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UNIVERSITY OF CALIFORNIA, IRVINE

POEM

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POEM

ACKNOWLEDGMENT

Shirley Crawford

It is with sincere gratitude and appreciation that the California Caucus of College and University Ombudsmen acknowledges the contribution that Mrs. Shirley Crawford made to our Asilomar Conference through the support services that she provided toward the completion of this publication. Without her diligent and nurturing assistance, our Journal would not have been possible.

At the University of California, Irvine, Mrs. Crawford is the Executive Assistant to Ron Wilson, the Assistant Executive Vice Chancellor and Interim Director, Office of Equal Opportunities & Diversity, with responsibilities for the Ombudsman Office; the Faculty & Staff Assistance Program; and, the Campus Mediation Program.

POEM

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POEM

An Inspirational Poem for Ombudsmen ***

"The Cold Within"

Six humans trapped by happenstance
In bleak and bitter cold,
Each one possessed a stick of wood,
Or, so the story's told.

Their dying fire in need of logs,
The first woman held hers back,
For on the faces 'round the fire,
She noticed one was Black.

The next man looking 'cross the way
Saw one not of his church,
And couldn't bring himself to give
The fire his stick of birch.

The third one sat in tattered clothes.
He gave his coat a hitch.
Why should his log be put to use
To warm the idle rich?

The rich man just sat back and thought
Of the wealth he had in store.
And, how to keep what he had earned
From the lazy, shiftless poor.

The black man's face bespoke revenge
As the fire passed from sight.
For, all he saw in his stick of wood
Was a chance to spite the white.

And, the last man of this forlorn group
Did naught except for gain,
Giving to those who gave
Was how he played the game.

The logs held in death's still hands
Was proof of human sin.
They didn't die from the cold without.
They died from the cold within.

*** The "inspirational poem" traveled from Florida to Massachusetts to California for our Journal. Moreover, our collective gratitude is owed to Vicky Brown, University Ombuds Officer, University of Central Florida, Orlando, who shared the poignant thoughts with Dr. Mary Rowe, Ombudsman, Massachusetts Institute of Technology. While reading the poem, Dr. Rowe felt

that the lump in her throat should be experienced by her "fellow Ombuddies," and, she forwarded the perceptive verse to Ron Wilson, University of California, Irvine, for inclusion in The Journal.

The poem was originally published in the first issue of the Diversity Digest, University of Central Florida, Orlando. (1996)

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INTRODUCTION

Ron Wilson

University of California, Irvine

We preface our ninth publication of The Journal for the 24th Annual Conference of the California Caucus of College and University Ombuds at Asilomar, California with a poem that expresses -- both accurately and vividly -- the human condition to which the Ombudsman profession dedicates its services. As Ombudsmen, each of us can recognize the six humans that the poem portrays because we have listened patiently to their prototypes who have requested our assistance in finding a palatable solution to their personal and professional problems. As our collective experiences reveal, their difficulties sometimes are simple and can be solved easily. However, occasionally, their dilemmas are complex and almost defy a solution. In these situations, an Ombudsman might use "creativity" and "experience" in equal amounts while working within the system to achieve justice.

As professionals absorbed in quests for justice, we might speculate on which attributes would be described if the poem were about six Ombudsmen who used six different methods to assist the individuals asking for their advice. Hopefully, the Ombudsmen's characters would be marked with honesty, generosity, flexibility, understanding, compassion, and sensitivity. These virtues always would be grounded in a sound foundation known as "common sense," and, "the ensemble" would provide the requisite tools to reckon with the diverse backgrounds and cultures of the people who come to the Ombudsman Office for the resolution of their grievances. Certainly, these would be the essential traits in an Ombudsman who tries to preserve the dignity of the individual; the integrity of the system; and, the equity of the process.

Our Ombudsmen's articles that follow our "inspirational poem" also are "moving" and "motivating" pieces that testify to the valuable knowledge our colleagues gained from their experiences in seeking justice and facilitating equity for the students, faculty, and staff who could not attain these goals on their own. Moreover, the authors' conscientious treatment of each subject also attests to their possession of the virtues that are necessary to the Ombudsman who strives to be successful in dispute resolution and conflict negotiation.

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In The Ombudsman and the Privatization of Governmental Services, **R. Adolfo de Castro** returns to a subject to which he has given considerable thought. [de Castro's first article for The Journal was entitled, "Bureaucracy, Representative Government, and The Ombudsman" (1992).] However, de Castro's recent literary effort adamantly tackles the specific issue of a citizen's right to complain versus an industry's autonomy apropos of listening.

As the 21st Century approaches, de Castro fears that the citizen will possess no recourse to rectify a serious problem regarding health, education, and welfare when these public services are provided by private corporations.

Because the costs for the multitude of services that the government provides for its citizens are escalating faster than the taxes can be increased for their coverage, private industry is being awarded the job. Although business has operated traditionally under the premise "The customer is **always** right!", the concept seems to work best when the products are non-essential. [The maxim appears to operate in a more nebulous sphere when the commodity is one of modern life's necessities. Moreover, the competition is greater amongst the enterprises that sell "fads" than in those organizations that provide services such as communications and health.]

However, de Castro believes that hope lies in extending the Ombudsman's present authority for reviewing the government agencies' administrative decisions to include the jurisdiction for scrutinizing the rulings of the government offices that provide basic services to the citizens. In addition, de Castro would incorporate the term "privatizing entities" under the Ombudsman's responsibility to analyze, critique, and advise.

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After three years of judicious preparation to support his plea for "judicial independence," **R. Adolfo de Castro** pens an eloquent summation in, May I Respectfully Insist . . . [de Castro's previous realistic and sound arguments were presented in The Journal articles entitled, "The Ombudsman and the Myth of Judicial Independence" (1994) and "An Ombudsman's Proposal for an Independent Judiciary" (1996).]

To realize his longtime goal, de Castro drafted four amendments to Articles III and V in Puerto Rico's Constitution which include the provision that judges should be selected from a pool of qualified candidates who have met continuing education requirements rather than from tenured members with gubernatorial connections.

Before resting his case, de Castro urges the Legislature to remove the judicial branch from the political arena by granting it self-government in conjunction with holding it accountable to the citizens it serves (or judges).

#

An employee reporting to a Supervisor who assesses the individual's blame before addressing the cause of an office problem will agree that **Tim Griffin's** article, The Diagnosis and Treatment of Scapegoating as an Organizational Illness, should be required reading for a Manager.

Griffin analytically compares the "MO" (method of operation) of criticizing employees for accidental mistakes, errors, or departmental embarrassments to an illness which can invade an institution and thwart the worthy goals which justify its existence. Griffin includes an astute observation that the disease can resemble an inverted V -- progressing downward from a single Supervisor at the top to the several subordinates at the bottom.

Citing the research of six authors on topics about self-destructive forces within an organization, Griffin ingeniously depicts an exact portrait of the Supervisor who asks "Who is responsible?" in lieu of "What went awry and what can I do to help?" Griffin also likens the Ombudsman to an organizational physician who possesses the medicinal remedies to alleviate the ailment. Because the Ombudsman listens to many opinions about an unpleasant feature within a department, including those of the person in charge, it is likely that the true cause of the problem will be uncovered and exposed. Griffin concludes that the Ombudsman holds an excellent position from which to diagnose the disorder, prescribe a remedy, and prevent further spreading of an insidious and highly contagious "workplace disease."

#

In Helping an Organization's Attorneys Understand -- and Defend -- the Ombuds Confidentiality Privilege, **Tom Sebok** skillfully outlines cogent, cohesive, and convincing arguments that Ombudsmen can use to support their "right to remain silent" when an informal matter on which they were working becomes a formal case to which they are subpoenaed.

Sebok's logical and pragmatic defenses also reflect the rich experience that he has gained through his continuing involvement in helping the Colorado Ombudsmen to obtain a "Shield Law." Moreover, these efforts have given him unique and valuable insight into the contrasting perspectives of the plaintiff's attorney and the attorneys who represent the institution at which the Ombudsman is employed.

As Sebok deftly describes the several contending viewpoints that confront the beleaguered Ombudsman in the legal arena, he simultaneously offers practical countermeasures that uphold the neutrality tenet to which the Ombudsman Office is committed. According to Sebok, an effective counterstroke is to provide the attorneys with the following information: the Ombudsman's precise mission; the Ombudsman's lack of power to make official decisions; and, the legal precedents which have established a "common law testimonial privilege" in other states.

Sebok also suggests that Ombudsmen give their institutions' attorneys several copies of the brochures which emphatically state the purpose of the Ombudsman Office; the limits under which it operates; and the Ethical Principles on which it is founded.

#

The Public Sector Ombudsman was written by the **United States Ombudsman Association** and was submitted by Patt Seleen, President, USOA. This timely and informative article contains a comprehensive and thorough description of the profession's origins, purpose, powers, limitations, and methods of operating.

In reflecting on the 188 years that have passed since the first Ombudsman was appointed by the Swedish Parliament to protect the citizens from "bureaucratic faux pas," it becomes evident that the position has been accepted and adopted by education and business. The University and College Ombudsman and the Corporate Ombudsman stem from the heritage of their relative, the Public Sector Ombudsman. Sharing similar goals and techniques, their differences lie in the channels through which their energies and experience lead them in the resolution of their clients' diverse complaints and grievances.

