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Police Arbitration

*Stephen Rushin**

Before punishing an officer for professional misconduct, police departments often provide the officer with an opportunity to file an appeal. In many police departments, this appeals process culminates in a hearing before an arbitrator. While numerous media reports have suggested that arbitrators regularly overturn or reduce discipline, little legal research has comprehensively examined the outcomes of police disciplinary appeals across the United States.

In order to better understand the use of arbitration in police disciplinary appeals and build on prior research, this Article draws on a dataset of 624 arbitration awards issued between 2006 and 2020 from a diverse range of law enforcement agencies. It finds that arbitrators on appeal reduced or overturned police officer discipline in 52% of these cases. In 46% of cases involving termination, arbitrators ordered police departments to rehire previously terminated officers. On average, arbitrators reduced the length of officer suspensions by approximately 49%.

Arbitrators gave several common justifications for reductions in officer discipline. Frequently, arbitrators found the original discipline to be excessive relative to the offense committed or relative to punishments received by other officers. In a somewhat smaller number of cases, arbitrators cited insufficient evidence or procedural flaws in the investigation or adjudication of the original internal disciplinary process.

This Article concludes by considering the implications of these findings for the literature on police accountability. It also considers emerging efforts in states like Minnesota and Oregon to reform police arbitration procedures in order to better balance officers' interests in due process with the public's interest in accountability.

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INTRODUCTION

In November 2016, Seattle Police Chief Kathleen O'Toole fired Officer Adley Shepherd for punching a handcuffed woman named Miyekko Durden-Bosley in the face, fracturing her orbital socket.¹ The facts leading up to the assault were mostly not in dispute. Over two years earlier, Shepherd and two other Seattle Police Department ("SPD") officers responded to a domestic violence call in a residential neighborhood in South Seattle.² Video recordings of the incident showed Officer Shepherd became irritated as he and his fellow officers attempted to resolve a tense dispute between three individuals.³

1. Steve Miletich, *Officer Fired for Punching Drunk, Handcuffed Woman*, SEATTLE TIMES, <https://www.seattletimes.com/seattle-news/crime/seattle-police-officer-fired-over-punching-of-handcuffed-woman> (last updated Nov. 9, 2016, 10:13 PM) [<https://perma.cc/T3ZN-6M8V>] (providing a link to a video of the incident and a full description of the events surrounding Officer Shepherd's actions).

2. Steve Miletich, *Video Shows SPD Officer Punch Cuffed Woman, Documents Say*, SEATTLE TIMES, <https://www.seattletimes.com/seattle-news/video-shows-spd-officer-punch-cuffed-woman-documents-say> (last updated Jan. 13, 2016, 11:22 AM) [<https://perma.cc/6XS2-4EBR>] (describing how Durden-Bosley appeared intoxicated in the video and repeatedly denied making any threats before her arrest).

3. SEATTLE POLICE DEP'T, OPA 14-0216, DISCIPLINARY ACTION REPORT: OFFICER ADLEY SHEPHERD (2016), http://spdblotter.seattle.gov/wp-content/uploads/sites/11/2016/11/DAR_11.9.16.pdf [perma.cc/N5EB-W2F5] [hereinafter SHEPHERD DISCIPLINARY REPORT] (providing the

Eventually, Officer Shepherd declared that his “patience was done” and that “someone was going to jail.”⁴ He then handcuffed Durden-Bosley and placed her under arrest for allegedly making threats.⁵ On the video, Durden-Bosley repeatedly shouted that she “did not make a threat.”⁶ The video then shows Officer Shepherd force Durden-Bosley into the back of his squad car.⁷ Clearly upset, Durden-Bosley responded by kicking towards the officer, possibly striking Officer Shepherd in his jaw.⁸ Officer Shepherd briefly stepped back from the car to regain his balance and told his fellow officers, “she kicked me.”⁹ Seconds later, Officer Shepherd lunged into the backseat and punched Durden-Bosley in her right eye.¹⁰ Throughout the incident, Durden-Bosley’s hands were handcuffed behind her back.¹¹

While Officer Shepherd came away from the confrontation with relatively minimal injuries,¹² Durden-Bosley suffered a bloody, bruised, and swollen right eye as a result of an orbital fracture.¹³ Almost immediately after the incident, the SPD’s Office of Professional Accountability opened an internal investigation into Officer Shepherd’s

summary of factual findings made by the Officer of Police Accountability and signed by the Seattle police chief).

4. *Id.* (internal quotation marks omitted).

5. Disciplinary Review Board’s Opinion and Award at 11, *Seattle Police Officers Guild v. City of Seattle*, No. 2:12-cv-01282-JLR (Dec. 7, 2018), ECF No. 512-6.

6. Miletech, *supra* note 1 (linking video of incident).

7. *Id.* (showing a struggle between Officer Shepherd and Durden-Bosley that appears to result in Officer Shepherd shoving her into the squad car where she lands on her back with her legs hanging outside of the squad car, pointed in the direction of Officer Shepherd).

8. Disciplinary Review Board’s Opinion and Award, *supra* note 5, at 4, 19. It is not immediately clear from the video whether the kicks hit the officer or where they may have made contact. Officer Shepherd also audibly exclaims that she kicked him before he punches her. Later in the evening, when Officer Shepherd reportedly sought medical attention, he claimed that Durden-Bosley’s Doc Marten shoe hit him in the jaw, causing him “shooting pain” for several seconds thereafter. *See id.* at 4, 6. In reviewing the events of that evening, the arbitrator on appeal described Durden-Bosley as engaging in a “felonious assault on an officer,” for which she was not charged. *Id.* at 6.

9. *Id.* at 4, 19.

10. *Id.*

11. SHEPHERD DISCIPLINARY REPORT, *supra* note 3 (placing particular emphasis on the fact that the suspect was handcuffed during his assault).

12. Disciplinary Review Board’s Opinion and Award, *supra* note 5, at 6 (stating that Officer Shepherd was “diagnosed with moderate, acute Temporomandibular Disorder (TMD)” due to the trauma from the kick, but noting that he only took one sick day before returning to the force).

13. Lewis Kamb, *Judge Reverses Arbitrator’s Rule Reinstating Seattle Police Officer Who Punched Handcuffed Suspect*, SEATTLE TIMES, <https://www.seattletimes.com/seattle-news/judge-reverses-arbitrators-rule-reinstating-seattle-police-officer-who-punched-handcuffed-suspect> (last updated Aug. 17, 2019, 12:15 PM) [<https://perma.cc/BMK2-HZKQ>] (showing multiple graphic photographs of Durden-Bosley’s injuries from the confrontation and also describing how, in a very rare set of events, a judge ultimately overturned the decision of the arbitrator in this case based on a determination that it was contrary to public policy).

behavior.¹⁴ Durden-Bosley also filed a § 1983 suit alleging a deprivation of her civil rights,¹⁵ which Seattle settled for \$195,000 in 2016.¹⁶ Two years later, after a lengthy internal investigation, Chief O'Toole concluded that Officer Shepherd violated the department's use of force policy.¹⁷ As she explained in her disciplinary report, the department's use of force policy requires officers to utilize de-escalation tactics and employ only necessary and proportional force.¹⁸ Officer Shepherd's conduct violated these principles, as there was no justification for him to assault an unarmed, "small, handcuffed, and supine" woman whom he had already secured in the back of his squad car.¹⁹ And, according to Chief O'Toole, there were numerous ways that Officer Shepherd could have easily taken control of the situation without resorting to a violent assault.²⁰

Further, Chief O'Toole noted that this was not the first time that Officer Shepherd's violation of departmental policies had seriously harmed a civilian. In 2009, the SPD suspended Officer Shepherd for ten days for prematurely releasing a domestic violence suspect who returned home and murdered his roommate.²¹ When viewed together,

14. SHEPHERD DISCIPLINARY REPORT, *supra* note 3 (describing the Office of Professional Accountability investigation of Officer Shepherd).

15. See Sara Jean Green, *Woman Punched by SPD Cop While Handcuffed Files Lawsuit*, SEATTLE TIMES, <https://www.seattletimes.com/seattle-news/crime/woman-punched-by-spd-cop-while-handcuffed-files-lawsuit/> (last updated Apr. 24, 2015, 9:11 AM) [<https://perma.cc/4UVM-AHN9>] (explaining that the suit accused "the Seattle Police Department of negligent training and supervision of Shepherd and cites three violations of Durden-Bosley's civil rights for excessive force, unreasonable search and seizure, and failure to train the officer," and claimed further that Durden-Bosley experienced "severe pain, partial blindness, a concussion, nausea and vomiting" because of the assault).

16. Christine Clarridge, *Woman Punched by Seattle Cop Settles Civil Suit for \$195,000*, SEATTLE TIMES, <https://www.seattletimes.com/seattle-news/crime/woman-punched-by-seattle-officer-settles-suit-for-195000> (last updated June 21, 2016, 6:39 PM) [<https://perma.cc/Q7UN-M3QE>] (discussing the controversy surrounding Officer Shepherd's use of force against Durden-Bosley and the subsequent settlement).

17. SHEPHERD DISCIPLINARY REPORT, *supra* note 3.

18. *Id.* (clarifying that under SPD policy, force may only be used against handcuffed suspects under "exceptional circumstances" like immediate risk of injury, escape, or destruction of property, none of which existed here).

19. *Id.*

20. *Id.* (explaining that he could have stepped away to de-escalate, utilized the other two officers on the scene, attempted to simply close the door of the car, or simply paused momentarily to reassess the situation).

21. *Id.*:

This instance marks . . . the second time you have failed to take personal responsibility You previously received a ten day suspension in 2009 for violating a different SPD policy where your failure resulted in the death of a victim; as such, you should be acutely aware of the potentially dire consequences of disregarding policies created to protect the public;

Disciplinary Review Board's Opinion and Award, *supra* note 5, at 25–26 (describing the prior incident in detail).

Chief O'Toole concluded that this series of behaviors exhibited a pattern of poor judgment.²² Based on these findings, Chief O'Toole terminated Officer Shepherd's employment with the SPD.²³ But before Chief O'Toole could finalize the firing, Officer Shepherd had the legal right under his collective bargaining agreement to file an appeal before an arbitrator to determine whether "just cause" existed for his termination.²⁴

As is often the case in police disciplinary matters,²⁵ Seattle's police union contract empowers an arbitrator, as part of a panel, to lead an independent hearing to review factual and legal determinations made by the police chief.²⁶ In November 2018—over four years after the incident in question—an arbitrator overturned the firing.²⁷ While the arbitrator agreed that Officer Shepherd violated the department's use of force policy in unjustifiably assaulting Durden-Bosley, she concluded that termination was simply "too severe a penalty."²⁸ Instead, the arbitrator reduced Officer Shepherd's punishment to a fifteen-day suspension and ordered the SPD to rehire Shepherd with back pay.²⁹

22. SHEPHERD DISCIPLINARY REPORT, *supra* note 3 ("I cannot take the risk of affording you further opportunity to serve as a police officer for this City given your demonstrated lapses in judgment and restraint.")

23. *Id.* ("I have determined that your employment with the Department should be terminated.")

24. CITY OF SEATTLE, AGREEMENT BY AND BETWEEN THE CITY OF SEATTLE AND SEATTLE POLICE OFFICERS' GUILD 7–8 (2013), <https://www.seattle.gov/personnel/resources/pubs/SPOG.pdf> [<https://perma.cc/4PS7-BY3K>]. It is worth noting that this was the then-effective collective bargaining agreement between Seattle and the Police Guild. They have since agreed to a different union contract that somewhat amends the appeals procedure in the city.

25. See Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. 545 (2019) (providing a comprehensive empirical analysis of the disciplinary procedures in 656 police departments and finding that many of the features described in this introduction mirror those used by a majority of police departments in that sample).

26. CITY OF SEATTLE, *supra* note 24, at 7 (describing the "just cause" standard for disciplinary appeals).

27. In Seattle, police disciplinary appeals are handled by a Disciplinary Review Board consisting of one representative appointed by the police union, one representative appointed by the city (often a high-ranking supervisor like the assistant chief), and one labor arbitrator selected "from a pool of arbitrators agreed upon by the parties within 30 days after execution of the agreement." *Id.* at 8. Functionally, this means that when a grievance is filed by the police union on behalf of an officer, arguing that the city has punished an officer without just cause, the decision of the appointed labor arbitrator will likely bind the city. For all practical purposes, this model of litigating police disciplinary appeals is similar to those used by many American cities, in that the labor arbitrator has the final say in these disciplinary grievances. Disciplinary Review Board's Opinion and Award, *supra* note 5, at 31 ("Although his was a serious offense, the Board majority finds that discharge was too severe a penalty, considering the circumstances of his use of force and other mitigating considerations.")

28. Disciplinary Review Board's Opinion and Award, *supra* note 5, at 31.

29. *Id.*:

The Board majority hereby orders instead that Officer Shepherd be disciplined for violating City's policy on the use of force with a 15-day unpaid suspension. It is also

Police reform advocates and city leaders in Seattle were disappointed and frustrated by the arbitrator's decision.³⁰ Although some might find the events in Seattle troubling, they do not appear unique. All across the country, reporters have documented numerous similar cases where arbitrators on appeal have ordered police departments to rehire officers deemed unfit for duty by their supervisors.³¹ These include: an officer in Sarasota, Florida, caught on camera allegedly beating a suspect in custody without justification,³² an officer in San Antonio, Texas, who repeatedly used an offensive racial slur while arresting a Black man;³³ a Broward County, Florida, sheriff's deputy who allegedly hid during the Marjory Stoneman Douglas High School shooting;³⁴ and a Washington, D.C., officer who allegedly sexually abused a teenager in his squad car.³⁵

Officers argue that these appellate hearings provide an important due process protection by allowing a neutral third party to reevaluate internal disciplinary actions.³⁶ According to this viewpoint,

ordered that he be reinstated as a police officer and that he receive[] full back pay . . . less 15 days for the suspension, and less all interim earnings and compensation.

30. Lewis Kamb, *Arbitrator Reinstates Seattle Police Officer Fired in 2016 for Punching Intoxicated Handcuffed Woman*, SEATTLE TIMES, <https://www.seattletimes.com/seattle-news/arbitrator-reinstates-seattle-police-officer-fired-in-2016-for-punching-intoxicated-handcuffed-woman/> (last updated Nov. 20, 2018, 3:30 PM) [<https://perma.cc/R6P9-4LET>] (quoting the spokesman for the city attorney saying that they were “disappointed” and “strongly disagree with” the decision; also noting that the NAACP in Seattle wanted Officer Shepherd criminally prosecuted for his behavior and likened “the case to the deaths of two black men, Eric Garner in New York and Michael Brown in Missouri”).

31. For a comprehensive series of stories about officers rehired on appeal, see Kimbriell Kelly, Wesley Lowery & Steven Rich, *Fired/Rehired: Police Chiefs Are Often Forced to Put Officers Fired for Misconduct Back on the Streets*, WASH. POST (Aug. 3, 2017), <https://www.washingtonpost.com/graphics/2017/investigations/police-fired-rehired/> [<https://perma.cc/VJZ8-JH3Z>]. For other examples not listed below, see Everton Bailey Jr., *Portland Must Rehire Cop Fired After Killing Unarmed Man in 2010, Court Rules*, OREGONIAN, https://www.oregonlive.com/portland/index.ssf/2015/12/portland_must_rehire_cop_fired.html (last updated Jan. 9, 2019) [<https://perma.cc/MH46-6DD4>] (explaining that an appellate court upheld an arbitrator's decision); *Connecticut Town Rehires Officer Who Shot Unarmed Man*, NEW HAVEN REG., <https://www.nhregister.com/connecticut/article/Connecticut-town-rehires-officer-who-shot-unarmed-11367888.php> (last updated July 25, 2017) [<https://perma.cc/GST3-2ZHB>].

32. Conor Friedersdorf, *How Police Unions and Arbitrators Keep Abusive Cops on the Street*, ATLANTIC (Dec. 2, 2014), <https://www.theatlantic.com/politics/archive/2014/12/how-police-unions-keep-abusive-cops-on-the-street/383258/> [<https://perma.cc/WD8W-YE4T>].

33. Mary Claire Patton & Tim Gerber, *San Antonio Officer Fired for Using N-Word Gets Job Back*, KSAT NEWS, <https://www.ksat.com/news/2019/11/05/san-antonio-officer-fired-for-using-n-word-gets-job-back/> (last updated Jan. 3, 2020) [<https://perma.cc/UYT4-JETC>].

34. Devoun Cetoute & Carli Teproff, *Fired Parkland BSO Deputy Given Job Back With Full Back Pay, Union Says*, MIAMI HERALD (May 13, 2020), <https://www.miamiherald.com/news/local/community/broward/article242719216.html> [<https://perma.cc/LJZ6-RLX4>].

35. Kelly et al., *supra* note 31.

36. *Id.* (explaining that “[p]olice unions argue that the right to appeal terminations through arbitration protects officers from arbitrary punishment or being second-guessed for their split-

these types of appellate procedures protect officers from unfair punishment and force police departments to maintain high standards in the investigation and adjudication of alleged misconduct. But some police reform advocates and police chiefs criticize the use of arbitration in appeals of police discipline as an antidemocratic usurpation of a community's ability to control its police force.³⁷ Critics also argue that the procedural choices made by some police departments in employing these appeals may systematically incentivize unreasonably high rates of reversals or reductions in discipline on appeal.³⁸ If true, this critique of police arbitration has significant implications for the literature on police accountability. A relatively small body of legal research, however, has considered the outcomes of appellate arbitrations in police disciplinary cases.

This Article contributes to the existing literature and builds on prior research³⁹ by conducting an examination of police arbitration across a national dataset of 624 police disciplinary appeals litigated before over two hundred arbitrators between 2006 and 2020 from a diverse range of law enforcement agencies.⁴⁰ This dataset covers police appellate arbitration decisions in twenty-eight states, the District of Columbia, and Puerto Rico.⁴¹ It includes disciplinary appeals for police departments and sheriff's departments of all sizes, as well as a number of specialized law enforcement agencies.⁴² Of these 624 opinions, 333 involved appeals of officer terminations.⁴³ In another 257 of the cases, officers appealed suspensions.⁴⁴ And in thirty-four cases, officers

second decisions" and further quoting union officials believing that "police chiefs are prone to overreach").

37. *Id.* (quoting the San Antonio police chief as saying that "[t]o overturn a police chief's decision . . . is a disservice to the good order of the department" and that it "undermines a chief's authority and ignores the chief's understanding of what serves the best interest of the community and department").

38. Mark Iris, *Police Discipline in Chicago: Arbitration or Arbitrary*, 89 J. CRIM. L. & CRIMINOLOGY 215, 235, 240 (1998) (explaining that the "selection of who will serve as an arbitrator depends upon the willingness of both parties to a dispute . . . to accept that individual as an arbitrator" and how the selection method may result in arbitrators frequently choosing to "split the baby").

39. *See infra* Part II.

40. *See infra* Part III (describing the methodology and dataset in more detail).

41. *Infra* Part III.

42. *Infra* Part III (explaining the demographic profile of law enforcement agencies in the sample used in this Article and describing in more detail how this sample was sorted to focus on patrol officers and other equivalent law enforcement professionals, omitting any cases involving corrections officers, police dispatchers, forensics professionals, or crime scene investigators).

43. *Infra* Part III (representing 52.4% of the sample).

44. *Infra* Part III (representing 41.2% of the sample).

appealed other types of disciplinary actions like letters of written reprimand, demotions, or losses of job responsibilities.⁴⁵

Arbitrators on appeal reduced or overturned police discipline in around 52% of cases.⁴⁶ In about 46% of termination cases, arbitrators ordered police departments to rehire previously terminated officers.⁴⁷ On average, arbitrators reduced the length of disciplinary suspensions by approximately 49%.⁴⁸ Arbitrators gave several common justifications for reductions in officer discipline. In a significant percentage of these cases, arbitrators found the original discipline to be excessive relative to the offense committed or relative to the punishments given to other officers from that same department in the past.⁴⁹ In a somewhat smaller number of cases, arbitrators cited insufficient evidence or procedural flaws in the investigation or adjudication of the original internal disciplinary process.⁵⁰

These findings are consistent with prior examinations of arbitration outcomes of police disciplinary appeals.⁵¹ Further, these findings make several contributions to the literature on police accountability. First, these findings are potentially consistent with prior scholarly characterizations of management decisionmaking in internal police disciplinary systems as “uneven, arbitrary,” and, at times, “entirely discretionary.”⁵² Under this view, the high rate of disciplinary reductions or reversals by arbitrators on appeal may suggest that many departments are failing to conduct sufficiently robust investigations. Arbitration may be merely providing necessary relief to officers aggrieved by a faulty disciplinary system. Additionally, the relatively high rate of reductions or reversals in discipline may also be a predictable outgrowth of the type of cases that proceed to arbitration. Evidence from prior studies suggest that a substantial number of appealed disciplinary sentences result in an eventual

45. *Infra* Part III (representing 5.4% of the sample).

