Analysis of the Public Policy Exception after *Paperworkers v. Misco*: A Proposal to Limit the Public Policy Exception and to Allow the Parties to Submit the Public Policy Question to the Arbitrator

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Parties to a collective bargaining agreement often agree to submit disputes regarding the collective bargaining agreement to an arbitrator experienced in resolving labor disputes. Courts are not to interfere with an arbitrator’s determination of a labor contract dispute unless the arbitration award violates one of several criteria. One criterion that allows courts to vacate an arbitration award is where the award violates public policy. Courts have interpreted this standard in two ways: (1) the broad view of the public policy exception allows courts to vacate awards benefitting employees who have engaged in misconduct because that misconduct violated public policy; (2) the narrow view of the public policy exception allows courts to vacate awards benefitting employees when the award orders an action that violates public policy. In this article, Deanna Mouser argues that the narrow view is the better of these two alternatives because it protects the parties’ agreement to have the arbitrator resolve the dispute, while denying to the party who lost the arbitration an opportunity to have a court redecide the question under the guise of determining whether the award violates public policy. She concludes that only where the award orders an action that is contrary to public policy should a court vacate the award on public policy grounds.


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INTRODUCTION

The Supreme Court began deferring to the fact finding and contract interpretation of labor arbitrators almost thirty years ago, reasoning that the arbitrator's greater experience in and knowledge of labor relations warranted only a limited court review of arbitration awards. Although some commentators have disagreed with the Supreme Court's crediting
arbitrators with such industrial knowledge, the standard remains that courts must defer to an arbitrator's fact finding and contract interpretation. One exception to this policy of deference is where the arbitration award violates a well-defined and dominant public policy. Increasingly, courts have used this exception to review and to vacate arbitration awards, contrary to the Supreme Court's emphasis on deference to arbitrators.

Courts have been divided in applying the public policy exception to arbitration awards. Some courts hold that an arbitration award violates public policy if the employee's wrongful underlying act violated a law. Other courts hold that an arbitration award violates public policy if the conduct the award requires—usually reinstatement of the employee—violates a law. For example, in examining a discharge for embezzlement, a court in the first instance inquires whether there is a public policy against embezzling the employer's money, while in the second instance the court considers whether there is a public policy against the reinstatement of a convicted embezzler.

Since most public policy exception cases involve employee discharges, the courts often speak only in terms of whether reinstatement violates public policy. This article also speaks in terms of reinstatement. Even so, the public policy doctrine precludes enforcement of any arbitration award found to violate law or legal precedent. Unions also use the public policy exception to argue that arbitration awards unfavorable to employees should be vacated. However, the case law largely consists of employers challenging arbitration awards that reinstate employees because employers are able to afford to litigate unfavorable arbitration awards more often than unions.

This article argues that the scope of the public policy exception should be limited so that courts do not unduly interfere with arbitrators' decisions of contract disputes. This result is consistent with the Supreme Court's emphasis on deference. Arbitration awards should be overturned only if the award orders conduct that violates a well-defined and dominant law or legal precedent. The employee's violation of a law which creates the arbitrable dispute should not suffice to establish that an arbitration award reinstating that employee violates a well-defined and dominant public policy. The arbitrator's role is to determine whether the employer-imposed punishment for the employee's contractual violation is excessive, taking into consideration the illegality of the employee's act and other relevant criteria such as employment history and the employer's past practices. A court usurps the arbitrator's role when the court redetermines the employee's punishment under the guise that the

1. See infra notes 5-17 and accompanying text.
2. See infra notes 182-89 and accompanying text.
award violates a well-defined and dominant public policy. According to
the Supreme Court, an arbitration award is only unenforceable "where
the contract as interpreted would violate 'some explicit public policy,'" not
where the employee's initial act violates public policy.

This author concludes that the exception should evolve in a new
direction by allowing arbitrators initially to consider the public policy
arguments while determining the contract issues, if the parties agree to
submit the public policy aspect to the arbitrator. The parties can state
that the arbitrator is to determine all contractual questions consistent
with whatever public policies the parties argue. They can also incorpo-
rate law and legal precedent into the contract by stating that certain viola-
tions will result in specified punishment, thereby authorizing the
arbitrator only to determine whether the employee violated the law and
not to vary the punishment. Currently, arbitrators often consider public
policy and legal considerations in rendering awards. If the employer and
union believe that arbitration is a better method of resolving labor dis-
putes, then they should submit the public policy question to the arbitra-

If both parties are satisfied, the entire dispute is resolved. If not, the
dissatisfied party should be allowed a de novo court determination of the
public policy question, since the courts’ legitimate role is to enforce the
laws and legal precedents that form the public policy. During such a de
novo review of the public policy question, however, the court must avoid
refinding facts and reinterpreting the contract, since those duties belong
to the arbitrator.

I

THE GENERAL RULE OF DEFERENCE

Generally, a court must defer to the arbitrator's interpretation and
application of a collective bargaining agreement. A court must enforce
an arbitrator's award if the award is based on the parties' collective bar-
gaining agreement. If, however, the arbitrator's award is based solely on
considerations external to the collective bargaining agreement or on the
arbitrator's own view of justice, then the court must overturn the award.4

The Supreme Court's rationale for deferring to arbitrators is based
both on a conception of arbitration functioning as a substitute for strikes
and lockouts and on the specialized knowledge of arbitrators. The


[A]n arbitrator is confined to interpretation and application of the collective bargaining
agreement; he does not sit to dispense his own brand of industrial justice. He may of
course look for guidance from many sources, yet his award is legitimate only so long as it
draws its essence from the collective bargaining agreement. When the arbitrator's words
manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of
the award.

Id.
Supreme Court noted in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, that labor arbitration is a substitute for industrial strife, unlike commercial arbitration which is a substitute for litigation. Arbitration of labor disputes arising under collective bargaining agreements is considered to be part of the collective bargaining process because arbitration is used to resolve problems that were unforeseen at the time the collective bargaining agreement was written. The Court relied on arbitrators' specialized knowledge of the common law of the shop as a basis for deference:

The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

The Supreme Court, therefore, based its decision that courts defer to arbitrators on both the belief that arbitrators have specialized knowledge and the view that labor arbitration is a substitute for industrial strife.

Professor David E. Feller emphasizes the rationale that arbitrators know they are a substitute for industrial strife and realize their role is not judicial. Feller points out that the expertise that forms the basis for deference to arbitrators "is not so much expertise as it is knowledge of the fact that the parties have not called upon him to act as a court. . . ." Courts defer because arbitration is not a substitute for judicial adjudication, but a method to resolve disputes which, except for the collective bargaining agreement and grievance procedures, would not be governed by other adjudicative principles.

One reason courts defer to arbitrators is the arbitrators' specialized knowledge. However, while some labor arbitration commentators believe "that arbitrators on the whole are capable of dealing with statutes and other external law bearing upon problems which the parties have brought to the arbitrator," other commentators disagree with the prop-

6. *Id.* at 578.
7. *Id.* at 580-81.
8. *Id.* at 582.
10. *Id.* at 100.
11. F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 376 (4th ed. 1985) (emphasis in original). Other commentators agree that labor arbitrators are capable of applying clearly defined rules of law:

The recent experience of labor arbitrators in the federal sector, who are required to police compliance with laws, rules, and regulations, suggests that the interpretation and application of law may not lie outside the competence of arbitrators. So long as we restrict arbitrators to the application of clearly defined rules of law, and strictly confine the articulation
osition that arbitrators are competent and knowledgeable in labor relations. Professor Paul Hays concludes that labor arbitrators lack the knowledge of industrial relations credited to them by the Supreme Court. Moreover, Hays believes that arbitrators often use compromise awards so that they remain acceptable to both parties, thereby assuring their continued employment. Hays also believes that the most positive statements regarding arbitrators’ ability are by arbitrators themselves or organizations whose purpose is to advance the cause of arbitration.

Professor Feller acknowledges that the experience level of arbitrators varies: “[A]rbitrators come in all shapes and sizes and vary enormously in the degree of expertise and sophistication they bring to the process.” Arbitrators have not been successful in predicting the direction in which labor law will develop: “Even more troublesome are the serious practical difficulties in determining what the law is. Thus, as Feller indicates, arbitrators, with respect to open legal questions, have sometimes shown a genius for false predictions . . . .” Where the parties submit the legal question to the arbitrator or incorporate the legal standard into the contract, the arbitrator has to determine the applica-

of public law to our courts, ADR [Alternative Dispute Resolution] can be an effective means of reducing mushrooming caseloads.

Edwards, Alternative Dispute Resolution: Panacea or Anathema, 99 HARV. L. REV. 668, 680 (1986) (footnote omitted). Another commentator agreed arbitrators are capable of considering public concerns:

The decisions suggest intelligent, rational handling of difficult problems. Some of the opinions are masterpieces. In the main, they reflect the men who wrote them, who have over the last fifteen years created an intelligible industrial jurisprudence from the raw matrix of labor relations and whose continued activity depends upon convincing both labor and management of the integrity and wisdom of their judgments. The impression created is a group whose judgment can be trusted to adequately weigh matters of public concern within the labor arbitration framework.


12. After quoting the passage from United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960), which credits arbitrators with using their judgment regarding productivity, morale, and industrial tensions, Hays states that no authority supports the Court’s statement. P. HAYS, LABOR ARBITRATION: A DISSENTING VIEW 37-38 (1966). The biographical data of labor arbitrators do not demonstrate labor expertise. Id. at 58. Furthermore, both employers and unions prefer arbitrators who use only the contract instead of the common law of the shop, since the latter is equivalent to the arbitrator’s personal view of what is good for the parties. Id. at 41. Arbitrators are expected to interpret the contract, not give advice, especially since most have little background information on the company. Id. at 111. Note that the Supreme Court also stated that “[t]he arbitrator’s authority is limited to interpretation and application of the terms contained in the agreement itself.” MISCO, 484 U.S. at 32.


14. Id. at 110.

15. Id. at 79-111.


tion of the law. As arbitrators often determine this legal question differently than courts do, courts must have the authority to review the arbitrator's legal determinations to ensure that the legal conclusions are not wrong.

A second reason a court generally will not overturn an arbitrator's interpretation of the collective bargaining agreement is that the parties voluntarily submitted the dispute to a particular arbitrator and agreed to be bound by that arbitrator's decision. Arbitration is thus considered to be part of industrial self-governance, because the parties to the labor contract determine the steps in the grievance procedure and the standards the arbitrator will apply to contract disputes. The parties to the contract determine the scope of the arbitrator's authority either by statements in the contract or by restricting the statement of the issue in the submission agreement.

The federal legislative policy of encouraging arbitration to resolve labor disputes would be undermined if federal courts were free to re-determine the facts of disputes and the merits of awards. Arbitrators are part of the collective bargaining relationship and are viewed as an expedited method to reduce industrial strife, thereby protecting continuity of production and services. If a court could re-determine the merits, the party who lost the arbitration award would view the arbitrator's determination as having little decisive effect and the party who won the arbitration would not be able to rely on the arbitrator's decision. When a court defers to an arbitrator, however, parties realize the arbitrator's interpretation of the collective bargaining agreement is binding, unless they can show the award fits within the narrow public policy exception or violates other grounds on which a court can vacate the award.

18. The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-68 (1960) (citation omitted).

19. "Section 203 (d) of the Labor Management Relations Act . . . , 29 U.S.C. § 173 (d), states, 'Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . .' American Mfg. Co., 363 U.S. at 566.


21. Other bases on which courts can vacate arbitration awards include: (1) an arbitrator's fraud, misconduct or bias; (2) a party's fraud or misconduct; and (3) an arbitrator's overreaching the authority given him in the collective bargaining agreement. F. ELKOURI & E. ELKOURI, supra note 11, at 41. The federal statute governing arbitration lists the following grounds for a court to vacate an arbitration award:

(a) Where the award was procured by corruption, fraud, or undue means.
II

PUBLIC POLICY EXCEPTION

An exception to the general rule of judicial deference to arbitrators exists in situations where the arbitration award violates a “well-defined and dominant” public policy. Traditionally, the public policy exception has been narrowly construed, so that an allegation that an arbitration award violates a community sense of justice or fairness is insufficient to vacate the award. The Supreme Court established the strict standard over thirty years ago, and it recently reiterated that standard in United Paperworkers International Union v. Misco, Inc.:

[A] court’s refusal to enforce an arbitrator's interpretation of such contracts is limited to situations where the contract as interpreted would violate “some explicit public policy” that is “well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'”

Although the Supreme Court has emphasized that the standard is narrow, courts have not agreed on the breadth of the public policy exception. The next section will discuss interpretations by courts of the public policy exception prior to the Supreme Court’s decision in Misco.

A. Decisions Before Misco

The Supreme Court defined the public policy exception to commercial contract enforcement in Muschany v. United States, where the federal government unsuccessfully argued that an option contract for land violated public policy because the vendor’s payment of a fee was contingent on securing a government contract. After stating that “[p]ublic policy is to be ascertained by reference to the laws and legal precedents,” the Court explained how to prove that public policy had been violated: “In the absence of a plain indication of that policy through long governmental practice or statutory enactments, or of violations of

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.
(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10 (1982). Most labor agreements are excluded from this act’s provisions, since employment contracts of workers engaged in interstate commerce are excluded. 9 U.S.C. § 1 (1982). See also CAL. CIV. PROC. CODE § 1286.2 (West 1982).

25. 324 U.S. 49 (1945).
26. Id. at 64.
27. Id. at 66.
obvious ethical or moral standards, this Court should not assume to declare contracts . . . contrary to public policy." Subsequent courts have used only the prior standard of "laws and legal precedents" and have not referred to the standard of "obvious ethical or moral standards." Courts intent on vacating arbitration awards might use this ethical standard to expand the exception even further, although the Supreme Court has not applied that standard to labor arbitration disputes. The statement in 

Misco that public policy cannot be based on "general considerations of supposed public interests" indicates the Supreme Court's unwillingness to base public policy on ethical or moral standards.

In 

W.R. Grace & Co. v. Local 759, International Union of the United Rubber Workers, the Supreme Court applied the public policy exception to a labor arbitration award. The Court held that the award did not violate public policy by granting back pay to employees laid off in contravention of the contractual seniority provisions, even though those provisions conflicted with a conciliation agreement the employer had signed with the Equal Employment Opportunity Commission (EEOC). The Court ordered that the award be enforced.

The underlying dispute began when the employer signed a voluntary conciliation agreement with the EEOC after the EEOC determined that it had reasonable cause to believe the employer had violated Title VII by discriminating against women and Blacks. This conciliation agreement conflicted with the collective bargaining agreement's seniority provision. The employer's compliance with the conciliation agreement resulted in two male employees being laid off who had seniority greater than the women strike replacements. These two employees filed grievances which the union submitted to arbitration. The employer sued to enjoin the arbitration, and the United States District Court granted an injunction, holding that the conciliation agreement should prevail over the collective bargaining agreement. The Fifth Circuit Court of Appeals reversed and compelled arbitration. After finding that the collective bargaining agreement did not contain any clauses which would provide a defense to the seniority violations, the arbitrator determined that the employer had violated the collective bargaining agreement and

28. Id. at 66-67 (emphasis added, citations omitted).
29. See, e.g., Misco, 484 U.S. at 43.
30. See supra note 24 and accompanying text.
32. Id. at 768-72.
33. Id. at 771-72.
34. Id. at 759.
35. Id. at 760-61.
36. Id. at 761.
37. Id.
38. Id. at 762.
ordered backpay.39

The employer refused to follow the arbitration award and petitioned the district court to overturn the award. The district court overturned the backpay award because public policy required obedience to the prior district court order. The district court held that this public policy prevented enforcement of the collective bargaining agreement and therefore prevented enforcement of the backpay award. The appellate court again reversed the district court, reinstating the backpay award for the period between the two times the district court heard the dispute.40

The Supreme Court unanimously affirmed the appellate court decision in *W.R. Grace*. Although the Supreme Court agreed that important public policies were involved, the Court decided that the arbitration award did not violate these public policies. The Court recognized that "[i]t is beyond question that obedience to judicial orders is an important public policy."41 However, the Supreme Court reasoned that the arbitrator's award did not require the employer to violate the district court's order that the conciliation agreement should prevail, since the arbitrator did not mandate layoffs or require that layoffs be conducted according to the collective bargaining agreement. The arbitrator only required the employer to pay damages for the violation of the collective bargaining agreement.42 Although the Supreme Court recognized that "[v]oluntary compliance with Title VII also is an important public policy,"43 the arbitration award did not violate the public policy behind Title VII. The employer could continue to correct past discrimination under the conciliation agreement, but it would have to pay damages to those employees whose contract rights were violated.44 Therefore, the Supreme Court required not only a well-defined public policy, but also that the arbitration award itself violate that public policy.

