

3-28-2018

How Higher Education Ombudsman Systems Can Benefit by Implementing Modified Restorative Justice Practices

Kyle Shiroma

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/drlj>



Part of the [Dispute Resolution and Arbitration Commons](#), and the [Education Law Commons](#)

Recommended Citation

Kyle Shiroma, *How Higher Education Ombudsman Systems Can Benefit by Implementing Modified Restorative Justice Practices*, 18 Pepp. Disp. Resol. L.J. 241 (2018)
Available at: <https://digitalcommons.pepperdine.edu/drlj/vol18/iss2/3>

This Comment is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Dispute Resolution Law Journal by an authorized editor of Pepperdine Digital Commons. For more information, please contact josias.bartram@pepperdine.edu , anna.speth@pepperdine.edu.

How Higher Education Ombudsman Systems Can Benefit by Implementing Modified Restorative Justice Practices

By Kyle Shiroma

A. Introduction

Conflict resolution conflicts that go unresolved often have a way of both resurfacing and becoming more expensive as time progresses. For organizations with many different moving parts and divisions, part of effective and efficient operations have included implementing ways of resolving conflicts as they arise, so that there will not be prolonged and thus affect the function of the entity as a whole. The Office of the Ombudsman (ombuds) is such a mechanism that has become invaluable to the monitoring and resolving of issues that arise within organizations such as corporations and institutions of higher education. With the added implementation of certain restorative justice practices and techniques, it is more than possible for this conflict resolution mechanism to increase its effectiveness within universities and the levels of satisfaction from those who go through the process. This article will explore both the concerns and the beneficial effects of implementing ombudsman systems in higher education. After a brief background and history of the ombuds office, Section C will explain the significance of why universities should implement ombuds systems. Section D will discuss some of the benefits of the proposed solution, Section E will address some of the concerns raised about this solution, and Section F will explain how ombuds offices can benefit by incorporating restorative justice ideas in its practices. Section G will summarize and conclude this proposal.

B. Background

Restorative justice in the context of Alternative Dispute Resolution (ADR) brings an approach to conflict resolution otherwise unaddressed by pure negotiations, mediations, and arbitrations.¹ Restorative justice addresses the effect of an offense or injury in the context of the harm suffered by not only the victim, but also of the relevant members of the community.² As such, while there may be elements of mediation and

¹ Judge Sophia H. Hall, *Restoring the Peace*, 21-APR CBA REC. 30, April 2007, at 30.

² *Id.*

[Vol. 18: 241, 2018]

How Higher Education Ombudsman Systems Can Benefit
PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

negotiation present during the “circle” discussions, like its name suggests, the restorative justice model is meant to both heal victims and rehabilitate offenders.³ This focus on reconciliation and addressing the effects of the harm on the community at large is an approach that serves as an educational point for both victim and offender, and can promote a greater sense of community and camaraderie once the restoration is complete.

The office of the ombuds first originated amongst the medieval Germanic peoples, but was not organized into a form recognizable by today’s ombuds offices until the 18th century, and even then not titled “ombudsman” until the 19th century.⁴ Currently, ombuds offices are a formally recognized division within organizations that are on payroll, but are still considered third-party neutrals in addressing disputes within said organization.⁵ While ombuds offices were first implemented in government roles, they have since been growing in popularity amongst non-governmental organizations.⁶ Currently, many universities across the United States have also opened ombuds offices.⁷ Many disputes that occur within a university system not only affect those directly involved in the dispute, but also the larger community surrounding the involved parties.⁸ That being said, ombuds systems have proven to be valuable assets in resolving minor disputes before they become large problems for the organization.⁹ The ombuds office within a large organization can act as one of the first warning signs of arising disputes, and can help an organization track the types and locations of disputes that arise within the organization.¹⁰ Additionally, one of the functions of the ombuds office seeks to humanize those employees utilizing the system to help them give honest feedback in a safe

³ Jan Peter Dembinski, Esq., *Restorative Justice-Time to Take it Seriously?*, VT. B.J., Winter 2014, at 20.

⁴ Shirley A. Wiegand, *A Just and Lasting Peace: Supplanting Mediation with the Ombuds Model*, 12 OHIO ST. J. ON DISP. RESOL. 95, 97 (1996).

⁵ Kristine L. Hayes, *Prepostal Prevention of Workplace Violence: Establishing an Ombuds Program as One Possible Solution*, 14 OHIO ST. J. ON DISP. RESOL. 215, 226 (1998).

⁶ Ga. ADR Prac. & Proc. § 2:14.

⁷ Wiegand, *supra* note 4, at 115.

⁸ See generally *Garstang v. Superior Court*, 39 Cal.App.4th 526 (1995) (“In 1992 and 1993, Helen Hasenfeld, Caltech’s ombudsperson, conducted a number of meetings in connection with the rumors being circulated. Ann Bussone, Caltech’s director of human resources, Giambelluca, Fontenette and other Caltech employees, including David Stevenson, participated in the Hasenfeld meetings.”).

⁹ Wiegand, *supra* note 4.