46. *See infra* Section IV.B (finding that 327 out of 624 punishments were reduced or overturned by arbitrators).

47. *See infra* Section IV.C (discussing arbitrators' justifications for reversals and revisions of disciplinary actions).

48. *See infra* Section IV.B (discussing the rates of arbitrators' reversals and revisions of disciplinary actions).

49. *See infra* Section IV.D (using this data to further argue that arbitration does less to correct procedural due process concerns than to substitute the judgment of democratically elected officials with the judgment of arbitrators).

50. *Infra* Section IV.D.

51. *See infra* Part IV (describing the consistency of these findings with prior academic and media examinations of this topic).

52. Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839, 842 (2019).

settlement with management.⁵³ Once more, the cases that proceed to arbitration may not be a random sample of all disciplinary cases, but rather those cases where both management and the police union believe they have a reasonable likelihood of success before an arbitrator. If this is the case, then perhaps it should not be surprising that arbitration results in each side succeeding roughly half of the time. Thus, supporters of arbitration in police disciplinary cases may argue that the data revealed by this study are consistent with the system working as intended.

Second, and alternatively, critics of police arbitration may point to these findings as consistent with prior critiques of the use of arbitration on appeal in police disciplinary cases. Prior studies have hypothesized that, as repeat players,⁵⁴ arbitrators may be incentivized to compromise in order to increase their chances of being selected for future cases.⁵⁵ Cities commonly employ alternative strike methods to select arbitrators in police disciplinary appeals.⁵⁶ Under this selection strategy, the union or the aggrieved officer and the police department are initially presented with a panel of arbitrators (typically seven or another single digit odd number).⁵⁷ Each side then alternatively strikes

53. See, e.g., William Bender & David Gambacorta, *Fired, Then Rehired*, PHILA. INQUIRER (Sept. 12, 2019), <https://www.inquirer.com/news/a/philadelphia-police-problem-union-misconduct-secret-20190912.html> [<https://perma.cc/F23N-A87M>] (noting that a substantial number of the 170 cases reviewed by the *Inquirer* resulted in settlements before arbitration).

54. In the dataset for this Article, many of the arbitrators appear many times. For example, one arbitrator in Texas (Harold E. Moore) appears nineteen times in the dataset. Another arbitrator (Walt De Treux) appears twenty-one times, primarily in Pennsylvania.

55. See Iris, *supra* note 38, at 235, 240; see also Mark Iris, *Police Discipline in Houston: The Arbitration Experience*, 5 POLICE Q. 132 (2002) (documenting how arbitrators in Houston appear to be motivated to “split the baby” in order to be selected in future cases); Rushin, *supra* note 25, at 576 (“The potential problem with using such a procedure [of arbitrator selection] in internal disciplinary appeals is that it may incentivize arbitrators to consistently compromise on punishment to increase their probability of being selected in future cases.”).

56. Rushin, *supra* note 25, at 574–75 (finding that in a sample of 656 police departments, 54% of the municipalities not only employed arbitration on appeal but also used this kind of selection method).

57. See, e.g., Agreement Between City of Milwaukee and the Milwaukee Police Association, Local #21, I.U.P.A., AFL-CIO 12 (2012), https://city.milwaukee.gov/ImageLibrary/User/jkamme/LaborContracts/Local_21_MPA_2010-2012.pdf [<https://perma.cc/RM4D-C8NM>] (establishing such an alternate strike approach); Memorandum of Understanding Between City of Oakland and Oakland Police Officers’ Association 20 (2015), <https://cao-94612.s3.amazonaws.com/documents/oak057845.pdf> [<https://perma.cc/P5KY-F7E4>] (also using an alternate strike approach); Agreement Between the City of Akron and Fraternal Order of Police Lodge #7, at 8 (Nov. 15, 2016), <https://serb.ohio.gov/static/PDF/Contracts/2015/15-MED-10-1144.pdf> [<https://perma.cc/XU4F-NZ5M>] (also using an alternate strike approach); Labor Agreement Between the City of Minneapolis and the Police Officers’ Federation of Minneapolis, at attach. H (2017), <http://www2.minneapolismn.gov/www/groups/public/@hr/documents/webcontent/wcmssp-200131.pdf> [<https://perma.cc/HY8Y-9YP2>] (establishing alternate striking methodology as well).

names from the panel until one arbitrator remains.⁵⁸ Prior scholars have argued that this method of selecting arbitrators creates incentives for arbitrators to meet in the middle in as many cases as possible so as to increase their chances of winning out in this alternative strike selection method in future cases.⁵⁹ And scholars worry that this incentive towards compromise may systematically lead to large numbers of officers fired for misconduct having their terminations downgraded to mere suspensions.⁶⁰ The findings of this Article are potentially consistent with this critique, although they fall short of validating such a hypothesis. In the dataset examined in this Article, arbitration hearings resulted in approximately half of all cases being overturned or substantially reduced. And it resulted in a typical officer serving roughly half of their original disciplinary suspension.

Third, and relatedly, this Article's findings help inform the broader normative debate about the appropriate scope of appellate review in police disciplinary cases. Police unions may understandably argue that police arbitration results in large numbers of reversals or reductions in discipline because police departments regularly conduct inadequate investigations or fail to provide officers with adequate procedural rights in their so-called *Loudermill* hearings—that is, the disciplinary hearings that police departments must ordinarily provide officers before issuing some types of punishment, like termination.⁶¹ While arbitrators in many cases in the present dataset did identify procedural flaws in a department's internal disciplinary process, this Article finds that such procedural justifications for reversals or reductions were somewhat less common than other justifications for

58. See, e.g., Agreement Between Illinois FOP Labor Council and City of Champaign Patrol and Sergeant 66 (2015), <http://documents.ci.champaign.il.us/v/0B8wlv3QqeZtnT0h6elh0RVE2WTQ> [<https://perma.cc/S5AA-SK4T>] (establishing this kind of methodology); Collective Bargaining Agreement Between City of Boulder and Boulder Police Officers Association 13 (2016), https://www.lris.com/wp-content/uploads/contracts/boulder_co_police.pdf [<https://perma.cc/87J2-AJT8>] (allowing for such a methodology); see also Collective Bargaining Agreement Between Las Vegas Metropolitan Police Department & Las Vegas Police Protective Association 19 (2016), <https://lvppa.com/wp-content/uploads/2016/10/CBA-2016-2019-signed.pdf> [<https://perma.cc/G7NL-HQSL>] (establishing a procedure that allows the union to select two of five potential arbitrators, with two of the additional arbitrators selected by the city and one selected by mutual agreement between the parties).

59. See, e.g., Eric Litke, *Unions Limit Police Accountability, but Moore Claim Exaggerates Impact*, POLITIFACT (July 10, 2020), <https://www.politifact.com/factchecks/2020/jul/10/gwen-moore/unions-limit-police-accountability-discipline> [<https://perma.cc/RT2Q-CTW5>] (quoting Professor Samuel Walker for the proposition that “the arbitration process consistently tends to find a middle ground,” that is, “a reduction of department-ordered discipline”).

60. See generally Iris, *supra* note 38 (worrying about this very phenomenon).

61. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (holding that before a public servant can be deprived of their property right in their employment, the employer must provide a pretermination hearing including a notice of the charges, an explanation of the evidence, and an opportunity to respond to the charges).

reductions or reversal. Arbitrators primarily cited procedural due process concerns in a minority of all cases where they ultimately overturned or reduced discipline.⁶² Instead, this Article finds that reversals and reductions in police officer punishments are more commonly the result of arbitrators concluding that the punishment is excessive relative to the officer's offense,⁶³ the punishment fails to consider mitigating circumstances in an officer's service record,⁶⁴ or that the punishment is disparate relative to what other officers in that agency have received in the past.⁶⁵ In a smaller, but still significant, number of cases, arbitrators simply disagreed with the factual determinations reached by police supervisors or city officials.⁶⁶ Put simply, in many cases, arbitrators overturned decisions by police chiefs and city officials because of disagreements over facts or concerns about proportionality, not because of procedural due process concerns. This raises challenging normative and policy questions about the proper role of arbitrators in overturning decisions made by more democratically accountable actors. It further illustrates the real-world consequences of the expansive standard of review given to arbitrators in police disciplinary appeals cases.

Based on these observations, this Article considers how communities could rethink the use of arbitration on appeal in police disciplinary cases. In doing so, it considers approaches recently adopted by Minnesota and Oregon in reforming their respective uses of police

62. This represented only 42 of the 327 cases where an arbitrator overturned or reduced discipline on appeal. This number indicates the circumstances where an arbitrator overruled a matter exclusively or primarily due to procedural due process issues. In a higher number of cases, arbitrators listed procedural due process concerns as one of multiple issues (and often as an issue of secondary concern).

63. See, e.g., Decision of Arbitrator, Employer and Command Officers Association, 148269-AAA, 2013 BNA LA Supp. (BL) 148269 (Am. Arb. Ass'n Mar. 25, 2013) (Wolkinson, Arb.) (redacted decision) (reinstating an officer after prior termination because of a belief that the penalty was excessive relative to the offense).

64. See, e.g., *Law Enft Lab. Servs., Inc. v. Steele Cnty.*, Case No. 06-PA-0620, at 8–9 (Minn. Bureau of Mediation Servs. Oct. 26, 2006) (Befort, Arb.) (reducing a written reprimand to an oral reprimand based in part on mitigating factors in the officer's service record); *Fairfield Cnty. Sheriff's Off. v. FOP*, FMCS Case No. 07/01667, 124 BNA LA (BL) 1066, 1073 (Fed. Mediation & Conciliation Serv. Nov. 5, 2007) (Chattman, Arb.) ("[T]he Arbitrator finds that although the Grievant committed an act worthy of discipline, the penalty of discharge was too excessive given the Grievant's long term employment, commendations, previous work in positions of responsibility . . .").

65. See, e.g., *City of Youngstown v. Youngstown Police Ass'n*, 134 BNA LA (BL) 1644, 1653–54 (May 20, 2015) (Bell, Arb.) (reducing a fifteen-day suspension to a half-day suspension because of concerns related to disparate treatment).

66. See, e.g., *City of Junction City v. Junction City Police Officers' Ass'n*, FOP Lodge 43, FMCS Case No. 181017/00551, 139 BNA LA (BL) 617, 624 (Fed. Mediation & Conciliation Serv July 13, 2018) (Costello, Arb.) (disagreeing with the department's factual judgment, overturning an officer's termination, and ordering reinstatement with back pay).

arbitration. In Minnesota, state legislators passed a statute amending the selection process for arbitrators in police disciplinary appeals.⁶⁷ Under the new state law, rather than having arbitrators selected via an alternative strike process, the state assigns arbitrators from a rotating panel appointed by the state.⁶⁸ Legislators hoped that this fix would prevent both police unions and management from gaming the selection process. Oregon has taken a different approach to reforming police arbitration by limiting the authority of arbitrators.⁶⁹ The new Oregon law requires all communities to develop disciplinary matrices that establish specified ranges of punishment for different types of misconduct.⁷⁰ Then, when arbitrators hear disciplinary appeals, their review authority is limited by the applicable disciplinary matrix.⁷¹ As long as the arbitrator finds there to be sufficient evidence to prove an officer engaged in the alleged misconduct and the punishment is consistent with the community's disciplinary matrix, the arbitrator may not alter the punishment issued by management. This reform effectively acts as a limitation on the scope of arbitration, while simultaneously requiring departments to provide officers with adequate notice of the disciplinary consequences of wrongdoing. This Article argues that each state's new law may represent a substantial

67. This change came as part of a broader reform measure, the Minnesota Police Accountability Act of 2020. See Walker Orenstein & Peter Callaghan, *The Legislature Just Passed a Police Reform Bill. What It Does – and Doesn't Do – to Reshape Law Enforcement in Minnesota*, MINNPOST (July 21, 2020), <https://www.minnpost.com/state-government/2020/07/the-legislature-just-passed-a-police-reform-bill-what-it-does-and-doesnt-do-to-reshape-law-enforcement-in-minnesota> [<https://perma.cc/75RD-69Q9>] (providing a summary of this overall legislative package); MINN. STAT. ANN. § 626.892 (West 2020) (describing the new selection method, whereby the commissioner of the Bureau of Mediation Services appoints a slate of possible arbitrators).

68. § 626.892(11) (“The parties shall not participate in, negotiate for, or agree to the selection of an arbitrator or arbitration panel under this section.”).

69. See OR. REV. STAT. ANN. § 243.706 (West 2020) (requiring, in certain situations, that “arbitration award[s] must conform to [various listed] principles”); see also Dirk VanderHart, *Oregon Legislative Session on Police Accountability Coming Soon*, OR. PUB. BROAD. (June 11, 2020, 5:08 PM), <https://www.opb.org/news/article/police-accountability-arbitration-oregon-special-session-legislature> [<https://perma.cc/A6QS-PB6Q>] (describing the legislative debate leading to the passage of this change in Oregon law and detailing how it was designed to limit the ability of arbitrators to overturn discipline when they agreed with the factual findings of the department); Steve Benham, *Police Reform Plan Restricts Arbitrator from Overturning Discipline Decisions*, KATU (June 22, 2020), <https://katu.com/news/politics/police-reform-plan-restricts-arbitrator-from-overturning-discipline-decisions> [<https://perma.cc/F7SY-WFSG>] (similarly describing the legislation).

70. OR. REV. STAT. ANN. § 243.650(7)(g) (describing the requirement of departments and unions to develop disciplinary matrices during collective bargaining negotiations).

71. *Id.* § 243.706(3) (noting that if an “arbitrator makes a finding that misconduct has occurred consistent with the law enforcement agency’s finding of misconduct,” then “the arbitration award may not order any disciplinary action that differs from . . . the provisions of a discipline guide or discipline matrix adopted by the agency”).

step towards better balancing officers' interests in due process with the public's important interest in accountability.

This Article proceeds in five parts. Part I discusses the internal disciplinary process in American police departments and describes the use of arbitration to adjudicate disciplinary appeals. Part II situates this project within the existing literature on police disciplinary appeals and police accountability more generally. Part III walks through this study's dataset and methodology. Part IV presents the results of this empirical examination, and Part V considers some of the implications of this study's findings for the literature on police accountability.

I. INTERNAL POLICE DISCIPLINE AND THE ROLE OF APPEALS

In order to reform police agencies, supervisors must pursue "rigorous enforcement of departmental regulations" and punish officers engaged in wrongdoing.⁷² This punishment comes in the form of written reprimands, demotions, suspensions, and, in some cases, terminations of officers' employment. Aggressive enforcement of internal rules both "deters future misconduct and removes unfit officers from the streets."⁷³ But numerous police chiefs have argued that, because of labor and employment protections afforded to police officers during internal investigations and disciplinary proceedings, supervisors cannot meaningfully oversee or control their departments.⁷⁴ And even if a police supervisor does punish an officer for professional misconduct, officers commonly receive reductions or reversals of discipline on appeal.

This Part discusses the internal disciplinary process in American police departments. It starts by discussing how labor and employment provisions purportedly designed to protect officers' due process rights during internal investigations may impede accountability efforts. Then, it focuses specifically on widespread use of arbitration in police disciplinary appeals.

A. Internal Investigations of Police Misconduct

Existing legal scholarship on police reform focuses largely on external accountability mechanisms. For example, scholars have theorized on the potential benefits and limitations of the exclusionary

72. Rushin, *supra* note 25, at 549.

73. *Id.*

74. See, e.g., Kelly et al., *supra* note 31 (noting one police chief's objection that overturning a department's decision to discharge an officer "undermines a chief's authority and ignores the chief's understanding of what serves the best interest of the community and the department").

rule,⁷⁵ civil rights litigation via § 1983,⁷⁶ criminal prosecution,⁷⁷ and federal consent decrees⁷⁸ in altering police behavior. But scholars have spent comparatively less time considering the role of the internal disciplinary process in promoting officer accountability and constitutional policing. The internal disciplinary process determines which officers will face employment penalties in cases of misconduct. And the internal disciplinary process covers all types of wrongdoing, including misconduct that may not rise to the level of warranting evidentiary exclusion, criminal prosecution, or a civil lawsuit.⁷⁹

75. The exclusionary rule prevents prosecutors from introducing at trial evidence obtained in violation of the Constitution. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (expanding the exclusionary rule to apply to state and local law enforcement misconduct). The Court crafted this rule in part to deter police misconduct “by removing the incentive to disregard it.” *Elkins v. United States*, 364 U.S. 206, 217 (1960). Scholars have questioned the ability of this change to bring about widespread reform in police departments. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 322–23 (2d ed. 2008) (arguing that the exclusionary rule may be ineffective at bringing about significant change).

76. Victims of police misconduct may file a civil suit against the officer that violated their constitutional rights and, in some cases, the agency that employed that officer. 42 U.S.C. § 1983. But succeeding in a § 1983 suit requires litigants to overcome the qualified immunity barrier, which exempts police officers from civil suit under § 1983 unless their wrongdoing violated “clearly established statutory or constitutional rights.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); see also *Hope v. Pelzer*, 536 U.S. 730, 739–41 (2002) (defining “clearly established” for § 1983 purposes); *Wilson v. Layne*, 526 U.S. 603, 614–18 (1999) (further clarifying the definition of “clearly established”). For a thorough critique of the qualified immunity doctrine, see Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018). Individuals can only reach the employing municipality in § 1983 cases where they are able to prove that the officer’s conduct was the result of deliberate indifference in their failure to train or oversee their employees. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (establishing deliberate indifference for failure to train as the standard for municipal liability under § 1983); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 700–01 (1978) (permitting municipal liability claims for some § 1983 cases). Scholars have also critiqued § 1983 litigation by arguing that communities often do not properly internalize the costs of these lawsuits. E.g., Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1148 (2016). Research has also shown that governments commonly indemnify officers, meaning that individual officers do not feel the financial burdens of misconduct. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (illustrating the prevalence of indemnification policies across the country).

77. Perhaps the best database on criminal charges brought against police officers comes from Bowling Green State University, which finds relatively few cases of criminal charges associated with officer use of force historically. THE HENRY A. WALLACE POLICE CRIME DATABASE, <https://policecrime.bgsu.edu> (last visited Feb. 4, 2021) [<https://perma.cc/977K-RFP>]; see also Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted> [<https://perma.cc/4ZMZ-AMZA>] (noting the scarcity of charges against police officers, despite thousands of deaths at their hands since 2005).

78. For a detailed summary of the benefits and drawbacks of federal consent decrees, see Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1396–1418 (2015) (describing the Department of Justice’s use of consent decrees and empirically assessing their effectiveness in promoting reform, as well as other potential drawbacks).

79. For a more complete breakdown of the kinds of misconduct that ends up in this internal disciplinary system, see *infra* Section IV.A.

In many jurisdictions, this internal investigation is conducted by an internal affairs division within a law enforcement agency.⁸⁰ In order to hold an officer accountable through the internal disciplinary process, police supervisors or internal investigators must first identify and investigate potential misconduct. In conducting these types of internal investigations of police officer misconduct, investigators must navigate “a complex web of labor and employment laws” that limits the kinds of investigation techniques they may employ and the kind of evidence they may use to build their case.⁸¹ These regulations are designed to protect officers from management abuse and ensure adequate due process rights during internal investigations. These limitations are derived from several sources, including police union contracts, civil service statutes, and law enforcement officer bills of rights (“LEOBRs”).

Roughly two-thirds of American police officers are part of labor unions that bargain collectively with their employers over wages, benefits, and other conditions of employment.⁸² In many jurisdictions, this statutory language empowers police unions to negotiate internal disciplinary procedures.⁸³ In addition, numerous states and localities have passed civil service laws or other local ordinances that further restrict the ability of police supervisors to investigate and discipline officers suspected of misconduct.⁸⁴ And in another roughly twenty states, the state legislature has passed a LEOBR designed to protect officers’ due process rights during internal investigations.⁸⁵ Together, union contracts and LEOBRs establish limitations on the ability of supervisors to investigate officer misconduct,⁸⁶ including delays of

80. See Udi Ofer, *Getting It Right: Building Effective Civilian Review Boards to Oversee Police*, 46 SETON HALL L. REV. 1033, 1039–43, 1047–48, 1052 (2016) (providing a detailed assessment of civilian review board models in the nation’s fifty largest cities; finding that a minority of twenty-four have civilian review boards; also finding that these boards rarely have extensive authority, instead vesting authority with internal investigators and police supervisors).

