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CRIMINOLOGY

POLICE DISCIPLINE IN CHICAGO: ARBITRATION OR ARBITRARY?

MARK IRIS*

I. INTRODUCTION

In many jurisdictions in the United States, the final word in disciplinary actions involving police officers is not had by the chief of police, the mayor, or a civilian review board, but by an arbitrator. Using binding arbitration as a means of resolving disputes over attempts to fire or suspend sworn officers is very common, especially in many larger departments. There may be great differences among departments in terms of arbitrators' involvement, for example, which actions are, or are not cognizable before an arbitrator, at what stage in the process does the arbitrator enter the scene, etc. However, a key shared feature is the commitment by both management and the officers, through their unions or associations, to the principle of binding arbitration. Both parties agree to abide by the arbitrators' decisions. The losing party generally has only very narrow grounds to challenge an arbitration decision through a civil suit.¹

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¹ FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 43 (B.N.A. 4th ed. 1985).

Therefore, in a very real sense, to get a feel for how a police department takes disciplinary action, one must look at the final outcomes of the process. What a police chief or review board may order and what an arbitrator may ultimately decide can be very different.

The objective of this article is to present an empirical evaluation of how a police executive's disciplinary actions against a large pool of officers have been affected by arbitrators' decisions. This study focuses on the Chicago Police Department and covers the years 1990-1993. A total of 328 disciplinary actions were decided by binding arbitration during that period. In addition, under a new process started in July 1993, 205 disciplinary actions have been reviewed by arbitrators for non-binding advisory opinions as of July 1995. These two distinct data sets demonstrate remarkably similar patterns of outcomes; collectively, the discipline imposed upon Chicago police officers is routinely cut in half by arbitrators. This pattern recurs despite an elaborate, lengthy review process and close scrutiny before the suspension of an officer is ordered.

This extraordinary even-handedness of outcomes raises serious, basic questions about the propriety of the arbitration process. Most studies of arbitration focus on precedential decisions. Although it is rare to have empirical analysis of a universe of decisions from one setting, this study closely scrutinizes one such pool of decisions. This study has particular significance because the underlying cases involve allegations of police misconduct that often arise from the highly charged, high-profile area of excessive force allegations.

II. POLICE DISCIPLINE AND CIVILIAN REVIEW

Across the United States, the issue of police discipline has been interwoven with the question of civilian review. For years, in many cities, citizens and community groups have pressured municipal authorities to establish civilian review boards. Some of the many jurisdictions which have gone through this debate include Denver,² Houston,³ San Jose,⁴ and Boston.⁵ The stated

² Mark Eddy, *Bill Exemplifies Art of Politics: Compromise Key to Sandos' Plan*, DENVER POST, Aug. 31, 1992, at 1-A.

rationale is often the same from city to city: citizens' complaints of police misconduct, when investigated by police internal affairs officers, are not handled properly. In calling for civilian review boards in New Orleans and in other Louisiana jurisdictions, the chair of the Coalition of Concerned Black Ministers called the existing police investigative process "a joke. It's a case of the fox guarding the henhouse."⁶ A common perception is that the police cannot be trusted to investigate themselves,⁷ especially when the allegation is use of excessive force. For example, police shootings of several car-theft suspects in Newark, New Jersey led community activists to call for a civilian complaint review board. The activists claimed that the city's Police Director allowed his officers to operate "with impunity."⁸ It is argued that only through civilian review, with a panel of citizens responding to public complaints, can the police be held accountable for their actions.⁹

There has been a slow but steady trend to establish civilian review boards in many cities across the United States.¹⁰ There is no single, generally used model of civilian review boards. Panels vary widely in their composition, jurisdiction, and authority. Some jurisdictions have panels composed entirely of citizens while others have panels composed jointly of officers and citizens. In some cities, the panels may undertake their own investigations, while others limit their scope to reviewing the police department's own internal investigations. Some panels have ju-

³ Raequel Roberts, *Anniversary of Slaying Sparks Rallies: Justice Committee Recalls Ida Delaney*, HOUSTON POST, Oct. 30, 1990, at A12.

⁴ Dan Turner, *San Jose Council Rejects Civilian Police Review*, S.F. CHRON., Nov. 19, 1992, at B7.

⁵ Michael Grunwald, *Critics Urge Review Board for Hub Police*, BOSTON GLOBE, Aug. 29, 1995, at 31.

⁶ Ed Anderson, *Ministers Seeking Police Oversight*, NEW ORLEANS TIMES-PICAYUNE, Jan. 29, 1993, at B1.

⁷ JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* 226 (1993).

⁸ Evelyn Nieves, *Newark Police Shootings Revive Call for a Civilian Review Board*, N. Y. TIMES, Sept. 11, 1992, at B5.

⁹ Chris Black, *Civilian Role in Police Reviews Expanding*, BOSTON GLOBE, July 28, 1991, at 1.

¹⁰ See generally SAMUEL WALKER & BETSY WRIGHT, *POLICE EXECUTIVE RESEARCH FORUM, CITIZEN REVIEW OF THE POLICE 1994: A NATIONAL SURVEY* (1995).

risdiction over all allegations of officer misconduct, while others are limited to instances involving allegations of verbal or physical abuse. Ultimately, the most significant variable is the panel's authority to discipline officers. Can the panel, on its own authority, suspend or fire an officer, or can the panel make only a recommendation to the chief of police?

Whether the disciplinary action emanates from the chief of police after the traditional investigation by sworn personnel, or whether the action stems from a citizens' review board, a crucial factor is the appeals mechanism. For discipline to be meaningful, it must be real. Penalties that are perceived as paper actions only, unlikely to withstand the appeals process, are also unlikely to either redirect the errant officer or deter other officers. The police subculture is characterized by a strong degree of suspicion¹¹ and cynicism.¹² Given such cynicism, in order for a disciplinary system to be effective, it needs to be unambiguously perceived as one capable of making decisions that withstand challenges.

The power to discipline an officer is crucial to police managers. Typically through such action an officer's misconduct can be corrected and other officers can be deterred from similar action. Other resources that can be used by police management to restrain an overly aggressive or errant officer are very limited. Civil service regulations and union contracts not only severely restrict a police chief's ability to reward exemplary performance through promotions, transfers, reassignments, pay increases, or bonuses, but also restrict the police chief's ability to impose sanctions for poor performance. Because police and local prosecuting attorneys cooperate closely, criminal prosecution of officer misconduct is typically limited to a very small number of the most blatant cases.¹³ Civil lawsuits against the police for misconduct, filed by persons alleging civil rights violations, are more significant to police management than to

¹¹ JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 43 (3rd ed. 1994).

¹² ARTHUR NIEDERHOFFER, *BEHIND THE SHIELD: THE POLICE IN URBAN SOCIETY* 9, 46-48 (Anchor ed. 1969).

