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Arbitral Practice and Purpose in Employee Off-Duty Misconduct Cases

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NOTE

Arbitral Practice and Purpose in Employee Off-Duty Misconduct Cases*

Researchers have addressed the influence of several variables on arbitration decisions with different degrees of empirical support.[1] Few attempts have been made, however, to empirically identify the determinants of arbitral decisions with regard to specific types of cases. This Note takes a first step toward eliminating this deficiency by considering the influences on arbitral decisions in cases dealing with employee off-duty misconduct.

The primary focus of Part I is the following: Under what circumstances will arbitrators allow employers to discipline employees for their off-duty behavior? This section first discusses those variables that industrial relations researchers—and arbitrators—have discursively identified as important to the arbitrator's decision in off-duty misconduct cases. It then empirically tests the influence of those variables on the arbitrator's award. The results indicate that industrial relations literature paints an incomplete picture as to what types of evidence arbitrators find persuasive in these cases.

Part II of this Note asks whether arbitrators are persuaded by another factor: criminal court decisions dealing with the employee's off-duty behavior. This section will show that arbitrators find important how the criminal law has resolved any formal charges against the employees. Finally, this Note argues that arbitrators should ignore the criminal resolutions altogether because the arbitral and criminal forums have different standards of proof, purposes, and overall concerns.

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1 *See, e.g.*, Nels E. Nelson & Earl M. Curry, Jr., *Arbitrator Characteristics and Arbitral Decisions*, 20 INDUS. REL. 312 (1981) (finding that age and arbitrator experience are significant predictors of arbitral decisions); Marlise McCammon & John L. Cotton, *Arbitral Decisions in Subcontracting Disputes*, 29 INDUS. REL. 135 (1990) (finding that the denial of a subcontracting grievance was more likely when the arbitrator found that actions taken by management were neither unreasonable nor arbitrary); Robert J. Thornton & Perry A. Zirkel, *The Consistency and Predictability of Grievance Arbitration Awards*, 43 INDUS. & LAB. REL. REV. 294 (1990) (finding absence of arbitral consistency).

I. ARBITRAL CRITERIA IN OFF-DUTY MISCONDUCT CASES

> 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.[2]

The world of labor-management relations faces the same concern confronted by Kadish. What conduct belongs strictly to the individual workers, and what may be legitimately policed by employers?[3] Is a worker's recreational drug use any of the employer's business? Or child molestation by the employee? Clearly, as this Note will indicate, many employers think so. But on what grounds do arbitrators agree?

The general rule among arbitrators is as one might expect: what employees do on their own time is their own business.[4] While such a rule may be explained on grounds of privacy, it is also a function of the parties' contractual relationship. Arbitrator Bard explains that the terms of the parties' contract—their collective bargaining agreement—limits the employer's discretion in these cases. "Not merely because an individual has been adjudged guilty of some sort of moral or criminal malfeasance do his rights as a citizen become abrogated; nor are his rights under contract thereby nullified."[5] Where the contract includes no mention of discipline for off-duty misconduct, then, employers must justify their disciplinary decisions in arbitration on non-contractual grounds.

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2 Sanford Kadish, *The Criminal Law and Industrial Discipline as Sanctioning Systems: Some Comparative Observations, in* LABOR ARBITRATION—PERSPECTIVES AND PROBLEMS 131, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators (Mark L. Kahn, ed., 1964).

3 *See id.*

4 Marvin F. Hill, Jr. & Mark L. Kahn, *Discipline and Discharge for Off-Duty Misconduct: What are the Arbitral Standards? in* ARBITRATION 1986: CURRENT AND EXPANDING ROLES 121, 124, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators (1986) (citing Chicago Pneumatic Tool Co., 38 Lab. Arb. (BNA) 891 (1961) (Duff, Arb.)).

5 City of New Hope v. International Union of Operating Eng'rs Local 49, 89 Lab. Arb. (BNA) 427, 430 (1987) (Bard, Arb.).

In some instances, the employer has explicitly bargained for the right to oversee the off-duty behavior of its employees. For example, a bargaining agreement may state that a "violation of criminal law"[6] or "a conviction of a felony involving honesty, death other than negligent homicide, morals, drugs, or narcotics"[7] is grounds for dismissal. Other agreements are far more expansive and may surrender jurisdiction to the company over any "conduct which violates the common decency or morality of the community."[8]

Still, the existence of a rule or contractual provision hardly means that discipline for off-duty misconduct is non-arbitrable: "the reasonableness of such a rule and the merits of its special application are subject to challenge before the arbitrator."[9]

A. Arbitral Standards: In Search of A "Nexus"

The question quickly becomes the standards that arbitrators apply in evaluating discipline for an employee's off-duty conduct. Arbitrator Bard summarized the general standard as follows: "The right of management to discharge or suspend an employee for conduct away from his or her place of employment depends entirely upon the impact of that conduct upon the employer's operations."[10] The test used by Arbitrator Bard is often referred to as the "nexus test," or the "nexus requirement."[11] Under this test, arbitrators examine the relationship or connection—*i.e.*, the nexus—between the conduct and the employer's business. If the off-duty conduct had no adverse effect on the employer's business, no nexus exists and the company's discipline—often discharge of the employee—is presumptively invalid.[12]

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6 Cities Serv. Oil Co., 41 Lab. Arb. (BNA) 1091, 1093 (1963) (Oppenheim, Arb.). The bargaining agreement explained the rule as necessary for the parties' "mutual protection": "There are times when individuals do things or neglect to do things which are not fair to themselves, to other employees, or to the Company." *Id.*

7 Nugent Sand Co. v. Teamsters, 71 Lab. Arb. (BNA) 585 (1978) (Kanner, Arb.).

8 Standard Oil Co. v. Oil, Chemical, & Atomic Workers' Int'l Union, 89 Lab. Arb. (BNA) 1155, 1156 (1987) (Feldman, Arb.).

9 Hill & Kahn, *supra* note 4, at 124.

10 City of New Hope v. International Union of Operating Eng'rs Local 49, 89 Lab. Arb. (BNA) 427, 430 (citing FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 658 (1984)).