As the arbitration award only required the employer to pay damages, the employer could still follow the conciliation agreement and the employees could still receive the monetary benefit of the collective bargaining agreement. Neither the EEOC nor the employer can alter a collective bargaining agreement without either a judicial determination or the union's consent, since unilateral alterations would violate the public policy behind honoring collective bargaining agreements.45 The Court reasoned that if the employer could unilaterally alter the labor contract to correct historical discrimination, then the employer could ignore em-

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39. *Id.* at 763-64.
40. *Id.* at 764.
41. *Id.* at 766.
42. *Id.* at 768-69.
43. *Id.* at 770.
44. *Id.* at 771.
45. *Id.*
ployee rights without fear of reprisal. Also, requiring the employer to pay damages for breaching the labor contract gives the employer an incentive to include the union in negotiations leading to the conciliation agreement.66

Although the Supreme Court unanimously found no public policy violation in *W.R. Grace*, the circuit courts of appeals have not been united about the scope of the public policy exception. While courts agree that any arbitration award that violates public policy is unenforceable, the courts cannot agree on the standard for determining whether an award violates public policy. Four circuits deciding the breadth of the exception before *Misco* was decided have held that an employee cannot be reinstated where the employee's wrongful act constituted a blatant violation of a clearly defined public policy.47 In contrast, three circuits have held that the act of reinstating the discharged employee must violate a specific public policy.48 Two circuits have not had to decide which ap-
proach to follow since the arbitration award in cases presented to them directly violated a law. The award should be enforced because "no California statute has been called to our attention which would make it illegal to employ bus drivers who have previously shown bad judgment." Id. at 644. A more recent Ninth Circuit case involved undocumented aliens. An arbitrator's decision granting reinstatement to undocumented aliens did not violate public policy because the aliens had not been subject to Immigration and Naturalization Service proceedings, so reinstatement would not require them to reenter the country illegally. Bevies Co. v. Teamsters Local Union 499, 831 F.2d 25 (9th Cir. 1987), cert. denied, 486 U.S. 985 (1987). The remedies available to illegal immigrants under collective bargaining agreements are limited only to the extent the remedies invite further immigration violations. Id. at 1394. Reinstating the immigrants would not violate the law: "For whatever reason, Congress has not adopted provisions in the INA [Immigration & Naturalization Act] making it unlawful for an employer to hire an alien who is present and working in the United States without appropriate authorization. . . . Moreover, Congress has not made it a separate criminal offense for an alien to accept employment after entering this country illegally.'" Id. at 1393 (quoting Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892-93 (1984)).

The Third Circuit held that it could not vacate a reinstatement award since no law compelled the harsher sanction of discharge. Kane Gas Light & Heating Co. v. International Bhd. of Firemen & Oilers, Local 112, 687 F.2d 673, 682 (3d Cir. 1982), cert. denied, 460 U.S. 1011 (1983). Vacation would be proper only if the award conformed a violation of law. Id. The Third Circuit cited with approval Teamsters Local 249 v. Consolidated Freightways, 464 F. Supp. 346 (W.D. Pa. 1979) which vacated an award that would have forced the employees to drive trucks in violation of the Pennsylvania Motor Vehicle Code.

49. The Sixth Circuit has not explicitly endorsed one of the views of the public policy exception, because the one case it decided involved an award that directly violated a federal law. See Professional Adm'nrs Ltd. v. Kopper-Glo Fuel, 819 F.2d 639, 643-44 (6th Cir. 1987). The court there held that an arbitration award that allowed trustees of pension funds to change contribution rates unilaterally violated the public policy embodied in the NLRA that benefits be collectively bargained. Id.

The Second Circuit also has not decided expressly whether the arbitration award must order an act violating a law because the award at issue violated the National Labor Relations Act. Perman Line Corp. v. Sign, Pictorial & Display Union Local 230, 639 F.2d 890, 895-96 (2d Cir. 1981). The court remanded for additional factual determinations, but noted that if facts justified the presumptively illegal contract clause were not found, the arbitration award could not be confirmed since a contract clause prohibiting a union steward from being terminated without union consent would violate sections 8(a)(3) and 8(b)(2) of the National Labor Relations Act. Id.

An early Second Circuit decision indicates that this court may follow the limitist approach. See Local 453, Int'l Union of Elec. Workers v. Otis Elevator Co., 314 F.2d 25 (2d Cir.), cert. denied, 373 U.S. 949 (1963). In Otis Elevator, the court did find that an employee's gambling at work was against public policy, but the court concluded that the public policy was vindicated because the state imposed criminal punishment and the arbitrator upheld a seven-month layoff without pay. Id. at 29. The court upheld the arbitration award reinstating the employee. However, one factor on which the court relied was the arbitrator's determination that no evidence indicated reinstatement would result in repetition of the illegal conduct. Id. This consideration of the risk of future violations indicates that the court may apply the broad view of the public policy exception, since the limitist view only considers whether the award orders an illegal act.

After Misco was decided, the Second Circuit affirmed a district court decision without publishing its own decision in Maggio v. Local 1199, 880 F.2d 1319 (2d Cir.), aff'd without op., 702 F. Supp. 989 (E.D.N.Y.), cert. denied, 110 S. Ct. 329 (1989) where the district court held that reinstatement of a nursing home employee suspected of abusing patients did not violate public policy. Id. at 996. The court never clearly stated whether the standard it was applying was the broad or narrow approach. The court instead required that "a sufficient link be shown between enforcement of the award and violation of the public policy." Id.

My research has not uncovered any public policy exception cases decided by the Fourth and Tenth Circuits prior to the Supreme Court's Misco decision.
itself must violate a law. Under the broader view, reinstatement is pre-
cluded if the employee's wrongful act violates a law.

Comparing two cases clarifies the different interpretations of the public policy exception. Both the First Circuit and the D.C. Circuit have decided similar cases involving postal workers who embezzled funds. In the First Circuit case, *United States Postal Service v. American Postal Workers Union*, the arbitrator reinstated the employee, and the employer sued to overturn the award on public policy grounds. The postal employees' union argued the court could overturn the award only if a specific public policy existed against the reinstatement of embezzlers. The First Circuit decided the reinstatement itself need not violate a law to violate public policy. Reinstating an embezzler would violate public policy by increasing the incentive for other employees to be dishonest, since the employees would believe the union could remedy future violations. The First Circuit vacated the employee's reinstatement. By contrast, in *American Postal Workers Union v. United States Postal Service* the D.C. Circuit allowed reinstatement on similar facts, since the reinstatement itself did not violate a law. No law prohibited reinstatement of an embezzler and the award did not otherwise mandate any illegal conduct. While the law demonstrated a public policy against embezzling, it did not prohibit the reemployment of convicted embezzlers.

Because of the split between the courts of appeals on the standard for overturning an arbitration award as violating public policy, the Supreme Court agreed to hear *United Paperworkers International Union v. Misco, Inc.*

### B. The Misco Decision

Despite granting certiorari to resolve the circuits' division, the Supreme Court did not decide the key issue: whether a court can vacate an arbitration award on public policy grounds only when the award orders an act that violates a law or legal precedent. However, the Supreme Court's reiteration of the deferral doctrine clarified that lower courts should not expand the public policy exception beyond where the award violates well-defined and dominant laws.

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50. 736 F.2d 822 (1st Cir. 1984).
51. *Id.* at 825.
52. 789 F.2d 1 (D.C. Cir. 1986).
53. *Id.* at 8.
54. 484 U.S. at 35 n.7 (1987).
55. The Supreme Court decided on grounds other than public policy:

We need not address the Union’s position that a court may refuse to enforce an award on public policy grounds only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law.

*Id.* at 45 n.12.
In *Misco*, a machine operator was discharged when he was found in the employer's parking lot sitting in the back seat of another employee's car while a lit marijuana cigarette was in the front seat ashtray. Two other employees had just left the car. Traces of marijuana were later found in the employee's car, but the arbitrator refused to consider this evidence, since the employer did not know of it when the employee was discharged. The arbitrator ordered reinstatement of the employee. The district court held that the reinstatement violated a public policy against driving dangerous machinery while under the influence of drugs. The Fifth Circuit affirmed.

The Supreme Court reversed the lower courts and reinstated the arbitrator's award, because the lower courts had not attempted to establish a public policy based on law or legal precedent. The lower court's common sense determination of what conduct violates public policy was not sufficient to overturn an award. Moreover, the district court had exceeded its authority in rejecting the arbitrator's findings of fact. A court cannot re-find the facts even when inquiring into the facts necessary to establish the public policy violation.

The Supreme Court summarized the significance of *W.R. Grace*:

Two points follow from our decision in *W.R. Grace*. First, a court may refuse to enforce a collective-bargaining agreement when the specific terms contained in that agreement violate public policy. Second, . . . our decision . . . does not otherwise sanction a broad judicial power to set aside arbitration awards as against public policy.

In *Misco*, the Supreme Court added little to *W.R. Grace* other than holding that courts cannot re-determine the facts necessary to find a public policy violation. Although the Supreme Court failed to directly resolve

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56. The Court of Appeals made no attempt to review existing laws and legal precedents in order to demonstrate that they establish a "well-defined and dominant" policy against the operation of dangerous machinery while under the influence of drugs. Although certainly such a judgment is firmly rooted in common sense, we explicitly held in *W.R. Grace* that a formulation of public policy based only on "general considerations of supposed public interests" is not the sort that permits a court to set aside an arbitration award that was entered in accordance with a valid collective-bargaining agreement. *Id.* at 44.

57. It was inappropriate for the Court of Appeals itself to draw the necessary inference. To conclude from the fact that marijuana had been found in Cooper's car that Cooper had ever been or would be under the influence of marijuana while he was on the job and operating dangerous machinery is an exercise in fact-finding about Cooper's use of drugs and his amenability to discipline, a task that exceeds the authority of a court asked to overturn an arbitration award. The parties did not bargain for the facts to be found by a court, but by an arbitrator chosen by them who had more opportunity to observe Cooper and to be familiar with the plant and its problems. *Id.* at 44-45.

58. "Nor does the fact that it is inquiring into a possible violation of public policy excuse a court for doing the arbitrator's task. If additional facts were to be found, the arbitrator should find them. . . ." *Id.* at 45.

59. *Id.* at 43.
the circuits' controversy over the public policy exception, the Supreme Court may have clarified the standard when it stated:

[O]ur decision [in W.R. Grace] turned on our examination of whether the award created any explicit conflict with other "laws and legal precedents" rather than an assessment of "general considerations of supposed public interests." At the very least, an alleged public policy must be properly framed under the approach set out in W.R. Grace, and the violation of such a policy must be clearly shown if an award is not to be enforced.60 Later courts have emphasized the "explicit conflict" in stating that a law must be directly violated, not just the rationale behind the adoption of the law.61

C. Decisions After Misco

Courts after Misco have handled public policy cases in many ways. Some courts have decided cases on alternative grounds to avoid the public policy determination.62 Some courts have stressed that public safety should be the major determinant of a public policy violation.63 Other courts have continued to follow the narrow interpretation that the award must violate a law, but some of these have expanded this "narrow" interpretation by interpreting public policy broadly.64 Still other courts have held that the employer failed to prove the well-defined public policy, or if the employer did establish the public policy, that the employer failed to prove the public policy was violated.65 Finally, some courts have balanced two conflicting public policies to determine whether the award should be enforced.66

1. Alternative Grounds

Courts may decide cases on alternative grounds to avoid the public policy issue. The Supreme Court vacated the appellate court's overruling of the arbitration award and remanded S.D. Warren Co. v. United Paperworkers International Union67 to the First Circuit for reconsideration in light of Misco. The First Circuit again reversed the arbitration award on the grounds that the arbitrator exceeded her authority under the collective bargaining agreement by substituting suspension for discharge. Since the agreement explicitly delineated discharge as the appropriate punishment, the arbitrator could not change the punishment awarded by the employer.

61. See infra notes 84-144 and accompanying text.
62. See infra notes 67-69 and accompanying text.
63. See infra notes 70-79 and accompanying text.
64. See infra notes 93-144 and accompanying text.
65. See infra notes 145-51 and accompanying text.
66. See infra notes 152-59 and accompanying text.
without rendering meaningless the negotiations that lead to the agreement. The First Circuit did not redetermine the public policy issue.\textsuperscript{68}

One Eleventh Circuit case affirmed a trial court's decision on alternative grounds explicitly because the law on the public policy exception was so unsettled. The trial court vacated an arbitration award which reinstated an employee, and the circuit court said:

\begin{quote}
We see considerable merit in the district court's rationale that there is a public interest in not having postal employees who steal from the mail that brings a public policy to bear on this case. Nevertheless, since the state of the law on the issue seems somewhat unsettled, we affirm the district court on a different, but more established ground.\textsuperscript{69}
\end{quote}

Courts should not have to avoid using a legal rule simply because the rule lacks clarity. Other courts have at least attempted to define the boundaries of the rule, as developed in the following sections.

2. \textit{Public Safety}

A federal district court in New York emphasized that risk to public safety is the primary factor for determining that awards violate public policy. In \textit{Flushing Hospital & Medical Center v. Local 1199, Drug, Hospital & Health Care Employees Union},\textsuperscript{70} the employer hospital dismissed a nursing attendant for her unauthorized changing of an intravenous (IV) bag. A patient needed an IV bag changed and the attendant searched unsuccessfully for a registered nurse (RN) for fifteen minutes. The attendant finally changed the bag herself. The collective bargaining agreement had a just cause clause. The arbitrator determined the dismissal was not for just cause and reinstated the attendant. The employer's dismissal was without just cause since the attendant was never explicitly told not to change the bag, she changed IV bags at least once a month in emergencies, and she had tried to find an RN.\textsuperscript{71}

The federal court in \textit{Flushing Hospital} pointed out that \textit{Misco} requires an "explicit conflict" with laws and legal precedents.\textsuperscript{72} A New York statute prohibited the unlicensed practice of professional nursing and required that the hospital must ensure compliance.\textsuperscript{73} But the court then noted that other cases holding that reinstatement violated public

\begin{footnotesize}
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\item \textsuperscript{68} 845 F.2d 3 (1st Cir.), \textit{cert. denied}, 488 U.S. 992 (1988).
\item \textsuperscript{69} United States Postal Serv. v. National Ass'n of Letter Carriers, 847 F.2d 775, 777-78 (11th Cir. 1988) (citations omitted) (affirmed district court's vacating arbitral award reinstating employee on the ground that the award was not based on collective bargaining agreement's language, but was based on the arbitrator's own notion of industrial justice). Again, this public sector employment dispute was included to clarify the court's frustration with trying to determine what conduct violates the public policy exception.
\item \textsuperscript{70} 685 F. Supp. 55 (S.D.N.Y. 1988).
\item \textsuperscript{71} \textit{Id.} at 56.
\item \textsuperscript{72} \textit{Misco}, 484 U.S. at 43.
\item \textsuperscript{73} N.Y. EDUC. LAW §§ 6509, 6512 & 6903 (McKinney 1985). Section 6509(7) defines as professional misconduct permitting an unlicensed person to perform activities which require a li-
\end{itemize}
\end{footnotesize}
policy involved employees who showed a propensity for continuing wrongful and dangerous conduct. The court specifically cited *Iowa Electric Light & Power Co. v. Local 204, International Brotherhood of Electrical Workers*, where an employee knowingly violated a nuclear power plant safety rule. The court determined that the attendant in *Flushing Hospital* was not likely to repeat the wrongful and dangerous conduct, since the attendant only acted out of concern for the patient, and since the hospital now knew to instruct the attendants to not change IV bags. The court concluded by emphasizing again that the potential danger to the public was not like that present in *Iowa Electric*.

In *Iowa Electric*, the Eighth Circuit also drew a distinction based on the risk to public safety. The Eighth Circuit noted that arbitration awards reinstating employees after a deliberate act that threatened public safety usually were vacated as a violation of public policy, whereas arbitration awards reinstating employees whose acts did not threaten public safety usually were upheld by the courts.

Without publishing an opinion, the Second Circuit affirmed a similar decision from another federal district court in New York. The court reached a similar result by emphasizing the requirement of a link between enforcement of the arbitration award and the violation of public policy. In *Maggio v. Local 1199*, the employee’s initial wrongful act was not sufficient to show a violation of public policy. In *Maggio*, the employee, who was stronger than other employees and who was hurrying to finish his duties, ended up mishandling patients. The arbitrator found the mishandling was not intentional and reinstated the employee, since the employer lacked just cause to dismiss the employee. While noting that reinstatement of a “patient abuser” would violate the public policy that seeks to prevent physical abuse of residents of health care facilities, the employee here was not a patient abuser, since the mishandling was unintentional. Therefore, reinstating the employee was not sufficiently linked to the physical abuse. This holding states, in effect, that an employee is always entitled to reinstatement, unless the employer can prove the employee would violate the statute against physical abuse in the future. While not mentioning public safety, the rationale is similar to
Flushing Hospital, since the court is considering the risk of future violations. If that risk is low, the court will allow reinstatement.

The standard of avoiding a threat to public safety is inadequate since no uniform standard defines what actions qualify as a risk to public safety. Many might think there is a public risk when an attendant, rather than an RN, changes an IV bag, but the court deciding that case failed to find one with those facts.80 Court determinations would be inconsistent, since they would be based on individual judge's views of what conduct constitutes a threat to public safety. Similar inconsistencies would occur among arbitration awards. If an employer thinks an employee's violation of a public safety rule is enough to terminate the employee, the employer can negotiate to specify that in the collective bargaining agreement.81 Without explicit contractual guidelines of what safety violations are sufficient to terminate an employee, awards would vary with each arbitrator's individual value judgment about safety. Also, courts or arbitrators could overemphasize the importance of safety relative to other concerns that the employer or union may value more, such as equal treatment of similarly situated employees.82 If the community feels that employees who

80. Flushing Hosp. & Medical Center, 685 F. Supp. at 57. See infra notes 81-83 and accompanying text.
81. While recognizing that the union and employer may disagree on which violations will suffice to terminate the employee automatically, current contracts provide that certain violations result in termination without allowing the employee the right to progressive discipline. See infra notes 211 and 218 and accompanying text.
82. The Eleventh Circuit overruled the arbitration award reinstating a pilot because of fears of decreased safety in commercial flying from pilots under the influence of alcohol. Delta Air Lines v. Air Line Pilots Ass'n, 861 F.2d 665 (11th Cir. 1988), cert. denied, 110 S. Ct. 201 (1989). The arbitration board reinstated the employee because the employer lacked just cause and focused on equal treatment of similarly situated employees—a fundamental fairness or equal protection concept. Delta had allowed other alcoholic employees to join a rehabilitation program instead of being discharged when other crew members intercepted these employees before flying. The arbitration board decided that this employee, whom others had not intercepted before flying, was entitled to be allowed to enter a rehabilitation program. The board ordered that the pilot be reinstated and that Delta pay for the pilot's alcoholic rehabilitation program. Id. at 668.

