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Effective Management of Ethics Systems: New Frontiers in Public Administration

Stuart C. Gilman, Ph.D.
Special Assistant to the Director
United States Office of Government Ethics
Washington, DC 20005

The thesis of the article is that ethics regimes are often created in "law" without implementation (legislators assume they will be self-implementing),created as administrative structures without the weight of law, or not provided with the authority to carry out their mission. This article will illustrate several examples of such systems and the problems created because of these defects. Finally, the article will outline a development and implementation model for integrity systems.

Note: The opinions expressed in this article are the author's alone and do not represent the policy or perspective of the Office of Government Ethics or the United States Government.

> Modern bureaucracy in the interest of integrity has developed a high sense of status honour; without this sense the danger of an awful corruption and a vulgar Philistinism threatens fatally. And without such integrity, even the purely technical functions of the state apparatus would be endangered. The significance of the state apparatus for the economy has been steadily rising, especially with increasing socialisation, and its significance will be further augmented.
>
> Max Weber, *Politics as a Vocation*

It is both difficult to manage and to work in modern government bureaucracies. Unlike their private counterparts, public systems not only struggle to comport with structural regulations, but also to operate with both agency and government-wide policy mandates that are often complex, and in some cases contradictory. Citizens in democracies today have also made clear their mandate for honest and transparent government, leading many governments to develop articulated integrity systems. Ethics or integrity systems are some of the most complicated, and least understood, systems in modern public administration. This essay intends to lay out the structure of those systems, the permutations within those structures, and some ideas on how to measure their effectiveness.

The question I would like to answer is, Awhat is an effectively designed and well managed ethics system?≅ Part of the answer to this question comes from the work of the Organization for Economic and Community Development, the Organization of American States, the United Nations Programme on Public Administration and Finance and the World Bank. Officials from all of these organisations share a relative agreement about the basic outlines of an ethics program: an independent office or agency; transparency systems; a code of conduct that is clear and based within a legal framework; ethics education; hotlines; whistle blower protection; open decision making processes; and, appropriate sanctions to deal with misconduct.

It has become fashionable in the American academic community to revile (Morgan and Reynolds, 1997; Anechiarico and Jacobs, 1996; Caiden, 1999; Mackenzie, 1999) or dismiss such ethics systems (Cooper, 1998). These critiques range across a spectrum of complaints: e.g., the programs discourage individuals from entering public service, the programs overburden bureaucracies with rules, and they are Aso political an effort to criminalise behaviour and humiliate public officials.≅ (Mackenzie, 1999, p. 13) Yet there is little analytical research in the area to validate those criticisms, and those that purport to be empirical are at best anecdotal and impressionistic. (Menzel and Carson, 1999) Even more befuddling are the range of alternatives these authors suggest, if they are even offered: urging stronger religious beliefs, moving from Asystems≅ to volition, or relying on reengineered government to eliminate unethical urges. (For a critique of the latter, see Gilman, 1999.) The critical literature in the area is both theoretically vague and provides little indication of how these alternative ethics programs function B either on a policy or an administrative level.

Perhaps a better series of analytical questions needs to be asked. More theoretically and

empirically rich issues would raise questions such as: can ethical reasoning be embodied in codes? Do minimal standards encourage public employees to have minimal ethics, or do they encourage those employees to think more deeply about ethical issues? Do programs that are designed to prevent unethical behaviour create impossible expectations in the public mind? For the purpose of this paper I hope to address a set of important, but less grand questions, such as what do we know about the way ethics systems work? Why do they work well and when they fail, what is the cause? I hope to sketch some provisional answers to these latter questions with the hope that it will be a model for enriching the research enterprise in public service ethics.

Why Do Ethics Systems Work Well and Why do they Fail?