11 Hill & Kahn, *supra* note 4, at 124.

12 *Id.* at 154. In addition to being an arbitral standard, the nexus requirement also exists as both a judicial standard and a codified statutory standard. In upholding discipline for off-duty misconduct, courts routinely inquire as to the nexus, or connection,

The nexus may assume a variety of forms. For example, the conduct may have adversely affected the company's business or reputation, or the employee's own ability to perform his job.[13]

1. Injury to the Company's Reputation

Damage to a company's reputation is particularly difficult to establish. In large part, the arbitrator can rely only on his intuition. Hill and Kahn described the arbitrator's challenge:

> To determine whether an employee's conduct has injured the company's reputation presents a highly subjective issue, of course, in the absence of any objective measurement of actual harm. To the extent that the off-duty misconduct is reported in the press and the grievant is identified as an employee of the company, the case for discipline or discharge is strengthened, especially if the misconduct involved a serious crime.[14]

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between the conduct and the employee's work or the company's business. *See, e.g.*, Phillips v. Bergland, 586 F.2d 1007 (4th Cir. 1978); Young v. Hampton, 568 F.2d 1253 (7th Cir. 1977); Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969). The Seventh Circuit even introduced the "presumptive nexus" concept for cases where the employee's conduct is "egregious" and the presumption is not rebutted. *See Young*, 568 F.2d at 1257.

The argument in favor of the presumptive nexus doctrine is that some conduct simply speaks for itself in affecting the employee's ability to perform a job or the company's reputation. Such cases might include drug use, sexual assault, or child abuse. The federal courts of appeal are split on the presumptive nexus doctrine. The D.C. Circuit, as well as the Second, Fourth, Seventh, and Eleventh Circuits, have adopted the doctrine. *See* Bosari v. FAA, 699 F.2d 106, 112 (2d Cir. 1983); Boylan v. United States Postal Serv., 704 F.2d 573, 576 (11th Cir. 1983); Cosey v. Department of the Navy, 689 F.2d 470 (4th Cir. 1982); Wild v. Department of Hous. and Urban Dev., 692 F.2d 1129, 1133 (7th Cir. 1982); Yacovone v. Bolger, 645 F.2d 1028, 1032 (D.C. Cir. 1981). The Fifth and Ninth Circuits have rejected the presumptive nexus doctrine. *See* McClaskey v. Department of Energy, 720 F.2d 583, 589 (9th Cir. 1983); Bonet v. United States Postal Serv., 661 F.2d 1071, 1076-77 (5th Cir. 1981). For the Fifth Circuit, even a postal employee's indecency with a child failed to establish a presumptive nexus.

The nexus requirement is a statutory standard under the Civil Service Reform Act of 1978, 92 Stat. 1111 (1978) (codified as amended in titles 5, 10, 15, 28, 31, 39, and 42 U.S.C. (1988)). The Merit Systems Protection Board (MSPB), an appellate agency designed to hear federal employee appeals of disciplinary actions, is also subject to the nexus requirement. *See* Neal Miller, *Criminal Convictions, "Off-Duty Misconduct," and Federal Employment: The Need for Better Definition of the Basis for Disciplinary Action*, 39 AM. U. L. REV. 869 (1990).

13 *See* Indiana Bell Tel. Co. v. Communications Workers of Am., 99 Lab. Arb. (BNA) 756, 761 (1991) (Goldstein, Arb.). Additionally, the nexus requirement may be described as the relationship between the employee's off-duty conduct and his job requirements, or the effect of the misconduct on the business as a whole. *See* Miller, *supra* note 12, at 869.

14 Hill & Kahn, *supra* note 4, at 128.

As Hill and Kahn suggest, several arbitrators infer injury to the company's reputation from publicity of the employee's conduct. Arbitrator Nelson demonstrated such inferential analysis in a National Railroad Adjustment Board (NRAB) decision:

> Undoubtedly, an article announcing the Claimant's felonious activity and subsequent conviction which appeared in the November 3, 1984 edition of the Pine Bluff Commercial was read by many readers who were aware the Claimant was an employe of the Carrier. It was not, therefore, unreasonable for the Carrier to conclude that the Claimant's misconduct and the resulting publicity had subjected the Carrier to criticism and loss of good will.[15]

Similarly, in another NRAB decision, Arbitrator Roukis wrote that the employee had brought "unmistakable discredit to his employer" because his assault "was reported in the media (newspaper and television) and claimant was named as a Southern Railway employe."[16] Finally, reputational damage may even be inferred from the nature of the conduct itself.[17]

2. Effect on Employee's Ability to Perform His Job

A second way in which an arbitrator may find a nexus relates not to the impact of the employee's off-duty conduct on the employer, but rather involves the relationship between the conduct and the employee's job duties. A nexus exists where the content of the conduct is closely related to the grievant's responsibilities. Arbitrator Riker described this form of the nexus variable as follows:

> It would be appropriate (where proof exists) to discipline or dismiss a security officer who commits acts of theft because his duties are directly related to stopping theft and apprehending thieves. Conversely, an employee not assigned to operate a vehicle, whose license is suspended for off-duty excessive speeding could not be properly charged with discipline for said

15 St. Louis Southwestern Railway Co., National Railroad Adjustment Board Second Division, No. 11253 (1987) (Nelson, Arb.) (upholding discharge of worker convicted of drug possession with intent to deliver).

16 Southern Railway Co. v. Brotherhood of Railway, Airline Employes, National Railroad Adjustment Board Third Division, No. 21957 (1978) (Roukis, Arb.).

