not constrain in the same way as legally binding rules or principles.

For example, consider the typical collective bargaining agreement's requirement of just cause for discipline or discharge. It is well established in the common law of the shop that the employer has the burden of proving just cause.[51] Arbitrators are not bound, however, by a rule or principle of law to place the burden of proof on the employer. Although

New Jersey police and firefighter negotiation impasses finding that employers and unions distinctly prefer some arbitrators to others and that their preferences in picking arbitrators tend to be moderately similar). Because the parties aim to select arbitrators who are not likely to decide a case in a manner inconsistent with their expectations, they tend to value an arbitrator's established track record. Consequently, a very small percentage of all arbitrators decide most of the cases. *See* Walter J. Primeaux, Jr. & Dalton E. Brannen, *Why Few Arbitrators Are Deemed Acceptable*, MONTHLY LAB. REV., Sept. 1975, at 29-30.

49. *See* Roger Abrams, *The Nature of the Arbitral Process: Substantive Decision-Making in Labor Arbitration*, 14 U.C. DAVIS L. REV. 551, 566-67 (1981).

50. It is common for arbitrators faced with prior awards between the same parties to disclaim application of the doctrine of stare decisis, maintain that they are not bound by the awards, but exercise their discretion to follow them to promote stability in labor relations, judicial economy, and finality in the arbitral process, or to find the prior awards persuasive. *See, e.g.*, HBI Automotive Glass, 97 Lab. Arb. (BNA) 121, 127 (1991) (Richard, Arb.); Boise Cascade Corp., 97 Lab. Arb. (BNA) 8, 12 (1991) (Flagler, Arb.); Safeway Stores, 96 Lab. Arb. (BNA) 675, 680 (1991) (Cohen, Arb.); North Am. Rayon Corp., 95 Lab. Arb. (BNA) 748, 751 (1990) (Clarke, Arb.); Oberlin College, 93 Lab. Arb. (BNA) 289, 292 (1989) (Fullmer, Arb.); Wisconsin Health & Social Servs., 91 Lab. Arb. (BNA) 596, 598 (1988) (Flaten, Arb.); Timken Co., 88 Lab. Arb. (BNA) 515, 517 (1986) (Morgan, Jr. Arb.); Madison Mutual Ins. Co., 81 Lab. Arb. (BNA) 519, 522 (1983) (Mangeot, Arb.). In some cases, although recognizing the importance of stability that following prior awards between the same parties promotes, arbitrators have refused to follow them, giving various justifications. *See, e.g.*, Fairview Southdale Hosp., 96 Lab. Arb. (BNA) 1129, 1135 (1991) (Flagler, Arb.) (disagreeing with prior award which found that a benefit became part of the contract as a result of past practice because of restrictive language of the agreement regarding the maintenance of benefits); Weyerhauser Co., 92 Lab. Arb. (BNA) 361, 364 (1989) (Woolf, Arb.) (refusing to follow prior award because it did not contain a full presentation of the arbitrator's reasoning, and opining that "mindless imposition of an award . . . may also result in the potential for destabilization"); McQuay-Perfex, Inc., 93 Lab. Arb. (BNA) 865, 873 (1989) (Bard, Arb.) (refusing to follow prior award which arbitrator regarded as clearly erroneous).

51. ELKOURI & ELKOURI, *supra* note 23, at 661.

many reasons were offered to justify placing the burden of proof on the employer in the early years of the practice's development,[52] today the practice is so common that the parties expect the arbitrator to follow it, usually select an arbitrator who will meet their expectations, and are rarely disappointed. Indeed, the practice is so common that arbitrators routinely assume that, by their silence in the agreement with respect to the burden of proof, the parties have adopted it. There is, however, no legally binding rule or principle of law that would prevent the parties from expressly providing that the union bears the burden of proof. Furthermore, an arbitration award upholding a discharge on the ground that the union failed to prove the absence of just cause would still draw its essence from the contract and be entitled to judicial enforcement.[53]

Thus, the function of grievance arbitration in collective bargaining's private system for governing the workplace defines the role of the arbitrator and the role of the court in reviewing arbitration awards. As the percentage of the workforce governed by this private system continues to decline, a flood of statutory and judicial regulation is emerging to fill the resulting void. The question naturally arises whether arbitration can play the same role in a system of public regulation as it has played in the collectively bargained system of private regulation.

III. Arbitration of Employment Law Claims

The law of employment arbitration appears to be developing parallel to the law of labor arbitration. In *Gilmer*, the Supreme Court established a broad presumption of arbitrability analogous to the broad presumption of arbitrability established in *The Trilogy*. As a condition of employment, Gilmer signed a uniform securities registration statement requiring him to arbitrate "any dispute, claim or controversy . . . required to be arbitrated under the rules . . . of the organizations with which I register."[54] Gilmer registered with the New York Stock Exchange, whose rules compelled arbitration of "any controversy . . . arising out of the employment or termination of employment of [a] registered representative."[55] The Court held that Gilmer was obligated to arbitrate his claim that his discharge violated the ADEA.

52. *See generally* Robert H. Gorske, *Burden of Proof in Grievance Arbitration*, 43 MARQ. L. REV. 135, 147-48 (1959).

53. *See* FAIRWEATHER, *supra* note 43, at 195 (recounting a few rare awards placing burden of proof on the union).

54. 111 S. Ct. at 1650.

55. *Id.* at 1651.

The Court, quoting from decisions interpreting the Federal Arbitration Act[56] (FAA) in commercial cases, decided that "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."[57] The Court placed a burden on Gilmer to show that Congress intended to preclude a waiver of judicial remedies in the ADEA.[58]

Gilmer's narrow holding is that an agreement to arbitrate contained in a securities exchange registration will be enforced with respect to claims under the ADEA. Its reach, however, raises several issues, including the scope of the FAA, and whether in passing particular statutes Congress intended to preclude arbitration.

Section 1 of the FAA exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[59] In *Gilmer*, the Court expressly reserved the issue of how broadly to construe the FAA's employment contract exception. The Court concluded that Gilmer's promise to arbitrate was not found in his employment contract, but in his securities exchange registration statement.[60] The dissent reached the issue, but would have excluded Gilmer's agreement to arbitrate from the FAA's coverage because of section 1.[61] The FAA's employment contract exclusion could preclude the application of *Gilmer* to the typical employment agreement to arbitrate.[62]

Even if the FAA is interpreted not to cover garden variety employment agreements to arbitrate, state law may still compel their enforcement.[63] The early state court response to *Gilmer* has been favorable toward arbitration, with several courts relying on its reasoning to compel arbitration of claims under state employment law.[64]

56. 9 U.S.C §§ 1-15 (1988).

57. *Id.* at 1652.

58. *Id.*

59. 9 U.S.C. § 1 (1988).

60. 111 S. Ct. at 1651-52 n.2.

61. *Id.* at 1657 (Stevens, J. dissenting).

62. *See* Willis v. Dean Witter Reynolds, Inc. 948 F.2d 305, 310-11 (6th Cir. 1991) (dicta) (broadly construing the FAA's employment agreement exclusion); Christine Godsil Cooper, *Where Are We Going with Gilmer?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. L. U. PUB. L. REV. 203, 226-34 (1992) (analyzing the scope of the FAA's exclusion of employment contracts).

63. For discussions of state law approaches to employment arbitration, see Cooper, *supra* note 62, at 223-24; Todd H. Thomas, *Using Arbitration to Avoid Litigation*, 44 LAB. L.J. 3, 13-14 (1993).

64. Spellman v. Securities, Annuities & Ins. Servs., 10 Cal. Rptr. 2d 427, 432-34 (Cal. Ct. App. 1992) (state employment discrimination statute); Skewes v. Shearson Lehman Bros., 829

Regardless of whether state or federal law applies, a key issue will be whether a particular federal employment statute contains an express declaration by Congress against enforcing predispute agreements to arbitrate. The Americans with Disabilities Act[65] (ADA) and the Civil Rights Act of 1991[66] each contain provisions encouraging the use of arbitration and other ADR techniques.[67] The House Report accompanying the ADA explained, "[A]ny agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of this Act."[68] The House Report on the Civil Rights Act contained a virtually identical statement of intent regarding predispute agreements to arbitrate.[69] Nevertheless, courts considering the issue have mechanically applied *Gilmer* to enforce predispute agreements to arbitrate Title VII claims.[70]

Similarly, the Employee Polygraph Protection Act contains an express preclusion of waiver of the statute's "rights and procedures."[71] Nevertheless, the Ninth Circuit Court of Appeals, relying on *Gilmer*, found no congressional intent to preclude enforcement of a predispute agreement to arbitrate a claim under the act.[72] Thus, the early federal appellate court reaction to *Gilmer* suggests that courts will be very reluctant to find a legislative intent to preclude enforcement of predispute agreements to arbitrate.

Thus, the law of employment arbitration appears to be developing a broad presumption of arbitrability that will cover virtually all statutory claims. This presumption of arbitrability appears to parallel the presumption of arbitrability in *The Trilogy*. Under the private system of

P.2d 874, 877-78 (Kan. 1992) (state retaliatory discharge tort); Fletcher v. Kidder, Peabody & Co., 584 N.Y.S.2d 838, 839-40 (N.Y. App. Div. 1992) (state human rights act).

65. 42 U.S.C. §§ 12111-12, 12209 (Supp. IV 1992).

66. 42 U.S.C. § 1981 (Supp. IV 1992).

67. 42 U.S.C. § 12212 (Supp. IV 1992); Civil Rights Act of 1991 § 118, 42 U.S.C. § 1981 (Supp. IV 1992).

68. H.R. REP. No. 485, 101st Cong., 2nd Sess., pt. 3, at 76-77 (1990). The representative who suggested the ADR language also clarified, "[U]nder no condition would an arbitration clause in a collective bargaining agreement or employment contract prevent an individual from pursuing their rights under the ADA." 136 CONG. REC. H2421-02, 2431 (daily ed. May 17, 1990) (statement of Representative Glickman).

69. H.R. REP. No. 40, 102d Cong., 2nd Sess., pt. 1, at 97 (1991).

70. Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932, 935 (9th Cir. 1992); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 307, 308-10 (6th Cir. 1991); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991).

71. 29 U.S.C. § 2005(d) (Supp. V 1993).

72. Saari v. Smith Barney, Harris Upham & Co., 968 F.2d 877, 883-84 (9th Cir.), *cert. denied*, 113 S. Ct. 494 (1992).

collective bargaining, the collective agreement contains the broad principles governing the workplace. Once the parties have agreed to arbitrate disputes under that agreement, there is a strong presumption that any particular dispute is arbitrable and the party resisting arbitration has a heavy burden of showing in the governing document itself, *i.e.*, the collective agreement, that the governing body, *i.e.*, the parties, intended to preclude arbitration.

Similar to collective bargaining agreements, the ADEA at issue in *Gilmer* and other employment statutes contain the basic legal rules governing the workplace. Once the parties have agreed to arbitrate workplace disputes, there is a strong presumption that any particular dispute is arbitrable. The party resisting arbitration has a heavy burden of showing in the governing document itself, *i.e.*, the statute or its legislative history, that the governing body, *i.e.*, the legislature, intended to preclude arbitration.[73]

The governing law of employment arbitration appears to subject those awards to a very narrow standard of judicial review. Both the FAA, which will govern if these awards are ultimately held subject to federal law, and the Uniform Arbitration Act (UAA), which will govern in many states if these awards are subject to state law, provide narrow grounds for vacating an arbitration award similar to those available under *The Trilogy*. Most of the grounds are procedural, such as fraud on the arbitrator, arbitral partiality, corruption, or failure to give a fair hearing.[74] With respect to substantive review, a court will only vacate an award where it demonstrates a manifest disregard for the law.[75]

73. The apparent parallel to the Court's grievance arbitration jurisprudence is not coincidental. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), is the first of a series of Supreme Court decisions that lead up to *Gilmer*. *See infra* notes 84-89 and accompanying text. In *Mitsubishi*, the Court interpreted an agreement to arbitrate any claims arising out of an automobile dealership contract as a requirement to arbitrate the dealer's antitrust claims against the manufacturer. The Court cited United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. at 582-83, and declared that federal policy required any doubts in interpreting the arbitration clause be resolved in favor of arbitrability. 473 U.S. at 626. For a critique of the Court's adoption of a presumption of arbitrability outside the collective bargaining context, see Jonathan R. Nelson, *Judge-Made Law and the Presumption of Arbitrability: David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 58 BROOK. L. REV. 279 (1992).

