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## FOR THE GOOD OF ALL NOT INVOLVED: THE CASE FOR A PUBLIC PROTECTION EXCEPTION TO THE ENFORCEMENT OF ARBITRAL AWARDS

Michelle Polato\*

### I. INTRODUCTION

Although much can be said about the efficiency of arbitration as a method of private dispute resolution,<sup>1</sup> arbitration is not always private. Sometimes, awards have the capacity to touch the lives of countless individuals whose identities are unknowable and whose interests are not represented at the time of the arbitral trial. This is nowhere more true than in labor arbitrations regarding the discharge of a union member.

At first glance, this type of arbitration seems private enough; and most of the time, it just might be. But where the union member is, for example, a seaman on an oil tanker discharged for being intoxicated, the arbitration can no longer be said to be private.<sup>2</sup> In situations like this, an arbitral award could directly impact the lives of individuals in the public. The analysis, therefore, changes.

Based on an extension of the common law exception to the judicial enforcement of private agreements, reviewing courts may refuse to enforce an arbitration award that is contrary to public policy.<sup>3</sup> Under the public policy exception, courts are authorized to consider the public in the course of an otherwise private dispute. This exception, however, leaves much to be desired in the way of public protection.

According to the United States Supreme Court, the public policy exception to the enforcement of arbitral awards is a narrow one.<sup>4</sup> It can be applied only where the award violates a policy, “ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.”<sup>5</sup> This formulation effectively leaves no room for merits review absent a clearly delineated law abrogated by the award, even where the outcome poses a threat to the public.

This shortcoming of the public policy exception is exemplified by a recent case out of Illinois. In *Decatur Police Benevolent & Protective Association Labor Committee*

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<sup>1</sup> See, e.g., UNIF. ARB. ACT § 15(a) cmt. n.2. (2000) (encouraging arbitrators to “keep in mind the goals of an expeditious, less costly, and efficient procedure . . .”).

<sup>2</sup> This scenario is borrowed from facts of *Exxon Shipping Co. v. Exxon Seamen's Union*, 11 F.3d 1189 (3d Cir. 1993), discussed *infra*. For another illustrative example, see Denis Theriault, *Fire Frashour? Done. The Cop who Shot Aaron Campbell is Canned; Three Others Are Suspended*, THE PORTLAND MERCURY (Nov. 18, 2010), available at <http://www.portlandmercury.com/portland/fire-frashour-done/Content?oid=3053450> (describing the firing—and subsequent arbitral award reinstating—of a white police officer who shot a black, unarmed, suicidal man in the back) (last visited Feb. 11, 2013).

<sup>3</sup> *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987) (indicating that the doctrine which allows a court to “refuse to enforce contracts that violate law or public policy . . . derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act . . .”).

<sup>4</sup> *Id.* at 43 (noting that the public policy exception to the judicial enforcement of arbitration awards “does not . . . sanction a broad judicial power to set aside arbitration awards . . .”).

<sup>5</sup> *Id.* (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)) (internal quotation marks omitted).

*v. City of Decatur*,<sup>6</sup> the Fourth District of the Appellate Court of Illinois heard the appeal of a union whose arbitration award was vacated on public policy grounds. The award reinstated a police officer who was discharged in the wake of his arrest in connection with a domestic violence incident.<sup>7</sup>

The appellate court in *Decatur* faced a tough decision: Affirm the lower court and provide protection to the people of Decatur from the potential harm associated with the City's employment of the police officer, or reverse the lower court and allow an officer of questionable moral fiber to return to duty. The court chose the former path and affirmed the decision of the trial court vacating the award on public policy grounds.<sup>8</sup> Although this outcome may be morally desirable, this comment argues that the result in *Decatur* is legally questionable.

This comment advocates for a public protection exception to the judicial enforcement of arbitration awards which would allow for merits review in cases where the public is threatened by an award.<sup>9</sup> Such an exception would ensure that courts, like the Illinois Appellate Court, would not have to stretch the public policy exception in order to provide public protection at the risk of being overturned. An exception of this sort would therefore benefit both the integrity and autonomy of the arbitral system, and the public – whose interests are oft forgotten in the course of private dispute resolution.

Part II below lays the foundation by giving an overview of the public policy exception to the enforcement of arbitral awards. Part III goes on to discuss the application of the public policy exception in practice. In this Part, the rationale of *Decatur* will be scrutinized and compared to a similar case. Part IV analyzes why the public policy exception is insufficient to protect the public. Finally, in Part V, a concluding analysis is offered.