17 *See, e.g.*, Martin-Marietta Aero. v. United Auto., Aero. & Agric. Implement Workers of Am. Local 738, 81 Lab. Arb. (BNA) 695 (1983) (Aronin, Arb.) (sale of cocaine caused damage to company's reputation).

misconduct.[18]

Other arbitrators have found a clear nexus where an ambulance corpsman was accused of possession and sale of cocaine[19] and where an off-duty truck driver was charged with driving while intoxicated.[20] However, a clear nexus was found lacking in a 1983 arbitration decided by Arbitrator Lubic.[21] In *SSA*, the grievant, a clerk in the state Office of Disability Operations, pleaded guilty to illegal sexual activity with a minor. Arbitrator Lubic held that the grievant's sexual offense did not pose a threat to minors with whom he worked. Arbitrator Lubic noted that "[t]he fact that [the grievant] has made sexual advances to minors does not necessarily imply that he would while on duty attempt to engage in similar activities with disabled employees or student aides, especially since nothing even slightly similar to this has occurred over the past eight years."[22]

B. Broadening the Nexus Test

As discussed above, the nexus test may be satisfied by showing either injury to the company's reputation, or, alternatively, a strong relationship between the employee's misconduct and his job duties. Additionally, the employer may satisfy the nexus test in two other ways, each of which focuses on the impact of the grievant's reinstatement on the employer: (1) showing that there would *likely* be an adverse impact on other employees or on the orderly operation of the business if the grievant were reinstated, or (2) showing that the company would *likely* incur reputational damage if the grievant were reinstated. While the first of these methods—adverse impact of reinstatement—has support in industrial relations literature,[23] the second method has remained relatively unexplored.[24]

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18 San Francisco Sheriff's Dept., 90 Lab. Arb. (BNA) 155, 157 (1987) (Riker, Arb.) (citing ELKOURI & ELKOURI, *supra* note 10, at 658 and upholding discharge of police sergeant accused of homosexual pandering and possession of marijuana).

19 Personnel Review Bd. of N.Y. City Health & Hosps. Corp., 76 Lab. Arb. (BNA) 387, 390 (1981) (Simons, Arb.) ("[P]ossession by hospital employees of controlled substances for the purpose of sale, and sale of drugs, both on- and off-duty and off-premises, are *ipso facto* dischargeable offenses.").

20 Pfeiffer Brewing Co., 26 Lab. Arb. (BNA) 570 (1956) (Ryder, Arb.).

21 Social Security Admin. (SSA) v. American Fed'n of Gov't. Employees, 80 Lab. Arb. (BNA) 725 (1983) (Lubic, Arb.).

22 *Id.* at 728-29.

23 Hill & Kahn, *supra* note 4, at 133.

24 Hill and Kahn discuss this method, but in the context of "brutal crimes." *Id.* at

1. Likely Adverse Impact of Reinstatement on Employees

There are two ways in which an employer may support an argument that the grievant's reinstatement would likely have an adverse impact on his co-workers. The first method involves documenting the objections of the grievant's co-workers toward his reinstatement.[25] Where the employer is able to produce such evidence, the arbitrator is more likely to find that reinstatement "could well impact on employee morale and efficiency at work."[26]

At the same time, the union may convince the arbitrator that reinstatement would cause no interference with morale and no interruption of operations. For example, in *Hughes Air Corp. v. Association of Flight Attendants*,[27] Arbitrator Barsamian overturned a company's discharge of a grievant in part because his co-workers testified on his behalf. There, the company discharged a flight attendant for making a homosexual approach to a minor. Arbitrator Barsamian noted that the offense had little effect on his co-workers:

> Absolutely no record evidence exists that any employee of the Company has refused to work with Grievant in consequence of the . . . incident, or has expressed a reluctance to work with him. On the contrary, his Union presented a number of witnesses, substantially all of whom were fellow employees, who testified in Grievant's behalf.[28]

A second approach in establishing a likely adverse impact involves the argument that the grievant's reinstatement would pose a threat to the safety of other workers. For example, in *Common-*

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128. "The *potential* for adverse public opinion may be deemed sufficient to warrant a dismissal even without an objective showing that the company's reputation has been affected." *Id.*

25 Arbitrator Nolan stated: "[F]irm evidence that the employee would not be able to work with his former co-workers will satisfy the nexus requirement." United States Postal Serv. v. National Ass'n. of Letter Carriers, 89 Lab. Arb. (BNA) 495, 500 (1987) (citing Bonet v. United States Postal Serv., 712 F.2d 213 (5th Cir. 1983), a case wherein "the employer submitted affidavits from five subordinates of the plaintiff stating that they could no longer work effectively for him. A majority of the court found this substantial evidence of the required nexus.").

26 Zenith Electronics Corp., 88 Lab. Arb. (BNA) 157, 160 (1986) (Doering, Arb.) (upholding three-day suspension of employee for fighting with a union steward in front of coworkers at a tavern near place of work).

27 73 Lab. Arb. (BNA) 148 (1979).

28 *Id.* at 158.

wealth of Pennsylvania,[29] Arbitrator Stonehouse heard a high-profile case of a liquor store clerk's brutal off-duty conduct. "[O]n a downtown street in Pittsburgh, Pennsylvania, during an altercation with his wife, the grievant beat [to death] a bystander, one Marguerite Lingenfelter, who was 71 years of age. According to the news media, Miss Lingenfelter had asked him to stop beating his wife."[30] Arbitrator Stonehouse found just cause for the grievant's discharge in the danger he posed to others: "Certainly the widely publicized assault by the grievant upon an elderly woman would tend to create feelings of danger and fear among the grievant's fellow employees and hesitancy among customers to enter the store and deal with him."[31]

2. Likely Damage to Employer's Reputation if Grievant Reinstated

A final, and relatively unresearched, way in which the company may satisfy the nexus test again involves damage to its reputation. However, in this context, the damage cannot be proven, only predicted. The company argues that the grievant's reinstatement would *likely* cause damage to its goodwill, or reputation, and that it simply cannot afford the risk of re-employing the grievant. Hill and Kahn mentioned such speculative reputational damage in the context of "brutal crimes such as murder or sexual assault": "The *potential* for adverse public opinion may be deemed sufficient to warrant a dismissal even without an objective showing that the company's reputation has been affected."[32]

This Note will establish that this conception of the nexus test is not limited to notorious or violent offenses; the argument of *likely* reputational damage is also available to employers faced with less serious crimes. For example, Arbitrator LaManna ruled in a 1985 case that "[t]he smoking of marijuana by an off-duty Corrections Officer and Peace Officer in the presence of minors on more than one occasion is an action of sufficient severity, *likely* to bring considerable discredit on the Employer, to warrant discharge on its own."[33] Similarly, Arbitrator Stouffer found that the company was justified in discharging a grievant charged with indecen-

29 65 Lab. Arb. (BNA) 280 (1975) (Stonehouse, Arb.).