The district court opinion clarified that the Delta Operations Manual stated that crew members who allow fellow crew members to fly while under the influence of alcohol were "equally guilty." This policy meant that the first and second officers should have also been discharged for allowing the pilot to fly, but the officers were only suspended. Delta Air Lines v. Airline Pilots Ass'n, 686 F. Supp. 1573, 1576 (N.D. Ga. 1987), aff'd, 861 F.2d 665. The arbitration board reasoned that the pilot was not at fault for his fellow employees' failure to intercept him as company policy required. The failure to intercept the pilot was the other crew members' fault. As Delta had not effectively implemented and communicated its interception program, the arbitration board concluded that the company must share in the responsibility for the non-interception. Id.

At the arbitration hearing, Delta argued that airlines are required to provide "the highest possible degree of safety in the public interest" based on 49 U.S.C. § 1421(b) (1982). In re Delta Air Lines, 89 Lab. Arb. (BNA) 408, 412 (1987) (Kahn, Arb.). The company claimed that the pilot's operation of the plane jeopardized the safety of the passengers and the crew. Id. at 412-13. All three cockpit crew members testified that the pilot flew the entire trip from Bangor, Maine to Boston, Massachusetts without incident. Id. at 410. The arbitration award, written by the neutral fifth arbitrator on the arbitration board, noted that whether the pilot or first officer actually did compe-
violate a public safety rule should not be reinstated, then the community can lobby for a law against such reinstatements. Otherwise, the courts should not second-guess what awards public policy prohibits.

The fact that reinstatement might create a future risk of illegal conduct that might threaten safety does not establish a public policy against reinstatement of the violator, since no law prohibits re-employment. The next section also considers the risk of future violations, with some courts finding a public policy violation when an award reinstates an employee who is apt to commit illegal acts again.

Id. at 417 n.9. The pilot's blood alcohol level when tested (over four hours after the flight began) was 0.13 grams percent alcohol, "well above the usual d.u.i. standard of 0.10." Id. at 417. The Delta manual stated that "[a]ny evidence of the use of alcohol . . . which is apparent at the time of reporting for flight duty . . . constitutes reason for discharge." Id. Delta's actual practice, however, was to consider all of the circumstances if other employees intercepted the pilot before he reached the aircraft. Id. at 417-18. "It is a reasonable inference that if grievant had been intercepted, given his nineteen years of satisfactory pilot service, he would not have been discharged." Id. at 418. The arbitrator inferred that the reason the other crew members failed to intercept the pilot was because they were not aware of the company policy:

Nothing in the record indicates that the Company has advised its pilot group that a pilot who reports for work under the influence of alcohol but who is intercepted before he gets to the plane will probably not be discharged, but that if this pilot enter [sic] the plane his discharge will be automatic. The FOPM [Flight Operations Procedures Manual] says only that reporting for flight duty under the influence is cause for discharge.

Id. at 419 (emphasis in original).

The arbitrator also noted that the threat to safety is as significant from the intercepted pilot as the non-intercepted pilot, so reinstatement of this pilot is not more risky than the other pilots' reinstatements:

The Company asserts, however, that the intercepted pilot will probably not be discharged and can return to the flight deck if and after he is successfully rehabilitated and satisfies FAA requirements. The Company does not deem such a pilot a threat to safety. If that is so, then a non-intercepted pilot who is similarly rehabilitated and meets all FAA requirements can also safely return to the flight deck.

Id.

The drunk pilots who had in the past reported to their planes, were intercepted after reporting to their aircraft and were terminated. All were reinstated. So, Delta's "past practice" of terminating drunk pilots was unsupported. Id. The grievant in this case was the first pilot who actually flew a plane while under the influence of alcohol. Id.

83. While recognizing that lobbying is not always successful, passage of laws restricting re-employment is possible since some laws currently prohibit re-employment of employees. For example, an interstate truck driver who reports to work under the influence of drugs or alcohol cannot be re-employed for a specified period. 49 C.F.R. § 391.15 (1988). An arbitration award ordering reinstatement of such a driver would be vacated as violating public policy.

Moreover, legislation is not the only means to prevent re-employment, since the parties to the collective bargaining agreement can specify that certain safety violations are grounds for termination without first using progressive discipline. An award also violates public policy if the award orders conduct that violates case law, since Misco allows courts to vacate an award if the award violates "law or legal precedent." Therefore, if the award orders an act contrary to case law precedent, courts can vacate the award. One potential danger to vacating awards based on legal precedent is that courts could create case law stating that re-employment of an employee who violates a certain law is illegal and, therefore, violates public policy and must be vacated. Courts would then be able to decide that any award is contrary to public policy. One limit on this is that the case law must be well defined and dominant, so a court could not create new case law to bar the reinstatement of an employee.
3. *Award Itself Violates a Law*

Other courts, including the Ninth Circuit, continued to follow the narrow interpretation of the public policy exception by holding that a reinstatement itself must violate a law. In *Stead Motors v. Automotive Machinists Lodge 1173*, an auto mechanic failed to tighten lug nuts attaching the wheels to a car so that a wheel almost came off while the owner was driving the car on the highway. The mechanic was warned to follow the foreman's instructions on tightening the nuts, but the employee did not, and a second driver complained of loose lug nuts. The collective bargaining agreement included a just cause provision and stated that no notice of discharge to the employee is necessary if the cause for discharge was recklessness, as it was in this case. The arbitrator determined the employee's acts were reckless, but thought discharge was too severe and ordered reinstatement. The district court in *Stead* held that the reinstatement violated public policy, a Ninth Circuit panel initially affirmed, but the Ninth Circuit en banc reversed the prior panel ruling.

The Ninth Circuit panel found that California has a "well-defined and dominant" public policy regarding automobile safety and maintenance, because a state statute made the operation of an unsafe vehicle unlawful. For a repair-dealer to operate, a state bureau must register that repair-dealer, and the bureau can invalidate the registration if an employee has been guilty of gross negligence. Because of these registration requirements, the Ninth Circuit panel concluded that "Stead Motors [the employer] could not have kept Rocks [the employee] and stayed in business." The court also emphasized that the employee's reinstatement created the very risk at which the California safety statute is directed, so that the award itself violated an explicit public policy.

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84. Cf., Brigham & Women's Hosp. v. Massachusetts Nurses Ass'n, 684 F. Supp. 1120, 1125 (D. Mass. 1988), where the court affirmed a nurse's reinstatement because the employer had not proved her reinstatement violated public policy requiring nurses be competent; the facts did not prove the nurse was incompetent, only that she occasionally failed to follow procedures.
85. 886 F.2d 1200 (9th Cir. 1989) (en banc), rev'g, 843 F.2d 357 (9th Cir. 1988).
86. Id. at 1202.
87. 843 F.2d at 358. Based on this contractual provision for immediate termination, the employer may have been more successful in overturning the award by arguing that the arbitrator exceeded his authority in varying the punishment once the arbitrator found the employee's act was reckless. See infra notes 211 and 218 and accompanying text.
88. 886 F.2d at 1203.
89. CAL. VEH. CODE § 24002 (West 1985) ("It is unlawful to operate any vehicle . . . which is in an unsafe condition. . . .").
90. CAL. BUS. & PROF. CODE § 9884.7(1)(e) (West 1975).
91. *Stead Motors*, 843 F.2d at 359.
92. "Reinstatement of the reckless mechanic creates the grave risk the legislature has emphatically disapproved. It is directly and substantially contrary to the express public policy of the state." *Id.*
panel did not redetermine any facts in vacating the arbitration award, since the arbitrator himself found that the employee's acts were reckless.

Although the Ninth Circuit panel stated that it followed the narrow interpretation of the public policy exception (that the award itself must violate public policy), its expansive interpretation of what laws can support finding a public policy in effect means that any obscure and narrow law automatically creates a "well-defined and dominant" public policy. The Supreme Court's standard of a "well-defined and dominant" public policy, based on law or legal precedent, intended that the law or precedent also be well-defined and dominant, or those terms lose all meaning.

The Ninth Circuit en banc redetermined the public policy question in Stead Motors and determined that the panel's interpretation of the public policy exception was too broad. An arbitration award can be vacated on public policy grounds only if the public policy bars the relief the arbitrator ordered, which is usually reinstatement. A public policy against the employee's underlying behavior is insufficient for a court to vacate an arbitration award that orders the employee be reinstated. The court reemphasized that a court must accord appropriate deference to the arbitrator's resolution of the dispute. A court must give substantial deference to an arbitrator's determination of whether an employee should be reinstated, because the parties have agreed to have an arbitrator, not a court, determine whether just cause to terminate the employee exists. The parties chose the arbitrator to fill in the contract's

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93. 886 F.2d at 1217.
94. If a court relies on public policy to vacate an arbitral award reinstating an employee, it must be a policy that bars reinstatement. Courts cannot determine merely that there is a "public policy" against a particular sort of behavior in society generally and, irrespective of the findings of the arbitrator, conclude that reinstatement of an individual who engaged in that sort of conduct in the past would violate that policy. In our view, a faithful reading of Misco requires something more. A court must both delineate an overriding public policy rooted in something more than "general considerations of supposed public interests," and, of equal significance, it must demonstrate that the policy is one that specifically militates against the relief ordered by the arbitrator.

Id. at 1212-13 (emphasis in original).

95. We reject the approach of the Eleventh Circuit that, simply because an employee has committed some act which violates a law or a public policy in the course of his employment, his reinstatement would also necessarily violate that public policy.

Id. at 1217.
96. Id. at 1205-09.
97. A court's deference to an arbitration award is "nearly unparalleled": When reviewing the award of an arbitrator chosen by the parties to a collective bargaining agreement, we are bound—under all except the most limited circumstances—to defer to the decision of another, even if we believe that the decision finds the facts and states the law erroneously. Possibly because the nature of our review in these cases is so unusual, there may be a tendency for judges, often with the most unobjectionable intentions, to exceed the permissible scope of review and to reform awards in our own image of the equities or the law. Consequently, cases like this one, which acquire the plenary attention of our court, provide an opportunity to repeat and reemphasize the unique character of an arbitrator's function and the nearly unparalleled degree of deference we afford his decisions.
gaps. Since the arbitrator is acting as the parties' surrogate, he cannot "misinterpret" the contract unless he exceeds his authority or engages in fraudulent conduct.\footnote{Id. at 1205.} Arbitrators are familiar with industrial practices and can use such knowledge, in addition to the contract, to resolve industrial disputes. Since courts lack such familiarity with industrial practices, they are not competent to second guess an arbitrator's resolution of the dispute.\footnote{Id. at 1207.} A court cannot refine or supplement the facts that the arbitrator determined and cannot vacate an arbitration award for ambiguity alone, although ambiguity might support the inference that the arbitrator exceeded his authority.\footnote{Id. at 1207-08.}

A court can vacate an arbitration award only in limited circumstances, such as when the award orders an act that violates public policy.\footnote{Id. at 1209.} Using such a standard, few arbitration awards will be vacated, since an arbitrator has broad discretion to determine the appropriate discipline which a court cannot second guess:

Ordinarily, a court would be hard-pressed to find a public policy barring reinstatement in a case in which an arbitrator has, expressly or by implication, determined that the employee is subject to rehabilitation and therefore not likely to commit an act which violates public policy in the future. As Misco recognized, an arbitral judgment of an employee's "amenability to discipline" is a factual determination which cannot be questioned or rejected by a reviewing court. Judgments about how a specific employee will perform after reinstatement if given a lesser sanction are nothing more than an exercise of the arbitrator's broad authority to determine appropriate punishments and remedies.\footnote{Id. at 1213 (citations omitted).}

The arbitrator determines appropriate discipline and the likelihood of rehabilitation, that is, whether the employee will engage in future wrongdoing.\footnote{Id. at 1217.} The Ninth Circuit does not require an express finding that the employee can be rehabilitated or that the employee will not violate the public policy in the future.\footnote{A court must defer to an arbitrator's resolution of the dispute even if the arbitrator's rationale is unstated or ambiguous: [W]e do not require an express "finding" that a grievant can be rehabilitated or, to borrow from the Misco court, is otherwise "amenable[e] to discipline." We apply the same deferential review to an award's statements concerning rehabilitation that we apply to other aspects of the award. Even if we were to view the reference to rehabilitation in the award as nothing more than an abstract observation, we would be required to reach the same result. A court cannot infer, from the mere fact that an award orders reinstatement but is silent on the subject of a grievant's rehabilitation or "amenability," that the arbitrator did not consider the question; nor can it make an independent judgment in such a case. Simply put, we look to the text of the arbitral award for an expression of an arbitrator's reasons for his}
The majority opinion in *Stead Motors* relies on the arbitrator's unique role as the parties' "surrogate." The dissent stresses that the federal court's enforcement of the reinstatement is a disaster since the arbitrator, not the parties, chose this result: "No wonder the district court refused to sanction this travesty. It would be one thing for the parties themselves to get together privately and agree on such an unpalatable result, but it is another altogether for a federal court to put its imprimatur on such a disaster." According to Professor St. Antoine, however, the parties did agree to the reinstatement, because they agreed to have the arbitrator determine the question. Therefore, the arbitrator's actions are, in effect, the actions of the parties, since the arbitrator speaks for the parties.

The dissent also stresses the risk to public safety if reckless employees are reinstated. The safety risk is a valid concern, but the arbitrator considers such risks when determining whether an employee is amenable to discipline. Laws currently block reinstatement of employees for some public safety violations. As long as the government favors arbitration as the most efficacious method of resolving labor disputes and as long as the parties are willing to submit public safety questions to an arbitrator, the arbitrator is acting as the parties' surrogate. The arbitrator's resolution of the public safety question is binding on the parties, unless the arbitration award orders an illegal act or exceeds the arbitrator's authority. Moreover, for egregious violations of public safety rules, the employer can bargain for a contract which holds that such violations are grounds for automatic termination and that the arbitrator cannot substitute his view of the appropriate punishment for the employer's decision to terminate. The arbitrator is then restricted to determining whether the employee did the wrongful act. If the arbitrator finds that the employee did violate the safety rule, the arbitrator cannot change the employer's decision to terminate.

The Ninth Circuit en banc declined to follow the broad interpretation of what suffices as public policy but stated that cases applying the broader interpretation may not be inconsistent with *Misco* if viewed in a different light. For example, safety concerns embodied in pervasive decision, but we do not infer the non-existence of a particular reason merely from the award's silence on a given issue. Indeed, the Supreme Court has determined that a court cannot set aside an arbitrator's award which, far from merely being silent, was affirmatively ambiguous, and arguably supported a claim that the arbitrator had exceeded his authority.

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105. Id. at 1219 (Trott, J., dissenting).
107. 886 F.2d at 1219 (Trott, J., dissenting).
108. See infra note 243 and accompanying text.
109. 886 F.2d at 1214.
regulations governing an industry may indicate a public policy against reinstating any employee who violated a safety regulation.\textsuperscript{110}

An alternative explanation the Ninth Circuit offers for the expansionist result focuses on explicit agency action.\textsuperscript{111} Where a government agency charged with overseeing an industry expressly finds that an employee in that industry should be discharged, such a finding operates as the well-defined and dominant public policy against reinstatement. The Nuclear Regulatory Commission explicitly reprimanded the employer in \textit{Iowa Electric} for the employee's breach of the safety rule and approved the termination of the employee.\textsuperscript{112} In \textit{Northwest Airlines v. Air Line Pilots Association},\textsuperscript{113} the Federal Aviation Administration (FAA) had recertified the pilot after he had completed an alcohol rehabilitation program. However, in \textit{Delta Air Lines v. Air Line Pilots Association}, the FAA had suspended the pilot's license and medical certification indicating the view of the federal regulators that he was neither fit nor qualified to fly.\textsuperscript{114}

While the Ninth Circuit expressly noted that it was not deciding whether an agency determination will suffice to establish a public policy,\textsuperscript{115} such a theory would expand the public policy exception. Recognition of such an agency action theory might mean that if the California Bureau of Automotive Repair revoked Stead Motor's operating license for gross negligence, this revocation would operate as a public policy against reinstating the employee who was grossly negligent. Since the employer cannot operate its business without this license, the agency's revocation of the license effectively precludes reinstatement of the employee. The Ninth Circuit, however, noted that the Bureau had not tried to have the employee decertified as a mechanic.\textsuperscript{116} The Ninth Circuit also determined that this car repair safety regulation only stated a general consideration of supposed public interest but did not demonstrate a well-defined and dominant public policy.\textsuperscript{117} The agency's application of the same statute to a fact situation should not suddenly change that statute to a well-defined and dominant law so that the arbitration award can be vacated. An agency decision or regulation prohibiting employment of

\footnotesize{\textsuperscript{110} Id. This analysis could be used to justify the result in the cases involving nuclear power plant employees. (Iowa Elec. Light & Power v. Local 204, Int'l Bhd. of Elec. Workers, 834 F.2d 1424 (8th Cir. 1987); Daniel Constr. Co. v. Local 257, Int'l Bhd. of Elec. Workers, 856 F.2d 1174 (8th Cir. 1988), cert. denied, 109 S. Ct. 1140 (1989)).

\textsuperscript{111} 886 F.2d at 1214-15.

\textsuperscript{112} 834 F.2d 1424, 1428 (8th Cir. 1987).

\textsuperscript{113} 808 F.2d 76, 78-79 (D.C. Cir. 1987), cert. denied, 486 U.S. 1014 (1988).

\textsuperscript{114} 861 F.2d 665, 668 n.3 (11th Cir. 1988), cert. denied, 110 S. Ct. 201 (1989). The Ninth Circuit acknowledges that the Eleventh Circuit did not rely on the FAA's determination. 886 F.2d at 1215.

