The Special Master in School Desegregation Cases: The Evolution of Roles in the Reformation of Public Institutions Through Litigation

By GEOFFREY F. ARONOW*

I. Introduction—Constitutional Legitimacy and the Evolution of Judicial Forms

Traditional constitutional debate on the proper role of the judiciary has focused in the main on the relationship between judicial and legislative authority. The invalidation of a statute by the Supreme Court is the usual judicial action which has to be justified and explained. Such rationalizations lead, in most instances, to a theory of the proper limits of judicial activity.[1]

In the last twenty-five years, however, the debate has shifted. While cases touching on the traditional conflict, statutory invalidation, have by no means disappeared, the present era of constitutional conflict has been increasingly dominated by the more complex relationships developing between the courts and other governmental institutions.[2] These relationships have grown out of institutional reform litigation, which has moved the courts' attention away from the invalidity of discrete acts of the legislative or, less frequently, the executive branch, and towards the restructuring of the bureaucractic institutions which discharge the principal functions of the modern state—police, education,

* J.D., Yale Law School, 1980. The author wishes to express his gratitude to Professor Owen M. Fiss of Yale Law School for his comments and encouragement in the writing of this article.

1. The literature in this field is enormous. Its best examples include A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); J. ELY, DEMOCRACY AND DISTRUST (1980); Fiss, *The Supreme Court, 1978 Term—Forward: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

2. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) [hereinafter cited as Chayes]; Note, *Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy*, 89 YALE L.J. 513 (1980).

punishment, housing, medical services and welfare.[3] The restructuring of these bureaucratic institutions has changed the task of the courts. The principal focus now involves the formulation, and policing, of the remedial portion of constitutional litigation. Formerly a relatively minor "cleaning up" operation flowing directly from the invalidation of the legislative or executive action, the remedial stage has since become the centerpiece of a new constitutional dilemma.[4]

This focus on the remedial aspects of litigation, and the more complex relationships between the judiciary and the rest of the governmental order, raises many of the same basic questions which were raised by the earlier eras of judicial activism. The debate over the scope and limits of the judicial role in our constitutional system has returned to an examination of the competence of the judiciary to deal with non-traditional litigation.[5] This new period of judicial activism, however, does present new challenges to the traditional understanding of judicial legitimacy, because it has resulted in the modification of the adjudicatory paradigm, in the use of nonjudicial personnel like monitors, review boards, magistrates and special masters in an auxiliary "judicial" capacity.[6] The question is whether this modification of the traditional

3. *See* the following cases dealing with these institutions. Police: Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966). Schools: Hart v. Community School Bd., 383 F. Supp. 699, *supplemented*, 383 F. Supp. 769 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975). Housing: Gautreaux v. Romney, 363 F. Supp. 690 (N.D. Ill. 1973), *rev'd and remanded sub nom.* Gautreaux v. Chicago Hous. Auth., 503 F.2d 930 (7th Cir. 1974), *aff'd sub nom.* Hills v. Gautreaux, 425 U.S. 284 (1976). Mental hospitals: Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part and rev'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). Welfare: Kelly v. Wyman, 294 F. Supp. 893 (S.D.N.Y. 1968), *aff'd sub nom.* Goldberg v. Kelly, 397 U.S. 254 (1970). Protracted litigation concerning the state prison system of Arkansas: Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965); Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967), *vacated*, 404 F.2d 571 (8th Cir. 1968); Courtney v. Bishop, 409 F.2d 1185 (8th Cir. 1969), *cert. denied*, 396 U.S. 915 (1969); Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); Holt v. Hutto, 363 F. Supp. 194 (E.D. Ark. 1973), *aff'd in part and rev'd in part sub nom.* Finney v. Arkansas Bd. of Correction, 505 F.2d 194 (8th Cir. 1974); Finney v. Hutto, 410 F. Supp. 251 (E.D. Ark 1976), *aff'd*, 548 F.2d 740 (8th Cir. 1977), *aff'd*, 439 U.S. 1122 (1978).

4. O. FISS, THE CIVIL RIGHTS INJUNCTION (1978) [hereinafter cited as O. FISS]; M. HARRIS & D. SPILLER, AFTER DECISION (1976); Fishman, *The Limits of Remedial Power: Hart v. Community School Board* 21, in LIMITS OF JUSTICE 115 (H. Kalodner & J. Fishman eds. 1978).

5. D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

6. For instance, a board of monitors was established in the case involving the Teamster Union's convention discussed in Note, *Monitors: A New Equitable Remedy?*, 70 YALE L.J. 103 (1960). The many uses of magistrates under federal statutory provisions are discussed in Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magis-*

adjudicatory paradigm undermines judicial legitimacy. The charge that it does is most often grounded on discussions of separation of powers, some expanded notion of due process, or sometimes under the limitations imposed by article III of the United States Constitution. But these formulas simply cloud the real reason for unhappiness with the new judicial role: if the courts are forced by this new conception of judicial activism to abandon the forms which lend legitimacy and efficacy to their participation in government and which defines the proper bounds of judicial activity, then their assumption of tasks which force reforms must be, in some fundamental sense, improper.[7]

Such a challenge to the judicial legacy of *Brown v. Board of Education*[8] and the remedial revolution that it triggered is, however, narrowly focused and fundamentally mistaken. The formal modifications of traditional judicial activity do not undermine the judicial role; rather, they represent a reformation of the adjudicatory paradigm proper to the demands of the new tasks facing the judiciary in modern society. I hope to illustrate the propriety of this reformation by focusing on one particular form of this questionable judicial activity, one which has emerged in the litigation deriving its impetus from *Brown*—the use of special masters in school desegregation cases.