30 *Id.* at 281.

31 *Id.* at 282.

32 Hill & Kahn, *supra* note 4, at 128.

33 N.Y. State Dep't of Corrections, 86 Lab. Arb. (BNA) 793, 797 (1985) (LaManna, Arb.) (emphasis added).

cy.[34] The Arbitrator agreed with the company that reinstatement could have a "detrimental effect"[35] on its reputation and "*might reasonably be expected* to affect the employer's affairs."[36]

It should be noted that this conception of the nexus test—likely damage to the company's reputation or image—does not garner universal support among arbitrators. Though a significant factor in arbitral decisions,[37] some arbitrators reject it as altogether too speculative. In a case where the grievant pleaded guilty to delivery of a controlled substance, Arbitrator LaCugna held that the company had "failed to adduce hard, specific, and compelling evidence to show the Grievant's act did actually and adversely affect the Company."[38] Company statements such as "continued employment would be damaging to the Employer's reputation" were too hypothetical to factor into the Arbitrator's decision.[39]

C. *Testing the Nexus Definitions*

Support for the proposition that arbitrators require a nexus in off-duty misconduct cases has largely been anecdotal rather than empirical.[40] Four separate conceptualizations of the nexus requirement were discussed above. The purpose of this section is to empirically test, for the first time, their influence on arbitral decisions in off-duty misconduct cases.

The effect of the off-duty conduct on the company's reputation, or on the grievant's ability to perform his job, represent traditional conceptualizations of the nexus requirement.[41] As discussed above, Hill and Kahn offer two additional considerations for the arbitrator, both of which are forward-looking: (1) whether reinstatement would *likely* cause injury to the company's reputation,[42] and (2) whether reinstatement would adversely affect the

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34 Tibbetts Plumbing-Heating Co. v. Teamsters, 46 Lab. Arb. (BNA) 124 (1966) (Stouffer, Arb.).

35 *Id.* at 125.

36 *Id.* at 127 (emphasis added).

37 *See infra* Part I.C.

38 Italco Aluminum Corp., 68 Lab. Arb. (BNA) 66 (1977) (LaCugna, Arb.).

39 *Id; see also* Raytheon Co. v. International Bhd. Elec. Workers Local 1505, 66 Lab. Arb. (BNA) 677, 677 (1976) (Turkus, Arb.) ("Mere surmise, conjecture or speculation as to the adverse effect upon its operations or its business because of the nature per se of the alleged misconduct is insufficient.").

40 *See, e.g.*, Hill & Kahn, *supra* note 4, at 124.

41 *Id.* at 124-26.

42 *Id.* at 128.

morale or safety of the grievant's co-workers.[43] Thus, the four elements of the nexus requirement may be set out as follows:

1. There is a strong relationship between the employee's off-duty conduct and his job requirements ("strong relationship");
2. The Company suffered actual reputational damage as a result of the Grievant's conduct ("actual reputational damage").

The nexus requirement, as set forth above, may also be described in speculative, prospective terms:

3. The Company *would likely* incur reputational damage if the Grievant were reinstated ("likely" or "possible reputational damage");
4. There *would likely* be an adverse impact on other employees or on the orderly operation of the business if the Grievant were reinstated ("likely" or "possible adverse impact").

1. The Dataset

The dataset used in this section consists of 125 labor arbitration cases involving discipline for alleged employee off-duty misconduct. The vast majority of the cases were extracted from Labor Arbitration Reports (volumes 35 through 94), a Bureau of National Affairs' publication which publishes complete arbitral decisions. Other sources included unpublished arbitration decisions obtained from arbitrators and from the American Association of Arbitrators. In order to avoid arbitral bias, no arbitrator was used more than once.

The industries represented in this dataset are diverse and include, but are not limited to, steel, railroad, oil, transportation, financial, and retail. Off-duty conduct which companies found actionable included assault and battery, murder, rape, molestation, drug possession or drug trafficking, fraud and burglary.

The "nexus" test was defined to include any of the four elements set forth above. The purpose of the dataset was to determine the importance of each of the elements to the arbitrator's decision in off-duty misconduct cases.[44]

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43 *Id.* at 133-35.

44 Non-linear logit estimation was used to determine the effect of the nexus elements on the dependent variable, the arbitral outcome. The dependent variable in this

2. A Nexus Variable with Many Influential Dimensions

The results indicate that the nexus requirement is multi-dimensional.[45] The traditional nexus definition, *i.e.* a "strong relationship" between the off-duty misconduct and the employee's job requirements, had a significant impact on the arbitrator's decision.[46] More revealing, other conceptions of the nexus requirement enjoyed as much or more influence as the traditional nexus definition.[47] The possible reputational damage and possible adverse impact arguments are future-based but highly influential nevertheless.[48] This is likely a conscious recognition on the arbitrator's part that the employer's interests should not be limited to the tangible, immediate effects of employee off-duty conduct.

The significance of the speculative, future-oriented elements of the nexus requirement indicates that arbitrators are interested not only in the nature of the grievant's offense, but also in the hypothetical effects of such an offense on the employer. Since the burden of proof lies with the company, it must surely be lessened by the influence enjoyed by these arguments. For company representatives in the arbitral process, the appeal of emphasizing the

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study is dichotomous, and was coded as a 0 if the grievance was denied in whole and a 1 if it was denied in part. If the arbitrator returned a discharged grievant to work but refused to consider him for backpay or lost benefits, or if the arbitrator reduced in length a disciplinary suspension, then the grievance was considered to have been denied in part. Grievances denied in whole contain no such provisions and upheld the company's discipline in its entirety. Of the 125 cases, 79 were denied in whole and 46 were denied in part.

The four nexus elements constituted independent variables. In order to control for quantum of discipline considerations, two additional dichotomous independent variables were included: (1) whether the grievant's offense was severe and (2) whether the grievant's work record was poor.