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James Vice delves deeply and systematically into the commonalities and differences that unite and separate three of the several concepts around which the Ombudsman's work revolves: neutrality, fairness, and justice.

In Neutrality, Justice, and Fairness, Vice defines eruditely and functionally the intricate and subtle composition of each term. Neutrality, for example, is an absence which is usually recognized when it is not present in a situation.

In contrast, justice was given five definitions by Plato -- four of which he discredited thoughtfully and painstakingly, and then, astutely placed the fifth under reason's command. Modern parlance incorporates the view that justice is higher than the law and that it can provide a criterion for judging the rightness of the laws. As we continue to search for an absolute, but elusive justice, we discover that the dialogue might not end before it must be arrested with a decision.

Fairness appears to be a term that is both tolerable and attainable in reaching a compromise or "informal agreement" between two adversaries. Furthermore, fairness can be determined more easily by reviewing the original conditions that were present in whatever situation is being disputed.

In a succinct, utilitarian conclusion, Vice advocates that the Ombudsman should conduct a neutral investigation which should be followed by an objective assessment regarding its fairness.

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As the variety of topics covered in the authors' articles demonstrate, diversity is a key component in the Ombudsman profession. Indeed, it is the existence of this very rich heterogeneity and the Ombudsmen's conviction of its importance that give these writings their distinctive value. The fact that Ombudsmen throughout the United States, Canada, Europe, and Puerto Rico are willing to commit their thoughts to writing and to share these results with their colleagues is a tribute to our profession and to the honorable work in which we are immersed. Moreover, the generous contribution of their time

and talents in creating The Journal offers all Ombudsmen the inspiration and encouragement to uphold the ethical principles to which we have sworn allegiance.

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THE OMBUDSMAN AND THE PRIVATIZATION OF GOVERNMENTAL SERVICES

R. Adolfo de Castro

Commonwealth of Puerto Rico

The right of the citizen to petition the government for redress of grievances is consecrated in Article II, Section 4 of the Constitution of Puerto Rico and in the First Amendment to the Constitution of the United States. In the matter of constitutional rights, the petition refers to the government's duty to diligently provide the citizenry with services of excellence.

In the year of 1977, Puerto Rico, a country of avant garde democracy, guaranteed the citizen the true exercise of that right by accessing to him an independent, legislative ombudsman who could intercede on his behalf whenever he believed the administrative acts of the government agencies were unjust, unreasonable, contrary to law, stated without proper reasons, or, generally executed inefficiently.

The experience gained in the first twenty years of the Office of the Commonwealth Ombudsman evidences that its functions as an instrument of democratic control over government's bureaucratic excesses has contributed greatly to the protection of the citizen against the rendering of inefficient, lackadaisical governmental services. Today, it is fitting to state that the Ombudsman has proven to be a true Protector of the People.

On the one hand, the ombudsman institution has served as an instrument for the establishment of better administrative procedures; and, on the other, it has cleared a path for the citizen to participate in the business of governing. Today, we can proudly claim that the Puerto Rican citizen is no

longer defenseless before his government. Furthermore, when the government does not comply with its obligation to provide services of excellence, the citizen **does have** an effective means of petitioning for redress.

Notwithstanding our democratic progress, however, the Ombudsman still has a long way to go in safeguarding the citizen's welfare. On this line of thought, the New Millennium's tendencies toward the privatization of governmental services merit our closest attention. What will happen to the citizen's right to redress in the new world of privatized services that is upon us? Who will defend the citizen against the privatized bureaucracy if the Ombudsman has no jurisdiction over it?

In this regard, our society is already experiencing certain detrimental effects pertaining to the privatization of some of our correctional facilities. Who will defend the inmates against the excesses of their jailors in these privatized institutions? Who will defend the citizens against the arbitrary administrative acts of the privatized suppliers of light, water, and telephone services? Who will defend the patients' rights against the insensibility of the medical service providers? Finally, who will defend the users of the social, educational, recreational, and other basic governmental services which may be privatized in the near future?

Faced with the present fact that the Commonwealth Ombudsman only has jurisdiction over government agencies, will we leave the citizen of the 21st Century adrift and defenseless before the extremely large and complex private entities that will be providing the services that were formerly rendered by the government? Will we establish as many regulatory boards to hear citizen complaints as there are privatized services? How many regional and municipal offices should be opened outside of San Juan to entertain all these complaints?

Moreover, with the door to the year 2000 ajar, are we going to regress to the impunity of times past? Or, are we going to defend our individual

liberties by taking the necessary action that will check the negative effects of privatization?

In my opinion, I understand that we are obligated to continue to move forward in our search for new ways to protect the interests of our citizenry. We cannot leave the citizen defenseless before anyone, including the great privatizers. Therefore, the Enabling Act of the Office of the Commonwealth Ombudsman should be modified to fit the present historical moment. The State always has the duty to afford the citizen **more** protection -- never **less.**

The present is the time to amend the Ombudsman Act to extend the Ombudsman's jurisdiction over the administrative acts of the government agencies that provide the basic services to the citizens. Now is the time to approve an amendment before the services of health, education, water, lights, telephone, housing, and transportation become privatized. Now is the moment to legislate a new section in Article 2 of our Enabling Act that adds the term "privatizing entity" to the text and defines it as **any business, enterprise or person, natural or juridical, contracted by the State to provide services to the citizenry or that has acquired from the State a majority interest over the public entity which formerly provided those services.**

Once the term "privatizing entity" is defined, its appropriate inclusion in the text of the statute would make it clear that the jurisdiction of the Ombudsman also applies to the administrative acts of the "privatized entities." In this manner, all the providers of basic services, public and private, would be **accountable** to the citizen. Then, the State would be in a position to enter the 21st Century because it would be fashioned to the new tendencies and simultaneously geared to the cardinal principle of democratic government which puts the welfare of the people first.

In addition, when we draw up the contracts of privatization, we should not forget to include the necessary clauses that will bind the "privatizing entities" to the same standards of accountability that apply to the government

agencies. Whether it is a sales contract or a services contract, the State must ensure that all privatizing entities are directly accountable to the citizen. The task of providing these services should not be confided to anyone who is not **legally** bound to render them with excellence.

The privatization of our governmental services is around the corner. We should prepare to fill the void that will be left in the citizen's treasure of individual rights by legislating **now** to protect him against the **future** excesses of the forthcoming privatized bureaucracy. With the statutory modifications that I am proposing for the Ombudsman Act, the citizen would be able to enter the New Millennium with the confidence that the new order should not detract from the previous successes that were gained through the steady growth of participative democracy.

Our slogan states, DON'T COMPLAIN IF YOU DON'T COMPLAIN. Therefore, the enrichment of our civilization will be tantamount to the amount of effort that we have expended in strengthening the right of our citizens to be heard.

MAY I RESPECTFULLY INSIST...

R. Adolfo de Castro

Commonwealth of Puerto Rico

The time has come for Puerto Rico to have a government of three **truly** equal and separate branches, i.e., executive, legislative, and judicial. To accomplish this reality, we must depolitize the judicial power by enriching it with the real independence that the other two already have.

The appointments, salaries, promotions, and tenure of the judges should not continue to be wholly dependent on the will of the Governor and of the Legislative Assembly. We are blessed with a Corps of Judges who possess the highest standards of the profession. It is time to upgrade their functional independence to the level enjoyed by the other two branches of government.

For more than a year, I have been discussing with legislators, judges, legal academics, lawyers, and other community members the need for our society to depolitize its judiciary. The judiciary can be depolitized by prescribing a new order of self-government in conjunction with a new obligation for standing accountable to the people. To this end, I have drafted and presented to the Legislature four short amendments to Articles III and V of our Constitution. I also have drafted a bill to extend the Commonwealth Ombudsman's jurisdiction over the administrative (non-adjudicative or decisional) acts of the courts.

It is noteworthy that a bill has already been filed by Senator Kenneth McClintock Hernández to fill the requirement of accountability. Although, this is a positive beginning, I have publicly opposed the approval of the measure until consideration for the adoption of the concomitant and absolutely

necessary requirement of guaranteeing **true** judicial independence is also filed. I firmly believe that consistent accountability to the people requires a constant judicial independence.

To gain true judicial independence, the Constitution will need the following amendments:

1. to reserve a pre-fixed percentage of the Commonwealth's general funds for the judiciary;

2. to allow for **a judicial career** controlled by the Supreme Court from whose list of qualified candidates and **life tenure** members all judicial gubernatorial appointments should be made.

The idea of a JUDICIAL CAREER is a **sine qua non** of real judicial independence. To depolitize the system, the first step is to ensure that no person can become a judge without proper examination and qualification. Our Schools of Law should offer the requisite courses that will prepare all candidates for qualification according to the guidelines of the Supreme Court. The second step requires the Schools of Law, the Bar Association, the Association of Members of the Judiciary, and the Supreme Court Judges to enact a written set of **continuing education standards** which must be met before an individual can be promoted to the level of the Circuit Court of Appeals.

After these two steps have been effected, the Constitution should be amended to include the following restrictions:

1. that all **initial** gubernatorial appointees must be selected from a list of qualified candidates;

2. that all promotions to the appellate level must be selected by the Governor from the list of judges who have met the approved continuing education requirements;

3. that only appellate judges can be appointed to the Supreme Court.

