CHAPTER 6

THE CRIMINAL LAW AND INDUSTRIAL DISCIPLINE AS SANCTIONING SYSTEMS: SOME COMPARATIVE OBSERVATIONS*

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My object today is to compare the workings of two social institutions I have been separately involved with for some time now: the criminal law, which I profess at, and industrial discipline, which, as an arbitrator, I work at. I will try to show that the criminal law and the process of disciplining employees for unsatisfactory conduct are peas from the same pod; that as a consequence each system gives rise to fundamental issues which are essentially similar; and that it is illuminating to seek to identify those common issues and to compare the responses of each system to them.

First, let me explain why I believe they *are* peas from the same pod. For all their many obvious differences, both are sanctioning systems; this is the pod I have in mind. That is to say, they are means deliberately used to attain compliance with approved ways of behaving. The criminal law is directed to reducing criminal behavior, and industrial discipline is directed to reducing violations of the laws of the plant. Moreover, not only are they both sanctioning systems, but they employ the same kind of sanction: the organized, negative sanction. By "organized," I mean that the sanctions are made and applied by the community's organs of authority, as contrasted with spontaneous reactions of persons in the community, which sociologists call "informal" sanctions. By "negative," I mean that the sanctions operate through disapprobation and discouragement, in a word, through punishment, as contrasted with those which operate through approbation and encouragement, often denominated "positive sanctions." In short, both

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criminal law and industrial discipline are organized sanctioning systems resting on the use of punishment.

Because both are kinds of punishment systems, they both give rise to those issues inherent in punishment systems. Those issues have their source in a tension between the use of punishment to achieve compliance and the limits upon its use in order to preserve other values. Before turning to those issues, it will be useful to consider these contrary pulls which produce them.

First, the mechanism through which punishment is presumed to achieve compliant behavior. People may be deterred, it is reasoned, from engaging in undesirable behavior by fear of painful consequences of greater intensity than the satisfactions anticipated by engaging in that behavior. This may operate upon the individual offender to cause him to refrain from repeating his offense—so-called "special deterrence." Or it may operate upon potential offenders in the community in the same way—so called "general deterrence." There is, moreover, a more subtle mechanism which operates to motivate compliance even beyond the offender himself and the group of immediate potential offenders. The view is that the imposition of punishment upon offenders serves as a dramatization of the community's commitment to the values breached by the offender, thereby promoting support for its norms in two ways; first, by reinforcing the moral inhibition, and second, by creating habits of law-abiding conduct. Finally, in addition to inducing complying behavior by the offender or others, there is still another way punishment may achieve its preventive purposes. This is through removal of the dangerous offender from the community. So in the criminal law an offender may be executed or detained in prison, or, at one time banished or transported; in the realm of industrial discipline he may be discharged.

I am aware that many challenge the validity of the theories of punishment. But it is not my purpose to take up this controversy, since my theme today is the workings and problems of a punishment system, not its ultimate effectiveness. Nor do I think this emphasis unwarranted for surely the hard, concrete problems we face whether as arbitrators or as students of criminal law are those which arise from the prevalent use of punishment by systems which historically and currently accept it.

Now to the contrary pull deriving from the need to limit the use of punishment to protect values other than obedience to rules. In a wholly authoritarian community there are no limits upon the sovereign's use of the state's power to inflict punishment upon individuals. But in communities where the holders of power are made accountable for its exercise, the rights of individuals to be free of official punishment is given recognition. In the general community the institutionalized processes of the criminal law—a codified body of criminal offenses, principles of exculpation and liability, and procedural restrictions upon the finding of guilt and the imposing of punishment—serve this protective function. In the industrial community the advent of unionization, collective bargaining, and arbitration have produced comparable limitations. Their primary thrust is in demanding that punishment be justified in each instance, and that the justification be demonstrated. Otherwise, it may not be imposed and the interest of the individual to be free of the prejudice of punishment prevails.

What, then, are these justifying conditions? On the highest level of generalization there are two. First, to be justified, the punishment of an individual must serve the purpose of inducing compliance with the rules, in one or more of the ways just stated. If it cannot do so, it is gratuitous and hence unjustified. Second, and in addition, the punishment must serve to accomplish its purposes at a cost to the individual which is not regarded as excessive. Finally, these two conditions indirectly create still another limitation on the use of punishment. For to the extent that they are violated, punishment will be regarded by the community as arbitrary and unfair. And to the extent this is so, not only will it be wrong to punish, but it may be futile as well. This is so because in considerable measure a system which is so regarded may end up nullified in practice by the persons charged with its administration and may create such a sense of injustice as to generate a loss of support for the very social system which the punishment system is designed to promote.

As I mean to show in a moment, it is out of these conditions, as well as out of the stated indirect limitation they produce, that there arise some of the recurrent issues inevitably encountered by systems of punishment. These issues are both procedural and substantive in character, but I will confine myself today to a group

of five major substantive issues. These are: 1) the issue of providing notice of the conduct forbidden; 2) the issue of drawing the line between what rules of conduct may and what may not be legitimately subjected to punishment; 3) the issue of exempting from punishment those unable to conform; 4) the issue of the required culpability of the offender; and 5) the issue of the appropriate kind and degree of punishment.

The Issue of Notice

By notice, I mean forewarning of the conduct which is prohibited. Without it, not only will punishment be regarded as unfair to the individuals affected, but, on its own terms, punishment will either be ineffective or too effective, that is, by coercing social as well as anti-social conduct.

One aspect of the notice requirement concerns the degree of specificity with which the prohibited conduct must be defined. As the Supreme Court has put it, "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." There are other reasons as well for the constitutional requirement of specificity, most notably a desire to avoid allowing the judge or the enforcement officials to exercise a de facto criminal law-making function. But these scruples have little relevance in industrial discipline because there is no separation among the law making, enforcing, and adjudicatory functions—management fills all three roles simultaneously. It is the informing rationale of the notice requirement which industrial offenses must face up to.

In industrial discipline, the notice required varies with the nature of the conduct prohibited. The first category of sanctioned industrial conduct which may be distinguished is the serious crime—stealing, for example. Here the prohibition of the criminal law, as well as rudimentary moral standards, are thought, and properly, I believe, to afford the required notice. The second category of punishable conduct which arbitrators have tended to free from any requirement of specific formulation embraces conduct which is so obviously, by custom and expectation, contrary to the central purpose of the industrial community that no employee could reasonably believe it was permitted. Such examples suggest

themselves as insubordination, horse-play on the job, or neglecting work assignments. These may be thought of as industrial common law offenses, or perhaps analogized to the doctrine of public mischief, according to which acts are criminal, even if not expressly made so, if they tend to the prejudice of the community. While in the criminal law a fair number of states retain common law crimes and the public mischief doctrine, a larger number have worked free of one or both of them. And even in states which retain them, there is a strong tendency to avoid creating new crimes grounded upon them. In the industrial arena, on the other hand, arbitrators have apparently not been disposed to narrow the industrial counterparts of these criminal law doctrines. Even where not codified into rules, employee behavior manifestly prejudicial to the industrial community may be punished.

I think this looser standard can be justified, or at least explained, on three grounds. First, the law of industrial impropriety is in its infancy compared to the centuries of experience with criminal behavior. There is therefore a greater case for fluidity and flexibility. Secondly, for the reasons already suggested, the vice of excessive rule-making discretion in the enforcement and adjudicative bodies is not pertinent. Thirdly, in this category of cases it is clear enough that the offender must have known he should not have behaved as he did. This may be insufficient in the criminal law where by no means all improper conduct is made punishable and where punishment is regarded as a last resort measure. It may be sufficient for purposes of industrial offenses where there are no comparable scruples against punishing all behavior prejudicial to the industrial community. Later I want to make more of this distinction in another context.

A third category of sanctioned conduct includes acts which are neither criminal nor common law industrial violations palpably prejudicial to the aims of any industrial community, but are localized rules of the house, as it were, reflecting the preferences of management for the conduct of employees—whether solicitation is permitted, or card playing, how the work should be done, dress preferences, when rest periods may be taken. If the first two categories are comparable to the *mala in se* of the criminal law, these are the *mala prohibita.* Here arbitrators, quite expectedly, have compelled a level of definiteness in the formulation of an employer rule comparable to that required in the criminal law.

