REDUCING POLICE LIABILITY AND DISCIPLIONARY EXPOSURE

Mark Iris, Ph.D.

Lecturer, Mathematical Methods in the Social Sciences Program, Northwestern University
and
Executive Director (retired) Chicago Police Board

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LIABILITY AND DISCIPLINARY CONSEQUENCES

- Economic cost is high. Chicago paid an average of $52,000,000 per year, 2006-2013.
- Additional costs for legal defense.
- Misconduct erodes public confidence, impairs perceived police legitimacy.
- Demoralizing effect on other employees.
- Consumes inordinate share of managerial attention, diverting resources from the primary mission.

PREVENTION!

- Municipal attorneys need to be proactively involved in assisting the police and fire services – the clients! – in preventing potentially costly misconduct.
- Areas in which attorneys should concentrate efforts:
    - Hiring Standards
    - Training
    - Policy Drafting and Revision

RECRUIT HIRING

- Hiring/Screening Standards
- Does the agency do comprehensive background checks? Be wary of outsourcing! Boots on the ground!
- What are the agency's policies on applicants with past problems such as DUI, domestic abuse?
- How thorough are public records checks?
- Psychological screening – what are the standards and expectations?
- Credit reviews
- The perils of too rapid expansion.

TRAINING

- Which academy does your agency use?
- Is academy curriculum subject to periodic review and revision?
- Does the curriculum incorporate current best practices (e.g., procedural justice, etc.) ?
- How well trained are the trainers? How are they selected?
- Does the training program provide adequate opportunities for experiential/hands on exercises?
- “Forget all they taught you in the academy; I’ll show you how it really works!” FTOs – your Achilles heel?

POLICY REVIEW

- How current, and consistent with best practices, are the agency's policies?
- Key areas of vulnerability include:
- Use of force (including deadly force, TASERS);
- Early Intervention Systems (EIS);
- Pursuits;
- Comprehensive in-service training (40 hours per year per officer).

Disciplinary Proceedings

- Legal guidance to I.A. personnel as to key components that should be in every disciplinary investigation.
- In discharge case hearings, competent, experienced counsel is a must! Pay extra, go outside if necessary
- Educate decision makers (civil service commission members, hearing examiners, etc.) on crucial aspects of discipline in a police agency (e.g, the gravity of insubordination and lying).
- Avoid arbitration!
- Too late? Unbinding binding arbitration.

SUGGESTED READINGS

On liability costs: Iris, Mark, "Your Tax Dollars at Work! Chicago Police Lawsuit Payments: How Much, and for What"?" 2 *Virginia Journal of Criminal Law* (2014): 25-61

On recruitment: Morison, Kevin P. *Hiring for the 21st Century Law Enforcement Officer: Challenges, Opportunities, and Strategies for Success,* Washington, DC: Office of Community Oriented Policing Services, 2017.

On Early Intervention Systems (EIS), training and recruitment: Police Executive Research Forum , *Critical Response Technical Assessment Review: Police Accountability – Findings and National Implications of an Assessment of the San Diego Police Department*. Washington, DC: Office of Community Oriented Policing Services, 2015

On training, supervision, and complaint investigation: *Investigation of the Chicago Police Department.* United States Department of Justice, Civil Rights Division, and United Stated Attorney's Office, Northern District of Illinois, 2017.

On arbitration: Iris, Mark, "Unbinding Binding Arbitration of Police Discipline: The Public Policy Exception," 1 *Virginia Journal of Criminal Law* (2013):540-594.

In General: President's Task Force on 21st Century Policing, *Final Report of the President's Task Force on 21st Century Policing.* Washington, DC: Office of Community Oriented Policing Services, 2015

UNBINDING BINDING ARBITRATION OF POLICE DISCIPLINE: THE PUBLIC POLICY EXCEPTION

Mark Iris, Ph.D.[*]

ABSTRACT

Police chiefs are often confronted with having to reinstate former officers, discharged for serious misconduct, after their discharges are reversed through arbitration. Such arbitral decisions are presumably binding, with no appeal. There are strong case law precedents affirming the concept of judicial deference to arbitral decisions; state and federal statutes appear to afford few options. Nonetheless, some state courts allow judicial reversal of presumably binding arbitration decisions when those decisions appear to contravene a clearly defined public policy. State courts vary in their willingness to exercise this option. This article examines case law for public policy exceptions in six states showing a wide degree of variation on this dimension: Pennsylvania, Texas, Nebraska, Massachusetts, Illinois, and Connecticut.

∗ Department of Political Science and Mathematical Methods in the Social Sciences Program, Northwestern University. I wish to thank Max Caproni, Ph.D., Executive Director, Chicago Police Board; Craig Ferrell, Chief's Counsel (retired), Houston Police Department; Roger Goldman, the Callis Family Professor of Law, School of Law, St. Louis University; and counselor Laurie Joseph Wasserman, J.D., Ph.D. for their assistance in reading and commenting upon drafts of this article.

TABLE OF CONTENTS

INTRODUCTION 541

II. POLICE DISCIPLINARY ARBITRATION IN PRACTICE..... 543

III. THE PUBLIC POLICY EXCEPTION: LEGAL UNDERPINNINGS 547

IV. THE PUBLIC POLICY EXCEPTION IN OPERATION..... 558
A. PENNSYLVANIA 559
B. TEXAS 564
C. NEBRASKA 569
D. MASSACHUSETTS 571
E. ILLINOIS 579
F. CONNECTICUT 584

CONCLUSION 590

INTRODUCTION

Among the problems that bedevil police chiefs across the United States are the constraints upon chiefs' authority to impose discipline upon officers for proven misconduct. The quasi-military heritage of policing, the exceptional powers vested in officers, the high visibility and serious consequences of police misconduct all combine to make chiefs deem their authority to suspend, and if necessary fire, errant officers a crucial aspect of their positions. Yet that authority is significantly constrained by a variety of factors. And one of the most, perhaps the most, significant of these factors is arbitration.

In many jurisdictions across the U.S., law enforcement officers enjoy a broad array of employment protections, safeguards not available to the vast majority of workforce employees. As public employees, typically vested with civil service protection after the completion of their probationary periods, police (and other civil service protected workers) are deemed to have a proprietary stake in their employment, and thus may not

be dismissed from employment without due process of law.[1] Within the sphere of employees with civil service status and protection, police in particular typically enjoy an additional layer of employment protection as numerous states have enacted police officer or peace officer Bill of Rights statutes, which afford a wide variety of procedural safeguards to officers accused of misconduct.[2] Additionally, in many agencies, especially larger ones, internal investigative files with sustained findings and recommendations for proposed disciplinary action will pass through several layers of internal supervisory and managerial review and comment before the chief of police orders an officer's suspension or discharge. These protections and procedures are simply nonexistent for the vast majority of the American private sector workforce, who typically serve in an employment at will capacity.

For many chiefs, however, perhaps the most significant factor impacting the disciplinary orders they hand down is the after the fact phenomenon of binding arbitration. In many jurisdictions, either collective bargaining agreements and/or state statutes allow officers who are being disciplined to challenge such disciplinary action through the arbitration process. A presumably neutral, independent third party will convene an arbitration hearing (or in certain instances simply review the relevant investigative file) and issue a decision: a decision which may uphold, modify or overturn in full the disciplinary action. And a core precept is that such arbitral decisions are *binding*; the parties agree in advance to accept the decision as final. Unlike most civil or criminal litigation, there is no appellate recourse.

But this general rule has a twist: *binding arbitration is not necessarily binding*. There is a legal exception, neither as well known nor well understood among police leadership as it ought to be. In a number of states, case law has carved out what is referred to as the public policy exception. This legal caveat states in essence that if an arbitrator's decision reverses discipline imposed upon a public employee, a public employer may initiate litigation to seek a court order to set aside that

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[1] Cleveland Bd. of Educ. v. Loudermill, 470 U.S 532, 541 (1985).

[2] *See, e.g.*, 735 ILL. COMP. STAT. ANN. 5/3-101-113 (2008) and CAL. GOVT. CODE §§ 3300-3312 (2003).

decision, and reinstate the original disciplinary action. Such a lawsuit is grounded in the notion that the arbitration decision is so contrary and anathema to a clearly defined public policy of the state that courts have the authority to intercede and block the enforcement of that arbitration award. Typically, the roots of this practice are grounded in case law, not statutes. The goal of this paper is to explore the nature of this public policy exception among the various states, explore state case law precedents, and note the sorts of misconduct which may—and may not—give rise to a claim of a public policy exception.

I. POLICE DISCIPLINARY ARBITRATION IN PRACTICE

Empirical findings confirm the reality that from a police chief's perspective, the results of the arbitration process are not pretty. For example, in Chicago, two separate pools of data were examined. In one pool, there was a total of 1,584 days of suspension handed down by the Superintendent of the Chicago Police Department[3] over a four years' period, involving 328 separate cases. Arbitrators upheld 794 days of discipline for management, while reversing 790 days—a virtual 50/50 split.[4] That same study examined a separate pool of cases involving fast track advisory opinions. Although formally non-binding, labor and management agreed to accept these advisory opinions in the overwhelming majority of instances. Of these 205 cases, arbitrators upheld 515 days of suspension, and reversed 508, again essentially a 50/50 split.[5]

A similar study of disciplinary actions in the Houston Police Department documented 149 cases over a five years' period, with 899 days of discipline under appeal. Arbitrators upheld 480 days for management, and gave back to officers 419 days (in percentage terms,

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[3] The title of Superintendent of the Chicago Police Department is equivalent to the chief's position in most other agencies.

[4] Mark Iris, *Police Discipline in Chicago: Arbitration or Arbitrary?*, 89 J. CRIM. L. & CRIMINOLOGY 215, 235 (1998).

[5] *Id*. at 237–38.

53% of the days upheld, 47% overturned).[6] The same study also examined a separate set of data for what Texas law labels "indefinite" suspensions, which are in reality discharges. Of thirty-six such cases, the Chief's discharge orders were upheld in seventeen, reversed outright in ten (that is, the officer reinstated with no disciplinary penalty whatsoever), and modified to a lesser penalty in nine.[7]

And perhaps the best—or worst, depending on one's perspective—example is that of the Cincinnati, Ohio, Police Department, where outside arbitrators, over a period of several years, handed down fourteen consecutive decisions reinstating officers previously ordered discharged.[8] It appears that in Cincinnati, the only way a discharge stayed in place was if the officer had also been convicted of a felony in criminal court proceedings.[9]

Anecdotal evidence can easily be generated from many other jurisdictions to illustrate the fact that disciplinary actions, grounded in conduct which chiefs of police and presumably the public at large would find simply unacceptable, are often overturned by arbitrators. For example, an arbitrator's decision compelled the Philadelphia Police Department to return to duty two officers, discharged after their use of excessive force in beating three suspects was captured on video taken from a news helicopter and widely publicized. Three other officers involved in that same incident had their disciplinary suspensions reduced to reprimands; a sergeant's demotion to police officer was reversed, and two discharged probationary officers would likely be reinstated even though they were not parties to the arbitration.[10] Two San Jose police

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[6] Mark Iris, *Police Discipline in Houston: The Arbitration Experience*, 5 POLICE Q. 132, 141 (2002).

[7] *Id*. at 142.

[8] Robert Anglen & Dan Horn, *Police Discipline Inconsistent: Sanctions Most Likely to be Reduced*, CINCINNATI ENQUIRER, Oct. 21, 2001, http://enquirer.com/editions/2001/10/21/loc_police_discipline.html.

[9] Cincinnati has a somewhat different practice, in that the Chief of Police recommends proposed disciplinary action, but the actual decision is made by the City Manager.

[10] Allison Steele, *Cops in Televised Beating Reinstated*, PHILA. INQUIRER, Mar.

officers were fired for failing to properly investigate an auto accident, thus covering up the intoxication of the driver, an off-duty district attorney's investigator whose husband was a San Jose police sergeant, and whose father-in law was a former police lieutenant. As a result of that multi-car auto accident, the driver in fact eventually pleaded guilty to DUI and causing injury. The discharged officers contested the discipline; an arbitrator in essence upheld the findings as to their guilt, but concluded the penalties were too severe. So the officers were ordered reinstated to duty with suspensions of eleven months each.[11]

Police discipline in some agencies may be subject to an administrative hearing process before a civil service commission or similar body. Those bodies too can hand down decisions, which may overturn an experienced police executive's considered judgment. What distinguishes arbitration from these other quasi-judicial forums is the fact that an administrative agency's decision is typically subject to appeal through litigation in civil courts.[12] After exhausting one's administrative remedies, recourse to an appropriate civil court by a losing party who wishes to contest an administrative decision is a basic, core component of administrative law. But arbitration is typically *binding* arbitration: the parties have in essence agreed, in advance, to abide by the arbitrator's decision; there is no appeal. Thus, when an arbitrator reversed the indefinite suspension of a St. Paul, Minnesota, officer—imposed after his criminal conviction for an off-duty misdemeanor sex offense—the chief of that department was left with no option but to return to duty a convicted sex offender.[13]

12, 2010, *available at* http://www.philadelphiaspeaks.com/forum/general-discussion/10901-not-sure-what-make.html.

[11] Sean Webby, *Arbitrators Rescind Firing of San Jose Cops Accused in Coverup*, SAN JOSE MERCURY NEWS, Nov. 11, 2010, http://www.mercurynews.com/ci_16588874.

[12] *See, e.g.*, 735 ILL. COMP. STAT. ANN. 5/3-113 (2008), which allows a decision of an administrative agency, such as the Chicago Police Board, to be challenged through a suit in administrative review.

[13] Conrad deFiebre, *Ruling on Convicted Cop's Job Explained; Work Record and Treatment Cited*, MINNEAPOLIS/ST. PAUL STAR TRIB., Aug. 17, 1993, 1B. Roughly a year after his reinstatement, however, the officer was convicted of a separate sex offense that occurred while on duty, and agreed to resign from his position as a police officer. A

Such arbitration decisions are heartily disliked by police chiefs. They are widely perceived as undermining, compromising the chief's ability to manage the agency and ensure proper discipline. They can have a corrosive effect on police discipline and morale, telling the misbehaving officers they may continue their misconduct without fear of adverse action, while undermining the morale of those who adhere to police regulations and ethical norms.

These decisions also carry a financial cost. Reversal of a disciplinary action will typically carry with it reinstatement to duty with back pay and benefits retroactive to the date of termination.[14] Depending upon the time lag from the date of the discharge until the date of reinstatement pursuant to an arbitration award, the amount could be substantial. Back pay awards arising from arbitration cost the City of Philadelphia $2.4 million between January 2008 and June 2010.[15]

There are occasional local variations on this financial norm. For example, arbitrators adjudicating grievances filed by Philadelphia police officers have a practice of not simply awarding back pay when a discharge or suspension is reduced or overturned (making that individual whole, the norm in most locales), but also awarding the additional amount of money the officer would *probably* have earned from overtime but for the disciplinary action. For example, one officer was suspended for ten days for falsely claiming three and a half hours overtime. He was also transferred to a different unit, one in which the overtime earnings' potential was much lower than in the officer's prior unit of assignment. The officer filed a grievance. The arbitrator sustained the infraction of a false overtime report, and upheld the disciplinary suspension, but struck

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state administrative proceeding then stripped him of his certification, making him ineligible to serve as a police officer anywhere in Minnesota. *See* Michael Alan Kveene, State of Minnesota Office of Admin. Hearings, Jan. 13, 1997, *available at http://www.oah.state.mn.us/aljBase/24020724.rt.htm*.

[14] Sometimes an arbitrator will reduce discharge to a lesser penalty, *e.g.*, a suspension of X days duration. In these instances, the back pay award is adjusted accordingly to account for the suspension.

[15] David Gambacorta, *Quick on the Trigger? Ramsey's Firings Strain City Coffers*, PHILA. DAILY NEWS, June 7, 2010, http://articles.philly.com/2010-06-07/news/24968128_1_firings-top-cop-internal-affairs-bureau.

down the transfer as being without just cause (the applicable standard, typical in many collective bargaining agreements). The arbitrator awarded back pay (later calculated as over $83,000) to compensate the officer for over 2,000 hours of overtime he did not work, but likely would have worked, during the two and a half years from the transfer until the issuance of the arbitration award.[16] Numerous other officers were similarly awarded substantial compensation for overtime not worked.[17] Again, binding arbitration left the agency with no apparent recourse in these situations.

II. THE PUBLIC POLICY EXCEPTION: LEGAL UNDERPINNINGS

For decades, the prevailing legal concept has been that arbitration is a desirable process for adjudication of disputes. It is seen as quicker than conventional civil litigation, and less costly due to the absence of discovery, depositions, jury selection, and other aspects of a typical civil lawsuit. The diversion of substantial numbers of disputes into arbitration also lessens the workload of the courts. The Federal Arbitration Act, initially enacted in 1925, empowers arbitration agreements in strong, unambiguous language. An agreement to arbitrate disputes " . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[18] Various provisions of that Act have long been upheld through a number of U.S. Supreme Court cases. In June 2010, the Court upheld arbitration as a process for adjudicating employer-employee disputes.[19] More recently, in a dispute between a consumer and a mobile phone company, the decision made it

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[16] City of Philadelphia and Fraternal Order of Police Lodge 5 (Officer John Mouzon Suspension & Transfer), American Arbitration Association, AAA Case No. 14 390 01326 05 (2007).

[17] Barbara Laker &Wendy Ruderman, *For Some Cops, Getting Overtime Is No Work at All*, PHILA. DAILY NEWS, Feb. 4, 2011, http://articles.philly.com/2011-02-04/news/27100758_1_overtime-thomas-w-jennings-arbitration-system.

[18] Federal Arbitration Act, 9 U.S.C. § 2 (2006).

[19] Rent-A-Ctr., W., Inc. v. Jackson, 558 U.S. 1142 (2010).

clear that the Court, as currently comprised, is firmly committed to upholding the primacy of the Federal Arbitration Act.[20]

In the police disciplinary context, the Court's preference for arbitration is reinforced by the fact that, in many instances, arbitration of disciplinary actions has been voluntarily agreed to by both the employer and the employees' union or association through a collective bargaining agreement. That agreement is a contract, and courts are reluctant to set aside the results of a contractually agreed-to process for resolution of disputes arising from interpretations of that contract. Arbitration is endorsed by courts as a speedier, more cost efficient way to resolve disputes and reduce the burdens on courts. Thus, at some level, courts are reluctant to encourage post-arbitration litigation. The benefits of arbitration over court litigation are quickly dissipated if courts routinely open the doors to subsequently contest substantial numbers of arbitration decisions.

To that end, it is also worth noting that when courts, either state or federal, do undertake review of an arbitration decision, there is a significant difference between that litigation and the typical court review of an administrative agency's decision. As will be discussed later, arbitration decisions are effectively immunized against court oversight of both legal and factual findings. The scope of court review of those decisions is typically very narrow. By way of contrast, if a civil service commission or another equivalent administrative agency discharges a public employee such as a police officer, there will typically be a decision which details findings of fact and conclusions of law. While a reviewing court is obligated to show deference to the agency's findings, especially its factual findings, neither those factual findings nor legal conclusions are immune from judicial scrutiny. Thus, for example, the Chicago Police Board, acting as a quasi-judicial administrative forum, holds hearings in cases in which the discharge of Chicago police officers is sought. A losing party—either the officer who has been disciplined, or the Superintendent of Police, if the discharge effort was unsuccessful—may seek judicial relief by filing a suit in Cook County Circuit Court, with appeal to the Illinois Appellate Court. Illinois case law provides for a two-step process.

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[20] AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740 (2011).

"First, the reviewing court must determine if the agency's factual findings are contrary to the manifest weight of the evidence . . . . Second, the reviewing court must determine if the findings of fact provide a sufficient basis for the agency's conclusion that cause for discharge exists."[21] While courts do give the Police Board, as the fact finder, substantial deference, that is not absolute. The decisions in these police disciplinary proceedings are subject to judicial scrutiny regarding both findings of fact and conclusions of law.