¹³ See SKOLNICK & FYFE, *supra* note 7, at 199.

individual officers. Typically, a jurisdiction is obligated to provide legal representation to an accused officer in a suit arising from the actions the officer took under color of law, whether on or off duty. The employing jurisdiction is usually obligated to indemnify the officer for any damages awarded in court.¹⁴ An officer may be personally liable only if punitive damages are imposed, which is an infrequent occurrence.

With criminal prosecution, civil suits, and managerial prerogatives severely limited as tools for correcting errant officers, disciplinary action remains the most potent means to get an officer's attention. The threat of losing one's job, or losing a week's or a month's pay while on suspension, is powerful and intimidating.

For rank and file officers, the advent of a civilian review board raises the specter that civilians will be second-guessing officers' actions and imposing discipline.¹⁵ For officers, the term "civilian" in this context is almost a pejorative: civilians are outside the police subculture and do not understand the types of people (sociopaths, drunks, etc.) with whom the police must routinely deal.¹⁶ A national police union representative noted that police feel it is difficult for civilians to understand the pressures under which police operate.¹⁷ Police officers find it especially threatening that such second guessing will be done most prominently in cases involving the use of force, which goes to the core definition of a police officer's role.¹⁸

These arguments have been fought out in city after city across the United States whenever the creation of a civilian review board is proposed. Typically, police unions, associations, and their allies are opposed to creating any such civilian review boards while community organizations and civil rights groups are in support of having such boards. Police union opposition to such boards can be strident. Donald L. Murray, the head of

¹⁴ See, e.g., 65 ILL. COMP. STAT. ANN. 5/1-4-5, 5/1-4-6 (West 1993).

¹⁵ See SKOLNICK & FYFE, *supra* note 7, at 221, 226.

¹⁶ ANTHONY V. BOUZA, *THE POLICE MYSTIQUE: AN INSIDER'S LOOK AT COPS, CRIME, AND THE CRIMINAL JUSTICE SYSTEM* 4-7 (1990).

¹⁷ David Rohde, *Civilian Review Boards Strain for Funds to Watch Cops*, CHRISTIAN SCI. MONITOR, Aug. 29, 1994, at 1.

¹⁸ CARL B. KLOCKARS, *THE IDEA OF POLICE* 9-10 (1985).

the Boston Police Patrolmen's Association, called the creation of a community appeals board "the ruination of the Boston Police Department. I'm very disheartened. It's a very sad day. And I feel I've been raped and sodomized."¹⁹ In New York City in 1966, the police officers association was crucial in leading the electoral campaign that successfully enacted a charter referendum, strongly opposed by Mayor John Lindsay, to bar any such review board.²⁰

There is often a racial dimension to this conflict. In many major cities, Hispanic and black police officers comprise much smaller proportions of the police forces than of the populations within their jurisdictions. In 1992, of the ten largest cities in the United States, only one, Los Angeles, had the same proportion of African-Americans both within the population at large and among its officers. The other nine cities all had significant under-representation.²¹ For these same cities, the under-representation of Hispanic officers was even more pronounced. In 1992, none of these ten cities had a proportion of Hispanic officers that equaled or exceeded two-thirds of the proportion of the city's Hispanic population.²² This racial divisiveness was illustrated in Houston, when in 1989 the Houston City Council voted, along racial lines, against the establishment of a civilian review board. Council members played down the racial split, but the Council's one Hispanic and four black members were the only ones to support the mayor on this issue.²³

Often the issue of civilian review becomes a very hot political item. In 1992, thousands of off-duty New York police officers staged a demonstration that verged on a riot to voice their opposition to Mayor David Dinkins' plans for such a board.²⁴ In San Jose, California, citizen review advocates, many Hispanic,

¹⁹ John Ellement, *Roache Creates Appeals Board*, BOSTON GLOBE, Jan. 18, 1992, at 1.

²⁰ See SKOLNICK & FYFE, *supra* note 7, at 221-22.

²¹ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 49 (1994).

²² *Id.* at 50.

²³ David Plesa & Andrew Kirtzman, *Council Blocks Police Review Panel; City to Seek Alternatives Brown Favors*, HOUSTON POST, Nov. 30, 1989, at A1.

²⁴ James C. McKinley, Jr., *Officers Rally and Dinkins is Their Target*, N.Y. TIMES, Sept. 17, 1992, at B1.

wanted a full civilian review board. The police chief, citing the potential for a witch-hunt atmosphere, threatened to resign if the proposal was enacted. As a compromise, a lesser plan, which created an independent auditor, was enacted. Community groups vowed to take their efforts for a more comprehensive review board to the ballot.²⁵ In Syracuse, New York, there was a divisive dispute as to whether or not a civilian review board should be created. The local police chief and the Republican leader of the city's Democrat-controlled Common Council were among those opposed to the creation of such a board; conversely, community leaders and civil liberties advocates supported its creation.²⁶

Controversy does not necessarily end once local authorities have decided to create a citizen review board. In Denver, after a review panel was established, the Police Protective Association (the officers' union) advised its members not to honor subpoenas issued by the city's civilian review board. A Denver County Judge upheld the board's subpoena powers, stating that without such powers, the commission would be gutted.²⁷

These disputes can highlight racial divisions between the police forces and the populations whom they police. Thus, in Springfield, Massachusetts, the local chapter of the NAACP threatened to initiate a grass-roots effort to police the police if a proposed review board was not granted authority to discipline officers and oversee investigations. This movement arose in the aftermath of the fatal shooting of a black motorist by a white police officer, and was further aggravated by an officers' party to celebrate a grand jury's decision to clear the officer of criminal wrongdoing.²⁸ The County Executive of Prince George's County, Maryland, proposed adding a civilian to the board of police officers then empowered to review complaints of police

²⁵ Dan Turner, *San Jose Council Rejects Civilian Police Reviews*, S.F. CHRON., Nov. 19, 1992, at B7.

²⁶ Lindsey Gruson, *Syracuse Grapples with Debate over Civilian Review of Police*, N.Y. TIMES, Aug. 3, 1992, at B1.

²⁷ Howard Pankratz, *Judge Orders Cops to Comply: Civilian Panel has Subpoena Powers*, DENVER POST, Nov. 30, 1995, at B1.