## II. THE ORIGINS OF THE PUBLIC POLICY EXCEPTION

The public policy exception to the judicial enforcement of arbitration awards is rooted in the common law doctrine which allows courts to refuse to enforce illegal contracts.<sup>10</sup> The exception made its debut when the Supreme Court decided *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber*.<sup>11</sup> *W.R. Grace* involved an arbitration decision awarding union members damages for the breach of a seniority provision in their collective bargaining agreement.<sup>12</sup> Shortly after deciding *W.R. Grace*, the Supreme Court granted a petition for a writ of certiorari in *United Paperworkers International Union v. Misco, Inc.* to clarify the scope of this newly minted exception to the enforcement of arbitration awards. *Misco* involved the discharge of a union member and an arbitral award subsequently reinstating that member.<sup>13</sup>

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<sup>6</sup> 968 N.E.2d 749 (Ill. App. Ct. 2012).

<sup>7</sup> *Id.* at 751.

<sup>8</sup> *Id.* at 752.

<sup>9</sup> A suggested statutory formulation for such an exception is: “Arbitral awards are enforceable except to the extent that enforcement threatens the health, safety or wellbeing of the public.”

<sup>10</sup> *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987).

<sup>11</sup> 461 U.S. 757 (1983).

<sup>12</sup> *Id.* at 769.

<sup>13</sup> *Misco*, 484 U.S. at 34-35.

## A. *Public Policy's Nascent Beginning: W.R. Grace*

### I. W.R. Grace

In the early 1970s, the Equal Employment Opportunity Commission (EEOC) determined that W.R. Grace & Co. was in violation of Title VII of the Civil Rights Act of 1964.<sup>14</sup> To remedy this, W.R. Grace entered into a conciliation agreement with the EEOC.<sup>15</sup> This agreement, however, was in direct conflict with the seniority provisions of the collective bargaining agreement between W.R. Grace and Local Union 759.<sup>16</sup>

After entering into the conciliation agreement, W.R. Grace laid off several union members who should have been protected under the collective bargaining agreement.<sup>17</sup> Grievances were filed, but arbitration was barred by an injunction issued by the District Court for the Northern District of Mississippi which found that collective bargaining agreements could be unilaterally modified “to alleviate the effects of past discrimination.”<sup>18</sup> This ruling was later reversed by the United States Court of Appeals for the Fifth Circuit, and arbitration was again initiated.<sup>19</sup>

The arbitrator’s award ordered W.R. Grace to issue back pay to those union members who were wrongfully terminated.<sup>20</sup> Dissatisfied with this result, W.R. Grace petitioned the District Court to vacate the award. The court did so on the ground that enforcing the collective bargaining agreement for the time period between the District Court’s original ruling and the Fifth Circuit’s reversal was contrary to public policy.<sup>21</sup> The Court of Appeals reversed, and W.R. Grace appealed.<sup>22</sup>

The United States Supreme Court granted the company's petition for a writ of certiorari and affirmed the ruling of the Court of Appeals.<sup>23</sup> Importantly, the Supreme Court did not rule that the public policy exception has no place in federal labor law; rather it held that the arbitral award was not repugnant to public policy in this case.

After the usual recitals of proper judicial deference to arbitration awards, the Court wrote that if an award “violates some explicit public policy, [the Court is] obliged to refrain from enforcing it.”<sup>24</sup> Such a public policy “must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest.”<sup>25</sup> It was with these observations that

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<sup>14</sup> W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, 461 U.S. 757, 759 (1983).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 759-60.

<sup>17</sup> *Id.* at 761.

<sup>18</sup> *Id.*

<sup>19</sup> W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, 461 U.S. 757, 762 (1983).

<sup>20</sup> *Id.* at 763-64. Contrary to the District Court’s conclusion that the collective bargaining agreement could be unilaterally modified “to alleviate the effects of past discrimination,” (*id.* at 761) the arbitrator concluded that such modification was not possible in light of the fact that the collective bargaining agreement “made no exception for good-faith violations” of its terms. *Id.* at 763-64.

<sup>21</sup> *Id.* at 764.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 772.

<sup>24</sup> W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, 461 U.S. 757, 766 (1983) (quoting *Hurd v. Hodge*, 334 U.S. 24, 35 (1948)).

<sup>25</sup> *Id.* (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945) (internal quotation marks omitted)).

the public policy exception to the judicial enforcement of arbitration awards was unceremoniously born.