The tendency is to view the creation of ethics systems with all of their incumbent programs as all being of a single design. In fact, ethics programs take on a multiplicity of shapes, organisations and responsibilities, both within the United States and throughout the world. As examples, these programs can be centralised or decentralised, they can have enforcement or only advisory capacities, they can be led by a single official or by a commission, and they can be only consulting bodies or the final arbiters of what is right and wrong. Each of these elements are worthwhile examining, however three facets of the structure of ethics programs are especially critical in their success: **legal structure, implementation and authority**. The rest of this paper will focus upon these critical foundations, both outlining alternative models and providing suggestions for measuring their effectiveness.

Legal Structure and Legal Standing:

It is often assumed that the essential work to be done in ethics is passing laws. The legal structure is designed to place sanctions against individuals for bribes, conflicts of interest, illicit enrichment or other behaviour that are viewed as contrary to the public good. These laws can entail criminal or civil remedies, including fines, as well as B in the broadest sense of law B administrative rules that are punishable by structural remedies, e.g. being removed from one=s government position. The problem is that laws without implementation strategies, and actual implementation, are almost worthless. Colleagues in Latin America often refer to their laws as A*mas palabras bellas*@, or many beautiful words. Yet it is institutions, not words, that make laws effective.

A lack of legal standing, no matter the country or legal system, is always an impediment to successful ethics institutions. The absence of clear laws creates problems for any ethics program in terms of its structure, its responsibilities, and its authority to ensure that public employees respect its guidance.

Any program created purely by fiat or executive order is vulnerable. Institutions that do not have standing in law are easily ignored, and even more easily swept away with every new election. Reflecting on the U.S. experience, Frederick Herrmann wrote: AIt is a fact of American political life . . . that the great weakness in the regulation of ethics in this country is not so much the provision of

the law but the lack of concern for their administration and enforcement.≅ (Herrmann, 1\997, p. 13) Good administration requires a clear mission and a detailed description of the structure and function of the institutions that implement the law.

Implementation Strategies crafted in law must identify and answer the following nine questions:

1.) What are the general responsibilities of the ethics program:
2.) Who is the final authority in making decisions;
3.) How independent of other authorities is the ethics office;
4.) How is the program to be organised, i.e. centralised or decentralised;
5.) What are the responsibilities of ethics officers who serve in this system;
6.) How will public employees (as well as the general public) gain knowledge about the rules they are expected to obey;
7.) What are the responsibilities of agencies and agency heads to the ethics programs;
8.) For what instruments, which identify ethics problems (e.g., financial disclosure), is the ethics agency responsible;
9.) How will ethics program evaluate and measure its success?

Each of these elements should be clearly spelled out in either law or regulation. It should also be linked to the mission of the agency. Ultimately, these questions should be reviewed by an independent agency to ensure these linkages exist and are working effectively. (For a slightly different perspective, see OECD, 1998.)

Law without Implementation:

A successful ethics program requires more than an administrative structure. There must also be a policy structure that links the elements of the program, and allows effective feedback about problems that results in adaptive changes. Even within this rather narrow set of issues there are several identifiable programmatic decisions that must be made.

An initial, pragmatic decision must be made within the language of the legislation: where is the ethics program to be located? Often the answer is to place it in a personnel office or a justice ministry. This generally does not work very well. One reason is that the office will take on the Acharacter≅ of the agency it is in, rather than having its own identity. A second reason is that budgeting and personnel decisions in that agency will always treat the office as a step child. And last, because the ethics office will be placed within another agency, questions will be raised about at least the appearance of ethics office=s decisions and objectivity. (See OECD, 1996)

A second critical set of decisions relates to how the various responsibilities of the ethics office link with one another. Ethics offices throughout the world have various activities or responsibilities: conflicts of interest, clean elections, standards of conduct, government in the sunshine, whistle blower

hotlines, whistle blower protections, ethics education, ethics counselling, ombudsman roles, etc. The legislative tendency is to put too much responsibility in one agency. The best solution to this is to be clear about not only the agency goals but how each responsibility links with other agency tasks. For example, having financial disclosure without some rule set (e.g. conflicts of interest laws, illicit enrichment restrictions, standards of conduct) creates a significant administrative burden with the only benefit being transparency. The question such transparency begs is Awhat do you do then?≅ If there is no standard against which to evaluate the disclosure any suggestion of impropriety is at best arbitrary.