74. 9 U.S.C. § 10 (1988); Unif. Arb. Act § 12, 7 U.L.A. 140 (1956).

75. *See, e.g.*, Health Servs. Management Corp. v. Hughes, 975 F.2d 1253, 1264 (7th Cir. 1992); Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1059-60 (9th Cir. 1991); Advest, Inc. v. McCarthy, 914 F.2d 6, 8-9 (1st Cir. 1990); Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933-34 (2d Cir. 1986); Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1213-14 (2d Cir. 1972). Even this narrow standard of review in not available in all federal circuits. Some courts expressly have declined to review arbitration awards for manifest disregard of the law. *See, e.g.*, Ainsworth v. Skurnick, 960 F.2d 939, 941 (11th Cir. 1992), *cert.*

The manifest disregard for the law standard originated in dicta in *Wilko v. Swan*,[76] a case in which the Supreme Court refused to compel arbitration of a claim under the Securities Act of 1933 because of the narrow standard of judicial review. The Court, however, did not define "manifest disregard" in its opinion. Lower courts have confined the standard to instances in which the arbitrator knew what the law was, but deliberately disregarded it.[77]

The manifest disregard standard is comparable to *The Trilogy*'s admonition that awards should only be set aside if they fail to draw their essence from the collective agreement. Both standards confine the reviewing court to determining whether the arbitrator did the job for which the parties contracted, *i.e.*, whether the arbitrator interpreted and applied, rather than disregarded, the private law of the collective bargaining agreement or public law expressed in statutes and court decisions. As long as the arbitrator did this, courts are not concerned with any errors in interpretation.[78]

In grievance arbitration, the arbitrator serves as an instrument of workplace self-government. Arbitrators are accountable to the private parties that appoint them. This accountability is the primary restraint on how arbitrators apply the privately drafted document that governs the workplace. Furthermore, when arbitral accountability runs directly to the parties litigating the grievance, it simultaneously runs to the parties who negotiated and drafted the governing document under which the

denied, 113 S. Ct 1269 (1993); R. M. Perez & Assoc. v. Welch, 960 F.2d 534, 540 (5th Cir. 1992); Robbins v. Day, 954 F.2d 679, 684 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 201 (1992); Chameleon Dental Prods. Inc. v. Jackson, 925 F.2d 223, 226 (7th Cir. 1991); Raiford v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 1410, 1412-13 (11th Cir. 1990).

76. 346 U.S. 427, 436-37 (1953), *overruled by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

77. *See, e.g.*, Health Servs. Management Corp. v. Hughes, 975 F.2d 1253, 1267 (7th Cir. 1992); Robbins v. Day, 954 F.2d at 683; Advest, Inc. v. McCarthy, 914 F.2d at 9; Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d at 933. In the employment context, Professor Cooper has suggested that in a sexual harassment arbitration, an award by an arbitrator who mistakenly states that Title VII does not cover sexual harassment would not be vacated by a court. A court would only overturn an award when the arbitrator stated that she recognized that Title VII prohibited sexual harassment and imposed liability under the facts presented, but decided not to find for the plaintiff because she disagreed with the law. Cooper, *supra* note 62, at 217.

78. It is not surprising that courts have cited *The Trilogy* as support for the manifest disregard standard. *See, e.g.*, Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1060 (9th Cir. 1991); *Advest*, 914 F.2d at 9. In *Advest*, the Court compared the "manifest disregard of the law" standard with the language used in other circuits, ("arbitrary and capricious," "completely irrational," "so long as it draws its essence from the underlying agreement") and concluded that "we regard the standard of review undergirding these various formulations as identical, no matter how pleochroic their shadings." *Id.*

dispute arose. Within this private self-contained system, the role of an external authority, such as a court, is extremely limited. *The Trilogy* properly confined it to ensuring that the arbitrator stays within the private system's confines.

A grievance arbitrator may use external statutory law as a tool for interpreting the collective bargaining agreement. For example, an arbitrator interpreting a contractual prohibition on race discrimination may look to law developed under Title VII. The arbitrator at all times, however, is interpreting and applying the contract.[79] Thus, when an arbitrator misreads statutory law, the apparent errors in legal interpretation merge with the arbitrator's interpretation of the contract. Because the parties have agreed to be bound by the arbitrator's interpretation of the contract, they still get what they bargained for and a court should not release them from their bargain. There is no adverse effect on public values because the employee's statutory claim is distinct from the grievance and may still be pursued in court.[80]

Courts applying the FAA outside the labor context have reasoned by analogy to grievance arbitration in refusing to review arbitral errors of law. For example, in *Northrop Corp. v. Triad International Marketing S.A.*,[81] Northrop contracted with Triad to represent it in marketing Northrop's products and services to the Saudi Arabian Air Force. However, a Saudi Council of Ministers' decree prohibited payment of commissions in connection with arms contracts, and Northrop ceased paying Triad. Triad brought a claim against Northrop pursuant to the arbitration clause of their contract.

The contract also contained a choice of law clause which subjected it to California law. A California statute excused performance of an obligation that is prevented by operation of law. Northrop relied on this statute in its defense. The arbitrator rejected the defense and issued an award in Triad's favor.[82] Northrop sought to vacate the award, arguing the arbitrator misread California law.

The court, however, refused to review the arbitrator's legal conclusions. It analogized to grievance arbitration cases and reasoned that the arbitrator's interpretation of California law was necessitated by his duty to interpret the choice of law clause in the contract. Thus, any errors of

79. *See* John E. Dunsford, *The Role and Function of the Labor Arbitrator*, 30 ST. LOUIS U. L.J. 109, 122 (1985).

80. McDonald v. City of West Branch, 466 U.S. 284 (1984); Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728 (1981); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

81. 811 F.2d 1265 (9th Cir. 1983), *cert. denied*, 484 U.S. 914 (1987).

82. 811 F.2d at 1267-68.

law that the arbitrator may have made were merged into his contractual interpretation of the choice of law clause. When the parties received the arbitrator's interpretation, they got exactly what they bargained for and, absent a manifest disregard for the law, should not be released from their bargain.[83]

The analogy to grievance arbitration drawn in commercial contract cases such as *Northrop* cannot be drawn in employment arbitration. The employee has agreed with the employer to arbitrate any disputes arising out of the relationship, including statutory claims. The dispute arises under the statute and the arbitrator is interpreting the statute itself, rather than merely looking to statutory law as a tool in interpreting the contract.[84]

In employment arbitration, usually the parties or a private agency, such as the American Arbitration Association, or a securities exchange appoint the arbitrator. The appointing authority, however, does not coincide with the legislative authority. Thus, although arbitrators again are accountable to the private appointing authority, they are not simultaneously accountable to the public authorities responsible for enacting the law that the arbitrators interpret. Unlike grievance arbitration in which a privately accountable arbitrator interprets and applies privately developed law, employment arbitration substitutes a privately accountable arbitrator, for a publicly accountable judge or administrative agency, to interpret and apply public law. Consequently, *The Trilogy*'s rationale of preserving a private system of workplace self-government cannot justify the similarly limited judicial role in overseeing employment arbitration.

Indeed, the lack of arbitral public accountability initially led the Supreme Court to deny enforcement of predispute agreements to arbitrate statutory claims. In *Wilko v. Swan*,[85] the Court held that a predispute arbitration agreement did not compel arbitration of a claim under the Securities Act of 1933. The Court expressed concern that arbitration would short circuit the judicial role in protecting the public values underlying the statute. It observed that the arbitration awards could be issued without an explanation of reasons and without a complete record of the proceeding, and that substantive judicial review would be limited to awards reflecting a manifest disregard for the law.[86]

83. *Id.* at 1269.

84. *See Mitsubishi*, 473 U.S. at 647-50 (Stevens, J., dissenting) (distinguishing between contractual rights and independent statutory rights).

85. 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

86. *Id.* at 436-37. Justices Frankfurter and Minton dissented, but agreed that protection

During the 1980s, the Court abandoned the concerns that it had expressed in *Wilko* regarding the absence of arbitrator accountability. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[87] the Court held that a United States automobile dealer was obligated by its franchise agreement with a Japanese manufacturer to arbitrate its claims under the antitrust laws. The Court regarded the arbitration agreement as not forgoing the dealer's statutory rights, but merely opting out of the judicial system and into an arbitral forum. It justified the change of forum as trading "the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration."[88] The Court considered the availability of judicial review at the enforcement stage of the arbitration as sufficient to preserve the public interests underlying the statute. It made clear, however, that such review would be limited to whether "the tribunal took cognizance of the antitrust claims and actually decided them."[89]

Two years after *Mitsubishi*, the Court relied on that decision to enforce predispute agreements to arbitrate claims under RICO[90] and the Securities Exchange Act of 1934.[91] Two years later, it formally overruled *Wilko*.[92] These cases enabled the Court in *Gilmer* to regard its holding compelling arbitration of ADEA claims as a logical extension of its developing jurisprudence involving the arbitration of statutory claims.[93]

Gilmer thus represents the Supreme Court's endorsement of delegating the interpretation of public law to privately accountable adjudicators subject only to minimal oversight by the judiciary. The justification for employment arbitration is thus the same as for other types of ADR—speed, informality, and cost-effectiveness—rather than the promotion of a private system of workplace self-government. Furthermore, it is presumed that arbitration will further the public interest by reducing overcrowded judicial and administrative dockets.[94]

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of public values underlying the statute required an arbitral record or opinion assuring that the arbitrator complied with the underlying law. *Id.* at 440 (Frankfurter, J., dissenting).

87. 473 U.S. 614 (1985).

88. *Id.* at 628.

89. *Id.* at 638.

90. 18 U.S.C. §§ 1961-68 (1988).

91. 15 U.S.C. §§ 77-78 (1988). Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987).

92. Rodrigues de Quejas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

93. *See Gilmer*, 111 S. Ct. at 1652.

94. Whether arbitration and other ADR techniques actually result in more efficient dispute resolution has been the subject of considerable debate. *Compare* Thomas D. Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era*, 50 U. PITT. L.

Both those who hail and those who dread the growing ADR movement recognize that there is a tension between speedy, efficient dispute resolution and publicly accountable lawmaking. ADR opponents maintain that gains in efficiency, if any, cannot justify what they decry as the privatization of public justice.[95] ADR proponents minimize the public justice concerns and maintain that without ADR's efficiency gains there will be no justice at all, only judicial and administrative gridlock.[96] Some have sought to resolve this seemingly insolvable debate by supporting ADR generally, while carving out certain types of cases heavily laden with public value choices and requiring that those be litigated in a public forum.[97] This Article looks to jurisprudential theory to resolve the debate.

