their discretion wisely. By acting with restraint, we can effectively protect the "just cause" rubric.

There have been changes. Whatever evolution has occurred, however, has been generated largely by the parties through collective bargaining. In some relationships, restraints of varying degrees have been placed on arbitral discretion. And pertinent rules or practices have been modified or enlarged. All of this has triggered adjustments in arbitral decisionmaking. But notwithstanding an occasional tightening or loosening in the "just cause" standard, the essential impact of this provision has remained much the same over the past 50 years, with arbitrators continuing to follow long-established guideposts in evaluating the discharge penalty.

Experience tells us that the vast majority of arbitral awards fall within a fairly predictable range of outcomes. Neither side suffers too many surprise wins or losses even though, as noted earlier, there is less predictability in discharge cases. Neither side seems to believe that the "reasonableness" test has been skewed in favor of labor or management. To the extent that particular issues or particular workplaces require additional guidance, the collective bargaining process has provided that guidance. God bless the "just cause" provision and the "reasonableness" standard, which allow room for understandable disagreement and thus inevitably create the cases on which arbitration thrives.

II. PANEL DISCUSSION

Moderator: Susan Meredith, NAA Member, New Haven, Connecticut
Union: Kathy L. Krieger, James & Hoffman, PC, Washington, DC
Management: Burton Kainen, Kainen, Escalera & McHale, PC, Hartford, Connecticut
Neutrals: Bonnie G. Bogue, NAA Member, El Cerrito, California
Bruce Welling, NAA Member, London, Ontario

Meredith: Just cause is a concept that we all as arbitrators and advocates use every day. Today, we are asking you to consider what this concept means to arbitrators, to management, and to unions

in the myriad cases in which we have to apply it. Dick Mittenthal and David Vaughn have opened the door for our discussion. After Dick adds one final footnote, we will hear from our panel of two advocates and two arbitrators. Then we will open the floor to all of you. I anticipate we will all have a lot to say and that the discussion today will be the beginning of a series of very interesting conversations across eight different industries from Airlines to Health Care. (See Chapter 4. –Ed.)

Mittenthal: The best "just cause" story, a true story, came to me by way of my friend, Howard Bloch. After hearing a discharge case in Los Angeles involving a female janitor, Howard went to visit his 97-year-old mother in an assisted living facility. He told her the details of the case that he had just heard and asked her how she thought the case should be decided. His mother, without skipping a beat, asked how old the grievant was, whether she was married, how many children she had, and whether they were living at home. A week later, during a recess in another discharge hearing, Howard told the parties about his mother's reaction to the earlier discharge. They were amused. And at the end of the hearing, the Teamster business agent approached Howard and whispered in his ear, "Could you give me your mother's telephone number? I think I have a case for her." [Laughter.]

Meredith: Thank you, Dick. I would now like to introduce you to our panel that will expand and take this conversation in some new directions, perhaps. First, we have Kathy Krieger, who is a member of the Washington, DC, law firm of James & Hoffman, representing unions, individuals, and non-profit organizations. Kathy?

Krieger: Thank you. And thank you to the National Academy for including me on this panel.

I can't add anything to the comprehensive, historical overview that Dick Mittenthal and David Vaughn have given us and their fine analysis of the tensions in "just cause." I do want to raise a question that jumped out for me. It may not be a question that anybody else had, but I was struck by the ease with which the analogy to the judicial system and to the criminal justice system, in particular, was drawn in the paper. I find myself asking, why the criminal justice system? Why this analogy? Does it accurately describe what's really going on in our relationships? Does it help deliver what the parties need from arbitration as a dispute resolution mechanism? Does it create certain tensions that the parties have to work around sub-rosa?

Perhaps part of the explanation for parties' efforts to restrain arbitral discretion through their negotiations is an effort, conscious or unconscious, to deal with the misfit—to deal with the tensions, if you will—that are created by a model that doesn't necessarily stand for what we need. I was struck particularly by the question of why labor arbitration, with its origins as an alternative dispute resolution mechanism, designed to be non-legalistic and accessible primarily to non-lawyers, and developed in large measure by non-lawyers, would draw so heavily on a criminal justice model.