\textsuperscript{115} Stead Motors, 886 F.2d at 1215 n.15.

\textsuperscript{116} Id. at 1216.

\textsuperscript{117} Id.
an individual, if based on a well-defined and dominant law, however, should suffice to block reemployment of the individual under the limitist theory.

The Eighth Circuit clarified its approach to the public policy exception by following the Ninth Circuit's narrow standard which requires that the award itself order an act that violates public policy to vacate the award. In *Daniel Construction Co. v. Local 257, International Brotherhood of Electrical Workers,*\(^\text{118}\) the court enforced an award of backpay for discharged nuclear plant workers, while noting that reinstating them would have violated public policy and thus would have been unenforceable. The workers building a nuclear power plant were subjected to a psychological test to determine whether each employee should be allowed at the site once the nuclear fuel arrived.\(^\text{119}\) The employer discharged those employees who failed the test.\(^\text{120}\) The court stated that "no question exists but that public policy requires that unstable employees be denied access to sensitive areas of a nuclear power plant[,]" but the court held the arbitrator's award did not violate public policy, because he only ordered backpay, not the employees' return to work, which would have violated the public policy against unstable employees having access to a nuclear power plant.\(^\text{121}\)

In *Delta Air Lines v. Air Line Pilots Association,*\(^\text{122}\) the Eleventh Circuit tries to frame its decision using the language of the limitist approach, but the rule it applies is actually the broad public policy exception. The court states that enforcement of an award reinstating a pilot who flew a plane while under the influence of alcohol would violate the public policy against operation of passenger planes by pilots under the influence of alcohol.\(^\text{123}\) The court distinguished other cases that did not involve employee wrongdoing during job performance.\(^\text{124}\) In those cases, the employers' decisions to continue employment did not violate public policy even though the employees' wrongful acts were contrary to public policy.\(^\text{125}\)

\(^{118}\) 856 F.2d 1174, 1182 (8th Cir. 1988), cert. denied, 109 S. Ct. 1140 (1989).

\(^{119}\) Id. at 1175.

\(^{120}\) Id.

\(^{121}\) Id.


\(^{123}\) The court cited to statutes in nearly every state that prohibit flying while intoxicated. Id. at 672. The statutes only prohibit the underlying conduct, not the reinstatement of an employee after conviction; therefore, the court is following the expansionist approach of whether the employee's act violates public policy, not whether reinstatement violates public policy.

\(^{124}\) The court distinguished *Misco* and *Florida Power* since the wrongdoing was not while the employee was actually performing his job. In *Misco,* the employee was in the employer's parking lot sitting in a car. 484 U.S. at 941. In *Florida Power,* the employee was discovered to have drug paraphernalia in his car. 861 F.2d at 671.

\(^{125}\) 861 F.2d at 671.
The Eleventh Circuit believed *Misco* focused on wrongful conduct integral to the employee's employment duties:

The public policy of which the Supreme Court speaks in *Misco* seems to be a public policy not addressing the disfavored conduct, in the abstract, but disfavored conduct which is *integral to the performance of employment duties*. The question we are instructed, by *Misco*, to ask is not, "Is there a public policy against the employee's conduct?", but, rather, "Does an established public policy condemn the performance of employment activities in the manner engaged in by the employee?" 126

The Eleventh Circuit noted that the employee in *Misco* was in the employer's parking lot when the alleged marijuana smoking occurred and that marijuana smoking is illegal on or off the job. 127 In *Delta Air Lines*, by comparison, the pilot's intoxication became illegal only when the pilot engaged in his employment duty of flying. 128 The pilot's performance of his job duties while under the influence of alcohol was wrongful and contrary to public policy. 129 The airline could not allow the employee's wrongful act to continue without the airline becoming an accessory to the wrongful act. 130 The court appears to have applied the expansionist standard of finding reinstatement illegitimate if the employee's underlying conduct violated public policy, instead of the narrower requirement that the reinstatement itself must violate a public policy.

The court, in effect, held that if the employee's conduct was integral to his employment duties and violates public policy, then the employee's reinstatement violates public policy. That is, the court essentially declared the two standards to be identical where the employee's wrongful act was integral to his employment duties.

Where the person performs his employment duties and, *in doing so*, violates standards, restraints and restrictions on conduct, clearly and explicitly established by the people in their laws, a requirement that the employer suffer that malperformance and not discharge the offender does

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126. *Id.* (emphasis in original). Other courts also have considered whether the violation was integral to the job. As an illustrative public sector case, the First Circuit in United States Postal Serv. v. American Postal Workers Union, 736 F.2d 822 (1st Cir. 1984), focused on whether the employee's wrongful act was a violation of a duty integral to the job. Since the offense of embezzling went to the very essence of the employee's responsibilities (because the employee was entrusted with large sums of money), the court held the employee could not be reinstated to any Post Office position which require handling stamps, money, or mail because all those jobs require trust. *Id.* at 825. The court distinguished this case from *Otis Elevator*, where the criminal act of gambling on the job was tangential to the employee's duties. *Id.* In *Otis Elevator*, the employee was reinstated because serving his criminal sentence was adequate vindication for gambling, but the First Circuit implicitly did not think the criminal sanction for embezzling to be adequate vindication for a criminal violation of a duty integral to the job because the court refused to reinstate the postal worker. *Id.*

127. 861 F.2d at 670.

128. *Id.* at 672.

129. *Id.* at 673-74.

130. *Id.* at 674.
itself violate the same well established public policy.\footnote{131. \textit{Id.} (emphasis in original).} One difficulty with this theory is that a violation of a duty integral to the job does not necessarily prove an employee is inherently less trustworthy than does a violation which is tangential; for example, an employee's embezzling should not be condoned through subsequent reinstatement just because his normal duties do not include the handling of money.

The Eleventh Circuit then analyzed the discharge applying an analysis similar to that of the panel in \textit{Stead Motors}, indicating that the expansionist approach was being applied:

While the employers in \textit{Misco} and \textit{Florida Power} may have wished to use the leverage of employment to vindicate public condemnation of marijuana smoking and drug dealing, neither was under a duty to do so. Delta, on the other hand, was under a duty to prevent the wrongdoing of which its Pilot-in-Command was guilty, and it could not agree to arbitrate that issue.

The collective bargaining agreement between Delta and the ALPA [Air Line Pilots Association], as interpreted by the System Board, insofar as it would submit to arbitration the question of whether Delta should authorize operation of aircraft by pilots under the influence of alcohol, violates public policy and cannot be enforced.\footnote{132. \textit{Id.} (emphasis in original). (\textit{Florida Power} is discussed \textit{infra} notes 145-46 and accompanying text.) See \textit{supra} note 82 for an explanation of the arbitration award. The decision did not hold that Delta could authorize aircraft operation by pilots under the influence of alcohol.} An employer's duty to prevent the employee violation renders the reinstatement award in conflict with that duty and, therefore, against public policy. The court concluded that this determination did not preclude reinstatement of a rehabilitated employee; the arbitrator could only determine whether the airline had just cause to terminate a drunk pilot, not whether a rehabilitated pilot should be reinstated.\footnote{133. \textit{Id.}}

The court in \textit{Delta Air Lines}, however, had to examine new facts regarding the safety risks and must have rejected the arbitration board's findings of facts, despite the statement in \textit{Misco} that a court exceeds its authority in rejecting the arbitrator's view of the evidence,\footnote{134. Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. To resolve disputes about the application of a collective bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them.} since the arbitration board's decision in \textit{Delta} was based on evidence of fairness and uniformity in the employer's procedure, not safety.\footnote{135. \textit{See supra} note 82 and accompanying text for the arbitrator's explanation of the reasons reinstatement did not violate safety rules since Delta had previously reinstated other alcoholic pilots.} The arbitrators...
tion board never found that the conduct threatened safety.

The Tenth Circuit might have adopted the limitist approach after Misco was decided. The court relied on the arbitrator’s discussion of equal treatment concerns and refused to vacate an award in Communication Workers v. Southeastern Electric Cooperative. The arbitrator in that case noted that an employee in a prior dispute had been warned that committing a second sexual offense while working would result in termination, and that employee was terminated after that second offense occurred. Based on the prior dispute, the arbitrator determined that the employee involved in the present dispute also was entitled to a warning or other corrective discipline for his first sexual offense, since he had a long career of satisfactory performance. The Tenth Circuit emphasized that a court must defer to an arbitrator, since the parties bargained for the arbitrator’s determination. While recognizing a public policy against sexual offenses, the court noted that the arbitrator’s determination of just cause incorporated the seriousness of the employee’s illegal act. The arbitrator noted that the employee was apologetic and penitent, which indicates that the arbitrator determined the employee is amenable to discipline. The fact that the Tenth Circuit distinguished Delta Air Lines on the ground that the employee’s act was not integral to his job performance, however, indicates that the Tenth Circuit might follow the expansionist approach where the employee violates an integral job duty.

After Misco was decided, state courts have also vacated awards ordering an action that violates public policy by applying the more restrictive standard of review. A Michigan appellate court applied the limitist approach when holding that neither the award nor the reinstatement of a professor after he was dismissed for smoking marijuana violates the public policy against the use of illegal narcotics. The court reasoned that the professor’s return to teaching was not contrary to the public interest, since, if it was, such violators would never again be worthy of pursuing their profession.

136. 882 F.2d 467 (10th Cir. 1989).
137. Id. at 468.
138. Id.
139. Id. at 468-69.
140. Id. at 469.
141. Id. at 469-70.
142. Id. at 469.
144. Id. See also City of Lincoln Park v. Lincoln Park Police Officers Ass’n, 176 Mich. App. 1, 438 N.W.2d 875, 878 (1989) (award reinstating a police officer who had engaged in a consensual sexual act while on duty did not violate public policy, because no law prohibited reinstatement of
Courts should only vacate awards ordering conduct that violates a law or legal precedent. The Eleventh Circuit’s *Delta* decision is more like the broad approach, which only requires that the employee’s underlying conduct violate a law. Thus, the conclusion that reinstatement violates public policy depends on a prediction that the employee will again violate such a law in the future. However, these laws only indicate a public policy against the underlying conduct, not a prohibition against re-employment of individuals who at one time violated such a law.

4. Failure to Prove Existence of Public Policy or Violation

Other courts avoid determining the extent of their authority because the employer fails to prove the existence of the public policy or the violation. In an Eleventh Circuit case, *Florida Power Corp. v. International Brotherhood of Electrical Workers Local 433*, an off-duty employee was arrested for drunk driving and possession of cocaine. The arbitrator reinstated the employee, and the Eleventh Circuit concluded without any discussion that *Misco* made it clear the award did not violate public policy.

In another case, *Bechtel Construction Co. v. Laborers District Council*, the court refused to refind the facts necessary to find a public policy violation. The court upheld the reinstatement of employees who tested positive for drug metabolites because the employment contract only authorized discharge for using, possessing, selling, buying, or being under the influence of drugs. The arbitrator had found that none of these violations were established by the drug test. The employer argued that the award violated the public policy against drug use, and the court accepted the proposition that drugs should not be used in the workplace. However, the court refused to refind the facts necessary to establish the employees had used drugs in the workplace. Since fact-finding is the arbitrator’s role, the court’s refusal to refind the facts was proper.

*such a person and the award did not mandate any illegal act*. An Illinois appellate court found a public policy violated when the arbitrator enforced a collective bargaining agreement clause that violated a state statute. *City of De Kalb v. International Ass’n of Firefighters Local 1236, 182 Ill. App. 3d 367, 372-73, 538 N.E.2d 867, 870-71, appeal denied, 127 Ill. 2d 614, 545 N.E.2d 106 (1989)* (state statute established uniform pension benefits for all state firefighters, so the court would not allow the arbitrator to enforce the collective bargaining agreement which provided a supplemental payment).

145. 847 F.2d 680 (11th Cir. 1988).
146. *Id.* at 681.
148. *Id.*
149. *Id.* at 2750.
150. *Id.* at 2751.
151. *Id.*
5. Balancing Conflicting Public Policies

Some cases present two competing public policies, for example, the public policy against drug use at work and the public policy in favor of employee privacy. In Equitable Gas Co. v. United Steelworkers of America, an employee, whose duties included inspecting pipes for gas leaks, took time off from work because of a neck injury. The arbitrator noted that the employer tried to force the employee to submit to a drug test, but the test's purpose was not to protect the employer's operations, since the employee was not even attempting to work during this time. In reinstating the employee, the arbitrator noted that a prerequisite to employee drug testing is an objective indication to the employer of "more than a remote likelihood of impaired job performance." However, the employee had no history of drug dependence or erratic on-the-job behavior. The court enforced the arbitrator's reinstatement of the employee.

Noting that a public policy against drug use at work does exist, the court held that a newly developing public policy also exists in favor of employee privacy and against employer drug testing, especially when testing an off-duty employee. This court did not have to determine the balance to be struck between the two public policies, since the arbitrator's award would not be invalidated regardless of the balance struck.

Another court prior to Misco agreed with the arbitrator's balancing of two competing public policies—the public policy against an employee gambling on his employer's premises and the public policy of rehabilitating criminals by employment.

A court will have to balance competing public policies when review-

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153. Id. at 650.
154. Id. at 651.
155. Id.
156. The court remanded to the arbitrator for further consideration of whether the employee met the contract requirements to receive benefits. Id. at 656.
157. Id. at 654.
158. Id. ("It is not necessary for us to decide today at what point these policies merge.")
159. [I]n light of the important role which employment plays in implementing the public policy of rehabilitating those convicted of crime, there can hardly be a public policy that a man who has been convicted, fined, and subjected to serious disciplinary measures, can never be ordered reinstated to his former employment, particularly when the conviction was for his first offense and when the arbitrator found no indication that reinstatement would result in repetition of the illegal activity. Indeed, the arbitrator in effect took into account the importance of rehabilitation when he concluded that the criminal conviction, the sentence imposed as a result of that conviction, and the seven-month layoff without pay or unemployment compensation were appropriate punishment under the circumstances. Local 453, Int'l Union of Elec. Workers v. Otis Elevator Co., 314 F.2d 25, 29 (2d Cir. 1963), cert. denied, 373 U.S. 949 (1963). For a public sector case using such a balancing approach, see American Federation of State, County & Mun. Employees v. State of Illinois Dep't of Mental Health, 124 Ill. 2d 246, 262-63, 529 N.E.2d 534, 541 (1988) (balancing public policies of finality in arbitration award and harmonious public employer-employee relationship against public policy of the state's commitment to compassionate care for the mentally disabled).
ing arbitration awards whenever the party seeking court review of the award claims that a public policy exists in its favor. The respondent in the court action will always have in its favor the public policies favoring enforcement and finality of arbitration awards and favoring the private resolution of disputes. As these policies always weigh in favor of enforcing the arbitration award and as violation of these policies does not amount to ordering a violation of law, the courts should focus on any public policy violated by enforcement of this particular award.

The Supreme Court never mentioned a balancing test and never stated that courts could consider the effect on public policy of vacating the award. The Court only stated that courts can refuse to enforce an award that violates a well-defined and dominant public policy. However, in practical application, the purpose of the public policy exception is to avoid ordering a party to perform an illegal act. Therefore, a court should consider whether its failure to enforce an arbitration award will in effect order the other party to perform a different illegal act. Where enforcement and non-enforcement of the award each requires an illegal act, the court will have to balance the policy implications to determine whether enforcement or non-enforcement of the award is the lesser evil. Where enforcement of the award compels one party to perform an illegal act, but nonenforcement does not compel an illegal act by the second party, the award cannot be enforced even though failure to enforce it undermines the finality of arbitration awards. Undermining the finality of awards violates a general consideration of supposed public interest, but does not rise to the level of ordering an act contrary to law or legal precedent.

III

ANALYSIS OF THE FUTURE OF THE PUBLIC POLICY EXCEPTION

Courts after *Misco* are still divided over the proper public policy standard. Many avoid the question by deciding the case on alternative grounds or by considering criteria the Supreme Court has not yet contemplated. This author concludes that the exception should be limited to awards ordering actions that violate well-defined and dominant laws or legal precedent. Expansion beyond this limit would violate arbitration's essential feature of courts deferring to arbitrators' interpretation of the contract. While this section concludes that the public policy exception should be limited, many arguments support the broader theory, especially the safety concern. However, if courts adopt the narrow approach, employers can protect public and employee safety in other ways as discussed at the end of this section.
A. Whether to Expand the Public Policy Exception

One argument in favor of a narrow public policy exception is that, if the employee breached public policy by violating a criminal law, the employer's "punishment" of the employee is in addition to the criminal punishment. The legislatures intended to establish the limits on punishment by setting maximum sentences in the statutes they passed. The employer's punishing the employee in addition to the state's punishment is inconsistent with the idea that a criminal should only have to pay once for a criminal act. The employer's additional punishment is also inconsistent with the concept of rehabilitation by re-employment of the offender. If the criminal sentence vindicates the wrong, then reinstating the worker should not be held to violate public policy. While expansion of the public policy exception would lower the number of employees reinstated and reduce the incentive to be dishonest, sufficient tools to deter wrongful conduct are available that still provide the employee a second chance to continue working. For example, the arbitrator could deny back pay and benefits, or suspend the employee, or the state could impose punishment for criminal acts.