IV. Jurisprudential Views of Constraints on Adjudicators

Concerns over the privatization of justice through employment arbitration are fueled by the employment arbitrator's accountability only to private appointing authorities, in contrast to the labor arbitrator who is accountable to the very authorities who enacted the standards that the

REV. 789, 795 (1989) (proposing the summary jury trial as an effective ADR technique to reduce burdens on the judicial system); A. ALLAN LIND & JOHN E. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS 93 (1988) (noting the results of their evaluation showed "arbitration rules have expedited the disposition of cases"); A. Leo Levin & Deirdre Golash, *Alternate Dispute Resolution in Federal District Courts*, 37 U. FLA. L. REV. 29, 59 (1985) (noting that "it is too early to make definitive judgments concerning" the general speed of arbitration in relation to litigation); *and* BARBARA S. MEIERHOEFER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS 109 (1990) ("Arbitration programs can, but do not always, reduce disposition time.") *with* Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 957 (1991) ("[F]or more than a decade, advocates of ADR have successfully met challenges of every description with the argument that ADR is both cost- and time-efficient . . . [but] the statistics simply do not support the claims.") *and* Deborah R. Hansler, *Court-Ordered Arbitration: An Alternative View*, 1990 U. CHI. LEGAL F. 399, 406-15 (arguing "court-ordered arbitration produces mixed results with regards to efficiency").

95. *See, e.g.*, Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Judith Resnick, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405 (1987); Diane P. Wood, *Court-Annexed Arbitration: The Wrong Cure*, 1990 U. CHI. LEGAL F. 421, 445-51.

96. *See, e.g.*, Arthur Eliot Berkeley & E. Patrick McDermott, *The Second Golden Age of Employment Arbitration*, 43 LAB. L.J. 774, 778 (1992); C. Edward Fletcher, III, *Privatizing of Securities Disputes Through the Enforcement of Arbitration Agreements*, 71 MINN. L. REV. 393, 458 (1987); Evan J. Spelfogel, *Alternative Dispute Resolution and Deferral to Arbitration*, 6 LAB. LAW. 87, 95 (1990).

97. *See, e.g.*, Robert A. Baruch Brush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893, 899-91; Cooper, *supra* note 62, at 241; Edwards, *Panacea or Anathema?*, *supra* note 12, at 671-72; Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239, 244-50 (1987).

arbitrator must apply. In other words, in employment arbitration the applicable law is public but the arbitrator's accountability is private. This raises substantial questions concerning the legitimate constraints on employment arbitrators. To whom are they ultimately accountable? What general standards of justice should they apply when interpreting employment statutes? What standards should courts use in reviewing employment arbitrators' decisions?

This Section reviews the implications of several well-known jurisprudential theories of the nature of law. It suggests that all adjudication presupposes ethical constraints grounded in what may be termed a moral minimalist conception of natural law. Considered in itself moral minimalism does not, however, significantly limit adjudicators' discretion in deciding particular cases. For this reason, it is necessary to supplement the moral minimalist conception of natural law to produce a useful account of the ethical responsibilities corresponding to the adjudicatory role. Accordingly, this Article reviews three jurisprudential theories: Legal Realism, H.L.A. Hart's version of Legal Positivism, and Ronald Dworkin's conception of Law as Integrity. These accounts of the nature of law implicitly or explicitly contain theories of the ethical constraints on the adjudicatory role.

Justice Benjamin Cardozo aptly described the issues that any adjudicator faces in resolving issues of law:

> What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals?[98]

This section proposes an intellectual framework in which to organize thought about the issues Justice Cardozo raised based upon a "minimalist" version of the theory of natural law. The writings of Thomas Hobbes contain the most detailed and philosophically influential statement of natural law theory.[99] Hobbes's *Leviathan* elucidated the principal characteristics of the law of nature.[100] Hobbes initially defined a law

98. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10 (1921).

99. *See* THOMAS HOBBES, LEVIATHAN (Michael Oakeshott ed., Collier MacMillan Publishers 1962) (1651); THOMAS HOBBES, *The Citizen*, *in* MAN AND CITIZEN (Bernard Gert ed., 1972) (1642).

100. HOBBES, LEVIATHAN, *supra* note 99, at 103-24.

of nature as a "precept, or general rule of reason."[101] He then enumerated all of the specific rules he believed satisfied this characterization, and explained common sense rationales for each of them that, presumably, every rational person could understand. Hobbes stated the sum and substance of the basic laws of nature in the following simple rule "intelligible, to even the meanest capacity": "*Do not that to another, which thou wouldest not have done to thyself.*"[102] In light of this summary statement of the laws of nature, Hobbes called the science of these laws "the true moral philosophy."[103]

According to Hobbes, all individuals recognize, insofar as they are rational, that human beings tend to have certain characteristics drawing them into mutually destructive violent conflict that produces a dreadful condition, which he described in memorable terms as a "war of all against all."[104] Hobbes argued, however, that society can avoid falling into this condition if individuals act in accordance with the rules contained in the laws of nature.[105]

Hobbes's writings presented a minimalist view of natural law. Although Hobbes believed in the existence of a law of nature grounded in reason and understandable to and binding upon all rational human beings, he also believed that deep, bitter, and potentially violent disagreement could arise over its interpretation in specific circumstances when individuals consider their vital interests at stake. For this reason, he viewed a principal function of government as providing a public interpretation of the laws of nature through enactment of what he termed "civil law," consisting of the commands of the sovereign authority.[106]

Thus, Hobbes distinguished between general precepts of the natural law, acknowledged by all rational human beings, and the often bitterly divergent interpretations of those precepts in concrete circumstances. In this respect, his views coincide with an outlook the contemporary political philosopher Michael Walzer has recently termed "moral minimalism."[107]

According to moral minimalism, morality has two components. The first is a set of broad principles, widely agreed upon in almost every human society. These principles are, however, so broad and general that

101. *Id.* at 103.
102. *Id.* at 122 (emphasis in original).
103. *Id.* at 123.
104. *Id.* at 100.
105. HOBBES, *The Citizen*, *supra* note 99, at 123.
106. *Id.* at 178.
107. Michael Walzer, *Moral Minimalism*, *in* FROM THE TWILIGHT OF PROBABILITY: ETHICS AND POLITICS 3 (William R. Shea and Antonio Spadafora eds., 1992).

they provide only minimal guidance for resolving the controversial and complex moral issues about which individuals and social groups deeply disagree. For this reason, moral minimalism points to a second component of morality, consisting of more determinate, but far less widely agreed upon, principles reflecting diverse interpretations of the broad, widely agreed upon "minimal" principles of morality. The diversity in interpretation results from differences on matters of importance to individuals and social groups, such as religion, politics, economics, cultural traditions, and personal outlooks on life.

For example, Walzer considers justice to be a universally valued goal, but one that is subject to diverse interpretations. For example, when presented with the statement in Deuteronomy, "Justice, justice shalt thou pursue,"[108] most people would agree.[109] If, however, they were presented with a detailed account of how the Deuteronomist actually understood the idea of justice, most people today would disagree. They would prefer a more general or flexible conception of justice and might view the Deteuronomist's conception as "so distant and alien as to leave them entirely unresponsive."[110]

Hobbes's laws of nature closely correspond to minimal morality in Walzer's sense (*i.e.*, to the idea of a set of broad principles, widely agreed upon, but often subject to deep and bitter disagreements over their interpretation in particular circumstances). The fact of such disagreement does not, however, make the laws of nature morally irrelevant or trivial. In Walzer's words:

> I want to stress . . . that "minimalism" does not describe a morality that is substantively minor or emotionally shallow. The opposite is more likely true: this is morality close to the bone. There isn't much that is more important than "truth" and "justice" minimally understood.[111]

Under the moral minimalist version of natural law theory, a judge has two fundamental duties. First, she must apply the civil law fairly, so that all of the parties in a given case receive their due under the law.[112] Second, if a case presents an issue of interpretation in regard to a particular law, the judge must make every effort to interpret the law in a way that results in a just decision. In other words, the judge must make a decision allowing one reasonably to view the law itself as just, and to

108. *Deuteronomy* 16:20.

109. "[T]he [general] idea of justice . . . appears . . . in every human society." Walzer, *supra* note 107, at 5-6.

110. *Id.*

111. *Id.* at 6.

112. HOBBES, LEVIATHAN, *supra* note 99, at 120-21.

view the law as justly applied in the circumstances of the case.[113] However, the moral minimalist version of natural law theory has little to say about the relevant standards of justice upon which a judge should rely to fulfill this second duty.

Various jurisprudential theories address this critical issue raised, but not settled, by the moral minimalist version of natural law theory. According to one view, the body of judicial opinion rendered by judges in prior cases provides the appropriate standard of justice a judge should follow when issues of legal interpretation arise in a given case.[114] The notion that precedent can provide judges with a genuine guide to decisionmaking, however, has come under strong criticism, especially from legal realists such as Karl Llewelyn.[115] Llewelyn and other legal realists have argued that any moderately complex case presents a range of precedents, each leading to a different decision. The question then becomes not whether to follow precedent, but which precedent to follow.

Furthermore, Llewelyn maintained that a skillful and clever judge can almost always fashion equally persuasive arguments for and against the application of a given precedent.[116] Statutes, in the realist view, also fail to provide genuine guidance for judicial decision. With enough intellectual ingenuity, say the realists, a judge can construct equally respectable arguments for and against the application of statutory language in any particular case.[117] The legal realists thus maintained that the standards of justice a judge employs emanate not from the law itself, but from the judge's personal viewpoints, combining such diverse elements as her cultural background, political and ethical beliefs, and individual psy-

113. *Id.* at 208-09.

114. For traditional formulations of this view, see SIR EDWARD COKE, 1 INSTITUTES § 138 (1629); SIR MATTHEW HALE, A HISTORY OF THE COMMON LAW (Charles M. Gray ed., 1971); SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 17-20, 67 (1629). Hobbes criticized the traditional defense of common-law precedent as a standard of justice in THOMAS HOBBES, A DIALOGUE BETWEEN A PHILOSOPHER AND STUDENT OF THE COMMON LAW OF ENGLAND (Joseph Cropsey ed., 1971) (1794). For Hale's response, see Sir Matthew Hale, *Reflections by the Lord Chief Justice Hale on Mr. Hobbes, His Dialogue on the Law*, *in* A HISTORY OF ENGLISH LAW 499 (Sir William Holdsworth ed., 1956) (1681). Bentham and Hume also defended precedent, but did so on different bases than Coke, Hale, and Blackstone. *See* JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT (J.H. Burns & H.L.A. Hart eds., 1977) (1823); DAVID HUME, ENQUIRY CONCERNING THE PRINCIPLES OF MORALS (P.H. Nidditch ed., 1975) (1751). For a discussion of the two defenses of precedent, see Gerald J. Postema, *Roots of Our Notion of Precedent*, *in* PRECEDENT IN LAW 9 (Lawrence Goldstein ed., 1987).

115. *See* KARL LLEWELYN, THE BRAMBLE BUSH (Oceana Publications, 1989) (1930).

116. *Id.* at 74-75, 81-82.

117. *Id.* at 84-85.

chology.[118] Thus, to the realists, the true law is limited to the judge's decision in any particular case.

This outlook poses major problems concerning the legitimacy of judicial authority. Everyone may have opinions about the rights and duties of others. A judge's opinions on these matters, as rendered in a judicial decision, are, however, generally thought to have two distinctive characteristics. First, individuals before a court are assumed to have a duty to make the judge's opinion their own standard of conduct. Second, most individuals generally regard the use of governmental power to enforce the judge's opinion as morally justifiable. These two salient characteristics of a judge's opinions concerning rights and duties in society are bound up in a crucial way with the judge's role as a public official who applies public, rather than purely personal, standards of justice to decide cases.

Legal realism leads, however, to one of the following two conclusions. Either legitimate judicial authority simply does not exist, or it exists, but does not, as widely supposed, depend on a judge's duty to apply public rather than personal standards of justice. Each of these propositions poses large and difficult questions.

On the one hand, if legitimate judicial authority does not exist, there can be no *basic* moral duty to obey the judgments of a court, and no *basic* moral justification for their enforcement through the instruments of governmental power. To the extent that such a moral duty or justification exists in particular circumstances, it follows as a logical consequence of other independent moral duties or justifying circumstances. For some people, this sweeping and radical conclusion may produce a sense of intellectual excitement, but most individuals would reject it as far too extreme.