As for the exception's application to this case, the Court identified two explicit public policies implicated by this award, only one of which will be discussed here: Obedience to judicial orders.<sup>26</sup> Although W.R. Grace complied with the District Court's holding allowing for unilateral modification of a collective bargaining agreement, the company argued that it was punished for doing so. Accordingly, W.R. Grace argued that the arbitration award incentivizes disobedience of court orders, thereby violating public policy.<sup>27</sup> The Court, however, found this argument inapposite. The award did not mandate layoffs, much less require that layoffs be conducted according to the collective bargaining agreement: "The award simply held, retrospectively that the employees were entitled to damages for the prior breach of the seniority provisions."<sup>28</sup> The Court noted that if anything, the award was punishing W.R. Grace for being a party to two irreconcilable contracts.<sup>29</sup>

## 2. *The Exception Emerges*

From *W.R. Grace*, the public policy exception arose and took shape as an exception with two steps: The first step is to identify an explicit public policy firmly rooted in the law;<sup>30</sup> the second step is to demonstrate that the award violates the identified public policy.<sup>31</sup> In essence then, the public policy exception is only applicable in situations in which the award orders conduct that violates established law.

### B. *Actions Speak Louder Than Words: Misco*

#### 1. *Misco*

After the Supreme Court handed down *W.R. Grace*, there was considerable confusion among the circuits concerning the proper application of the public policy exception.<sup>32</sup> In order to resolve this split, the Court granted certiorari in *United Paperworkers Int'l Union v. Misco, Inc.*<sup>33</sup>

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<sup>26</sup> *Id.* (citing *Walker v. Birmingham*, 388 U.S. 307, 313-314 (1967); *United States v. Mine Workers*, 330 U.S. 258, 293-294 (1947); *Howat v. Kansas*, 258 U.S. 181, 189-190 (1922)).

<sup>27</sup> *Id.* at 766-70.

<sup>28</sup> *Id.* at 768-69.

<sup>29</sup> *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber*, 461 U.S. 757, 767 (1983) ("The dilemma . . . was of the Company's own making. The company committed itself voluntarily to two conflicting contractual obligations.").

<sup>30</sup> *Id.* at 766 (defining a public policy as an explicit, well defined and dominant one).

<sup>31</sup> *Id.* (indicated that the award must actually be in violation of public policy).

<sup>32</sup> *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 35 n.7 (1987) (listing cases).

<sup>33</sup> *Id.* at 35. As both the majority and the concurring opinions indicate, however, the Court did not explicitly answer the question on which they granted certiorari which was: "whether a court may refuse to enforce an arbitration award rendered under a collective-bargaining agreement on public policy grounds

Misco, Inc. operated a paper plant in Louisiana and was a party to a collective bargaining agreement with United Paperworkers International Union.<sup>34</sup> Under the agreement, Misco had the right to create and enforce internal rules.<sup>35</sup> Among the rules was a drug policy which provided for discharge if an employee brought or consumed drugs on plant property.<sup>36</sup>

Isiah Cooper was a union member who worked at the plant operating a slitter-rewinder machine—a hazardous contraption that had caused numerous injuries in years past.<sup>37</sup> Cooper was under investigation by the police because of his supposed involvement with drugs.<sup>38</sup> Accordingly, the police kept his car under surveillance. In January 1983, Cooper was seen by the police entering a car in the plant's parking lot with two other men during work hours.<sup>39</sup> After a while, the two men returned to the plant, leaving Cooper in the back seat.<sup>40</sup> The police apprehended Cooper after observing that the car was full of smoke and that a lighted marijuana cigarette was in the front seat ashtray.<sup>41</sup>

The following month, Cooper was discharged on the grounds that his presence in the car violated the company's drug policy.<sup>42</sup> Cooper filed a grievance and arbitration was initiated on the issue of whether just cause existed for the discharge.<sup>43</sup> The arbitrator found that Misco had failed to prove that Cooper had possessed or used marijuana on plant property. The fact that Cooper was found in the backseat of a car, in which a joint was burning in the front, was insufficient. The arbitrator ordered Misco to reinstate Cooper.<sup>44</sup>

Misco petitioned the District Court to vacate the award arguing *inter alia* that it violated public policy.<sup>45</sup> The District Court agreed, and the Court of Appeals affirmed, ruling that “reinstatement would violate the public policy against the operation of dangerous machinery by persons under the influence of drugs or alcohol.”<sup>46</sup> The Union appealed, asserting that an “award may not be set aside on public policy grounds unless the award orders conduct that violates the positive law.”<sup>47</sup>

The Supreme Court granted certiorari and reversed, finding for the Union.<sup>48</sup> As both the majority and the concurring opinions indicate, however, the Court did not

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only when the award itself violates positive law or requires unlawful conduct by the employer.” *Id.* at 45 n.12, 46 (Blackmun, J., concurring).