Another difficulty with denying reinstatement for a criminal violation is determining the level of proof required to find that a public policy was violated. Where legislatures or courts have determined that certain behavior requires the criminal standard of proof of "beyond a reasonable doubt" before punishing the actor, some may argue that the same level of proof should be required to deny reinstatement to the employee, since termination is a form of punishment. On the other hand, to impose civil punishment for a criminal act, other causes of action only require a civil standard of proof of "preponderance of the evidence" or "clear and convincing evidence." Finally, where the arbitrator found by applying a

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160. Of course there is a public policy which condemns gambling by an employee on the premises of his employer; it is a policy expressed by the section of the New York Penal Law which . . . [the employee] was convicted of violating. But that policy has been vindicated in the present case in the very manner that the State of New York contemplated, by a criminal conviction and the judicial imposition of a penalty. Parenthetically, it may further have been vindicated . . . by the seven-month layoff without compensation or accrual of seniority benefits which . . . [the employee] sustained and which the arbitrator upheld. There is no federal policy that requires greater vindication of the public condemnation of gambling than this. The law is not that Draconian. To enforce the arbitrator's award in these circumstances cannot fairly be looked upon as judicial condonation of . . . [the employee's] offense. Local 453, Int'l Union of Elec. Workers, 314 F.2d at 29.

161. Many courts have used this rationale of reducing employee crime to justify an expansion of the exception. See supra note 45 and accompanying text.

162. Arbitrators have applied both the "clear and convincing evidence" standard and the "beyond a reasonable doubt" standard in discharge cases involving criminal conduct. F. Elkouri & E. Elkouri, supra, note 11 at 662-63.

An example of the differing burden of proof for determining whether a crime occurred for purposes of a civil cause of action is an heir's murdering of the decedent in estate law. The court can determine by a preponderance of the evidence whether the killing was felonious and intentional.
civil standard of proof that the employee did the criminal act but reinstates the employee because of mitigating factors, a reviewing court probably cannot redetermine that the evidence meets the higher criminal standard, since Misco prohibits a court from refunding the facts.

The parties, moreover, agreed to submit the termination decision to the arbitrator who can also consider the purpose the law hopes to serve when he is determining just cause. Thus one argument against expansion of the public policy exception is that it would eliminate the arbitrator's authority to determine just cause when the employee's conduct violated a law. If the broad view of the exception is adopted, an external law violation would automatically justify the termination, because the employee's act would always violate public policy. The arbitrator would no longer be able to consider the mitigating factors of past work history and justification for the employee's act:

These [just cause] contract provisions protecting employees from unwarranted termination from their jobs and livelihood require more than a finding that the fired worker committed the misconduct—even activity implicating such public policy issues as use or possession of drugs or alcohol, safety violations, theft, assault and fighting, falsifying records, engaging in illegal strikes, and the like. For the discharge to stand, the cause must also be just. Arbitrators . . . must consider the terms of the punishment for the offense and whether mitigation is in order. Before the final penalty is assessed, the arbitrator must evaluate factors such as the employee's work record . . . ; with what degree of intent or culpability the employee acted; whether the rules have been equally enforced against all employees; and whether the rehabilitation of the worker is a realistic possibility. In other words, before sustaining a discharge, even for actions involving a violation of explicit external law, an arbitrator is duty-bound under a just cause clause to consider all of the pertinent facts and circumstances. Courts under the guise of public policy should not usurp this critical arbitral function.

A broad exception would prevent the reinstatement of many employees. If an employee's reinstatement is contrary to public policy, the court is in effect declaring that the employee is not worthy of that work, and the employee may never be able to find employment in the same occupation.

Furthermore, expansion would undermine the finality of the arbitration award. Although most labor arbitration awards are upheld, an increasing number of cases have extended the bases for attacking the award's finality by using the public policy exception. Unless the ex-

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163. See infra notes 199-209 and accompanying text.
165. Id. at 246-47 (and cases cited therein); see supra note 47.
ception is limited to laws barring the employee's reinstatement, the potential expansion of the exception is virtually limitless. Unions could argue that no arbitration awards could be overturned, because that would undermine the public policy behind enforcing arbitration awards. Employers could use many statutes that include broad or vague statements of societal goals; a public policy could be formulated on the basis of any of these statements and then be used to circumvent the arbitrator's decision. For example, the Ninth Circuit panel in Stead Motors used the very general statute prohibiting operation of a car in an unsafe condition as supporting a public policy against careless mechanics being reinstated. Another example is the requirement in the Occupational Safety and Health Act that the employer must maintain a safe workplace: "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." If the expansionist analysis is applied, then reinstatement of any employee found under the influence of alcohol or drugs would violate OSHA, since an employee under the influence of alcohol or drugs is a recognized hazard where the employer indicates awareness of the hazard by discharging the employee for being under the influence and since such an employee is likely to cause death or injury in the workplace. Although this example initially might appear extreme, one court has used the OSHA requirement of a safe workplace, in conjunction with other laws and legal precedents, to support its conclusion that the reinstatement of a chronic drug user whose job involved poten-

166. The Seventh Circuit came close to such a broad interpretation in Sheet Metal Workers Local 20 v. Baylor Heating & Air Conditioning, 877 F.2d 547 (7th Cir. 1989). The court held that the national labor policy favoring arbitration and promoting labor stability prevailed over the policy of free employee choice in electing a majority union. Id. at 555. The saving grace of the decision is the statutory reference to NLRA § 8(f), 29 U.S.C. § 158(f) (1988), which explicitly allows employers in the construction industry to execute prehire agreements with non-majority unions before any employees are hired or any work is begun. Id. at 552. Therefore, the court concluded that no well-defined and dominant public policy prevents an employer and union from voluntarily agreeing to include an interest arbitration clause in a prehire agreement even though allowing non-majority representation compromises employees' free choice, and it therefore upheld the interest arbitration clause. Id. at 555.

167. See supra notes 89-92 and accompanying text.

168. Occupational Safety and Health Act, 29 U.S.C. § 654(a)(1) (1982). An even more extreme example would be courts' using the federal government's statutory goal of full employment to hold all terminations of employees violate public policy. "[F]ull employment and production . . . are important national requirements and will promote the economic security and well-being of all citizens of the Nation." Full Employment and Balanced Growth Act, 15 U.S.C. § 3102(d) (1982). If the broad interpretation is used, any illegal conduct by the employee could support a court vacating the arbitration award of reinstatement. Other absurd examples of illegal conduct that could support a finding that a reinstatement award violates public policy include failure to pay child support or a traffic violation. 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, 21 (1988).
tially dangerous high pressure equipment violated public policy.169

One author has suggested that only laws which directly regulate individual employee behavior should be used to vacate an arbitration award:

Although laws and regulations exist that address the workplace generally, most of them do not contain the requisite connection to the public interest in regulating workplace behavior. These laws thus provide equally insufficient justification for using the public policy exception to overturn an arbitrator's reinstatement order. Typical of such a law is the Postal Reorganization Act provision that requires the Postal Service to be reliable and efficient. Although it declares the responsibility of the Postal Service as a whole, the law is not one that expressly regulates the behavior of individual employees. As such, it does not provide sufficient grounds to justify a court's decision to reverse an arbitrator's order to reinstate an impaired worker. A court's reliance on such a law essentially enables it to retry a dispute that an arbitrator has already resolved. Similar to the court's reliance on criminal laws that do not address the workplace, this approach unnecessarily compromises the finality of arbitration.170

Similarly, the OSHA standard should not be a basis for setting aside an award, since it could be used as justification to set aside almost any award where the employee's conduct created a health or safety risk. The laws used by courts to vacate an award must regulate individual employee conduct and must prohibit the employment of a person who violates a particular law.

If courts circumvented arbitrator's decisions by adopting the expansionist theory, employees would lose all faith in the arbitration system, since they would know that the arbitrator's decision was not final. Accompanying such a loss of faith would be the loss of the benefits of arbitration: slower resolution of disputes through the litigation process in courts, increased expense, more strikes, and loss of the arbitrator's spe-

169. Georgia Power Co. v. International Bhd. of Elec. Workers, Local 84, 707 F. Supp. 531 (N.D. Ga. 1989). The court cited several federal and state anti-drug statutes, the OSHA requirement of a safe workplace free from recognized hazards, a state statute requiring an employer to exercise ordinary care in selecting employees and not to retain employees after the employer knows of their incompetency, and the Fifth Circuit's recognition in Misco of the public policy against operation of dangerous machinery by an employee under the influence of drugs. Id. at 536-39. The court distinguished the Supreme Court's reversal of Misco on the grounds that the Supreme Court relied on the failure of the lower courts to base the public policy on law or precedent (whereas the present case sets out those laws and precedents) and on the failure to prove the employee was actually intoxicated while at work (whereas the present employee was tested for drugs at work and the level of marijuana residue was sufficient to show that the employee was intoxicated at the time of the test). Id. at 539. The court concluded that enforcement of the award of reinstatement would violate the public policy against drug use and expose the employer to state law and OSHA liability. Id. The court was following the Eleventh Circuit's rationale in Delta. Id. at 535; see supra notes 122-35 and accompanying text.

cialized expertise and knowledge. As one advantage of arbitrating disputes is to avoid litigation, a broad public policy exception is counterproductive, because it produces the very litigation that arbitration is designed to curtail. As long as courts continue the policy of substantial deference to arbitrators' decisions, courts will probably follow the limitist approach, since it accords greater deference to the parties' contract and to arbitrators' decisions.

One commentator has argued that finding a public policy violation only where the award orders an illegal act would undermine finality of arbitration awards, because employees will file wrongful discharge claims in state courts based on a violation of public policy, and because employers will fear tort suits based on unsafe workplaces. With respect to the wrongful discharge claim, the public policy exception is only applied to contract disputes determined by the arbitrator, not to wrongful discharge suits. However, if the public policy considerations are the same, the doctrines of collateral estoppel and res judicata should prevent litigation of the same public policy question in the wrongful discharge suit. The public policy aspect would have been or should have been litigated in the suit to vacate the arbitrator's award. With respect to the tort suits regarding workplace safety, courts following the limitist theory will bar reinstatement because of a violation of public policy. This is true, so long as the arbitration award orders an act that violates statutes requiring workplace safety. Ordering reinstatement of a reckless employee is not apt to violate a law, since no statutory law bars reinstatement of an employee who committed a reckless act. If the award does not order an illegal act, then the employer's conduct cannot be negligence per se, because no statutory rules were violated. Also, if the federal court finds that the ordered conduct does not violate public policy, the court implicitly would be finding the conduct does not violate any common law rule because the rule articulated in W.R. Grace referred to violations of law and legal precedent. Therefore, collateral estoppel and res judicata should again pre-

172. Res judicata precludes litigation of questions that should have been litigated in the prior suit, while collateral estoppel precludes relitigation of questions actually litigated in the prior suit: The most important task in framing the vocabulary of res judicata is to distinguish clearly between the two very different effects of judgments. The first is the effect of foreclosing any litigation of matters that never have been litigated, because of a determination that they should have been advanced in an earlier suit. The second is the effect of foreclosing relitigation of matters that have once been litigated and decided.
173. See supra note 24 and accompanying text.
vent the state suit, because the federal court, in finding that the award did not violate public policy, would have to have determined that the award did not order the employer to perform an illegal tort.

Another reason to limit the public policy exception is to protect the parties' right to negotiate the terms and conditions of employment. Judge Harry T. Edwards argues that Congress intended that the parties to the collective bargaining agreement should have wide latitude in establishing the terms of the agreement. The broad interpretation of the public policy exception eliminates the employer's duty to bargain regarding the reasons for discharge because the court will redetermine what conduct constitutes sufficient grounds for discharge based on public policy. Even though the parties selected an arbitrator to give meaning to the agreement, the court in effect can determine that the arbitrator reached an impermissible conclusion. This happens when the court reverses the reinstatement on public policy grounds. "We are left holding all the cards." Employers could discharge employees in violation of the just cause provision and courts could use public policy to overrule arbitrators' reinstatement awards, or employers could retain employees who violated a law and courts could do nothing about it. Narrow interpretation of the public policy exception prevents reinstatement only when a law against the reinstatement exists. This interpretation would protect the duty to bargain by requiring the employer to define explicitly, in the agreement, what legal violations were just cause for discharge.

A final reason for narrowing the public policy exception is to prevent judicial interference in the collective bargaining relationship. As the public policy exception expands, courts may increasingly intervene in the employment relationship. Arbitration was intended as a substitute for industrial strife, not as a substitute for litigation. Since arbitration is a substitute for strikes and lockouts, employers and unions should be able to control the determination of their rights. Courts are outsiders to the collective bargaining and arbitration relationship and lack familiarity with the parties' situation. Thus, parties remain able to determine the procedure to resolve disputes and to select the person who will determine the dispute.

Other arguments support expanding the public policy exception. Expansion of the public policy exception would reinforce the rationale

175. Id.
176. Id. at 26. "The employer is no longer strictly bound by the duty to bargain over grievance and arbitration procedures. . . . The relevant language in the collective bargaining agreement is thus rendered meaningless." Id. at 27.
177. Id. at 28.
178. Id.
behind the laws giving rise to the statement of public policy. Not only would the laws be enforced directly, but the public policy exception could be used to achieve the policy or broader social concern underlying statutes or case law. This would in turn increase uniformity in courts’ reasoning, thus reducing the discrepancy in decisions which undermine the public’s confidence in the legal system.

The best argument for expansion is that a broad interpretation would reduce the threat to public safety. Courts usually vacate an award reinstating an employee if the employee’s act threatened public safety, but uphold the reinstatement if the act did not involve a great risk to the public. This application of the public policy exception reinforces the goal of protecting the public from dangers. By terminating employees guilty of such a violation, other employees may be encouraged to follow safety rules instead of putting personal concerns first, as the employee did in Iowa Electric. However, this may unrealistically assume employees discuss the reasons for terminations among themselves. Also, the employer can achieve the same result by stating in the collective bargaining agreement that employees will be terminated for violating workplace rules designed to protect employee or public safety.

Narrowing the public policy exception will not always disadvantage the employer because unions may also attempt to vacate an arbitration award on the ground that the award violates public policy. Unions may use the broader rule to argue that an award unfavorable to a union or to an employee violates public policy. Employees have tried to use the public policy exception to vacate awards. In Ferran v. Columbia University, the employer learned that the employee had jury duty only in the afternoon and ordered the employee to work his regularly scheduled mornings. The employee refused, so the employer terminated the employee. The arbitrator found the termination was for good cause because of the employee’s insubordination. The union argued to the court that the award violated the public policy of promoting jury service.

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180. See supra notes 70-75 and accompanying text.
181. The employee in Iowa Electric deliberately violated a nuclear power plant safety rule. 834 F.2d at 1426 (the employee was in a hurry to leave before the lunch rush because he had a leg cast which slowed him down).
182. A union used the public policy exception to challenge an arbitration award apportioning backpay damages against the union because the union delayed processing the employee’s grievance. United Food & Commercial Workers, Local 7R v. Safeway Stores, 889 F.2d 940, 948 (10th Cir. 1989). The union argued that the award violated the public policy in favor of arbitration for resolving disputes since the award creates a disincentive for the union to try to establish that the employer violated the contract. The Tenth Circuit found no public policy violation since the Supreme Court expressly allowed apportionment of damages against a union. Id. at 948-49 (citing Bowen v. United States Postal Serv., 459 U.S. 212, 224 (1983)).
184. Id. at 1546.
185. Id.
by ensuring employees could not be penalized for absence from work. The court determined that the discharge did not violate public policy. While termination for insubordination does not violate public policy, termination of an employee for fulfilling his civic duty would violate public policy.

Employees could also challenge an arbitration award ordering drug testing under a broad interpretation. If the ordered conduct of drug testing violates a constitutional right or other law, the employee could ask the court to vacate the drug testing order under the public policy exception. The vacating of drug testing orders is also possible under the limitist approach since a court can vacate an award that orders an illegal act. Even though unions may also challenge arbitration awards under the public policy exception, the exception disproportionately benefits employers who can better afford the litigation expenses necessary to vacate arbitration awards.

The arguments against expansion of the public policy exception outweigh those supporting its expansion. The Supreme Court's emphasis in *Misco* on the importance of arbitration to industrial labor relations and its repeated reliance on the *Enterprise Wheel* standard of cursory court review of arbitration awards indicates that the Court is unwilling to expand the public policy exception to the point where it would interfere substantially with the finality of the arbitration award.

**B. Courts Must Use Laws or Precedents That Are Well Defined and Dominant**

To find a well-defined and dominant public policy, the courts should look only to well-defined and dominant laws or precedents. The Supreme Court's requirement of "well-defined and dominant" public policy is rendered meaningless if any vague statute can support a well-defined and dominant public policy. A further expansion of the public policy standard should not be allowed on the alternative ground, noted by the Supreme Court in *Muschany*, that a public policy violation can be based on "obvious ethical or moral standards." This part of *Muschany* has not been quoted in subsequent opinions, probably because distinguishing between "obvious ethical or moral standards" and "general considerations of supposed public interests" would be difficult. The former can be used to determine a public policy violation, but not the latter. Moreover, any ethical standard that is obvious has probably already been legislated. Any further attempt to determine an obvious ethical standard

186. *Id.* at 1547.
187. *Id.*
188. *Id.* at 1547-48.
189. See *supra* notes 56-60 and accompanying text.
190. See *supra* note 28 and accompanying text.
would conflict with the Supreme Court's prohibition of courts' considering general public interests. It would also create controversy in trying to separate the obvious ethical standards from those that are less than obvious. Courts should not try to apply the nebulous standard of "obvious ethical or moral standards," because such a standard could not be adequately separated from the impermissible standard of "general considerations of supposed public interests."

Another reason that courts should base public policy only on well-defined and dominant laws or legal precedents is that using state law as a basis for public policy undermines the requirement of "dominant" public policy and undermines the federal government's goal of uniformity in labor law.\(^{191}\) Arbitrators' decisions would be subject to varying standards of review based on the state law where the dispute arose. Varying state standards might undermine the faith of employees in the arbitration process, when employees see that results vary because of state law instead of contract language. Moreover, states could succumb to union or management pressure and create new public policy by passing legislation to circumvent the required deferral to arbitrators' awards. The resulting lack of uniformity could be minimized if courts were to interpret the well-defined and dominant public policy standard to require a well-defined and dominant law or legal precedent that all, or at least a substantial majority, of states agree on. While this would decrease each state's responsiveness to its citizens' views of which employee acts should preclude reinstatement, the federal courts and legislature believe uniformity is important enough in labor law to warrant federal control despite any resulting loss of state control.

