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Mark Davies

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GOVERNMENTAL ETHICS LAWS: MYTHS AND MYTHOS*

MARK DAVIES**

I. INTRODUCTION: DEMYTHOLOGIZING GOVERNMENTAL ETHICS LAWS

Some years ago, it was fashionable among theologians to speak of "demythologizing" the Bible,[1] an unfortunate and controversial phrase that described an essential and common practice: to separate the eternally true from the literally true, to find the essence of faith among the trappings of a particular time and culture.[2]

Governmental ethicists must do precisely that with ethics laws: they must demythologize them. They must separate the wheat of first principles from the chaff of political realities, public pressure, and bureaucratic inertia. Thus, when ethicists find themselves arguing over this comma or that, like a couple of theologians fighting over whether the tree in the Garden of Eden was a Winesap or a MacIntosh, they need to step back, take a deep breath, and undertake a little self-analysis and renewal.

II. FUNDAMENTAL ASSUMPTIONS OF GOVERNMENTAL ETHICS LAWS

The genesis of much of the myth surrounding governmental ethics laws lies in a misconception as to their purpose and bases. Thus, one must first lay out five fundamental assumptions underlying those laws.

Assumption No. 1. The primary purpose of governmental ethics laws is to improve honesty and integrity in government. It is not to collect forms, hand out fines, or publish rules and opinions. Those activities can be important, but only to the extent that they improve integrity in government. Two corollaries accompany this assumption. One, the *prevention* of unethical conduct does far more for integrity in government than the *punishment* of unethical conduct. It is better to shut the barn

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* This essay is based on a speech delivered by the author at the international conference of the Council on Governmental Ethics Laws in Honolulu, Hawaii, December 4-7, 1994. The views expressed herein are solely those of the author and do not necessarily reflect the views of the Conflicts of Interest Board.

** Executive Director/Counsel, New York City Conflicts of Interest Board.

1. The German scholar Rudolf Bultmann (1884-1976) is perhaps best known for this approach. *See* William W. Quinn, Jr., *Rudolf Bultmann's "Demythologization" Hermeneutic as Applied to New Testament and Constitutional Exegesis*, 6 J.L. & REL. 297 (1988).

2. *See id.* at 303 (discussing Bultmann's attempts to ascertain the "true" meaning of the New Testament through "demythologization").

door *before* the horse has bolted. Two, the perception of integrity in government is no less important than the reality of integrity in government. Both are essential because regardless of how honest public officials are in fact, a democratic system of government cannot function properly if the public believes its officials are corrupt.[3]

Assumption No. 2. The vast majority of public officials are honest and want to do the right thing. For example, the city of New York has over 200,000 employees,[4] yet only a small fraction has ever proven to be corrupt.

From this second assumption arise two corollaries. One, the vast majority of conduct that is unethical under the law results from employees' ignorance of what the law is. For this reason, training and education are the most important responsibilities of an ethics agency. Two, ethics laws must not place on officials the entire burden of ensuring government integrity. Vendors, developers, and applicants should all have a stake in officials complying with ethics laws. But the reality is more like this: a village treasurer gets a little jammed up financially, with tuition bills, a sick parent, a broken down car. Along comes the local bank that hopes to keep the village's business and gives the treasurer a loan at a couple of points below the usual interest rate. Since no bribe is offered, nothing happens to the bank; but the treasurer may well lose his job. That disparity is grossly unjust.

Assumption No. 3. Officials cannot obey an ethics law they do not understand. And the vast majority of government employees are lay persons with limited access to attorneys. Therefore, ethics codes must be clear, comprehensive, short, simple, and straightforward. To quote the trial lawyers, *KISS*—Keep It Simple, Stupid. Moreover, whenever possible, ethics codes should contain bright-line rules and never three-armed lawyer gobbledygook—that is, *on the one hand this, on one the other hand that, and on the third hand something else.* Yet, one New

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3. *See* Deborah L. Markowitz, *A Crisis in Confidence: Municipal Officials Under Fire*, 16 VT. L. REV. 579, 579-82 (1992):

> The proper operation of democratic government requires that public officials and employees be independent, impartial and responsible to the people; that government decisions and policy be made in proper channels of the governmental structure; that public office not be used for personal gain; and that the public have confidence in the integrity of government.