¹⁰ *Ombuds Benefits to Organizations*, INTERNATIONAL OMBUDSMAN ASSOCIATION, <http://www.ombudsassociation.org/Resources/Resource-Library/Tools-for-Ombuds-Office-Operations/Ombuds-Benefits-to-Organizations.aspx> (last visited Feb. 13, 2018).

environment.¹¹ Offering employees an avenue to give honest feedback about issues they may be facing also helps bolster company morale and satisfaction with the process of resolving disputes.¹²

In a university setting, the ombuds office can act as an avenue to help explain the policies and rules of the university, as well as serve as a resource of information in helping users make informed decisions.¹³

There are several different basic forms of restorative justice systems.¹⁴ Victim offender mediation (VOM) is one of the most widespread forms available, and allows for the victim of a crime to confront the perpetrator in a safe setting under the watch of a mediator.¹⁵ Family group conferencing shares similarities with VOM, but those present at the mediation can extend to “family, friends and key supporters of both victim and offender.”¹⁶ Community Restorative Boards are made up of individuals who then confront an offender about the wrong committed and set out a plan of action for the offender to make amends for the wrong.¹⁷ These forms of restorative justice are by no means exhaustive, but they give a glimpse of the basic qualities retained in restorative justice systems, and how such qualities can be modified for to allow for different dimensions and adjusted to best suit the conflict context.

C. Significance of the Topic

a. Why Ombuds in Higher Education

The need for internal mechanisms of resolving disputes within an organization is already something recognized and embraced by corporate America;¹⁸ there is no reason why higher education systems in America should not at the very least explore such ADR opportunities and tailor them to fit the specific needs of the institution. The same benefits that a

¹¹ *Id.*

¹² *Id.*

¹³ *Benefits of Using the Office*, UCI OFFICE OF THE OMBUDSMAN, <http://ombuds.uci.edu/general-information/benefits-of-using-the-office/> (last visited Feb. 13, 2018).

¹⁴ Wiegand, *supra* note 4.

¹⁵ Mary Ellen Reimund, *Is Restorative Justice on a Collision Course With the Constitution?*, 3 APPALACHIAN J.L. 1, 10 (2004).

¹⁶ *Id.* at 11.

¹⁷ *Id.* at 11.

¹⁸ See generally Andrea McGrath, *The Corporate Ombuds Office: An ADR Tool No Company Should Be Without*, 18 HAMLINE J. PUB. L. & POL’Y 452 (1997).

[Vol. 18: 241, 2018]

How Higher Education Ombudsman Systems Can Benefit
PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

corporation or private company would derive from an ombuds system, which would be available for a higher education institution.

The ombuds office is an effective tool in preventing these issues from escalating to litigation In addition to averting litigation expenses, the ombuds office is credited with improving a company's bottom line by reducing employee turnover and retaining valuable employees, increasing productivity, and enabling management time savings by allowing managers to focus on the business at hand, rather than getting involved in the handling of workplace disputes.¹⁹

Incorporating ombuds systems in higher education is nothing new. In the United States, one of the first major educational institutions to embrace the ombuds office was Michigan State University in 1966.²⁰ However, a report from the Carnegie Commission on Higher Education proposed that:

the ombudsman to be used to respond informally to faculty, student and administrator complaints, and the hearing officer to formally investigate and resolve disputes. 'The ombudsman (chosen by a committee consisting of faculty, students and administrators) would independently attempt to resolve both academic and nonacademic grievances, as well as help individuals to use existing avenues for redress of grievances.'²¹

Two of the arguably most important elements of the ombuds office are neutrality and confidentiality. Neutrality is necessary for an ombuds office in order to preserve the trust of employees utilizing the ombuds office, as well as for effective resolution of issues.²² The same reasoning can be applied to the necessary element of confidentiality as well, although there has been some pushback about the conflict of interests contained in having an ombuds office ultimately answer to the company that creates it.²³ However, as in any form of alternative dispute resolution, a healthy measure of confidentiality works for the benefit of the parties involved in the dispute,

¹⁹ McGrath, *supra* note 18, at 457.

²⁰ Weigand, *supra* note 4, at 113.

²¹ *Id.* at 114.

²² Christine L. Hayes, *Prepostal Prevention of Workplace Violence: Establishing an Ombuds Program as One Possible Solution*, 14 OHIO ST. J. ON DISP. RESOL. 215, 228 (1998).

²³ *Id.* at 229.

and in some cases, confidentiality in ombuds cases are protected by the Federal Rules of Evidence.²⁴ This shows the extent to which confidentiality is valued and protected in dispute resolution systems.

Some of the issues surrounding confidentiality within an ombuds office can be illustrated from the case of *Smartwood v. County of San Diego*. In this case, plaintiffs had “moved to compel disclosure of (1) approximately 11 lines of text redacted from documents prepared as a result of the Office of the Ombudsman’s investigation into Plaintiffs’ complaints against the social worker who removed the children, and (2) a line of redacted text from an email stream.”²⁵ One of the issues here was whether the ombuds office had the privilege of withholding information from discovery based on the Deliberative Process Privilege, “which shields confidential inter-agency memoranda on matters of law or policy from public disclosure.”²⁶ The court in this case decided to use a balancing test to determine whether the “[p]laintiff’s need for disclosure outweighs Defendant’s interest in confidentiality.”²⁷ The court then listed eight factors to consider in the balancing test:

“(1) the relevance of the evidence; (2) the availability of other evidence; (3) the government’s role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions” Other factors courts may consider include: “(5) the interest of the litigant, and ultimately society, in accurate judicial fact finding, (6) the seriousness of the litigation and the issues involved, (7) the presence of issues concerning alleged governmental misconduct, and (8) the federal interest in the enforcement of federal law.”²⁸

In evaluating the facts of this case against these factors, the court then concluded that the plaintiff’s interest in disclosure outweighed the defendant’s interest in confidentiality. Thus, in this specific instance, there

²⁴ *Id.* at 230. “In coming to the conclusion that the confidential communications of the ombuds office were protected by Federal Rule of Evidence 501, and thereby granting the ombuds officer’s motion to protect the communications from discovery, the court applied four factors that were necessary to its finding.” *Id.*

²⁵ *Swartwood v. Cty. of San Diego*, No. 12CV1665-W BGS, 2013 WL 6670545, at 1 (S.D. Cal. Dec. 18, 2013).