The Supreme Court's requirement that federal labor law prevail over inconsistent state rules so as to preserve the benefits of collective bargaining could indicate a displacement of obscure state law under *Boyle v. United Technologies Corp.*\(^{192}\) Displacement occurs "only where

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The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract.

*Id.* at 103.

192. 487 U.S. 500 (1988). In *Boyle*, after a United States Marine helicopter crashed off the Virginia coast, a copilot drowned, because he was unable to escape from the helicopter. *Id.* at 502. The copilot's father sued the manufacturer of the helicopter for wrongful death. The Supreme Court
NARROWING THE PUBLIC POLICY EXCEPTION

... a ‘significant conflict’ exists between an identifiable ‘federal policy or interest and the (operation) of state law,’ or the application of state law would ‘frustrate specific objectives’ of federal legislation.’\textsuperscript{193} Obscure state laws could not be used to support a well-defined and dominant public policy, because such an interpretation would frustrate the federal objective of uniformity in interpreting collective bargaining agreements. The federal government sought uniformity in contract interpretation so that the parties could be sure of their rights under the agreement.\textsuperscript{194} Laws that vary between jurisdictions could not be used to determine public policy since the parties could not be sure of their rights under the agreement. If the award violates a non-uniform state law, the arbitration award would have to be upheld despite violating a state public policy because the federal objective of uniformity displaces the state law. However, if the arbitration award violated a law or legal precedent that all or most states agreed on and that was not inconsistent with federal substantive labor law, the courts could vacate the award on public policy grounds without violating the federal goal of uniformity.

By requiring that courts use well-defined and dominant public policy, rather than general considerations of supposed public interests, the Supreme Court probably hoped to avoid the inconsistency and vagueness problems which arise from standards based on public safety, integral employment duties, or ethics. Using state law or precedent would undermine the federal goal of uniform labor law in the private sector, unless such uniformity was established by courts holding that well-defined and dominant public policy requires that all or most states have law or precedent on the subject. The scope of the public policy exception should be restricted to well-defined and dominant law or precedent that directly prohibits the act that the award is requiring. Unless the award orders the employer to violate a well-defined and dominant law, the court should defer to the arbitrator’s determination of the dispute.

C. Arbitrator Determination of Public Policy Question

If the parties wanted arbitrators to consider these general considerations of public interest, the parties could present all the arguments supporting the standards for the arbitrators’ use in determining whether the collective bargaining agreement was violated. The parties could authorize

\begin{notes}
\textsuperscript{193} Id. at 507 (citations omitted).
\textsuperscript{194} See supra note 191 and accompanying text.
\end{notes}
ize the arbitrator to consider these public interests in determining the grievance. The arbitrator would then resolve all the facts, including those related to:

1. the public policy violation;
2. the employee's work history;
3. the uniformity of the employer’s punishment;
4. the threat to public safety;
5. the violation being an integral or tangential aspect of the employee's duties; and
6. any other standard the parties wish to present.

The arbitrator's application of these standards and his knowledge of the common law of the shop to the dispute allow for a comprehensive analysis of the labor and public concerns. Although commentators do not agree on the extent of arbitrators' expertise, the parties control the scope of the arbitrator's authority and can choose which issues and standards to submit to the arbitrator. The arbitrator would determine only the questions submitted to the arbitrator under the collective bargaining dispute. This could include the public policy aspect, if the parties request such a determination, but the courts would still have the final say on whether an award violates public policy since that is a legal determination.

1. Methods for Arbitrators to Use to Consider External Law

(a) Voluntary Submission of Public Policy Question

The parties in their collective bargaining agreement should be able to choose to submit the public policy question to the arbitrator based on their belief of the arbitrator's expertise. The voluntary decision of the parties to submit a question to an arbitrator is one reason a court defers to an arbitrator's award. Therefore, the parties can specify in the contract or in the submission agreement that the arbitrator will also decide the public policy question.

An arbitrator can consider external law if the parties request the arbitrator to do so. Although Feller cautions against arbitrators voluntarily considering external law, because that reduces an arbitrator's immunity from judicial review, an arbitrator can consider external law, if the parties so request:

The parties can, if they want to, make it quite explicit that they want the

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195. See supra notes 11-17 and accompanying text.
196. Id.
197. "Arbitrators in private-sector cases are not required to consider external law unless to do so is clearly mandated by the submission agreement . . . or by the collective agreement itself." F. ELKouri & E. ELKouri, supra note 11, at 377 (emphasis in original). "[A]rbitrators are entitled to rest their decision squarely on the law if the parties have granted the arbitrator such authority, either by contract or by a submission agreement." M. Hill, Jr. & A. Sinicropi, Remedies in Arbitration 219 (1981).
arbitrator to decide the rights of the parties not only under the agreement, but under the applicable external law. An arbitrator is, after all, the servant of the parties, and if they make it clear that they want what must inevitably be an advisory opinion from him in the hope that, when rendered, it will resolve the dispute and no one will seek to contest it in court, he must oblige.\textsuperscript{198}

Both parties may be satisfied with an arbitrator’s well-reasoned application of the law to the dispute and, therefore, may choose not to seek court review of the question.

(b) Arbitrators Indirectly Consider External Law

Currently, the arbitrator must consider public policy indirectly when deciding just cause questions: “[A]n arbitrator generally lacks authority to implement external law or public policy, as such. Nonetheless, in applying a just-cause standard, an arbitrator must take account of those considerations because they shape standards of justice in the plant as well as in the larger community.”\textsuperscript{199} Feller agrees that arbitrators consider external law in determining just cause:

In determining the justice of the discipline imposed by an employer, as well as in prescribing the appropriate remedy where there is not, the arbitrator is authorized by the agreement to decide any questions of public policy relating to those issues. This is particularly true with respect to issues of public safety. Examination of arbitrators’ decisions in disciplinary cases shows that arbitrators not only have the authority to rule on public policy questions in such cases but exercise it. Since the parties have vested in the arbitrator the authority to consider public policy in determining whether there was “just cause,” and in providing a remedy, the courts should not entertain claims of the losing party that the arbitrator has not made the appropriate judgment on the public policy issue unless the remedy prescribed by the arbitrator would require a violation of law.\textsuperscript{200}

Even without the parties’ express authorization, arbitrators consider public policy concerns, such as whether the employee is a threat to safety and whether the employee can still effectively perform the job, so that the employee will not be “relegat[ed] to the scrap heap.”\textsuperscript{201}

\textsuperscript{198} Feller, \textit{The Coming End of Arbitration’s Golden Age}, \textit{supra} note 9, at 123.
\textsuperscript{199} Meltzer, \textit{supra} note 171, at 249.
\textsuperscript{200} Brief of the National Academy of Arbitrators as Amicus Curiae in Support of Petitioners at 4, United Paperworkers Int’l Union v. Misco, Inc., 484 U.S. 29 (1987) (No. 86-651)
\textsuperscript{201} \textit{Id.} at 18. Other commentators agree that labor arbitrators consider public interest including safety questions:

Arbitrators consider it their duty to take account of public policy considerations involved in labor-management relations. In not a single case has it been suggested that the employer-union relationship is a private affair, and that public interests should not affect a decision by a person privately selected by the parties to resolve some of their private disputes. The argument might be made that an arbitrator, not being a judge, does not represent the public, and ought not to concern himself with the implications of his decision for
"Public policy" as used in the just-cause context has a broader meaning than well-defined and dominant law and legal precedent and probably includes consideration of general public interests not articulated in the law. Arbitrators are better able to determine general public interest, since they can hear those public policy concerns along with all other relevant facts, whereas a court is limited to examining the legal aspect of the dispute.\textsuperscript{202} By giving the arbitrator the power to determine just cause, the parties give the arbitrator, not the courts, the power to determine the weight to be given to public policy:

By vesting in the arbitrator the power to determine the justice of the discipline, and the appropriate remedy where justice requires it, the parties have delegated to the arbitrator the authority to determine the weight to be given to public policy, and the principles of \textit{Enterprise Wheel & Car} require that the courts respect his determination.\textsuperscript{203}

Therefore, the courts should not redetermine the public policy question when the employer is invoking the doctrine in the employer's own interest to avoid the adverse arbitration award. However, if the arbitrator's determination affects a public policy articulated in a law or legal precedent, then courts should be able to review the arbitration award to determine the legal interpretation that applies.\textsuperscript{204}

Arbitrators also consider law external to the collective bargaining agreement to aid in resolving ambiguities in the agreement. Even when the agreement is unambiguous, some arbitrators consider external law to assure a just result to the parties. Most arbitrators agree that, when a
contract is ambiguous and can be interpreted in two ways (consistent with the law or repugnant to the law), they should consider external law, so as to interpret the contract in the manner consistent with the law. When a contract clause is inconsistent with a statute, arbitrators take three views. One school of thought, led by Bernard Meltzer, argues that the arbitrator should follow the contract and leave the legal determination of the statute to the courts. The second school of thought, led by Robert Howlett, argues that arbitrators should always consider both the contract and the law. A middle position is that arbitrators should consider statutes to avoid a determination that requires the parties to violate the law. Therefore, many arbitrators currently consider public policy by analyzing the effects of statutes on contract clauses even when the parties do not expressly submit consideration of the statute to the arbitrator. Thus, arbitrators consider external law without an express submission despite the Supreme Court’s statement in Enterprise Wheel that the arbitration award cannot be enforced if it is based on external law.

(c) Contract Clause Restating a Public Policy

The employer can also negotiate to include a contract clause providing for termination of an employee who engages in conduct sufficient to violate laws specifically identified in the contract or any law. An employer may have difficulty specifying which laws constitute grounds for discharge if the laws are violated, so an employer may prefer to state that a violation of any law is grounds for termination. Another alternative would be for the employer to specify the laws that employees are most apt to violate but also to note that the grounds for discharge include, but are not limited to, the enumerated laws. The employer can also negotiate a management rights clause into the contract stating that the employer has the sole right to discharge the employee for violating a company rule and that the arbitrator may not vary the discipline the employer imposes. However, a union is more apt to agree to a clause providing for discharge if it also provides for an arbitrator’s review of

208. M. Hill, Jr. & A. Sinicropi, supra note 197, at 209.
209. See supra note 4 and accompanying text.
210. Arbitrators have not limited the grounds for termination to those specified in the contract: Some agreements enumerate specific grounds for discharge or discipline. It has been ruled that the fact that an agreement specifies certain types of misconduct for which employees may be discharged does not mean that causes not expressly stated may not be used where the grounds enumerated are merely illustrative and not exclusive. Similarly, the listing of certain offenses in written plant rules does not necessarily exclude other offenses as grounds for punishment.

F. Elkouri & E. Elkouri, supra note 11, at 653.
whether the employee engaged in the prohibited conduct. For example, the employer could insist on a clause that possession or use of alcohol or drugs on company property is proper cause for discharge without applying progressive discipline or other limitations. If the arbitrator finds that the employee did the prohibited act, then the arbitrator could not change the punishment and the courts could not change the result, even if reinstatement would not have violated the public policy against drugs or even if no public policy was proved.211 Even if a union opposes such a

211. An arbitrator generally has authority to modify the employer-imposed discipline unless the contract requires a specified punishment or reserves the determination of that punishment to the employer. See S.D. Warren Co. v. United Paperworkers Int'l Union, 846 F.2d 827, 828 (1st Cir. 1988) (arbitrator lacked authority to reduce employer-imposed discipline when contract stated employer had sole right to discharge employees for proper cause and separate agreement stated possession, use or sale of drugs is considered cause for discharge).

An arbitrator is not limited to the contract's explicit language since he can also consider the common law of the shop: "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960). An arbitrator can assume the parties intended remedies that are common practices in the industrial relations community. Feller, The Remedy Power in Grievance Arbitration, supra note 16, at 145.

However, where the contract explicitly states a particular remedy is to be applied, the explicit clause will prevail over general practice. M. HILL, JR., & A. SINICROPI, supra note 197, at 28. Limitations on an arbitrator's ability to modify penalties must be expressly stated. F. ELKOURI & E. ELKOURI, supra note 11, at 667-68. However, some arbitrators have allowed reinstatement of employees with no penalty even though the employee was guilty of some misconduct. Id. at 668 & n.92. The contract would have to expressly state that the arbitrator is limited to determining whether the employee was guilty of the misconduct. Such a finding would prevent reinstatement where the contract provides that the violation results in discharge without corrective discipline.

Where a collective bargaining agreement stated that the employer retained sole control over employee discipline, an arbitrator exceeded his authority when he varied the punishment; the arbitrator only had authority to determine just cause and once the arbitrator had found just cause to terminate, his authority ended and he could not reinstate the employee. Delta Queen Steamboat Co. v. District 2 Marine Eng'rs & Beneficial Ass'n, 889 F.2d 599, 604 (5th Cir. 1989) (court held arbitrator's finding of "gross carelessness" indicated that the arbitrator had found just cause, even though the arbitrator had reinstated the employee because similarly situated employees had not been terminated); Butterkrust Bakeries v. Bakery Workers Int'l Union, 726 F.2d 698, 700 (11th Cir. 1984).

A contract which provides that the arbitrator cannot modify punishment precludes an arbitrator from modifying punishment. Bridgeford Frozen-Rite Foods, 91 Lab. Arb. (BNA) 681, 681-82 (1988) (McKee, Arb.). The contract stated: "[N]or shall he [the arbitrator] have the power to mitigate penalties or disciplinary action except pursuant to the terms of this Agreement where the arbitrator has found that the employee did in fact commit the acts of which he was accused." Id. at 681. The arbitrator upheld the termination of an employee for removing a five dollar box of hair nets since the contract stated that the company may discharge an employee for removing company property. Id. at 681-82. The arbitrator could not modify the punishment because of the contract clause limiting his authority. Therefore, the arbitrator did not have authority to consider equity, due process, or the employee's thirty years of service to the company. Id. at 685. Although the arbitrator believed that the discipline of termination was excessive, the arbitrator could not modify that punishment. Id.

The parties also may limit the arbitrator's ability to modify the employer's imposition of discipline by stipulating that the arbitrator is limited to the question of whether just cause existed for the termination. Detroit Edison Co., 82 Lab. Arb. (BNA) 226, 228-29 (1983) (Jones, Arb.) (as the parties' stipulation limited the arbitrator to the question of whether just cause existed for termina-
clause, after the employer bargains in good faith to impasse with the union, the employer can implement the proposed change unilaterally.212

This proposal does not require the parties to state that the arbitrator will determine "public policy." The parties instead will be "contractualizing" external laws or legal precedents. The parties can write contract clauses stating that reinstatement is precluded if an employee violates a certain law or any law.213 The arbitrator is then limited to determining whether the employee's conduct violated the law.214 Under current just cause clauses, the arbitrator generally has discretion to determine whether the employee's illegal act constitutes sufficient just cause for termination. The arbitrator can consider the employee's past work history and lack of prior violations to determine that a first violation does not

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212. See supra notes 67-68 and accompanying text.

213. The parties may invite the arbitrator to consider law external to the contract either by express statement in the agreement, or by tracking the language of statutes or regulations. Kaden, Judges and Arbitrators: Observations on the Scope of Judicial Review, 80 Colum. L. Rev. 267, 286 (1980).

214. Where an employer bargains for and obtains specific language that the employer has the right to terminate the employee without warning for drug use, the arbitrator must uphold the summary termination of the employee for drug use. Lick Fish & Poultry, 87 Lab. Arb. (BNA) 1062, 1066 (1986) (Concepcion, Arb.).
constitute cause for discharge. However, the arbitrator would not be allowed such discretion if the contract provided that a finding of a violation of a law constitutes cause for automatic discharge. Even so, the parties may prefer not to incorporate the law into the contract for all situations, since the legal expertise of arbitrators varies. The parties may prefer to submit the legal violation to the arbitrator only for violations of certain types of laws. In those cases, the parties can specify that the arbitrator must consider certain laws in the submittal agreement to the arbitrator.  

An additional advantage to employers specifying that violations of laws will result in automatic discharge is preventing arbitrators from awarding damages to the employee. Under the Supreme Court's analysis in *W.R. Grace*, an arbitration award of damages does not violate public policy even though ordering conduct such as layoffs or reinstatements would. With the discipline explicitly stated in the contract, an arbitrator will not be able to substitute a damages award. Without such a clause, arbitrators may tend to award damages with increasing frequency as a compromise measure when actual reinstatement would violate public policy. Indeed, unions might attempt to negotiate contract language allowing the arbitrator to award damages, even though reinstatement of the employee is barred on public policy grounds. Perhaps as a compromise, in order to obtain the union’s agreement on the automatic termination language, employers might consider allowing a damage award or providing for a severance payment, subject to a maximum amount which an arbitrator could not increase.

Unions will probably oppose clauses requiring automatic discharges for violations of laws. However, since unions have an interest in providing a safe workplace for the protection of its bargaining unit members, unions may be more receptive to the proposal if discharges are limited to safety violations. As some contracts currently allow discharges without progressive discipline, a union and employer are apt to agree that certain types of conduct justify automatic termination. This automatic discharge proposal also preserves the parties' duty to bargain over the

215. The submission agreement can authorize the arbitrator to determine topics not included in the collective bargaining agreement. High Concrete Structures, Inc. v. United Elec. Workers Local 166, 879 F.2d 1215, 1218-19 (3d Cir. 1989). The same deference that is accorded to an arbitrator's interpretation of the collective bargaining agreement should also be accorded to an arbitrator's interpretation of issues stated in the submission agreement. *Id.* at 1219.