So far I have been speaking of the requirement of notice as it is reflected in the degree of specificity with which the prohibition must be formulated. Another aspect of the notice requirement is bringing the prohibition to the attention of the individual. The criminal law has traditionally worked from the position that ignorance of the law is no excuse. And it has shown a marked slowness in departing from that position when dealing with the wide variety of regulatory offenses—the *mala prohibita*—which do not prohibit the obviously wrongful. The arbitrators have done better. For what I have called the industrial *mala prohibita* offenses, arbitrators have indulged no fiction comparable to that of the criminal law that all are conclusively presumed to know the law. Indeed, they have almost reversed the presumption. In virtually all cases, arbitrators have required the employer to take such steps to communicate his rules as will tend to insure that none but the wilfully ignorant will fail to know them, for example, by posting in conspicuous places, by conferences with groups of employees, by personal distribution of copies of the rules, sometimes by express warnings to offenders that further violations will be punished.

A similar concern with notice is reflected in another widely accepted precept of industrial discipline—that the rule be consistently enforced before it is justly applied against an offender. Whether phrased in terms of condonation or otherwise, the central thrust of this requirement is notice. In a criminal prosecution inconsistency in enforcement is itself generally no defense. But unlike the criminal prosecutor, the employer is both the law maker and the law enforcer. Therefore, in failing to enforce his rules he acts, implicitly, in his legislative function to unmake the rule itself, and its subsequent enforcement upon an individual is rejected as a new rule, notice of which has not been given. It is true that the requirement of consistency in enforcement also serves to prevent invidious discrimination, but this is not of the essence. This is apparent in the common reluctance of arbitrators to approve discipline clearly the result of the employer's decision to turn a new leaf in enforcement rather than a device to pick on a particular employee. Notice is the heart of the matter here. It is rather in cases where the degree of punishment has been erratically dispensed that considerations of equity and discrimination are the dominant ones.

The Issue of the Range of Prohibited Conduct

In any community which values individual freedom, the claim of the individual to privacy must be faced by the punishment system—the value described by Justice Brandeis as "the right to be let alone—the most comprehensive of rights, and the right most valued by civilized man." The issue arises most dramatically in connection with the policing function; but it arises as well in the formulation of the forbidden conduct.

In the criminal law there are two central issues—first, drawing the line between the kinds of conduct which the community may legitimately attempt to influence, and the kind which is strictly the individual's business, off bounds to the government; secondly, within the category of conduct in which the government has an interest, drawing the line between what may and may not be influenced through the particular sanction of punishment. In its broadest terms the criminal law typically faces one or both of these issues in attempting to define the acceptable relationship between crime and morals: Should nonconforming sexual conduct be punished even when it is engaged in privately and voluntarily by adults? How far may the state punish blasphemy, or obscenity, or drinking, or gambling, or dishonesty short of theft?

The system of industrial punishment inevitably confronts the same general issue of distinguishing between what belongs to Caesar and what to the individual. The form it takes is in marking the boundaries of employer concern with employee misbehavior. May the employer discipline for fights outside the plant? What connections with the employer's business must exist to warrant this interference—that the quarrel arose from a plant dispute or that a supervisor was involved? Or even within the plant, when do demands for employee decorum in their own relationships, and in relationships with supervisors, trench upon their dignity as men? When an otherwise acceptable employee is arrested or perhaps convicted of crime unconnected with his work, but without affect upon his attendance, under what circumstances may the employer discharge? What of the efficient worker who is, or was at one time, identified with Communist activities? These are the problems on the industrial scene which raise the same conflict between the competing claims of conformity and individuality long faced by the criminal law.

Comparing the responses of the two systems, I find it difficult to say if they have struck the balance any differently between the competing claims. Yet it is true that at least in one respect the arbitrators have indulged a wider ambit of punishable conduct than the criminal courts. This is in the use of punishment as the means of creating conformity where the community concededly has a legitimate interest. In the general community the recognition of a social interest does not itself justify criminal punishment. Many acts that are socially undesirable are not criminal; nor would it be thought proper to make them so—negligently injuring another, breaking contracts, failing to come to the aid of the needy, lying. Criminal punishment, as I said earlier, is in principle, if not always in fact, regarded as a sanction of last resort for the utterly intolerable when other sanctions have failed. In the industrial community, on the other hand, there are no such limitations. If the conduct is such that the employer is justified in discouraging it, he may do so by punishment. Industrial punishment is regarded as the normal and expected and rarely, if ever, as an inappropriate sanction.

The contrast is understandable. The general community, to the extent it is libertarian, places a high value on personal freedom. It is committed to a wide margin for non-conformity and to the maintenance of fluid social conditions to allow individuals themselves to find their own levels of preferred conduct and values. The ultimate sanction of criminal punishment, because of its severity, its moral stigma, and its overall compulsiveness, is therefore thought inappropriate except to support the minimum social conditions of order necessary to allow men to pursue their own alternatives to fulfillment. In an industrial community, on the other hand, the social values are imposed by the nature of the enterprise—an efficient and profitable operation, although, of course, within the limits set by the human and contractual claims of the workers and the union. It is not and cannot be a wholly libertarian community; it is a special purpose community with a job to do. Hence, the very effectiveness of industrial punishment in coercing compliance is not viewed as a limitation on its use so long as the behavior regulated has justifiable relevance to the needs of the enterprise.

The Issue of Excluding Those Unable to Conform

Excluding the non-deterrable from punishment proves to be another recurrent issue. It follows from the logic of the punishment system that punishing a person cannot be justified where he was beyond being influenced by the deterrent threat of punishment. It would be both unfair and futile to do so. Hence, the criminal law creates a total defense for the person who is legally insane. The danger to the community threatened by the legally insane person is dealt with in a non-penal way by commitment and, hopefully, treatment.

In the area of industrial punishment the issue of excluding the non-deterrable is not so dramatically faced. This is because a discharge is a discharge—there is no counterpart to the distinction between criminal punishment and civil commitment. Yet the issue is there. There is a difference between discharging a man who wilfully misbehaves and discharging one who tries his best but cannot do the work. The latter is warranted in the interest of protecting the industrial community, but it is not punishment in the sense of the former. The justification is protection, not deterrence. This difference in the two cases is more than a matter of words. It is, I think, in felt response to this difference that arbitrators will disapprove such disciplinary measures as compulsory time-off for incompetence and will often require the employer to reassign the innocently incompetent employee to a job he can do rather than discharge him. In some circumstances, as where a worker has proved repeatedly negligent, it is not immediately apparent whether the man can't or won't. Where arbitrators, in order to determine what discipline is warranted, venture to distinguish the congenitally careless worker from the one who could do better with some prodding, they are performing a task strictly parallel to that of the criminal law when it seeks to determine whether a defendant is legally insane.

The Issue of Culpability

The issue raised by questions of culpability is, in a word, this: Assuming an individual has committed an act which does the harm sought to be prevented by the prohibition, what attention is paid to his state of mind with respect to his behavior or its consequences? The question arises in connection with the degree of

punishment as well as with whether the actor is punishable at all, but it is solely with the latter that I am here concerned. In the criminal law the question is put in terms of defining, or ascertaining, the so-called *mens rea* necessary to make out the offense. No one doubts that a person may be held liable where he acted with full knowledge of the relevant circumstances and with knowledge or intention that the prohibited result would occur. The conflict and controversy in the criminal law arises over whether something less suffices; specifically, whether liability may be imposed for negligence, or, indeed, even without negligence—so-called strict liability.

First, negligence. Suppose the failure of the actor to know all the relevant circumstances surrounding his behavior, or his failure to foresee the consequences, is attributable to some fault on his part. Is his negligence sufficient to impose criminal responsibility? For example, the railroad track crew foreman who misreads the train schedules with the result that lives are lost in an accident; the motorist who carelessly kills another by driving too fast, or by failing to note and observe a stop sign or a red light. The case against liability is that carelessness is a personality problem and a man can't be scared into habits of care by the threat of punishment or made to be aware of the facts which a reasonable man would be aware of. The case in favor is that the criminal threat may provide another incentive for taking care and for being aware. It is clear that the criminal law accepts the latter view and imposes liability for negligence in a wide variety of instances. Yet, with some exceptions, it insists that the negligence be more than what would suffice to ground civil liability—not merely falling below the reasonable standard of care, but falling substantially below that level.

In industrial discipline it is quite beyond argument, and understandably so, that negligence may properly be disciplined. To the extent that habits of care can be generated by the threat of punishment, discipline is, of course, justified. But even if the acts of negligence are not deterrable in the group or correctible in the employee disciplined, justification may rest in the employer's concern for protecting the plant against the destructiveness of the careless worker. The case for discharging him is on a par with that for disciplining the innocent incompetent.