Id. at 579 (quoting Rutland, Vt., Code of Ethics § 451 (1982)). *See generally* Archibald Cox, *Ethics in Government: The Cornerstone of Public Trust*, 94 W. VA. L. REV. 281 (1991-92).

4. The estimated number of filled, full-time positions as of June 30, 1995, was 228,037. THE 1994-95 GREEN BOOK: OFFICIAL DIRECTORY OF THE CITY OF NEW YORK 616-17 (1994).

York State ethics provision[5] contains fifteen exceptions, with exceptions to the exceptions.[6] No ethics provision should require fifteen exceptions.

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5. *See* N.Y. GEN. MUN. LAW § 801 (McKinney 1986 & Supp. 1995) (Conflicts of Interest Prohibited).

6. *See* N.Y. GEN. MUN. LAW § 802 (McKinney 1986 & Supp. 1995). The statute reads as follows:

> The provisions of section eight hundred one of this chapter shall not apply to:
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> 1. a. The designation of a bank or trust company as a depository, paying agent, registration agent or for investment of funds of a municipality except when the chief fiscal officer, treasurer, or his deputy or employee, has an interest in such bank or trust company; provided, however, that where designation of a bank or trust company outside the municipality would be required because of the foregoing restriction, a bank or trust company within the municipality may nevertheless be so designated;
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> b. A contract with a person, firm, corporation or association in which a municipal officer or employee has an interest which is prohibited solely by reason of employment as an officer or employee thereof, if the remuneration of such employment will not be directly affected as a result of such contract and the duties of such employment do not directly involve the procurement, preparation or performance of any part of such contract;
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> c. The designation of a newspaper, including but not limited to an official newspaper, for the publication of any notice, resolution, ordinance or other proceeding where such publication is required or authorized by law;
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> d. The purchase by a municipality of real property or an interest therein, provided the purchase and the consideration therefor is approved by order of the supreme court upon petition of the governing board;
>
> e. The acquisition of real property or an interest therein, through condemnation proceedings according to law;
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> f. A contract with a membership corporation or other voluntary non-profit corporation or association;
>
> g. The sale of bonds and notes pursuant to section 60.10 of the local finance law;
>
> h. A contract in which a municipal officer or employee has an interest if such contract was entered into prior to the time he was elected or appointed as such officer or employee, but this paragraph shall in no event authorize a renewal of such contract;
>
> i. Employment of a duly licensed physician as school physician for a school district upon authorization by a two-thirds vote of the board of education of such school district, notwithstanding the fact that such physician shall have an interest, as defined in section eight hundred one of this chapter, in such employment.
>
> 2. a. A contract with a corporation in which a municipal officer or employee has an interest by reason of stockholdings when less than five per centum of the outstanding stock of the corporation is owned or controlled directly or indirectly by such officer or employee;

Furthermore, public officials must have easy access to guidance on ethics laws and quick answers to ethics questions. Public servants do not want analysis but answers; and, whenever possible, they want those answers not next month or next year but immediately, or at least within a few days.

Assumption No. 4. Officials will not obey, or will only grudgingly obey, an ethics law that does not make sense to them. In ethics, common sense is king. That is why public officials favor transactional disclosure (disclosure of a conflict when it actually arises) over annual disclosure: transactional disclosure makes sense to them.[7] Yet when an ethics law defines as unethical something that most people do not regard as unethical, that ethics law spawns "unethical" conduct.

From this fourth assumption, two corollaries arise. One, ethics regulations must always be written and interpreted in light of reason, common sense, and everyday experience. An ethics code is not the Internal Revenue Code but rather a collection of general principles governing human conduct in a rather fuzzy area.