<sup>34</sup> *Id.* at 31.

<sup>35</sup> *Id.* at 32.

<sup>36</sup> *Id.*

<sup>37</sup> *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 32 (1987).

<sup>38</sup> *Id.* at 33.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 33 (1987).

<sup>43</sup> *Id.* at 33-34.

<sup>44</sup> *Id.* at 34.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 35 (internal quotation marks omitted).

<sup>47</sup> *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987).

<sup>48</sup> *Id.* at 45.

explicitly hold that the Union's interpretation of the public policy exception was correct.<sup>49</sup> The Court's reasoning, however, suggests that the public policy exception is indeed narrow and is only applicable in situations in which the award orders illegal conduct.

The first step in the Court's analysis involved a recital of the limited function of the judiciary when the parties have agreed to submit their claims to arbitration.<sup>50</sup> The Court next clarified their holding in *W.R. Grace* by stating that “case does not . . . sanction a broad judicial power to set aside arbitration awards as against public policy.”<sup>51</sup> Instead, their decision in *W.R. Grace* turned on an “examination of whether the award created an explicit conflict with other laws and legal precedents . . . .”<sup>52</sup>

After clarifying this narrow scope of the public policy exception, the Court indicated that the application of the public policy exception in the present case fails on both of the two prongs laid out in *W.R. Grace*.

First, the Court of Appeals failed to identify an explicit public policy firmly rooted in the law: “The Court of Appeals made no attempt to review existing laws . . . in order to demonstrate that they establish a well-defined and dominant policy against the operation of dangerous machinery while under the influence of drugs.”<sup>53</sup> Second, even if the court were to have effectively identified a public policy, the holding of the Court of Appeals failed to pass muster under the second step. The Court of Appeals’ opinion came up short by failing to demonstrate that the award actually violates the law. The link between a marijuana cigarette found in a car in which Cooper was found and “Cooper's actual use of drugs in the workplace is tenuous at best and provides an insufficient basis for holding that his reinstatement would *actually* violate the public policy identified.”<sup>54</sup>

The Supreme Court ended its analysis by chastising the Court of Appeals for playing the role of fact finder and for deciding a case on the basis of its own views.<sup>55</sup>

## 2. *The Exception is Narrow*

In spite of the Court's failing to reach the question on which it granted certiorari, the Court was by no means unclear. The Supreme Court unanimously reversed on the ground that the Court of Appeals' public policy analysis was too broad. The standard used by the Court in evaluating the Court of Appeals' analysis was whether the court demonstrated that the award actually violates the public policy identified.<sup>56</sup> Since public

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<sup>49</sup> *Id.* at 45 n.12, 46 (Blackmun, J., concurring). Many courts have since latched on to this fact in order to justify rulings that are in plain contradiction to the Supreme Court decisions in *W.R. Grace* and *Misco*. See, e.g., *Exxon Shipping Co. v. Exxon Seamen's Union*, 11 F.3d 1189, 1192 (3d Cir. 1993) (indicating that the Circuit has adopted a “broader approach” to the application of the public policy exception, and allowing for awards to be vacated if they are “inconsistent with some significant public policy.”).

<sup>50</sup> *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36-37 (1987).

<sup>51</sup> *Id.* at 43.

<sup>52</sup> *Id.* (internal quotation marks omitted).

<sup>53</sup> *Id.* at 44 (internal quotation marks omitted).

<sup>54</sup> *Id.* (emphasis added).

<sup>55</sup> *Id.* at 44-45 (“[I]t was inappropriate for the Court of Appeals itself to draw the necessary inference. . . . [T]he Court of Appeals could not upset the award because of its own view that the public policy about plant safety was threatened.”).

<sup>56</sup> *Id.* at 44.

policy is ascertained by reference to laws and legal precedents,<sup>57</sup> *Misco* can fairly be read to hold that the public policy exception does not apply unless an award would actually violate the law.