In addition, what if the financial disclosure reveals potential problems with an employee=s job or assets. What are the remedies? These need to be clearly outlined in law and administrative process. Examples of remedies include divestiture, waiver systems, recusal or some trust arrangement. Within some systems transparency alone might suffice, such as an independent office reviewing a conflict or an asset. But the expectations *in* law and *in* administration should be made clear. (Gilman, 1998b)

The absence of these considerations creates circumstances where law, however well crafted, becomes impossible to enforce. The result is that ethical obligations can become the subject of ridicule within the bureaucracy. Outside of government the impact is even worse. Citizens= belief in their government, and even a belief in democracy and democratic values, will erode. Inevitably, countries with these problems begin to develop a Atrust deficit.≅ As Donald Menzel has argued:

> Although there may be many conditions and circumstances that diminish or destroy trust in public authorities and government, none is likely to do it more quickly and effectively than the unethical conduct of public officeholders, both elected and appointed. The unethical acts of public officials are a direct threat to democratic government.≅ (Menzel, 1996, p. 73)

The effective design of ethics programs can reduce the trust deficit. However, the reverse is also true. Ineffective design of such programs can lead to wholesale condemnation of political opponents or the entrapment of individuals involved in petty violations. The result is that ethics programs without boundaries and a mission have a tendency to be viewed by the average citizen as a modern variation of the inquisition or a validation of the ineffectiveness of democratic institutions.

Institutions Without Law:

As bad as ethics law without institutions can be, institutions without a legal framework can be even worse. Often these institution tend to have the flavour of vigilantism. Because they are not enforcing anything specifically, they enforce everything. The image in the public mind tends to be one of a star chamber, where a secret cabal of officials meet to determine guilt and innocence based on petty prejudices or ideological fervour. In some countries, agencies with very neutral or passive titles,

e.g. integrity commissions or ombudsman, have taken on the roles of interpretation, advice, investigation, prosecution B and in rare instance judgement B in the fight against corruption. Such a *complete* systems puts extraordinary power in the hands of a very few and would be a challenge to even the most stable democratic societies.

There are variations on the theme of all powerful integrity institutions. One is to have a legislature create a melange of agencies with overlapping jurisdictions and vaguely written legal provisions. For example, Argentina has a law that criminalises an individual accepting a job in the public service for which he is incompetent. It seems impossible to even imagine how such a law would be enforced, yet it is a recommended principle in the United Nations= Code of Conduct. Add to this mixture competing public offices in the same country B public prosecutor, inspectors general, ethics commissions, exceptional investigating units, integrity investigators B and the result is more Franz Kafka and far less democracy. (See Gilman, 1999)

There must be a balance of offices with clear sets of distinctive responsibilities to enforce specific laws or well defined rules in order to avoid what can be characterised as ethical anarchy. Without detailed guidance and specificity a type of cultural relativism becomes the dominant theme, with each integrity entity defining for itself what acts are worthy of sanctions. Many times these institutions are ultimately loosened from responsibility, even to the entities that create them. Such agencies, operating as a external branch of government, inevitably raise the question of whether they are a threat to democratic institutions and democratic values.

The symmetry between the independence of these agencies and their responsibility within democratic government is perhaps the most difficult part to craft into law. It is a test of legislative ingenuity. There are a number of governments who have achieved such a balance in critical and important ways. (UNDP, 1997)

The Instruments of Ethics: **Financial Disclosure**

There are many instrumental means to help ensure ethical behaviour. Contemporary governments appear to favour transparency systems as integrity instruments. These can be laws governing openness of government operations and procedures, the ability of the public to comment upon regulations by publishing them in proposed form first B as well as the government agencies= obligation to respond to these comments, and so called Asunshine≅ provisions in government procurement and contracting. However, the most popular form of transparency is financial disclosure.

