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The Illusion of the Public Policy Exception: Arbitration, Law Enforcement Discipline, and the Need to Reform Minnesota's Approach to the Public Policy Exception

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THE ILLUSION OF THE PUBLIC POLICY EXCEPTION: ARBITRATION, LAW ENFORCEMENT DISCIPLINE, AND THE NEED TO REFORM MINNESOTA'S APPROACH TO THE PUBLIC POLICY EXCEPTION

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I. INTRODUCTION

In November of 2012, after a car chase, Cleveland police officers fired 137 shots at the suspects' vehicle.[1] An investigation revealed that thirteen officers fired more than 100 shots in the span of eight seconds.[2] One officer, Michael Brelo, stood on the hood of the suspects' vehicle and fired at least

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[1] Eliott C. McLaughlin, *6 Cleveland Police Officers Fired for Actions in Fatal 2012 Chase,* CNN (Jan. 26, 2016), https://www.cnn.com/2016/01/26/us/cleveland-police-officers-fired-chase/index.html [https://perma.cc/R86T-HMTR].

[2] *Id.*

fifteen shots through the windshield at close range.[3] Both individuals in the vehicle, Timothy Russell and Malissa Williams, were killed. Russell and Williams "were both homeless with a history of mental illness and drug use," and fled after an officer attempted to pull them over for a turn signal violation.[4] Brelo, who allegedly fired a total of forty-nine of the shots in the incident, said that he thought he and his partner were in danger.[5] The source of this belief, according to prosecutors, was a backfiring engine that officers mistook for gunshots.[6] Russell and Williams were both unarmed.[7]

Ultimately, the city attempted to fire six of the officers involved.[8] But the terms of the Cleveland police union contract allowed each officer the opportunity to challenge any termination to a third-party arbitrator who would then issue a final, binding decision.[9] This arbitration clause also allowed the arbitrator expansive authority to relitigate any determinations made during earlier disciplinary proceedings.[10] After the arbitrations for the six fired officers, the assigned arbitrator "ordered the city to rehire five of the six officers involved in the deadly shooting, over the fierce objections of city leaders."[11] Officer Brelo was the only officer whose termination stood.[12]

Today, most police officers are represented by unions and covered by collective bargaining agreements.[13] While the terms and structures of these agreements vary widely, they almost always permit officers to appeal disciplinary actions to immediate superiors and, if they still wish to dispute the disciplinary decision, to a neutral arbitrator.[14]

Although studies on the subject are limited in scope, the studies available suggest that "neutral arbitrators regularly overturn police discipline."[15] More controversial, however, is the role of these arbitrators in

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[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] Stephen Rushin, *Police Disciplinary Appeals*, 167 U. PA. L. REV. 545, 560 (2019).
[8] *Id.*
[9] *Id.* at 560–61.
[10] *Id.* at 561.
[11] *Id.*
[12] McLaughlin, *supra* note 1.
[13] Tyler Adams, *Factors in Police Misconduct Arbitration Outcomes: What Does it Take to Fire a Bad Cop?*, 32 A.B.A. J. LAB. & EMP. L. 133, 135 (2017) ("The likelihood of police officers being covered by a collective bargaining agreement increases with the size of the city in which the department is located. In 2013, 92% of police officers serving a population of 1,000,000 people or more had collective bargaining agreements, compared to slightly less than 60% of officers serving populations of fewer than 2,500 people.").
[14] *Id.* at 135–36; *see* Rushin, *supra* note 7, at 571–73.
[15] Adams, *supra* note 13, at 136–37 ("One study of Chicago police discipline arbitration decisions from 1990 and 1993 found that arbitrators overturned about half of the total days of disciplinary suspension imposed by police executives. A similar study of Houston police discipline arbitration awards from 1994 to 1998 found that arbitrators upheld slightly more than half of all suspension days.").

situations where the officer was discharged as opposed to disciplined in a manner that allows them to ultimately retain their position. In his work on the issue, Tyler Adams notes that,

> A 2001 study of police discharge grievances in Cincinnati, for example, observed how high standards for terminating police officers resulted in many officers being reinstated. In recent years, Philadelphia and Oklahoma City have seen nearly every discharged police officer reinstated through arbitration. A study of police discipline in Oakland between 2010 and 2014 characterized the arbitration system as "broken" because police officials were upheld only about a quarter of the time.[16]

Considering the widespread availability of arbitration to police officers in challenging disciplinary decisions, the propensity of those arbitrations to overrule the determinations of police chiefs, mayors, or other disciplinary bodies, and the binding nature of arbitrator awards, arbitration constitutes a massive obstacle to enforcing disciplinary decisions against law enforcement.

Minnesota is not uniquely immune to these arbitration concerns. Following arbitration, Minnesota officers have been reinstated after discharge despite having kicked unarmed suspects already on the ground being attacked by a police dog, repeatedly punched intoxicated individuals in the face, and committed various dishonest acts in performing their duties.[17] Similar to the pattern seen in other states and cities, about half of Minnesota officers who have fought discharge actions in arbitration over the last twenty years were reinstated by arbitrator decisions.[18] Some of these officers were reinstated twice.[19] Accordingly, arbitration poses a systemic challenge to the ability of public officials to hold law enforcement accountable for their conduct—a challenge that crosses state and jurisdictional lines.

This note begins by exploring the basics of arbitration: the role of arbitration in the law and how it functions in employment disputes.[20] It then moves on to discuss the limited methods to overturn arbitration awards.[21] Following this discussion, this note will look at arbitration involving law

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[16] *Id.* at 137.

[17] Jennifer Bjorhus, *Fired Minnesota Officers Have a Proven Career Saver: Arbitration*, STAR TRIB. (Minneapolis) (June 21, 2020), https://www.startribune.com/minnesota-cops-fired-then-rehired/571392702 [https://perma.cc/DX9N-7EC9].

[18] *Id.* (noting that the true figure could be higher because "Minnesota's public records laws prohibit releasing any information at all when arbitrators overturn a decision to fire a cop without imposing any type of discipline. Such total exonerations, while uncommon, are erased from public record.").

[19] *Id.*

[20] *See infra* Part II.

[21] *See infra* Part III.

enforcement, both its role in the profession and its function in practice across Minnesota.[22] The analysis of this note argues that while the role of arbitration in law-enforcement employment decisions needs to be revamped to provide for more democratic participation in the process, the ability of courts to vacate arbitration awards under the public policy exception should be expanded in Minnesota as a more immediate and robust solution.[23] Finally, this note concludes that without reformation of arbitration's role in law enforcement employment, the public will bear a perpetual risk of harm at the hands of officers whom officials have discharged as a result of their conduct, but whom arbitrators, with no public accountability, have reinstated.[24]

II. ARBITRATION AS A MEANS OF DISPUTE RESOLUTION

A. Defining Arbitration

The American Bar Association defines arbitration as "a private process where disputing parties agree that one or several individuals can make a decision about the dispute after receiving evidence and hearing arguments."[25] Arbitration can be understood as similar to a traditional trial in its structure, but where alterations in procedure allow the disputes to be settled more quickly and in a less formal proceeding.[26] Contrary to mediation—where a third-party mediator has no decision power but acts as a conduit for the parties to develop a mutually acceptable solution—arbitrators have the authority to make a decision on the dispute.[27] This decision is either binding or non-binding (advisory)—becoming final only if the parties accept the decision—depending on the agreement made by the parties.[28]

B. Arbitration and Employment

Arbitration can be best described as the double-edged sword of employment dispute resolution—providing an equitable, alternative means of dispute resolution in some circumstances and creating an inherently

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[22] *See infra* Part IV.

[23] *See infra* Part V.

[24] *See infra* Part VI.

[25] *Dispute Resolution Processes: Arbitration,* AM. BAR. ASS'N, https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/arbitration/ [https://perma.cc/J4YU-XC68].

[26] *Id.* (explaining that, opposed to traditional trials, parties in arbitration often do not have to adhere to rules of evidence and arbitrators themselves may not be required to apply governing law).

[27] *Id.*; *Dispute Resolution Processes: Mediation,* AM. BAR. ASS'N, https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/mediation/ [https://perma.cc/GC72-U6Q9].

[28] AM. BAR. ASS'N, *supra* note 25.

biased process in others. Employers, on one side, often utilize "forced arbitration" to advantage themselves against employees.[29] In this, employers condition valuable benefits, including receiving a job in the first place, on the agreement of the individual to submit claims to arbitration instead of presenting them to the public court system.[30] According to a recent survey by the Economic Policy Institute, more than sixty million employees in America are employed in a position that requires arbitration as a condition of their employment.[31] These "forced arbitration" circumstances are meant to provide employers with significant advantages for workplace-related issues by removing or limiting valuable aspects of the public court system, such as discovery and the appeals process.[32]

On the other side, voluntary arbitration historically allows for quick, relatively inexpensive settlements in commercial disputes.[33] This is also true in situations of organized workplaces where workers are represented by unions.[34] In these circumstances, the same disparity in bargaining power that is present between employers and employees is not implicated, and both sides have equal access to evidence necessary to prove their case.[35] As such, arbitration that is not "forced" may not constitute the potentially advantageous arena for the employer to pursue their interests, but rather presents an inexpensive alternative to traditional dispute resolution through the court system.

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[29] *Arbitration Agreements*, WORKPLACE FAIRNESS, https://www.workplacefairness.org/forced-arbitration-agreements [https://perma.cc/ED8N-TFZA].

[30] *Id.* ("Usually such agreements provide that you have no right to go outside the arbitration system and present your claims to the public courts. In force arbitration situations, your job may depend on accepting such a provision: your only other choice is to not take the job.").

[31] *Id.* ("[M]ore than half of nonunion private sector employers have mandatory arbitration procedures. Among private sector nonunion employees, 56.2 percent are subject to mandatory employment arbitration procedures.").

[32] *Id.* ("The public court system provides the protection of a system relatively free from the influence of the employer - a protection often not provided in forced arbitration. Additionally, the court system is open to public scrutiny and its decisions are subject to appeal. In employment cases, access to discovery is critical, since so much of the information you need to prove your case is in your employer's hands . . . . These and many other valuable features of the public court system are either limited or not available in the forced arbitration system.").