Nonetheless, while arbitration is generally endorsed by courts as a means of dispute resolution, there are a number of clearly articulated, but narrow, exceptions which allow a party to arbitration to challenge a decision. The Federal Arbitration Act recognizes a number of grounds for setting aside an arbitrator's decision. These include an award procured through corruption or fraud, evident partiality by the arbitrator, arbitrator misconduct in refusing to allow pertinent evidence or improperly denying a continuance of the proceedings or an arbitrator exceeding the scope of authority.[22]

The Federal Arbitration Act (FAA), while seminal legislation in this field, covers arbitrations arising from interstate commerce disputes. State and local government employees, such as police officers, would typically not be covered by its specific provisions. That gap was addressed by the promulgation of the Uniform Arbitration Act, first set forth in 1955 and revised significantly in 2000. Its grounds for setting aside an arbitration award closely parallel those set forth in the FAA. *Significantly, in their comments on the proposed 2000 revisions, the drafters noted the inclusion of a public policy grounds for setting aside an arbitration award had been considered but rejected, in part because of unsettled, conflicting case law precedents in various courts, and especially in light of the absence of any public policy exception in the Federal act.*[23]

Most states have adopted the Uniform Arbitration Act in whole or in substantial part. This usually means a public policy exception to

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[21] Rodriguez v. Weis, 946 N.E.2d 501, 504 (Ill. App. 2011).

[22] Federal Arbitration Act, 9 U.S.C. § 10 (2006).

[23] Unif. Arbitration Act § 23(C)(5) (2000).

enforcement of arbitration awards is not included in the relevant statute. Thus, typically, a court challenge to an arbitrator's decision may be initiated only for certain very limited reasons, as specified by statute. Some variations are quite narrow. For example, Texas law governing police arbitrations directly limits civil court challenges to those instances where the arbitrator or arbitration panel was " . . . without jurisdiction or exceeded its jurisdiction or that the order was procured by fraud, collusion, or other unlawful means."[24] Thus, in a typical police disciplinary arbitration, an arbitrator who determined after a hearing there was insufficient evidence to sustain the allegations, would be within the scope of authority to reverse the officer's discharge, order reinstatement to employment, and award back pay and benefits retroactive to the date of the officer's discharge. However, in a hypothetical case, if the arbitrator determined the officer's reputation had been tarnished, and the officer suffered severe emotional harm as a result of the discharge, and thus also ordered the employing police department to pay, say, $100,000 in damages, that would, under Texas law, presumably be fair game for a legal challenge to the arbitration decision. But such grounds for a legal challenge rarely occur. The typical employment arbitration award will limit itself to addressing the issue of reversing the disciplinary action, and related measures necessary to make whole the employee and undo the economic deprivation arising from that disciplinary action. Therefore, a common scenario could involve an officer serving, and then grieving, an unpaid fifteen days' suspension from duty. If the officer prevails, the award would typically order fifteen days' back pay be paid to the officer, and any record of the disciplinary action expunged from the officer's record.

That an arbitration decision could be successfully challenged in court because the arbitrator was corrupt, or exceeded his/her authority under the terms of the applicable collective bargaining agreement, is fairly

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[24] TEX. LOC. GOV'T CODE, § 143.057(j) (West 2005); TEX. LOC. GOV'T CODE § 143.1016(j) (West 2005). Sections 143.057(j) and 143.1016(j) contain identical wording. The former is applicable to all jurisdictions with populations of less than 1.5 million people; the latter is applicable to those with populations greater than 1.5 million—which at this time covers only the City of Houston.

straightforward. But these grounds for reversal are simply absent in the typical police disciplinary arbitration.

Most pertinent for this paper, however, is the public policy exception. At the federal level, the seminal U.S. Supreme Court case in this area is *W.R. Grace and Co. v. Rubber Workers.* The Court stated:

> [A] court may not enforce a collective bargaining agreement that is contrary to public policy. . . . If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it. . . . Such a public policy, however, must be well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents *and not from general considerations of supposed public interests*."[25]

The Court subsequently made clear that reviewing courts may not substitute their own fact-finding for that of the arbitrator. Thus, in the *Misco* case,[26] a factory worker was discharged for possession and use of marijuana on company premises, a violation of company policy. Arbitration reinstated him. The employer acted to have the arbitration award set aside on public policy grounds, as the employee posed a threat by operating hazardous machinery at work while under the influence of drugs. While the Fifth Circuit set aside the arbitration award, the Supreme Court reversed the decision. The Supreme Court noted that not only had the Fifth Circuit overridden the arbitrator's fact-finding, it had also failed to establish a clear, well-defined and dominant public policy against the operation of hazardous machinery while under the influence of illegal drugs.[27]

Even if the accused employee's misconduct violates a clear public policy, that in and of itself is not necessarily grounds for court action to reverse an arbitration decision. The U.S. Supreme Court confronted the

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[25] W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 766 (1983) (emphasis added) (citations omitted).

[26] United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29 (1987).

[27] *Id*. at 39, 44.

issue of an arbitration decision which reduced an employer-imposed penalty of discharge to a suspension of three months in the *Eastern Associated Coal* case. In that case, the employee, a truck driver, had failed a random drug screen test as mandated by U.S. Department of Transportation regulations. Even though public policy explicitly called for drug-free truck operators as a key public policy concern, in the Court's eyes, that was not sufficient to mandate reversal of the arbitration decision. The Court noted the key question is "not whether [the employee's] drug use itself violates public policy, but whether the agreement to reinstate him does so."[28]

Grounds for court intervention in arbitration proceedings were further narrowed in the case of *Hall Street Associates L.L.C. v. Mattel, Inc*.[29] The Supreme Court held that the FAA's narrow grounds for vacatur of arbitration decisions are mandatory, and may not be expanded. Thus, reversals of arbitration awards on grounds such as "manifest disregard of the law" would, presumably, no longer be valid. This rationale has been interpreted by some as essentially sounding the death knell for reversing arbitration awards on public policy grounds.[30] However, note that the Court addressed court review of arbitration decisions under the FAA. As will be later discussed, challenges to police disciplinary arbitrations are typically brought in state court under state law jurisdiction. Thus, the applicability of *Hall Street* to these questions is presumably not controlling.

Empirical research, immediately predating the *Hall Street* case, examined the outcomes of challenges to arbitration decisions, with an eye towards how ready courts were to uphold the finality of those decisions.[31] Attributing the pattern to changes in the Revised Uniform Arbitration Act,

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[28] E. Associated Coal Corp. v. Mine Workers of Am., Dist. 17, 531 U.S. 57, 62-63 (2000).

[29] Hall St. Assocs. L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008).

[30] Jonathan A. Marcantel, *The Crumbled Difference Between Legal and Illegal Arbitration Awards:* Hall Street Associates *and the Waning Public Policy Exception*, 14 FORDHAM J. CORP. & FIN. L. 597 (2009).

[31] Michael H. LeRoy, *Misguided Fairness? Regulating Arbitration by Statute: Empirical Evidence of Declining Award Finality*, 83 NOTRE DAME L. REV. 551 (2008).

the author documented that state courts have shown an overall lesser willingness to confirm arbitration decisions than federal courts have. Confirmation rates at the trial court level were 92.7% in U.S. courts, but only 78.8% in state courts; the respective figures for appellate level courts were 87.7% and 71.4%.[32]

What is crucial for police managers is the extent to which various state appellate courts, and courts of last resort, have interpreted the *Hall Street* case rationale, and applied it to the various factual scenarios presented in police disciplinary cases.

At this point, before considering whether to initiate a court challenge to an unfavorable arbitration decision, a crucial question for a police chief to ask is the basis of the arbitrator's reversal of discipline. Broadly speaking, reversals can be categorized into two groups: (1) Yes, the officer did in fact commit the alleged misconduct (in whole or in part), but discharge is not warranted because the penalty is too harsh, certain procedural rights were violated, the penalty is disproportionate to that meted out to other officers guilty of similar actions, etc., and thus the penalty should be eliminated or reduced; and (2) No, the officer's misconduct cannot be proven, and therefore no penalty at all should be imposed.

Let us address the first group: those cases in which arbitrators agree that officers' misconduct was proven. That a police officer's conduct can be convincingly shown as contrary to an established public policy does not, in and of itself, ensure that a police chief's efforts to reverse an arbitration decision to reinstate the officer will be successful. Recall the Supreme Court's *Eastern Coal* decision. It is not a question of whether the officer's conduct violated public policy, but whether reinstating the officer to duty would do so. Presumably, one could argue that an arbitration decision which reverses an officer's discharge, and orders the officer's reinstatement, but with a lesser penalty, such as a suspension of X duration, is not contrary to public policy. After all, such a decision is not tolerating the offensive conduct; it is simply imposing an alternative penalty, a lesser sanction. Under those conditions, a court *may*,

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[32] *Id*. at 556.

not *shall*, set aside the arbitration decision. There is room for judicial discretion here.

What of the second group, those cases in which the arbitrator's reinstatement is based upon the conclusion that no officer misconduct has been proven? Typically, an arbitration proceeds as a quasi-judicial hearing. These are adversarial proceedings. Each party may call witnesses, who are subject to both direct and cross examination. The decision will thus be drawn upon the arbitrator's assessment of the demeanor and credibility of the witnesses. An arbitrator may reverse an internal affairs' sustained finding of misconduct, and the chief's resultant disciplinary penalty, based upon those credibility conclusions. Under these circumstances, a chief's challenge of an unfavorable decision will run into a serious problem. Our legal system in general affords great deference to the fact finder's credibility assessment, and also expects courts to show great deference to the arbitrators' decisions. Unlike appellate courts reviewing the proceedings of a trial court, courts will typically not address whether the arbitrator committed errors of fact or law. "The strong public policy favoring arbitration requires us to uphold an arbitrator's decision even where it is wrong on the facts or the law, and whether it is wise or foolish, clear or ambiguous."[33] The whole notion of arbitration is to offer a speedier, less costly alternative to court litigation. If courts were to engage in a broad pattern of second guessing arbitrators' findings of fact and conclusions of law, that could easily lead to a very substantial increase in litigation, totally negating the key justification for using arbitration in the first place. Thus, cases of this type (*i.e.*, an arbitrator found the employee factually not guilty) are typically absent from the court cases lodged on public policy grounds.[34]

This two-fold categorization of the bases for arbitration decisions reversing police discipline is made more complex in that some arbitration decisions will include components of both categories. For instance, a chief

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[33] City of Boston v. Boston Police Patrolmen's Ass'n, 443 Mass. 813, 818 (2005).

[34] Of the many dozens of court cases involving arbitration and public policy researched in the course of this project, the author encountered not a single one in which the arbitrator simply found the accused officer (or other public employee) not guilty on factual grounds.

may order an officer's discharge based on an internal investigation which concluded there were sustained violations of departmental rules X and Y. An arbitrator may determine, after a hearing, that the testimony supports a guilty decision as to violation of Rule X, but not Rule Y. With one guilty finding struck down, the arbitrator may then conclude the now-reduced infractions do not justify a penalty of discharge, and thus reduce the penalty.

Anecdotal evidence suggests it is the first category (upholding guilt but reducing the penalty), not the second, which especially galls police managers. That a presumably neutral third party heard the witnesses and concluded there was insufficient evidence to prove misconduct is something which many police chiefs may, albeit with some grumbling, accept. What particularly frustrates police chiefs are cases in which the underlying misconduct was deemed proven by the arbitrator, who nonetheless determined it was 'no big deal' and reduced a significant penalty to something much more lenient. Consider the St. Paul officer discussed above, in which the arbitrator stated in essence, yes, he was a convicted sex offender, but it was only a misdemeanor, so let him come back to work as a cop.[35] As another example, two Cincinnati, Ohio officers were fired for having sex, while on duty, with a clearly intoxicated woman, whom they had escorted to her apartment. They lied about the incident during the course of the subsequent internal investigation. These facts were uncontested, confirmed in separate decisions, one for each of the two officers.[36] Citing procedural lapses in the internal investigation and the department's own matrix of penalties for various disciplinary infractions, one arbitrator reduced one officer's penalty from discharge to a suspension of five days; the second arbitrator reduced the other officer's penalty from discharge to a three days' suspension.[37] The case of

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[35] *See*, *supra* note 13.

[36] These cases illustrate a problem in police regulations: given the wide variety of situations in which police officers can become involved, it is extremely difficult to devise a set of regulations which can address every potential type of misconduct. Cincinnati did not have a rule that explicitly barred on-duty officers from having sexual relations with intoxicated citizens.

[37] In the Matter of the Arbitration Between Queen City Lodge No. 69, Fraternal Order of Police and City of Cincinnati, Ohio, American Arbitration Association, AAA

Pennsylvania State Trooper Smith, to be discussed later (drunk, he accosted his ex-girlfriend, placing his gun in her mouth), is yet another example of this phenomenon. For the purposes of this paper, it is these very cases in which arbitrators agree the officers are guilty of various infractions (and typically very serious infractions), but deem the penalties too harsh, that also offer the potential for reversal on public policy grounds.

Over and above contractual language and case law precedents, one needs to recognize a pervasive political reality. Almost invariably, appeals of arbitration decisions involving state, city or county public employees fall under the jurisdiction of state courts, not federal courts. Nationally, in the U.S., a very substantial proportion of state court judges are elected. Police officers are, in both large cities and not so large communities, heavily unionized—and these unions tend to be politically very active. The electoral endorsement of an officers' union is no doubt seen as a desirable asset by most judicial candidates. Conversely, most candidates would wish to avoid raising these unions' ire and earning their enmity and electoral opposition. This raises the very real possibility that especially at the margin, in those cases where the law is not absolutely clear cut and a judge has discretion in deciding a case, a judge may tacitly decide not to antagonize officers and their union by reversing a favorable (from the union's perspective) arbitration decision. The role of campaign finance donations in shaping judicial decision making has been convincingly demonstrated elsewhere.[38] Another study noted that corporate employers fared significantly better in post-arbitration litigation in those courts staffed by judges chosen through partisan elections.[39] It is not unreasonable to speculate that other pressures, such as potential union endorsements or opposition, could affect judicial decisions in these cases.

Case No. 52 390 0006 03; In the Matter of the Arbitration Between Queen City Lodge No. 69, Fraternal Order of Police and City of Cincinnati, Ohio, American Arbitration Association, AAA Case No. 52 390 0007 03.

[38] Vernon Valentine Palmer & John Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 TULANE L. REV. 1291–1314 (2008).

[39] Michael H. LeRoy, *Do Partisan Elections of Judges Produce Unequal Justice When Courts Review Employment Arbitrations?*, 95 IOWA L. REV. 1569 (2010).

Even in the absence of any actual case outcomes affected by this, police chiefs' and city/county attorneys' *perceptions* that judicial decision making *might* be impacted this way can likely, in some jurisdictions, exercise a significant deterrent effect, blocking such cases from being pursued in court.

And the political power of police officers' (and, to a lesser extent, firefighters') unions is a major reality, not just a perception, in many jurisdictions. For example, during the winter of 2011, national attention was focused on Wisconsin, where the Governor and state legislature enacted a law that wholly decimated collective bargaining rights of state and local government employees. Significantly, and much less well-known, that law exempted from its coverage police and fire employees.[40] In California, that state's Supreme Court, in the *Copley Press* case, effectively forced all of California's numerous citizen oversight panels to cease holding public hearings, citing confidentiality requirements in a state public employee personnel statute.[41] Decided on a specific interpretation of statutory wording, and not on federal or state constitutional grounds, the remedy (for those supporting public hearings) was in theory simple: a narrow amendment of the statute. Although supported by a variety of organizations, including the American Civil Liberties Union, news media, and citizen oversight groups, the legislation was opposed by police unions. More than one hundred union representatives showed up when the appropriate legislative committee was to take action on the bill. With that show of opposition, the entire committee (except for the bill's sponsor) literally remained silent when the bill was called for a vote, effectively killing the measure.[42] And in Wisconsin, state law has been amended over time to require that the City of Milwaukee pay police officers, discharged

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[40] Steven Greenhouse, *Ohio's Anti-Union Law Is Tougher Than Wisconsin's*, N.Y. TIMES, Mar. 31, 2011, *available at* http://www.nytimes.com/2011/04/01/us/01ohio.html?scp=1&sq=wisconsin%20collective%20bargaining%20police&st=cse.

[41] Copley Press, Inc. v. Super. Ct., 39 Cal. 4th 1272 (2006).

[42] Mark Schlossberg, *Lawmakers Submit to Police Union Threats: Recent Press*, ACLU of Santa Cruz County, CA, *available at* http://www.aclusantacruz.org/node/145.

for cause, their full salaries during the pendency of their appeals of their discharges.[43]

These are but three examples of a widespread reality. The precise impact of such political pressure by officers' unions on behalf of their members facing disciplinary action cannot be definitively measured, but one would have to be very naïve to conclude such extra-legal factors are not pertinent.

III. THE PUBLIC POLICY EXCEPTION IN OPERATION

Previous studies have examined how courts have addressed the public policy exception. One study limited its scope to cases litigated in U.S. courts.[44] The subject matter here—police officer disciplinary arbitration—is however exclusively a matter for state court adjudication. Another study examined New York state court dispositions of challenges to arbitration awards, noting rates of arbitration affirmation/reversals across the various regions of that state. While very useful from an

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[43] Gina Barton & John Diedrich, *Three Democrats Seek Gov. Walker Veto of Plan to Pay Fired Officers,* MILWAUKEE SENTINEL J., June 20, 2011, *available at* http://www.jsonline.com/news/statepolitics/124209678.html. The irrationality of requiring significant pay for work not performed should resonate with Marx Brothers fans, who may recall an exchange in *Animal Crackers* in which Groucho Marx asked Chico (playing a musician) how much he and Harpo charged for performing:

"Chico: For playing, we get-a ten dollars an hour.

Groucho: I see. What do you get for not playing?

Chico: Twelve dollars an hour. . . Now for rehearsing, we make special rate. That's-a fifteen dollars an hour. . .

Groucho: And what do you get for not rehearsing?

Chico: You couldn't afford it. . ."

Tim Dirks, *Animal Crackers (1930),* AMC FILMSITE, www.filmsite.org/anim.html.

[44] Ann C. Hodges, *Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law,* 16 OHIO ST. J. ON DISP. RESOL. 91 (2000).

empirical stance, highlighting overall patterns in that state's courts, the study looked at all arbitration cases subsequently litigated, with no special focus on public policy exceptions.[45] The author noted in that state, the Court of Appeals has limited court reversals of arbitration on public policy grounds in cases arising from public sector employment, based on specific legislation.[46]

What insights can be gleaned? Legal efforts to reverse unfavorable (from the chiefs' perspectives) arbitration decisions have had mixed results. Various cases discussed below will illustrate the potentials and pitfalls of such efforts. A comprehensive fifty states' overview of this issue is beyond the scope of this study. The intent here is to shed light on the phenomenon by drawing upon cases from several states. These examples will show clearly that the pattern varies significantly from state to state, depending in large part on the case law precedents from appellate courts and courts of last resort in those states. The case studies which follow are listed in a rough continuum, starting with the states with courts that appear least receptive to public policy claims (Pennsylvania and Texas), followed by a state which has just begun to open the door to such claims (Nebraska), and on to states which appear increasingly more receptive to such claims (Massachusetts, Illinois, and especially Connecticut).

A. PENNSYLVANIA

In contrast to other states, Pennsylvania presents an example of case law expansion of statutory language so as to effectively bar almost any public policy exception. In 1968, the Pennsylvania legislature enacted Act 111.[47] This Act afforded police officers and firefighters in that state the right to engage in collective bargaining. The Act went on to outline the

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[45] Monica R. Skanes, *The Truth Behind "Final and Binding" Arbitration: A Study of Vacated Arbitration Awards in the New York State Appellate Division*, 74 ALB. L. REV. 983 (2011).

[46] *Id*. at 997.

[47] 43 PA. STAT. ANN. § 217.1 (West).

process to be followed when there is an impasse in reaching a collective bargaining agreement. The process requires a three member arbitration panel. The panel's decision is binding, the Act stating (relative to any such decision): "No appeal therefrom shall be allowed to any court."[48] Note once again this act illustrates the special position these public safety employees enjoy relative to other civil servants, presumably yet another example of the political influence wielded by police and fire unions.

There is only tangential mention of grievances in the opening section, which states that police and fire personnel ". . . shall have the right to an adjustment or settlement of their grievances or disputes in accordance with the terms of this act."[49] The detailed requirements of arbitration which follow in the rest of this Act make no reference whatsoever to an individual employee's grievances. The wording makes it quite clear the arbitration process, as described, applies to what is generally known as interest arbitration. Typically, that refers to arbitration used in reaching an overall collective bargaining agreement, resolving employee-employer differences over wages, overtime, benefits, holiday and vacation, and other common conditions of employment.

Despite the statute's near-silence on the issue of individual employees' disciplinary-related grievances, the case law history of Pennsylvania shows that courts have issued decisions which expand, rather than contract, the coverage of Act 111. In *Chirico*, the Pennsylvania Supreme Court addressed the apparent contradiction within Act 111: granting police and fire employees the right to having their grievances settled, but not specifying how those grievances would be settled.

