

POLICE ARBITRATION AND THE PUBLIC INTEREST

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Arbitrators have been blamed for promoting unaccountable policing by reversing discipline in proven misconduct cases. Although studies have shown great success rates for cops in arbitration, they do not address the legal causes for that success. This paper identifies three factors that permit arbitrators to lawfully rule for rogue officers. The first factor is arbitral failure to incorporate the public interest when assessing discipline because they are not legally obliged to do so. The second is the procedural discretion arbitrators have to exclude incriminating evidence under the labor contract. And the third is Supreme Court doctrine that limits the ability of judges to vacate arbitral awards that are repugnant to justice. The article shows that the rules that facilitate arbitral unaccountability to the public were created for the private sector workplace where the public's interest is not implicated when a worker violates public laws or workplace rules. Wholesale adoption of private sector arbitration rules in the context of police discipline has insulated cops who present a danger to the communities they serve and the departments they represent. These private sector rules allow arbitrators to make disciplinary decisions grounded in optimistic predictions about officers' psychological suitability for the job, although they are not qualified to make such assessments. Because the legal landscape for enforcing police arbitration decisions is unsuited to protecting the public from bad officers, the article argues for removal of arbitrators from the disciplinary process. Adjudicated cases show that the nuances of policing, and the difficulties of knowing police officers' mental states, require that publicly accountable individuals have final authority for police discipline.

INTRODUCTION

The police killing of George Floyd in May of 2020 shocked the world with its public display of callous indifference to human life.¹ Almost nine minutes of video footage now memorialize this event that has served to

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1. See Jennifer Hassan and Siobham O'Grady, *Anger Over George Floyd's Killing Ripples Far Beyond the United States*, WASH. POST, May 29, 2020 (reporting an international response of shock and outrage which included Canada's Prime Minister acknowledging the persistence of racism, and calling on Canadians to resist discrimination). *International Reaction to George Floyd Killing*, ALJAZEERA, June 2, 2020 (reporting protest events around the world condemning racism and police brutality).

catalyze the ongoing struggle to reform police practices, particularly as they relate to use of force against blacks.² The George Floyd incident intensified the spotlight on police departments' failure to rid their rolls of bad cops, particularly those that evince indifference to black life. For example, the officer that killed George Floyd had seventeen prior misconduct complaints, some involving the use of excessive force, yet his disciplinary record showed only two letters of reprimand.³ Why was George Floyd's killer still on the force after other civilians had accused him of trying to kill them?⁴ The answer can be traced in part to the unionization of police officers and the contractual protections unions have negotiated to protect officers from discipline or discharge for misconduct. Those contract protections have combined with labor laws to give some bad cops *de facto* immunity when they abuse the communities they serve.

Police officers did not always enjoy the contractual and legal protections they now have. Unlike the private sector where collective bargaining rights for workers were legally endorsed by the National Labor Relations Act in 1935,⁵ bargaining rights for public sector workers, including the police, emerged in the 1960s via state law.⁶ With the legal right to collectively bargain, police employees unionized and made labor contracts that provide significant protection for cops in discipline cases. Negotiated contract provisions removed final authority for discipline from police departments and lodged it with private arbitrators.⁷ Although the

2. *See id.*

3. *See* Shaila Dewan and Serge F. Kovalski, *Thousands of Complaints Do Little to Change Police Ways*, N.Y. TIMES, May 30, 2020.

4. *See id.* (reporting that the officer who killed Floyd was named in a brutality lawsuit); Derek Hawkins, *Officer Charged in George Floyd's Death Used Fatal Force Before and Had History of Complaints*, WASH. POST, May 29, 2020 (reporting one domestic disturbance suspect's claim that Floyd's killer tried to kill him after he had locked himself in a bathroom).

5. 29 U.S.C. §§ 151-169 (2012) ("It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."). *Id.* at § 151.

6. Catherine L. Fisk and L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 736 (2017) (reporting the emergence of police collective bargaining activities in the late 1960s); Milla Sanes and John Schmitt, *Regulation of Public Sector Collective Bargaining in the States*, Ctr. for Econ. and Pol'y Res., 3 (2014) ("While unionization of most private sector workers is governed by the National Labor Relations Act (NLRA), the legal scope of collective bargaining for state and local public sector workers is the domain of states, and where states allow it, local authorities."). *Id. See also Collective Bargaining In The Public Sector*, 97 HARV. L. REV. 1676, 1676-77 (1984) (noting that Congress had exempted public employees from coverage under the National Labor Relations Act in 1935).

7. *See* Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV., 545, 574-76 (2019) (describing the typical arbitrator selection process the parties use in police disciplinary cases). Arbitrator qualifications are generally determined by the referring agency. For example, if the parties are using the American Arbitration Association, that organization's rules specifying qualifications will control who they will refer

right to discipline is generally reserved to management in a labor contract, unions also have the contractual right to challenge that discipline as too harsh, unjust, or discriminatory.⁸ This right to grieve discipline emanates from “just cause” provisions in collective bargaining contracts that require legitimate business or contractual reasons to discipline unionized workers.⁹ Labor contracts also typically provide that disagreement about discipline will be settled with finality in arbitration – a private adjudication process presided over by a private neutral person chosen by the parties.¹⁰

Because the parties agree to be bound by the private judgment of an arbitrator, the Supreme Court has ruled that the arbitral award is legally binding and also insulated from judicial review.¹¹ Courts must enforce arbitral awards, and they cannot be appealed but may be vacated in rare cases.¹² One exceptional way to vacate an award is to sue to have it set aside on public policy grounds.¹³ The public policy exception to the enforcement of labor contracts emanated from commercial law and was later adopted as a private sector labor law rule.¹⁴ The public policy doctrine basically states that courts can refuse to enforce private bargains that are repugnant to the public’s interests.¹⁵ And a private labor arbitrator’s award is the same as the private bargain of the parties.

To ensure finality of arbitral awards, the Court crafted very narrow rules for vacatur to ensure that judges did not second-guess arbitrators

out for work. See Sarah Rudolph Cole, *Arbitrator Diversity: Can It Be Achieved?*, 98 WASH. U. L. REV. 965, 976 (2021).

8. See Roger I. Abrams, and Dennis R. Nolan, *Toward A Theory Of ‘Just Cause’ In Employee Discipline Cases*, 1985 DUKE L. J. 594, 595 (1985) (noting that labor arbitrators generally expect discipline to be reasonable and not arbitrary, excessive, or discriminatory).
9. See *id.* at 594-95 (reporting that just cause provisions are ubiquitous in labor contracts and may even be implied when they are missing).
10. See Rushin, *supra* note 7 at 574-76.
11. See *United Paperworkers Int’l Union v. Misco*, 484 U.S. 29 (1987); *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960); See also FRANK ELKOURI AND EDNA ELKOURI, *HOW ARBITRATION WORKS*, Ch. 21.7.A, 21-53 (2016) (“In light of the tradition of deference to arbitration and the policy of ensuring the finality of awards, state courts emphasize that review of arbitrators’ awards is limited in scope.”). *Id.*
12. The grounds for judicial review are very narrow because they are essentially limited to proof of misconduct by the arbitrator or fraud by the parties. See *id.* at 21-52. Errors of fact or law are not grounds for vacating an award. See *id.* at 21-53. (“Indeed, state courts generally utilize the same standard of review in both public- and private-sector cases . . . Most courts will not review the arbitrator’s interpretation of the contract, or the merits of the award, even if they are believed to be erroneous, and will not vacate a decision even if they would have reached a contrary decision on the facts.” [footnotes omitted]). *Id.*
13. See *W.R. Grace and Co. v. Local Union 759, International Union Of The United Rubber, Cork, Linoleum And Plastic Workers Of America*, 461 U.S. 757, 766 (1983) (“As with any contract, however, a court may not enforce a collective bargaining agreement that is contrary to public policy.”). *Id.*
14. *Id.*
15. See generally *W.R. Grace and Co.*, 461 U.S. 757 (1983).

whose decisions they disagreed with.¹⁶ The rules for vacating arbitral awards therefore require that a requesting party prove that the award implicates a legally recognized public policy,¹⁷ and that the award violates that public policy.¹⁸ Judges cannot vacate an award simply because the arbitrator reinstated a worker who engaged in serious misconduct. Judges must cite a legal rule or precedent that says workers who engage in such conduct cannot be allowed to keep their jobs.¹⁹

Police officers through their unions know that they have tremendous protection from discipline even when they misbehave. And there is now a rich body of research demonstrating a correlation between the labor contract protections police officers have and an increase in violent police misconduct.²⁰ Contractual protections include the rejection of anonymous complaints, delays before interrogation for misconduct, disclosure of the entire investigation file to the officer, legal representation during investigations, multiple layers of administrative appeals, concealment of disciplinary records from the public, indemnification in civil rights violation suits, and rapid purging of disciplinary records, among other security devices.²¹

Police unions have used their tremendous political power and resources to fight for all cops, even the rogue ones, and this has built solidarity to hide abuses and fight disciplinary measures implemented to promote accountable and transparent policing.²² Labor contract protec-

16. Limited judicial review is grounded in the theory that a right to judicial review of awards will disincentivize prompt settlement of disputes and potentially increase labor strife. See *Misco*, 484 U.S. at 38 (1987).

17. See *W.R. Grace and Co.*, 461 U.S. at 766 (holding that the award must contravene a well-defined, explicit, and dominant public policy that is grounded in law or legal precedents). *Id.*

18. One cannot merely show that the worker's misconduct violates public policy. It must be shown that the arbitrator's decision to reinstate the worker violates public policy. See *Eastern Assoc. Coal Corp. v. United Mine Workers of America*, Dist. 17, 531 U.S. 57, 63-65 (2000).

19. See *id.*

20. See Steven Greenhouse, *How Police Unions Enable and Conceal Abuses of Power*, NEWS DESK, June 18, 2020 (discussing studies that show a direct correlation between police labor contracts and an increase in abusive police behaviour); Christopher Ingraham, *Police Unions and Police Misconduct: What the Research Says About the Connection*, WASH. POST, June 10, 2020 (reporting evidence of a forty-percent increase in violent police misconduct that is associated with unionization); Rushin, *supra* note 7, at 619 (reporting a study that showed a significant increase in misconduct complaints in Florida that corresponds with the advent of collective bargaining).

21. See Daniel Oates, *I used to be a police chief. This is why it's so hard to fire bad cops*, WASH. POST, June 12, 2020 (providing a firsthand account of the operation of labor contract rules that insulate bad cops from discipline and discharge); See also Greenhouse, *supra* note 20; Ingraham, *supra* note 20; Rushin, *supra* note 7, at 559.

22. See Noam Scheiber, Farah Stockman and J. David Goodman, *How Police Unions Became Such Powerful Opponents to Reform Efforts*, N.Y. TIMES, June 6, 2020 (reporting that police unions have been the most vocal and strident opponents to reform, that they have a code of silence for abusive conduct, and they have retaliated when anyone advances proposals for accountability); See also Ingraham, *supra* note 20 (reporting that unionization has brought solidarity, a code of silence, and a contractual shield from accountability); Robert Iafolla, *Defunding Is One Place Police Unions See Vaunted Powers Limited*, DLR, June 12, 2020 (reporting that police union powers extend beyond the labor contract to the political arena).

tions have worked well for cops and union representatives, but they have harmed police departments and victims of police excess. Statutory and contractual “Bill of Rights” have insulated police from misconduct complaints, limited police departments’ ability to impose discipline, and produced frequent reversal or reduction of discipline in proven misconduct cases.²³ When multiple levels of administrative appeals do not produce the desired result, officers get to relitigate their discipline *de novo*, before a private arbitrator, who is not publicly accountable for reinstating officers found guilty of misconduct; and the arbitration process itself is hidden from the public.²⁴ Like the private sector, police agencies reserve discharge for the most serious offenses, so termination cases usually involve issues of integrity or abuse of authority. So when arbitrators return discharged officers to work, it comes with costs and risks for the affected police departments and the communities they serve.