[33] *Id.*

[34] *See id.* ("Generally, the matters before the arbitrator involve issues of interpreting the contract, and involve repeat users of the system.").

[35] *Id.*

III. THE STANDARDS OF VACATING ARBITRATOR DECISIONS

A. The Federal Standards of the FAA

Arbitration, like any other system, is not impervious to abuses or unreasonable results. As such, it is not surprising that there are means for the decisions of arbitrators to be challenged and, potentially, vacated. Comparable to parties' ability to challenge the decisions of courts through the appeals process, parties can challenge an arbitrator's decision in the traditional court system.[36] However, due to several factors, including the concern that regularly vacating arbitrator awards would undercut arbitration as a system and disenfranchise a viable means of dispute resolution that absorbs a portion of disputes that would otherwise end up in the court system, there are very limited circumstances where courts have a recognized authority to vacate arbitrator awards.[37] Statutorily, this authority flows from the Federal Arbitration Act (FAA). The FAA, originally enacted in 1925, "empowers arbitration agreements in strong, unambiguous language."[38] In accordance with this focus on the empowerment of arbitration and the valuable service arbitration provides the court system, the FAA offers very few circumstances that justify the vacating of an arbitration award.[39] Arbitrator awards that were procured through undue means, situations where there is evident partiality in the arbitrator, or the presence of other misconduct in the proceedings, constitute grounds to vacate an arbitrator's award.[40] Additionally, there has been a concerted effort to reserve certain authorities for the courts and provide protections against arbitrators who

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[36] *See* Mark Iris, *Unbinding Binding Arbitration of Police Discipline: The Public Policy Exception,* 1 VA. J. CRIM. L. 540, 549–50 (2013) (discussing challenging an arbitrator's decision in court).

[37] *See id.* at 548 ("Arbitration is endorsed by courts as a speedier, more cost efficient way to resolve disputes and reduce the burdens on courts. Thus, at some level, courts are reluctant to encourage post-arbitration litigation. The benefits of arbitration over court litigation are quickly dissipated if courts routinely open the doors to subsequently contest substantial numbers of arbitration decisions.").

[38] *Id.* at 547. This is further emphasized in that "[a]n agreement to arbitrate disputes '... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of a contract.'" *Id.* (quoting 9 U.S.C. § 2 (2006)) (This quote notes both the statutory and common law grounds for vacating an arbitration decision).

[39] *See id.* at 549–52.

[40] 9 U.S.C. § 10 (2002) ("(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced . . . .").

commit unrectifiable error in the performance of their duties.[41]

B. Vacating Arbitrator Awards Beyond the Scope of the FAA

While the FAA provides a statutory framework under which courts have a recognized authority to vacate arbitrator awards, it also references an additional common law basis on which courts can vacate these awards.[42] While the Supreme Court has asserted that the ability of a court to review a labor-arbitration decision is "very limited,"[43] it has also recognized the responsibility of courts to refrain from enforcing a contract that is contrary to public policy—likening arbitrator decisions to contractual agreements.[44] This responsibility has been referred to as the public policy exception to the traditional deference shown by courts to the decisions of arbitrators.[45]

While often cited in court opinions addressing a challenge to an arbitrator's award, the public policy exception is rarely utilized to overturn those awards.[46] Just as the Court has affirmed the idea that the ability of a court to review arbitration decisions is very limited, so too are the circumstances under which those decisions can be vacated. The Court's discussion of the public policy exception reflects this idea of limited court authority to review arbitrator decisions and that, as currently understood, there are only a narrow collection of circumstances that allow for a court to vacate arbitration awards under the justification of this standard.

Early discussion and application of the public policy exception at the federal level is found in *W.R. Grace & Co. v. Local Union 759*. In *W.R. Grace*, an employer was facing liability for violations of Title VII of the Civil

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[41] *Id.* ("In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration . . . (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.").

[42] *See* WORKPLACE FAIRNESS, *supra* note 29 (". . . or in equity for the revocation of any contract.").

[43] Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001) (citations omitted) (quoting Paperworkers v. Misco, Inc., 484 U.S. 29, 36 (1987)) ("Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement . . . . [I]f an 'arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.'"); *see* W.R. Grace and Co. v. Loc. Union 759, 461 U.S. 757, 764 (1983).

[44] E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57, 57 (2000) (citing *W.R. Grace*, 461 U.S. at 766) ("Since the award is not distinguishable from the contractual agreement, the Court must decide whether a contractual reinstatement requirement would fall within the legal exception that makes unenforceable 'a collective bargaining agreement that is contrary to public policy.'").

[45] *See generally id.* at 63.

[46] *See* Iris, *supra* note 36, at 559.

Rights Act of 1964.[47] To address this violation, the employer signed a conciliation agreement with the Equal Employment Opportunity Commission that conflicted with the employer's collective bargaining agreement with its unionized workforce.[48] Grievances were filed, employees were laid off, and when those employees were reinstated to their entitled positions under the collective bargaining agreement, their grievances seeking backpay moved to arbitration.[49] Eventually, an award was delivered to the employees.[50] While the arbitrator accepted the employer's contention that it had acted in good faith in following the conciliation agreement, he nevertheless determined that the employer "acted at its own risk in breaching the [collective bargaining] agreement."[51] The employer, then, challenged the arbitrator's award.[52]

While the district court found in favor of the employer in that "public policy prevented enforcement of the collective-bargaining agreement,"[53] the court of appeals reversed.[54] In addressing the enforcement of the arbitrator's award, the Supreme Court laid out the components of the public policy exception:

> If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it. Such a public policy, however, must be well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests."[55]

Perhaps the most important part of this standard is the idea that the public policy implicated must be made in reference to "laws and legal precedents" and not from general considerations of "supposed public interests." This limitation, while potentially creating a more consistent standard—as all courts within a jurisdiction must rely on the same body of public interests determined through legislation—simultaneously hinders the ability of courts to acknowledge accepted public interests that have not been "put to paper" in addressing arbitrator awards that may be incompatible with those interests.

Four years after the Court's opinion in *W.R. Grace*, the Court seemed to acknowledge the inconsistency in this standard. In *United Paperworkers*

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[47] *W.R. Grace.*, 461 U.S. at 759.
[48] *Id.*
[49] *Id.* at 762.
[50] *Id.* at 772.
[51] *Id.* at 763 (alteration in original).
[52] *Id.* at 764.
[53] *Id.*
[54] *Id.*
[55] *Id.* at 766 (citation omitted) (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)).

International Union, AFL-CIO v. Misco, Inc.,[56] the Court discussed the common law underpinning the public policy exception. There, the Court stated that the public policy exception is a "specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy."[57] Perhaps most interesting here is the Court's distinction between written law and public policy despite their conflation in the doctrine of the public policy exception.[58] Despite acknowledging this distinction, the Court in *Misco* affirmed the standards of *W.R. Grace*:

> Two points follow from our decision in *W.R. Grace*. First, a court may refuse to enforce a collective-bargaining agreement when the specific terms contained in that agreement violate public policy. Second, it is apparent that our decision in that case does not otherwise sanction a broad judicial power to set aside arbitration awards as against public policy. Although we discussed the effect of that award on two broad areas of public policy, our decision turned on our examination of whether the award created any explicit conflict with other "laws and legal precedents" rather than an assessment of "general considerations of supposed public interest." At the very least, an alleged public policy must be properly framed under the approach set out in *W.R. Grace*, and the violation of such a policy must be clearly shown if an award is not to be enforced.[59]

In simpler terms there are, generally, two circumstances under which a court can vacate an arbitration award under the public policy exception in cases that involve collective bargaining agreements—known as labor agreements in some cases: (1) if the collective bargaining agreement contains terms that violate public policy, or (2) the arbitration award creates an explicit conflict with other laws and legal precedents.[60]

The standards of these cases have continued through to our current understanding of the public policy exception. In 2000, the Court again asserted that "[a]ny such [public] policy must be 'explicit,' 'well defined,' and 'dominant,' and it must be 'ascertained by reference to the laws and legal precedents, not from general considerations of supposed public

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[56] Paperworkers v. Misco, Inc., 484 U.S. 29 (1987).

[57] *Id.* at 42 (expanding later "[t]hat doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interests in confining 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.").

[58] *Id.* at 42–43.

[59] *Id.* at 43 (citation omitted).

[60] *See* State v. Minn. Ass'n of Pro. Emps., 504 N.W.2d 751, 756 (Minn. 1993).

interests.'"[61] Interestingly, the Court here hinted at some flexibility to the application of the public policy exception before, again, affirming the standards of *W.R. Grace* and *Misco*.[62]

C. Minnesota Statutory Standards

Like the federal government's legislation denoting the authority of courts to vacate arbitration awards on limited grounds, the Minnesota legislature has codified a similar standard that, in many ways, reflects the language of the FAA. Here, the Minnesota statute sets similar standards for vacating awards procured through undue means, situations of evident partiality or corruption, and the presence of other procedural misconduct.[63] However, the Minnesota standard also includes protections for arbitrations conducted without proper notice and with other procedural issues that are not mentioned in the FAA.[64]

D. Minnesota and the Public Policy Exception

As the Minnesota statutory standard for vacating arbitration awards is derivative of the federal standard of the FAA, its standard regarding the public policy exception is similarly derivative of the Supreme Court standard. The Minnesota Supreme Court has directly cited cases like *W.R. Grace* and *Misco* in defining the public policy exception.[65] Accordingly, the Minnesota Supreme Court has adopted the same standard regarding the public policy exception in considering the implications of an arbitrator's award and potentially vacating that award.[66] The Minnesota Supreme Court, however, has noted that the court's public policy exception standard is still

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[61] E. Ass'd Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57, 57–58 (2000) (quoting *W.R. Grace,* 461 U.S. at 766).

[62] E. Ass'd Coal Corp., 531 U.S. at 63 ("We agree, in principle, that courts' authority to invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law. Nevertheless, the public policy exception is narrow and must satisfy the principles set forth in *W.R. Grace* and *Misco*.").

