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Among Users of Public Services Ombuds  
Gill, C. and Creutzfeldt, N.**

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# **The ‘ombuds watchers’: collective dissent and legal protest amongst users of public services ombuds**

*Chris Gill and Naomi Creutzfeldt – accepted paper for Social and Legal Studies 8 June 2017*

## **Introduction**

This article contributes to legal consciousness scholarship by developing and applying an integrated legal consciousness framework to the activities of groups of dissatisfied users of public service ombuds, whom we call ‘ombuds watchers’.<sup>1</sup> These groups campaign to reform the UK’s ombuds system and are part of an emerging phenomenon which has been called ‘legal protest’ (Hertogh, 2011). The ombuds watcher phenomenon is particularly interesting for legal consciousness researchers, because it provides an example of ‘dissenting collectivism’ (Halliday and Morgan, 2013), a recently identified extension to Ewick and Silbey’s (1998) classic ‘before the law’, ‘with the law’, and ‘against the law’ legal consciousness schema. Here, dissent from legal systems involves not only individual disaffection but the collectivization of dissent and the undertaking of group protests. Previous legal consciousness scholarship has examined these kind of protests in the context of environmental activism (Fritzvold, 2009, Halliday and Morgan, 2013) and family and criminal justice (Hertogh, 2011). For the first time, this article explores collective protests in relation to ombuds.

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<sup>1</sup> The authors use the gender neutral term ‘ombuds’ rather than ‘ombudsman’. See Bondy and Doyle (2015) for a discussion of gender neutral terminology.

The article argues that legal consciousness provides an appropriate theoretical lens for studying user experiences of ombuds processes, and a useful framework for understanding the ways in which people make sense of experiences, construct ideas about justice, and make decisions about what action to take in response to dissatisfaction. While procedural justice theory (Lind and Tyler, 1988) is the dominant paradigm within which user experiences of dispute processes have been studied, this article argues that legal consciousness perspectives offer complementary avenues for research by adopting a holistic emphasis on the strategies, resources, and schemas which people draw on to make sense of their experiences of the justice system.<sup>2</sup> While the application of legal consciousness to an informal system of justice, such as ombuds, may be controversial, this is justified as a result of the semi-legal character of ombuds (as statutory, state-provided means of redress against government) and of the pluralistic emphasis in legal consciousness literature on constructions of law and justice outwith the context of formal state law (Hertogh, 2004).

In addition, as will be demonstrated in the article's analysis of the ombuds watchers, citizens' ideas about ombuds are influenced in part by legal ideologies, so that legal consciousness provides an important framework for understanding user experiences in this context. This approach is also particularly relevant to an investigation of the ombuds watchers, since it places emphasis on understanding what people do in response to disillusionment with law and the strategies of mobilization and protest they adopt as a result (Hertogh, 2011). The ombuds watcher phenomenon, therefore, provides a unique opportunity to study groups of citizens who have

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<sup>2</sup> This will be expanded upon in more empirical and theoretical detail in a forthcoming book by Creutzfeldt (2018).

progressed from mobilization through to protest in the course of making complaints and to contribute to the legal consciousness scholarship's interest in the way ordinary people '... engage, avoid, or resist the law and legal meanings' (Ewick and Silbey, 1998, p. 35).

Our focus, then, is on understanding the experiences of ordinary people who have used ombuds, become dissatisfied, and proceeded to form groups engaged in campaigning activities. Here, we follow existing legal consciousness scholarship in seeking to understand the way certain groups understand legal institutions, rather than in providing normative evaluations of these understandings. The purpose of legal consciousness scholarship is not to determine whether ordinary people's understandings of law are objectively 'correct', but to explore how people feel about, think about, and use, legal ideas. The article will not sit in judgment and assess whether the ombuds watchers' various criticisms of the UK's ombuds system are valid. Instead, the article will limit itself to exploring the role of legal consciousness in relation to the ombuds watchers' activism and to understand how they see the world. This 'bottom up' approach, concerned only with understanding how lay people perceive the law and legal institutions, fits squarely within the legal consciousness tradition. Fritzvold (2009), for example, does not evaluate whether environmental activists are justified in protesting and Hertogh (2011) does not provide a normative commentary on the protests he examines in the context of family and criminal justice. In a similar vein, this article is limited to exploring how the watchers make sense of their interactions with the ombuds system.

However, in adopting this bottom-up perspective, we do not dismiss the value of exploring the policy implications that arise from any divergence between what the watchers subjectively expect from ombuds and what the ombuds system is objectively designed to provide. Especially when considered in light of other data suggesting high levels of user dissatisfaction with public services ombuds (Creutzfeldt, 2015), the watchers' protests may well highlight important gaps between expectation and reality in terms of citizens' experiences of using ombuds. Such dissatisfaction is important to assess in terms of what it means for justice policy, particularly in the context of a broader justice system in which greater emphasis is being placed on informal processes (Ministry of Justice, 2016). The tension between what citizens may want in terms of redress and the mechanisms which are available to them has previously been the subject of critical academic commentary, with the system for citizens' redress assessed as failing to meet citizens' needs (Dunleavy *et al*, 2010). While the watchers' protests may well provide a novel and helpful insight into matters of redress design (Le Sueur, 2012), the focus of the present article is limited to the theoretical conceptualisation of the watchers' protests in terms of legal consciousness scholarship.<sup>3</sup>

The article has three ambitions. The first is to analyze existing legal consciousness literature with a view to synthesizing key elements and setting out an integrated framework for use in empirical scholarship. The second involves providing an empirical analysis of the ombuds watchers' campaigns, which is framed as a case study of the legal consciousness schema described by Halliday and Morgan (2013) as 'dissenting collectivism'. The article's third ambition is to draw attention to the

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<sup>3</sup> We appreciate the value of drawing out the policy implications of our research and we will return, in the conclusion, to consider how the data presented in this article may be developed in future research.

phenomenon of 'legal protest' (Hertogh, 2011), whereby aspects of the justice system become subject to public campaigning. Hertogh (*ibid.*, p.31) has called for attention to be paid to the 'anonymous people' who have 'lost confidence in the law' and to 'consider critics of the justice system as real persons with genuine concerns about the administration of justice'. The present article is a response to this call.

The article is in five parts. Part I contextualizes the UK's ombuds system and the ombuds watchers' campaigns. Part II analyses the legal consciousness literature. Part III applies legal consciousness approaches to the study of ombuds. Part IV describes the methodology. Part V presents the empirical analysis.