Furthermore, in drafting an ethics law, legislators must know their customer. They must draft the law to reflect the size and nature of the particular governmental entity and the sophistication of its employees and constituents. An ethics provision that is good for a state or a major city may devastate a small municipality. What is good for the goose is not necessarily good for the gander. For example, in New York, a largely

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b. A contract for the furnishing of public utility services when the rates or charges therefor are fixed or regulated by the public service commission;

c. A contract for the payment of a reasonable rental of a room or rooms owned or leased by an officer or employee when the same are used in the performance of his official duties and are so designated as an office or chamber;

d. A contract for the payment of a portion of the compensation of a private employee of an officer when such employee performs part time service in the official duties of the office;

e. A contract in which a municipal officer or employee has an interest if the total consideration payable thereunder, when added to the aggregate amount of all consideration payable under contracts in which such person had an interest during the fiscal year, does not exceed the sum of one hundred dollars;

f. A contract with a member of a private industry council established in accordance with the federal job training partnership act [29 U.S.C.A. §1501 *et seq.*] or any firm, corporation or association in which such member holds an interest, provided the member discloses such interest to the council and the member does not vote on the contract.

Id.

7. *See generally* Mark Davies, *1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Reform*, 11 PACE L. REV. 243, 246-57 (1991) (discussing the annual disclosure requirements under New York law).

rural state, small communities depend heavily upon volunteers for municipal officials,[8] who meet only monthly, who are independent but sometimes not terribly sophisticated, who are known by everyone in the community, who cherish their privacy, and who have little money for expensive state mandates.[9] Those facts explain why lengthy financial disclosure forms are unneeded anathema in these communities, why a "two-hats" provision prohibiting a public official from holding a political office is unworkable (there are simply not enough volunteers to go around),[10] why broad "revolving door" restrictions will probably keep some of the best people out of local government, and why a sensible code of ethics is critical, as conflicts of interest in small communities are virtually unavoidable.

Good government requires good people in government. Yet when ethics laws become so onerous that good citizens refuse to serve,[11] or when ethics laws become so convoluted or so divorced from common sense that government officials unwittingly violate them or knowingly ignore them, then ethics laws promote unethical conduct and foster bad government. The bottom line is this: ethics regulations must encourage, not discourage, good citizens from serving in government. If they do not do that, they have failed and belong in the rubbish heap.

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8. *See* Sydney Duncombe, *Volunteers in City Government: Getting More than Your Money's Worth*, 75 NAT'L CIVIC REV. 291 (1986); Sydney Duncombe, *Volunteers in City Government: Advantages, Disadvantages and Uses*, 74 NAT'L CIVIC REV. 356 (1985); William D. Duncombe & Jeffrey L. Brudney, *The Optimal Mix of Volunteer and Paid Staff in Local Governments: An Application to Municipal Fire Departments*, 23 PUB. FIN. Q. 356 (1995); Sandra Reinsel Markwood, *Volunteers in Local Government: Partners in Service*, 76 PUB. MGMT. 6 (1994); Ina Aronow, *Two Small Villages, A Century Old and Content*, N.Y. TIMES, Aug. 11, 1991, § 12 (Westchester County), at 1 (discussing the operations of two small villages in Westchester County, New York, including volunteers in local government).

9. *See* Aronow, *supra* note 8.

10. *See* Elizabeth Kolbert, *Loss of Members Forces Suburban Volunteer Groups to Change Strategies*, N.Y. TIMES, Oct. 11, 1986, at B4 (regarding the shrinking pool of volunteers as more women work full-time and more men and women work longer hours); *see also* Jeffrey L. Brudney, *The Availability of Volunteers: Implications for Local Governments*, 21 ADMIN. & SOC'Y 413 (1990).

