

Just Culture – Acceptable Behavior

The construction of Just Culture is currently incongruous with other legal and regulatory mechanisms, making it a questionable tool for safety improvement.

Just Culture in an organization requires an unambiguous definition of acceptable behavior. Acceptable behavior in this context means an action which can be used as a teachable moment, as an example of a practice. Unacceptable behavior is that which appropriately leads to discipline or termination.

The requirement for this distinction is drawn carefully in the work of James Reason, whose work has been highly influential in the development of Safety Management Systems around the world.

Reason describes a *Just Culture* as “...an atmosphere of trust in which people are encouraged, and even rewarded, for providing essential safety-related information, but in which they are also clear about where the line must be drawn between acceptable and unacceptable behavior.”ⁱ

He restates his vision of a *Just Culture* as one “in which each individual is clear about what determines the difference between acceptable and unacceptable actions, [and] second, ... in which the vast majority of errant behaviors could be reported without fear of punishment.”ⁱⁱ

Followers of Reason go on to describe a continuum of behaviors through which a line can be drawn that defines acceptable and unacceptable behavior. As a self-contained concept, it is compelling. When deployed in a larger context, it is potentially dangerous to an organization.

Patrick Hudson describes four kinds of error.ⁱⁱⁱ

- Slips
- Lapses
- Mistakes
- Violations

Slips

Hudson defines *slip* as an unintended action with an unintended result.

Lapses

Hudson defines *lapse* as an unintended inaction with an unintended result.

Mistakes

Hudson defines *mistake* as an intended action with an unintended result.

Violations

Hudson defines *violation* as an intended action with an intended result.

Hudson goes on to describe five types of violation:

- Unintentional violations
- Routine violations
- Situational violations
- Optimizing violations
- Exceptional violations

An unintentional violation arises as the result of procedures that are written in a way to be impossible to follow, or has not been disseminated through the organization. Technically it is a violation, but practically fits into the category of mistake.

A routine violation is one commonly committed in the organization. A situational violation is one in which the employee seeks to accomplish a task when he has insufficient time, resources, or supervision to comply with a standard procedure. An optimizing violation is one in which the employee seeks to accomplish a task in less time, using fewer resources in an attempt to save himself or the organization time and money. An exceptional violation occurs in the context of an emergency or other situation for which there is no established procedure.

Hudson does not even describe a malicious or criminal violation. His description of eight types of error is generally charitable. For the most part, they are unintended, and when they are intended, often for the perceived benefit of the organization. Hudson's taxonomy is very useful for diagnosis of systemic problems.

The Global Aviation Information Network (GAIN) uses a different nomenclature. The GAIN Working Group uses David Marx's definition of four types of behavior:^{iv} Marx is primarily interested in the medical field, but the stakes are similarly high.

- Human Error
- Negligent Conduct
- Reckless Conduct
- Willful Violations

Human Error

“When there is general agreement that the individual should have done other than what they did, and in the course of that conduct inadvertently causes or could cause an undesirable outcome, the individual is labeled as having committed an error.” Marx (2001)

Human Error is an inadvertent error, which did or might have led to an unsafe condition. The guidance provided by most authorities is that upon self-report, human error is acceptable behavior, and should be adopted by the organization as a teachable moment.

An example of human error is the failure to tighten the oil cap after preflight inspection, or forgetting to extend full flaps for landing.

Negligent Conduct

Negligent Conduct is a failure to exercise reasonable care in the exercise of a duty, which did or might have lead to an unsafe condition. The guidance provided by most authorities is that person *should have been aware* that they were taking a substantial and unjustifiable risk toward causing an undesirable outcome, but may not have understood the implications of the action.

An example of negligent conduct is the reuse of a self-locking nut when a new nut is recommended by the manufacturer.

Reckless Conduct

Reckless Conduct is a failure to exercise reasonable care in the exercise of a duty, the risk of which would be apparent to reasonable (but not necessarily trained) person. The guidance provided by most authorities is that this is a violation of protocol in which the actor knew the risk and could foresee the potential harm.

An example of reckless conduct is the unauthorized substitution of fluids in service, or deliberately failing to comply with an air traffic directive.

Willful Violation

Willful violation is reckless conduct resulting in damage or injury which the actor foresaw.

Willful Violation (gross negligence) occurs when the individual chooses to knowingly violate a rule while he is performing a task.

The continuum of behavior is clear using either model, even if it is difficult to classify specific instances of behavior. Reason proposes a dividing line across the spectrum, with unacceptable behavior dealt with first by discipline. The balance of the behavior is forgiven – especially if it is self-reported. Afterwards, all of the reported behavior can be analyzed.

Criterion for Acceptable Behavior

Reason's undescribed criterion – the distinction between acceptable and unacceptable behavior – seems to be motive. If the occurrence came as the result of absent-mindedness, which is to say there was no motive, then this example of human error would be acceptable error. If the occurrence came as the result of an error of judgment, *negligent conduct* in Marx's taxonomy, then adherents to Reason would classify it as acceptable behavior. After all, it appeared that the actor was unaware of the potential consequences of the action.