> We acknowledge it is clearly inadequate to recognize a right "to a settlement of grievances or disputes", while failing to provide any method for the implementation of those rights. This obvious vacuum must not be countenanced. Yet resort to the courts to meet this need would contravene the strong affirmance of the use of non-adversarial methods for the resolution of disputes between

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[48] *Id*. at § 217.7(a).

[49] *Id*. at § 217.1.

> governmental employers and police and firemen[50] embodied in section two of the Act.[51]

The remedy, in the court's decision was clear: the arbitration process would apply to individual employees' grievances, as well as union-employer contract negotiations.

> Act 111 specifically avoids the use of the courts for dispute resolution. This policy is so strong that section seven of the Act, 43 P.S. 217.7, provides for binding arbitration and contains the unique provision that "[n]o appeal therefrom shall be allowed to any court." Thus the only method for settling grievance disputes allowable within the framework of Act 111 is arbitration. This objective would be completely frustrated if we were to superimpose, by judicial fiat, a layer of court intervention.[52]

As a result, Pennsylvania courts have consistently interpreted Article 111 to constrict their ability to intervene and disturb an arbitration award. In what Pennsylvania courts commonly refer to as the *Betancourt* case,[53] the Pennsylvania Supreme Court made clear its requirement for a very focused scope of review. "[T]he narrow certiorari scope of review limits courts to reviewing questions concerning (1) the jurisdiction of the arbitrators; (2) the regularity of the proceedings; (3) an excess of the arbitrator's powers; and (4) deprivation of constitutional rights." While the letter of the wording differs from that found in other states such as Nebraska and Illinois, the spirit is arguably the same.

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[50] It is curious that the court refers to arbitration as a "non-adversarial method," given the format of the typical grievance arbitration, with attorneys for each party representing their clients' positions, calling and examining witnesses, and cross-examining the opposing side's witnesses, before a presiding, relatively passive, non-inquisitorial arbiter. If that does not capture the essence of an adversarial proceeding in the U.S. legal system, this author is at a loss as to what does.

[51] James Chirico v. Bd. of Supervisors for Newton Twp., 504 Pa. 71,78–79 (1983).

[52] *Id*. at 79.

[53] Pa. State Police v. Pa. State Troopers Ass'n, 540 Pa. 66 (1995).

Act 111, and the *Betancourt* precedent applying that Act, have been cited in subsequent judicial proceedings to constrain court intervention.[54] As such, they serve as a major obstacle to any police (or fire) service employer seeking a reversal of an adverse disciplinary arbitration proceeding.

The only other apparent judicially imposed constraint on arbitration is that the courts may not enforce an order which would compel a party to commit an illegal act. This stance was articulated in the *Washington Arbitration Case*.[55] The city of Washington, Pennsylvania, challenged an arbitration panel award that required the city to provide hospitalization insurance, paid for solely at the city's expense, for police officers' family members.[56] The Pennsylvania Supreme Court overturned this arbitration award, stating, " . . . such [arbitration] panels may not mandate that a governing body carry out an illegal act."[57] Third class cities may exercise only those powers expressly granted to them by the legislature. State legislation dating from 1933 specifically allowed cities of the third class to enter into group insurance contracts for city officials and employees.[58] The statute was silent as to employees' family members. The city argued, and the court agreed, that such silence meant that ensuring employees' families at public expense would thus be against the law.

This escape valve, articulated in the context of a challenge to a non-disciplinary arbitration proceeding, is, however, virtually useless in addressing even the most egregious, factually uncontested instances of police misconduct. Again, when faced with the potential to modify the scope of Act 111, courts have passed on that opportunity. In perhaps the most noteworthy example, Pennsylvania State Police Trooper Rodney Smith, while off duty and intoxicated, accosted his ex-girlfriend, threatened her, and placed his loaded police issued firearm in her mouth.

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[54] *See* Pa. State Police v. Pa. State Troopers Ass'n, 902 A.2d 599, *perm. app. denied*, 590 Pa. 690 (2006).

[55] City of Washington v. Police Dep't, 436 Pa. 168 (1969).

[56] *Id*. at 170.

[57] *Id*. at 176.

[58] *Id*. at 177–78.

He pled guilty to five criminal charges, including three counts of driving under the influence, simple assault, and making terroristic threats.[59] Nonetheless, the arbitrator concluded this misconduct was not serious enough to warrant discharge.[60] Smith was ordered to be reinstated to duty, but with no back pay (in essence reducing the discipline from discharge to a suspension equal to time served, a period of approximately twenty months).

The ensuing litigation to set aside the arbitration award and reinstate the discharge order reached the Pennsylvania Supreme Court. Six of the seven justices felt compelled to uphold the arbitrators' awards (in a joint decision involving both this and an unrelated case of a state trooper reinstated by arbitration after he was discharged for a criminal conviction for shoplifting). In separate opinions, two justices indicated their reluctant concurrence based on existing precedents.[61] One hoped these two cases would serve as a catalyst to legislative revision of Act 111 (a dubious and/or naïve hope, given the political power of officers' unions previously discussed). The other concurrence expressed support for the court revisiting its standards for the scope of judicial review and considering " . . . whether the arbitration decision is repugnant to public policy or shocks the conscience of the court."[62]

One justice dissented, noting the court's own precedent that " . . Act 111 arbitration panels may not order a public employer to do an act that was forbidden," and that Pennsylvania statutes and administrative code require that agencies appoint as police officers only those of "good moral character."[63] The dissent's rationale was that requiring the state police to reinstate Mr. Smith as a trooper (given that his actions clearly showed a strong lack of moral character) was in essence requiring the employer to commit an illegal act; something clearly beyond the arbitrator's power under existing case law. Justice Newman was alone in

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[59] Pa. State Police v. Pa. State Troopers Ass'n, 559 Pa. 586, 588–89 (1999).

[60] *Id.* at 589.

[61] *Id*. at 595, 597.

[62] *Id*. at 597.

[63] *Id*. at 599-600 (Newman, J., dissenting).

her dissent. Given Trooper Smith's actions in terrorizing his ex-girlfriend, it is probably not a coincidence that the sole dissent was authored by the court's lone female justice.[64]

B. TEXAS

As previously noted, Texas statute limits court challenges of arbitration awards to very narrow grounds, alleging the arbitration panel was " . . . without jurisdiction or exceeded its jurisdiction or that the order was procured by fraud, collusion, or other unlawful means."[65] While there are a number of cases reported in which losing parties challenged arbitration awards on the basis of one (or more) of these specified grounds, challenges on public policy grounds are rare.

There is at least one case in which Texas courts overturned a public employment related arbitration decision. This was not a discipline-related matter, but instead dealt with a dispute over payment of accrued sick leave pay to a sheriff's deputy. The county contended such back pay would be in violation of a provision of the Texas Constitution. The arbitrator, in an unusual move, awarded the back pay but acknowledged the constitutionality would have to be addressed by the courts. The trial court ruled the award was in violation of the Texas Constitution. The Texas Court of Appeals affirmed, noting, "[t]he public policy exception both allows and encourages trial courts to set aside arbitration awards that conflict with well defined and dominant public interests, which most certainly include compliance with the Texas Constitution."[66] This is consistent with the general principle that courts will not affirm an

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[64] *See id.*, as it references Madame Justice Newman, as well as Mr. Justice Nigro, Mr. Justice Castille, and Mr. Justice Cappy. The gender of the other three—Justices Saylor and Zappala, and Chief Justice Flaherty can be verified through the Pennsylvania Supreme Court's website, http://www.pacourts.us/T/SupremeCourt/.

[65] *See supra* note 24; TEX. LOC. GOV'T CODE. § 143.057 (West 2005) (refering to "hearing examiner;" however, a full reading of the statute makes clear these individuals are in fact functioning as arbitrators, and should not be confused with those hearing examiners who serve as administrative law judges).

[66] Willie Lee v. El Paso Cnty., 965 S.W.2d 668, 673 (Tex. App. 1998).

arbitration award requiring the performance of an illegal act. However, for a police chief, the reality is that in employee disciplinary matters, arbitrator-ordered reinstatement to duty of a discharged police officer, however repugnant the officer's underlying misconduct, typically does not rise to the level of being an illegal act.[67]

With no pertinent case law on police discipline to serve as a basis for challenging adverse arbitration decisions, jurisdictions in Texas have sought to utilize the statutorily provided grounds as a basis for such challenges. Police chiefs dissatisfied with arbitration decisions have enjoyed some very limited success through these efforts. Thus, for instance, the issue of an arbitrator exceeding his/her jurisdiction was significant in the Texas Supreme Court's decision in *City of Pasadena v. Smith*.[68] Smith had been indefinitely suspended, and challenged that action through arbitration.[69] At the time of the hearing, the arbitrator concluded that the chief had to be present in person at the hearing. The presence of the assistant chief was deemed insufficient. The arbitrator refused to hear any evidence relative to the actual misconduct at issue.[70] The city challenged the decision to reinstate Smith, arguing the arbitrator had misinterpreted the law, by not allowing the assistant chief to stand in for the chief. The officer contested on jurisdictional grounds, with which the trial court agreed; the appellate court affirmed. On further review, the Texas Supreme Court reversed and remanded, noting that the arbitrator was required to make a decision based on the evidence. The arbitrator had exceeded his jurisdiction as no evidence had been presented.[71] The jurisdictional objections raised by the officer were denied.

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[67] In extreme cases, that argument has been made—at least unsuccessfully, in a dissenting opinion. *See, e.g.*, *supra* note 59, referencing the *Smith* case involving the Pennsylvania State Police.

[68] Pasadena v. Smith, 292 S.W.3d 14 (Tex. 2009).

[69] *Supra* note 68. As noted previously, this means, in reality, discharge.

[70] *Pasadena*, 292 S.W.3d at 14. The arbitrator also erred in applying to this case statutory provisions applicable only to a city with a population greater than 1.5 million people.

[71] Interestingly, with no evidence heard at the arbitration, the court decision is silent as to the nature of Smith's alleged misconduct.

A subsequent case, based in part on the [Texas] *Smith* precedent, also determined that the hearing examiner exceeded his jurisdiction.[72] The officer had been indefinitely suspended after he was found to have had sex with a woman while on duty, as well as committing other rules violations. The arbitrator reversed the discipline, based on the police department's failure to provide the accused officer with a copy of the signed complaint, as required by law. However, the Court of Appeals noted the statute was silent as to the consequences of such a procedural breach. "In the absence of a legislative directive that the failure to provide a complainant's statement prior to discipline means that the officer will escape discipline, the hearing examiner exceeded his jurisdiction by crafting such a rule."[73] The Supreme Court of Texas denied the petition for review.[74]

Court challenges based on an arbitrator's abuse of authority can also work to the advantage of the accused employee. In a case involving a fire department captain accused of having exposed himself to another firefighter, the resultant disciplinary recommendation was a demotion of two ranks. The arbitrator found insufficient evidence to support that allegation, and thus overturned the discipline. However, the arbitrator found the individual guilty of other infractions, not charged in the original disciplinary case, and imposed a thirty days' suspension. The fire captain successfully challenged this in court, arguing that the arbitrator exceeded his authority by imposing discipline for an infraction not charged.[75] The trial court granted a motion for summary judgment by the city. The Texas Court of Appeals reversed, and set aside the arbitration decision.

In general, Texas courts show reluctance to reverse arbitration decisions. For example, in the *Longoria* case, the City of San Antonio sought to challenge an arbitrator's decision voiding the indefinite suspension of a firefighter.[76] In one pay check, Longoria was mistakenly

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[72] City of Athens v. MacAvoy, 353 S.W.3d 905 (Tex. App. 2011).

[73] *Id.*

[74] *Id.*

[75] Kuykendall v. City of Grand Prairie, 257 S.W.3d 515 (Tex. App. 2008).

[76] City of San Antonio v. Longoria, No. 04-04-00063-CV, 2004 WL 2098074 (Tex. App. 2004).

paid approximately $6,000 more than the correct amount. He noticed the overpayment, setting it aside in a savings account, but did not report it. After some time, city officials detected the error, notified Longoria, who eventually repaid the excess money. Despite this repayment, he was subsequently disciplined. The key issue at arbitration was whether or not the city had complied with the statutory requirement that it take disciplinary action within 180 days of learning of an infraction. The arbitrator granted the accused's motion for summary judgment, based on a breach of the 180 days' requirement. The city sued, claiming the arbitrator had exceeded his authority and jurisdiction. The trial court and Texas Court of Appeals denied the city's claims, showing deference to the arbitrator's interpretation of the statute mandating action within 180 days.

The same issue—the 180 days' limit—arose in the *Phillips* case. A Houston police officer challenged an indefinite suspension, which was upheld by an arbitrator. In this case, court action was initiated by the ex-officer, who sued to have the arbitration decision set aside, alleging the arbitrator exceeded his authority by not properly enforcing the 180 days' limit. Again, both the trial court and Texas Court of Appeals showed deference and upheld the arbitrator's interpretation of the time frame requirements.[77]

In yet another instance exemplifying the obstacles to reversing disciplinary arbitrations in Texas courts, the City of Houston engaged in protracted litigation (the incident occurred in 1999; the most recent court decision is from 2008) over a seven days' suspension of a firefighter, Donald Clark. An arbitrator ruled that the evidence clearly supported this suspension. However, the arbitrator granted Clark's motion to dismiss, on the grounds the suspension had been ordered by the acting chief of the fire department, and by statute only the chief had such authority.[78] At one point in these lengthy court proceedings, the Court of Appeals dismissed the City's claim for lack of subject matter jurisdiction. The city persevered, and the Supreme Court of Texas reversed and remanded the matter, holding that the City of Houston did in fact have the right to appeal

[77] Claire Phillips v. City of Houston, 993 S.W.2d 357 (Tex. App. 1999).

[78] City of Houston v. Donald Clark, 197 S.W.3d 314, 315 (Tex. 2006).

in this case.[79] But, in an example of winning a key battle but losing the war, the Texas high court's decision was for naught. On remand, the Court of Appeals, having been told it did have jurisdiction, addressed the merits of the city's appeal and concluded, "the hearing examiner's determination and rulings, as set forth in the award, were not made without jurisdiction or in excess of jurisdiction. The district court did not err in rejecting the City's appeal."[80]

One issue seen in Texas, but not in the other states examined in this study, is that of outsourcing: the Texas Local Government Code provides that arbitrators shall be chosen from lists of qualified neutral arbitrators provided by either the American Arbitration Association or the Federal Mediation and Conciliation Service.[81] Curiously, a fair amount of energy has been spent challenging arbitration decisions on the grounds that either the terms "qualified" and "neutral" are too ambiguous, and/or the statutory delegation of a governmental power to an outside entity such as the American Arbitration Association is not legally permissible. These efforts have been unsuccessful in a number of cases, both in the Texas Supreme Court,[82] and the Texas Court of Appeals.[83]

Overall, examination of case law shows clearly that Texas courts are very reluctant to set aside arbitrators' decisions, and have thus far made only a very minimal acknowledgement of a public policy exception.

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[79] *Id.* at 324.

[80] City of Houston v. Donald Clark, 252 S.W.3d 561, 567 (Tex. App. 2008).

[81] *Supra* note 24. In some jurisdictions, the police department and the union, under Texas "meet and confer" procedures have agreed to alternative arbitrator selection processes. These may supercede the requirements of the *Texas Local Government Code*, for the duration of the contract.

[82] *See, e.g.*, Proctor v. Andrews, 972 S.W.2d 729 (Tex. 1998).

[83] *See, e.g.*, Blair v. Razis, 926 S.W.2d 784 (Tex. App. 1996); City of Garland v. Byrd, 97 S.W.3d 601 (Tex. App. 2002).

C. NEBRASKA

An alternative approach is presented by Nebraska. Consider the relatively recent (2009) case decided by the Nebraska Supreme Court.[84] Until this decision, that state had no case law interpreting the relevant Nebraska statute. "We have not previously addressed whether an arbitration decision, under the Uniform Arbitration Act, can be vacated by a court on public policy grounds."[85]

In 2005, the Nebraska State Patrol was informed that one of its troopers might be a member of the Ku Klux Klan. An internal investigation confirmed that State Trooper Robert Henderson was a member of the Knights Party of the Klan. As a result of that inquiry, the trooper was then discharged, his membership having " . . . reflected negatively on the State Patrol and brought the State Patrol into disrepute."[86] A grievance was then filed, and the matter went to arbitration. The arbitrator, citing constitutional grounds (there was no question that Henderson had committed the acts for which he was charged), sustained the grievance and ordered the sworn member reinstated to duty.[87]

The State of Nebraska opted to sue, seeking a court order vacating the arbitration decision and reinstating the discharge order. A district court agreed. The troopers' association appealed.

In its opinion, the Nebraska Supreme Court affirmed the lower court's decision. In considering the court's action, it is worth noting that the Nebraska Uniform Arbitration Act allows limited grounds for challenging an arbitration decision.

> (a) Upon application of a party, the court shall vacate an award when:

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[84] State of Nebraska v. Robert Henderson, 277 Neb. 240 (2009).

[85] *Id*. at 245.

[86] *Id.* at 241–42.

[87] *Id.* at 242.

> (1) The award was procured by corruption, fraud, or other undue means;
> (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
> (3) The arbitrators exceeded their powers;
> (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor, refused to hear evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of section 25-2606, as to prejudice substantially the rights of a party;
> (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under section 25-2603, and the party did not participate in the arbitration hearing without raising the objection; or
> (6) An arbitrator was subject to disqualification pursuant to section 25-2604.01 and failed, upon receipt of timely demand, to disqualify himself or herself as required by such section.[88]

Of these six grounds, three may, broadly speaking, be considered ethical in nature (numbers in parentheses refer to the statutory sections listed above): (1) the award was the result of fraud or corruption, (2) the arbitrator showed evident partiality or other misconduct or (6) the arbitrator should have been disqualified. The other three grounds are more procedural in nature: (3) the arbitrator exceeded his powers, (4) the arbitrator refused to postpone a hearing despite good cause or otherwise breached proper procedures or (5) the arbitration was convened in the absence of an arbitration agreement. These grounds are not unique to Nebraska: similar wording exists in other states' codes. Note in particular the absence of any wording explicitly or implicitly authorizing a public policy exception.

In addition to the statutory silence on this issue, the Nebraska Supreme Court noted that Nebraska case law had not yet addressed the

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[88] NEB. REV. STAT. § 25-2613 (West 2012).

public policy exception.[89] Thus that court was in essence creating a wholly new precedent for that state. While reaffirming the general state and federal stance in favor of arbitration as a desirable alternative to court litigation, the court clearly indicated such preference has its limits.

> Although arbitration decisions are given great deference, they are not sacrosanct. Here we cannot say that the strong public policy favoring arbitration should trump the explicit, well-defined, and dominant public policy that laws should be enforced without racial or religious discrimination, and the public should reasonably perceive this to be so.[90]

Note also this decision was issued approximately one year after the U.S. Supreme Court decision in the *Hall Street* case. This highlights the dual nature of the U.S. court systems: the Nebraska high court reviewed the case under the terms of the Nebraska Uniform Arbitration Act and apparently did not feel compelled by the *Hall Street* precedent to narrow its grounds for review.

D. MASSACHUSETTS

As noted previously, police chiefs are particularly upset by decisions in which an arbitrator acknowledges an officer's misconduct, but deems the misconduct insufficient to justify discharge as a penalty. Massachusetts offers a number of such cases in which the public policy exception has been raised. As an example, consider the case of Boston Police Officer John DiSciullo. While on-duty, he encountered a double parked car. Words were exchanged with one of the car's occupants. Other passengers in the car were threatened, and two persons were arrested for disorderly conduct. Officer DiSciullo then added additional felony charges including assault and battery of a police officer. An internal investigation concluded, among other findings, that the assault and battery charges were

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[89] *Supra* note 83, at 245.