If we really want to depolitize our judiciary, instead of just talking about it, these are the measures that must be taken.

Optimist that I am, I believe that most of the people are probably in agreement with my proposal. Sorrowfully, however, we need to change a lot of attitudes among our judges and legislators to put it into effect. Notwithstanding the good results obtained by legislative ombudsmen acting as overseers of the administrative conduct of the courts in other countries, the traditional misgivings of both judges and politicians on this subject are going to be very difficult to overcome. The judges, because they do not want **any** control; the politicians, because they feel they would not have enough.

But, **May I Respectfully Insist . . .** As I write this article, a bill is being discussed in the Senate that will curtail the authority of the Chief Justice of the Supreme Court over the transfers of judges. The bickering between judges and legislators must stop. We are at a crucial time in history where we must make up our minds **now** to be fully prepared for facing the challenges that await us in the New Millennium.

To leave things as they are, is to go backward. Now is the moment to endow our judiciary with the **true** independence required to satisfy the needs of the 21st CENTURY. Without subverting the delicate system of checks and

balances which governs relations between the three branches of government, the time has come to achieve a more efficient judicial power that is capable of freely exercising the full authority to plan, develop, and execute its own operational objectives the way it sees fit -- not just the way the politicians desire it. In 1983, the situation was set right in Spain. In 1997, there is no reason why Puerto Rico cannot do the same.

As I stated, I have filed before our Legislative Assembly a draft bill that extends the ombudsman's jurisdiction over the administrative acts of the judiciary, and a draft of four short amendments to our Constitution on the matter of **true** judicial independence. To succeed, both the bill and the four amendments must be passed and adopted.

In conclusion, **May I Most Respectfully Insist . . .** that the judges have nothing to fear from the intervention of the Legislative Ombudsman over their administrative affairs. Let it not be said that they prefer to remain politicized rather than to stand accountable to the citizen. [They already are obligated to allow the intervention of the Commonwealth Controller over their fiscal matters.] Therefore, I believe that it is time for the judges to acknowledge the fact that they also are a part of the government and that, as such, they must accept the New Millennium's concept that the citizen's constitutional right to petition the government for redress is equally applicable to them. The sooner the judges recognize this constitutional obligation, the sooner will the Governor and legislators act to grant them the **true** judicial independence they sorely need. An enriched society can be the only salubrious result.

THE DIAGNOSIS AND TREATMENT OF SCAPEGOATING AS AN ORGANIZATIONAL ILLNESS

Tim Griffin

Northern Illinois University

There are many conditions which have been shown to be counterproductive toward the development of efficient and humanitarian organizations. A number of these factors have been discussed widely in the literature on organizational behavior and development. Among these counterproductive conditions are poor interpersonal communications, lack of goal and mission clarity, an absence of two-way vertical communication within the hierarchy of the organization, and a shortage of adequate resources. Using the analogy of the organization as a living organism (Morgan, 1986), these and other types of negative factors can be referred to as illnesses.

An organizational illness observed widely among the various institutions at which the author has had an affiliation is that of blaming or scapegoating. Surely every ombudsperson has had the opportunity to observe managers and administrators so focused on deflecting blame from themselves that they neglected to address the precipitating conditions that led to the current problem. For the purposes of this article, this phenomenon can be defined as actions taken to divert the potential for perceived responsibility for a negative occurrence from one's self by attempting to attribute such responsibility to others. Perhaps the following hypothetical example will serve to further define such behavior.

When a university enacted a hiring "freeze" to address fiscal shortcomings, the custodial staff of the student union building was expected

to continue providing regular services despite fewer and fewer staff members to share the work. If any custodial crew members were ill or used vacation benefits, the situation was particularly acute, and it became impossible for crew members to provide custodial services to certain offices on certain days. One of the offices relying heavily on these services was that of the student newspaper.

When informal verbal pleas to the custodial staff failed to result in the desired return to daily service, the student newspaper printed an editorial that was severely critical of the building's management in general and the custodial services in particular. This editorial immediately resulted in various responses from the leadership of the custodial union, executive management in the division of business affairs, student affairs administrators, and journalism faculty. A flurry of telephone calls among these individuals resulted in a clear organizational mandate to correct the situation by resuming daily custodial services to the student newspaper office.

In an after-the-fact analysis of numerous communications, it became evident that the communications received by the manager of the student union building were directed only toward correcting the lack of service. None of the communications, explicitly or implicitly, requested the identification of responsible parties or imparted a desire for punishment. However, several days later, one of the custodians (we will call him Jim) appeared as a client in the ombuds office and presented a copy of a formal disciplinary letter which had recently been placed in his personnel file. The letter clearly implied that Jim had been the sole cause for regular services not being rendered. The written reprimand included a warning that any future repetition of sloth would result in employment suspension or termination.

In his initial meeting with the ombudsperson, Jim expressed frustration and anger toward his supervisor who had signed the disciplinary letter. He

alleged that he had previously spoken with his supervisor about the impossibility of a depleted custodial crew providing effective coverage of the building. He further alleged to the ombudsperson that the supervisor had subsequently directed him verbally to skip certain offices on certain days as a compensating strategy. Jim indicated that the other crew members had heard the same statements and received similar instructions but were too fearful of supervisory retaliation to publicly concur. Subsequent confidential interviews with others supported Jim's allegations; however, the supervisor denied ever having made such statements.

Scapegoating, as described in this example, is an organizational illness that is both counterproductive and highly contagious. Not only does it frequently fail to address the real problem at hand, but it encourages others to behave in a similar manner in order to shield their posteriors from blame and subsequent retribution. Once ingrained in an organization, this disease can be very difficult to cure.

Argyris (1982) describes scapegoating as one type of "distancing behavior" which presents a highly undesirable impediment to the desired goal of "double-loop" organizational learning. Highly decentralized organizations like colleges and universities are particularly susceptible to this disease (Bolman & Deal, 1991). In addition, institutions of higher education are frequently environments in which supervisory personnel fit the profile of "destructive achiever" as described by Kelly (1988). One of the identifying characteristics of this managerial type is a preponderance to engage in scapegoating.

In short, colleges and universities are particularly at risk for the organizational disease of scapegoating. This illness can be debilitating when it serves to divert attention from necessary organizational change. The ombudsperson is in a unique position to diagnose and suggest treatment for this condition.

Precipitating Factors

The presence of several observable conditions seems to correlate positively with scapegoating. Clearly, fear can be a major precipitating factor in the development of this disease. When one is afraid that he or she will suffer punitive actions if identified as the person who made an error, one is naturally inclined to protect one's self from such actions. Identifying someone else as the cause of the problem is one method of accomplishing this goal.

Other factors that can constitute precipitating conditions for scapegoating include a lack of trust in co-workers and supervisors, the absence of a team approach to responsibility for accomplishing work unit objectives, and inadequate positive reinforcement from supervisors. If employees believe they are noticed only when something has gone wrong and for the purposes of assigning blame and punishment, they are more likely to avoid being noticed at all. When such individuals receive attention in such an organizational culture, scapegoating is an understandable survival technique.

Diagnosis

Birnbaum (1988) suggests that a healthy organization has an actively functioning "cybernetic loop" which includes a "sensing unit" (an ombudsperson) that must effectively communicate with the "controlling unit" (an administrator/manager) to ensure wellness. Such a metaphor is also consistent with Argyris's (1982) concept of the healthy "double-loop learning" organization mentioned earlier. In both of these models, optimal organizational responses to undesirable events are analytical and designed to help the organization learn and improve. Distancing behavior, like scapegoating, breaks this cybernetic loop and precludes the organizational organism from learning from its mistakes.

The ombudsperson is in a unique position in most institutions of higher education to diagnose this illness because of the range of issues and the variety of individuals with whom the incumbent interacts in the performance of the ombuds role. Besides the personal observations and comments from employees in other units who visit the ombuds office to discuss disparate issues, the ombudsperson may hear from consumers and the ultimate victims of the disease (like Jim).

The comments made by administrators and other supervisory personnel during visits to discuss problematic issues and concerns can also provide clues to the unit's predisposition to scapegoating. When the individual reacts in a defensive, curt, and angry manner, or immediately makes statements like "we'll find out who's responsible" or "sounds like the hammer needs to fall on somebody for this," the potential for scapegoating behavior within the unit should be given thorough consideration. This disease usually spreads vertically within the organizational body in the form of an inverted V, with the illness progressing downward from a single manager or administrator.

Treatment

Consistent with the analogy of scapegoating as an organizational illness is the application of treatment to the precipitating conditions, or causes, of the disease. Although this list is by no means complete, fear, mistrust of supervisors and co-workers, the lack of a team approach to responsibility for task accomplishment, and inadequate positive reinforcement are offered here as common factors present in the organizational environment which can contribute to the contraction of this disease.

There are a number of institutional strategies which can serve to prevent the further development and spread of this organizational illness. The first, and no doubt single most important, response in this regard is the establishment and demonstration of a supportive and non-accusatory approach to

problem solving from upper levels of administration. Clearly, if the executive manager or administrator seeks to address problems by demanding "someone's head on a platter," it is unrealistic to expect other employees within that manager's purview to respond from a more healthy and productive organizational and developmental perspective. Supervisors should make it clear that they are more interested in preventing a recurrence of the problematic behavior than in identifying an individual to blame. A supervisor can evidence this approach by questioning any subordinate's eager response to such discussions by abruptly providing the name and/or the position of the people "at fault."