In the last ten years, the federal courts have begun to appoint special masters in many school desegregation cases, principally to aid in the formulation of remedial decrees.[9] At first glance, these special mas-

trates: A Dissenting View, 88 YALE L.J. 1023 (1979), which argues in favor of limitations on the role of magistrates in adjudication.

7. *See* note 5 *supra*. *But see* Chayes, *supra* note 2, for a description of this new phenomenon which at least suggests possible instrumental justifications.

8. 347 U.S. 483 (1954).

9. As discussed more fully in the text accompanying note 17 *infra*, a special master was appointed in the Cleveland school desegregation case at the time of the finding of liability, "to assist [the court] in the prudent exercise of its equitable jurisdiction to remedy the constitutional violations . . . [and] so that input may be received from legitimately affected interest groups." Reed v. Rhodes, 422 F. Supp. 708, 797 (N.D. Ohio 1976), *remanded*, 559 F.2d 1220 (6th Cir. 1977), *on remand*, 455 F. Supp. 546, *supplemented*, 455 F. Supp. 569 (N.D. Ohio 1978) (remedial order).

In the Boston desegregation case, the district court did not decide to appoint a panel of special masters until well after its initial finding of liability, at the point when the parties had submitted their own remedial plans. Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974), *aff'd sub nom.* Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). The court then appointed the masters "because of the complexity and multiplicity of the school desegregation plans and proposals filed . . . ." Morgan v. Kerrigan, 401 F. Supp. 216, 227 (D. Mass. 1975), *supplementing* 388 F. Supp. 581 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir. 1976), *supplemented*, 409 F. Supp. 1141 (D. Mass. 1975), *aff'd sub nom.* Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977).

In New York, Judge Weinstein appointed Curtis Burger as special master to "bridge the

ters appear to undermine precisely those traditional elements of the litigation paradigm which give the courts their legitimacy in a democratic society—elements intimately tied to our concept of justice based on a strictly controlled adversarial process.[10] Yet these initial reactions to the role played by special masters—and, I would contend, those same reactions to the many other similar techniques and devices developed by the courts over the last twenty-five years to contend with institutional reform litigation—originates in a misconception of their function in the adjudicatory process, rather than in well-founded fears of usurpation of powers constitutionally delegated to other branches of government.

In this article, I will evaluate the special master as part of a model which considers them not as "sub-judges," as they are traditionally thought to be,[11] but as a fusion of elements of the traditional functions of party and judge. This adaptation, I will argue, came in response to the demands of a new type of litigation, litigation which (1) focuses in its liability stage on the unjust results of bureaucratic decision-making and implementation, and (2) therefore compels a remedial order restructuring those bureaucratic processes. So viewed, the function fulfilled by the special master will not only appear proper, but will be understandable as a necessary response by the judicial system in order to deal effectively and fairly with this new kind of litigation, while pre-

gap between the court as impartial arbiter of plans placed before it and advocates protecting their clients' positions that are often narrower than that of society at large" in the formulation of a plan to desegregate Mark Twain Junior High School in Coney Island, Brooklyn. Hart v. Community School Bd., 383 F. Supp. 699, 764 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975).

Similar actors have been used effectively in other cases. In Swann v. Charlotte-Mecklenburg Bd. of Educ., 306 F. Supp. 1291, 1313 *supplemented*, 311 F. Supp. 265 (W.D.N.C. 1969), *vacated on other grounds*, 431 F.2d 138 (4th Cir. 1969), *on remand*, 318 F. Supp. 786 (W.D.N.C. 1970), *aff'd*, 402 U.S. 1 (1971), the district court appointed a "consultant" to formulate remedial plans for the desegregation of the school system, and the court ultimately adopted most of the "consultant's" recommendations. In Bradley v. Milliken, 345 F. Supp. 914, 916-17 (E.D. Mich. 1972), *aff'd in part*, 484 F.2d 215 (6th Cir. 1973), *rev'd on other grounds*, 418 U.S. 717 (1974), *on remand*, 402 F. Supp. 1096 (E.D. Mich. 1975), *aff'd and remanded*, 540 F.2d 229 (6th Cir. 1976), *on remand*, 411 F. Supp. 943 (E.D. Mich. 1975), *aff'd*, 433 U.S. 267 (1977), the district court appointed a panel to come up with an appropriate remedial plan for the desegregation of the Detroit schools, although in that instance all members of the panel had some association with the state or municipal defendants or with the plaintiffs.

10. For a discussion of some of the constitutional questions posed by the use of "parajudges" in the federal courts, see Note, *Masters and Magistrates in the Federal Courts*, 88 HARV. L. REV. 779 (1975).

11. Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452 (1958) [hereinafter cited as Kaufman]; Bryant, *The Office of Master in Chancery—Development and Use in Illinois*, 49 N.W.U. L. REV. 458 (1954).

serving the definitional qualities necessary to the judiciary's legitimacy and efficacy in our constitutional system. This approach to the constitutional problem suggests that the techniques developed by the courts to deal with the novel problems presented by these cases do not undermine judicial legitimacy but enhance it. The new techniques allow the courts to provide redress for constitutional wrongs which might not otherwise be remedied, while preserving the underlying structural elements which are essential to the preservation of the court's legitimacy in the constitutional scheme.