Most unions, when they think about justice on the job, do not have in mind the model of the sword of justice or the avenging angel of justice but something entirely different. Given arbitration's role and origin in the labor relations context, not as an alternative to litigation in the courts but as an alternative to self-help, to strikes, to economic weapons, to street resolution of disputes, it seems odd that it would be developed on a criminal justice model.

In the labor relations context, I do not believe that we, on the union side, view arbitrators as private judges or anything like that. They are more like the parties' designated contract reader, interpreter, and facilitator—or, perhaps, just the person whom we can turn to and say, "You've been around; you've seen a lot of this; how far off base are we? How should we work this out?"

I'm also struck by the inaptness, if you will, of the criminal justice model given that outside the unionized labor relations and collective bargaining context in the broader employment law world, that is not the lens through which judges and juries see the employment relationship and employment disputes. At ABA meetings and elsewhere, judges, jury consultants, and practitioners have repeatedly indicated that the conceptual framework for employment disputes is not "crime and punishment." It is not prosecutor and perpetrator. It is rather the model of familial relationships. The workplace is like family. Your ties are like spousal ties or parent/child, an amalgam of all the interpersonal relationships that are called up when we think of family. In a family context, disputes are not resolved by termination—the industrial equivalent of capital punishment. That's not what happens when something goes bad within your family. When mistakes are made, you try repair the relationship. If there's going to be a divorce, ultimately, it's a process among equals. It's not something handed down by one side and then adjudicated by an omniscient judge or third party.

So in labor arbitration, we seem to be stuck perpetuating an anachronistic model of employment relationships. The criminal justice model seems to be the most authoritarian and adversarial of all possible frameworks for handling an employment dispute. It goes far beyond parent/child. Even the most paternalistic relationship is not about resolving difficulties through the execution of one of the parties. And in no context, even the most domineering family relationship, would anyone think of it as a master/servant relationship.

In summary, it struck me that resorting to the criminal justice model as a framework for looking at some of these issues catapults us back in history and keeps us confined. It is not the first time, however, that we have done this while the rest of the world evolves into a different way of looking at things.

Meredith: Thank you very much, Kathy. Our next commentator is Burt Kainen, who practices labor law on the management side with Kainen, Escalera & McHale, PC, in Hartford, Connecticut. Burt?

Kainen: Thank you. I'm Burt Kainen; and I'm particularly honored to be here on your program today because when I first started practicing labor law, the very first professional meeting my firm sent me to was a meeting of the National Academy of Arbitrators in Puerto Rico. I think that was 1973. I was young and bewildered. It was Bill Fallon, who was mentioned earlier this morning, who made me feel welcome and guided me through the meeting. So I feel like I've come full circle. Some people still think I'm bewildered; but I'm 33 years older and on your program. [Laughter.]

I had three points I wanted to make about the paper, which I thought was terrific. First, I wanted to urge Dick and David to find a substitute for the word "manipulate." Twice in the paper, they used the word "manipulate" to describe the conduct of employers and unions in trying to limit or channel arbitral discretion. I'll admit to trying to do the latter, but I don't think it is manipulative. I think that the parties are entitled to order their own relationship. And I think "manipulate" has a negative connotation; so I urge them to find a different word for that.

Second, I wanted to provocatively ask whether, if the premises in the paper are true—and I don't think they are—but if they are true, has the time come for arbitrators to increase penalties as well as reduce them? After all, if, as the paper suggests, arbitrators are supposed to apply a reasonable person's standard and decide what's just, and if the analogy to judges and the criminal justice

system is correct, then why should discipline be a one-way street to leniency? Why, if, in fact, the arbitrator is going to fit the punishment to the crime—and that's a term that was used—why, if the arbitrator believes that the punishment ought to be more than the three-day suspension, shouldn't the arbitrator impose it?

Maybe what we need to do is to come up with a different formulation of the issue, so that instead of, "Was the grievant disciplined for 'just cause?' If not, what shall be the remedy?" maybe the issue ought to be, "Did the grievant commit the offense as charged? And if so, what shall be the punishment?"

Finally, what I'd like to do is to speak in favor of what has been characterized as the pragmatic approach and urge a rejection of the Dallas Young formula, which I would characterize as a solution in search of a problem. In the pragmatic world in which I practice, reinstatement with no back pay is warranted for the case that we all recognize as serious—warranting more than a three-day suspension—but where, for some reason, discharge is a little shaky. Reinstatement with no back pay is a result that pragmatically creates varying degrees of winners and no losers.

