REFORM, JUSTICE AND THE OMBUDSMAN

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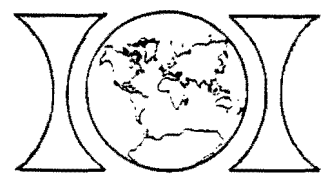

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LARRY B. HILL[1]

PREFACE

An early version of some of the content of this monograph was presented to the Annual Meeting of the Southern Political Science Association, Atlanta, Georgia, November 6–8, 1980. The version at hand is an elaboration of an address presented to the Fifth Annual Conference of the United States Association of Ombudsmen, Minneapolis, Minnesota, November 5, 1981.

I am deeply grateful to the United States Ombudsmen, who have suffered my visitations, my interrogations, and--now--my admonitions with unfailing cooperation and good grace.

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I. INTRODUCTION

EXHORTING A GROUP OF OMBUDSMEN to be sure that they devote sufficient attention to fostering administrative reform and routing systematic injustice may seem to be superfluous, if not quixotic. Nonetheless, this is the course of action I shall urge upon you. At the conclusion of the address, I shall indicate why I think the subject is an especially appropriate one for United States Ombudsmen at this time. Let me immediately betray my academic proclivities by beginning with some definitions.

I conceive of administrative "reform" as a category of administrative "impact". In my New Zealand study, I defined the latter term as follows: *"We shall reserve the term 'impact' for those situations in which, as a result of the Ombudsman's investigation, government departments make policy changes that have consequences reaching into the future beyond the particular decision complained against."*[2] My perspective is a normative one: reforms are those administrative impacts whose effects are salubrious.

Furthermore, I am interested in those reforms that promote administrative justice. *Justice,* which was a central concept for Plato and Aristotle, has been an important subject for Western political theorists. Interest continues in our day, as the intellectual community's fascination with the writings of John Rawls exemplifies.[3] But only infrequently has the concept of justice been applied specifically to bureaucratic agencies in any systematic fashion. Fortunately, many of the abstract concerns of philosophers can be translated into terms that are relevant to the problems of citizens interacting with government organizations.

Curiously, writers often consider the meaning of justice to be so obvious that they do not feel compelled to define it explicitly. Fairness, equitableness, rightfulness,

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[2]Larry B. Hill, *The Model Ombudsman: Institutionalizing New Zealand's Democratic Experiment.* (Princeton, N.J.: Princeton University Press, 1976) p. 205; emphasis is original.

[3]John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

impartiality--all are frequently used as synonyms for justice. John Plamenatz's conclusion is widely accepted: "*Justice* is still commonly used in the two primary senses, of giving every man his due, and of the setting right of wrong."[4] Rather than introducing a new meaning for justice, I want to indicate how our conventional understandings are useful in analyzing certain administrative reforms. Although much agreement exists on the general nature of justice, philosophers create innumerable categorizations among kinds of justice. These distinctions will illustrate the point: individual vs. social justice; procedural vs. substantive justice; and aggregative vs. distributive justice.[5]

At present, my interests are more practical than theoretical, so I shall devote only brief attention to the scheme of categorization that I shall use. Two basic types of administrative justice are distinguished:

1. *Processual Justice.* Most of the problems citizens have with government agencies come from situations in which questions arise about the fairness of the means by which policy is implemented. The point of contention is whether or not the citizen was processed properly; no fundamental issue about the content of the policy is raised. Other names for this kind of justice include "procedural" and "instrumental" justice.

2. *Ultimate Justice.* Some problems go beyond the means administrators employ to the essence of the policy--that is, to the more fundamental questions about the existential fairness of the policy. Other names for this kind of justice include "substantive" and "noninstrumental" justice.

Hence: processual justice involves mainly the "how" of citizen/bureaucratic involvement, and ultimate justice involves mainly the "what". Unfortunately, the distinction between the two types is not ironclad, and sometimes a given situation raises problems for both kinds of justice. For these reasons, I am attracted to Edmond Cahn's view that justice can best be analyzed by looking at its facets, which tend to overlap,

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[4]J.P. Plamenatz, "Justice," in *A Dictionary of the Social Sciences*, ed. Julius Gould and William L. Kolb (New York: Free Press, 1964), p. 364.
[5]For a discussion of such distinctions, see William Nelson, "The Very Idea of Pure Procedural Justice," *Ethics* 90:502-511, July, 1980.

rather than by attempting to devise exclusive categories.[6] Additionally, I emphasize that my classification of reforms--especially the subclasses and their arrangement--is provisional in my mind, and it is not comprehensive.[7] Although all of the justice problems identified below focus on issues for which a place will have to be found in a more conceptually rigorous and thorough formulation, the following is only a preliminary step in developing such a study.

Although advocates of ombudsmen for American governments frequently tout the ombudsman's capabilities as a permanent administrative reform commission, the office's actual performance of this function has hardly been studied. Evaluating comprehensively the reform impact of American ombudsmen would be a mammoth undertaking. Quite a limited approach is taken here. The case notes that many of you publish in your reports constitute the data base for this study. Using this base, as was done in the New Zealand study, I have attempted a detailed analysis of the reports of Hawaii's Ombudsman, Herman Doi.[8]

I was able to determine from the case notes that for the first eight years of its existence the office was responsible for 188 reforms, 24 per year. Since then, Herman Doi has conducted a study of his files which confirms the general outline of my findings; using his complete records, he found that he caused 202 reforms during the same

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[6]Edmond N. Cahn, *The Sense of Injustice* (New York: New York University Press, 1949), p. 22. Also, I am attracted by Cahn's approach to justice from its reverse side.