45 Each of the independent variables was statistically significant in estimating the arbitrator's outcome, and the majority were significant at the .01 level. The coefficients and asymptotic t-ratios (in parentheses) were: Constant, .723*** (3.85); (1) Strong Relationship, -.962** (2.07); (2) Actual reputational damage, -1.204*** (-2.66); (3) *Possible* reputational damage, -1.140** (-1.92); (4) *Possible* adverse impact, -1.976*** (-3.58); * significant at .10 level; ** significant at .05 level; *** significant at .01 level; one- or two-tailed test as appropriate.

46 The logit estimates indicate that an arbitrator is 7.5 times more likely to deny a grievance in whole rather than in part if a strong relationship between the employee's conduct and job requirements is observed.

47 The logit estimates indicate that the probability of reinstatement is .19 given actual reputational damage to the company. Interestingly, the probability of reinstatement given the possibility of future reputational damage is even less—.09.

48 When found together, the probability of reinstatement by the arbitrator is only .01.

future-based aspect of the nexus requirement lies in the fact that "possible reputational effect" and "possible adverse impact on coworkers" are concerns that cannot be proven, but can only be described as likely. The burden of proof may not rest upon the union, but it is affected as well: factual arguments may be refuted by revisiting the evidence in a case; speculative arguments, however, are more difficult to contest.

In most cases, the arbitrator considered the severity of the offense, along with the grievant's work record, to indicate the appropriate quantum of discipline. In eight cases, however, the arbitrator found a presumptive nexus through the severity of the misconduct. None of the employees involved in these cases were reinstated.

Hill and Kahn's prescription regarding the importance of the traditional nexus requirement[49] was confirmed through the dataset, as was the general expectation that arbitrators are swayed by evidence establishing the negative impact of the off-duty misconduct on the company. However, the results indicate that the nexus requirement has many elements and cannot be easily condensed. For example, arbitrators were swayed not only by any factual reputational damage incurred by the company, but also by any evidence that while such damage has yet to occur, it remains as a possibility.

The speculative conceptualizations of the nexus requirement were more influential when used in tandem. For example, when the arbitrator finds a nexus through possible reputational damage to the company, the probability that the grievant will be reinstated is .09. However, when this finding is coupled with a second speculative element—possible adverse impact on coworkers—the probability of reinstatement decreases to .01.

In general, the results confirm that the nexus test may be satisfied in many ways. The traditional nexus understanding emphasizes the strong relationship between the off-duty misconduct and the grievant's job requirements. For example, the case of a school bus driver convicted of using drugs while off-duty would satisfy this understanding of the nexus principle. However, the results indicate that arbitrators have broadened the nexus test. A nexus may be found in a number of other ways: by finding that the employee's misconduct has damaged the company's reputation, that reinstatement of the employee *would likely* cause damage

49 Hill & Kahn, *supra* note 4, at 124.

to the company's reputation, or that reinstatement *could* adversely affect co-workers' morale or safety.

II. THE INFLUENCE OF CRIMINAL COURT DECISIONS ON THE ARBITRATION OF OFF-DUTY MISCONDUCT CASES

Part I of this Note empirically examined the influence of the "nexus" variable—in its many forms—on the arbitrator's decision. Part I focused on the off-duty conduct of the employee and "the impact of that conduct upon the employer's operations."[50] Part II of this Note discusses those cases in which a court and an arbitrator have each evaluated the same conduct of a particular employee—*i.e.*, those cases requiring both criminal and industrial resolutions. For arbitrators, the question quickly becomes how much weight, if any, criminal law decisions should be given when passing on a grievant's discharge or suspension for off-duty misconduct. Is it important to arbitrators whether the court finds the grievant criminally liable for his conduct?

As Part I of this Note indicated, employers are very much concerned with the "private," off-duty activities of their employees. Part II will show that arbitrators find it important how the criminal law has resolved any formal charges against the employee. Finally, this Note argues that arbitrators should ignore the criminal resolutions altogether because the arbitral and criminal law forums have distinct purposes and advance vastly different concerns.

A. The Line Between Arbitration and the Courts

Harry Shulman, in his classic paper on reason, contract, and law in labor relations, wrote this on the tendency of parties to the collective bargaining relationship to involve external law in resolving disputes:

> The arbitration award is an integral part of the system of self government . . . . The courts cannot, by occasional sporadic decision, restore the parties' continuing relationship; and their intervention in such cases may seriously affect the going systems of self-government. When their autonomous system breaks down, might not the parties better be left to the usual methods for adjustment of labor disputes rather than to court actions

50 City of New Hope v. International Union of Operating Eng'rs Local 49, 89 Lab. Arb. (BNA) 427, 430 (1987) (Bard, Arb.).

on the contract or on the arbitration award?[51]

The separation between the courts and arbitration to which Shulman refers is grounded as much in practicality as it is in philosophy. Labor arbitration exists as a specialized form of dispute resolution, and neither the courts of today nor scholars such as Shulman would suggest that the judicial process is a more desirable one in which to resolve union-management disputes. Indeed, the Supreme Court has often affirmed the principle that parties to a collective bargaining agreement must accept an arbitrator's interpretation of the contract over a court's and that a reviewing court could not reject such an interpretation simply on the grounds that it disagreed.[52]

For parties feeling wronged by an arbitrator's ruling, the Supreme Court has established some direction as to when cause for judicial review is *absent.* Arbitral immunity,[53] while hardly absolute, is likely to be unchallenged by the courts so long as an arbitration award "draws its essence" from the language of the bargaining agreement.[54] The distinction between arbitral and judicial responsibility is further defined by the fact that legal doctrines such as stare decisis, res judicata, and collateral estoppel are generally not considered binding on arbitrators.[55]

Of course, arbitration and the courts cannot be considered mutually exclusive. Arbitrators rule on issues involving double jurisdiction where both they and the courts are forced to interpret or apply contractual language. For example, arbitrators may, as Feller noted, interpret a seniority provision "inserted into a collective bargaining agreement as a result of a Title VII decree [and] under which the court retains jurisdiction."[56] Still, cases wherein

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51 Harry Shulman, *Reason, Contract, and Law in Labor Relations,* 68 HARV. L. REV. 1024 (1955).