11. *See* Thomas G. Scott, *If You Work for the Government, You Must Disclose Finances; Government Ruling on Public Officials' Financial Disclosure*, 7 BUS. FIRST OF BUFFALO 1 (1991), *available in* LEXIS, Nexis Library, NEAST file (discussing the negative responses of some New York state local government officials to the financial disclosure requirements of the 1987 Ethics in Government Act); Jay Romano, *New Ethics Law is Called Obstacle for Local Officials*, N.Y. TIMES, May 19, 1991, § 12 (New Jersey), at 1 (explaining New Jersey's then-new ethics law and the effect on volunteers).

Assumption No. 5. Unless an army of investigators is to be hired, enforcement of ethics laws must depend primarily upon self-interest, peer pressure, whistle blowers, concerned citizens, and the media. These are the enforcers of ethics laws—not inspectors general, not district attorneys, and not even ethics commissions.

Accordingly, ethics laws must be simple and inexpensive to administer and enforce, and they must be flexible. Certainly the last thing municipalities need is yet another expensive, inflexible government mandate. Further, the best enforcement is local enforcement, provided it is even-handed and effective. The principles of home rule, the limits of ethics commissions' budgets, and the greater knowledge that officials and citizens at the agency or local level have of their own needs, all dictate that an ethics commission intervene in the enforcement of ethics laws only when local or agency enforcement fails. Ethics commissions should oversee, not implement, the enforcement of ethics laws.

III. THE FUNDAMENTAL NATURE OF ETHICS LAWS

Applying these assumptions to an analysis of the nature and structure of ethics regulations and ethics commissions leads one to analogize ethics laws to a three-legged stool, resting upon a code of ethics, disclosure, and enforcement.[12] If any of these legs is removed, the stool topples.

A. *Code of Ethics*

A code of ethics must contain a clear and comprehensive list of do's and don'ts. Simple, straightforward, sensible, and short, such a code will not only guide officials but also protect them against an outside employer or relative who asks the official for a favor. For example, when requested by an employer or relative to help him or her obtain a contract with the official's village, the official can reply, "I'm sorry, I wish I could help, but look at what the code of ethics says; I can't do it." The ethics code must also have definitions that narrow the scope of ethics rules, never expand them. Thus, if officials read nothing but the code of ethics and follow it, they will not go astray.

Unfortunately, most ethics laws fail to meet these basic requirements, as the following example illustrates. A partner in a small, local moving firm, who lives in a rural, upstate New York village, serves on the village

12. *See generally* New York State Temporary State Commission on Local Government Ethics, *Final Report*, 21 FORDHAM URB. L.J. 1 (1993); Mark Davies, *Keeping the Faith: A Model Local Ethics Law—Content and Commentary*, 21 FORDHAM URB. L.J. 61 (1993); Mark Davies, *New Municipal Ethics Law Proposed*, 5 MUN. LAW., March/April 1991, at 1.

board of trustees. The person in charge of village buildings, who is appointed by the village board, hires the moving firm to move a piano and some other heavy furniture out of village hall at a cost of $350. The partner-trustee has nothing whatsoever to do with the contract, either for the firm or the village—complete recusal. Moreover, to be on the safe side, she informs the village clerk in writing of these facts and also informs her partner that 100% of the profit from the contract must go to him—that the partner-trustee will not profit one nickel from any village business. Although one would think that, by taking these precautions, the trustee would have complied with any ethics rules, in fact the trustee had better pack her toothbrush because she has just committed a crime, a misdemeanor.[13] Under the definition of "interest"[14] she is deemed to have a prohibited interest in the contract because she is part owner of a firm that receives money from the contract, even though she herself receives no money.[15] Moreover, none of the fifteen exceptions to this rule applies.[16] Furthermore, the contract is "null, void and wholly unenforceable"—a totally inflexible fiat.[17] Thus, the trustee's village will have to go to a moving company 40 miles down the road and pay twice the price to move that furniture. Too bad, so sad, says current New York State law.

