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Social Policy in Title VII Arbitrations

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By Steven R. Wolfson*

Introduction

"Where the collective-bargaining agreement conflicts with Title VII, the arbitrator must follow the agreement."[1]

With these words, the United States Supreme Court fanned a conflagration which has engulfed the labor relations world. The controversy centers on the propriety and extent to which labor arbitrators may consider the social policy underlying Title VII of the 1964 Civil Rights Act[2] in deciding discrimination grievances. This article examines the dilemma arbitrators face in attempting to divorce arbitration from social policy by analyzing Title VII arbitrations where social policy has had a major impact.

The notion that social policies are reflected in the law is based on the idea that laws are neither enacted, nor do they operate, "in a vacuum."[3] The arbitration process clearly parallels the law in this respect. Although outwardly judging labor relations, arbitrators also judge human relations, since contract disputes arise by virtue of human disagreements. Like the opinions of judges, the opinions of arbitrators often reflect social policies which transcend the results in particular cases. It is therefore impossible to divorce social policy from arbitration.

In recent years, Title VII has been a fertile ground for weaving social policy into the fabric of labor arbitration. Unquestionably, the single most important social policy behind Title VII is to remove "artificial, arbitrary, and unneces-

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

[2] 42 U.S.C. § 2000e-2 (1976) prohibits employment discrimination on the basis of "race, color, religion, sex, or national origin."

[3] This phrase was used by arbitrator Daniel Dykstra in Kaiser-Permanente Medical Care Program, 64 Lab. Arb. Rep. 245, 247 (1975).

sary barriers to employment"[4] which are based upon race, religion, sex or nationality. The vastness of this policy is underscored by the massive debates and lawsuits which it generates. Arbitrators are daily adjudicating Title VII grievances, and in so doing they simply cannot ignore the policy behind the law. An arbitrator who closes his or her eyes to the implicit policy considerations can never truly resolve a dispute. It is the position of this article that arbitrators must consider social policy in resolving Title VII grievances.

I. THE DILEMMA BETWEEN ARBITRATION AND THE LAW

The debate concerning arbitrators considering social policy under Title VII grew out of the more general question of whether arbitrators should consider the *law* of Title VII.[5] An understanding of this dilemma is necessary before exploring the more profound problems inherent in arbitrators weighing social policy.

A. *Is the Arbitrator Limited to Contractual Interpretation?*

Two divergent philosophies provide the crux of the debate over legal determinations being made by arbitrators. Opponents of arbitrators examining the law believe that because arbitration is created contractually, the arbitrator owes uncompromising fidelity to the contract. In the event of a conflict between the law and the labor agreement, "the arbitrator should respect the agreement and ignore the law."[6] Arbitral considerations may extend to the "law of the shop," but any

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[4] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[5] *See e.g.*, Howlett, *A Reprise*, in DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION 64 (C. Rehmus ed. 1969); Meltzer, *The Role of Law in Arbitration: A Rejoinder*, in DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION 58 (C. Rehmus ed. 1969); Mittenthal, *The Role of Law in Arbitration*, in DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION 42 (C. Rehmus ed. 1969); McKelvey, *Sex and the Single Arbitrator*, 24 INDUS. & LAB. REL. REV. 335 (1971); Meltzer, *Labor Arbitration and Discrimination: The Parties' Process and the Public's Purposes*, 43 U. CHI. L. REV. 724 (1976); Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. CHI. L. REV. 30 (1971).

[6] Meltzer, *Labor Arbitration and Overlapping Conflicting Remedies for Employment Discrimination*, 39 U. CHI. L. REV. 30, 33 (1971).

movement into the public law exceeds the arbitrator's jurisdiction.[7]

Proponents assert that arbitrators should have freedom to interpret the labor agreement within its legal context. Since an illegal contract is no contract, arbitrators lack authority to consider illegal contract provisions. They must therefore consider the contract in light of the public law, which logically requires a consideration of the social policy behind that law.

Both philosophies create a dilemma for arbitrators. In case of a conflict between the labor agreement and the law, common sense dictates that in the final analysis the law will prevail. Yet, should an arbitrator who is engaged to resolve contractual, as distinguished from legal, disputes be permitted to look beyond the actual contract into legal considerations?

B. *Judicial Response: Constrained Within the Contract*

Courts have held arbitrators correct in putting the contract ahead of the law where there is a direct conflict between the two. A recent case, *Telephone Workers Local 827 v. New Jersey Bell Telephone Company,*[8] illustrates this point. In *Telephone Workers Local 827,* the New Jersey Bell Telephone Company and the United States Equal Employment Opportunity Commission (EEOC) had joined in a judicial consent decree which established goals and timetables for correcting an imbalance in racial, ethnic and sexual compositions in eleven different job classifications. The consent decree contained an override provision in which the company agreed that it should "necessarily promote one who is not the most senior or hire a member of the under-utilized race or sex."[9] The purpose of this provision was that in certain circumstances the consent decree should supercede conflicting provisions of the collective bargaining agreement, most notably the seniority provision, the literal interpretation of which could impede fulfillment of the company's goals and timetables.

One of these goals was to employ more men as operations clerks, a job traditionally held almost exclusively by women.

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[7] *Id.*

[8] 450 F. Supp. 284 (D.N.J. 1977), *aff'd,* 584 F.2d 31 (3d Cir. 1978).

[9] *Id.* at 288-89.

Bertha Biel, a longtime woman employee of the company, applied for a promotion as an operations clerk but was rejected because the company was lagging in its goal to hire more men for that job. The company hired a new man "from off the street."[10] Consequently, Biel's union filed a grievance, alleging company violation of the seniority and nondiscrimination provisions of the labor agreement.

The grievance proceeded to arbitration where an arbitration panel held in favor of the union on both its allegations, and ordered the company to promote Biel to operations clerk and pay her the difference in salary between the two positions from the time the outsider was hired. In reaching this decision, the arbitration panel followed the agreement eschewing the law and the consent decree.

> [W]henever . . . primary jurisdiction to adjudicate the question of law resides with the courts, the arbitrator should refrain from and make it clear that he is not deciding the issue of law but only the narrower question of contract interpretation.[11]

Citing its obligations under the consent decree, the company refused to comply with the arbitration award. The union thereupon filed suit under section 301 of the Labor Management Relations Act of 1947 to enforce the award.[12]

The federal district court rejected the union's demand and vacated the arbitration award on the ground that it conflicted with the terms of the consent decree. Although vacating the arbitration award, the court held that "[t]he arbitrator . . . properly refrained from deciding the merits of the application of the Consent Decree."[13] Implicit in the court's opinion was the conclusion that the reasoning of the arbitrator was correct, even though the decision was wrong. How could the arbitrator have correctly reasoned to the wrong conclusion? Alas, this result illustrates the dilemma of ignoring the law and respecting the agreement.

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[10] *Id.* at 286.

[11] *Id.* at 291.

[12] Arbitration decisions are enforceable under the Labor Management Relations Act, 29 U.S.C. § 185(a). *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

[13] 450 F. Supp. at 292.

The problem is not purely academic. In the real-life industrial world of punching time clocks and standing on assembly lines, arbitration is intended to resolve labor disagreements with a minimum of production disruption. Yet, here is a situation where arbitrators must decide wrongly if they are to decide correctly. As ridiculous as this conclusion seems, it is precisely the one which is compelled under opinions such as *Telephone Workers Local 827* and, indeed, it appears to be the law. As the court in *Telephone Workers Local 827* declared: "[T]he arbitrator's province is limited to the contract between the parties and so much of his decision as rests solely upon considerations extrinsic to the contract is subject to plenary review by the court."[14]

C. *The Problem of Title VII Contractual and Legal Coextensive Prohibitions*

At this point, the parameters of the arbitrator's dilemma seem fairly well defined. A boundary exists between law and contract, and the arbitrator should not cross the line from the contract into the law. Unfortunately, in Title VII grievances the delineation often is not that clear, in that contractual and legal prohibitions frequently co-exist. Most modern collective bargaining agreements specifically include nondiscrimination clauses which parallel the prohibitions of Title VII.[15]

The incorporation of nondiscrimination provisions into collective bargaining agreements creates the most perplexing dilemma for arbitrators considering the law of Title VII. If the words of the statute are incorporated, often verbatim, into the agreement, why should the arbitrator not consider the law as part of the agreement? More important than the language of such provisions is their intent. Since equal employment opportunity already is the law, why should management and labor incorporate additional nondiscrimination provisions into their agreement? Such provisions are not included as a mere gesture

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[14] *Id.*

[15] In 1973, 74% of 400 sample contracts contained nondiscrimination clauses similar to section 703(a)(1) of Title VII. This figure was up from 46% in 1970, and 28% in 1965. BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 127 (8th ed. 1975).

to the ideal of equal employment opportunity. To the contrary, nondiscrimination provisions have a substantive purpose. Since that purpose is, and can only be, the promotion of equal employment opportunity, the issue "is not whether arbitrators apply the law, but . . . what law they apply."[16]

The quotation cited at the beginning of this article intimated that the Supreme Court has rejected the idea that arbitrators may apply the law of Title VII. The landmark decision in which that quotation appeared, *Alexander v. Gardner-Denver Company*,[17] drew into focus the judicial view of arbitration in the enforcement of Title VII. In *Alexander*, a discharged black employee, Alexander, filed a racial discrimination grievance which proceeded to arbitration. The arbitrator ruled that the employee had been fired for "just cause,"[18] but "made no reference to [the] claim of racial discrimination."[19] Unhappy with this ruling, and after complying with necessary statutory procedure, Alexander filed suit in federal court under Title VII. The primary issue was whether Alexander's prior submission of the Title VII claim to arbitration was an election of remedies or a waiver of his right to sue. The Supreme Court held that it was not. Citing the nationwide policy of equal employment opportunity, the Court held that "final responsibility for enforcement of Title VII is vested with federal courts."[20]

With this issue decided, the Court, for reasons unknown, digressed upon an issue removed from the one at bar. By its digression, the Court attempted to answer the very complex questions relating to arbitration and consideration of the law of Title VII. In a rather contradictory passage the Court first stated that the arbitrator "has no general authority to invoke public laws that conflict with the bargain between the parties,"[21] yet said that the arbitrator may "look for guidance from

[16] Block, *Legal and Traditional Criteria in the Arbitration of Sex Discrimination Grievances*, 32 ARB. J. 241, 243 (1977).