52 United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36 (1987) ("The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract."); *see also* Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596-97 (1960) (the arbitral award is legitimate if it "draws its essence from the collective bargaining agreement" and is not merely the arbitrator's "own brand of industrial justice").

53 For an excellent discussion of arbitral immunity, see Dennis Nolan & Roger I. Abrams, *Arbitral Immunity,* 11 INDUS. REL. L.J. 228 (1989).

54 United Steelworkers v. Enterprise Wheel & Car Co., 363 U.S. 593, 597 (1960).

55 Howard Block, *Decisional Thinking: West Coast Panel Report, in* DECISIONAL THINKING OF ARBITRATORS AND JUDGES 158, Proceedings of the 33rd Annual Meeting, National Academy of Arbitrators (J.L. Stern & B.D. Dennis eds., 1981).

56 David E. Feller, *Arbitration: The Days of Its Glory are Numbered,* 2 INDUS. REL. L.J. 97 (1977).

both arbitration and the courts must resolve identical disputes generally represent the exception.

1. Rulings in Non-Arbitral Forums as a Source of Evidence in Arbitration

Arbitrators disagree with respect to the appropriateness of using legal conclusions drawn from non-arbitral forums in framing decisions in an arbitration case. Prior rulings by administrative agencies may well be disregarded by arbitrators as beyond the "four corners of the contract." What this Note will establish, however, is that arbitrators do in some cases give weight to rulings coming from other legal forums and then treat such rulings as evidence.

The arbitral rule of thumb is that the evidentiary weight accorded non-arbitral rulings is determined by the authority of the agency making the ruling.[57] Likewise, arbitrators have looked to statutory law for guidance in framing conclusions in cases which bring them beyond the four corners of the contract. For example, arbitrators have concluded that statutory requirements or guidance dealing with returning veterans, national security issues and so on must be evidentiary considerations.[58]

But what of court decisions dealing with the same issue before the arbitrator? In certain kinds of cases there exist parallel attempts to resolve the alleged inappropriateness of employee behavior. Cases dealing with off-duty behavior provide an example of this. Consider the case of an alleged violation by an employee of a state controlled-substance law. While that case is being processed by the courts, the employer may become aware of the employee's alleged actions and levy disciplinary actions.

If the typical steps of labor-management grievance resolution do not result in the employee's reinstatement, the employee may frequently bring the case to arbitration. In the interim, a determination is made by the court as to whether the employee violated the drug laws. The question then arises whether the arbitrator ought to use the decision by the courts in this type of case—or in any type of case for that matter—as evidence in framing an arbitral conclusion.

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57 *See generally* ELKOURI & ELKOURI, *supra* note 10, at 390.
58 *Id.* at 380.

2. Court Decisions As Evidence

Arbitral precedent clearly dictates that "[t]he arbitrator may choose to consider external law along with the collective agreement."[59] However, as a matter of practice, no universal guideline directs arbitrators in the use of court decisions as evidence. At present, the following general considerations exist: (1) Arbitrators generally feel constrained to follow court decisions of last resort issued by a state or the United States Supreme Court;[60] (2) Arbitrators generally feel less constrained, however, to honor lower court decisions.[61] At bottom, there is a strong tradition within the trade against according court decisions evidentiary weight:

> The standards of proof, the relevant policies at issue, the cast of judgment of the triers of fact, and the environment in which the respective hearings take place *are sufficiently different to warrant the conclusion that a decision in one tribunal should not bind the other* . . . .[62]

B. Do Court Decisions Matter? The Case of Off-Duty Misconduct

The primary purpose of this section is to test the hypothesis that arbitrators decide cases independent of the decisions of other tribunals. Specifically, the question is whether arbitrators, charged with deciding employee off-duty misconduct cases, treat collateral court decisions as relevant to their award. The dataset used in Part I was used for this analysis.

1. Court Decisions Matter

In an off-duty misconduct case, the arbitrator must resolve two issues: (1) Did the grievant do the act in question, and (2) If he did, what is the appropriate quantum of discipline?

What considerations should factor into the arbitrator's decision? Arbitral theory generally holds that the risk is not hearing enough relevant evidence, rather than in hearing too much, and

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59 *Id.* at 378.

60 *Id.* at 390 n.79.

61 *Id.* at 390 nn.80, 81.

62 MARVIN HILL, JR. & ANTHONY V. SINICROPI, EVIDENCE IN ARBITRATION 67 (1980) (emphasis added) (quoting *Report of the West Coast Tripartite Committee, in* PROBLEMS OF PROOF IN ARBITRATION 206, Proceedings of the 19th Annual Meeting, National Academy of Arbitrators (1967)). The Committee goes on to say that decisions from other tribunals "should [nevertheless] be admissible as relevant evidence." *Id.*

arbitrators usually cast a wide net of admissibility as a result.[63] However, as this Note argues, there are dangers to such a loose standard.

In approximately one-half (61 of 125) of the arbitration cases, the arbitrator explicitly referred to court decisions dealing with the misconduct under consideration by the arbitrator. In other words, the court decisions themselves became part of the arbitrators' evidentiary considerations.

Of the 61 arbitrators who referred to the court's decision, 35 (57%) appeared to be particularly influenced by that decision. The influence enjoyed by the court decisions was measured narrowly: in each of the 35 cases, the arbitrator explicitly stated that the court decision was significant. In 23 of the 35 cases, the arbitrator partially relied on the court verdict in deciding the merits of the case or whether enough proof was introduced in arbitration to assign guilt.[64] In 15 of the 35 cases, the arbitrator relied on the sentence imposed by the court in resolving the quantum, or quantity, of appropriate discipline issue.[65] Finally, in 3 of the 35 cases, the arbitrator at least partially relied on both the verdict and the subsequent sentence of the court in assigning guilt and discipline for the conduct.

2. Problems Posed by Relying on Criminal Court Decisions

The line which separates arbitration from the courts disappeared in this study. This disappearance carries with it four notable concerns.

(a) Burden of Proof.—The most serious concern may be that some arbitrators apply an inappropriate standard of evidence when resolving grievances. Schmertz states that "beyond a reasonable doubt is not a standard of proof in arbitration cases; that is the criminal standard."[66] If so, then criminal court verdicts would be

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63 Shulman, *supra* note 51, at 1024.