²⁸ Geeta Anand, *Civilian Review Proposed for Springfield Police: Fatal Shooting of Black Driver Led to Protests*, BOSTON GLOBE, July 11, 1994, at 13.

misconduct. This proposed addition was acknowledged as a step that would help to counter the negative image of the police held by segments of the county's black population. The members of the union representing the county's police officers voted their unanimous opposition to this proposal.²⁹

In contrast to the above incidents, the absence of controversy during the creation of a board in Omaha, Nebraska, was deemed newsworthy.³⁰

In the public debates on this disciplinary process, one major factor is typically not given the attention it merits: the ultimate role of outside arbitration in disciplinary actions against officers. It is crucial to understand this role. In the end, outside arbitration can negate the police disciplinary process, whether that process takes place through internal mechanisms, or through a civilian review board.³¹

Therein lies a crucial, and, heretofore unexamined question: how do arbitrators decide questions of police discipline? If the objective of citizens' groups is to hold officers accountable for their misconduct through disciplinary actions, and if the officers' objective is to avoid disciplinary action, then focusing attention on the merits of the civilian review process versus internal investigations misses the point. The *process* of *who* investigates and *how*, while symbolically significant, is less crucial than *what* actually happens. To that end, this article documents how a large pool of disciplinary suspensions of police officers, imposed after lengthy review processes, has been subsequently affected by arbitrators' decisions.

III. POLICE, UNIONS, AND ARBITRATION

Recent years have not been kind to the organized labor movement in the United States. In 1954, labor union members

²⁹ Keith Harriston & Debbie M. Price, *Glendening Supports Adding Civilian to Police Review Board*, WASH. POST, July 28, 1989, at C1.

³⁰ *A Review Board Without a Ripple? Omaha Proves that It Can Be Done*, LAW ENFORCEMENT NEWS, July/Aug. 1993, at 1.

³¹ The controversy over the establishment of a civilian review system in Houston is one exception to this statement. Media coverage of the dispute noted, with analysis and numbers, that "arbitrators have done well by the cops." Steve Friedman, *Discipline Procedures Take Time*, HOUSTON POST, Nov. 19, 1989, at A37.

composed 35.3% of America's non-farm work force.³² By 1993, they composed only 15.8% of the work force.³³ During that time span, the raw number of union members actually declined even as the work force more than doubled in size.³⁴

One major exception to this general decline has been the public sector. Employees in many jurisdictions are now members of collective bargaining units. In 1993, 36.7% of government workers were members of unions.³⁵ Police forces across the country have shared in this growth. While comprehensive data are lacking,³⁶ one survey of jurisdictions with populations of ten thousand or more indicated 58% of these departments had at least some of their members in unions.³⁷ At the state and local levels, there are an estimated 604,000 police officers in the United States.³⁸ The Fraternal Order of Police represents 250,000 of these officers.³⁹ Other police unions represent many additional officers. Some of these unions, such as the New York City Patrolmen's Benevolent Association and the Los Angeles Police Protective Association, are free-standing local organizations, and they are not part of a national union. In major cities—those with the greatest numbers of officers—unionization is almost the norm. New York City, Chicago, Los Angeles, Philadelphia, Phoenix, Boston, and Washington all have unions or associations representing officers.⁴⁰

³² BUREAU OF THE CENSUS, U.S. DEP'T. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 228 (1956).

³³ BUREAU OF THE CENSUS, U.S. DEP'T. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 436 (1993).

³⁴ *Id.*; BUREAU OF THE CENSUS, *supra* note 32, at 198, 228.

³⁵ BUREAU OF THE CENSUS, *supra* note 33, at 436.

³⁶ The fragmented, local nature of policing makes it difficult to assemble comprehensive data on police. For example, surveys as to the number of police *departments* in the United States have produced estimates from 15,000 to 20,000. See SAMUEL WALKER, *THE POLICE IN AMERICA: AN INTRODUCTION* 37 (2d ed. 1992).

³⁷ See generally EVELINA MOULDER, U.S. DEP'T. OF JUSTICE, *POLICE SALARIES 1993: SPECIAL DATA ISSUE* (1993).

³⁸ See BUREAU OF JUSTICE STATISTICS, *supra* note 21, at 45.

³⁹ See Rohde, *supra* note 17, at 1.

⁴⁰ "Associations" or "protective leagues" were formed by officers in numerous jurisdictions where state or local laws barred officers from forming or joining unions. Over the years, many of these associations have come to perform almost all of the functions of unions, including negotiating collective bargaining agreements.

Unionization comes with a contract. While these contracts may resolve some disputes, they open the door to the creation of new disputes. A collective bargaining agreement will normally provide for a mechanism to resolve disputes in contract interpretation and application. One common model for dispute resolution is the arbitration of grievances. One survey of major private sector collective bargaining agreements found that almost 96% provided for arbitration as the final step in the grievance process.⁴¹ If an employee is dissatisfied with the disciplinary action to be imposed, a grievance is filed. With whom the grievance shall be filed, and how it shall be resolved, are specified in the collective bargaining agreement.⁴² The collective bargaining agreement may typically detail various pre-arbitration procedures to be applied in an effort to resolve the dispute by negotiation between the parties, prior to its presentation to an outside, impartial arbitrator.⁴³ Typically, the contract will provide for binding arbitration. The parties agree to honor the arbitrator's decision as final, with no appeals process.

Police departments' disciplinary processes are typically complex and lengthy, with large differences across cities. A sample process will be detailed later in this article.⁴⁴ However, in many cities, some, if not all, disciplinary actions that the chief of police may wish to take against an officer are subject to an arbitrator's jurisdiction. Chicago, Boston, Cleveland, Houston and Pittsburgh are just a few of the major U.S. cities in which arbitration is at least a partial means to adjudicate certain disciplinary actions. New York City's police unions successfully pressured the state legislature into passing a bill that would take disciplinary actions out of the Department's control and require mandatory arbitration. Governor Pataki eventually vetoed the bill, in the face of strong support from the police unions.⁴⁵ In Chicago, the collective bargaining agreement specifies that no

⁴¹ See ELKOURI & ELKOURI, *supra* note 1, at 6.

⁴² *Id.* at 153-55.

⁴³ *Id.* at 165-69.

⁴⁴ See *infra*, Part V.

⁴⁵ *To Albany: Don't Undermine the N.Y.P.D.*, N.Y. TIMES, June 29, 1995, at A20; James Dao, *Pataki Vetoes Bill as a Threat to New York Police Merger*, N. Y. TIMES, Nov. 11, 1995, at A1.

officer may be disciplined by management except for "just cause."⁴⁶ Thus, arbitrations center on the issue of whether or not the Department can meet its burden to convince the arbitrator that just cause did in fact exist for taking disciplinary action.