II. The Role of Special Masters: A Description

A. Masters and Special Masters

Traditionally, the courts have relied on special masters to relieve congested court calendars. These masters essentially serve as "sub-judges" in complex cases. Because of the potential for subversion of procedural rights inherent in the function of these special masters, their use in federal courts is strictly delineated by Rule 53 of the Federal Rules of Civil Procedure. Under that rule, the special master mimics the neutral role of the traditional judge. He holds hearings, at which parties present evidence, as in a trial. The hearing is structured and governed by most of the rules which govern the courts themselves.[12] Moreover, the report of the special master in non-jury cases must be accepted by the court as a final ruling on the issue in question, unless the findings are "clearly erroneous." The traditional adjudicatory model, therefore, is duplicated even to the point of limiting the original court's power of review to the standard of "clearly erroneous"—an appellate court's standard of review.[13]

The federal district courts, however, have come to use masters in desegregation suits in a much different manner. Although the uses and functions of special masters have varied a great deal in each lawsuit, depending on the particular circumstances of the case and the personalities of the individuals involved, certain general attributes can be detected which clearly distinguish these masters from traditional masters and from judges.

The special masters in desegregation cases take an active, aggressive, often advocatory role in the proceedings. They are usually aggres-

12. In many cases, in fact, the people appointed as masters under Rule 53 have been former judges.

13. *See* Kaufman, *supra* note 11; J. POMEROY, EQUITY JURISPRUDENCE, § 1484 (4th ed. 1907).

sive in seeking out evidence, in questioning witnesses, in going beyond the information and issues developed by the parties, and in expanding the scope of their task as they see fit. In fact some special masters appear to believe that their jobs include the formulation of plans for the complete social reconstruction of the community.[14] In fashioning a plan for desegregation they have considered a broad range of issues, such as school financial management, teaching techniques, tracking policies, transportation and police protection. They have exercised broad powers of investigation, have interviewed widely in the local communities, have had the aid of the courts in obtaining detailed data and analysis from the defendant institutions, and have recommended final remedial orders which have seldom precisely coincided with the wishes of either the plaintiffs or the defendants.[15]

The courts, while hardly treating the reports of these special masters as an appellate court would treat the findings of a lower court, have generally shown great deference to the work of these special masters. They have almost always given them strong support when their methods were challenged by the parties. The same deference and support has not always extended to their recommendations. But the courts still give great weight to the recommendations of the special master, greater than that given to the proposals of either the plaintiffs or the defendants.[16]

One of the cases in which the courts have introduced a special master into the proceedings to help formulate the remedial decree is the Cleveland school desegregation case of *Reed v. Rhodes*.[17] The activities of the special master in that case represent well the scope of the concerns which these masters have considered and the methods of opera-

14. *See, e.g.*, the final report of the special master, Curtis Burger, filed in Hart v. Community School Bd., 383 F. Supp. 699 (E.D.N.Y. 1974). *See also* Berger, *Away From the Court House and into the Field: The Odessey of a Special Master*, 78 COLUM. L. REV. 707 (1978) [hereinafter cited as Berger].

15. *See* note 14 *supra*. *See also* various unpublished materials from *Reed v. Rhodes*, including the Recommendations of the Special Master Regarding Defendant's Proposed Desegregation Plans, and the various Orders and Opinions attached thereto (undated); Report of the Special Master Responding to Defendant's Motion to Modify Court's Order of April 1, 1977 (undated); Interim Report by the Special Master (Jan. 13, 1978); Special Master's Report and Request for Supplemental Orders Regarding School Closings (Dec. 21, 1977); Summary of Special Master's Hearing of July 15, 1977, prepared for Study Group on Racial Isolation in Public Schools, Greater Cleveland Project; and materials in Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975), including the Order on Motion for Relief Concerning Security (Dec. 17, 1974).

16. *Id.*

17. 422 F. Supp. 708 (N.D. Ohio 1976), *remanded*, 559 F. 2d 1220 (6th Cir. 1977). *See also* Reed v. Rhodes 455 F. Supp. 546, *supplemented*, 455 F. Supp. 569 (N.D. Ohio 1978).

tion used by the courts and the masters. In the course of his work, the special master in Cleveland, Daniel R. McCarthy, evaluated the Cleveland school system's financial problems, management techniques, special schools program, contracting system and transportation capability. The judge, Frank Battisti, repeatedly asked the special master to investigate and report on new problems as they arose, and the judge was unswerving in his support of the special master. Mr. McCarthy proceeded by use of legislative-type hearings, assisted by two "experts" or "assistant special masters" and by his own broad investigatory work in the field. His final recommendations included proposals for restructuring the districts and tracking system in the Cleveland schools, as well as the most detailed discussion of the form and substance of the figures that were to appear in reports to be filed with the courts by the defendants.[18]

In some respects the use of the special master in the Cleveland case was not as innovative and ground-breaking as it might have been. But in one important way Judge Battisti has broken new ground, with the appointment of a court auxiliary who is a conceptual and functional cousin of the special master. He did this by ordering the Cleveland Board of Education to establish a Department of Desegregation Implementation. And the court itself, by court order, appointed the head of this new department, a Deputy Superintendent of Desegregation Implementation. Although this person is an official of the school system, the judge defines his job and responsibilities, determines the organizational make-up of his department, and demands periodic reports from him. Indeed, the order of the court went into some detail in defining the tasks of this new deputy superintendent, placing him in charge of overseeing all aspects of the implementation of the court's remedial order and empowering him to recommend changes in the implementation procedure to the court.[19]

18. *See* note 15 *supra*; Memorandum Opinion and Order (Dec. 21, 1977) (planning for bus transportation); Memorandum Opinion and Order (Dec. 21, 1977) (adopting Special Master's Recommendations on School Closings). *See also* Report on Open Court Session of April 1, 1977 (April 30, 1977), and Text of Judge Battisti's Statement and Orders Issued on October 19, 1977 (Oct. 19, 1977), both prepared for Study Group on Racial Isolation in the Public Schools, Greater Cleveland Project.