While much has been written about the effects of police unionization and its link to increased police abuses, there has not been much focus on the particular challenges police departments face when arbitrators reinstate officers in proven misconduct cases. Studies show that arbitral reversal of discipline is routine,²⁵ but there is a small body of exceptional cases where police officials fight desperately to rid their departments and communities of cops found to have committed egregious offenses. Police departments typically lose these suits to vacate arbitral awards on public policy grounds because of Supreme Court precedents that mandate broad deference to arbitrators and very narrow rules for vacatur on public policy grounds.²⁶ These rules of deference and vacatur were developed for

23. See John Dunbar and Andrew Wallender, *Cops Legal Cover Is in Question as States Agonize over Reforms*, DLR, Aug 6, 2020 (reporting that at least 20 states have statutes that “make it difficult to adequately discipline or remove officers accused of misconduct by creating a separate set of rights and rules not granted to any other public sector union members. . .”); Rushin, *supra* note 7, at 551, 561-63 (describing the many layers of procedural protections officers have from state codes, local ordinances, and labor contracts).

24. See Rushin, *supra* note 7, at 551-52.

25. See Ingraham, *supra* note 20 (reporting reinstatement rates of 45% for Washington D.C., 62% for Philadelphia, and 70% for San Antonio); *Philadelphia Police Need Greater Accountability*, PHILADELPHIA INQUIRER, Dec. 25, 2019 (reporting arbitral reversal of discipline 70% of the time in 170 cases studied in Pennsylvania); Mara H. Gottfried, *How Often Do Arbitrators Reinstate Fired Cops? Just Under Half The Time*, PIONEER PRESS, June 23, 2019 (providing one study for Minnesota showing a 46% reinstatement rate); Beth Burger, *Fired Police Often Have Edge In Arbitration Cases*, THE COLUMBUS DISPATCH, June 3, 2018 (reporting a 74% win rate for officers in Columbus Ohio); Jennifer Smith Richards and Jodi S. Cohen, *Chicago Police Win Big When Appealing Discipline*, CHICAGO TRIBUNE AND PRO PUBLICA, Dec. 14, 2017 (reporting arbitral reversals of discipline in 85% of cases in Chicago).

26. See *Enterprise*, 363 U.S. at 596 (holding that a court cannot overrule an arbitrator as long as his award draws its essence from the labor contract); *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 580-82 (1960) (holding that arbitrators have a special competence to interpret and apply the parties’ system of self governance); *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960) (holding that the national policy favoring arbitration requires that judges not decide the merits of a dispute governed by the labor contract); See generally *Misco*, 484 U.S. 29 (1987) (establishing the narrow contours of the public policy exception to the enforcement of labor arbitration awards).

the private sector, where no public interest is implicated, as, for example, when an employee engages in workplace violence, steals, or lies in the course of his employment, and an arbitrator decides that termination was unjustified under the labor contract.²⁷

But reversing an accountable public official's determination to discharge has great implications because it imposes tens of millions of dollars in backpay, benefits, and other costs on municipalities, impairs accountable law enforcement and police reputation, and terrorizes communities, particularly those that already view the police as a threat to their safety.²⁸ Blacks, as a group, bear the brunt of police excess,²⁹ and the radiating effects of police misconduct go beyond physical and psychological injury. Those effects include arrest, incarceration, loss of work, and the financial costs associated with defending oneself against the lies often perpetrated to cover the abuse of authority.³⁰ So it is very important that arbitrators get it right. But there are three forces that militate in favor of reinstatement. They are arbitral failure to make the public's interest part of the record, the routine exclusion of evidence of misconduct from the arbitral record, and unreviewable arbitral predictions that the misconduct will not recur.

This article discusses the flaws of police arbitration and its contribution to unaccountable policing. Part I surveys the public policy doctrine and shows how it is harmful in the context of police discipline cases. It shows that unlike the private sector, police discharge cases always implicate public policies because of the variable constitutions, statutes, and de-

27. See *Misco*, 484 U.S. at 29, 37 (noting that arbitration under the Labor Management and Relations Act (LMRA) addresses rights emanating from private agreements); *Prima Paint Corp. v. Flood and Conklin Mfg. Co.*, 388 U.S. 395, 403 (1967) (noting that arbitration under the Federal Arbitration Act (FAA), adjudicates rights created by private contractual promises).

28. See *Philadelphia Police Need Greater Accountability*, *supra* note 25 (reporting that the city of Philadelphia alone paid more than \$85 million in settlement of arbitration decisions that reduced or overturned police discipline); Ian Kullgren, *Police Unions Face Reckoning Over Contracts Shielding Misconduct*, BLOOMBERG LAW NEWS, June 12, 2020 (reporting a study that almost all of the increase in police killings associated with unionization fell on non-whites); POLICE USE OF FORCE: AN EXAMINATION OF MODERN POLICING PRACTICES, U.S. COMMISSION ON CIVIL RIGHTS, BRIEFING REPORT, Nov. 15, 2018 (discussing black distrust and fear of the police).

29. See Kullgren, *supra* note 28 (quoting from one study that “[i]t looks like there is a discriminatory view among that population of workers, and they are bargaining for the ability to shoot nonwhite civilians without prosecution. . .”); POLICE USE OF FORCE, *supra* note 28, at 23 (reporting data that shows racial disparities in police use of force, with Native Americans and Blacks being disproportionately affected).

30. See MICHELLE ALEXANDER, *THE NEW JIM CROW* 4 (2012) (noting that once you have a criminal record, you are consigned to the margins of society, and can be legally denied employment, housing, voting rights, and public benefits). Police abuse of authority also inflicts mental scars on minority communities. See E.J.R. David, Tiera M. Schroeder, and Jessica Anne Fernandez, *Internalized Racism: A Systematic Review of the Psychological Literature on Racism's Most Insidious Consequence*, 75 J. OF SOC. ISSUES 1057, 1060 (2019) (noting that the victims of racism experience self-doubt, identity confusion, and an inferiority complex); Jordan E. De Vylden, *Donald Trump, the Police, and Mental Health in US Cities*, 107 AJP, July 2017 (concluding that President Trump favors police immunity over police accountability, and immunity causes victimization with associated distress, depression, anxiety, and trauma).

partmental regulations that require officers to act even-handedly, and prohibit discriminatory treatment of citizens. Despite the abundance of public policies, and administrative, arbitral, and judicial findings that these policies were violated, arbitrators are still able to legally justify reinstatement on contractual grounds.³¹ Part I shows that because police departments have ceded their authority as final deciders of discipline,³² arbitration law requires that police officials prove not only that the officers' conduct violated public policy but that keeping them employed also violates public policy.³³ This is an almost insurmountable task.

Part II shows how arbitrators are contractually prevented from getting a complete behavioral profile of the disciplined officer. It discusses how collective bargaining contract rules exclude evidence of misconduct from the case record, and how arbitrators do not deploy their authority to interpret the labor contract broadly to protect the public's interests. Particularly in cases of discriminatory policing, arbitrators are incapable of knowing how racial bias affected or will continue to influence an officer's performance on the job. Yet, arbitrators make predictions about officers' mental suitability that psychologists find difficult to make. These mental state judgments then provide a basis for reinstatement decisions.

Part III discusses the arbitral penchant to reinstate. Even in cases finding serious racial, sexual, and excessive force misconduct, arbitrators use labor contract rules, legal precedents, and unsubstantiated predictions about recidivism to justify reinstatement. Part III shows that arbitrators have the flexibility to uphold discharges contractually when regulations are violated, but they seldom exercise their prerogative to do so. Instead, arbitrators often create a narrow record, cabin themselves to contract rules, and boldly predict that recidivism is unlikely.³⁴ This results in reinstatement, despite findings of serious misconduct. Part III also shows that reinstatement is possible even when police officers openly express antipathy for the communities they serve by arguing that their speech is protected by the First Amendment. Through litigated cases, this part shows that public sector managers, such as mayors, city managers, and police chiefs, have greater incentives than arbitrators to do something about such officers.

Part IV reflects on the difficulty of identifying and monitoring the motives that drive discriminatory policing, the importance of managerial discretion when misconduct is evident, and the need to remove arbitrators as the final deciders of discipline. It recommends that final decisions

31. See *infra* notes 122-151 and accompanying text.

32. Not only have labor contracts made private arbitrators the final deciders of discipline, but they provide for expungement of proven misconduct, and unions have sued to guarantee that such bad behaviour is hidden from arbitrators, other employers, and the public. See Kathleen Dailey and Hassan A. Kanu, *Chicago Prevails in Union Dispute Over Police Discipline Records*, DLR, June 19, 2020 (reporting the Illinois Supreme Court decision rejecting an arbitration award ordering the city to negotiate with the union about the destruction of police misconduct records); Alex Ebert, *To Keep Bad Cops Off the Streets, States Consider Police Licensing*, DLR, July 7, 2020 (reporting that labor contracts make it nigh impossible to discipline bad cops).

33. See *Eastern Assoc. Coal Corp.*, 531 U.S. at 63-65.

34. See cases discussed *infra* Part III.

be lodged in a publicly accountable person or body, because arbitrators and unions have ignored the public interest, and have served as roadblocks to accountable policing.³⁵ This proposal for reform is practical because it can be immediately negotiated or imposed.³⁶

I. POLICE LABOR CONTRACTS AND THE PUBLIC POLICY DOCTRINE

When police abuse racial minorities, it is anyone's guess whether racial animus motivated it. Direct evidence of a racial motive is generally unavailable,³⁷ so police departments can only guess whether the officer poses a public safety risk to minorities or threatens the reputation and effective operation of the police department. Nonetheless, arbitrators often predict that the forces that motivated the misconduct will not reactivate in order to justify reversing discipline. There is no law that requires deference to a police department's determination that the misconduct reflects unsuitability for constitutional policing — a well-defined and dominant public policy.

Collective bargaining contracts place significant restraints on discipline and discharge decisions of employing agencies because police unions wield outsized clout. It has been said that public employers, strapped for cash, decided to cede significant non-economic, job security concessions to police unions in order to appease them at the bargaining table.³⁸ The result has been a proliferation of practices and contract terms that necessitate “an edict from the King to fire a bad cop.”³⁹ Labor contracts give unions the ability to coach officers on how to exonerate themselves for misconduct, give officers time to prepare their stories, access evidence and witnesses, secure legal advice, and purge records of misconduct.⁴⁰ Studies show that labor contracts have helped to create a secretive and opaque disciplinary process that coincides with increased use of ex-

35. See Ben Mathis-Lilley, *Obama Calls Police Violence a “Crisis,” Condemns Mass Neglect of Poor*, THE SLATEST, April 28, 2015 (reporting President Obama's challenge to the Fraternal Order of Police and other police unions to speak up against police violence against unarmed suspects); Greenhouse, *supra* note 20 (describing pushback from union leaders who do not even acknowledge there is a problem or a need for reform).

36. See ROBERT N. COVINGTON, *EMPLOYMENT LAW IN A NUTSHELL* 550-51 (2017) (reporting that public sector workers are generally prohibited from striking with rare exceptions for those who do not work in the areas of public health and safety).

37. See Lori Ann Hale, *Less Altruism, More Racism: The Relationship Between Positive Defiance and Racial Bias*, 23 RACE, GENDER, AND CLASS 186, 189 (2016) (noting that racism today consists of subtle acts or microaggressions rather than blatant outward expressions).