[7] In the earlier version of this paper, I used the labels "instrumental" and "noninstrumental" for what I now dub "processual" and "ultimate" justice. The latter set of labels now seem more useful in evoking my intended meaning than the former. If possible, I want to avoid using "procedural" and "substantive" justice--terms so much beloved by lawyers--as the labels for my main categories, because they are hackneyed and because a given reform concerning either processual or ultimate justice may have both procedural and substantive features. Nonetheless, I acknowledge that some lawyers use "procedural" and "substantive" to make virtually the same distinctions I make using "processual" and "ultimate". Vide, for example, Thomas C. Grey ("Procedural Fairness and Substantive Rights", in *Due Process*, Nomos XVIII, ed. J. Roland Pennock and John W. Chapman [New York: New York University Press, 1977], p. 182): "On the one hand, norms of procedural fairness--a moral concept--apply to processes used in deciding nonlegal disputes. Thus a parent's decision of a dispute between children might violate notions of fair procedure if the parent listened to only one side of the dispute before deciding it. On the other hand, procedural fairness does not include those fundamental substantive rights which in our constitutional law are enforced in the name of due process--rights such as the freedoms of speech and religion insofar as they restrain state governments, or the rights of liberty and privacy usually characterized as aspects of substantive due process."

[8]See Larry B. Hill and Associates. *American Ombudsmen*, forthcoming.

period I studied, 25 per year.[9] During the entire eleven-year period covered by his study, Doi determined that his office was responsible for 264 reforms, 24 per year. Although we have no definitive basis for evaluating the extent of the reforms (the New Zealand average was 15 reforms per year), on the face of it, this seems to be a reasonable number of reforms.

Are the other American ombudsmen similarly successful? Unfortunately, we cannot be sure about many offices that provide little information concerning their operations. Examination of the reports of some other offices that publish case notes at least intermittently (namely, Alaska, Iowa, Anchorage, Detroit, and Seattle/King County) suggests that administrative reform also occurs there on a regular basis. Interviews and impressionistic evidence from yet other offices point in the same direction. Although the total magnitude of the administrative reform achieved by the American ombudsmen cannot be definitively assessed, such reform apparently occurs with enough regularity and in sufficient quantity that the ombudsmen must be taken seriously by administrators and others in the ombudsmen's "authority system".[10]

But qualitative aspects of the ombudsman's impact may be of more import than quantitative aspects, and it is to the former that the analysis now turns. The remainder of the paper features brief recitations of cases in which various kinds of reforms in both instrumental and noninstrumental justice have been achieved by ombudsmen.

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[9] Hawaii, Office of the Ombudsman, *Report of the Ombudsman for the period July 1, 1979--June 30, 1980*, Report No. 11, January 1981, p. 33. The results of our studies may not be precisely comparable, because our definitions of reform may have varied slightly.

[10] See Larry B. Hill, "The New Zealand Ombudsman's Authority System", *Political Science* 20:40-51, September, 1968.

II. REFORMS CONCERNING PROCESSUAL JUSTICE

The range of problem areas that raise questions about the instrumental fairness of the administrative process is enormously wide. The following treatment does not attempt to be exhaustive; it only deals with selected issues.

A. Assuring Administrative Due Process

The term "due process" can be used in such a general way that it becomes a synonym for justice. Here I shall limit it to what lawyers often call procedural due process. My main interest is in the extent to which citizens are treated according to generally accepted standards of fairness--whether in the making of the original administrative decision or in the appealing of the decision.

Secrecy

Knowledge is power, and administrators frequently are unwilling to allow citizens to have access to important information in the agency's possession. Ombudsmen have stimulated a number of reforms that reduce secrecy. For example, an injured worker complained about the refusal of Alaska's Department of Labor to release an accident inspection report; following the ombudsman's investigation, the department changed its policy, agreeing that the reports were covered by the state "sunshine" laws (1975:60).[11]

A more complicated issue was posed by the practice followed by Alaska's Alcohol Beverage Control Board in which access to the files on particular licenses was denied because some of the information was legally confidential; the Ombudsman secured an agreement in which legally restricted information would be separately maintained and other information would be open to the public (1976:108). Finally, Hawaiian law allowed relatives and legal guardians of mental patients to have access to

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[11]The parenthetical material following the cases refers to the year and page number of the ombudsman report.

information in their records that was "not apparently adverse to the interest of the patient". At the Ombudsman's urging, the law was amended to give patients themselves access to their records on the same basis (1972-73:78).

Explanatory Requirements

Requiring that agencies give reasons for their decisions affecting citizens seems to many observers an essential principle of natural justice. Yet, under some circumstances, American governments at various levels are not legally obligated to explain the basis for their decisions.[12] From the agency's viewpoint, failing to give reasons is very convenient; the explanation would, of course, become a target for the citizen to attack. But routinely requiring that decisions be justified by those making them might be advantageous for agencies because it would strengthen management's control of its subordinates and increase citizens' acceptance of the legitimacy of decisions that are not contested.

Recognizing that from the citizens' viewpoint appealing a decision whose rationale has not been articulated is very difficult, ombudsmen have urged agencies to justify their actions. Two examples of such reforms will suffice:

> First: the Ombudsman's reform of Hawaii's Department of Regulatory Agencies that caused the department to instruct boards and commissions under its authority to give citizens detailed explanations when dismissing their complaints narrowed these bodies' opportunities for arbitrary action (1971-72:135-36).
>
> Second: the Iowa Ombudsman found that no due process requirements fettered the discretion of prison administrators when considering the transfer of inmates from minimum security to a more restrictive environment. Nonetheless, the Division of Corrections accepted his conclusion that "essential fairness indicated that the inmate should be informed of the reasons why he was transferred" and implemented such a policy (1980:15).