[63] *Compare* MINN. STAT. § 572B.23 (2020) ("(a) Upon motion of a party to the arbitration proceeding, the court shall vacate an award if: (1) the award was procured by corruption, fraud, or other undue means; (2) there was: (A) evident partiality by an arbitrator appointed as a neutral; (B) corruption by an arbitrator; or (C) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding; (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 572B.15, so as to prejudice substantially the rights of a party to the arbitration proceeding; (4) an arbitrator exceeded the arbitrator's powers. . . ."), *with* 9 U.S.C. § 10 (2002).

[64] *See* MINN. STAT. § 572B.23 (2020) (". . . (6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in section 572B.09 so as to prejudice substantially the rights of a party to the arbitration proceeding.").

[65] *Minn. Ass'n of Pro. Emps.*, 504 N.W.2d at 756–57.

[66] *Id.*

open to interpretation in some areas.[67] In this, the court cites Justice Blackmun's concurrence in *Misco*:

> In particular, the Court does *not* reach the issue upon which certiorari was granted: whether a court may refuse to enforce an arbitration award rendered under a collective-bargaining agreement on public policy grounds only when the award itself violates positive law or requires unlawful conduct by the employer. The opinion takes no position on this issue. Nor do I understand the Court to decide, more generally, in what way, if any, a court's authority to set aside an arbitration award on public policy grounds differs from its authority, outside the collective-bargaining context, to refuse to enforce a contract on public policy grounds. Those issues are left for another day.[68]

The court goes on to discuss this unresolved area and notes that many courts that have addressed the issue, including the Eighth Circuit, require that the award be at least inconsistent with some public policy before it will be vacated.[69] There is an important distinction drawn by Minnesota courts, flowing from the *Misco* decision, between the conduct of the party and the award provided by the arbitrator, despite the U.S. Supreme Court's later decision stating that this distinction is not determinative.[70]

The distinction drawn by courts between the conduct of the party and the award provided by the arbitrator is evidenced in *State Auditor*. There, the court specifically stated that while the individual's conduct may appear to violate a well-defined and dominant public policy, that does not mean it can be assumed that an award reinstating that individual violates that public policy.[71] Ultimately, the court found that the arbitrator's award reinstating an individual whose conduct violated a well-defined and dominant public policy did not, itself, violate that policy.[72] Accordingly, the question for

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[67] *Id.* at 757.

[68] *Id.* (quoting United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 46 (1987)).

[69] *Minn. Ass'n of Pro. Emps*, 504 N.W.2d at 757 ("While this issue thus remains unresolved, many courts, when confronted with similar claims, have focused on the arbitrator's award and have refused to strike down an award that is not in direct conflict with any explicit public policy. While some of these courts have held that they will not overrule an arbitrator's award unless it actually violates some positive law or otherwise compels illegal conduct, even those courts which have taken a broader view of the public policy exception, such as the Eighth Circuit, at least require that the award itself be inconsistent with some public policy before it will be vacated.") (footnote omitted).

[70] Paperworkers v. Misco, Inc., 484 U.S. 29 (1987).

[71] *Minn. Ass'n of Pro. Emps.*, 504 N.W.2d at 757. ("Under the facts of this case, while Beer's *conduct* would appear to violate a well-defined and dominant public policy against the embezzlement of state funds by public employees, we cannot automatically conclude that the arbitrator's *award* reinstating Beer violates that public policy.") (footnote omitted).

[72] *Id.* at 757–58.

courts, in the second circumstance of vacating an arbitrator's award in cases involving collective bargaining agreements,[73] is not whether the conduct of the party was against public policy, but whether the award provided by the arbitrator, specifically, is counter to public policy. Additionally, there are a variety of interpretations regarding the degree that the award must conflict with public policy—whether it must actively violate positive law or simply be inconsistent with public policy.

Minnesota courts have also limited the authority of arbitrators regarding constitutional questions. The Minnesota Supreme Court has held that "in the public sector an arbitrator has no authority to make constitutional determinations, irrespective of the language of the arbitration agreement."[74] As evidenced by the court in this decision, there are other means by which courts regulate arbitrations, such as established, court-imposed limitations on arbitrator authority in some situations.

IV. ARBITRATION INVOLVING LAW ENFORCEMENT OFFICERS

A. Unionization, Arbitration, and the Employment of Law Enforcement Officers

As discussed previously, most police officers are represented by unions and covered by collective bargaining agreements.[75] Like any other collective bargaining agreement, these agreements are meant to protect the union members. These agreements can include various protections to officers in addition to protections they may already enjoy through state statutes or other means.[76] In addition to the arbitration clauses that most of these agreements include, clauses referred to as "just cause" provisions provide even greater protection to officers by forcing departments to bear the burden of persuasion to prove that disciplinary action is supported by "just cause"—the meaning of the term is derived from principles of fundamental fairness and is rarely defined in these agreements.[77] All this being said, the unionization of police is a relatively new development in the

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[73] *See* E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57, 57 (2000).

[74] Cnty. of Hennepin v. Law Enf't Lab. Servs., Inc., 527 N.W.2d 821, 825 (Minn. 1995) (reaffirming City of Richfield v. Loc. No. 1215, etc., 276 N.W.2d 42 (Minn. 1979) *and* McGrath v. State, 312 N.W.2d 438 (Minn. 1981)).

[75] Adams, *supra* note 13.

[76] *Id.* at 144 ("Along with protections granted by collective bargaining agreements, police officers often enjoy due process rights granted by the Law Enforcement Officers' Bill of Rights (LEOBOR). LEOBORs are found in collective bargaining agreements or state statutes. Generally, LEOBORs provide police officers accused of misconduct certain protections, such as the right against self-incrimination during an investigation.") (footnotes omitted).

[77] *Id.* at 140.

labor movement.[78] For much of American history, police did not have the legal right to unionize, partially due to the Boston Police Department Strike of 1919 when about two-thirds of Boston's police force made a bid for higher pay and better hours by refusing to report for duty, leading to riots and numerous deaths.[79] This delayed the right of police to unionize for decades.[80]

Today, however, "police unionization has strong supporters on both sides of the political aisle."[81] State statutes on police unionization "generally permit police officers to bargain collectively on any matter related to wages, hours, and other conditions of employment," though, "[t]erms like 'conditions of employment' present some interpretive complexity."[82] In this,

> If read broadly, this sort of language can become a "catchall phrase into which almost any proposal may fall." To prevent such a broad interpretation, courts and state labor relations boards have found that so-called managerial prerogatives are not subject to collective bargaining as conditions of employment. For all practical purposes, though, courts have held that many disciplinary procedures qualify as conditions of employment rather than managerial prerogatives.[83]

Despite the positives that these agreements provide in assuring law enforcement are properly compensated and that their employment conditions are appropriate, "studies have found that police union contracts frequently include language that impedes officer investigation and oversight by delaying officer interrogations, limiting civilian oversight, expunging records of prior officer misconduct, and more."[84] And, again, one prominent feature of these agreements is that they frequently require the arbitration of disciplinary appeals.[85]

Rather than being characterized as an asset to ensuring equitable rights and protections to law enforcement officers in their employment, this arbitration is often characterized as a problematic system that presents accountability issues and obstructs the internal discipline of police as well as public oversight.[86] Examples of this obstructive nature are prevalent across

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[78] Rushin, *supra* note 7, at 557.
[79] *Id.* at 557–58.
[80] *Id.* at 558.
[81] *Id.*
[82] *Id.*
[83] *Id.* (footnotes omitted).
[84] *Id.* at 559 (footnotes omitted).
[85] *Id.* at 560.
[86] *See* Martha Bellisle, *Police in Misconduct Cases Stay on Force Through Arbitration,* MPR NEWS (June 24, 2020), https://www.mprnews.org/story/2020/06/24/police-in-misconduct-cases-stay-on-force-through-arbitration [https://perma.cc/J4EY-U578] ("'Arbitration

the country, and Minnesota is no exception.[87] While the ability of police to unionize and pursue their employment priorities through collective bargaining has an indisputable place in the labor market, the agreements they form through those efforts also have a propensity to insulate police from accountability through the arbitration they provide.[88] This insulation is not limited to minor offenses and, as seen in the following examples, can require police forces to reinstate officers despite violent and repeated misconduct.[89]

B. Minnesota's Pattern of Arbitration Favoring Law Enforcement, Court Deference to Those Decisions, and the Refusal to Apply the Public Policy Exception

On New Year's Eve of 1990, Craig Mische was arrested at a Minneapolis nightclub formerly known as Juke Box Saturday Night.[90] Mische alleged that while he was in custody, the arresting officer, Michael Sauro, beat him with his fists and feet and that, as a result, Mische suffered facial lacerations, bruising, swelling, and bleeding.[91] A civil suit was filed against Sauro and the City of Minneapolis where the jury returned a special verdict in favor of Mische for Sauro's use of excessive force and the City's "custom of deliberate indifference to complaints concerning the use of excessive force by Minneapolis police officers."[92] After this verdict and an internal investigation into Sauro's conduct, Sauro was terminated from the police force.[93] The Police Officers' Federation of Minneapolis filed grievances under the parties' collective bargaining agreement, and these

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inherently undermines police decisions,' said Michael Gennaco, a police reform expert and former federal civil rights prosecutor who specialized in police misconduct cases."); *see* Bjorhus, *supra* note 17 ("Chief Medaria Arradondo noted the discipline and arbitration process as areas needing reform. 'There is nothing more debilitating to a chief from an employment matter perspective, than when you have grounds to terminate an officer for misconduct, and you're dealing with a third-party mechanism that allows for that employee to not only be back on your department, but to be patrolling in your communities,' Arradondo said."); *see* Jon Collins, *Half of Fired Minnesota Police Officers Get Their Jobs Back Through Arbitration,* MPR NEWS (July 9, 2020), https://www.mprnews.org/story/2020/07/09/half-of-fired-minnesota-police-officers-get-their-jobs-back-through-arbitration [https://perma.cc/JJ9Y-YD3U] ("Richfield Mayor Maria Regan Gonzalez said the arbitrator's decision to reinstate Kinsey undermined the city's efforts to create a more community-oriented police force. 'How are we going to continue to build trust with our community, when we don't have the power and the leverage to terminate officers that aren't on the same page or aren't a good fit for our community?' Gonzalez said.").