²⁶ *Id.* at 2.

²⁷ *Id.* at 3.

²⁸ *Id.* at 4.

[Vol. 18: 241, 2018]

How Higher Education Ombudsman Systems Can Benefit
PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

was reason to override the confidentiality of the ombuds office.²⁹ However, as in most situations where alternative dispute resolution processes are employed, neutrality in the third party is crucial to the success of the process.³⁰

b. Why Restorative Justice?

Restorative justice, as explained previously, focuses on the relationship between the victim and offender, and the impact the harm committed has on the community as a whole.³¹ “Restorative justice is the theory that shapes processes in which those impacted by a crime or harmful event share how they have been affected by it and what can be done to restore their lives.”³² This process differs from traditional dispute resolution mechanisms in that it not only involves members of the community that were affected by the offense, but also seeks to both restore the victim and make him whole, as well as instruct the offender as to why the offending act was inappropriate. While this process may not be appropriate for all types of offenses – restorative justice practices hardly seems appropriate in a murder situation – restorative justice practices could potentially be a great asset in repairing relationships and fostering a sense of community in those offenses which are lesser in gravity and contained to clearly identified parties. As John Braithwaite wrote in his article *Evidence for Restorative Justice*, “Restorative justice is not just about strengthening justice systems or strengthening democracy. It is also about strengthening communities, families, and schools, which have profound value in themselves, independent of the contributions they make to democracy or justice.”³³

Braithwaite goes on to say that while there is evidence that supports the idea of restorative justice being effective, there is not much data to support it being effective on a consistent basis.³⁴ There could be several possible explanations for this. One such explanation is that restorative justice focuses on systemic changes, which can take various different forms and cover a

²⁹ *Id.* at 16.

³⁰ John Lowry, Negotiation Theory and Practice Class Lecture, 2013.

³¹ Elmar G. M. Weitekamp & Stephan Parmentier, *Restorative Justice as Healing Justice: Looking Back to the Future of the Concept*, 4 RESTORATIVE JUSTICE 141, 141 (2016).

³² Jan Peter Dembinski, *Restorative Justice—Time to Take It Seriously?*, 39 VT. B.J. 20, 20 (2014).

³³ John Braithwaite, *Evidence for Restorative Justice*, 40 VT. B.J. 18, 21 (2014).

³⁴ *Id.*

wide range of activities.³⁵ The changes sought can be on an interpersonal level (such as a bettering of relationships or a decrease in bullying at school) or the marco level (involving business regulation or resolving international conflicts).³⁶ Because there is no standard by which to measure success across such a wide range of conflicts, and because some conflicts require more time in order to see progress in peacemaking, any review for success can only be focused on certain variables in measuring success.³⁷ There are many different elements in play while restorative justice practices are implemented, such as the support systems of both the victim and the offender, the nature of the offense committed, the effect it had on the victim, offender, and community at large, and how the community members react to the offender. Those factors are not exhaustive, but it shows that because there are many moving parts within restorative justice, it is difficult to measure which aspects are more effective at resolving issues and restoring community.

If evaluating the effects of restorative justice in a measurable way is an issue, one solution is to create a system of measurement that can quantify or define whether progress toward a goal or whether regression from the intended target occurs. Depending on the situation, a restorative justice facilitator, or one of the members involved in the process, can serve as a type of probation counselor to the offender, checking in on the progress of the offender through the rehabilitation program established through the restorative process. Also, participants' satisfaction with both the way the program was conducted as well as the offender's disposition moving forward can be recorded along a scale of pre-determined answers on a sliding scale measuring satisfaction levels. While the answers will not fully represent the range of emotions that participants feel, it will give some feedback on the participants' observations on the mechanics of the restorative justice system.

D. Proposed Solution

Introduce restorative justice concepts and practices into university ombuds systems for the benefit of the parties directly involved in the

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

[Vol. 18: 241, 2018]

How Higher Education Ombudsman Systems Can Benefit
PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

conflict, in addition to strengthening the overall university community.³⁸ Contemporary dispute resolution culture has already recognized a need for an organizational system to handle internal disputes in a way which fulfills the needs and expectations of all who are a part of the organization.³⁹ An effective ombudsman system can be a critical component in monitoring the levels of conflict within an organization, as well as addressing minor conflicts before they plague the entire organization.⁴⁰ The unique role of the ombudsman as opposed to the typical mediator or Alternative Dispute Resolution (ADR) professional allows the ombudsman to operate according to the specific needs and situations an organization experiences, thus allowing for a finely-tuned response and action plan.⁴¹ For entities such as higher education, ombuds offices “try to keep small gripes from becoming big issues.”⁴²