## **Part I: UK ombuds and ombuds watchers**

### *Ombuds in the UK*

Ombuds deal with complaints from citizens about the provision of public services (Buck *et al*, 2011, Seneviratne, 2002). One of the aims of an ombuds is to even out the power imbalance between the individual and the state by providing an avenue for redress. This aim is reflected in the way ombuds have developed around the world, although there is diversity in how ombuds have evolved in different jurisdictions (Reif, 2004). In the UK, ombuds are one of the four 'pillars' of the administrative justice system along with courts, tribunals, and internal redress mechanisms (Law Commission, 2010). The first UK ombuds was instituted in 1967, with the aim of providing additional remedies to those available through courts and tribunals (Buck *et al*, 2011). In particular, ombuds

were instituted to provide redress for maladministration and to consider complaints about administrative matters unsuitable for court or tribunal adjudication (*ibid.*). A particular feature of ombuds is their inquisitorial approach and their procedural informality, which is designed to be accessible and user-friendly (*ibid.*).

While the UK's ombuds are now a well-established feature of the constitution (Buck *et al*, 2011), their exact roles and constitutional position remain subject to debate. Ombuds have been seen either as part of a political system of redress (Elliott, 2012), part of a new 'integrity branch' of government (Buck *et al*, 2011), part of the formal justice system (Magnette, 2003), or as a hybrid institution sitting between legal and political forms of control (Gill, 2014). The core purpose of ombuds in the UK also remains contested, with the emphasis ombuds place on either 'fire-fighting' (individual redress) and 'fire-watching' (administrative improvement) remaining unclear (*ibid.*). O'Brien (2015) has argued that ombuds are increasingly torn between a consumerist model of justice and one based on deliberative democracy. This has been reflected in the development of informal resolution procedures used by ombuds, which have now partly replaced ombuds' focus on formal investigation (Bondy *et al*, 2014).

### *The ombuds watchers' campaigns*

In the last 15 years, some of the main UK ombuds – including the Local Government Ombudsman (LGO), the Scottish Public Services Ombudsman (SPSO), and the Parliamentary and Health Services Ombudsman (PHSO) – have been subject to campaigns by groups of dissatisfied complainants. The groups examined in this article



are: 'Local Government Ombudsman Watch' (LW), 'Accountability Scotland' (AS), and 'PHSO the Facts' (PF). Some brief details are given here about each group.

LW was set-up in 2003 with a focus on the LGO. In 2009, it broadened its emphasis to consider public services ombuds in general and to facilitate others to campaign. The LW website ceased to be updated in the course of 2013, although at least one member of the group remained active until October 2014. It is unclear how many people were involved in LW although, when active, its website listed a number of people as members. Its activities mainly involved information-provision through its website and the submission of responses to Select Committee inquiries.

AS has its roots in an organisation called Scottish Ombudsman Watch, whose website was set up in 2006. It is not clear when AS itself was set up, but its website refers to AS having an elected committee since 2011. The group has 70 or more registered supporters, of which 20 are actively involved and 3 are very actively involved. Its Facebook page has 53 'likes'. The AS website has well-organised content, including a members' area. The organisation has committee meetings with agendas posted online and has also organised a conference to promote its work.

PF was founded in 2013. It had 12 members when set-up, although its current membership is unknown. Its website has received 26,000 hits and its blog 17,000 hits. Its Twitter account has 674 followers and its Facebook page has 185 'likes'. The campaign has a blog and the group regularly lobbies a range of policymakers. The campaign has also organised a rally and a parliamentary briefing for MPs.

## Part II: the legal consciousness literature

Legal consciousness studies have been analysed in a number of recent works (Cowan, 2004, Hertogh, 2004, Silbey, 2005, Halliday and Morgan, 2013). Silbey (2005) describes how legal consciousness scholarship initially emerged from law *and* society research concerned with exploring the gap between law in books and law in action. This research adopted a 'law first' approach (Cowan, 2004) concerned with examining whether legal rules achieve their purpose. This emphasis was later challenged by a law *in* society approach, which saw the law more as a constitutive social process, with the law providing 'an ongoing structure of social action' that helped to shape social relations (Silbey, 2005, p. 328). As a result, law's hegemonic grip on society was seen to result from 'social transactions becoming habituated practices and institutionalized into principles, patterns, and institutions' (Silbey, 2005, p. 331). A strong influence on legal consciousness research was the Critical Legal Studies movement's concern with understanding 'law's hegemonic role in sustaining domination' (Morgan and Kuch, 2015, p. 566). This influence can be seen in the claim that the aim of legal consciousness studies is to explain the persistence of legal hegemony:

*'How [can] we explain... unrelenting faith in and support for legal institutions in the face of... consistent distinctions between ideal and reality...?' (Silbey, 2005, p. 326)*

In terms of the concept of legal consciousness itself, no single definition is accepted, although it is generally considered to refer to the way people understand and use the law (Merry, 1985), placing emphasis on the experiences of ordinary people (Cowan, 2004). The concept has two elements: legality and consciousness. Consciousness refers to the process through which the meanings that people ascribe to their world settle into a stable pattern (Silbey, 2005). Through a process of institutionalization and socialization, such meanings eventually become the unquestioned assumptions people hold about a particular facet of social life (Merry, 1990). The study of consciousness, therefore, is the study of the process through which meanings settle into baseline assumptions about the world and of the way those assumptions structure how the world may be interpreted. With regard to legality, Hertogh (2004) has pointed out that this concept has been approached differently in North American and European scholarship. He argues that North American scholars have tended to focus on 'official law' (state law), while European scholars have tended to focus on 'living law' (the norms people consider to be important, regardless of any official status). Legal consciousness can, therefore, be seen as a broad concept that encompasses ordinary people's understandings both of official law and other norms that shape their world.

Central to legal consciousness research are complex interactions between power, resistance, and deference. Ewick and Silbey's (1998) analytical framework distills these ideas into three cultural schemas that provide a 'cultural toolkit from which popular understandings of legality are constructed' (Silbey, 2005, p. 349). According to Sewell (1992), cultural schemas are metaphors of communication, action, and

representation, which circulate amongst social actors and provide the context for creating meanings. Ewick and Silbey's (1998) three schemas are shown in box 1.