One town in New York had to truck its bulk trash (like old washing machines) to another state because the local landfill was owned by a member of the town board.[18] And at his former commission, this author once received a call from an enthusiastic, newly-elected town legislator,

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13. *See* N.Y. GEN. MUN. LAW §§ 800(3)(b)-(d), 801, 805 (McKinney 1986 & Supp. 1995). *See also* OP. ST. COMPT. No. 89-39 (1989) (quoting N.Y. GEN. MUN. LAW, § 800(3)(b), (c), (d) ("[R]egardless of whether an officer or employee receives a direct or indirect pecuniary benefit from a contract, an officer or employee is *deemed to* have an interest in any contract of a firm, partnership or association of which the officer or employee is an employee, or in any contract of a corporation of which he is an officer, director, employee, or stockholder . . ." (emphasis in original)); OP. ST. COMPT. No. 80-623 (1980) ("A member of a village board of trustees has a prohibited conflict of interest if a firm of which he is a member sells supplies to the village.").

14. N.Y. GEN. MUN. LAW § 800(3) (defining "Interest").

15. *See id.* § 801 (prohibiting conflicts of interest).

16. *See id.* §§ 800(3), 802.

17. *See id.* § 804 (McKinney 1986).

18. *See also* 15 OP. ST. COMPT. 35 (1959) ("A town may not contract for repair work with a firm in which the town clerk is a partner, even though it is the only authorized repair service in the area."); 17 OP. ST. COMPT. 88 (1961) ("A village trustee may not be an officer of a private corporation which contracts with such village. If he wishes to retain both positions, official and private, the corporation must not enter into further contracts with the village.").

who said her husband was the only insurance agent in town and had had the town's insurance business for years. She asked if that contract would present any problem if she recused herself from any matter relating to the town's insurance. Unfortunately, unless she were to resign her position on the town board or her husband were to give up the town's insurance business when it came up for renewal, she would commit a crime.[19]

Communities like this face Hobson's choice: either they violate the law or they lose an official who is difficult to replace or they pay substantially more for services from a non-official located many miles away. One must question whether these results promote honesty and integrity in government, whether they foster respect for the ethics law, or whether the legislators, in drafting these laws, knew their customers, these small, rural communities. Moreover, beyond a shadow of a doubt, these ethics provisions squander precious municipal resources. To paraphrase Mr. Bumble, if that's the law, then the law is an ass.[20]

Similarly, the New York State gifts law for municipal officials prohibits gifts worth $75 or more, "under circumstances in which it could reasonably be inferred that the gift was intended to influence the official."[21] One seeks in vain to divine the meaning of this provision, to determine whether one may accept the gift or not. Officials need answers, not "reasonably be inferred" gibberish.

Ethics laws that are long or complex or that cannot be understood or do not make sense to the average official are not merely flawed, they are bad laws. And a bad ethics law is worse than no ethics law at all because it raises expectations it cannot meet and condemns officials to ethical violations, thereby undermining citizens' trust and confidence in the integrity and effectiveness of their government.

B. *Disclosure*

The second leg of the ethics stool is disclosure: transactional disclosure, applicant disclosure, and annual disclosure.[22] Rarely does one meet an official who objects to transactional disclosure—that is, disclosure and recusal when a conflict actually arises. Transactional

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19. *See* N.Y. GEN. MUN. LAW §§ 801, 805. Note that, at the same time, under the New York State ethics law, the town attorney could represent private clients before the town's zoning board. *See id.*, §§ 801, 805-a.

20. *See* CHARLES DICKENS, OLIVER TWIST 399 (Oxford University Press 1987) (1838).

21. *See* N.Y. GEN. MUN. LAW § 805-a(1). *But see* People v. Moore, 377 N.Y.S.2d 1005, 1008 (Fulton County Ct. 1975) (holding the reasonable inference provision to be unconstitutionally vague).

22. *See* Davies, *supra* note 7, at 260-62.

disclosure is pinpoint disclosure—"I'd like to state for the record that I am employed by the applicant for this zoning variance, and I therefore recuse myself from taking part in this matter."

