NOTES

THE PUBLIC POLICY EXCEPTION TO ARBITRAL FINALITY: PROTECTING CHILDREN AND PRESERVING THE SANCTITY OF ARBITRATION

I. INTRODUCTION

Most people have heard of private arbitration, where private parties resolve a private matter, like a contract, before a non-judicial referee. Most people have also heard of mandatory arbitration, where parties agree to arbitrate any disagreements arising from a business undertaking before a dispute even arises.[1] Recently, however, the Massachusetts General Court mandated arbitration as the dispute resolution process in an area where the public has a vested interest: teacher discipline.[2] I will call this "legislated arbitration" in this Note. Judicial review of arbitration has traditionally been limited because private parties are considered competent to enter into private agreements about private matters over which the public has no concern.[3] Critics disfavor mandatory arbitration because the clauses are often ones of adhesion that favor stronger parties.[4] Courts are concerned with predispute arbitration agreements because there is a strong public interest in protecting the rights of weaker parties who are forced to enter such

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[1] *See* F. Denise Rios, Comment, *Mandatory Arbitration Agreements: Do They Protect Employers From Adjudicating Title VII Claims?*, 31 ST. MARY'S L.J. 199, 210-11 (1999); Calvin William Sharpe, Introduction to Symposium, *An Oral History of the National War Labor Board and Critical Issues in the Development of Modern Grievance Arbitration*, 39 CASE W. RES. L. REV. 505, 511-13 n.20 (1988-1989).

[2] *See* MASS. GEN. LAWS ch. 71, § 42 (2002).

[3] *See* United Paperworkers Int'l Union v. Misco, 484 U.S. 29, 37 (1987).

[4] *See* Harry T. Edwards, *Where Are We Heading with Mandatory Arbitration of Statutory Claims in Employment?*, 16 GA. ST. U. L. REV. 293, 296 (1999); David A. Lipton, *Mandatory Securities Industry Arbitration: The Problems and the Solution*, 48 MD. L. REV. 881, 881-84 (1989).

contracts.[5] What level of judicial review should legislated arbitration receive? Should courts treat it like an adhesion contract? Or should courts give deference to legislation mandating arbitration with the interest of the parties and the public in mind?

In 1996, the Beverly, Massachusetts, School District fired James Geller from his teaching position for using physical force against his students on three separate occasions.[6] Geller appealed the decision to an arbitrator who found that he had committed the alleged actions.[7] The arbitrator reinstated him nonetheless.[8] In seeking judicial review of the arbitrator's decision in Superior Court,[9] the Beverly School District sparked a debate within the Commonwealth over whether the public policy of protecting students was more important than maintaining an allegiance to arbitral finality.

The Superior Court upheld the arbitration award, stating that even if the public policy of protecting children is well-defined and important to society, the "findings [of the arbitrator] cannot be tampered with by the Court."[10] The Massachusetts Appeals Court thereafter reversed the trial court, holding that considerations of a clear and well-defined public policy against a teacher's use of physical force against a student permitted it to vacate the arbitrator's decision.[11]

On October 5, 2001, the Massachusetts Supreme Judicial Court ("SJC") vacated the arbitration award reinstating Geller.[12] The decision took an unusually long five months.[13] The outcome was divergent, including two separate concurring opinions and no majority opinion.[14] In effect, the SJC vacated the decision of the Superior Court to uphold the arbitration award without adopting

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[5] *See id.*

[6] *See* Geller v. Beverly Pub. Sch., #11 390 02394 96 at 2 (Am. Arb. Ass'n, 1997) [hereinafter "*Geller Arbitration*"].

[7] *See id.* at 14.

[8] *See id.* at 18.

[9] *See* Beverly Sch. Dist. v. Geller, No. 97-4739-A (Mass. Super. Ct. Jan. 5, 1998).

[10] *Id.* at 24.

[11] *See* Sch. Dist. of Beverly v. Geller, 737 N.E.2d 873, 879 (Mass. App. Ct. 2000) [hereinafter "*Geller I*"].

[12] *See* Sch. Dist. of Beverly v. Geller, 755 N.E.2d 1241 (Mass. 2001) [hereinafter "*Geller II*"] ("The judgment of the Superior Court upholding the arbitration award is vacated. The matter is recommitted to the arbitrator for further proceedings.")(citation omitted)). This Note discusses the two concurring opinions in this case.

[13] *Geller II* was argued April 2, 2001, and decided five months later on October 5, 2001. *Id.* The SJC has an internal rule that every case is decided within 130 days after oral argument. Court personnel acknowledged that there "are very few cases each year where the 130-day rule is waived" and that "some cases are decided very quickly." E-mail from Jane Kenworthy Lewis, Assistant Clerk, Office of the Clerk for the Commonwealth, Massachusetts Supreme Judicial Court, to Daryl DeValerio (Mar. 14, 2002, 15:45 EST) (on file with author).

[14] *See Geller II*, 755 N.E.2d at 1241.

the Appeals Court's decision.[15] Despite its lack of a majority opinion, the SJC has, at the very least, signaled that there are times when the sanctity of arbitration is not paramount.[16] This Note argues that the SJC's decision should be read as support for a public policy exception to arbitral finality.

Part II of this Note lays out the importance of arbitration to society generally and to teacher dismissal disputes specifically. Part III discusses the public policy of protecting children from physical harm. Part IV sets forth the criteria the SJC requires to overrule an arbitration award: a well defined public policy; conduct that clearly violates that policy; and a threat to the safety of the public if the award is not overturned. Part V discusses the *Geller* cases in more detail. Part VI demonstrates that the Appeals Court's decision and Justice Ireland's opinion, while espousing the need to protect children and the validity of an exception to arbitral finality, are, in effect, also good precedent for the sanctity of the arbitration process. Overruling an arbitration award on public policy grounds only when the SJC's narrow test is met preserves the sanctity of arbitration for all but a very few cases where children's safety is at stake. Lower courts of the Commonwealth—and other jurisdictions—would be wise to recognize a public policy exception for protecting children to the general rule favoring the finality of arbitration awards.