[87] *See infra* Part IV.B.

[88] Rushin, *supra* note 7, at 553.

[89] *See infra* Part IV.B.

[90] City of Minneapolis v. Police Officers' Fed'n of Minneapolis, 566 N.W.2d 83, 85 (Minn. Ct. App. 1997).

[91] *Id.*

[92] *Id.*

[93] *Id.* at 85–86.

grievances then proceeded to arbitration.[94] The arbitrator, in the award, reinstated Sauro while upholding a twenty-day suspension given to him.[95] The City then commenced an action seeking to vacate that award, but the district court concluded that it did not have a "legal basis" to do so.[96]

On appeal, the Minnesota Supreme Court cited *State Auditor* as the basis for the state's public policy exception jurisprudence.[97] The court agreed with the district court in holding that "the city has failed to present any well-defined, dominant public policy that prohibits police officers found to have used excessive force from being reinstated to the police force."[98] The court noted that "[i]t is axiomatic that there is a well-defined and dominant public policy against police officers using excessive force. However, as the district court concluded, there is no well-defined public policy stating that an officer must automatically be discharged if he or she is involved in an excessive force situation."[99] The court also brought attention to the fact that the police department itself did not have a "well-defined policy or practice that officers found to have used excessive force must be automatically discharged."[100] Ultimately, the arbitrator's award reinstating *Sauro* was upheld.[101]

In another case from 2005, a woman issued a complaint against a Duluth police officer stating that he had come into her apartment and assaulted her.[102] Criminal charges were brought as well as disciplinary procedures, and while a jury acquitted the officer of the criminal charges, the City discharged the officer.[103] The officer's collective bargaining agency then filed a grievance on behalf of the officer, and, according to the terms of the collective bargaining agreement, the matter went to arbitration, and the arbitrator issued an award sustaining the officer's grievance and ordering

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[94] *Id.* at 86.

[95] *Id.*

[96] *Id.* ("The district court concluded that there was no legal basis to conclude the arbitrator exceeded his authority or violated the essence of the parties' CBA. The district court also ruled that there is no well-defined and dominant public policy requiring the automatic discharge of a police officer who was found to have used excessive force by a civil jury.").

[97] *Id.* at 89.

[98] *Id.* at 89. This is reflective of the standard previously discussed of courts drawing a distinction between the conduct of the party and the arbitration award. Here, the question is not whether there is a well-defined, dominant public policy against police use of excessive force. Instead, it is a very limited, very specific question of whether there is a well-defined, dominant public policy that prohibits the reinstatement of officers who have been found to have used excessive force.

[99] *Id.*

[100] *Id.* (explaining that "[a]s the district court found, the record shows several instances where officers found to have used excessive force were disciplined, but not discharged.").

[101] *Id.* at 90.

[102] City of Duluth v. Duluth Police Loc., No. A04-2374, 2005 WL 1620352, at *1 (Minn. Ct. App. July 12, 2005).

[103] *Id.*

his reinstatement.[104]

During arbitration, the City argued that the arbitrator violated public policy in admitting polygraph testimony contrary to Minnesota's legal precedent of not admitting such evidence.[105] The appellate court, however, was not persuaded by this argument.[106] In its decision, the court stated that "Minnesota has no precedent of admitting, or not admitting, polygraph evidence in arbitrations: it is inadmissible only in court cases. The arbitrator's award, even if based in part on polygraph evidence, does not create a conflict with any law or legal precedent."[107] Again, the arbitrator's award was upheld in these circumstances.[108]

Ten years later, in 2015, Officer Nathan Kinsey from Richfield was recorded pushing a nineteen-year-old Somali man twice and slapping him on the back of the head.[109] Kinsey issued a careless driving citation to the man but did not include any mention of his use of force in his notes on the citation.[110] The recorded video circulated on social media, and while no criminal charges were brought against Kinsey, an internal investigation was launched.[111] This internal investigation found violations of several department policies, and as a result, Kinsey was discharged.[112]

The police union challenged Kinsey's discharge under its collective bargaining agreement, and this challenge was brought to arbitration.[113] Ultimately, the arbitrator decided that the City did not have just cause to terminate Kinsey and ordered his reinstatement.[114] The City then moved to vacate the arbitrator's award on public policy grounds, but the district court upheld the award.[115] However, on appeal to the Minnesota Court of Appeals, the court agreed with the City that reinstating Kinsey would

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[104] *Id.*

[105] *Id.* at *3.

[106] *Id.*

[107] *Id.* (citing State v. Anderson, 379 N.W.2d 70, 79 (Minn. 1985)).

[108] *Id.* at *4.

[109] City of Richfield v. Law Enf't Lab. Servs., Inc., 923 N.W.2d 36, 39 (Minn. 2019).

[110] *Id.*

[111] *Id.*

[112] *Id.* at 40.

[113] *Id.*

[114] *Id.* ("After a 5-day hearing, the arbitrator issued a 40-page decision, concluding: 1) given the totality of the circumstances, Kinsey did not use excessive or unreasonable force in this incident; 2) the City's policy on reporting use of force was not clear, and Kinsey was not technically required to report the type of force that he used, but he should have alerted the command staff to the incident; 3) Kinsey's actions were not motivated by racial bias; and 4) his use of profanity violated department policy but '[did] not warrant disciplinary action.' The arbitrator concluded that Kinsey did not intend to deceive or conceal information from his supervisors, but that failing to report the use of force was a 'lapse in judgement constituting unacceptable performance that warrants disciplinary action.'").

[115] *Id.* (stating, "the [C]ity[ ] failed to present any well-defined, dominant public policy that prohibits police officers who are disciplined or counseled for use of excessive force but who are then charged with excessive force, from being reinstated to the police force.").

interfere with public policy.[116] The union appealed this decision, and, ultimately, the Minnesota Supreme Court agreed with the union and reversed the decision of the court of appeals, effectively reinstating the award of the arbitrator.[117] In its rationale, the court stated that there were no available facts to support applying the public policy exception.[118] In dicta, however, it appears the court did not particularly agree with this holding but was limited in its authority to hold differently:

> No doubt many observers would find Kinsey's actions disturbing. But state statute requires arbitration, and the City's contract with the Union gives the arbitrator the authority to decide what constitutes just cause for termination. Applying the statute and the language in the contract, and deferring to the facts as found by the arbitrator, we reverse the decision of the court of appeals.[119]

Lastly, during an arrest in 2017, Officer Adam Huot of the City of Duluth's police department grabbed the chain connecting the arrested individual's handcuffs and "dragged him along the floor for about 100 feet through the skywalk to an elevator. On the way to the elevator, Huot dragged [the individual] through a doorway, where [their] head struck the metal doorframe."[120] Although Huot called two other officers later that night to discuss the incident, he did not report the use of force to his supervisor.[121] The City determined that Huot's conduct violated the police department's use-of-force policy and code of conduct, and based on these determinations, terminated Huot.[122] Huot's union, of course, challenged his termination pursuant to its collective bargaining agreement, and the dispute was ultimately referred to binding arbitration.[123] The arbitrator, despite finding that Huot's use of force was unreasonable and that he had been involved in a prior use-of-force incident, determined that, while discipline was warranted, the collective bargaining agreement called for progressive discipline and Huot's conduct did not justify termination under the

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[116] *Id.*
[117] *Id.* at 41–42.
[118] *Id.* ("Assuming without deciding that a public-policy exception permits courts to vacate arbitration awards, the facts here do not support applying the exception. It is difficult to conclude that the arbitration award violates public policy given the finding that excessive force was not used. Kinsey's failure to report does not provide a basis for applying the public-policy exception because the arbitrator found that, even though Kinsey should have reported the incident, the City's policy was not clear on that question.").
[119] *Id.* at 42.
[120] City of Duluth v. Duluth Police Union, Loc. No. 807, No. A19-0404, 2019 WL 4165031, at *1 (Minn. Ct. App. Sept. 3, 2019).
[121] *Id.*
[122] *Id.*
[123] *Id.*

agreement.[124]

The City moved to have the award vacated by the district court, but the court denied this motion, reasoning that "while Huot's conduct was contrary to public policy, the arbitrator's award did not violate any 'well-defined public policy.'"[125] The City appealed, asserting that the arbitrator's award did, in fact, violate a well-defined public policy.[126] In its decision, the court of appeals stated that the speculation of the command staff regarding Huot's potential to misuse force again, and the arbitrator's inability to find fault in that speculation, was not enough to justify vacating the award.[127] Additionally, the arbitrator's description of Huot as having a "penchant" for misusing force did not "constitute a prediction that he will continue to act accordingly; it merely recognizes Huot's past practices."[128] Ultimately, the court of appeals found that, while Huot's use of force was contrary to a public policy against unreasonable use of force, the arbitrator's award reinstating Huot was not.[129]

C. The Exception of City of Brooklyn Center v. Law Enforcement Labor Services, Inc.[130]

Despite the pattern of Minnesota courts upholding arbitrator decisions in cases involving law enforcement, the Court of Appeals of Minnesota went against this pattern in the circumstances of John R. Barlow.[131] In 1993, a

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[124] *Id.* at *1–2 ("The arbitrator ruled that Huot's conduct was an unreasonable use of force that violated the department's use-of-force policy and that Huot's failure to promptly report the use of force violated the department's policy on reporting use of force. The arbitrator also found that Huot had been involved in a prior use-of-force incident in which he repeatedly punched a man in the head in order to get the man to drop a shard of glass, even though other officers were restraining the man . . . . Huot was also involved in two other incidents that were deemed not to be use-of-force incidents. Huot received coaching, but not discipline, for those two incidents . . . . The arbitrator stated that Huot's conduct in the incident at issue, in light of the fact that he had already been trained and coached about use of force, caused 'command staff to speculate' that he would misuse force again if reinstated. The arbitrator continued, 'The Arbitrator cannot find fault with this speculation. [Officer] Huot and his career as a police officer is at a crossroad: Either he takes control of his penchant for misusing vocal and physical force or he will be fired: A *third* use of force violation would be his last.'").