[90] *Id*. at 265–66.

groundless. Officer DiSciullo had falsified his incident report, and had assaulted and threatened the citizen.[91] He was discharged.[92]

The Boston Police Patrolmen's Association (BPPA) grieved the discharge on behalf of Mr. DiSciullo. The arbitrator did not find sufficient evidence to uphold the allegation that the officer had threatened one of the car's occupants, but essentially upheld many other findings. She deemed the officer's sworn arbitration testimony as "transparently phony."[93] Despite the numerous allegations proved, the arbitrator decided a one year's suspension was sufficient. To appreciate more fully the inexplicability of this decision (from a police chief's perspective), it should be noted that a significant trend in police disciplinary practices in recent years is growing support for a policy of "You lie, you die"; *i.e.*, an officer's false report or testimony (especially in the course of an internal investigation) constitutes grounds for discharge in and of itself, separate from the underlying incident being investigated.[94] An officer with a proven track record of lying is in essence damaged goods. His/Her credibility when testifying in any subsequent proceedings, either civil, criminal, or administrative, can easily be challenged. That person's worth and utility as an officer is thus seriously compromised for years afterwards. Here the arbitrator essentially called the officer an outright liar, in addition to his other transgressions, but felt these were not sufficient to warrant discharge.

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[91] City of Boston v. Boston Police Patrolmen's Ass'n, 824 N.E.2d 855, 857 (Mass. 2005).

[92] *Id*. at 816. As additional evidence of the political power of police officers' unions and associations, in keeping with Boston police norms, Officer DiSciullo was on paid administrative leave during the pendency of the internal disciplinary investigation and hearing. In short, as a direct result of being accused of serious misconduct, he was rewarded an unspecified number of months of full pay for not working. This practice is widespread, and not unique to Boston. For most employees, paid time off from work is usually called vacation. Why financially strapped public agencies so frequently follow this practice is a separate question beyond the scope of this study. *See also* Barton & Diedrich, *supra* note 43.

[93] *Supra* note 33, at 816.

[94] *See, e.g.*, Enric Volante, *New Rule for Cops: You Lie, You're Out*, ARIZ. DAILY STAR, Apr. 22, 2002.

The City of Boston understandably sought to vacate the arbitrator's decision. A Superior Court judge denied the City's motion, and granted the BPPA's motion to confirm the arbitration award. The Appeals Court affirmed the lower court's decision. However, the Massachusetts Supreme Judicial Court (that state's court of last resort) took a different position:

> Given the arbitrator's findings that DiSciullo had falsely arrested two individuals on misdemeanor and felony charges, lied in sworn testimony and over a period of two years about his official conduct, and knowingly and intentionally squandered the resources of the criminal justice system on false pretexts, an agreement to reinstate DiSciullo would offend public policy.[95]

In ordering the reinstatement of the discharge decision, and vacating the arbitration award, the Court stated:

> Although arbitration decisions are given great deference, they are not sacrosanct. Here we cannot say that the strong public policy favoring arbitration should trump the strong (and in our view stronger) public policy,[96] "explicit, well-defined and dominant," . . . that police officers be truthful and obey the law in the performance of their official duties.[97]

Massachusetts' statutory language on vacating arbitration decisions is in many respects similar to Nebraska's:

> . . . the superior court shall vacate an award if
> (1) the award was procured by corruption, fraud or other undue means;
> (2) there was evident partiality by an arbitrator appointed as a neutral, or corruption in any of the arbitrators, or misconduct prejudicing the rights of any party;

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[95] *Supra* note 33, at 819.

[96] Note the Nebraska Supreme Court used this identical wording in the *Henderson* case, *supra* note 84, at 241-42.

[97] *Supra* note 33, at 823.

> (3) the arbitrators exceeded their powers or rendered an award requiring a person to commit an act or engage in conduct prohibited by state or federal law;
> (4) the arbitrators refused to postpone the hearing upon a sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section five as to prejudice substantially the rights of a party;
> (5) there was no arbitration agreement and the issue was not adversely determined in proceedings under section two and the party did not participate in the arbitration hearing without raising the objection; but the fact that the award orders reinstatement of an employee with or without back pay or grants relief such that it could not grant or would not be granted by a court of law or equity shall not be ground for vacating or refusing to confirm the award.[98]

There is no explicit public policy exception as such. The closest is section (3), which calls for vacating an arbitration decision if it required conduct prohibited by state or federal law. How this applies in practice, however, is case-law driven.

The state's high court has addressed the scope of this public policy exception in other cases involving public employees. An arbitrator's decision reversed the discharge of a public school teacher who had used physical force against students on three separate occasions.[99] The penalty reinstated him to his position, although without back pay, thus imposing a suspension of approximately ten months.[100] The school district challenged this, and in the end the high court reversed the arbitration decision and reinstated the discharge order. Interestingly, the court noted that the original discharge decision was grounded in a state statute. The court acknowledged an arbitrator's primacy in interpreting a contractual dispute,

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[98] *Compare* MASS. GEN. LAWS ch. 150C § 11 (West 2012), *with* NEB. REV. STAT. § 25-2613 (West 2012).

[99] Sch. Dist. of Beverly v. Geller, 435 Mass. 223, 226–27 (2001).

[100] *Id*. at 227.

but indicated the court would not defer to an arbitrator on issues on statutory interpretation: that remained the court's prerogative.[101]

In a non-disciplinary public employee case, an individual, William Wick, was denied employment as a rail repairer for the Boston transit system. He was hearing impaired, but was not allowed to use his hearing aids during the test, and thus failed the job's physical exam.[102] He then filed a handicap based state law discrimination claim. The transit system settled the matter by paying a $16,000 settlement, offering him employment (and a reasonable accommodation of allowing him to use his hearing aids on the job) with seniority retroactive to the date he would have begun employment.[103] The union later objected, arguing on behalf of another employee who was denied his selection of shift due to Wick's greater seniority. An arbitrator granted the grievance, concluding that since Wick was granted seniority by virtue of a settlement, not a court verdict affirming discrimination had taken place, Wick should be stripped of the seniority covering the period he was not actually working (1999–2004).[104] Ultimately, the transit system (and Wick) prevailed.

> The union does not argue that Wick was not handicapped or that he is not capable of performing the essential functions of his job with the reasonable accommodation of the use of hearing aids. There is no question that the MBTA withdrew its employment offer to Wick because he failed the hearing test. Where the settlement [of Wicks' employment discrimination claim] is presumptively legitimate, and where the union has not shown that the settlement was a sham and in derogation of the collective bargaining agreement, public policy required the collective bargaining agreement to yield to Wick's settlement agreement.[105]

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[101] *Id*. at 229-30.

[102] Mass. Bay Transit Auth. v. Local 589, 454 Mass. 19, 21 (2009).

[103] *Id*.

[104] *Id*. at 23.

[105] *Id*. at 29–30.

However, these decisions should not be construed as an expression of strong judicial readiness to reverse arbitration decisions. In a number of other cases, that same court has taken an opposing stance.

In *City of Lynn v. Thompson*, an arbitrator reversed the discharge of an officer who had broken the arm of a mentally ill woman whom he was attempting to restrain in order to take her to a psychiatric facility. The allegation of use of excessive force was not sustained. The arbitrator found the officer "lacking in sensitivity." His action, sustained as to conduct unbecoming an officer, was deemed to warrant a two weeks' suspension without pay.[106]

The City of Lynn went to Superior Court in an effort to have the arbitration award vacated, and the original discharge order reinstated. The Superior Court so ordered. On appeal, the Massachusetts Appeals Court affirmed the Superior Court's decision. However, the Supreme Judicial Court concluded otherwise:

> One may well take issue with the arbitrator's analysis. The conclusion that an officer, whose record includes a civil rights judgment against himself and the city for excessive force (including an award of $30,000 in punitive damages), nevertheless has an unblemished record because another arbitrator determined that Thompson should not be disciplined for that incident, appears notably unsound. Similarly, the conclusion that force sufficient to break a person's arm, even the arm of a person with fragile bones, is not "excessive" when the person does not even pose a current danger to the officers is a conclusion that seems indefensible. Finally, common sense would dictate that the city would not voluntarily pay E.R. $350,000 to settle her civil rights claim unless there were significant evidence supporting that claim. *Yet, we are not free to ignore the arbitrator's conclusions merely because they appear unsound, poorly reasoned, or otherwise flawed* (emphasis added).[107]

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[106] City of Lynn v. Thompson, 435 Mass. 54, 59 (2001).

[107] *Id*. at 64.

The Court went on to note that it is obligated to accept an arbitrator's factual determinations, "[e]ven a grossly erroneous [arbitration] decision is binding in the absence of fraud."[108] This concept has been endorsed by a number of state courts, and the U.S. Supreme Court, which stated " . . . that a court is convinced he [an arbitrator] committed serious error does not suffice to overturn his decision."[109]

The Supreme Judicial Court has also refused to overturn, on public policy grounds, an arbitrator's decision reinstating a state highway department employee, discharged for possession at work of a handgun (with an obliterated serial number).[110] The reinstatement awarded no back pay. Thus, his disciplinary penalty was reduced from discharge to a suspension of approximately seven months. The court declined to reverse on public policy grounds. "Arbitration awards reinstating public employees are therefore upheld if the public policy, while disfavoring the employee's conduct, does not require dismissal."[111]

Similarly, the same court declined to reverse the arbitration decision reducing two discharges to suspensions of three months each.[112] These employees had used their official positions to access online state tax records of both Boston sports celebrities and managers in their own department. Citing the highway department case just mentioned, the court noted the Bureau of Special Investigations did have a clearly articulated public policy of protecting confidential information. But there was no explicit policy *requiring* discharge of offending employees. Thus,

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[108] *Id.* at 61–62.

[109] *Supra* note 26, at 38. One could hardly devise a better way to encourage sloppy legal work and discourage attorney accountability than having case law precedents which consistently affirm near-total acceptance of arbitrators' factual and legal determinations, no matter how outrageous or erroneous those decisions might be. Fuller exploration of this key issue, however, is beyond the scope of this paper.

[110] Mass. Highway Dep't. v. AFSCME, 420 Mass. 13, 20–21 (1994).

[111] *Id*. at 19.

[112] Bureau of Special Investigations v. Coal. of Pub. Safety, 430 Mass. 601, 602, 606 (2000).

upholding, or reducing, the penalty was properly within the arbitrator's discretion, and not a matter for court intervention.[113]

Lower courts have also addressed these public policy issues, with varying results The Appeals Court refused to vacate the reinstatement of a county jail officer, previously discharged for his role in covering up the beating of an inmate.[114] However, the same court reinstated the discharge of a Boston police officer, involved in use of excessive force in an off-duty incident.[115] An arbitrator had found the conduct "offensive, way out-of-line and worthy of substantial discipline" but reduced the penalty to a suspension of six months, resulting in back pay and benefits being awarded.[116] The Appeals Court vacated the arbitration decision, and reinstated the discharge order, noting that as a matter of public policy, someone could not be hired (or presumably remain) as a police officer if he had engaged in felonious *conduct*, even in the absence of an actual felony *conviction*.[117]

A variety of trial court decisions, and unpublished appellate court opinions, make it clear that despite statutory narrowness, Massachusetts courts are, unlike their Texas and Pennsylvania counterparts, willing to engage the public policy exception to arbitration in a variety of cases.[118]

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[113] *Id*. at 605–06.

[114] Sheriff of Suffolk Cnty. v. Jail Officers & Emps. of Suffolk Cnty., 860 N.E.2d 963, 966–67 (Mass. App. 2007).

[115] City of Boston v. BPPA, 907 N.E.2d 241, 243 (Mass. App. 2009).

[116] *Id*. at 242.

[117] *Id*. at 242.

[118] *See, e.g.*, Mass. Corr. Officers Federated Union v. Dep't. of Corr., No. 09-P-849, 2010 Mass. App. Unpub. LEXIS 166 (2010) (union moved to set aside an arbitration decision upholding a correctional officer's discharge for use of force against an inmate; union argued unsuccessfully the arbitrator had exceeded his authority); Essex Cnty. Sheriff's Dep't. v. Essex Cnty. Corr. Officers Ass'n., 27 Mass. L. Rep. 487 (Mass. 2010) (ruling the arbitration award reinstating sheriff's supervisors to duty reversed, discharge order reinstated; these supervisors allowed racist and sexually harassing comments to be posted on a union sponsored website).

E. ILLINOIS

Illinois also presents a pattern of significant court willingness to consider motions to set aside arbitration decisions, involving both police officers and other public employees. In one of the most recent such cases, the Chicago Transit Authority (CTA) discharged a bus driver, Maurice Gibson, when it learned he had been convicted of aggravated criminal sexual abuse (frequent sexual conduct with his thirteen-year-old stepdaughter), and had violated terms of his felony probation in having unsupervised contact with minors (passengers on his bus). The transit workers union filed a grievance. An arbitrator issued a decision, reinstating the driver. The arbitrator noted that Gibson posed a very low risk for further offenses, given that years had elapsed since the initial felony, with no indication of any further incidents.[119]

The CTA sued, seeking to have the arbitrator's award set aside. The trial court denied the CTA's claim. On appeal, the Illinois Appellate Court noted that court review of an arbitration award is very limited. The parties voluntarily agreed that an arbitrator, not a judge, would resolve disputes. "A labor arbitration award must be enforced if the arbitrator acts within his scope of authority and the award draws its essence from the parties' collective bargaining agreement."[120]

The Court went on, stating "[h]owever, a court will vacate the award if it is repugnant to the established norms of public policy."[121] The Court further reiterated the narrow requirements set forth by the U.S. Supreme Court in the *Grace* decision, quoted above. With those as its criteria, the Illinois court went on to determine that Illinois has clearly set forth well-defined and dominant public policies both in terms of the safe and secure transportation of passengers, and protection of the public, especially juveniles, from convicted sex offenders. Finding clear statutory support for these policies, the arbitrator's decision was reversed as

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[119] Chi. Transit Auth. v. ATU Local 241, 399 Ill. App. 3d 689, 694 (2010).

[120] *Id*. at 696.

[121] *Id*.

contrary to those policies, thus reinstating Gibson's discharge from employment.[122]

This case is perhaps the most recent in a series of Illinois Appellate Court and Illinois Supreme Court decisions negating arbitration awards. In a case involving the Illinois State Police, the Illinois Appellate Court addressed two separate, unrelated cases involving state troopers, in which essentially the same legal issue arose. In both, there were criminal investigations of state troopers, one of whom allegedly had sex with a fourteen-year-old girl. In both cases, the suspect troopers waived *Miranda* rights and gave statements. However, they were not advised of additional rights concerning such interrogations, under the troopers' collective bargaining agreement. Those rights came into play during administrative investigations. The initial statements resulted in the troopers being placed in a no-pay status for some period of time. The issue for the arbitrator was whether the initial criminal interrogations were violations of the collective bargaining agreement. The arbitrator concluded they were, and ordered back pay compensation for the periods when these troopers were in no-pay status (the arbitration did not address the ultimate disciplinary dispositions of these cases).[123]

The State Police challenged the arbitrator's order. The lower court granted the troopers' union's motion for summary judgment. On appeal, the Illinois Appellate Court reversed the lower court, and vacated the arbitrator's award. The Court found that " . . . the arbitrator's award requiring compliance with Article 7 [of the collective bargaining agreement] for criminal investigations violates the public policy of effective law enforcement."[124]

Disciplinary-related arbitration awards go beyond issues of discharge or suspension. A Springfield officer served a ten days' suspension, and was directed to counseling, arising from an excessive force incident, and was also transferred out—and kept out—of third shift work (in Springfield, 11 p.m. to 7 a.m.) because the perceived likelihood

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[122] *Id*. at 697–98, 702.

[123] Ill. State Police v. Fraternal Order of Police Troopers Lodge No. 41, 323 Ill. App. 3d 322, 326 (2001).

[124] *Id*. at 330.

of an officer using force during those hours is greater.[125] An arbitrator ruled this shift reassignment was in effect a disciplinary action, and one done without just cause. Thus, the award concluded that the officer was in fact entitled to work that shift.[126] The city sued to have the award set aside on the grounds that the award was contrary to public policy and because the arbitrator exceeded his authority. Losing at the trial court stage, the city raised solely the public policy grounds on appeal. That did not prevail. The Illinois Appellate Court noted that police use of excessive force was clearly against public policy. But, the issue here was the department's indefinite, open-ended bar to the officer working in a presumably higher-exposure setting. The ten days' suspension from duty, and counseling, were not at issue. The arbitration award was deemed not contrary to public policy; " . . . the record indicates the arbitrator's award in this case was based upon the particular facts relating to [Officer] Workman's conduct and completed discipline. The public policy issue is not clearly intertwined with the arbitrator's decision."[127] The arbitrator's award addressed solely the officer's preferred work shift, and the employer's action, even though it did not cost the officer lost time (and income) from not working, was deemed disciplinary in nature.

It should be noted the potential pool of police arbitration cases that might otherwise be brought in Illinois courts is significantly reduced by the fact that discharge cases involving sworn personnel of the Chicago Police Department (by far the largest law enforcement agency in the state) are under the exclusive jurisdiction of the Chicago Police Board, and not cognizable before an arbitrator. Similarly, many smaller municipalities have boards of police and fire commissioners, which, among other duties, serve as civil service commissions and provide the *Loudermill* mandated due process opportunity for a police officer or firefighter to contest disciplinary action. Thus, significant disciplinary actions in many

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[125] City of Springfield v. Springfield PBA Unit # 5, 229 Ill. App. 3d 744, 747 (1992).

[126] *Id*. at 745.

[127] *Id*. at 750.

communities bypass arbitration and instead proceed in an administrative law forum, with court review clearly available as an appeals process.[128]

As a result, while arbitration cases involving police officers are very infrequently seen in Illinois case law, Illinois courts have, over the years, used the public policy concept as justification to address arbitrator's awards reversing disciplinary action against public employees, in a variety of non–law enforcement public agencies. The state's highest court endorsed the public policy exception in the case of a state Department of Children and Family Services (DCFS) case worker who falsified a progress report on the status of children whose welfare she was responsible for monitoring. She reported the children were "doing fine," when in fact they had all perished in a fire the previous month.[129] An arbitrator reversed her discharge, citing DCFS's failure to impose discipline in a timely manner, as required by the contract. That failure, the arbitrator added, made it unnecessary to address the merits of the case. The circuit court reversed the arbitration decision on public policy grounds, and remanded the matter for additional proceedings. On remand, the union 'demurred,' and stood by the original arbitration decision. The arbitrator then denied the grievance, stating the demurral prevented him from a hearing on the merits per the court remand. The Illinois Appellate Court reversed the circuit court and confirmed the arbitrator's original decision to reinstate the worker. However, the Illinois Supreme Court, citing public policy grounds, reversed the arbitrator. Citing in detail DCFS's legal obligations to oversee the well-being of children, and to provide courts (especially juvenile courts) with accurate reports to assist those courts in many child welfare related cases, the court stated: "We, therefore, have little difficulty in concluding that there exists a 'well-defined and dominant' public policy against DCFS's employment of individuals whose dishonesty and neglect could seriously undermine the welfare, safety, and protection of minors."[130] The decision went on to address the serious consequences—for the public, DCFS case workers, judges who rely upon DCFS child welfare reports, etc.—of allowing the

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[128] *Supra* note 12.

[129] AFSCME v. Dep't of Cent. Mgmt. Serv., 173 Ill. 2d. 299, 301 (1996).

[130] *Id*. at 316.

arbitrator's reinstatement decision to stand. "We will not put our imprimatur on such a disaster. We do not believe that deference to arbitration, *a concept with which we wholeheartedly agree*, suffers at all if the judiciary retains the right to keep arbitrators within the bounds of public policy" (emphasis added).[131]

Similarly, another DCFS case worker (in a separate matter) was discharged after she fabricated an interview with a witness in her investigation of an alleged child abuse case.[132] The arbitrator reversed the discharge as inconsistent with the progressive discipline requirements of the collective bargaining agreement. The Illinois Appellate Court reversed the arbitration award and reinstated the discharge order on public policy grounds. Noting such grounds must be based on clearly articulated laws, not some generalized consideration of supposed public interests, the court cited perhaps two dozen specific statutes which specifically address the state interest in protecting children.[133] The court noted that truthful, accurate reports are an integral part of addressing this public policy. "Her lies defeat the essential purpose of her job—to investigate child abuse and protect children and families."[134]

In another locally well-publicized case, twenty-eight on- and off-duty Chicago firefighters were caught on videotape, at a firehouse retirement party for a colleague. They were drinking alcoholic beverages, exposing themselves on video, and uttering a variety of racial and other slurs. At one point, they interrupted their partying for work, and drove off in their fire engines to respond to an alarm. A variety of disciplinary penalties were handed out, ranging from five day suspensions through discharge.[135] An arbitrator reversed these actions because the employer did

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[131] *Id*. at 335.

[132] Dep't. of Cent. Mgmt. Serv. v. AFSCME, 245 Ill. App. 3d 87 (1993).

[133] *Id.* at 94–95.

[134] *Id*. at 98.