81. Rushin, *supra* note 25, at 557.

82. See BRIAN A. REAVES, U.S. DEP’T OF JUST., LOCAL POLICE DEPARTMENTS, 2007, at 13 (rev. ed. 2011), <http://bjs.gov/content/pub/pdf/lpd07.pdf> [<https://perma.cc/ZDQ6-CREN>] (showing the percentage of officers that are part of unions); Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 740–44 (2017) (describing the statutory provisions that permit police officers to collectively bargain and how these statutes have been interpreted).

83. Fisk & Richardson, *supra* note 82, at 740–41.

84. Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 797 (2012) (describing the challenges potentially posed by civil service laws as they apply to law enforcement).

85. Aziz Z. Huq & Richard McAdams, *Litigating the Blue Wall of Silence: How to Challenge the Police Privilege to Delay Investigations*, 2016 CHI. LEGAL F. 213, 222.

86. For a complete, careful, and regularly updated explanation of the ways that union contracts and LEOBRs may impede accountability, see CAMPAIGN ZERO, CHECK THE POLICE, <http://www.checkthepolice.org> [<https://perma.cc/BKH5-RB37>].

officer interrogations after suspected misconduct,⁸⁷ requirements that supervisors give officers access to incriminating evidence before interrogations,⁸⁸ bans on the investigation of anonymous complaints,⁸⁹ and requirements that supervisors purge officer disciplinary records that could be used to evaluate patterns of officer misconduct over time.⁹⁰ Prior research has suggested that the existence of these extensive limitations on internal investigations may contribute to higher rates of officer misconduct. For example, one study by Professors Dhammika Dharmapala, Richard McAdams, and John Rappaport found that the introduction of collective bargaining to Florida Sheriff's Departments was associated with a statistically significant increase in complaints and officer violence against civilians.⁹¹ But a recent study by Professor Felipe Goncalves failed to find statistically significant increases in

87. See, e.g., Agreement Between the City of Chicago Department of Police and the Fraternal Order of Police Chicago Lodge No. 7, at 4 (2012), https://www.chicago.gov/content/dam/city/depts/dol/Collective%20Bargaining%20Agreement3/FOPCBA2012-2017_2.20.15.pdf [<https://perma.cc/8G7N-GDUN>] (establishing rigid delay periods before some interrogations); Meet & Confer Agreement Between the Houston Police Officers' Union and the City of Houston, Texas 39–41 (2015), <https://hpou.org/wp-content/uploads/Final-2018-MC-Draft-Prior-to-Ratification.pdf> [<https://perma.cc/UDA8-3RDH>] (providing a general forty-eight hour waiting period); Agreement Between the City of Norman, Oklahoma and the Fraternal Order of Police – Lodge No. 122, at 6 (2016), <https://www.normanok.gov/sites/default/files/documents/2020-06/FOP%20Contract%20FY%202021.pdf> [<https://perma.cc/6RWL-T62E>] (providing a ten working-day delay to secure representation before being interviewed).

88. See, e.g., Agreement Between City of Green Bay and Green Bay Professional Police Association 49 (2016), <https://greenbaywi.gov/DocumentCenter/View/306/Police-Officers-Agreement-PDF> [<https://perma.cc/KNU5-N78U>] (providing officers with access to description and summary of all physical evidence against them prior to interview); Memorandum of Understanding: The City of Phoenix and Phoenix Law Enforcement Association 12 (2016), <https://azplea.com/wp-content/uploads/2016/06/MOU-2016-2019.pdf> [<https://perma.cc/5428-GV6X>] (providing officers with “any material that is being used as the basis for an allegation of misconduct” including “video, audio, photographs, or documents”).

89. See, e.g., Agreement Between the City of Chicago Department of Police and the Fraternal Order of Police Chicago Lodge No. 7, *supra* note 87, at 4 (“No anonymous complaints made against an Officer shall be made the subject of a Complaint Register investigation unless the allegation is a violation of the Illinois Criminal Code, the criminal code of another state of the United States or a criminal violation of a federal statute.”).

90. Collective Bargaining Agreement Between the City of Cleveland and Cleveland Police Patrolmen's Association Non-Civilian Personnel 7 (2013), <https://serb.ohio.gov/static/PDF/Contracts/2010/10-CON-05-0536.pdf> [<https://perma.cc/UGA3-EBGC>] (requiring removal of disciplinary action from personnel file after two years and verbal or written reprimands after six months).

91. Dhammika Dharmapala, Richard H. McAdams & John Rappaport, *Collective Bargaining Rights and Police Misconduct: Evidence from Florida* (Univ. of Chi. Coase-Sandor Inst. for L. & Econ. Rsch., Paper No. 831, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3095217 [<https://perma.cc/LW4J-XJE6>]; see also Abdul N. Rad, *Police Institutions and Police Abuse: Evidence from the U.S.* (Apr. 23, 2018) (M.Phil. thesis, University of Oxford), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3246419 [<https://perma.cc/4BCF-CTQD>].

officer misconduct in Florida law enforcement agencies after the introduction of unionization.⁹²

If a supervisor or internal affairs division within a police department is able to uncover evidence of wrongdoing by an officer, officers are often guaranteed a predisciplinary hearing. This right to a predisciplinary hearing comes from *Cleveland Board of Education v. Loudermill*, where the U.S. Supreme Court held that many public sector employees, like police officers, have a property right in their continued employment.⁹³ Thus, deprivation of this property right by the government triggers certain due process requirements, including a written notice of charges, explanation of evidence against them, and an opportunity to be heard.⁹⁴ This *Loudermill* hearing serves as an important check, particularly pretermination, to ensure that reasonable grounds exist for the proposed discipline.⁹⁵ So, take the example involving Seattle Officer Shepherd's use of force against the handcuffed woman from the Introduction. In that case, before Chief O'Toole could terminate Officer Shepherd's employment, the city provided him with an explanation of the alleged policy violations and the evidence supporting the city's position.⁹⁶

During the *Loudermill* hearing, Officer Shepherd had an opportunity to defend himself and respond to the charges. He argued that his actions were appropriate under the circumstances. He emphasized his prior contacts with Durden-Bosley and her history with law enforcement.⁹⁷ He provided his own competing experts, who argued that his use of force was justified under the circumstances.⁹⁸ He asked the city to consider the totality of his service record and training

92. Felipe Goncalves, Do Police Unions Increase Misconduct? 20–21 (Mar. 2021) (unpublished manuscript), https://static1.squarespace.com/static/58d9a8d71e5b6c72dc2a90f1/t/60622724b6a902732b636324/1617045285669/Goncalves_Unions.pdf [<https://perma.cc/SZV7-C2NL>].

93. 470 U.S. 532, 539 (1985) (“The statute plainly supports the conclusion, reached by both lower courts, that respondents possessed property rights in continued employment.”).

94. *Id.* at 546:

The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. . . . The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.

95. But of course, this right is limited in scope. And the *Loudermill* hearing need not be exhaustive, particularly when there exists a post-termination opportunity to appeal. As the Court reiterated near the end of the opinion, “We conclude that all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by the Ohio statute.” *Id.* at 547–48.

96. SHEPHERD DISCIPLINARY REPORT, *supra* note 3 (providing summary under “Specification” subheading).

97. *Id.*

98. *Id.*

history.⁹⁹ Finally, he argued that he was treated differently than other officers who engaged in similar conduct, in part because of his race. (Officer Shepherd is Black.)¹⁰⁰

After hearing all the evidence during this *Loudermill* proceeding, Chief O'Toole issued a fairly detailed written decision.¹⁰¹ In it, she said that she found Officer Shepherd's competing experts to be "unconvincing" and believed that his arguments conflated lawfulness under the Fourth Amendment with permissibility under Seattle's more stringent use of force policy.¹⁰² She then walked through a detailed assessment of how she believed Officer Shepherd's conduct violated the use of force policy and warranted termination of his employment, particularly when viewed in conjunction with his previous disciplinary history.¹⁰³

Attached to the end of Chief O'Toole's findings was a page entitled "Appeal of Final Disposition," which laid out Officer Shepherd's options for challenging the decision she issued in the *Loudermill* hearing.¹⁰⁴ As discussed in the next Section, even after a police supervisor issues a disciplinary decision, this is often just the beginning of the process. Before the punishment is final, officers must ordinarily be given a chance to appeal.

B. Disciplinary Appeals

Once an officer receives a disciplinary sentence issued by a police supervisor, civilian review board, or city administrator, the officer generally has an opportunity to appeal the decision.¹⁰⁵ Prior studies suggest that many police departments afford officers with similar appeal procedures. To begin with, departments commonly give officers multiple layers of appeal, normally culminating in binding arbitration as a final layer of protection.¹⁰⁶ Communities use a couple of common

99. *Id.*

100. *Id.*

101. *Id.* (providing Chief O'Toole's decision under "Determination of the Chief" subheading).

102. *Id.*

103. *Id.* ("You previously received a ten day suspension in 2009 for violating a different SPD policy where your failure resulted in the death of a victim; as such, you should be acutely aware of the potentially dire consequences of disregarding policies created to protect the public.").

104. *Id.*

105. In some cities, this appeals process helps bolster an otherwise informal or less rigorous earlier determination that an officer engaged in misconduct. The law allows the original *Loudermill* hearing to be relatively cursory in jurisdictions where officers are granted a full hearing on appeal. In other jurisdictions, officers are afforded elaborate or robust hearings both in the initial predisdisciplinary hearing and on appeal in a postdisciplinary hearing.

106. Rushin, *supra* note 25, at 571 ("The median police department in the dataset offers police officers up to four layers of appellate review in disciplinary cases.").

approaches to select the identity of arbitrators that will hear these appeals. Some unionized agencies negotiate over the identity of the outside arbitrator that will hear appeals as part of the collective bargaining process. More commonly, though, police departments employ an alternative strike process or some similar selection methodology.¹⁰⁷ Under this selection method, the parties are presented with a panel of arbitrators.¹⁰⁸ Each side then alternatively strikes one name from this panel until a single name remains.¹⁰⁹ That person then becomes the arbitrator for the appeal.¹¹⁰

After the parties have selected an arbitrator, many communities give this decisionmaker authority to conduct something akin to a de novo hearing to review conclusions reached by management.¹¹¹ During this hearing, the arbitrator is often tasked with determining whether “just cause” existed for the disciplinary action, and the employer bears the burden of proving its case by a preponderance of the evidence or, in some cases, by clear and convincing evidence.¹¹² In defining “just cause,” it is common for arbitrators to employ the so-called Daugherty test, or to employ an understanding of “just cause” that resembles this test.¹¹³ This seven-prong test, developed by Arbitrator Carroll Daugherty in 1964, asks:

1. Did the Employer give the employee forewarning or foreknowledge of the possible or probable consequences of the employee’s disciplinary conduct?
2. Was the Employer’s rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer’s business, and (b) the performance that the Employer might properly expect of the employee?

107. See, e.g., Collective Bargaining Agreement Between the City of Fairbanks and Public Safety Employees Association, Fairbanks Police Department Chapter Local 83, at 11 (Dec. 23, 2011), <http://www.psea.net/wp-content/uploads/2015/02/2011-City-PSEA-CBA-agreement-04-03-12-3.pdf> [<https://perma.cc/LK3X-2YUV>] (establishing alternative striking methodology from prearranged list of arbitrators); Agreement Between City of Corpus Christi and the Corpus Christi Police Officers’ Association 18–19 (Sept. 17, 2015), http://www.corpuschristipoa.net/docs/contracts/2015_2019_City_CCPOA_FINAL_CONTRACT.pdf [<https://perma.cc/L4S8-VQZR>] [hereinafter Corpus Christi Agreement] (establishing alternative strike procedure).

108. Corpus Christi Agreement, *supra* note 107, at 19 (providing that the department should receive a panel of seven assigned arbitrators from the National Academy of Arbitrators or another qualified agency).

109. *Id.*

110. *Id.*

111. Rushin, *supra* note 25, at 576–78 (explaining that around 70% of the jurisdictions in that study provide a de novo hearing on appeal).

112. Tyler Adams, Note, *Factors in Police Misconduct Arbitration Outcomes: What Does It Take to Fire a Bad Cop?*, 32 A.B.A. J. LAB. & EMP. L. 133, 140–41 (2016) (describing the commonality of these standards in review of police disciplinary cases).

113. John J. Hindera & Jyl J. Josephson, *Reinventing the Public Employer-Employee Relationship: The Just Cause Standard*, 22 PUB. ADMIN. Q. 98, 105 (1998) (quoting Enter. Wire, Co., 46 Lab. Arb. Rep. (BL) 359, 363–64 (1966) (Daugherty, Arb.)) (discussing the seven-prong Daugherty test).

3. Did the Employer, before administering the discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the Employer's investigation conducted fairly and objectively?
5. At the investigation, did the "judge" obtain substantial proof that the employee was guilty as charged?
6. Has the Employer applied its rules, orders and penalties evenhandedly and without discrimination to all employees?
7. Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee's *proven* offense, and (b) the record of the employee in his service with the Employer?¹¹⁴

While this test is referenced frequently in police disciplinary appeals, it is by no means a rigid or exhaustive standard of review. As one arbitrator remarked in a police arbitration award from Michigan, "although it is hard to define, a good arbitrator knows whether just cause exists when s/he reviews the facts, evidence and testimony in the case that has been presented to him or her for decision."¹¹⁵ In any event, "just cause" standards generally provide arbitrators with broad authority to review the sufficiency of the evidence presented against the officer, the procedural due process protections afforded to the officer during the investigation and earlier adjudication, the proportionality of the punishment to the alleged offense, and the consistency of the punishment with that given to other officers accused of similar wrongdoing.¹¹⁶

Although collective bargaining agreements and internal departmental policies describe arbitration in this context as an appeal, that name may be a bit of a misnomer, at least as we normally use the word in other areas of law. In the American justice system, appeals are normally limited in scope.¹¹⁷ For example, while litigants may be able to challenge to an appellate court the legal decisions made at their trial, litigants often have little opportunity to challenge factual findings made by juries or punishments issued by trial courts within the statutorily authorized range.¹¹⁸ In most cases, appeals in our criminal

114. *Id.*

115. *In re Emp. & Police Officers Ass'n of Mich.*, 137 BNA LA (BL) 1534, 1542 (2017) (Scales, Arb.) (emphasis omitted) (redacted).

116. *See* Hinderer & Josephson, *supra* note 113, at 106–10 (discussing the procedural due process goals served by the just cause standard).

117. Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 993 (1986) (concluding that in the United States, "appellate courts almost never decide cases de novo").

118. *Id.* (noting that the "primary function" of an appellate court is to correct legal errors made at the trial court below).

justice system involve challenging the procedural sufficiency of the earlier trial, not the substantive findings of the jury, unless those findings are clearly erroneous or unreasonable.¹¹⁹

By contrast, appeals of internal disciplinary action against police officers operate, effectively, as an opportunity to re-adjudicate the matter in front of an arbitrator, with the disciplinary sentence issued by the police department as a ceiling for the possible punishment. This realization has significant implications for the practical ability of a community to oversee its police department. Take the example of Detroit, Michigan, which has created a seemingly powerful civilian review board.¹²⁰ This seven-person board purports to be one of the few in the United States to have the power to subpoena information, conduct independent investigations, and discipline officers.¹²¹ At first glance, Detroit looks like a model of civilian control of law enforcement. But like most big cities, Detroit has established a disciplinary appeals process that allows officers to challenge to an arbitrator any discipline handed down by the city or the civilian review board.¹²² And the officers' union contract grants this arbitrator authority to determine independently whether just cause exists for punishment.¹²³ This procedural redundancy may diminish the practical importance of the city's civilian oversight apparatus, because "[t]he ultimate power resides with an appellate arbitrator."¹²⁴

As discussed in more detail in the Article, this transferring of oversight ability from democratically accountable actors to arbitrators may result in relatively frequent reductions in officer discipline. And, as Judge Thelton Henderson of the U.S. District Court for the Northern District of California explained, "[j]ust like any failure to impose appropriate discipline by the (police) chief or city administrator, any reversal of appropriate discipline at arbitration undermines the very objectives" of any police reform effort.¹²⁵

119. *Id.* at 993–95; see also Robert L. Stern, *Review of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 72 (1944) (explaining how, ordinarily, determinations of facts by earlier adjudicators are treated with "considerable, though varying degrees of, respect" on appeal).

120. Ofer, *supra* note 80, app. at 1055.

121. *Id.* at 1043 ("[T]he only review board that has a leadership structure that is not majority nominated by the mayor and is empowered with subpoena, disciplinary, and policy review authorities, is Detroit's.").

122. Master Agreement Between the City of Detroit and the Detroit Police Officers Association 11–16 (Oct. 2014), <https://static1.squarespace.com/static/559fbf2be4b08ef197467542/t/55a26d54e4b02ee06b2a86ed/1436708180775/Detroit+police+contract.pdf> [<https://perma.cc/83U7-ZKC6>].

123. *Id.* at 11–13.

124. Rushin, *supra* note 25, at 583.

125. Matthew Artz, *Judge Orders Investigation into Oakland's Police Arbitration Losses*, MERCURY NEWS, <https://www.mercurynews.com/2014/08/14/judge-orders-investigation-into->

II. EXISTING LITERATURE

A handful of existing academic studies have found that arbitration is the most common mechanism for adjudicating police disciplinary appeals. And a number of media examinations have found that a significant number of police disciplinary appeals result in the reversal or reduction of disciplinary penalties against officers. Nevertheless, less research has examined the outcomes of police disciplinary appeals—specifically, the outcomes of appellate arbitration in police disciplinary cases. As this Part explains, this study seeks to consider this important research question. The existing studies roughly fall into three general categories.

First, some prior studies have found that arbitration is a common feature of police disciplinary appeals across American police departments.¹²⁶ Because these arbitrators often reevaluate police discipline in de novo proceedings, at least one scholar has concluded that arbitrators—and not civilian review boards, police chiefs, or mayors—are the “true adjudicators of internal discipline” in the United States.¹²⁷ These findings were roughly consistent with other prior research that concluded that arbitration was a common feature of police disciplinary procedures and police union contracts.¹²⁸ Nevertheless, these existing studies do not explore the outcomes of police disciplinary procedures. Instead, they are focused on the procedural choices made by cities in developing disciplinary appeals procedures.

Second, a few legal studies have hypothesized about the ways in which arbitration in police disciplinary cases may impede accountability. Most notably, Professor Mark Iris conducted two in-depth case studies examining the disciplinary appeals process in

oaklands-police-arbitration-losses (last updated Aug. 12, 2016, 7:03 AM) [<https://perma.cc/7LZC-HRRM>].

126. For example, one recent study, which examined the police disciplinary appeals procedures articulated in 656 law enforcement collective bargaining agreements from a geographically diverse range of police departments, found binding arbitration to be common. Rushin, *supra* note 25. For other examples, see *infra* note 128.

127. *Id.* at 582.

128. A number of prior studies by academics and civil rights activists point to arbitration as a potential problem stemming from collective bargaining agreements or state and local laws. See, e.g., DERAY MCKESSON, SAMUEL SINYANGWE, JOHNETTA ELZIE & BRITTNEY PACKNETT, CAMPAIGN ZERO, POLICE UNION CONTRACTS AND POLICE BILL OF RIGHTS ANALYSIS (2016), <https://static1.squarespace.com/static/559fbf2be4b08ef197467542/t/5773f695f7e0abbdf28a1f0/1467217560243/Campaign+Zero+Police+Union+Contract+Report.pdf> [<https://perma.cc/WBG8-TEQR>] (identifying how contracts can vest authority in nondemocratic actors in a way that limits community oversight of police); Rad, *supra* note 91, at 51–52 (identifying arbitration as a potential barrier to accountability).

Chicago¹²⁹ and Houston.¹³⁰ He found that in both jurisdictions, arbitrators in the aggregate routinely cut police discipline roughly in half.¹³¹ This Article's study is distinct from and builds on Professor Iris's prior work. Professor Iris's studies looked at individual jurisdictions. As Professor Iris wondered in his most recent study from 2002, "Can this pattern [found in Chicago and Houston] be documented in yet another major city police agency? This is a tantalizing question that for now remains unanswered. This suggests a fruitful area for future research."¹³² This study builds on Professor Iris's work by answering his call for more expansive future research into police arbitrations.