[125] *Id.* at *2.

[126] *Id.*

[127] *Id.* at *4 (quoting United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 44 (1987) ("[W]hile the arbitrator did not find fault with such speculation, he also did not find that it was substantiated or that it was anything more than speculation. 'A refusal to enforce an award must rest on more than speculation or assumption.'")).

[128] *Id.*

[129] *Id.* Again, displaying the distinction that courts draw between the conduct of the party and the award of the arbitrator in addressing the public policy exception.

[130] City of Brooklyn Ctr. v. Law Enf't Lab. Servs., Inc., 635 N.W.2d 236 (Minn. Ct. App. 2001).

[131] *Id.* at 244.

female employee of the Brooklyn Center Police Department filed a complaint against Barlow alleging that Barlow committed criminal sexual conduct against her.[132] While criminal charges could not be brought as the statute of limitations had expired, the City still decided to fire Barlow.[133] Under his collective bargaining agreement, Barlow demanded arbitration in challenging the termination.[134] Although they made no express findings as to the truthfulness of the allegations against him, the arbitrator determined that Barlow was entitled to reinstatement and entered an award in accordance with that determination.[135]

Then, in 1997, a member of the public filed a complaint against Barlow accusing him of harassing and stalking her.[136] Barlow was prosecuted and found not guilty by the jury.[137] However, during an internal investigation, the City obtained records containing complaints against Barlow by more than thirty women.[138] Based on this, the investigator determined that Barlow had "demonstrated patterns of improper conduct."[139] The police chief

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[132] *Id.* at 238.

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.* ("The Brooklyn Center police chief then held a televised press conference during which he showed Barlow's photograph and asked that anyone with complaints against Barlow contact the police department. In response, a number of women called the department to complain about Barlow's behavior toward them.").

[137] *Id.*

[138] *Id.*

[139] *Id.* at 239 ("[I]ncluding regularly meeting young women in the routine course of working, and later returning, while on duty and in uniform, to arrange dates; conducting traffic stops of young women, which resulted in neither the issuance of a citation nor a warning, apparently for the sole purpose of gathering personal information about the young women or for making personal comments to facilitate potential social relationships; repeatedly visiting local businesses, while on duty and in uniform, for excessive periods of time for the purpose of watching and talking to young women; driving Brooklyn Center Police squad cars to visit the homes (both within and outside of the city's jurisdiction) of young women he was either dating or trying to persuade to date him; demonstrating unwanted persistence in placing telephone calls or approaching young women he was trying to date; following women, often while he was in uniform and in a Brooklyn Center squad car, for no apparent reason and in a manner that frightened the women he was following; repeatedly stating that he needed to know everything about the young women he was trying to date, or, in the alternative, saying he could find out everything about them; describing the interiors or exteriors of the women's homes, even though he had never been invited to the residences; belittling the boyfriends or significant others of women he was trying to date; making sexually suggestive comments to women he encountered on duty; running license plate numbers for his personal use of women he wanted to date; using his position as a police officer to gather personal information to be used to further his social life; using his influence as a police officer (through showing his badge) to gain entrance into nightclubs to check for under-aged women; acting in a sexually aggressive manner while on duty; intimidating women who confronted him about unwanted telephone calls; maintaining that he wanted women he met while on duty to bear his children; and purchasing alcohol for minors.").

subsequently recommended that the City fire Barlow, which it did.[140]

Once again, Barlow filed a grievance challenging the termination, which went to arbitration.[141] Fifteen women who had complained about Barlow testified at the arbitration, but, despite this testimony, the arbitrator concluded that "much of the alleged conduct was time-barred for disciplinary purposes and that the remaining conduct, while serious, did not warrant outright dismissal."[142] Accordingly, the arbitrator issued an award in Barlow's favor, reinstating him.[143] The City moved in district court to vacate the award under a public policy argument, but the district court denied the City's motion.[144]

In describing its approach to the matter, the court of appeals cited *State Auditor* in defining the public policy exception as a standard where "a court may set aside an arbitration award only if (1) the labor agreement contains terms which violate public policy, or (2) the arbitration award creates an explicit conflict with other laws and legal precedents."[145] The court followed this by asserting that "it is indisputable that Minnesota's public policy proscribes invasion of privacy, stalking, harassment, and sexual harassment."[146] Expanding on this, the court stated that an employer has an affirmative duty to take action reasonably calculated to prevent sexual harassment in the workplace, "particularly from employees who have committed acts of sexual harassment in the past."[147] The court then applied this line of reasoning to the circumstances of Barlow's arbitration award:

> Recognizing the strong and clear public policy against sexual harassment, the affirmative duty of employers to implement that policy, and the unique opportunity of a police officer with a lengthy history of violations of that policy to continue to commit similar violations, we hold that the arbitrator's decision under the extreme facts of this case violated public policy and must be vacated.[148]

It is important to note in discussing the exception this case presents, however, that it appears that Barlow's history of misconduct was likely not the deciding factor in the case.[149] The court stated later that "[t]o allow

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[140] *Id.*
[141] *Id.*
[142] *Id.* at 239-40.
[143] *Id.* at 240.
[144] *Id.* The city also alleged that the arbitrator exceeded his powers. *Id.*
[145] *Id.* at 241 (citing State v. Minn. Ass'n of Pro. Emps., 504 N.W.2d 751, 756 (Minn. 1993)).
[146] *Id.* at 242 (expanding with references to: MINN. STAT. § 609.746, subdiv. 1 (2000); MINN. STAT. § 609.749, subdiv. 2 (2000); and MINN. STAT. § 363.03, subdiv. 4 (2000)).
[147] *Id.* at 243 (citing Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 676 (10th Cir. 1998)).
[148] *Id.* at 244 (later adding that "[Barlow] violates the law with apparent impunity and perhaps will be even more resolute in his misconduct if his reinstatement is allowed.").
[149] *Id.*

Barlow to continue to work as a police officer for Brooklyn Center is tantamount to exempting the city from its duty to enforce its own policy and the public policy against sexual harassment."[150]

Despite acknowledging Barlow's history of misconduct and the potential for him to continue that behavior if he were reinstated, the court conceded that its authority to vacate that reinstatement award is only due to the explicit public policy regarding sexual harassment.[151] It is the City's duty to prevent sexual harassment that sustained Barlow's discharge, not the serious misconduct he committed.

V. REFORMING THE ROLE OF ARBITRATION IN LAW ENFORCEMENT EMPLOYMENT AND THE APPLICATION OF THE PUBLIC POLICY EXCEPTION

A. The Need for Reform

The cases discussed in the previous section demonstrate an established pattern of court deference to arbitration decisions favoring law enforcement and refusal to apply the public policy exception, regardless of the degree of misconduct committed by the officer in question.[152] Even cases that involve long-established patterns of misconduct can be found in favor of the offending officer, with rare exceptions.[153] This pattern creates two major issues for our policing system: the continued presence of potentially violent and aggressive individuals in roles of authority, and the continued frustration of police officials' attempts to regulate their officers and the conduct of those officers.[154] Ultimately, the problematic nature of arbitration in police discipline can be traced to the systemic failure to recognize the inherent

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[150] *Id.*

[151] *Id.*

[152] *See supra* Part IV.B.

[153] *See supra* Part IV.B. *But see supra* Part IV.C.

[154] *See* Bjorhus, *supra* notes 17–19 and accompanying text; Kaomi Lee, *Is Arbitration a Fair Way to Decide Police Firings?*, TPT ORIGINALS (Aug. 10, 2020), https://www.tptoriginals.org/police-reform-and-arbitration/ [https://perma.cc/9JJR-LDFR] ("'If the police chief in the organization doesn't have the authority to take away a position as important as this in society, and leaves this to arbitration, I think that's problematic,' Duluth Police Chief Michael Tusken told *Almanac* earlier this summer . . . . 'I think arbitration has its place – if it's union contracts, if it's minor disputes, I think it's fine. If we are looking at gross misconduct, if we are looking at violations of our code of conduct, I think there should be a different route and a different path for us to take,' he said."); Rushin, *supra* note 7, at 576, 578 ("The majority of communities—around seventy percent—vest arbitrators with significant review authority on appeal. That is, these jurisdictions effectively give arbitrators the power to re-review all relevant issues on appeal . . . . [A]n expansive or de novo standard of review on appeal may insulate officers from democratic accountability. It diminishes the ability of police supervisors, city officials, and civilian review boards to reform police departments . . . . This effectively means that any earlier disciplinary action taken against a police officer by a city official, police supervisor, or civilian review board is somewhat symbolic. Significant power sits with the arbitrator on appeal.").

differences between general arbitration and arbitration that involves the employment of law enforcement officers.[155]

Our society entrusts enormous power and authority to our law enforcement officers—power and authority that are not regularly present in general arbitration.[156] While the arbitration of a dispute between two private parties will likely have no effect on the general public, the same cannot be said for arbitration that involves the employment of a police officer accused of misconduct.[157] Treating these arbitrations as the same and holding them to the same standards is an inarguably illogical and reckless approach to regulating the conduct of individuals entrusted with the power and authority society provides law enforcement officers. The direct effect of law enforcement arbitration decisions on the public requires greater oversight than what is held over general arbitration.

One of the most evident issues in the use of arbitration regarding police discipline is the lack of accountability for the arbitrators making the decisions. Arbitration regarding police discipline "allows third parties, often from outside the community, to make final disciplinary decisions that can go against the will of police supervisors or civilian oversight entities. In this way, arbitration can arguably constitute an antidemocratic limitation on public oversight of law enforcement behavior."[158]Arbitrators have no accountability to the public affected by their decisions and have authority to make decisions based on their subjective standards and opinions rather than

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[155] *See* Tate Fegley, *How the Police Arbitration System Shields Police from Accountability,* MISES INST. (June 17, 2020), https://mises.org/wire/how-police-arbitration-system-shields-police-accountability [https://perma.cc/9RUV-GK79] ("Courts are 'strictly bound by an arbitrator's findings and legal conclusions, even if they appear erroneous, inconsistent, or unsupported by the record.' This deference to arbitrators makes sense when the dispute is between two private parties who previously agreed to be bound by an arbitrator's decision and when the dispute only involves those parties. If either party can simply appeal an adverse decision to a government court, the system of private arbitration is completely undermined. However, it makes much less sense when what is in dispute is to what degree police officers are allowed to use violence.") (citations omitted).