On the other hand, if legitimate judicial authority does not depend on a judge's duty to apply public standards of justice, one is hard put to say what legitimate judicial authority means or could mean. The problem here does not stem from the often highly subjective nature of personal views concerning standards of justice and their application in concrete circumstances. Even if a judge's personal views on justice, as applied to a particular case, are objectively correct (however one chooses to understand the idea of objective correctness in this context), to the extent a judge bases her decision solely upon her personal views of justice, she has applied her *personal* law. This, in turn, raises the questions of why anyone should regard themselves as having a duty to comply with

118. *Id.* at 81.

her *personal* law, and of why anyone should consider the use of governmental power to enforce her *personal* law as morally justified.[119]

A person thus faces a choice between two highly problematic viewpoints as a logical consequence of accepting legal realism. Legal positivists, such as H.L.A. Hart, have tried to avoid this dilemma by rejecting the central ideas of legal realism. Hart acknowledged that "[f]act situations do not await us neatly creased and folded," and "their legal classification [is not] written on them to be simply read off by the judge."[120] For Hart it is, however, a long leap from these points to Llewelyn's claim that a skillful and clever judge can always fashion equally persuasive arguments for any stance on whether a given case falls under a certain statutory provision, or whether a particular precedent applies.

According to Hart, all legal systems require compromise between certainty and flexibility. On the one hand, many of the rules of a legal system must be capable of application by most individuals over large areas of conduct. On the other hand, the rules of the system "need to leave open, for later settlement by an informed official choice, issues which can only be properly appreciated and settled when they arise in a concrete case."[121] Hart observed that modern legal systems typically effect this compromise through a variety of methods depending on implicit judgments concerning ability to anticipate the future in different areas of social life. Legislatures, according to Hart, provide for future application of statutes in two ways. First, they enact general standards and implement the standards by delegating rule-making authority to an administrative body.[122] Second, when a legislature believes that future circumstances, although varied, will encompass familiar features of experience, it leaves application of the statutes to courts to judge what is reasonable.[123]

Hart contrasted these two techniques with statutes that successfully regulate conduct by delineating specific requirements of action. According to Hart, under these circumstances, "certain distinguishable actions, events, or states of affairs are of such practical importance to us, as things either to avert or bring about, that very few concomitant circumstances

119. As some scholars have observed, none of the eminent Legal Realists ever systematically explored the ethical implications of their positions with respect to the legitimacy of judicial decisions. *See, e.g.,* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 5-7 (1977).

120. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

121. H.L.A. HART, THE CONCEPT OF LAW 127 (1961).

122. *Id.* at 127-28.

123. *Id.* at 128-29.

incline us to regard them differently."[124] Legal regulation of conduct through statute presupposes that general words in a language have standard instances "in which no doubts are felt about [their] application."[125] Accordingly, in Hart's view, one can distinguish between the "core of settled meaning" associated with a particular statutory provision, and the "penumbra of debatable cases in which words are neither absolutely applicable nor obviously ruled out."[126] Hart maintained that a statute's core area of settled meaning increases over time through judicial reliance upon precedent. Hart conceded the legal realists' point that "there is no single method of determining the rule for which a given authoritative precedent is an authority."[127] He also recognized that judges may narrow and widen the rules enunciated in prior cases. Hart insisted, however, that even when one takes these points into account, judicial adherence to precedent can produce "a body of rules of which a vast number . . . are as determinate as any statutory rule."[128] According to Hart, a responsible judge has a choice about standards of justice only on issues lying within the penumbral zone, in which core meanings of statutory terms and rules laid down in prior cases no longer provide determinate guidance for decision.

In *Law's Empire*, Ronald Dworkin proposed an account of the judicial role occupying a middle ground between legal realism and Hart's version of legal positivism.[129] Dworkin recognized a large element of choice in judicial decision making. He argued, however, that a responsible judge is not constrained by a duty to apply core statutory meanings and to follow precedent. Rather, a responsible judge has a duty to approach cases in a way consistent with what Dworkin called "law as integrity."

To explain the idea of law as integrity, Dworkin drew an analogy between judging and literary criticism.[130] Judges and literary critics alike deal with texts whose overall meanings are substantially underdetermined by their exact words. For this reason, both judges and literary critics confront problems of interpretation that call for a theoretical approach which brings a diversity of elements to one's understanding of a text, such as history, philosophy, politics, religion, and psychology. Dworkin observed, however, that the analogy between judging and liter-

124. *Id.* at 130.
125. Hart, *supra* note 120, at 607.
126. *Id.*
127. HART, *supra* note 121, at 131.
128. *Id.* at 132.
129. RONALD DWORKIN, LAW'S EMPIRE (1986).
130. *Id.* at 94-96.

ary criticism breaks down in a crucial respect. The judge not only interprets law, but also makes it.[131] A judge's interpretation of the body of law in a jurisdiction, as it applies to a particular case, becomes part of that body of law for judges to interpret in the future. As a result, the judge is like a critic, but like an author as well.

Dworkin further developed the analogy between judging and literary activity through an imaginary genre, which he called the chain novel.[132] In a chain novel, a number of different authors write its chapters one after another. In this respect, chain novels resemble television soap operas and story games played around a campfire. Unlike soap operas and story games, however, each of the authors of a chain novel takes the enterprise seriously. Chain novelists view themselves as responsible to continue the novel, at the respective points that they begin writing, in a way that makes the novel the best it can be as a literary work.

Continuing a chain novel thus requires an author to develop a conception of how the novel, as written up to a given point, hangs together and how its elements, such as plot, development of character, narrative style, imagery, and symbolism, cohere with one another. Such a conception, in turn, depends on developing an overall interpretation of the novel, of its main themes and underlying aesthetic structure. Dworkin observed that overall interpretations of a novel have two dimensions of evaluation.[133]

The first dimension concerns how well hypotheses about theme and aesthetic structure harmonize and make sense of the novel so that the chain novelist can continue it in a way that makes it the best it can be.[134] The second dimension concerns the chain novelist's independent artistic judgments, as determined, among other ways, by her outlook on life and personal values.[135] In some cases, two or more interpretations may appear to fit the novel equally well, and so the chain novelist, taking seriously the charge to help make the novel the best it can be, proceeds from the standpoint of her independent aesthetic outlook.[136]

Dworkin conceived of the judicial role by analogy to the chain novel. According to Dworkin, judges should "identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent con-

131. *Id.* at 229.
132. *Id.* at 229.
133. *Id.* at 230-31.
134. *Id.*
135. *Id.* at 231.
136. *Id.*

ception of justice and fairness."[137] As with the chain novelist, ideally speaking, a judge brings an interpretive theory to the adjudication of cases in order to further the development of the law and make it the best it can be. Furthermore, as with chain novels, such a theory can be evaluated from two standpoints. The first concerns the degree to which an interpretive theory effects coherence among the diverse sources of law such as statutes and case law. The second standpoint comes into play when considerations of fit cannot discriminate between two or more interpretations of a statute or line of cases.[138]

Judicial reasoning, according to Dworkin's account, thus accords an important role to the independent judgment of judges. This role, however, is limited by a responsibility to decide cases from the standpoint of a particular kind of intellectual approach. This approach aims to discover coherence among the diverse sources of law, including precedent, and to bring them to bear upon cases in a way that promotes development of the law toward the best it can be. According to Dworkin, the duty of a judge in a given case cannot be analyzed as following precedent, if one interprets this to mean reaching the result absolutely demanded by prior case law. The law makes no such absolute demands.[139] For Dworkin, judges fulfill their duty by adopting the standpoint of law as integrity, *i.e.*, by "trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of the community."[140] Law as integrity thus requires a judge "to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole."[141]

The foregoing discussion of Legal Realism, H.L.A. Hart's version of Legal Positivism, and Ronald Dworkin's conception of Law as Integrity has been truncated in a key respect. Each of these theories addresses issues besides those associated with the adjudicatory role raised by Justice Cardozo. Most important, however, each theory explicitly or implicitly addresses the legitimacy of adjudicatory authority; each theory addresses why an adjudicator acting under color of legal authority has a moral right to decide issues for others, and why persons subject to those decisions have a duty to regard them as binding. Furthermore, answers

137. *Id.* at 225.
138. *Id.* at 239.
139. *Id.* at 122.
140. *Id.* at 255.
141. *Id.* at 245.

or assumptions within a jurisprudential theory concerning the nature of legitimate adjudicatory authority affect, although they do not always uniquely determine, the account of the adjudicatory role within that theory.[142]

The next section returns to the issues concerning privatization of justice raised by the *Gilmer* case and engages in a type of intellectual "transplant operation." The accounts of the adjudicatory role discussed in this section will be removed from their traditional theoretical contexts and applied to the significantly different circumstances of labor and employment arbitration.

V. A Proposed Jurisprudence of Labor and Employment Arbitration

The preceding discussion of competing jurisprudential theories of the constraints on judges allows a return to questions about legitimate constraints on arbitral decision-making. In this regard, it is helpful to note the following two sets of distinctions.

First, jurisprudential theories of the adjudicatory role, such as Legal Realism, H.L.A. Hart's version of Legal Positivism, and Ronald Dworkin's conception of Law as Integrity, have both a normative and a descriptive dimension. Normatively, these theories provide general accounts of the approach a person occupying an adjudicatory role ought to adopt in her efforts to reach a just decision when interpreting the law. From a descriptive standpoint, one assesses the plausibility of jurisprudential theories about the adjudicatory role in terms of their consistency with what one might term "best adjudicatory practice." Here, one assumes the possibility of identifying, apart from any prior jurisprudential theory, at least a number of clear-cut instances in which an adjudicator has rendered a just decision under circumstances presenting significant interpretive problems. A theory of the adjudicatory role must pass the descriptive test of consistency with such clear-cut examples.

Second, from either a normative or a descriptive standpoint, an adequate theory of the adjudicatory role analyzes two critical factors termed respectively "personal" and "institutional" constraints on an adjudicator. Personal constraints concern an adjudicator's beliefs about factors that in her opinion limit her degrees of freedom in deciding cases. In all likelihood these beliefs will encompass a wide range of factors, including ethical, social, and economic considerations. In contrast, institutional constraints pertain not to an adjudicator's beliefs, but rather to self-en-

142. *See* Postema, *supra* note 114, at 9-34.

forcing elements within a system of adjudication that impose limits on an adjudicator's range of discretion. These primarily include bases of jurisdiction and provisions relating to review of the adjudicator's decision by higher authorities within the system.

Accordingly, the analysis proceeds to the key jurisprudential question: What are the personal and the institutional constraints that apply to arbitration? An acceptable answer to this question must provide a convincing analysis of the personal and institutional constraints that ought to apply to arbitrators. Furthermore, the answer must be consistent with views of the personal and institutional constraints that bind arbitrators embodied in clearly identifiable best arbitration practice. In dealing with the key jurisprudential question, we will look first at labor arbitration under collective bargaining agreements, and then turn our attention to arbitration of statutory claims under agreements to arbitrate between employers and employees, of the kind that figured in *Gilmer*.

A. Labor Arbitration

Collective bargaining agreements do not establish traditional common-law contract rights. Rather, they provide a code of very broad generalized principles governing the workplace. These principles take on meaning only as applied to specific situations, and the parties defer their refinement to case-by-case negotiation through the grievance procedure. When the parties are unable to reach agreement in a particular case, they submit their dispute to an arbitrator. The range of resolutions available to the arbitrator is limited only by the parties—by what they provided in the collective bargaining agreement and by what they choose to give the arbitrator by way of evidence and argument.

Legal Realism provides the best theory of the adjudicatory role for answering the key jurisprudential question as it relates to labor arbitration under collective bargaining agreements. Legal Realism accounts for the personal and institutional constraints upon labor arbitrators, both normatively and descriptively, in a far more plausible way than do the other leading jurisprudential theories of the adjudicatory role.