19. Memorandum Opinion and Order, filed December 21, 1977, in Reed v. Rhodes, 422 F. Supp. 708 (N.D. Ohio 1976). The subsequent history of both the Cleveland school case and the court-appointed deputy superintendent has been rocky and has produced mixed results. The court first appointed Dr. Charles Leftwich to the position. He experienced a rather controversial tenure, during which, at one point, Judge Battisti ordered that four of the major departments of the school system's administrative apparatus be placed under Dr.

B. Federal Executive Auxiliaries

An examination of the role played by two executive departments—the Departments of Justice and Health, Education, and Welfare (HEW)—as auxiliaries to the courts in school desegregation cases in the 1960s will illuminate the role later played by the special masters.

Starting in the early 1960s, the Departments of Justice and HEW began to take an active interest in desegregation policy. The courts tapped these departments' growing expertise and resources in this area. For example, they brought the Department of Justice into the litigation as a party-plaintiff, to help develop the proper approach to the individual case. HEW, although not directly involved in the suits, did establish desegregation guidelines, under the command of the Civil Rights Act of 1964, for school districts wishing to qualify for federal funds. The Fifth Circuit Court of Appeals, in which most of the school cases were at that time being litigated, seized upon these guidelines, which initially called for "freedom of choice" in the assignment of students, as the minimum remedy acceptable under the Constitution. In taking this approach, the Fifth Circuit called openly for a coordinated effort of the judicial, legislative and executive branches to eradicate segregation.[20]

Leftwich's control. Subsequently, Dr. Leftwich resigned and was replaced by Dr. Margaret Fleming. *See* note 64 *infra*.

20. United States v. Jefferson County Bd. of Educ. 372 F.2d 836, 847-61 (5th Cir. 1966), involved the appeal of a series of desegregation orders from Louisiana and Alabama. The Fifth Circuit engaged in an extensive discussion of the parameters of the constitutional requirement of desegregation, and the court embraced the HEW guidelines wholeheartedly, saying they offered, "for the first time, the prospect that the transition from a de jure segregated dual system to a unitary integrated system may be carried out effectively, promptly, and in an orderly manner." *Id.* at 852. The court told its district courts that, "[i]n evaluating desegregation plans, district courts should make few exceptions to the [HEW] Guidelines and should carefully tailor those so as not to defeat the policies of HEW or the holding of this Court." *Id.* at 848.

The interaction of the federal courts, particularly those of the Fifth Circuit, and the federal executive branch in the battle to end segregation in public education did not take the form exclusively of incorporating HEW guidelines into the Constitution. One instance of the varied forms the interaction took involved the confrontation between the Fifth Circuit and Ross Barnett (Governor of Mississippi) over the attempts by James Meredith (a black) to enter the University of Mississippi. The stalemate between the two was broken only after President Kennedy sent federal troops into Oxford, Mississippi to enforce Meredith's admission. *See* United States v. Barnett, 330 F.2d 369 (5th Cir. 1963) (recounting the judicial and extra-judicial events). Another infamous instance of early maneuvers involving the federal judiciary, the state executive, and, ultimately, the federal executive, occurred in the effort to desegregate the public schools of Little Rock, Arkansas. *See* Faubus v. United States, 254 F.2d 797 (8th Cir. 1958).

For further exploration of the use by the federal judiciary of the path laid down by HEW, see Lee v. Macon County Bd. of Educ. 267 F. Supp. 458 (M.D. Ala. 1967), *aff'd sub nom.* Wallace v. United States, 389 U.S. 215 (1967); Dunn, *Title VI, The Guidelines and*

But beginning in 1969 with *Alexander v. Holmes County Board of Education*,[21] a case concerning desegregation in Mississippi, the Departments of Justice and HEW began to display less enthusiasm for desegregation. Instead of aiding the courts in the formulation of remedial decrees, the executive departments began to urge delay. Only in the most recent school cases—such as *Reed v. Rhodes*—has the Department of Justice begun again to play a role in the litigation, usually as *amicus curiae* rather than as a party-plaintiff, and on a much more limited scale than in the middle 1960s.[22]

III. The Emergence of the Special Master: Conditions Making the Emergence Possible

The new set of participants—first the executive departments, then the special masters, and finally, the court auxiliaries used in the implementation process—appeared to fill a gap left in the traditional structure of litigation, a gap caused by the new tasks demanded by institutional reform litigation: the examination and restructuring of the multifarious bureaucratic decision-making processes.