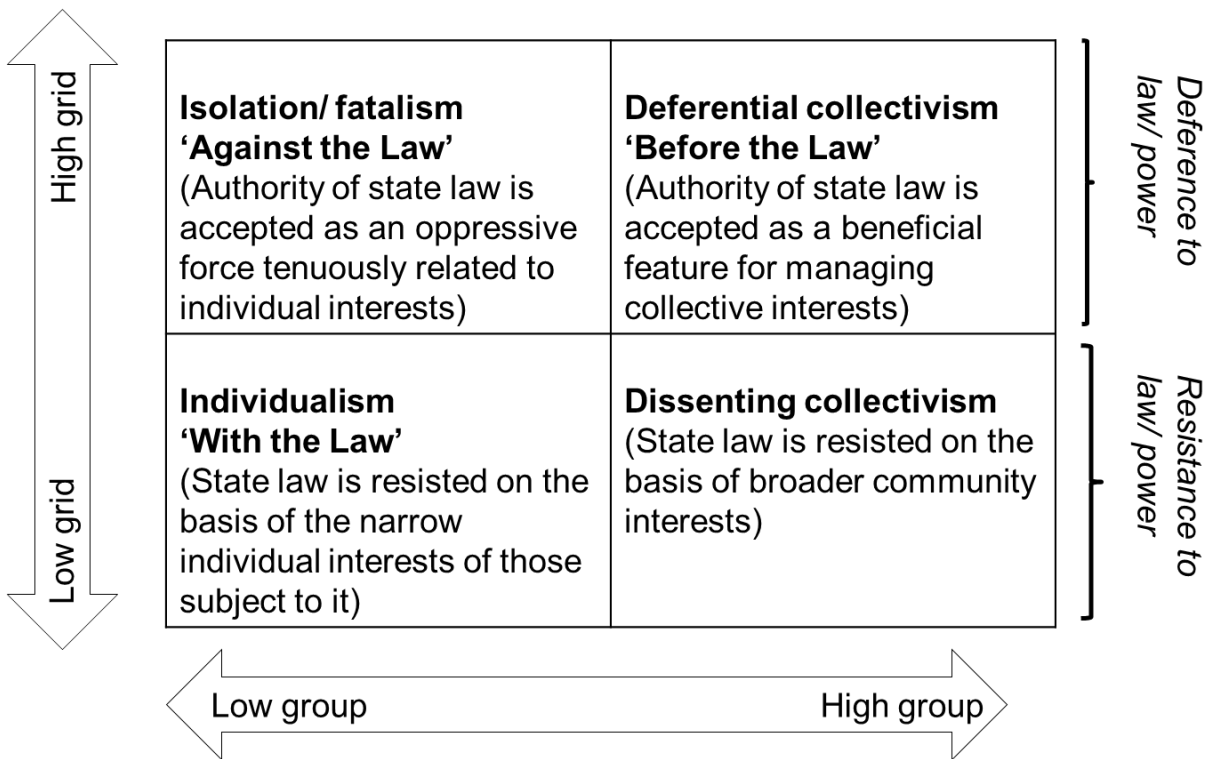
- ***Before the law.*** People are impressed by the law's majesty and persuaded of its legitimacy.
- ***With the law.*** People use the law instrumentally for strategic ends and see law as a game.
- ***Against the law.*** People are cynical about the law's legitimacy and distrust its implementation.

*Box 1: Ewick and Silbey's (1998) cultural schemas*

According to Silbey (2005, p. 349), legal consciousness consists of 'mobilising, inventing, and amending pieces of these schemas'. The schemas do not exist independently, but occur in varied constellations. Central to Ewick and Silbey's (1998) model is the idea that this limited set of schemas constrains popular legal consciousness in ways that mean that legal hegemony is preserved.

Ewick and Silbey's (1998) schemas have recently been supplemented by a fourth schema, referred to as 'under the law' (Fritzvold, 2009). Here, people violently reject the law, conceiving of the social order as fundamentally illegitimate. Whereas the

'against the law' schema involves mild forms of resistance, the 'under the law' schema involves flamboyant law-breaking. The latter approach is, therefore, anti-hegemonic in its resistance to legal ideology and involves its explicit challenge. The political dimensions of resistance have also been highlighted by Halliday and Morgan (2013) in their application of cultural theory to legal consciousness. Drawing on Mary Douglas' (1992) cultural theory framework, Halliday and Morgan (2013) classify Ewick and Silbey's (1998) three schemas according to four cultural types varying across 'grid' and 'group' dimensions. The grid dimension refers to cultural preferences regarding how individuals relate to authority and the extent to which a society's culture either defers to hierarchical authority (high grid) or prefers egalitarian models of social organisation (low grid). The group dimension meanwhile refers to cultural preferences regarding the extent to which a society's culture is individualistic (low group) or communitarian (high group). Figure 1 shows Halliday and Morgan's (2013) application of cultural theory to Ewick and Silbey's (1998) schemas.



*Figure 1: Applying cultural theory to legal consciousness*

Figure 1 displays the four cultural types produced by the application of cultural theory to the study of legal consciousness. In both 'high grid' types, law is deferred to, while in the 'low grid' types it is resisted. Deference and resistance to law then vary according to whether there is a purely individual ('low group') or a collective basis ('high group') for such a response. Halliday and Morgan (2013) associate Ewick and Silbey's (1998) three cultural schemas with three cultural types: the 'against the law' schema is associated with fatalistic acceptance of law; the 'before the law' schema is associated with deferential acceptance that law serves collective interests; and the 'with the law' schema is associated with individualism, where individuals use law as a resource to serve their own ends. As will be clear, the fourth type shown in figure 1 – 'low grid/ high

group' – represents a new category, not reflected in Ewick and Silbey's (1998) model. Halliday and Morgan (2013, p. 28) suggest, therefore, that the application of cultural theory demonstrates a 'missing narrative', which they refer to as collective dissent and which has three distinguishing characteristics: (1) state law is seen as illegitimate (2) an alternative vision of law beyond the state is advanced and (3) a gaming approach is adopted to state law. Importantly, Halliday and Morgan's (2013) collective dissent schema represents a counter-hegemonic narrative, which opens up 'opportunities to build alternative imaginaries and institutions' (Morgan and Kuch, 2015, p. 567). This echoes Fritzvold's (2009) development of an explicitly political dimension in his 'under the law' schema, where resistance to power serves collective ends.

An alternative model for understanding variations in legal consciousness has been offered by Hertogh (2011). He explores alienation from the formal justice system and considers this across two dimensions: legal mobilisation (whether people use the system) and legal protest (the tactics people employ following an unsatisfactory experience of the justice system). In order to study legal alienation and the propensity for individuals to engage in mobilisation or protest, Hertogh (2011) distinguishes four normative profiles, based on variations in legal awareness and legal identification. These are shown in figure 2.

		<b>AWARENESS</b>	
		<b>+</b>	<b>-</b>
<b>IDENTIFICATION</b>	<b>+</b>	<b>Legalists</b> (Informed identification)	<b>Loyalists</b> (Uninformed identification)
	<b>-</b>	<b>Cynics</b> (Informed alienation)	<b>Outsiders</b> (Uninformed alienation)

*Figure 2: Normative profiles of legal consciousness*

Hertogh's normative profiles suggest four responses to the legal system. 'Legalists' have a good knowledge of law and identify with it. 'Loyalists' share this identification, but do so on the basis of vague knowledge about law. 'Cynics' meanwhile are aware of law, but do not share its values. Finally, 'outsiders' have little awareness of law nor do they identify with it; unlike cynics who use the law for their own purposes, outsiders are entirely alienated from it. Hertogh (2011, p. 31) suggests that these profiles are helpful for understanding the basis of people's criticisms of the justice system and:



*'...help us look beyond common stereotypes and consider critics of the justice system as real persons with genuine concerns about the administration of justice.'*

For the purposes of this article, Hertogh's (2011) study adds an additional dimension to Fritzvold's (2009) and Halliday and Morgan's (2013) emphasis on counter-hegemonic forms of collective protest, in that it focuses attention on protest about the operation of the justice system (e.g. protests against miscarriages of justice or inequality in the administration of justice).