The employee is happy because he or she has gotten his or her job back and perhaps, in the grand scheme of things, he or she has been scared straight. The union is happy because it can claim that it's gotten the grievant his or her job back and can show the rest of the bargaining unit what a good job the union has done for them. And, believe it or not, in more cases than not, the employer is happy because one of the little secrets that you may or may not be aware of is that frequently, management advocates have told the client that it is a shaky case. And the client has said, "You know what? I really need to back up local management." So if the arbitrator puts him back, that's okay.

There is the case in which there is some external force driving the decision to discharge the nurse who has done something wrong—not the egregious conduct we've talked about this morning, but something wrong nonetheless. The hospital administrator says, "You know what? If somebody is going to put that person back to work, let the arbitrator do it. I don't want to do it." So even for the employer, the reinstatement without back pay, if not a full win, can be wrapped up as one. And finally, that result allows the arbitrator to go to bed guilt-free. [Laughter.]

The Dallas Young formula would allow the arbitrator to append onto the process a second-phase, last best offer. That complicates the procedure, adds cost, turns winners into losers to the extent

that the employee who would otherwise have been scared straight gets a bundle of money and comes back to work with a very different arrogant attitude. So I would urge a rejection of that and what I would commend to you is the advice that my mother gave me and your mother probably gave you, which is to leave well enough alone. [Laughter.]

Meredith: Thank you very much, Burt. Next we turn to Bruce Welling who is a National Academy member from North of the Boarder, practicing in London, Ontario. Bruce, we look forward to your Canadian perspective on all of this.

Welling: Thank you Susan. Just to give you a little bit of context in case I say something strange, I'm from Canada. [Laughter.] And I'm a legal academic. So you won't be surprised that whenever I come to your country to attend meetings like this or for other reasons, I'm slightly apprehensive that I'm in a foreign country. But I got to attend today's luncheon and listen with great interest to today's luncheon speaker [Justice Antonin Scalia. –Ed.]. And that changed everything; so I feel right at home, now. [Laughter.]

Regarding the paper, I have two relatively minor quibbles, although I'm not sure they are that minor. I think some people might dismiss them as semantic and I concede that maybe they are. But I think they're worth thinking about against the background of at least what I understand about labor law.

The first has to do with the use of the word "discretion." I looked it up. Discretion means "freedom to make one's own decisions." So I have discretion to choose the color of my socks despite advice to the contrary. I also know that in at least my legal system, it describes a judicial power that a judge has in extremely rare circumstances, for example, whether to award costs against the party who has won the case. We have an awarding of costs system. And the judge has discretion to do that.

Now those two definitions or descriptions are what I think the word "discretion" means. Exercising judgment, on the other hand, is not the same as exercising discretion. I needed to go no further than a few of my students at the law school to ask what they thought about that. Virtually, unanimously, they said, "Why would anybody give somebody like you discretion?" [Laughter.]

So I think we need a word other than the word "discretion." And whether that word is "judgment" or some other word that a thesaurus will apply, I'd like to see the word "discretion" disappear.

The second quibble is about the word "reasonable." You all heard Dick's description of the evolution of the word in our field.

I'm going back just a little further. We all know about what used to be called "the reasonable man." But what he was called by the English judges long before—since the 19th century—was "the man on the Clapham omnibus"—an officious little objective figure with no personal views other than to say, "I disagree."

Now, I think we have to stop using the word "reasonable." Here's why. Let's focus on a particular decision that was made by management. I don't really mind what the decision was. The decision was made and some arbitrator is going to be asked to make a decision on it. Let's suppose, as is likely at least in my system, that the person who made the decision in a case like we are talking about is a corporate officer, which is a defined term in my legal system. So it is somebody of a certain rank in a corporation. So let's say, then, that officer X made the decision that we're now calling "management's decision."

As a mandatory matter, under corporate law rules, before officer X makes that decision, she must ask herself the following question: Would making that decision be, in my view—officer X's view and nobody else's view—in the best interest of the corporation? The decision is required by law to be "yes" or "no." Would it be in the corporation's best interest? Yes? Then, yes. No? Then, no.