One must first look to the functions fulfilled by each of the actors in the traditional structure of the adjudicatory process, particularly the role played by the parties. Since the early development of our legal traditions, an individual, the plaintiff, has been responsible for triggering the adjudicatory process by accusing another individual, the defendant, of a violation of law or custom. The plaintiff not only introduces the initial issue to be tried, but takes primary responsibility, through the nature of the accusations, for determining the scope of the issues to be considered at the trial. The defendant, to a lesser extent, can expand the considerations at trial, by introducing those matters pertinent to his defense. The defendant, however, must confine the matters he introduces to those bearing some direct relationship to the

School Desegregation in the South, 53 VA. L. REV. 42 (1967); Note, *The Courts, HEW, and Southern School Desegregation*, 77 YALE L.J. 321 (1967). *See also* Carr v. Montgomery County Bd. of Educ., 232 F. Supp. 705 (M.D. Ala. 1964); Carr v. Mongomery County Bd. of Educ., 253 F. Supp. 306 (M.D. Ala. 1966); Carr v. Montgomery County Bd. of Educ., 289 F. Supp. 647 (M.D. Ala. 1968), *modified*, 400 F. 2d 1 (5th Cir. 1968), *rev'd and remanded*, 395 U.S. 225 (1969), *reprinted in* O. FISS, *supra* note 4, ch. 3 (1978). For a concise history of the litigation of this period, see G. ORFIELD, THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT, 15-332 (1969).

21. United States v. Hinds County School Bd., 417 F.2d 852 (5th Cir. 1969), *vacated sub nom.* Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969), *order amended*, United States v. Hinds County School Bds., 423 F.2d 1264 (5th Cir. 1969).

22. Remarks of Drew Days III, Ass't Attorney General in charge of the Civil Rights Division, Department of Justice, at Yale Law School (Mar. 1, 1978).

plaintiff's charges. The court itself takes the most passive role. The judge is basically a traffic cop. He rules on procedural questions, but usually only at the instigation of the parties. He keeps order, and expedites the process. He does play a substantive role to the extent that he acts as the interpreter of the law and, in non-jury cases, as the trier of fact.[23]

The parties, therefore, are the central agents in the litigation process. They perform five functions: (1) they raise the issues; (2) they present alternative theories or interpretations of the facts and also, by not raising such theories, confine the universe of considerations; (3) they refute evidence and arguments presented; (4) they interpret law for the court; and (5) they request the form of relief, including all the alternatives and the justification for those alternatives.

In traditional types of litigation, this reliance on individual parties to manage a suit from beginning to end seemed well placed. The belief that the injured person was in the best position not only to raise a complaint but to determine the scope of the inquiry and to develop the evidence was based on: (1) a non-interventionist concept of the judicial apparatus, which relied on the assumption that the "invisible hand" kept the social institutions running smoothly;[24] (2) a desire for accuracy and a belief that the injured party was in the best position to advance, limit and shape the litigation; and (3) a belief that the injured party should, as a matter of justice, hold the responsibility for the success or failure of his or her case. Therefore, within the bounds of the rules, rules essentially designed to assure fairness, the parties were free to develop the evidence of guilt or innocence as they saw fit. The court only participated actively at the conclusion, to enter judgment.

The courts have been less passive in the remedial stage of litigation. Perhaps this stemmed from their perception that there is less need for an artificial barrier at this stage to assure judicial restraint. Remedies are more naturally confined by the determination of liability. There might be some leeway for the court, such as compensation, restoration of the status quo, or the award of some punitive remedy, and considerations of remedy might also shape the court's approach to lia-

23. *See* Chayes, *supra* note 2.

24. Under this concept, dysfunction, calling for judicial intervention by definition, would manifest itself by the injury of a particular member or members of the community who would thereby be moved to call upon the legal apparatus for restitution or retribution. The idea of the "activist" versus the "non-interventionist" theory of political society, and the resulting orientations of the legal culture, has been developed most thoroughly by Professor Bruce Ackerman of the Yale Law School. For an example of a discussion of the concept, see Ackerman, *Four Questions for Legal Theory*, NOMOS XXII, PROPERTY.

bility at times. But the outcome is sufficiently confined at the time of remedy by what has come before, in the liability state, to obviate the concern about judicial overreaching. As a result, the courts have not been bound by the specific requests for relief advocated by the plaintiffs, but have formulated relief as they deemed appropriate from the facts of the case. It is in the remedial stage, therefore, that the courts traditionally have shown the most inventiveness.

Yet a number of factors mitigated against the success of this traditional approach in school desegregation cases and in litigation concerned with the operation of prisons,[25] mental institutions[26] and hospitals.[27] The most important factor instigating a change in approach was the bureaucratic nature of the violation. This feature of the litigation led to three major breakdowns in the traditional structure of the law suit: (1) the default of the directly affected party and the entrance into that vacuum of the organizational plaintiff; (2) the recognition of the breadth of interests affected in the remedial restructuring of public institutions; and (3) the lack of standards for evaluating a successful remedy. While these factors are obviously interrelated and therefore likely to create artificial categories, they are extremely useful in comprehending the dynamics that led to the emergence of the new structure of constitutional litigation in the United States.

A. The Bureaucratic Nature of the Violation

What is at issue in school desegregation cases is not a single injury, nor a series of acts causing harm, nor even (at least in northern school districts) an explicit official policy found to be constitutionally deficient. Rather, it is a bureaucratic process, a systemic operation of social

25. Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in part and rev'd in part sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977).

26. Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part and rev'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). *See* Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977); Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975).