There have been recent instances in which arbitration decisions have inflamed public opinion. In St. Paul, Minnesota, an officer pled guilty to misdemeanor charges stemming from an off-duty sexual assault. He had exposed himself to a fourteen-year-old babysitter at his home and fondled her. The police department fired the officer, who then was restored to duty by an arbitrator. The arbitrator found the department's penalty of discharge too harsh, citing the officer's past job performance, remorseful attitude, and a positive report from a therapist the officer subsequently saw for counseling.⁴⁷ In Pittsburgh, Pennsylvania, an officer faced criminal charges for indecent assault arising from an on-duty incident. He was discharged by the police department. An arbitration panel overturned the officer's discharge, and reduced the penalty to a suspension of six months and two years probation. One arbitrator concluded the incident was not an assault, and stated the officer was "not the first man to lose his head" over sex.⁴⁸ A Hartford, Connecticut officer twice struck a handcuffed student in the face at a near-riotous beer party at the University of Hartford. The incident was videotaped and the resulting complaint led to the officer's discharge. The officer filed a grievance. While the Connecticut Board of Mediation and Arbitration did not dictate the officer's reinstatement, its suggestion that the police chief negotiate the disciplinary action with the police union led to the officer's reinstatement. Reports at that time indicated only two other officers had been fired by the Hartford Police Department for use of excessive force in twenty years, and both of those officers

⁴⁶ Agreement Between the City of Chicago Department of Police and the Fraternal Order of Police Chicago Lodge No. 7, effective through June 30, 1995, § 8.1 (on file with *Journal of Criminal Law & Criminology*).

⁴⁷ Conrad deFiebre, *Ruling on Convicted Cop's Job Explained; Work Record and Treatment Cited*, MINNEAPOLIS/ST. PAUL STAR TRIB., Aug. 17, 1993, at 1B.

⁴⁸ Jan Ackerman, *Woman Testifies in Assault Case; Says City Officer Came to Her Home and Attached Her*, PITTSBURGH POST-GAZETTE, June 21, 1995, at B-2.

were also subsequently reinstated.⁴⁹ In Oregon, two state police troopers were discharged as the result of a 1992 incident in which they had sex with a woman in their police car while on duty. An arbitrator subsequently reversed those disciplinary actions.⁵⁰ These cases are exceptional, not because the police chiefs' decisions were overturned, but because the arbitrators' decisions became publicly known and attracted wide attention.

IV. ARBITRATION DECISIONS: AN OVERVIEW OF THE LITERATURE

The labor law literature gives extensive coverage to arbitration issues. There have been a number of studies which have examined pools of arbitration decisions, with varied research objectives. Bemmels studied 557 grievance arbitrations, and concluded that male arbitrators were more likely to sustain the grievances of female grievants than those of male grievants.⁵¹ Karim examined a group of 102 public sector discharge cases subsequently taken to arbitration.⁵² A forty year overview examined more than 1,700 discharge cases concluded by arbitration, selected from three separate time spans. Building on two prior studies, the authors added 300 new decisions to the pool of decisions analyzed.⁵³ All of these studies examined cases involving numerous employers.

Rahnema-Moghadam et al. examined a pool of arbitration decisions arising from incidents of insubordination and absenteeism, limiting their study to public sector actions only.⁵⁴ There was a noticeable trend for unions to win in insubordina-

⁴⁹ Blanca M. Quintanilla, *Chief Reinstates Officer Fired for Hitting Student*, HARTFORD COURANT, Sept. 29, 1992, at A1; *Who's Running the Police Department?*, HARTFORD COURANT, Sept. 30, 1992, at B16.

⁵⁰ *Oregon SP Code of Ethics Stirs Up Short-Lived Tempest*, LAW ENFORCEMENT NEWS, Aug. 20, 1995, at 1.

⁵¹ Brian Bemmels, *Gender Effects in Grievance Arbitration*, 29 INDUS. & LAB. REL. REV. 513 (1990).

⁵² Ahmad R. Karim, *Arbitrator Considerations In Modifying Discharge Decisions in the Public Sector*, 22 J. COLLECTIVE NEGOTIATIONS IN THE PUB. SECTOR 245, 248 (1993).

⁵³ Ken Jennings et al., *The Arbitration of Discharge Cases: A Forty-Year Perspective*, 38 LAB. L.J. 33, 34 (1987).

⁵⁴ Mashalah Rahnema-Moghadam et al., *The Arbitration Of Disciplinary Matters In the Public Sector: Does Objective Evidence Make A Difference?*, 21 J. COLLECTIVE NEGOTIATIONS IN THE PUB. SECTOR 151, 152-53 (1992).

tion cases, but for management to win on absenteeism issues.⁵⁵ This led the authors to conclude that in cases where there is objective evidence, the burden of proof is more easily discharged.⁵⁶ Malinowski examined a pool of 159 discharge cases, drawn from the private sector, in which employees who had been discharged were subsequently reinstated by arbitration decisions.⁵⁷

These—and other cases not cited—all share one factor in common. The universe of decisions, from which the cases studied were drawn, was defined as consisting of arbitration decisions published in the Bureau of National Affairs' Labor Arbitration Reports. Yet this publication, by its own expressed criteria, explicitly excludes from publication those cases which turn on the question of which witness(es) are to be believed as to the facts, or those cases deemed to be "routine."⁵⁸ Thus, these studies, which attempt to ascertain certain *typical* trends or characteristics of arbitrators' decisions, do so by examining decisions culled from published reports which are by definition *atypical*.⁵⁹

Other studies have limited their scope to public sector organizations only, with access to broader data pools. Sherr examined public sector arbitration awards to ascertain factors associated with employers' and unions' utilization of attorneys in arbitrations.⁶⁰ Franklin and Stephens conducted a survey of police officers' and fire fighters' associations in Texas to ascertain their support for, and utilization of, then-recently enacted statutory changes allowing access to arbitration.⁶¹ Neither of

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Arthur Anthony Malinowski, *An Empirical Analysis Of Discharge Cases and the Work History Of Employees Reinstated by Labor Arbitrators*, ARB. J., March, 1981, at 32-33.

⁵⁸ 99 LAB. ARB. REP. v (1993).

⁵⁹ Less commonly, studies may utilize arbitration decisions reported in Commerce Clearing House Labor Arbitration Awards. This series also screens decisions to accept and publish only those of more general interest, although the publication does not state its criteria with the same clarity as does Labor Arbitration Reports.

⁶⁰ Mitchell A. Sherr, *Legal Representation Of Public Sector Employers and Unions in Grievance Arbitration*, 23 J. COLLECTIVE NEGOTIATIONS IN THE PUB. SECTOR 203 (1994).

⁶¹ GERALYN MCCLURE FRANKLIN & ELVIS C. STEPHENS, *Public Sector Labor Relations in Texas: An Examination of the Appeals Process for Fire Fighters and Police Officers Covered Under State Civil Service*, 18 J. COLLECTIVE NEGOTIATIONS IN THE PUB. SECTOR 87, 90-91 (1989).

these studies, however, examined pools of actual decisions to ascertain patterns of outcomes.

My analysis can be distinguished from these other studies by its utilization of *all* disciplinary arbitrations drawn from the Chicago Police Department during a four year period.