### III. THE PUBLIC POLICY EXCEPTION IN PRACTICE: A CASE STUDY IN OVERREACHING

In practice, courts do not always heed the admonition of the Supreme Court to avoid an *ultra vires* injection of general notions of public interest into a public policy decision. This is exemplified in a recent case out of the Forth District of the Appellate Court of Illinois involving an arbitration award reinstating a police officer who was discharged after his arrest following a domestic violence incident.<sup>58</sup>

#### A. *Decatur Police Benevolent and Protective Association Labor Committee*

Jeremy Welker was a member of the Decatur Police Benevolent and Protective Association Labor Committee, and a decorated officer who had been with the City of Decatur's police department for sixteen years.<sup>59</sup> In 2010, however, the City discharged Officer Welker after his arrest on a charge of domestic violence.<sup>60</sup> Officer Welker and the Union filed a grievance contesting this discharge.<sup>61</sup>

At the arbitration, the City produced a statement by Officer Welker's wife, Michelle, depicting a dispute that occurred between the couple in January 2010.<sup>62</sup> The event escalated into verbal and physical violence, ending with Officer Welker head-butting Michelle in her forehead.<sup>63</sup> After this, Michelle called the police and Sergeant Steven Carroll responded to investigate.<sup>64</sup> Sergeant Carroll's report contains statements from Officer Welker denying the incident.<sup>65</sup> Officer Welker was then arrested, and during the subsequent interview, admitted the physical violence.<sup>66</sup> Officer Welker was not charged in connection with this incident.<sup>67</sup>

The arbitrator found that no just cause existed for the discharge, and ordered that the Officer be reinstated after a forty-five day suspension.<sup>68</sup> The City petitioned in state

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<sup>57</sup> *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987).

<sup>58</sup> *Decatur Police Benevolent & Protective Ass'n Labor Comm. v. Decatur*, 968 N.E.2d 749, 751 (Ill. App. Ct. 2012).

<sup>59</sup> *Id.* at 752.

<sup>60</sup> *Id.* at 751.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 752.

<sup>63</sup> *Decatur Police Benevolent & Protective Ass'n Labor Comm. v. Decatur*, 968 N.E.2d 749, 752 (Ill. App. Ct. 2012).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 753.

<sup>68</sup> *Decatur Police Benevolent & Protective Ass'n Labor Comm. v. Decatur*, 968 N.E.2d 749, 751 (Ill. App. Ct. 2012). The arbitrator issued a ninety-nine page decision, in which the arbitrator justified his holding on multiple grounds. One of these was a finding that the City had only proven criminal conduct by a preponderance of the evidence, whereas under the language of the collective bargaining agreement, the City must prove criminal conduct by clear and convincing evidence to justify discharge. Another reason

court for vacatur, claiming that the award violated public policy. The court agreed, finding that the award violates both the public policy against domestic violence and the public policy in favor of police truthfulness during police investigations.<sup>69</sup>

On appeal, the Appellate Court of Illinois upheld the judgment. Surprisingly, however, after reciting the exception's two-step application process,<sup>70</sup> the court did not engage in the two-step application process. Instead, the court moved on to other aspects of the case. Because of this, and the reasons stated below, *Decatur's* application of the public policy exception fails under *W.R. Grace* and *Misco*.

### 1. *The Public Policy against Domestic Violence*

The Illinois trial court vacated the award reinstating Officer Welker, finding *inter alia* that it contravened the public policy against domestic violence.<sup>71</sup> As discussed *supra*, in order to vacate an award on public policy grounds, two findings are required. The first is that the policy be ascertained by reference to “laws and legal precedents rather than an assessment of general considerations of supposed public interest”<sup>72</sup> and the second is a finding that the award violates the policy identified.<sup>73</sup>

In this case, the appellate court failed to meet the analytical requirements of the first step when it did not evaluate the trial court's finding that the domestic violence laws of Illinois establish a public policy against domestic violence. The Supreme Court indicated in *Misco* that it is the responsibility of the reviewing courts to survey the laws in order to demonstrate the existence of a public policy.<sup>74</sup> It is not enough to summarily state that the policy exists. If the reviewing court doesn't go through the motions, the public policy exception is improperly applied—regardless of whether one could have been shown to exist—and the decision is thus open to reversal.

Assuming *arguendo* that the appellate court decision passed the first hurdle, it lacks the analytical constitution to go any further. Seen from ten thousand feet, the outcome in *Decatur* looks persuasive and appeals to our morality; but it is not sound. Similar to *Misco*, where the Supreme Court found the causal connection between the

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for the reinstatement was a finding by the arbitrator that Officer Welker was being punished more severely than other union members for similar conduct. *Id.* at 752-53.

<sup>69</sup> *Id.* at 754.