38. See Jorge L. Ortiz, “The Major Stumbling Block”: Powerful Police Unions Stand in the Way of Structural Reform, *Experts Say*, USA TODAY, June 12, 2020 (“Instead of alienating taxpayers by demanding larger salaries for their members, unions have focused on gaining job security and more favorable working terms, requests that are usually more palatable to elected officials.”); *But see*, Iafolla, *supra* note 22 (reporting that “only police departments and schools [have] escape[d] the sharp fiscal cuts that ravaged other public institutions.”).

39. See Kullgren, *supra* note 28; Gottfried, *supra* note 25 (reporting the frustration of some Minnesota police chiefs with the difficulty of firing police officers who have demonstrated their unwillingness to follow public policy).

40. See Kullgren, *supra* note 28; Ingraham, *supra* note 20; Greenhouse, *supra* note 20.

cessive force, particularly against racial minorities.⁴¹ Equally secretive are the arbitral awards that routinely reduce or overturn discipline for misconduct.⁴²

Also seldom discussed are the many exceptional cases where the employing agency, even ones condemned as racially insensitive, fight desperately to permanently remove officers who abuse the public trust. Labor contracts generally contain “just cause” provisions that vest third party arbitrators with final authority to decide appropriate discipline for misconduct.⁴³ In contract negotiations, employing agencies cede their power to decide an officer’s suitability for continuing employment to a private third party who has no fidelity to the public interest.⁴⁴ By law and contract, arbitrators are contract slaves, and their decisions are legally enforceable even when they make factual and legal errors.⁴⁵ Arbitral awards are generally unreviewable, and courts can vacate them only in very narrow circumstances.⁴⁶ So in addition to the pre-arbitral hurdles to imposing discipline, and routine arbitral rejection of discipline, police departments must contend with narrow rules of vacatur when arbitrators reduce discipline or reinstate rogue officers. One narrow basis for setting aside an arbitral award is the public policy exception to enforcement. The public policy exception requires proof that *reinstating the offending officer* will violate some law or legal precedent, not merely proof that *the officer’s conduct* violated some public policy.

1. *The Public Policy Exception And Labor Contract Enforcement*

The ability to prioritize the public interest is severely restricted when police departments cede final authority to discipline in labor contracts because of Supreme Court rules of deference to arbitral procedures and outcomes. Since 1960, the Court has emphasized that the judiciary must play a very limited role once the parties agree to arbitrate disputes. Courts are barred from reviewing the merits of an arbitral award or va-

41. See Ortiz, *supra* note 38; Greenhouse, *supra* note 20.

42. See Richards and Cohen, *supra* note 25 (reporting study results that show arbitrators routinely overturn discharge decisions, with one arbitrator ruling for 59 officers 79% of the time). “Victims and complainants were not told when an officer filed a grievance nor were they notified of its outcome.” *Id.*

43. David V. Johns, *Toward A More Modern Application Of The “Nexus To The Workplace” Test: Arbitral Considerations In Off-Duty Employee Misconduct Cases*, 23 HARV. NEGOT. L. REV. 1, 8-9 (2017). Arbitrators will infer a just cause requirement even if the contract is silent on the issue. See ELKOURI AND ELKOURI, *supra* note 11, at Ch. 15.2.A.i, 15-3. This is done because without a cause requirement, unionized workers will be reverted to an “at-will” status that makes all their other contractual protections meaningless. *Id.*

44. See Ortiz, *supra* note 38 (reporting that over time, police departments have ceded their managerial prerogative to discipline to unions, and now they feel handcuffed by their labor deals).

45. See *Misco*, 484 U.S. at 30 (holding that only fraud by the parties and dishonesty by the arbitrator are grounds for judicial review of an arbitrator’s award). For a discussion of the operational effects of the Supreme Court’s vacatur rules in the labor and commercial contract contexts, see Stephen A. Plass, *Federal Arbitration Law and the Preservation of Legal Remedies*, 90 TEMP. L. REV. 213, 266-74 (2018).

46. See *id.*

cating it, even if there are errors of fact or law. As long as the arbitrator is “arguably construing the contract,” the award must be enforced, absent fraud or misconduct.⁴⁷ In order to vacate an award on public policy grounds, a party must establish that there is a well-defined, dominant, and explicit public policy that is reflected in laws or legal precedents.⁴⁸

Police departments often lose cases filed to set aside awards because courts must construe public policies very narrowly. For example, in the *Town of South Windsor v. South Windsor Police Union Local 1480*, the Supreme Court of Connecticut evaluated the Town’s claim that public policy prohibited an arbitration panel from overriding its determination that officer John Marchesseault was unfit for duty.⁴⁹ Marchesseault had drawn his weapon and ordered seven young men to get on the floor after encountering them at night playing basketball in a school gym without authorization.⁵⁰ The Town cited a number of regulations that purportedly vested exclusive control of officers’ fitness in the municipality, but the court said that the regulations vested sole power of removal in a *board of police commissioners*, and the Town had no such board.⁵¹ Further, the court ruled that other cited regulations addressed only fitness for *appointment* as an officer, not fitness for duty *terminations*.⁵²

The court rejected the Town’s broader reading that “local board of police commissioners” meant “some public body, a police commission or town government,” and that its regulatory control of the hiring process also includes the power of dismissal.⁵³ The court further ruled that even if the Town could establish exclusive regulatory control of fitness for duty terminations, the Town’s powers were limited by its labor contract that gave arbitrators the power to decide whether “just cause” exists for terminations.⁵⁴ Finding no conflict in a disciplinary structure that permits both the Town and an arbitrator to determine cause for termination, the court ruled that there was “no explicit, well-defined, and dominant public policy that requires a town’s view of an officer’s fitness for duty, to trump the arbitrators’ contrary determination that has been arrived at pursuant to such an agreement and submission.”⁵⁵ And even when a relevant public policy is available, courts require that law to speak directly to the issue of continuing employment.

2. *The Absence Of Public Policies Prohibiting Reinstatement*

Police officers benefit from the absence of laws that specifically prohibit their retention when they violate the regulations they are sworn to uphold. When officers are fired for malfeasance, police departments must contend with arbitrators who reinstate them, and courts that confirm the

47. *See id.*

48. *Misco*, 484 U.S. at 31.

49. *Town of South Windsor v. South Windsor Police Union Local 1480*, 770 A. 2d 14 (2001).

50. *See id.* at 17.

51. *Id.* at 24-25.

52. *Id.* at 25.

53. *See id.* at 27-28.

54. *Id.*

55. *See id.* at 28.

arbitral awards, ostensibly on the premise that the misconduct will not recur. Arbitrators and courts are not bound to defer to the police departments' interest in protecting the public from officers who break the law, on and off duty, and often lie and vilify their victims to exonerate themselves. The case of *City of Highland Park v. Teamsters Local Union 714*, demonstrates this phenomenon.⁵⁶

In *Teamsters Local Union 714*, officer Martin Stumpf was discharged after he was convicted of criminal trespass to a vehicle. Investigators determined that during an off-duty encounter, Stumpf violated numerous regulations when he aggressively confronted Christopher Tyran, his wife, and two young children after their van had hit his wife's car.⁵⁷ Stumpf then concocted a story that he feared Christopher Tyran would run over him or his wife, and lied about reaching into Tyran's van and making physical contact with Lisa Tyran.⁵⁸ Even after his conviction for criminal trespass, and a suspension that he did not contest, Stumpf maintained that he acted properly.⁵⁹ The City felt he could not be rehabilitated and discharged him, but an arbitrator disagreed.⁶⁰ The arbitrator reinstated Stumpf, a trial court vacated the award on public policy grounds, and the court of appeals reversed. The appellate court ruled that there were no state "statutes or case law that *directly* required the city to terminate Stumpf,"⁶¹ nor was there any law that "implicitly forbids" his reinstatement.⁶²

The City of Minneapolis got the same response from the Court of Appeals of Minnesota when it tried to vacate an award that reinstated officer Michael Sauro, who a jury concluded had used excessive force causing injury to a handcuffed arrestee.⁶³ Although the discharge was a response to a jury determination of constitutional violations, and a jury declaration that the City had "a custom of deliberate indifference" to excessive force complaints, the court ruled that there was no state rule that mandated the discharge of officers who use excessive force.⁶⁴ Although there are ample public policies protecting the constitutional right of arrestees, none of those public policies require an officer's discharge.⁶⁵ In fact, the court said the City's own practice shows a contrary policy of lesser discipline for excessive force violations, and concerns that Sauro is a public safety risk were "based on pure speculation."⁶⁶ The court did not have to explore whether Sauro's future noncompliance with regulations was also likely,

56. *City of Highland Park v. Teamsters Local Union 714*, 828 N.E. 2d 311 (2008).

57. *See id.* at 312-13.

58. *Id.* at 313.

59. *Id.* at 315.

60. *See id.*

61. *See id.* at 317-18.

62. *Id.* at 318.

63. *See City of Minneapolis v. Police Officers' Federation of Minneapolis*, 566 N.W. 2d 83 (1997).

64. *See id.* at 89.

65. *Id.*

66. *See id.* at 90.

and simply cited another court-confirmed arbitral award that concluded that the reinstated employee posed no risk of future misconduct.⁶⁷

The expansive rules of deference to arbitral awards, and the narrow contours of the public policy exception to enforcement have been the Achilles' heel of police departments trying to protect the public from officers who have demonstrated their unfitness for policing but were returned to work by arbitrators. Private arbitrators, with no public accountability, get to say whether the contract or the law permits discharge, even after an officer's conduct indicates he is a danger to the public and the paramilitary organization he represents.⁶⁸ While police departments have no difficulty proving that officers' malfeasance violates public laws and department regulations, they often cannot prove that their cited public policies *require* that officers be fired even for egregious violations of citizens' constitutional rights and department rules.⁶⁹ Because labor contracts or public laws do not command discharge for public law violations, there is nothing to guarantee arbitral accountability to the public.

When the origins of the public policy exception to arbitral enforcement are traced, it becomes clear why it is unsuitable in the police disciplinary context. The Court crafted this very narrow exception to arbitral finality because it wanted speedy, private resolution of labor grievances to avoid strikes in the private sector.⁷⁰ Disputes between private sector

67. See *id.* at 89. The court also found that to the extent Sauro presented an actual risk to the department, it could simply take him off the streets and give him another assignment. *Id.* at 90. But unless the arbitrator ruled that this was the department's prerogative, it would likely face a grievance for violating one of the many protective provisions that are included in police contracts.

68. See *Bryson v. City of Waycross*, No. CU 588-017, 1988 WL 428478, at *9 (labeling police departments as quasi military employers with special disciplinary needs); *Tindle v. Caldwell*, 56 F. 3d 966, 971 (8th Cir. 1995) (finding that police departments' disciplinary decisions deserve special deference because they are paramilitary organizations responsible for public safety).

69. Vacating arbitral awards that reverse police officers' discipline is a rare event. See *City of Boston v. Boston Police Patrolmen's Association*, 855 N.E. 2d 855, 857 (2005) ("This case presents one of those 'rare instances' in which an arbitrator's award must be vacated as contrary to 'an explicit, well-defined, and dominant public policy. . ."). More common is the routine confirmation of arbitral awards; See, e.g., *City of Richfield v. Law Enforcement Labor Services, Inc.*, 910 N.W. 2nd 465 (2018) (reversing a trial court's decision that arbitral reinstatement of an officer for failing to report use of force violated public policy); *Lake County Forest Reserve District v. Illinois Fraternal Order of Police Labor Council*, 2012 Il App (1st) 110280-u (reversing a trial-court's decision that arbitral reinstatement of an officer who left his post without authorization and lied about it violated public policy); *State of Alaska v. Public Safety Employees Association*, 257 P. 3rd 151 (2011) (confirming a trial court's finding that arbitral reinstatement of a trooper fired for dishonesty did not violate public policy); *Michigan Association of Police v. City of Pontiac*, 2009 WL 794307 (reversing a trial court's decision that arbitral reinstatement of an officer who filed a false report in conjunction with his arrest of a juvenile violates public policy); *Washington County Police Officers' Association v. Washington County*, 63 P. 3rd 1167 (2003) (holding that arbitral reinstatement of a deputy sheriff who failed a drug test and lied about his marijuana use did not violate public policy).