Ombuds systems can benefit greatly by employing restorative justice ideas and practices. Restorative justice as an approach to conflict resolution views “[c]rime as a violation of people and of interpersonal relationships.”⁴³ Restorative justice can be seen a concept of “healing justice,” with its end result being a restored community and understanding of the law.⁴⁴ As such, this takes into account not only a recognition of the benefits of resolving conflicts early in their development, but also an awareness of the second-hand effects of conflict on the organization as a whole. Restorative justice has also been defined as “an ethos with practical goals, among which to restore harm by including affected parties in a (direct or indirect) encounter and a process of understanding through voluntary and honest dialogue.”⁴⁵ While restorative justice has often been evaluated in the context of criminal offenses, it’s value and usefulness to organizations is not limited to that realm of disputes.

³⁸ See generally Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systematic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667 (2005).

³⁹ John S. Barkat, *Blueprint for Success: Designing a Proactive Organizational Ombudsman Program*, 8 J. INT’L OMBUDSMAN ASS’N 36, 37 (2015).

⁴⁰ *Id.*

⁴¹ J. Kathleen Moore, *Enhancing Ombudsman Practice and Outcome: Stage Model of Change and Motivational Interviewing*, 7 J. INT’L OMBUDSMAN ASS’N 68 (2014).

⁴² Tom Sebok, *Interviews with Pioneers of Higher Education Ombudsmen*, 6 J. INT’L OMBUDSMAN ASS’N 8, 9 (2013).

⁴³ Reimund, *supra* note 38, at 670.

⁴⁴ Weitekamp & Parmentier, *supra* note 31.

⁴⁵ Dr. Theo Gavrielides, *Restorative Practices: From the Early Societies to the 1970s*, Internet J. of Criminology 2 (2011).

Generally, an ombuds office must be set up and instituted with certain key characteristics and authority to act. According to the International Ombudsman Association (IOA) Preamble for the Standards of Practice, “[e]ach Ombudsman office should have an organizational Charter or Terms of Reference, approved by senior management, articulating the principles of the Ombudsman function in that organization and their consistency with the IOA Standards of Practice.”⁴⁶ The IOA Standards of Practice list components of what an ombuds should seek to achieve in different characteristics of the office, such as independence, neutrality and impartiality, confidentiality, and informality, among others.⁴⁷

The independent nature of the ombuds office is a key component of this, in that it is crucial for the ombuds office to gain the trust of employees of a company both to use the ombuds office, and to actually trust that a truthful recounting of the events will not have a negative impact on their employment. It is recommended in California that “The ombudsperson should have the broad mandate to look into any situation brought up by any person within an organization, review any pertinent documents, meet and discuss the matter with anyone having knowledge about it, and give advice and opinion as his or her judgment and conscience dictate.”⁴⁸ In addition, the Third District Court of Appeals in *Ombudsman Services of Northern California v. Superior Court* ruled that while there is no specific statute that generally covers ombudsmen in California, there is a specific statute

providing a privilege for the investigatory records and files of the office of the long-term care ombudsman . . . Section 9725 provides: “All records and files of the office relating to any complaint or investigation made pursuant to this chapter and the identities of complainants, witnesses, patients, or residents shall remain confidential, unless disclosure is authorized by the patient or resident or his or her conservator of the person or legal representative, required by a court order, or release of the information is to a law enforcement agency, public protective service agency, licensing or certification agency in a manner consistent with federal laws and regulations.”⁴⁹

⁴⁶ *IOA Standards of Practice*, INT’L OMBUDSMAN ASS’N, (Oct. 2009), http://www.ombudsassociation.org/IOA_Main/media/SiteFiles/IOA_Standards_of_Practice_Oct09.pdf.

⁴⁷ *Id.*

⁴⁸ NONBINDING ADR PROCEDURES, Cal. Prac. Guide Employment Litigation Ch. 18-B (2016).

⁴⁹ *Ombudsman Servs. of N. California v. Superior Court*, 154 Cal. App. 4th 1233, 1243–44 (2007).

[Vol. 18: 241, 2018]

How Higher Education Ombudsman Systems Can Benefit
PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

In this case, California created a long-term care ombudsman program compliant with federal law, the Ombudsman Services of Northern California (OSNC) to help manage long-term care residents.⁵⁰ A party in a related lawsuit had requested that OSNC hand over “any and all records of complaints and actions taken pertaining to Foothill Oaks Care Center between May 20, 2005 and January 31, 2006.”⁵¹ The trial court ordered OSNC to produce the information requested by the opposing party, and the OSNC appealed that decision.⁵² The Court of Appeals concluded that the particularized consent portion of the applicable federal statute had prohibited the compulsion of the requested discovery because certain parties were unable to give the consent necessary for the disclosure to be lawful.⁵³ Furthermore, the court concluded that the information possessed by the OSNC were protected by the right to privacy guarantee of the California Constitution, and therefore showed that an ombuds office, acting within their statutory powers, are not subject to disclosing information at the mere request of a party seeking that information.⁵⁴ The fact that an ombuds office does not act as the fact-gathering arm of a larger organization or government helps to solidify the employees’ trust in using the ombuds office as an alternative dispute resolution forum.