<sup>70</sup> *Id.* at 755 (“A two-step analysis is to be employed when considering whether the public-policy exception applies. The first question is whether a well-defined and dominant public policy can be identified. If one can, then the second question is whether the award or the arbitrator, resulting from his or her interpretation of the agreement, violates public policy.”) (citations omitted) (internal quotation marks omitted).

<sup>71</sup> *Id.* at 754.

<sup>72</sup> *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987) (quoting *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983)) (internal quotation marks omitted).

<sup>73</sup> *W.R. Grace*, 461 U.S. at 766 (quoting *Hurd v. Hodge*, 334 U.S. 24, 35 (1948)).

<sup>74</sup> *Misco*, 484 U.S. at 44 (“The Court of Appeals made no attempt to review existing laws . . . in order to demonstrate that they establish a well-defined and dominant policy against the operation of dangerous machinery while under the influence of drugs.”).

award and an actual violation of the public policy to be lacking,<sup>75</sup> the appellate court here failed to demonstrate a causal link between the award finding no just cause for the discharge of Officer Welker and a violation of the Illinois domestic violence laws.

The only language from the opinion rationalizing the finding that the award violates public policy is this: “The arbitrator’s award does not in any way promote the welfare and protection of victims of domestic violence.”<sup>76</sup> While this much may be true, it is not enough to support a finding that the award actually violates public policy.<sup>77</sup> The award in *Decatur* simply held that there was no just cause for the discharge of a union member.<sup>78</sup> The result of this award was that Officer Welker would be eventually reinstated after a period of suspension.<sup>79</sup> The narrow question that must be answered is whether this award violates domestic violence laws. The answer to this question is almost certainly “no”.<sup>80</sup>

## 2. *Public Policy Favoring Police Truthfulness*

The appellate court in *Decatur* also failed to properly apply the public policy exception in the context of the second public policy identified: That in favor of police truthfulness during police investigations.<sup>81</sup> The reviewing court again failed to ascertain this policy by reference to laws and legal precedents as required by the Supreme Court.<sup>82</sup> Instead, it seems as though the court looked to generalized notions of public interest; and although the public might very well benefit from police officers who demonstrate the utmost veracity under all circumstances—including an investigation into the circumstances leading to their own arrests—this is not the proper inquiry under the public policy exception. The reviewing court must reference laws and legal precedents in identifying a public policy.<sup>83</sup> Merely stating that such a policy exists, as the court did here, is not enough.

Assuming that the court would have been able to identify a public policy favoring police truthfulness by reference to laws and legal precedents, the reasoning offered in the

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<sup>75</sup> *Id.* (The link between a marijuana cigarette found in a car in which Cooper was found and “Cooper’s actual use of drugs in the workplace is tenuous at best and provides an insufficient basis for holding that his reinstatement would *actually* violate the public policy identified.”).

<sup>76</sup> *Decatur Police Benevolent & Protective Ass’n Labor Comm. v. Decatur*, 968 N.E.2d 749, 754 (Ill. App. Ct. 2012).

<sup>77</sup> *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 44 (1987) (indicating that the court must show that “reinstatement would *actually* violate the public policy identified . . . .”) (emphasis added) (internal quotation marks omitted). Since public policy is defined by reference to “laws and legal precedents,” *id.* at 43, an award may not be vacated on public policy grounds unless it is shown that it would actually violate the law.

<sup>78</sup> *Decatur*, 968 N.E.2d at 751.

<sup>79</sup> *Id.*

<sup>80</sup> The answer may be different if, for example, there were laws or legal precedents preventing individuals who have been arrested for domestic violence from serving as police officers.

<sup>81</sup> *Decatur Police Benevolent & Protective Ass’n Labor Comm. v. Decatur*, 968 N.E.2d 749, 754 (Ill. App. Ct. 2012) (noting a “strong public policy for law-enforcement officers to be truthful during police investigations.”).

<sup>82</sup> *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987).

<sup>83</sup> *Id.*

second step of the public policy analysis is equally obscure. The court's second step analysis consists in whole of the statement that the award “undermines the public confidence in police departments by requiring the continued employment of officers who fail to tell the truth during investigations surrounding their own conduct.”<sup>84</sup> While the reinstatement of an officer who lied to police as a civilian may indeed undermine public confidence in the system, it is hard to imagine how this argument supports a finding that the award actually violates the policy identified. What is required is a showing that the reinstatement of Officer Welker after a period of suspension actually violates the public policy against police untruthfulness.<sup>85</sup> This causal relationship was not shown here.