[135] Chi. Fire Fighters Union Local No. 2 v. City of Chi., 323 Ill. App. 3d 168,170 (2001).

not adhere to the time deadlines for internal investigations, as specified in the contract.[136] After lengthy litigation, the Illinois Appellate Court stated:

> Here, the arbitrator's award reinstating the discharged firefighters violates the well-established public policy favoring safe and effective fire prevention services in the critical matter of public safety. The conduct at issue in the present case was recorded on videotape and reveals public safety workers in an on-going state of intoxication, some participants setting about to perform their duties by way of responding to an alarm for a fire.[137]

Once again, as was also the case in the Massachusetts and Nebraska examples discussed above, there was no explicit statutory language requiring or permitting court reversal of an arbitration decision on public policy grounds. Illinois statutes recognize five grounds for a court to vacate arbitration awards.[138] These five grounds closely parallel the first five of the six grounds specified in the Nebraska statutes; the wording is in fact almost identical. Thus, yet another example highlights the reality that the authority for such public policy grounded reversals is typically driven by case law precedent, not legislative action and statutory wording.

F. CONNECTICUT

In sharp contrast to Pennsylvania's statutory requirements and case law precedents which almost enshrine the sanctity of arbitrators' decisions, Connecticut has substantial case law which allows courts significant leeway to vacate arbitration awards on public policy grounds.

Arbitration, especially for public sector employees, is in Connecticut often administered by the Connecticut State Board of

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[136] *Id.* at 171.

[137] *Id.* at 183.

[138] 710 ILL. COMP. STAT. ANN. 5/12(a)(1)(5) (West 2013).

Mediation and Arbitration.[139] Differing from many arbitrations in other states, Connecticut's proceedings are often held before an arbitration panel rather than a sole arbitrator.

The wording of the pertinent statute in Connecticut is no more inviting of judicial intervention on public policy grounds than are its equivalents in other states. Court vacation of arbitration awards is authorized under the following conditions; note the similarities between this wording and that of other states:

> (1) If the award has been procured by corruption, fraud or undue means;
> (2) if there has been evident partiality or corruption on the part of any arbitrator;
> (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or
> (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.[140]

Note that unlike Massachusetts' statute (quoted above), Connecticut is silent as to a court vacating an arbitration award that requires a party to commit an illegal act. Despite the narrow scope of these grounds, Connecticut courts have not been reluctant to set aside arbitration decisions, in cases involving both police officers and other public employees. Courts in that state rely upon the *Schoonmaker* precedent in which the Connecticut Supreme Court held:

> Although we recognize the important role that arbitration plays in settling private disputes, we take this opportunity to articulate expressly the role of the judiciary in reviewing public policy challenges to consensual arbitration awards. We conclude that when an arbitrator has been called upon

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[139] *See* CONN. DEP'T OF LABOR, http://www.ctdol.state.ct.us/csblr/default.htm (last visited Aug. 25, 2011).

[140] CONN. GEN. STAT. ANN. § 52-418 (West 2013).

> to determine whether an employment agreement violates a legitimate and clearly established public policy . . . de novo review is proper.[141]

There are examples of court reversals of arbitration decisions which predate the *Schoonmaker* case; this precedent clearly gave lower Connecticut courts substantially more latitude in addressing public policy challenges than before. Not surprisingly, there are numerous examples of courts using this authority. For example, in one case, a police officer was discharged after it was determined that he harassed and intimidated several females, groped their buttocks, made sexual remarks and asked one to display her breasts.[142] An arbitration panel agreed this misconduct had occurred, but, citing various procedural violations (such as a delay in acting on the citizens' complaints), reinstated him to duty although without back pay.[143] The city, understandably reluctant to have such an individual back at work in a position of police authority, challenged the arbitration decision.[144] The trial court granted the city's motion to vacate the arbitration decision. The officer appealed. The Connecticut Appellate Court affirmed the trial court, noting well-defined public policies against such misconduct, including both sexual harassment under Connecticut law, and also civil rights violations under 42 U.S.C. § 1983.[145] The court then noted that Stanley's reinstatement would be a clear breach of public policy. "When a municipal employee violates the public policies enumerated in state statutes and employment regulations, a reviewing court cannot enforce an arbitral award reinstating him to employment as a police officer."[146]

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[141] Samuel V. Schoonmaker III v. Cummings & Lockwood of Conn., P.C., 747 A.2d 1017, 1024 (Conn. 2000).

[142] Bd. of Police Comm'r of the City of Ansonia v. Stanley, 887 A.2d 394 (Conn. App. Ct. 2005).

[143] *Id.* at 400.

[144] This is yet another example of the issue previously noted: police chiefs' outrage at arbitrators who conclude serious misconduct did in fact occur, but nonetheless feel it was not sufficient to justify discharge.

[145] *Id.* at 404–05.

[146] *Id*. at 406.

In another case, a police officer was discharged for a number of infractions, including revealing the identity of a confidential informant. An arbitration panel upheld guilt but reduced the penalty to a suspension of 150 days. The time the officer had been off duty was substantially longer by the time of decision, making him eligible for back pay.[147] The employer filed to vacate the arbitration decision. The trial court so ordered. On appeal, the Appellate Court of Connecticut affirmed the trial court. In support of the public policy breach alleged by the employer, that court cited various statutes which make clear that the identity of confidential informants is just that—confidential—and affirmed the trial court's decision in vacating the arbitration award.[148]

In a field related to police work, Connecticut courts have issued a number of decisions affirming reversal of arbitration decisions reinstating discharged state corrections officers. One officer was discharged for leaving an obscene, racist phone voice mail to a state senator, making the call from work, on a state telephone, while on duty. The arbitration decisions reduced the penalty to a sixty days' suspension. The trial court vacated the arbitration award; the Supreme Court of Connecticut affirmed that decision.[149]

In an Appellate Court case, the court reversed an arbitration award reinstating a discharged corrections officer who had engaged in an ongoing pattern of sexual harassment, reducing his penalty from discharge to a suspension of one year.[150] Significantly, the court based its decision in large part on the arbitrator's finding of fact that harassment had in fact occurred.[151] The court noted the oft-mentioned deference to arbitration as a preferred means of dispute resolution, but then added, "[b]ecause the plaintiff's challenge raises such a [violation of public policy] claim, we undertake de novo review of the award. In this regard, we emphasize that

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[147] Town of South Windsor v. South Windsor Police Union, 677 A.2d 464, 466-67 (Conn. App. Ct. 1996).

[148] *Id.* at 470.

[149] State v. AFSCME, Council 4, Local 387, 747 A.2d 480 (Conn. 2000).

[150] State v. AFSCME, Council 4, Local 391, 7 A.3d 931 (Conn. App. Ct. 2010).

[151] *Id.* at 939–40.

in conducting our review, we are not concerned with the correctness of the arbitrator's decision; our concern is only whether the award can be lawfully enforced."[152] This, in essence, conforms to the U.S. Supreme Court's decision in *Eastern Associated Coal*, noting the key point is not whether the employee's misconduct itself violates public policy, but whether the agreement to reinstate him does so.[153]

In yet another case, a trial court's recent decision addressed the state's claim to set aside an arbitration decision reducing a corrections officer's discharge to two suspensions totaling thirty-five days. This individual had used, purchased and dealt narcotics, and lied to investigators. The court, again relying on the arbitration's findings of fact, determined the misconduct had occurred and from there proceeded to hold that these actions violated clearly defined public policy. The arbitration award was thus vacated.[154]

In various other cases involving arbitration of public employees' discharges for cause, the Connecticut Supreme Court upheld the vacatur of a decision reinstating an employee who pled nolo contendre to embezzling town funds.[155] The Appellate Court voided the reinstatement of a driver for the Department of Children and Families who had been found criminally guilty of possession with intent to sell of both marijuana and

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[152] *Id.* at 937. As of June 26, 2013, the case is open and pending before the Connecticut Supreme Court, with review limited to the following issue: "Did the Appellate Court properly conclude that the arbitration award was correctly vacated on the ground that it violated the public policy against workplace sexual harassment?" State v. AFSCME, Council 4, Local 391, 13 A.2d 1101–02 (Conn. 2011).

[153] E. Associated Coal Corp. v. United Mine Workers of Am., District 17, 531 U.S. 57, 62–63 (2000).

[154] State v. AFSCME Council 4, Local 391, No. HHD-CV10-6010997-S, 2011 Conn. Super. LEXIS 880 (Conn. Super. Ct. 2011). The union subsequently appealed that decision, but then withdrew the appeal in January 2012. *See* Docket for HHD-CV10-6010997-S, STATE OF CONN. JUDICIAL BRANCH, http://civilinquiry.jud.ct.gov/CaseDetail/PublicCaseDetail.aspx?DocketNo=HHDCV1060 10997S (last modified Jan. 23, 2012).

[155] Town of Groton v. United Steelworkers of Am., 757 A.2d 501 (Conn. 2000).

cocaine;[156] and the Superior Court granted a motion to vacate an arbitration award reversing the discharge of a police officer who lied.[157]

Public policy grounds can also be claimed by employees and their unions as justification for reversing an unfavorable arbitration award. Thus, an arbitration award upheld the discharge of a corrections officer for undue familiarity with inmates, and engaging in unprofessional behavior.[158] The union unsuccessfully claimed the decision violated public policy, alleging that discipline was applied unevenly, thus denying equal protection of the law, in violation of the Fourteenth Amendment. The court rejected this argument.

In a novel twist, one discharged police officer sought court action to reverse an arbitration decision on unusual public policy grounds. This part-time constable was discharged after he was found to have used racist and profane slurs in discussing whom he would not work with on future assignments. An arbitration panel upheld his discharge, whereupon he sued, claiming the panel's *failure* to reinstate him to duty was a violation of public policy. The trial court denied his claim. Not content, he appealed. The Connecticut Appellate Court ruled, "additionally, in light of Senn's use of a highly derogatory racial slur regarding his fellow officers, we find astonishing the plaintiff's claim that considerations of public policy require his return to his law enforcement duties. Suffice it to say, we disagree."[159] As a side-note, this speaks to the oft-noted tenacity of police unions in aggressively supporting officers accused of blatant misconduct. The constable's union, acting on his behalf (the union, not the officer, was the plaintiff party in this case), invested its presumably scarce resources to pursue a near-frivolous appeal that had the most dubious chances for success.

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[156] State v. AFSCME, Council 4, Local 2663, 758 A.2d 387 (Conn. App. Ct. 2000).

[157] Town of Bloomfield v. United Electrical Radio & Machine Workers of Am./Conn. Indep. Police Union Local No. 14, 916 A.2d 882 (Conn. Super. Ct. 2006).

[158] AFSCME, Council 4, Local 1565 v. State Dep't of Corr., No. CV 04-0524924, 2005 Conn. Super. LEXIS 3646 (Conn. Super. Ct. 2005).

[159] Westbrook Police Union, Local 1257, Council 15 v. Town of Westbrook, 6 A.3d 1164, 1167 (Conn. App. Ct. 2010).

These decisions have been applied in a variety of public sector employment cases. In Connecticut, reversal of arbitration awards on public policy grounds is not limited simply to employee disciplinary proceedings. The scope of subjects raised is more varied than in other states. In one case example, the union representing staff attorneys working for the Connecticut Commission on Human Rights and Opportunities grieved the denial of overtime pay. The state's position was that these attorneys were salaried professional employees and, as such, ineligible for overtime. An arbitrator sided with the union. The state went to court to have the decision vacated. The trial court confirmed the arbitration decision. On appeal, the state claimed the " . . . arbitration award violates the clear public policy of prohibiting professional employees from receiving overtime compensation."[160] The court denied the appeal, and affirmed the trial court's decision. For our purposes here, the specific case outcome is less important than the unusual circumstances of the public policy exception being raised in a wholly non-disciplinary context.

One should not conclude that Connecticut courts routinely reverse arbitration decisions. There are any number of cases in which losing parties have sought court vacatur of arbitration awards on public policy grounds, and have failed in those attempts. But the various cases cited above illustrate the point that, unlike Texas and Pennsylvania, Connecticut courts are reasonably receptive to careful consideration of such efforts. Again, this is entirely a case-law driven practice. The wording of the pertinent Connecticut statute is no more inviting of a public policy claim than is its Texas counterpart. The crucial difference is how courts interpret that statutory wording.

CONCLUSION

The above examples, drawn from several states, are presented to provide a broad overview of the issue, not to present a comprehensive fifty states' comparison of case law and statutes on the subject.

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[160] State v. AFSCME, Council 4, Local 2663, 777 A.2d 169, 177 (Conn. 2001).

The various states profiled herein show a variety of approaches to the public policy exception in operation. In Pennsylvania, the statutory wording of Act 111 severely constrains court options for judicial review. Court precedents take that very narrow statutory window of opportunity, and narrow it even further.

Texas presents an example of a state in which courts have fairly consistently declined to set case law precedent and create a public policy exception. Interestingly, Texas is widely perceived by many as a state that is not particularly hospitable to organized labor. In contrast, Illinois, Massachusetts and Connecticut are states in which organized labor is perceived as having much more political clout. Yet courts in the more labor friendly states have issued a number of precedents that can undercut pro-labor arbitration decisions, while courts in the less organized labor friendly state have chosen not to make such decisions. Detailed analysis of how such extra-legal factors may play a role in shaping these courts' decisions is beyond the scope of the paper, but nonetheless they warrant mention at this point.

In Nebraska, a statutory and case law void was filled in 2009 when the Nebraska Supreme Court saw fit to create a public policy exception. How widely—or narrowly—that exception will be applied in other cases is a question which can be answered only through the passage of time, as that state's courts are called upon to address other such cases.

Massachusetts and Illinois present examples of state court precedents which appear, in comparison to other states, fairly generous (from a public employer's perspective) in allowing arbitration decisions to be reversed on public policy grounds. Police officers, firefighters, transit system employees, child protective services workers, have all seen their success at disciplinary arbitration proceedings negated through subsequent court litigation. A note of caution is in order, however. While these states may appear fairly open to motions to invoke the public policy exception, these cases in total are a very small minority of the total pool of public employee disciplinary actions reversed by arbitrators. One may reasonably speculate that public employers exercise considerable restraint and opt to

pursue court remedies only in those cases which appear particularly egregious and/or have generated considerable public interest.[161]

Note that almost all of the cases discussed here (with the exception of the *Clark* case in Houston) involve arbitration decisions reversing discipline imposed in discharge cases, not suspensions. In theory, presumably a suspension could be challenged just the same as a discharge. However, as a practical matter, such a case would be a poor candidate to pursue in court. If a police chief ordered an officer suspended for ten days, and an arbitrator then reduced it to five days, or even none, it would be hard to mount a compelling public policy case over such a marginal difference. Thus, there is presumably a great deal of self-control exercised in choosing those cases to pursue in court on public policy grounds. They typically involve discharge decisions, and typically in cases readily perceived as particularly egregious.

Connecticut courts appear fairly open to considering challenges based on public policy grounds. While the various cases typically recite the usual court position of strong deference to arbitration decisions, that incantation clearly carries a significantly different meaning in Connecticut than elsewhere. While numbers for all public employee arbitrations cases are not available, the readings of court decisions suggest that of these six states, Connecticut courts are the ones most willing to intervene on public policy grounds.

This leads to an appropriate note of caution at this point. Comprehensive data on disciplinary arbitrations, either for public employees in general or police officers in particular, are simply not readily available. The fragmented nature of state and local government, and collective bargaining agreements, in the U.S. is a formidable barrier to systematic data collection on this topic. Policing in the U.S. is so decentralized we do not even have a fully accurate count as to the number of police *departments* in this country.[162] Among these thousands of police

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[161] For instance, the author clearly recalls how the Chicago firefighters' fire station party antics (fire house meets *Animal House*) generated a great deal of public attention, with edited clips of the party widely aired on local television news outlets.

[162] While estimates and surveys tend to cluster in the area of 18,000 separate police agencies in the U.S., the author has seen counts as high as 20,000. If those are the

agencies, how many arbitration decisions impacting police officer discipline are issued annually? Of those, how many substantially reduce or reverse police chiefs' decisions in serious cases? Of those, how many, at least in theory, might be reasonably reversed on public policy grounds if courts were receptive to such arguments? How many suits to set aside arbitral decisions on public policy grounds are filed nationwide annually? What proportion of those ultimately prevails?

These questions for now must remain unanswered and unanswerable. A full fifty states' review of comprehensive arbitration data, pertinent statutes and case law is beyond the scope of this essay. The objective here is to inform readers and sensitize them to the fact that on a state by state basis, there is considerable variation in how courts have addressed this issue. And this variation is dynamic, not static, as new precedents (*e.g.*, Nebraska in 2009) emerge or evolve. For a police chief faced with taking back an officer discharged for egregious misconduct, courtesy of an adverse arbitration decision, detailed scrutiny of the existing case law—or the absence of any on point case law—in that particular state may help decide whether mounting a judicial challenge to the arbitration decision is potentially viable. The evolving nature of this issue is illustrated by recent developments in Oregon. As this Article was in the final editorial stages (May, 2013), immediately before publication, the author learned of a case in the briefing stages before the Oregon Court of Appeals.[163] The Portland Police Bureau discharged Officer Ronald Frashour after he fatally shot an unarmed mentally ill man. An arbitrator ordered his reinstatement; the City declined to do so, prompting an unfair labor practices finding from the state Employment Relations Bureau. At issue in this case is who has the authority in excessive force cases to determine if discipline is consistent with public policy or not—the Chief of Police or the arbitrator. This case, when decided, will likely set an important precedent for that state.

Future changes are difficult to predict. As this was written (2011–2012), anti–public union employee sentiment in various state houses and

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worst case extremes, either someone is counting as many as 2,000 departments which do not exist, or someone else is failing to count 2,000 departments which do exist!

[163] Portland Police Ass'n v. City of Portland, Cal., No. A 152657 (Or. Ct. App. filed 2013).

state legislatures was strong, with significant efforts to restrict those unions' prerogatives advanced in Ohio, Wisconsin and elsewhere. While efforts to diminish arbitrators' powers have not been a major component of these efforts, one could easily see such a trend evolving, given the perceived pro-union bias of these arbitrators. On the other hand, as noted previously, police and fire unions enjoy a particularly powerful and positive position, which may help to immunize them from any potential moves to constrain arbitrators' authority.

In summary, police chiefs (and the heads of other governmental agencies), faced with the prospect of taking back a public employee whose discharge for misconduct has been voided by an arbitrator, should keep the following principle in mind:

> *Binding arbitration of police officers' disciplinary cases is always binding—except when it's not!*

YOUR TAX DOLLARS AT WORK!
CHICAGO POLICE LAWSUIT PAYMENTS: HOW MUCH, AND FOR WHAT?

Mark Iris, Ph.D.[*]

TABLE OF CONTENTS

INTRODUCTION 26

I. SITE SELECTION AND DATA 31

II. FINDINGS 37

III. CIVIL RIGHTS SUITS 40

IV. WRONGFUL CONVICTIONS 44

V. TORTS 46

VI. PURSUIT CASES 47

VII. OTHER CASES 49

VIII. OTHER COSTS 51

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[*] Department of Political Science and Mathematical Methods in the Social Sciences Program, Northwestern University. The author wishes to recognize the efforts of Ms. Janus Pan, Weinberg College of Arts and Sciences (WCAS), of Northwestern University, Class of 2013 and now a student at UCLA School of Law. As an undergraduate research assistant, Janus did an exemplary job of editing the data spreadsheet for this project. The author also wishes to thank WCAS for underwriting Ms. Pan's work through a grant from the Wendy DeMonchaux Fund, which supports female students engaged in quantitative research. The author wishes to thank Professor Roger Goldman, School of Law, St. Louis University, and Professor Wesley Skogan, Department of Political Science, Northwestern University, for their reviews and suggestions after reading an earlier draft of this work.

IX. SETTLEMENT VERSUS TRIALS 53

X. DISCUSSION 56

XI. POSTSCRIPT 60

INTRODUCTION

LAPD crash will cost city $6.6 million[1]

Wrongful-death suit vs. [Philadelphia] officer settled for $500,000[2]

Seattle to Pay Man $185,000 to Settle Civil Rights Lawsuit[3]

[New York] City Pays $98,000 to Critical Mass Cyclists[4]

[Houston] Jury Awards Man $5M in Lawsuit over Prison Time[5]

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[1] Joel Rubin & David Zahniser, *LAPD Crash Will Cost City $6.6 Million; Settlement Over Woman's Death Is the Latest Payout Related to Police Driving*, L.A. TIMES, June 30, 2012, at AA1.