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[12]See Frank I. Michelman, "Formal and Associational Aims in Procedural Due Process," in *Due Process* ed. Pennock and Chapman, pp. 126-171.

Adequate Notice

Giving citizens a reasonable warning that action will be taken affecting their interests is thought to be fundamental to the idea of administrative fairness. Ombudsmen continually promote reforms involving the provision of notice. For example, four cows belonging to a complainant of the Seattle/King County Ombudsman were impounded and sold at auction without a notice of sale being published fifteen days in advance, as state law required. King County brought its policy into compliance with the law (1975:36). Similarly, a citizen who had obtained a permit for harvesting game but was late in returning it to Alaska's Department of Fish and Game found he was automatically denied a permit for the following year; the Alaska Ombudsman felt such forfeiture without provision for notice and hearing was unjust, and the policy was changed (1976:45).

Notice also may be unjust because it is selective. After investigating the complaints of several businesses that the leasing policies of the Department of Aviation were unjust because only certain businesses were given notice of the availability of the leases, the Alaska Ombudsman agreed with the complainants; the policy was changed to provide for public notice of the availability of leases and for other reforms (1976:98).

Right to a Hearing

The idea that citizens should have a right to an administrative hearing whenever they have important interests at stake has in recent years gained momentum as a general principle of public policy. Ombudsmen have encouraged this trend. The right to a hearing was a secondary issue in the penultimate Alaska case cited above. Another case may also be mentioned: the Hawaii Ombudsman convinced the state prison to modify its procedures to insure that its formal policy actually was followed--that at least a preliminary hearing would be held on misconduct charges within forty-eight hours of the alleged infraction (1971-72:154).

Fair Hearing--Right to Counsel

Whenever a hearing is held to resolve a dispute between a citizen and an agency, the hearing must be a "fair" hearing. In order for a hearing to be fair, the courts have specified that notice must be adequate, reasons for the proposed action must be given, and the opportunity to confront witnesses and present evidence must be provided. The courts also have favored allowing citizens to be represented by counsel at such a hearing, but do not necessarily require that counsel be permitted.[13]

As the preceding sections indicate, American ombudsmen have taken a variety of actions to foster fair hearings. They also have encouraged agencies to allow representation by counsel in important cases. For example, the Hawaii Ombudsman discovered that a prison inmate charged with using an intoxicant would be allowed legal counsel at a disciplinary hearing. But an inmate charged with "violating a condition of any community release or furlough program"--even though the substance of the violation concerned the use of alcohol--was not entitled to counsel. Thus, a new policy was developed providing that those charged with a vague violation of prison rules would be allowed legal representation if the substance of the charge would otherwise entitle them to counsel (1979-80:145).

B. Enforcing The Rule Of Law

Arbitrary power may be particularly oppressive, and ombudsmen have been active in trying to obtain reforms of policies whose legal basis is suspect. Frequently, ombudsmen uncover situations involving a conflict between an agency's operational policy and a higher legal authority. For example, the Seattle/King County Ombudsman found that the Judges' Rules and Regulations allowed juveniles to visit inmates in jails, but the King County's Jail Operating Procedures did not. The operating procedures were appropriately amended (1978:64).

A technique that ombudsmen have found effective in pursuing such cases is simply to inquire about the authority for a policy. For example, when a recipient of

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[13]See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

child support payments complained that a Friend of the Court charged a four dollar annual fee for handling and mailing the checks, the Iowa Ombudsman asked for the fee's statutory basis. Following the issuance of an Attorney General's opinion that found no legal authority for the fee, it was dropped (1974:63). In a case involving related issues, investigation revealed that Alaska's Department of Education was following its regulation, which required that prospective teachers provide an Affidavit of Citizenship, even though an Attorney General's opinion had found the statute on which the regulation was based to be unconstitutional and the statute had been repealed by the legislature. The regulation was removed (1975:50). Sometimes also, ombudsmen learn that the legal basis for a policy is insufficient, and--since they do not challenge the policy--they encourage the agency to seek legal authorization for the policy.

Although the circumstances seldom arise, ombudsmen may demand that agencies abandon their own policies and instead obey the law, even if this may be disadvantageous for citizens. An appeal to the rule of law arose in the Iowa case in which the Ombudsman put a stop to the procedure that allowed many prison inmates to receive funds both from the Basic Educational Opportunity Grant program and the Veterans Administration for the same educational services (1980:33). If justice is defined in the philosophical sense of "moral desert", most observers would probably agree with the Ombudsman's judgment that the prisoners did not deserve double payments.

But would all ombudsman offices agree with the following case? Hawaii's Ombudsman objected when he learned that the Department of Labor and Industrial Relations was applying a state Supreme Court opinion that resulted in reduced benefits only when claimants filed appeals. Consequently, the department immediately applied the court decision to all beneficiaries rather than awaiting legislative action on the proposed amendment (which was subsequently enacted) to nullify the decision (1973-74:78). I strongly suspect that many "quasi-ombudsman" offices that were organized under the "advocacy" model, rather than the "impartial investigator" model, might not have exhibited

such a strong commitment to the rule of law as the Hawaii Ombudsman did in this case.[14]

C. Filling a Policy Vacuum

Frequently, the problem for administrative justice is that a policy gap exists. This seems to be one of the largest single subjects of reform. My favorite case follows. When investigating a prisoner's complaint that her television set had been stolen while she had temporarily escaped from the Women's reformatory, the Iowa Ombudsman discovered there was no procedure for maintaining an inventory of inmates' property; such a procedure was established (1974:44). An additional case from Iowa deserves mention. After a woman who was suing her former husband learned that the case was dismissed because she did not appear to testify, she complained to the Ombudsman. Investigation revealed that she had received no subpoena owing to the fact that the county involved did not have a follow-up system to contact important witnesses when a subpoena was returned; such a system was initiated (1980:26). Furthermore, ombudsmen frequently convince agencies to develop formal policies and procedures manuals.