Under a Legal Realist account, the personal constraints on a labor arbitrator are minimal from both normative and descriptive standpoints. In this regard, the Legal Realist account holds that an arbitrator may draw heavily upon her personal views concerning justice in the workplace, reflecting her individual outlook on factual matters, her sense of ethics, and her views on social policy. To the extent any personal constraints bind a labor arbitrator, they concern her beliefs in regard to the general expectations of the parties as to the broad principles she will ap-

ply in resolving the case at hand. Correspondingly, a Legal Realist account implies extremely weak institutional constraints on labor arbitrators. Under this view, courts should treat the decisions of labor arbitrators as unreviewable except within a narrow range of circumstances in which the arbitrator's award completely disregards the terms of the applicable collective bargaining agreement.

With respect to personal constraints, Legal Realism views the standards of justice employed by an adjudicator as emanating from her personal viewpoint, shaped by her background, psychological makeup, and outlook on life. For this reason, as discussed in Part IV, the Legal Realist view of the judicial process raises serious questions of legitimacy. Judicial reliance on personal rather than public standards of justice in interpreting, applying, and shaping public law calls into question the moral authority and the binding nature of judicial decisions. No such problem of legitimacy exists, however, when the Legal Realist model is applied to the labor arbitration process because the labor arbitrator does not interpret, apply, or shape public law. The labor arbitrator is a private adjudicator in a system of private law. The parties confer on the arbitrator a legitimacy to apply her personal standards of justice to the collective bargaining agreement. The arbitrator is the parties' designated interpreter of the agreement. When the arbitrator applies her personal standards of justice the parties receive exactly what they bargained for, as long as she stays within the range of options arguably available to her under the agreement.

Some legal realists implicitly recognize the potential legitimacy problems raised by their view of the judicial process. They limit the binding nature of any judicial decision to the actual litigants. The precedential value of case law lies in its utility as a predictor of what a judge may do in a future case. Truly binding law is, however, "what . . . officials do about disputes."[143]

Regardless of whether this view appropriately describes the essence of law,[144] it clearly applies to labor arbitration. Because the function of the labor arbitrator is to resolve the negotiation impasse in a particular grievance, the arbitrator's award is not legally binding beyond that grievance. Awards do not have stare decisis precedential effects unless the parties expressly provide for that.[145] Adapting Llewelyn's words, "This

143. LLEWELYN, *supra* note 115, at 12.

144. Llewelyn himself retreated from it somewhat after the first edition of his book. *Id.* at ix.

145. *See supra* notes 40-44 and accompanying text. The absence of stare decisis precedential effects of prior awards is directly related to the parties' conferral on the selected arbitrator

doing of something about disputes, this doing it reasonably, is the business of"[146] labor arbitration.

With respect to the institutional constraints upon labor arbitrators, judicial deference to grievance arbitration awards promotes peaceful collective bargaining as the primary form of workplace self-government. The broad standard of deference facilitates the parties' ability to defer most workplace disputes to case-by-case negotiations through the grievance procedure.[147] This process, in turn, facilitates the parties' ability to conclude collective bargaining agreements without resort to strikes or other economic weaponry. Moreover, by broadly enforcing arbitration awards, courts give effect to arbitration as the parties' tool for resolving impasses in grievance negotiations, thereby ensuring labor peace during the term of the collective agreement.

Under a Legal Realist model, the private law of the collective bargaining agreement is the arbitrator's resolution of the particular dispute, which is exactly what the parties bargained for. Therefore, arbitral decisions should be enforced by a court or deferred to by an administrative agency. The legitimacy of judicial deference to grievance arbitration awards thus stems from the private nature of the collective bargaining process. Because the collective bargaining agreement is a private governing document and grievance arbitration is a private adjudication process, the system itself is directly accountable to the parties who control it. The only public concerns implicated by the results of this private, self-contained system arise when the arbitrator clearly exceeds the system's boundaries and when the result of the system clearly contravenes a well-defined and dominant public policy.

The consequences of conflicting arbitration awards illustrates the absence of public concern with the operation of the private system of workplace government. Assume that the same union has collective bargaining agreements with two different companies and that the agree-

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of authority and responsibility to apply her standards of workplace justice to resolve their particular grievance. Were she to give stare decisis effect to awards of other arbitrators, particularly in cases arising under other contracts, she would abdicate her responsibility. As one leading arbitrator has explained:

> While an opinion of another arbitrator, in an unrelated bargaining relationship, sometimes may be useful in suggesting possible approaches to a difficult interpretive question, the inescapable fact is that the parties agree in any given case only to accept the judgment of the arbitrator whom they have selected—they grant no commission to apply some other individual's judgment.

Sylvester Garrett, *The Interpretive Process: Myths and Reality*, 38TH ANN. MTG. NAT'L ACAD. ARB. 121, 144 (1986).

146. LLEWELYN, *supra* note 115, at 3.

147. *See supra* notes 21-28 and accompanying text.

ments contain identical language requiring just cause for discharge. Each company fires an employee with ten years of seniority and a relatively good work record because of excessive absenteeism. Each company has a no-fault attendance program under which employees are charged demerit points for each lateness or unpaid absence, regardless of the reason. After three points the employee is reprimanded, after five points the employee is suspended, and after seven points the employee is terminated. Both fired employees had very good attendance records during most of their tenure. Both, however, became ill, exhausted their paid sick leave, accumulated seven points, and were dismissed. The union grieved both discharges, was unable to settle either, and proceeded to arbitration before two different arbitrators.

The union's grievance against Company One came before Arbitrator A. Arbitrator A sustained the grievance, concluding that under these circumstances the discharge lacked just cause because the employee was not at fault in being absent and could be expected to return to an acceptable level of attendance upon physical recovery.

The union's grievance against Company Two came before Arbitrator B. Arbitrator B denied the grievance, reasoning that, although the employee could not be faulted for being absent, because of Company Two's need for a reliable workforce, it could not be expected to continue employing a worker who was not showing up for work, regardless of the reasons for the absences.

Arbitrators A and B reached completely opposite results despite applying identical governing language to virtually identical fact situations. Their inconsistent conclusions resulted from their different personal perspectives on workplace justice. Arbitrator A approached the issue of just cause for discharge from the perspective of employee expectations of job security and the belief that employees should be terminated only for culpable misconduct. Arbitrator B approached the issue from the perspective of employer needs and the employee's inability to meet those needs regardless of culpability.

Both decisions fall within the range of options that the parties' agreement gave the arbitrator for resolving the disputes, *i.e.*, both decisions draw their essence from the contracts' just cause provisions. In each case the parties gave the arbitrator the authority to resolve the dispute in accordance with her personal perspectives on just cause for dismissal. Each arbitrator performed that task. Moreover, each arbitrator's decision became the common law of the shop only in the company in which it was rendered. Each decision is binding in future cases within that company only to the extent that future arbitrators choose to follow

it. Thus, a court need not be concerned that the decisions are inconsistent because each decision stands on its own within the separate private governance system where it was rendered. Both decisions are entitled to judicial enforcement.

The union's remedy in Company Two is to seek express language in the collective bargaining agreement precluding the company from penalizing employees for absences due to legitimate illnesses. Alternatively, the union may seek to relitigate the issue the next time it arises before a different arbitrator and try to persuade him or her to disregard the prior award. Similarly, Company One's remedy is to seek contract language expressly authorizing it to count illness-related absences to the extent they exceed paid sick leave or to relitigate the issue the next time it arises before a different arbitrator. The only body of law in this private system that results from the arbitrator's award is the resolution of the particular grievance. Thus, the Legal Realist model appropriately defines the constraints on arbitral decision-making and the very limited availability of judicial review because of the private nature of the grievance arbitration system.

A Legal Realist model also corresponds descriptively to widespread beliefs shared by labor, management, arbitrators, and courts about the proper adjudicatory role of labor arbitrators.[148] The parties typically

148. Leading arbitrators have expressly relied on the Legal Realist model in discussing how they decide cases. For example, at the 1961 meeting of the National Academy of Arbitrators, Sylvester Garrett, a former president of the National Academy of Arbitrators and chair of the U.S. Steel-United Steelworkers Board of Arbitration, relied on legal realist writings in describing how arbitrators decide grievances:

> The creative and intuitive nature of this [decision-making] function . . . has a counterpart in the conventional judicial process. Judges are not often driven to given results in difficult cases by the inexorable compulsion of concepts, maxims, logic, and language. Almost always there is a choice among several potentially applicable sets of principles.
>
> One knowledgeable judge . . . has written that the vital motivating impulse for judicial decision often is a "hunch" or intuition as to what is right or wrong for the particular case. Judge Hutcheson's explanation of the opinion-writing process will seem familiar to many an arbitrator. He went on to write that, having reached a "hunch" decision:
>
> > . . . the astute judge, having so decided, enlists his every faculty and belabors his laggard mind, not only to justify that intuition to himself, but to make it pass muster with his critics.

Sylvester Garrett, *The Role of Lawyers in Arbitration*, PROC. 14TH ANN. MTG. NAT'L ACAD. ARB. 102, 122 (1961) (citing Joseph C. Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 285 (1929)). Twenty-four years later, Mr. Garrett reiterated his recitation of the Legal Realist model of arbitral decision-making and observed that since his initial observations, many other arbitrators had expressly concurred with that model. Garrett, *supra* note 145, at 144-46 (citing, *inter alia*, Gabriel N. Alexander, *Reflections on Decision Making*, PROC. 15TH ANN. MTG. NAT'L ACAD. ARB. 7

recognize the arbitrator's wide range of discretion. They also realize that the arbitrator's personal perspective on labor relations, as influenced by her background, training, and ideological viewpoints, can play a major role in resolution of the grievance. Consequently, the parties often pay attention to these matters when selecting an arbitrator. Arbitrator appointing agencies, which provide the parties in a case with a panel of arbitrators from which to choose, usually supply the parties with background information about the potential arbitrators' training and experience. Parties frequently research potential arbitrators' prior awards and other writings to gain insight into their perspectives on workplace issues.[149] Arbitrators whose understanding and perspectives do not meet the parties' expectations simply do not get selected to hear grievances. Consequently, arbitrators who are selected share a common understanding about collective bargaining and their roles in that process.[150]

Consequently, from a descriptive standpoint, the parties' expectations enter into both the personal and institutional constraints upon labor arbitrators in three ways. First, arbitrators have a personal interest in conforming their decisions to those expectations. Those who deviate too widely from the parties' expectations, for example by placing the burden of proof in a discharge case on the union, will not likely continue to receive appointments. Second, as a general matter, the parties select arbitrators whose personal understandings and perspectives conform to

(1962)); Peter Seitz, *How Arbitrators Decide Cases: A Study in Black Magic*, PROC. 15TH ANN. MTG. NAT'L ACAD. ARB. 159 (1962); *see also Decisional Thinking: Chicago Panel Report*, PROC. 33D ANN. MTG. NAT'L ACAD. ARB. 63, 84-87 (1980); *Decisional Thinking: West Coast Panel Report*, PROC. 33D MTG NAT'L ACAD. ARB. 119, 124-30 (1980).

149. *See, e.g.*, Nels E. Nelson, *The Selection of Arbitrators*, 37 LAB. L.J. 703 (1986).

150. Professor John Dunsford, a former president of the National Academy of Arbitrators, has observed that once selected to hear a case, an arbitrator's options in handling the matter are practically unlimited. The only meaningful restraints are those tacitly conveyed by the parties as to their expectations. As an arbitrator's reputation and docket grow, a reciprocal conditioning comes into play. The parties are presumed to be familiar with the arbitrator's conduct, rulings, and decisions and, by their selection, represent the arbitrator's past performance to be their expected standard for the current matter. Dunsford, *supra* note 79, at 112-13.