[17] 415 U.S. 36 (1974).

[18] Section six of the collective-bargaining contract required that an employee would not be "discharged, suspended or given a written warning notice except for just cause." *Id.* at 39.

[19] *Id.* at 42.

[20] *Id.* at 44.

[21] *Id.* at 53.

many sources."[22] The Court finally found that "an arbitral decision . . . based 'solely upon the arbitrator's view of the requirement of enacted legislation,' rather than on an interpretation of the collective bargaining agreement . . . will not be enforced. Thus the arbitrator has authority to resolve only questions of contractual rights."[23]

This statement would appear to be a definitive foreclosure of the issue, were it not for a final footnote added by the Court.[24] Although the Court did criticize the practice of arbitrators considering Title VII, it refused to ban the practice completely. In that final footnote the Court suggested a number of principles which could be applied by federal district courts in according "weight" to prior Title VII arbitrations as evidence in subsequent federal suits.[25] In addition, the Court noted: "Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight."[26] This footnote is the famous and frequently cited "footnote 21," which left open a wedge for arbitrators to continue considering Title VII, a practice which not only has refused to die but has flourished.

II. THE DILEMMA BETWEEN ARBITRATION AND SOCIAL POLICY

An even more poignant dilemma than the one between arbitration and the law is found between arbitration and social policy. Law is fairly well defined, but social policy usually exists in an amorphic, uncodified state. The arbitrator therefore knows not where to tread. No guidelines clarify when the arbitrator should retreat to the labor agreement, progress to the social policy or straddle the boundary between the two. Nevertheless, arbitrators often accept the challenge of incorporating social policy in their deliberations.

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[22] *Id.* (quoting United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

[23] *Id.* at 53-54.

[24] *Id.* at 60 n.21.

[25] *Id.* These factors included: "[T]he 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."

[26] *Id.*

A. *The "Just Cause" Concept: Fertile Ground for Policy Infusion*

The "just cause" requirement found in most labor agreements provides a fertile area through which arbitrators may delve into the realm of social policy. Such provisions generally require that employees covered by the contract may not be discharged or otherwise disciplined without "just cause."[27] Grappling with this concept has caused many arbitrators to consider social policy in defining "just cause," particularly in disputes involving personal safety, national security or prior criminal convictions.[28]

1. *Personal Safety Discharges*

When an employer defends a firing on considerations of personal safety, arbitrators are reluctant to question the employer's "just cause" determination. Since a mistake by the arbitrator could cost health or lives, arbitrators tend to be conservative, deferring to the judgment of the employer. This tendency is illustrated in *Pennsylvania Greyhound Lines, Inc.*,[29] where the arbitrator upheld the discharge of a bus driver who failed to "stop, look and listen" at a railroad crossing. The arbitrator acknowledged the danger of second guessing the employer.

> In dealing with the general run of offenses, the proper function of discipline is to correct an employee's conduct; discharge is justified only when an employee's prior disciplinary record indicates that he is incorrigible. It is universally recognized, however, that there are some offenses which are of so serious a nature that the employer cannot properly be required to run the risk of their repetition.[30]

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[27] A study conducted by the Bureau of National Affairs showed that 80 percent of the collective agreements surveyed contained a provision stating that there must be just cause for discharge. 2 COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS (BNA) 40:1.

[28] For an extensive anthology of such cases, see Blumrosen, *Public Policy Considerations in Labor Arbitration Cases*, 14 RUT. L. REV. 217 (1960). *See also* Seitz, *The Arbitrator's Responsibility for Public Policy*, 19 ARB. J. 23 (1964); Summers, *Labor Arbitration: A Private Process with a Public Function*, 34 REV. JUR. U.P.R. 477 (1965).

[29] 19 LAB. ARB. REP. 210 (1952).

[30] Pennsylvania Greyhound Lines, Inc., 19 LAB. ARB. REP. 210, 212 (1952); *accord*,

Thus, in questions involving safety risks, arbitrators focus on the underlying policy of promoting safety.

2. *National Security Discharges*

In the area of discharges based on national security, arbitrators tend to defer less to management's determinations. Perhaps national security poses a less immediate threat than the personal safety of particular, identifiable individuals, thus allowing arbitrators more leeway.

The leading national security decision is *Black v. Cutter Laboratories,*[31] in which an employee was fired for being a member of the Communist party and for falsifying her employment application. The circumstances were exacerbated by the fact that her job, producing antibiotics for both the civilian and military markets, was a sensitive one. An arbitration panel held that the employee had actually been fired for union activity and accordingly ordered her reinstated with backpay.[32] The California Supreme Court vacated the decision, primarily on social policy grounds.

> [A]n arbitration award which directs that a member of the Communist Party who is dedicated to that party's program of "sabotage, force, violence and the like" be reinstated to employment in a plant which produces antibiotics used by both the military and civilians is against public policy, as expressed in both federal and state laws, is therefore illegal and void and will not be enforced by the courts.[33]

Western Express Co., 10 LAB. ARB. REP. 1972 (1948) (discharge sustained for truck driver who was driving while intoxicated). *But see* Couey v. Arrow Coach Lines, Inc., 288 S.W.2d 192 (Tex. Ct. App. 1956) (court enforced arbitration award reinstating a bus driver who violated a company rule against speeding and smoking. Arbitrator had held that the violations did not constitute just cause for discharge). For other notable personal safety cases, *see e.g.,* James Vernor Co., 20 LAB. ARB. REP. 50 (1953) (discharge of boiler operator upheld for getting drunk and falling asleep on job); Northwest Airlines, Inc. 18 LAB. ARB. REP. 656 (1952) (discharge of pilot upheld for series of minor incidents); Standard Oil Co., (Indiana), 14 LAB. ARB. REP. 516 (1950) (discharge upheld for negligently switching gasoline and furnace oil).

[31] 278 P.2d 905 (Cal.), *cert. granted,* 350 U.S. 816 (1955), *cert. dismissed,* 351 U.S. 292 (1956).

[32] *Id.* at 911.

[33] *Id. But see* Foote Bros. Gear & Mach. Corp., 13 LAB. ARB. REP. 848 (1949); Curtis-Wright Corp., 9 LAB. ARB. REP. 77 (1947); Spokane-Idaho Mining Co., 9 LAB. ARB. REP. 749 (1947) (membership in Communist Party insufficient to uphold dis-

It is interesting to note the similarity between *Cutter Laboratories* and *Telephone Workers Local 827.*[34] Recall that in *Telephone Workers,* the arbitrator properly refrained from considering the law and accordingly made an incorrect award.[35] In *Cutter Laboratories,* the arbitrators also eschewed the policy "expressed in both federal and state laws,"[36] and made an incorrect award based upon the narrow contractual ground of

charge). *See also* Carey v. Westinghouse Elec. Corp., 178 N.Y.S.2d 846 (Sup. Ct.), *modified,* 180 N.Y.S.2d 203 (Sup. Ct. 1958), *aff'd mem.,* 161 N.E.2d 216 (N.Y. App. Div. 1959). The appellate division's opinion in *Carey v. Westinghouse* marked a retreat from the earlier New York doctrine found in Int'l Ass'n of Machinists Local 402 v. Cutler-Hammer, Inc., 67 N.Y.S.2d 317 (N.Y. App. Div. 1947), *aff'd mem.,* 74 N.E.2d 464 (N.Y. 1947). Briefly, the *Cutler-Hammer* doctrine held that if a court determined *in the first instance* that a contract provision was "beyond dispute," there could be no arbitration. 67 N.Y.S.2d 318. This principle was criticized by the United States Supreme Court in United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). The Court said that the *Cutler-Hammer* doctrine "could only have a crippling effect on grievance arbitration." *Id.* at 566-67.

New York since has overruled the *Cutler-Hammer* decision both judicially, In Re Wilaka Constr. Co., 216 N.E.2d 696 (N.Y. 1966), and statutorily, N.Y. Civ. Prac. Law § 7501 (McKinney). Thus, courts are no longer free to determine in advance the merits of arbitration disputes. Public policy militates in favor of submitting labor disputes to arbitration; and even where a claim of arbitrability is tenuous, courts still favor arbitration. At minimum, "if the arbitration clause is 'susceptible of an interpretation that covers the asserted dispute,' then it is for the *arbitrator* to decide whether the dispute comes within the scope of the agreement to arbitrate . . . ." Board of Educ. of Buffalo v. Buffalo Council of Supervisors and Adm'rs, 383 N.Y.S.2d 732, 734 (N.Y. App. Div. 1976) (citations omitted) (emphasis added). The current New York view has been enunciated in Gangel v. N. DeGrott, PVBA, 362 N.E.2d 249 (N.Y. 1977).

> [A]n arbitration clause must be read conservatively if it is subject to an equivocal reading . . . . A distinction must be drawn. The agreement to arbitrate must be express, direct, and unequivocal as to the issues of disputes to be submitted to arbitration. But, once there is agreement or submission to arbitration, the scope of the arbitrators is unlimited, and with very limited exceptions, reviewable . . . .

Id. at 250 (citations omitted).

It is still a "threshold" determination "for the courts to decide" whether arbitration of some particular matter would violate public policy. Board of Educ. of Buffalo v. Buffalo Council of Supervisors and Adm'rs, 383 N.Y.S.2d 732, 735 (N.Y. App. Div. 1976). If it would violate public policy, the courts could enjoin arbitration. Enjoinable policy violations include child custody, wills and probate, antitrust and securities actions. For a discussion of arbitrations under the Securities Act of 1933 see notes 45-56 *infra* and accompanying text.

[34] *See* notes 8-14 *supra* and accompanying text for a discussion of *Telephone Workers Local 827.*

[35] *See* notes 13-14 *supra* and accompanying text for a discussion of the arbitrator's dilemma in this situation.