Third, a few media examinations have explored the outcomes of police disciplinary appeals, particularly as they relate to the rehiring of previously terminated officers. Most prominently, Kimbriell Kelly, Wesley Lowery, and Steven Rich of the *Washington Post* conducted one of the most well-known studies on the rehiring of fired officers.¹³³ They found that over a ten-year period, nearly 24% of officers terminated in thirty-seven agencies were rehired on appeal.¹³⁴ And they found that the disciplinary appeals processes in some police departments—like those in San Antonio, Denver, and Philadelphia—have forced the departments to rehire the large majority of terminated officers.¹³⁵ A

129. See Iris, *supra* note 38.

130. See Iris, *supra* note 55.

131. *Id.* at 141–42 tbl.1 (showing that of the 899 total days of suspension issued between 1994 and 1998 in the City of Houston, 480 days were upheld and 419 days were overturned, suggesting “[c]ollectively the individual cases add up to a systematic pattern of arbitrators reducing the disciplinary actions of the chief of police by close to 50%”).

132. *Id.* at 147 (citation omitted). It is also worth noting that in laying out a roadmap for future research on arbitration, Iris speculated that some commercially available databases are not representative of the universe of all police arbitration opinions. *Id.* This study addresses this very problem by combining data from one comprehensive state database in Minnesota (which reports all cases processed by the Minnesota Bureau of Mediation Services) with one of the largest national databases. As explained in more detail in Part IV, the results of this study suggest that arbitrators across the 512 arbitration opinions in the Bloomberg database behaved nearly identically overall to arbitrators in the 112 arbitration opinions in Minnesota. And arbitrators in both databases reached mostly identical results to the arbitrators in Iris's smaller examinations of opinions in Houston and Chicago. Put simply, this Article responds to the call for more research proposed by Iris nearly twenty years ago and finds through a national analysis that his observations about the arbitration process are not just true in Chicago and Houston, but possibly in jurisdictions all across the country. Additionally, Iris conducted his studies around two or more decades ago. And unlike the present study, Iris spent less time considering the arbitrators' justifications for reducing or reversing discipline. By conducting a wider, national examination of a larger number of arbitration outcomes and supplementing this with normative recommendations for reforming the police disciplinary appeals process, this study updates, builds on, and expands Professor Iris's important work.

133. See Kelly et al., *supra* note 31.

134. *Id.*

135. *Id.* (showing that 31 of 44 officers fired in San Antonio were ordered rehired, as were 44 of 71 in Philadelphia, and 21 of 31 in Denver).

number of other reporters have found similar patterns, in individual agencies or across individual states, of departments being forced to rehire previously terminated officers after appeals. For example, Jon Collins of Minnesota Public Radio found around half of all officers terminated across Minnesota over a five-year period got their jobs back via arbitration on appeal.¹³⁶

While important, these media investigations leave many important questions unanswered. For one thing, several of these examinations have been focused on a handful of large police departments that may not be representative of the country as a whole. These prior examinations have also focused primarily on disciplinary terminations, not other types of discipline (like suspensions, demotions, or written reprimands) that are also appealable to arbitration.¹³⁷ Additionally, these prior media examinations were outcome oriented. Their focus was on the frequency of officers getting rehired; they did not systematically explore the justifications given for these rehiring decisions or the procedures employed to arrive at this result. To the extent that existing appellate procedures for police officers may result in undesirable outcomes—namely, the rehiring of unfit officers—it is important to study this procedure in-depth rather than just the outcomes of police disciplinary systems more generally.

One recent study has examined arbitrators' justifications for rehiring terminated officers. Tyler Adams conducted one of the few existing studies to date on the outcomes of police arbitrations by examining a dataset of ninety-two police arbitration decisions challenging officer terminations.¹³⁸ While important, Adams's study

136. Jon Collins, *Half of Fired Minnesota Police Officers Get Their Jobs Back Through Arbitration*, MINN. PUB. RADIO (July 9, 2020, 9:00 AM), <https://www.mprnews.org/story/2020/07/09/half-of-fired-minnesota-police-officers-get-their-jobs-back-through-arbitration> [<https://perma.cc/9BBC-BULD>] (relying on data from the Minnesota Bureau of Mediation Services). This mirrors a slew of similar local news reports that have found that police officers frequently succeed in overturning disciplinary action on appeal. For example, Robert Angien and Dan Horn of the *Cincinnati Enquirer* found that roughly a quarter of disciplinary suspensions were reduced or reversed in that city, while a similar examination by Jodi S. Cohen of *ProPublica* and Jennifer Smith Richards of the *Chicago Tribune* found that sanctions are reversed or remanded in around 85% of cases in Chicago. Robert Angien & Dan Horn, *Police Discipline Inconsistent: Sanctions Most Likely to Be Reduced*, CIN. ENQUIRER, Oct. 21, 2001, at A1; Jennifer Smith Richards & Jodi S. Cohen, *Cop Disciplinary System Undercut*, CHI. TRIB. (Dec. 14, 2017), http://digitaledition.chicagotribune.com/tribune/article_popover.aspx?guid=bc73d166-b1f0-4d8b-9ff9-0529bad5bd7a [<https://perma.cc/L9FM-9A2P>]; see also Dan Stamm, *Police Commish Angry that 90 Percent of Fired Officers Get Jobs Back*, NBC PHILA., <http://www.nbcphiladelphia.com/news/local/Police-Officers-Get-Jobs-Back-194100131.html> (last updated Mar. 1, 2013, 11:02 AM) [<https://perma.cc/46QM-D793>].

137. See, e.g., Kelly et al., *supra* note 31 (focusing exclusively on firing and rehiring of officers).

138. Adams, *supra* note 112. Adams examined the Bloomberg database, which this study also partially relies upon. He found that in rehiring terminated officers, arbitrators commonly cited inadequate investigations, lack of proof about the guilt of the discharged officer, and mitigating

does not foreclose the need for additional research on this topic. This Article builds on Adams's important work in several ways—by analyzing a larger dataset of police arbitration awards over a longer period of time,¹³⁹ by focusing on a somewhat different set of variables,¹⁴⁰ and by expanding the analysis of police arbitration awards to not just those involving terminations, but also those involving suspensions, written reprimands, demotions, or other forms of discipline. This further builds our understanding of the role of arbitration in the police disciplinary process across the country.

Perhaps most importantly, though, this Article reaches a different conclusion than Adams's study. Adams argues that it is unfortunate that, "due to the media's propensity for circulating sensationalist headlines, they rarely provide complete and accurate accounts of the details of police misconduct arbitration decisions."¹⁴¹ He ultimately concludes that departments themselves, not arbitrators or the procedural choices made by jurisdictions in employing arbitration, are often to blame for the high rate of officer reinstatements. In his view, arbitrators—and the system of arbitration generally—serve an important role because, unlike the department, "arbitrators care about who the officer is. They care about whether an officer is sufficiently trustworthy to deserve a second chance."¹⁴²

As explained in Part V, this Article reaches a somewhat different, although not necessarily inconsistent, conclusion. It argues that while appellate arbitration can (and does) help correct some particularly egregious cases of unjustified or excessive punishment, the existing system as described in this Article may also raise broader questions about officer accountability, democratic accountability, and organizational management of police departments. In doing so, the methodology employed by this Article seeks to contribute to the existing literature, as described in the next Part.

circumstances in the officer's personnel file. *Id.* at 133–34, 146–152. He also conducted nuanced analyses of the standard of proof required by arbitrators in these cases and the percentage of cases involving off-duty behavior or direct mistreatment of citizens. *Id.* at 140–41, 153–54.

139. By bringing together state and national databases, this study looks at over six hundred arbitration decisions across twenty-eight states, the District of Columbia, and Puerto Rico over fifteen years.

140. The present study codes these decisions based on eighteen different variables, some of which are informed by the studies of police arbitration by Adams, Iris, Rushin, and other prior scholars, but still represent my own personal choices about the appropriate variable definitions and applications for this particular project.

141. Adams, *supra* note 112, at 135.

142. *Id.* at 156.

III. METHODOLOGY

This Article examines a dataset of 624 arbitration opinions involving police disciplinary appeals decided between 2006 and 2020, constructed through sorting and combining arbitration awards from two separate resources: (1) the Bloomberg Law Labor Arbitration Awards database, one of the largest available commercial databases, and (2) the Minnesota Bureau of Mediation Services, one of the only publicly accessible state databases of police arbitration awards.¹⁴³

In sorting both databases, I focused specifically on opinions involving police officers, sheriff's deputies, and other similar law enforcement professionals. I removed any cases dealing with corrections officers, security guards, and police dispatchers.¹⁴⁴ This left a dataset of 624 arbitration opinions related to disciplinary appeals for police officers authored by over two hundred different arbitrators in at least twenty-eight states,¹⁴⁵ Puerto Rico, and the District of Columbia. Of the 624 opinions analyzed as part of this Article, 333 of them involved appeals of officer terminations. Another 257 of the cases involved officers appealing suspensions. And thirty-four cases involved officers appealing other types of disciplinary actions like letters of written reprimand, demotions, or loss of job responsibilities.

The dataset represents a wide and diverse sample of American law enforcement agencies. It includes many cases from the primary municipal police departments in several of the nation's largest cities,

143. *Arbitration Awards*, MINN. BUREAU OF MEDIATION SERVS., <https://mn.gov/bms/arbitration/awards> (last visited Jan. 28, 2021) [<https://perma.cc/6DUC-RMNJ>]. In looking at both the Bloomberg database and the Minnesota database, this study combines two databases used in prior academic and media examinations of police arbitration awards. See Adams, *supra* note 112 (conducting a similar examination of the Bloomberg database over a shorter period of time and focused on a smaller number of cases); Collins, *supra* note 136 (also conducting a similar analysis of the Minnesota database over a shorter period of time and focused on a smaller number of cases).

144. From the Bloomberg database, this removed approximately 317 arbitration awards. This required reviewing each case individually to sort them based on the exact job description of the grievant.

145. These states include California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, and Washington. In a number of the opinions, the location of the department, including the state, was redacted because of state law, local ordinances, or the department's collective bargaining agreement. Thus, the total number of states represented in this dataset is likely larger than twenty-eight.

including Austin, Texas;¹⁴⁶ Chicago, Illinois;¹⁴⁷ Cleveland, Ohio;¹⁴⁸ Columbus, Ohio;¹⁴⁹ Fort Worth, Texas;¹⁵⁰ Honolulu, Hawaii;¹⁵¹ Houston, Texas;¹⁵² Minneapolis, Minnesota;¹⁵³ Newark, New Jersey;¹⁵⁴ Oakland, California;¹⁵⁵ Omaha, Nebraska;¹⁵⁶ Saint Paul, Minnesota;¹⁵⁷ San Jose, California;¹⁵⁸ and Tulsa, Oklahoma.¹⁵⁹ The dataset also includes cases from police departments in medium-sized communities, like Chesterfield, Michigan;¹⁶⁰ Kalamazoo, Michigan;¹⁶¹ Killeen, Texas;¹⁶² Pharr, Texas;¹⁶³ Stillwater, Oklahoma;¹⁶⁴ Waco, Texas;¹⁶⁵ Woodbury,

146. *City of Austin v. Combined L. Enft Ass'n of Tex.*, 123 BNA LA (BL) 1042 (Dec. 9, 2006) (Guttshall, Arb.).

147. *City of Chi. Dep't of Police v. Fraternal Ord. of Police, Lodge No. 7*, 07-150, 2008 BNA LA Supp. (BL) 119401 (Dec. 23, 2008) (Bierig, Arb.).

148. *City of Cleveland v. Fraternal Ord. of Police, Lodge No. 8*, 53-390-L-00425-09, 127 BNA LA (BL) 1620 (Am. Arb. Ass'n May 19, 2010) (Ruben, Arb.).

149. *City of Columbus v. Fraternal Ord. of Police, Cap. City Lodge No. 9*, 2010 BNA LA Supp. (BL) 118947 (June 26, 2010) (Goldberg, Arb.).

150. *City of Fort Worth, CSC-01-2010-HP*, 127 BNA LA (BL) 1021 (May 15, 2010) (Moore, Arb.).

151. *Honolulu Police Dep't v. State of Haw. Org. of Police Officers*, 0-2007-003, 127 BNA LA (BL) 148 (Oct. 23, 2009) (Henner, Arb.).

152. *City of Hous. Police Dep't v. Individual Grievant*, 70-390-00502-10, 128 BNA LA (BL) 910 (Am. Arb. Ass'n Dec. 22, 2010) (Moore, Arb.).

153. *Police Officers Fed'n of Minneapolis v. City of Minneapolis* (Minn. Bureau of Mediation Servs. Dec. 30, 2015) (Jacobs, Arb.), <https://mn.gov/bms-stat/assets/20151230-Mpls.pdf> [<https://perma.cc/U57Q-7H9L>].

154. *City of Newark v. Fraternal Ord. of Police, Newark Lodge 12*, 04-0534, 122 BNA LA (BL) 242 (N.J. Bureau of Mediation Jan. 4, 2006) (Smith, Arb.).

155. *City of Oakland v. Oakland Police Officers' Ass'n*, 09-0707, 128 BNA LA (BL) 1217 (Mar. 2, 2011) (Gaba, Arb.).

156. *Omaha Police Union, Local 101 v. City of Omaha, FMCS 07-03391*, 2007 BNA LA Supp. (BL) 119735 (Dec. 5, 2007) (Fincher, Arb.).

157. *Saint Paul Police Fed'n v. City of Saint Paul* (Minn. Bureau of Mediation Servs. Oct. 12, 2012) (Befort, Arb.), <https://mn.gov/bms-stat/assets/20121012-St--Paul-Police.pdf> [<https://perma.cc/KNG8-JGKD>].

158. *City of San Jose v. Individual Grievant*, ARB-10-0153, 129 BNA LA (BL) 1313 (Nov. 15, 2011) (Reeves, Arb.).

159. *City of Tulsa v. Fraternal Ord. of Police, Lodge 93*, 10/60154, 130 BNA LA (BL) 714 (May 21, 2012) (McReynolds, Arb.).

160. *Charter Twp. of Chesterfield v. Police Officers Lab. Council (POLC) Union*, 09-55992, 2010 BNA LA Supp. (BL) 119375 (Jan. 12, 2010) (McDonald, Arb.).

161. *City of Kalamazoo v. Kalamazoo Pub. Safety Officers Ass'n*, 54-390-00148-09, 128 BNA LA (BL) 749 (Am. Arb. Ass'n Nov. 12, 2010) (Hornberger, Arb.).

162. *City of Killeen v. Police Officer T.B.*, AAA Case A 71 390 00789 09, 2010 BNA LA Supp. (BL) 118818 (Am. Arb. Ass'n May 10, 2010) (Jennings, Arb.).

163. *City of Pharr v. Combined Law Enft Ass'n of Tex.*, 127 BNA LA (BL) 1025 (May 15, 2010) (Jennings, Arb.).

164. *City of Stillwater v. Fraternal Ord. of Police, Lodge 102*, 12/51012-1, 130 BNA LA (BL) 913 (May 8, 2012) (Chapdelaine, Arb.).

165. *City of Waco v. Sergeant P.M.*, 2010 BNA LA Supp. (BL) 118819 (May 15, 2010) (Jennings, Arb.).

Minnesota;¹⁶⁶ and Youngstown, Ohio.¹⁶⁷ And the dataset includes many cases from small police departments, including those in places like Eaton, Ohio;¹⁶⁸ Hialeah Gardens, Florida;¹⁶⁹ Markham, Illinois;¹⁷⁰ Milford, Michigan;¹⁷¹ Piqua, Ohio;¹⁷² Sandy, Oregon;¹⁷³ and Taylorsville, Illinois.¹⁷⁴ Finally, the dataset includes arbitration awards from numerous sheriff's departments, including those in places like Erie County¹⁷⁵ and Hamilton County¹⁷⁶ in Ohio, and San Joaquin County¹⁷⁷ and Yuba County¹⁷⁸ in California. It also includes several cases involving federal law enforcement agencies.¹⁷⁹

It is important to recognize the limitations of this merged dataset. Per the terms of local collective bargaining agreements or municipal ordinances, many arbitration hearings are confidential, meaning that those awards will not be included in this dataset.¹⁸⁰

166. *City of Woodbury v. Woodbury Police Officers Ass'n*, 09-PA-0952, 2010 BNA LA Supp. (BL) 118973 (Aug. 16, 2010) (Bognanno, Arb.).

167. *City of Youngstown v. Ohio Patrolman's Benevolent Ass'n*, 2011 BNA LA Supp. (BL) 119807 (Mar. 10, 2011) (Paolucci, Arb.).

168. *City of Eaton v. FOP/Ohio Lab. Council*, 14/01484-6, 134 BNA LA (BL) 672 (Sept. 12, 2014) (Tolley, Arb.).

169. *City of Hialeah Gardens v. Fraternal Ord. of Police, Fla. State Lodge*, 32-390-00161-10, 128 BNA LA (BL) 367 (Am. Arb. Ass'n Aug. 23, 2010) (Wolfson, Arb.).

170. *City of Markham Police Dep't v. State and Mun. Teamsters, Chauffeurs and Helpers Loc. 726*, 08/072, 2010 BNA LA Supp. (BL) 119262 (Feb. 11, 2010) (Goldstein, Arb.).

171. *Vill. of Milford v. Police Officers Council, Grievance: #10-34/J.R.*, 2010 BNA LA Supp. (BL) 119906 (Dec. 28, 2010) (McDonald, Arb.).

172. *City of Piqua v. Fraternal Ord. of Police*, 01/14, 133 BNA LA (BL) 1811 (Sept. 3, 2014) (Weatherspoon, Arb.).

173. *City of Sandy v. Sandy Police Ass'n*, 129 BNA LA (BL) 669 (Aug. 12, 2011) (Calhoun, Arb.).

174. *City of Taylorville v. Policeman's Benevolent Lab. Comm.*, 0955293, 129 BNA LA (BL) 616 (June 23, 2011) (Goldstein, Arb.).

175. *Erie Cnty. Sheriff v. Fraternal Ord. of Police, Ohio Lab. Council, Inc.*, 110310/01887-6, 129 BNA LA (BL) 1070 (Oct. 18, 2011) (Heekin, Arb.).

176. *Hamilton Cnty. Sheriff's Dep't v. Fraternal Ord. of Police, Ohio Lab. Council, Inc.*, 05-03516-8, 2006 BNA LA Supp. (BL) 119785 (Apr. 18, 2006) (Cohen, Arb.).

177. *County of San Joaquin v. San Joaquin Deputy Sheriff's Ass'n*, 128 BNA LA (BL) 1096 (Dec. 16, 2010) (Riker, Arb.).

178. *Deputy Sheriff's Ass'n v. Cnty. of Yuba*, 74 390 00172 10, 2010 BNA LA Supp. (BL) 119463 (Am. Arb. Ass'n Oct. 16, 2010) (Riker, Arb.).

179. *See, e.g., Dep't of Homeland Sec., U.S. Customs & Border Prot. v. Nat'l Border Patrol Council of the Am. Fed'n of Gov't Emps.*, 10/0826-04759-3, 129 BNA LA (BL) 1464 (Nov. 21, 2011) (Skulina, Arb.); *U.S. Customs & Border Prot. v. Nat'l Treasury Emps. Union*, 129 BNA LA (BL) 1461 (Dec. 19, 2011) (Abrams, Arb.).

180. *See, e.g., Agreement Between Illinois FOP Labor Council and City of Champaign Patrol and Sergeant 66* (July 1, 2015), <http://documents.ci.champaign.il.us/v/0B8wlv3QqeZtnT0h6elh0RVE2WTQ> [https://perma.cc/KDR2-TXFC] (establishing a confidential proceeding); *Memorandum of Understanding Between the City of Colton and the Colton Police Officers Association 7* (Feb. 1, 2017), <https://www.ci.colton.ca.us/DocumentCenter/View/3436/2017-05-16-MOU---Colton-Police-Officers-Association-Term-020117---013119?bidId=> [https://perma.cc/U9MB-JR4K] ("Grievance arbitration hearings shall be private.").

Nevertheless, there is reason to believe that the combined dataset constructed for this Article provides a somewhat reasonably representative sample of police arbitration outcomes. First, at least one prior study found that jurisdictions across the country use similar procedures for adjudicating police disciplinary appeals.¹⁸¹ The majority of collective bargaining agreements dictate a fairly similar disciplinary appeals process—one that involves arbitrators, selected through alternative strike processes (or similar selection procedures) issuing binding rulings after *de novo* hearings.¹⁸² Indeed, nearly all of the arbitration opinions in the present dataset used this same basic procedural process. Given these procedural similarities across police disciplinary appeals, the size of the dataset, the fifteen-year period covered by the dataset, and the wide geographical variation in the dataset, it seems possible that the dataset provides a useful cross section of police arbitration decisions in the United States.