70. See *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 455 (1957) (holding that Congress prioritized the parties' arbitration dispute resolution mechanism in the Labor Management Relations Act (LMRA), in order to avoid labor strife).

employees and their employers do not typically implicate the public interest, so that factor was given little weight in framing the doctrine. The Court's public policy precedents, all of which deal with private sector employers, demonstrate this. The doctrine is "justified by the observation that the public's interests in confirming the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements."⁷¹

In *United Paperworkers Int'l Union v. Misco, Inc.*, the Court discussed the general absence of public policy impacts in arbitrated private sector cases where employees are reinstated for conduct violative of public laws.⁷² In *Misco*, the employee's job involved working on dangerous machinery and he was discharged for possession and use of marijuana.⁷³ An arbitrator reinstated him, and his employer sought to vacate the award on public policy grounds.⁷⁴ The alleged public policy was public disapproval of operating dangerous machinery while under the influence of drugs.⁷⁵ While illegal drug use may violate the criminal laws, the Court ruled that there was no cited law that prohibits the employment of persons who perform dangerous work and also use illegal drugs.⁷⁶ Further, there was no law that prohibited the reinstatement of such an employee.⁷⁷

Even when a public policy can be identified, Court precedents still make it almost impossible for employers to prove a public policy violation. In *Eastern Associated Coal Corp. v. United Mine Workers*, the Court addressed an employer's claim that arbitral reinstatement of a recidivist drug user violated Department of Transportation regulations.⁷⁸ The employer cited transportation regulations that require employers to take steps to eliminate the use of illegal drugs by employees performing safety

71. *Misco*, 484 U.S. at 42.

72. See generally *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987).

73. See *id.* at 33.

74. *Id.* at 34. The arbitrator used technical and procedural devices to justify reinstatement. Specifically, the arbitrator found that the company did not prove possession and use by showing that the employee was in the back seat of a car and there was a burning marijuana cigarette in the front seat ashtray. *Id.* The arbitrator also ruled that the company could not introduce evidence that the employee had marijuana in his car on company property, because it was unaware of this at the time the decision to discharge was made. *Id.*

75. See *id.* at 35. Several formulations of public policy were offered in the case. The employer asserted that possession of marijuana on company property violated public policy, while the district court ruled that the award violated general safety concerns associated with operating dangerous machinery while under the influence of drugs. *Id.* at 34-35. The court of appeals held that reinstatement violated the public policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol." *Id.* at 35.

76. The Court found that the court of appeals' formulation of public policy was rooted in common sense and this violated the standard set out in its seminal public policy precedent. *W.R. Grace and Co. v. Rubber Workers*, 461 U.S. 757 (1983). *Id.* at 43-44. *W.R. Grace* held that public policy must be explicit, well-defined, dominant, and reflected in laws and legal precedents, not "general considerations of supposed public interests." *Id.* at 44-45.

77. See *id.* at 43.

78. *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000).

sensitive work.⁷⁹ The Court found that even if those regulations applied to the employee, they did not prohibit the continued employment of a recidivist drug user. At best, the regulations required the employer to do something about the misconduct, and that included a range of options short of discharge.⁸⁰ Because the arbitrator is empowered by the parties as the final decider of appropriate discipline, he was contractually free to decide that other forms of discipline were appropriate.⁸¹

These cases show that private employee misconduct typically implicates only the employee's and employer's interests, even when the conduct violates public laws. The public is generally not affected if an employer decides to retain or an arbitrator decides to reinstate a drug or alcohol abuser. The same is true if that employee steals from his employer, engages in domestic violence, lies to his employer, or engages in any other conduct that the law frowns on. But law enforcement work is quintessentially public-centered, with officers having the power to literally end lives when they breach work rules and associated regulations.⁸² This makes the public policy doctrine unsuitable for protecting the public interest. And, modifying the doctrine does not appear to be a realistic option. Court precedents have successively narrowed this exception to arbitral enforcement, as confirmed by the Court's pronouncement that even the parties cannot expand the grounds for judicial review of arbitral awards.⁸³ Because the public policy exception is designed to promote arbitral finality, it can also insulate irresponsible arbitral decision-making by protecting arbitral speculation about the motivation for police misconduct and whether it may recur.

II. RISKY ARBITRAL CLAIRVOYANCE AND THE ARBITRATION RECORD

In their attempt to screen out unsuitable candidates, almost all police departments perform psychological testing in addition to background investigations, medical examinations, and physical and agility tests.⁸⁴ The most commonly used psychological tests consist of true/false questions

79. *See id.* at 63.

80. *See id.* at 64-65. The Court noted that as is generally true in labor relations, the regulations gave the parties final control of discipline by permitting for testing, rehabilitation, or discipline, and did not require termination. *Id.*

81. *See id.* at 65. Therefore an arbitral decision to suspend the employee, subject him to drug testing, and imposing arbitration costs on him, was consonant with the Department of Transportation regulations. *Id.* at 65-66.

82. *See Tindle v. Caudell*, 56 F.3d 966, 971 (8th Cir. 1985) (police departments are responsible for providing public safety and order).

83. *See Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 589 (2008) (holding that the parties to an arbitration agreement cannot contract for judicial review of legal errors by the arbitrator).

84. *See* David A. Decicco, *Police Officer Candidate Assessment And Selection*, FBI LAW ENFORCEMENT BULLETIN 1, 2-4, Dec. 2000; Ryan M. Roberts, Anthony M. Tarescavage, Yossef S. Ben-Porath, Michael D. Roberts, *Predicting Postprobationary Job Performance Of Police Officers Using CPI and MMPI-2-RF Test Data Obtained During Pre-employment Psychological Screening* (2018) (noting that pre employment psychological screening for police officers is routinely performed nationwide).

that measure pathology or personality and behavioral characteristics.⁸⁵ Factors such as antisocial behaviour, aggression, impulsivity, the need to dominate others, and general attitudes to law enforcement are measured, but the predictive value of these tests is highly questionable.⁸⁶ Officer candidates can game that test by giving socially desirable responses, thereby underreporting psychopathology.⁸⁷ Most studies have concluded that these tests are not accurate predictors of on-the-job performance because of their failure to correlate with disciplinary problems, commendations, or supervisory ratings, among other things.⁸⁸ Tests have been shown to misidentify who will be good or bad cops, and those that were regarded as having predictive value have been undermined by design flaws.⁸⁹ The bottom line appears to be that “no best practice instrument for the selection of police officers exists at this time.”⁹⁰ And police psychologists concede that they should reject more applicants because of emotional or psychological unsuitability.⁹¹

Because professional psychological testing is incapable of screening out all bad cops, police departments must rely on specific behaviour or behavioral patterns to assess conscious or unconscious biases. The absence of overt racism, and the underreporting of abuses further limit a department’s ability to determine causation in police abuse cases.⁹² So it is difficult for department heads to know whether psychopathology, hypomania, stress, or some other factor motivated misconduct. It is therefore not unusual for police departments to view specific cases of abuse as one-off events, and argue that one bad apple should not taint the image of the entire department.⁹³ These barriers to knowing officers’ mental states sug-

85. See Jonathan Lough and Kathryn Von Treuer, *A Critical Review Of Psychological Instruments Used In Police Officer Selection*, 36 *PIJPSM* 737, 739-44 (2013).

86. See *id.* at 739-47.

87. See Stephen L. Aita, Benjamin D. Hill, Mandi W. Musso, Wm. Drew Gouvier, *Can we Identify Bad Cops Based on History? Base Rates of Historical Markers in Law Enforcement Pre-employment Evaluations*, 33 *J. OF POLICE AND CRIM. PSYCH.*, 201, 203 (2018). Because psychological screening relies on the applicant’s responses, the clinical judgment of the tester is key in screening out poor candidates. *Id.* at 202.

88. See *id.*

89. See Lough and Treuer, *supra* note 85 at 741-43.

90. *Id.* at 746.

91. See Robin Inwald and Nathan Thompson, *A 2018-2019 Snapshot of Psychological Screening Rejection Rates: Perceived Trends Reported by Police/Public Safety Psychologist*, *J. OF POLICE & CRIM. PSYC.* (2020) (reporting that the desired rejection rate of police psychologists is 26%, which is much higher than actual rejection rate of 15%).

92. See Sophie Trawalter, D.J. Bart-Plange and Kelly M. Hoffman, *A Socioecological Psychology Of Racism: Making Structures And History More Visible*, 32 *SCIENCE DIRECT* 47, 49 (2020) (reporting that it is taboo to display bias so police officers do not exhibit it); Cassandra Chaney and Ray V. Robertson, *Racism and Police Brutality in America*, 17 *J. AFR. AM. ST.* 480, 482 (2013) (reporting studies that show that blacks are more likely to be victims of police brutality and typically underreport incidents where they were profiled or stopped without evidence of criminality).

93. See Andrew Cohen, *Good Cops, Bad Cops, and the Self-Fulfilling Prophecy of the Police Protest Movement*, *BRENNAN CENTER FOR JUSTICE*, June 17, 2020 (commenting on the Trump Administration’s advocacy of the view that policing is tarnished by a few rotten apples); See Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through An Empirical Assessment of Graham v. Connor*, 112 *N.W. U. L. REV.* 1465, 1468 (2018) (noting that discussions

gest that when strong action is taken, department heads know enough to conclude that offending officers are a danger to the community. But what department heads know is not always admissible in arbitration.

1. *The Arbitral Record Is Incomplete*

Arbitrators know even less about the factors that motivate abuse in the cases they adjudicate because they have less information than the psychologists or department heads who evaluate officers' suitability for the job. The narrow arbitral record is too incomplete to produce a true profile of the officer, in part because not every person who is abused by the police files a complaint. Of those that complain, only a few are found meritorious.⁹⁴ And even for meritorious complaints for which discipline is imposed, there may be no record because of contract rules that expunge discipline. So predicting whether an officer will abuse his power again based on a pattern of abuse is a mighty challenge for anyone. Without admissible evidence of abuse or reliable evidence of motivation, it is dangerous for arbitrators to adopt the view that the misconduct was an isolated event.

Courts hearing public policy challenges do not generally address the inherent danger of arbitral prediction of future behavior as a basis for confirming awards. If each *known* incident of misconduct is symptomatic of a trait that endangers the public, and places the image and effectiveness of the police department at risk, then arbitrators and judges should include this consideration in their decision-making. Studies investigating the problem of excessive force, for example, show that police excess is systemic, and racism and excessive violence are woven into the fabric of law enforcement.⁹⁵ If arbitrators cannot know all of an officer's reprehensible behaviour, and reported misconduct is barred by contract rules, their judgements about recidivism cannot be reliable.

2. *The Exclusion of Systemic And Implicit Bias From The Arbitral Record*

Studies that demonstrate the national problem of police using excessive force is not evidence that arbitrators consider in their decision-making

about police excess "has largely been framed as a problem of individual 'bad apples' — rogue officers who harbor animosity or fail to adhere to department regulations — or departmental shortcomings such as poor training, or lack of clear policy."); *But see* Tonya Staeger, *I Worked With Bad Cops For Years. Law Enforcement Doesn't Have To Be 'Us Versus Them'*, KANSAS CITY STAR, July 15, 2019 (giving a first-hand account of the pervasiveness of police abuse of authority).