27. *See generally* M. HARRIS & D. SPILLER, AFTER DECISIONS: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS (1976); Note, *Monitors: A New Equitable Remedy?*, 70 YALE L.J. 103 (1960). For an excellent discussion of the problems with the traditional adjudicatory model in deciding issues of public policy and the reformation of public policy institutions, with some suggestions of appropriate alternative approaches, see Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH L. REV. 111 (1972) [hereinafter cited as Boyer]; for a discussion of the successes and failures of another extra-judicial device used to monitor and implement an institutional injunction, see Altman, *Implementing A Civil Rights Injunction: A Case Study of* NAACP v. Brennan, 78 COLUM. L. REV. 739 (1978).

institutions whose outcome affects all people, albeit in a discriminatory manner.[28] While the injury of discrimination remains easily identifiable, the culpability of those responsible and the means of remedying the discrimination which results from their acts are obscured by the processes of bureaucratic decision-making and action.

It is this peculiar focus of school desegregation cases—on a bureaucratic process—which demands more active and continuous participation by both the traditional plaintiff and the court to achieve a satisfactory solution. By the very nature of bureaucracies, it is a complex task to identify all those responsible within the organization for acts of discrimination. Responsibility is diffused and bureaucratic action is a cumulative result of many separate decisions and acts; often those apparently responsible for certain results have no power to alter their actions, and often actors who at first impression appear to have nothing to do with the discriminatory result contribute significantly to the outcome. These institutions are also subject to a variety of societal pressures and the influence of many political, economic, community and professional interests.

The nature of the discriminatory violation by a social institution raises two fundamental problems for the traditional litigation paradigm. First, while the judicial evaluation of liability may focus on the discriminatory impact of bureaucratic actions on individuals or identifiable groups, the formulation of a remedy has to take into account the effects on a much larger segment of the populace, since governmental bureaucratic activities touch either directly or indirectly all lives in the community.[29] Second, because the bureaucratic process is the product of so many separate parts, it has frequently been difficult to pinpoint who is to blame. The job of the court in these cases is made even more difficult by the necessity of accomplishing two tasks through the injunctive order. The order must not only correct the discrimination, but must also force changes in bureaucratic decision-making and actions to insure that the future administration of the school system is not discriminatory.

The courts can sidestep these potential difficulties in the liability stage of litigation by taking a result-oriented approach. Without attempting to understand the complex elements of bureaucratic procedures, the court can simply look to see if the process resulted in a segregated school system. The Supreme Court's interpretation of con-

28. *See generally* Note, *Parties Plaintiff in Civil Rights Litigation*, 68 COLUM. L. REV. 893 (1968).

29. *Id.*

stitutional doctrine, however, particularly in more recent years, has required that the courts establish more than *de facto* segregation before finding liability.[30] This has meant that as the desegregation cases came to focus more on northern cities, where the causes of the segregation were less obvious, the courts could no longer avoid in-depth scrutiny of bureaucratic procedures in order to accurately assign responsibility for the segregative result.

Perhaps the greatest difficulty with a result-oriented approach to desegregation cases arises in the consideration of remedies. One can imagine that the courts could articulate a set of integration goals and then leave the defendants to implement the goals in whatever manner they chose. But a number of problems work to preclude such an approach. Historically, the intransigency of the southern states to desegregation suggests that orders allowing defendants discretion would meet with obstruction and delay. Even an order backed by the threat of contempt of court would be ineffective. Indeed, such a threat might backfire, providing instead a rallying point for resistance. In the northern cases, the complexity of the issues would make contempt proceedings appear oppressive at best, assuming any sort of good faith showing by the bureaucrats—a threshold burden easily met, given the opaqueness of the bureaucratic processes. In the face of pressures from many diverse constituencies and interests, moreover, it is unlikely that even public institutions headed by cooperative administrators will reform themselves without the outside coercive force of the court providing the impetus for specific changes. In addition, the danger exists that the procedure of remedial formulation would degenerate into a "hidden ball" scenerio, with the defendants formulating plans, and the courts sending them away to try again if they are "unsatisfactory." Finally, the threat of judicial condemnation of a public institution with its re-

30. The adherence to the standard of *de jure* segregation has led the Court in recent years to have to confront the difficult questions of burdens of proof, proper inferences from facts proved, and the residual effects of past discrimination, in order to define the barrier it had erected between *de facto* and *de jure* segregation. The Court first suggested that it would be willing to allow broad inferences from the facts proved, meaning that a relatively limited *prima facie* case could justify broad remedies, in Keyes v. School Dist. No. 1, 413 U.S. 189 (1973). The Court, however, began to limit its willingness to draw inferences and allow limited factual cases to support broad remedial decrees in Milliken v. Bradley, 418 U.S. 717 (1974) (Milliken I), Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977) (Dayton I), and School Dist. of Omaha v. United States, 433 U.S. 667 (1977). In the October 1979 Term, the Court seemed to open the door again to inferences across time and space from proven acts to support broad remedies in school desegregation cases, in Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979) and Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (Dayton II).

sulting complete disbandment would appear to be an even greater interference with public policy than would judicially-instigated reforms. Any sizeable public institution serves many purposes, goals and constituencies at once; that is the reason why judicial examination for discriminatory intent is so difficult. The courts, in these school cases, may find a defect in one part of a bureaucracy or its decision-making process, yet, to throw the baby out with the bath water—to shut down the schools, release prisoners, condemn the mentally ill to the exploitation they inevitably face on the streets—on the basis of this finding would overstep the bounds of court legitimacy far more clearly than would the reformist aspects of remedial orders.