Fear of retaliation is often highly correlated to, if not totally the result of, a lack of trust in one's supervisors and co-workers. For example, if an employee trusts his or her supervisor to focus on the problem and its correction rather than on merely assigning blame and punishment, the employee is much more likely to be forthcoming with information designed to analyze the problem and develop strategies to effectively avoid its recurrence. The development of such trust, however, can be a nebulous task. Modeling appropriate and caring behavior, evidencing a non-blaming orientation on the part of the supervisor, and the passage of time are all predicates to the development of such trust.

While modeling may, over time, eventually provide for improvements, there are other, more intensive, measures that can be taken to promote the healing process. For example, individuals trained in developing a sense of trust can be utilized to conduct exercises and workshops designed to quell these types of employee concerns. It is strongly recommended that supervisors support and actively participate in such efforts.

When the accomplishment of a unit's goals and objectives are perceived appropriately by all involved as the culmination of the effort of a large number of people, the likelihood of individual blaming is greatly reduced. In

other words, if everyone shares a feeling of responsibility to accomplish the objective(s), everyone shares in the sense of accomplishment when the objective is met. Similarly, in such an organization, everyone shares mutual responsibility for addressing less-than-desirable performance.

The effective manager can design personnel reward systems based somewhat more strongly on unit or team performance assessment than on that of the individual. Such treatment entails a certain degree of risk associated with co-worker resentments and therefore should be applied with careful monitoring for this potential side effect. If such systems are prescribed, it is suggested that an appropriate balance exist between group and individual accountability to be most conducive to the establishment and maintenance of maximum health and productivity.

As suggested earlier, when non-routine contact from a supervisor is perceived as always or usually resulting in punishment, scapegoating is an understandable response. More frequent formal and informal contacts of a positive nature can serve to extinguish this symptomatic defensive behavior and weaken the disease.

The supervisor wishing to cure or prevent the development of scapegoating would also be well-advised to establish clear, mutually developed, reasonable standards of performance for departments and units. These standards should be measured by using a wide range and number of techniques including verbal and written feedback from service recipients, careful tracking of formal grievances through human resource services, and regular communications with offices like that of the ombudsperson.

Organizations of human beings cannot be expected to change perceptions and behaviors with immediacy. If a culture of blame has been present for some time, it will often take months to years to break down the entrenched perceptions of fear and mistrust and replace them with new perspectives toward mutual responsibility for improved performance. The supervisor attempting to

facilitate such a change should anticipate a great deal of initial skepticism and caution on the part of individuals within his or her unit as well as a lengthy healing process.

Another course of treatment to address scapegoating is the use of professional development training opportunities for supervisors. Supervisors can be trained to communicate concerns and engage in problem-solving activities within their unit in improved ways that minimize the likelihood that their behaviors will be interpreted as defensive or blaming. They should follow-up on problem-solving discussions with subordinates and team members with an eye toward problem resolution in a broad, creative manner which may or may not ultimately result in disciplinary action. Disciplinary action should occur, however, only after it has been determined that more systemic and positive approaches like the alteration of staffing patterns and employee training strategies have been given full consideration.

Prognosis

Although it may take months or even years to completely eradicate the disease, application of the treatments previously discussed can serve to return the organization to relative health in most cases. Adherence to appropriate supervisory modeling behavior and the judicious application of personnel training can act as effective preventive measures.

The college and university ombudsperson can promote the organizational health and development of his or her institution and its departments in a number of ways to minimize the effect of this disease. As previously mentioned, the identification of such an organizational affliction, including the spread of the disease and degree of infection within the institutional organism, can be the first essential step in addressing this problem. Through client contacts and confidential discussions regarding unit performance with managers and supervisors, the ombudsperson can quickly gauge the seriousness

of the organization's condition. This assessment allows for appropriate parameters and the targeting of the most efficient means by which to first subdue and then kill the infection.

The ombudsperson can assist managers and supervisors through individual interactions designed to develop appropriate supervisory skills and approaches that will address issues and concerns in a manner that relieves subordinates from feeling the necessity to shift blame. The ombudsperson can also be an integral part of the design of appropriate institutional training opportunities to address the manifestation of the disease in a specific unit. By working closely with the human resource professionals who design such training, the ombudsperson can provide fairly specific input regarding the nature and extent of the malady of a particular unit. By serving as an organizational physician, the ombudsperson can be a crucial component in the diagnosis and treatment of this affliction to which colleges and universities are so susceptible.

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HELPING AN ORGANIZATION'S ATTORNEYS UNDERSTAND - AND DEFEND - THE OMBUDS CONFIDENTIALITY PRIVILEGE

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I have, at times, likened my experience in the Ombuds Office to working on a bomb squad. Although it usually isn't, one never knows when the work may become explosive! One obvious way a situation can "explode" is when informal attempts to resolve issues are unsuccessful and complainants file lawsuits. This outcome dramatically increases the likelihood of a threat to the Ombuds' commitment to confidentiality.

On a few occasions, former complainants and others have attempted to obtain my testimony or records. In the absence of a "Shield Law" protecting the ombuds confidentiality, I decided to speak with a number of attorneys in an attempt to better understand the kinds of criteria on which courts rely in evaluating our assertion that we should be protected from testifying and/or providing our records. It is from these discussions that I drew the conclusions which are detailed in this article. I hope that the following information will be helpful to the ombudspeople and the attorneys who might face the task of defending "The Ombuds Confidentiality Privilege."

Institutional/Organizational Agreements

When administrators establish an Ombuds Office, they do so with the hope that the benefits to the organization of having such a function will outweigh the costs. One of those "costs" is that ombudspeople do not testify in formal

proceedings, even when that testimony might help the organization win -- or avoid losing -- cases. The logic is, of course, that while the testimony of an ombudsperson may, indeed, "help" in some cases, it might be damaging in others. So, in order to prevent our having to give the testimony deemed by our employers to be damaging, we do not give the testimony our employers might find beneficial.

Ombuds Offices, almost without exception, are delegated no authority within their organizations. This means we cannot make official decisions for our organizations, sanction those accused of wrong-doing, or bind users of the office in any way. Also, our offices are designated to be independent of -- but not a replacement for -- the formal administrative grievances or complaint procedures. Finally, use of the Ombuds Office is always voluntary and in no way prevents individuals from using other options within the organization to address conflicts, complaints, or disputes. This combination of factors may have relevance for attorneys to whom we turn for help when we attempt to avoid testifying in court.

To enhance the possibility of these factors being helpful in our avoiding testimony, I believe office brochures, promotional materials, and web sites should detail the Ombuds Office's lack of authority for making official decisions. Also, it can strengthen our legal position if all the official organizational publications which mention the Ombuds Office indicate that the office functions in a confidential, neutral, informal, and independent manner while attempting to assist individuals in resolving conflicts, complaints, and disputes.

Legal Challenges and Strategies

I believe attorneys representing our organizations are likely to face two primary kinds of challenges with respect to Ombuds Offices. In the

absence of a "Shield Law," there may be attempts by the plaintiff's attorney to compel our testimony. Furthermore, because we will not testify, attorneys for our organizations might, on occasion, perceive the need to "neutralize" the potentially damaging effects of the testimonies given by the plaintiffs or witnesses which contain statements that can be attributed to an ombudsperson.

Attorneys may be able to meet the challenge of the plaintiff's attorney who seeks to compel our testimony by citing precedents related to confidentiality in case law. It can be argued that these precedents establish a common law testimonial privilege. According to Howard and Gulluni (1996), the following are the four tests which are traditionally understood to be necessary for establishing a common law testimonial privilege:

1. The communication must be made in the belief that it will not be disclosed;

2. Confidentiality must be essential to the maintenance of the relationship between the parties;

3. The relationship is one that society considers worthy of being fostered; and,

4. The injury to the relationship incurred by the disclosure must be greater than the benefit gained in the correct disposal of the litigation.

Ombudspeople who practice according to the ethical principles of a professional ombuds association -- and who publicize this fact -- are likely to meet the "expectation of confidentiality" test (#1 above) because the ethical obligation to maintain confidentiality is one of the key ethical

principles of all ombuds professional organizations. I also believe that it is in the interest of the ombudspeople to give copies of these Ethical Principles to their organization's attorneys which can be kept in their files for ready reference.

Additionally, to assist attorneys in demonstrating how the Ombuds Office meets the other three tests required to establish a common law testimonial privilege, I believe it may be helpful to give them the following information to present to the court:

1. The Ombuds Office offers independent, confidential, and neutral alternative dispute resolution services to various constituents within an organization.

2. The primary purpose of the Ombuds Office is to provide an opportunity for individuals to resolve disputes confidentially and informally. This confidential assistance is, in fact, the reason many people choose to use the Ombuds Office, rather than less confidential alternatives.

3. Because of reasons 1 and 2, the Ombuds Office promotes individual, organizational, and societal interests by providing an alternative to expensive and time-consuming litigation.

4. If its confidentiality were eliminated (or even threatened), these individual, organizational, and societal benefits would be severely diminished, and, perhaps lost completely.

Attorneys may also find it useful to liken the protection needed by Ombuds Offices to that currently enjoyed by mediators in a number of states.