Similarly, Edgar Jones, another former Academy president, has commented on the link between the parties' selection process and the legitimate role of the arbitrator's personal values in resolving a grievance: "[I]n this process of competitive selection, '*his* own brand' was analyzed and adopted [by the parties] as *their* own brand [of justice], whatever may have been their respective expectations . . . ." Edgar A. Jones, Jr., *A Meditation on Labor Arbitration and "His Own Brand of Industrial Justice,"* PROC. 35TH ANN. MTG. NAT'L ACAD. ARB. 1, 11 (1982) (emphasis in original). Therefore, it is not surprising that parties are very reluctant to select an arbitrator with whom they have had no experience. *See id.* at 8-11; MAX ZIMMY & CHRISTOPHER BARRECA, *Views of the Parties*, *in* LABOR ARBITRATOR DEVELOPMENT, *supra* note 43, at 194 (management and union lawyers acknowledging that the first thing they look for in evaluating prospective arbitrators is whether they have had prior experience with the arbitrator in question).

their expectations. Third, labor arbitrators, by and large, tend to internalize the general expectations of parties as a critical component of their respective personal standards of fairness. Even a labor arbitrator who genuinely does not care about future appointments, perhaps because of plans to retire, is not very likely to deviate from the parties' general expectations in deciding cases.

A Legal Realist approach to the constraints on labor arbitrators also accounts for the extremely limited external constraints imposed by courts. Under *The Trilogy*, if the arbitration award draws its essence from the collective bargaining agreement, *i.e.*, if the arbitrator has resolved the dispute within the confines of the contract's general code, the court must enforce the award. This is true even if the award is inconsistent with the court's view of the facts or the contract language, with other arbitrators' awards interpreting the same contract, or with the approach of a large percentage of arbitrators interpreting similar language under other contracts. When the parties receive the award, they get what they bargained for. Essentially, when the parties have been unable to agree on what the contract means in a given situation, they have agreed that the contract means whatever the arbitrator says it means.

Under this analysis, H.L.A. Hart's version of Legal Positivism can be ruled out as a theory of the adjudicatory role in labor arbitration. Hart's emphasis on the responsibility of an adjudicator to focus on core meanings cannot apply to the inherently broad and general provisions of a collective bargaining agreement. The breadth and generality of the agreement's provisions directly reflect the parties' intent to defer questions about what the provisions mean until a later time. In this respect, a collective bargaining agreement resembles a political constitution, but with a key difference. It is private rather than public law. A collective bargaining agreement specifies the fundamental law, but only as it applies to the relationship between two parties. For this reason, Ronald Dworkin's conception of Law as Integrity likewise does not apply to labor arbitration.[151] The principal responsibility of an adjudicator under Law as Integrity is to make the law better in the sense of more logically and ethically coherent. This responsibility concerns the law itself. In contrast, a labor arbitrator's principal responsibility is to interpret and apply the broad provisions of a collective bargaining agreement in order to resolve a particular impasse between two *private* parties.

151. *See* United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564, 567-68 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960).

B. Employment Arbitration

Under the current judicial approach to employment arbitration, courts do not require arbitrators to explain the reasons behind their awards. Arbitral errors of law are not grounds for judicial vacation of an arbitration award, unless the award displays a manifest disregard for the law.[152] When parties agree to arbitrate a claim, courts regard them as having traded "legal precision" for speed, efficiency, and informality in dispute settlement.[153] In other words, under the prevailing judicial view, an agreement to arbitrate represents a decision to opt out of the public legal system and into a private system that places primary value on dispute resolution.[154] According to this view, the only law that results is the award itself, and that law is binding only on the immediate parties.

The current judicial view of employment arbitration thus extends the Legal Realist framework to employment arbitration, in which the arbitrator interprets and applies public law to resolve a dispute arising out of the workplace. It is inappropriate, however, to extend the Legal Realist framework to employment arbitration because the arbitrator's application of public law to private disputes poses special problems not present in labor arbitration under collective bargaining. The following example illustrates these problems.

Title VII of the 1964 Civil Rights Act makes it unlawful "to discriminate . . . with respect to . . . terms, conditions or privileges of employment, because of . . . race."[155] Assume that Companies One and

152. *See supra* notes 72-75 and accompanying text.

153. *See* Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1214 (2d Cir. 1972); *see also* Raiford v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 1410, 1413 (11th Cir. 1990) ("When the parties agreed to submit to arbitration, they also agreed to accept whatever reasonable uncertainties might arise from the process.").

154. *See* Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 102 (1992). Some courts go even further and regard the parties who have agreed to arbitrate as having opted out of the substantive rules of public law as well as the public legal process. For example, in refusing to vacate a nonunion employment arbitration award, the California Supreme Court opined:

> Because the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system . . . finality is a core component of the parties' agreement. . . . [Moreover,] arbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action. . . . Parties who stipulate in an agreement that controversies that may arise out of it shall be settled by arbitration, may expect not only to reap the advantages that flow from the use of that nontechnical, summary procedure, but also to find themselves bound by an award reached by paths neither marked nor traceable and not subject to judicial review.

Moncharsh v. Heily & Blase, 832 P.2d 899, 903-04 (Cal. 1992) (citations omitted).

155. 42 U.S.C. § 2000e-2(a)(1) (1988).

Two are competing insurance agencies. Both are located in a metropolitan area with housing patterns that exhibit a high degree of racial segregation. Both hire sales representatives without regard to race. Both have concluded that a significant number of potential customers will be more likely to purchase insurance from a sales representative who is a member of their race. Furthermore, both have concluded that although there are many potential customers who regard the race of the sales representative as irrelevant, there are few if any who are more likely to buy insurance from a sales representative of a different race. Therefore, both conclude that it is good business practice to assign white sales representatives to their offices that serve predominantly white areas and African-American sales representatives to their offices that serve predominantly black areas. As a result, each company is challenged under Title VII by its employees, but the Title VII claims come before different arbitrators.

Arbitrator A sustains the claim against Company One, reasoning that job assignments are conditions of employment and that the statute prohibits basing those assignments on race, regardless of motivation or effect. Arbitrator B rejects the claim against Company Two, reasoning that it did not use race in deciding whether to hire sales representatives, that all sales representatives were given the same job duties regardless of race, and that assignments to particular offices were not racially motivated, but were instead a direct response to market pressures. Arbitrator B further observes that the assignment scheme worked to the advantage of the company and the sales representatives because it maximized the company's profits and the sales representatives' commissions by maximizing potential sales.

Unlike the cases of the employees discharged for absenteeism in which two arbitrators produced conflicting decisions in separate systems of private law, here, two arbitrators have produced conflicting decisions in a single system of public law. These conflicting decisions, resulting from the respective employment arbitrators' different personal perspectives on Title VII, and their differing views on what constitutes racial discrimination, pose a deep problem.

First, if the conflict is allowed to stand, Company One will be at a competitive disadvantage vis-à-vis Company Two. In the absenteeism labor arbitration the conflicting results also placed Company One at a competitive disadvantage by forcing it to retain an employee who, because of illness, had an unreliable attendance record. Company One's competitive disadvantage in that case, however, was of its own making because it resulted from its own system of private law as interpreted by its own private adjudicator. Company One's competitive disadvantage in

the insurance case is not of its own making. Rather, it is imposed on Company One by conflicting interpretations of public law.

Second, Company One has a remedy for its competitive disadvantage in the absenteeism case. It can return to the bargaining table and try to persuade the union to agree to express provisions in the contract giving it authority to terminate workers whose excessive absenteeism is caused by illness. By contrast, in the insurance case Company One has no such remedy because it lacks the direct control over the statute that it has over the contract in the absenteeism case.

Third, Arbitrator B's interpretation, when measured against judicial and administrative agency interpretations of Title VII, is incorrect.[156] By enacting Title VII, Congress recognized that private markets do not prevent racial discrimination.[157] For example, assume that both companies would prefer to assign their sales representatives without regard to race. Neither company acting alone will do so because it runs a substantial risk of losing business to the other. When both act alone they end up in a less than optimal situation—they stay competitively equal but have racially segregated sales forces that they would prefer not to have. Because of this prisoner's dilemma,[158] a competitive market actually prevents an otherwise efficient solution to a problem of racial discrimination. Title VII recognizes this imperfection in the private market and solves the dilemma.

156. *See, e.g.*, EEOC Dec. 70350, 2 F.E.P. Cas. (BNA) 498 (1969); *cf.* Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981) (holding that the belief that customers in foreign country will refuse to do business with women because of that country's culture does not make sex a bona fide occupational qualification under Title VII); Baker v. City of St. Petersburg, 400 F.2d 294 (5th Cir. 1968) (holding that assignment of black police officers to patrol only predominantly black residential and business districts violates the Fourteenth Amendment's Equal Protection Clause).

157. *See* Cass Sunstein, *Why Markets Don't Stop Discrimination*, SOC. PHIL. & POL., Spring 1991, at 22.

158. A prisoner's dilemma is usually explained with the following example. Imagine two prisoners charged as coparticipants in an armed robbery who are interrogated separately by the prosecutor. The prosecutor tells each prisoner the following. If neither confesses, they will each serve one year in prison. If one confesses to armed robbery and testifies against the other, he will go free, while the other will receive a ten-year sentence. If both confess, each will receive a five-year sentence. In this situation, each prisoner acting alone has a sufficient motive to confess regardless of what the other does, even though the most reasonable course of action for the two prisoners together is for both not to confess to armed robbery.

Frequently the relationship between rival businesses exemplifies a prisoner's dilemma (though often of a more complex kind involving more than just two parties). Under the example given in the text, because each firm prefers not to assign sales representatives on the basis of race, the best outcome for all would result if every firm refused to discriminate. On the other hand, the decision of any given firm to repudiate discrimination regardless of what other firms might do would be fraught with economic peril. For this reason, prisoner's dilemma reasoning provided some of the strongest arguments in favor of Title VII of the 1964 Civil Rights Act.

On the other hand, assume that both companies wish to cooperate, so that neither will suffer a competitive disadvantage vis-a-vis the other by integrating its sales force. Unfortunately, they each still might have a motive not to integrate because they might conclude, either separately or together, that integrated sales forces in both companies may produce a lower level of overall insurance sales. That is, for some extremely bigoted customers, the prospect of buying insurance from a representative of a different race will be so odious that they will spend their money on other financial products.

Title VII represents a public justice value judgment that the elimination of racial discrimination is so important that forcing employers to bear some of the costs of pursuing that goal is justified. The extent of the costs that employers must bear is not specified in the statute. That issue is delegated to politically accountable judges and administrative agencies to determine as a matter of interpretation. Under a system in which employment arbitrators make final and binding decisions in cases involving charges of discrimination based on Title VII, there will be serious concern about whether those decisions adequately reflect the public justice values at the heart of the statute.

The Legal Realist account of the adjudicatory role underlying labor arbitration thus does not apply to arbitration of claims based on employment statutes, such as Title VII of the 1964 Civil Rights Act. In employment arbitration, the arbitrator does not interpret private law, but public law. Interpreting public law implicates major public decisions that reflect the weighing and balancing of important social values by the legislature. It follows that the private expectations of the parties that provide the principal check on the labor arbitrator's use of her own justice values can not serve the same function for the employment arbitrator. Although in some cases the parties' expectations may coincide with the overall value judgments reflected in the enactment of various public laws, the coincidence is not inherent in the private arbitration system. Moreover, parties cannot give the arbitrator the authority to apply personal viewpoints of justice in interpreting public law.

If Legal Realism fails to provide a normatively desirable theory of employment arbitration, what personal and institutional constraints should apply to the arbitrator's decision? Employment arbitrators should personally regard themselves as under a strong constraint to decide cases in terms of the settled meanings of statutory terms and precedential language. In other words, H.L.A. Hart's version of Legal Positivism provides the best jurisprudential framework for analyzing the personal constraints on employment arbitrators. From an institutional

standpoint, courts should subject employment arbitrators' interpretations of statutes to de novo review.