The submission agreement may also limit the arbitrator's authority by submitting a precise and narrow statement of the issue to the arbitrator. United Food & Commercial Workers, Local 7R v. Safeway Stores, 889 F.2d 940, 947 (10th Cir. 1989) (arbitrator apportioned backpay damages against union based on union's delay in processing grievance since remedy question submitted to the arbitrator was not limited expressly to the appropriate remedy against the employer).

grounds for discharge, which is undermined by broad readings of the public policy exception. Unions will also benefit from having the arbitrator consider the legal violation, since an employer is less apt to litigate the question in court where the arbitrator provides a well-reasoned decision. However, employers and unions still might litigate if the arbitration award is adverse to one side's interests.

Where an employer is concerned with an employee's propensity to repeat the illegal conduct, the employer can provide a probationary period in the contract. For example, the employer could specify that if the employee repeats the conduct in the next six months (or longer period if necessary), the employer can terminate the employee without progressive discipline. Such a clause would be wise where the misconduct is integral to the employee's job, since the employee is more apt to repeat the offense. For example, a cashier is more apt to steal from an employer than an employee who has only occasional contact with the employer's money. The expected propensity to misbehave is not sufficient to block reemployment under the public policy exception, since a court could never be certain an employee would repeat the conduct. Even if the court was certain that the employee would repeat the illegal conduct, the law prohibits only the conduct, not the reinstatement. Therefore, the reinstatement award does not order an illegal act.

Where the parties specify in their contract which legal violations constitute automatic grounds for termination, the arbitrator then determines only whether the employee did the illegal act. Such a determination is largely a factual one which arbitrators are considered competent

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217. See supra notes 174-78 and accompanying text.

218. Such agreements providing immediate termination upon a subsequent violation often are labeled "Last Chance Agreements." Where the parties have agreed to such immediate termination, the arbitrator cannot modify the discipline: "The 'Last Chance' Agreement which provides the discipline of termination for its violation prevents an Arbitrator from altering or modifying the discipline, if the Arbitrator finds that the employee violated the Agreement." Champion Int'l Corp., 86 Lab. Arb. (BNA) 1077, 1081 (1986) (Chalfie, Arb.) (agreement provided for immediate termination for further absences since the employee had been absent an excessive amount). Where the agreement provides for immediate termination for further violations, the arbitrator will uphold that punishment even though the arbitrator believes that such discipline is excessive. Colorado-Ute Elec. Ass'n, 86 Lab. Arb. (BNA) 536, 540 (1985) (Watkins, Arb.) (arbitrator upheld a termination where the employee had received a warning subjecting him to immediate termination for further violations of safety procedures where the employee subsequent to the warning did violate the safety procedures, although the arbitrator would have reduced the punishment to a suspension if the arbitrator had the authority to do so). See also, Inland Container Corp., 91 Lab. Arb. (BNA) 544, 549 (1988) (Howell, Arb.) ("Last Chance" Agreement in the settlement of a prior alcohol abuse incident providing that any repetition is cause for immediate termination of the employee means that the arbitrator lacks authority to modify any punishment).

An employer's listing the causes for termination of an employee does not prevent an arbitrator from reducing the punishment. Misco, 484 U.S. at 41-42. The Supreme Court indicated that the lower court should have remanded the case to the arbitrator, since the arbitrator "cryptically observed" that the contract did not provide for immediate termination upon the prohibited act occurring, so the arbitrator could vary the discipline. Id.
to make. Where the arbitrator must determine a legal question, courts should be allowed a wider scope of review as discussed in the next section.

2. **Judicial Standard of Review of Arbitrator's Determination of Public Policy Question**

The Supreme Court allows arbitrators to consider external law, and, where the arbitrator fully considers the external law, a court may accord the arbitrator's determination great weight.\(^{219}\) In an employment discrimination case, the Court clarified the standards used to determine the weight courts should give to arbitral determinations:

We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight.\(^{220}\)

Since the Supreme Court relied in part on arbitrators' specialized knowledge of the common law of the shop, the court standard of review should vary with the extent of expertise that each individual arbitrator possesses.\(^{221}\)

However, there is a danger that arbitrators will not give sufficient

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220. Id. This consideration of "special competence" does refer to the particular arbitrator's substantive expertise. Feller, *The Coming End of Arbitration's Golden Age*, supra note 9, at 107.

De novo review of an arbitrator's award has been allowed under other circumstances. A court can review an arbitrator's conclusions of law de novo; however, this decision to allow de novo review was based on an ERISA section (29 U.S.C. § 1401(b)(2)) which provides for judicial review to enforce, vacate, or modify the arbitration award. Trustees of Amalgamated Ins. Fund v. Geltman Indus., 784 F.2d 926, 928-29 (9th Cir. 1986). Even though a court's review of an arbitration award traditionally has been limited, a court can use de novo review when the question is whether the district court's granting of a motion for summary judgment affirming the arbitration award was appropriate, rather than whether the arbitration award was correct. A. Dariano & Sons, Inc. v. District Council of Painters No. 33, 869 F.2d 514, 516-17 (9th Cir. 1989).

221. *See Warrior & Gulf*, 363 U.S. at 582, quoted in text accompanying note 8, supra. While determining the expertise and experience of arbitrators may cause the party who is attacking the award to attack the arbitrator's qualifications also, the Supreme Court specifically allowed this as one criterion in determining the weight to give an award. A well-respected law professor's decision would be given more weight than an inexperienced arbitrator with little legal background. The awkwardness generated in attacking the arbitrator's experience is minimized because this is not the only factor a court considers. Moreover, as both parties participate in selecting the arbitrator, the opponent of the award is not apt to rely on the arbitrator's lack of expertise exclusively, since that argument reveals that party's lack of diligent inquiry into the arbitrator's qualifications before selecting that arbitrator.
emphasis to public policy considerations.\textsuperscript{222} To counter this problem, two standards of court review of the arbitration award are possible. Under the first, courts can retain the power to reverse the arbitrator, if his findings regarding the public policy are clearly erroneous. Under this standard, the court's job would be the equivalent of appellate review of the public policy aspect, as distinguished from its current original determination of that question.

The second standard of review is de novo review, since "the question of public policy is ultimately one for resolution by the courts."\textsuperscript{223} Even with de novo review, the court can give appropriate weight to the arbitrator's findings.\textsuperscript{224} This appropriate weight standard allows the courts to give more weight to an arbitrator's decision when that arbitrator has greater expertise and has made sure the arbitration hearing met procedural due process requirements. Greater weight is also given based on the degree of similarity between the collective bargaining agreement clause and the substantive law, since similar language is some evidence that a similar standard is being applied. Courts that believe the arbitrator did not develop the factual record of the case adequately can give such an arbitrator's ruling less weight. Probably the major reason behind the courts' expansion of the public policy exception is the courts' lack of confidence in the arbitrator's special expertise.\textsuperscript{225}

The de novo review standard is more appropriate than the clearly erroneous standard, since the court still can consider the arbitrator's conclusions, if the court believes the arbitrator did have special expertise in industrial relations or in the law. The court can more easily overrule the arbitrator's conclusion on the public policy exception under a de novo standard, since the clearly erroneous standard requires a much more egregious arbitrator violation to overrule the arbitrator's decision.

As public policy requires the interpretation of statutes and case law, the courts should remain in control of the ultimate determination. Even if an arbitrator's legal determinations are not necessarily subject to de novo review currently,\textsuperscript{226} the court should utilize de novo review when

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\item \textsuperscript{222} Arbitrators may refuse to even consider public policy since "[a]rbitrators, particularly those without legal training, are proud of eschewing legalisms." P. Hays, supra note 12, at 68.
\item \textsuperscript{223} W.R. Grace, 461 U.S. at 766. The Sixth Circuit has stated that an arbitrator exceeds his authority when basing an award on public policy: "An arbitrator who bases an award on public policy considerations exceeds his powers." Board of County Comm'rs v. L. Robert Kimball & Assocs., 860 F.2d 683, 686 (6th Cir. 1988) (arbitration award enforcing contracts for an indefinite period between county and engineering firm did not violate public policy because no Ohio law prohibited county commissioners from entering a contract for a period beyond their stay in office). In that case, the public policy aspect was not voluntarily submitted to the arbitrator. No case was found which forbade the parties from submitting the public policy question voluntarily to arbitration.
\item \textsuperscript{224} See supra notes 219-21 and accompanying text.
\item \textsuperscript{225} See supra notes 5-17 and accompanying text.
\item \textsuperscript{226} An arbitrator's interpretation of a statute is not necessarily subject to de novo review by
the award affects the public interest and not just the parties' interests.\footnote{227}

At the same time, courts should limit themselves to determining the public policy question, not refinding the facts or reinterpreting the contract, because finding the facts and interpreting the contract are the arbitrator's functions. While the Supreme Court allowed de novo review of the factual determinations in Title VII cases, such de novo review of the arbitrator's factual determinations is not justified in non-Title VII cases under the Supreme Court's rationale. The Supreme Court relied on Congress' determination to provide a remedy in court for employment discrimination. After the Supreme Court stated that a court could accord great weight to an arbitrator's determinations, the Court stated:

This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. The court should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum.\footnote{228}

Without such a legislative cause of action, the Supreme Court is not apt to allow de novo review of an arbitrator's determinations of fact. Therefore, courts should engage in de novo review of the arbitrator's legal conclusions but not the arbitrator's factual conclusions.\footnote{229}

A court will also perform de novo review on mixed questions of law...
and fact. Therefore, if the dispute involves application of a law to the facts, a court can redetermine this application. The standard of deference will continue for the arbitrator’s traditional roles of factfinder and contract interpreter, but the arbitrator’s determination of acts that constitute a legal violation must be subject to de novo review by courts.

In one case before Misco, the Seventh Circuit pointed out that the standard of review for an arbitrator’s factual findings is more deferential than the clearly erroneous standard, since courts cannot redetermine an award’s merits simply because of strong disagreement with the arbitrator. However, a court’s normally heavy deference to an arbitrator does not extend to an arbitrator’s determination of the public policy question. The court used de novo review to decide whether the arbitrator’s judgment that reinstatement of an employee would not threaten workplace safety violated public policy. The court considered and rejected the application of the more deferential standard of “clearly erroneous” to an arbitrator’s fact findings relating to the public policy question, because the court’s duty not to enforce awards violative of public policy would be impaired if the court had to defer to the arbitrator’s clearly erroneous findings of fact. However, the Supreme Court explicitly stated in Misco that courts could not refine the facts, not even if the facts are relevant to the public policy determination.

A second danger when an arbitrator determines the public policy aspect is that the arbitrator may not know the statute that is the basis for the public policy argument. Many arbitrators are not attorneys, and an arbitrator’s main function is to interpret the contract to effectuate the

230. Cf. American Fed’n of Television & Radio Artists v. Storer Broadcasting Co., 745 F.2d 392, 398-99 (6th Cir. 1984) (a court cannot perform de novo review of an arbitrator’s determination of a mixed question of law and fact). However, the court also noted that an arbitrator’s decision involving an explicit public policy is subject to judicial review because the question of public policy is ultimately one for resolution by the court. Id. at 398 n.3 (citing, W.R. Grace, 461 U.S. 757 (1983)). Therefore, a court should be able to review an arbitrator’s mixed questions of law and fact as applied to the public policy exception.

231. E.I. DuPont de Nemours & Co. v. Grasselli Employees Indep. Ass’n, 790 F.2d 611, 614 (7th Cir.), cert. denied, 479 U.S. 853 (1986). In this case, the arbitrator reinstated an employee who had assaulted two other employees, because the arbitrator found that the employee had a mental breakdown and that a subsequent breakdown was unlikely. The arbitrator concluded that the employee had been discharged without just cause, since the danger to workplace safety and company property was not great due to the improbability of the employee having another breakdown. Id. at 613.

232. Id. at 615-16.

233. Id. at 617. Iowa Electric also applied the de novo standard of review. See 834 F.2d at 1427.

234. E.I. DuPont de Nemours & Co., 790 F.2d at 617. The Seventh Circuit’s consideration of the appropriate standard was dictum. The court explicitly stated it did not have to decide the precise legal standard for reviewing factual findings pertaining to the public policy exception, since the arbitrator’s findings did not even violate the less deferential “clearly erroneous” standard. Id.

235. See supra note 58 and accompanying text.
parties’ intent, not to apply laws. As with other contract clauses involving application of law, the parties can present all necessary public policy theories and evidence to the arbitrator. If the arbitrator fails to determine the public policy question, courts could return the case to the arbitrator for reconsideration, or they could perform the original application of the public policy exception themselves. Although this proposal is contrary to the arbitrator’s general role, when an arbitrator initially analyzes the public policy exception, reviewing courts have the benefit of the arbitrator’s specialized expertise, which results in a better balancing of issues and a better determination of when the public policy violation should preclude reinstatement.

Where an arbitrator realizes that courts can use only de novo review on the legal aspects of the public policy determination, an arbitrator is apt to minimize or avoid the public policy considerations altogether to avoid court review of the arbitrator’s conclusions. This is another reason to contractualize the legal violations that support automatic discharge, since an arbitrator will then have to state whether the employee did violate that provision of the contract. To avoid an arbitrator’s circumvention of the public policy question by failing to find facts for the public policy determination, a court can remand a dispute to the arbitrator to clarify the factual findings on the public policy question.

236. Many arbitrators are not lawyers. The arbitrator’s view of the law may, in fact, be erroneous. The parties are asking for a reader of the contract to tell them what the contract means. It is then up to the courts to deal with the question of whether the reading is or is not in accord with enacted legislation.

St. Antoine, Deferral to Arbitration and Use of External Law in Arbitration, 10 INDUS. REL. L.J. 19, 21 (1988).

[The institution of grievance arbitration as we know it today has been built upon the assumption that arbitrators are not courts and do not have an implied power of discretion to see that justice and equity are done. They are, and should be, restricted to performing the limited role defined by the parties. In determining the meaning of an ambiguous contractual provision, or in determining what remedy should fairly be read into an agreement, arbitrators should choose the alternative which best corresponds to what they believe the parties intended. That, in turn, may involve an assumption that the parties intended to do the “right thing” as the arbitrator sees it. But where the agreement cannot be interpreted to do justice, the integrity and continuing vitality of the arbitral system requires that the arbitrator exercise the discipline to issue the award contemplated by the parties, even if the award is not a model of fairness.


237. Courts currently have the power to return a dispute to the arbitrator for further fact-finding or consideration. Misco, 484 U.S. at 40 n.10; 9 U.S.C. § 10(e) (1970). See also infra note 239 and accompanying text.

238. A proper definition of the appropriate roles of arbitrators, administrative agencies and the courts depends in great part on the notion that, generally speaking, in labor relations, the interpretation and application of contracts is for arbitrators, and the interpretation and application of statutes is for the administrative agencies and the courts.

St. Antoine, supra note 236, at 19.

239. A court should not enforce an ambiguous award. Instead, it should remand the ambiguous award to the arbitrator so that the court knows what it is being asked to enforce. Americas Ins. Co. v. Seagull Compania Naviera, 774 F.2d 64, 67 (2d Cir. 1985) (remanded an admiralty dispute to the arbitrator). Courts have the power to remand the award to the arbitrator under the federal common
Many employers may not want to submit the public policy question to the arbitrator, because employers use the public policy exception to have an unfavorable award overturned more frequently than unions do. However, with de novo review, the employer has little to fear because the court hears the case and determines the public policy issue without relying on the arbitrator’s determination. Where the parties initially submit the public policy question to the arbitrator, the parties may be content with the arbitrator’s determination, rendering court action unnecessary. The employer may decide that the most efficient method to discharge employees is to negotiate with the union for a contract provision agreeing that certain misconduct results in automatic dismissal without the benefit of a warning or progressive discipline. For example, the employer and union could decide that use or possession of illegal drugs is just cause for discharge without progressive discipline. Therefore, because the collective bargaining agreement states that the employee must be discharged, an arbitrator could not reinstate an employee found guilty of the dischargeable offense. Therefore, a court would not have to determine if reinstatement of a drug user violated public policy because the parties’ collective bargaining agreement has effectively removed such a determination from the court.

D. Proposals to Address the Threat to Public Safety

If courts adopt the limitist approach, they will have less authority to vacate arbitration awards based on safety or other public policy concerns. Employers who have been compelled by arbitration awards to reinstate reckless employees may become disenchanted with arbitration and may consider eliminating their arbitration system or eliminating the employees’ just cause protection. Such a response would be an extreme reaction considering that arbitration has been the preferred method of resolving industrial disputes for thirty years. Incorporating the public policy concern into the contract and specifying that violation of the public policy precludes reinstatement is a less drastic way to safeguard the employer’s interest in protecting the safety of its employees, customers and the general public.

1. Alternative Grievance Procedure

Employers could consider an alternative procedure to resolve disputes that implicate public or employee safety. For example, a contract could provide that a three person panel will resolve grievances affecting
safety concerns. The three person panel would consist of one union member, one management representative and one neutral party. A contract could specify that an employee whose underlying conduct violated a safety law can only be reinstated if the three person panel unanimously agree to the reinstatement. While unions will resist the unanimity requirement, employers filing cases under the public policy exception are concerned primarily with safety issues. Compromises could be negotiated with the union on other aspects of the grievance procedure, such as the sufficiency of a majority vote of the three person panel to reinstate employees for non-safety violations, or allowing an arbitrator to resolve non-safety violations under traditional just cause analysis. Employers could offer concessions on other issues to achieve agreement on the safety issue. Unions should be concerned about the safety of bargaining unit members and, therefore, should be willing to recognize the safety issue as requiring a unique rule. Where a union opposes all methods of resolving the safety concern, an employer, after negotiating in good faith to impasse, can change its grievance procedure unilaterally. While unilateral changes after negotiating to impasse will affect negatively the employer-employee relationship, the employer may have to initiate such a unilateral change where the issue is of sufficient importance.