In terms of confidentiality, it is generally accepted that the ombuds office should keep all information it acquires during the course of its operations confidential.⁵⁵ The IOA standards for confidentiality lay out multiple types of communications and information that a typical ombuds should keep confidential in most normal circumstances. While in California there is no formal ombuds privilege of confidentiality codified in law, the case of *Garstang v. Superior Court* helps to illustrate how confidentiality in ombuds offices are viewed by California courts. In this case, the plaintiff Garstang sued Caltech and three employees of Caltech for slander and intentional infliction of emotional distress, and attempted to gain access to the information gained by Caltech’s ombudsperson in preparation for

⁵⁰ *Id.* at 1242.

⁵¹ *Id.* at 1239.

⁵² *Id.* at 1240.

⁵³ *Id.* at 1247.

⁵⁴ *Id.* at 1239-40.

⁵⁵ *IOA Standards of Practice*, *supra* note 46.

litigation.⁵⁶ The superior court denied the request, and Garstang filed a petition for writ of mandate.⁵⁷

The Second District Court of Appeals, on review, opined that while there is no specific statute protecting the ombudsman's office on confidentiality grounds, the California State Constitutional right to privacy might be applicable in this situation.⁵⁸ The California State Constitution contains a provision which states "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, *and privacy*. (italics added.)"⁵⁹

In the analysis, the Court of Appeals stated that the right to privacy may be overcome if there is a "compelling and opposing state interest," one of which is "ascertaining the truth in connection with legal claims."⁶⁰ The court supported a balancing test brought up by another case (*Board of Trustees v. Superior Court*, 119 Cal.App.3d 516 (1981)) that aims to weigh the "'compelling public need' for discovery against the fundamental right of privacy."⁶¹ After applying that test to the facts of this case, the court addressed the nature of confidentiality in respect to its importance in the work of the ombuds office.⁶² The Caltech ombuds services were to "provide the Caltech community with confidential, informal assistance in resolving intra-campus conflicts, disputes and grievances; in promoting fair and equitable treatment within the Institute, and in fostering the general well-being of the Caltech community."⁶³ The court also recognized that violating the principle of confidentiality of the ombuds office would

destroy the reputation and principle of confidentiality that the Caltech ombudsman program and office now enjoys and needs to perform its function. This is so because the utility of such a program and office "in resolving disputes in [the] workplace and thus diminishing the need for more formal resolution procedures, is

⁵⁶ See *Garstang v. Superior Court*, 39 Cal.App.4th 526, 529-30 (1995).

⁵⁷ See *Id.* at 530.

⁵⁸ See *Id.* at 532.

⁵⁹ See *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 533 (1995) (citing *Board of Trustees v. Superior Court*, 119 Cal.App.3d 516 (1981)).

⁶² *Id.* at 534.

⁶³ *Id.*

[Vol. 18: 241, 2018]

How Higher Education Ombudsman Systems Can Benefit
PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

founded on the confidentiality of its communications to and from company officials and employees.”⁶⁴

The court reasoned that, as an alternative dispute resolution mechanism, the ombuds office seeks the resolution of issues that are brought into the office, and that breaking the ombuds session, because of the ombuds’ discretion, should not be taken as evidence in itself during a future lawsuit.⁶⁵

There are many implications from this case for both the ombuds office in general and ombuds offices in higher education. Because in California there is no formal recognition of an ombuds privilege of confidentiality, a decision from the Second Circuit Court of Appeals, recognizing that the ombuds office operates best when confidentiality is not breached, goes a long way in setting precedents for future similar situations. This is particularly important in the area of higher education. One study conducted on the procedural preferences of university students revealed that a majority of students who participated preferred a third-party neutral be present in aiding the disputing parties come to their own decisions.⁶⁶ Until a formal statute creating and recognizing a privilege of the ombuds office is enforced, court decisions like this one will be looked to as guidance in determining whether or not an ombuds office’s confidentiality in operations will be upheld.

E. Discussion of Potential Objections

Previously, arguments have been made that restorative justice systems in the United States have insufficient oversight and accountability when it comes to goals and results of restorative justice.⁶⁷ The basis of this claim is that there are currently no sufficiently adequate measures of evaluating

⁶⁴ *Id.* at 535.

⁶⁵ *Id.* at 536.

⁶⁶ See generally Donna Shestowsky, *Procedural Preferences in Dispute Resolution*, 10 PSYCHOL. PUB. POL’Y & L. 211, 229-30 (2004) (“Three experiments were conducted to investigate preferences for dispute resolution procedures. . . . All three experiments focused on civil disputes--noncriminal disputes in which one person sustained a monetary harm and blamed another person for it. Participants were asked to indicate preferences for dispute resolution features (e.g., decision, process, and rules) that correspond to actual procedures (e.g., mediation, arbitration), rather than to provide direct preference ratings for procedures that are explicitly labeled, for example, *mediation* and *arbitration*.”).