Another variety of this problem concerns situations in which authority is dispersed. For example, after receiving complaints about security and other related problems at a public housing project, the Hawaii Ombudsman brought together at a meeting the following: three levels of executives of the Housing Authority, the administrator of the Public Welfare Division of the Department of Social Services and Housing, and representatives of four divisions of the Honolulu Police Department. Together, these officials worked out procedures to deal with the problems, which previously had been allowed to slip between the cracks in the jurisdictions of the various units (1973-74:96-99).

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[14] See Larry B. Hill, "The Citizen Participation-Representation Roles of American Ombudsmen," *Administration and Society* 13:405-433, February 1982.

D. Providing for Appropriate discretion

How much discretion, or choice, administrators should be allowed to exercise is a subject of controversy. Many of the reforms discussed above affected discretion; now we consider the topic explicitly.

Excessive Discretion

Most scholars are concerned about too much discretion. Kenneth Culp Davis concludes: "The vast quantities of unnecessary discretionary power that have grown up in our system should be cut back, and the discretionary power that is found to be necessary should be properly confined, structured, and checked".[15] Most of the reforms thus far detailed have increased the constraints on agencies' choices. For example, when a policy vacuum exists, an agency may have enormous discretion.

Discretionary powers are likely to be particularly wide in the case of new programs. For example, Alaska's Department of Revenue made a verbal agreement with state banks in which they would use $50 million in state surplus revenue to bolster the sagging housing market. But when the Ombudsman's investigation revealed that some banks were planning to put the money into non-housing investments that would bring a higher return, strict guidelines and reporting requirements were created (1979:16).

Insufficient Discretion

Too little discretion also can cause injustice. For example, Hawaii's Department of Finance had rigidly interpreted the motor vehicle registration statutes to mean that when vehicles used off the highway (and therefore exempt from the registration fees) were converted to highway use, they became subject to the fees retroactive to when they were initially sold in the state--regardless of how long ago that may have been or of how long the person wishing to register the vehicle may have owned it. At the Ombudsman's suggestion, Finance discontinued the policy of imposing back fees (1973-74:125). Further rigidity is displayed by the policy of the Department of

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[15]Kenneth Davis Culp, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State Press, 1969), p. 216.

Accounting and General Services that denied advances per diem to state employees when others in the same agency had failed to submit a travel report for an earlier trip. The Hawaii Ombudsman convinced the Department to revise the policy (1974-75:35).

Davis is aware that excessive and inappropriate rigidity can cause injustice, but he is much more concerned about agencies having excessive discretion: "Perhaps nine-tenths of injustice in our legal system flows from discretion and perhaps only one-tenth from rules".[16] My Hawaiian study fulfilled Davis's expectations: 85 percent of the Ombudsman's reforms resulted from excessive discretion; 15 percent resulted from insufficient discretion.

E. Promoting administrative rationality and efficiency

Many of the reforms discussed above under other categories also contribute to administrative rationality and efficiency. Now I shall mention some cases in which these aspects of the occasion for reform were especially prominent. Administrative inefficiency is so variegated a phenomenon that it defies attempts at strict categorization. Such reforms as strengthening, reinforcing, or clarifying particular policies and improving the flow of authority and other forms of communication within government agencies are, for example, recurrent causes of reform. I shall mention only two general categories of these reforms.

Delay

The citizen who is unable to get a ruling from an administrative agency is likely to agree strongly with Gladstone's oft-quoted maxim: "Justice delayed, is justice denied". Inordinate delay may be symptomatic of underlying needs for organizational reform. Ombudsmen frequently foster such reforms, as the following examples illustrate. The Alaska Ombudsman found that the explanation for a six-month delay in processing a batch of business license applications was that the Department of Revenue had misplaced them. But repeated inquiries about the delay had no effect because a system for

[16] Ibid., p. 25.

dealing with service complaints did not exist. Such a system was inaugurated (1975:63). After complaints to the Hawaii Ombudsman revealed that (because of computer programming problems) the State Health Fund was ten months behind in processing refunds, a system of issuing conditional refunds, which were subject to later audit, was created (1973–74:65).

Confusion

Muddle and confusion within an agency also are frequent causes of administrative injustice. For example, the Alaska Ombudsman found that a complainant's property was mistakenly seized for a tax lien on another person who was repairing the complainant's property. As a result, the Department of Revenue tightened its ownership determination research procedures (1979:18). Reducing inefficiency often eliminates the underlying cause of substantive problems. For example, the Seattle/King County Ombudsman discovered that Seattle's Department of Licenses and Consumer Affairs failed to provide notice that a family's dog was to be destroyed because agency procedures were hopelessly inefficient; new procedures were adopted (1978:41).

III. REFORMS CONCERNING ULTIMATE JUSTICE

As mentioned above, most of the reforms caused by ombudsmen deal with processual justice--with procedure and the *how* of citizen/bureaucratic interaction. An important explanation of this finding is strategic: if the ombudsman can point to one of the already-discussed defects in processing (e.g., the policy conflicts with a law, or no hearing was allowed), remedying the defect may be a simple matter. Thus, the ombudsman does not have to comment about the ultimate, or substantive, fairness of the policy. Whenever nonprocessual matters are raised, ombudsmen tend to attempt to redefine them as processual ones. If an issue cannot be redefined, ombudsmen are likely to campaign strongly for reform only if the implications for ultimate justice are clear-cut. Even though the ombudsman's reforms involving ultimate justice frequently are compelling, this is not to claim that they are necessarily important; in fact, many are rather minor.