### **Part III: applying legal consciousness approaches to the ombuds context**

In this section, legal consciousness concepts are applied to the ombuds context in order to: (1) demonstrate how legal consciousness may be adapted to study ombuds users' experiences and (2) to set out, as a basis for empirical research, an integrated analytic framework.

Before proceeding, it is important to justify the application of legal consciousness concepts to the ombuds setting. An objection might be raised that legal consciousness does not provide an appropriate framework for considering ombuds, since they are non-judicial processes. Ombuds might, for example, be seen as a political form of redress (Elliott, 2012), rather than being part of the justice system. This article argues that while ombuds are non-judicial institutions, they are not non-legal. Public service ombuds are statutory bodies, with defined legal jurisdictions and legal powers of investigation. And

while ombuds have an extra-judicial jurisdiction to consider maladministration, this does not take away from the fact that ombuds routinely apply the law in determinations (Remac, 2013). It is also well accepted that, as a state-sponsored means of redress for complaints about government, ombuds are one of the four ‘pillars’ of the administrative justice system (Law Commission, 2010). As such, it is reasonable to characterise ombuds as, at least, quasi-legal institutions.

In applying legal consciousness frameworks to the quasi-legal context of the ombuds, the article situates itself within a well-established strand of the legal consciousness literature. For instance, both Cowan (2004) and Lens (2007) use legal consciousness as a framework for exploring citizens’ encounters with public bureaucracies, while Hoffmann (2003) uses it as a framework for investigating workplace grievances. Indeed, there are parallels between Hoffmann’s (2003, p. 693) argument for the application of legal consciousness approaches beyond the formal justice system and our own attempt to apply the concept beyond its traditional confines:

*“While this article examines internal company rules and formal grievance procedures rather than laws and courts, interviewees’ legal consciousness at their workplace is comparable to legal consciousness in the more traditional sense. For example, the rules and grievances procedures of the workplaces explored in this article are all associated with fairness, rule determinacy and rights – key symbols of law and legal authority.”*

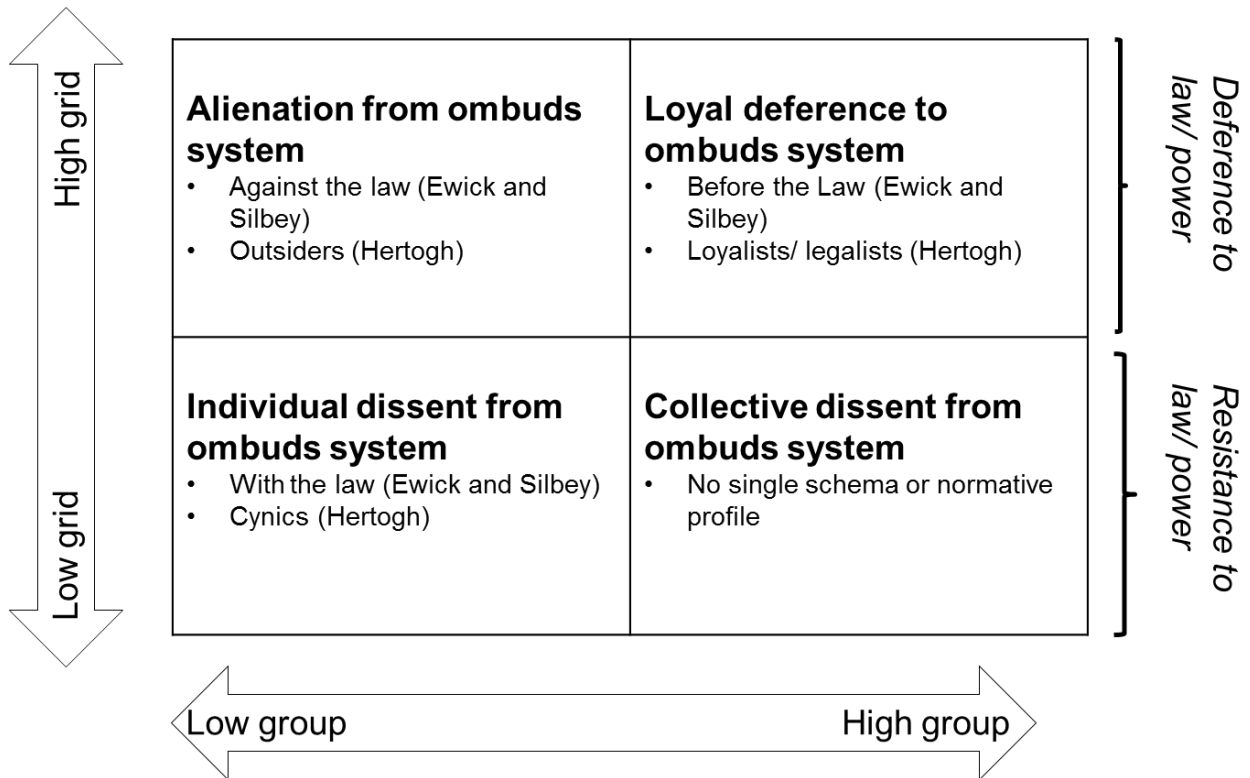
It is also noteworthy that there is precedent for the application of legal consciousness to study aspects of the ombuds process, such as in Hertogh's (2013) study examining public trust and ombuds.

The article suggests that legal consciousness is a legitimate framework in this context for two further reasons: (1) people's responses to the ombuds – as a system of justice – are likely to be influenced by their basic orientations to the law and (2) legal consciousness provides a framework for understanding citizens' own beliefs about justice and calls for a more pluralistic approach than merely considering responses to narrowly defined state law (Hertogh 2004). As will be shown below, the ombuds watchers clearly see ombuds as legal institutions, '*dignified by the state as a governing body*', in the words of one of the watcher groups. Indeed, the ombuds watchers' expectations of ombuds are, at least in part, influenced by legal ideas drawn from their understandings of the formal justice system. At the same time, however, the watchers recognise ombuds as legal institutions in themselves, so that their criticism of ombuds can legitimately be seen through the lens of legal consciousness. Indeed, as will become apparent in the article's data analysis, while the ombuds watchers' focus is initially on ombuds, they eventually dissent from the wider system of political and legal redress which they come to see as complicit in preserving an unjust *status quo*. Importantly, that status quo is understood by the ombuds watchers as legally-sanctioned, with ombuds being a part of a legal and political system that is, in the words of one of the groups, '*corrupt by design*'.