Disclosure by bidders or applicants of the interest of any officials in the bid or application also presents little problem. But annual financial disclosure justifiably raises a fire storm among officials.[23]

Every ethics commission employee has heard it: how many people report bribes on their financial disclosure forms? None. That answer is hardly suprising since, as governmental ethicists uniformly agree, the purpose of financial disclosure is not to catch crooks. However, the question is quite revealing because it demonstrates that the public has been sold a bill of goods on financial disclosure. Disclosure forms are not the magic bullet that will cure all ethical ills. Indeed, too often these forms are used by elected officials as a smoke screen to make the public think they have done something about ethics when, in fact, they have not. Long financial disclosure forms can never replace a tough code of ethics with full transactional disclosure, enforced by a well-financed ethics commission with real teeth.[24] Such forms provide a lot of paper for people to push, but they do not do much to improve officials' ethics. They do, however, drive volunteers out of government, particularly in smaller communities. In New York State almost 300 county volunteer board members resigned when lengthy financial disclosure became effective.[25] Even at the state level excessive financial disclosure impedes the recruitment of qualified appointees. For example, an article in *The Honolulu Advertiser* described then Governor-elect Cayetano's problem in filling cabinet posts: "[T]he task of filling 40 cabinet positions is proving touchy. At $85,000 a year, cabinet posts pay far less than jobs in the private sector. *Prospective appointees are also daunted by the state's financial disclosure laws*, and the chance of losing ground in the office hierarchy by taking a limited-term appointment in the public sector."[26]

Yet one should not conclude that annual disclosure serves no purpose. It does serve a purpose, at least if the forms are tailored to the filer's position and agency. Annual disclosure focuses the official's and the public's attention at least once a year upon potential conflicts of interest *before* they occur and thereby, one hopes, prevents those conflicts from

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23. *See id.*

24. Compare the terminally anemic New York State ethics laws for municipal officials outside New York City with New York City's tough ethics law. N.Y. GEN. MUN. LAW, art. 18, § 800 *et. seq.* (McKinney 1986 & Supp. 1995); N.Y. CITY CHARTER ch. 68 (1992).

25. *See* Aronow, *supra* note 8.

26. Ann Botticelli, *Cayetano's Challenge: Break with 'Old Boys,'* HONOLULU ADVERTISER, Dec. 4, 1994, at A1, A2 (emphasis added).

actually happening or at least minimizes them when they do happen. However, fulfilling that purpose does not require lengthy disclosure, except perhaps for certain officials in the largest state or municipal governments. Annual disclosure forms are like zucchini: more and bigger is not necessarily better.

Furthermore, if ethics laws are to be enforced primarily by the public and the media, then disclosure forms should be completely open to the public. A disclosure form that is not disclosed serves little purpose, other than gathering dust in a back room or perhaps, one day providing another arrow in a district attorney's quiver. If prosecutors want disclosure forms, then let prosecutors collect and pay for them.

Indeed, to be usable at all, disclosure forms *must* be computerized, because they reveal conflicts of interest only upon comparison with other data, such as lists of vendors to the governmental entity. Electronic filing is thus not merely the wave of the future; it is the only future for annual disclosure.

C. *Enforcement*

Finally, the third leg is enforcement. It is embarrassing to talk about enforcement because enforcement actions and fines are not an ethics commission's successes; they are its failures. Every enforcement proceeding an ethics commission undertakes, every fine it imposes, is an indictment of that agency for failing to teach that official what the law is or for failing to convince him or her to obey it. Nevertheless, enforcement will always exist, and ethics agencies must have aggressive enforcement programs.

Yet, above all, it is training, education, and advice, both written and oral, not enforcement, that prevents unethical conduct *before* it occurs. Indeed, every ethics commission must convince its public officials that its purpose is not to whack them but to help them—to protect them against unscrupulous vendors and overbearing superiors, to guide them through the ethical jungle, and to stand up for them against self-proclaimed ethics experts and misguided citizens who accuse the officials of unspecified ethics violations.