Have I just painted a portrait of a gutless "citizens' champion" who lacks the courage required to challenge bureaucracy on appropriate occasions and who accomplishes few worthwhile reforms? Not necessarily. These findings reflect some political realities. In no case--as far as I can recall--do the laws establishing U.S. ombudsmen follow the Commonwealth example and directly embrace the policy/administration dichotomy by specifying that the office may investigate cases involving "a matter of administration" (in the words of the New Zealand and many other statutes), while implying that "policy" matters are outside the jurisdiction.[17] Yet, in large

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[17]The implication was intentional in New Zealand; whether it was intentional is less clear in the laws creating some of the newer ombudsmen. In any event, foreign ombudsmen frequently work around such legislative language and, in practice, distinguish "political" policy from "administrative" policy; the latter is considered within their jurisdictions. This practice is prevalent in Canada, for example. For a strong argument against perpetuating the language of the politics-administration dichotomy in ombudsman statutes, see K.A. Friedmann and A.G. Milne, "The Federal Ombudsman Legislation: A Critique of Bill C-43," *Canadian Public Policy* 6:63-77, Winter, 1980.

Although the Alaska law mentions "Administrative act," the law clearly includes policies within the meaning of that term. See K.A. Friedmann, "Legal and Political Redress of Grievances: Criteria for Public Policy Decisions," paper presented to the Seventeenth Biennial Conference of the International Bar Association. Sydney, Australia, September 10-16, 1978, pp. 18-19.

measure, the spirit of this restriction is observed everywhere. Although U.S. ombudsmen need not preoccupy themselves with the formalistic question of whether a particular issue is "administrative", it is generally understood that these kinds of cases--which, despite the difficulties of comparing the terms, for the most part probably concern matters of processual justice--constitute the ombudsman's true province. If U.S. ombudsmen are not barred from considering "policy" questions--which label probably would be given to most issues concerning ultimate justice--it is clear that these kinds of questions are not considered central to the ombudsman's purposes. Critics of ombudsmen frequently have decried the possibility of the office becoming merely a parallel bureaucracy, substituting its judgment for that of the agency making the original decision and ombudsmen have been concerned that they do not get a reputation for behaving in this manner. In general, ombudsmen are not expected to point out new departures in substantive policy; this is understood to be the job of the traditional branches of government and their handmaiden --bureaucracy.

Another reason ombudsmen are cautious about pressing for reforms concerning ultimate justice is that these matters frequently become highly controversial, e.g., How can we be sure that a policy denies freedom of speech or that a prescribed punishment is inhumane? Since the ombudsman is a relatively low-powered institution, it must depend upon the ability to convince agencies of its conception of justice.[18] Hence, ombudsmen tend to proceed cautiously through this volatile field. Finally, many U.S. ombudsman reforms dealing with ultimate justice seem less than spectacular because the courts are so active on such matters. Judges tend to be quite willing to review and reverse administrative policies that may deny constitutional liberties, leaving less interesting matters for ombudsmen.

The following ombudsman reforms having to do with ultimate justice may be characterized in various ways. In some cases, the agency's policies improperly discriminated among categories of individuals, or they did not treat clients equitably. In other cases, the ombudsman found that policies should be changed in order to improve

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[18]I have developed this theme in "Institutionalization, the Ombudsman, and Bureaucracy," *American Political Science Review* 68:1075-1085, September 1974.

services or increase the flexibility with which client eligibility was determined. In yet other cases, the ombudsman recommended reforms in order to protect fundamental liberties. Frequently, the conditions underlying the reforms were mixed. Of course, many reforms also were mixed in that they concerned both processual and ultimate justice. Although the reforms discussed below may have had a processual aspect, in each case I felt that the more important implication was for ultimate justice.

A. Nurturing Human Rights

In the following cases, an ombudsman caused a reform concerning ultimate justice that helped people in their capacities as members of one of the following groups: as women, as elderly people, as handicapped people, as veterans, or as prisoners.

Rights of Women

Although ombudsmen have not been deeply involved with the feminist movement, reforms dealing with women's rights occasionally occur. For example, an Ombudsman investigation confirmed that a form prepared jointly by the Department of Agriculture and the Hawaii Visitors Bureau and collected from all incoming flight passengers required females to identify themselves as "Miss" or "Mrs." but did not require males to designate their marital status. The form was revised to delete the offending designations (1979-80:110-111).

Rights of the Elderly

For several reasons, ombudsmen receive many complaints from elderly people. A principal reason is, of course, that such people frequently are highly dependent upon a variety of government programs; increased contact is likely to bring increased conflict with agencies. In the following case, an ombudsman promoted the expansion of the margins of distributive justice for the elderly by arguing for liberalizing eligibility standards. When the Hawaii Ombudsman found that the rents of public housing

residents who reached the age of sixty-two but who continued to work were likely to be raised substatially (because the basis of payment then switched from a fixed schedule to a proportion of their incomes), he campaigned for changing the policy. Even though the policy applied equally to those affected by it, the Ombudsman felt it was insufficiently liberal; the law was amended so that rents could be calculated on whichever basis was cheaper for the tenant (1969-70:58).

Rights of the Handicapped

Assisting the handicapped has been an important concern for ombudsmen. In the following Hawaii reform, handicapped people in general were helped. The Department of Accounting and General Services followed the Department of Education's policy--which the ombudsman believed was contrary to state law--of designating only certain schools as being for the handicapped in each district and built a school that was not "accessible and usable by the physically handicapped", as the law required. When the legislature refused to endorse the policy, Education provided $100,000 to remove the school's architectural barriers (1975-76:40-42).