V. POLICE DISCIPLINE IN CHICAGO

The focus of this study is arbitrators' reviews of disciplinary actions against Chicago police officers during the years 1990 through 1993. First, however, an explanation of the disciplinary process in Chicago is required. The general process, as outlined below, applies to all employees of the Chicago Police Department (the "Department"), both civilian and sworn, although the vast majority of employees are sworn officers. It is their actions which are of greatest concern to the public, for it is the sworn officers who have been empowered to use coercive force if they feel it necessary to do so. Therefore, the following discussion refers to officers only. The procedures for civilian employees are essentially similar, although there are some minor differences.⁶²

The disciplinary process starts through a Complaint Register (CR) investigation. With the exception of those problems dealt with under Summary Punishment,⁶³ all complaints of misconduct committed by either sworn or civilian employees, on or off duty, begin with the lodging of a complaint with the Department's Office of Professional Standards (OPS). This is a unit of the Chicago Police Department staffed by civilians. OPS issues a Complaint Register Number (CR number) to each incoming complaint, regardless of the nature of the allegation or

⁶² The most significant difference concerns the scope of disciplinary matters subject to arbitrations. Sworn officers below the rank of sergeant may grieve suspensions up to 30 days in length. As specified in the applicable collective bargaining agreements, most civilian members may grieve suspensions of 10 days or less. Sworn members of sergeants' rank or higher do not at this time have any right to use the grievance/arbitration procedures.

⁶³ In addition to CR investigations, a Chicago officer may also be given minor suspensions (usually one or two days) under a process known as Summary Punishment. This usually deals with minor infractions (late for roll call, improper uniform). A suspension issued under this process is not subject to arbitration unless it is the officer's fourth infraction in 12 months. See Agreement, *supra* note 46, § 7.2 at 11.

the source—a citizen, a supervisor, or for that matter, any member of the Department. Under certain conditions, anonymous complaints are also accepted for investigation. CR numbers are obtained by supervisors for all infractions except those minor ones dealt with under summary punishment procedures.

After a CR number is assigned, the investigation proceeds one of two ways. If the primary allegation is use of excessive force, OPS, along with its civilian investigators, will be responsible for investigating the complaint. All other allegations, e.g., drug use, corruption, insubordination, intoxication, etc., are forwarded to the Department's Internal Affairs Division (IAD), which is staffed by sworn personnel, for investigation. This separation empowers civilian employees to investigate complaints of excessive force, the types of complaints that, as discussed earlier, are most crucial to the public. In recent years, there have been approximately 8,000 CR numbers issued annually.⁶⁴ Typically, one-third are retained by OPS and two-thirds are forwarded to IAD.⁶⁵ It should be noted that in contrast to some other departments, Chicago's unwritten practice is very open to accepting formal complaints. Virtually any complaint alleging a violation of the Department's rules is logged in and assigned for follow-up investigation, even if the allegation appears minor, or far-fetched. By contrast, the Los Angeles Police Department had been accused of taking steps to deter complaints, particularly excessive force complaints, from formally entering its system. Tests done with volunteer complainants indicated one-third of these persons were actively discouraged from lodging their complaints.⁶⁶ Chicago has committed a substantial number of personnel to this intake and complaints process: OPS has had approximately eighty-five authorized staff

⁶⁴ CITY OF CHICAGO POLICE BOARD, 1993-1994 BIENNIAL REPORT 7.

⁶⁵ *Id.*

⁶⁶ WARREN CHRISTOPHER, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 158-59 (1991). This organizational practice of discouraging complaints is further underscored by that department's initial lack of interest in receiving the videotape of the beating of Rodney King for investigation. See SKOLNICK & FYFE, *supra* note 7, at 2-3.

members and IAD one-hundred during the period covered in this study.⁶⁷

Whether the complaint is investigated by IAD or OPS, a similar procedure is followed.⁶⁸ The investigator conducts a comprehensive investigation: interviewing the witnesses and the accused, obtaining crime lab analyses, medical records, photos, etc., as appropriate. The investigator also documents administrative due process requirements, such as informing the accused of his/her right to seek legal counsel and the inadmissibility of any statement in any subsequent criminal proceeding. One of four possible dispositions is then made: (1) sustained (one or more rules of the Department were violated); (2) not sustained (the allegation could be neither proven nor disproven); (3) unfounded (the incident simply did not occur); or (4) exonerated (the action did occur, but the accused's conduct was proper under the circumstances).⁶⁹ If a "sustained" finding is entered, the investigator recommends a disciplinary penalty, taking into account all the circumstances, including the accused's past complementary and disciplinary record. The penalties range from a reprimand through separation (demotion is not an option in the Chicago system). Findings of "not sustained," "exonerated," or "unfounded," denote that the burden of proof could not be met, and thus no disciplinary action can be taken, thereby terminating the process.

A lengthy internal review process follows.⁷⁰ This includes the Command Channel review, in which supervisors review the file and either endorse the findings of the investigators or recommend changes. For the most common police position, patrol officer, this channel includes review by the officer's district

⁶⁷ CITY OF CHICAGO 1995 BUDGET RECOMMENDATIONS 143-44.

⁶⁸ The various steps in the internal investigative and review process are detailed in CHICAGO POLICE DEP'T., GENERAL ORDER 93-3: COMPLAINT AND DISCIPLINARY PROCEDURES.

⁶⁹ A survey of numerous police departments concluded that these same four categories are invariably used in labeling the dispositions of internal investigations, although the terms "substantiated/not substantiated" are sometimes used in place of "sustained/not sustained." CIVILIAN COMPLAINT INVESTIGATIVE BUREAU, POLICE DEPT., CITY OF NEW YORK, SURVEY OF CIVILIAN COMPLAINT SYSTEMS 71 (Sept., 1992).

⁷⁰ See CHICAGO POLICE DEP'T., *supra* note 68.

commander, deputy chief of patrol, chief of patrol, and first deputy superintendent. Any of these parties may return the matter for additional investigation should they discern a shortcoming in the investigative file. This does in fact happen; it is not simply a theoretical option. The head of OPS or IAD, as appropriate, also reviews the file and may make a recommendation to change the finding or the penalty.

Following this review, the officer may opt to exercise his or her right for a Complaint Review Panel hearing. This is essentially a peer review process, in which three sworn members—typically a police officer, sergeant, and lieutenant—review the matter, hear brief oral presentations by the officer (usually accompanied by a union representative) and staff of either IAD or OPS. The panel may either concur with the findings and recommended penalty, or suggest changes.

Thus far, all of these conclusions are only advisory. At the end of this lengthy process, the Superintendent of Police, taking into consideration all of these findings and recommendations, makes a determination as to what disciplinary action shall be taken, and issues a suspension order.

At this point the officer's options to appeal this disciplinary action vary according to the severity of the discipline ordered by the Superintendent of Police. If the discipline is a suspension of five days or fewer, the officer will serve the penalty and then may file a grievance under the terms of the City's contract with the Fraternal Order of Police (FOP).