94. *See* Dunbar and Wallender, *supra* note 23 (one study in Minnesota showed that of 3133 civilian complaints lodged, only 13 resulted in discipline); Ingraham, *supra* note 20 (reporting that unionized police departments receive double the number of complaints as those that are not unionized, and that only 7% of the complaints are credited).

95. *See* POLICE USE OF FORCE, *supra* note 28, at 41 (reporting that "high rates of police involved killings of people of color stem from explicit and implicit systemic bias against marginalized communities [And although] advocates disagree on the causes of this disproportionate impact, a prevalent theme in this body of literature is that the criminal justice system disproportionately impacts communities of color."). *Id.* Rates across the United States are similarly disproportionate. *Id.* at 44.

ing, but it is evidence that police departments are intimately aware of.⁹⁶ Decisions to discharge for racist behaviour, excessive force, or other misconduct that goes to the integrity of constitutional policing, are contextualized by what the misconduct portends. Studies show that officers generally target blacks at a disproportionate rate.⁹⁷ For example, 2011-12 statistics from Dearborn, Michigan show that 50% of all arrests were black even though blacks comprise only 4% of city residents.⁹⁸ In fact, during these two years, local police arrested 4,500 blacks - 500 more than lived in the city.⁹⁹ In some cases, it is not merely individual officers, but entire units or departments that terrorize members of the communities they are sworn to protect and serve.¹⁰⁰ As a result, black communities feel "heavily surveilled, devalued and under attack by law enforcement."¹⁰¹

When arbitrators make reinstatement decisions, they are not only contractually incapable of developing a full record of behavior, but they fail to consider documented instances of pernicious practices. Misconduct may be excluded from evidence because of labor contract procedural or expungement rules, but a wider corpus of evidence is unavailable because of severe underreporting by victims of abuse.¹⁰² People are generally afraid of the police and the prospect of retaliation if their misconduct is reported. That fear is more widespread and heightened for blacks, who routinely experience abuse at the hands of police officers.¹⁰³ While 75% of whites believe there is even-handed law enforcement by police officers, most blacks believe that cops discriminate, and 31% of blacks won't even call the police because of their fear of biased treatment.¹⁰⁴ So whether an officer has a propensity for breaking the rules will not likely be reflected in the arbitration record.

Arbitral reversal of discipline is also not contextualized by the data on implicit bias.¹⁰⁵ To the extent that arbitrators possess higher levels of white racial identity, their empathy for blacks who are victims of police abuse is likely diminished, along with their inclination to uphold disci-

96. *See id.* at 14-15 (discussing police departments failure to report, and efforts to obscure use of force data grounded in concern that the information will be used vilify them).

97. *Id.* at 8, 41.

98. *See id.* at 43-44.

99. *Id.*

100. *See id.* at 22.

101. *Id.* at 43.

102. One study on use of force complaints showed 26,000 complaints in one year for law enforcement agencies with 100 or more officers. *See* Matthew J. Hickman, *Citizen Complaints about Police Use of Force*, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, June 2006.

103. POLICE USE OF FORCE, *supra* note 28, at 41.

104. *Id.* at 42.

105. *See* Megan Quattlebaum, *Let's Get Real: Behavioral Realism, Implicit Bias, and the Reasonable Police Officer*, 2 STAN. J. OF CIV. RTS. & CIV. LIB. 1 (2018); Vickie M. Mays, Denise Johnson, Courtney N. Coles, Denise Gellene, Susan D. Cochran, *Using the Science of Psychology to Target Perpetrators of Racism and Race-Based Discrimination For Intervention Efforts: Preventing Another Trayvon Martin Tragedy*, 5 J. OF SOCIAL ACTION IN COUNSELING AND PSYCHOLOGY 14 (2013); Gregory S. Parks and Jeffrey O. Rachlinski, *Implicit Bias, Election '08, and The Myth of a Post-Racial America*, 37 FL. STATE L. REV. 659, 683 (2010).

pline.¹⁰⁶ Studies in the employment discrimination context have shown that judges favor plaintiffs of their own race in racial harassment lawsuits.¹⁰⁷ There is no process for arbitral self-auditing in order to prevent incorrect forecasts about future abuses by officers. Individual police department heads are more knowledgeable about their officers' proclivities and behaviour, and they generally try to keep that information as private as possible. For example, there is no federal law mandating the reporting of excessive force cases or police shootings, and as a result, police departments report little or nothing.¹⁰⁸ In fact, big cities and states with records of racially biased police shootings provide no data at all under the voluntary program Congress mandated.¹⁰⁹ And what little data police departments keep is often inaccurate because they underreport or misclassify excessive force cases.¹¹⁰ Some departments file police killings as general homicides, and one study showed that half the data on fatal shootings was misclassified as not being police-involved.¹¹¹ Data collected by The Washington Post and Guardian news outlets is more accurate than the FBI's, and it shows twice as many police killings as the government's data.¹¹² Blacks as a group bear the brunt in these killings or excessive force encounters, and 99% of the time, no charges are filed against the officers.¹¹³

So when department heads take the bold step to discharge an officer, the decision is made with unique knowledge of the risk the officer represents, based on comments, complaints, or abuse of authority infractions, for which no record is available. This important contextual information does not inform arbitral assessment of appropriate discipline.

3. *Misplaced Arbitral Clairvoyance*

Although police officers can easily mask socially unacceptable thoughts and conduct, and psychological testing cannot effectively screen out bad cops, arbitrators nonetheless feel qualified to predict that proven misconduct will not recur. In the *South Windsor* case, for example, the officer drew his gun on a group of young men playing basketball, and ordered them to the floor.¹¹⁴ When he spoke to the Lieutenant about it, he admitted that he screwed up, but he and the Lieutenant could not figure out why it happened.¹¹⁵ A psychiatrist and a psychologist retained by the

106. See James Johnson and Len Lecci, *How Caring is "Nullified": Strong Racial Identity Eliminates White Participant Empathy Effects When Police Shoot an Unarmed Black Male*, 10 AM. PSYCH. ASSOC. 58 (2020) (discussing how one's social identity affects the empathy for persons of another race).

107. See Pat K. Chew, Robert E. Kelley, *The Realism of Racism in Judicial Decision Making: An Empirical Analysis of Plaintiffs' Race and Judges' Race*, 28 HARV. J. ON RACIAL AND ETHNIC JUSTICE 91 (2012).

108. See POLICE USE OF FORCE, *supra* note 28, at 1, 13.

109. See *id.* at 15-16.

110. *Id.* at 14-15.

111. See *id.*

112. See *id.* at 18.

113. *Id.* at 24.

114. See *Town of South Windsor v. South Windsor Police Union, Local 1480*, 770 A. 2d 14, 16-17 (2001).

115. *Id.* at 17.

department both concluded that the officer lacked the “requisite psychological stability to handle weapons safely.”¹¹⁶ The psychiatrist concluded that the officer had “significant potential to decompensate in stressful situations.”¹¹⁷ A mutually agreed-upon evaluation by a psychology professor, Ezra Griffith, concluded that the officer was fit for duty, and the arbitrator sided with Griffith.¹¹⁸ But Griffith’s conclusion was a product of heavy reliance on the officer’s personnel record, which showed no history of decompensation, so Griffith and the arbitrator concluded that to the extent there was decompensation, it was “very swift” and “not clinically remarkable.”¹¹⁹ The officer had a prior incident, but the arbitrator found that the department and their psychiatrist were barred from using this prior conduct to determine fitness for duty.¹²⁰

Another example of dangerous arbitral assessment and prediction about recidivism can be seen in the *Teamsters Local Union No. 714* case.¹²¹ In this case the officer was discharged for verbally and physically attacking a family because their car had run into his wife’s.¹²² The arbitrator diagnosed the officer’s problem as “anger” and felt the behaviour could be prevented with anger management counselling.¹²³ This diagnosis, coupled with the absence of discipline in the officer’s record, and the arbitrator’s purposeful failure to rule on the officer’s credibility, provided the bases for reinstatement.¹²⁴ But a trial judge reviewing the award disagreed with the arbitrator’s assessment, finding that *righteousness*, not anger, motivated the behaviour.¹²⁵ Like the employer, the trial judge found that the officer maintained that he did nothing wrong, even after the department and a jury found that he did.¹²⁶

The arbitrator is confined to the contract and the parties’ past practices, so if the contract bars the admission of data that support discharge, it will be excluded. Arbitrators can also use the department’s failure to take strong action in the past when officers abused their authority to support reversal decisions. Lenient discipline as a past practice can be treated as a contract rule that commands more leniency.¹²⁷ What this adjudicatory model portends for public safety is not controlling on the arbitrator. An incomplete arbitral record is aggravated by the fact that the public, including arbitrators, and police, are socialized to believe in black criminality, so arbitrators’ implicit biases can influence their judgments about

116. *See id.* at 17-18.

117. *Id.* at 20.

118. *Id.* at 19-21.

119. *See id.* at 20.

120. *Id.*

121. *See City of Highland Park v. Teamsters Local Union No. 714*, 828 N.E. 2d 311 (2005).

122. *Id.* at 312-13.

123. *Id.* at 315.

124. *See id.*

125. *See id.*

126. *See id.* at 315-16.

127. *See ELKOURI AND ELKOURI, supra* note 11, at 12.1 (noting that arbitrators and the Supreme Court have accepted the principle that past practice can be enforced as a contract rule).

whether the officer's excesses were more or less justified.¹²⁸ Even when arbitrators determine there was egregious misconduct, their biases could persuade them that it will not recur.¹²⁹

And, arbitrators are not accountable to the public. Arbitrators get paid and return to their private lives without having to explain themselves to the victims of police excess, or the electorate from whose funds they are paid. Decisions favoring rogue cops may also reflect the arbitrators' personal view that police officers really do protect and serve their communities, and instances of abuse are anomalies.¹³⁰ This results in reinstatement rationalized with arbitral predictions about recidivism which judges are bound to respect.

III. REINSTATEMENT IN THE FACE OF PROVEN MISCONDUCT

Because of legal rules requiring broad deference to arbitral awards, and the failure of arbitrators to incorporate the public's interests in adjudicating disciplinary cases, police departments can be saddled with reinstatement decisions that place the public at risk. The specter of arbitral unaccountability is highlighted by reinstatement decisions that the public may find shocking. For example, an arbitrator reinstated a Nebraska state trooper who was fired for his membership in and association with the Ku Klux Klan (KKK).¹³¹ In order to prevent the reinstatement, the state had to commit resources to vacate the award on public policy grounds. The police union fought the state in trial court and lost, but continued the fight on appeal.¹³² In *State of Nebraska v. Henderson*, the Nebraska Supreme Court ultimately ruled that "[o]ne cannot simultaneously wear the badge of the Nebraska State Patrol and the robe of a Klansman without degrading what that badge represents when worn by *any officer*."¹³³

To reach its decision, the court juxtaposed the history and purpose of the Ku Klux Klan to the racial equality principles upon which the State was founded and operates. The court found that the KKK, from its inception in 1865 or 1866, has been an organization whose central purpose is

128. See POLICE USE OF FORCE, *supra* note 28, at 30 (reporting that whites including police are socialized to believe in black criminality, which the media reinforces, resulting in implicit bias at every stage of the law enforcement process).