As for the criminal law's distinction between ordinary and gross negligence, there is no comparable limitation expressly recognized in industrial discipline. I think, however, that it is there, but is treated as a question of punishment rather than liability. The point of the distinction appears to be that criminal punishment, even of the mildest kind, is too severe a sanction for minor lapses from care which few persons in the community feel themselves immune from; and, in addition, to punish on this basis would create an undesirable sense of insecurity and anxiety. Like considerations are not irrelevant to the industrial community. But what precludes the need to protect ordinary negligence from industrial discipline is the greater versatility and flexibility in the lesser sanctions of industrial law than in those of the criminal law. So long as a word of warning for the first lapse, or a reprimand for a repetition is all that is involved, there is no substantial concern with excessive severity or the creation of insecurity. Where the minor lapses persist, heavier sanctions become warranted for the same reasons that gross negligence may warrant heavy sanctions. It is clear, however, that an arbitrator would not sustain a discharge for a single act of ordinary negligence, and I submit that his reluctance is understandable in the same terms as is the reluctance of the criminal law to make ordinary negligence criminally punishable at all.

With some notable exceptions, punishment in the complete absence of fault, even negligence, is foreign to the central tradition of the criminal law. It has become common, however, in a wide variety of statutory offenses of a regulatory character where it is felt that the practical difficulties of proof of fault would tend to interfere with effective regulation needed to protect the public welfare. Hence, in these cases the risk of criminal liability is placed on those who seek profit from the activity—pure food and drug laws, for example, or regulation of the sale of alcoholic beverages or narcotics. It is of interest that in the area of industrial discipline no comparable compromise with the value of justice and fairness to the individual has appeared. Discharge of the willing, but unable, worker can't really be thought to be in the same category, since, as I have tried to suggest, such discharges are not punishment sanctions but efforts at self-protection comparable to the civil commitment of the legally insane. The reason, I believe, for this resistance to strict liability is that if there are

courses of behavior on the job which create large possibilities of harm or loss and make proof of fault difficult, the responsibility for the risk of harm or loss belongs far more to the employer than to the employee, who after all, is doing the boss' work, not his own.

The Issue of the Quantum of Punishment

No punishment system can escape the problem of the degree of punishment to be imposed. The issue must be faced in general terms as well as in the concrete instance; that is to say, in terms of the standards to govern the imposition of punishment as well as of the application of those standards to a particular offender. It is in responding to these tasks that the parallel between the processes of criminal law and industrial discipline is most striking.

In both areas the task has proven equally intractable. The primary difficulty lies in the varieties of conflicting feelings, values, and purposes associated with the systematic infliction upon people of pain which punishment represents. On the one hand, it is desired either as a means of satisfying the urge to retaliate or as a rational, though hard, means of compelling compliance with laws or of indirectly influencing moral values. On the other hand, there is the venerable urge to avoid excessive harm to violators, what Voltaire stated to be "the true spirit of all laws, which teaches never to sacrifice a man but in evident necessity" and what Bentham posed as the principle of economy of punishment. There is also the urge to redeem both as an end in itself and as a means of community protection. The stages through which the theory and practices of criminal punishment have evolved in the last two centuries reveal something of the conflict.

Criminal punishment before the turn of the 18th century was marked by the indiscriminate use of punishment of the utmost severity as an instrument of terror. This was the stage of deterrence by massive retaliation. Hanging was the order of the day for cutting down trees or shooting rabbits as well as for murder. The stage of terror later gave way to a second stage in which crimes were graded in order of their severity with the punishment precisely prescribed in accordance with the severity of the offense. In the last 50 to 100 years a third stage is discernible, the stage of individualization, in which the variations in the circumstances and personality of the offender came to be regarded as relevant in

determining treatment to be imposed, and readapting him to responsible citizenship became a primary goal.

That similar conflicts in feelings and values mark the area of industrial discipline is apparent from the strikingly parallel evolution of stages of industrial punishment. Before the First World War the indiscriminate mailed fist was the dominant feature of discipline. For displeasing the boss, in ways ranging from the trivial to the serious, the employee could expect outright discharge. As management became more scientific in its approach to personnel problems, strongly legalistic elements made their appearance, such as routinely set discipline for particular offenses. Finally, the contemporary era has become the age of "corrective discipline," strongly emphasizing individualization and the values of making good workers out of bad ones.

In modern punishment, then, the prevailing themes have come to be rehabilitation, correction, and individualization. All three themes reflect the assertion of a new human claim, or, in the terms suggested at the beginning of this paper, of a new justification for the infliction of punishment. In other words, it is not alone sufficient that to punish tends generally to serve deterrent and vindicatory purposes, and generally to do so without undue fairness to the individual. The dispositions the state makes of the particular offender must be useful in the particular instance—useful in protecting the community against persons disposed to violate the law, and useful to the offender himself by making him better suited to live adequately within the community. But while this much is common to the themes of rehabilitation, individualization, and correction, there are differences in their implications for and compatibility with a punishment system and in their applicability to industrial discipline.

Rehabilitation encompasses the restructuring of the offender, in his personality and circumstances, to eliminate the factors responsible for his deviancy. While it is not necessarily incompatible with punishment, it tends to become so. Its advocates, regarding deviancy as the product of sickness rather than badness, commonly reject the efficacy of special and general deterrence, and argue that curing offenders be substituted for hurting them as the means of social protection. Juvenile delinquency laws are the most obvious instance of the triumph of this view. But the ideal needn't

be exclusive, and it has in fact been widely put to work in conjunction with punishment—in supervised probation, for example, or young adult reformatories, in rehabilitation centers, in prison educational programs, and more.

Surely it is beyond doubt that, either in its exclusive or non-exclusive form, the rehabilitative ideal has no place in industrial punishment as we now know it. If an employee is negligent or insubordinate or guilty of habitual lateness or absenteeism, a thoughtful employer may try to discover the reasons with the hope of helping the man. But it would hardly be thought that, either in place of a disciplinary lay-off or in conjunction with it, he is obliged to provide the services of social workers, family counsellors, or psychiatrists. Salvation is a duty for the church, and perhaps for the state, but clearly not for the employer in a private enterprise system. It is only in a thoroughly socialized community that such a development is likely, and where it happens, as in the Soviet Union, the mechanism is to make employee misbehavior on his job a public offense.

Corrective discipline, on the other hand, as distinguished from rehabilitative therapy, has an obvious relevance in the system of industrial punishment. As I am using the term, it differs from rehabilitation in that it does not necessarily posit an affirmative program of therapy. It focuses upon retaining the usefulness of the person in the community after punishment has been imposed. But the assumption is that punishment itself has a kind of educational value—the offender is taught a lesson, as it were; he is "specially deterred," to use a term I used at the outset of these remarks in describing the mechanism of punishment. And the implication is that the amount of punishment should not be so excessive as to destroy his opportunity to learn and apply that lesson. While in criminal law this corrective discipline commonly appears as the twin of rehabilitation, it is in the industrial area that it appears by itself. Unlike the pure rehabilitative ideal, it is not at all a challenge to the essence of a punishment philosophy. Its implication is not that the infliction of painful consequences be abandoned, but only that it be moderated so far as possible to avoid its becoming destructive.

The philosophy of corrective discipline dominates today in the industrial area. One sees this in the personnel literature, and in

the opinions and speeches of arbitrators. One sees it as well in the reluctance of arbitrators to sustain and, more and more, of employers to use, the discharge sanction; and in the prevailing attachment to progressive discipline whereby sanctions become increasingly severe as offenses are repeated, until correction becomes sufficiently unlikely to warrant discharge. Nevertheless, the philosophy is paradoxically and dramatically departed from for certain kinds of offenses.

It is chiefly where the offense is regarded as particularly serious that outright discharge tends to be accepted as a legitimate substitute for progressive discipline—an outright criminal theft, an act of gross recklessness with extremely severe consequences, such as serious injury to another or extensive damage to company property. One finds a parallel aberration, if it be that, in criminal punishment for the more serious or feared crimes—ineligibility for probation or parole, high minimum terms of imprisonment, mandatory prison terms, not to mention life imprisonment and capital punishment.

The paradoxical quality of these exceptional cases arises from the fact that the seriousness of the harm done or the moral gravity of the behavior do not themselves demonstrate the hopelessness of the offender. Consider, for example, a case suggested by Peter Seitz in some correspondence: the employee who accidentally blows off his best friend's arm in horse play with an acetylene torch. If investigation showed the offender was a senior employee of sterling record, a leader among his peers, and overwhelmed by grief at his aberrant thoughtlessness, surely the corrective ideal would call for something a good deal less than outright discharge. And similar instances of high corrective potential can be imagined even in cases of activity which is criminal—great emotional pressure in special circumstances, a worthy, though misguided, motive, genuine remorse, and an otherwise clean record.