[36] 278 P.2d at 911.

discriminating against union activity. This action may have been proper arbitration procedure, but by refusing to acknowledge the height of the paranoia of Communism during that era the arbitration panel in *Cutter Laboratories* somehow neglected its function. During the 1950's, it is doubtful that any court would have enforced the arbitration award. Although the California Supreme Court's decision in *Cutter Laboratories* may be unpalatable by today's standards, it provides a clear example of a court vacating an arbitral award on policy grounds.

3. *Criminal Conviction Discharges*

The issue in prior criminal conviction discharges is akin to double jeopardy in that a person first is convicted and then punished again by discharge due to the conviction. The policy question is whether it is in the public interest to deny someone a livelihood because of a criminal conviction. The answer depends on the nature of the crime.

The landmark case in this area is *Local 453, International Union of Electrical, Radio & Machine Workers v. Otis Elevator Company,*[37] in which Joseph Calise was convicted of a misdemeanor (willful possession of gambling slips on his employer's premises) and was fined $250.00. Four days after his conviction, Calise was discharged for violating a company rule against gambling on company premises.

Calise grieved the discharge and the dispute went to arbitration. The arbitrator ruled that Calise had not been discharged for "just cause," and ordered him reinstated but without backpay, accrual of seniority or other contract benefits. The arbitration decision relied heavily upon the idea that Calise had paid his debt to society by his conviction, in addition to his loss of backpay, seniority and other benefits from the time of his discharge to the time of the arbitration decision.[38]

Otis Elevator refused to abide by the decision. The union sued Otis to force compliance. The district court denied injunctive enforcement of the award, rejected the union's motion for

[37] 314 F.2d 25 (2d Cir.), *cert. denied,* 373 U.S. 949 (1963).
[38] *Id.* at 26.

summary judgment, and instead granted summary judgment for Otis, thereby vacating the arbitration award.[39] The court held the award to be "void and unenforceable" because it violated an "overriding public policy" and "indulges crime, cripples an employer's power to support the law, and impairs his right to prevent exposure to criminal liability."[40]

From this decision, the union appealed. The Second Circuit Court of Appeals chided the district court for considering perfunctorily the social policy upon which it based its decision.[41] In essence, the Second Circuit disagreed with the district court over interpretation of the policy considerations.[42] Taking judicial notice of New York policy against gambling, the Second Circuit undertook its own assessment of the content of the social policy involved.

Two points emerged. First, the court noted that Calise already had been punished by his conviction as well as by his layoff between the time of his discharge and his reinstatement without backpay or benefits.[43] Second, and more significant, the court took judicial notice of "the important role which employment plays in implementing the public policy of rehabilitating those convicted of crime."[44]

One of the lessons taught by *Otis Elevator* is that social policy can neither be ignored nor treated lightly. The case also

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[39] *Id.* at 27. The district court opinion granting summary judgment is reported at 206 F. Supp. 853 (S.D.N.Y. 1962). Judge Cashin in that case relied on an earlier opinion by Judge MacMahon of the same court in which a motion to enforce the arbitration award was denied. Local 453, International Union of Electrical, Radio & Machine Workers v. Otis Elevator Company, 201 F. Supp. 213 (S.D.N.Y. 1962).

[40] 201 F. Supp. at 218.

[41] 314 F.2d at 28-29.

[42] *Id.* at 29. *Accord,* Metal Products Workers Union, Local 1645 v. Torrington Co., 358 F.2d 103, 106 (2d Cir. 1966).

[43] 314 F.2d at 29.

[44] *Id.* The Court stated:

> [T]here 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, . . . when the arbitrator found no indication that reinstatement would result in repetition of the illegal activity.

Id. Accord, Goodyear Tire & Rubber Co., Houston Chem. Plant v. Sanford, 540 S.W.2d 478 (Tex. Ct. App. 1976); Int'l Ass'n of Machinists v. Campbell Soup Co., 406 F.2d 1223 (7th Cir.), *cert. denied,* 396 U.S. 820 (1969). *But see* Avco Corp. v. Preteska, 174 A.2d 684 (Conn. Super. Ct. 1961).

illustrates that social policy considerations, for arbitrators as well as for judges, are not off-limits. Not only can they be helpful, but they actually can be determinative of whether a decision is correct. For no matter how isolated a particular arbitration award may be in its particular labor context, it must always withstand scrutiny in its overall social setting. For this reason, arbitrators should consider social policy and do so carefully, not superficially.

B. *Judicial Protection of Statutory Rights: A Securities Act Analogy*

Before examining social policy considerations under Title VII as they apply to arbitration, it is instructive to look at an analogous problem in the context of the Securities Act of 1933. In *Wilko v. Swan,*[45] the validity of agreements to arbitrate disputes under the Securities Act of 1933 was questioned. In this case, a client of a securities brokerage firm sued the firm for damages under the Securities Act. The firm moved to stay the suit pending arbitration of the claim under section 3 of the United States Arbitration Act,[46] which had been incorporated by reference into the margin agreements executed by the client. The district court denied the motion on the ground that the margin agreements illegally attempted to deprive the client of his judicial remedy under the Securities Act. The Second Circuit Court of Appeals reversed[47] and the Supreme Court reversed the Second Circuit, holding that agreements to arbitrate future disputes under the Securities Act of 1933 were illegal and void.

The Court distinguished between arbitral "considerations of fairness" and considerations of law.[48] In *Wilko,* considerations of law prevailed, rendering void the agreement to arbitrate, even though under the explicit terms of the agreement

[45] 346 U.S. 427 (1953).

[46] 9 U.S.C. §§ 1-208 (1978). The United States Arbitration Act applies only to commercial and maritime arbitrations, as distinguished from labor arbitrations. *See* General Elec. Co. v. Local 205, United Electrical, Radio and Machine Workers, 353 U.S. 547 (1957).

[47] 201 F.2d 439.

[48] 346 U.S. at 433-34.

the arbitrator may not have been required to follow the law.[49] The Court explained that the securities law was enacted for the purpose of equalizing positions of buyers and sellers with regard to investment disclosures, and that agreements to arbitrate future controversies would engender defeat of this purpose. The Court envisioned that sellers would employ "take it or leave it" tactics and contracts of adhesion to obtain such a result:

> When the security buyer, prior to any violation of the Securities Act, waives his right to sue in courts, he gives up more than would a participant in other business transactions. The security buyer has a wider choice of courts and venue. He thus surrenders one of the advantages the Act gives him and surrenders it at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary.[50]

This language raises some important similarities between *Wilko* and *Gardner-Denver*.[51] Recall that *Gardner-Denver* stood for the proposition that federal courts, not arbitrators, were the final judges of Title VII rights in our society.[52] Similarly, *Wilko* held that agreements to arbitrate future securities disputes were void.[53]

Wilko left open the question of the validity of agreements to arbitrate *existing* disputes under the Securities Act, however, and subsequent decisions have held that such agreements may be valid.[54] The court in *Gardner-Denver* held that binding

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[49] *Id.*

[50] *Id.* at 435.

[51] 415 U.S. 36 (1974).

[52] *See* notes 17-26 *supra* and accompanying text for a discussion of the *Gardner-Denver* holding.

[53] *See* Wilko v. Swan, 346 U.S. at 438 (Jackson, J., concurring).

[54] *See, e.g.,* Gardner v. Shearson, Hammill & Co., 433 F.2d 367 (5th Cir. 1970), *cert. denied,* 401 U.S. 978 (1971) (agreement to arbitrate existing claim under Securities and Exchange Act of 1934 valid); Moran v. Paine, Webber, Jackson & Curtis, 279 F. Supp. 573 (W.D. Pa. 1967), *aff'd* 389 F.2d 242 (3d Cir. 1968); Moran v. Paine, Webber, Jackson & Curtis, 220 A.2d 624 (Pa. 1966); *cf.* Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974) (antitrust claim); Lawson Fabrics, Inc. v. Akzona, Inc., 355 F. Supp. 1146 (S.D.N.Y. 1973), *aff'd mem.,* 486 F.2d 1394 (2d Cir. 1973) (claims under Trade Mark Act of 1946, 15 U.S.C. § 1125, Textile Fiber Products Identification Act, 15 U.S.C. § 70a, and Federal Trade Commission Act, 15 U.S.C. § 45); *see also* Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 431 F. Supp. 271 (E.D. Pa. 1977) (agree-

agreements to arbitrate future Title VII controversies were invalid,[55] but equivocated on the issue of existing disputes.[56] Therefore, as in *Wilko,* the prohibition in Title VII arbitrations is upon *prospective waivers* of adjudicating claims in court. The protection lies in waiving future claims at a time when one is unable to understand the significance of the waiver.

Another similarity between the two cases is also important. What is actually forbidden are final and binding attempts to arbitrate future Title VII claims. In no other way is the use of arbitration expressly curtailed. *Gardner-Denver* simply deprives arbitration of its traditional finality and allows a grievant who is dissatisfied with an arbitrator's decision another chance in court. Despite detracting dicta primarily toward the end of the opinion, the basis for the Court's decision in *Gardner-Denver* is that "final responsibility for enforcement of Title VII is vested with federal courts."[57] Therefore, even though employees may not relinquish their right to sue, they may nonetheless submit their claims to arbitration. A court in a subsequent lawsuit on the same claim may accord the arbitration opinion whatever weight it deems appropriate.[58]

These similarities manifest the convergence of the theories behind *Gardner-Denver* and *Wilko.* Both are premised not so much on jurisdiction but on judicial protection of statutory rights. Although courts jealously guard statutory rights,[59] they

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ment to arbitrate future claims under the Employees Retirement Income Security Act of 1974 (ERISA) void); Coenen v. R.W. Pressprich & Co., 329 F. Supp. 1296 (S.D.N.Y. 1971), *aff'd,* 453 F.2d 1209 (2d Cir.), *cert. denied,* 406 U.S. 949 (1972) (Plaintiff, a sophisticated investor and member of the New York Stock Exchange, was bound by his arbitration agreement. "[A] person aware of possible claims against another is bound by any subsequent agreement to arbitrate disputes between them which is knowingly entered into.") 329 F. Supp. at 1298. *But see* Romnes v. Bache & Co. Inc. 439 F. Supp., 833 (W.D. Wis. 1977) (no public policy against arbitration of prospective claims under the Commodity Exchange Act, 7 U.S.C. §§ 1-3006).