⁶⁷ Zvi D. Gabbay, *Holding Restorative Justice Accountable*, 8 CARDOZO J. CONFLICT. RESOL. 85, 86-87 (2006).

whether finished cases are achieving the goals set out for them.⁶⁸ Thus, in order to gain a more accurate picture of the good restorative justice actually does in conflict situations, there must be a more effective way of monitoring the progress and actions of offenders that have gone through the restorative justice system in the past. There is also an argument that restorative justice programs should be compared amongst themselves and evaluated by their success relative to the work and results of similar programs.⁶⁹

The idea of restorative justice has also been criticized by academia in other countries. An article published in Canada by Arlène Gaudrault, the president of Association Québécoise Plaidoyer-Victimes, discussed some of the criticisms, in particular, of the victim-offender mediation model of restorative justice that has been used in the Canadian Department of Justice.⁷⁰ One such criticism is that, in the Canadian implementation of restorative justice practices, much of the victim-offender mediation has been focused on property offenses and first-time offenses of youths.⁷¹ Critics argue that this increases the net amount of people getting in trouble with the law more than normal, because many of these areas are “not normally within the jurisdiction of the court,” and they also seem to negatively impact disadvantaged groups more than other groups.⁷²

There is also a viewpoint that restorative justice promotes “unrealistic or unreasonable goals.”⁷³ A report entitled *Listening to Victims - A Critique of Restorative Justice Policy and Practice in the United States*, discusses the criticism that restorative justice as both an idea and practice has faced in the United States.⁷⁴ The report describes the work of the Listening Project as “a collaboration of professionals active in the victim community and the field of restorative justice in the United States,” and was formed with the purpose “to confront the significant deficiencies of restorative justice practice pertaining to victim participation and impacts for victims, their advocates[,] and victims services generally.”⁷⁵ One of the goals of the project was to

⁶⁸ *Id.* at 163.

⁶⁹ *Id.* at 115.

⁷⁰ Arlène Gaudrault, *The Limits of Restorative Justice*, VICTIMS & SURVIVORS OF CRIME WK. (Jan. 7, 2015), http://www.victimswweek.gc.ca/symp-colloque/past-passe/2009/presentation/arlg_1.html.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Harry Mika et. al., *Listening to Victims-A Critique of Restorative Justice Policy and Practice in the United States*, 68 FED. PROB. 32, 33 (2004).

⁷⁴ *See generally Id.*

⁷⁵ *Id.* at 32.

[Vol. 18: 241, 2018]

How Higher Education Ombudsman Systems Can Benefit
PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

help develop a practical action plan that would benefit victims of crimes, and this plan was implemented in a two-step process.⁷⁶ The first step would be to raise awareness to the messages and platform of the victims and their support system, while the second step would be to have the victims, their supporters, and support systems dialogue with restorative justice practitioners about areas of concern and ideas for improving the system and process.⁷⁷

The report continued with some of the criticisms that the restorative justice concept faced, such as the process sometimes being driven by the needs of the offender—rehabilitation and making amends for the offense—instead of catering to the needs of the victim.⁷⁸ It is understandable that one who was wrongfully hurt, or was otherwise the victim of an offender, would feel further aggravated if the process for addressing the wrong was based on the needs and position of the offender instead of the victim. A fair process must take into account the position and feelings of the victim so that the victim does not feel further insulted or suffer a “second offense” through a process that he perceives is centered around the offender. Even if the restorative justice process is not focused on how the offense impacted the victim and the victim’s community, acknowledging how their position was affected by the offense when constructing the restorative process can help build rapport, and it may relieve some of the feelings of unrest the victim may have.

This view is sometimes felt by victims of offenses who feel that restorative justice practices are a way for offenders of “getting off easy” and avoiding the true consequences of their actions.⁷⁹ Such a view can be promulgated in situations where offenders do not give sincere apologies for their offenses, since one of the core ideas of restorative justice is offenders genuinely apologizing for their actions, and recognizing its harmful effect on the victim and others involved.⁸⁰ Sometimes, victims also do not see or feel the need to be involved in the offender’s rehabilitation or post-offense correction, as they may want to first address their own change in situation before becoming involved in the offender’s corrective measures.⁸¹ The restorative justice process depends on the sincere involvement of both the

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 33.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

offender and victim, at the very least, otherwise the main point of the process will not be met.⁸² Making sure that both victim and offender participate sincerely and of their own will is important not only for the process to work as intended but also for the both parties to experience the healing effect of interacting positively with the other party moving forward.

Another criticism of restorative justice from *Listening to Victims* was that the language used—"restorative justice"—has been troubling or confusing in both its meaning and implementation.⁸³ For example, if offenders do not participate with sincerity or do not participate at all, then, by all accounts, this restorative justice concept has failed to bring any type of restoration to the victim.⁸⁴ Restoration for a victim is also inappropriate, and even sometimes insensitive to suggest, for certain crimes involving violence, such as sexual assault or domestic violence.⁸⁵ In those situations it is not a question of whether the victim and offender want to work together to get past the offense and its impact on the victim, but if restoration is even possible from the victim's point of view, and if so, will there actually be sincere participation in the process by the offender.⁸⁶ An offender who has also been under the influence of drugs, or is otherwise not completely sane, presents not only a questionable level of sincerity of participation in the process, but might also pose a basic threat to the safety of all involved in the process.⁸⁷

With other objections to the restorative justice practice, such as distorting the view of who the "real" victims are and how to evaluate the effectiveness of the restorative justice process,⁸⁸ it is clear that the coexistence of restorative justice practices in the formal judicial system has a long way to go before it becomes a viable common practice option. However, such a view of restorative justice is one that misunderstands the whole concept of what restorative justice is aimed to do: restore the victim to a place of healing and peace, while rehabilitating the offender to a point of understanding why the offense is wrong, and to make amends for the wrong suffered. It is understandable, however, that in every situation a victim has certain needs in order to be able to either forgive or otherwise move past the