And second, the overall outcomes of police arbitration are nearly identical when limiting analysis to the Bloomberg database, the Minnesota Bureau of Mediation Services database, or the combined database. That is to say, when I analyzed the 512 opinions derived from the Bloomberg database exclusively, the 112 opinions derived from the Minnesota Bureau of Mediation Services exclusively, or the 624 opinions from the combined database, the overall outcomes—including the types of alleged misconduct, the rate of reversals, and the justifications for reversals—are substantially similar in the aggregate. This provides some confidence that the overall dataset is potentially representative of the predictable outcomes of police arbitration as currently employed in most American jurisdictions.

Once I collected and sorted this dataset, I developed relevant coding variables and definitions. In order to do this in a manner consistent with prior studies of police policies,¹⁸³ I conducted a preliminary examination of the dataset and surveyed the existing

181. Rushin, *supra* note 25, at 570–71 tbl.2 (showing the common features of arbitration appeals procedures across the country).

182. *Id.*

183. See, e.g., Mary D. Fan, *Privacy, Public Disclosure, Police Body Cameras: Police Splits*, 68 ALA. L. REV. 395, 423–24 (2016) (conducting a detailed coding of body camera policies from the largest one hundred police departments); Joanna Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 1, 19–25 (2017) (describing a similar methodology for coding cases to examine the effects of qualified immunity); Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1217 (2017) (also coding police labor agreements in a similar manner to observe patterns across a dataset that can inform theory); MARY D. FAN, CAMERA POWER: PROOF, POLICING, PRIVACY, AND AUDIOVISUAL BIG DATA (2019) (conducting a more extensive coding of even more body camera policies from more agencies); Rushin, *supra* note 25, at 566–70 (describing use of similar methodology); Stephen Rushin & Atticus DeProspo, *Interrogating Police Officers*, 87 GEO. WASH. L. REV. 646, 662–68 (2019) (similarly describing this type of methodology).

literature discussed in Part II. Ultimately, after this iterative process, I settled on eighteen variables that help illustrate the outcomes of arbitration in police disciplinary cases. These variables fall into three general groups. First, I included six variables that summarized the general case characteristics and outcome, including basic information like the name of the arbitrator, a short summary of the alleged offense, the prevailing party in the arbitration proceeding, the disciplinary sentence before arbitration, the disciplinary sentence after arbitration, and the final disciplinary sentence expressed as a percentage of the original disciplinary sentence. Second, I included nine variables designed to categorize the wide range of alleged misconduct found in the dataset. After a preliminary review of the dataset, I sorted the cases into the most common types of misconduct, including dishonesty, domestic offenses, uses of force or incidents of violence, failures by officers to act, racist or homophobic remarks, sexual impropriety, substance abuse, traffic violations, and other general technical violations. Finally, I added an additional three variables designed to document the most common justifications for arbitrators revising or overturning disciplinary action against officers: procedural, proportionality, and evidentiary justifications.

Coding this dataset across these eighteen variables resulted in 11,232 coding decisions. It is important to recognize that not every case fit neatly into these coding variable definitions. In a small number of cases, I had to exercise my own judgment in categorizing the type of offense or the arbitrator's justification for reducing or overturning discipline. And in some cases, alleged offenses fit into multiple categories, as did the arbitrator's justification for reversals or reductions in discipline. The next Part describes the results of this analysis.

IV. OUTCOMES OF POLICE ARBITRATION

Arbitrators overturned or reduced roughly half of all disciplinary penalties issued by police chiefs, sheriffs, and city leaders. This finding is roughly consistent with prior examinations of police arbitration outcomes by Adams¹⁸⁴ and Collins.¹⁸⁵ These findings are also potentially consistent with those by Kelly, Lowery, and Rich.¹⁸⁶ Even though Kelly, Lowery, and Rich found that a mere 24% of all officers terminated

184. Adams, *supra* note 112, at 140 (finding in his analysis that a similar rate—46.7%—of discharges were overturned via arbitration).

185. Collins, *supra* note 136 (finding that roughly half of disciplinary cases in Minnesota resulted in reversals or reductions).

186. See Kelly et al., *supra* note 31.

across thirty-seven agencies were rehired on appeal, their dataset seemingly included *both* cases that advanced to arbitration and those that did not (for example, cases where the union or aggrieved officer chose not to appeal discipline, or cases where the union reached a settlement agreement with management prior to arbitration).¹⁸⁷ This study, by contrast, focuses exclusively on disciplinary appeals that advance to arbitration. It seems plausible that unions or aggrieved officers may choose not to challenge some disciplinary sanctions or terminations because of the low probability of success on appeal. This could skew the resulting arbitration outcomes as described in more detail in Part V.

Overall, in the context of the present dataset, arbitrators reduced the length of the average suspension by about half. And in roughly half of all cases of terminations, arbitrators ordered the officer rehired on appeal. Further, arbitrators most commonly cited proportionality concerns in reducing or overturning discipline. It was comparatively rarer—although not uncommon—for arbitrators to uphold disciplinary sanctions because of disagreements with the factual findings or concerns about the procedural defects in the earlier investigation or adjudication of wrongdoing. The sections that follow describe the types of misconduct that advanced to arbitration on appeal, the rates of reversals and reductions of discipline, and the justifications given by arbitrators in altering disciplinary penalties.

A. Types of Misconduct Appealed to Arbitration

The types of misconduct that progressed on appeal to arbitration vary widely. Some of this misconduct is serious and involves significant harm to other people in a manner rarely seen in other professions. Other misconduct is relatively minor and similar to the kind of misconduct we might expect to find in any workplace. Table 1 summarizes the distribution of offenses that advanced to arbitration on appeal.¹⁸⁸

187. *See id.*

188. It is also important to recognize that this does not represent a complete picture of the world of police misconduct generally. Presumably, there are some types of misconduct that officers choose to not appeal—perhaps because they realize their chances of success are relatively low, or in more minor cases, because they decided to accept the initial punishment without further appeal. Thus, it is important to understand what this data can and cannot tell us. It is worth noting that some incidents fell into multiple categories. Thus, the numbers in Table 1 will add up to more than 624.

TABLE 1: TYPES OF MISCONDUCT APPEALED TO ARBITRATION

Type of Alleged Misconduct	Frequency
Technical Offense	54.5% (340/624)
Force Offense	25.6% (160/624)
Dishonesty Offense	23.1% (144/624)
Traffic Offense	11.5% (72/624)
Failure to Act Offense	11.2% (70/624)
Substances Offense	10.6% (66/624)
Domestic Offense	6.4% (40/624)
Sexual Offense	5.1% (32/624)
Racism or Homophobia	2.6% (16/624)

As seen in Table 1, around a quarter of cases involved officers using or threatening to use physical force.¹⁸⁹ These included cases where officers allegedly used unauthorized chokeholds,¹⁹⁰ kicked civilians in the head,¹⁹¹ unjustifiably or excessively used electronic control weapons or tasers,¹⁹² and at least one case eerily similar to the murder of George Floyd, where an officer killed a man through the use of a chokehold shortly after the man yelled, “I can’t breathe.”¹⁹³ And

189. *See, e.g.*, Senior Officer Michael Delgado v. City of Corpus Christi, AAA No. 70 390 00820 05, 2006 BNA LA Supp. (BL) 117671 (Am. Arb. Ass’n May 7, 2006) (Moore, Arb.) (challenging twenty-day suspension for kicking a suspect).

190. *See, e.g.*, Emp. v. Cnty. Police Benevolent Ass’n, 149585-AAA, 2011 BNA LA Supp. (BL) 149585 (Am. Arb. Ass’n June 10, 2011) (Hoffman, Arb.) (redacted decision) (overturning punishment for use of carotid artery chokehold).

191. *See, e.g.*, Fraternal Ord. of Police Lodge – v. Emp., 199348-AAA, 2016 BNA LA Supp. (BL) 199348 (Am. Arb. Ass’n Jan. 15, 2016) (Miller, Arb.) (redacted decision) (upholding written reprimand for kicking suspect five times in the head).

192. *See, e.g.*, Int’l Brotherhood of Police Officers, Loc. – v. Emp., 199456-AAA, 2016 BNA LA Supp (BL) 199456 (Am. Arb. Ass’n Mar. 25, 2016) (Raucci, Arb.) (redacted decision) (overturning punishment against officer who allegedly used a taser on a shoplifting suspect unjustifiably); City of Sauk Rapids v. Law Enf’t Lab. Servs., Inc., BMS Case No. 17PA0475, 2017 WL 6059936, at *5, *7, *9 (Minn. Bureau of Mediation Servs. June 2, 2017) (Tidwell, Arb.) (overturning a termination and reducing punishment to a two-day suspension for an officer facing multiple complaints for unjustified use of a taser); – PBA v. – Cnty. (Police Dep’t), 4661466-AAA, 2019 BNA LA (BL) 111, at *2, *6 (Am. Arb. Ass’n Feb. 12, 2019) (Humphries, Arb.) (redacted decision) (overturning a ten-day suspension of an officer for allegedly unjustifiably using taser, baton, and kicking a suspect).

193. – Police Patrolmen’s Ass’n v. City of –, 4663671-AAA, 2019 BNA LA Supp. (BL) 4663671 (Am. Arb. Ass’n Apr. 20, 2019) (Alutto, Arb.) (redacted decision) (arbitrator overturned discipline when officer responded to man saying “I can’t breathe” by replying, “So? I don’t give a f[*]ck”).

these included acts of violence against unarmed civilians,¹⁹⁴ fellow officers,¹⁹⁵ children,¹⁹⁶ individuals with physical disabilities,¹⁹⁷ individuals experiencing mental health crises,¹⁹⁸ animals,¹⁹⁹ and numerous individuals already in officer custody or in handcuffs.²⁰⁰

In nearly a quarter of the cases, supervisors allege officers engaged in professional dishonesty, including falsified police reports,²⁰¹ lack of candor during investigations,²⁰² withholding information in

194. *See, e.g.,* —, *Union v. Emp.*, 4654834-AAA, 2018 BNA LA Supp. (BL) 4654834 (Am. Arb. Ass'n Oct. 16, 2018) (Zeiser, Arb.) (redacted decision) (case involving officer who killed a burglary suspect, faced criminal charges for the killing, and was terminated by his department, only to be ordered rehired with back pay by an arbitrator on appeal).

195. *See, e.g.,* *City of Tulsa v. Fraternal Ord. of Police, Lodge 93*, FCMS Case No. 10/60154, 130 BNA LA (BL) 714, 719, 724 (Fed. Mediation & Conciliation Serv. May 21, 2012) (McReynolds, Arb.) (upholding the termination of an officer who choked a fellow officer until she lost consciousness).

196. *See, e.g.,* *Police Command Officers Union v. Emp.*, 149904-AAA, 2011 BNA LA Supp. (BL) 149904 (Am. Arb. Ass'n Dec. 26, 2011) (Ryan, Arb.) (upholding the termination of an officer who, among other offenses, unjustifiably used force against a juvenile); *City of Columbus v. Fraternal Ord. of Police, Cap. City Lodge 9*, Grievance No. 24-2016, 138 BNA LA (BL) 158, 160, 164 (June 3, 2017) (Goldberg, Arb.) (overturning three-day suspension for officer who accidentally shot a child).

197. *See, e.g.,* *City of Slayton v. Slayton Police Officers Ass'n*, 138 BNA LA (BL) 1917, 1926–27 (Oct. 1, 2018) (Latsch, Arb.) (officer allegedly forcibly and unnecessarily removed a paraplegic driver from his car, unlawfully arrested him, and used excessive force).

198. *See, e.g.,* *IBPO Loc. – v. Emp.*, 148703-AAA, 2012 BNA LA Supp. (BL) 148703 (Am. Arb. Ass'n Mar. 5, 2012) (Altman, Arb.) (redacted decision) (reducing the penalty against an officer who mishandled a situation, resulting in injuries, with a person experiencing a mental health crisis).

199. *See, e.g.,* *Ramsey Cnty. v. Law Enf't Lab. Servs.*, BMS Case No. 16-PA-0957, 2016 WL 6610300, at *1, *3 (Minn. Bureau of Mediation Servs. Oct. 29, 2016) (Vernon, Arb.) (ordering the rehiring, with limitations, of an officer who severely beat his dog while drunk, resulting in animal cruelty charges against him).

200. *See, e.g.,* *Metro. Council v. Teamsters Loc. 320*, BMS Case No. 14-PA-1085, 2015 WL 4931085, at *1–2 (Minn. Bureau of Mediation Servs. May 25, 2015) (Jacobs, Arb.) (involving an officer who allegedly punched a person who was handcuffed and in custody); *City of Blue Island v. Ill. Fed'n of Police*, FCMS Case No. 16-52757, 137 BNA LA (BL) 845, 846–48 (Fed. Mediation & Conciliation Serv. Apr. 10, 2017) (Dichter, Arb.) (arbitrator reducing thirty-day suspension to two-day suspension for striking a handcuffed suspect).

201. *See, e.g.,* *Law Enf't Lab. Servs. Deputy Loc. 212 v. Cnty. of Isanti*, BMS Case No. 17-PA-0050 (Minn. Bureau of Mediation Servs. Sept. 6, 2017) (Neigh, Arb.), <https://mn.gov/bms/documents/BMS/130696-20170906-Isanti.pdf> [<https://perma.cc/4G5J-JPSQ>] (upholding termination for falsifying a report, making hostile/harassing calls to another officer, and failing to act appropriately in vehicle chase); *United Pub. Serv. Emps. Union/COPS Loc. – v. Emp.*, 4642861-AAA, 2018 BNA LA Supp. (BL) 4642861 (Am. Arb. Ass'n Apr. 9, 2018) (Williamson, Jr., Arb.) (redacted decision) (upholding termination for multiple falsified accident reports).

202. *See, e.g.,* *Emp. v. Individual Grievant Appellant*, 148074-AAA, 2013 BNA LA Supp. (BL) 148074 (Am. Arb. Ass'n Aug. 4, 2013) (Bennett, Arb.) (redacted decision) (reducing indefinite suspension to five-day suspension in case involving alleged lack of candor by officer).

investigations,²⁰³ and falsifying time sheets.²⁰⁴ In several of these cases, employers sought termination of the officer because of a belief that the officer's dishonesty would require inclusion on a *Brady* list,²⁰⁵ thereby limiting the officer's ability to serve as an effective witness in a future criminal trial.²⁰⁶

While these large numbers of crimes of violence and dishonesty are illuminating, it is important to recognize that the largest segment of cases (54.5%) involves technical violations of departmental policy. These can range from relatively serious violations of departmental policy, like conduct unbecoming of an officer²⁰⁷ and insubordination,²⁰⁸ to relatively minor offenses, like violations of uniform dress code,²⁰⁹

203. See, e.g., *City of Sandy v. Sandy Police Ass'n*, 129 BNA LA (BL) 669, 672, 680 (Aug. 12, 2011) (Calhoun, Arb.) (ordering officer rehired where officer allegedly withheld information from prosecution for a friend).

204. See, e.g., *Emp. v. Officers Ass'n*, 161910-AAA, 2010 BNA LA Supp. (BL) 161910 (Am. Arb. Ass'n June 11, 2010) (McDonald, Arb.) (redacted decision) (termination downgraded to a ninety-day suspension for providing false information about overtime worked).

205. See *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963) (holding that prosecutors must disclose material evidence that may be favorable to a criminal defendant, which can include an officer's prior history of dishonesty or misconduct); see also *Kyles v. Whitley*, 514 U.S. 419, 437–38 (1995) (concluding that *Brady* requires the prosecution to turn over evidence known to them). For a detailed summary of how police disciplinary records interact with *Brady* requirements, see Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 749–51, 762–79 (2015); see also Rachel Moran, *Contesting Police Credibility*, 93 WASH. L. REV. 1339, 1360–79 (2018) (noting the kinds of barriers that prevent access to officers' records, which may shed light on their proclivity towards dishonesty).

206. See, e.g., *City of Lakeland v. W. Cent. Fla. Police Benevolent Ass'n*, FMCS Case No. 15114/00483, 135 BNA LA (BL) 8 (Fed. Mediation & Conciliation Serv. June 29, 2015) (Sergeant, Arb.) (forcing police department to reassign officer to policing duties, despite inclusion on *Brady* list and strong objection by department); *Law Enf't Lab. Servs., Inc. v. Cnty. of Mahanomen*, Case No. 16-PA-0738 (Minn. Bureau of Mediation Servs. Aug. 17, 2016) (Paull, Arb.), <https://mn.gov/bms/documents/BMS/126428-20160817-Mahanomen.pdf> [<https://perma.cc/KQ8N-B3QJ>] (arbitrator reinstating officer with last chance agreement despite objection by county, which believed the officer was impaired from testifying in the future because of inclusion on *Brady* list).

207. See, e.g., *Cent. State Univ. Police Dep't v. Fraternal Ord. of Police, Ohio Lab. Council, Inc.*, FMCS Case No. 08/03136, 125 BNA LA (BL) 981 (Fed. Mediation & Conciliation Serv. Oct. 28, 2008) (Sellman, Arb.) (overturning suspension for intoxication and conduct unbecoming of an officer).

208. See, e.g., *City of Hous. Police Dep't v. Sergeant R.T.*, AAA Case No. 70 390 00205 09, 2009 BNA LA Supp. (BL) 119556 (Am. Arb. Ass'n May 20, 2009) (Moore, Arb.) (upholding ten-day suspension for failure to act and insubordination).

209. See, e.g., *Police Benevolent Ass'n, Inc. v. City of —*, 4661480-AAA, BNA LA Supp. (BL) 4661480 (Am. Arb. Ass'n Feb. 25, 2019) (Stokes, Arb.) (redacted decision) (upholding three-day suspension for uniform violation and visibility of tattoos).

scheduling disagreements,²¹⁰ tardiness,²¹¹ and even one case involving an officer bringing his new puppy to visit coworkers at the precinct without authorization.²¹² And numerous cases involved officers making offensive statements in public or on social media, including one officer who, after getting called out for his offensive behavior, bragged online that, “I can’t get fired ha ha.”²¹³ That officer *was* fired by his chief, but ultimately rehired by an arbitrator on appeal.²¹⁴

A smaller, but still significant, percentage of the cases involved domestic violence,²¹⁵ traffic accidents,²¹⁶ or substance abuse (most notably, alcohol abuse).²¹⁷ And at least sixteen cases involved officers

210. *See, e.g.*, Fraternal Ord. of Police v. Borough, 161612-AAA, 2010 BNA LA Supp. (BL) 161612 (Am. Arb. Ass’n Mar. 2, 2010) (Skonier, Arb.) (redacted decision) (overturning ten-day suspension related to scheduling disagreement).

211. *See, e.g.*, City of Tacoma v. Tacoma Police Union Loc. 6, FMCS Case No. 17/56138, 138 BNA LA (BL) 610 (Fed. Mediation & Conciliation Serv. Feb. 26, 2018) (Bonney, Arb.) (overturning termination for repeated tardiness among other violations).

212. Wright State Univ. v. Fraternal Ord. of Police, Ohio Lab. Council, Inc., FMCS Case No. 15/01115-6, 135 BNA LA (BL) 1174 (Fed. Mediation & Conciliation Serv. Aug. 3, 2015) (Goldberg, Arb.).

213. Police Dep’t v. Police Ass’n, 148178-AAA, 2013 BNA LA Supp. (BL) 148178 (Am. Arb. Ass’n Sept. 4, 2013) (Visco, Arb.) (redacted decision).

214. *Id.* (reducing the termination to a seven-day suspension from the date of the opinion).

215. In total, twenty-seven cases in the dataset involved both domestic disputes and the alleged use of physical violence or show of physical force. *See, e.g.*, Minneapolis Police Officers Fed’n v. City of Minneapolis (Minn. Bureau of Mediation Servs. Dec. 30, 2009) (Reynolds, Arb.), <https://mn.gov/bms-stat/assets/20091230-Mpls.pdf> [<https://per.ma.cc/WD3E-NGE9>] (upholding termination in case involving domestic violence and a restraining order); Minneapolis Police Officers Fed’n v. City of Minneapolis (Minn. Bureau of Mediation Servs. May 18, 2012) (Reynolds, Arb.), <https://mn.gov/bms-stat/assets/20120518.pdf> [<https://perma.cc/32VT-HQZS>] (reducing termination for case involving felony assault of spouse to a short suspension after the spouse recanted claims); Emp. v. Fraternal Ord. of Police Lodge No. –, 149805-AAA, 2011 BNA LA Supp. (BL) 149805 (Am. Arb. Ass’n Oct. 20, 2011) (Talarico, Arb.) (redacted decision) (reinstating officer without back pay who was accused of pulling spouse’s hair and hitting her in the head with the butt of his gun); Emp. v. Combined L. Enf’t Ass’ns, 148668-AAA, 2012 BNA LA Supp. (BL) 148668 (Am. Arb. Ass’n Feb. 17, 2012) (Hays, Arb.) (redacted decision) (upholding termination of officer who drunkenly punched spouse multiple times in the face).