Ombudsmen have helped people afflicted with a variety of specific handicapping conditions. Frequently, the ombudsman's goal is to insure that bureaucratic policies do not discriminate improperly against the handicapped. For example, the Alaska Ombudsman learned that certain vision abnormalities, that do not affect driving, do inhibit performance on the machine used in the eye examination for driver licensing; henceforth, those affected were given the option of using a wall chart for the exam (1979:17). Similarly, the Iowa Ombudsman learned that the rules of the Department of Public Instruction required school bus drivers to pass a hearing test without using a hearing aid, although eyeglasses were allowed for the vision test. The Ombudsman's research determined that the differential standard could not be justified on grounds of safety, and rules were changed to allow testing with hearing aids (1980:32).

Furthermore, handicapped people may be especially sensitive to matters they believe affect their dignity. Ombudsmen can cause reform in this area, as the following case concerning bureaucratic labeling illustrates. After determining that the archaic and

inaccurate term "deaf-mute"--considered offensive by many deaf people--appeared on the state identification card for the deaf, the Hawaii Ombudsman convinced the agency to delete "mute" from the card (1979-80:111).

Rights of Veterans

Ombudsmen also have attempted to extend the rights of veterans, as the following reform concerning the principle of equity illustrates. When the Hawaii Ombudsman discovered that Viet Nam veterans--unlike the veterans of previous conflicts--were not eligible for the selection priority provision of the Rent Supplement Program, he convinced the Hawaii Housing Authority to amend its regulations to include Viet Nam veterans (1974-75:65).

Rights of Prisoners

Ombudsmen receive many complaints from people in prisons; of course, several states and other jurisdictions have created specialized prison ombudsmen. Some processual reforms that ombudsmen have brought about for prisoners were mentioned above; ombudsmen also bring about prison reforms that concern ultimate justice.

One of the areas in which ombudsmen have obtained policy changes for prisoners is health. For example, the Iowa Ombudsman found that inmates of the security area of the women's reformatory were not allowed to see the physician's assistant unless they were referred by the nursing staff. A reform allowed inmates to see the physician's assistant each time he or she visited the institution, without first making a request to the nursing staff (1980:16). To be sure, from the agency's veiwpoint, this reform (like many other similar ones) involved only a minor procedural change. But the issue did not concern one of the processual matters discussed above; the Ombudsman appealed to a substantive conception of justice and opined that inmates should have more ready access to medical services. Sanitation has been another health-related concern of ombudsmen. For example, after the Ombudsman's investigation revealed that the isolation cellhouse at Iowa State Prison was extremely unsanitary, the unit was closed (1977:56).

What kinds of punishments are "cruel and unusual" or otherwise inappropriate is a matter of continual concern for ombudsmen, who have caused a number of reforms that go beyond procedure. For example, the Iowa Ombudsman convinced the legislature to amend a law enacted in the 1850's that allowed "refractory" prisoners to be chained and given a bread-and-water diet (1977:34).

B. Nurturing Political Rights

It is my impression that the preponderance of the ombudsman reforms affecting ultimate justice concern people in their capacities as members of a group--the most important of which are discussed above. But some ombudsman reforms promote justice by fostering the distinctively *political* rights of citizens at large.

Civil Liberties

Maintaining freedom from arbitrary governmental interference in citizens' personal lives is a paramount goal in a free society. Ombudsmen sometimes cause reforms enhancing civil liberties, as illustrated by the following cases. The Jackson County (Kansas City), Missouri Ombudsman investigated complaints that some police agencies in the county were indiscriminately conducting strip searches and body cavity searches of many citizens picked up for misdemeanors--including minor traffic offenses. Furthermore, no clear policy described who should conduct the searches or the procedures to be followed, and allegations of capricious and sexually discriminatory behavior were raised. The Ombudsman believed these practices to be unjust and in conflict with the Fourth Amendment, which admonishes: "The right of the people to be secure in their persons...against unreasonable searches and seizures, shall not be violated...." The amendment further specifies the manner in which searches should be conducted: "no Warrants shall issue, but upon probable cause...."

As a result of the Ombudsman's investigation, the county legislature passed a law substantially limiting the discretion of police agencies to search citizens in these kinds of situations. Subsequently, also as a result of these cases, the state legislature passed a

similar law--even though the Jackson County Ombudsman has, of course, no jurisdiction over state government. The state law stipulates: "No person arrested or detained for a traffic offense or an offense which does not constitute a felony, may be subject to a strip search or a body cavity search by any law enforcement officer or employee unless there is probable cause to believe that such person is concealing a weapon, evidence of the commission of a crime or contraband". Additionally, all such searches must be conducted in private and by a person of the same sex as the person being searched. Even more stringent limitations apply to body cavity searches in these circumstances: (1) a search warrant must first be obtained; (2) the examining conditions must be sanitary; (3) and the examination may only be conducted by a licensed physician or nurse. Strict reporting requirements also are imposed for both types of searches, and citizens retain their right to sue for injunctive relief and for damages--including punitive damages; the court also may award reasonable attorney's fees.