II. ARBITRATION

A. Historical Background

Before parties entered predispute arbitration agreements and Massachusetts legislated arbitration in teacher dismissal cases, arbitration proceedings were based on contractual agreements between private parties.[17] The background of the arbitration clause in American history sheds light on the SJC's reluctance to overturn an arbitration award.[18]

Arbitration constitutes an extremely important aspect of American labor relations today, but its well-regarded position in the adversarial process was evolutionary.[19] The standard arbitration clause dates back to at least World War II.[20] In order to avoid labor strikes by employees and lockouts by employers, the

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[15] *See id.*

[16] The concurring opinions diverge on the proper rationale for overturning the arbitrations awards. One focuses on the arbitrator's authority, and the other focuses on the public policy. *See id.*

[17] *See Geller I*, 737 N.E.2d at 876.

[18] *See Geller II*, 755 N.E.2d at 1245 (Cordy, J., concurring) ("In this case the source of the authority to arbitrate the dismissal of a teacher is a statute, not a collective bargaining contract. This important difference informs this court's determination of how the arbitrator's powers are to be ascertained and interpreted.").

[19] *See* Sharpe, *supra* note 1, at 511-13 n.20.

[20] *See id.*

War Labor Board required a standard arbitration clause in all government contracts during the war.[21] By the end of the war, eighty-five percent of all collective bargaining agreements contained an arbitration clause. The success of these clauses had a major influence on modern arbitration.[22]

Reasons for the success of arbitration under a collective bargaining agreement similarly apply to legislated arbitration.[23] First, arbitration provides speedy resolution of disputes by a method that is "not subject to delay and obstruction in the courts."[24] Second, parties tend to favor arbitration because it costs significantly less than litigation.[25] Third, arbitration is informal and, therefore, often more conducive to settling disputes.[26] Finally, arbitration provides a neutral third party with total control to relieve a deadlock between adversarial parties.[27]

Arbitration, however, has its drawbacks. There is no requirement that arbitrators explain their decisions in writing.[28] Written opinions are seen as costly, time consuming, and an invitation for parties to seek judicial review.[29] Additionally, arbitrators are experts in a particular field but frequently possess no special expertise in determinations of public law.[30] Despite these flaws, a strong policy of favoring arbitration to settle disputes in many labor areas continues.[31]

Another characteristic of arbitration, whether legislated or contracted, is limited judicial review.[32] Judicial review of arbitration awards was traditionally limited because parties chose arbitration with the express intent of avoiding litigation.[33] The arbitrator's broad authority in contract cases comes from the express agreement of the parties themselves.[34] As for legislated arbitration, states mandating arbitration for particular labor disputes included provisions for limited judicial review that parallel the deference to arbitration awards based on collective bargaining agreements.[35] The justification for limited judicial review is

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[21] *See id.*

[22] *See* Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Maturing Years,* 35 FLA. L. REV. 557, 568-77 (1983).

[23] *See Geller II*, 755 N.E.2d at 1245 (Cordy, J., concurring).

[24] Quirk v. Data Terminal Sys., Inc., 400 N.E.2d 858, 861 (Mass. 1980).

[25] *See* DOUGLAS E. RAY ET AL., UNDERSTANDING LABOR LAW 338 (1999).

[26] *See id.*

[27] *See* Rios, *supra* note 1, at 210-11.

[28] *See id.* at 212.

[29] *See id.*

[30] *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974) (citing United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-83 (1960)) ("The specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land.").

[31] *See generally* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[32] *See Geller II*, 755 N.E.2d at 1245 (Cordy, J., concurring).

[33] *See* Rios, *supra* note 1, at 211.

[34] *See* Sch. Comm. of Danvers v. Tyman, 360 N.E.2d 877, 882 (Mass. 1977).

[35] *See* Schoonmaker v. Cummings & Lockwood, 747 A.2d 1017, 1026 (Conn. 2000);

a "decided preference for private settlement of labor disputes" even when the arbitration is mandated by legislation.[36]

In Massachusetts teacher dismissal cases, arbitration has been the method of choice for resolving disputes since the Massachusetts Legislature enacted the Education Reform Act of 1993, making major changes to the ways in which teachers may challenge their termination.[37] The Legislature repealed Massachusetts General Law chapter 71, section 43A, which gave teachers a right to challenge dismissals in the Superior Court, and replaced it with section 42, which specifically provides teachers with professional status[38] the right to dispute dismissal decisions by filing a petition for arbitration.[39] Thus, the Legislature took away the right of teachers to challenge dismissals by filing an action in the Superior Court and replaced it with a right to file a petition for arbitration.[40] This decision "evinces an intent on [the Legislature's] part to establish arbitration as the sole remedy for all dismissals."[41]

B. Review of Arbitration Awards

Courts generally refuse to review the merits of an arbitration award.[42] Several reasons exist for such limited review. Continuous judicial review of the merits of an award would undermine the policy and reasoning behind arbitration.[43] If courts could freely intervene with arbitration awards because they disagreed with the facts as the arbitrator found them, "the speedy resolution of grievances by [arbitration] would be greatly undermined."[44]

However, when an arbitrator fashions an award that does not conform to an agreement, is tainted by some procedural unfairness, or violates public policy, the "courts have no choice but to refuse enforcement of the award."[45] Only where

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Geller I, 737 N.E.2d at 877.

[36] *See United Paperworkers*, 484 U.S. at 37.

[37] *See* Turner v. Sch. Comm. of Dedham, 670 N.E.2d 202, 204 (Mass. App. Ct. 1996) (citing MASS. GEN. LAWS ch. 71, § 49 (1993)).

[38] Previously known as tenure. *See* MASS. GEN. LAWS ch. 71, § 41 (2002).

[39] *See id.* § 43A (repealed 1993); *id.* § 42; *see also Turner*, 670 N.E.2d at 204. The statute outlines specific arbitration procedures for dismissals based on "inefficiency, incompetency, incapacity, conduct unbecoming a teacher, insubordination or failure on the part of the teacher to satisfy teacher performance standards developed pursuant to [MASS. GEN. LAWS ch. 71, § 38]." Westport Sch. Comm. v. Coelho, 692 N.E.2d 540, 543 (Mass. App. Ct. 1998).

[40] *See Turner*, 670 N.E.2d at 204.

[41] *Id.*

[42] *See United Paperworkers*, 484 U.S. at 38 ("As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.").

[43] *See id.* at 36.

[44] *Id.* at 38.