⁸² *Id.* at 34.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *See Id.*

[Vol. 18: 241, 2018]

How Higher Education Ombudsman Systems Can Benefit
PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

offense, and in some instances the model of restorative justice does not adequately meet the victim's needs according to the victim.⁸⁹

F. Why Ombuds Offices Should Adopt Restorative Justice Practices

In light of the criticisms of restorative justice previously mentioned, there is still a case to be made that ombuds offices can benefit from the incorporation of restorative justice practices and ideas. Because on-campus ombuds offices do not operate like a traditional law enforcement agency or like the formal judicial system in state and local governments, broadening the scope of actions that are within the ombuds office dispute resolution domain is not a problem, but instead can be a benefit to the whole community.

Furthermore, the practice of restorative justice contains components that can be complementary to the dispute resolution efforts of higher education institutions.⁹⁰ In an article for the Conflict Management in Higher Education Report, a project of Campus Conflict Resolution Resources (campus-adr.org), Bill Warters makes a case for the introduction of restorative justice practices to college campus dispute resolution approaches.⁹¹ For example, the numerous types of communities on higher education campuses allow for inherent opportunities for problem-solving collaboration.⁹² Such campuses usually have support systems already set up, and the flexibility of restorative justice practices can help those support systems with resolving issues among diverse population types.⁹³ The restorative justice program at the University of Colorado Boulder campus is cited as a successful example of how the "group conference" approach helps victims, offenders, and community members deal with the harm inflicted by the offender, and how to address the hurt in a community context.⁹⁴ The UC Boulder restorative justice program was headed in part by the director of the UC Boulder Ombuds office, and during their first year in operation the

⁸⁹ *Id.* at 33.

⁹⁰ Bill Warters, Tom Sebok & Andrea Goldblum, *Making Things Right: Restorative Justice Comes to Campuses*, 1 CONFL. MGMT. HIGHER EDUC. REP. 1 (2000), http://www.campus-adr.org/cmher/reportarticles/Edition1_1/Restorative1_1.html.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

program oversaw the resolution of eight different student conflicts, which received much positive feedback.⁹⁵

Robert Shelton, in his article *Justice as Basis of Equity and Fairness in Ombudsman Practice*, reflects on his time as an ombudsman for Kansas University and his view on the role of the university ombudsman.⁹⁶ The article discusses how as an ombudsman, he was called to operate in accordance with the ethical principles of the International Ombudsman Association, which reads in part: “an ombudsman should be guided by the following principles: objectivity, independence, accessibility, confidentiality and justice; *justice is pre-eminent*.”⁹⁷ (emphasis added). While exploring what the idea of justice as pre-eminent meant to him, Shelton includes a discussion of how restorative justice is a part of the overall call of being devoted to justice.⁹⁸ According to Shelton, the process of restorative justice can be helpful for an ombudsperson to strive for justice by trying to repair the relationship between victims and offenders.⁹⁹ He concludes with a quote by Howard Zehr: “Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”¹⁰⁰

In 2014, Senators Eileen Barrett and Luz Calvo requested that the California State University, East Bay Academic Senate hire an ombudsman on campus, and that the ombudsman direct a new Center for Restorative Justice.¹⁰¹ The proposal explains that ombudsman offices at other universities such as California State University San Marcos, Oregon State University, and Stanford University have all successfully employed ombudsman offices on campus, and should be viewed as examples to follow in creating a service that helps with the peaceful resolution of potentially complex issues.¹⁰² In proposing that the ombudsman office head a new

⁹⁵ *Id.*

⁹⁶ Robert L. Shelton, *Justice as Basis of Equity and Fairness in Ombudsman Practice*, 4 J. INT’L OMBUDSMAN ASS’N. NO.1, at 18 (2011).

⁹⁷ *Id.* at 18.

⁹⁸ *Id.* at 23.

⁹⁹ *Id.* at 24.

¹⁰⁰ *Id.*

¹⁰¹ Eileen Barrett & Luz Calvo, *Some Research on Ombuds and Restorative Justice in University Settings* 1, 6 (Cal. State Univ. East Bay Exec. Comm. eds., 2014), <https://www.csueastbay.edu/faculty/senate/committees/excom/13-14/13-14-docs/13-14-bec-15-ten-pt-plan-update.pdf>.

¹⁰² *Id.* at 2–6.

[Vol. 18: 241, 2018]

How Higher Education Ombudsman Systems Can Benefit
PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Center for Restorative Justice, the reasoning was that the ombudsman should already be fostering a harmonious environment, and therefore is in a suitable position to head the center.¹⁰³ The proposal lists several centers for restorative justice as examples of the progress and positive effect that such centers can have in different community types, including that of higher education.¹⁰⁴

Two of those examples are the centers for restorative justice at the University of Colorado – Boulder, and Skidmore College, where the principles of restorative justice have been implemented as creative approaches to conflict, and have been praised for their effectiveness within a student-affairs environment.¹⁰⁵

Probably one of the most applicable scenarios in which restorative justice practices can be of benefit to the university ombuds office is in cases of bullying. Bullying and Cyberbullying behavior are defined on Stopbullying.gov as “include[ing] actions such as making threats, spreading rumors, attacking someone physically or verbally, and excluding someone from a group on purpose” and “bullying that takes place using electronic messages,” respectively.¹⁰⁶ The Contrary to some preconceived notions that bullying is found in high schools or places of elementary education, bullying on college campuses are not an uncommon occurrence. An article published by the USA Today College section explained how bullying does not just end after high school, but

[a] 2011 study from the University of Indiana showed 22% of college students reported being cyberbullied, while 15% reported traditional bullying. The same study showed 42% of students reported seeing someone bullied by another student and 8% reported being a bully in a situation. In addition, almost 15% reported seeing a professor bully a student, and 4% reported a professor had bullied them.¹⁰⁷

Because bullying and cyberbullying are present issues at many universities, it is important that ombuds offices be properly equipped to

¹⁰³ *Id.* at 6.