[55] 415 U.S. at 51-52.

[56] *Id.* at 60 n.21.

[57] *Id.* at 44.

[58] *Id.* at 60 n.21. Footnote 21 and its accompanying text suggest that arbitration opinions may be given weight as evidence by federal courts in subsequent Title VII suits on the same claims. The degree of weight depends upon factors in the collective bargaining agreement and the arbitration hearing. Ultimately, however, the degree of weight is determinable in the trial court's discretion. *See* note 25 *supra* for factors that may be considered in determining the weight to be accorded the arbitration.

[59] Other than the Securities Act, other statutory rights seemingly forbidden to arbitration include patents, trademarks and copyrights, 28 U.S.C. § 1338 (a) (1970);

tend to defer to arbitration of contractual rights. Thus courts impliedly distinguish between the statutory law and the law of the shop, the former being reserved for the courts and the latter for arbitration. Where legislatures have not provided a judicially enforceable remedy, the remedy of arbitration appears to be final.[60]

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see Diematic Mfg. Corp. v. Packaging Indus., Inc. 381 F. Supp. 1057, 1061 (S.D.N.Y. 1974), *appeal dismissed,* 516 F.2d 975 (2d Cir.), *cert. denied,* 423 U.S. 913 (1975); *accord,* Hanes Corp. v. Millard, 531 F.2d 585 (D.C. Cir. 1976). The reasons for prohibiting arbitration of such rights include: (1) the broad social interests involved, (2) the complexity of issues and evidence, and (3) the dubious propriety of permitting arbitrators, who often are selected for their business acumen, to interpret the very laws which are meant to govern them. American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 827 (2d Cir. 1968).

Two other areas forbidden to arbitration are: (1) the traditional states' rights of child custody and support, wills and probate and state employment, and (2) for want of a better term, a category referred to as the "anomalies."

For some interesting decisions involving child custody and support, *see e.g.,* Swartz v. Swartz, 374 N.Y.S.2d 857 (App. Div. 1975); Wertlake v. Wertlake, 318 A.2d 446 (N.J. Sup. Ct. 1974), *modified,* 349 A.2d 552, 559 (Sup. Ct. App. Div. 1975); Nestel v. Nestel, 331 N.Y.S.2d 241 (App. Div. 1972); Ringland v. Ringland, 324 N.Y.S.2d 935 (Sup. Ct. 1971); In Re Michaelman, 135 N.Y.S.2d 608 (Sup. Ct. 1954). For the wills and probate prohibition, *see e.g.,* In Re Will of Jacobovitz, 295 N.Y.S.2d (Sup. Ct. 1968). And in regard to state employment matters, most prominently teachers' rights, *see e.g.,* Maryland Classified Employees Ass'n v. Anderson, 380 A.2d 1032 (Md. Ct. App. 1977); In Re the Arbitration between Fort Ann Cent. School Dist. and Fort Ann Cent. School Teachers Ass'n, 386 N.Y.S.2d 129 (App. Div. 1976); Board of Educ., Greenburgh Cent. School Dist. No. 7 v. Greenburgh Teachers Fed'n Local 1788, 381 N.Y.S.2d 517 (App. Div. 1976).

An assortment of some fascinating "anomolies" include *e.g.,* Int'l Bhd. of Teamsters Local 117 v. Washington Employers, Inc., 557 F.2d 1345 (9th Cir. 1977) (Notwithstanding management's argument that arbitration award violated federal law, court held that enforcement of award was *de minimis,* since it bound only immediate parties to dispute and involved only one transaction); Gulf States Tel. Co. v. Local 1692, Int'l Bhd of Electrical Workers, 416 F.2d 198 (5th Cir. 1969) (in Texas, an award of reinstatement with backpay for gossiping and rumor-mongering does not violate public policy); Fallick v. Kehr, 369 F.2d 899 (2d Cir. 1966) (permission to arbitrate effects of discharge in bankruptcy is within the sole discretion of the bankruptcy court); Rosenblum v. Steiner, 390 N.Y.S.2d 106 (App. Div. 1977) (defense of usury is not arbitrable "as a matter of public policy"); Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793 (arbitral award of punitive damages forbidden); Weiner v. Ernest M. Weiner, D.P.M., P.C., 390 N.Y.S.2d 359 (Sup. Ct. 1976) (issue whether a physician operating a professional corporation may use the name of another physician for that corporation is not arbitrable); Publishers Ass'n of New York City v. Newspaper & Mail Deliverers' Union, 114 N.Y.S.2d 401 (App. Div. 1952) (good explanation why punitive damages cannot be awarded in arbitration).

[60] *See, e.g.,* Romnes v. Bache & Co., Inc., 439 F. Supp. 833 (W.D. Wis. 1977), a suit under the Commodity Exchange Act (CEA), 7 U.S.C. §§ 1-50. The defendant

C. *Title VII: Justification for Social Policy Considerations*

Under most modern labor agreements, Title VII rights are a hybrid of statutory and contractual rights. Title VII never was intended to be exclusively a judically enforceable right; "[l]egislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination."[61] Therefore, Title VII is not on the face of the statute, nor in its purpose, forbidden to arbitration. Although with arbitration and judicial sanctions employees do possess two stones in their slings, the courts insist that the extra weapon not be abused.[62]

The magnitude of Title VII is reflected in its social prevalence. The doctrine of equal employment opportunity is not an esoteric policy which only the courts are privy to consider. It is a policy which permeates all of society. The reach of that policy is evident in its inclusion in most modern labor agreements. It is not just the law of the land; it is also the law of the shop. It is not purely statutory, but also contractual, and arbitration is the traditional tribunal for adjudicating contractual rights.

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moved to stay proceedings pending arbitration. The plaintiff analogized the CEA to the securities law which was held nonarbitrable in Wilko v. Swan 346 U.S. 427 (1953). The court averred that the right to damages under the CEA was "judicially created." However, "Congress did not see fit in the case of the CEA, as it did in the federal securities acts, to provide such a right of action and to prohibit waiver thereof." 439 F. Supp. at 838. The court granted the motion to stay proceedings pending arbitration. *Id.* at 840.

[61] Alexander v. Gardner-Denver Co. 415 U.S. 36, 47 (1974) (footnote omitted); *cf.* Gonzales v. Shanker, 399 F. Supp. 858 (S.D.N.Y. 1975) ("It seems to us that *Alexander* also precludes any requirement that purely contractual remedies be exhausted in civil rights actions brought under sections other than Title VII, such as 42 U.S.C. § 1981, § 1983, § 1985 or § 1986." *Id.* at 867).

[62] *See* Equal Employment Opportunity Comm'n v. McLean Trucking Co., 525 F.2d 1007 (6th Cir. 1975) ("*Gardner-Denver* did not hold that a grievant may accept an award of an arbitrator and settle with his employer, and thereafter sue his employer for additional benefits." *Id.* at 1010. However, neither settlement nor acceptance of an arbitration award forecloses an EEOC enforcement action. *Id.*); *cf.* United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975), *cert. denied sub nom.* Harris v. Allegheny-Ludlum Indus., Inc., 425 U.S. 944 (1976) (employee who voluntarily settles an employment discrimination claim with his employer and union may not subsequently sue on the same claim because he becomes dissatisfied with settlement). *But cf.* Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974) ("Nor does the result reached in arbitration under a collective bargaining agreement have res judicata or collateral estoppel consequences for a Title VII suit." *Id.* at 657 n.44.).

Title VII was expressly intended to be enforceable by concurrent, parallel and overlapping remedies as the Supreme Court expressed in *Gardner-Denver*.[63] This situation is not at all unusual in the labor relations world where statutory rights are often accorded parallel recognition under the labor contract. Two of the most common examples are sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, which prohibit employer interference with or discrimination against union activities.[64] Although the National Labor Relations Board possesses statutory authority to enforce these sections,[65] similarly worded provisions in the labor agreement are enforceable through arbitration.[66]

This situation is also true for Title VII. Federal courts are the final, but not the exclusive, judges of those rights. Simply because legal rights overlap with contractual rights renders neither right unarbitrable. By way of analogy in a securities arbitration decision, the First Circuit Court of Appeals has stated: "[N]o area of arbitration is guaranteed to be kept insulated from important issues of substantive law. A labor-management arbitration agreement could not be imagined to contain the caveat, 'except when an important or novel construction of the National Labor-Management Relations Act is involved.'"[67] To imply such an exclusion would justify "enjoining all" arbitrations.[68] Moreover, "any manifest mis-

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[63] 415 U.S. at 47 (1974).

[64] 29 U.S.C. § 158(a)(1), (3) (1970).

[65] 29 U.S.C. § 160 (1970).

[66] *See e.g.*, Carey v. Westinghouse Elec. Corp., 178 N.Y.S.2d 846 (Sup. Ct.), *modified*, 180 N.Y.S.2d 203 (App. Div. 1958), *aff'd mem.*, 161 N.E.2d 216 (N.Y. 1959) (A grievance of antiunion discrimination "is clearly arbitrable as a *claimed violation* of the [National] Agreement . . . ." *Id.* at 849). *But see* Stephenson v. NLRB, 550 F.2d 535 (9th Cir. 1977), where the court stated:

> But the Board should not defer when the issue presented involves primarily a statutory rather than a contractual or factual issue . . . . When the arbitration proceedings show a specific refusal to pass upon a statutory issue, the Board should not defer. Likewise, when the arbitrator does not consider the statutory issues, the Board should do so. . . . *A priori*, when it is impossible to determine what issues the arbitration panel considered, or if the arbitration panel has not considered the statutory issue fairly and consistently with the precepts and purposes of the Act, then the Board should also not defer.

Id. at 537 (citations omitted).

[67] In Re the Revenue Properties Litigation Cases, 451 F.2d 310, 313 (1st Cir. 1971).

[68] *Id.* at 314.

reading" of the law always could "be effectively challenged in court."[69]

III. THE SOCIAL POLICY-CONTRACT DILEMMA FACED BY TITLE VII ARBITRATORS

Title VII arbitrations by nature draw into issue primarily innate characteristics such as race, skin color, religion, sex and ethnic origin. The sensitive nature of differentiating in any manner on these chiefly immutable characteristics is the most vexing problem with Title VII's implementation. For example, without discussing the merits of affirmative action, such action necessarily requires discrimination on the basis of the stated characteristics.[70] Therefore, the question is: "When is discrimination illegal?" The answer depends upon value judgments which inhere in implementing the policies of Title VII.