[45] *Id.*

there is fraud, corruption, bias, or where the award violates some other clear public policy, will courts inquire into an arbitration award.[46] The arbitrator's award is legitimate so "long as it draws its essence from the collective bargaining agreement" or the law establishing arbitration procedures.[47]

In *W.R. Grace v. Local Union 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers*,[48] the United States Supreme Court established the public policy exception as one of the few grounds for reviewing and vacating arbitration awards.[49] The Court held W.R. Grace guilty of violating Title VII of the Civil Rights Act of 1964 by discriminating against African Americans and women.[50] W.R. Grace signed a conciliation agreement with the Equal Employment Opportunity Commission ("EEOC"), stating that it would maintain the existing proportion of women in the event of layoffs.[51] This agreement contradicted the seniority system previously worked out between W.R. Grace and Local Union 759.[52] The arbitrator, Gerald A. Barrett, found that W.R. Grace voluntarily entered the bargaining agreement for the seniority system.[53] Thus, the terms of the agreement were binding, and the company had no defense to curing its breach by claiming that the EEOC conciliation agreement was binding.[54] The Supreme Court reviewed the action and refused to overturn the arbitration award.[55] Justice Blackmun, writing for the Court, limited a court's ability to overturn an arbitration award to situations where the award would violate an explicit "well defined and dominant [public policy, as] ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests."[56] The Court found that Barrett's award did not violate such a public policy.[57]

Various state courts have followed the reasoning of *W.R. Grace* and held that a court may vacate an arbitral award only if it is violative of a clear public policy.[58] When an award violates an explicit and well-defined public policy, a court can review the arbitration award in light of its greater legal expertise and knowledge

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[46] *See* Mass. Highway Dep't v. Am. Fed'n of State, County, and Municipal Employees, Council 93, 648 N.E.2d 430, 432 (Mass. 1995). This Note discusses which policies fit this last category of "clear public policy" in Massachusetts courts.

[47] *United Steelworkers*, 363 U.S. at 597.

[48] 461 U.S. 757 (1983).

[49] *See id.* at 766.

[50] *See id.* at 759.

[51] *See id.* at 760.

[52] *See id.* at 759-60.

[53] *See W.R. Grace*, 461 U.S. at 763-64.

[54] *See id.*

[55] *See id.* at 764.

[56] *Id.* at 766 (quotations omitted).

[57] *See id.* at 767, 771-72.

[58] *See, e.g.*, Stratford v. Int'l Ass'n of Firefighters, 728 A.2d 1063, 1074 (Conn. 1999); Bureau of Special Investigations v. Coalition of Pub. Safety, 722 N.E.2d 441, 444 (Mass. 2000); Faherty v. Faherty, 477 A.2d 1257, 1262 (N.J. 1984).

of public interest considerations.[59] Because arbitrators lack the authority to consider the public policy implications of their awards and courts may not enforce awards that violate strong public policies, the courts should decide when an award violates a public policy.[60]

Judge Easterbrook, sitting on the United States Court of Appeals for the Seventh Circuit, disagrees with allowing arbitration review on public policy grounds: "I find the principle itself objectionable. The power to set aside awards on grounds of public policy, as distinct from rules of law, is too sweeping."[61] He wrote that a loose definition of public policy conflicts with "*real* public policy, one expressed in positive law."[62] Judge Easterbrook's concurring opinion reflects the general concern of most who oppose arbitration review on public policy grounds.[63] It is, therefore, crucial to ensure a court uses a well-defined public policy.[64]

Courts do not usurp the power of arbitrators by reserving the right to review arbitration awards.[65] Courts must still defer to the arbitrator's legal and factual findings when deciding whether an award violates a clear public policy.[66] As this Note demonstrates, it is possible to protect the sanctity of arbitration by denying enforcement of awards that threaten a public policy.[67] "The policy of *limited* judicial review is reflective of the strong public policy favoring arbitration."[68]

III. PUBLIC POLICY OF PROTECTING CHILDREN

Courts rely on many sources when determining whether a clear public policy exists.[69] In order of preference, "courts have found public policy in constitutions, statutes, administrative regulations, the common law, and general notions of right and wrong."[70]

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[59] *See Schoonmaker*, 747 A.2d at 1926.

[60] *See Bureau of Special Investigations*, 722 N.E.2d at 443-44.

[61] E.I. DuPont de Nemours & Co. v. Grasselli Employees Indep. Ass'n, 790 F.2d 611, 618 (7th Cir. 1986) (Easterbrook, J., concurring).

[62] *Id.* (emphasis in original).

[63] *See* Douglas E. Ray, *Sexual Harassment, Labor Arbitration and National Labor Policy*, 73 NEB. L. REV. 812, 822-25 (1994).

[64] *See E.I. DuPont*, 790 F.2d at 620 (Easterbrook, J., concurring).

[65] *See Schoonmaker*, 747 A.2d at 1026-27.

[66] *See id.*

[67] *See id.*

[68] Plymouth-Carver Reg'l Sch. Dist. v. J. Farmer & Co., 553 N.E.2d 1284, 1285 (Mass. 1990) (emphasis added).

[69] *See* Brock Rowatt, *The Public Policy Exception to Employment At Will: Can Judicial Decisions Be Used as Source of Public Policy?*, 62 U.M.K.C. L. Rev. 325, 331-32 (1994).

[70] *Id.*

A. Constitutional Rights

Public school children under the disciplinary control of public school teachers have a recognized constitutional "right to be free of state intrusions into the realms of personal privacy and bodily security."[71] In *Webb v. McCullough*, a student, Webb, locked herself in the bathroom after being caught by her principal, McCullough, with a boy and alcohol in her room.[72] McCullough slammed into the bathroom door multiple times with his shoulder before it finally gave way, knocking Webb to the ground.[73] McCullough then threw Webb against the wall and slapped her.[74]

In *Webb*, the Sixth Circuit extended the Fourteenth Amendment due process right to be free of state intrusions in the realms of personal privacy and bodily security to public school children under the disciplinary control of public school teachers.[75] The right to be free of brutal state intrusion into the realms of personal privacy and bodily security is clearly recognized in persons charged with or suspected of crimes and in the custody of police officers.[76] The *Webb* court recognized that public school children under the disciplinary control of public school teachers should have at least the same rights as alleged criminals.[77] A number of courts have followed this opinion.[78] A policy of protecting children from physical harm is firmly grounded in a student's constitutional due process rights.

B. Statutes

Courts have found a public policy of protecting children in the Massachusetts General Laws that are specifically designed to protect children and in the Massachusetts criminal statutes designed to protect the public in general.[79]

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[71] Webb v. McCullough, 828 F.2d 1151, 1158 (6th Cir. 1987) (reversing in part a grant of summary judgment insofar as it applied to the principal's alleged blows to the student).

[72] *See id.* at 1153.

[73] *See id.* at 1154.