[156] *See* Conor Friedersdorf, *How Police Unions and Arbitrators Keep Abusive Cops on the Street,* ATLANTIC (Dec. 2, 2014), https://www.theatlantic.com/politics/archive/2014/12/how-police-unions-keep-abusive-cops-on-the-street/383258/ [https://perma.cc/6C2C-GMCX] ("Society entrusts police officers with awesome power. The stakes could not be higher when they abuse it: Innocents are killed, wrongly imprisoned, beaten, harassed—and as knowledge of such abuses spreads, respect for the rule of law wanes. If police officers were at-will employees (as I've been at every job I've ever held), none of the cops mentioned above would now be walking the streets with badges and loaded guns. Perhaps one or two of them deserved to be exonerated, despite how bad their cases look. Does the benefit of being scrupulously fair to those individuals justify the cost of having more abusive cops on the street?").

[157] *See id.*; Fegley, *supra* note 155.

[158] Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1239 (2017).

on the facts of the case and relevant law or applicable policies.[159]

The potential for arbitrator decisions to be based on subjective opinion rather than facts, and the refusal of courts to exercise oversight over these decisions, constitute a disservice to the general public and the individuals harmed by the conduct of offending officers. Examples of these controversial arbitrator decisions are not difficult to find.

> In a 2014 case, an officer was discharged for sexually harassing a female crime victim. The officer had turned off his dash camera in violation of the department's recording policy, leaving no video evidence to prove the officer's misconduct. To support the discharge, the city offered results of a polygraph test suggesting the officer had inappropriately touched the victim while in his squad car. The arbitrator overturned the discharge because he was "not convinced" that the evidence was sufficient to infer guilt. The arbitrator thought the victim lacked credibility and that testimony supporting the discharge was "contradictory."[160]

One of the most egregious of these examples, arguably, comes from the Huot case discussed previously in this article.[161] There, the arbitrator recognized Huot's history of misconduct and did not fault the command staff's speculation that Huot would continue to misuse force if reinstated.[162] However, the arbitrator asserted that the collective bargaining agreement involved called for "progressive discipline," which justified allowing Huot to retain his position.[163] In this, the arbitrator introduced a subjective "three strikes and you're out" approach to the issue.[164] Despite Huot's history of misusing force, and the appropriate speculation by officials that he would continue to do so if reinstated, the arbitrator disregarded these facts and inserted their own determination based on a subjective belief that termination would only be justified after a third misuse of force.[165] This subjective approach, instituted by an individual arbitrator with no public accountability, is not based on fact, law, or any cognizable policy, and was

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[159] *Id.* ("[T]he Supreme Court has held that the 'refusal of courts to review the merits of an arbitration award is ... proper,' an arbitrator 'can be wrong on the facts and wrong on the law and a court will not overturn the arbitrator's opinion.'"). *See* Fegley, *supra* note 155 ("Since they are selected from a list agreed upon by police management and unions, and since the courts' scope to review their decisions is extremely narrow, arbitrators are unaccountable to the public for their decisions regarding the policies governing police use of force.").

[160] Adams, *supra* note 13, at 143–44. (footnotes omitted).

[161] *See* City of Duluth v. Duluth Police Union, Loc. No. 807, No. A19-0404, 2019 WL 4165031 (Minn. Ct. App. Sept. 3, 2019); *see supra* notes 120–129 and accompany text.

[162] *City of Duluth*, 2019 WL 4165031, at *2.

[163] *Id.*

[164] *Id.* ("Huot and his career as a police officer is at a crossroad: Either he takes control of his penchant for misusing vocal and physical force or he will be fired: A *third* use of force violation would be his last.").

[165] *Id.*

the basis for reinstating an officer with a history of misconduct regarding his use of force whom officials speculated would continue to misuse force.

The acknowledgement of officer misconduct by arbitrators, and decisions of those arbitrators to reinstate the officer regardless of that acknowledgement, are not uncommon. In most cases that overturn officer discharges, "arbitrators cite mitigating factors favoring reinstatement. In twenty-nine of the forty-three decisions (67.4%) in which an arbitrator overturned a discharge, the arbitrator cited mitigating factors unrelated to whether the officer was guilty of the alleged offense."[166] Reinstatement of officers, despite misconduct, for reasons that have nothing to do with that misconduct is unambiguously counter to any degree of law enforcement accountability. A good work record, acceptance of responsibility for the actions, and honesty of the officer through the disciplinary process should not be enough to justify reinstating officers for serious or continuous misconduct.[167]

> For example, an officer was discharged in a 2013 case for sexually harassing another officer. The arbitrator concluded that the discharged officer's conduct "was pervasive enough to create a hostile work environment and did constitute harassment." The arbitrator nonetheless overturned the discharge in light of the officer's "willingness to accept blame for his actions." Of particular importance to the arbitrator was the officer's "general truthfulness about his culpability."[168]

The ability of arbitrators to acknowledge misconduct but disregard that acknowledgment, and the facts it is based on, in favor of their own subjective opinions regarding the officer, and reinstate the officer based on those subjective opinions is not only problematic from a logical perspective but also largely unrectifiable.

Arbitrators are insulated from public accountability and are shown an almost unimaginable degree of deference from courts when their decisions are challenged.[169] While this may be a workable standard for general arbitration, it is not for arbitration regarding the employment of law enforcement officers who have committed misconduct. The nature of law enforcement as a position of power within our society demands greater public oversight, specifically when it comes to officer discipline.[170] Officers

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[166] Adams, *supra* note 13, at 146. The statistics used in Adams' work are based off "ninety-two arbitration awards published between 2011 and 2015 regarding police officers discharged for misconduct. Nearly all of these decisions came from Bloomberg Law's Labor and Employment Law Resource Center." *Id.* at 139. (footnote omitted).

[167] *See id.* at 146–52.

[168] *Id.* at 150. (footnotes omitted).

[169] *See* Fegley, *supra* note 155.

[170] *See generally supra* notes 156–57 and accompanying text.

should not be able to avoid accountability for their misconduct based on the subjective standards and opinions of an individual with no accountability to the public that is directly affected by their decision. In addressing this need for greater oversight, there are two predominant solutions: the democratizing reform of discipline procedures for law enforcement, and the broadening of the public policy exception to allow courts a more robust ability to regulate arbitrator decisions regarding law enforcement.

B. Democratizing the Discipline of Law Enforcement

Arbitration is, in many ways, incompatible with police accountability and a constant obstacle to police oversight.[171] Accordingly, some have proposed that "to the extent that communities want to promote democratic oversight of police behavior, policymakers could replace arbitrators with democratically accountable actors."[172] Effectively, this solution replaces arbitration with a separate, more democratic, process. In his work on this issue, Stephen Rushin notes that while police undoubtedly need protections from unnecessary discipline, arbitration and the larger police disciplinary process effectively serve as an obstacle to officer accountability.[173] While the individual procedures that allow officers to appeal disciplinary action against them may be defensible, they "could theoretically combine to create a formidable barrier to accountability."[174] Democratic participation is a necessary, but largely absent, part of the police disciplinary process that could serve to balance the necessary protections for officers with the assurance that those protections do not constitute an obstacle to necessary oversight and discipline.[175]

The most effective solution to this issue, as argued by Rushin, is to

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[171] *See* Lee *supra* note 154; Rushin, *supra* note 7, at 576–78.

[172] Rushin, *supra* note 7, at 553. Rushin explains that "[a] number of police departments already do this, by providing officers with an opportunity to appeal discipline levied by a police supervisor to civilian review boards, city councils, mayors, or city managers." *Id.*

[173] *Id.* at 588 ("Police need basic procedural protections against arbitrary and capricious punishment. This includes the ability to appeal disciplinary action. At the same time, these appellate procedures should not allow officers to circumvent democratic oversight or otherwise thwart reasonable accountability efforts. This Article shows that virtually all police departments give officers multiple layers of appellate review, often culminating in binding arbitration. In most cases, the police union has some substantial role in selecting the identity of the arbitrator. And in most of these cases, the arbitrator is given expansive authority to relitigate all decisions made by police supervisors, city officials, and civilian review boards.").

[174] *Id.* ("These procedural protections may be problematic to the extent that they limit the ability of supervisors to punish or terminate problematic officers responsible for misconduct. Additionally, these protections may be troubling because they limit the role of the public in overseeing local law enforcement.").

[175] *See id.* at 589 ("Regardless of where experts fall in this debate, there is nearly uniform agreement that the development of police policies and officer oversight should not be divorced from community input. . . . The data presented in this Article suggests that the disciplinary appeals process in many departments is largely devoid of democratic participation." (footnotes omitted)).

eliminate the arbitration of police disciplinary appeals entirely.[176] However, Rushin also acknowledges that this solution is a controversial one.[177] While this solution would allow internal disciplinary responses to reflect community values more accurately by placing the review authority currently held by arbitrators with a more democratically accountable actor, the controversy of this solution may impede its application.[178]

A potentially less controversial solution proposed by Rushin is making appellate arbitrations advisory or providing some opportunity for city leaders to overturn particularly egregious arbitrator decisions.[179] By removing the "binding" nature of arbitration decisions regarding police discipline, city leaders would "maintain the flexibility to depart from decisions made by an arbitrator when it appears to run counter to the public's interest."[180] Essentially, this would function as a legislative public policy exception while circumventing the limitations of the public policy exception within the court system. A modification of this idea is already utilized in Oceanside, California, where arbitration decisions are binding for minor disciplinary actions but advisory for more serious misconduct.[181]

Alternatively, communities can limit the scope of an arbitrator's review.[182] These limitations could take a variety of forms, including limiting the authority of an arbitrator to overrule or modify punishments to apply in only a few specific circumstances.[183] This would allow communities to "maintain the use of arbitration while preventing these appellate procedures from entirely displacing the role of police leaders, city leaders, and civilian

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[176] *Id.*

[177] *Id.*

[178] *See id.* at 589–90 (noting that this solution is already in place in some communities such as Fountain Valley, California and Lincoln, Nebraska).