216. *See, e.g.*, Individual Grievant v. Emp., 148628-AAA, 2012 BNA LA Supp. (BL) 148628 (Am. Arb. Ass’n Jan. 21, 2012) (Molina, Arb.) (redacted decision) (upholding one-day suspension for car accident while driving at unsafe speed); Emp. v. Union, 149841-AAA, 2011 BNA LA Supp. (BL) 149841 (Am. Arb. Ass’n Nov. 4, 2011) (Miller, Arb.) (redacted decision) (reducing a three-day suspension to a one-day suspension for causing an accident via an illegal turn).

217. Many of these cases involved driving while intoxicated. *See, e.g.*, Dep’t of Homeland Sec., U.S. Customs & Border Prot. v. Am. Fed’n of Gov’t Emps., Loc. 3307, FMCS Case No. 13/00842-8, 133 BNA LA (BL) 419 (Fed. Mediation & Conciliation Serv. Jan. 3, 2014) (Nicholas, Arb.) (upholding a reduction in responsibilities after agent caught allegedly driving under the influence of alcohol); Police Officers’ Fed’n of Minneapolis v. City of Minneapolis (Minn. Bureau of Mediation Servs. Nov. 8, 2014) (Fogelberg, Arb.), <https://mn.gov/bms-stat/assets/20141108-Minneapolis.pdf> [<https://perma.cc/3LPA-WBAP>] (reducing a thirty-two day suspension to a ten-day suspension in case involving officer caught allegedly driving under the influence). Some involve cases where alcohol appears to be a contributing factor to other types of misconduct, like public intoxication or unbecoming conduct. *See, e.g.*, Cent. State Univ. Police Dep’t v. Fraternal Ord. of Police, Ohio Lab. Council, Inc., FMCS Case No. 08/03136, 125 BNA LA (BL) 981 (Fed. Mediation & Conciliation

using racist or homophobic slurs,²¹⁸ including multiple officers accused of using the n-word²¹⁹ and several who posted offensive or inappropriate comments on their social media accounts.²²⁰

The distribution of misconduct listed in Table 1 is significant, in part because it provides insight into the wide range of misconduct allegedly committed by police officers across the country. On the one hand, some of the alleged misconduct handled by the police disciplinary system looks fairly similar to the kinds of mistakes or wrongdoing we would expect to find in any professional setting. Just like any other public servant, some police officers are punished for arriving late to work,²²¹ sleeping on the job,²²² and failing to properly file paperwork or follow day-to-day procedures.²²³

On the other hand, these data also demonstrate the unique nature of professional misconduct in policing relative to other fields. Unlike most other public servants, sworn law enforcement officers

Serv. Oct. 28, 2008) (Sellman, Arb.) (in case where officer allegedly got into a fight while intoxicated, overturning suspension because the disciplinary action was not commenced within the mandatory time requirements). Other cases involve other types of drugs or unlawful substances. *See, e.g.*, U.S. Immigr. & Customs Enft, Dep't of Homeland Sec., Fed. Protective Serv. v. Am. Fed'n of Gov't Emps., Loc. 505, 130 BNA LA (BL) 481 (May 21, 2012) (Gentile, Arb.) (upholding termination for an officer testing positive for methamphetamine); Summit Cnty. Ohio Sheriff's Dep't v. Fraternal Ord. of Police Ohio Lab. Council, Inc., No. 2013-30, 133 BNA LA (BL) 546 (May 16, 2014) (Feldman, Arb.) (thirty-day suspension reduced to ten-day suspension in case involving marijuana use).

218. *See, e.g.*, Emp. v. Police Patrolmen's Union, Local -, 148474-AAA, 2013 BNA LA Supp. (BL) 148474 (Am. Arb. Ass'n July 26, 2013) (Litton, Arb.) (redacted decision) (involving an officer who made multiple racist comments and social media posts including racial slurs); Police Ass'n v. Emp., 205234-AAA, 2016 BNA LA Supp. (BL) 205234 (Am. Arb. Ass'n Nov. 27, 2016) (Lurie, Arb.) (redacted decision) (cutting a ten-day suspension in half for an officer who used racist slurs when talking to a home inspector, including using the word "wetb[*]jck").

219. *See, e.g.*, City of -, Conn. v. - Police Union, 4664750-AAA, 2019 BNA LA Supp. (BL) 4664750 (Am. Arb. Ass'n May 10, 2019) (Neumeier, Arb.) (redacted decision) (ordering the rehiring of an officer who operated a vehicle under the influence, used the n-word multiple times, and threatened officers); Emp. (Tex.) v. Tex. Mun. Police Ass'n, 200576-AAA, 136 BNA LA (BL) 1467 (Am. Arb. Ass'n Apr. 22, 2016) (Jennings, Arb.) (redacted decision) (downgrading termination to a five-day suspension after officer failed to respond to another officer's use of "racially insensitive" remarks, including use of the n-word and other racist comments).

220. *See, e.g.*, Emp. v. Police Patrolmen's Ass'n, 166027-AAA, 2015 BNA LA Supp. (BL) 166027 (Am. Arb. Ass'n Jan. 9, 2015) (Cohen, Arb.) (redacted decision) (upholding three-day suspension for officer who made inappropriate comments on social media).

221. *See, e.g.*, Emp. v. Individual Grievant, 148334-AAA, 2013 BNA LA Supp. (BL) 148334 (Am. Arb. Ass'n May 7, 2013) (Barnard, Arb.) (redacted decision) (decreasing a five-day suspension to a three-day suspension for arriving late to work and failing to notify supervisor).

222. *See, e.g.*, Teamsters, Loc. Union No. 637 v. Licking Cnty. Sheriff's Off., FMCS No. 050517-03576-8, 2006 BNA LA Supp. (BL) 117664 (Fed. Mediation & Conciliation Serv. Jan. 10, 2006) (Goldberg, Arb.) (upholding termination of officer for sleeping on the job).

223. *See, e.g.*, City of W. Carrollton v. Fraternal Ord. of Police, Ohio Lab. Council, FMCS No. 13/01895, 132 BNA LA Supp. (BL) 960 (Fed. Mediation & Conciliation Serv. Oct. 24, 2013) (Lalka, Arb.) (upholding termination for repeated failure to submit paperwork as required by performance improvement plan).

generally carry weapons and are trained to utilize force. As part of their job, we also expect police officers to make split-second judgments on the application of the law. And we expect them to honestly fill out police reports and regularly testify before court in criminal proceedings about their observations and actions. These job responsibilities are fundamentally different than those given to teachers, firefighters, government social workers, or other civil servants. So, it may come as no surprise that officer abuse of these unique job responsibilities—that is, their use of unauthorized force and their dishonesty in filling out police reports—makes up a substantial portion of the incidents that result in discipline, suspension, or termination.

This realization is significant, as it conveys the stakes of these disciplinary appeals decisions and, by extension, the community's interest in the outcomes of these cases. In some cases, like those involving scheduling misunderstandings or uniform violations, the stakes may be comparatively low. But when the case involves an officer that has used force against unarmed individuals, demonstrated an ongoing proclivity towards dishonesty, or revealed bigoted personal beliefs, the stakes are high, particularly if we believe these behaviors are suggestive of the risk that officer poses to the community in the future.

B. Rate of Reversals or Revisions of Disciplinary Action

Consistent with prior predictions by scholars and civil rights activists, it appears that arbitrators reversed or reduced officer discipline in a substantial number of the cases in the dataset. Table 2 summarizes the rates of reversals or reductions in discipline.

TABLE 2: RATES OF REVERSALS OR REDUCTIONS IN DISCIPLINE

Punishment	Rate of Reversal or Reduction
Termination	46.2% (154/333)
Suspension	61.1% (157/257)
Other Discipline	47.1% (16/34)

In total, in 52.4% of the cases (327 out of 624), the arbitrator sided, at least in part, with the aggrieved officer or the police union. This includes 154 cases in which the arbitrator reinstated an officer fired by their employer for professional misconduct. In total, 46.2% of fired officers (154 out of 333) ultimately got their jobs back. This

includes fifty-six officers that got their jobs back on appeal despite accusations of significant dishonesty,²²⁴ including a Minnesota officer accused of copying a judge's signature on a warrant application²²⁵ and a California officer allegedly caught by his partner planting drug evidence on a suspect.²²⁶

Another forty-seven officers accused of unjustified violence were ordered rehired, including an officer who shot and killed an unarmed man in Oakland, California,²²⁷ multiple officers who allegedly pointed their guns at fellow officers,²²⁸ and multiple officers charged with crimes of violence like assault.²²⁹ Also among the officers reinstated by arbitrators were twenty-two accused of substance abuse,²³⁰ nine accused of racist or homophobic comments,²³¹ and nine accused of sexual impropriety.²³² When arbitrators forced communities to rehire previously fired officers, the revised punishments varied widely; some officers received full back pay and no punishment,²³³ while other officers

224. *See, e.g.*, *Emp. v. Police Benevolent Ass'n*, 150813-AAA, 2009 BNA LA Supp. (BL) 150813 (Am. Arb. Ass'n June 1, 2009) (Humphries, Arb.) (redacted decision) (overturning termination of officer for alleged false statements and ordering officer rehired with back pay).

225. *Benton Cnty. v. Law Enf't Lab. Servs.*, BMS Case No. 18-PA-0058 (Minn. Bureau of Mediation Servs. Oct. 12, 2018) (Miller, Arb.), <https://mn.gov/bms/documents/BMS/233107-20181012-Benton.pdf> [<https://perma.cc/B7PV-TRLZ>].

226. *Cnty. of Stanislaus v. Stanislaus Sworn Deputies Ass'n, Loc. 315*, CSMCS Case No. ARB 09-0478, 128 BN LNA Supp. (BL) 592 (Cal. State Mediation & Conciliation Serv. Oct. 7, 2010) (Pool, Arb.).

227. *City of Oakland v. Oakland Police Officers' Ass'n*, CSMCS Case No. 09-0707, 128 BNA LNA Supp. (BL) 1217 (Cal. State Mediation & Conciliation Serv. Mar. 2, 2011) (Gaba, Arb.).

228. *See, e.g.*, *Law Enf't Lab. Servs., Inc. v. Cnty. of Washington*, BMS Case No. 05-PA-599 (Minn. Bureau of Mediation Servs., Apr. 26, 2006) (Befort, Arb.), <https://mn.gov/bms/documents/BMS/155235-Arbitration%20Awards.pdf> [<https://perma.cc/GKS8-225X>] (reducing termination to thirty-day suspension); *Fraternal Ord. of Police v. Emp.*, 161709-AAA, 2010 BNA LA Supp. (BL) 161709 (Am. Arb. Ass'n Feb. 8, 2010) (Skonier, Arb.) (redacted decision) (reducing termination to ten-day suspension).

229. *See, e.g.*, *Fraternal Ord. of Police Lodge – v. Emp.*, 150395-AAA, 2011 BNA LA Supp. (BL) 150395 (Am. Arb. Ass'n Jan. 21, 2011) (Long, Arb.) (redacted decision) (grievant charged with simple assault, aggravated assault, and harassment); –, *Union v. Emp.*, 4654834-AAA, 2018 BNA LA Supp. (BL) 4654834 (Am. Arb. Ass'n Oct. 16, 2018) (Zeiser, Arb.) (redacted decision) (officer accused of unjustifiably killing burglary suspect and also faced criminal charges).

230. *See, e.g.*, *Police Officers Fed'n of Minneapolis v. City of Minneapolis* (Minn. Bureau of Mediation Servs. Dec. 5, 2007) (Befort, Arb.) (reducing termination involving alcohol use and driving under the influence to a five-day suspension).

231. *See, e.g.*, *Police Ass'n v. Emp.*, 200981-AAA, 2017 BNA LA Supp. (BL) 200981 (Am. Arb. Ass'n June 19, 2017) (Wood, Arb.) (redacted decision) (offenses included racial harassment, mocking an accent, racist statements, and slurs; termination reduced to five-day suspension).

232. *See, e.g.*, *Emp. v. Police, FOP Lodge –*, 199114-AAA, 2015 BNA LA Supp. (BL) 199114 (Am. Arb. Ass'n Sept. 28, 2015) (Colflesh, Arb.) (redacted decision) (reinstating officer without back pay; officer accused of accessing pornography at work eighty-three times and arranging sexual encounters at work).

233. *See, e.g.*, *Emp. v. Police Benevolent Ass'n*, 149508-AAA, 2011 BNA LA Supp. (BL) 149508 (Am. Arb. Ass'n May 24, 2011) (Humphries, Arb.) (redacted decision) (overturning termination and ordering reinstatement with back pay).

saw their terminations downgraded to suspensions without pay²³⁴ and last chance agreements.²³⁵

Similarly, 61.1% of the suspensions (157 out of 257) were reduced or overturned by arbitrators. Among those receiving a suspension, the average officer in the dataset received an initial suspension of 10.3 days in length, which was reduced to an average of 5.2 days after arbitration. Put another way, law enforcement agencies issued a grand total of around 2,623 days of suspension to officers in the dataset. But after appellate arbitration, officers ended up serving only 1,325 days of these original suspensions. This means that the typical officer saw their suspension reduced by about 49% after arbitration. And nearly half (47.1%) of officers receiving other types of disciplinary actions like demotions, written reprimands, or oral reprimands saw their punishments overturned on appeal via arbitration.

C. Justifications for Reversals and Revisions of Disciplinary Action

Arbitrators gave a wide range of justifications for their reductions or reversals of police discipline. Table 3 summarizes the frequency of these different justifications for arbitrators overturning—in part or in whole—the punishment handed down by officers' employers. In many cases, arbitrators gave multiple justifications.

TABLE 3: STATED JUSTIFICATION FOR REVERSAL OR REVISION IN DISCIPLINE

Justification for Reversal or Revision	Frequency
Procedural Justification	29.7% (97/327)
Proportionality Justification	64.5% (211/327)
Evidentiary Justification	38.5% (126/327)

In some cases—around 97 of the 327 cases that resulted in reversals or reductions in discipline, or nearly 30% of the time—the arbitrator identified a procedural flaw in the earlier investigation or adjudication of the case. In multiple cases, arbitrators concluded that

234. *See, e.g.*, *Broward Sheriff's Off. v. FOPE*, FMCS Case No. 101202/00729-3, 127 BNA LA Supp. (BL) 1503 (Fed. Mediation & Conciliation Serv. July 19, 2010) (Wolfson, Arb.) (reducing termination to 185-day suspension).

235. *See, e.g.*, *City of Hialeah Gardens v. Fraternal Ord. of Police*, Fla. State Lodge, AAA Case No. 32-390-00161-10, 128 BNA LA Supp. (BL) 367 (Am. Arb. Ass'n Aug. 23, 2010) (Wolfson, Arb.) (reinstating officer, but issuing a last chance agreement).

the discipline was time limited, either because the employer took too long to complete its investigation or the complainant made their allegation too long after the alleged wrongdoing.²³⁶ In other cases, arbitrators cited lack of notice,²³⁷ improper consideration of prior disciplinary history in violation of a collective bargaining agreement or state law,²³⁸ or other more complicated procedural objections.²³⁹

In a somewhat larger number of cases, arbitrators cited a disagreement with the strength of the evidence presented at the hearing. Often, these cases involved the arbitrator simply disagreeing with the employer's determination that sufficient evidence existed to prove a case by a preponderance of the evidence or by clear and convincing evidence.²⁴⁰

But the most common justification for overturning or reducing disciplinary action was a determination that the punishment was disproportionate. In some cases, arbitrators found that a punishment was disproportionate because it failed to properly consider mitigating factors in an officer's record.²⁴¹ In other cases, arbitrators found that a punishment was disproportionate to the punishments given to other similarly situated officers in the same department who committed the same type of misconduct in the past.²⁴² And in many cases, the

236. *See, e.g.*, *El Paso Police Dep't v. Police Officer Michael Velez*, AAA No. 70 390 00813 04, 2006 BNA LA Supp. (BL) 117630 (Am. Arb. Ass'n Oct. 18, 2006) (Allen, Jr., Arb.) (justifying reduction of six-day penalty to no punishment because notice was not served on the officer within the appropriate time limit).

237. *See, e.g.*, *Police Ass'n v. Emp.*, 150953-AAA, 2014 BNA LA Supp. (BL) 150593 (Am. Arb. Ass'n Jan. 17, 2014) (Simpkins, Arb.) (redacted decision) ("Lack of notice is not an excuse for prohibited conduct but it can be, as it is here, a bar to the assessment of discipline and its effect.").

238. *See, e.g.*, *Emp. v. Pro. L. Enft Ass'n*, 4633833-AAA, 2017 BNA LA Supp. (BL) 4633833 (Am. Arb. Ass'n Dec. 4, 2017) (Milinski, Arb.) (redacted decision) (citing improper consideration of disciplinary history); *Dewitt Charter Twp. v. Police Officers Lab. Council, Grievance POLC No. 18-001*, 139 BNA LA Supp. (BL) 1356, 1362 (Jan. 21, 2019) (McDonald, Arb.) (finding that department violated collective bargaining agreement by "not removing a reference to the Grievant's May 2016 discipline from the Grievant's backdated November 28, 2016 written reprimand").

239. *See, e.g.*, *City of Springfield v. Springfield Police Officers Ass'n*, Lodge 22, FMCS Case No. 150826-57265-8, 2016 BNA LA Supp. (BL) 4660933 (Fed. Mediation & Conciliation Serv. May 10, 2016) (Fowler, Arb.) (justifying overturning of punishment because of lack of exact rule on point).

240. *See, e.g.*, *Police Dep't v. Individual Grievant*, 161551-AAA, 2010 BNA LA Supp. (BL) 161551 (Am. Arb. Ass'n Mar. 23, 2010) (Fragoli, Arb.) (redacted decision) (determining that, despite evidence that an email violating departmental policy originated from an officer's home IP address, this was insufficient on a preponderance of the evidence standard to prove that she sent it).

241. *See, e.g.*, *Law Enft Lab. Servs., Inc. v. Steele Cnty.*, BMS Case No. 06-PA-620 (Minn. Bureau of Mediation Servs., Oct. 26, 2006) (Befort, Arb.), <https://mn.gov/bms-stat/assets/Matejcek-Steele-County-Decision1.pdf> [<https://perma.cc/C66W-MRAJ>] (focusing primarily on mitigating circumstances reducing written reprimand to oral reprimand).

242. *See, e.g.*, *City of Youngstown v. Youngstown Police Ass'n/The Ohio Patrolmen's Benevolent Ass'n*, 134 BNA LA (BL) 1644, 1654 (May 20, 2015) (Bell, Arb.) (reducing penalty to

arbitrator simply exercised her independent judgment in concluding that the penalty given by the police chief or city official was disproportionate relative to the offense committed.²⁴³ An example from Fairfield County, Ohio, illustrates how arbitrators sometimes exercise their discretion to reduce officer penalties out of a concern for proportionality. In that case, an officer was accused of unnecessarily and unjustifiably choking a man in custody.²⁴⁴ The events were videotaped, and there did not appear to be any disagreement about the facts. The arbitrator ultimately agreed that the officer's conduct was "inappropriate and worthy of discipline,"²⁴⁵ but concluded that "the penalty of discharge was too excessive" given the officer's work history and commendations.²⁴⁶

Similarly, in another Ohio case, an arbitrator largely agreed with the factual determinations reached by the police department in terminating an officer for "'sexting' former and current victims of crimes that that he had investigated" while on duty, failing to appear for a disciplinary interview, and moonlighting as a security guard at a liquor store without departmental approval.²⁴⁷ There was little factual debate. As the arbitrator noted, the officer "admitted to and accepted full responsibility for [his] repeated egregious wrongdoing," which was not "isolated" but rather "continuous for a period of months."²⁴⁸ As the arbitrator bluntly put it, there was a "mountain of misconduct demanding harsh discipline."²⁴⁹ Ultimately, though, the arbitrator concluded that some mitigating factors, including the officer's acceptance of responsibility and his marital problems, warranted a lesser punishment.²⁵⁰ Thus, despite the arbitrator agreeing that the officer's conduct was "wrongful and reprehensible," he ordered him rehired.²⁵¹

In these cases, and dozens of others like them, arbitrators arguably substituted the judgment of police chiefs, sheriffs, and city

match that of a prior officer at the department who, in judgment of arbitrator, committed factually similar wrongdoing).

243. See, e.g., *Emp. v. Police Ass'n*, 200916-AAA, 2017 BNA LA Supp. (BL) 200916 (Am. Arb. Ass'n May 18, 2017) (Stein, Arb.) (redacted decision) (reducing six-day suspension to nondisciplinary counseling based on concerns about excessive punishment).