Most studies interested in responses to justice processes and the extent to which decisions are accepted as legitimate, have drawn on procedural justice theory (Lind and

Tyler, 1988). These have generally been quantitative and aimed at examining the extent to which the qualities of dispute processes affect the propensity of the individuals to accept their outcomes. While these approaches are helpful in establishing the likelihood that decisions will be seen as legitimate, they are limited when considering subsequent responses to dissatisfaction. Effectively, the procedural justice literature ends its analysis after considering whether features of process have affected users' acceptance of outcome. By contrast, this article's interest is in exploring what individuals do once they come to see an outcome as unsatisfactory. The legal consciousness literature's emphasis on the strategies, resources, and schemas which individuals draw on to make sense of their experiences of justice therefore provides an insightful and complementary framework to procedural justice theory.

We can now provide an integrated model of legal consciousness for application to the study of user experiences of ombuds. Figure 3 adapts Halliday and Morgan's (2013) terminology in order to refer specifically to the ombuds system and integrates Ewick and Silbey's (1998) three schemas and Hertogh's (2011) four normative profiles into the overall framework provided by Halliday and Morgan (2013).



*Figure 3: An integrated legal consciousness model for analyzing interactions between citizens and ombuds systems*

The model in figure 3 indicates ideal-type orientations which citizens may have to the ombuds system. Citizens' two basic responses are to defer to or to resist the system's exercises of authority. Deference may take the form of alienation from the ombuds system, where the individual is highly dissatisfied and considers an outcome illegitimate, but feels powerless to resist. Deference here is fatalistic and the individual stands outside the ombuds system's norms and values. Alternatively, deference may have a more positive form, as individuals feel personally aggrieved, but recognize the fundamental legitimacy of the outcome and the need to defer to community values.

Deference here takes the form of loyalty to a system in which the individual is invested and which broadly serves his or her interests. In terms of resistance, this may initially take the form of individual dissent, where legal appeals and other strategies (such as writing to MPs or newspapers) are designed specifically to address a perceived individual injustice. Here, individuals become cynical about the potential for achieving justice, but continue to seek to use their rights in pursuit of their self-interest. Finally, resistance may take on a collective dimension, as individuals seek to challenge aspects of the ombuds system's operation, not on their own behalf but in order to uphold a perceived public interest. Here, resistance moves into the realms of collective protest and individuals band together to reshape those aspects of the system which they consider unjust. As we shall see in the case study below, collective dissent draws on a range of schemas, strategies, and resources, rather than being predominantly associated with any single approach.

#### **Part IV: Case study methodology**

The case study draws on two data sources. The primary source is online content produced by the ombuds watchers, which is supplemented by data collected at two meetings held with watcher representatives.<sup>4</sup> The analysis below is mostly based on the online data. For the documentary analysis, the content of the 'PHSO the Facts' (PF) and 'Accountability Scotland' (AS) websites were used. Unfortunately, the LGO Watch (LW) website is no longer online and, as a result, its data were unavailable. As a substitute,

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<sup>4</sup> In relying predominantly on naturally occurring data, the study follows the tradition of legal consciousness research whereby individuals are not asked directly about their experiences of law.

data was collected from the LGO Watcher blog, operated by an LW member, in addition to collecting LW documents that remained online.<sup>5</sup> The meetings with watcher representatives were held in September 2015, in London and Edinburgh, and lasted two hours each. The London meeting was attended by two PF members and the Edinburgh meeting by two AS members. LW declined to take part because they had ceased campaigning. Meeting data were recorded in field notes and a summary was sent to participants for confirmation.

In total, 538 pages of online content and field notes were analyzed using Nvivo and Miles *et al's* (2014) thematic analysis approach. The first stage involved primary coding of the data to map themes and develop memos to track emergent ideas. Secondary coding then analyzed the data at a more granular level to break down identified themes. A data summary document was prepared to condense, organize, and display data and provide the basis for reporting. Finally, data were systematically compared to the theoretical framework and themes were re-categorized to make explicit connections between the data and existing knowledge.

In terms of limitations, the findings presented here are exploratory and provide only an initial look at a phenomenon which, to date, has escaped scholars' attention. One area where data are currently lacking relates to the watchers' demographics, with little known about the personal characteristics of those who engage in collective protests. Greater depth of analysis may also have been possible had interviews been conducted with individual ombuds watchers. This would have allowed us to deepen our analysis of the ombuds watchers' legal consciousness.

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<sup>5</sup> The fact that LW is no longer in operation supports Halliday and Morgan's (2013, p. 21) suggestion that dissenting collectives are at threat of 'schism and collapse'.

## **Part V: The ombuds watchers – a case study of collective dissent**

This section organizes the findings according to the three dimensions of collective dissent: (1) rejection of the legitimacy of state law, (2) an appeal to a higher law or sense of justice, and (3) a gaming approach to the law which seeks to meet collective ends.

### ***Rejecting the legitimacy of state law: the ombuds watchers' critique of the state-sponsored system of redress for public service complaints***

***The complaint experience as hegemonic rupture.*** The starting point for the watchers' critique lies in experiences of the complaint system, which '*...can be the cause of intense... anguish*' (LW). The watchers highlight the material, emotional, and psychological costs of unsatisfactory complaint experiences and are concerned:

*'...not with injustice in the abstract, but with the fact that maladministration... lead[s] to serious psychological stress.'* (AS)

The watchers emphasize the damage which injustice has on '*human lives*' (LW). They report being contacted by people traumatized by their experiences, who feel anger, stress, depression, helplessness, and suicidal ideation. The knock on effects are described as including loss of savings, homes, health, and careers.



The experience of complaining is seen as Kafkaesque and consisting of ‘a *maze of processes*’ (PF), where ombuds adopt the gatekeeping approaches used by public bodies: ‘... *roadblocks are thrown up at every turn*’ (PF). This is described by a blog commentator as: ‘...*a surreal... banging-your-head-against-brick-wall experience*’ (PF). Particularly significant is the ‘*compound*’ nature of the experience, where disillusionment with a public body is replaced by faith in an ombuds, only to turn to alienation:

*‘The suffering is made... more trenchant... by a further experience of injustice from a second institution, where that... institution is dignified by the state as a governing body...’* (LW)

A key aspect of the complaint experience is shock when expectations are not met. Here, the watchers’ expectations fit Hertogh’s (2011) ‘loyalist’ normative profile and Ewick and Silbey’s (1998) ‘before the law’ schema. When they experience a problem with a public service, they turn to ombuds with the expectation of justice. When experience does not match expectation, the watchers are ‘*shell-shocked*’ (LW). The shock of unmet expectation leads to what Silbey (2005) describes as a hegemonic ‘rupture’, with the ombuds’ legitimacy suddenly called into question.

The response to this rupture is deeply personal: ‘*Complainants... often blame themselves*’ (PF). The initial response is for individuals to feel alienated – ‘outsiders’ in Hertogh’s (2011) scheme or ‘against the law’ in Ewick and Silbey’s (1998) language – and be left ‘*feeling helpless and stupid*’ (PF). This powerlessness before authority is exacerbated by the fact that the act of complaining is itself an act of resistance: ‘*People*

*are... taking on the government... this is very scary'* (AS). While the watchers' response is to protest, the experience of powerlessness does not necessarily result in mobilization. Indeed, the watchers mix calls for action with despondency, echoing Halliday and Morgan's (2013) finding that dissenting collectives are likely to shift between fatalism and collective protest.