[2] Julie Shaw, *Wrongful Death Suit vs. Officer Settled for $500,000*, PHILA. DAILY NEWS, Jan. 25, 2011, at 6.

[3] Scott Gutierrez, *Seattle to Pay Man $185,000 to Settle Civil Rights Lawsuit*, SEATTLE POST-INTELLIGENCER, Nov. 24, 2007, at B2.

[4] Anahad O'Connor, *City Pays $98,000 to Critical Mass Cyclists*, CITY ROOM BLOG, (Mar. 30, 2010), *available at* http://cityroom.blogs.nytimes.com/2010/03/30/city-pays-98000-to-critical-mass-cyclists/?_r=0.

[5] *Jury Awards Man $5 M in Lawsuit Over Prison Time*, ASSOCIATED PRESS, June 26, 2009, *available at* http://www.boston.com/news/nation/articles/2009/06/25/jury_awards_man_5m_in_lawsuit_over_prison_time/.

Wrongfully Convicted Boston Man Awarded $14M[6]

No Daley Deposition in Burge Lawsuit: Ex-prisoner who alleged police torture in line to get $5.375M settlement[7]

Lawsuits alleging wrongs committed by police officers are a fact of life. Verdicts and settlements similar to those noted above are paid out in major—and not so major—jurisdictions across the country. For police managers and other local officials, these lawsuits are significant for at least two very important reasons. First, each lawsuit clearly communicates that someone in the public is very dissatisfied, even outraged, with the perceived misconduct of the local police. Thus, a lawsuit represents some degree of failure of police-community relations, an erosion of public confidence in the police. Second, these lawsuits are a drain on local funds. The financial costs include not only monies paid to plaintiffs as the result of out of court settlements and trial verdict judgments, but also legal expenses.

While the issue of lost public trust reflected by lawsuits is an important question, this paper will address the second question: *how much do these lawsuits cost?* Intuitively, many major city police chiefs might respond, "a lot!"

Empirically, that answer is less than satisfactory. The anecdotal cases, the headlines of the sort noted above, do not present a comprehensive overview of what is happening. An eye-catching headline is disproportionately likely to capture the exceptional case, the litigation atypical of what takes place, usually because of the cost.

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[6] Dennis Lavoie, *Wrongfully Convicted Boston Man Awarded $14 M*, ASSOCIATED PRESS, Oct. 21, 2009, *available at* http://seattletimes.com/html/nationworld/2010107413_apuswrongfulconviction.html.

[7] John Byrne, *No Daley Deposition in Burge Lawsuit: Ex-prisoner who alleged police torture in line to get $5.375M settlement*, CHIC. TRIBUNE, July 24, 2012, at 4.

Previous research in this field is surprisingly very limited. Chiabi examined 42 U.S.C. § 1983 suits against police, filed in U.S. District Courts for the Southern and Eastern Districts of New York (effectively New York City and many of its surrounding suburbs) during 1983-1987.[8] While useful, the study's utility is limited by its age, using data that are now over a quarter of a century old. Additionally, the study is at once both too broad and too narrow—too broad in that by focusing on court *filings* in two U.S. district courts, it captures numerous separate police agencies within the jurisdictions of those two courts, and therefore not revealing a particular agency's experience, and too narrow by *not* covering *state court* filings. State court litigation, as will be shown later, can be a significant and very costly component of the overall police litigation landscape. Of undoubtedly greater significance, Chiabi's study also examined only judgments, thus missing the scope and impact of a crucial factor: settlements, which in all likelihood substantially outnumbered judgments.

The limited work previously done in this area is the result of a very common and basic problem. Police agencies tend not to be forthcoming with these data. In fact, too often the data are simply not available. Perhaps the most telling piece in the literature deals not with data on the costs of litigation, but the *absence* of these data. Miller and Wright pointedly noted: ". . . many civil claims against police are resolved either before a case is filed, or through secret settlements and judgments sealed by courts. Police departments, cities and counties are settling strong cases, and perhaps even less strong cases, but they are requiring (and probably paying for) sealed agreements."[9]

Such a lack of transparency is commonplace, and may in fact be spreading. New York City recently "quietly adopted a practice of withholding from public filings how much it pays to settle most federal

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[8] David K. Chiabi, *Police Civil Liability: An Analysis of Section 1983 Actions in the Eastern and Southern Districts of New York*, 21 AM. J. CRIM. JUST. 83, 83-102 *(*1996).

[9] Marc L. Miller & Ronald Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 775 (2004).

court cases filed against the city or its employees."[10] Omission of the actual settlement amounts from court records is specifically required as a condition of settling these cases, although reportedly the city would honor specific Freedom of Information Act requests. The policy originally dealt with labor and employment cases, and was later expanded to cover suits against the police.[11]

While newspapers may pick up on the sensational verdict with the exceptionally large judgment, many garden-variety cases are settled for lesser amounts and escape media attention.[12] There are some exceptions. In a few cities, newspapers have been able to access data on both judgments and settlements. One study found that New York City paid nearly $1,000,000,000 in police lawsuit payments over the course of a decade.[13] Another study found that Chicago paid in excess of $45,000,000 during a period of just under three years for police misconduct lawsuits.[14] But these, and similar media reports in other cities, are typically both vague and incomplete. Exactly what is a "police misconduct" lawsuit? What sorts of cases are included in these tallies of payments? And, even more significantly, what sorts of cases are *not* included? The accounts cited above, and others, do not address these crucial questions, because they focus only on part of the litigation landscape. For police chiefs and municipal risk managers, a comprehensive overview, covering full

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[10] Colin Moynihan, *City New Withholds Cost of Federal Court Settlements in Public Filings*, N.Y. TIMES, Dec. 10, 2012, at A19.

[11] *Id.*

[12] For example, in Chicago, newspaper reports of settlements, such as that noted *supra* in note 9, typically result from cases in which the proposed settlement is $100,000 or greater, and thus require City Council approval (to be discussed later). Thus, the vast number of cases with settlements of less than $100,000 typically get no news coverage.

[13] Colleen Long & Jennifer Pelt, *Nearly $1B in NYC Police Payouts*, N.Y. POST, Oct. 14, 2010, *available at* http://nypost.com/2010/10/14/nearly-1b-in-nyc-police-payouts-investigation/.

[14] Angela Caputo, *Abusing the Badge*, CHIC. REP., May-June, 2012, at 8-14.

liability exposure, gives a more complete picture of the dimensions of the problem.

For a police chief, the impact of the full cost of litigation is affected by two opposing factors. On the one hand, the recession, which began in 2008, has had a massive impact on local government finances, severely straining local budgets, including those of police departments.[15] Presumably this would make police executives even more sensitive to the issue of lawsuit payments. On the other hand, police chiefs are partially insulated from the direct financial impact of litigation, because such costs (whether paid directly by the municipality or through a third party outside insurance carrier) are often carried on the budget of another municipal agency, and not on the police department's own budgetary accounts.[16] Thus, the cost of a number of settlements or judgments does not necessarily impact the police department's bottom line.

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[15] Budgetary constraints have led to police layoffs and/or hiring freezes in a number of jurisdictions. *See*, *e.g.*, *HPD lays off 127 civilian employees*, KHOU.COM, (May 11, 2011) http://www.khou.com/news/-HPD-127-civilian-employees-issued-layoff-notices-121674349.html#; Martha Moore, *Police Layoffs make crime-plagued Camden [NJ] all the worse*, USA TODAY, Feb. 15, 2011, http://usatoday30.usatoday.com/news/nation/2011-02-14-camden-cops_N.htm#.

[16] For example, the San Francisco Police Department Budget shows no entry for lawsuit costs, but there is an $11,000,000 appropriation labeled "Litigation Reserve" located in the General Fund. *See* CITY AND COUNTY OF SAN FRANCISCO: ANNUAL APPROPRIATION ORDINANCE 164-12 (2010) *available at* http://sfcontroller.org/Modules/ShowDocument.aspx?documentid=3358. Similarly, Houston covers claims against police and other city agencies under the "General Government" heading in a "Claims & Judgments Account." *See* CITY OF HOUSTON, ADOPTED OPERATING BUDGET VOL. 1,(2012) *available at* http://www.houstontx.gov/budget/13budadopt/vol_1.pdf. The use of these accounts to cover police litigation payments was confirmed through e-mail communications with appropriate officials in both cities (on file with author).

Regardless of what accounts are used to cover these costs, the central question remains: how much is paid?[17] Thus, the objective here is to present a detailed analysis of one city's experiences in civil litigation involving the police. How much do these suits cost? What are the specific areas of exposure? Addressing these questions with current data will fill a void in the existing literature on police performance and misconduct.

For reasons to be discussed later, the city chosen for this study is Chicago, Illinois. That city's payments for seven years will be analyzed to assess how much has been paid to resolve police-related litigation. The results should give the reader a fuller understanding of the toll of civil litigation for one major police agency, what causes of action are included, and what their relative shares of the total outlays are. This article will then explore how Chicago's experience may or may not be typical of other police departments.

I. SITE SELECTION AND DATA

Why Chicago? There are several reasons for examining lawsuits against the Chicago Police Department. First, it is a very large agency, with more than 12,000 sworn personnel. As such, it generates a large number of cases. Thus, patterns and trends can be discerned more easily than with a smaller agency with many fewer suits.

However, the most important reason for selecting Chicago is data availability. One would have to be very naïve to hold up Chicago as a model of good governance. Chicago, and Illinois in general, have a storied history of official corruption. In fact, many Chicagoans take almost a perverse pride in the scope and brazenness of that corruption. Nonetheless, some years ago, in a commendable step towards greater governmental transparency, the City of Chicago Law Department began to post online a

[17] There are of course serious non-monetary costs associated with such litigation, such as erosion of public confidence in the police. These consequences, while important, are beyond the scope of this paper.

roster listing *all* lawsuit payments made by the City arising from claims against the City.[18] While, in theory, information on expenditures of public funds should be readily available under the Freedom of Information Act and similar statutes, such transparency is far from the norm. The author's own personal experience, combined with insights gleaned from others, makes it clear that many jurisdictions keep this type of information closely guarded, wholly consistent with Miller and Wright's assessment.[19]

A sample page, adapted from one of the Chicago Law Department's postings, is reproduced in Table I. Note that while this figure lists payments involving litigation arising from all city departments, this paper will restrict itself to those involving only the Chicago Police Department. A quick review of the online data makes it clear that the police are far and away the most costly city agency involved.

[18] These payment rosters do not report routine internal employee payments, such as workers' compensation costs or back pay awarded to an employee when, for example, an arbitrator reduces or overturns a disciplinary suspension, making the employee eligible for back pay.

[19] *See* Miller & Wright, *supra* note 11, at 775-76.

TABLE I
SAMPLE EXCERPT FROM CITY OF CHICAGO, DEPARTMENT OF LAW
2011 JUDGMENT & SETTLEMENT REQUESTS

Case #	Payee	Payment Amount ($)	Fees & Costs ($)	Primary Cause	City Department Involved	Disposition	Date to Comptroller
08 C 6956	Robinson, Cinderella and Troy	30,000	0	Excessive Force/Minor	Police	Settlement	3-May-11
09 C 3476	Olan, Jesse, Lemus	99,000	0	Excessive Force/Serious	Police	Settlement	3-May-11
11 M1 11023	Allstate Insurance Company A/S/O Surmacz, Maria	899	0	Property Damage-Street Condition	Transportation	Settlement	3-May-11
182-A08036-1	Kundu Anindya	117	0	Surface Damage Mechanical Equipment	Streets & Sanitation	Settlement	4-May-11
08 L 13324	Otero, Joseph and Smith, Madeline	27,364	784	MVA-City Vehicle	Transportation	Verdict	11-May-11

This Table lists the case number, the plaintiff's name, the amount paid, a very terse description of the nature of the case, the city department involved, and whether the payment was the result of an out-of-court settlement, a judgment from a trial verdict, or a satisfaction.[20] The last column on the right is the date the Law Department sent formal notice to the City Comptroller's office, authorizing payment. Those dates are typically the primary means of organization of this table. In four of the

[20] The entry of satisfaction is rarely seen. Significantly, some (but not all) "satisfactions" arise when the City is hit with a substantial judgment at trial, especially in a 42 U.S.C § 1983 suit, which carries with it fee-shifting, making the City responsible for the plaintiff's attorney's fees over and above the damages awarded by the jury. In these instances, and especially if the jury awards punitive damages, the City may then negotiate a settlement with the plaintiff. The parties agree to set aside the verdict; the plaintiff takes a reduced payment in satisfaction of the claim. In return, the City agrees to pay promptly, and waives any appeals, motions for a new trial, etc. This will be discussed in more depth later in this paper.

seven years studied here, cases are sequenced not by case number or plaintiffs' names, but in chronological order by the dates of these letters.

The case numbers noted in the far left hand column are significant for tracking purposes. Case numbers with the initials C (or sometimes CV) represent civil suits filed in the U.S. District Court for the Northern District of Illinois. Overwhelmingly, these are 42 U.S.C. § 1983 cases, alleging officers violated a subject's constitutional rights through the use of excessive force, false arrest, etc. There are also a handful of other non-42 U.S.C. § 1983 cases, alleging other federal claims, such as employment discrimination.

Case numbers with the notation L designate cases filed in the Law Division of the Cook County Circuit Court (the trial court of general jurisdiction). These are significant tort claims, with damages sought in excess of $30,000. They constitute a mixed bag. Some of these lawsuits arise from traffic accidents involving Chicago police vehicles. Others are essentially 42 U.S.C. §1983 claims, but filed in state court. Given that a federal claim has been asserted, Chicago, in recent years, has typically petitioned to have these cases removed to U.S. district court. But previously, a number of these cases would remain in the Cook County Circuit Court. Using contacts with individuals well versed in local police litigation, efforts were made to ascertain why some cases remained in Cook County Circuit Court while others were moved to U.S. Court, and the rationale for the apparent shift in policy by the City's Law Department. These inquiries were inconclusive.

Case numbers with the notation M represent cases filed in the Municipal District of the Cook County Circuit Court. These are lesser tort claims and are below the $30,000 threshold. They typically represent injury and/or property damage claims, mostly arising from vehicle accidents.

There are many cases with the caption beginning 011, 2011, or 182-A (the prefix used has changed over time). Although listed on the Law Department's roster of settlements and judgments, these do not reflect actual court cases. Instead, these are claims against the City processed administratively, bypassing the courts. One can even file such a

claim online with the City Clerk.[21] These are modest claims, many in the $500 to $3,000 range. Overwhelmingly, they represent property damage claims, usually minor traffic accidents; in short, fender-benders.

There are a very small number of payments which in essence constitute miscellaneous state claims: an administrative hearing before the Illinois Human Rights Commission, actions in replevin in Circuit Court, payments arising from Freedom of Information disputes, Law Division cases which do not fit neatly into the categories noted above, etc. These cases appear on the Law Department's online roster very infrequently, typically no more than two or three a year, or less than one percent of the total.

In addition, despite each entry having a case number as a seemingly unique identifier, there are a handful of cases which defy classification, for a variety of reasons. The case numbers did not correspond to court records, plaintiffs' names could not be located in databases, etc. One untraceable case listed the cause of action as "Other," a description not very conducive to accurate coding. Realistically, those case numbers and names may represent data entry errors. Nonetheless, as funds were presumably paid for these cases, they are included for the sake of thoroughness.

A review of the full roster of online payments will disclose a number of payments of $99,000 (or even $99,999), not just the one shown in Table I. That is not a coincidence. City policy allows the Law Department the authority to enter into settlements of less than $100,000. Once that threshold is reached, any settlement requires the approval of the City Council. Plaintiffs' attorneys may sometimes find it more expedient to settle a case for $99,000, rather than hold out for a somewhat greater amount. In return for a reduced payment, the plaintiff avoids the delay and potentially bad publicity associated with a City Council hearing.

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[21] *See File and Track Your Claim*, CITY OF CHI. OFFICE OF THE CLERK, http://chicityclerk.com/programs-services/claims/file-track-your-claim/ (last visited Feb. 10, 2014).

As of the conclusion of the writing of this article (July, 2013) data were posted online covering all payments for the years 2008, 2009, 2010, 2011, 2012, and the first four months of 2013. Previous years' postings had been taken down from the web, but upon request, the Law Department did make available rosters for the years 2006 and 2007. Thus, this paper will examine seven complete years' worth of payments—a total of 2,880 cases, paid (but not necessarily filed) from January, 2006 through December 2012.

These Law Department postings have very terse (two to five words, usually) descriptions of the nature of each case. For greater accuracy in coding many of these cases, the author examined many individual court case files and also used other resources (online edition of the *Chicago Tribune* and the National Registry of Exonerations). This scrutiny identified several cases in which the online summary did not accurately state the actual nature of the case. For instance, one § 1983 case, described as a *Monell* claim (indicative of a § 1983 case), [22] was in fact an employee-employer dispute,[23] and two tort claims described as "Extended Detention" were in fact wrongful conviction cases, despite the fact that "Wrongful Conviction" was correctly used as the coding label for other cases.[24]

During the time span covered by these data, there was a significant shift in Chicago's litigation posture. Late in 2009, the Law Department began to implement a new policy to deter allegedly frivolous lawsuits. The City essentially stopped settling many cases, especially the less serious ones, and began to litigate them—even if this meant spending $50,000 in legal bills to defend a case that could have been settled for $10,000. As

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[22] Monell v. Dep't. of Soc. Servs., 436 U.S. 658 (1978).

[23] FitzSimmons v. Weis, No. 08-CV-3558 (N.D. Ill. 2008).

[24] The sheer number of cases—almost 2,900—combined with the nature of court files (paper files are common in Cook County, most already relegated to warehouses) precluded thorough verification of the nature of every individual cases. The miscategorizations discovered in this scrutiny were less than one percent of case files examined.

this new policy became known among the plaintiffs' bar, and as it became clear the policy was actually being followed, the number of new suits filed began to fall sharply.[25] And presumably over time, this would reflect a change in both the number of settlements and also the relative mix of total settlement costs versus total judgment costs.

II. FINDINGS

What then, can we learn from these data? Table II shows the total number of claims and the total expenditures paid by Chicago for the years 2006-2012. The most obvious finding is the sheer magnitude of the Chicago Police Department's liability exposure. During these seven years, the city authorized payments for 2,880 cases for a total of more than $328,000,000. That works out to an average of just over $46,900,000 per year.

[25] Kari Lydersen, *Fighting Suits Saves Money for Chicago*, N.Y. TIMES, Jan. 27, 2011, at A25A.

TABLE II
PAYMENTS FOR CHICAGO POLICE LAWSUITS, 2006-2012:
SETTLEMENTS, JUDGMENTS, AND ADMINISTRATIVE PAYMENTS

Year	U.S. Court Payments ($)	N. Cases	State Court and Administrative Payments ($)	N. Cases	Total Cases	Total Payments ($)
2006	16,954,606	197	16,598,561	224	421	33,553,167
2007	30,329,172	306	9,197,019	235	541	39,526,191
2008	40,013,648	353	41,763,311	218	571	81,776,959
2009	23,460,879	293	16,194,518	177	470	39,655,397
2010	40,609,630	91	9,667,948	226	317	50,277,578
2011	26,489,957	106	11,997,815	181	287	38,487,772
2012	38,807,708	161	6,263,642	112	273	45,071,350
TOTAL	**216,665,600**	**1,507**	**111,682,814**	**1,373**	**2,880**	**328,348,414**

Police litigation as a proportion of the City of Chicago's total settlements has been substantially more than the combined total for all other city departments. Over the seven years covered, police expenditures have been 67.2 percent of the total for all city litigation payments. However, that average conceals some substantial variation—from a low of 51.6 percent in 2012 to a high of 83.9 percent in 2010.

In a number of ways, 2008 is an outlier. In absolute dollars, police payments that year were the highest—over $81,000,000—of the seven years covered. Two factors helped produce this spike. It was by far the costliest year for payments arising from wrongful conviction cases (see Table IV below), and there was also a $20,923,609 pursuit case payment.[26] Yet despite the size of these outliers, the police *share* of the total for that year was the second *lowest* out of the seven years examined. The explanation: there were several extraordinarily large payments in

[26] *See infra* note 43.

2008 for non-police cases,[27] increasing the City's total by a massive amount and thus driving down police lawsuit costs in proportional (but not absolute) terms. The combination of multiple police and non-police outliers, all paid in the same year led to total litigation payments of $136,574,044 in 2008, 56 percent greater than the next-most costly year.