If a suspension of six through thirty days has been ordered, the officer may file a grievance, or may instead appeal to the Police Board for a review of the matter. The Board is a civilian oversight panel, composed of nine citizens appointed by the Mayor with the consent of the City Council.⁷¹ The Board conducts a paper review of the matter and may concur, reduce the penalty, or overturn it entirely.⁷² The implementation of the

⁷¹ CHICAGO, ILL., CODE § 2-84-020 (1990).

⁷² The Board's authority to conduct these Suspension Review proceedings derives from *Kropel v. Conlisk*, 322 N.E.2d 793, 798 (Ill. 1975). For the Board's procedures for conducting these Suspension Reviews, see CHICAGO POLICE DEP'T., RULES AND REGULATIONS 34-36 (1975).

penalty is stayed until the Police Board issues its decision. The officer, if still dissatisfied with the penalty after a Police Board review, still retains the right to then file a grievance.

If the Superintendent seeks a penalty of more than thirty days suspension, he is usually seeking to discharge the officer. In a small number of cases, a finite suspension of more than thirty days is sought. In these instances, there is no Command Channel Review or Complaint Review Panel.⁷³ Full due process rights come into play: the right to counsel, to receive pre-hearing discovery materials, and the right to subpoena, examine, and cross-examine witnesses. Each member of the Board is given a full transcript of the hearing to read. At their next executive session, they then decide on guilt, and, if guilty, may impose a penalty of discharge or a lesser penalty.⁷⁴ The city-union contract specifically excludes separation cases from the jurisdiction of the grievance process.⁷⁵ However, discharges may be appealed through a suit in civil court.⁷⁶

This lengthy summary of the disciplinary process illustrates a key fact: before disciplinary action is taken against a Chicago police officer, the matter in dispute has been through a very complex investigative process with numerous points for review. A decision to suspend an officer is not made in haste. It comes only at the end of an exhaustive process often spread over many months. Of the 33,998 investigations completed by OPS and IAD during the period 1990-1993, 7060, or 21% of the total, were categorized as sustained.⁷⁷

⁷³ CHICAGO, ILL., CODE § 2-84-030 (1990).

⁷⁴ See CHICAGO POLICE DEP'T., *supra* note 72, at 28-34.

⁷⁵ See Agreement, *supra* note 46, § 9.1 at 13-14.

⁷⁶ These suits are brought under the authority of the ADMINISTRATIVE REVIEW ACT, 735 ILCS 5/3-101 to -5/3-113 (West 1998).

⁷⁷ CHICAGO POLICE DEP'T., SUPERINTENDENT'S REPORT TO THE POLICE BOARD (Jan. 1991); CHICAGO POLICE DEP'T., SUPERINTENDENT'S REPORT TO THE POLICE BOARD (Jan. 1992); CHICAGO POLICE DEP'T., SUPERINTENDENT'S REPORT TO THE POLICE BOARD (Jan. 1993); CHICAGO POLICE DEP'T., SUPERINTENDENT'S REPORT TO THE POLICE BOARD (Jan. 1994).

VI. ARBITRATIONS IN CHICAGO 1990—1993

As noted above, arbitration newsletters report on only those arbitration decisions deemed particularly significant. The ready availability of these publications has in turn helped to define the data which scholars and practitioners then utilize for their studies. Decisions which turn solely on weighing evidence in factual disputes are, as a rule, explicitly excluded from these newsletters' compilations. Yet these are the vast majority of cases facing an organization. How do such numerous decisions impact a large organization?

The following analysis is based on an examination of all arbitration decisions arising from disciplinary actions⁷⁸ affecting sworn Chicago police personnel, handed down from January, 1990 through December, 1993. The Chicago Police Department's strength was in excess of 12,000 sworn officers during this period.⁷⁹ Of these, perhaps 10,000 were below the rank of sergeant and therefore were members of the current collective bargaining unit, the Fraternal Order of Police (FOP). Through the FOP contract with the City of Chicago, these officers may grieve disciplinary actions involving suspensions of thirty days or less. Those of sergeant's rank or higher do not have that option, as the F.O.P.'s membership, for the purposes of its collective bargaining agreement, is defined as comprising those below the rank of sergeant.⁸⁰

The Department's Management and Labor Affairs Section received and distributed copies of all arbitration decisions issued during the four years of this study. The following data were all tabulated from those arbitrations. During these four years, arbitrators handed down decisions resolving 328 individual suspensions of officers. These officers had been suspended for a total of 1584 days. The average disciplinary action was for

⁷⁸ Grievances pertaining to non-disciplinary issues, such as transfers, disputes over selection of vacation periods, etc., were excluded from this analysis.

⁷⁹ See, e.g., CHICAGO POLICE DEPARTMENT, BIENNIAL REPORT 1993 & 1994, at 47.

⁸⁰ See Agreement, *supra* note 46, art. 2 at 1. Recently, supervisors (sergeants, lieutenants, and captains) gained the right to be represented for collective bargaining purposes. In the future, it is likely a separate agreement covering these employees will allow them to grieve, but currently (Feb. 1999), no such agreement is in effect.

a suspension of approximately five days. The range of actions grieved ran from a one day suspension through thirty days.⁸¹ There were no reprimands that were the subject of arbitration decisions. In all of these cases, the penalties had been served before the arbitrations took place. The arbitrators' decisions in this system, therefore, came after the fact and took one of three forms: (1) affirmed the full disciplinary penalty already ordered and served; (2) overturned the suspension in full; or (3) upheld the penalty in part (for example, in deciding a suspension of five days, reduce the penalty to a suspension of three days and overturn the remaining two days, for which the officer was then awarded back pay).

Table I summarizes these arbitration outcome data. Of the 1584 total days of suspension presented to arbitrators, 794 were upheld by the arbitrators, while 790 were overturned. For these employees, their disciplinary records were amended to reflect the arbitrators' decisions, and back pay awarded.

⁸¹ In the Chicago Police Department, suspension, by definition, means a suspension without pay. The author has read of instances in which other governmental agencies suspend with pay employees accused of wrongdoing, pending a disciplinary hearing. The rationale as to why one would in essence reward employees suspected of serious misconduct with additional paid vacation is difficult to fathom.

TABLE I
CHICAGO POLICE DISCIPLINARY ARBITRATION
RESULTS: 1990—1993

Year	Number of Cases Decided	Total Days of Suspension Arbitrated	Days of Suspension Upheld	Days of Suspension Overturned
1990	64	256	116	140
1991	82	404	167	237
1992	105	615	379	236
1993	77	309	132	177
TOTAL	328	1,584	794	790

Source: Individual arbitration decisions, as provided by Management and Labor Affairs Section, Chicago Police Department.

This result is striking. In the aggregate, the arbitrators “split the baby” with almost perfect fifty-fifty precision.⁸² This was done through a mixture of orders: 135 of the 328 decisions (41%) upheld the Department’s discipline in full; 133 (40%) reversed the Department and awarded full back pay for the suspensions at stake; and, in the remaining sixty cases (19%), there were split findings.⁸³

I then examined the distribution of arbitration outcomes by arbitrator. A comprehensive review of the decisions indicated

⁸² When this phenomenon first attracted the author’s attention, the split, though close, was not quite as even. Every successive enhancement of the study—expansion of the universe by adding another year’s results, refinement of data, clarification of missing cases—has served only to narrow the gap.