There are several possible levels of explanation of this departure from individualized corrective discipline. Retribution, the feeling of satisfaction at making great wrong-doers suffer, is one. Intellectually it is unconvincing; yet it is a pervasive feeling. A leading English scholar of the last century observed that the criminal law stands to the passion for revenge in much the same relation as marriage to the sexual appetite. It is not surprising that indus-

trial punishment, at least of what are regarded as the heinous offenses, should serve a similar function. It is perhaps as much as can be realistically hoped for in industrial as well as criminal punishment, that the situations in which satisfaction of the sentiment of revenge preempts the more rational values will be isolated and confined within the narrowest possible limits. I do not think that an arbitrator, any more than a legislator, can completely disregard it.

A second explanation is that the more serious and strongly disapproved the offense, the more vigorously may the community seek to combat it. The assumption made is that drastic punishment is needed to deter others both by enhancing the terror of the threat for violation and by underscoring the vigor of the community's disapproval. I think there is a case to be made on these grounds for increasing the severity of the punishment. Offenses especially feared or especially dangerous may fairly be combatted by heavier weapons.

But there are costs to be paid. In the criminal law, the life-term or execution apart, longer sentences in the service of this end do not necessarily destroy programs of correction, although they may and often do. In industrial discipline, however, this is precisely what discharge does, at least for purposes of the existing employment relationship. What makes difficult a more balanced accommodation of interests of deterrence and correction is that there are no in-between penalties, more severe than the maximum practicable layoff but less completely destructive than a discharge. The choice is therefore a hard and costly one, however made. What this suggests is that the decision to discharge should be made (and reviewed) with awareness of the cost, and not without strong reason to believe that the cost must be paid to achieve the desired deterrent effect. In the case of the acetylene torch accident, for example, it is hard to believe that the discharge of the remorseful employee would add substantially to the deterrent impact against such horseplay inevitably produced in employees by the sheer horror of the accident.

A third explanation is that the more serious the offense the less warrant there is for the employer to expose himself to the chance of a repetition by applying a progressive discipline. In short, for the same goal, the greater the loss at stake, the smaller

the risk one is prepared to take. The argument has its logic and appeal. The difficulties lie in its application without thought to whether in fact a substantial risk of repetition is indicated. There is no infallible or even probable relation between the seriousness of the offense and the risk of repetition. Indeed, the relation may be inverse, again, as in the case of the acetylene accident. One would suppose that a thoughtful application of the rationale would entail what is not always forthcoming—a careful consideration of precisely how large a risk of repetition exists, given the total circumstances of the incident and the character and record of the employee.

The third of the current dominant themes, individualization, is essentially not an independent goal of punishment, but the necessary means whereby rehabilitation and correction may be achieved in the process of imposing punishment. In so far as correction has been subordinated in the ways already described, whether in deference to retribution or general deterrence or social protection, this has also meant the rejection of the relevance of the special circumstances, personal history, and character of the offender in the dispensing of punishment. There is one challenge to individualization, however, that is not necessarily a challenge to corrective discipline as well. This is the use of schedules of penalties for specified offenses, commonly in conjunction with a system of progressive discipline. For example, for leaving the plant during shift: first offense, 1 day off; second offense, 1 week off; third offense, discharge; for mistakes due to carelessness: first offense, warning; second offense, 3 days off; third offense, 1 week off; fourth offense, discharge.

The objectives of these so-called "price lists" are laudable enough. They tend to avoid erratic inconsistencies in punishment, they create the appearance of scientific objectivity, they preclude severe penalties for early offenses, and they perform a notice-giving function in the matter of punishment. But their use ignores the venerable insight that it is as unjust to treat different cases alike as to treat like cases differently. The number of relevant variables for punishment purposes is hardly exhausted by the bare statement of the behavior prohibited. Suppose an employee with 6-months service and one with 15-years service both are guilty three times of leaving the plant during

shift. From the standpoint of common justice, correction, or deterrence, does a system make sense which automatically requires that both be discharged? Or suppose one employee makes a second mistake of inexcusable carelessness without extenuating circumstances, while another makes a second careless mistake which many others have made and which requires considerable attention to avoid, and in one or both instances does so after a sleepless night with a sick child? Surely equal punishment here is the falsest kind of equality.

The criminal law has largely abandoned the fixed penalty for particular crimes, substituting instead a minimum and maximum term, separated by a spread to allow for individualization, or sometimes solely a maximum. These devices serve to attain some of the advantages of a schedule of penalties without their gross disadvantages. It may be that for some offenses, at least, a similar approach would be useful in industrial discipline. This is already achieved in those occasional cases where the schedule of penalties is interpreted as setting the maximum rather than the automatically justifiable punishment.

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I have no grand reprise to conclude these remarks. It may be useful, though, to comment in general terms on the role of the arbitrator in facing and resolving the kinds of issues I have attempted to raise. That arbitrators have a broad responsibility for contributing to the resolution of many hard issues is not disputed. They have played an active role in dealing with such matters as procedural regularity, the requirements of persuasive proof of the facts adduced to support the contested discipline, and the range of problems involved in the first four large issues I attempted to raise—the issues of notice, of defining the range of conduct which may be prohibited, of excluding from punishment those unable to conform, and of defining the required culpability of the offender. All this comprises a vast and ranging responsibility over industrial discipline.

While in an ultimate sense it is true that the arbitrator's authority derives from consent, it is inadequate and misleading to describe his behavior as involving the interpretation of the "just cause" requirement of the contract. Such a description is

as wrong-headed as a description of the Supreme Court as engaging in statutory interpretation when passing upon questions of due process of law or freedom of speech. In actuality the language of the basic document in each case constitutes a broad charter of responsibility to work out a principled jurisprudence in light of the moral admonition expressed—in the case of the arbitrator it is to see that the cause for discipline is just, in the case of the Court to see that the process which is due is given or that speech is kept free.

It is a different story when we turn to the role of the arbitrator in second-guessing the employer's choice of punishment. Here there is doubt and debate centering on two issues. The first is the very authority of the arbitrator to modify the amount of discipline when that authority is not expressly delegated. This is an old battle which I do not intend to enter, save to observe that arbitrators are increasingly tending to assume authority in such cases and, in my view, rightly. It is the second issue which concerns me today. This is the manner in which arbitrators discharge the responsibility of review when authority to do so is found to exist.

The conventional case for a narrow review is weighty. It is that the employer has the primary responsibility for running an efficient operation; that easy interference with his judgment impairs his authority and his effectiveness; that, therefore, even where authority over the degree of punishment is delegated to the arbitrator, the employer's judgment should not be overturned unless it can be shown to be palpably without rhyme or reason. There is as well another source of reluctance of arbitrators to reassess the degree of punishment. It is suggested by the parallel reluctance in this country to subject criminal sentences to review by appellate courts. I believe that in both cases the cause lies in the inherent subjectivity of the grounds for deciding such questions, the vast number and the imponderable quality of the factors relevant to decision, and the felt need, therefore, to vest final responsibility in the person most directly and personally exposed to the full situation. In other words, from the viewpoint of the arbitrator, the explanation lies in the anxiety and insecurity resulting from the lack of handles for decision.

It is in reviewing relatively fine differences in punishment that these objections have their greatest force. Is the proper

discipline a reprimand or a one day lay-off? A two-day lay-off or a week? Here there are no substantial standards for the arbitrator to apply beyond protecting against inconsistency with past practice and unfair surprise where the practice is altered, and assuring equal treatment for like cases.

The defensibility of a discharge, however, as compared with a lesser penalty, is another matter. That arbitrators have in practice recognized this difference is demonstrated by the large percentage of cases in which the discharge is upset although some discipline is warranted—the familiar reinstatement without back pay.

In my view the more active review is warranted. The difference between a discharge and a lesser penalty is gross and the impact upon the parties substantial and consequential. It is not a matter of the arbitrator acting God. Surely the employer's responsibility, expertise, and close familiarity with the problems of the plant must be given their due. But what is needed, and this is true in the sentencing of criminals as well as in reviewing industrial discharges, is the development of criteria and principles to replace undisciplined subjectivity. Arbitrators are in a unique position to make this contribution, to bring order and coherence into the process of making decisions of this kind, to expose the issues of fact and value upon which decision must turn, to lay out implications and costs and gains of alternative dispositions, to articulate and relate with clarity the dimly felt governing standards. In a word, the task is not less than to strive to introduce rationality into the process of industrial discipline.