64 *See, e.g.*, Rohr Industries, 59 Lab. Arb. (BNA) 1298 (1972) (Rule, Arb.) (accepting judgment of the court, which dismissed arson charge against grievant); Continental Banking Co. v. Bakery, Confectionary and Tobacco Workers Int'l Union, 88 Lab. Arb. (BNA) 1142 (1987) (Gordon, Arb.) (finding that company had no obligation to reinstate grievant until she produced a court document announcing the court's dismissal of charges).

65 *See, e.g.*, Indian Head, Inc. v. Glass Bottle Blowers Ass'n, 71 Lab. Arb. (BNA) 83 (1978) (Rimer, Arb.) (finding it dispositive that Court put grievant on probation for drug possession and found him not guilty of drug trafficking).

66 Eric Schmertz, *Evidentiary Considerations, in* A PRIMER FOR ARBITRATORS 78 (1985).

inappropriate indications of a grievant's "guilt" in arbitration, as grievance arbitration applies a lesser standard of evidence. Others describe the arbitral standard for discharge cases as a standard between "preponderance" and "beyond a reasonable doubt," which is often referred to as a "clear and convincing" standard.[67]

If the courts and arbitrations apply disparate standards of evidence, then judicial verdicts of innocence may not necessarily imply similar arbitral decisions. In fact, arbitrators should plainly not import criminal acquittals or dismissals into the arbitral process.[68] An employee acquitted of drug use in a criminal courtroom may still be found guilty under a lesser standard in arbitration. The arbitrator who relies on the court's decision has forced the employer to fulfill a harsher burden of proof than is ordinarily expected.[69] Only guilty verdicts would seem to have any relevance to the arbitration: for example, an employee correctly found guilty

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67 It is well settled in arbitral jurisprudence "that the criminal law standards are not applicable in employment relations." Kansas City Area Transp. Auth., 82 Lab. Arb. (BNA) 409, 413 (1984) (Maniscalco, Arb.). The criminal law standard should not be required because there is a fundamental distinction between criminal proceedings and the arbitral forum: the former involves governmental action against individuals while the latter does not. Historically, proof beyond a reasonable doubt "was a political check upon [the] power of the government against individuals." Visiting Nurse Assoc., 86-1 (CCH) ¶ 8024, at 3099 (1985) (Askin, Arb.). Government sanctions go beyond depriving a worker of his livelihood and tarnishing his reputation within the community; they may also involve imprisonment and the deprivation of civil liberties. Since the criminal and arbitral forums impose different risks on the accused, different standards of proof should be required. *Id. See generally* American Steel Foundries, 94 Lab. Arb. (BNA) 745 (1990) (Seidman, Arb.); *Kansas City*, 82 Lab. Arb. (BNA) at 413; Armour-Dial Inc., 76 Lab. Arb. (BNA) 96 (1981) (Aaron, Arb.).

68 *See* San Francisco Sheriff's Dep't, 90 Lab. Arb. (BNA) 154 (1987) (Riker, Arb.) (finding the fact that criminal charges were dropped irrelevant to an administrative hearing); Genesee County v. Social Serv. Workers Union, 90 Lab. Arb. (BNA) 48, 48 (1987) (House, Arb.) ("as to the dropped charges, if [shoplifting] is present, an employee is still subject to discipline even if civil authorities do not act"); Wayne State Univ. v. United Auto Workers, 87 Lab. Arb. (BNA) 953 (1986) (Lipson, Arb.) (ruling that the Arbitrator is not bound by a court's dismissal of criminal charges and may accept all relevant evidence).

69 One arbitrator went so far as to rule that "a determination of innocence in the criminal forum does *increase* the Employer's burden of persuasion that discharge is warranted." City of Muskegon Heights Police v. Teamsters, 88 Lab. Arb. (BNA) 675, 675 (1987) (Girolama, Arb.) (emphasis added). The better view is that "the mere fact of an acquittal does not preclude an arbitrator from upholding management's action where adequate evidence is presented of the misconduct alleged." Indiana Bell Tel. v. Communication Workers, 99 Lab. Arb. (BNA) 756, 756 (1992) (Goldstein, Arb.); *see also* Associated Grocers v. United Wholesale & Warehouse Employees Local 261, 83 Lab. Arb. (BNA) 261 (1984) (Odom, Jr., Arb.); City of Pontiac v. Police Officers Ass'n, 77 Lab. Arb. (BNA) 765 (1981) (Ott, Arb.); Personnel Review Bd. of New York City Health & Hosps. Corp., 76 Lab. Arb. (BNA) 387 (1981) (Simons, Arb.).

of drug use beyond a reasonable doubt ought to be found guilty under a lesser arbitral standard.[70]

(b) Separateness.—Even arbitrators who reasonably rely on the guilty verdicts of courts ignore a second concern: the separateness of the distinct forums raised by Shulman. The two forums of dispute resolution cannot truly be considered separate if arbitrators must delay their decision until the courts have resolved the issue of guilt. In such a capacity, arbitrators merely apply court verdicts, further exposing themselves to judicial review. An arbitrator faced with an off-duty conduct case may even go so far as to interpret the language of the court, as if the verdict itself was somehow incapable of communicating guilt, innocence, or the appropriateness of punishment. One arbitrator in this study interpreted a guilty plea to be the result of a plea bargain and subsequently found insufficient proof to exist against the grievant.[71] The role of the arbitrator who interprets the judicial record is an unfortunate, less active one which Feller alluded to when he wrote: "They may even be used as assistants to the courts or the EEOC as special masters."[72]

(c) Consistency.—The third concern involves arbitration which strives for consistency. The fact that *some* arbitrators rely on court verdicts and others do not indicates that different standards of proof may be applied in identical cases. If precedent held that in cases of criminal conduct, court resolutions regarding guilt are always or never relevant, parties to the collective bargaining relationship could better prepare their arguments in advance. Such consistency in practice, afterall, would not be unique to arbitration. As Shulman wrote:

> Even in the absence of arbitration, the parties themselves seek to establish a form of stare decisis or precedent for their own guidance—by statements of policy, instructions, manuals of procedure, and the like . . . . When the parties submit to arbi-

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70 It should be noted that not all arbitrators agree that the "beyond a reasonable doubt" standard is inappropriate for arbitration. In criminal cases or those involving moral turpitude, some arbitrators hold that the higher degree of proof is required. *See* MARVIN HILL, JR. & ANTHONY V. SINICROPI, EVIDENCE IN ARBITRATION 33 (2d ed. 1987). If so, then the application of criminal court verdicts to indicate guilt in an arbitral hearing would not be inconsistent.