[74] *See id.*

[75] *See id.* at 1158 (citing Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980).

[76] *See Webb*, 828 F.2d at 1158.

[77] *See id.*

[78] *See, e.g.*, Frances-Colon v. Ramirez, 107 F.3d 62 (1st Cir. 1997) (articulating the test that a substantive due process claim is supported when the government has taken the claimant into custody. Public school children would fall into this category since they are in the custody of the government while in public school.); Kurilla v. Callahan, 68 F. Supp. 2d 556 (M.D. Pa. 1999); Waechter v. Sch. Dist. No. 14-030, 773 F. Supp. 1005 (W.D. Mich. 1991).

[79] *See Geller I*, 737 N.E.2d at 878.

1. Massachusetts General Laws

Chapters 119 and 71 of the Massachusetts General Laws specifically deal with the protection of the state's children. The purpose of chapter 119 is "to insure that the children of the Commonwealth are protected against the harmful effects resulting from the absence, inability, inadequacy or destructive behavior of parents or parent substitutes . . . ."[80] Chapter 71 protects school children against physical or corporal punishment by specifying that teachers have no right to inflict corporal punishment on students.[81]

Additionally, Massachusetts common law protects trespassing children from physical harm caused by the condition of the property.[82] In *Soule v. Massachusetts Electric Co.*,[83] a child climbed up to an electric power substation controlled and operated by the electric company's predecessor and was severely injured by coming into contact with an electrical wire.[84] The court held that the common law duty of reasonable care requires a landowner or occupier to prevent harm to foreseeable child trespassers.[85] The court explained that the state must protect the safety of trespassing children in the face of property owners' rights because children are "unable to appreciate danger as intelligently as an adult."[86]

The state's interest in protecting its children also reaches the private realm of family life.[87] Even family autonomy is not absolute in the face of threats to the physical safety of children.[88] The Legislature provides a "best interests of the child" standard for courts reviewing adoption cases where parental rights are at

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[80] MASS. GEN. LAWS ch. 119, § 1 (2002).

[81] *See id.* ch. 71, § 37G(a) ("The power of . . . any teacher . . . to maintain discipline upon school property shall not include the right to inflict corporal punishment upon any pupil.").

[82] *See id.* ch. 231 § 85Q (2002) ("Any person who maintains an artificial condition upon his own land shall be liable for physical harm to children trespassing thereon if *(a)* the place where the condition exists is one upon which the land owner knows or has reason to know that children are likely to trespass, *(b)* the condition is one of which the land owner knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, *(c)* the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, *(d)* the utility to the land owner of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and *(e)* the land owner fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.").

[83] 390 N.E.2d 716 (Mass. 1979).

[84] *See id.* at 717.

[85] *See id.* at 720.

[86] *Id.*

[87] *See* Custody of a Minor, 483 N.E.2d 473, 477 (Mass. App. Ct. 1985) (holding that the general rule that parents have a fundamental right to the custody of their children is not absolute but must be considered with all the other factors, with primary reference to the welfare of the child).

[88] *See id.*

stake.[89] The state's interest in the child is strong enough that it may take a child from its parents without consent if it is in the "best interests of the child."[90] In fact, as one SJC justice opined, "the primary purpose of the adoption statute . . . is undoubtedly the advancement of the best interests of the subject child."[91]

Additionally, cases where parents' medical decisions will jeopardize the health or safety of the child also illustrate the state's responsibility to protect the "best interests of the child."[92] For example, in *Custody of a Minor*, the SJC upheld a court order requiring that a three year-old child undergo chemotherapy treatments and that the child's parents discontinue treating the child with laetrile and other metabolic therapy.[93] The SJC noted that "it is only under serious provocation that [the court will] permit interference by the State with parental rights."[94] In this case, it was Massachusetts' policy of protecting the physical safety of its children that constituted a serious enough provocation to interfere with the strong rights of parents to make decisions about the welfare of their children.[95]

2. Massachusetts Criminal Statutes

Under Massachusetts law, any instance of assault and battery is subject to criminal penalties.[96] Massachusetts defines assault and battery as the "intentional and unjustified use of force upon the person of another, however slight."[97] It follows that if an adult uses unjustified force against a child, he or she will be subject to criminal penalties in addition to any civil penalties that directly relate to

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[89] *See* MASS. GEN. LAWS ch. 210, § 3 (2002). In determining the best interests of the child, courts consider: (1) ability, capacity, fitness, and readiness of child's parents or other specified person to assume parental responsibility; and (2) plan proposed by department or other agency initiating petition along with parental nomination of caretaker in extended family. Petition of Dep't of Social Serv. to Dispense with Consent to Adoption, 491 N.E.2d 270, 274-75 (Mass. App. Ct. 1986).

[90] *Id.* § 3(a) ("Whenever a petition for adoption is filed by a person having the care or custody of a child, the consent of the persons named in section 2, other than that of the child, shall not be required if: (i) the person to be adopted is 18 years of age or older; or (ii) the court hearing the petition finds that the allowance of the petition is in the best interests of the child . . . .").

[91] Adoption of Tammy, 619 N.E.2d 315, 318 (Mass. 1993) (granting joint custody of a child conceived by artificial insemination by the non-biological mother's cousin to two unmarried women).

[92] *See* Custody of a Minor, 393 N.E. 2d 836, 843 (Mass. 1979).

[93] *See id.* at 846.

[94] *Id.*

[95] *See id.* at 843-44; *see also* MASS. GEN. LAWS ch. 119, § 24 (2002).

[96] *See* MASS. GEN. LAWS ch. 265, § 13A (2002) ("Whoever commits an assault or an assault and battery upon another shall be punished by imprisonment for not more than two and one half years in a house of correction or by a fine of not more than five hundred dollars.").

[97] Commonwealth v. McCan, 178 N.E. 633, 635 (Mass. 1931).

the specific situation.

C. Administrative Regulations

While the state's general rule regarding custody of children favors a parent's fundamental right to the custody of his or her children,[98] this right is not absolute because the welfare of children is also of primary concern to the public.[99] The Massachusetts Department of Social Services ("DSS") has a strong interest in protecting children, even if it means taking them away from their parents and giving custody to the state.[100] DSS regulations provide that when DSS obtains custody of a child,[101] "the physical safety of the child [is] of paramount concern."[102]

D. Common Law

Absent prior legislative expression on the subject, courts proceed cautiously when basing a public policy on common law.[103] Judicial decisions are adequate sources of public policy, as long as there is ample legislation to support them.[104] There is little Massachusetts caselaw articulating the policy of protecting children beyond the assumption that such a policy exists,[105] but further support can be found in the decisions of other courts in the geographical region.[106]

Massachusetts courts can look to Connecticut opinions as a source of caselaw regarding the public policy of protecting children.[107] For example, in *State v. AFSCME*,[108] a Connecticut case, the trial court vacated an arbitration award that ordered the reinstatement of an employee who was dismissed from his position as

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[98] *See Custody of a Minor*, 483 N.E.2d 473, 477 (1985).