These statutes prevent mediators from having to testify except in limited circumstances. In Colorado, for example, the testimony of mediators requires their consent. This is in marked contrast to the client-attorney privilege in which a client may "waive" the privilege and, in essence, obligate an attorney to testify.

As mentioned previously, attorneys representing our organizations may also encounter the need to "neutralize" the effects of any testimony offered by plaintiffs or their witnesses about statements (whether true or false) attributed to an ombudsperson. Normally, they would achieve this goal by asking the individual to whom the statements were attributed to testify in an attempt to rebut any testimony thought to be harmful to the organization's case. However, because ombudspeople do not testify, there is no way to rebut anything that is alleged.

Therefore, what can an attorney do? The attorney can remind the court that the Ombuds Office operates under the following parameters: it has no authority to make official determinations or decisions for the organization; it functions independently of those within the organization who do have authority; it is optional for all users; and, its use does not preclude individuals from using other grievance resolution alternatives within the organization. This rationale should provide a sufficient contrast between our circumstances and those in our organizations who do have the authority to make official determinations for the organization; who do not function independently; and, whose involvement is not optional.

In essence, an attorney might argue that actions and statements by these individuals are far more relevant than anything an ombudsperson is alleged to have said. In fact, given these factors, it might even be argued that any statements attributed to an ombudsperson are, for the purposes of adjudicating a case, absolutely meaningless. This argument applies in cases where complainants say they spoke about their complaints with both an ombudsperson

and with formal investigators or administrators. In cases where complainants say they only spoke with the ombudsperson, the arguments can still be made that the ombudsperson's alleged statement is legally meaningless because no formal or administrative investigation occurred, and that the ombudsperson lacks the authority to make an official determinations for the organization.

Confidentiality and Neutrality

In addition to focusing on our lack of authority, our independence, and the ways in which our work meets the four-part test for establishing a common law testimonial privilege, I believe it is important for the attorneys who are representing our organizations to understand how "the ombuds confidentiality and neutrality tenets" function. Ombudspeople are asserting a confidentiality privilege which is significantly different from other privileges with which most attorneys are familiar. As mentioned previously, "The Ombuds Confidentiality Privilege" is most similar to that of mediators in some states. Specifically, what makes it different from other kinds of privileges is that "The Ombuds Confidentiality Privilege" cannot be waived by the individuals who use the services of the Ombuds Office.

Furthermore, it is important that attorneys understand and assert that Ombuds Offices are specifically designated to operate in a neutral manner. As a result, Ombuds Office staff members cannot take sides or participate in adversarial proceedings because the attorneys who represent the opposing litigants must use any information available to advocate for their clients. The oppositing attorney's use of any information provided by the Ombuds Office staff members would violate this promised neutrality. This need to avoid our being inappropriately required to participate in an adversarial process, of course, is a major rationale for the assertion that "The Ombuds

Confidentiality Privilege" cannot be waived by the individuals who use the Ombuds Office.

The result of functioning with this kind of confidentiality and neutrality is that, other than in situations not addressed here, e.g., cases involving the "duty to warn," ombudspeople who operate according to the ethical principles of a professional ombuds association cannot testify in court about "who" used the Ombuds Office or "what" was said.

Conclusion

I believe it is important that we operate in all the ways that give us the greatest likelihood of gaining a confidentiality privilege. I believe the principles and strategies identified in this article represent our best chance of defending "The Ombuds Confidentiality Privilege" until such time as we obtain "Shield Laws" to accomplish the same thing. In the meantime, despite my non-adversarial bias, I have learned that attorneys can be helpful. I hope that my colleagues who read this article will seriously consider sharing and discussing it with the attorneys who represent their organizations.

For ombudspeople and attorneys who seek more in-depth understanding about legal strategies for defending "The Ombuds Confidentiality Privilege," I highly recommend Charles Howard and Maria Gulluni's booklet, "The Ombuds Confidentiality Privilege, Theory and Mechanics." [published by TOA, 1996]

THE PUBLIC SECTOR OMBUDSMAN

United States Ombudsman Association

St. Paul, Minnesota

History of the Ombudsman

For as long as government has existed, guaranteeing citizens fair and equitable treatment under the law has been an issue and various protections have been utilized over the years. In modern times the public sector Ombudsman, where instituted, has been a successful and valuable guarantor of citizens' rights. By impartial and independent investigation of citizens' complaints, it has provided an informal and accessible avenue of redress.

The first public sector Ombudsman was appointed by the Parliament of Sweden in 1809. The Swedish Constitution divided and balanced power between the King and Parliament with the King having executive powers and Parliament retaining legislative power. The Ombudsman, who was appointed by and responsible to Parliament, was to protect individual rights against the excesses of the bureaucracy.

Since its creation, this first Ombudsman Office has been the model for the public sector Ombudsman, and set the definition that is still accepted today: a public official appointed by the legislature to receive and investigate citizen complaints against administrative acts of government. These acts may or may not include the administrative acts of the judiciary or the legislature, depending upon the statute. Ombudsman is a gender-neutral term, used throughout the world by women and men who hold the office. The Ombudsman concept spread through Europe and to this continent

with the establishing of the first offices in the United States in the mid 1960's.

"The first public sector Ombudsman was appointed by the Parliament of Sweden in 1809."

This was a time in the U.S.A. when the exposure of government secrecy and scandal (as well as the movements such as civil rights and good government) created a political atmosphere that was more favorable to openness and to establishing recourse for the aggrieved.

Hawaii established the first office in 1967. Since then, a number of states, counties, and municipalities have followed suit by establishing offices of general jurisdiction. The Ombudsman movement in the U.S.A. has also been characterized by offices that represent a departure from the Swedish model. These variations would include offices with general jurisdiction but appointment by a governor or mayor; legislative offices with special jurisdiction such as corrections; and, a single agency Ombudsman with statutory authority.

Characteristics of the Ombudsman

In 1969, the American Bar Association recognized the value of the institution and recommended the following criteria for creating an Ombudsman Office:

1. That State and local governments of the United States should give consideration to the establishment of an Ombudsman authorized to inquire into administrative action and to make public criticism.

2. That each statute or ordinance establishing an Ombudsman should contain the following twelve essentials:

a. authority of the Ombudsman to criticize all agencies, officials, and public employees except courts and their personnel, legislative bodies and their personnel, and the chief executive and his personal staff;

b. independence of the Ombudsman from control by any other officer, except for responsibility to the legislative body;

c. appointment by the legislative body or appointment by the executive with confirmation by a designated proportion of the legislative body, preferably more than a majority, such as two-thirds;

d. independence of the Ombudsman through a long term, not less than five years, with freedom from removal except for cause, determined by more than a majority of the legislative body, such as two-thirds;

e. a high salary equivalent to that of a designated top officer;

f. freedom of the Ombudsman to employ assistants and to delegate work to them, without restraints of civil service and classifications acts;

g. freedom of the Ombudsman to investigate any act or failure to act by any agency, official, or public employee;

h. access of the Ombudsman to all public records deemed relevant to an investigation;

i. authority to inquire into fairness, correctness of findings, motivation, adequacy of reasons, efficiency, and procedural propriety of any action or inaction by any agency, official, or public employee;

j. discretionary power to determine what complaints to investigate and to determine what criticisms to make or to publicize;

k. opportunity for any agency, official, or public employee criticized by the Ombudsman to have advance notice of the criticism and to publish with the criticism an answering statement;

l. immunity of the Ombudsman and staff from civil liability on account of official action.

3. That for the purpose of determining the workability of the Ombudsman idea within the Federal government, the Federal government should experiment with the establishment of an Ombudsman or Ombudsman for limited geographical area or areas; for a specific agency or agencies; or, for a limited phase or limited phases of Federal activity.

4. That establishment of a Federal government-wide Ombudsman program should await findings based on the experimentation recommended.

It also is noteworthy that the aforementioned recommendations by the American Bar Association are still accepted today.

The United States Ombudsman Association (USOA), the national organization of the public sector Ombudsman, has incorporated these criteria in its Bylaws. They also are integral to the USOA annotated Model Statute for Ombudsman Offices which is built on 30 years of experience with the concept in the U.S.A.

An Ombudsman's Power and Responsibilities

The essential characteristics of an Ombudsman Office are independence, the ability to investigate complaints which often includes **subpoena power, the ability to criticize government agencies and to recommend changes** that may be issued in public reports. An Ombudsman, however, has no enforcement or disciplinary powers.

The Ombudsman Offices are a paradox, being both powerful and powerless at the same time. They can investigate complaints, choosing which are the most important, and initiate investigations without complaints. They set an agenda by what they choose to investigate. They can determine whether a complaint is justified and seek remedies for it. They can compel people to talk to them and produce records, subject to the protections witnesses have in court. They cannot, however, make an agency do anything, but they can make their reports public. Aside from choosing what questions to ask and issuing subpoenas, their powers are mainly persuasion and publicity.

An Ombudsman generally has neither the power to investigate the people who appoint the Ombudsman and other elected officials nor the power to look at the judicial acts of courts. Voters, however, do have remedies such as recall or impeachment for elected officials. Unfavorable court decisions can be appealed to a higher court. Complaints about judicial misconduct may result in an administrative sanction of a judge or rejection of an incumbent at the polls. The Ombudsman is not an alternative to these traditional remedies.