There is sometimes a substantial delay from when a verdict is rendered until payment is made. Early in 2012, there was a $25,000,000 judgment returned in a wrongful conviction case.[28] In 2012, the City Council also approved a settlement of more than $12,000,000 to protesters arrested during anti-war demonstrations in 2003.[29] Neither of those costs was posted to the 2012 payments roster.[30]

For Chicago's taxpayers, 2013 is not looking very good either. As this article was finalized, payments posted online covered the first four

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[27] *See 2008 Judgment & Settlement Payment Requests*, CITY OF CHI., http://www.cityofchicago.org/content/dam/city/depts/dol/JudgementAndSettlementRequests/2008expendituresthrough12312008.pdf (Feb. 9, 2009). These extraordinary non-police costs include more than $11,000,000 paid to over 1,000 claimants for violations of the *Shakman* decree (a 1969 court case which barred political considerations in city government hiring and promotions), an $11,000,000 settlement pertaining to a claim arising from the construction of Millennium Park, and a $6,900,000 settlement pertaining to Fire Department Medicare reimbursement (presumably for ambulance service billing). *See* Shakman v. Dem. Org. of Cook Cnty., 310 F. Supp. 1398 (N.D. Ill. 1969). Any one of these in one year would have been a major factor driving up the non-police share of the total; all three in one year had a massive impact.

[28] Jeremy Gorner, *Wrongfully Imprisoned Chicago Man Wins $25 Million in Damages: Federal Jury Award Comes after Arrest at 13 and 16 Years in Prison*, CHI. TRIB., Jan. 24, 2012, http://articles.chicagotribune.com/2012-01-24/news/ct-met-multimillion-verdict-wrongly-convicted-20120125_1_chicago-man-federal-jury-thaddeus-jimenez.

[29] Hal Dardick, *Aldermen settle Iraq War protest lawsuits for $12 million*, CHI. TRIB., June 6, 2012, *available at* http://articles.chicagotribune.com/2012-06-06/news/chi-aldermen-settle-iraq-war-protest-lawsuits-for-12-million-20120606_1_protest-aldermen-police-conduct.

[30] As of July 2013, the $25,000,000 judgment was still not yet reflected in the online payments roster, which was as of that date complete through April 30, 2013.

months of 2013. As of April 30, 2013, payments for police-related litigation were more than $48,700,000. So for 2013, the first *four months' total* thus far is greater than the *annual* average for the previous seven years—with eight months to go!

These large annual totals for police-related settlements and judgments become more meaningful when one examines the categories within those aggregate figures. And allegations of excessive force and other civil rights violations are probably the ones of greatest significance to both police executives and the public alike.

III. CIVIL RIGHTS SUITS

Of greatest concern, and perhaps most corrosive of public support for police, are suits brought under 42 U.S.C. § 1983, the federal statute that makes local governments and their agents liable for damages if they deprive individuals of their constitutional rights. These suits commonly allege misconduct such as excessive force, illegal searches, or false arrest. The hot-button issues that inflame public opinion, the apparently unjustified beatings now so often captured on video—these are the sorts of incidents for which § 1983 provides potential legal redress. The payment rosters list most of these cases with descriptions such as "False Arrest," "Excessive Force—Serious," etc. Also included in these tallies (a coding judgment call) were cases labeled as "Other Police Misconduct."[31]

While usually brought in U.S. court, a number of cases alleging these same general types of misconduct were also filed in Cook County Circuit Court. Some were subsequently removed to U.S. district court; some were not. For the purposes of this article, several of these Cook County Circuit Court cases were coded as civil rights cases based on the

[31] For many (but not all) of these "Other Police Misconduct" cases, it was possible to examine the court case files to verify the actual nature of the alleged actions, and verify that a case was at its core a § 42 U.S.C. §1983 suit. However, it was not feasible to do this in all such cases.

nature of what allegedly happened, rather than the formal statutory authority cited in the suit. For example, in one case, the plaintiff was the victim of an illegal search. Had it been framed in § 1983 terms, this would have been a typical police-civil rights case in U.S. district court. But in this instance, there was no claim of deprivation of constitutional rights. The suit instead claimed trespass and willful infliction of emotional distress—*state* court claims, thus ensuring the case would not and could not be transferred to U.S. district court. Often, a state law claim of malicious prosecution was added to the U.S. district court § 1983 claim. Table III sets forth the amounts paid for these claims.

TABLE III
PAYMENTS FOR 42 U.S.C. § 1983 CLAIMS IN U.S. DISTRICT COURT AND PAYMENTS FOR SIMILAR CLAIMS IN COOK COUNTY CIRCUIT COURT
2006-2012

			Cook County Circuit Court					
Year	U.S. District Court ($)	N. Cases	Law Division ($)	N. Cases	Municipal Division ($)	N. Cases	Total Payments ($)	N. Cases
2006	8,869,606	193	5,337,999	16	8,000	2	14,215,605	211
2007	20,195,472	299	3,711,499	18	10,200	2	23,917,171	319
2008	18,317,022	342	4,947,450	11	38,500	2	23,302,972	355
2009	18,714,379	287	8,793,946	20	0	0	27,508,325	307
2010	30,313,968	85	2,220,514	14	23,367	3	32,557,849	102
2011	24,817,810	102	3,297,750	11	0	0	28,115,560	113
2012	23,682,708	156	3,402,646	10	0	0	27,085,354	166
TOTAL	**144,910,965**	**1,464**	**31,711,804**	**100**	**80,067**	**9**	**176,702,836**	**1,573**

The amounts paid are substantial. U.S. court claims over the seven years totaled $144,910,965 with payments made in 1,464 individual cases (some cases had multiple plaintiffs). This equates to a mean payment of $98,983 per case. The median payment was significantly lower, $19,000, indicating the mean was skewed by a relatively small proportion of very costly cases. Those cases which were disposed of in Cook County Circuit Court were less costly. In the Law Division, there were 100 cases costing $31,711,804, an average of $317,118 per case. Again the median was substantially lower, $42,500. The Municipal Division of the Circuit Court

had a handful of such cases, nine over the seven years, totaling $80,067 with a mean of $8,896. Note these totals (for both the U.S. District Court for the Northern District of Illinois and the Cook County Circuit Court) do not include amounts paid for cases seeking damages for wrongful convictions or for injuries sustained as a result of police pursuits. Due to the particular salience of these specific claims for police managers, they will be addressed separately below.

It would be interesting to separate out and compare the cost of false arrest claims with illegal search claims, excessive force claims, etc. Unfortunately, that is simply not feasible. While the online postings typically list *one* of those as the specific cause for payment in each individual case, examination of many actual complaints filed in court made it very clear that the typical suit alleges *multiple* violations of constitutional rights. Thus, even if payment is made in a particular case with, for example, excessive force listed as the cause, it is extremely likely, in fact almost a certainty, that there were also one or more additional allegations of false arrest, illegal search, malicious prosecution (a state court claim often adjudicated in U.S. district court along with the § 1983 claim), etc.[32] One rarely sees a court complaint filing with one, and only one, alleged rights violation (*e.g.*, false arrest). With multiple allegations present in the typical case, it is virtually impossible to assess the relative weight of each factor in the overall payment. Thus, it would be a fruitless exercise to subdivide these settlements and judgments in an attempt to categorize separately the amounts paid for claims labeled as excessive force, compared to claims for false arrest, etc. And as noted previously, many cases simply have a vague term such as "Police

[32] As an example of this, see Mayo v. City of Chicago, No. 09-CV-1293 (N.D. Ill, 2009). The complaint (PACER Document 1 for this case), lists six separate allegations of misconduct. Five were § 1983 claims: (1) unreasonable seizure, (2) illegal search of a vehicle, (3) excessive force, (4) false arrest, and (5) failure to intervene; the sixth was a state law malicious prosecution claim. Also added were state law claims of *respondeat superior* and an indemnification claim. The Law Department payments roster shows a settlement payment of $14,000 was authorized on August 31, 2009, with the cause of action listed simply as "False Arrest."

Misconduct" or "Other Police Misconduct" to describe the cause for the payment.[33]

These payments in Table III are totaled by the year of payment, not by case. On occasion, a case may have had multiple payments in different years. For example, a plaintiff may have been paid in one year, and the attorney received payment for fees and costs the following year. In a handful of cases, large judgments and settlements were paid in installments spread over multiple years. By tallying each payment for the year in which payment was made, and not aggregating payments by case across years, the annual payment totals are more accurate—but at the cost of very slightly inflating the numbers of cases involved. Conversely, if there were multiple payments for the same case, each listed separately, but all paid in the same year, they were aggregated so as to give one total payment for that year, with the case counted just once.

Finally, one should note the Law Department's practice of not settling cases is linked with a sharp *decrease* in the *number* of cases in which payments were made—but an *increase* in the total *amounts* paid. In each of the last three years of the practice of widespread settlements (2007-2009), there were on average more than 300 cases per year with payments, with a total cost averaging less than $25,000,000 annually. For the first three complete years of the non-settlement posture (2010-2012), the annual number of cases with payments plummeted to roughly half or less of that figure—but the annual cost was over $32,000,000 in 2010, more than $28,000,000 in 2011, and more than $27,000,000 in 2012. And presumably there were significant additional costs, not captured on these charts for fees paid by the City of Chicago for its own legal counsel. One reasonable inference is that those cases that go to trial and result in verdicts against the City, and/or the cases which do settle, are costing on average substantially more per case.

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[33] *See e.g.*, Crawford v. City of Chicago, No. 10-CV-7312 (N.D. Ill. 2010).

IV. WRONGFUL CONVICTIONS

In contrast to the blurred boundaries between excessive force cases and false arrest cases, suits alleging wrongful conviction stand out starkly. They all share a common factor: an actually innocent person went to prison for a crime he simply did not commit. While these cases may also feature allegations of excessive force or false arrest, it is the wrongful conviction, typically resulting in years in prison, which is the dominant characteristic of these cases. While one may question the role of courts, prosecutors, and jurors in these convictions, the amounts tabulated here all represent payments made solely for Chicago police defendants. Other individuals and agencies may in fact share some of the responsibility; but these data reflect solely on the liability exposure of the Chicago police. Table IV documents the costs of these particular suits.

TABLE IV
WRONGFUL CONVICTIONS PAYMENTS, 2006-2012

Year	U.S. District Court ($)	N. Cases	Cook County Circuit Court ($)	N. Cases	Total
2006	8,035,000	3	0	0	8,035,000
2007	9,975,000	4	0	0	9,975,000
2008	16,008,500	7	6,840,000	2	22,848,500
2009	1,700,000	1	2,700,000	1	4,400,000
2010	7,894,912	3	0	0	7,894,912
2011	1,659,647	2	0	0	1,659,647
2012	15,125,000	5	0	0	15,125,000
TOTAL	**60,398,059**	**25**	**9,540,000**	**3**	**69,938,059**

While the cases are few in number, they are exceptionally costly. Those cases in U.S. district court numbered 25 with a total payment of $60,398,059 and a mean payment of $2,415,922 (the median was

$1,800,000). An additional three cases adjudicated in the Cook County Circuit Court cost $9,540,000, an average of $3,180,000. These high per-case costs are readily understandable. Misconduct typified by a false arrest claim, or an allegation of police use of force that produces minor injuries, may appear outrageous, but it is usually sharply limited to a brief time frame. But a wrongful conviction claim often carries with it the long-term aftermath of someone imprisoned for five, ten or more years for a crime he simply did not commit. And if one has been exonerated of a felony, then realistically, the balance of proof in a civil case shifts dramatically. A police officer sued for use of excessive force can argue in defense that the suspect was violently resisting arrest, and the use of force was therefore lawful, thus clouding the issue for the jury. But defending against liability when someone was locked up for a crime he simply did not commit is definitely an uphill battle. As noted above, in one case (decided in 2012 but not yet paid, and thus not reflected in Table IV), a jury rendered a $25,000,000 verdict against the City of Chicago. Arrested as a teenager for a crime he did not commit, the youth then spent sixteen years in prison before he was exonerated and released.[34] Unlike, say, excessive force cases, in this case, the question is not if the City will have to pay damages, but rather a question of how much.

Wrongful conviction cases certainly represent a very serious type of deprivation of constitutional rights; thus they are in essence a subset of § 1983 suits. Combining the totals from Tables III and IV, we see that for these seven years (2006-2012) Chicago paid a total of $246,640,895 to resolve 1,601 § 1983 cases, an average of $154,054 per case. These payments amount to more than 75 percent of the total litigation payments for these seven years.

[34] *See* Gorner, *supra* note 30.

V. TORTS

In addition to the various types of civil rights cases discussed above, the Chicago Police Department, as a large agency operating in an urban area, runs the more generalized risk of tort litigation—from minor fender benders to more serious incidents (typically but not exclusively arising from accidents involving police cars). Table V presents data on the costs of these cases. Note these data do not include the amounts paid to resolve pursuit cases; these will be discussed later in this paper.

TABLE V
PAYMENTS FOR TORT CLAIMS IN COOK COUNTY CIRCUIT COURT
2006-2012

Year	Administrative Claims ($)	N. Cases	Municipal Division ($)	N. Cases	Law Division ($)	N. Cases	Total Payments ($)	N. Cases
2006	297,748	145	187,927	45	397,500	8	883,175	198
2007	505,340	151	206,422	44	442,126	12	1,153,888	207
2008	361,919	137	198,809	43	989,750	12	1,550,478	192
2009	219,531	94	177,020	41	4,103,321	15	4,499,872	150
2010	258,856	114	322,716	78	3,801,495	14	4,383,067	206
2011	208,568	87	233,479	65	1,273,878	12	1,715,925	164
2012	248,769	44	195,873	38	628,143	15	1,072,785	97
TOTAL	**2,100,731**	**772**	**1,522,246**	**354**	**11,636,213**	**88**	**15,259,190**	**1,214**

These tort claims are dealt with in three separate settings. The first column shows the costs of claims processed administratively; that is, a claim filed without any requirement for a lawsuit. The seven years of data show a total of 772 cases. The total cost was $2,100,731. The average cost was $2,721.

The second column represents tort claims filed in the Municipal Division of Cook County Circuit Court. There were 354 settlements and judgments paid, with a total of $1,522,246 and an average payment of $4,300. The range of payments for these cases shows considerable overlap with those captured in the first column. It is unclear why an individual claimant would proceed in one forum versus the other.

The third column represents settlements and judgments for cases filed in the Law Division of Cook County Circuit Court. That division has a filing requirement of suits claiming a minimum of $30,000 in damages. It is here that one sees suits seeking substantial damages. The bulk of these claims arose from accidents involving police cars, but there were assorted other tort claims, including one person whose foot was injured when stepped on by a police horse,[35] and another bitten by a police dog.[36] There were 88 cases in all, with a total cost of $11,636,213 and a mean payment of $132,230. Again, the median is much lower ($21,161), indicating the mean was skewed by a handful of very costly cases.

VI. PURSUIT CASES

Not included in the preceding tort overview are pursuit cases. These pose a special exposure for police departments, and thus are examined separately in this Article. While wild police chase videos may captivate cable television audiences, many prudent police chiefs have recognized the great risk to the public and officers posed by these chases. As a result, many agencies, including the Chicago Police Department, have in the past fifteen to twenty years adopted restrictive polices designed to both minimize pursuits and also ensure that those pursuits which do take place are closely supervised, tightly regulated, and justified by a compelling police purpose.[37]

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[35] Graton v. City of Chicago, No. 09 L 1072 (Cook Cnty. Cir. Ct. 2009).

[36] Cress v. City of Chicago, No. 09 L 1000 (Cook Cnty. Cir. Ct, 2009). This was a general dog bite case, and *not* a § 1983 claim of excessive force (alleging the dog was used as the instrument of excessive force). In other words, in this instance, the police dog was simply being a dog, and was not acting under color of law.

[37] For a contemporary example of such a policy, see GEOFFREY P. Alpert, Roger G. DUNHAM & MEGHAN S. STROSHINE, *Orlando Police Department: Policy and Procedure 1120.0. Vehicle Pursuits, in* POLICING: CONTINUITY AND CHANGE 227-36 (Waveland Press 2008) (reporting the city's policy).

Chicago similarly adopted a policy aimed at limiting these pursuits.[38] Nonetheless, even with these restrictions in place, there are accidents, sometimes serious ones, arising from these pursuits. And with pursuits sometimes taking place at high speed, the consequences can be devastating. Table VI lists the pursuit cases identified, and their costs.

TABLE VI
PURSUIT ACCIDENT PAYMENTS: 2006-2012

Year	Cook County Circuit Court Payments ($)	N. Cases
2006	6,100,000	3
2007	4,311,607	4
2008	28,217,883	8
2009	50,000	1
2010	3,000,000	1
2011	6,580,000	2
2012	1,385,000	2
TOTAL	**49,644,490**	**21**

These suits were all brought in Cook County Circuit Court. The nature of a police pursuit, coupled with unfavorable (for a prospective plaintiff) U.S. Supreme Court rulings (e.g. *Scott v. Harris*)[39] make it difficult if not impossible to find valid grounds for filing such a suit in U.S. district court under § 1983 or any other grounds. But state law claims are another matter altogether. Note the number of cases—twenty-one—is relatively low,[40] possibly a reflection of the success of Chicago's

[38] Chicago Police Department, GENERAL ORDER G 03-03-01, EMERGENCY VEHICLE OPERATIONS—PURSUIT, *available at* http://directives.chicagopolice.org/directives.

[39] Scott v. Harris, 550 U.S. 372 (2007).

[40] A caveat: cases were identified for this Table based on the designation "pursuit" in the Law Department's case roster's description. In addition to these, the author reviewed

restrictive pursuit policy. But those cases which do arise are very costly. The seven years' total cost ($49,644,490) and the mean payment ($2,364,023) are both skewed by one case: a 2001 collision that led to a $20,923,609 judgment,[41] which was eventually paid in 2008 after an unsuccessful appeal. That one case accounted for one-fourth of Chicago's total police-related litigation payments in 2008.

VII. OTHER CASES

Finally, we have the residual category: cases which do not fit neatly into the categories above. These costs are detailed in Table VII.

TABLE VII
OTHER PAYMENTS, 2006-2012

Year	Misc. Payments - U.S. Courts ($)	N. Cases	Misc. Payments - State Forums ($)	N. Cases	Payments - Unknown Settings ($)	N. Cases	Total Payments ($)	N. Cases
2006	50,000	1	4,253,387	3	16,000	2	4,319,387	6
2007	158,700	3	0	0	9,825	4	168,525	7
2008	5,688,126	4	129,000	2	40,000	1	5,857,126	7
2009	3,046,500	5	134,873	3	15,827	2	3,197,200	10
2010	2,400,750	3	10,000	1	31,000	1	2,441,750	5
2011	12,500	2	404,140	4	0	0	416,640	6
2012	0	0	400,461	2	2,750	1	403,211	3
TOTAL	**11,356,576**	**18**	**5,331,861**	**15**	**115,402**	**11**	**16,803,839**	**44**

court files for many cases categorized as "MVA" (motor vehicle accident), and was able to identify and verify that two MVA cases were in fact pursuit cases. Although numerous court files were reviewed specifically to detect such instances, these file reviews were sometimes inconclusive in terms of determining whether or not the vehicle collisions in question occurred as the result of a police pursuit. Thus, there is a remote possibility that one or two additional cases were similarly mislabeled but went undetected.

[41] Hudson v. City of Chicago, 01 L 6424 (Cook Cnty. Cir. Ct. 2001).

The first column tallies the costs of miscellaneous cases in U.S. district courts. For the most part, these payments arise from employer-employee disputes. Some of these payments arose from Title VII discrimination claims; others from suits alleging violation of the Fair Labor Standards Act. In terms of types of claims, the numbers of these cases are too few to allow for any further meaningful breakdown by type of case. However, in terms of the costs, by far the largest share of these payments ($9,300,000 out of the total of $11,356,576) arose from just one case. A U.S. Bureau of Alcohol, Tobacco and Firearms agent, working jointly with the Chicago Police on a task force, tried to alert the Chicago Police Department to a corrupt Chicago officer with whom she worked. She alleged a cover-up and severe retaliation in response to her whistle-blowing efforts; a jury awarded her substantial damages.[42]

Similarly, the second column represents the costs of miscellaneous state forum proceedings—an administrative hearing alleging race and age discrimination, violations of the state Freedom of Information Act, etc. There were also a handful of cases in the Law Division of Cook County Circuit Court. While a few of these may meet the legal definition of a tort claim, they are included here, not in Table V. The essence of these claims, *e.g.*, employees' allegations of defamation against supervisors and other employee-employer disputes, is at its core substantively different from the citizens-based claims, *e.g.*, arising from auto collisions, tabulated in Table V. As with the U.S. district court claims tallied in the first column, the small number of cases (fifteen in seven years, with a total cost of $5,331,861) makes any further subdivision meaningless.