A. *Establishing Authority for Arbitrators to Consider Title VII*

The value judgments inherent in Title VII implementation must be faced squarely. Examination of two arbitrations providing for such policy decisions suggest methods for creating authority in an arbitrator to consider Title VII policy.

1. Basic Vegetable Products, Inc.

One of the most innovative Title VII arbitrations after the *Gardner-Denver* decision was *Basic Vegetable Products, Inc.*[71] In *Basic Vegetable,* the arbitrator derived his authority from a labor agreement and from an EEOC conciliation agreement which "attempted to provide the arbitrator with all the authority which is accorded a Federal District Court operating under

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[69] *Id.*

[70] For a short, philosophical essay on this issue, see Blumrosen, *Civil Rights Conflicts: The Uneasy Search For Peace In our Time,* 27 ARB. J. 35 (1972). For a more protracted dissertation, see Fiss, *A Theory of Fair Employment Laws,* 38 U. CHI. L. REV. 235 (1971). *See also* the trinity of reverse discrimination cases: Regents of the University of California v. Bakke, 438 U.S. 265 (1978); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976); DeFunis v. Odegaard, 416 U.S. 312 (1974), *vacated as moot.*

[71] 64 LAB. ARB. REP. 620 (1975).

Title VII"[72] in an effort to tailor the grievance procedure to "whatever deference the Supreme Court may have accorded arbitration in [*Gardener-Denver*]."[73] The arbitration was supposed to be final and binding on the parties.[74]

The purpose of this agreement was to allow the arbitrator to consider the law and policy of Title VII. As such, there was an attempt to alleviate the dilemma an arbitrator faces by being called upon to serve two masters—the law and the contract. One must prevail, and under our system the law is supreme. Thus in *Basic Vegetable Products, Inc.*, the arbitrator could consider Title VII, with its underlying policy, and conform the contract to it.

If the Supreme Court meant to eliminate such considerations it never would have authored the *Gardner-Denver* foot-

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[72] *Id.* The arbitrator praised the parties for their agreement:

> It seems to me desirable that employment discrimination cases be heard by arbitrators wherever possible because of the complicated and time-consuming nature of Title VII litigation in the Federal Courts and the huge backlog with which the Equal Employment Opportunity Commission is now confronted. Delay and protracted litigation permit open wounds to fester. But traditional arbitration procedures are no answer to this problem. It is axiomatic that the parties provide the arbitrator with the authority to act as a Federal District Court as was done in this case. Only under such circumstances can the parties hope to have the judiciary accord "great weight" to the process.

Id. at 624-25.

[73] *Id.* (citation omitted).

[74] *Id.* Although the arbitrator expressed no opinion concerning the legality of this agreement, it already had been established that judicial enforcement of Title VII rights may not be prospectively waived. Alexander v. Gardner-Denver, 415 U.S. 36, 51 (1974); *cf.* Cox v. Allied Chem. Corp., 538 F.2d 1094 (5th Cir. 1976), *reh. denied,* 551 F.2d 93 (5th Cir. 1977) (*per curiam*), *cert. denied sub nom.* Allied Chem. Corp. v. White, 434 U.S. 1051 (1978) (The district court dismissed intervenors in a Title VII suit because they had signed an EEOC conciliation agreement containing a waiver of their right to sue. The court of appeals held that the district court should have determined the voluntariness of the waiver. A "mere signature" is not enough to prove voluntariness and understanding. "To assume that, notwithstanding strong evidence to the contrary, a signature implies understanding is to allow a rule of contract law to play too salient a part in the administration of a remedial civil rights statute." 538 F.2d at 1098). *But see* Equal Employment Opportunity Comm'n v. McLean Trucking Co., 525 F.2d 1007 (6th Cir. 1975) ("*Gardner-Denver* did not hold that a grievant may accept an award of an arbitrator and settle with his employer, and thereafter sue his employer for additional benefits." However, neither settlement nor acceptance of an arbitration award precludes an EEOC enforcement suit. 525 F.2d at 1010). *See generally* Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974) (Arbitration has no res judicata or collateral estoppel effect on a subsequent court suit. *Id.* at 657 n.44).

note 21, nor have bothered to dispel the prophecies of doom for arbitration.[75] In *Gardner-Denver,* the Court sought to preserve judicial finality in Title VII decisions while reaffirming its faith in arbitration. Thus the Court emphasized that arbitration "remains a relatively inexpensive and expeditious means for resolving a wide range of disputes, *including claims of discriminatory employment practices.*"[76]

2. Southbridge Plastics

In a recent decision, *Southbridge Plastics Division, W.R. Grace & Company v. Local 759 Int'l Union of United Rubber, Cork, Linoleum and Plastic Workers,*[77] the Fifth Circuit Court of Appeals ordered arbitration of grievances which it knew would bring Title VII into issue. The employer and the EEOC executed a conciliation agreement calling for sex quotas in determining layoffs. These quotas flatly "contradicted the standard seniority provision in the collective bargaining agreement that layoffs would be determined by an employee's seniority, not his or her sex."[78]

The employer sought a declaratory judgment in federal district court that the EEOC conciliation agreement superceded the seniority provision. The union counterclaimed for arbitration of all grievances arising from the employer's breach of the seniority provision in following the EEOC conciliation agreement. The district court upheld the conciliation agreement as "necessary to cure the effects of past hiring discrimination by the Company and to effectuate the goals of Title VII . . . ."[79]

The Fifth Circuit reversed[80] and granted the union's counterclaim. That court based its decision upon the recent Supreme Court opinion in *United States v. International Brotherhood of Teamsters,*[81] which held that "bona fide" seniority systems "negotiated and maintained without a discriminatory

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[75] Alexander v. Gardner-Denver Co., 415 U.S. 36, 54 (1974).
[76] *Id.* at 55 (emphasis added).
[77] 565 F.2d 913 (5th Cir. 1978).
[78] *Id.* at 915.
[79] *Id.*
[80] *Id.* at 917.
[81] 431 U.S. 324 (1977).

purpose" were legal under Title VII,[82] even if they perpetrated "the effects of an employer's pre-act or post-act discrimination . . . ."[83] The Fifth Circuit found no discriminatory purpose in the seniority provision and, following the *Teamsters* opinion, ordered "arbitration of all grievances arising out of the Company's breach, through its employment of the conciliation agreement, of the seniority provisions contained in the agreement."[84] Under such an order, the arbitrator will invariably be faced with Title VII questions.

B. *Practical Illustrations of Arbitral Considerations of Title VII Policies*

A detailed examination of several situations in which arbitrators considered the policy behind Title VII reveals the complex questions inherent in Title VII implementation. By focusing on the dilemma of arbitrators in specific settings, the difficulty of separating the contract from the law and the policy become apparent.

1. *Married Stewardess Cases*

One area in which arbitrators have considered the policy of Title VII involved the "no-marriage rules" for stewardesses. In *Southern Airways, Inc.*,[85] two stewardesses were discharged because each had married. Under the collective bargaining agreement, the only reason the discharge could have been sustained was for "just cause." Thus, the validity of the discharge hinged on whether marriage constituted a "just cause."

The married stewardesses prohibition had been incorporated into the collective bargaining agreement under the stipulation that its validity would be determined in arbitration. At

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[82] Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) provides: "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . ."

[83] 565 F.2d at 916 (citation omitted). *See also* Hollander & Co., 64 LAB. ARB. REP. 816 (1975) ("Neither Title VII nor approved affirmative action programs necessarily invalidate seniority systems." *Id.* at 820).

[84] 565 F.2d at 917.

[85] 47 LAB. ARB. REP. 1135 (1966).

arbitration, the company urged that since the parties had authority to agree upon the ban the inquiry of the arbitration board was limited to strict contract interpretation, "and not whether [the ban] should be illegal because of social policy or modern trends of thought."[86] The company's chief argument was that the ban was reasonable, and constituted a bona fide occupational qualification under Title VII.[87]

In support of its argument, the company introduced voluminous expert testimony on the rationale for the marriage ban. The initial barrage consisted of an attempt to prove that marriage was incompatible with the job, by attempting to show that the life of a stewardess was less regular than that of other jobs normally held by "girls."[88] Soon, however, pregnancy emerged as the company's real reason for desiring the restriction.

The company introduced testimony of a doctor who cited statistics to substantiate his theory that pregnancy almost invariably followed marriage within a short time.[89] The company urged that marriage (i.e., pregnancy) was the cause of a plethora of ills that could befall stewardesses, including miscarriage, anemia, impaired "ability of the red blood corpuscles or hemoglobin to carry oxygen to the tissues," "toxemia," "infection," hypertension, "a greater tendency to accident proneness because of the change in body carriage accompanied with carrying a fetus" and excessive urination due to increased bladder pressure.[90] To add insult to injury, it was also argued that married stewardesses would undermine the company's advertising program which revolved around "the image of stewardesses as 'young, attractive, and unencumbered.'"[91]

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[86] *Id.* at 1136.

[87] A bona fide occupational qualification is an exception to Title VII. Section 703(e) of the Act provides that "it shall not be an unlawful employment practice" to discriminate on account of "religion, sex, or national origin in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ." This exception is expressly limited to religion, sex or national origin. 42 U.S.C. § 2000(e)-2(e) (1970).

[88] 47 LAB. ARB. REP. at 1137.

[89] *Id.*

[90] *Id.*

[91] *Id.* at 1138.

The Air Line Stewards and Stewardesses Association responded that the marriage prohibition was not based upon an objection to marriage, but upon pregnancy. It refuted the notion that marriage and pregnancy were synonymous, noting that "[t]here can be married stewardesses who are not pregnant and pregnant stewardesses who are not married."[92] The Association's presentation decimated the company's argument that married stewardesses could not perform their job as well as single stewardesses.