One final problem faced by the courts in considering such an approach is the limitations upon their political power. It is unclear whether the courts could have effectively articulated a set of specific goals for integration in the mid-1960s, or whether they had enough political clout to force acceptance of those goals. By focusing generally on the process of integration, by identifying and enforcing indirect, means-oriented standards of remedy, they avoided the political powder-keg of explicitly articulated goals. They were able to proceed slowly by tinkering with the machinery, working towards the hazy goal of "unitary non-segregated school systems," rather than translating that goal into concrete terms. To focus on process, however, meant that the courts had to identify the elements of the bureaucratic structure which were in need of repair.

Three new burdens, therefore, were placed upon the traditional participants in the adjudicatory model: (1) the traditional plaintiff had to recognize, evaluate and effectively present to the court a legal analysis of the bureaucratic actions which led to the violation; (2) the court had to accept the legitimacy of the plaintiff's traditional role in the litigation, especially in the formulation of the remedial decree, in the face of the broad impact of ongoing public institutions; and (3) the court had to deal with the complexity of formulating, enforcing and evaluating a remedial order which would effectively manipulate such a process. The failure of traditional methods of adjudication to deal satisfactorily with these problems led to the emergence of the special master as a new participant in the adjudication of these cases.

B. The Default of the Traditional Plaintiff

The difficulties involved in analyzing the process of discrimination by bureaucratic defendants were too great for the traditional party-plaintiff. In addition, since the reformation of public institutions af-

fected more than just the plaintiff(s), the court's reliance upon party representatives in formulating a remedy made it nearly impossible to do justice for those actually affected.

While the detection and presentation of a case challenging the activities of a bureaucratic institution is difficult under any circumstances, it may well be impossible for the individual plaintiff. Although the general, amorphous discriminatory results of decision-making and implementation processes may be obvious to any individual who has had contact with the system, an individual—student, parent, teacher or administrator—sees only one small part of the whole. Such an individual might have no knowledge of the decision-making process, seeing only its results. The most sophisticated victim might be unable to piece together a claim which would rise to the level of legal proof. Indeed, a student or other individual temporarily associated with a school system is much less likely to comprehend the process or to maintain a desire to sue than one whose personal contact with the organization is less fleeting. The problem is even more apparent in the northern urban schools, where the administrative operations which violate the Fourteenth Amendment are more subtle and hence less susceptible to detection by the casual observer. Because the "victims" have only a temporary stake in the school system, it is unlikely any individual will grapple successfully with these complex issues of cause and effect in a bureaucracy before that individual passes out of the system. As time passes, the issue loses its personal urgency for the victims and their desire for specific reform is subsumed into the general discontent with public and private institutions.

The problem is compounded by the disproportionate impact that school systems have on the poor. These relatively unsophisticated potential plaintiffs are neither likely to understand the subtleties of the chain of responsibility for systemic discrimination, nor likely to be in a position to devote the time and energy needed to press such a suit. Given the limited impact that even a successful suit will have on their own lives, there is little incentive for the poor to bring suit. The cruel irony is that the very constitutional violation involved—unequal educational opportunity—is at least partially responsible for placing the potential plaintiffs in a position from which they are powerless to complain.

A related problem is the nature of the relief available. In desegregation cases, the relief is prospective in nature. Precisely because of the breadth of the impact of public institutions on society, it is unlikely that courts would ever undertake the redistribution of wealth that damage

awards would necessarily entail, especially if the theory behind such awards was carried beyond school systems to the sometimes amorphous disadvantages created, enhanced or supported by various public institutions. Given the reformist, prospective nature of the relief to be expected, and the temporary nature of the interface of victim and institution, the potential for effective action by our traditional plaintiff is greatly diminished.

Not only does the traditional plaintiff default for these functional reasons in this new type of litigation, but these factors at least partially undermine the normative grounds for reliance on the party-plaintiff. Part of the reason for relying on the party-plaintiff in traditional adjudication was the notion that the injury and the remedy had a discrete impact upon the parties and no wider impact; therefore, the coercive power of the state could justly be wielded and molded by the affected parties. While many of the concepts which underlie the traditional litigative paradigm may have always been artificial and mythical, they certainly become so in the context of the school desegregation cases. These cases have forced the courts to recognize the inappropriateness of many of the previously accepted elements of traditional adjudication. For instance, as it became increasingly obvious that the reform of public institutions affected many groups and interests in the community, extending far beyond the limits of an individual plaintiff, the inappropriateness of the notion of discrete impact was recognized. The normative basis for maintaining the focus of litigation on the individual plaintiff, particularly in the remedial stage of the litigation, was weakened, if not destroyed. Even in the liability stage, the discriminatory impact of the bureaucratic processes was not individual- but group-oriented; consequently, the reliance on the individual plaintiff seemed normatively, as well as functionally, inappropriate.[31]

Part of the solution to the dilemma faced in these cases was found with the emergence of organizational and group plaintiffs. The relaxation of the rules on standing, the increasing use of class actions and the growing control which organizations like the NAACP exercised in bringing suits, all served to counteract the inequities that existed between the governmental organizations "acting" in violation of the Constitution, and their affected victims.[32]

31. *See* Boyer, *supra* note 27; Note, *supra* note 28.