The law does not apply to persons committed to a correctional institution or jail, environments in which the individual's noninterference rights must be balanced against the security rights of officials and other inmates. Really sticky problems are raised by the question of searching these facilities' visitors, who have not been convicted of a crime but might constitute a severe safety or disciplinary hazard by bringing in such contraband as weapons or drugs. After investigating a number of complaints concerning search procedures in the Jackson County jail, the Ombudsman made several recommendations leading to a new set of policies that were more rational and just.[19]

The preceding set of reforms concerned the right to personal security and also, from another perspective, the right to privacy. Society's interest in the latter right has increased as bureaucratic functions and records have proliferated. Ombudsmen have viewed the protection of privacy as a crucial matter. For example, the Iowa Ombudsman disagreed with the policy of a local school board that compelled a student applying for an affidavit of necessity (which was required to obtain a minor's school driving license) to register all vehicles with the school, to bring parents to a school

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[19] See *Jackson County Ombudsman's Report and Recommendations on Strip/Body Cavity Searches in the Jackson County Jail*, prepared by Doris R. Stout, Jackson County Office of Human Relations and Citizen Complaints, March 1981.

conference, and to provide the local police with the vehicles' license numbers. At a hearing held by the Department of Public Instruction, the Ombudsman argued that the policy invaded citizens' privacy. The board's policy was overturned on the grounds that it violated federal privacy laws (1980:16–17).

The question of privacy often arises in connection with the registration of vital statistics, as the following two Hawaiian reforms illustrate. Despite the objections of those who operated businesses that specialized in soliciting newlyweds, the Director of Public Health stopped automatically disclosing the addresses of those getting marriage licenses. The Ombudsman's proposed policy was accepted: persons registering vital statistics events would be allowed to choose whether their addresses were disclosed (1974–75:51–52). Following an Ombudsman investigation, the Department of Health decided to remove all birth records from its district offices--in order to protect the records' confidentiality--and to allow researchers limited access to those offices' marriage and death records (1976–77:63). Thus, the Ombudsman found ways of reconciling the protection of privacy with the encouragement of enterprise and research.

Political Participation

Not only do ombudsmen foster administrative justice by securing reforms involving "freedom from" governmental interference, but also they foster "freedom to" participate in the policy process. A good example comes from Detroit. The Ombudsman found that no provision existed for allowing citizen input into an evaluation of the performance of snow removal equipment operators, who are given exclusive permits for designated areas of the city. At the Ombudsman's urging, the city council passed an ordinance that created a procedure whereby if two–thirds of the citizens affected were to petition to revoke the operator's permit, then a hearing would be held whose outcome could be appealed to the city council (1979:74).

The idea that citizens should be allowed to participate in an administrative adjudication of issues affecting them individually is well established. But the courts are less likely to support citizens' rights to participate in a hearing that involves quasi–legislative, rather than quasi–judicial, matters. Nonetheless, administrative justice

gradually is being extended to the former matters, and ombudsmen have encouraged the trend. For example, at the Ombudsman's urging, the Hawaii Housing Authority changed its policy and agreed to hold public hearings in order to amend rental allowances and housing eligibility requirements, even though the State Administrative Procedure Act may not have required such hearings (1970-71:139). Since this case is likely to increase the ability of the poor to participate in decision making, the reform could be viewed as increasing social justice.

IV. CONCLUSION AND JUSTIFICATION

The preceding demonstrates to my satisfaction that U.S. ombudsmen commonly succeed in sponsoring reforms that make the actions of bureaucracy significantly more just as they affect citizens. In fact, if we were to undertake a comprehensive and longitudinal study of the reform impact of particular ombudsmen, I believe we would find that most offices have substantially improved the quality of administrative justice in their jurisdictions.

"But what is the point of telling all this to a congregation of ombudsmen?", someone might ask. "Surely, this is a quintessential example of preaching to the already converted." Although this observation would contain much truth, such sermons may be useful in inspiring the faithful. Additionally, I am unconvinced that all U.S. ombudsmen devote as much attention as they might to reforming public administration. Furthermore, I believe that most offices need to do a better job than they do of drawing attention to the reforms they precipitate and that tooting their own horns about reforms is a vital, if frequently neglected, political function for ombudsmen.

As a preliminary to defending these views, which are likely to be somewhat controversial, let me reminisce. As I look out over this audience, I see only a few ombudsmen who were in office when I addressed the founding meeting of this organization in Seattle in 1977. Of course, various reasons--including such natural ones as retirement--explain why the incumbents no longer serve. Yet, we all know that in some cases political pressures forced them out; in other cases, they left voluntarily but in disappointment because their aspirations for the office had not been fulfilled and its future did not seem auspicious. Although, as far as I as aware, the Atlanta office is the only U.S. ombudsman to have been discontinued, some other offices seem to be under rather severe political pressure. As the repercussions from the Reagan budget cuts (amplified by the current recession) are felt at the state and local levels, these governments may have to make some tough choices about their own budgets. Of course, this situation could be an opportunity for an ombudsman's enemies to strike, but

even disinterested members of the legislature or the executive could decide that the ombudsman was simply a luxury that was no longer affordable. Thus, the past several years have proved that the ombudsman is compatible with U.S. political institutions at various levels, but the ombudsman is not thriving in the U.S. One reason for this state of affairs may be an over-reliance on the client-serving model upon which many offices were built.

Recall that most U.S. offices were established during the late 1960's and early 1970's as a part of the social ferment associated with the Great Society and the rise of "consumerism". The Office of Economic Opportunity experimented with the ombudsman because of the institution's apparent potential for helping OEO's target populations--the poor and minorities.[20] The ombudsman was considered merely another kind of "people program", many of which were vying for public attention during this time. Although it is my impression that many proponents of ombudsmen for the U.S. had only a shaky understanding about how this institution differed from a citizens' advocate, I believe that the U.S. ombudsmen have, on the whole, done a good job of acting as impartial investigators of citizens' complaints.[21] Furthermore, I believe that because of the adoption of the client-serving model, many U.S. offices have been more accessible and frequently have provided more help for citizens than the ombudsmen of other countries provide for their citizens. Nonetheless, the fact that most U.S. offices were created as "programs", rather than as fundamental political institutions (as was frequently true of the ombudsmen created in other countries), makes the U.S. ombudsmen highly vulnerable to changes in the political climate.