Discussion—

ARTHUR M. ROSS *

The assumption that industrial discipline and criminal law are first cousins is deeply embedded in the parlance of arbitration. It was not more than a month ago that a union representative exclaimed to me in a discharge hearing: "Mr. Arbiter, this man may have committed a mischievous demeanor, but that doesn't justify capital punishment." Arbitrators as well as their clients are wedded to the analogy. This accounts for some remarkable deci-

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sions based on burden of proof, degree of proof, etc. In cases of discharge for sleeping on the job, for example, it is well established that the only reliable means of substantiating guilt beyond a reasonable doubt is to lift the grievant from the chair in which he has been snoring and bounce him off the floor until he opens his eyes, blinks in confusion, and angrily inquires, "What's the big idea waking me up in the middle of a shift?" Otherwise the grievant may successfully claim that he was momentarily resting his eyes or that he was deep in meditation concerning the problems of the job.

The real value of an analogy depends on the amount of light which it sheds on the subject being considered; the real danger arises when it conceals more than it reveals about that subject. I want to express sincere admiration for Mr. Kadish's paper because he has gotten more mileage from the analogy between industrial discipline and criminal law than I would have considered possible. He applies the principal theories of crime and punishment to common disciplinary practices with much insight and imagination, and in so doing raises significant questions about the purpose and rationality of these practices. His discussion of how punishment has evolved from the original stage of unlimited terror or massive retaliation, through an intermediate stage of mechanically doling out the prescribed penalty for each particular offense, to the present stage of individual treatment in search of rehabilitation and correction, is particularly valuable.

Parts of the paper are rather inconclusive, such as his treatment of the so-called industrial capital offenses and his analysis of whether it is proper to punish a worker for mere negligence or even simple incompetence. I will argue that these passages are necessarily unsatisfactory because Mr. Kadish has not sufficiently taken into account the differences between the industrial situation and civil society at large. Nevertheless, we are greatly in his debt for raising these issues and identifying the problems which have to be faced if we claim to be sensitive to the demands of logic, ethics, and humanity.

Thus the analogy between industrial discipline and criminal law has useful applications. At the same time I am persuaded that it has severe limitations and that it collapses and falls to the ground if we push it too hard. I think it best conceived as a loose

figure of speech such as we employ when we say that arbitration is a profession or that Senator Javits is a Republican.

To begin with, the relationship between the state and its citizens is not the same as the relationship between an employer and his employees. The thrust of criminal law is primarily negative or prohibitive, although there are exceptions such as the affirmative duty to support one's children, pay one's taxes, and register for the draft.

But the employee is involved in a commercial transaction with his employer, an exchange of services for wages. Though the terms of the bargain are notoriously ill-defined in many respects, nevertheless the bargain is there. The employers' obligations are enforced through the collective agreement and the grievance procedure. The employee's obligations are enforced through a system of inducements and sanctions including those we call industrial discipline. The thrust of industrial discipline is prohibitive to some extent: thou shalt not lift company property, thou shalt not slug the foreman, etc. But the affirmative commands are more prominent and more significant. They include dependability, diligence, collaboration, conformity, and all the other requirements for efficient production in a complex organization.

A *disciplined* worker, therefore, is not merely one who keeps out of fights, refrains from smoking in the washroom, and otherwise obeys the rules of comportment. He also makes a positive contribution more or less equivalent to what was contemplated when the employment relationship was originally sealed. He makes out; he cuts the mustard; or if he should be unready, unwilling, or unable to do so, the lapse is only temporary. I submit that we arbitrators are looking for evidence of discipline in this augmented sense when we confront the usual discharge case.

For this reason, Mr. Kadish's discussion of the issue of culpability must be regarded as one of the less successful portions of his paper. He points out that strict criminal liability, i.e., punishment in the absence of fault, "is, with some notable exceptions, foreign to the central tradition of the criminal law." Since he considers discharge as a form of punishment, he forces himself to wrestle with the problem of how an employer can discharge a worker lacking in *mens rea*, the guilty mind—for example, the worker

who tries hard but is just incompetent. He adopts a terminological solution by suggesting that such discharges are exceptional: they "are not punishment sanctions but efforts at self-protection comparable to the civil commitment to the potentially dangerous mentally ill."

A much better solution becomes obvious once we pierce the veil of analogy and confront the realities of industrial discipline in their own right. Discharge, catastrophic as it may be, does not constitute punishment. Concededly it is sacrilegious to oppose such time-honored locutions as "the ultimate sanction," "the final penalty," and "industrial capital punishment." But the fact is that a worker is fired because the employer has decided, rightly or wrongly, that he is not getting what he bargained for and that he wants to close out the employment relationship. When we reinstate the worker, we commonly intone that "some penalty may have been justified but the ultimate sanction of discharge was too severe." In my opinion, however, we are really expressing our disagreement with the employer's judgment and our conviction that a viable relationship can be reconstructed.

If I am correct, it follows that the question of culpability is largely irrelevant in the arbitration of discharge cases. Assume the employer can show that the grievant has been chronically absent, for periods of one to three days at a time, over the course of several years. Finding replacements has been difficult, production has suffered, and his fellow workers have been unfairly burdened. There have been numerous conferences, warning notices, and so on. Is the grievant's state of mind really material? Perhaps he doesn't give a damn. Perhaps he gets drunk every weekend and suffers prolonged hangovers. Perhaps he is a hypochondriac. Perhaps he has some incurable physical ailment. I submit that the case looks essentially the same regardless of these gross differences in culpability.

Or take the following discharge case which I decided some years ago. A young man was hired by an oil company to deliver gasoline around the Los Angeles area, driving 5,000-gallon tank trucks weighing up to 30 tons when fully loaded. For a while all went well, but then he suffered a series of four mishaps within a ten-month period. While filling a storage tank, he cut off the flow of gasoline too late and flooded the pavement. Backing his rig

up to a loading platform, he failed to notice that one of the elevators had not been raised sufficiently to permit his truck to clear it. On another occasion he forgot to disconnect the downspout while driving his truck off the platform, so that the spout and the dome cover of the truck were broken. Finally, he drove into the rear end of a passenger car which he had been trailing by only eighteen feet. This was enough for me, although the union argued that the monetary damage was relatively small, that the grievant had previously driven a mayonnaise truck without difficulty, and that accidents can happen to anyone. Since the line between negligence and incompetence is often difficult to locate, I was not prepared to say that the grievant was culpable. Was it important?

The analogy between criminal law and industrial discipline breaks down in another important respect. Unlike a criminal trial, the typical discharge arbitration is not a means of determining the guilt or innocence of the accused. On the contrary, it is a review of the reasonableness of management's action in a state of facts which, after the jousting and sparring are over, can be seen to be essentially uncontroverted. Some cases, it is true, actually turn on contested issues of fact. Did the grievant steal the screwdriver? Did he strike the first blow? Did he take command of the illegal walkout? But these cases are distinctly in the minority. More often the basic circumstances are clear enough (although any skillful advocate is capable of miring the hearing in endless confusion over trivial or peripheral details). Our real task is to decide whether these circumstances constituted just and proper cause for terminating the employment relationship in the face of the grievant's seniority and associated job property rights. If they did not, we reinstate the grievant. His state of mind and degree of guilt then become secondary problems which can be resolved by cutting or withholding back pay and by sternly admonishing him in the opinion—which, in all likelihood, he will never read.

As arbitrators we are frequently criticized on the ground that we substitute our judgment for that of the employer. In the whole lexicon of arbitration clichés, that one is the most overworked. If our task is officially to review the employer's judgment, obviously we must be ready to substitute our own if we find that his was unreasonable. What else are we there for? It is no answer

to say that we should uphold the termination unless it was arbitrary and capricious. Let us face it, in most discharge cases the grievants are not model employees. There is generally *some* cause for discharge; the real problem is whether it was *sufficient* cause. We are not brought in to try the facts, but to review the employer's judgment.

In deciding whether to sustain or to reverse a disciplinary discharge, we consider numerous circumstances which really have little or nothing to do with guilt, innocence, mitigation, extenuation, or other criteria of criminal law. One of these circumstances is seniority. Long service creates a presumption that the employee is capable of satisfactory performance, so that stronger evidence is needed before the contrary is established. Moreover, the senior employee has developed a greater equity in his job, which is thought of as a species of property right. He has more to lose when he is terminated and finds it more difficult to get readjusted. We therefore tend to feel that an employer must be willing to put up with more from a long-service employee.

Another important circumstance is nature of the employment. Can a worker use rough language? It depends on his job. Likewise, there are great differences in the extent to which dependable teamwork, punctilious honesty, etc., are essential if one is to make out as an employee. A friend of mine arbitrated a case in which a salesgirl in a dress shop had been terminated for using improper language to a customer. It appears that the customer tried on a dress and inquired, "Do you think it does anything for me?" The grievant amiably responded, "Dearie, if I had a fat rump like yours I wouldn't go near that dress." My friend reinstated the grievant (without back pay) but remarked that if the incident had occurred in one of the really fashionable shops, the result could have been otherwise.