On the surface, it would appear that financial disclosure is relatively straight forward. A government official discloses his or her assets to ensure that they have not taken or will not take advantage of their public office. As is generally the case, the devil is in the details. And, in the case of financial disclosure, important questions are not asked before the systems are put into place. The

reality is that the creation of disclosure programs are generally a reaction to a public scandal or the perception of public corruption. The management and implications of these programs are seldom effectively thought through, however, and their purpose is usually less clear.

Why financial disclosure? There are generally two reasons for using financial disclosure: detecting illicit enrichment or prophylactically eliminating the reality or appearance of using one's job for personal benefit. Governments tend to be attracted to systems that capture illicit enrichment. However, there are manifold problems with implementing these systems. First, any illicit enrichment form which purports to capture everything one owns is limited by at least three elements: *categories, memory and honesty*. By *categories*, can you effectively account for everything a human being owns (cars, jewellery, etc.)? By *memory*, will even the most honest person remember that they own a lawnmower that they loaned their neighbour? Finally by *honesty*, illicit enrichment forms assume that people with something to hide will be motivated to accurately fill out forms that would be prima facie evidence of criminal wrong doing.

Financial disclosure can be used to prevent unethical behaviour. It would be preposterous to suggest that it could eliminate *all* potential unethical acts. However, financial disclosure does solve some of the problems illicit enrichment programs do have. First, there is a motivation to fill these disclosure forms out because problems can be identified and remedied before they have an impact on the employee or the government. Second, the categories for such forms can be far simpler. You just need to capture those elements whose value could increase (or decrease) because of the officials government position. And last, because the categories are simpler it is easier for the official to fill them out.

The problem with financial disclosure is that it requires sophisticated technical training to meaningfully review and analyse potential problems. It also requires sufficient staffing to ensure that the forms are reviewed in a timely manner. Furthermore, there must be specific periods for filing these forms (e.g. annually) and having them reviewed before entering office, as well as a clear set of remedies if problems arise. Finally, there is a tendency to require far greater numbers of public servants to file such forms than are necessary. The experience of the Office of Government Ethics is that ethics issues, as well as the public interest, usually arise in only the top one-half of one percent of government officials.

A last issue that arises with financial disclosure is whether to make it public or not, and if it is public what it will mean in practice. For example, in the United States there is a two tiered system of financial disclosure consisting of public and confidential elements. The most senior executive branch officials are required to fill out public disclosures, including the President, the Vice President, all cabinet level and sub-cabinet level officials above a certain pay grade, all general officers in the military, and all senior executive service members. These forms are filed when officials enter government, annually thereafter every May 15, and when upon termination of government service. Copies of the actual forms are available to anyone upon request, including the most recent form, and any from the six years preceding years. The confidential system includes the same data, but it is for

lower level employees, and is used for only internal government purposes, e.g. counselling or investigation. (Gilman, 1998b)

There are multiple variations on this theme. In South Africa, the legislature has developed a from that is part public and part confidential. In Egypt disclosure forms are currently filed every seven years and can only be released by a court order. In Romania a three judge panel must recommend the "unsealing" of disclosures, and the president of the country must decide whether to do so. In several countries disclosures are collected and only released if criminal charges are filed against the individual. (Gilman, 1999) The question as to which of these systems is Abetter≅ is both a cultural and empirical one. A further question is whether an independent body reviewing such instruments is transparent enough, or does it require public access?

A last issue often raised when one discusses disclosure is that of the privacy of the public official. This will be raised in any country where a balance must be found between personal privacy and the public=s right to know. At the time that government-wide disclosure was mandated in the United States many in the media argued that no one would be willing to serve the government because of the undue scrutiny financial disclosure entailed. Yet contrary to dire predictions and current ad hominem assumptions, the U.S. government does not lack for applicants who desire to serve office. (Gilman, 1998a) Ultimately, the test of financial disclosure comes down to former U.S. Supreme Court Justice Brandeis= oft-repeated statement that: APublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.≅ (Quoted in Duplantier, 1979) In the same way, financial disclosure, and the openness that comes with it, are often among the best ways to sanitise corruption.