Ombudsman Jurisdiction

Jurisdiction varies according to the law which creates an office. For a general jurisdiction Ombudsman, the administrative acts of most, if not all, agencies in a local or state government are within an Ombudsman's mandate. A specialty Ombudsman looks at the acts of a single agency or a group of agencies that work in a single area of concern such as children's issues.

Appointment of an Ombudsman

Enabling legislation will determine the appointment process of an Ombudsman. As the office of an Ombudsman is one that must operate with the trust and respect of the community, it is recommended that the selection process be one that is not unilateral but is shared by appropriate legislative and/or administrative committees and bodies. The efficacy of an office is largely dependent upon a widely held view of the Ombudsman as a person of integrity, who works with non partisan fairness and ethical behavior.

Confidentiality

Enabling legislation for many Ombudsman Offices requires that the complainant's identity be kept confidential. People need to be able to talk to the Ombudsman and staff in confidence. After discussion, some choose not to file complaints and others want their complaints recorded but not pursued. Confidentiality is critical to creating confidence that complainants can talk to the Ombudsman without their identity being disclosed against their will.

"...the office of an Ombudsman is one that must operate with the trust and respect of the community..."

Complaint Handling

Complaints that come to an Ombudsman Office are screened to determine whether the complaint is in the jurisdiction of the Ombudsman; whether the complainant has utilized the government agency's established complaint process; and, whether there is validity under the law to the complaint. The Ombudsman helps citizens understand how government agencies operate; what are the appropriate laws, rules, policies; or, how citizens may handle complaints themselves. Complaints that are accepted are objectively investigated by the Ombudsman. Informal resolution is often attempted with the agency. When this is not possible, the full power of the office may be utilized, which could result in a public report containing recommendations to the agency or to the legislature. Many jurisdictions provide whistle blower protection for both complainants and witnesses who may contact or be interviewed by the office. This is done to ensure the Ombudsman has access to all of the facts in a matter and to prevent retaliation against those who seek help from the office.

In resolving complaints, it is also the responsibility of the Ombudsman to identify patterns of abuse of power or negligence by government that would require legislative attention.

Reporting

Most public sector Ombudsmen are required to report annually to the appointing authority. With much of the Ombudsman's work being done quietly and in confidentiality, the Annual Report is an opportunity for the Ombudsman to speak publicly on issues of concern. Annual Reports will contain statistical information on the contacts by citizens during the prior year, an analysis of these statistics, and recommendations that flow from this analysis.

Advocacy

The Ombudsman Offices perform an unusual role in government. While they receive complaints from the public, their job is not to be become an advocate for the complainant or the governments over which they have jurisdiction. Ombudsman are charged with collecting and evaluating all of the facts regarding a matter as a neutral investigator. They determine if there was an error; unfairness or harm by the agency involved; or, no basis to the complaint. The Ombudsman may make recommendations to correct wrongs done to individuals to improve the administration of government. If their recommendations are not accepted and good reasons not given, the Ombudsman may become an advocate for their implementation.

Summary

With an Ombudsman Office, people who have problems with government have a place to seek solutions, independent explanations, investigations, and recommendations.

An Ombudsman Office, by providing a direct and informal avenue for the mediation of citizen grievances, is a valuable tool for enhancing the relationship between a government and its citizens and ultimately for improving the administration of government itself.

NEUTRALITY, JUSTICE, AND FAIRNESS

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In the Spring 1997 issue of the University and College Ombuds Association newsletter OMBUDS News, University of Kansas Ombudsman and Associate Professor of Religious Studies, Bob Shelton, has addressed -- from an ombuds' point of view -- the question "How Do We Advocate For Justice?" He begins with a case study to explore the ombuds principle that "justice is pre-eminent" and then draws on a number of definitions of justice which seem to be implicated in the case. Bob's discussion and University of California, Los Angeles Ombudsman, Howard Gadlin's remarks on "neutrality" at conferences (I have not yet seen a written version) prompt the following ruminations. In addition, the image of a blind-folded Justice holding balanced scales suggests the connection of the two ideas, and I shall start with "neutrality."

I. Neutrality

Any discussion of neutrality reasonably starts with the recognition that no developed human being can be completely and comprehensively 'neutral' -- a blank slate. Every adult has a personal history and a number of positions in the world which are brought to every new experiencing. Each individual's history and positions are unique and thus we each have our individual perspectives -- points of viewing what comes before us. The language(s) in which we think and speak have their own ways of cutting up the shining, buzzing world of sense perceptions. Recognizing these limitations does not

mean that we must abandon the word "neutrality" nor give up attempts to specify and seek it. What do we mean by neutrality? When and how can we use it?

Modern "alternative dispute resolution," to which neutrality is central, may (my knowledge of the subject is quite superficial) have begun as an American professional activity with labor/management mediation and arbitration. The mediator or arbitrator was to be neutral in the following senses: not being affiliated with either side; being acceptable to both sides in advance as someone who would try to remain disinterested; and, having a personal "interest" only in satisfying both sides that he or she either helped the parties to a resolution or remained impartial. "Not being affiliated," "being mutually acceptable," "disinterested," "having no personal interest," and "impartial" are all synonyms for (or aspects of) "being neutral." In the labor/management disputes of the 1940s and 1950s, both sides probably often suspected that the mediator had "biases" of some sort and tried either to obviate or to take advantage of these perceived biases. If the mediator was not neutral "enough," one or the other parties backed out of the process. I suppose that over time, some people became good enough at seeming neutral, and, that -- under governmental pressure for resolution -- they were accepted as preferable in cases of arbitration. (The history of compulsory arbitration in labor disputes is an involved one. Both labor and management found reasons to suspect arbitrators to be biased.)

Another major area for mediators now is family mediation, e.g., in cases of divorce, property settlements, and child support. What the parties seek is not some disembodied soul but <u>someone</u>: someone who seems fair and is the best person on whom they can agree among those available. Nobody expects an angel; everybody would be scared of a disembodied spirit; and everybody would be suspicious of a woman in a skimpy robe, blind-folded, and carrying a balance-scale. Both sides would prefer someone who will "side" with them; but, they

know the other side will not agree to that. They recognize no one is going to be perfect.

What is it that the parties to a dispute look for in seeking someone who is impartial (to pick one term from the list above)?

In the first place, the someone must seem to have reached no prejudgment as between the parties. "Prejudgment" is another form of "prejudice." "As between the parties" is very important. Two Ku Klux Klan members might prefer to have another Klan member as their mediator, i.e., a bigot -- but, a bigot of a particular sort who would be mutually preferable, in all probability, to a distinguished jurist who happened to be black. "Neutrality" in such a case is not a general virtue. It is quite particular to the situation of the two parties.

Even approaching the problem by a different formulation will help only a little. We say we want someone who will approach the situation with an "open mind." Ruling out the impossible "blank slate" mentioned above, we still would not want someone with a completely "open mind." In any dispute, the parties (of necessity) have a good deal in common, including whatever it is they are disputing. They probably also share common experiences, language, many presuppositions (biases), and so forth. Both parties would be reluctant to agree to someone they would think of as "clueless." "Clueless" does not mean stupid so much as out-of-touch with the situation.

"Understand what I mean, not what I say" sounds at first like a cop-out. In fact, it is a necessity of understanding. No verbal formula can be perfect. To emphasize the particular formulation is to think words, not things (to reverse O.W. Holmes' word order) and to end in arid abstractions. Care in formulation is important for all parties, and the mediator has a responsibility to draw out the words to promote clarity. But even so, the mediator must be familiar enough with the sort of issue in dispute to

conjecture and explore the hiatuses left by the spoken words. He or she must recognize clues.

I hope I have said enough to illustrate my view that "neutrality" is not something to be given an explicit and essential definition. Neutrality is not an essence; it is an absence. We must dance around it with enough synonyms and examples to be able to recognize when "it ain't present."

The need for clues must be kept in mind when one approaches academic ombudsing. Someone moving from the world of a for-profit business corporation into a university setting must learn the mores of academe (and vice versa). The relevant mores may differ less between a business and the problems of a "non-academic staff ombudsperson" than the differences faced by a "faculty ombudsperson." However, they will exist.

The ombudsperson must be "neutral" as between the party which presents a case and the other person or persons who are "involved" in that presentation. Often, the presenter may set her or himself against "the university"; but this is misleading until the complainant takes the case outside the university, e.g., into the law courts. The other involved parties are persons, even if they are persons who claim to represent the university in its corporate capacity. All college and university ombudspersons I know are employees of (and thus a part of) the institution. They can set themselves against the institution (as contrasted with persons professing to speak for the institution) only by quitting it. The ombudsperson can, however, come to the conclusion that individuals who claim to represent the institution are not acting to represent the institution in its best, that is, ideal self. In such a case, the ombudsperson lays claim to the conscience of the institution and has an obligation to display why the actions (policies, etc.) are not consistent with the institutional mission (as expressed in university statements) or with academic professional standards.

We can now address the "pre-eminence of justice."

II. Justice

Bob Shelton has given us several definitions of justice and shown how they relate to his case study. While he probably did this to illustrate the definitions, he also gives us a kitfull of tools to approach future cases. His principle of selection of definitions is not made explicit, and he does not claim exhaustiveness. I propose to turn to "classics" for definitions which are thereby structured by the argument of the source texts.