Once I upheld the discharge of an insurance agent whose job it was to sell industrial life policies to people of modest means. He had been a model employee in almost every way. He had been frequently praised by his superiors and his clients, and was the recipient of countless certificates, plaques, ribbons, and similar awards. He had an exemplary war record, a lovely wife, and several children. Out of good-heartedness he made one mistake. One of his customers was an elderly man who had carried a

$500.00 term insurance policy for many years. Although the agent knew that this man had recently been refused a larger policy on the ground of high blood pressure, he accepted a renewal of the $500.00 policy. There was no commission on the transaction. Through a freakish combination of circumstances, this dereliction came to the attention of the regional officer and the agent was promptly discharged. Understandably, I felt as if I were hanging a man for stealing a sheep. But this was a situation in which the company was intrinsically vulnerable to any connivance between agents and customers. The problem had been fairly serious; numerous cases had been taken to arbitration; there was no leeway at all. If the situation had been different, an arbitrator would have been strongly tempted to find extenuating circumstances and to hold that although serious punishment was fully warranted, the ultimate sanction was a little too severe.

Mr. Kadish discusses the question of whether employees can be punished for misbehavior outside the job. Once again you will not find the answer by comparing the intrinsic culpability of different grievants. The celebrated infidelities of a movie star enormously increase her value as an employee; in fact the grateful studio even gives her husband $500,000 for being a good sport. But let us construct a hypothetical case of an instructor in a private girls' school operated by a devout religious group. He becomes involved in a juicy scandal and 25 percent of the girls are withdrawn by their parents. Have the employers' interests been sufficiently impaired that he is entitled to break off the employment relationship? I tried this out on my friend Jesse Friedin, a redoubtable champion of intellectual honesty. He accused me of being a meally-mouthed hypocrite for espousing a double standard. But suppose that 50 percent or 75 percent of the pupils were withdrawn?

In discussing the philosophy of corrective discipline, Mr. Kadish points out that there are dramatic and paradoxical departures in cases of theft, immorality, negligence resulting in serious injury, and other so-called capital offenses. He observes that "the seriousness of the harm done or the moral gravity of the behavior do not themselves demonstrate the hopelessness of trying to correct the offender;" that "there is no infallible or even probable relation between the seriousness of the offense and the risk of repetition";

and that discharge cuts off the possibility of rehabilitation. The missing clue to the paradox, in my belief, is that we are speaking about a work situation in which people of limited capacity are supposed to work together effectively despite all the human failings which make this a difficult undertaking even under the best of circumstances. Even if there is no substantial risk that the grievant would slug his boss a second time, reinstatement might well entail so much embarrassment, resentment, and strain as to be impracticable. The true capital offense is one which destroys the viability of the employment relationship. I should add that there is a real danger of underestimating the capacity of supervisors and workers to let bygones be bygones and to live with other imperfect people.

The most interesting discipline cases are those which present a poignant picture of employees and supervisors attempting to live with each others' imperfections in the confining space of the work environment and the stringent imperatives of the production process. We try to analyze such cases in the language of crime, guilt, and punishment, but these concepts are frequently not very helpful. I want to illustrate this point and conclude my comments by relating an inspiring saga of the unquenchable human spirit which, for reasons that will be evident, I have called "The Unsinkable Molly Brown."

Molly Brown was really her name. She had worked about eleven years at a San Jose cannery and during this period she had been in and out of a fair amount of trouble. The principal problem, as an analysis of warning notices revealed, was that she went to the rest room too often and stayed too long. She had received an ultimatum that if she left her machine without permission, discharge would follow.

On the "day in question," as we arbitrators like to call it, peaches were being canned and a temporary forelady was in charge of Molly's group. As the forelady passed down the line, Molly beckoned her and said, "Dearie, I've go to go." The forelady responded, "You'll have to wait your turn, honey. There's five girls ahead of you waiting for the relief girl." Molly waited. Thirty-five minutes later, although seven girls had had relief, Molly's turn had still not arrived.

At this point the forelady was up on a ramp inspecting some peaches. Suddenly a piece of fruit hit her on the back of the head. It is stipulated that this was a half peach, unpeeled and uncooked but without the pit. Wheeling around, she saw Molly Brown down at the floor level, about twelve feet away, for it was Molly who had thrown the peach. There were sharp conflicts in testimony as to her motive and manner in so doing. The union asserted that she had tossed it lightly, expecting it to land on the conveyor belt next to the forelady, and thus attract her attention. The employer maintained, on the contrary, that she had viciously hurled this dangerous missile in a fit of uncontrollable anger.

When the forelady turned around, Molly flapped her arms and called out, "I gotta go, I tell you; I gotta go!" Once again the testimony is in conflict, this time as to the forelady's reply. According to the union, the forelady extended her palms and shouted, "OK, OK, OK!" This version is flatly contradicted by the employer, according to whom the forelady stated, "Wait, wait! It's not your turn yet!"

Molly did not wait. She proceeded to the ladies' room. Members of supervision followed her there, took her to Labor Relations and made out the discharge papers. She was terminated on three counts, to wit: gross insubordination, leaving her machine without permission, and assaulting a member of supervision.

Since my award has not been published, perhaps I should tell you the decision. I concluded that although Molly's misbehavior could not be condoned, there were mitigating factors, and the ultimate sanction of discharge was too severe.

Discussion—

JOHN F. E. HIPPEL *

The paper presented by Professor Kadish is a brilliant, well-conceived, and objective work. I am not here as a devil's advocate to attempt to second-guess or refute each of the substantive points presented.

On the other hand, I would perform no service at all if I came here merely to expound a series of laudatory comments. It is most

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obvious that this report represents a great effort at careful analysis and is the product of a man who knows what he is talking about. George Taylor recently stated:

> Insights should be created not only to give intellectual satisfaction . . . but to assist in dealing with the urgent economic and social problems that beset our country.

The administration of industrial discipline involves both economic and social problems. Its proper administration is a key to efficient plant operation. Efficient industrial plants mean greater productivity; greater productivity is essential to national growth and well-being. Professor Kadish has taken a long step in aiding our insights into this vital field of industrial discipline—a field in which all of us here today have great personal concern.

But I would not be honoring George Taylor's maxim—I would not be creating any "insight"—if I did not comment on the total impact of this report as well as its specific references.

Professor Kadish has performed a noteworthy service in analyzing the very real relationships that exist between the criminal law and industrial discipline. I am sure that much of his analysis and some highly quotable material will appear in arbitrators' opinions for years to come. It is important that arbitrators and practitioners understand the ingredients of a discipline case. It is true that many of these ingredients are analogous and partially explainable in terms of the criminal law. But, it would be a grievous error to suppose that criminal law analysis is all that is necessary to analyze industrial discipline cases.

This is where I raise a sign of caution. Let no one take away from this meeting the impression that the Kadish paper provides all the analogy that is necessary between law, on the one hand, and industrial discipline, on the other, and I submit it wasn't intended to. If this report sharpens our thinking, it has performed a helpful service. But, if we gloss over the particulars and assume that because this comparative study was made the arbitrator's role in these cases can be completely defined in terms of criminal law, then we have taken a step backward. Mr. Kadish, himself, makes no claim that he has preempted the field. In his initial draft of this paper his introductory paragraphs made it clear that this was a comparative study and not a final blueprint for action. Other

scholars should follow the Kadish presentation with papers analogizing industrial discipline to tort laws involving negligence, to property law, and, most importantly, to contract law. Arbitration is a complicated field. A complete understanding of industrial discipline is not possible unless we have available tools from fields other than criminal law.

Let me make it clear that I am not criticizing Mr. Kadish. Nor am I criticizing him for limiting the scope of his paper to criminal law and industrial discipline as sanctioning systems. Indeed, that was his topic. His is a work that was well worth doing. In fact, my remarks are aimed at complementing his—his work is so magnificent that I am dreadfully afraid many of us will leave here saying—"Kadish gave us the word—that is all the analysis we need."

On behalf of management I raise my cautionary sign. If we go away from here believing we have heard all we need to know on the relationship between criminal law and plant discipline, we are probably right. But we do not, I repeat, do not, have all we need to solve discipline problems. We also need in our portfolios studies of the relationships to the other fields of law that I mentioned—tort law, property law, contract law. All of these are equally meaningful to a proper understanding of industrial discipline.