Authority and Empowerment: Fueling the Effectiveness of Ethics Structures

Frederick Herrmann recently argued that the effectiveness of ethics agencies Arests on the three pillars of autonomy, adequate funding, and enforcement capability.≅ (Herrmann, 1997, p. 14) This section of my paper will borrow heavily from Herrmann=s arguments. Fundamentally, ethics agencies must have the authority to accomplish their mission. Many scholars confuse this as somehow the combination of the legal structure and implementation strategies. Yet, a close examination of these agencies reveals their authority structures are separable and without those structures it would be impossible for them to function no matter how well the law is written or how thorough implementation strategies are designed.

As important, in the pragmatic political world it is not uncommon for political leaders to offer ethics offices, programs, or initiatives as ways of concealing their own mendacity, or to conceal the venality of their ministers. As Niccolo Machiavelli points out, monarchical leaders should Ahave little regard for good faith, and [be] . . . able by astuteness to confuse men's brains.≅ He continues later in this chapter:

> Thus it is well to seem merciful, faithful, humane, sincere, religious . . . but you must have the mind so disposed that when it is needful to be otherwise you . . . . must have a mind disposed

> to adapt itself according to the wind, and as the variations of fortune dictate, and as I said before, not deviate from what is good, if possible, but be able to do evil if constrained. (Machiavelli, 1950, Chapter XVIII)

In a few cases both the executive and legislative have created ethics programs, not to control abuses or corruption, but only to put a patina of legitimacy on their anticorruption efforts. This is usually done by giving these offices too little authority. In so doing, the venality of politics confuses men=s brains, ultimately eroding the legitimacy of government.

Autonomy:

Autonomy is the single most important pillar of authority for ethics agencies. There must be independent political control, and yet at the same time it must be responsible. By responsible I mean that an ethics agency cannot expect unlimited funding, nor should it be protected from normal oversight in contracting, budgeting and personnel areas. An ethics agency, whether run by an individual director or a commission, needs to be able to *speak truth to power*. For that reason, the head of these offices cannot be subject to ad hoc removal. In most effective systems these leaders do not serve at the pleasure of the appointing authority, but have some specific terms of office. An additional insulation comes from having most of the office=s functions carried out by civil servants who have some sort of long term job and pension protection.

Autonomy also means that ethics agencies must be above the political fray, both in reality and in appearance. It is unfortunately true that some governments have used such offices Ato get≅ their opponents. The best way to avoid this is by isolating the authority of the ethics regime from the influences of political bias. There is nothing more dangerous to democratic institutions than to use these offices in a partisan or ideological way. Even the perception of abuse can undermine the entire enterprise of trying to maintain integrity.

Autonomy furthermore means that the structure and budget requests for the program are solely the concern of the ethics office, and not some larger program or ministry. The leadership of such offices will in all likelihood be more senior with some significant experience in government. Ethics officials are often forced to say Ano≅ to very powerful people. They perform difficult, but necessary functions, and if carried out properly, they are guaranteed not to make friends. Telling a senior minister that the person they are living with cannot accept a scholarship from a corporation will not be popular for several reasons; first, their companion will feel cheated, and second, the minister will feel embarrassed that their integrity was questioned. Ultimately, such decisions protect both the individual and the integrity of the government. Nevertheless, it often takes incredible intestinal fortitude to withstand the short term ire of those who are accustomed to hearing Ayes.≅

Funding and Resources:

Not providing adequate funding and staffing for ethics offices is an extremely efficient way of making them ineffective. For example, 1973 in the state of New Jersey the legislature allocated only $50,000 to enforce the law when conservative estimates suggested that they would need twenty times that amount to be barely effective. (Herrmann, 1997, p. 17) The other way to control effectiveness is introduce a control staff. If an ethics office is allocated only three people to review 60,000 financial disclosure reports, it is clear that the government is not concerned about financial disclosure. Another aspect of this has to do with full and part time employees. Part of the autonomy of ethics offices has to do with the independence of their staffs. If office staff are only part time or have short term contracts, it is impossible to maintain both technical capability and to ensure the independence of the staff. Constant concern as to whether you will be employed next month is not a reasonable foundation for an effective personnel system in any office.