[99] *See* Care & Protection of Three Minors, 467 N.E.2d 851, 857-60 (Mass. 1984); Custody of a Minor 467 N.E.2d 1286, 1289-90 (Mass. 1984); Custody of a Minor, 452 N.E.2d 483, 489-90 (Mass. 1983); Bezio v. Patenaude, 410 N.E.2d 1207, 1215 (Mass. 1980); Guardianship of a Minor, 474 N.E.2d 192, 195 (Mass. App. Ct. 1985).

[100] *See Custody of a Minor*, 393 N.E.2d at 383.

[101] *See* MASS. GEN. LAWS ch. 119, § 24 (2002).

[102] MASS. REGS. CODE tit. 110, § 5.12(1)(a) (1981).

[103] *See* Rowatt, *supra* note 69, at 338.

[104] *See id.*

[105] *See Geller II*, 755 N.E.2d at 1252 (Ireland, J., concurring) ("In what is almost too obvious for discussion, ample statutory, administrative, and judicial sources make unmistakably clear, the protection of children, particularly those in elementary school, is a 'well defined and dominant' public policy of the Commonwealth.").

[106] *See* David Blumberg, *High Court Study: Influence of the Massachusetts Supreme Judicial Court on State High Court Decisionmaking 1982-1997: A Study in Horizontal Federalism*, 61 ALB. L. REV. 1583, 1592 (1998).

[107] *See id.* at 1585-86.

[108] 758 A.2d 387, 390-91 (Conn. 2000) ("That the protection and nurturing of children is an important public policy is almost too obvious for discussion.").

a driver of children because he had been convicted of possession with intent to sell drugs.[109] The appellate court affirmed, holding the award contrary to the state's public policy of protecting and nurturing children.[110] The court did not belabor the point beyond a quick synopsis of the state's general statutes: "The continuing welfare of the child is a matter of legitimate state interest."[111] Additionally, beyond Connecticut caselaw, there are countless references in other states' decisions to public policies that protect children.[112]

E. General Notions of Right and Wrong

The importance of protecting children is illustrated in political commentary which often reflects a community's general notions of right and wrong. Massachusetts House Representative Mike Festa[113] recently stated, when referring to proposed legislation to protect at-risk children by placing them in "loving and caring homes," that "[o]f all the things that government can do, protecting those who are most vulnerable is among the most important."[114]

In addition, the American Bar Association ("ABA") looked beyond the legal community and called on the community at large to protect the best interests of children in order to ensure their health, safety, and futures.[115] The ABA also called for tougher enforcement of existing laws to protect children from violence.[116]

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[109] *See id.*

[110] *See id.*

[111] *See id.*

[112] *See, e.g.*, Kia P. v. McIntyre, 235 F.3d 749 (2d Cir. 2000); AFSCME v. Dep't of Cent. Mgmt. Serv., 671 N.E.2d 668 (Ill. 1996) (stating that the "compelling public policy" of promoting the welfare, safety, and protection of children outweighed any concern for timeliness or preserving the arbitration rights of unions); *Faherty*, 477 A.2d at 1262 (stating that traditionally, "courts under the doctrine of *parens patriae* have been entrusted to protect the best interests of children. Children's maintenance, custody-visitation, and overall best interests have always been subject to the close scrutiny and supervision of the courts despite any agreements to the contrary"); Miller v. Miller, 620 A.2d 1161 (Pa. 1993) (finding a separate "best interest of the child" beyond that of the parents' interests, as determined by the trial court).

[113] Representative Festa is a Democrat from Melrose.

[114] State Representative Mike Festa, *Protecting Children,* Apr. 1, 2002, *available at* http://www.mikefesta.com/children.html ("Legislators have an obligation to protect vulnerable and abused children. This legislation is a first step in accomplishing our collective duty. Violence, abuse, and neglect should never be words that are used to describe one's childhood. Adoptive families can provide love, laughter, and learning in a stable household free from fear and violence. We owe this protection to our children. It is our duty.").

[115] *See* Martha Barnett, *The 1st Priority is the Children*, CHI. DAILY L. BULLETIN, Apr. 21, 2001.

[116] *See id.*

The cumulative weight of constitutions, statutes, administrative regulations, the common law, and general notions of right and wrong supports the conclusion that there is a clear and strong national conscience calling for the protection of children from physical harm inflicted on them by their teachers.

IV. THE SJC'S TEST FOR OVERTURNING ARBITRATION AWARDS

The SJC has used a narrow test for overturning arbitration awards on public policy, a test fashioned after the Supreme Court's language in *W.R. Grace*.[117] "Because the public policy exception allows the court to by-pass the normal heavy deference accorded to arbitration awards and potentially to 'judicialize' the arbitration process, the judiciary must be cautious about overruling an arbitration award on the grounds that it conflicts with public policy."[118] The SJC's test is narrower than the *W.R. Grace* test because it includes two additional elements.[119] The SJC test thus avoids the arbitrary nature of a judge's whims.[120]

The SJC established a three-pronged test for determining whether a public policy violation is strong enough to overturn and arbitration award in *Massachusetts Highway Dep't v. American Federation of State, County, and Municipal Employees, Council 93*.[121] The three prongs of the test are: (1) the violation must be of a clear and well-defined public policy;[122] (2) the violation of this policy must be disfavored conduct that relates to the worker's employment;[123] and (3) the reinstatement award must pose a direct threat to the safety of the public.[124]

A. A Clear and Well-Defined Public Policy

Courts should avoid imposing a judge's arbitrary ideas of what is or is not public policy to overturn an arbitration award because general considerations of public interest are not the sort that permit courts to set aside an arbitration award.[125] To avoid appearing arbitrary, the court must ascertain the policy by reference to laws and legal precedents.[126] The policy must be "properly framed"

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[117] *See W.R. Grace*, 461 U.S. at 766; City of Lynn v. Thompson, 754 N.E.2d 54, 61 (Mass. 2001); *Bureau of Special Investigations*, 722 N.E.2d at 444; *Mass. Highway Dep't*, 648 N.E.2d at 444-43.