Arbitrator Saul Wallen agreed with the Association. Wallen expressly avoided basing his decision upon the law, stating:

> The Company's third argument, namely that the rule is consistent with and not violative of the Civil Rights Act of 1964, is one on which we need not pass. It has not been deemed in violation of that act [*sic*] because the Act is relatively new and the subject has not yet been considered by the administrative agency involved. At this point the question of the consistency of the rule with the Act is best left to that agency for determination. Until it acts, the rule carries a presumption of validity.[93]

Wallen then rendered a policy decision. Conceding that marriage bans had been sustained in previous airline arbitrations, Wallen concluded that such decisions were based solely upon industry consent. In the earlier cases, the airlines would point to each other and insist they could have such a ban because the others had them, which only exasperated the problem without confronting the basic issue of discrimination. Wallen broke with precedent and confronted the issue squarely. He concluded:

> When these parties, on signing the current contract (their first), agreed in effect to submit the question of its reasonableness to a determination by arbitration, they knew or should have known that the issue would be viewed in its current context. And in the context of today's attitudes toward the question *in the airlines industry,* we are unable to conclude that the rule against marriage by stewardesses is reasonable.[94]

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[92] *Id.*

[93] *Id.* at 1140.

[94] *Id.* at 1141 (emphasis added).

The sharpest criticism was aimed at the company's advertising campaign. By trying to project an image of comely, young, single stewardesses, the company argued that it was trying to sell "atmosphere."[95] Wallen rejected the fallacy behind the assumption that marriage somehow detracted from a woman's beauty or charm. Even if airlines were in the business of selling such "atmosphere," that was, Wallen opined, still no justification for firing married stewardesses. Wallen noted that the image which the company was attempting to project actually was a "composite." Simply because some stewardesses were married would not detract from their overall single image.[96]

A few arbitrators joined Wallen in striking down no-marriage rules,[97] but many refused to do so.[98] It was, however, Wallen's view which eventually prevailed. His opinion was vindicated by the courts in *Sprogis v. United Airlines, Inc.*,[99] which held that airline marriage prohibitions were illegally discriminatory when applied only to women.[100]

Ironically, successes like Wallen's raise two criticisms to policy considerations in Title VII arbitrations. First, it is too simplistic just to consider such successes as examples that ar-

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[95] *Id.* at 1140.

[96] *Id.*

[97] *See, e.g.*, Allegheny Airlines, Inc., 48 LAB. ARB. REP. 734 (1967); Braniff Airways, Inc., 48 LAB. ARB. REP. 769 (1965).

[98] *See, e.g.*, United Air Lines, Inc., 48 LAB. ARB. REP. 727 (1967). ("Whatever reservations [the arbitration] Board members may have about the wisdom of the no-marriage policy, it is not the function of the Board members to evaluate the policy on its merits." *Id.* at 733).

[99] 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

[100] *Id.*; *Cf.* Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971) (sex not a bona fide occupational qualification for flight attendant position, therefore, illegal to refuse to hire men for such jobs). *But cf.* Stroud v. Delta Air Lines, Inc., 544 F.2d 892 (5th Cir.), *cert. denied*, 434 U.S. 844, (1977) (Where only women had been hired as stewardesses, a no-marriage rule did not discriminate on the basis of sex, only marriage. The rule, therefore, was valid under Title VII.); American Airlines, Inc., 68 LAB. ARB. REP. 527 (1977) (discharge of stewardess for corpulence not sex discrimination); Condit v. United Air Lines, Inc., 558 F.2d 1176 (4th Cir. 1977) (per curiam), *cert. denied*, 435 U.S. 934 (1978) (Maternity leave policy, as distinguished from marriage prohibition, is a bona fide occupational qualification under section 703e of Title VII. 42 U.S.C. § 2000e-2(e) (1976). It is consistent with a common carrier's duty to exercise the highest degree of care for the safety of its passengers. 588 F.2d at 1176 (footnote omitted)).

bitrators always should consider social policy; for if the courts decide such cases contrary to the arbitrator, critics would be quick to seize upon those cases for the proposition that social policy should not be considered. Second, since policy considerations ultimately are resolvable in court, arbitrators should not inject their opinions at all. Both of these criticisms are legitimate, but can be satisfactorily answered.

Any case in which an arbitrator's policy considerations are enforced in court could just as easily be vacated. Arbitrators are not perfect; but that imperfection is the reason for judicial review. However, simply because perfection is unattainable, a blanket prohibition against policy considerations is not warranted. Toward the goal of promoting expeditious and economical resolutions of labor grievances, arbitrators should not be expected to shut their eyes to policy, since employment discrimination grievances involve considerations beyond the printed labor agreement. By submitting such grievances to arbitration, the parties invariably invoke policy considerations. Since Title VII grievances transcend the agreement, it is ridiculous to take such grievances to arbitration and then demand that the arbitrator constrain his or her deliberations to the agreement.

Title VII is the epitome of overlapping legal, policy and contract considerations. Because of the complexities of these considerations, arbitration can provide, at minimum, an outlet for airing disputes. In many cases a satisfactory settlement results, while in other cases the parties will abide by the arbitrator's decision. In probably the least number of cases an employee who loses in arbitration will file suit in federal court. Even then, under footnote 21 of *Gardner-Denver,* the court may look to the arbitration decision. Finally, arbitration can provide an early means of weeding out frivolous or vexatious claims.

2. *Maternity Benefits Cases*

Another context in which arbitrators have faced Title VII questions involves maternity restrictions, minus the marriage

disguise. In *Middletown Board of Education,*[101] a teacher's contract provided that "[t]eachers . . . *may* become eligible for a maternity leave subject to the following conditions . . . ."[102] The condition in issue provided that "[t]eachers *shall* be required to vacate their positions at the end of the fifth month of pregnancy."[103]

M, a non-tenured teacher, became pregnant but refused to vacate her position, citing the permissive "may" in the maternity leave provision. The school board cited the mandatory "shall" in the fifth month condition and demanded that *M* leave school at the end of her fifth month of pregnancy.[104] *M*'s union argued that the permissive language gave *M* a choice of whether to take maternity leave, and if she chose to do so only then must she leave at the end of the fifth month.[105] The school board contended that *M* had no choice. If so interpreted, the union argued, the fifth month condition should be void under a nondiscrimination clause and the following conflict with laws provision: "Nothing in this Agreement shall in any way limit or contrvene [*sic*] the authority of any Municipal, State or Federal board, commission, agency, or other governmental body or authority."[106]

Applying policy considerations, arbitrator John Hogan held the fifth month condition void under both the nondiscrimination and the conflict with laws clauses. Hogan stated:

> The decision turns on whether or not the five-month rule . . . constitutes discrimination on the basis of sex. If it does, then it contravenes Public Policy as defined by Title VII of the Civil Rights Act. The Clause would also limit or contravene a "Federal Board, Commission or agency, or other governmental body or authority" . . . that sought to apply Title VII. So that if it be found that [the fifth month condition] constitutes discrimination on the basis of sex, the clause conflicts with [the conflict with laws provision] and is void as contravening public policy.[107]

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[101] 56 LAB. ARB. REP. 830 (1971).
[102] *Id.* (emphasis supplied).
[103] *Id.* at 831 (emphasis added).
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.; cf.* Schattman v. Texas Employment Comm'n, 330 F. Supp. 328 (W.D.

Likewise, in *Kaiser-Permanente Medical Care Program,*[103] arbitrator Daniel Dykstra accepted the "principle" that arbitrators should respect the collective bargaining agreement and refrain from venturing on "frolics of their own;" nevertheless, this "principle" did not require that contract provisions be "interpreted in a vacuum."[109] Dykstra applied this reasoning as a prelude to striking down a company practice of granting sick leave without pay for pregnancy-related disabilities. Dykstra evaluated the practice in light of modern public thought; and while he did not feel bound by either state or federal law, he did consider the law as "part and parcel of the contemporary scene,"[110] which buttressed arguments against the practice.

Under Dykstra's analysis, sick leave and nondiscrimination provisions were much less susceptible to precise interpretation than traditional terms of collective bargaining. More traditional labor issues, such as wages and hours, already have a developed body of precedent behind them, while modern sick leave and nondiscrimination clauses "admittedly are not given to precise interpretation and . . . are in the process of evolvement in Courts and administrative agencies."[111] Due to the flux in social and legal thought, more flexibility was required in interpreting such provisions.

Arbitrators Hogan in *Middletown Board of Education* and Dykstra in *Kaiser-Permanente* distinguished between policy and law. Admittedly, such a distinction is difficult since law evolves from policy. There are, however, interstices of the law which may properly be classified as policies. Because these areas do not fall squarely within the law, but just outside its

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Tex. 1971) (rule requiring women to leave their jobs no more than 2 months prior to giving birth is "a condition attendant to . . . sex," *id.* at 329, precisely "condemned" by EEOC guidelines), *rev'd on other grounds,* 459 F.2d 32 (5th Cir. 1972), *cert. denied,* 409 U.S. 1107 (1973), *reh. denied,* 410 U.S. 959 (1973). The Fifth Circuit reversed on the basis that the Texas Employment Commission, a state agency, was not an employer under Title VII, and that the mandatory leave rule was reasonable and rationally related to a permissible state purpose under the equal protection clause of the fourteenth amendment. In 1972, however, Congress amended Title VII to include states and their political subdivisions. 42 U.S.C. § 2000e(b) (1970); *see* City of Los Angeles, Dep't of Water and Power v. Manhart, 435 U.S. 702, (1978).

[103] 64 LAB. ARB. REP. 245 (1975).

[109] *Id.* at 247.

[110] *Id.* at 248.

[111] *Id.*

parameters, they possess legal characteristics. Pregnancy is an example.

Prior to October 31, 1978, under Title VII, discrimination against pregnant women was not considered sex-based, but instead was based upon a physical condition attendant to sex.[112] Although only women can become pregnant, the Supreme Court has ruled that pregnancy discrimination was not sex discrimination. In *Geduldig v. Aiello,*[113] the Court upheld a pregnancy exclusion under a State of California disability insurance program. Since a state regulation was being attacked, the test for validity was not Title VII, but the equal protection clause of the fourteenth amendment.