Plato, in the Republic, provides five definitions of justice which are introduced in the following order. Justice is first defined as telling the truth and paying one's debts. While the definition is quickly dismissed in Plato's argument, this definition is still very much alive and undergirds much of the Anglo-American legal system, e.g., libel, false advertising, paying one's bills. The second definition is helping one's friends and harming one's enemies. While you and I may not like this one very much, it is in common use throughout the world, and it is even on university campuses. (Consider the fraternities -- alas, since I am a member -- and other cliques.) It also may find expression in the different form, "my group" (c.f., ethnic, the disadvantaged). The third definition is that justice is the will of the stronger. This definition has quite articulate modern interpreters (c.f., John Austin, Hans Kelsen). The more common way of putting it is that justice varies from community to community. The state -- that is, the dominant people in each community (a tyrant, the rich, the demos) -- passes laws which express justice for that community. The fourth is that justice is a kind of compromise between the many weak and the few strong. Each of these definitions is raised by Plato only to be refuted.

The fifth (and the true definition of justice according to the dialogue) is the right ordering of the parts -- whether of the soul or the state -- with reason in command of the appetites and passions and the philosopher-kings in command of the warrior and productive classes. This definition of justice has

its modern advocates as diverse as, inter alia, Christians tracing their views (consciously or not) back to St. Augustine and Marxists.

Justice as right ordering is related in Plato to the idea of harmony, a rightness in the soul and a rightness in the relation of the soul to the cosmos. It is an easy step to the Stoic belief in a community of gods and human beings governed by "natural law."

Aristotle recognizes that "justice" is an ambiguous word (like most others) and thus makes careful distinctions of definition appropriate to the context of use. The discussion concerns actions voluntary and involuntary. Justice is both a virtue in the individual (Nicomachean Ethics) and a principle of order in the state (Ethics and Politics). In the individual, justice may be viewed either as the comprehensive virtue ("...justice is often thought to be the greatest of virtues...and proverbially 'in justice is every virtue comprehended'") or as one part of virtue or one among several virtues. This latter virtue, justice, is of two kinds: distributive and rectificatory. The former of these gives to each according to the merit of the person; the latter gives to each in proportion to what the individual has contributed, e.g., money, effort, time.

Justice in the polity may be either common to all human beings or an expression of the laws of the particular community. Since polities may be "best" in four different senses, the analysis must be detailed, i.e., best absolutely [ideal circumstances]; best in existing circumstances; best commonly; and, best in situations of change. The treatment of justice in the Politics mostly examines ambiguities in the meaning of equality and the impact different views of equality have on social/economic class balance and struggle. If everyone is to be treated equally, is that treatment arithmetic or geometric, i.e., each person counted as one, or each person weighed on some scale of worth? (Treating equals unequally is unjust and treating unequals equally is unjust.)

Aristotle's distinctions can be roughly related to Plato's in the following manner: Distributive justice in the ideal state approximates Plato's idea of true justice. Rectificatory justice is a more detailed view of "telling the truth and paying one's debts." Aristotle's treatment of justice in the different kinds of polity is a more elaborate study of justice as a kind of compact between the strong and the weak. For Aristotle, force (the rule of the strongest) and friendship are subjects for study distinct from the study of justice.

Shelton's approaches, too, can be related to these earlier formulations. Smurl's study is explicitly about distributive justice with the interesting apparent focus on burdens. In the brief statement here, it is not clear whether the principles of distribution are to be found in the order of things (as in Plato) or in the distinctions of human excellence (as in Aristotle) or lie elsewhere. The "compensatory" justice mentioned by Shelton seems close to rectificatory justice. Retributive justice is an aspect of the application of force, but it can be excused or justified on several different bases.

Finally, beginning with injustice, as suggested by Lebacqz, is an application of the "problematic" approach, developed by Aristotle and John Dewey, i.e., inquiry begins with some "problema" -- some thing in the path catching our attention by blocking the smooth flow of experience. These and other thinkers develop definitions foreshadowed in those of Plato and Aristotle. Still other works of religion, philosophy, and literature may deepen, expand, or supplement the foundation/works of Western philosophy. The difficulty comes in relating all these definitions to one another and to real-life situations in which "justice" somehow seems relevant.

In Aristotle, the law common to all humankind is "natural" in the sense of reflecting an aspect of human nature. It is not a "higher law" in the Stoic and then Christian sense of being shared with (or an expression of) the will of the gods (God). Aristotle's treatment throughout is based on

observation and the exploration of connections among things observed (causes). People distinguish between what is and what ought to be; but, they are often not as exact as they might be in describing what is and they often disagree about what ought to be.

In contemporary American discourse, "justice" is seldom employed by the verbal classes simply to mean the "legal." "Justice" usually is meant to refer to something "higher than" the law -- something which can be used as a criterion for judging the rightness of laws. It is my impression that in the limited articulations of the "street person" justice is more closely associated with the existing laws, i.e., "if it wasn't wrong, it wouldn't be against the law" and many variations thereupon.

Being somewhat verbally oriented myself, I incline to uses of "justice" either in the context of legal systems (imperfect systems for doing justice) or in the "higher" or, more properly in my usage, the "critical" sense. Justice is an appeal from what is to what ought to be. This "ought" occurs at two levels. In one sense, it refers to an appeal from what is in fact to what is intended. The (in)justice of the prison system is an example of this "ought." As they actually operate, prisons are often a far cry from what is officially intended and what is professed to be the case -- instead of institutions for "reform," they are overcrowded, gang-run, and violent.

In the second, the "higher" sense, the "ought" implies an appeal to some more comprehensive criteria than the correct operating of the intended system. The "problem of justice" is translated into the criteria or meaning of "higher." In whose view -- or according to what principles -- is this "higherness" defined? The following sources of justice are the four with which I am most familiar:

1. Justice may be in accordance with God's law/will/command.

2. Justice may be inherent in nature itself -- a part of the orderliness or rationality of the cosmos. (In this sense, extraterrestrials would be governed by the same rules of justice.)

3. Justice may be inherent in human nature. (In this sense, fundamental rules of justice are common to all human beings.)

4. Justice may be the result of some sort of consensus. (This last is my own view of the source of justice.)

Each of these views regarding the source of justice raises its own subsidiary problems. I shall address only those connected with justice as a kind of consensus.

The first question is "consensus of whom?" The most obvious answer is a consensus of "everyone." But does that mean everyone alive today (thus opening the field for pollsters)? Everyone in this country? Everyone in the world? Everyone in the Western world? Everyone in the Anglo-American tradition? There also are possibly some age/health limitations (excluding, for example, infants and those in the late stages of Alzheimer's). Finally, what about minimal intelligence requirements?

Another possibility is a consensus of the "best minds." But how are these to be identified? (This selection is often employed in disputation, with the "best minds" typically self-chosen -- an elite of the best and brightest.)

The third possibility (and my own choice) is suggested by David Hume's essay "Of the Standard of Taste." Hume was an "academic skeptic" which means that he believed in the following concepts: that things are complicated; that the mind is imperfect in grasping that complexity; that language is an

imperfect medium for communicating what we think we know; and, that we can never be completely certain that we have the absolutely final and best formulation of any truth -- including the truths about matters of justice. Without duplicating Hume's argument in the aesthetic sphere and then accounting for any complications of adjusting it to the ethical sphere, I conclude that the consensus we are seeking is one accumulated over time by conscientious, observant, intelligent people who have paid attention to a group of problems and issues we loosely group under the heading "justice." This is not very satisfactory; however, it remains the best there is.

This consensus about justice is not fixed in any definitive formulation; is changing slowly as human observation and experience accumulate; and, is enriched by fertile minds, diverse cultures, and (what turn out to be) sound judgments. The Platonic and Aristotelian insights into justice cited above certainly do not exhaust the field. However, they do -- along with the Analects of Confucius, the teachings of Buddha, the Bible, and the Koran -- provide grounding for further exploration and discourse. To them, we can add a long list of documents such as "Magna Charta," the English and American "Bills of Rights," the UNESCO "Universal Declaration of Human Rights," and books such as those by John Locke, David Hume, etc. We can even add Bob Shelton's texts and other twentieth century works.

When we (individually or in a group), try to determine what is justice in specific circumstances, we engage in a dialogue drawing on all the resources available to us. The dialogue about justice never ends. At some point in a particular case we must break it off with a decision. We (whether editorial or actual) must decide. This is a far cry from dropping the suspected witch into the water to see if she floats or sinks as a way of reaching the justice of the matter. It is also rather far from the procedure my grandfather might have employed of testing the case against (his view of) the Bible (the King James version). [I put the two phrases in parentheses

because it never would have occurred to my grandfather that the written text is not self-evident or that translators made interpretive judgments in the course of translation.]

How does my approach relate to ombudsing? Among other things, it evokes lots of problems. It calls attention to the difficulty for an intermediary of defining and then applying justice in cases in which the general approach and definition may be in question between the parties. In my own experience, people with problems, even university folks, are not too interested in spending time exploring the meanings and implications of justice. They are usually simply sure that "they know it when they see it" (or when they feel they are experiencing injustice). While Bob Shelton calls attention to the exemplification of various views of justice in his case study, I rather wonder how many ombuds clients (speaking now of all parties in the case) would be interested in the connections of particular approaches to particular aspects. The set of approaches may, of course, be suggestive to the ombudsperson seeking resolution and thus have heuristic value.