[118] *Bureau of Special Investigations*, 722 N.E.2d at 444 (quoting *E.I. DuPont*, 790 F.2d at 615).

[119] *See id.*

[120] *See* Ray, *supra* note 63, at 822.

[121] *See Mass. Highway Dep't*, 648 N.E.2d at 433-34.

[122] *See id.*

[123] *See id.*

[124] *See id.*

[125] *See id.* at 433 (citing *United Paperworkers*, 484 U.S. at 44).

[126] *See Mass. Highway Dep't*, 684 U.S. 433 (citing *W.R. Grace*, 461 U.S. at 766).

and "clearly shown."[127] The court may not simply formulate a policy; it must review laws and legal precedent "in order to demonstrate that they establish a 'well-defined and dominant' policy."[128] If the public policy asserted is simply one "from general considerations of supposed public interest," then it will not pass this prong of the test.[129] The conduct in question must violate more than just a policy that makes sense.[130] The court must ascertain the policy by standards clearly and explicitly established by reference to laws and legal precedents.[131]

B. Conduct Related to the Worker's Employment

Once a clear public policy has been established, a court can decide when an award violates such a policy.[132] Courts consistently require that the conduct leading to dismissal or punishment relate to the core of the employee's duties.[133] Under this prong of the SJC test, the court must ask whether an established public policy condemns the performance of employment activities in the manner engaged in by the employee.[134]

To overturn an arbitration award, it is not enough that the conduct cause some harm, even if the harm violates a clear public policy.[135] The exception to the finality of an arbitration award does not address generally disfavored conduct, only disfavored conduct that is integral to the performance of employment duties.[136] Arbitration awards reinstating discharged employees are not upheld if the public policy relates to the worker's employment and the offense goes to the heart of the worker's responsibilities.[137] Courts do not want the employer and its customers or clients to suffer from an award that reinstates an employee who clearly violated a policy directly related to his or her work.[138]

Additionally, a rule limiting the public policy exception to conduct integral to the performance of employment duties allows the courts to limit the exception to those cases where it is really needed. The violation must *directly relate* to the worker's employment and employee's actions and must go to the heart of his responsibilities; otherwise, there is no threat to the safety of the public and, therefore, no need to terminate the employee.[139]

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[127] *Id.*

[128] *United Paperworkers*, 484 U.S. at 43-44.

[129] *See W.R. Grace*, 461 U.S. at 766.

[130] *See United Paperworkers*, 484 U.S. at 44.

[131] *See id.*

[132] *See Mass. Highway Dep't*, 648 N.E.2d at 433.

[133] *See United Paperworkers*, 484 U.S. at 44.

[134] *See Mass. Highway Dep't*, 648 N.E.2d at 434.

[135] *See id.*

[136] *See id.*

[137] *See id.*

[138] *See id.*

[139] *See Mass. Highway Dep't*, 648 N.E.2d at 443; *U.S. Postal Serv. v. Am. Postal Workers Union*, 736 F.2d 822, 823 (1st Cir. 1984).

In *Delta Air Lines v. Air Line Pilots Ass'n, International*, Delta fired an airline pilot for flying while intoxicated.[140] The Eleventh Circuit held that the pilot's employment was inextricably part of the offensive conduct that violated the public policy against airline pilots operating an aircraft while under the influence of alcohol.[141] On the other hand, there would be no need to make a public policy exception for a situation in which a person abuses his or her children and, as a result, is fired from his or her job driving a city bus.[142] While there is a clear policy against hitting one's own children, it is difficult to understand how this will affect the employee's performance on the job.

C. *Threat to Public Safety*

Upon determination that the conduct relates to the worker's employment, a court must decide whether the arbitration award threatens the safety of the public.[143] "[A]rbitration awards reinstating employees are upheld if the employee's conduct, even though harmful, . . . did not pose a special risk to the public."[144]

The test for whether there is a threat to public safety asks if the arbitration award itself, not the reinstatement of the employee, violates a clear public policy.[145] Reinstating an employee would not have to be illegal for an arbitration award to violate a clear public policy.[146] An award endorsing conduct that violated the public's safety violates public policy, and the court must not enforce it.[147]

V. THE MATTER BETWEEN JAMES GELLER AND BEVERLY PUBLIC SCHOOLS

James Geller was a sixth-grade teacher with professional status at Memorial Middle School in Beverly, Massachusetts for over twenty years.[148] In November 1995, Geller yelled at his students to the point that they felt uncomfortable being in class, and a parent wrote a letter to the school.[149] After the assistant principal warned Geller to refrain from such conduct, Geller's actions escalated to physical force against students on three separate occasions in May of 1996. On May 22, Geller pushed or threw one student against a locker and then pushed the student's

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[140] *See Delta Air Lines v. Air line Pilots Ass'n, Int'l*, 861 F.2d 665, 666-68 (11th Cir. 1988).

[141] *See id.* at 674.

[142] *See id.*

[143] *See Mass. Highway Dep't*, 648 N.E.2d at 434; Exxon Shipping Co. v. Exxon Seaman's Union, 993 F.2d 357, 367 (3d Cir. 1993).

[144] *Mass. Highway Dep't*, 648 N.E.2d at 434; *Exxon Shipping*, 993 F.2d at 367.

[145] *See Mass. Highway Dep't*, 648 N.E.2d at 434; *Exxon Shipping*, 993 F.2d at 367.

[146] *See Delta Air Lines*, 861 F.2d at 671.

[147] *See Exxon Shipping*, 993 F.2d at 360.

[148] *See Geller Arbitration*, *supra* note 6, at 17.

[149] *See id.* at 5.

head, forcing him against the wall next to the lockers.[150] On May 23, Geller poked a student in the back when he would not sit immediately. Geller then shoved the student, causing him to fall on top of a desk. Geller also grabbed the student by the hand and pulled him over to the teacher's desk. This student did not return to class for the rest of the year for fear of being hurt again by Geller.[151] On or about May 27, Geller grabbed a student who was humming and pushed him against the door and then against a locker, while screaming and yelling at him.[152]

Subsequently, Memorial's principal, with the approval of the Superintendent of Beverly Public Schools, dismissed Geller for conduct unbecoming a teacher.[153] The principal alleged Geller used corporal punishment against students, which is prohibited by Massachusetts General Law, chapter 71, section 37G.[154] Geller appealed his dismissal to an arbitrator pursuant to Massachusetts General Law, chapter 71, section 42.[155]

The arbitrator found that Geller "inappropriately touch[ed] and yell[ed] at students in May 1996," as alleged by the school district and the students.[156] Additionally, he found that Geller's behavior was "totally inappropriate," "unacceptable," and "cannot be condoned."[157] The arbitrator inconsistently proceeded to reinstate Geller, concluding that dismissal was inappropriate because of Geller's "fine record" and he had "no prior disciplinary problems of any kind."[158] While the arbitrator used statutory language to support his conclusion,[159] he did not support this language with any explanation of these findings.