I know that corporate law does not operate in a vacuum. All I am referring to here is a danger we are slipping into by using the word "reasonable." In the grander legal system of which our game is just a part, it asks us, what would the ordinary observer think? What would the reasonable man think in earlier terminology? Or what would this funny little man on the Clapham omnibus think while rolling through the streets of London on the bus? With respect, what the man on the Clapham omnibus thinks about a decision that somebody like Bill Gates might want to make is utterly irrelevant. And if Bill Gates were required, and had been required, to make those kinds of decisions, there would be no Microsoft Corporation; and all of us would not be behaving in the way we do on a daily basis using our limited typing skills rather than somebody else's excellent secretarial skills. The world has changed because people like Bill Gates were not reasonable men. Now, again, I'm not suggesting that this standard is whatever management decides the standard is. What I'm saying is, please do not use the word "reasonable" out of context to describe what some corporate official was trying to do.

Now, finally then, to reiterate, corporate law, which is part of the game, clearly says that what the man in the Clapham omnibus

thinks officer X should decide is a red herring. To go back to my students who are wiser than many of us, to ask Bruce Welling whether what was done was reasonable is highly irregular and legally irrelevant.

Thanks.

Meredith: Thank you Bruce. Finally we have Bonnie Bogue, National Academy member from Berkeley, California. Bonnie has published *A Pocket Guide to Public Sector Arbitration, A Pocket Guide to Workplace Rights of Public Employees,* and *A Pocket Guide to Educational Employment Relations Act.* Because we don't have a lot of time, we're hoping she gives us *A Pocket Guide to "Just Cause."* [Laughter.] Bonnie?

Bogue: I'm Bonnie Bogue from Berkeley, California; although, the bio information says otherwise. That's where El Cerrito is. [Laughter.] So that gives you a little background as to who I am.

We have just heard a remarkable critique and been given a fresh look at what occupies a great deal of the time and attention of everybody in this room—answering the question, "What is just cause?" Reading Dick Mittenthal and David Vaughn's eloquent study of where we are and how we got this far, I was looking for guidance for myself, as an arbitrator. I asked,

- What are the problems, the shortcomings, of the just cause standard that they have brought out?
- What can we as arbitrators do, what measures can we take to speak to those issues—to ensure the viability of the just cause standard?

Two of the statements in Dick and David's paper have shaped my thoughts. The first is this: "The arbitrator's personal judgment of the severity of the penalty has become the measuring stick. This highly subjective element has meant that our rulings are probably less predictable than they are in contract interpretation." That caused me to pose the question: *How can we as arbitrators reduce the appearance as well as the reality of unpredictability in just cause rulings?*

The second statement in their paper that I have focused on is this: "So long as we offer an explanation for ruling that a discharge penalty is 'unreasonable,' an explanation not so absurd or extreme as to be considered beyond the bounds of reason, then it is unlikely that a court would find we have exceeded our authority." That statement caused me to think about award writing. I am not so concerned with what a court might think. I am very

concerned with the parties—about the quality of the decisions we write, and how those decisions can better serve the interests of the parties.

So, what should our objectives be? What should arbitrators be doing? Or, what should we be doing better, in order to further our mutual goal of a just cause standard that really works? Ours is an awesome responsibility. We should never get too comfortable with that responsibility. I remember when I interviewed my office assistant and was trying to explain just what an arbitrator does, he said, "It sounds like you play God with people's lives." That brought me up short—I hadn't ever thought of myself as playing God. It brought to mind a Berkeley bumper sticker that reads: "God is coming, and is she pissed!"

So what do we arbitrators do, while playing God? As Dick and David have pointed out, the now accepted "reasonableness" standard crafted by Harry Platt 60 years ago is necessarily subjective, and sometimes leads to unpredictable results that can prove distressing to the parties. Having read Harry Platt in my formative years, I've always aspired to be a "reasonable MAN." But owing to certain immutable physical traits, I may be perceived as falling on the "softer side" of the balance.