## B. Exxon

*Decatur* does not stand alone as a case broadly applying the public policy exception in contravention of the Supreme Court's clear command to the contrary. One such case deserves a quick mention here because of its compelling fact pattern.

In 1989, Randall Fris, a seaman working for Exxon Shipping Company on an oil tanker was discharged when he reported to work with a blood alcohol level of .15.<sup>86</sup> Fris was a member of the Exxon Seamen's Union, which filed a grievance protesting the discharge.<sup>87</sup> The arbitration award held that, in light of the employee's spotless eight-year employment record, discharge was not the appropriate remedy. The award ordered reinstatement upon a ninety day suspension.<sup>88</sup>

Exxon applied to the District Court to have the award vacated. The District Court granted the request, finding that the award “was contrary to a well-defined and dominant public policy against having intoxicated persons operate commercial vessels.”<sup>89</sup> The Union appealed, and Third Circuit affirmed.<sup>90</sup>

Unlike the court in *Decatur*, the Court of Appeals in *Exxon* purported to engage in the public policy analysis. First, the court looked to laws and legal precedents in order to ascertain the identified public policy. Specifically, the court turned to several environmental laws and regulations providing for liability in the case of oil spills.<sup>91</sup> The court concluded that these laws establish the “well defined” public policy identified by the District Court.<sup>92</sup> Second, the court concluded that “this policy precluded the reinstatement” of Fris.<sup>93</sup>

Importantly, the court made note of its own analytical shortcoming; namely, there is “no statute or regulation that directly prohibits the owner or operator of an oil tanker

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<sup>84</sup> *Decatur*, 968 N.E.2d at 754.

<sup>85</sup> *Misco*, 484 U.S. at 44. See text *supra* note 77.

<sup>86</sup> *Exxon Shipping Co. v. Exxon Seamen's Union*, 11 F.3d 1189, 1190-91 (3d Cir. 1993).

<sup>87</sup> *Id.* at 1191.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* (internal quotation marks omitted).

<sup>90</sup> *Id.* at 1190.

<sup>91</sup> *Exxon Shipping Co. v. Exxon Seamen's Union*, 11 F.3d 1189, 1194-95 (3d Cir. 1993).

<sup>92</sup> *Id.* at 1196.

<sup>93</sup> *Id.*

from continuing to employ a crew member who is found to be intoxicated on duty.”<sup>94</sup> Accordingly, its public policy finding is based on unstable footing. The dissenting opinion recognized as much. Judge Seitz refused to join the majority opinion due to what he saw as an inaccurate application of the public policy exception, stating that the exception is to be applied only if “upholding an award would amount to 'judicial condemnation' of illegal acts . . . .”<sup>95</sup> Because the award did not sanction illegal acts, Judge Seitz dissented.

### C. *Generalized Considerations are Insufficient*

*Decatur* and *Exxon* demonstrate that, even where there is a patent need for public protection, the narrow formulation that the Supreme Court gave to the public policy exception can be insufficient to provide this protection. While “generalized considerations” may support the inference that we would be safer in a world without crooked cops and drunken seamen, generalized notions are not enough to support a public policy finding.<sup>96</sup> Further, even if a court is capable of identifying a “well defined and dominant”<sup>97</sup> public policy, it faces an additional hurdle because it must show that the award violates that policy.<sup>98</sup> This is, then an extremely narrow exception—one which only applies upon a finding that an award would cause illegalities. This bar is a high one, and the courts in *Decatur* and *Exxon* were unable to live up to it. These courts instead stretched the limits of the exception, engaging in broad merits review at the risk of being overturned and having the public again exposed to the very dangers from which the court sought to protect them in the first instance.

## IV. A PUBLIC PROTECTION EXCEPTION TO THE ENFORCEMENT OF ARBITRAL AWARDS

It is, indeed, unsavory to argue that the public policy exception was wrongfully applied in *Decatur* and similar cases; but for the integrity and autonomy of the arbitral system, and for the sake of the otherwise unguarded public interests, this argument must be made. Arbitration law must make room for an exception to the enforcement of arbitration awards that would allow for judicial merits review in circumstances in which the award implicates significant public interests – a public protection exception.

### A. *For the Autonomy of Arbitration*

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<sup>94</sup> *Id.* at 1195. The court nevertheless upheld the District Court's ruling, reasoning that the cited environmental statutes and regulations “convey the unequivocal message that [Exxon] should take every practicable step to ensure that an intoxicated crew member does not cause or contribute to an oil spill.” *Id.*

<sup>95</sup> *Id.* at 1196 (Seitz, J., dissenting).