2. Pervasiveness of Regulations Justifying Increased Court Intervention

The Ninth Circuit in Stead Motors offered the theory that pervasive regulations of an industry may indicate a public policy against reinstating any employee who violates one of those pervasive regulations. Where regulations are pervasive and all-encompassing, the agency should have had the foresight to prohibit reinstatement of violators, if the agency so intended. Several regulations prohibit re-employment for certain violations. The party advocating vacation of the award may try to argue that the pervasiveness of regulations in the industry justifies heightened

242. See supra note 110 and accompanying text.
243. One such regulation prohibits re-employment of truck drivers for drug use or other criminal conduct. "A driver who is disqualified shall not drive a commercial motor vehicle." 49 C.F.R. § 391.15(a) (1988). A driver can be disqualified if convicted of (1) operating a motor vehicle under the influence of alcohol or other controlled substance; (2) transporting, possessing or unlawfully using a controlled substance while on duty; (3) leaving the scene of an accident which resulted in injury or death; or (4) a felony involving the use of a motor vehicle. 49 C.F.R. § 391.15(c)(2). The driver is disqualified from driving for six months to three years depending on prior convictions. 49 C.F.R. § 391.15(c)(3). An arbitration award ordering reinstatement of a disqualified driver could be vacated under the limitist view of the public policy exception.

Truck drivers with certain diseases or disabilities are also precluded from driving. "A person shall not drive a motor vehicle unless he is physically qualified to do so. . . ." 49 C.F.R. § 391.41(a) (1988). Examples of people who are not physically qualified to drive a motor vehicle include people with diabetes mellitus currently requiring insulin for control, people with clinical diagnosis of a respiratory disfunction or high blood pressure likely to interfere with his ability to operate a motor vehicle safely, people with epilepsy or any other condition which is likely to cause loss of conscious-
court intervention because the employee does not have as great an expectation of just cause protection. This argument is analogous to instances where certain companies or occupations have been held to have lesser expectations of protection against searches because of the pervasiveness of regulations. Where the contract specifies that the employees have just cause protection, however, a court may have difficulty explaining how the same contractual language applied to similar facts has different results according to the pervasiveness of regulations covering the industry. The fact that arbitrators can consider industrial practices in interpreting contracts because of their specialized knowledge of industry may open the door to the argument that courts should be able to use their knowledge of the uniqueness of laws governing an industry.

3. Creation of Case Law Against Reinstatement

The party advocating that the arbitration award be vacated could argue that, since the Misco standard of "law or legal precedent" includes case law, courts do not have to determine that a statute bars reinstatement if case law bars reinstatement. However, under the limitist theory, case law prohibiting an employee's underlying conduct is insufficient to

ness or any loss of ability to control a motor vehicle, and people with a current clinical diagnosis of alcoholism. 49 C.F.R. § 391.41(b)(3), (5), (6), (8), and (13) (1988).

Other regulations prohibit the reinstatement of pilots for drug and alcohol consumption. A person cannot act as a pilot unless he has a current pilot certificate. 14 C.F.R. § 61.3 (1988). The FAA can deny an application for a certificate or revoke a certificate for a violation of a federal or state drug law or for acting or attempting to act as a crew member within eight hours of consuming alcohol or drugs. 14 C.F.R. § 61.15. The certificate can also be revoked if the pilot refuses to take a test to determine the percentage of alcohol in his blood. 14 C.F.R. § 61.16. If the FAA revoked the pilot's certificate, an arbitrator could not reinstate the employee since the pilot's flying without a certificate is an illegal act.

Administrative regulations do have the force of law if Congress has delegated rule-making authority to the agency:

A valid legislative rule is binding upon all persons, and on the courts, to the same extent as a congressional statute. When Congress delegates rulemaking authority to an agency, and the agency adopts legislative rules, the agency stands in the place of Congress and makes law. An "interpretative" rule, by contrast, does not contain new substance of its own but merely expresses the agency's understanding of a congressional statute. Thus an interpretative rule does not have the force of law and is not binding on anyone, including the courts, though the status conferred on an agency as the delegate of Congress and by its expertise often leads courts to defer to the agency's interpretation of its governing statute.


244. Skinner v. Railway Labor Executives Ass'n, 109 S. Ct. 1402, 1418 (1989) (railroad employees' expectations of privacy are diminished because of their participation in an industry that is "regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees"); Donovan v. Dewey, 452 U.S. 594 (1981) (pervasive regulations of coal industry justified warrantless searches because such an industry had no reasonable expectations of privacy); Shoemaker v. Handel, 795 F.2d 1136, 1142 (3d Cir. 1986) (pervasive regulations of horse racing jockeys justified drug testing).

245. "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally part of the collective bargaining agreement although not expressed in it." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960).
vacate an award; case law would have to hold that the reinstatement itself is illegal. Courts may base the reinstatement's illegality on negligent hiring or supervision theories. For example, if case law stated that reinstating a reckless employee created employer liability, then the limitist standard is met. Where the employer's liability would arise only when the employee committed a subsequent violation, reinstatement is not illegal under the limitist theory.

Basing the finding of illegality on case precedent could allow complete circumvention of arbitration awards. A court could determine that risk of the employee repeating the illegal act would render the reinstatement illegal even though the arbitrator did not make this determination. Even under the limitist view, a court's holding that reinstatement orders conduct that violates case law would justify the court's vacating the arbitration award ordering reinstatement. Vacating awards because the awards violate case law may be justified, since the Supreme Court explicitly stated public policy can be found in "legal precedent." This result may also be justified by the need to protect public safety through the ability of employers to prevent reckless employees from endangering others. It could also be argued that society has an interest in arbitration awards that potentially threaten public safety because the parties to the contract are not the only ones affected. The extent to which "legal precedent" can be used to expand the public policy exception is limited by the requirement that the public policy be well defined and dominant. Moreover, a court cannot refind facts but must rely on the arbitrator's determination of facts. Therefore, where an arbitrator determines an employee is amenable to discipline and will not repeat the improper conduct, a court cannot find such a reinstatement illegal because the award does not order a violation of law or legal precedent.

CONCLUSION

The public policy exception should be restricted to arbitration awards that directly violate laws which directly regulate an employee's behavior. The purpose of criminal punishment is to deter criminal violations; the employee need not be punished also by losing his job just because the crime was related indirectly to his job. Narrowing the public policy exception allows an arbitrator to determine just cause by balancing mitigating factors without running the risk that a court will vacate the award if the employee's underlying conduct violated a law. Narrowing the exception also provides more finality to arbitration awards, thereby increasing the parties' reliance on arbitration, with the attendant benefits of speedier resolution, lower cost, fewer strikes, and increased industrial expertise. A narrow public policy exception also encourages meaningful collective bargaining, because employers cannot routinely
circumvent the collective agreement by using the public policy exception to avoid adverse arbitration awards.

The Supreme Court's recent emphasis on deferral to arbitrators in *Misco* demonstrates that the expansion of the public policy exception should be curbed. This article concludes that the exception should be restricted to situations where the award violates a "well-defined and dominant" law making the employment or reinstatement of the individual illegal. An arbitration award should only be unenforceable where the award orders an act that violates a well-defined and dominant law or legal precedent. A "well-defined" law is one that directly prohibits employment or reinstatement of an individual. A vague endorsement of general public concern against specified conduct is insufficient to establish a well-defined law. The employee's initial act violating a law should not suffice to establish a public policy violation because the award ordering reinstatement does not order the employee to perform another illegal act. In order to be a "dominant" law, the law must be consistent with the federal government's goal of uniformity in labor law.

This article also proposes that arbitrators consider the public policy arguments initially and balance them against the wide array of other factors traditionally considered. This would be particularly appropriate when the issue before the arbitrator is whether the employer had just cause to terminate an employee. If the Supreme Court and labor practitioners are not merely giving lip service to the reasoning in *Enterprise Wheel* and *American Manufacturing*, the future development of labor law would benefit by application of arbitrators' expertise in considering public policy arguments. A court cannot review an arbitrator's factual findings, but can review de novo the legal determination of the public policy violation. The "clearly erroneous" standard—by which courts can overrule an arbitration award only if the arbitrator's finding of a public policy violation is clearly erroneous—gives arbitrators too much authority to interpret statutes. If the Supreme Court is correctly deferring to arbitrators' greater labor expertise, then the parties to the contract should be able to submit the public policy aspect to the arbitrator, subject to de novo review by courts. The legal system can only benefit from arbitrators' industrial expertise when applied to the public policy arguments. If the arbitration critics, who say that arbitrators lack specialized knowledge in the labor field are correct, then the parties will not submit the public policy aspect to the arbitrator. Based on the prevalence of arbitration clauses in contracts, most management and union representatives must believe in the validity of the arbitration process.

Even if the legal system is unwilling to change the traditional rule that public policy determinations are for the courts, parties to a collective
bargaining agreement can force the arbitrator to consider "public policy" by incorporating language similar to the "law or legal precedent" into their agreement.
APPENDIX ON DETERMINING THE PUBLIC POLICY QUESTION IN PUBLIC SECTOR LABOR DISPUTES

The appropriate standard of review for public sector employees may be less deferential to the arbitrators' conclusions, since the public has a greater interest in government operations and the enforcement of federal and state laws. However, I found no case that drew an explicit distinction between the public and private sectors. In a private sector labor dispute, the Supreme Court has stated that an arbitrator's role is not to promote community justice, but is only to resolve the parties' current dispute.246 When government employees and functions are involved, the judicial system arguably has a greater interest in seeing that justice is done, since the interests involved are not limited to those of the employee and employer—citizens also have an interest in resolving disputes that may affect the provision of government services.

The need for public input in legislating standards for public employees may be more significant than public input regarding laws regulating private sector employees. While removal of private employees for dishonesty or criminal acts is determined by the private employer, the public has a greater interest in seeing that government employees act consistent with the public interest, not contrary to public policy. The taxpayers' interest in efficient government operations and efficient use of taxpayer money may allow for increased citizens' input in the determination of questions involving public employees. "Whereas in the private sector there exists only two essential parties—the employer and the union—whose interests must be reconciled by the bargaining process, in the public sector there is an additional party: the public."247 The myriad of laws governing only public sector employees demonstrates that the public has a greater interest in determining public employment questions:

The civil service system is an explicit acknowledgement that public servants should receive treatment different from that afforded their counterparts in the private sector. The system of tenure protecting public employees against dismissals without cause grows out of the fear that untrammeled executive discretion would result in a patronage system that would distort the political process and hamper the provision of government services. Restrictions on the political activities of public employees and on their subsequent employment, as well as financial disclosure requirements, similarly reflect the view that the public has a greater interest in the conduct of public employees than in that of private workers.248

248. Id. at 1616.
Because law should be created through the legislative process and not through arbitrators' determinations, arbitrators determining public sector disputes should be strictly confined to the collective bargaining agreement's language. Arbitrators should not be allowed to extend the bounds of the collective bargaining agreement into areas regulated by law:

Whatever one's judgment on the wisdom or unwisdom of accommodation in private sector grievance arbitration, it is dangerous business in the public sector. Because the scope of bargaining has vast social implications in public employment, arbitrators should not be allowed to extend the area of union control through the settlement of grievances. The arbitrator must be given narrower boundaries than he is accustomed to in the private sector. This can be accomplished partially in public employee bargaining statutes. Legislation should require clauses in all arbitration agreements that confine the arbitrator to the express terms of the agreement and prohibit him from holding arbitrable any issue that is a specifically prohibited subject of bargaining under state law.\(^{249}\)

The judicial review of arbitration awards in the public sector should also be strict so as to prevent arbitrators from creating extensions of the agreement:

A proviso that the arbitrator's opinion must at least set forth its grounds, to facilitate judicial review, would also be appropriate. This review, moreover, should be searching. The private sector practice of judicial deference to the arbitrator on the issue of arbitrability is particularly inappropriate in the public sector and should be rejected by state courts. Grievance arbitration can be very useful in the public sector, but it should not be the institution through which the union extends its area of control over issues that belong to the political process.\(^{250}\)

Therefore, courts must carefully review arbitrators' determinations of public sector disputes, because arbitrators should not be able to give either party more rights than that party obtained in the collective bargaining agreement.

The arbitrator of a public sector dispute may have a greater need to consider external law and ensure that an award is consistent with the law, however, because one party to the collective bargaining agreement is the government. This need arises from the government's obligation to verify that the collective bargaining agreement, and therefore any award enforcing the agreement, conforms with the law:

The problems of external law are amplified when one considers arbitration in the public sector. There, any uncertainty as to whether the employer is authorized to negotiate a contract at variance with the law is moot. The parties' agreement is between the union and the government; one must assume conformity to, and compliance with, the prevailing law.


\(^{250}\) Id. at 162.
Even though the law may not be specifically incorporated by reference in the contract, it is an omnipresent force which is ignored only at the peril of the parties. Indeed, the prevailing law has such an impact on public sector agreements that conformity thereto becomes in effect a condition of employment, thus binding on the arbitrator as well as the parties.251

One commentator in a Note has advocated decreased judicial review of public employee arbitration awards so that they receive the same deference as private sector arbitration awards receive.252 According to that author, public sector awards currently receive less deferential review because of the idea of sovereignty—that the government must retain the authority to act in the public interest:

Although arguments regarding government sovereignty no longer prevent general recognition of the lawfulness of grievance arbitration in the public sector, they nonetheless continue to limit its efficacy. The utility of grievance arbitration strongly depends on judicial respect for the central role of the arbitrator in resolving ambiguities and filling gaps in collective bargaining agreements. Because courts have continued to invoke the principle of government sovereignty, however, guarantees of arbitral autonomy similar to those established in the Steelworkers trilogy have not been adequately developed and consistently applied in the public sector.253

According to the same author, courts currently balance the government interest in controlling the development of public policy against the public interest in having arbitrators determine employment disputes:

In deciding whether a matter is substantively arbitrable, courts have confronted the task of defining the extent to which grievance arbitration is compatible with government sovereignty. Courts have attempted to distinguish matters of basic government policy, with which arbitration cannot interfere, from matters that merely affect conditions of employment. In practice, however, this distinction has proved unworkable and has degenerated into an ad hoc balancing test, under which a court must decide 'whether the issues of [government] policy which are implicated . . . outweigh the similarly implicated issues of employment conditions.' Because it is so vague and manipulable, this balancing test has generated inconsistent results. Moreover, the balancing has often been one-sided: the lack of clear standards has allowed courts to maintain their traditional deference to the government employer's interest in controlling the workplace and has also enabled courts to obscure the public's interest in an effective system of public sector grievance arbitration.254

This balancing, however, is appropriate because of the additional public

252. Note, supra note 247, at 1718.
253. Id. at 1718-24.
254. Id. at 1722-23.
interest that justifies greater regulation of the public employment relationship.

Although the author of the previously mentioned Note believed public sector awards receive less deference, other scholars believe that courts deciding public sector cases generally apply the same standard of review used for the review of private sector arbitration awards: "Courts reviewing public sector grievance arbitration awards have generally followed the private sector practice of according substantial deference to the arbitrators' grievance resolutions, with awards being denied affirmance only where the arbitrators have clearly exceeded their contractual authority or issued decisions contravening law or public policy."²⁵⁵

Many cases apply the public policy rule without any special focus on the public employees' duties to provide services to the public.²⁵⁶

This Appendix is not intended to be an exhaustive survey of opinions on determining the public policy exception in public sector labor disputes. It is intended to provoke further analysis and discussion of whether courts deciding public sector cases should follow private sector precedent without considering the potential differences between the two sectors.

²⁵⁶  E.g., Watertown Police Union Local 541 v. Town of Watertown, 210 Conn. 333, 342-43, 555 A.2d 406, 410-11 (1989) (court upheld arbitration award terminating probationary police officer who violated an order to make no motor vehicle stops and did so without giving additional weight to the public employee's role in protecting the public from traffic violations, because no statute required the police to stop all vehicles that violate traffic laws); District of Columbia Dep't of Corrections v. Teamsters Union Local 246, 554 A.2d 319, 324-25 (D.C. 1989) (statute defining "cause" to terminate correction officer did not include drug dealing with, or assault of, former prisoner; therefore, public policy which is determined by the statute did not require termination, so the court upheld the arbitration award reinstating the employee).

Other public sector cases applying the public policy exception are: United States Postal Serv. v. National Ass'n of Letter Carriers, 839 F.2d 146 (3d Cir. 1988) (reinstating the arbitration award, holding that the district court had refound the facts and had failed to establish the law or legal precedent necessary to a violation of public policy when the employee had fired gunshots into a supervisor's unoccupied car); Social Services Union/American Fed'n of Nurses, SEIU Local 535 v. Alameda County Training & Employment Bd., 207 Cal. App. 3d 1458, 1465-66, 255 Cal. Rptr. 746, 749-50 (1989) (employers have an interest in administering their own civil service system, but California's strong public policy favoring collective bargaining agreements or Memoranda of Understanding in the public sector prevailed so that the court enforced the award upholding the agreement); City of New Haven v. AFSCME Local 530, 208 Conn. 411, 544 A.2d 186 (1988) (award of back-pay to police officer, who was voluntarily reinstated after an appellate court reversed his criminal conviction, did not violate public policy); American Fed'n of State, County & Municipal Employees v. State Dep't of Mental Health, 124 Ill. 2d 246, 529 N.E.2d 534 (1988) (finding no public policy violation, because no link existed between the two employees' unauthorized excursion and the patient's death); and International Ass'n of Firefighters Local 1619 v. Prince George's County, 74 Md. App. 438, 538 A.2d 329 (1988) (upholding arbitrator's reinstatement of employee because employer failed to prove link between safety interest at work and the vacationing employee driving under the influence of alcohol and possessing marijuana).