So, how can each of us define "just cause" on a case-by-case basis, while reducing the impression that it's a crap shoot? How can we remedy the criticism of unpredictability? Perhaps only the Harry Platts of this world can point to that one award that defines how we view our responsibility in deciding "What is just cause?" The primary job of the arbitrator is to step back and take a look at the totality of the circumstances, from a point of view that the parties simply cannot have—an uninvolved and hopefully dispassionate perspective. That neutral perspective is why the parties have opted for this vague but eminently workable "just cause" standard. And why they have relinquished to arbitrators the discretion and the solemn responsibility of deciding what constitutes "cause," and what discipline is "just."

Out West, we have a saying: "Don't judge a person until you've walked a mile in that person's moccasins." So our first job is to take that walk—in the moccasins of the grievant, of the supervisor, of the plant manager, of the shop steward, of the co-workers. That is why we hold hearings, and don't decide these matters on written submissions and depositions and briefs. Every case requires us to get into that workplace as best we can—to understand not just the rules of conduct, but also the established standards and practices

in that particular workplace, the personal dynamics, the culture, the traditions, the expectations, the realities. If we do that, we have a better chance of exercising our discretion wisely. But even after we have done that, have listened and observed with care, we still have to answer the two basic questions—of guilt, and then the justness of the discipline imposed on the guilty.

Do we just go willy-nilly, dispensing our own personal and subjective vision of justice in the workplace? This room is full of war stories—as our spouses have oft been heard to complain—the cases over which we spend sleepless nights, the decisions for which we have been chastised or even threatened. But it is the collective outcome of all those individual cases—those resolved at 2 a.m., as well as those we feel we could decide after hearing opening statements—it is that collective reasoning from every arbitrator, multiplied out over more than 70 years and a several thousand arbitrators, that has created the "just cause" standard.

This generation of arbitrators is blessed with the rich resource of thousands of reported cases that examine these questions in uncountable variations on the theme of human misconduct. Plus, we have insightful analyses from brilliant minds like Jack Dunsford and now Dick Mittenthal and David Vaughn, that help us get out of the trees and find the forest.

So, one answer to my question, "What should arbitrators be doing, or doing better?" is this: We can do our homework. Of course, we will never find "the answer" because no two cases are ever alike. But we do have this collective wisdom to serve as our touchstone. I don't mean citing a string of reported awards to support our ruling. But the arbitrator who knows well and is guided by that collective wisdom is more likely to produce just cause decisions that are predictable and, therefore, acceptable to the parties—decisions that will strengthen the viability of the just cause standard.

The paper you have heard today should be required reading for every arbitrator in the Academy, including those with 30 year pins and all those who aspire to membership. Advocates would be well-advised to use it in training and when advising clients. The intelligence of this paper requires all of us—arbitrators and advocates—to rethink how we should apply this accumulated wisdom to the often very perplexing cases before us. Those perplexing cases are arbitrated because the "reasonable result" is not all that obvious to either side. The "just cause" review gives a third party the discretion to provide a reasonable result that neither the em-

ployer nor the union could voluntarily agree to, but which they can live with and which enables everybody to move on. That is the primary reason that the just cause system has proved acceptable over time, even though it hands over a great deal of discretion to someone unaccountable to either side.

The second lesson I have taken from this excellent paper is this: Arbitrators' foremost responsibility is to write clearly stated and well thought-out explanations of our reasoning. Our awards must explain to the parties how we have resolved credibility in making findings of fact; how we have applied the just cause principles to those facts; why the discharge is either justified or must be modified; and why the remedy we have ordered is "just under all of the circumstances," particularly when we have crafted one of those unique equitable solutions that probably has left both sides somewhat dissatisfied.

The arbitrator's decision should not just speak to the trained advocates. Rather, the award must be written for the benefit of the grievant and the supervisor as well, and for the managers who must evaluate the next case to decide what action to take, and for the union reps who must decide whether to take the next grievance to arbitration. Arbitrators' greatest service is not just making the difficult decisions, or crafting an appropriate and justified remedy. Rather, our greatest service is to ensure the decision makes sense to the parties, so that the just cause standard is better understood and remains workable and acceptable.