I cry "halt" on behalf of management because it is management that will suffer, and unjustifiably so, if you as arbitrators decide your discharge cases by using criminal law analysis alone. Naturally we all know the criminal law of the English-speaking world focuses on protecting the individual from punishment unless his guilt is proved beyond a reasonable doubt. But on behalf of management let me point out a preponderance of the evidence suffices to hold a man liable for his negligence. And the property law of ownership, which has historical "sacred cow" roots far deeper than our criminal law, gives a man the right to manage his property as he sees fit unless he has specifically contracted away his rights. And directly on point is the contract law of employment. Pennsylvania (my home state), and the majority of states in this country, hold as a matter of settled law that employment contracts are "at will." This means that unless there is a contract provision to the contrary, the employer may discharge an

employee as he sees fit. I would submit to you that this is the closest possible legal analogy to industrial discipline, and should be given some weight at least by arbitrators in determining "just cause" in discharge or discipline cases.

It is not my purpose to submit at this meeting a counter paper entitled "Property, Tort and Contract Law and Industrial Discipline." Nor can I say in good conscience that criminal law considerations are not extremely important in these cases. But I can say that there is more to a discharge case than criminal law analysis. If I were a union lawyer, I would always argue criminal law comparisons are all that are necessary. But I am not, and I consider it vitally important to the rights of management that I emphasize that other appropriate tools are available in handling discipline cases.

A careful reading of the Kadish paper indicates time after time that he recognizes areas in which the criminal law is not applicable. He is quite objective in comparing the two sanctioning systems. For example, he points out that "the rehabilitation ideal has no place in industrial punishment." I particularly like his quotation that "salvation is a duty for the church." I do not consider myself an unreconstructed mill owner of an earlier century, but I can tell you that the ever-increasing tendency on the part of arbitrators to mitigate all types of penalties is, at least in part, a subconscious urge to perform the "salvation" function—which, in my opinion, is really no part of an arbitrator's business.

It is at this same point that I have my only quarrel with the Kadish paper. In his conclusion he makes several broad statements concerning the right, indeed the duty, of arbitrators to mitigate punishment in order to "introduce rationality into the process of industrial discipline."

I think that this broad conclusion is beyond the scope of a paper that limits itself to comparing criminal law to industrial discipline. I do not think one can jump from an analysis considering only criminal law comparisons to explanations for arbitrators' final decisions. It is for this reason that I raised the cautionary cry.

Professor Kadish was magnificent in setting forth the requirements of notice, the permissible range of prohibited conduct,

the exclusion of the nonconforming, culpability, and the allocation of punishment. But again I submit one cannot go from a narrow comparative study to an all-embracing conclusion defining the role of the arbitrator. You as arbitrators would be negligent as individuals and would be ignoring fundamental contract rights if you would look solely to criminal law comparisons to define your role as arbitrators. Admittedly, there is much that makes sense in the conclusion re the role of the arbitrator in mitigation. Certainly the arbitrator has a duty to mitigate in some instances. My personal quarrel with mitigation is not that arbitrators do not have the power; my quarrel is rather one of degree. I am afraid that criminal law analysis will tend to create artificial standards that more and more see the arbitrator usurping management functions.

The paper talks of "economy of punishment." An arbitrator applying that standard, as opposed to some other standard, for instance, the standard of "clearly erroneous," would upset more and more management decisions. Managing authority would be weakened by this outside force inserting itself into the picture of industrial discipline with increasing frequency. It is certain that some part of the inefficiency of the Communist system, and to a lesser extent our own civil service system, is caused by the fact that it is almost impossible to discharge a poor worker. Is there any incentive to produce, is there any respect for authority when the worker knows he is insulated from discipline except for the most grievous sins?

There are certain portions of criminal law analysis which lead down the path to inefficiency—a path that this country cannot afford to take. For instance, at least twice in the Kadish paper discharge for negligence is equated with actions that cause "large possibilities of harm or loss," or is justified by "protecting the plant against destructiveness." Must we rise to this serious a standard of proof in order to sustain a discharge for incompetent work?

Similarly, consider the premise that it is the arbitrators' role to distinguish the "incompetent" from the man who "wilfully misbehaves" or is negligent. I am concerned with the condonation in awards reassigning the "innocently incompetent" employee to a job requiring less skill. Proof of fault in this area is

extremely difficult. Clearly there should be no further burden on the employer once it is demonstrated that an employee is unsatisfactory. I do not agree that the criminal law equation—that you do not punish the insane—is a valid one.

This paper does a great deal to analyze and to further clarify many of the ingredients of the opinions and arguments that are foundation stones of discipline cases. It has similarly pointed out the fallacies in some areas of our thinking. For instance, I traditionally have resisted any publication of work rules with a fixed schedule of warnings and penalties. I always realized fixed schedules would destroy management flexibility. My answer to the union on this point used to be "no," but now I know what my supporting argument is—in the words of Sanford Kadish—"it is as unjust to treat different cases alike as it is to treat like cases differently." This is wonderful prose and sound thinking.

On this same point I noted with interest his historical analysis of criminal law and the current approach of the age of "individualization." This is important for industrial discipline as well. It highlights the fact that "past practice" is not a cliché answer that can be used to decide discipline cases. Moreover, I agree with his further thought that an employee does not receive proper notice if enforcement is not consistent, and that there is merit in "assuring equal treatment for like cases." In walking this fine line between "individualization" and "consistency" the arbitrator has a much more difficult role than in most contract interpretation cases. Furthermore, in these cases the arbitrator must resist the tendency to overmanage in his role or there will result a continuous snowballing of mitigation decisions cutting the heart out of plant discipline, morale, and efficiency.

Of particular interest to me was the analysis of the legitimate area of employer concern—what conduct can be punished? Naturally, if the offense is of the type that an arbitrator determines is none of the employer's concern, then discipline is wrong whether the man involved is guilty or innocent. But if the crime is a heinous one, I do not believe that the question of discharge should depend on the result of the criminal trial. Legal technicalities, the requirement of proof of guilt beyond a reasonable doubt, political pressures, if you will, all have an influence on the outcome of a criminal proceeding. These should have no place in

arbitration. Let the offender be tried in each forum, under the rules and procedures of each, and completely independent of the other.

Discussion—

BERTRAM DIAMOND *

Professor Kadish's comparative survey of industrial discipline and criminal law affords valuable insights and analogies. However, as he recognizes, to identify both institutions as sanctioning systems marks the beginning of wisdom, not its culmination, a starting point for inquiry rather than its finish.

We are presented with a classical view of criminal law and industrial discipline seemingly expressed in terms of a single principle—deterrence. Admittedly, however, such systems may have other goals as well; for example, retribution, rehabilitation, reform, or dramatic affirmation of the moral norms of a social group.

The hard task of the arbitrator in assessing industrial discipline does not only entail functions like those of judge, jury, and court of review for administrative agency decisions. In larger measure than the others mentioned, the arbitrator's responsibility calls for exercise of the art of articulating or formulating *just* rules—a function that may be described as law-making—within the framework established by agreement of the parties.

True, the arbitrator appears after the employer has exacted discipline and such discipline, together with the rule it represents, forms the subject matter of the arbitrator's problem. To the extent that the arbitrator sets aside discipline because the rule on which it was based is improper, he adopts a rule-making role even though his action is negative in form. Not infrequently arbitral approval of discipline is accompanied by recasting or modification of the underlying rule. The process of adjudication by arbitrators thus involves evaluation of existing rules of discipline in order to determine whether and to what extent they are just. In so far as such rules are found to be unjust the arbitrator in effect revises them or promulgates different rules.

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Proper fulfillment of this role demands that the decision-maker know the full range of divergent and sometimes conflicting ends attributable to a sanctioning system.

In discussing the problem of criminal responsibility one writer observed:

> Is the function of such [penal] law the reform of the accused? Or is it to offer warning to others? Is it simply revenge? Or is it, as Tarde thought, the more subtle function of serving as a moral drama to impress a certain code of conduct not simply upon the accused, but even more upon the minds of judge, jury, and law maker, and the public, whose agents these chief actors are? Which of these ends we accept as sound will clearly have some effect upon the question of whether a given class of persons is to be deemed sane or insane in the eyes of the law.[1]

The same questions are equally relevant to other fundamental problems common to penal law and industrial discipline. For instance, Professor Kadish summarily rejects the notion that rehabilitation has a place in the system of industrial punishment. However, take the case of the chronic alcoholic with long service who has been discharged for being at work while under the influence of liquor. Assume that just before the alleged offense the employee had prematurely returned from the hospital where he was confined for alcoholism. At the time of the hearing he was undergoing further treatment in a local clinic. Prognosis: good. Would it be unreasonable for an arbitrator to award that the employee should be placed on leave of absence for sickness, as authorized by the contract, to be reinstated upon proper medical certification of fitness to return to work? Certainly, the employer need not furnish the medical treatment, although some do, but may not such an award be appropriate and if rendered, as one was in a similar situation, should it be classified as an instance of deterrence rather than rehabilitation? Or shall we dispose of the problem by calling it non-disciplinary?