Overall, negative experiences of complaining are described as '*demoralizing*' (AS) and disruptive of citizens' orientations to the state-sponsored system of justice represented by ombuds. Complaint experiences are the crucible in which faith transforms into disillusionment, dissent, and protest. Underlying this are interactions of powerlessness and resistance, which echo Cowan (2004) and Lens' (2007) descriptions of the legal consciousness of individuals subject to bureaucracy.

***A critique of the ombuds' inquisitorial and bureaucratic justice.*** The watchers' key criticism relates to ombuds' inquisitorial approach and the lack of transparency inherent in a bureaucratic system of justice. One watcher, referring to *Alice in Wonderland*, describes the ombuds process as follows:

*'The judge settled in his throne in the... empty courtroom... Alice, entered alone, awed that the judge... had been appointed by the Red Queen... She presented her case and was dismissed to wait outside... The accused then entered, accompanied by his counsel, alleged accomplices and witnesses. The judge then summed up the plaintiff's case as best he could. The accused responded with*

*the help of his retinue .... The judge deliberated on what he had heard and gave his verdict. He was happy that there could be no appeal.'* (AS)

The private and bureaucratic character of the ombuds process is a '*smokescreen*' (PF) for the complainant, who is unable to evaluate whether he or she has been treated fairly:

*'Justice... require[s] that the... investigator has the... full facts of the case and, for the satisfaction of complainants, they must believe this to be so.'* (AS)

The inability to satisfy complainants that they have received a fair hearing is important to the watchers' critique, who argue (in line with procedural justice theory – Lind and Tyler, 1988) that it should be possible to satisfy the parties even were the outcome is unfavorable: '*If the SPSO delivers a quality report, both sides should be satisfied*' (AS).

The watchers also argue that the ombuds' inquisitorial method is insufficiently robust and participative. They are critical of the paper-based process and the lack of face-to-face contact, interviews, and fieldwork. Paper files are seen as '*useful for the primary stage*' but as not providing full accounts (AS). The fact that investigations are generally a '*desk exercise*' (PF) is seen to weight the system against the citizen, since public bodies control the production of official records that form the basis of ombuds decisions. Information provided by citizens is dismissed as '*subjective*' or '*irrelevant*' (PF), recalling Lens' (2007) analysis of welfare recipients' struggles within the bureaucratic forum of the 'fair hearing system' in the US. The watchers feel the need to

prove their cases, without which bureaucratic accounts will be accepted as fact: *'Although you are... asking for an investigation, you... have the find all the evidence yourself'* (PF).

Linked to a perceived absence of inquiry, the watchers attack what they see as lack of impartiality. The watchers' argue that shared bureaucratic perspectives result in relationships between the ombuds and public bodies that are insufficiently challenging. One of the watchers, for example, notes that the ombuds encourages a *'buddy'* relationship with bureaucrats, arguing that *'...this can be likened to encouraging the police to form friendships with criminals'* (AS). They believe that ombuds have a similar mindset and professional orientation to public bodies: *'...they are far too emotionally and professionally connected with the bodies they should be investigating impartially'* (LW). The result is a *'cozy alliance'* (LW), compounded by an absence of powers which leaves the ombuds having to *'... negotiate with the public body...'* (PF).

A further criticism is that the ombuds deploy a form of bureaucratized justice which does not chime with the watchers' own constructions of justice. They argue that ombuds provide *'customer service'* rather than *'truth and... justice'* (AS). Recalling Nader's (2002, p.144) assessment of ADR as a *'pacification scheme'*, the watchers are critical of what they see as bureaucratic manipulation: *'I can see their... modus operandi. Give you loads of sympathy, build you up and [then] drop you'* (LW). The watchers identify ombuds' approaches as conforming to *'expectations management'* (Gilad, 2008), whereby attempts are made to adjust complainants' expectations with a view to reconciling them to adverse outcomes. This is referred to as *'softening the blow with kind understanding'* and seen as patronizing: *'PHSO... thinks we... will be fended*

*off with fluff* (PF). The watchers refer to ombuds adopting a *'call centre model'* (PF) and consider that ombuds are overly focused on *'speed, politeness and cost'* but insufficiently concerned with *'the question of justice'* (AS). Overall, the emphasis on customer service and case *'disposal'* (PF), leads the watchers to conclude that the *'ombuds system offers second rate justice'* (PF) and a *'... pseudo system of administrative justice'* (LW).

***From the ombuds process to a systemic critique.*** The watchers' rejection of the legitimacy of state law extends beyond ombuds. Indeed, ombuds are depicted as illegitimate in the context of a wider political-legal-bureaucratic establishment which shares that illegitimacy. The watchers' critique includes calls for ombuds to be accountable, but shows cynicism about the institutions that might fulfil this role and an eventually concludes that the whole system is *'corrupt by design'* (PF). Corruption refers to an institutionalized *status quo* which works against the interests of citizens. This is reflected in one of the watcher's comments about the possibility of challenging the *status quo* using the legal system:

*'... bear in mind who makes the law, who upholds the law and who benefits from the law. It's not you is it? The judicial system is biased... in favour of government organisations and those in power. They make the law in order to... keep the little guy out in the cold. You may well need to revise everything you ever understood about truth and justice'.* (PF)

Rather than seeing ombuds as affronting the values of other state institutions, the latter become complicit: *'the political establishment is... very reluctant to call into question the integrity of this institution'* (LW). This complicity is seen as benefiting those in power: *'... it's game, set and match to the political elite'* (PF) and resulting in a lack of challenge to *'...the vested interests of those in power and authority who benefit from this unjust status quo'* (LW). The result of this analysis is alienation:

*'It is a recipe for... cynicism towards political and government institutions... This disillusionment erodes the very foundations on which our social values and shared identity as a community are built.'* (LW)

The system of redress is, therefore, described as a *'dustbin for complaints'* and a *'swindle'* (PF), with the system not meeting the needs of citizens because it was not designed to: *'... all the 'regulation' by authorities is simply window dressing... it was never there to serve you'* (PF).

**Summary.** The watchers' rejection of the state provided system for the redress of citizens' complaints is characterized by three features: (1) experiences of injustice which lead to a re-evaluation of deferential approaches to state authority and legal institutions, (2) divergence between the watchers and ombuds in terms of their constructions of justice and the means of delivering it, and (3) a broader rejection – echoing the subjects in Fritzvold's (2009) study – of the legitimacy of the political-legal-bureaucratic order.