⁸³ For the purposes of this study, a suspension reduced to a written reprimand was counted the same as if the suspension had been overturned completely and no disciplinary action ordered. A reprimand causes no immediate monetary loss; its other ramifications are in general very limited. This is a reasonable assumption within the context of the Chicago Police Department. Different norms prevail elsewhere; for example, in the U.S. armed forces, a written reprimand in one’s file can have serious consequences for one’s career.

that during the relevant time span, three persons handled the vast majority of the arbitrations—285 of the 328, or 87%. A few cases involved penalties of ten or more days. The bulk of these cases, however, typically involved lesser penalties—suspensions of one through five days. Almost all were decided under a process known as “fast track,” in which an arbitrator might hear two cases per day for three consecutive days each month and issue written decisions later. Each side presents its case without using attorneys. Oral arguments and witnesses’ testimony focus almost exclusively on attempting to ascertain the factual context of the underlying incident. These “fast track” cases are precisely the type explicitly excluded from compilation in nationally reported series.⁸⁴ Although these three arbitrators decided 87% of the cases, these arbitrations constituted only 59% of the days of discipline at stake.

Table II details the results of arbitration by arbitrator. The remaining 13% of the cases determined the outcome of 652 days of discipline—41% of the total. A number of arbitrators decided these cases, with no one or two persons dominant. A minority of these cases were also “fast track” arbitrations. The bulk of these remaining cases were “full” arbitrations. These often dealt with longer suspensions, usually from ten through thirty days. These more serious cases tended to be more intensely contested. Typically, the hearings were longer; multi-day proceedings were not uncommon. An Assistant Corporation Counsel would present the Department’s position; a union attorney would represent the officer. In contrast to the “fast-track” cases, procedural arguments accompanied the factual testimony. Many of these suspensions of thirty days or less had previously been upheld by the Police Board through appellate-style paper reviews.

⁸⁴ See *supra*, text accompanying note 58.

TABLE II
ARBITRATION RESULTS, BY ARBITRATOR: 1990 - 1993

Arbitrator	Number of Cases Decided	Total Days of Suspension Arbitrated	Days of Suspension Upheld	Days of Suspension Overturned
Doe	91	271	123	148
Jones	101	389	271	118
Smith	93	272	119	153
All Others	43	652	281	371
TOTAL	328	1,584	794	790

Source: Individual arbitration decisions, Management and Labor Affairs Section, Chicago Police Department.

No one arbitrator's decisions split with the same fifty-fifty precision noted in Table I. Only the collective outcome of all arbitrators combined produced that effect.

There is another, separate, pool of data which reinforces this pattern. In recent years, there has been a growth in the number of grievances filed, leading to a substantial backlog of open cases. In an effort to reduce this backlog and deal with grievances in a more timely manner, both labor and management agreed to participate in what are known as summary reviews. In this process, an arbitrator is given a Complaint Register file, with no additional motions, pleadings, or other materials filed by either side. The arbitrator reviews the material and issues an advisory decision, stating, in essence, "based on the material now available, if this came to me as an arbitration, I would probably decide as follows." Under this process, the arbitrator's conclusions are advisory and not binding. In theory, either party can opt to pursue the matter to binding arbitration. In practice, this does not occur. The arbitrator's advisory opinion gives both sides an unambiguous message as to what is likely to occur if the matter is pursued to arbitration.

Therefore, both sides almost always agree to accept and implement the arbitrator's advice.

The results of these advisory opinions, by arbitrator, are presented in Table III. These data comprise the universe of all such advisories issued, from the inception of this process through July, 1995. These cases are wholly separate from those summarized in Tables I and II.

TABLE III
ADVISORY OPINION RESULTS, BY ARBITRATOR:
JANUARY 1994—JULY 1995

Arbitrator	Number of Cases Decided	Total Days of Suspension Under Advisement	Days of Suspension Upheld	Days of Suspension Overturned
Doe	53	245	129	116
Jones	45	248	177	71
Smith	107	530	209	321
TOTAL	205	1,023	515	508

Source: Arbitrators' summary reviews, Management and Labor Affairs Section, Chicago Police Department.

Again, with almost perfect precision, the aggregate results are evenly split. This is all the more striking because the proportion of days of discipline reviewed by each arbitrator in this set of data is different from the profile in Table II. For example, Arbitrator Smith, the most pro-union of the three arbitrators, was responsible for deciding only 17.2% of the days of discipline tallied in Table II, but was responsible for 51.8% of the discipline summarized in Table III. Arbitrator Doe had 17.1% of the total days in Table II, but 23.9% of the total days in Table III. Despite these differences, the net results are virtually identical.

At first glance, one might assume the overall split of decisions demonstrates the fairness and impartiality of the arbitra-

tors' collective wisdom. However, looking more closely at the disciplinary process makes this a difficult proposition to accept. As discussed previously, the process leading to the suspension of an officer is an intensive one. That, in turn, suggests that arbitrators' decisions are collectively far more evenly split than one might reasonably expect. If one accepts this proposition, then the key question is why do these decisions divide as they do? A number of observations can be made, some of which serve only to reinforce the conclusion that the distribution observed here is a very unusual one.

First, before a suspension reaches the grievance filing stage, note the elaborate investigative and internal review process summarized above. A CR file will lead to disciplinary action against an officer only if it has jumped over all of these hurdles. As noted earlier, almost 80% of the complaints investigated are winnowed out through this process.⁸⁵ Those which remain are not marginal cases. Management is unlikely to impose discipline on those cases seen as weak from its perspective. Conversely, this review process does not give FOP an opportunity to drop those cases which are weakest from its perspective. Thus, the surviving cases should be relatively strong ones from the managerial perspective. It therefore seems more reasonable to expect that a group of outside arbitrators would support the disciplinary actions, not 50% of the time, but at a much higher rate.

Secondly, after a grievance is filed, for the Department to prevail in an arbitration, it may be necessary for police management to call witnesses. Given those with whom police officers have their most frequent contacts, witnesses crucial to the Department's cases are often drawn from the underclass—felons, prostitutes, etc. As a practical matter, the delay from when a citizen's complaint was filed until an arbitration is held often makes it very difficult to locate these witnesses and then induce them to testify. As it is the Department's burden to convince the arbitrator that just cause exists for imposing discipline, witness unavailability is usually far more crucial to police manage-

⁸⁵ See *supra* note 77.

ment than to the grieving officer. If it is clear that the necessary witnesses are not available, the Department will therefore not pursue a grievance to arbitration, but instead may resolve the matter through negotiation. Cases resolved through negotiation are thus typically the weakest ones from the Police Department's perspective. These pre-arbitration case resolutions are not reflected in Table I. Their removal from the universe of cases examined makes this even split all the more striking.