¹⁰⁴ *Id.* at 7–8.

¹⁰⁵ *Id.* at 7.

¹⁰⁶ *What is Bullying & What is Cyberbullying*, stopbullying.gov.

¹⁰⁷ Kaitlyn Krasselt, *Bullying is not a Thing of the Past for College Students*, USA TODAY COLLEGE (Oct. 21, 2014), <http://college.usatoday.com/2014/10/21/bullying-not-a-thing-of-the-past-for-college-students/>.

handle these issues in a way that is most beneficial to both the parties involved and for the community at large. Tom Sebok, an ombudsman at the University of Colorado – Boulder, believes that restorative justice principles can be implemented by ombudsmen to effectively combat bullying in universities.¹⁰⁸ Sebok writes that victims of bullying might not be as receptive to the traditional mediation model because in his experience, most mediated conflicts result from both parties being at least somewhat responsible for the conflict, and bullying does not fit this model.¹⁰⁹ Victims of bullying might not be receptive to listening to the concerns of the offender or even making concessions in order to address the needs of the offender.¹¹⁰ However, the various restorative justice approaches frame the issue of bullying different than traditional methods of anti-bullying policies.¹¹¹ Bullying has traditionally been framed via a retributive system of justice, meaning that if there was a wrongdoing, what was the wrong committed, and what is the appropriate punishment for the wrong.¹¹² Restorative justice processes focus on repairing the harm done to both the victim and the community.¹¹³ The process that Sebok uses at the University of Colorado – Boulder requires that upon entering this restorative process voluntarily, the offender would issue a sincere apology and agree to stop the bullying behavior.¹¹⁴

Sebok does acknowledge that there are situations in which restorative practices will not be for bullying situations.¹¹⁵ For the restorative approach to even have a chance at success, the offender has to acknowledge that his actions were wrong and that they did result in a victim being hurt.¹¹⁶ Restorative processes are inappropriate where offenders are unwilling to admit that their actions were wrong or harmful, as without that step, there can be no progress made towards restoration and healing.¹¹⁷

¹⁰⁸ Tom Sebok, *Can Bullying Be Mediated?*, WORKPLACE BULLYING INSTITUTE (Dec. 8, 2010), <http://www.workplacebullying.org/sebok-restorative-justice/>.

¹⁰⁹ *Id.* at 1.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 2.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 2–3.

¹¹⁷ *Id.* at 3.

[Vol. 18: 241, 2018]

How Higher Education Ombudsman Systems Can Benefit
PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

In order to better utilize restorative justice services, Ombuds offices first should create a type of screening test to determine if restorative justice is a viable means of addressing the situation. If not, then the protocol for resolving conflicts should be followed. But if the conflict situation is of the type that lends itself to restorative justice practices, that option should be made available to the victim and offender for consent to use that process. The restorative practices will then only be used if both parties agree to give a good faith effort in meeting the behavioral expectations necessary for the process to be successful. Given the nature of conflicts that restorative practices can address, much of the process will depend on whether or not the parties involved are willing to step outside of the traditional method of addressing wrongs. Ombudsmen should be educated in the benefits and concerns of restorative justice practices to be able to inform parties about the process and help them reach educated decisions. While some parties may not be willing to engage in restorative justice practices, having the option for those parties that are can be beneficial to creating a culture of alternative dispute resolution on higher education campuses.

G. Conclusion

While there are challenges to overcome in incorporating restorative justice practices into higher education ombuds systems, the potential benefits warrant at least an exploration into the possibility of such incorporation. The role of an ombuds office is to identify and resolve the small issues within the organization effectively before it can grow into a problem for both the administration of the organization, and for multiple employees that were not parties to the original issue. Ombudsman offices, which have become an invaluable part of large corporations, have proven to be both useful and beneficial in resolving disputes within the organization. Higher education systems are similar to corporations in that there are multiple departments and divisions within the entity, have are many opportunities for small issues to become entity-wide problems. Thus, many large higher education institutions have begun to form ombuds offices on their campuses in order to offer a new route in resolving intra-institution issues. Ombuds offices are designed to resolve conflicts within an organization, and the addition of restorative justice processes to the toolchest of ombuds offices can help the office to become more adept at resolving multiple types of issues. Restorative justice focuses on repairing the harm committed and healing the community that was affected, not punishing the offender for violating a policy. Because restorative justice

[Vol. 18: 241, 2018]

How Higher Education Ombudsman Systems Can Benefit
PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

includes offenders, victims, and the community in creating flexible ways for mending the harm, there is a higher chance of the participant satisfaction once the agreed-upon remedy is completed.