Let us turn to an area that Professor Kadish touched upon rather lightly. Where do the rules of industrial conduct come from and how are they validated? To speak of *mala in se* and *mala prohibita* is not very informative; one group's *in se* may be another's *prohibita.* From Professor Kadish's presentation one might gain the impression that it is a simple process to find and

[1] F. S. Cohen, *The Legal Conscience* (1960), p. 27.

review the content of disciplinary rules as distinguished from their application. The industrial community is portrayed as unitary in nature. The employer makes the rules. The limits of his rule-making power are defined by "the nature of the enterprise—an efficient and profitable operation." "The very effectiveness of industrial punishment in coercing compliance," says Professor Kadish, "is not viewed as a limitation on its use so long as the behavior regulated has justifiable relevance to the needs of the enterprise." Professor Kadish also mentions other limitations—those "set by the human and contractual claims of the workers and the union." Even with this added qualification I find his analysis of the range of prohibited conduct in industrial life to be incomplete.

As Professor Kadish acknowledges, the arbitrator's charter is the "just cause" requirement of the contract between an employer and a union. Normally the parties do not mutually establish a code of plant conduct, although occasionally they do. While it is the employer who ordinarily lays down rules of conduct for employees, either in advance of punishment or by inflicting it, a plant is not necessarily a homogeneous community. It consists of various sub-groups that may have divers norms of conduct. How do managerial norms develop, to what extent do they reflect the norms of sub-groups in the plant, industry or community, and to what extent do they diverge therefrom? Managerial norms do not depend for their authority upon consensus, but study of the manner in which they come into being and are reinforced or opposed by the values found in and around the plant would help in understanding how industrial discipline actually operates.

The job of the arbitrator is to scrutinize the norms employed by management. For this purpose he is obliged to do more than merely consider the economic or technological needs of the business. His charter must fairly be read as requiring that he must also safeguard the interests of employees as individuals, as participants in an enterprise in which they, too, have a stake, and for which they have acquired useful skills, and as members or representatives of a union. The mandate is for *justice.*

At the start of the Industrial Revolution in eighteenth century England employers, dealing with workers who had previously been their own masters, were "anxious . . . to control their every

move." [2] Bendix cites the study entitled *The Town Labourer* (1925) by the Hammonds, historians of the period, as source for the following example:

> In one spinning factory the doors were locked during working hours; it was prohibited to drink water despite the prevailing heat; and fines were imposed on such misdemeanors as leaving a window open, being dirty, washing one's self, whistling, putting the light out too soon or not soon enough, being found in the wrong place, and so on.

"Under these conditions," Bendix states, "it is not surprising that employers frequently hired women and children, whom they could discipline more readily than men." [3]

Of course, values have altered since that time. The point is that one expression of this change is the growth of unions and the demand of workers for protection against oppressive or arbitrary disciplinary practices, protection which takes the form of a contractual safeguard that discipline must be "just."

"Just cause" has therefore an important substantive aspect, comparable to that of the constitutional guarantee of due process.

In the "Shuffling Sam" case, the Supreme Court set aside the conviction of a Louisville character whose only transgression consisted in frequenting a bar room where he beat time to juke box music with his feet.[4] Similarly, employees look to arbitrators to curb unconscionable discipline.

In formulating standards of justice the arbitrator may look to the plant community, the particular industry or industry in general, the larger society, or the opinions of other professional arbitrators. His duty, however, is to respect the contractual understandings of the parties, to give heed to the prevailing norms in the plant but, nevertheless, to cleave to what in his conscientious judgment are generally recognized standards of fairness and right. The needs of the business must be balanced against the interests of the employees, and to strike a proper balance it may be necessary to resort to norms that are found in the community at large. In fact, how an arbitrator views the needs of a particular business

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[2] Bendix, *Work and Authority in Industry* (2d ed. 1963), p. 39.

[3] *Ibid.*

[4] *Thompson* v. *City of Louisville*, 362 U.S. 19 (1960).

may be substantially affected by his concept of the kind of disciplinary system that should prevail.

Must an employee work overtime if he has a compelling personal excuse? Should a local union official be given leave of absence to attend a convention of his international union, where he may vote for officers of that union pursuant to the provisions of federal law? Does the union steward have a right to investigate grievances during working hours or to represent employees being questioned by management with a view toward possible disciplinary action? Should provocation be a defense to a charge of fighting in or near the plant? Where does shop talk end and punishable invective begin? These and a host of similar or related problems cannot be resolved properly by using either as a sole or primary determining factor the narrow needs of the business. An enterprise without a union is not the same as one with a union. Small shop society differs from that in a large plant. Employers themselves attempt to justify disciplinary action in the circumstances just mentioned in terms of overall reasonableness.

I doubt that today, A.B., after Birmingham, there are members of this Academy who would approve the firing of a Negro employee in the deep South for drinking at a racially segregated water fountain, if there still are any, regardless of the strength of the employer's defense grounded on an asserted need to maintain order and discipline. Here, dominant plant norms and alleged business needs must yield to more compelling considerations.

Does a public utility employee have a right to appear at a hearing of a regulatory commission to oppose his employer's request for a rate increase? Should the discharge of a union official be upheld where, in answer to public criticism by management, he published in the union newspaper a defense that was construed as an attack on the employer's product? *Quare,* if an arbitrator resolves such issues against the employee, do his decisions find their justification in the needs of the business, or would such results reflect a notion of retributive justice? I ask these questions to show that just cause comprises many variables of which the needs of a business form but one, and not necessarily the dominant one.

I indicated earlier that it is important to investigate the patterns, both actual and possible, of industrial bureaucracy. One

writer has classified them as "mock," "representative," and "punishment-centered," depending on whether rules are imposed from outside, by joint action of groups within the system, or by one group upon another within the system.[5] In each case the nature of the support for rules and the consequences of rule violations differ. To the extent that the "just cause" concept reflects a diffusion or sharing of power between groups in the area of discipline, it would appear desirable for arbitrators to aim at affirming a broad consensus of values within the industrial community. By their reasoning and the results they reach, arbitrators may help the parties achieve a consensus that would otherwise be unattainable. According to this view the arbitrator functions as a mutually designated agency for the review and validation of plant rules, thus increasing the chances of their acceptance by all groups within the plant. As such rules gain acceptability, the need for reliance upon negative deterrent sanctions decreases.

Just cause, as Professor Kadish notes, has a procedural as well as substantive side. On the procedural side, the comparative law approach raises the question whether for industrial discipline, as now in criminal law, an employee should not be free of compulsion, either during investigation of a possible infraction or in arbitration, to give evidence that might be used against him. Are employees entitled to protection against their employer's search of their persons or seizure of their private effects in the plant? These questions deserve serious consideration.

Realistically, in evaluating industrial disciplinary sanctions there must be taken into account the social stigma that attaches to discharge for reprehensible conduct such as theft, as well as such consequences as disqualification from unemployment compensation benefits and jeopardy to chances of finding other suitable employment. These discharges create the risk of "permanent exclusion from economic life," a penalty far more harsh than many exacted for violations of criminal law. Arbitrators have not hesitated to cite such circumstances as reasons for examining discharges of this sort with extreme care.

The incidence and effect of industrial sanctions ought not to be left to conjecture. Criminology has yielded much useful knowl-

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[5] Dubin, *The World of Work* (1958), pp. 216-7.

edge. Similarly, we ought to know how, in fact, industrial discipline works. Whom does it affect, how, and why? What are the consequences of arbitral intervention? To what extent do discharged employees who are reinstated by arbitrators perform satisfactorily thereafter? For these and similar questions, sound research is needed.

If the problems of dispensing industrial justice were easy, arbitrators could be replaced by computers. If all such problems could be resolved solely in terms of the needs of the business as expressed by one of the parties to the contract, we could dispense with the computers as well. As it is, the issues of discipline that parties refer to arbitrators are thorny and complex. Comparative study of criminal law and industrial discipline suggests the need for organized knowledge about industrial sanctions, as well as for development of principles of industrial discipline consonant with the ideals of American society. We are indebted to Professor Kadish for pointing to the areas of inquiry that lie ahead.