***An appeal to a higher law and sense of justice: the ombuds watchers' vision for an alternative complaints system***

***A system with social justice, democracy, and the citizen at its heart.*** The watchers offer two alternative visions for a reformed system, the first of which argues for a more citizen-centred and humane system, drawing on ideas of social justice and democratic engagement. One of the watcher groups favors the idea of a local system, which would allow the citizen to access the ombuds in person and facilitate '*...full, honest, and sympathetic discussion of the issues*' (AS). The human aspect of the system is key, with its '*sympathetic*' nature required to overcome the alienating effect of bureaucracy. The idea of greater accessibility and a form of justice which is more personal is emphasized in calls for interaction with the ombuds to be '*face-to-face*' (AS). Greater direct participation in the process of justice is seen as a remedy to a faceless system, which traps individuals in a maze of paperwork.

Of equal importance, the watchers call for ombuds' decision-making to be re-oriented. Developing the criticism that the system pits the citizen against the public body's control of the official record, the watchers argue for a '*presumption of honesty*' (PF), whereby the system would operate on the assumption that citizens are well-meaning. Complaints, therefore, become a form of democratically engaged participation in state administration, rather than damaging processes in which citizens fight for justice, with those in power needing to '*...work with their citizens, and not against them*' (LW). This results in a vision which requires:

*'...a new concept of active citizenship and social justice, as well as the... depolarization of society, where concerned citizens are no longer treated as enemies of vested political interests...'* (LW).

This presents a challenge to authority and a call for citizens to be seen as partners in the achievement of fairer public services. It appeals to a sense of justice deeply involved with the idea of democratic participation and a more horizontal, local, and human engagement between citizens, public bodies, and the system of state sponsored redress for complaints. As such, its emphasis is political and social, mainstreaming the democratic relationship between citizen and state and the need to value the individual complaint as a means of preserving *'...our social values and shared identity as a community...'* (LW). In setting out this vision, the watchers reach out for alternative ideologies, which resist the hegemony of the *status quo* and explicitly call for a model of justice which departs from those associated with the legal system. This echoes Morgan and Kutch's (2015) suggestion that dissenting collectives, which resist state law based on communal understandings of the public good, offer the potential 'to build alternative imaginaries and institutions' (Morgan and Kuch 2015, p. 567).

***A court-like system of formal and adversarial justice.*** In strong contrast, the watchers' second and sometimes dominant vision is of a reformed system that borrows the trappings of the court system. Rather than searching for alternative ideologies, here the watchers operate as 'loyalists' (Hertogh, 2011), heavily constrained by a 'before the law' (Ewick and Silbey, 1998) schema. Indeed, a number of the watchers' criticisms rely



on loyalty to aspects of the formal court system: comparisons are often explicit, with one of the groups comparing the courts' *'15 pillars of justice'* with the ombuds' *'15 pillars of injustice'* (LW). So, for example, the idea that courts hear cases openly is compared with the ombuds' private process, or the fact that judges require certain qualifications is compared with the lack of prescription regarding the training of ombuds' staff. Many of the watchers' concerns about the fairness of the ombuds process rely on their understanding that similar processes *'...would not be tolerated in a law court'* (AS). Indeed, in describing the ombuds process as *'second rate'*, it is often the failure to operate in a judicial mode which is problematic: *'It does not offer just processes... based on the law to produce correct legal outcomes'* (PF). More colloquially, a blog commentator notes: *'We r [sic] here for justice its [sic] the law but all we get is ruff [sic] justice'* (PF).

In this vision, therefore, the watchers effectively seek the recreation of aspects of the court system in the ombuds context. This includes calls for: a right of appeal, requirements around legal qualifications, greater use of hearings, replacement of ombuds with administrative tribunals, replacement of ombuds with a body operating a criminal jurisdiction, legally binding decisions and enforcement powers, a statutory definition of maladministration, and a stricter application of natural justice principles. As Thomas *et al* (2013) note when assessing criticisms of the LGO, many of these proposals involve a rejection of the distinct contribution of ombuds and a loss of their value as a supplement to judicial approaches. But regardless of the merits of these suggestions, they demonstrate the watchers' attachment to a legal consciousness that draws its understandings of justice from those associated with the formal legal system.

This position is interestingly naïve given the cynicism which the watchers express about the judicial system and its involvement in preserving the *status quo*. While they are critical of the formal justice system, therefore, they nonetheless uncritically adopt many of its tropes as part of their analysis of the ombuds system. This appears to support Silbey's (2005) emphasis on the hegemonic character of legal ideologies, since despite critiquing the legitimacy of the state's political-legal-bureaucratic establishment, the watchers remain constrained by schemas which emphasize loyalty to the narratives of formal justice. The latter are, therefore, both a resource used to critique the ombuds' model of justice, at the same time as a constraint which structures their visions of potential alternatives.

**Summary.** The watchers make both an appeal to justice which departs from ideologies associated with state law, and an appeal which prefers one conception of state law (formal justice) to another (informal justice). As such, it demonstrates the potential identified by Fritzvold (2009) and Halliday and Morgan (2013) for anti-hegemonic narratives to develop, while also confirming Silbey's (2005) emphasis on the powerful constraint of official law in people's constructions of justice. The watchers also illustrate the dynamic nature of legal consciousness, shifting between being 'legalist', 'loyalist', 'cynic', and 'outsider' profiles (Hertogh, 2011) in the course of setting out their critiques and future visions.

***A collective approach to gaming: the ombuds watchers' collective purpose and protesting tactics***

***The collectivization of dissatisfaction and the communal dynamics of protest.*** The watchers demonstrate a collective approach to dissent, which goes beyond the pursuit of self interest. Indeed, the watchers see themselves as a community of '*... like minded people who understand your despair*' (AS), which lets people know that '*... they are not alone in feeling let down by the system*' (PF). The watchers support distraught citizens who contact them '*... to help them on a practical and emotional level*' (LW) and call for collective action:

*'Those members of the public... who are isolated in their misery in dealing with officials must get together to change the attitudes of our rulers.'* (AS)

Coming together is depicted as facilitating individuals to make sense of their experiences, moving from self-blame towards the construction of critical narratives: '*...there was much nodding of heads as we realized that we had all been delivered the same closure service*' (PF). Collectivity is the means through which complainants rendered helpless could regain a voice and not remain '*... unfairly shut out in the cold*' (PF). The watchers also stress the effectiveness of this strategy: '*... by coming together we have found a voice loud enough to be heard... Collective power has untold strength*' (PF). This empowerment through group structures is aimed at securing changes in the public interest: '*[Our aim is] to improve the service for all those who follow*' (PF).