The school board appealed the arbitration decision,[160] basing its request to have the arbitration award set aside on four grounds. First, it claimed the award was in excess of the arbitrator's powers because the statutory requirement to consider

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[150] *See id.* at 2-5.

[151] *See id.*

[152] *See id.*

[153] *See* MASS. GEN. LAWS ch. 71, § 42, ¶ 3 (2002) (providing that a "teacher with professional status . . . shall not be dismissed except for . . . conduct unbecoming a teacher . . . .").

[154] *See id.* § 37G(a) ("The power of . . . any teacher . . . to maintain discipline upon school property shall not include the right to inflict corporal punishment upon any pupil."); *id.* § 37G(b) (providing that the only time a teacher may use reasonable force with students is to protect pupils, other persons, or themselves from an assault by a pupil).

[155] *See id.* § 42, ¶ 4 ("A teacher with professional status may seek review of a dismissal decision within thirty days after receiving notice of his dismissal by filing petition for arbitration with the commissioner.").

[156] *See Geller Arbitration*, *supra* note 6, at 15.

[157] *Id.* at 16.

[158] *Id.* at 16-17.

[159] *See id.* at 18 ("The dismissal of James Geller [was] not for just cause within the meaning of Chapter 71, Section 42 . . . . It is in the best interest of the students that [Geller] be retained.").

[160] *See* MASS. GEN. LAWS ch. 150C, § 11 (2002) (providing for judicial review by the district court).

the best interests of the pupils was not properly fulfilled. Second, the award offended the public policy protecting children. Third, the award violated the prohibition against corporal punishment. Finally, the arbitrator wrongly declined to accept certain documentary material in evidence.[161] While the district court upheld the arbitrator's award,[162] the Appeals Court reversed, basing its decision on a clear public policy of protecting students from physical harm.[163]

A. The Appeals Court Decision Finding Public Policy an Exception to Arbitral Finality

The Appeals Court vacated the Superior Court's decision to uphold the arbitrator's award reinstating James Geller as a teacher in the Beverly Public Schools.[164] The court found a clearly defined public policy, specific conduct that violated it, and a direct threat to Geller's students if he were reinstated.[165]

1. A Clear and Well-Defined Public Policy

The Appeals Court found a clear and well-defined public policy against the use of physical force, however slight, by a teacher against his or her students.[166] The Appeals Court found a public policy of protecting children by reference to Massachusetts Generals Laws with criminal and civil penalties.[167] The court referenced the Massachusetts statutes that impose criminal penalties for assault and battery and prohibit physical and corporal punishment of school children.[168] Additionally, the court found "evidence of a public policy with respect to the protection of young people that is well defined and dominant" in a statute that requires certain persons to report suspected abuse in children.[169] As discussed previously, if a policy is firmly rooted in statutes, then it need not be elaborated upon in legal opinions.[170]

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[161] *See Beverly Sch. Dist.*, No. 97-4739-A, at 23.

[162] *See id.* at 25.

[163] *See Geller I*, 737 N.E.2d at 879.

[164] *See id.*

[165] *See id.*

[166] *See* MASS. GEN. LAWS ch. 71, § 37G(a) ("The power of the school committee or of any teacher or any other employee or agent of the school committee to maintain discipline upon school property shall not include the right to inflict corporal punishment upon any pupil."); *id.* § 37G(b) ("The provisions of this section shall not preclude any member of the school committee or any teacher or any employee or agent of the school committee from using such reasonable force as is necessary to protect pupils, other persons, and themselves from an assault by a pupil. When such an assault has occurred, the principal shall file a detailed report of such with the school committee.").

[167] *See Geller I*, 737 N.E.2d at 878.

[168] *See id.*; MASS. GEN. LAWS ch. 265, § 13A (2002); *id.* § 37G.

[169] *See Geller I*, 737 N.E.2d at 878; MASS. GEN. LAWS ch. 119, § 51A (2002).

[170] *See* Rowatt, *supra* note 69, at 331-32.

2. Conduct Related to the Worker's Employment

The court found it important that the arbitrator made factual findings of physical force.[171] This establishes that the conduct is not disfavored conduct in general but is specific conduct that violates a well-defined statute against corporal punishment in the classroom.[172] "Geller has on more than one occasion engaged in conduct, as a teacher, that is contrary to the statute."[173] The court found that reinstating a teacher "who on three separate occasions forcibly pushed, shoved, jabbed, dragged, and knocked down, or slammed into a locker three different sixth-grade students"[174] violated public policy because the conduct was "inextricably related to his employment duties."[175]

3. Threat to Public Safety

The court found Geller's conduct "sufficient to show that his continuing as a teacher poses a special risk of injury, physical and psychological, to students."[176] The safety of the school children of Beverly, all of whom are members of the public, was directly threatened by Geller's reinstatement.[177] The court found this case in line with previous SJC opinions in which "a policy [is] so clear and well defined that termination, despite an arbitrator's award, has been upheld" where the "physical safety of members of the public" is involved.[178]

B. The SJC decision

The SJC vacated the Superior Court's judgment and remitted the matter to the arbitrator without adopting the Appeals Court's rationale.[179] The SJC's decision, in which three judges concurred, contained only two sentences.[180] There was no majority opinion.[181] Justice Cordy concurred in the decision to vacate the Superior Court judgment and focused his opinion on the arbitrator's scope of authority.[182] Justice Ireland also concurred in the result and focused his decision on the rationale of the Appeals Court.[183] The dissent rejected both concurring