The Court found the exclusion nondiscriminatory, reasoning that the "program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities."[114] Two years after *Geduldig,* the Court applied the same reasoning to a private disability insurance program in *General Electric Company v. Gilbert.*[115] This time, Title VII was directly in issue, and the Court analogized the foregoing equal protection "concepts of discrimination" to Title VII. Discrimination based on pregnancy, the Court held, was not an illegal, "gender-based discrimination."[116]

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[112] Under Act of October 31, 1978, Pub. L. No. 95-555 (to be codified in 42 U.S.C. § 2000e(k) (1976)), the terms in Title VII "because of sex" or "on the basis of sex" were amended to include pregnancy and its related medical conditions.

[113] 417 U.S. 484 (1974).

[114] *Id.* at 496 n.20 (citations omitted).

[115] 429 U.S. 125 (1976).

[116] *Id.* at 135. *But see* City of Los Angeles, Dep't of Water and Power v. Manhart, 435 U.S. 702 (1978) (State pension plan requirement that women contribute more money than men discriminated on the basis of sex. This requirement was distinguishable from that in *General Electric Company,* which "discriminated on the basis of a special physical disability." *Id.* at 715). *See generally* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) (A woman employee's job with the Environmental Protection Agency was dissolved after she repulsed her male supervisor's sexual advances. The EPA argued that the action was not based upon the employee's sex, but upon her refusal to provide sexual favors. The court responded that the employee would not have been approached by her superior but for her sex. Therefore, there was a sex discrimination in this case. The court distinguished this situation from one where a bisexual supervisor might approach a subordinate, since "the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike." *Id.* at 990 n.55).

Prior to October 31, 1978, pregnancy was an interstice (policy) within Title VII. When arbitrators involve themselves in this area, they reason from policy as distinguished from law. Other interstices exist.[117] Some are fairly esoteric; and the more esoteric they are, the more apparent are the policy considerations, as distinguished from legal considerations.

3. *Locker Room Restrictions*

An amusing example of another interstice is *FMC Corp.*,[118] where arbitrator Joseph Shister was confronted with an unusual sex discrimination claim. Three women were hired as plant janitors. Their duties included cleaning two men's locker rooms, but due to the enormity and twenty-four hour use of the locker rooms, it was virtually impossible for the female janitors to clean them without seeing unclad male workers.[119]

Because this situation was objectionable, the employer reassigned the duties between male and female janitors so as to exclude the women from the men's locker rooms. The female janitors lost valuable overtime which was accumulated by cleaning the men's locker rooms. The women filed a sex discrimination grievance, and the male janitors whose duties had been reassigned grieved of reverse discrimination against the employer.[120]

The union and the employer tried every conceivable way

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[117] *See, e.g.*, Uddo v. Taormina, 45 LAB. ARB. REP. 72 (1965). In *Uddo*, the legal interstice that the "American government has not yet enacted penalties for the failure . . . to vote," *id.* at 74, was the fulcrum of that decision. In accordance with a collective bargaining agreement, the employer had agreed to close his plant one hour early to allow his employees to vote. However, he offered to pay only those employees who signed a statement that they actually had voted, which resulted in a loss of pay for those who did not, or could not, vote. This action precipitated a grievance, which went to arbitration. *Id.* Since there was no law on the subject, the social policy made the difference. The arbitrator noted:

> American government has not yet exacted penalties for the failure of a citizen to vote. Clearly, therefore, it is against public policy to allow a private employer to do so. The same holds true where the effects of a system unilaterally imposed by the employer in meeting the problems of an election day clause results in penalizing the non-voter.

Id.

[118] 70 LAB. ARB. REP. 110 (1978).

[119] *Id.* at 111.

[120] *Id.*

to negotiate a settlement which would have equalized the duties between the male and female janitors, but their efforts failed. The union finally took the matter to arbitration. The employer argued that the discrimination against the females "was based on sound and reasonable considerations, consistent with public policy, and therefore not contractually or legally violative."[121]

The labor agreement contained a nondiscrimination provision. Sex was included in that provision "because both parties agreed that the clause was required by public policy—the Federal Civil Rights Act of 1964 . . . ."[122] With this stipulation in mind, arbitrator Shister framed the issue as whether the employer's exclusion of the female janitors from the male locker rooms violated public policy.[123] He held that it did not.

The opinion contained no discussion as to the nature of the policy, but merely implied its existence. Offhand, this implication appears unsatisfactory. At least a terse explanation of why society dictates nonexposure of unclad members of the opposite sex should have seemed helpful, but Shister tendered none. In fairness to Shister, however, there was no conflict over the policy. "[T]he Union itself admitted that the exposure of nude males to females would generate complaints by the male employees."[124] With the issue thus stipulated, there was no advantage in Shister generating more adversity by raising a major policy discussion. But more fundamentally, the policy was fairly implicit[125] and there was no need to discuss it. *FMC Corp.* turned upon a legal interstice, implicitly understood, and is therefore a classic example of a social policy arbitration.

The lesson from these legal interstices is that arbitrators

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[121] *Id.* at 112.

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.* Shister did obliquely refer to sex as a bona fide occupational qualification, but declined to explain why. He presumably took the reason for granted. *Cf.* Ludtke v. Kuhn, 461 F. Supp. 86 (S.D.N.Y. 1978) (baseball Commissioner's policy of excluding female reporters from Yankee Stadium locker rooms violates 42 U.S.C. § 1983 and fourteenth amendment equal protection and due process). In *Ludtke,* the court rejected the defendant's privacy argument, since the undressed players could shield themselves from the view of female reporters. In *FMC Corp.,* exposure was unavoidable, which precipitated the action.

may and should consider social policy in Title VII grievances. The fact that an employment discrimination grievance proceeds to arbitration invites in the first instance legal considerations. When arbitrators delve into the nature of such complaints and the available remedies, policy considerations then become critical; the legal interstitial areas lie just beyond the law, and the law itself is insufficient to address all the underlying issues.

C. *Guidelines for Applying Social Policy*

As arbitrators consider social policy, the need arises for some direction in their deliberations. The most prominent guidelines for the application of such considerations come from the Supreme Court's footnote 21 in *Alexander v. Gardner-Denver Company.*[126] Footnote 21 and its accompanying text suggest that arbitrations may be given weight as evidence in federal court with the degree of weight dependent upon factors in the collective bargaining agreement and in the arbitration. Ultimately, the degree of weight is determined by the trial court.[127] Although the Court adopted "no standards," it did suggest that attention might be directed to nondiscrimination clauses in the collective bargaining agreement, procedural due process in the arbitration hearing, "adequacy of the record with respect to the issue of discrimination and the special competence of particular arbitrators."[128] The Court acknowledged that if an arbitrator "gives full consideration to an employee's Title VII rights, a court may properly accord [the arbitration] great weight,"[129] "especially" for questions of fact.[130]

Arbitrations like *Basic Vegetable Products, Inc.*[131] attempted specifically to comply with the Court's guidelines. Other arbitrators have forged their own standards. In *Mountain States Telephone & Telegraph Co.,*[132] arbitrator

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[126] 451 U.S. 36, 60 n.21 (1974).

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] 64 LAB. ARB. REP. 620 (1975). *See* notes 71-76 *supra* and accompanying text for a full discussion of this case.

[132] 64 LAB. ARB. REP. 316 (1974).

Harry Platt gleaned two conclusions from *Gardner-Denver.* First, where a provision in the collective bargaining agreement conflicts with the federal law, the law "will prevail."[133] Second, if arbitrations of Title VII grievances are to be of any "practical value," they should be heard only by competent arbitrators "who should give full consideration to Title VII and, by inference, other relevant Federal statutory and administrative law . . . ."[134]

Platt was granted wide latitude in deciding four hypothetical cases submitted in lieu of analogous real life situations which arose under the employer's affirmative action program. Neither the union nor the employer contested Platt's authority or competence to consider the law. Platt commented:

> This is as it should be, for there can no longer be any real question that an arbitrator has both the authority and the obligation to consider Federal equal employment opportunity laws in the arbitration of grievances concerning alleged discriminatory employment practices . . . . This is particularly true where the collective bargaining agreement contains an antidiscrimination clause . . . .[135]

A statement of even greater magnitude came from arbitrator Sanford Cohen in *Whitfield Tank Lines, Inc.,*[136] decided in May 1974, less than three months after *Gardner-Denver.* Answering a claim of racial discrimination, the employer argued that, in light of *Gardner-Denver,* Cohen would be wasting his time by hearing the Title VII grievance. Cohen replied that if "constitutional history" teaches any lesson at all, *Gardner-Denver* will be but the beginning of what promises to be a protracted development of the question of arbitration and Title VII.[137] "Given the various uncertainties now present," Cohen rejected the employer's argument.[138] "[I]t would appear to be premature for industrial relations practitioners to simply aban-

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[133] *Id.* at 326.
[134] *Id.*
[135] *Id.*
[136] 62 LAB. ARB. REP. 934 (1974).
[137] *Id.* at 938.
[138] *Id.*

don the practice of arbitration in the case of disputes involving questions of discrimination."[139]

D. *Review of Title VII Policy Decisions*

Policy considerations are difficult to define, especially in the area of Title VII, where frequently society is found to be divided. Equal employment opportunity is a principle to which society is committed, as is manifest by its enactment into law, but at times it generates great dissension. Reasonable arbitrators can differ in their evaluations of Title VII policy, but the courts serve as an ultimate check on any erroneous decisions. An example of a divisive Title VII issue is reverse discrimination. Examination of an early arbitration of the issue illustrates the difficult nature of the policy judgments. *Hotel Employers Association*[140] was decided on November 17, 1966, little more than a year after the effective date of Title VII.[141] The case arose during the frenzy of civil rights demonstrations in the 1960's. In California, a number of civil rights groups, including the San Francisco Human Rights Commission, the NAACP and CORE (Congress of Racial Equality) exerted pressure upon the Hotel Association to execute a Civil Rights Agreement which essentially provided for the advancement of equal employment rights for blacks and other minorities. The union representing certain employees of the Hotel Association challenged the agreement on the ground that it violated the collective bargaining agreement by recognizing an organization which was not the exclusive collective bargaining representative.[142]

The union took its complaint to arbitration and the arbitration panel held the Civil Rights Agreement void. The union argued that the agreement conflicted with and purported to "supercede" the collective bargaining contract.[143] More significant, the agreement was deemed "unlawful and contrary to public policy" because it created a "discrimination in favor of

[139] *Id.*
[140] 47 LAB. ARB. REP. 873 (1966).
[141] Title VII became effective on July 2, 1965.
[142] 47 LAB. ARB. REP. at 881.
[143] *Id.*

one group of employees" against another.[144]

The arbitration panel based its decision upon social policy under Title VII. Although the statute was designed to protect minority rights, the panel felt the policy protected all groups. "Preference" for any group at the expense of another was deemed "unlawful."[145] The panel noted:

> Discrimination against any individual in hiring or discharging or with respect to compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin is unlawful under Federal law [citing Title VII] and is an unlawful employment practice under California Law . . . . The 1966 civil rights agreement is against public policy of the United States and State of California.[146]

The flux of social policy, as demonstrated by recent reverse discrimination cases,[147] is the reason for judicial review of Title VII policy considerations by arbitrators. Arbitrators are not accountable to the public. When they consider social policy, however, they do construct a body of what becomes, in effect, public law.