When a case presents issues of justice in the sense of "legality," the situation is rather different. If the ombudsperson calls one or more of the parties' attention to potential illegalities, he or she is indeed likely to capture the attention and concern of those who may be in danger of running afoul of "justice." But that was not, apparently, the situation in the case study. (At one time, I myself dealt with a case in which a junior dean -- himself with a legal degree -- had to be given "other," palliative justifications to get out of a situation in which the University would almost certainly have lost in a court of law. In this case, even a lawyer may not see the path of justice in contrast to an ombudsperson for whom the injustice/illegality is obvious.)

The more interesting cases for reflection are those in which illegality is not an issue, but where something seems "unjust" even though "legal" in

both the internal system of rules and vis-à-vis the courts. But I am not sure "justice" is the right tool for most such cases. It seems to me TOO BIG. In my experience, trying "justice" on most university people is like waving a red flag of controversy (except with those whose eyes glaze over).

III. Fairness

"Fairness" is somehow more earthy than justice -- less pretentious, less confrontational, and, less an invitation to philosophical dispute than an attempt "to work out" something comfortable.

"Justice" evokes the comprehensive and transcendental. "Fairness" evokes local images. "Fairness" is pretty clearly context-bound. A referee makes a "fair" call in a game, not a "just" one (except perhaps in some Big Eight games). The meaning of "context-bound" and the use of "game" language must be examined.

Let me first acknowledge that some very important aspects of ombudswork clearly involve justice in either or both of its Aristotelian applications -- common to all human beings or as an application of the laws of our particular society. Discrimination based on race or gender is unjust, and those of us within the ombudscircle would say they were unjust even before they became illegal. Would we have said either was "unfair"? My guess is we would have opted for the stronger word in speaking against it. In such matters, the "context" is humanly universal.

Let us consider another case to which I have previously referred in which "the issue" was never raised (except in my conversations with myself). Is the enforcement of an office dress code "fair"? Is it "just"? I think of a situation at my university in which male employees serving as receptionists are required to wear a jacket and a tie while full professors are not. The former are paid very little as compared with the full professors. Yet, the man who revealed the dress code to me did so casually and during a discussion

about "his problem" which had nothing to do with the dress code. (I was, of course, sitting there in my turtleneck.) He did not consider it unfair; rather, it was simply one of the expectations under which he took the job. Within the rules of the game that he was playing, this rule was fair.

Is it just? To answer that question with more than a "gut reaction" would, in my view, take extended reflection on society and economy. (Perhaps, for example, professors have "earned" their informality by years of scholarship. Perhaps everyone should wear a simple white smock.) Is this <u>really</u> a question? Perhaps "elevating" this situation to the status of an issue of justice is a failure of proportion.

Much ombudswork concerns matters which should be "kept in perspective." A major aspect of doing so is recalling that we operate in an institution that most of those present have "joined." In "joining," we "commit" ourselves to play the game that is the particular institution. Of course, like falling in love and getting married, we do not know everything to which we are committing ourselves. Moreover, we cannot foresee the institutional analogue "in sickness and in health, for richer and for poorer," nor do we make the same legal and moral commitment "to stick with it." Although we can quit more easily, we may feel trapped by the various additional commitments that we have made, e.g., mortgaged homes and cars; development of personal loyalties. Finally, people are sometimes "entrapped" by false descriptions of the situation they are entering, e.g., working conditions promised (perhaps in good faith), but not delivered.

I believe the ombudsperson must have a commitment to institutional fairness. We should "expect" people to honor the rules of the game they have joined, and we should help them to understand these rules. We also should help the rule makers and the enforcers to uphold the ideals -- explicit and implicit -- of the institution. Thus, while I think we should study works of ethics and politics (in the Platonic and Aristotelian senses of the words), we

also should study the mores of our individual institution. I suspect we shall get further toward being accepted as spokespersons for the conscience of the institution if -- after a neutral investigation -- we ask, "Is this really fair?"

R. Adolfo de Castro

Adolfo, a former trial lawyer, turned "ombudsman" 12 years ago and is serving his second Six Year Term as the Ombudsman for the Commonwealth of Puerto Rico -- "Defensor del Pueblo." His past experiences as a state attorney and as a judge have significantly influenced his perspective on the Ombudsman profession.

Adolfo has written several articles on the Ombudsman as an "institution"; has discussed the subject at worldwide forums; and, has presented at the following international conferences: the Taiwan International Ombudsman Conference (1994); the Judicial Ombudsman International Conference of Mexico (1993); the Fifth International Ombudsman Conference of the International Ombudsman Institute at Vienna (1992); the First Caribbean Ombudsman Conference at Barbados (1989); and, the 22th Biennial Conference of the International Bar Association at Buenos Aires (1988).

Adolfo has served as President of the United States Ombudsman Association; as Chairman of the Ombudsman Forum of the International Bar Association in London; as a member of the Board of Directors for the International Ombudsman Institute at Edmonton; and, as a member of the Board of Directors for the Latin American Ombudsman Institute at Caracas.

Adolfo received a B.A. from New York University and a J.D. from the University of Puerto Rico.

Tim Griffin

Tim, a 24 year veteran serving in the roles of counselor, mediator, and dispute resolution specialist within the conflict mediation arena, originally earned a B.A. in Music and a M.A. in Counseling from Western Michigan University. These contrasting studies were followed by a Ph.D. from The Ohio State University in Higher Education with an emphasis in Higher Education Law.

Tim's academic experience is as diverse as his degrees -- administrative posts at six universities in four states and professorial appointments at three institutions. The positions included five years as High School Band Director and Music Department Chair; President of a local union; Resident Assistant; Residence Hall Director; Director of Campus Union and Student Activities; Assistant Vice President for Student Affairs; and, Director of Judicial Affairs.

Tim also taught in the Higher Education Graduate Program at The Ohio State University; in the Student Affairs Program at Northern Illinois University; and, in the Music Department at the University of Alabama, Huntsville as a full-time music faculty member.

In addition, **Griffin** was an Intern in the Ombudsman Office at Western Michigan University, and worked four years as the Student Ombudsman at the University of Alabama, Huntsville. At present, Tim is serving his seventh year as the University Ombudsman at Northern Illinois University.

Tom Sebok

Tom is in his seventh year as the Director of the Ombuds Office at the University of Colorado, Boulder. Simultaneously, Tom is serving his second year as Secretary for the University and College Ombuds Association (UCOA) and has been re-elected to another two year term.

Tom's professional interests include helping the Colorado Ombudsmen to obtain a "shield law"; exploring ombuds ethical dilemmas; and, clarifying areas of consensus and disagreement about the theory/practice of ombudsing. Tom also has made presentations at the CalCaucus Conferences, the UCOA Conferences, and the 1995 Ombuds Superconference.

Prior to the Ombudsman position, Tom spent 11 years in personal, career, and academic counselling at the following colleges: Chesapeake College, Wye Mills, Maryland; Salem Community College, Pennsgrove, New Jersey; and, Northampton Community College, Bethlehem, Pennsylvania. Tom earned a Bachelor of Arts and Master of Education at the University of Delaware.

Tom has contributed three articles to previous editions of The Journal. The participants at the Asilomar Conference will also remember Tom's strong interest in music -- writing songs to play on his guitar -- which they enjoy at the annual Camp Fire Celebration.

USOA

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James W. Vice

Jim is serving his seventh year as Ombudsperson at Loyola University Chicago. An alumnus of the University of Chicago, Jim remained at his alma mater for several years as an administrator in Student Affairs and as a Professor of Social Science. In 1975, he became Dean of Students at the Illinois Institute of Technology. In addition to his administrative duties at IIT, Jim taught Political Science.

Jim's academic interests focus on the general nature of practical reasoning and in the specific ways people reason together through institutions -- areas in which he has 27 years of teaching experience. These concentrations, combined with his varied administrative experiences, have sharpened his commitment to improving communication and community understanding within a university.

In Spring '94, Jim was elected a SPIDR Board Member for the Chicago Chapter.

Ron Wilson

Ron Wilson is an Assistant Executive Vice Chancellor and Interim Director for the Office of Equal Opportunity & Diversity (OEOD) at the University of California, Irvine with responsibilities for the Ombudsman Office; the Faculty & Staff Assistance Program; and, the Campus Mediation Program. [The Ombudsman Office services the California College of Medicine, the Medical Center, and the UCI Main Campus.]

A 19 year veteran Ombudsman, Ron came to UCI in 1979 as the Campus Ombudsman and Associate Dean of Students from UC Riverside where he had served as the Director of Student Affirmative Action.

Active in several Ombudsmen organizations, Ron is a past President of the University and College Ombuds Association. This year marks Ron's ninth contributing effort as the Compiler and Editor of The Journal. Ron also is serving as a Co-Convener of the 24th Annual Conference of the California Caucus of College and University Ombuds with Dr. Lois Price Spratlen, University Ombudsman, University of Washington.

Ron received a B.A. in English Literature from Bard College, New York in 1975; a Certificate of Administration and Analytical Skills from the Center for Public Policy & Administration, California State University, Long Beach in 1980; and, a M.P.P.A. in Public Policy and Administration in 1983.