[179] *Id.* at 590–91 (noting this solution is already utilized in some cities such as Peoria, Arizona, and many cities in California, including Buena Park, Burbank, Cathedral City, Costa Mesa, Delano, Fullerton, Indio, Ontario, Oxnard, and Pasadena).

[180] *Id.* at 591.

[181] *Id.* ("There, the city's police union contract permits officers to appeal relatively minor disciplinary action to binding arbitration. But the contract makes arbitration decisions merely advisory for serious misconduct resulting in suspensions and terminations. Such a compromise would allow cities to maintain the use of arbitration so as to avoid unfair punishments in some cases, while maintaining the ability of city officials to protect the public interest in police accountability in cases of serious misconduct where the continued employment of the officer could pose a public safety risk." (footnotes omitted)).

[182] *Id.* at 591–92.

[183] *Id.* at 592 ("For example, Fullerton, California permits advisory arbitration on appeal, but bars an arbitrator from overruling or modifying punishment handed down against an officer unless the arbitrator finds the punishment to be 'arbitrary, capricious, discriminatory or otherwise unreasonable. . . .' Alternatively, communities could limit arbitrators from altering punishment in cases where the facts support a finding of guilt. This is the case in Grand Rapids, Michigan, where an arbitrator on appeal can overturn a decision made by the city, but cannot reduce punishment in cases where there is evidence to support the allegation of misconduct." (footnotes omitted)).

review boards."[184]

While these proposed solutions all have their pros and cons, they share an overarching commonality: they are all legislative solutions. Courts, in accordance with the separation of powers, do not have the authority to implement or require the legislature to enact these kinds of solutions. Considering the extreme divisiveness and polarization in our current political discourse, especially on the subject of law enforcement, a legislative solution to this issue is unlikely. Accordingly, we must look to other potential sources for a solution that is not reliant on the legislature. There, we find the common law development of the public policy exception and the ability of courts to guide that development and its application.

C. Broadening the Application of the Public Policy Exception

The application of the public policy exception is not consistent from state to state.[185] Rather, the application of the exception exists on a continuum, with the courts of some states being unreceptive to public policy arguments, others being slightly receptive, and still others being most receptive to such claims.[186] This means that, while the public policy exception itself originates from the same source, various jurisdictions have developed that exception in different ways while still maintaining the same overall standards under the applicable Supreme Court decisions. This fluid development not only allows a single jurisdiction to continuously construct its own approach to the exception, but also allows that jurisdiction to analyze the positives and negatives of the unique approaches of other jurisdictions as it develops its own approach to the exception. In this, it is useful to determine where Minnesota currently falls on this continuum and what jurisdictions we may take guidance from in reforming our approach to the public policy exception.

1. Pennsylvania's Approach

Pennsylvania is recognized as an "example of case law expansion of statutory language so as to effectively bar almost any public policy exception."[187] Pennsylvania's case law has expanded on the statutory language of the Pennsylvania legislature's Act 111,[188] which, among other things, prohibited the appeal of arbitration decisions regarding the formation of collective bargaining agreements with police officers and

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[184] *Id.*

[185] Iris, *supra* note 36, at 559.

[186] *Id.* Pennsylvania and Texas are provided as states that are the least receptive to these claims; Nebraska is provided as a state that is beginning to open the door to such claims; and Massachusetts, Illinois, and Connecticut are provided as states that are increasingly more receptive to public policy exception claims. *Id.*

[187] *Id.*

[188] 43 PA. STAT. ANN. § 217.1 (West, Westlaw through 2021 Reg. Sess. Act 70).

firefighters.[189] And, despite the statute's general silence on the issue of individual disciplinary-related grievances, Pennsylvania's case law history shows that courts have expanded the coverage of Act 111.[190] In addressing this general silence, the Pennsylvania Supreme Court held:

> Act 111 specifically avoids the use of the courts for dispute resolution. This policy is so strong that section seven of the Act, 43 P.S. 217.7, provides for binding arbitration and contains the unique provision that "[n]o appeal therefrom shall be allowed to any court." Thus the only method for settling grievance disputes allowable within the framework of Act 111 is arbitration. This objective would be completely frustrated if we were to superimpose, by judicial fiat, a layer of court intervention.[191]

In accordance with this opinion, "Pennsylvania courts have consistently interpreted Article 111 to constrict their ability to intervene and disturb an arbitration award."[192] Later decisions, such as the case of James Betancourt, clarified and articulated the focused scope of judicial review of arbitrator awards.[193] While Pennsylvania does recognize the general contractual standard that courts may not enforce an order that would "compel a party to commit an illegal act," this additional exception is "virtually useless" in addressing instances of police misconduct.[194] Ultimately, Pennsylvania's application of the public policy exception stands as one of the most restrictive approaches to the exception.

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[189] Iris, *supra* note 36, at 559–60 ("This Act afforded police officers and firefighters in that state the right to engage in collective bargaining. The Act went on to outline the process to be followed when there is an impasse in reaching a collective bargaining agreement. The process requires a three member arbitration panel. The panel's decision is binding, the Act stating (relative to any such decisions): 'No appeal therefrom shall be allowed to any court.'").

[190] *Id.* at 560.

[191] *Id.* at 561 (quoting Chirico v. Bd. of Supervisors for Newton Twp., 470 A.2d 470, 475 (Pa. 1983)).

[192] *Id.*

[193] *Id.* ("[T]he narrow certiorari scope of review limits courts to reviewing questions concerning (1) the jurisdiction of the arbitrators; (2) the regularity of the proceedings; (3) an excess of the arbitrator's powers; and (4) deprivation of constitutional rights." (quoting Pa. State Police v. Pa. State Troopers' Ass'n, 656 A.2d 83, 89–90 (Pa. 1995)). *See generally* Pa. State Police v. Pa. State Troopers' Ass'n, 633 A.2d 1278 (Pa. 1993) (This is the case commonly referenced as *The Betancourt Case* involving Trooper James Betancourt).

[194] Iris, *supra* note 36, at 562–63 ("This escape valve, articulated in the context of a challenge to a non-disciplinary arbitration proceeding, is, however, virtually useless in addressing even the most egregious, factually uncontested instances of police misconduct.") Supporting this assertion with a discussion of Trooper Rodney Smith who, "while off duty and intoxicated, accosted his ex-girlfriend, threatened her, and placed his loaded police issued firearm in her mouth. He pled guilty to five criminal charges, including three counts of driving under the influence, simple assault, and making terroristic threats. Nonetheless, the arbitrator concluded this misconduct was not serious enough to warrant discharge." *Id.*

2. Nebraska's Approach

Nebraska presents a different approach than Pennsylvania. Developed recently, the Nebraska Supreme Court first addressed the public policy exception issue in 2009.[195] Like Pennsylvania, there was a general silence in the statutory law regarding this question, so the court was, largely, creating the Nebraska precedent regarding the public policy exception in this single case.[196] While the court essentially deferred to the general state and federal approach in favor of arbitration "as a desirable alternative to court litigation," it also "clearly indicated such preference has its limits."[197]

3. Connecticut's Approach

On the opposite end of the spectrum from Pennsylvania, with Nebraska situated somewhere in the middle, sits Connecticut. Interestingly, "[t]he wording of the pertinent statue in Connecticut is no more inviting of judicial intervention on public policy grounds than are its equivalents in other states."[198] Like other jurisdictions, Connecticut statutory law is silent as to a court vacating an arbitration award that would require a party to commit an illegal act.[199] However, despite the similarly narrow scope of the statutory grounds for vacating arbitration awards compared to other, more restrictive jurisdictions, Connecticut courts "have not been reluctant to set aside arbitration decisions, in cases involving both police officers and other public

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[195] *Id.* at 569. *See generally* State v. Henderson, 762 N.W.2d 1 (Neb. 2009) (This is the case referenced by the material).

[196] Iris, *supra* note 36, at 570–71.

[197] *Id.* at 571; *see Henderson*, 762 N.W.2d at 18 ("Although arbitration decisions are given great deference, they are not sacrosanct. Here we cannot say that the strong public policy favoring arbitration should trump the explicit, well-defined, and dominant public policy that laws should be enforced without racial or religious discrimination, and the public should reasonably perceive this to be so. Having associated himself with the Ku Klux Klan, 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. Therefore, we conclude that the arbitrator's decision reinstating Henderson to the Nebraska State Patrol violates Nebraska public policy and that the district court correctly refused to enforce the award. Henderson and SLEBC's assignment of error lacks merit." (footnote omitted)).

[198] Iris, *supra* note 36, at 585 (noting the Connecticut statute allows the vacation of arbitration awards: "(1) If the award has been procured by corruption, fraud, or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in requesting to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."). This language is similar to both the federal and Minnesota statutory standards for overturning arbitrator awards. *Compare* CONN. GEN. STAT. ANN. § 52-418 (West 2013), *with* 9 U.S.C. § 10 (2002), *and* MINN. STAT. § 572B.23 (2020).

[199] Iris, *supra* note 36, at 585.

employees."[200]

As the basis for this more liberal application of the public policy exception, Connecticut courts have relied heavily on the precedent of *Schoonmaker v. Cummings and Lockwood of Connecticut, P.C.*[201] While there are "examples of court reversals of arbitration decisions which predate the *Schoonmaker* case; this precedent clearly gave lower Connecticut courts substantially more latitude in addressing public policy challenges."[202] This larger latitude regarding the public policy exception can be seen in action in one particular example:

> In a field related to police work, Connecticut courts have issued a number of decisions affirming reversal of arbitration decisions reinstating discharged state corrections officers. One officer was discharged for leaving an obscene, racist, phone voice mail to a state senator, making the call from work, on a state telephone, while on duty. The arbitration decisions reduced the penalty to a sixty days' suspension. The trial court vacated the arbitration award; the Supreme Court of Connecticut affirmed that decision.[203]

In its analysis, the Supreme Court of Connecticut noted the proper evaluation set forth by the trial court, presenting a straightforward breakdown of the appropriate approach to public policy exception application under Connecticut's precedent.