One might suppose that the need to interpret public law brings the employment arbitrator's adjudicatory role within the scope of Dworkin's model of Law as Integrity. This conclusion is not correct for the following reason.

Dworkin's view affords a major role in the development of the law to the independent judgments of judges. They must balance diverse concerns in each case to reach the result that best promotes the law's development. Furthermore, such balancing involves application of principles to a case which, at times, may weigh heavily toward a particular result but never command it. In any given case, weightier principles may tilt the balance toward another result, such as when judges decide to overrule existing case law.

The judge's role, as envisioned by Dworkin, is legitimate because of the judge's political accountability. First, judges are screened at the outset for their social and political values, either directly by the electorate or through the appointment and confirmation process. Second, judges act within a unitary legal system, characterized by provision for review of judges' decisions up to review by a judicially supreme tribunal. Third, even though it is final within the judicial system, the law as decreed by the judicially supreme tribunal is ultimately revisable by the legislature. When the legislature enacts a statute with broad language, one may reasonably infer a legislative intent to invest judges with authority to refine the public law through case-by-case interpretation, guided by the conception of Law as Integrity. The legitimate authority of judges in the system to interpret and apply statutes is accordingly conferred upon them by the initial lawmakers, *i.e.*, the legislature, just as labor arbitrators derive their legitimate authority to interpret and apply collective bargaining agreements through the initial lawmakers, *i.e.*, the parties.[159]

Dworkin's model of Law as Integrity thus provides a reasonable account of the constraints on an adjudicator in light of an institutional background containing three key elements: (1) prior screening of judges' social and political values, (2) extensive judicial review within the system of judges' decisions, and (3) ultimate authority of the legislature to revise law as interpreted by the highest court in the system. Privately appointed arbitrators apply public law, but not within a system of public law containing these three elements. For this reason, one cannot reason-

159. Administrative agencies derive a similar legitimacy when the legislature delegates the primary task of interpretation to them. *See* Chevron, USA, Inc. v. Natural Resources Defense Counsel, 467 U.S. 837, 843-44 (1984).

ably apply the wide scope of independent adjudicatory discretion under Law as Integrity to employment arbitrators. An employment arbitrator, for example, has no legitimate authority to overrule existing case law or even to severely limit its reach. The case law emanating from politically accountable judges must be binding on privately appointed arbitrators who lack the judge's institutional legitimacy.[160]

Employment statutes represent legislative determinations that public justice values require the substitution of uniform labor standards for terms and conditions of employment that would otherwise be privately bargained for in the marketplace.[161] The appropriate institutional framework for ensuring that there will be uniform labor standards is a unified court system designed to produce a single, socially binding interpretation of the law.[162] The decisions of employment arbitrators, however, are not linked together through such a system. Each decision is binding only on the parties in the actual case.[163]

160. The Supreme Court has recognized this on several occasions when it has held that statutory claims are independent of grievances and that the result of grievance arbitration does not per se preclude litigation of a statutory claim arising out of the same incident. *See, e.g.*, McDonald v. City of West Branch, 466 U.S. 284, 292 (1984); Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 737 (1981); Alexander v. Gardner-Denver Co., 415 U.S. 36, 56-57 (1974).

161. For example, the Senate report accompanying the Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 5 U.S.C. and 29 U.S.C. (Supp. V 1993)), described the act in the context of other employment statutes as follows:

> Even without minimum standards most employers would pay a living wage, take steps to protect the health and safety of their work force, and offer their employees decent benefits. A central reason that labor standards are necessary is to relieve the competitive pressure placed on responsible employers by employers who act irresponsibly. Federal labor standards take broad societal concerns out of the competitive process so that conscientious employers are not forced to compete with unscrupulous employers.

S. REP. NO. 3, 103d Cong., 1st Sess. (1993).

162. It is certainly possible for a legislature to enact a statute that sets broad guidelines for conduct but does not command refinement of those guidelines in a uniform manner. In such a case, the constraints on arbitrators adjudicating claims under the statute would be weaker than the constraints we advocate for adjudicating statutory employment claims.

163. *See* Barrowclough v. Kidder, Peabody & Co., 752 F.2d 923 (3d Cir. 1985). In *Barrowclough*, the court enforced an employment agreement to arbitrate claims under ERISA for unpaid benefits, reasoning that the claims were based on the terms of the private employee benefit plan. It refused to compel arbitration of claims based on the statute that were independent of the terms of the plan, such as the statutory disclosure and fiduciary duty provisions. The court reasoned that Congress intended to establish uniform federal standards for employee benefit plans and to provide a consistent body of law to guide plan administrators, fiduciaries, and participants in planning their actions. *Id.* at 939-41. Because decisions of private arbitrators fall outside the unified legal system, referral of these statutory claims to arbitration would defeat the congressional goal of uniform standards. *Id.* at 941.

Barrowclough, however, may be inconsistent with the Supreme Court's current FAA ju-

For this reason, an employment arbitrator who wants to interpret a statute in a way that reflects the congressional goal of uniform standards has a difficult problem. She must try tacitly to coordinate her decision on a particular issue with the decisions on the same issue made by other employment arbitrators working in isolation from her.[164]

This problem instantiates a broader problem, described by the economist Thomas Schelling as that of achieving tacit coordination between parties with identical interests when communication is impossible.[165] Schelling hypothesizes a situation in which two individuals become separated in a store without prior arrangements for handling such a situation.[166] Schelling suggests that it is very likely they will each think of the same place to meet, because the place will be obvious to both of them.[167] Each individual will ask herself what location her companion is likely to think of, and what location her companion is likely to deduce that she will think of. According to Shelling, "What is necessary is to coordinate predictions, to read the same message in the common situation, to identify the one course of action that their expectations of each other can converge on."[168]

Schelling's observations suggest a plausible answer to the question of what values should guide an employment arbitrator dealing with a claim under a statute. In this circumstance, an employment arbitrator needs to identify an interpretation of relevant law with respect to the issue at hand on which the expectations of other employment arbitrators, dealing with the same issue, can converge.

One characteristic that every employment arbitrator shares is the lack of public accountability. Consequently, the point of convergence around which arbitrators tacitly coordinate their decisions should reflect the public justice values already articulated and applied by publicly ac-

risprudence. *See* G. Richard Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?* 68 TEX. L. REV. 509, 562-65 (1990). *Gilmer*'s very strong presumption that statutory claims are arbitrable certainly calls into question *Barrowclough*'s continuing validity. It is not likely that the Supreme Court will infer congressional intent to preclude arbitration from intent to impose uniform labor standards.

164. This concern is not merely theoretical. A review by one federal appellate judge of published grievance arbitration awards under nondiscrimination clauses found that they considerably lacked uniformity in dealing with the concept of nondiscrimination. Betty Binnis Fletcher, *Arbitration of Title VII Claims: Some Judicial Perceptions*, PROC. 34TH ANN. MTG. NAT'L ACAD. ARB. 218, 221 (1981).

165. THOMAS SCHELLING, THE STRATEGY OF CONFLICT 54 (1960).

166. *Id.*

167. *Id.*

168. *Id.*

countable and, accordingly, institutionally competent legislatures, judges, and administrative agencies.

Accordingly, employment arbitrators' need for tacit coordination to properly serve public justice values, coupled with their absence of public accountability, compels that they adopt a judicially cautious approach to statutory interpretation. Such an approach has two components. First, consistent with H.L.A. Hart's theory of Legal Positivism, employment arbitrators should regard themselves as under a strong personal constraint to decide cases in terms of the settled meanings of statutory terms and precedential language. But Hart's theory acknowledges the existence of a penumbral zone in which an adjudicator must go beyond settled meanings of statutory terms or precedential language to interpret relevant law in terms of ethical and social values.[169] So second, when dealing with issues in Hart's penumbral zone, employment arbitrators should continue to place predominant value on judicial caution. When extending current law, they should regard themselves as constrained to do so in relatively familiar and unsurprising ways. This approach will maximize the probability of convergence, at least as compared with a bold, novel, or ideologically charged interpretation.[170]

The value placed on judicial caution is not unique to employment arbitration. One finds it elsewhere as well, such as in adjudication by appellate courts. For appellate courts, however, the value of judicial caution does not predominate. Instead, judicial caution needs to be balanced carefully against other values emphasized by Dworkin in his Law as Integrity model, which relate to promoting greater logical and ethical coherence in various areas of law. In this regard, a publicly accountable appellate judge should depart from the most cautious approach to interpreting a particular statute when she firmly believes that a bolder, more novel interpretive stance would significantly further the overarching goal, under Dworkin's Law as Integrity, of improving the law as a whole. In contrast, a privately accountable employment arbitrator should exercise judicial caution and maximize convergence of her interpretation of a statute with the interpretations of other employment arbitrators, *even if she believes that better law would result from a more creative interpretation.*

169. *See supra* notes 124-128 and accompanying text.

170. The high value employment arbitrators should give to judicial caution is linked conceptually to Hart's distinction between a core of settled meaning and a penumbral zone of statutory and precedential language. The word "caution" generally refers to the exercise of special care when departing from a status quo. In the context of adjudication, it is difficult to say what the idea of a status quo could mean, other than a consensually settled interpretation of key terms in statutes and prior cases.

To illustrate the exercise of judicial caution as a personal constraint on employment arbitrators, assume that an arbitrator faced the following claim in early 1989. An employer in Missouri maintained a pension plan that provided retirement benefits to employees based on age and length of service. To receive benefits, retirees had to be at least fifty-five years old or have at least twenty-five years of service. An employee who suffered a permanent disability, however, could receive benefits if she had at least five years of service. The plan guaranteed that permanently disabled employees would receive benefits equal to at least thirty percent of their final average salaries. The guarantee only applied if the disabled retiree was younger than age sixty. The employer could show no correlation between being sixty years or older and the cost of providing disability retirement benefits.

A sixty-one-year-old employee claimed that she was forced to take regular pension benefits rather than disability retirement benefits because of her age, and that this resulted in substantially lower benefits. An arbitration provision in her employment agreement forced her to bring her claim under the ADEA to an arbitrator. The employer defended by relying on Section 4(f)(2) of the ADEA which, at the time, provided that it was not a violation for an employer to follow the provisions of a "bona fide employee benefit plan . . . which [was] not a subterfuge to evade the purposes of [the statute]."[171]

In early 1989, the EEOC,[172] the agency charged with the administration of the ADEA, and the U.S. Courts of Appeals for the Second, Third, Fourth, Sixth, Seventh and Ninth Circuits[173] had all interpreted Section 4(f)(2) to apply only when the reduction in benefits for older workers was necessary because the costs of providing such benefits increased with age. Missouri, however, is in the Eighth Circuit and that Court of Appeals had yet to decide whether Section 4(f)(2) should be so narrowly interpreted.

Assume that the arbitrator examined the language and legislative history of Section 4(f)(2) and concluded that the EEOC and the several circuit courts had interpreted the provision too narrowly. As she read

171. 29 U.S.C. § 623(f)(2) (1988).

172. 29 C.F.R. § 1625.10 (1988).