<sup>96</sup> *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987) (Reiterating that the public policy “must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest.”) (citing *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983)).

<sup>97</sup> *Misco*, 484 U.S. at 43.

<sup>98</sup> *Id.* at 44.

When courts engage in *ultra vires* merits review of an arbitration award, the integrity of the system is undermined because arbitration becomes a mere precursor to judicial litigation.<sup>99</sup> The broad judicial review that occurs under the guise of the public policy exception—as exemplified in *Decatur* and *Exxon*—threatens the autonomy of the arbitral system and is exactly what the Supreme Court meant to guard against in *Misco*.<sup>100</sup> Courts, however, are often faced with the real and difficult task of deciding between an analytically unsound application of the public policy exception which threatens the autonomy of arbitration, and a holding which threatens the public. Unsurprisingly, then, cases like *Decatur* are not rare. A public protection exception to the enforcement of arbitration awards would alleviate the strain felt by courts when faced by a decision similar to the ones presented in *Decatur* and *Exxon*.

Not only is the integrity of the arbitral system threatened when courts broadly review the merits of an arbitral award, it is also harmed by inconsistent judicial applications of enforcement standards and exceptions.<sup>101</sup> A public protection exception would therefore benefit the autonomy of the arbitral system by encouraging uniformity of application in arbitration law.

### B. For the Public Good

As arbitration grows in importance and prevalence in our legal system,<sup>102</sup> so too does the threat to the public. The public policy exception to the enforcement of arbitration awards leaves much to be desired in terms of its ability to protect the public from harm resulting from an otherwise private arbitration award. An untruthful and abusive police officer and a drunken seaman aboard an oil tanker are unquestionably public threats. The public, however, is unrepresented in private proceedings adjudicating dangerous aberrant behavior, and under a narrow application of the public policy exception, are guaranteed protection only when an arbitral award orders conduct in violation of the law.<sup>103</sup>

Even when courts stretch the public policy exception in an effort to protect the public, the court does so at the risk of being overturned and having the public again exposed to the harm. A public protection exception to the enforcement of arbitral awards is the only way to ensure that in such circumstances, the public will not bear the risks of private adjudication.

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<sup>99</sup> For a case expounding on the principle that judicial review of arbitration awards should be deferential, *see, e.g.*, *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001). *See also* *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008) (holding that 9 U.S.C. § 10(a), providing statutory grounds for the vacatur of arbitration awards which are narrow and procedural in nature, is “exclusive”).

<sup>100</sup> *Misco*, 484 U.S. at 43 (clarifying the scope of the public policy exception which took shape in *W.R. Grace* by stating that *W.R. Grace* “does not . . . sanction a broad judicial power to set aside arbitration awards as against public policy.”).

<sup>101</sup> *See* Winnie Ma, *Public Policy in the Judicial Enforcement of Arbitral Awards: Lessons for and from Australia*, [http://works.bepress.com/winnie\\_ma/2](http://works.bepress.com/winnie_ma/2) (last visited Jan. 26, 2013).

<sup>102</sup> F. Shabnam Nouraie, *Arbitration Nation: While Arbitration Grows, Judicial Review of Arbitral Awards may be Shrinking*, 2010 J. DISP. RESOL. 205, 205 (2010) (“In recent years, arbitration has been embraced with almost ‘religious fervor’ . . . . [I]t is undeniable that arbitration has become a favored tool.”).

<sup>103</sup> *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 44 (1987). *See text supra* note 77.

## V. CONCLUSION

Despite its name, the public policy exception to the enforcement of arbitration awards provides little protection to the public. The Supreme Court has construed the exception narrowly, applying it only in circumstances where the reviewing court finds that the award would actually violate the law.<sup>104</sup> As demonstrated in *Decatur*, the public policy exception is nevertheless applied broadly in situations in which no explicit public policy is identified, and without a showing that the award actually violates the supposed policy. When this happens, the autonomy of the arbitration system is harmed and the public is no better off because of the potential that the case could be overturned on appeal. Arbitration law needs to make room for a public protection exception to the enforcement of arbitration awards which would allow for merits review in situations where the health, safety or welfare of the public is jeopardized. Such an exception is needed if courts are to stop applying *ultra vires* merits review and if public interests are to be accounted for in a world in which private dispute resolution is increasingly prevalent.

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<sup>104</sup> *Misco*, 484 U.S. at 44.