> Here, the trial court set forth the "two-step analysis ... often employed [in] deciding cases such as this. First, the court determines whether an explicit, well-defined and dominant public policy can be identified. If so, the court then decides if the arbitrator's award violated the public policy." The trial court

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[200] *Id.*

[201] *Id.*; Schoonmaker v. Cummings & Lockwood of Conn., P.C., 747 A.2d 1017, 1024–25 (Conn. 2000) ("Although we recognize the important role that arbitration plays in settling private disputes, we take this opportunity to articulate expressly the role of the judiciary in reviewing public policy challenges to consensual arbitration awards. . . . Although we previously have held that an arbitral award may be vacated if it is violative of a clear public policy, we have never *expressly* articulated the proper standard, de novo or otherwise, for reviewing whether an arbitral decision does in fact violate public policy. Until now, our role in addressing a public policy challenge has been confined largely to determining whether, as gleaned from a statute, administrative decision or case law, there exists a public policy mandate with which an arbitral award must conform. . . . We conclude that where a party challenges a consensual arbitral award on the ground that it violates public policy, and where that challenge has a legitimate, colorable basis, de novo review of the award is appropriate in order to determine whether the award does in fact violate public policy." (footnote omitted) (citation omitted)).

[202] Iris, *supra* note 36, at 586.

[203] *Id.* at 587.

> determined that [the officer's] act of placing an anonymous, obscene and racist telephone call while on duty in a state correction facility, from a state owned telephone, was a violation of explicit public policy. This public policy is articulated in both § 53a–183, the offense for which Frederick was given accelerated rehabilitation, and the relevant regulations of the department of correction. We agree with the trial court that an explicit, well-defined and dominant public policy is identified here, wherein a state employee, while on duty, utilized a state owned telephone to place an anonymous, obscene and racist call. Accordingly, the first prong of the required inquiry is satisfied.
>
> The trial court then proceeded to the second prong of the analysis: whether the arbitrator's award violated this clear public policy. The court noted that the arbitrator attempted to excuse Frederick's conduct "as the outgrowth of various personal stressors," but did "[find] that he did, in fact, leave the stipulated message for the legislator." Accordingly, the arbitrator justified reinstating Frederick despite his conduct, which violated both statute and department regulations. We agree with the trial court that, in doing so, the arbitrator "minimize[d] society's overriding interest in preventing conduct such as that at issue in this case from occurring." Thus, the award—with its inherent rationalization of conduct stipulated to by Frederick, which was violative of statute and regulations—is in itself violative of clear public policy.[204]

In comparing the Connecticut approach to less receptive approaches, such as Pennsylvania's, it is important to recognize that these approaches are developed entirely through case law.[205] The Connecticut statute is "no more inviting of a public policy claim" than other jurisdictions with more restrictive approaches; "[t]he crucial difference is how courts interpret that statutory wording."[206]

4. Minnesota's Place on the Continuum

On the same continuum, Minnesota most likely falls somewhere around the recently developed standard in Nebraska. Similar to Nebraska, Minnesota courts have expressed an approach that favors arbitration and constitutes significant deference to the decisions reached in arbitration, citing to federal cases such as *W.R. Grace* and *Misco* to support this

[204] State v. AFSCME, Council 4, Loc. 387, AFL-CIO, 747 A.2d 480, 486 (Conn. 2000).
[205] Iris, *supra* note 36, at 590.
[206] *Id.*

approach.[207] However, like Nebraska, Minnesota courts have inferred the possibility that this favorable approach has its limitations.[208] While not as restrictive in the application of the public policy exception as states such as Pennsylvania,[209] Minnesota courts are inarguably more restrictive than jurisdictions such as Connecticut.[210] Therefore, it is most appropriate to place Minnesota, currently, somewhere around the middle of the continuum. The middle of the continuum, however, is not sufficient to establish the necessary protections and oversight over the arbitration process when dealing with issues of police discipline.[211] To provide the necessary protections and oversight, the application of the public policy exception must be reformed in light of the more liberal application of the exception in jurisdictions like Connecticut.

5. Reforming Minnesota's Application of the Public Policy Exception

Minnesota courts must focus on the conduct of the individual involved in the arbitration, rather than the arbitrator's award, when determining whether public policy has been violated to truly represent the public interest in applying the public policy exception. As noted previously, the application of the public policy exception is developed entirely through case law.[212] Interpretation of similar statutory principles is what differentiates the restrictive applications of this exception from the more liberal applications.[213] Accordingly, reforming the jurisdictional application of this exception does not require legislative intervention and can be pursued purely through court decisions regarding the interpretation and application of statutory principles on the limitations of overturning arbitrator awards. In other words, the only thing hindering the reformation of the application of the public policy exception in Minnesota to a more workable solution that truly serves the public interest is the deference to the historical approach of Minnesota courts—an approach that does not account for the inherent

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[207] *See supra* Part III.D.

[208] *See supra* text accompanying note 67–68.

[209] *Compare* Pa. State Police v. Pa. State Troopers' Ass'n, 741 A.2d 1248 (Pa. 1999), *with* City of Brooklyn Ctr. v. Law Enf't Lab. Servs., Inc., 635 N.W.2d 236 (Minn. Ct. App. 2001) (considering the Pennsylvania court's decision to uphold the arbitrator's award reinstating the officer in that case, it is unlikely it would have applied the public policy exception as the Minnesota court did in the *Brooklyn Center* case if faced with similar circumstances).

[210] *Compare* State v. AFSCME, Council 4, Loc. 387, AFL-CIO, 747 A.2d 480, 485 (Conn. 2000), *with* City of Duluth v. Duluth Police Union, Loc. No. 807, No. A19-0404, 2019 WL 4165031 (Minn. Ct. App. Sep. 3, 2019).

[211] *See supra* Part IV.B (recognizing that Minnesota's place on the middle of the public policy exception application continuum has required courts to uphold arbitration awards reinstating officers whose conduct is not compatible with the public interest). *See, e.g.*, *City of Duluth,* 2019 WL 4165031.

[212] *See supra* text accompanying note 205.

[213] *See supra* text accompanying note 206.

differences between general arbitration and arbitration regarding police misconduct.[214]

In broadening Minnesota's application of the public policy exception to allow for the necessary degree of oversight over arbitrator decisions regarding law enforcement discipline,[215] the two-step analysis presented by the Connecticut courts provides the most straightforward and applicable standard of application. That two-step analysis can be broken down as follows: (1) whether there is an explicit, well-defined, and dominant public policy involved; and (2) whether the arbitrator's award violates that policy.[216] While this may not seem so different than the Minnesota standard, the inherent differences between the approaches rest in their application.

Minnesota's approach has emphasized the arbitrator's decision specifically, rather than the conduct of the individual, when analyzing the potential application of the public policy exception.[217] In contrast to Minnesota, Connecticut courts have looked to the conduct of the individual to determine if there is a public policy involved.[218] If it is determined that there is a public policy involved based on that conduct, the arbitrator's award is then analyzed to determine whether that award violates that policy.[219] The award's violation, however, does not necessarily need to be an explicit violation of the policy itself, according to the language of the court; it is more a question of whether it violates the public's *interest* in that policy.[220] Accordingly, a practical standard for Minnesota courts to apply, reflective of the application of the Connecticut standard, is: (1) whether there is an explicit, well-defined, and dominant public policy involved; and (2) whether the arbitrator's award violates the public's interest in that policy. This standard maintains the emphasis of Minnesota court precedent that there be an explicit and well-defined public policy involved, while simultaneously allowing for a more liberal application of that standard in determining whether, in the case of an officer discharged for misconduct but reinstated through arbitration, the arbitrator's reinstatement of that officer is a violation of the public's "overriding interest in preventing conduct such as that at issue . . . from occurring."[221]

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[214] *See supra* notes 156–157 and accompanying text.
[215] *See supra* Part V.A.
[216] *See supra* text accompanying note 204.
[217] *See supra* text accompanying note 70.
[218] *See supra* text accompanying note 204.
[219] *Id.*
[220] *Id.* ("Accordingly, the arbitrator justified reinstating Frederick despite his conduct, which violated both statute and department regulations. We agree with the trial court that, in doing so, the arbitrator '**minimize[d] society's overriding interest in preventing conduct such as that at issue in this case from occurring**.' Thus, the award—with its inherent rationalization of conduct stipulated to by Frederick, which was violative of statute and regulations—is in itself violative of clear public policy.") (emphasis added).
[221] *See id.*

VI. CONCLUSION

Arbitration is not an inherently problematic method of dispute resolution.[222] However, the current use of arbitration in disputes regarding police misconduct and subsequent discipline constitutes an unacceptable obstacle to officer accountability and the ability of officials to regulate the conduct of their officers.[223] The incredible authority provided to arbitrators in making decisions in these disputes, the insulation from public accountability, and the deference courts provide to those decisions combine to create a system that favors individual officers over the interests of the communities they are meant to serve. These standards, while workable in general arbitration, become fundamentally unworkable when applied to the intrinsically different circumstances of police discipline. While there are potential legislative solutions to the problematic use of arbitration regarding police discipline,[224] courts should not sit on their hands and wait for a solution that may never come.

The public policy exception is an accepted standard for overturning arbitrator awards that are counter to public policy.[225] This standard narrowly applied, however, does not function to truly serve the public interest.[226] A more robust application of this standard allows for the continued use of arbitration in police disciplinary proceedings but simultaneously provides greater oversight regarding the decisions of those arbitrators, allowing courts to ensure that those decisions do not contradict the public interest in regulating the conduct of law enforcement officers.[227] Without this reformed approach, the public will bear a continuous risk of harm at the hands of officers discharged for violent or inappropriate misconduct but reinstated based on the subjective opinion of an unaccountable actor.

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[222] *See supra* notes 33–35 and accompanying text.
[223] *See supra* Part V.A.
[224] *See supra* Part V.B.
[225] *See supra* Part III.B.
[226] *See supra* Part V.C.1; *see, e.g.*, Iris, *supra* note 36, at 562–63.
[227] *See supra* Part V.C.5.