173. Betts v. Hamilton County Bd. of Mental Retardation, 848 F.2d 692 (6th Cir. 1988), *rev'd sub nom.* Public Employees Retirement Sys. v. Betts, 492 U.S. 158 (1989); EEOC v. City of Mt. Lebanon, 842 F.2d 1480 (3d Cir. 1988); Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir.), *cert. denied sub nom.* Cook County College Teachers Union Local 1600 v. City Colleges of Chicago, 486 U.S. 1044 (1988); Cipriano v. Board of Educ., 785 F.2d 51 (2d Cir. 1986); EEOC v. Westinghouse Elec. Corp., 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984); EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984).

the statute, it protected employers from liability as long as the benefit plan was not used to mask age discrimination in aspects of employment not involving fringe benefits. Such an interpretation is not only reasonable, it was the interpretation adopted by the Supreme Court later that year.[174]

Had the case come before a federal district judge in Missouri, the absence of Eighth Circuit precedent on point would have left the judge free to express her disagreement with the other circuits and the EEOC and adopt a broad interpretation of Section 4(f)(2). Her boldness in doing so would have been vindicated later that year by the Supreme Court. But, because the arbitrator lacked the legitimacy of a publicly accountable judge and was outside the unitary judicial system, she would have been constrained by judicial caution to follow the consensus interpretation adopted by the other circuit courts and the EEOC, even though the arbitrator believed, correctly as it turned out, that a bolder approach would have better developed the law.

The differing personal constraints on judges and arbitrators reflects a problematic feature of the proposal contained in this Article. If judges, constrained by the principle of integrity, may appropriately balance both of Dworkin's dimensions in shaping the law, arbitrators constrained by a theory of judicial caution may, in a particular case, give inappropriate weight to the first dimension at the expense of the second.

The approach followed in this Article raises additional problems. Hart criticized other jurisprudential theories, such as Legal Realism, for being preoccupied with the penumbra.[175] Many of Hart's critics contend that his theory is preoccupied with the core. These critics argue that, more often than not, an adjudicator attempting to analyze a statute's key provisions finds herself led into the penumbral zone.[176] To tell employment arbitrators that they should resolve penumbral issues by placing a predominant value upon judicial caution is vague advice that, at most, only helps move them a little closer toward convergence than they might otherwise get. The inadequacies of the personal constraints in safeguarding public justice values reinforces the importance of the institutional constraint on arbitral adjudication.

Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Bobker,[177] a case reviewing a complex securities consumer arbitration, illustrates the inade-

174. Public Employee Retirement Sys. v. Betts, 492 U.S. 158 (1989).

175. Hart, *supra* note 120, at 614-15.

176. *See, e.g.*, Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 664-65 (1958).

177. 808 F.2d 930 (2d Cir.), *rev'g* 636 F. Supp. 444 (S.D.N.Y. 1986).

quacies of the manifest disregard of the law standard of judicial review. Philips Petroleum Company had issued a pro-rated tender offer for its stock. Bobker instructed Merrill, Lynch to tender all 4,000 shares of Philips in his Merrill, Lynch account. Merrill, Lynch complied. Bobker subsequently instructed Merrill, Lynch to sell short 2,000 shares of Philips stock. Merrill, Lynch refused to do so.

Bobker instituted arbitration proceedings to recover the profits he would have made had Merrill, Lynch executed the sell short order. Merrill, Lynch defended on the ground that the instruction violated Rule 10b-4 of the Securities Exchange Commission.[178] The arbitration panel awarded Bobker $12,500.

Upon Merrill, Lynch's petition, the trial court vacated the award. The court, aided by a requested amicus brief of the SEC, reasoned that Rule 10b-4 prohibited hedged tendering of the type in which Bobker attempted to engage. Rule 10b-4 provided that a person tendering shares in a pro-rated tender offer must be net long in all shares tendered both at the time of tender and as of the offer's cutoff date. A person is "net long" if the number of shares tendered is offset by the number of shares sold. Had Merrill, Lynch executed the sell short order, Bobker would have been net long for only 2,000 of the 4,000 shares tendered and would have been in violation of Rule 10b-4.

The district court reviewed the arbitration transcript and found that the arbitrators were aware of Rule 10b-4 but ignored it. The court vacated the award because of the arbitrators' manifest disregard for the law, observing, "Permitting this award to stand would have the unacceptable result of penalizing Merrill, Lynch for acting in accordance with the law."[179]

The Second Circuit reversed. The court criticized Rule 10b-4's net long requirements, suggesting that the rule was not a valid interpretation of section 10(b) of the Securities and Exchange Act.[180] The court did not decide, however, whether Rule 10b-4 was a valid rule. It merely observed that because of doubts concerning the validity of the rule and because those doubts were raised in the arbitration, the award did not display a manifest disregard for the law.[181]

178. 17 C.F.R. § 240.10b-4 (1990).

179. 636 F. Supp. at 447-48.

180. 808 F.2d at 935-36.

181. *Id.* at 936-37. We note that if the arbitrators based their awards on their view that Rule 10b-4 was invalid, they did not act in accordance with our view that judicial caution should constrain arbitrators interpreting statutes. An arbitral judicial caution approach would defer to the regulation of the politically accountable administrative agency, rather than take the bold step of finding it to be an invalid interpretation of the statute.

Had the arbitrators applied Rule 10b-4 and denied the claim, their award clearly would not have displayed a manifest disregard for the law. The application of the manifest disregard standard thus leaves securities arbitrators free of institutional constraints to enforce Rule 10b-4 or not as they see fit. As a result, investors have no way of knowing whether hedged tendering is lawful. Brokers are in an untenable position. If they refuse hedged tender orders, they risk liability for doing so. If they accept them, they risk liability for violating Rule 10b-4.

The court's criticisms of Rule 10b-4 display a disagreement with the SEC over interpretation of section 10(b). Had the court held the rule invalid, the clash of public justice values between a court and the agency charged with administering the statute might have led to Supreme Court or congressional resolution of the issue. Instead, the court short-circuited the very process that gives public law its legitimacy by leaving the validity of Rule 10b-4 outside of the unitary public justice system.

To ensure that public law continues to develop in accordance with public justice values as articulated by publicly accountable judges constrained by the principle of integrity, arbitral legal conclusions must be subject to de novo judicial or administrative review. Only the judge has the legitimacy conferred by the legislature to authoritatively continue the chain novel based on a balancing of Dworkin's dimensions. Of course, judges are not infallible. Judicial mistakes are, however, more likely to be corrected legislatively because of their sweeping precedential value than are arbitral mistakes which have no stare decisis value. Indeed, the history of employment discrimination laws is replete with legislative correction of judicial mistakes. When the Supreme Court held that discrimination on the basis of pregnancy was not per se discrimination on the basis of sex,[182] Congress responded with the Pregnancy Discrimination Act of 1978.[183] When the Court held that mandatory retirement did not violate the Age Discrimination in Employment Act,[184] Congress responded with the 1978 Amendments to the ADEA.[185] When the Court held that the ADEA does not require that age differentials in fringe benefits be cost-justified,[186] Congress responded with the Older Workers Benefits Protection Act.[187] When the Court held that employers do not have

182. General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

183. Pub. L. No. 95-555, 92 Stat 2076 (codified as amended at 42 U.S.C. § 2000e(k) (1988)).

184. United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977).

185. Pub. L. No. 91-596, 84 Stat. 1614 (codified at 29 U.S.C. § 623(f)(2) (1988)).

186. *Betts*, 492 U.S. at 158.

187. Pub. L. No. 101-438, 104 Stat. 978 (1990) (codified as amended in scattered sections of 29 U.S.C. §§ 621-634).

the burden of proving a business necessity to justify practices that have a disparate impact on protected classes,[188] that section 1981 does not cover post-hiring racial discrimination,[189] and that allegations that a change in a seniority system must be attacked at the time the change is made, rather than when the change results in layoffs,[190] Congress responded with the Civil Rights Act of 1991.[191]

Concerns of legitimacy and inadequate personal constraints on arbitral decision-making mandate the strong institutional constraint of de novo judicial review. Nevertheless, courts have justified their refusal to scrutinize arbitral interpretations of statutes on the ground that to do so would undermine arbitration's finality and, with it, arbitration's efficiency advantages. The efficiency advantages will remain, however, relatively unimpaired under our proposal. De novo review is necessary only for arbitral conclusions of law. Arbitral factual findings remain properly constrained by the parties' expectations and the minimal standards embodied in the FAA and UAA. Together these statutes constrain the arbitrator to conduct the hearing fairly and impartially, and find the facts with reason and integrity. There is no reason to subject employment arbitration's factual findings to judicial review beyond these minimalist standards of fairness. There is no reason to treat them any differently than grievance arbitration's factual findings.

Accordingly, we advocate a dual standard of review of employment arbitration awards: broad deference to arbitral factual findings and de novo review of arbitral legal conclusions. Most of the delay and expense of litigation may be attributed to the judicial system's formalistic procedures for factual inquiry. Were the facts undisputed, a lawsuit could be resolved quickly and cheaply through cross motions for summary judgment. Thus, making arbitration of the facts effectively final and binding preserves most of the efficiency gains that arbitration may offer. Furthermore, because most statutory employment claims are predominantly fact-based, the availability of de novo review of arbitral interpretations of law will have minimal impact on the overall finality of employment arbitration. The availability of de novo legal review, however, will provide the legitimacy that would otherwise be lacking in the privatization of public workplace justice.

188. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

189. Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

190. Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989).

191. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

VI. Conclusion

The success of arbitration as a mechanism for resolving disputes under collective bargaining agreements has prompted an increasing number of employers to use it as a means for resolving disputes arising under employment statutes in the nonunionized workplace. Grievance arbitration in the unionized workplace is part of the continuing process of collective bargaining. Thus, labor arbitration functions as an integral part of the process of workplace self-government. The arbitrator is privately accountable to the parties who appoint her to interpret and apply the parties' private law.

Employment arbitration in the nonunionized workplace does not serve the same function. Rather, its justification is as a faster, less expensive method than litigation for resolving statutory claims. Because the privately appointed and privately accountable arbitrator is called upon to interpret and apply public law, many are concerned that arbitration's efficiency gains come at a cost of diminished protection for public justice values expressed in statutes. The constraints on adjudicators inherent in different theories about the nature of law provide a way out of this undesirable trade-off.

Legal Realism appropriately characterizes the personal and institutional constraints on labor arbitrators. As the parties' designated interpreter of their system of private law, a labor arbitrator is granted legitimate authority to apply personal standards of justice to the collective bargaining agreement. Arbitrators who apply their personal standards of justice give the parties exactly what they bargained for as long as the arbitrators stay within the range of options arguably available under the contract. Consequently, judicial review of labor arbitration awards is confined generally to ensuring that the arbitrator stayed within this broad range of options.

The current judicial approach to employment arbitration also reflects a Legal Realist model. This approach is inappropriate. Private employment arbitrators lack legitimate authority to apply personal standards of justice when interpreting the public law of employment statutes. Nor do they have the legitimacy to exercise the broad range of discretion that Ronald Dworkin envisions for the judicial role. The appointment of a private arbitrator is not publicly screened. Private arbitrators do not act within a unitary legal system that is characterized by review up to a judicially supreme tribunal, and subject to ultimate revision by the legislature.

Consequently, the personal constraints on employment arbitrators must be stronger than those on labor arbitrators. Employment arbitra-

tors should be subject to a personal constraint of judicial caution, characterized by H.L.A. Hart's version of Legal Positivism. They should rely primarily on the core of settled meaning found in statutory language and judicial decisions. When forced to operate outside the core, they should avoid a bold or novel interpretation, even though they believe that such an interpretation is the best one available.

The strong personal constraints appropriate for employment arbitrators, by virtue of their lack of public accountability, do not adequately safeguard public justice values. Accordingly, an even stronger institutional constraint is needed: de novo judicial review of arbitral interpretations of law. De novo review of legal interpretations will not undermine the efficiency gains of arbitration if arbitral findings of fact are subject only to the minimal institutional constraints of procedural fairness recognized in current law. Most expense and delay in litigation results from the formality of the fact-finding process and most employment claims are fact-based. Thus, broad deference to arbitral findings of fact will protect most of the efficiency gained through arbitration and will ensure finality of most arbitration awards. Moreover, de novo review of arbitral interpretations of law will protect the public justice values expressed in employment statutes.