Arbitrators rarely get direct feedback, but I recently got an exceptional comment from a management attorney who had lost a discharge case before me. Despite the fact that he had lost, and despite a rather elaborate remedy calling for conditional reinstatement but requiring both sides to jump through several hoops—just the kind of creative remedy that is reputed to drive management nuts—he told me that it was a "beautiful decision." He said the decision was written in a way that he could take it to his supervisors and human resources people and say, "This explains what you should do to avoid this kind of problem in the future." I will redouble my efforts to ensure that that is the norm, not the exception, in my awards.

Dick and David have made our task easier by this remarkable reexamination of the principles of just cause and the effect of arbitral discretion on the labor-management relationship. Arbitrators and advocates alike are indebted to you, and we thank you.

Meredith: We have a few minutes for questions or comments from the audience.

Oldham: I'm Jim Oldham from Washington, DC. First, an observation, and then a question. We had a question raised by Kathy Krieger about whether the criminal justice model really worked, here. And it might be reasonable to think about a different model—the law of negligence. Was the employer negligent in dismissing the employee? That is, did the employer violate the standard of reasonable care that we associate with the law of negligence, which is the standard that most of us are familiar with as are the persons who serve on juries and decide automobile accident cases.

Bruce Welling refers to the man on the Clapham omnibus and asks whether that person should be trusted to know of what goes on in the corporate board room in the case of sophisticated corporate mismanagement just as Justice Scalia asks what judges really know when damages are excessive or other such issues. But as Justice Cardozo once remarked, the mores of the community must be guarded somewhere; and it's appropriate for judges to be the guardian of the mores of the community. I would argue that it is appropriate for arbitrators to be the guardian of the mores of the workplace. That's the observation.

If I may, a question. Dick, you and David present this intriguing remedy possibility reminding us of Dallas Young's baseball salary choice; and I wonder, first, if you've ever had success with this yourselves in hearings. But, second, it occurs to me that it's quite tricky to think about how to implement that. Because in a discharge case, in my experience, at least, it's a delicate business to ask the parties, "Now, what do you think we should do if I reinstate this employee?" And at what point in the hearing does one ask that? And does one ask the parties for permission to use the baseball salary model in the event there is a reinstatement? And if not, is it okay for the arbitrator to use that model without notifying the parties about it in advance?

Mittenthal: It seems to me that one should not raise this as a possibility until you're reasonably convinced—that is after the hearing—that you are going to reinstate and then you're going to have to confront the back pay question. I don't see anything improper about remanding the remedy question to the parties. You can remand on the remedy issue for a lot of different reasons. For this peculiar situation, which most arbitrators in this audience

have found extremely difficult and have felt that whatever they do, they are going to be doing something wrong, it seems particularly appropriate. This gives the parties an opportunity to put in their oar and help the arbitrator with the difficult question of finding a just result. And I tell you, it tends to do that. No, I've never done it; but as a result of this paper, I intend to do it if and when I run into this very problem.

Audience Member: Well, I like the idea. I think it's really an interesting one. Maybe we can figure out how to implement it.

Sands: John Sands. Harking back to the *Trilogy*[1] this morning, I was thinking as I was listening of the words of Justice Douglas how difficult it would be to capture in 5 pages or even 50 the myriad rules that govern a complex industrial workplace. And so it is the job of the arbitrators to flesh out the bones of that structure in the agreement. Using that as the jumping off point, it seems to me that the phrase "just cause" is shorthand that the parties use instead of giving us 50 pages of rules for what should govern appropriate discipline. Essentially, the parties have said, "We agree that discipline should stand if it passes muster by an impartial third party." This leads to the rather cynical view, I guess, that "just cause" is whatever the arbitrator says it is. And it is up to the parties to choose responsible arbitrators who are thoughtful, who clearly express the reasons for what they decide, and whose reasons are consistent with standards that the parties agree should control. That's what makes arbitral careers. We are market certified. Those of us who don't pass that muster, fall by the wayside. Those of us who do, over a career, have very satisfying lives.

Meredith: We are at the end of our time; so I'm going to thank everyone—presenters, commentators, and the audience—for your participation, and welcome everyone to join us in the breakout sessions on "just cause" that follow.

[*Editor's Note:* Chapter 4 presents a continuation of the consideration of the meaning of "just cause" across eight different industry sectors. It reports on the breakout sessions that followed the plenary sessions reported in this chapter.]

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[1]*Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).