Another part of adequate funding is that ethics agencies must have the tools to do their trade. Among the most important tools today are personal computers. Given the requirements of transparency and counselling systems it is critical to have database programs, computer tracking systems and the ability to do research on line. An agency responsible for financial disclosure, as Hedlund and Rosenburg (1996, p. 14) wrote, Ais merely a warehouse for thousands of sheets of paper.≅ Unfortunately, many disclosure systems, rather than being the paragons of transparency, are in reality several dusty, grey filing cabinets filled with inaccessible refuse. The cause of this, according to Herrmann, is the double phobia of disclosure and computers. This led the legislature of the state of Maryland to reject computer filing three years in a row earlier in this decade. (Herrmann, p. 17) There are other funding requirements as well. If ethics offices will be required to do ethics audits of offsite components within the government, they must have funding for travel to visit the programs. If the offices are responsible for education and training, they must also have resources to develop effective course and training materials.

Enforcement:

The final pillar is enforcement. It is important not to confuse this with the notion of judicial enforcement. To be effective ethics agencies do not have to investigate and prosecute violations. Rather, there must be systems to ensure that the enforcement of ethics guidelines occur in a prompt and sure manner. In many countries the tendency is to fight increasing problems of corruption with more and more severe penalties. In fact, in several countries, such as Vietnam and the Philippines, public corruption is a capital offence. The experience of many countries has been that the severity of the penalty against corruption has little impact. What does have impact is the belief that the penalty will be sure and quick. As a testable proposition, it might be suggested that a $500 fine for corruption collected within a month of violation would create a greater deterrence than a poor enforced capital punishment sentence for the same crime.

Authority is decisive when considering the effective management of ethics structures. In at least one sense, it is more important to pay attention to the authority of the ethics agency or program,

because it is most easily, and cynically, manipulated for political ends. Ethics programs, as anticorruption agencies, must be Apurer than Caesar=s wife.≅ These agencies must be free not only of the reality of ethical problems but even free of such appearances. This is a difficult job yet it is more and more critical to effective, modern democracy.

Conclusion:

This essay is little more than a sketch about what is necessary to effectively manage public ethics programs. It should indicate more about how much we do *not* know, than what we really know. It also does not even ask the question of *how* we manage these new agencies. Much more empirical research needs to be done on what makes these programs effective and how they are best run to protect democracies. Modern democracies can ill afford to ignore these or other anticorruption programs. Corruption breeds its own version of a Abanality of evil≅ that any defender of democracy must fear and be ever vigilant against.

We know little about the cultural variables that go into these differences, although it is reasonable to suggest many of these cultural differences are more myth than reality. (Gilman and Lewis, 1996) We need to better understand the failings of these programs. Arguing that ethics programs ought to espouse philosophical or religious principles as the sole guides to behaviour suggests more about the naivete of the proponents who argue this than the failings of the programs. However, there are justified concerns that we do not effectively measure the impact of ethics agencies and that there are perhaps alternative ways of ensuring the integrity of government. This is a challenge all who work in the vineyards of ethics must face.

Ultimately, we must focus on the purpose of ethics programs. One might like to think that being ethical is its own reward. However, the social psychology literature paints a far more complex picture than this, looking to a variety of motives and meanings. The primary purpose of ethics programs in a democracy is to maintain the confidence of the people in their government. There is no more important role. A great Chinese sage is credited with the following aphorism which captures the essence of my argument:

> Tzu Kung asked for a definition of good government. The Master replied: It consists in providing enough food to eat, in keeping enough soldiers to guard the State, and in winning the confidence of the people. - And if one of these three things had to be sacrificed, which should go first? - The Master replied: Sacrifice the soldiers. - And if of the two remaining things one had to be sacrificed, which should it be? - The Master replied: let it be the food. From the beginning men have always had to die. But without the confidence of the people no government can stand at all.

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