Ethics commissions also need to focus far more on what officials may do and less on what they may not do, that is, these commissions must offer more carrot and less stick. Perhaps it would not be inappropriate to issue a rule permitting government employees to copy their personal tax returns and their medical forms on office photocopiers or to use their

office computer to type the minutes of their PTA meeting, provided they supply their own paper and do it on their own time.[27]

IV. CONCLUSION: A TASTE FOR THE TEUTONIC

Consonant with their mission and as a concession to political reality, ethics agencies must always reflect not a bloated bureaucracy but a lean, though not cadaverous, machine. To quote New York City's Parks Commissioner, Henry J. Stern, there had been so many budget cuts, "it's like giving liposuction to a skeleton."[28]

Ethics commissions must face the fact that they are only a gnat on a dinosaur. Yet these commissions must nevertheless convince their elected officials that unethical conduct costs money and that, as money becomes tighter, unethical shortcuts become ever more enticing. Consequently, the threats to ethics, and the corresponding need for strengthened ethics agencies, becomes greater. Witness the New York State legislature's recent attempt, initially vetoed by Governor Pataki, to suspend the "revolving door" provisions of State law during a budget crisis; to lay off state employees but cut them a break on ethics.[29]

Money, it is said, cannot buy happiness; but it can buy more ethical government. Training, education, and quick advice to government employees, all of which cost money, mean fewer ethical lapses. It has even been suggested that this country consider the German system of life tenure and high pay for government officials in return for stringent ethical standards. The previous quote from *The Honolulu Advertiser* illustrates the impetus for such a proposal.[30]

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27. During the discussion following this speech, one member of the audience pointed out that permitting a public official to type PTA minutes would probably raise few eyebrows but allowing him or her to type KKK minutes would create an uproar; and the government may be constitutionally prohibited from distinguishing between the two. This example illustrates the need for caution in permitting private use of government equipment.

28. *See* Douglas Martin, *Trying New Ways to Save Decaying Parks*, N.Y. TIMES, Nov. 15, 1994, at A1, B4.

29. Tom Precious, *Pataki Nudges Closed Revolving Door of State Jobs*, TIMES UNION, Apr. 13, 1995 at B2. *But see* 1995 N.Y. Laws Ch. 299, amending N.Y. PUB. OFF. LAW § 73(8) to exempt from the state's two-year revolving door bar certain New York State employees who lost their jobs because of a reduction in the state work force; Legis. Mem., 1995 N.Y. Laws A-728; Exec. Mem., 1995 N.Y. Laws A-945.

30. *See* Botticelli, *supra* note 26, at A2. ("Prospective appointees are also daunted by . . . the chance of losing ground in the office hierarchy by taking a limited-term appointment in the public sector.").

The German system imposes upon higher-level public servants (generally those with discretionary authority) substantial duties of service and loyalty; but the duty of service is legally and financially secured by an appointment for life, and the duty of loyalty requires that the government provide for the welfare of the public official.[31] The German Constitution itself guarantees these rights to public officials and enshrines in constitutional law the officials' independence in office.[32]

In short, officials' duties presuppose officials' rights. The German model leads one to question whether Americans have any right to impose stringent ethical obligations upon their public officials unless and until those officials are granted reciprocal rights. Perhaps one even needs to declare a moratorium on ethics laws until those rights have been secured, remembering that "[o]f them has much been demanded. To them should at least a little be given in return."[33]

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31. *See* Mark Davies, *The Public Administrative Law Context of Ethics Requirements for West German and American Public Officials: A Comparative Analysis*, 18 GA. J. INT'L & COMP. L. 319, 371-81 (1988) (discussing German constitutional principles with regard to civil service employment and the duties of service and loyalty).

32. *See id.*

33. *Id.* at 390.