Unacceptable behavior includes an intentional failure to exercise care with knowledge of the consequences. That includes both reckless conduct and willful violation in Marx' taxonomy. We may not know what the motive of the actor was, but if he or she did it on purpose, there must have been a reason. Insofar as the actor knew of the potential negative consequences, one might argue this is a morally bad choice.

Reason is not the first professor to argue that this kind of morally reprehensible behavior is unacceptable. Immanuel Kant (1724 – 1804) said generally that the moral worth of an action depends on its motive. Kant, like Reason, looks to the motivation of the actor to determine what constitutes acceptable and unacceptable behavior.

If as safety professionals, all we had to do was sort our occurrence reports into two piles, the first being *discipline then analyze*, and the second being *forgive then analyze*, life would be easy. The problem is that there are two other moral spectra against which same behavior will be judged. They are *consequential reasoning* and *categorical reasoning*.

Consequential Reasoning in Law

Consequential reasoning or consequentialism is a school of thought that requires us to look at the results of a decision or behavior before we judge it. In Marx's taxonomy, the term *negligence* appears in the last three classifications. Negligence is a term well defined in law. Negligence requires a failure to exercise reasonable care in the exercise of a duty. A tort claim also requires that there be a victim who suffers a loss. Without the loss, there is no case. In common language, "no harm, no foul." We leave aside for this discussion the strict liability principles that apply to manufacturers and international carriers.

When there is a major loss, a fatal crash for example, plaintiffs' attorneys will immediately begin a search for those parties who failed to exercise due care. If their pockets are deep enough, or they have insurance, the lawsuits will begin. The law of torts (negligence cases) is not interested in motive. And the jury will not be instructed to take into consideration whether the lack of care came as the result of absent-mindedness or not.

Reason's concept of acceptable and unacceptable differs quite substantially from the law. This injects a large problem for sponsors of a Just Culture. In the eyes of the law, unacceptable behavior that results in no untoward outcome is simply a non-event. Conversely, in the eyes of the law, any failure to exercise due care that results in a loss is unacceptable. What Reason might call "errant behaviors [that could] be reported without fear of punishment" would be the cause of action at trial. The records of an air carrier that includes discussions of these events as a regular occurrence might look very bad in front of a jury.

In United States aviation almost all of the important actors hold licenses: pilots, mechanics, dispatchers, mechanics, and flight attendants. Those licenses all require some kind of test. The tests all involve some knowledge or skill that implies a standard of care. For example, a pilot is required to demonstrate that he or she uses a checklist in order to win a certificate. A mechanic is required to demonstrate the use of a manual before maintaining an aircraft. All are required to demonstrate familiarity with the Federal Aviation Regulations (FARs).

However well-intentioned the effort to collect and analyze safety problems may be, the database of a company engaged in a Safety Management System will be a treasure trove of information for a plaintiff's attorney seeking to demonstrate an ongoing pattern of failure to exercise due care. While a complete history is useful to the analyst, it is poison from a legal defense perspective.

Categorical Reasoning at the FAA

There is a third spectrum against which behavior is judged: categorical reasoning. Categorical reasoning assumes an unconditional absolute requirement that applies in all circumstances, which is both required and justified as an end in itself. Categorical reasoning is unconcerned with the result of the behavior. Categorical reasoning is unconcerned with the circumstances. The FAA's regulations don't say, "An airplane should have a compass ... if not having one would be a danger." The FAA regulations are categorical, and more important, the opinions of an inspector may be more so.

The distinction between acceptable and unacceptable behavior in the FAA context is therefore far different from that in a Just Culture. The FAA is unconcerned with whether behavior leads to an undesired outcome. The FAA is unconcerned with the motive behind behavior that is contrary to the FARs. Failure to comply with the FARs is unacceptable in itself.

As the FAA inspects the records of a Safety Management System, any indication of an FAR violation is potentially a cause of action against the carrier or other air agency and its employees. There is currently no protection afforded to participants in a Safety Management System, not in law, not in regulation, and not by any other Order. One might argue that in the forty years since the Aviation Safety Reporting Program has been in existence, the FAA has faithfully stood behind the terms of Advisory Circular [AC 00-46E](#) and its antecedents. The agency is capable of fostering Just Culture, but it would be much easier to adopt one if regulatory protections were granted.

Conclusion

In short, the proponent of a Just Culture in the context of a Safety Management System is faced with a logical dilemma. A Just Culture requires "an atmosphere of trust in which people are encouraged, and even rewarded, for providing essential safety-related information." This standard is contrary to the processes and protections that exist in aviation law and regulation. The company puts itself and its employees at substantial risk from the legal community's ability to use that same information adverse to the company. The company puts itself and its employees at substantial risk from the FAA's use of that same data.

The wise proponent of Just Culture will continue to support its development, but will delay implementation until sufficient protections are afforded in law and in regulation.

ⁱ Reason, James, *Managing the Risks of Organizational Accidents*, Ashgate Publishing 2007

ⁱⁱ Reason, James; *Achieving a safe culture: theory and practice*, *Work & Stress*, 1998, VOL. 12, NO. 3 293-306

ⁱⁱⁱ Hudson, P, *Bending the Rules: Managing Violation in the Workplace*, Leiden University 2005

^{iv} Marx, David, *Patient Safety and the "Just Culture": A Primer for Health Care Executives*. Columbia University; 2001.