129. See Rushin, *supra* note 7, at 588-92 (reporting expert consensus that without community involvement, police disciplinary processes have become insular and unaccountable, and suggesting a number of ways to eliminate or limit arbitral involvement); Richards and Cohen, *supra* note 25 (discussing the secretive nature of police arbitrations, and noting that in one city, the arbitrator sided with officers 79% of the time in the course of adjudicating 75 cases).

130. See Alan Symonette, *Labor Arbitration and Police Discipline: Misperceptions and Reforms*, presented at the 2020 ABA Labor and Employment Virtual CLE 1, 17, November 13, 2020 (arbitrator declaring that "[t]he vast majority of police officers work hard to honor their oaths to serve and protect their communities. . . There are officers who seize the opportunity to be engaged in this service while there are a few others [emphasis added] who feel they are tasked to enforce the rules in a community they know little about, don't care to know about, or just don't like."). *Id.*

131. See *Nebraska v. Henderson*, 762 N.W. 2d 1 (2009).

132. See *id.*

133. See *Henderson*, 762 N.W. 2d, at 18.

the maintenance of white supremacy.¹³⁴ Despite its claims of non-violence and Christian purpose, the KKK has been and remains an entity that “represents discrimination, violence, and armed resistance to lawful authority.”¹³⁵ By contrast, the State of Nebraska was founded two years after the KKK, on principles of racial equality and equal protection of the laws.¹³⁶ Attesting to principles of racial equality was a requirement for statehood, and the State’s constitution, its statutes, and specifically laws governing police officers all require equal treatment, regardless of race, color, religion, national origin, and a host of other factors.¹³⁷ The court concluded that these laws reflect a strong public policy that the law will be enforced without discrimination, and this public policy incorporates and depends on the public’s perception that law enforcement is fair.¹³⁸ Because Henderson knowingly joined the KKK, took its oath which is antithetical to state policy, gave the organization financial assistance, and provided them with the propaganda of having law enforcement support, “Henderson’s return to duty would involuntarily associate the State patrol with the Ku Klux Klan and severely undermine public confidence in the fairness of law enforcement and the law itself.”¹³⁹ But the public policy exception is so narrow that it provided the basis for two judges to dissent.¹⁴⁰ The dissenters argued that the arbitrator’s findings that provided the basis for reinstatement must be deferred to.¹⁴¹ And the arbitrator found that the State did not prove that Henderson had engaged in or would engage in discriminatory law enforcement, so reinstatement was appropriate.¹⁴² Therefore, the award did not violate or impair Nebraska public policy. This kind of reasoning is not unusual.

In *City of Ansonia v. Stanley*, the city discharged officer Earl Stanley because in a short period of time, four women complained about unwelcome, vulgar sexual advances and touching, while Stanley was on and off duty.¹⁴³ One of the complaints led to his arrest and a sexual assault charge, for which Stanley was placed on probation, ordered to make restitution, get counseling, and to stay away from the victim.¹⁴⁴ The combination of complaints and the criminal charge provided the basis for dismissal, and the union appealed to the state arbitration board. A panel of arbitrators reinstated Stanley on purely procedural grounds, finding

134. *See id.* at 11-12.

135. *Id.* at 12-13.

136. *Id.* at 14-15.

137. *Id.*

138. *See id.* at 15.

139. *Id.* at 18.

140. *See id.* at 18-24 (Stephen, Connolly, J.J., dissenting).

141. *See id.*

142. *See id.* at 20. The dissenters felt that Henderson’s reinstatement would not result in “racial profiling or some other form of discriminatory law enforcement.” *Id.* Further, that only post-reinstatement conduct can violate the state’s public policies, and misconduct is unlikely despite his personal beliefs. *Id.* The dissent was sure that Henderson had “never breach[ed] his duty to enforce the law fairly and impartially in the past,” and his oath to enforce the law fairly will constrain him in the future. *Id.*

143. *City of Ansonia v. Stanley*, 854 A. 2d 101 (2004).

144. *See id.* at 105.

that the city did not provide Stanley with written complaints from the victims within seven days, nor act on three of the complaints within five months, as provided in the labor contract.¹⁴⁵ Contemporaneously, the arbitration board found that Stanley engaged in sexual misconduct at work, used his position to intimidate women, violated the trust that accompanies his position, lied to investigators, admitted that he engaged in sexual misconduct to facilitate sexual relations, and had expressed no remorse.¹⁴⁶

In its move to vacate the award on public policy grounds, the city cited state and federal civil and criminal laws prohibiting sexual harassment in employment generally, and in the law enforcement sector specifically.¹⁴⁷ The city also pointed to its legal obligation to take preventive steps for known sexual misconduct, in addition to the police manual which requires honesty and civility by officers.¹⁴⁸ But the arbitrators agreed with the union's contention that the state and federal laws cited don't apply to this case because contractual requirements controlled. They ruled that the contract required written complaints, provided to Stanley within seven days of receipt, no exceptions.¹⁴⁹ For his serial victimization of women, the panel concluded that denial of backpay was the only punishment the city could contractually impose.¹⁵⁰

In *Stanley*, the arbitrators' preoccupation with Stanley's contractual due process rights took precedence over public laws, proven sexual victimization of women, and the city's interest in providing the public with fair and accountable policing. Arbitral emphasis on contractual rules even when they could produce injustice is a fundamental arbitration practice that is not well-suited to the task of promoting accountable policing.¹⁵¹ Under the public policy exception, the court could have endorsed the arbitrators' deferral to contractual procedures. But the court concluded that reinstating Stanley "would be directly at odds with dominant public policies supported by clear laws and legal precedent."¹⁵² The union appealed, unsuccessfully arguing that the award did not violate any public policy, and the arbitrators' findings of sexual misconduct, intimidation, and dishonesty, that served as the basis for denying Stanley backpay, was mere dicta.¹⁵³

Arbitral awards are insulated from vacatur by the requirement that the award, as opposed to the misconduct, violates public policy. In mis-

145. *See id.* at 107-08.

146. *Id.* at 108.

147. *See id.* at 108-09.

148. *Id.* at 108, 111.

149. *See id.* at 107-08.

150. *Id.* at 108.

151. DOUGLAS L. LESLIE, LABOR LAW IN A NUTSHELL 276 (2008) (summarizing Supreme Court precedent that compels a court "to abide by the arbitrator's decision and award even though it finds that award on the merits repugnant to logic and justice."); *Enterprise*, 363 U.S. at 597-99 (when parties bargain for an arbitrator's judgment, courts must enforce the award even if it is irrational); *Misco*, 484 U.S. at 36-38 (a court cannot overturn an arbitral award even if it disagrees with the arbitrator's interpretation of the contract and remedial order).

152. *Id.* at 113.

153. *See City of Ansonia v. Stanley*, 887 A.2d 394, 401 (2005).

conduct cases, the officer's misbehaviour will invariably violate some public law or departmental regulation that reflects public policy. But the decision to reinstate an officer who contravenes the public policy is likely not prohibited by any regulation. That is to say, there is likely no public policy that expressly states that officers who break the rules cannot remain employed. This reality insulates arbitrators' broad discretion to impose very light discipline in misconduct cases, as consonant with the labor contract's "just cause" requirement.

For example, in *City of Owasso v. Fraternal Order of Police, Lodge #149*, the City fired officer Mike Denton for stepping on an arrestee's head and striking him in the face while the arrestee was at the police department, in handcuffs, and face down on the floor.¹⁵⁴ The union grieved the discharge, and an arbitrator ruled that the city only had just cause to give Denton a written warning notwithstanding a finding of "unreasonable and unnecessary force."¹⁵⁵ Because no injury to the arrestee was evident, and the police department had been lenient in meting out discipline for misconduct in the past, the arbitrator reinstated Denton.¹⁵⁶ Absent evidence of physical injury, the arbitrator concluded that Denton's use of force was not *excessive*.

The City persuaded a trial court to vacate the award on public policy grounds. Relying on excessive force criminal statutes, the trial court found Denton's conduct violated criminal laws, his conduct was job-related, his conduct exposed the public to a special risk, and if reinstated, the department will have to account for its continuation of an abusive officer.¹⁵⁷ But the appellate court sided with the arbitrator, finding that none of the cited public policies prohibit the reinstatement or retention of an officer who uses excessive force.¹⁵⁸ The court reasoned that if the city could fire any officer who uses excessive force, this power would trump the labor contract's delegation of appropriate discipline determination to the arbitrator.¹⁵⁹ Without a law that says the city cannot employ officers who use excessive force, the court of appeals concluded that only an arbitrator can make the final decision whether discharge is appropriate for an officer who engages in such misconduct.¹⁶⁰

1. *Construing The Contract To Protect The Public*

Were all courts to take the approach to vacatur adopted by the court in *City of Owasso*, arbitral awards would be impervious to challenge as courts look away from the implications of reinstatement for the public, and focus solely on whether reinstatement violates positive law. The case of *City of Boston v. Boston Police Patrolmen's Association* demonstrates the

154. See *City of Owasso v. Fraternal Order Of Police, Lodge #149*, 336 P. 3d 1023, 1024 (2014).

155. See *id.* at 1024.

156. *Id.*

157. See *id.* at 1025.

158. *Id.* at 1029.

159. *Id.* at 1030.

160. See *id.* at 1029.

flexibility courts have with the public policy exception.¹⁶¹ In this case, officer John DiSciullo was discharged for making false arrests, filing false charges, and lying to cover his tracks.¹⁶² The arbitrator found that DiSciullo confronted Jonathan Rodriguez and his wife who were double-parked, and was impatient, harsh, and derisive, even calling Rodriguez's wife a "b——." ¹⁶³ He then arrested them, threatened Rodriguez while he was handcuffed to a wall at the police station, and filed a report charging them with disorderly conduct, assault and battery on an officer, and resisting arrest.¹⁶⁴ These criminal charges were tossed out by the state, and an arbitrator also found that the charges were intentionally false.¹⁶⁵ The arbitrator also found that DiSciullo lied to investigators, lied at the arbitration hearing, and intentionally falsified his report accusing Rodriguez and his wife of criminal conduct.¹⁶⁶ The arbitrator made no finding in respect to violations of public policy, and concluded that only a one-year suspension was warranted.¹⁶⁷

In the City's suit to vacate the award on public policy grounds, both the Superior Court and the Court of Appeals refused vacatur.¹⁶⁸ But the Massachusetts Supreme Court vacated the award on public policy grounds. While conceding that an arbitral award deserves great deference, the court noted that it is not sacrosanct.¹⁶⁹ The court found that an arbitrator cannot "order a party to engage in an action that offends strong public policy."¹⁷⁰ Further, an award can still violate public policy if it does not violate "the letter of a statute."¹⁷¹ The court noted that there are state laws prohibiting the hiring of felons, criminalizing perjury, and mandating that police commissioners take steps up to and including discharge, to ensure that officers obey the law and tell the truth.¹⁷² The arbitrator found that DiSciullo "falsely arrested two individuals on misdemeanor and felony charges, lied in sworn testimony 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, . . ."¹⁷³

161. *See City of Boston v. Boston Police Patrolmen's Association*, 824 N.E. 2d 855, 862 (2005) (quoting the Supreme Court's pronouncement in *Eastern* that the "courts authority to invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law.").

162. *Id.* at 857.

163. *See id.* at 857-58.

164. *Id.* at 858.

165. *Id.* at 858.

166. *See id.*

167. Although the arbitrator regarded DiSciullo's conduct as "extreme and bizarre," she did not conclude that he used excessive force, nor did she address whether his conduct violated any laws, ostensibly because the issue was not argued. *See id.* at 859.

168. *See id.* at 859-60 (noting that the appeals court affirmed the trial judge's confirmation of the award "with a distinct lack of enthusiasm.").

169. *See id.* at 863.

170. *Id.* at 860.