From the other direction, the union may similarly decide not to press to full arbitration the cases it perceives as weak. While the costs of "fast-track" arbitrations are split between the police department and the union, the collective bargaining agreement provides that the party losing an arbitration must pay the arbitrator's fees and expenses. This can be costly in a multi-day, adversarial case. In a split decision, these costs are divided between the two parties. From a strictly financial perspective, it is therefore clearly in a party's interest to settle a weak case before arbitration, so as to avoid being tagged with the arbitrator's bill.

The net, cumulative effect of these factors is unidirectional: to leave in the pool of suspensions actually ordered, and proceeding to the arbitration stage those cases which are strong from management's perspective, and to remove from the universe of cases those disciplinary actions which are relatively weak.

VII. DISCUSSION AND CONCLUSIONS

What then accounts for these results? The most obvious explanation is difficult to accept, for it calls into question the very integrity and impartiality that are key parts of the conceptual foundation of arbitration. The selection of who will serve as an arbitrator depends upon the willingness of both parties to a dispute (or in this study, series of disputes) to accept that individual as an arbitrator. Those arbitrators whom labor perceives as strongly pro-management, or vice versa, will over time find themselves not being selected to serve as arbitrators. Thus, it is in the self-interest of the individual arbitrators to project an image of impartiality. It may be that being perceived as even-

handed in terms of the results of decisions takes precedence over impartiality in viewing the evidence in the various cases.

Alternatively, arbitrators may strongly internalize the norm of impartiality. In doing so, handing down decisions which support one side 80% of the time may implicitly be viewed as too partisan, even if that side consistently has stronger cases to present. Does the concept of impartiality necessitate even-handed distribution of outcomes? Elkouri and Elkouri, a standard work in the arbitration literature, recognizes the possibility of splitting awards, but comments that "[p]ossibly there has been too much concern over this matter."⁸⁶ The same authors, however, while noting arbitrators as a group reject this practice, nonetheless concede its possibility has been recognized.⁸⁷

These explanations are not wholly satisfactory. If it is in the arbitrators' self-interest to be perceived as reasonably even-handed, then the difference between the decisions of Arbitrator Jones versus those of Arbitrators Doe and Smith is difficult to explain. Doe's and Smith's patterns, while pro-police officers, are not so far removed from an even split to cause them to be perceived as solidly favoring one side. Jones, however, supported management's position approximately 70% of the time (based on proportion of days of suspension upheld in both arbitrations and summary reviews). While his individual position, strongly pro-police management, is cancelled out by the more moderately pro-police union decisions of his colleagues, he is nonetheless conspicuous in terms of his net results. This has not, however, jeopardized his position; he continues to be one of the designated arbitrators for these matters.

In the end, the metaphor that occurs to me to explain these results is drawn from a long-time exhibit at Chicago's Museum of Science and Industry. The exhibit illustrated probability distribution at work. A vertical display of two parallel sheets of glass, several inches apart, had a bell shaped curve drawn upon each sheet. Steel balls spewed down between the sheets from above, with horizontal pegs between the two sheets serving to

⁸⁶ See ELKOURI & ELKOURI, *supra* note 1, at 125-26.

⁸⁷ *Id.* at 125.

deflect the balls from side to side as they descended, much as a ball in a pinball machine is bounced around. Each ball would eventually fall into one of several slots formed by vertical dividers under the curves. As the quantity of balls mounted, they sorted themselves into the vertical compartments under the drawing of the bell curve, with the greatest concentration in the center slot, and the numbers tailing off to either side. No one ball had any knowledge of where any of the other balls had gone, but the net result was clear: they somehow sorted themselves out into a consistent pattern of a normal distribution under a bell shaped curve.

Are arbitration decisions similarly "motivated?" I have no information suggesting that each of these arbitrators keeps record of the distribution of either his own decisions, or those of his colleagues. The decisions allow one to tabulate only results, not motives or philosophical approach to these grievances. Nonetheless, just as the steel balls sorted themselves out, so too these arbitration decisions assumed a distinct and uniform pattern of distribution.

If in fact what has been presented here is indicative of some arbitrary process at work, then there are many serious ramifications. First and foremost, it tells all those with a stake in the disciplinary process—the accused officer, the complainant (be it a citizen or fellow officer/supervisor), police management, union staff, IAD/OPS investigators, etc.—that their efforts may well be for naught. A suspension may be overturned or upheld, not because of the weakness of the evidence or the strength of the investigation, but because of chance. While the aggregate results are clear, the results for any one case are unpredictable.

A pattern of such results can have a subtle but pernicious effect upon a police department's disciplinary process over time. This, in turn, has serious implications for a police department and its relations with the public. It erodes the deterrent value of discipline, both for the affected officer and his/her colleagues. The insular nature of the police subculture ensures that awareness of arbitration decisions will likely be high among both the rank and file and their supervisors. When an officer, whose misconduct is proven in an internal investigation and

whom the Superintendent finds it necessary to discipline, nonetheless successfully evades any penalty, citizens may understandably lose confidence in the ability of the police department to control its own personnel.

Information drawn from other police jurisdictions is ambiguous, but suggests a similar process is at work. In Houston, during the period from September 1, 1985 through December 29, 1988, arbitrators reversed forty-seven police disciplinary actions, upheld sixty actions, and modified forty-eight. It is unclear how many arbitrators accounted for these results, and what level of penalty needed to be met for an action to qualify for arbitration.⁸⁸ Nonetheless, the numbers suggest a pattern not unlike the results noted for Chicago.

While the facts of the arbitration decisions' distribution are quite clear, the explanations are more ambiguous. Nonetheless, the pattern is so striking and so uniform as to raise serious questions relative to the merits of the entire arbitration process. If these findings could be replicated through studies of pools of decisions from other jurisdictions, arbitration may indeed be suspected of being arbitrary. Non-replicability could help to focus attention on those factors unique to Chicago which led to the results reported here.

Given the entrenched position binding arbitration now holds as the preferred means of resolving grievances under collective bargaining agreements, it is not clear what type of an alternative to arbitration could both feasibly be used to replace arbitration and avoid the apparent tendency to split awards documented here. However, the current absence of a viable option should not deter one from facing the very real prospect that the system now in place appears to have a very crucial drawback.

For professional arbitrators, it is an article of faith that they decide issues before them in a fair and impartial manner, based on the evidence in front of them. Impartiality has been deemed the most important criterion for an arbitrator.⁸⁹ These results,

⁸⁸ See Friedman, *supra* note 31.

⁸⁹ See ELKOURI & ELKOURI, *supra* note 1, at 140.

however, suggest that the words “arbitration” and “arbitrary” share a common root for good reason.