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[171] *See Geller I*, 737 N.E.2d at 875.
[172] *See* MASS. GEN. LAWS ch. 71, § 37G(a).
[173] *Geller I*, 737 N.E.2d. at 879.
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *See id.*
[178] *Geller I*, 737 N.E.2d. at 879.
[179] *See Geller II*, 755 N.E.2d at 1242.
[180] *See id.* ("The judgment of the Superior Court upholding the arbitration award is vacated. The matter is recommitted to the arbitrator for further proceedings.").
[181] *See id.*
[182] *See id.* at 1242-50 (Cordy, J., concurring).
[183] *See id.* at 1251-52 (Ireland, J., concurring).

opinions as ways of undermining arbitral finality.[184]

Justice Cordy argued that the arbitrator's award should be vacated because the arbitrator exceeded his scope of authority.[185] Cordy asserted that once the arbitrator found that Geller had engaged in the alleged conduct, he did not have the power to substitute his own judgment of what the penalty should be for the judgment of the school district.[186] Cordy focused on the difference between this case, which involved a statute as the source of the authority to arbitrate, and cases in which a collective bargaining contract is the source of the authority to arbitrate.[187] This important difference, according to Cordy, determines "how the arbitrator's powers are to be ascertained and interpreted."[188] An arbitrator in the collective bargaining context has more power to fashion a remedy that will be relatively free from judicial review than an arbitrator in a legislated arbitration case.[189] Cordy did not think the court should give as much deference to this arbitrator because the Massachusetts Legislature did not cede the authority to determine sanctions for teacher misconduct to the arbitrator.[190]

Justice Ireland, on the other hand, would adopt the Appeals Court's rationale, as described in Section V(A) of this Note.[191] Ireland recognized that when a strong and clear public policy, as ascertained by reference to laws and legal precedents, has been violated, the court should overrule an arbitrator's award.[192] Ireland found it unnecessary to reach the broader question, examined in Cordy's opinion, of an arbitrator's authority to modify the sanction of dismissal.[193]

VI. CONCLUSION

The SJC ruling was so divided that it is difficult to discern a clear precedent. Justice Ireland's well-reasoned opinion, however, endorses both the public policy of protecting children and the importance of arbitration in teacher dismissal cases. His opinion supports a very narrow reading of the common law rulethat allows a court to vacate an arbitration award on public policy grounds, thereby preserving the sanctity of arbitration awards. At the same time, Ireland's clear articulation of the public policy protecting children extends the courts adequate leeway to overturn awards that threaten children's safety. Justice Cordy's reasoning, on the other hand, would expose judicial opinions to much criticism. If courts begin to review the arbitrator's authority in every legislated arbitration case, they will

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[184] *See Geller II*, 755 N.E.2d at 1258 (Cowen, J., dissenting).
[185] *See id.* at 1245 (Cordy, J., concurring).
[186] *See id.* at 1247.
[187] *See id.* at 1245.
[188] *Id.*
[189] *See Geller II*, 755 N.E.2d at 1245 (Cordy, J., concurring).
[190] *See id.* at 1246.
[191] *See id.* at 1251 (Ireland, J., concurring).
[192] *See id.* at 1252.
[193] *See id.* at 1251 n.1.

have to probe much further into cases than they do at present. If courts review legislated arbitration without substantial deference to the arbitrator's authority and fact finding, the rationale behind legislated arbitration is undermined. Time and money, two precious judicial resources, will be wasted in the process.

Justice Ireland was correct to focus on the narrow question of public policy. The key to Ireland's opinion is its focus on a narrow exception to a well-established rule. Limiting the exception to arbitral finality in such a clear and well-defined way emphasizes that the exception to arbitral finality is just that, an exception. An exception implies that deviations will occur only when there is an especially compelling reason. Recognition of a public policy exception to arbitral finality would give the SJC the power to overturn that award without greatly upsetting the strong policy in favor of arbitration. An exception to the rule of arbitral finality recognizes, by definition, the strength and importance of the rule itself. It recognizes that sometimes there are extreme situations where such a rule will have a negative effect on the community and should yield to more important principles. By allowing courts to refrain from manipulating rules to make them accommodate a given set of facts, exceptions maintain the integrity of rules for general application.

It is important to clearly articulate a limited public policy exception to the finality of arbitration awards in order to ensure the sanctity of arbitration awards generally. Courts should subject an arbitration decision to review only in cases where it is clear that the public will be affected and the community has a stake in the outcome of the case. Exceptions that are truly in the public interest should be determined by reference to constitutions, statutes, and applicable legal precedents to prevent the create of exceptions that do not stand the test of time. The public policy of protecting children is a good illustration of this rationale. The protection of children is a popular and well-supported policy in Massachusetts and nationwide, and it illustrates a rare but important exception to the notion of arbitral finality. By limiting judicial review of arbitration decisions to cases where the safety of children is involved, the exception supports the sanctity of arbitral finality.

In contrast to Justice Ireland's opinion, Justice Cordy's opinion relies too heavily on the difference between collectively bargained arbitration and legislated arbitration. Courts generally defer to collectively bargained arbitration awards not only because they prefer to save judicial resources, but also because the parties have agreed to submit the matter to arbitration. The courts should not defer less to legislated arbitration because the parties involved do not have a collective bargaining agreement. It is doubtful that the SJC would consciously defer to the judgment of private parties but not to the Massachusetts Legislature. Deference to the arbitrator is just as legitimate when the Legislature submits the matter to arbitration as when private parties decide to arbitrate. If this case were to be read the way Justice Cordy argues, then the authority of arbitrator would be eroded under the guise of deference to the parties' intentions.

The courts will maintain the integrity of the arbitration process by not reaching the question of the arbitrator's authority. Arbitrators' powers are derived from

their expertise in certain areas.[194] The courts should not usurp this power by reviewing the arbitrator's decision or determining the arbitrator's authority. The courts would be duplicating the entire process and rendering it superfluous. The courts should instead concern themselves with the lawfulness of the award.[195] This is where the court has its expertise. The arbitrator possesses no special expertise where the determinations to be made are primarily issues of public law.[196] The public policy question is thus better left to judges who are experts in the law of the land.[197] Arbitrators chosen for their expertise in other areas should have discretion in deciding factual questions and in fashioning remedies. It is only when a remedy offends a clear and well-defined public policy that courts should interfere with arbitral finality.

Daryl DeValerio Andrews

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[194] *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974).

[195] *See* Botany Indus., Inc. v. New York Joint Bd., Amalgamated Clothing Workers of Am., 375 F. Supp. 485, 490 (S.D.N.Y. 1974).

[196] School Comm. of Hanover v. Curry, 325 N.E.2d 282, 285-86 (Mass. App. Ct. 1976).

[197] *See id.* at 286 n.11.