244. *Fairfield Cnty. Sheriff's Off. v. Fraternal Ord. of Police*, FMCS Case No. 07/01667, 124 BNA LA (BL) 1066 (Fed. Mediation & Conciliation Serv. Nov. 5, 2007) (Chattman, Arb.).

245. *Id.* at 1072.

246. *Id.* at 1073.

247. *Police Patrolmen's Ass'n v. Emp.*, 149974-AAA, 2013 BNA LA Supp. (BL) 149974 (Am. Arb. Ass'n Nov. 7, 2013) (Spring, Arb.) (redacted decision).

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

leaders with their own. Critics may argue that this could hamper the ability of these more democratically accountable actors to control departments and promote organizational reform, as discussed more in the next Part.

V. IMPLICATIONS FOR POLICE ACCOUNTABILITY

The findings from this Article have important implications for the literature on police accountability and reform. These findings may be consistent with claims by police unions that arbitration serves an important role in correcting arbitrary and unpredictable punishment by management. The results may also be a reminder that not all disciplinary appeals necessarily proceed to arbitration. Prior examinations have found that management and unions in some cities frequently settle disciplinary appeals before they proceed to arbitration.²⁵² For example, an examination by William Bender and David Gambacorta in the *Philadelphia Inquirer* found that around 75 out of 169 police disciplinary cases between 2011 and 2019 in Philadelphia, Pennsylvania, were settled before they proceeded to arbitration.²⁵³ This may mean that the cases that actually proceed to arbitration in communities like Philadelphia are not a representative sample of all disciplinary cases. Instead, the disciplinary cases that proceed to arbitration may be the ones where the outcome of the appeal is most uncertain—perhaps because of genuine disagreements about management’s adherence to organizational precedent for discipline, procedural irregularities, or questionable factual findings. Additionally, anecdotal evidence suggests that police unions sometimes employ more experienced advocates during arbitration procedures, perhaps contributing to their high rates of success.²⁵⁴ As one Fraternal Order of Police leader joked, lawyers for the police unions are often so much more experienced than their government counterparts that “[i]t’s like the L.A. Lakers or the 76ers going up against a grade school team. . . . I mean, it’s not that hard.”²⁵⁵ This hypothesis—that the frequency of reversals of police discipline via arbitration is the result of inadequate investment by management in internal investigations—is worthy of additional, serious scholarly inquiry. All of this means that we should view the data from this study with caution before drawing sweeping

252. Bender & Gambacorta, *supra* note 53 (showing in the table, labeled “The Philadelphia Police Misconduct Database,” all of the cases between 2011 and 2019 and their outcomes; further showing that 75 of the 169 cases listed in this table resulted in a settlement).

253. *Id.*

254. *Id.*

255. *Id.*

conclusions about the use of arbitration in police disciplinary cases more generally. The high rates of union success may be an outgrowth of case selection and other contextual facts unique to the litigation of appeals in local governments.

Nevertheless, the findings from this Article may also be consistent with prior criticisms of arbitration in policing. For one thing, the evidence from this study is consistent with the hypothesis that the use of arbitration on appeal creates incentives for arbitrators to consistently reduce disciplinary actions in order to increase their probability of being selected in future cases. The high frequency of arbitrators overturning or reducing discipline also suggests that arbitration may be a barrier to reform efforts. In response, this Part concludes by considering ways that communities could amend police disciplinary procedures so as to better balance officer due process rights with the public's interest in officer accountability. In doing so, this Article draws on recent legislative changes in Minnesota and Oregon as possible blueprints for reform in other jurisdictions.

A. Arbitration and Compromise

The results of this study are potentially consistent with the scholarly hypothesis that arbitration in police disciplinary appeals may consistently result in compromise that can impede accountability efforts.²⁵⁶ One possible explanation is that the methodology that many communities use to select arbitrators may incentivize compromise.²⁵⁷ Remember, prior research has found that a majority of law enforcement agencies use one of two methods to select arbitrators in disciplinary appeals—they use either an alternate strike method, where each side can strike names in alternating order from a pool of potential arbitrators until one name remains, or they name arbitrators in their labor agreements.²⁵⁸ Either selection method may incentivize rational arbitrators to reach compromise results in the aggregate in order to increase their chances of being selected as arbitrators for future cases.

256. After conducting case studies of the arbitration processes in Chicago and Houston, Professor Mark Iris concluded that “arbitration decisions were often based on something other than the merits of the parties’ evidence or strength of case presentation.” Iris, *supra* note 55, at 137.

257. Rushin, *supra* note 25, at 566 (“Such a selection process may contribute to arbitrator decisions that split the difference between supervisor and union demands, since siding too frequently with one side or the other might endanger an arbitrator’s selection in future cases through an alternate strike system.”).

258. *Id.* at 574–75 (“Most of these departments fall into two different categories: First, a handful of agencies explicitly stipulate an acceptable panel of arbitrators in their union contract. . . . Second, another group of agencies establish alternative striking procedures.”).

As Professor Iris previously theorized, because of the use of these arbitrator selection methods, the decision about “who will serve as an arbitrator depends upon the willingness of both parties to a dispute . . . to accept that individual as an arbitrator.”²⁵⁹ Arbitrators who side with management or the union too often may find themselves stricken from the pool of potential arbitrators in future cases, or they may find their names taken out of future labor contracts. Because of this, Professor Iris concludes, “it is in the self-interest of the individual arbitrators to project an image of impartiality.”²⁶⁰ As repeat players who are concerned about being selected for future cases, arbitrators may often make the rational choice to compromise.²⁶¹

In other fields, an arbitrator’s tendency towards compromise may not be a problem, particularly when it allows for the resolution of matters like financial or contractual disputes between sophisticated parties.²⁶² But in the world of police accountability, compromise can have serious public policy implications. Compromise can result in unfit or dangerous officers terminated for acts of violence or dishonesty being forced back onto a police force where they are prone to commit future acts of wrongdoing.

Over the years in San Antonio, Texas, for example, arbitrators have repeatedly ordered the rehiring of officers that have allegedly committed egregious misconduct, only to have those same officers engage in similar misconduct after rehiring. For example, in 2009, a San Antonio Police Department (“SAPD”) officer stood accused of entering a suspect’s home without a warrant and using excessive force

259. Iris, *supra* note 38, at 240.

260. *Id.*

261. To be clear, this is just a theory. It is not intended to suggest bad faith on the part of any individual arbitrator. For one thing, this kind of incentive may operate unconsciously. And even if arbitrators are acting in good faith within the system as currently established, this does not mean that the system as a whole serves the public interest. A system of well-intended individuals acting in good faith may still produce undesirable results.

262. See, e.g., Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 452 (2010) (noting that among the theories about why sophisticated parties in business relationships may choose arbitration over litigation to resolve disputes is that arbitration “may enhance the ability of parties to have their disputes resolved using trade rules” and “arbitration may enable the parties to better preserve their relationship”); Andrea Doneff, *Arbitration Clauses in Contracts of Adhesion Trap “Sophisticated Parties” Too*, 2010 J. DISP. RESOL. 235, 236 (“In arbitration clause analysis, the argument is that sophisticated businesspeople, individually or on behalf of a commercial entity, can protect themselves from an onerous arbitration clause, while an unsophisticated person cannot.”). *But cf.* Stephanie E. Keer & Richard W. Naimark, *Arbitrators Do Not “Split the Baby”: Empirical Evidence from International Business Arbitrations*, 18 J. INT’L ARB. 573, 574 (2001) (finding a lack of evidence of compromise in arbitration awards in other contexts).

in making an arrest.²⁶³ Days later, a man arrested for driving under the influence of alcohol accused the officer of challenging him to a fight for the opportunity to be released from his custody.²⁶⁴ Based on these incidents, the SAPD fired the officer, only to see an arbitrator reduce the termination to two thirty-day suspensions and a last chance agreement.²⁶⁵ Then, after rejoining the force, the same officer's squad car camera caught him engaging in strikingly similar misconduct when he challenged *yet another* man to a fist fight for the chance to be released from his custody.²⁶⁶ Again, the SAPD attempted to fire the officer, and again an arbitrator overturned the firing, settling instead on a forty-five-day suspension.²⁶⁷

Similarly, the SAPD fired another officer in 2016 for "trying to give a homeless man a sandwich filled with dog feces."²⁶⁸ But an arbitrator ordered that officer rehired on appeal.²⁶⁹ Shortly after rehiring, though, the police department again attempted to fire that officer, alleging that he committed yet another transgression involving excrement.²⁷⁰ This pattern is repeated across the country. When

263. Tim Gerber, *SAPD Officer Appeals Termination, Wins Job Back Through Arbitration*, KSAT (Apr. 27, 2017, 9:47 PM), <https://www.ksat.com/news/2017/04/28/sapd-officer-appeals-termination-wins-job-back-through-arbitration> [<https://perma.cc/BK44-75SC>].

264. *Id.*

265. *Id.*

266. Michael Barajas, *San Antonio Cop Arrests, Berates and Threatens to Fight Man for Being "Disrespectful,"* SAN ANTONIO CURRENT (June 9, 2016, 8:30 AM), <https://www.sacurrent.com/the-daily/archives/2016/06/09/san-antonio-cop-arrests-berates-and-threatens-to-fight-man-for-being-disrespectful> [<https://perma.cc/4NBQ-7Z3A>].

267. Gerber, *supra* note 263; *see also* City of San Antonio v. Officer Matthew Belver, No. 400169 (Mar. 1, 2017) (Gomez, Arb.), <https://www.scribd.com/document/346931719/SAPD-Officer-Matthew-Belver-arbitration-hearing-document-pdf> [<https://perma.cc/F5BD-VCU3>].

268. Sanford Nowlin, *Report: Two-Thirds of Fired San Antonio Cops Won Their Jobs Back in Arbitration*, SAN ANTONIO CURRENT (Jan. 7, 2020, 12:45 PM), <https://www.sacurrent.com/the-daily/archives/2020/01/07/report-two-thirds-of-fired-san-antonio-cops-won-their-jobs-back-in-arbitration> [<https://perma.cc/45SW-LARE>].

269. Sanford Nowlin, *San Antonio Officer Who Handed Feces Sandwich to Homeless Man Wins His Termination Appeal*, SAN ANTONIO CURRENT (Mar. 25, 2019, 3:13 PM), <https://www.sacurrent.com/the-daily/archives/2019/03/25/san-antonio-officer-who-handed-feces-sandwich-to-homeless-man-wins-his-termination-appeal> [<https://perma.cc/7DCX-UDLL>].

270. Emilie Eaton, *SAPD: Fired Cop Involved in Second Feces Prank*, SAN ANTONIO EXPRESS-NEWS, <https://www.expressnews.com/news/local/article/SAPD-Fired-cop-involved-in-second-feces-prank-10886729.php> (last updated Jan. 26, 2017, 9:04 PM) [<https://perma.cc/TZ6N-9MLX>] (describing the initial firing decision); Dillon Collier, David Raziq & Joshua Saunders, *SAPD Officer Who Gave Homeless Man a Feces Sandwich Trying to Win Back Job for a Second Time*, KSAT, <https://www.ksat.com/news/defenders/2020/01/03/sapd-officer-who-gave-homeless-man-a-feces-sandwich-trying-to-win-back-job-for-a-second-time> (last updated Jan. 11, 2020, 8:45 AM) [<https://perma.cc/DR5F-6ZD4>] (detailing the officer's appeal); Emilie Eaton, *Fired SAPD Officer Accused in Feces Sandwich Prank Loses Second Bid to Get His Job Back*, SAN ANTONIO EXPRESS-NEWS (June 19, 2020), <https://www.expressnews.com/news/local/article/Fired-SAPD-officer-accused-in-feces-sandwich-15353640.php> [<https://perma.cc/9C9X-X7YH>] (explaining that the second appeal was unsuccessful and that the officer was finally terminated).

compromise on appeal forces police departments to employ dangerous or unfit officers, these officers put the public at risk.

While the evidence from this study is consistent with the hypothesis that arbitration incentivizes compromise in police discipline cases, it falls short of proving causation. This study cannot answer one of the most challenging questions facing critics of police arbitration: How often *should* arbitrators overturn or reduce discipline on appeal? As prior research has observed, “[t]here is no easy answer to this question” and “appellate success ought to vary by department” based on the unique characteristics of each agency and whether a given agency is particularly prone to “arbitrary, excessive, or unreasonable disciplinary decisions.”²⁷¹ But what is clear from this study is that the frequency of appellate success for police disciplinary appeals greatly outpaces the rate of success of litigants in front of other appellate bodies. As one recent study found, between July 2017 and June 2018 across all U.S. federal courts of appeals, only 6.6% of criminal appeals, and 7.5% of administrative agency appeals, resulted in reversal.²⁷² In total, the annual rate of successful appeals filed in federal courts hovered between 6.9% and 9.6% between 2013 and 2018.²⁷³ And according to the Bureau of Justice Statistics, the rate of appellate success in state criminal courts sat around 12% in 2010.²⁷⁴ These figures stand in stark contrast to the 52% rate of success for police disciplinary appeals observed in this study.

Given the standard of review on appeal in police disciplinary cases,²⁷⁵ perhaps it is unsurprising that arbitrators so frequently reduce or reverse discipline. Indeed, appellate courts might overturn trial courts more often if given more expansive responsibility to review factual, legal, and sentencing decisions made by juries and trial courts. As it stands, though, appellate courts are almost always given a significantly narrower standard of review than arbitrators in police disciplinary appeals cases.²⁷⁶ The unpredictable and sometimes

271. Rushin, *supra* note 25, at 581.

272. Barry C. Edwards, *Why Appeals Courts Rarely Reverse Lower Courts: An Experimental Study to Explore Affirmation Bias*, 68 EMORY L.J. ONLINE 1035, 1037 (2019).

273. *Id.* at 1038.

274. *Id.* at 1039 (citing Nicole L. Waters, Anne Gallegos, James Green & Martha Roszi, *Criminal Appeals in State Courts*, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS 1 (2015), <https://www.bjs.gov/content/pub/pdf/casc.pdf> [<https://perma.cc/BB9W-KUEU>]).

275. Rushin, *supra* note 25, at 576–78.

276. Federal appellate courts in the United States may sometimes review “the factual findings made by the trial court or agency, but generally may overturn a decision on factual grounds only if the findings were ‘clearly erroneous’” or if the trial court made a procedural error. *Appellate Courts and Cases – Journalist’s Guide*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/appellate-courts-and-cases-journalists-guide> (last visited Jan. 21, 2021) [<https://perma.cc/39Q4-CPQT>]. Appellate courts in both the criminal and civil justice systems may remedy incorrect

arbitrary nature of some departments' internal disciplinary systems may necessitate and justify a higher rate of reversal, relative to the American justice system. As explained in the next Section, though, this raises even more challenging normative questions about the best way to balance democratic accountability and due process rights in police disciplinary appeals.

B. Democratic Accountability and Organizational Change

The results of this study raise tough questions about democratic accountability and the appropriate role of appeals in police disciplinary cases. Police unions may understandably argue that appeals to an arbitrator are an important due process protection to prevent unjust punishment and retaliation. Appellate review may also force departments to provide adequate procedural protections during internal investigations. And in some cases, it seems that arbitration on appeal serves this exact function. For example, in 2017 an arbitrator overturned the termination of a police officer in Detroit because the employer failed to give the officer a chance to respond to the allegations against him before termination, something the arbitrator found "antithetical to the whole notion of due process."²⁷⁷ Such corrections of procedural failures by an employer seem to align with the purposes of virtually all appellate systems of review.

But in other cases in the dataset, arbitrators do not merely correct procedural due process errors. Instead, the data indicate that arbitrators may arguably supplant the judgment of city leaders and police chiefs with their own judgments on matters of facts and proportionality. Consider, for example, a case from Texas involving an officer appealing his termination for use of threats, profanity, and a homophobic slur during an arrest.²⁷⁸ In that case, a bystander video recorded the officer on top of a handcuffed man yelling, "Move and die. Move and f[*]cking die. F[*]cking move again. F[*]cking move again."²⁷⁹

applications of law but ordinarily do not replace the judgment of lower courts or juries on matters of fact or the appropriate punishment, so long as the punishment is within the range specified by statutes or sentencing guidelines. *Id.*

277. *Detroit Transp. Serv. v. Police Officers Lab. Council*, FMCS Case No. 1754575, 138 BNA LA (BL) 209, at *215 (Fed. Mediation & Conciliation Serv. Dec. 22, 2017) (Obee, Arb.).

278. *Officer A__ v. Emp.*, 148464-AAA, 2013 BNA LA Supp. (BL) 148464 (Am. Arb. Ass'n July 24, 2013) (Fragoli, Arb.) (redacted decision) (noting also that the stop started after the officer saw the man allegedly make a "gesture indicating he might have been hiding something in his waistband," leading the officer to execute a stop; thereafter when the officer learned that the man had several active warrants, he decided to execute an arrest).

279. When one of the suspect's friends asked, "Are you f[*]cking serious?" the officer responded, "Sit down. Sit down and shut the f[*]ck up." As the exchange continued, both the suspect and the officer referred to one another by a homophobic slur, and the officer told the

The video also caught the officer referring to the handcuffed man by a homophobic slur and challenging him to “move” or “blink wrong,” seemingly in hopes of providing the officer with a justification to use additional force.²⁸⁰ While the arbitrator in that case conceded that “[t]here is no question that the Grievant’s conduct violated Department policy,”²⁸¹ he ultimately concluded that termination was “disproportionate to the severity of the proven charges and unwarranted in light of mitigating factors,” including the officer’s prior service record and the fact that “this is a case about language only.”²⁸² That arbitrator ultimately reduced the officer’s sentence to a fifteen-day suspension.²⁸³

As another example, take the case involving an Ohio officer who allegedly forced his way into the home of his ex-girlfriend, punched holes in her wall, and ultimately faced criminal charges for assaulting her multiple times.²⁸⁴ The arbitrator in that case agreed that the officer’s behavior constituted “conduct unbecoming [of] a police officer,” which “warrants serious discipline.”²⁸⁵ But the arbitrator concluded that termination was too harsh; he instead issued a ten-day suspension, which he felt would be enough to “serve as a warning . . . to other officers that such actions cannot be tolerated.”²⁸⁶

Indeed, arbitrators in this dataset reduced or overturned punishments as unduly severe or disproportionate in cases of officers that engaged in domestic violence,²⁸⁷ utilized excessive force,²⁸⁸ cheated on exams,²⁸⁹ and exposed their genitals in public.²⁹⁰ In many of these

suspect, “Move so I can kick your ass. Move so I can f[*]ck you up. Give me a reason to f[*]ck you up. Stupid ass. When the police are talking to you, you be quiet and shut up.” *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Emp. v. Union*, 162289-AAA, 2014 BNA LA Supp. (BL) 162289 (Am. Arb. Ass’n Apr. 10, 2014) (Bethel, Arb.).

285. *Id.*

286. *Id.*

287. *See, e.g., Emp. v. Command Officers Ass’n*, 148269-AAA, 2013 BNA LA Supp. (BL) 148269 (Am. Arb. Ass’n Mar. 25, 2013) (Wolkinson, Arb.) (redacted decision) (reducing termination to suspension without back pay in case involving domestic violence, harassing and threatening a private citizen, dishonesty, and violation of a last chance agreement in failing to see a therapist).

288. *See, e.g., Individual Grievant v. Emp.*, 200818-AAA, 2017 BNA LA Supp. (BL) 200818 (Am. Arb. Ass’n Mar. 9, 2017) (Toedt, Arb.) (redacted decision) (finding punishment too severe in case where officer allegedly grabbed man by the throat during traffic stop without justification).

289. *See, e.g., State of Ohio v. Ohio State Troopers Ass’n*, 2009 BNA LA Supp. (BL) 118488 (May 11, 2009) (Feldman, Arb.) (citing “impeccable” record of officer to justify overturning termination for cheating on exam).

290. *See, e.g., Emp. v. Police Benevolent Ass’n*, 161994-AAA, 2010 BNA LA Supp. (BL) 161994 (Am. Arb. Ass’n July 14, 2010) (Humphries, Arb.) (redacted decision) (overturning termination in case involving officer urinating on duty in public and exposing his genitals).

cases, the facts were mostly or completely undisputed. Often, there was no debate about the procedural sufficiency of due process rights afforded to the officer. And yet despite the fact that some of these instances of officer misconduct might, as one arbitrator conceded, “‘shock the conscience’ of most citizens,”²⁹¹ arbitrators in the dataset exercised their authority to lower the punishment out of a concern for proportionality.