Arbitrations generally are nonreviewable on their merits.[148] Merits consist of fact findings and contract interpretations. Concerning merits, policy considerations fall into three categories. First is industrial policy, which is gleaned from the labor agreement and industrial practice. "Just cause" is the most prevalent example, since a fully developed body of industrial policy revolves around this single concept. Second is public

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[144] *Id.*

[145] *Id.* at 886.

[146] *Id.* at 886-87 (citations omitted). While it is true that Title VII protects not only minority, but also majority rights, see McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), it is not always true that preference for one group over another is illegal, especially under the remedial provisions of Title VII, such as § 706(g) (court may order "affirmative action . . . or any other equitable relief" when it finds an employer which has engaged in "unlawful employment practices") 42 U.S.C. § 2000e-5(g) (1970). *See* United Steelworkers of America v. Weber, 99 S. Ct. 2721 (1979), *but cf.* Regents of the University of California v. Bakke, 438 U.S. 265, (1978) (quota system for admission to university medical school illegal under Title VI of the 1964 Civil Rights Act and the equal protection clause of the fourteenth amendment).

[147] *See* note 70 *supra* for citation of these cases.

[148] *See, e.g.*, United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

law, which is derived from statutes, judicial opinions and administrative rulings. Title VII and its interpretations provide an example. Third is social policy, which emanates from the public law. Examples of this category are the legal interstices discussed earlier.[149]

Of these three categories, only industrial policy comprises non-judicially reviewable merits. As the law of the shop, industrial policy is strictly the arbitrator's domain. The other two categories, public law and social policy, extend beyond the law of the shop into the public domain. Therefore, it violates no legal or contractual principle to permit judicial review of legal and policy considerations of arbitrators. Nothing novel is involved. When a court is asked to review a Title VII arbitration, it may, under the *Gardner-Denver* guidelines, accord the arbitration whatever deference it chooses. It may apply the substantial evidence rule or grant a trial *de novo*. Both procedures already are utilized.

In *Kornbluh v. Stearns and Foster Company*,[150] John Kornbluh was fired for falsifying his employment application. Kornbluh raised a Title VII complaint which went to arbitration. The record reflected that Kornbluh was represented fairly by the union at the arbitration and that the arbitration was procedurally fair. The arbitrator decided all the issues, including the Title VII grievance, against Kornbluh.[151]

Kornbluh brought a Title VII action in federal court. Relying upon footnote 21, the employer moved for summary judgment on the ground that all material facts had been fully aired and resolved at arbitration.[152] The company unsuccessfully argued that the court should defer to the arbitral decision. The court acknowledged that the arbitration had complied with footnote 21 in all respects, except one. The procedure was fair, the arbitrator was competent, the record was complete and all the issues were considered. However, one element was absent: the collective bargaining agreement contained no nondiscrimi-

[149] *See* notes 112-18 and accompanying text *supra* for a discussion of legal interstices.

[150] 73 F.R.D. 307 (S.D. Ohio 1976).

[151] *Id.* at 311.

[152] *Id.* at 312.

nation provision. Even if such a provision had existed, the court still was "not satisfied that [footnote 21 meant] or dictate[d] that an arbitration award made under the factor satisfying circumstances would [have been] of sufficient 'weight' on which to base a summary judgment."[153]

Nevertheless, lack of a nondiscrimination clause in the labor contract appears to have been harmless error. If, as the court found, the Title VII issues had been fully raised and decided at arbitration, the employer waived its argument that Kornbluh had no Title VII rights under the agreement. Neither party to the suit had relied on the lack of a nondiscrimination provision.

The court, however, was not satisfied that the arbitration was reliable enough upon which to base a summary judgment. Summary judgment is harsh, sustainable only upon proof "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[154] Therefore, it is understandable that a federal court would be reticent to grant summary judgment upon facts established outside of court. It would have been interesting if, instead of moving for summary judgment, Stearns and Foster had moved that the arbitration be granted as evidence at trial.

This approach was taken in *Dripps v. United Parcel Service.*[155] In *Dripps,* the plaintiff, a welder, challenged as male sex discrimination a job-related rule against growing a beard. The employer cited safety and personal appearance as justifications for the rule. The court held that the rule was a "bona fide occupational qualification based on reasonable concern for safety."[156] Citing *Gardner-Denver Company,*[157] the Court accorded "great weight" to an arbitrator's like ruling. Similarly, in *Barnes v. St. Catherine's Hospital,*[158] the Seventh Circuit Court of Appeals, also citing *Gardner-Denver,* refused to overturn a district court's use of an earlier arbitration decision.[159]

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[153] *Id.*

[154] FED. R. CIV. P. 56.

[155] 381 F. Supp. 421 (W.D. Pa. 1974), *aff'd mem.*, 515 F.2d 506 (3d Cir. 1975).

[156] 381 F. Supp. at 421.

[157] *Id.* at 422.

[158] 563 F.2d 324 (7th Cir. 1977).

[159] *Id.* at 330.

These cases illustrate that a court may give the arbitrator's determination "great weight" or it may choose to evaluate the issues differently. Whichever result obtains, judges of equal employment opportunity cases, be they courts or arbitrators, must constantly be conscious of the policy surrounding the law.

CONCLUSION

Three conclusions emerge from the controversy of Title VII policy considerations by arbitrators. First, social policy considerations in Title VII arbitrations remain active, but the courts have pulled in the reins. Since arbitrators are not accountable to the public, some guidelines are necessary to assist them when they tread from their familiar terrain into the public domain.

Second, it is permissible for arbitrators to enter the public domain when they hear Title VII grievances. This conclusion certainly is true when the collective bargaining agreement provides a framework of contractual rights co-extensive with Title VII, or in cases like *Kornbluh v. Stearns and Foster Company,*[160] where, although there is no nondiscrimination clause, the employer waives this defect. The concept is concurrent or overlapping jurisdiction, as distinguished from exclusive jurisdiction in the federal courts. Finally, and most important, is the nature of Title VII and how it espouses the single social policy of equal employment opportunity. The law itself is not overly complicated, but implementation is complex. The present difficulties with implementing the law arise not from the language of the statute, but from the values beneath it. Title VII considerations cannot be mechanistically or even logically applied. All Title VII decisions, judicial and arbitral, ultimately revolve around value judgments, and these judgments invariably reflect the values of the judge or arbitrator making the decision. Like judges, arbitrators owe society a duty to consider policy from society's viewpoint, rather than only from their own.

Arbitrators are not public tribunals, nor are they intended

[160] 73 F.R.D. 307 (S.D. Ohio 1976). *See* notes 151-55 and accompanying text *supra* for a discussion of *Kornbluh.*

to be. Therefore, courts should reserve the right to review social policy considerations in Title VII arbitrations. If arbitrators are to consider social policy, it is incumbent upon the courts to review those considerations.[161] Nevertheless, arbitration should retain its role as an expeditious and economical method of resolving labor disputes. It cannot be used as a panacea for all such disputes, but it can produce the very desirable result of fairly and rapidly resolving many problems. This manner of resolution is particularly crucial in light of the high incidence of Title VII grievances today. Courts could not possibly hear all Title VII complaints, the parties could not possibly afford the expense and industry could not bear such a substantial adverse impact. Therefore, labor and management should be free to use their ingenuity in granting arbitrators latitude in putting Title VII grievances to rest. After all, subject only to the "constraints of statute and public policy," the combinations of what arbitrators may consider is "virtually unlimited."[162]

The Supreme Court recently intimated that courts should refrain from interceding in business affairs. "Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."[163] This area is where arbitration fills the gap in policing "industrial self-government."[164] So long as arbitration awards draw their "essence from the agreement" and do not "manifest an infidelity" to the agreement, courts should respect those awards.[165]

The purpose of the guidelines for arbitrators considering social policy in Title VII grievances is to insure fairness at all

[161] Metal Products Workers, Local 1645 v. Torrington Co., 358 F.2d 103, 106 (2d Cir. 1966); Local 453, Int'l Union of Electrical, Radio & Machine Workers v. Otis Elevator Co., 314 F.2d 25, 29 (2d Cir. 1963), *cert. denied*, 373 U.S. 949 (1963).

[162] Walter A. Stanley & Son, Inc. v. Trustees of Hackley School, 366 N.E.2d 1339, 1340-41 (N.Y. 1977) (per curiam).

[163] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978).

[164] Lucas v. Philco-Ford Corp., 399 F. Supp. 1184, 1188 n.7 (E.D. Pa. 1975).

[165] San Francisco-Oakland Newspaper Guild v. Tribune Publishing Co., 407 F.2d 1327 (9th Cir. 1969) (*citing* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)); *cf.* Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123 (3d Cir. 1969) (An arbitration award "draws its essence from the collective bargaining agreement if the interpretation can in any rational way be derived from the agreement . . . ." *Id.* at 1128).

stages of the arbitral process. Toward that end, there is no fault. But the guidelines do not, and should not, foreclose arbitrators from considering social policy. Only then can arbitration fulfill its role in promoting industrial peace under the policy of equal employment opportunity.