171. *See id.* at 862 (the court ruled that emphasis should be placed on the felonious conduct of the officer, not whether he was convicted of it). *Id.*

172. *See id.* (positing that legislated rules that bar persons from becoming police officers should be read to also bar them from remaining as police officers).

173. *See id.* at 861.

Instead of asking whether there is any law prohibiting the reinstatement of a police officer who engaged in such egregious misconduct, the court incorporated the public's interest into the "just cause" analysis. Although state laws prohibit the hiring of a felon, and criminalized perjury, the court ruled that DiSciullo need not be convicted of these specific offenses to violate the public policies they reflect.¹⁷⁴ Filing false reports and lying about them comprise criminal conduct even if DiSciullo is not prosecuted or convicted for his actions. And the statutory prohibition against hiring felons as police officers was read to encompass *retention* of officers engaged in felonious conduct.¹⁷⁵ Since DiSciullo's conduct occurred while carrying out his job duties, the court reasoned that the legislature had given "strong instruction that such individuals not be entrusted with the formidable authority of police officers."¹⁷⁶ The court was also not persuaded by the union's "one-time offense" argument, citing the arbitrator's finding that for two years, DiSciullo kept up his "charade of innocence . . . [in his] calculated effort to cover his tracks."¹⁷⁷

Unfortunately, most courts do not approach suits requesting vacatur in this way. The result is deference to arbitral reinstatement decisions, even after findings of egregious misconduct. Arbitrators can also reinstate officers who are discharged for publicly expressing racial hatred, by crediting their claims that their expressed views do not reflect their personal beliefs. Cases in which officers were disciplined for publicly expressing racial antipathy highlight the importance of final authority to discipline in police departments.

2. RACIST SPEECH, THE FIRST AMENDMENT, AND REINSTATEMENT

Reported cases show police officers arguing that their racist speech is constitutionally protected, thereby immunizing them from discipline.¹⁷⁸ Government employees do not have First Amendment protection for speech that occurs while on the job that is within the scope of their work duties.¹⁷⁹ However, government employees are protected when they speak about matters of public concern unless the government can show an interest that outweighs the employees' free speech rights.¹⁸⁰ While pri-

174. *See id.* at 862.

175. *See id.* (noting that this misconduct goes to the heart of an officer's responsibilities).

176. *Id.* at 862.

177. *Id.* at 863.

178. For a discussion of the constitutional requirements for bringing such claims, *see* George S. Scoville III, *Purged by Press Release: First Responders, Free Speech, and Public Employment Retaliation in the Digital Age*, 97 OR. L. REV. 477, 485-488 (2019).

179. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

180. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES*, Ch. 11 (2011). Free speech cases are evaluated using a four-part test: "(1) The speech must not be expression on the job and within the scope of the employee's duties; if it is, there is no First Amendment protection for the speech; (2) the employee must prove that an adverse employment action was motivated by the employee's speech; if the employee does this, the burden shifts to the employer to prove by a preponderance of the evidence that the same action would have been taken anyway; (3) the speech must be deemed to be a matter of public concern; and (4) the court must balance the employee's speech rights against the employer's interest in the efficient functioning of the office."). *Id.*

vate decisionmakers like arbitrators may be persuaded that such speech does not interfere with an officer's ability to police evenhandedly, police departments typically regard such speech as an ominous sign. The following cases demonstrate that police departments and communities of color in particular have legitimate cause to worry about police officers who recast their racist expressions as constitutionally protected speech that is insulated from discipline.

In *Locurto v. Giuliani*, officer Joseph Locurto and two firefighters were fired because of their participation in a parade in their New York island town of Broad Channel that is predominantly white.¹⁸¹ Every year, local politicians almost always judge floats mocking Jews, Asians, and gays "funniest," and they award prizes accordingly.¹⁸² One year Locurto, Jonathan Walters and Robert Steiner entered a float in which they donned blackface, afro wigs, and urban clothing; displayed buckets of Kentucky Fried Chicken; and ate and threw watermelon into the crowd.¹⁸³ They also shouted "No Justice, No Peace," and "Crackers, we're moving in," complemented with Walters' reenactment of the murder of James Byrd, Jr., a black man who was chained to the back of a pickup truck by three white men and dragged to his death.¹⁸⁴ The city through Mayor Giuliani swiftly moved to discharge the three men because their conduct was viewed as "a disgusting display of racism"¹⁸⁵ that would bring "discredit upon the police and fire departments within minority communities."¹⁸⁶ The incident was widely covered by television and print media as racist, and it provoked public outcry.¹⁸⁷

The three employees had no record of expressing racial views on their jobs, and the two firefighters were apparently well-liked by some of their black co-workers.¹⁸⁸ With no evidence that these public servants harbored racial animus, the three sued the city for violating their First Amendment right of free speech and their Fourteenth Amendment right of due process. They argued that their float activities were not an expression of their personal views but a humorous commentary or satire on the prospect of racial integration of their town.¹⁸⁹ A federal district judge agreed with them, and awarded reinstatement, full back pay and benefits.¹⁹⁰ The judge also found that they were denied due process in the course of challenging their dismissals and that the city improperly retaliated for the content of their speech.¹⁹¹

181. *Locurto v. Giuliani*, 447 F. 3d 159 (2d Cir. 2006).

182. *See id.* at 164.

183. *Id.*

184. *See id.* at 165. The James Byrd Jr. incident would have been memorable because it was so shocking and had occurred only months earlier. *Id.*

185. *Id.* at 180.

186. *See id.* at 181.

187. *Id.* at 180.

188. Two black coworkers testified that they would be happy to work with Steiner and Walters if they were reinstated, and that they had never witnessed any racist behaviour by either of them. *Id.* at 167.

189. *See id.* at 163, 167.

190. *Id.* at 169-70.

191. *Id.*

By contrast, a hearing officer who had administratively upheld Locurto's discharge found that his own testimony established that he was not expressing an opinion on a public matter, but was mimicking and mocking a racial group for the amusement of others.¹⁹² Likewise, an Administrative Law Judge found as disingenuous Steiner's and Walters' claims that they were promoting an "integrationist message."¹⁹³ On appeal, the second circuit rejected the district court's analysis and conclusion that the First Amendment was violated. The circuit court found that the trial court's findings of a due process violation was valid because the employees were denied adequate discovery of the city's motivation for firing them.¹⁹⁴ But the court concluded that even if the float was a comment on the future prospects of racial integration of the town, the discharges were not a retaliatory response to the content of the float, nor an attempt to protect the Mayor's political image.¹⁹⁵

The second circuit found that the discharges were motivated by the Mayor's concern about damage to the image of the police and fire departments, the city itself, public perception about the impartiality of police and firefighters, and the float's impact on minority recruiting.¹⁹⁶ The court also found reasonable the Mayor's concern about public perception that the police and fire departments were racially insensitive.¹⁹⁷ The court noted that irrespective of their intentions, the float's message of racial stereotypes and hatred threatened to damage the relationship between minority communities and the city.¹⁹⁸ And, minority community reaction was also a highly relevant consideration for the Mayor in evaluating the disruptive effects of the float, not merely an "external" factor or "heckler's veto" as the district court concluded.¹⁹⁹ The court then balanced the parties' interests and concluded that the city's interest "in maintaining a relationship of trust between the police and fire departments and the communities they serve, outweighs the plaintiffs' expressive interests in this case."²⁰⁰

Another case in which an officer disciplined for publicizing his racist views argued he engaged in protected political speech is *Duke v. Hamil*.²⁰¹ In this case, a Deputy Chief of Police, Rex Duke, posted on Facebook a picture of a confederate flag and the words "It's time for the second

192. *See id.* at 167.

193. *See id.* at 168 (an Administrative Law Judge found that there was "no credible evidence that the float's message was anything but racist.").

194. *See id.* at 171.

195. *See id.* at 178-82.

196. *Id.* at 182.

197. *Id.*

198. *See id.*

199. The district court had found that the workers were not fired because of the city's concern about the disruptive effects that their conduct could have on operations, but even if the city's concern in this regard was real, it was nevertheless unreasonable. *Id.* at 170, 182. But the Second Circuit found that the city's concern about disruptive effects were real, the disruption need not be actual, and "a reasonable prediction of disruption" would support the city's decision to fire. *Id.* at 179, 182.

200. *See id.* at 183.

201. *Duke v. Hamil*, 997 F. Supp. 2d 1291, 1293 (2014).

revolution,” right after President Obama was reelected in 2012.²⁰² Duke said the post was intended solely for the eyes of close friends and family, and in no way implicated his job or caused any harm to his employer.²⁰³ Someone showed the post to the media, and it became the topic of the evening news and anonymous complaints, eventually leading to Duke’s demotion and reassignment.²⁰⁴

Duke sued alleging that his post merely conveyed his dissatisfaction with Washington politicians and was a protected comment by a government employee on a matter of public concern.²⁰⁵ The court credited Duke’s claim that he spoke as a citizen and not as a police department employee, and it further found plausible his claim that his post was political commentary.²⁰⁶ But the court acknowledged the implications of the post, since it was open to “many controversial interpretations” and “likely offensive to some members of the public.”²⁰⁷ Given Duke’s leadership position, the court found that his advocacy for revolution during a presidential election, and associating that idea with a Confederate flag, clearly sent a prejudicial message to his co-workers and the community.²⁰⁸ The genuine potential of Duke’s post to harm the police department’s reputation and to impair public trust, legitimized his employer’s decision to take action.²⁰⁹ The court concluded that the post gave Duke’s superiors valid concerns about his prejudice, and “was capable of impeding the government’s ability to perform its duties efficiently.”²¹⁰

These cases demonstrate that arbitrators are preoccupied with enforcing contract rules that protect cops to the detriment of the public’s interests. They also show that some officers feel so secure in their jobs that they boldly publish their dislike for some members of the communities they serve. Because arbitrators are willing to exclude evidence that shows officers are psychologically unfit while also crediting officers’ neutral explanations for abusive or racist behavior, the arbitration process facilitates unaccountable policing. Conversely, publicly accountable individuals have the incentive to purge the force of officers whose conduct or words suggest they are hostile to the communities they serve.

IV. THE PROBLEM OF MOTIVE AND THE PROSPECTS FOR REFORM

People generally do not wear their prejudices on their sleeves because overt bias is now taboo. You cannot always know a person’s invidious thoughts by observing their outward expressions. For example, in the

202. *See id.* at 1293.

203. *See id.* at 293.

204. *Id.* at 1294.

205. *See id.*

206. *Id.* at 1300. The court liberally found that a Confederate flag can communicate “various political and historical points of view” and combined with a call for revolution, plausibly expressed “dissatisfaction with Washington politicians.” *See id.* But this interpretation is highly implausible given its context, i.e., reaction to a black man becoming president.

207. *Id.* at 1302.

208. *See id.* at 1302-03.

209. *Id.*

210. *Id.* at 1302.

North Carolina church massacre of nine blacks, Dylann Roof quietly sat in bible study for forty minutes with his victims before killing them.²¹¹ Motivated by racial hatred, Roof showed up at the church and was welcomed by the parishioners, but he never displayed any sign of the hatred he harbored.²¹² A black friend later said he had never heard Roof say anything racist.²¹³ And when racial views are expressed, they are now coded. In the electoral context, for example, studies show that whites generally do not publicize their private views of blacks. Instead of disclosing their opposition to school integration, for example, voters responded that they “don’t know,”²¹⁴ when asked their position. Similarly, voters who opposed black candidates for office responded that they were “undecided.”²¹⁵ No one wants to be viewed as a racist.