71 Means Servs., 81 Lab. Arb. (BNA) 1213 (1983) (Slade, Arb.).

72 Feller, *supra* note 56, at 131.

> tration . . . they seek not merely resolution of the particular stalemate, but guidance for the future, at least for similar cases. They could hardly have a high opinion of the arbitrator's mind if it were a constantly changing mind.[73]

(d) Purposes.—Finally, arbitrators should be reluctant to rely on criminal court resolutions in deciding their arbitrations because the two forums have distinct purposes and concerns. The Sentencing Reform Act of 1984[74] and the Federal Sentencing Guidelines of 1987[75] marked a change in the federal government's philosophy toward criminal sentencing. Congress returned to the concept of retribution for crimes and all but abandoned the idea that imprisonment was a means of promoting rehabilitation.[76]

In contrast to court sentencing, discharges and arbitral decisions are not about punishment or distributing blame in a moral sense.[77] For example, consider the case of the automobile plant worker who is convicted of using drugs while off-duty. Why is he discharged? The company does not discharge him because of the fact of his drug use, nor because he deserves to be punished.[78]

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73 Shulman, *supra* note 51, at 1020.

74 Pub. L. No. 98-473, Title II, ch. II, §§ 211-239 (codified at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586, 3621-3625, 3742; 28 U.S.C. §§ 991-998 (1988)).

75 UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL (1991).

76 *Id.*; *see also* Sentencing Reform Act of 1984, 28 U.S.C. § 994(k) (1988); Mistretta v. United States, 488 U.S. 361, 365 (1989) (Under indeterminate sentencing, "[s]erious disparities in sentences . . . were common. Rehabilitation as a sound penological theory came to be questioned and, in any event, was regarded by some as an unattainable goal for most cases.").

77 At least one author points to the Supreme Court for the proposition that the purpose of a criminal sanction is distributing blame:

> Criminal sanctions are imposed upon offenders because they have committed a morally reprehensible act and, therefore, are subject to blame. Moral repugnance to the actor in a criminal situation is the only justifiable basis for distinguishing the criminal law from other kinds of legal actions (such as tort claims) against persons who injure, and the purposes of criminal law should be served by our penal sanctions . . . . Recognition of the role that blame must play in a valid sentencing scheme requires . . . a central focus on the *act* the offender committed and the moral culpability with which he committed it.

RICHARD G. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT 16, 17 (1979) (citing Robinson v. California, 370 U.S. 660 (1962) and summarizing just deserts jurisprudence).

78 Nor should the arbitrator be concerned with such matters. Arbitrator Bard writes that moral judgments are beyond the scope of the arbitrator's task:

> [A]n arbitrator in making a ruling as to whether or not an employee who has committed a crime or pled guilty to a criminal charge ought to be punished by

He is discharged because of the implications of his drug use for the company.[79] As Abrams points out, "[d]ischarge should not be viewed as punishment for misconduct . . . . Rather, an employee is discharged because his past actions are indicative of what he may do in the future."[80]

III. CONCLUSION

This Note has attempted to provide insight into arbitral thinking. By examining only cases of employee off-duty misconduct, this Note has studied how arbitrators reconcile fundamental notions of privacy and individuality with the employer's own unique concerns. The results of this Note are revealing: arbitrators are generally pragmatic and look beyond the content of the employee's conduct to consider its arguably speculative consequences.

Speculative concerns—such as the *possibility* that the company would incur damage to its reputation if the employee were reinstated—form the basis for arbitral decisions more frequently than

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> his employer is not ruling as to the moral reprehensibility of the alleged actions of the individual involved—*that is for the courts and society to judge.* Rather, he is making a determination based on rights which arise under a Collective Bargaining Agreement. Not merely because an individual has been adjudged guilty of some sort of moral or criminal malfeasance do his rights as a citizen become abrogated; nor are his rights under contract thereby nullified.

City of New Hope v. International Union of Operating Eng'rs Local 49, 89 Lab. Arb. (BNA) 427, 430 (1987) (emphasis added).

79 As discussed in Part I, the company may feel it cannot afford to employ a proven drug user for several reasons. First, his employment may affect the safety of all of the company's employees, in addition to their morale. His employment would be an added distraction to workers and supervisors, who would constantly wonder whether he was under the influence of drugs while at work. Second, his drug use may affect the quality of his work; even if his work product did not suffer in quality, the company could be expected to expend additional resources double-checking his work. Third, his employment could affect the reputation of the company. Consumers may be less likely to purchase from an automobile manufacturer who employs drug users, and the company's market value would surely suffer as a result.

80 Roger I. Abrams, *A Theory For the Discharge Case*, 36 ARBITRATION JOURNAL 24, 25 (1981). Additionally, relying on court decisions in arbitrations presumes an ability to read courts' minds. However, sentences are a function of a multitude of factors. Within statutory guidelines, courts may grant a defendant a suspended or light sentence because he is no longer in need of punishment. Alternatively, the judge may weigh the interests of society in deterring crime against the prospect of the defendant becoming a productive member of society. Or, he may temper his decision by the reality of overcrowded prisons. Whatever the exact reasoning of the judge, many considerations affect his sentencing decision and they are largely unavailable to the arbitrator.

secondary literature acknowledges. This is not inappropriate if one accepts the proposition that, in addition to protecting the employee from arbitrary employer sanctions, arbitration decisions should also consider the employer's business interests. There is less justification, however, for arbitrators using criminal court resolutions as the basis for their decision-making. If the purpose of arbitration is to resolve disputes which originate from the employer-employee relationship, its decisions should reflect a distinctly industrial focus.

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