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[42] Klipfel v. Bentsen, No. 94-CV-6415, (N.D. Ill. 1994). In this case, the total of $9,300,000 is the sum of three separate (and unequal) payments, one each in 2008, 2009, and 2010. The officer whose misdeeds this plaintiff tried to report was Joseph Miedzianowski. He was eventually tried in U.S. district court and sentenced to life in prison (subsequently appealed); Todd Lighty, *Ex-city cop loses appeal of conviction in federal drug case*, CHI. TRIB., June 22, 2005, *available at* http://articles.chicagotribune.com/2005-06-22/news/0506220227_1_sentencing-guidelines-new-sentencing-hearings-appeals-court (reporting federal prosecutors labeled Miedzianowski "the most corrupt cop in the city's history").

Finally, the third column represents those cases which defy categorization altogether. These are low in terms of both numbers and cost—$115,402 paid in eleven cases. Candidly, they likely reflect data entry errors in the Law Department's roster of cases in which payments were made. For instance, in a few cases, the case numbers on the Law Department rosters do not match up with the standard formats for state or federal court cases. Searches of online court databases, in both state and U.S. district courts, revealed that either the case number and/or the plaintiff's name was non-existent. Other follow-up efforts to clarify these matters were unsuccessful. Nonetheless, they do represent city funds paid to resolve litigation, and thus for the sake of thoroughness those figures are included here.

VIII. OTHER COSTS

The costs detailed above represent the sums paid out to claimants. Not included here are substantial additional costs. The City of Chicago Law Department has a sizable staff of attorneys (and support staff) who work exclusively on these cases. That of course means substantial sums for salaries, fringe benefits, office space and overhead, etc. With the push to litigate more cases, additional attorneys from outside law firms have been retained to try these cases.[43] One report stated the City of Chicago paid over $13,000,000 to outside counsel representing the Chicago Police Department in 2012 alone.[44] Just one case—the $25,000,000 wrongful conviction judgment noted above—resulted in payment of legal fees of more than $972,000 in 2012. Presumably this case incurred additional pre and post trial legal costs paid before and after 2012.

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[43] *See* Lydersen, *supra* note 27.

[44] Tim Noval & Art Golub, *The Watchdogs: City Hall's tab for private lawyers nearly $22 million last year*, CHICAGO SUN TIMES, April 8, 2013, *available at* http://www.suntimes.com/19030733-761/the-watchdogs-city-halls-tab-for-private-lawyers-nearly-22-million-last-year.html.

Additionally, personnel within the Chicago Police Department (including attorneys who are sworn personnel in the Legal Affairs unit) work extensively in a supporting role in these cases—assembling documents, responding to discovery requests. Officers, either as defendants or witnesses, cost the City substantial sums for appearing in court for trials, being available for depositions, etc. Either they do these tasks during their regular duty hours (meaning they are not out on the streets doing normal police work), or they do them outside their normal hours, in which case they may actually be paid at a premium, overtime rate. Either way—police work not performed, or extra salary paid—is a real cost. And there are additional case preparation costs—payments for expert witnesses, court reporters' charges for depositions, etc. While it is not the purpose of this paper to document fully these costs, they must be considerable.

In addition, these tables tallied payments for 2,880 cases over a period of seven years. *But those are only the cases which resulted in payments.* The total number of cases which consumed municipal resources includes cases which went to trial with verdicts against the plaintiffs.[45] One also needs to address cases which did not go to trial, but were disposed of through means other than a settlement: the plaintiff voluntarily withdrew the suit, the case was dismissed for want of prosecution, the court granted defendant's motion for summary judgment, etc. Other research, examining a subset of police litigation cases in Chicago, shows these non-trial and non-settlement dispositions were a full 50 percent of total case dispositions.[46] While these cases led to no payments to the

[45] Ascertaining the *total* number of lawsuits against the Chicago police would seem to be a straightforward matter by simply using standard databases as a means to calculate the total numbers of suits filed against the City of Chicago in any given time frame. However, as explained elsewhere in more detail, these supposedly standard databases are both inconsistent with one another and incomplete. Mark Iris, *Illegal Searches in Chicago: The Outcomes of 42 USC § 1983 Litigation*, 32 ST. LOUIS U. PUB. L. REV. 123, 125-26 (2012).

[46] *Id*.

plaintiffs, they nonetheless required City personnel to devote varying amounts of time and other resources, thus adding to the overall costs.

IX. SETTLEMENT VERSUS TRIALS

The online postings note whether the payment was the result of a trial verdict, settlement, or satisfaction. The first two are self-evident; the latter merits explanation. In § 1983 cases, losing defendants must pay legal fees for the prevailing plaintiff, separate from any damages awarded to the plaintiff. It is not unusual for these legal fees to be substantially more than the damages awarded.[47] Note also that Illinois law explicitly bars a unit of local government from paying punitive damages awarded against a public employee.[48] Thus, one may see a case in which a jury's verdict is against an officer. The City is liable for both the compensatory damages levied by the jury, and legal fees and costs. Occasionally, there may also be punitive damages. What sometimes happens in this sort of situation? Post-verdict, the City may negotiate with plaintiff's counsel. If there is a meeting of the minds, counsel will file an agreed motion to set aside the verdict, and the defendant (and counsel) will accept a discounted total package payment covering all damages, legal fees and costs. In return for accepting this reduced payment, the City agrees to pay promptly and not file any motion for a new trial, appeal, etc. Thus, in one case, court records show the jury awarded $34,000 in compensatory damages and punitive damages of $33,000. Attorney's fees for plaintiff's counsel were

[47] *See* Henry v. Boyd, No. 09-CV-5738, (N.D. Ill. 2009). The jury awarded compensatory damages of $12,500; separately the attorney billed for fees of $144,361 and costs of $3,181 (subsequently negotiated down to a total of $100,000); *see also* Gillespie v. City of Chicago, No. 09-CV-2733, (N.D. Ill. 2009) (awarding by jury compensatory damages of $7,500; prevailing plaintiff's counsel submitted cost and fees petitions for $4,152 and $139,000, respectively).

[48] 745 ILL. COMP. STAT. ANN. 10/2-302 (West 2013) ("It is hereby declared to be the public policy of this State, however, that no local public entity may elect to indemnify an employee for any portion of a judgment representing an award of punitive or exemplary damages.").

set at $117,000, bringing the total to $184,000.[49] The parties agreed to set aside the verdict; two separate payments totaling $150,000 were made.[50] This type of arrangement is labeled a satisfaction on the Law Department payment roster.[51] *With the trial verdict officially set aside, the City is formally paying a lump sum, with no specific award for punitive damages.* Thus, the statute barring public funds' coverage of punitive damages does not apply, and the officer is no longer liable for this payment. *This is a very significant practice.* Punitive damages are supposed to have a deterrent effect, both for the individual held liable for these punitive damages, and for his or her colleagues. *By relieving the officer from any obligation to pay punitive damages out of his or her own pocket, these satisfactions effectively neutralize the deterrent effect of punitive damages.*

The practice of officers not having to pay anything by way of damages, either punitive or compensatory, is apparently widespread. Schwartz was able to secure data from 70 of the largest law enforcement agencies in the United States, and found not one single instance of an officer satisfying a punitive damages judgment. Overall, she found that governments paid approximately 99.98 percent of the dollars paid to plaintiffs. Defendant officers' total share in all judgments and settlements was approximately 0.02 percent—roughly $125,000 out of a total greater than $754,000,000.[52] So clearly the practice of officers held liable for punitive damages being able to evade any personal cost is not

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[49] *See* Rodriguez v. Doe, No. 09-CV-1913, (N.D. Ill. 2009), PACER Document Number 163 (specifying the judgment amounts) and Document Number 168 (vacating the jury verdict and also specifying attorneys' fees).

[50] *See 2011 Judgment & Settlement Payment Requests*, CITY OF CHI., http://www.cityofchicago.org/content/dam/city/depts/dol/JudgementAndSettlementRequests/2011expendituresthrough12312011.xls (last visited Oct. 31, 2013). The payment by the City to cover all aspects of this case appears on the payment roster, dated January 13, 2011.

[51] The term "satisfaction" also applies to other types of atypical dispositions of cases. But the type discussed here is the most significant.

[52] Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. (forthcoming 2014).

unique to Chicago. Schwartz calculated that the likelihood of an officer having to contribute any payment towards a settlement or judgment was lower than that officer's chance of being struck by lightning.[53]

The author has often informed students in law and politics classes of Iris' First Theorem: "The Trial is the Anomaly." The general, growing trend in U.S. district courts is that the vast majority of cases, both civil and criminal, are disposed of through something other than an actual trial. Recent estimates indicate trials have now shrunk to less than two percent of the case dispositions in U.S. district courts nationwide.[54] Chicago's experience certainly supports this. The Law Department's roster of payments made in 2011 shows that payments were made in 26 § 1983 cases as the result of verdicts or satisfactions; that year's settlements numbered 77 cases. Contrast this with 2008 results, before the City adopted its pro-trial, anti-settlement stance. In that year there were ten payments as the results of judgments and satisfactions in 42 U.S.C. § 1983 cases—and 343 settlements. Clearly, while trials are much more common than they were in the past, settlements still outnumber verdicts by a very wide margin.

Those numbers do not give a full picture of trials as a proportion of all case dispositions. To do that, one must add in those cases that went to trial with verdicts favorable to the City of Chicago and the officers. More significantly, as noted above, there are many, many cases that are resolved with neither settlements nor trials. Factoring in the likely scope of these missing data, one can readily conclude that trials of police cases remain the exception, even under the more aggressive pro-litigation, anti-settlement posture adopted by Chicago in 2009.[55]

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[53] Schwartz, *supra* note 54.

[54] ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL 2 (2009).

[55] The City's pro-trial, anti-settlement posture may be wavering in practice. Reviewing the online payments roster, the author noted a spate of settlements of § 1983 cases in the period May-October, 2012. Whether this was simply an anomaly, or an indication of a weakening of the no-settlements policy is unclear at this time.

X. DISCUSSION

Chicago is just one police agency among the many thousands in the United States. To what extent may one generalize from the Chicago experience to police agencies elsewhere? As noted previously, many jurisdictions treat their equivalents to these data as a state secret. Other jurisdictions may release data but only in an aggregate manner, making it difficult to assess the numbers and types of cases, mean payments for each, etc. A variety of factors come into play that can make any particular jurisdiction's litigation experience different from Chicago's. Let us consider some of these variables.

First, size matters. All other factors being constant, the more officers an agency has, the greater its litigation exposure. And officers are not always proportionate to a jurisdiction's population. Sworn personnel per thousand population, a commonly used measure of police strength, varies widely across the United States. Chicago is definitely on the high end of the scale in that respect. With 12,515 officers, Chicago is a large agency, in both absolute and relative terms.[56] In raw numbers, Chicago's force is the second largest municipal police force in the country. In relative terms, with an estimated population of 2,833,649, that sworn strength works out to a ratio of slightly more than 4.4 sworn per 1,000 population.[57] Many other cities have lower ratios in the 2.5 per 1,000 range. In particular, west coast cities' police forces are strikingly thinner on the ground. For example, San Diego (population 1,313,433) and San Jose (970,252) had 2010 sworn officer strengths of 1,863 and 1,259,

[56] FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, TABLE 78: ILLINOIS FULL TIME LAW ENFORCEMENT EMPLOYEES BY CITY 2010, (Oct. 31, 2010), http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/table-78/10tbl78il.xls.

[57] *Id*.

respectively.[58] These equate in turn to ratios of 1.4 and 1.3 per 1,000, less than one third of Chicago's ratio.[59]

In addition to the *numbers* of officers, cities vary in terms of the *costs per officer.* McGhee estimated the costs of settling cases in Chicago to be the highest, on a per officer basis, of the several cities examined. The figures per officer per year (with the year(s) covered not specified) were $2,930 in Chicago, $2,700 in New York City, $2,200 in Los Angeles, $1,360 in Philadelphia, and $697 in Denver.[60] Thus, in Chicago, a high per officer cost is compounded by a relatively high number of officers, with the net result being a very large litigation bill for Chicago's taxpayers.

Why is the cost per officer high? This question leads to another key point. Varying statutes can have a major impact on state court verdicts. While § 1983 cases are heard around the country under the same statutory framework, tort claims adjudicated in state court reflect major inter-state variations. As noted above, in 2008 Chicago paid a judgment of more than $20,000,000, awarded by a jury to a motorist severely and permanently disabled as the result of a collision with a police car. That same case, had it occurred in a Texas city such as Houston, would have yielded the victim no more than $250,000. Texas law caps a municipality's liability at $250,000 per person and $500,000 per incident if there is more than one claimant in the same event.[61] While excessive

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[58] FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, TABLE 78: CALIFORNIA FULL TIME LAW ENFORCEMENT EMPLOYEES BY CITY 2010, (Oct. 31, 2010), *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/table-78/10tbl78ca.xls.

[59] Figures on sworn personnel for all the cities cited in this paragraph are somewhat out of date. The net effect of the ongoing recession and resultant government hiring cutbacks across the United States means the actual figures at the time this was written (winter-spring 2013) are probably lower.

[60] Tom McGhee, *Spike in Cops' Lawsuit Payouts: Settlements Over Allegations of Excessive Force by Denver Police Top $1 Million in 2011*, DENVER POST, Jan. 13, 2012, at B01.

[61] TEX. CIV. PRAC. & REM. CODE ANN. § 101.023 (West 2013). § 101.023(a) imposes similar caps in suits against state government, but § 101.023(b) sets lower caps of

force and police shooting claims may be fair game for a §1983 suit, auto accidents are not. Even criminal suspects injured while fleeing the police face Supreme Court precedent severely constraining successful § 1983 litigation.[62] Texans involved in more ordinary vehicle accidents would likely find it very hard indeed to justify federal jurisdiction and thus avoid Texas state courts and that damages cap. Had Texas' cap been in force in Illinois during the time span covered, payments by the City of Chicago would have been reduced by at least $46,000,000 in police pursuit cases alone—roughly 14 percent of all payments during the years covered.

Another legal factor in shaping litigation expenses in § 1983 cases is the variations among federal courts. Not every inter-circuit variation in Circuit Court of Appeals decisions leads to the Supreme Court settling the matter. Insiders in Texas jurisdictions perceive their relatively low costs in § 1983 litigation as resulting from favorable rulings in those cases from the Fifth Circuit.

Another factor, very real albeit not readily quantifiable, is the local legal culture—the values and norms that presumably impact attorneys' perceptions of jurors' receptivity to such claims. The perceived willingness of prospective jurors in certain locales to award massive damages in civil cases has long been a subject of commentary. Thus, different local jury pools could result in two similar cases filed in two different jurisdictions (possibly even within the same state) having vastly different verdicts. Similarly, differences in counsels' *perceptions* of the values of local jurors could significantly impact both whether a case is settled, and if so, for what amount; and, in fact, whether one decides to file a suit in the first place. For instance, as a related example in corrections (not police) litigation, consider the case of *Ruiz v. Estelle*.[63] In this landmark class action lawsuit alleging brutal conditions in Texas prisons,

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$100,000 per person and $300,000 per incident for units of local government other than municipalities. I am indebted to Craig Ferrell, Chief's Counsel (retired), Houston Police Department, for alerting me to these particular statutory provisions.

[62] *See* Scott v. Harris, 550 U.S. 372 (2007).

[63] Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980).

the lead plaintiff's counsel asserted an Eighth Amendment claim only, and deliberately opted not to seek monetary damages. This strategy ensured a bench trial for the injunctive relief sought. Adding a claim for monetary damages would have resulted in a jury trial.[64] Presumably, counsel strongly sensed that a jury in that district would have been very unreceptive to prison inmates' claims and wanted to avoid having a jury be the finder of fact.

Availability of experienced local counsel is also a crucial factor. Success feeds upon itself. If local attorneys observe that pursuing cases against the police, either for § 1983 claims or state court tort actions, is likely to be successful in terms of significant judgments or settlements, they will be more willing to file cases on behalf of other clients. Other legal resources besides the typical plaintiffs' trial bar play a major role. Chicago's huge 2008 payments included millions of dollars for settlements of wrongful conviction cases. The crucial factor in those civil settlements was the reversal of the underlying criminal convictions. Those convictions were erased in large part due to legal efforts by the Center on Wrongful Convictions, part of the School of Law at Northwestern University. The 2012 $25,000,000 judgment in a wrongful conviction case noted above was also an outgrowth of that Center's work.[65] Wrongfully convicted "offenders" in another jurisdiction, lacking access to such a specialized pro bono resource, would likely receive neither exoneration nor the resultant litigation-driven compensation.

Finally, one must not overlook the efforts of a police agency to proactively police itself and thus, over time, reduce its liability exposure. For example, a number of agencies have entered into U.S. Department of Justice consent decrees to address past claims of patterns and practices of abusing residents' constitutional rights.[66] Typically, a key component of

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[64] ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE 270 (2010).

[65] *See supra* note 30.

[66] The term "consent decree" is very misleading. While officially the decree is voluntary and not the result of a court proceeding, the reality is that the state or local

these decrees is a requirement that the agency in question institute an early intervention system ("EIS") to monitor officers' behavior, track actions which may be indicative of growing problematic behavior, and intervene with appropriate action (*e.g.*, training, counseling, close supervision) when the officer's actions cross a certain pre-determined threshold. In theory such EIS measures, over time, should result in significant reductions in officer misconduct, with (hopefully) similar reductions in litigation costs.

In summary, the above details both how one city has experienced police litigation costs and how that experience might differ from other jurisdictions. The next step is clear: if comparable, comprehensive studies are done for other jurisdictions, what will be the results?

XI. Postscript

On the eve of publication, the Chicago Law Department posted the last data for 2013 payments. The editors kindly allowed the last minute addition of this update so as to present readers with an assessment of the most current data. Time constraints barred a thorough analysis; thus, the figures cited are preliminary estimates only. While not subjected to complete verification, these figures give a reasonably accurate overview of 2013 payments.

2013 was a very costly year. Police-related litigation cost Chicago more than $86,000,000, the most in the eight years covered. The overwhelming share was for 42 U.S.C. § 1983 litigation. Those payments (including those for wrongful convictions) were over $81,000,000. The trend (which began in 2010) of fewer payments but larger amounts paid continued. Also, in keeping with the more aggressive litigation posture, cases with settlements were 75 percent of the cases with payments; trials comprised 25 percent.

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police agency typically finds itself under severe pressure to agree to the Justice Department's proffered decree. One might as well describe an armed robbery simply as a funds transfer.

Tort payments (including claims bypassing the courts, and processed administratively) were roughly $2,200,000. In addition to this, police pursuit cases led to just two payments totaling $165,000.

One case that would have been tallied in Table VII as a miscellaneous state court case warrants mention, as it is the first such case seen in the now eight years of data examined. A man called police because his girlfriend's adult son was drunk and threatening. In two separate calls, the same officers responded, and in essence did nothing despite ample grounds for arrest under Illinois' domestic violence statutes. Shortly after the officers left from their second call to the house, the adult son killed the caller. The caller's heir sued, alleging willful and wanton indifference by these officers. The case went to trial, and the verdict cost the City $2,133,000.

Finally, a word on wrongful conviction payments: There were at least four such cases paid out in 2013, *for a staggering total of $32,750,000!* All four trace back to Jon Burge. To briefly summarize what is now a thirty years' saga: Starting in the 1980s, Burge, a commander of detectives, and his subordinates were repeatedly accused of torturing suspects into confessing to crimes (especially homicides). One such allegation led to his being fired in 1993. Burge is now in US prison after a perjury conviction in 2010 arising from a deposition he gave in a civil suit. But the inquests into wrongful convictions, the exonerations, and the litigation persist. There were Burge-related wrongful conviction payments in prior years, but these 2013 payments are more than the combined total for 2009–2012.

There could well be additional litigation, and payments, in 2014 (and beyond). Mr. Burge has not exercised any police powers since he was suspended in 1991 in the lead-up to his disciplinary hearing at the Police Board. That multi-million dollar lawsuit payments continue, almost a quarter of a century after he last carried a Chicago Police Star, is a telling comment on the financial costs of police misconduct. The human costs, paid by people imprisoned for decades for crimes they did not commit, cannot be quantified.