Although applicants for police jobs undergo psychological evaluations and background checks, these processes cannot screen out all unsuitable candidates. They are incapable of determining whether the person has improper motives for joining the force because it is difficult to know whether a person views police work as an opportunity to dominate and control others, versus protecting and serving a community.²¹⁶ If officers are not psychologically suited for the stressors of police work, they represent a threat to the community, even if their backgrounds or work records do not demonstrate that danger. Individuals who lack a disposition to serve are more likely to humiliate and ostracize members of the community they serve in many unseen ways. For example, the reason many blacks do not like police officers and will not turn to them in time of need is because they feel threatened by them.²¹⁷

Studies show disproportionate police abuse of minorities, but it is not all reported.²¹⁸ While minorities live with the continuing risk of discriminatory police treatment, whites can excuse police excess particularly against blacks because of their racist views.²¹⁹ Whites see fewer instances of overt racism and reflect on their own experiences to conclude that prejudice has declined significantly.²²⁰ Many blacks don’t call the police

211. Alan Blinder and Kevin Sack, *Dylann Roof Is Sentenced to Death in Charleston Church Massacre*, NY TIMES, Jan 10, 2017 (Roof showed up at the church and was offered a seat for Bible study, sat there quietly for 40 minutes, and when the parishioners closed their eyes for benediction, he began killing them).

212. *See id.* (Roof self-radicalized online by posts claiming blacks were murdering whites with impunity).

213. *Dylann Roof’s friend: He never said anything racist*, BBC NEWS, June 20, 2015.

214. *See Parks and Rachlinski, supra note 105, at 705.*

215. *See id.*

216. Police jobs are attractive to many because of the autonomy, power, and prestige it provides. *See Stamatis Elntib and Daliborka Milincic, Motivations for Becoming a Police Officer: A Global Snapshot*, J. OF POL. CRIM. PSYCH. 1, 2 (2020). The powers associated with the job may be used in abusive ways, as the George Floyd killing demonstrates.

217. *See Cynthia J. Najdowski, Bette L. Bottoms, Phillip Atiba Goff, Stereotype Threat and Racial Differences in Citizens’ Experiences of Police Encounters*, 39 LAW AND HUMAN BEHAVIOR 463 (2015) (noting that blacks expect to be judged and treated unfairly by police because of stereotypical descriptions of blacks as criminals).

218. *See Chaney and Robertson, supra note 92, at 481, 483.*

219. *See id.*

220. *See Hale, supra note 37, at 4.*

for help because they fear that upon arrival, the cops will look for ways to find fault with them.²²¹ Blacks are concerned that they will be worse off after the police arrive. Everyday indignities are often not part of departmental records, so they certainly will not be part of the arbitral record. Even more, when police publicly express their antipathy for blacks, they still expect to be secure in their jobs.

It is very difficult to know how many police officers have disdain or antipathy for racial minorities or the communities they serve, given the general taboo for publicly expressing hostile racial views.²²² It is equally difficult to know the extent to which negative views and thoughts affect policing on a daily basis.²²³ But when there is proven misconduct, police officers should not be shielded by legal rules and arbitral discretion that is untethered from the public interest.

Perhaps the political environment is ripe for legislated or negotiated rollbacks of contract rights that protect rogue officers, in part because conservatives who normally exempt police unions from their opposition to collective bargaining are now reconsidering their position.²²⁴ Abundant and publicly displayed evidence of police excess have increased conservatives' support for the longstanding calls by liberals to rein in collective bargaining terms that insulate misconduct and promote unaccountable policing.²²⁵ Fresh memories of police misconduct and widespread public outcry now make it possible to pressure government officials of all political stripes to remove arbitrators from the disciplinary process. Because police collective bargaining protections emanate from state legislation, the current crisis provides a clarion call for legislative overhaul of contractual protections that contribute to abusive policing.²²⁶ The District of Columbia's response to public outcry demonstrates the feasibility of making publicly accountable officials the final authority on discipline.

Within two months of George Floyd's death, the District enacted a law that reserved control of police discipline as a managerial prerogative, and prohibited future collective bargaining on this subject.²²⁷ This law was an emergency response to community protests for change in police practices,

221. See POLICE USE OF FORCE, *supra* note 28, at 42.

222. See Hale, *supra* note 37, at 189 (2016) (social norms have coerced a change from outward expressions of prejudice, to covert or subtle bias which is now more acceptable); See Parks and Rachlinski, *supra* note 105 at 670-71 (noting that overt racism is now taboo so subtle messages are used to communicate bias).

223. However, research has shown that unconscious or implicit biases influence our racial reaction. See Parks and Rachlinski, *supra* note 105, at 683.

224. See Jonathan Chaif, *Why Conservatives and Liberals Might Join to Fight Back Against Police Unions*, N.Y. INTELLIGENCE, June 16, 2020 (reporting that conservatives in many quarters now regard "police unions as a primary culprit in allowing violent and racist officers to operate with impunity).

225. See Kimberly Quick, *The Double Standard for Public Sector Unions*, THE CENTURY FOUNDATION, Oct. 17, 2017 (noting that police unions are the black sheep of the labor movement because of their routine opposition to accountability and civil rights initiatives).

226. See *Collective Bargaining In The Public Sector*, 97 HARV. L. REV. 1676 (1984) (describing the constitutional and legislative bases of public sector collective bargaining).

227. See Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020, §116, D.C. Code §1-617.08.

and to promote accountable and transparent policing.²²⁸ The law was slated to take effect after the existing collective bargaining contract expired on September 30, 2020, and it reflected the city's view that collective bargaining should not be a shield for police misconduct.²²⁹ The police union challenged the law on constitutional grounds, arguing that it violated the constitution's equal protection, contract, and substantive due process clauses, and also operated as a Bill of Attainder.²³⁰ Factually, the union argued that the right to collectively bargain about discipline is a property right, and the law presumed that police as a group are racist and punishes them by taking away that right.²³¹ Further, they argued that the law is discriminatory because it does not target other law enforcement officials or unions,²³² and it breaches their labor contract because the existing agreement provides for an automatic one-year renewal term once the contract expires at the end of September 2020.²³³

The court rejected all of the union's claims, finding that the City's goal of transparency and accountability was a legitimate governmental objective and that the City's distinction between police officers and other law enforcement officials was rational in view of the fact that police officers have broader jurisdiction and powers.²³⁴ The court ruled that there was no support for the contention that bargaining about discipline is a property or fundamental right, or that the City exercised its power arbitrarily or oppressively.²³⁵ In any event, the laws did not affect the officers' job status, or operate as a form of legislative punishment, or impair existing contractual protections for officers facing discipline.²³⁶

With the elimination of the right to bargain about disciplinary procedures, the District of Columbia is now free to craft due process rules that balance officers' interest in fair hearings and the public's interest in accountable policing. In view of the defects in the arbitration process, the City can remove arbitration as the final step in the disciplinary process, and replace it with a publicly accountable person or body to achieve its goals. Similar changes can also occur through contract negotiations, ideally with the support of police unions, but this seems unlikely.²³⁷

228. *See Fraternal Order of Police v. District of Columbia*, No. 20-2130 (JEB), 2020 WL 6484312 (D. D.C. Nov. 4, 2020).

229. *See id.* at *1.

230. *See id.*

231. *See id.* at *9-10. The union did not provide any legal support for its claim that government employment or public employees' bargaining rights are fundamental interests. *Id.*

232. The union noted that the law did not apply to corrections officers, housing police and other similar law enforcement employees responsible for public safety, but simply targeted a politically disfavored group. *See id.* at *3.

233. *See id.* at *7-8.

234. The court noted that the union had the heavy burden of negating every conceivable basis advanced for the law, and there was no dispute that the law was enacted to advance police accountability and transparency. *See id.* *3-4.

235. *See id.* at *9-10.

236. *See id.* at *7-8. Disciplinary procedures had not changed, and officers were not susceptible to summary discharge as the union claimed.

237. *See To Hold Police Accountable, Ax The Arbitrators*, NY TIMES, October, 3, 2020, <https://www.nytimes.com/2020/10/03/opinion/sunday/police-arbitration-reform-un->

CONCLUSION

Police officers perform jobs that grant them tremendous power and authority. Their daily routine can often be filled with boredom, interrupted by occasional excitement, and sometimes extreme danger.²³⁸ One officer reported that “[h]andling feelings of separation, uselessness, and frustration becomes a ritual habit.”²³⁹ It is therefore critical for police departments to screen out applicants who cannot manage the usual stress and anxiety that routine policing engenders. Normal job stress is elevated by the implicit biases that studies show are endemic to society and police officers.²⁴⁰ American “society [is] structured by police and cultural norms that implicitly support prejudice, bias, or race-based discrimination in everyday societal interactions.”²⁴¹ Our society is one of stereotypes that promotes a positive social identity for whites, and a negative one for blacks. Implicit bias therefore contributes to police mistreatment of minorities, or lack of empathy for them.²⁴² To combat these societal tendencies, police work requires sound moral reasoning and the ability to resist opportunities to abuse power.²⁴³

The public policy exception to the enforcement of arbitral awards was crafted for the private sector where public interests are generally not implicated by arbitral decisions to reverse discipline. Because police disciplinary cases invariably implicate the public’s interests, the doctrine’s emphasis on the *award* violating public policy makes it ill-suited in the police disciplinary context. Since public laws generally do not dictate spe-

ions.html (advocating the removal of arbitrators from the police disciplinary process and noting that efforts to make reforms “are bound to be stymied by powerful police unions.”); See Martin H. Malin and Joseph E. Slater, *In Defense of Police Collective Bargaining*, CHICAGO SUN TIMES, August 12, 2020 (“The idea of partnering with unions is probably anathema to most police chiefs. And it is easier politically for union officials to play to rank and-file feelings that they are under siege than to engage in meaningful cooperation with management. But with calls to defund police departments and to eliminate police collective bargaining, both labor and management may feel they are facing existential moments and have some incentive to come together to address that.”).

238. See Decicco, *supra* note 84, at 1.

239. See *id.*

240. See Quattlebaum, *supra* note 105, at 5-13 (2018) (discussing the data on implicit bias and its manifestation in racial profiling where police target blacks and others without any evidence of criminality); Mays, et al *supra* note 105 (noting that racism is now implicit wherein “individuals use information derived from experience, media, culture, or others to organize people into social categories, according to salient traits, such as age, gender, race, ethnicity, or social roles in society.”). These stereotypes produce unintentional behavior that disadvantages or discriminates against racial and ethnic minorities. *Id.*

241. See Mays, et al *supra* note 105, at 12.

242. See *Id.* at 14, 20 (noting that implicit bias affects police officers who subconsciously see crime and danger in blacks). For a discussion of the overall contributing factors to racism, see generally Steven D. Roberts and Michael T. Rizzo, *The Psychology of American Racism*, AMERICAN PSYCHOLOGICAL ASSOCIATION (2020) (identifying groupings or categories, factions, segregation, hierarchy, power, media, and passivism as factors contributing to racism in America).

243. See Aita, Hill, Musso, and Gouvier, *supra* note 87, at 201 (suggesting that using demographic and historical information about police applicants can help to improve the selection process).

cific disciplinary responses for misconduct, arbitrators have broad prerogatives to reverse discipline for proven misconduct, and courts routinely confirm such awards even when they ignore the public's interest or expose the public to great risks. These awards are confirmed despite the fact that arbitrators are not able to consider the officers' complete record of infractions or know what motivated officers' misconduct. The limited arbitral record and the dearth of arbitral expertise about officers' motives make their predictions about recidivism unreliable. Private arbitral adjudication leaves the public and police departments with the risks that rogue officers represent. These shortcomings in the arbitration process make a compelling case for lodging final authority for disciplinary decisions in the hands of individuals who prioritize the public's interest.