***Game playing and a ‘with the law’ orientation.*** An important feature of collective dissent is a gaming approach to law, whereby it is used strategically as a means of achieving goals. Such approaches can be seen in one of the group’s campaigns encouraging members to make complaints of misconduct in public office to the police: *‘We are calling on all interested parties to... submit their evidence by following our pro forma’* (PF). It seems likely that the watchers are aware of the limited chances of such claims succeeding, but the invocation of legal processes is a means of putting pressure on the ombuds and keeping campaign momentum up through directed action. Other gaming approaches involve the use of the Freedom of Information Act 2000 to collect information that could be used to disrupt ombuds’ ‘spin’ tactics. As noted above, the watchers have limited faith in legal remedies, but despite this, their dissent remains very much within the ambit of the ‘with the law’ and ‘against the law’ schemas (Ewick and Silbey, 1998) rather than the ‘under the law’ schema (Fritzvold, 2009). Indeed, the watchers’ tactics involve a mix of working with legal processes and using methods which, although they are beyond the legal system, are nonetheless very much lawful (e.g. setting up websites, writing to MPs, organizing events, etc.) As such, despite their concerns about the legitimacy of the system, the watchers do not operate outside it and play a game within the established rules:

*‘... people told me that ‘you can’t beat the system’, but I wasn’t trying to..., I was naively trying to use the system I was entitled to as part of my stake in the democratic process.’* (PF)

***Protesting tactics – online voicing, information, and resistance to bureaucratic power.*** The strongest evidence of the watchers' game playing relates to their use of information, which becomes a strategy of resistance to power. Indeed, the watchers are critical of the way ombuds present information about their services: *'Ombuds... control the information that is provided publicly about their work'* (PF). The watchers consider ombuds to be engaged in *'propaganda'* (LW), since they are required to play the *'accountability game'* (PF) of making themselves look good to stakeholders. Self-preservation leads ombuds to use obfuscation techniques in responding to scrutiny: *'Some involve misinformation or simple evasion of questions... [and] smokescreens of barely comprehensible verbiage'* (AS). Generally, the watchers consider themselves to be in an information war, where a key tactic of resistance is the provision of information to counter the *'ombudsman's own PR'* (PF): *'The purpose of this site is to give you the facts behind the rhetoric .... This site gives you both information and a voice.'* (PF).

Important to the watchers' strategy is a form of bureaucratic mimicry, with the adoption of an objective and detached approach:

*'We might try to prove the point by recounting harrowing tales... However, most cases... could be dismissed... as merely 'anecdotal'. So we focus here on the evidence from the SPSO's own website.'* (AS)

This shows the watchers both operating within the confines of the existing system and seeking to resist and subvert it, by co-opting ombuds' own language and data. Understanding institutional skepticism of the personal story, which is *'regarded with*

*suspicion*' (AS), they seek to use data from other actors to help make their case. This frequently involves citing critical comments made in official reviews, parliamentary scrutiny processes, by individual MPs and MSPs, newspapers, and advocacy organisations. The watchers' strategies of resistance can also be seen in the way they resist attempts by ombuds to marginalize their critiques as vexatious: *'This is a way of... implying that our arguments are of no consequence... We combat the use of such phraseology against us'* (AS). This results in language used aiming at restraint:

*'We must play by Parliament's rules when only Parliament can deliver our goals... Are we suggesting that angry complainants should be two-faced? 'Restrained and objective' is a better description.'* (AS)

Such attempts to mimic bureaucratic and legal values of disinterest and objectivity are, therefore, a means through which the watchers seek to redress the power imbalance between them and ombuds.

Ultimately, the watchers' tactics mostly involve politically-oriented strategies of information-giving and public voice. Such strategies are facilitated by the internet where the watchers become *'... our own 'Tripadvisor' of dysfunctional organizations'* (PF). While never working *'against the system'* (PF), nonetheless the watchers recognize the importance of seeking a voice and empowerment outside of its structures as well as within it. Here the internet is key in redressing power and information asymmetries:

*'Treating complainants with contempt was not a problem before the internet. Now we... can see the big picture and so can everyone else with a little google search.'* (PF)

**Summary.** The watchers act as groups pursuing collective goals and use a range of dissenting tactics. These include strategies that attempt to harness the resources of law, politics, and bureaucracy. At the same time, the watchers look for a voice outside of these systems and find in the internet an empowering space which allows them to reconstruct their understandings of justice in defiance of the state authority they reject. This provides the watchers with their own space, which constitutes both an opportunity for healing and a means of action, as noted by one blog commentator:

*'Thank you... for bringing us together – as together we now have a voice. I see what you mean about wilderness – a place of despair. Now we have a chance to bring justice and hope, and a place of friendship.'* (PF)

## **Conclusion**

This article has sought to demonstrate the value of applying legal consciousness approaches to understanding the campaigning activities of groups engaged in legal protest against the current system for the redress of public service complaints. It makes three claims for its contribution to the existing literature.

Firstly, the article has integrated various strands of legal consciousness literature, providing a unified approach for application in the context of user experiences of ombuds processes. While this framework was principally used to situate and conceptualize the collectivized protest of the ombuds watchers, it is hoped that it will be deployed in future research in order to explore a broader range of user experiences of ombuds. Such research would seek to develop more holistic understandings of the way in which citizens construct ideas about justice through the experience of the ombuds process.

Secondly, in presenting the case study of the ombuds watchers, the article has sought to demonstrate – in a practical way – the value of applying legal consciousness approaches to the ombuds context. While the ombuds watchers represent only a small group, who take the unusual step of protesting about their experiences of seeking redress, the case study has shown how the schema of dissenting collectivism can help to elucidate and situate the way in which these individuals think about law and justice. It is hoped that the article has demonstrated the usefulness of legal consciousness approaches in analyzing the ombuds watcher phenomenon and in charting their critiques, demands for change, and protesting tactics.

Thirdly, the article has contributed to existing legal consciousness literature by providing corroboration for Halliday and Morgan's (2013) extension of Ewick and Silbey's (1998) schemas to include collective dissent. Our analysis has shown that the ombuds watchers meet each of the defining characteristics of dissenting collectivism and demonstrate the existence of forms of legal consciousness which present 'opportunities to build alternative imaginaries and institutions' (Morgan and Kuch, 2015,



p. 567). In this context, our case study provides a valuable insight into the potential for dissenting collectives to challenge the hegemonic structures of state law, while at the same time emphasising the continuing power of legal ideology in shaping popular understandings of justice.

Finally, we end with a note on avenues for future research. The current case study has examined the experiences of highly atypical citizens, who have not only been dissatisfied with their experience of redress, but have engaged in public protest. Future research should seek to deploy legal consciousness approaches to study a wider population of ombuds users, including those who were satisfied with their experiences. This will provide a more holistic picture of ombuds users' legal consciousness and help to develop further our understanding of how users experience ombuds processes. Future work should also seek to make connections between data suggesting unmet expectations on the part of citizens and current policy developments, both in relation to ombuds and the wider justice system. The focus of the present article has precluded significant discussion of these issues, but there would be merit in further investigating the apparent gaps between what citizens expect and what the system currently provides. Current work on redress design (Le Sueur, 2012) has tended to proceed in the absence of data about what citizens want from redress systems: future research on ombuds users' legal consciousness has the potential to address this gap.

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