All this suggests that, as currently structured, the existing process of police disciplinary appeals is not just an appellate system. Instead, critics of this system may argue that it creates a shadow disciplinary system that can largely disregard the decisions reached by law enforcement agencies, city leaders, or civilian review boards.²⁹² Scholars have expressed widely varying views about how to create an internal disciplinary process for law enforcement officers that is sufficiently responsive to democratic demands without risking officer due process.²⁹³ Some scholars prefer to vest primary disciplinary authority in the hands of police chiefs.²⁹⁴ Others believe that police chiefs are too insulated from democratic accountability and argue instead that communities should vest authority in groups like civilian review boards that are more directly accountable and representative of the public.²⁹⁵ But regardless of where scholars fall on this spectrum, there seems to be broader agreement that “officer oversight should not be divorced from community input.”²⁹⁶

The current approach to police discipline, though, creates a procedural redundancy that may curtail the ability of many police chiefs and community leaders to control their police departments. This

291. *City of St. Paul v. St. Paul Police Fed’n 24* (Minn. Bureau of Mediation Servs. Apr. 3, 2017) (Miller, Arb.), <https://mn.gov/bms/documents/BMS/129594-20170403-St.Paul.pdf> [<https://perma.cc/N3SG-FBJ8>]. In that case, the St. Paul Police Department terminated an officer in 2016 for engaging in excessive force and unnecessarily deploying a canine on an unarmed man, resulting in multiple broken ribs, two collapsed lungs, and other injuries. The facts in the case were clear, as the incident was caught on camera. As the arbitrator conceded in the opinion:

At first blush, the video of K-9 Falco grabbing and biting Mr. Baker, twisting Mr. Baker around in a circle and then having the Grievant administer two consecutive kicks to Mr. Baker’s torso and then waiting about 30 more seconds to administer another kick to Mr. Baker’s torso would be proof alone to terminate.

Id. But the arbitrator ultimately elected to reduce the penalty to a thirty-day suspension based largely on proportionality concerns.

292. Rushin, *supra* note 25, at 582–83 (using the example of Detroit to describe how cities that have robust civilian review boards may nevertheless blunt their effectiveness with the use of binding arbitration on appeal).

293. See generally Christopher E. Stone & Heather Ward, *Democratic Policing: A Framework for Action*, 10 POLICING & SOC’Y 11, 12 (2000) (considering this question).

294. *Id.* at 17.

295. *Id.* at 17–18.

296. Rushin, *supra* note 25, at 589.

could be problematic for many reasons. While unions may argue that arbitrators are more detached or neutral, they may be disconnected from the communities that the police department serves. And they may lack the same institutional memory as police supervisors and may be less responsive to community demands for increased accountability for wrongdoing. They do not have to internalize or experience the costs they place on communities by overturning discipline, for example in cases where they force a department to rehire an officer who cannot testify at trial because they are on a *Brady* list²⁹⁷ or an officer with a proven proclivity for violence. And they may be disconnected from the budgetary challenges they force on municipalities when they order rehired an officer who cannot be safely deployed on the streets and must therefore be hidden somewhere else in the organization.

Additionally, to the extent that communities demand reform within a law enforcement agency, the current approach to police disciplinary appeals used in many agencies could make transformative change more difficult. Prior studies have shown that a small number of officers are often responsible for a disproportionate amount of misconduct.²⁹⁸ Further, recent empirical work suggests that the presence of a small number of officers engaged in repeated misconduct may increase the probability of misconduct among other officers around them.²⁹⁹ This indicates that in order to reform a police department, supervisors must be able to remove bad officers before their wrongdoing can escalate and cause serious harm.³⁰⁰ But one of the possible effects of the current police disciplinary appeals process is that, in some cases, it lengthens considerably the time it takes to remove these unfit officers from the force. Often, arbitrators demand that departments build lengthy records of officer wrongdoing before they will uphold a termination. And even when departments do build such a record, some

297. See *supra* note 205 and accompanying text (explaining the basis of *Brady* lists and some of the recent literature on the topic).

298. See, e.g., NAT'L INST. OF JUST. & BUREAU OF JUST. STATS., USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA, U.S. DEP'T OF JUST., at viii (1999), <https://www.ncjrs.gov/pdffiles1/nij/176330-1.pdf> [<https://perma.cc/UMT7-X6SH>] ("A small portion of officers are disproportionately involved in use-of-force incidents.").

299. George Wood, Daria Roithmayr & Andrew V. Papachristos, *The Network Structure of Police Misconduct*, 5 SOCIUS 1 (2019) (finding through a network analysis of 16,503 complaints involving 15,811 police officers over a six-year period in Chicago that "almost half of police officers are connected in misconduct ties in broader networks of misconduct").

300. Nevertheless, it is worth noting that at least one compelling new paper has cast serious doubt on whether incapacitating a few bad officers can substantially reduce misconduct. See Aaron Chalfin & Jacob Kaplan, *How Many Complaints Against Police Officers Can Be Abated by Incapacitating a Few 'Bad Apples?'* (Oct. 29, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3673981 [<https://perma.cc/NEM6-84VL>].

police chiefs complain that arbitrators may still decide that a long-documented history is insufficient to justify termination.

For instance, a police department documented an extensive record of prior misconduct by a single officer, including “fourteen (14) written counseling’s, twenty-two (22) reprimands, and eight (8) suspensions; the most recent being thirty (30) days.”³⁰¹ In August 2007, that officer detained a man for nine hours after being ordered to release him from his custody.³⁰² The chief concluded that the officer’s “irresponsible behavior . . . placed the health and life of the prisoner in jeopardy.”³⁰³ Based on this conclusion and the officer’s extensive disciplinary history, the mayor terminated his employment.³⁰⁴ But on appeal, an arbitrator ordered the officer rehired.³⁰⁵ While the arbitrator agreed that the officer’s behavior “amounted to gross misjudgment and negligence,” he described termination as “the capital punishment of employment discipline.”³⁰⁶ Ultimately, he felt such a severe punishment was inappropriate, largely because he could not find evidence that the city had similarly punished other officers accused of oversight of procedures involving inmates in custody.³⁰⁷

This is just one of many similar cases in the dataset. To be clear, arbitrators likely serve a valuable role in creating incentives for departments to properly document misconduct by employees over time and employ a progressive disciplinary system. But to the extent that the current approach to police disciplinary appeals makes it unreasonably difficult to remove unfit officers from the force in a timely manner, the existing system may also impede reform.

C. Alternative Appellate Procedures

Police officers deserve adequate procedural protections against arbitrary punishment and retaliation. Nevertheless, these protections should not become so cumbersome as to unreasonably impair the ability

301. *City of Florida City v. Dade Cnty. Police Benevolent Ass’n, Inc.*, 2008 BNA LA Supp. (BL) 118889 (Sept. 9, 2008) (Smith, Arb.).

302. *Id.* The officer was instructed and agreed to release the man before the end of his shift. But he said that he assumed that the man was released by someone else. The officer also failed to physically walk into the holding cells or check on the inmate, as was apparently protocol.

303. *Id.*

304. *Id.* (explaining how the termination was approved by supervisors and then ordered by the mayor).

305. *Id.* (“R shall be reinstated forthwith, to the same or equivalent position that he held prior to his employment termination.”).

306. *Id.*

307. *Id.* (“There was abundant evidence presented by the Union to show that the City was lax in enforcing the rules requiring arresting officers to check on their prisoners at 30-minute intervals, and to enter those times in the prisoner log book.”).

of police supervisors to control their departments or promote reform. The empirical findings from this Article raise questions about whether the current approach to police disciplinary appeals in the United States strikes a fair balance between these competing values. There are several ways that communities could restructure their police disciplinary appeals procedures.

First, and perhaps most radically, communities could transfer disciplinary appeals authority to parties other than arbitrators. Instead, communities could have more democratically accountable actors like city managers, mayors, or city councils hear disciplinary appeals. A number of communities across the country already do this.³⁰⁸ For example, in Murrieta, California, officers have the ability to appeal discipline issued by the police chief to the city manager.³⁰⁹ This still provides officers with an opportunity to appeal disciplinary decisions to a party outside the police department—but one that more intimately understands the demands of the community and the impact of any disciplinary decision and termination on the police department. An examination by the *Boston Globe* found that Murrieta has not had to rehire any officer it previously fired while using this appellate model, something that is not true for many similarly sized departments utilizing arbitration.³¹⁰

Of course, police unions may understandably argue that a city manager is insufficiently detached from the police department to act as a neutral outsider. In this way, arbitration may have an advantage. If cities want to maintain the use of arbitration, there are ways to do so while still providing a more substantial role for community oversight of the appeals process. A number of cities, including Buena Park,

308. See, e.g., Memorandum of Understanding Between the City of Fountain Valley and the Fountain Valley Police Officers' Association 36–37 (2020), <https://www.fountainvalley.org/DocumentCenter/View/12231/Police-Officers-Association-2020-2021> [<https://perma.cc/4HFW-C5NZ>] (vesting appellate authority in the city manager rather than in arbitrators, and in some cases allowing challenges of the city manager's decision to be brought to city council).

309. See Memorandum of Understanding Between the City of Murrieta and the Murrieta Police Officers Association 5–10 (2019), <https://www.murrietaca.gov/DocumentCenter/View/285/Murrieta-Police-Officers-Association-MPOA-2019-to-2021-PDF> [<https://perma.cc/E5MG-3UL2>] (discussing disciplinary and appeals procedures).

310. Editorial Board, Editorial, *Other Cities Can Fire Police Officers for Misconduct. Why Not Boston?*, BOS. GLOBE, <https://www.bostonglobe.com/2020/07/02/opinion/other-cities-can-fire-police-officers-misconduct-why-not-boston/> (last updated July 2, 2020, 4:00 AM) [<https://perma.cc/KES6-UYVH>] (“A police department spokesman told the Globe that the city [Murrieta] has never been forced to rehire a cop who had been previously fired.”).

California,³¹¹ Cathedral City, California,³¹² Oxnard, California,³¹³ and Peoria, Arizona,³¹⁴ use arbitration for disciplinary appeals, but make the decision of the arbitrator advisory rather than binding. This model may allow officers to make their case before a neutral outsider, perhaps in a more procedurally robust manner than anything that may be available through a department's internal process. The weight of an arbitration opinion in an officer's favor may be sufficient to convince the city to abide by that decision. But at the same time, this method recognizes the need for democratic accountability and control over local police forces by allowing city leaders "to depart from decisions made by an arbitrator when [they] appear[] to run counter to the public's interest."³¹⁵

Second, if communities want to maintain the use of arbitration as an important due process protection for officers, they may consider altering the method of selecting arbitrators to reduce the incentive to compromise. Minnesota recently enacted such a reform. In the wake of the killing of George Floyd, legislators in Minnesota passed a wide-ranging reform bill entitled the Police Accountability Act of 2020.³¹⁶ While this bill touched on numerous policing issues,³¹⁷ it also reformed the process of selecting arbitrators in police disciplinary appeals.³¹⁸ Under the new law, the government appoints a roster of six arbitrators to hear police disciplinary appeals for the state. To be eligible for

311. Memorandum of Understanding Between the City of Buena Park, California and the Buena Park Police Association 40–42, 62–64 (2019), <http://www.buenapark.com/home/showdocument?id=16689> [<https://perma.cc/R8FD-5K39>] (stating that the arbitrator's opinion is advisory in nature).

312. Memorandum of Understanding Between City of Cathedral City and Cathedral City Police Officer's Association (CCPOA) 21–23 (2020), <http://www.joincathedralcity.org/wp-content/uploads/2020/10/CCPOA-MOU-Final-05.07.20-1-Rev.-06.10.20-Side-Letter-10.01.20.pdf> [<https://perma.cc/Y9R7-SMTQ>] ("City Manager or designee mutually agreeable to the City Manager and the employee shall review the Hearing Officer's recommendation, but shall not be bound thereby.")

313. See Memorandum of Understanding Between City of Oxnard and Oxnard Peace Officers' Association 22–23 (2016), <https://www.oxnard.org/wp-content/uploads/2016/11/OPOA-MOU.pdf> [<https://perma.cc/2TAU-78HA>] (also making arbitration decisions advisory).

314. Memorandum of Understanding Between City of Peoria and Peoria Police Officers Association, Covering Police Officers Unit 23–24 (2018), <https://www.peoriaaz.gov/home/showpublisheddocument?id=17212> [<https://perma.cc/6PGA-2AL8>] (allowing police department to appeal arbitration decision to city manager).

315. Rushin, *supra* note 25, at 591.

316. See Orenstein & Callaghan, *supra* note 67 (discussing the law).

317. *League Calls on Legislature to Keep Working on Police Arbitration Reform*, LEAGUE OF MINN. CITIES (Aug. 3, 2020), <https://www.lmc.org/news-publications/news/all/police-arbitration-reform> [<https://perma.cc/EZ4N-7MTH>] (noting that the new police reform bill in Minnesota was wide-ranging, including limitations on the use of chokeholds, the establishment of an independent use of force investigation unit at the state level, and reporting requirements for officer use of force).

318. MINN. STAT. ANN. § 626.892 (West 2020) (providing a description of this selection method).

selection on the state's appointed roster, a potential arbitrator must "complete training . . . [on] cultural competency, racism, implicit bias, and recognizing and valuing community diversity and cultural differences."³¹⁹ Now, anytime a police disciplinary appeal proceeds to arbitration, there is no longer an alternate strike system to select an arbitrator. Instead, the state simply assigns one of these six arbitrators on a rotating basis.³²⁰ The hope is that by eliminating the traditional selection process, arbitrators will not have the same incentives to compromise in order to increase their probability of being selected in future cases.³²¹ Time will tell whether this change in selection method will influence arbitration outcomes. But at a minimum, the Minnesota reform removes the appearance of either management or unions attempting to game the arbitrator selection process to their advantage.

Third, as an alternative to altering the selection process, communities that want to maintain the use of arbitration could limit the standard of review on appeal or the remedies available to an arbitrator. Currently, most arbitrators are given fairly expansive authority to rehear most or all factual and legal disputes in disciplinary cases on appeal, something that rarely occurs in other appellate contexts.³²² But it does not have to be this way. Some communities already give arbitrators narrower standards of review.³²³ Rather than granting arbitrators the ability to determine whether "just cause" existed for the discipline, communities could instead limit the arbitrators' review authority to a determination of whether the punishment was, say, arbitrary or capricious. Or they could limit the ability of arbitrators to amend the disciplinary punishment, provided that the employer has satisfied the preponderance of the evidence standard in proving a violation of departmental policy.

Consider the example of Oregon.³²⁴ Under the recently passed law in that state, police departments must now negotiate with police

319. *Id.* § 628.892(10)(a)(1).

320. *Id.* § 628.892(11) ("The commissioner shall assign or appoint an arbitrator or panel of arbitrators from the roster to a peace officer grievance arbitration under this section on rotation through the roster alphabetically ordered by last name.").

321. Collins, *supra* note 136.

322. Rushin, *supra* note 25, at 576–78.

323. See, e.g., Agreement Between City of Bloomington, Illinois and Police Benevolent and Protective Association, Unit No. 21, at 15 (2014), <https://www.cityblm.org/Home/ShowDocument?id=504> [<https://perma.cc/R84T-G83V>] (establishing a standard of review that says arbitrator must uphold punishment unless "arbitrary, unreasonable or unrelated to the needs of the service").

324. For a brief history of the debate surrounding this law, see Nigel Jaquiss, *Skeptics Say Oregon's Police Arbitration Bill Doesn't Do Enough, While Cops Play Defense*, WILLAMETTE WEEK (June 25, 2020), <https://www.wweek.com/news/2020/06/25/skeptics-say-oregons-police-arbitration-bill-doesnt-do-enough-while-cops-play-defense> [<https://perma.cc/8TJA-3S89>]; see also

unions over the terms of a disciplinary matrix that will set levels of discipline for different types of officer misconduct.³²⁵ Once the two parties have reached an agreement on the terms of their agreed upon disciplinary matrix, state law limits the ability of arbitrators to deviate from a police chief's disciplinary decision on appeal, as long as it abides by the disciplinary matrix.³²⁶ Essentially, if an arbitrator agrees that evidence existed to justify the punishment in question and the punishment is within the limits of the disciplinary matrix, the arbitrator may not reduce the officer's discipline below that issued by the city management or police chief. The Oregon approach effectively narrows the arbitrator's standard of review and remedial toolkit—potentially meeting some of the demands of reform activists and management. At the same time, it also puts the impetus on cities to proactively negotiate the terms of the disciplinary matrix in a manner that satisfies union demands for predictability in punishment and fair notice. Like with the Minnesota reform, time will tell whether the Oregon approach will influence disciplinary appeal outcomes. But the Oregon law may prove to be the most politically palatable reform option for some states in the future, as it has the potential to garner limited support from police reformers, management, and unions.

CONCLUSION

This Article finds that police arbitration results in nearly half of all police disciplinary penalties being reduced or overturned on appeal, often because of arbitrators' reevaluation of the factual support for disciplinary charges or because of their belief that the proposed punishment is excessive. This finding raises broader normative questions about how communities ought to structure the police disciplinary appeals process. Police disciplinary appeals are challenging, in part because the stakes in many of these cases are extraordinarily high. On the one hand, unjust discipline can unfairly derail an officer's livelihood. On the other hand, failure to respond

Dirk VanderHart & Jeff Mapes, *Oregon Legislature Advances Police Accountability Measures*, OR. PUB. BROAD. (June 26, 2020), <https://www.opb.org/news/article/oregon-senate-sends-police-discipline-bill-to-house> [https://perma.cc/THK9-BE7C] (describing the advancement of the bill and its development over time).

325. OR. REV. STAT. ANN. § 243.650(7)(g) (West 2020) (detailing the matrices requirement for collective bargaining purposes).

326. *Id.* § 243.706(3) (explaining that if an "arbitrator makes a finding that misconduct has occurred consistent with the law enforcement agency's finding of misconduct," then "the arbitration award may not order any disciplinary action that differs from . . . the provisions of a discipline guide or discipline matrix adopted by the agency").

forcefully to evidence of misconduct can put members of the public at risk for the deadly consequences of police wrongdoing.

Take the example of an officer from the Oakland Police Department.³²⁷ On New Year's Eve of 2007, that officer shot and killed an unarmed twenty-year-old man who ran and hid from the officer.³²⁸ Only seven months later, that officer shot another unarmed twenty-year-old three times in the back, killing him.³²⁹ The officer's actions cost the city \$650,000 in a civil judgment.³³⁰ Based on these events, the City of Oakland terminated his employment.³³¹ But as in many of the cases discussed in this Article, an arbitrator overturned this decision and ordered the officer rehired with full back pay.³³² The arbitrator disagreed with the city's conclusion that the officer's use of force was unjustified and argued that "sacrificing [the officer] on the altar of public opinion" would not bring back the victim.³³³

All officers, including that officer in Oakland, deserve adequate due process before they suffer serious discipline. And no officer's career should be unfairly ended for political expedience. Even so, the Oakland Police Department also has a pressing need to rigorously enforce its bars on officer use of excessive force. The current approach to police disciplinary appeals in the United States may not be striking an appropriate balance between these important, competing values. By narrowing the standard of review on appeal, limiting the available remedies, or modifying the process of selecting arbitrators, communities may be able to better strike a balance between officer due process rights and the need for rigorous accountability.

327. Sean Maher, *Oakland Police Officer to be Reinstated*, MERCURY NEWS (Mar. 6, 2011, 11:11 AM), <https://www.mercurynews.com/2011/03/06/oakland-police-officer-to-be-reinstated> [<https://perma.cc/69WS-ZH7D>].

328. *Id.* ("[H]e and another officer shot and killed 20-year-old Andrew Moppin after a traffic stop, when Moppin ran and hid and then shouted and swore at officers, police officials said.")

329. *Id.*

330. Friedersdorf, *supra* note 32.

331. Maher, *supra* note 327 (noting that he was fired specifically for the 2008 shooting, not for the 2007 shooting that was deemed consistent with policy).

332. Eat, Shrink, & Be Merry, *Police Officer's Reinstatement Sends Wrong Message*, E. BAY TIMES, <https://www.eastbaytimes.com/2011/03/10/police-officers-reinstatement-sends-wrong-message> (last updated Aug. 15, 2016, 3:12 PM) [<https://perma.cc/KH95-QFLZ>] (noting that he was awarded around \$200,000 in backpay).

333. Henry K. Lee, *Oakland Must Rehire Cop Who Shot Suspect in Back*, SFGATE (Mar. 5, 2011), <https://www.sfgate.com/crime/article/Oakland-must-rehire-cop-who-shot-suspect-in-back-2528215.php> [<https://perma.cc/JJ6Z-7FP5>].