And our political climate is changing. People programs are out of favor. They are frequently seen as expensive, misguided, unnecessary, and ineffective. Even if the ombudsman is a good program--as such programs go--it may be considered expendable if the ombudsman is perceived as being only a kind of glorified social worker. I say this without intending to disparage the effectiveness of those U.S.

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[20] See William B. Gwyn, "Obstacles within the Office of Economic Opportunity to the Evaluation of Experimental Ombudsmen," *Public Administration* Summer 1976, p. 177-197.

[21] See Hill, *Citizen Participation-Representation Roles,* Table 5.

ombudsmen, such as our distinguished conference host, who have professional backgrounds in the field of social work. Truly, many of my best friends are social workers, and I believe that a successful ombudsman must do a good job of performing the role of social worker. Nonetheless, I suspect that some ombudsmen become so caught up in handling the "casework" that flows in on a daily basis--in securing justice for individuals--that they neglect attempting to bring about reforms that could expand the frontiers of administrative justice for large numbers of citizens. Thus, identifying too strongly with the social work role could inhibit the search for administrative reform, which I argue is also a vital goal for ombudsmen.

Furthermore, being identified as a social work institution may be a political liability for ombudsmen. Like it or not, the stereotyped view that the social work function is an effete, dependent, emotional, and liberal one is widespread. What is an alternative role conception that might help counter the image problem? *I suggest that ombudsmen emphasize their roles as public management control devices.* Elsewhere, I have elaborated on this role conception and indicated how ombudsmen may be compared with other, similar offices in the performance of the function. I have developed two labels for those offices that perform this general function, calling them "bureaucratic monitoring mechanisms" and "bureaucratic auditors".[22]

The prevalent view is that public management (which is closely identified with business management) is a virile, self-actualizing, rational, and conservative function. Let me hasten to interject that even though I speak of an "image problem", I do not propose that ombudsmen take up the management role conception purely for cosmetic purposes. Self-images affect behavior. If ombudsmen were to think of themselves consistently as monitors, or auditors, of public management, as well as social workers, then administrative reforms might occur more frequently than they do. Adopting a modern management information system for an ombudsman office or having staff

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[22]See Larry B. Hill and F. Ted Hebert, *Essentials of Public Administration* (North Scituate, Mass.: Duxbury Press, 1979), pp. 425-451; Larry B. Hill, "Bureaucratic Monitoring Mechanisms," in *The Public Encounter: Where State and Citizen Meet*, ed. Charles T. Goodsell (Bloominton: Indiana University Press, 1981), pp. 160-186; Larry B. Hill, "Bureaucracy, the Bureaucratic Auditor, and the Ombudsman: An Ideal-Type Analysis," in *State Audit: Developments in Public Accountability*, ed. B. Geist (London: Macmillan, 1981), pp. 83-121.

members trained in program evaluation techniques, for examples, might help to identify patterns of administrative weakness that would be susceptible to reform.

But we must be aware that the images projected by institutions have political consequences. A principal means by which ombudsmen project an image is through written reports describing their investigations to legislative bodies. A few U.S. offices have done a good job of seizing the opportunity offered by their reports to depict the full range of their activities--producing reports similar to those of the European and Commonwealth offices. Other U.S. offices produce reports that are so skimpy as to be of little value in communicating the nature of their activities.

Even those U.S. offices that make fairly extensive reports and include a number of case notes usually do not give special attention to administrative reforms or report them in a systematic, comprehensive fashion. A considerable amount of perseverence and ratiocination was required to ferret out many of the examples of administrative reform that I relate above. Most of the reforms I list were not featured in the respective ombudsman reports, nor were they explicitly identified as reforms. Why have ombudsmen not been more assiduous in drawing attention to the reforms they have sponsored? I identify three reasons:

First: concentrating on reporting reforms in a comprehensive fashion seems not to have occurred to a number of offices. Cynical political scientists would find this difficult to believe, but it is obvious to me that many offices try to report a variety of types of cases--some that show how the office can help individuals, others that raise particularly interesting issues or involve unusual patterns of political-administrative interaction, and yet others that reveal the offices's jurisdictional or other limitations. No formal or informal requirements have mandated that reforms be considered more worthy of mention than other kinds of cases.

Second: some ombudsmen do not detail every instance of reform because they want to avoid embarrassing the agencies, which it is felt might cause them to become less cooperative in future investigations. Although I am sensitive to this problem, I think ombudsmen that deal with agencies firmly, without becoming

unnecessarily antagonistic, and record agencies' administrative shortcomings and the steps taken to improve them, are in the long run more likely to be respected and effective than those that are dedicated to engendering quiet compliance; furthermore, offices that fit into the latter category may even be accused of engaging in collusion with agencies.

Third: some ombudsmen fail to report many of the reforms they stimulate because they feel they cannot afford the staff time to write the reports. I understand that many offices do not have the financial resources to produce reports comparable to those of the Hawaii office. But even very small offices could, if they made it a high priority, keep a running list of reforms accomplished and could report them in a form similar to the one I have used above at little or no extra cost in staff time. In fact, I contend if ombudsmen want to be able to prove they are doing something more important than helping a few isolated individuals--that they cannot afford *not* to report their reforms.

In conclusion, I realize that my plea to ombudsmen to provide more information about the administrative reforms they inspire may seem tinged with self-interest. After all, this data would create more grist for the academic mills. But I hope my argument is convincing--that in order to perform their proper function and to prosper as organizations U.S. ombudsmen should insure that they devote sufficient attention both to fostering administrative reform and publicizing the reforms achieved. Becoming known as a "bureaucratic monitor" or a "bureaucratic auditor" would be quite compatible with the ombudsman's other important role as "citizens' helper".