32. "Acting" is in quotes because it applies the coherence of an individual to an organization, one of the very mistakes of perception which this article means to highlight and to dispute. The term refers to the net result of the series of decisions and implementation actions made within and by the organization. Potts v. Flax, 313 F.2d 284 (5th Cir. 1963) illustrates some of the problems with identifying "acts" of a bureaucratic institution, imputing

C. The Failure of Legitimacy

Organizational plaintiffs like the NAACP, working nominally through individually injured students, came to fulfill many of the new functional needs of the injured parties. Such organizational plaintiffs were capable of the new kinds of systemic analysis and evidentiary presentations demanded by these suits. As organizations, these plaintiffs were better equipped to represent the broad interests of Blacks in desegregation cases than individual students, or even groups of students, who had only temporary and limited contact with the discriminatory system. As organizations, the new party-plaintiffs were also better equipped than the traditional plaintiff to collect, evaluate, and use the existing information to prove the connection between segregative results and failings in the institutional decision making processes. They could call upon the resources needed to coordinate, examine and analyze the many individual decisions and actions which, when presented in an integrated manner, triggered the finding of a constitutional violation.

In the early days, this task involved developing legal theory, rather than developing the factual situations. After the theory was firmly established subsequent to *Brown v. Board of Education*,[33] a long period ensued in which effective remedies had to be developed. As the battleground moved north, more attention had to be paid to ferreting out and coherently presenting the individual acts within and by the school bureaucracies which, *in toto*, could be said to produce a "deliberate" unconstitutional act of discrimination by the school system. This task was further complicated by the need to identify whether the culpable actions lay in the decision-making or in the implementation processes of the school bureaucracy, or in some combination of both.

If, however, this task demanded an organizational, rather than an individual plaintiff to effectively frame the issues and produce the proof, the advisability of leaving the suit in the hands of an organization such as the NAACP was undermined, especially in developing proper remedial orders. As the intricacies of proving a discrimination case and evolving remedies began to push the court into many uncharted areas of policy and administration, the possibility that the organizational plaintiffs would not protect the interests of all the injured

good or bad faith, or trying to identify policies or activities of the institution itself as opposed to the thought and actions of individual members. *See also* Note, *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318 (1976).

33. 347 U.S. at 483.

parties began to loom larger.[34] Yet a neutral plaintiff was not the answer. A strong advocate was needed to counter both the bureaucratic defendant's powerful defense, and the natural difficulty of proving such a case in a system of law structured around the traditional litigation paradigm.

The breadth of the remedial decrees compounded the problem. It was increasingly apparent that virtually the whole *polis* was affected either directly or indirectly by the systemic reforms ordered by the court. Although it may be argued that such effects are present in any court interference with the administration of public institutions, it is clear that, as the courts widened the scope of their inquiry and detailed the necessary remedial actions in areas related to educational services, the inadequacy of representation by even organizational plaintiffs became more obvious.[35]

Because this new form of plaintiff opened up new problem areas, it encouraged the courts to discard the chains of traditional adjudication and look to new sources of help. Once the old form of adjudication was *de facto* discarded, and old ideas no longer seemed appropriate to the new type of case confronting the federal courts, the need for greater judicial intervention to protect the interests of the many persons not represented by the parties became apparent. The well-recognized need for judicial restraint, both to limit the power of the court and to preserve the court's flexibility in its role as final arbiter, however, remained in the path of direct, active judicial oversight.

The Department of Justice and, to a lesser extent, HEW solved this problem. These executive departments provided the federal courts the parties they needed. In the early 1960s, these Departments' commitment to desegregation was strong. They had the structure and the ability to digest information, to meet the challenges of the school systems' bureaucracies, and to present this information to the court in a form which it could process within the confines of traditional adjudication. Unlike the NAACP, the federal executive departments appeared to represent and consider the legitimate interests of all the people who would be affected by these major institutional changes.[36]

Then came 1969 and a new administration. Suddenly the courts

34. For a recent argument against the control exercised in desegregation suits by organizational plaintiffs like the NAACP, see Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) [hereinafter cited as Bell].

35. *See* Casper, *Lawyers Before the Supreme Court: Civil Liberties and Civil Rights, 1957-66*, 22 STAN. L. REV. 487 (1970).

36. *See* O. FISS, *supra* note 4, at 15; Fiss, *The Fate of An Idea Whose Time Has Come:*

could no longer rely on the executive departments. Their response was to develop an internal auxillary to assist them in doing the desired job. As would be expected, the courts turned to old familiar forms, and adapted them to the new circumstances.

D. The Lack of Remedial Standards

The real source of judicial frustration in desegregation cases was the remedial order. While traditionally there was more room for judicial action in this area, the problems presented by this new form of litigation outpaced judicial solutions, at least at first.

In the traditional adjudication paradigm, the remedy flowed directly from the violation. The desegregation cases, unfortunately, were not so easily solved. In many of the cases immediately following *Brown v. Board of Education*,[37] the court simply invoked *Brown* and enjoined the school districts from continued discriminatory practices. However, the recalcitrance of the school districts, the social intransigency of discrimination, and the bureaucratic nature of the defendant organizations made for easy avoidance of even token desegregation.[38]

The nature of the defendant and the offense simply did not lend themselves to the remedial formulations of the court. Such remedial orders, based on a conception of parties as single, rational actors who could be ordered to do something and be held accountable for a failure to obey, did not demand much activism from the court or from the plaintiff. The liability findings would logically suggest the remedy, often explicitly advocated by the plaintiff, and the judge would simply select the remedy from the limited universe of appropriate actions. Little, if any, follow-up was necessary, since the likelihood that the defendant could avoid compliance without detection was minimal. The plaintiff was either compensated or not; the defect was either repaired or not; the penalty was either paid or not. It was a relatively simple matter for the plaintiff in the paradigmatic case (1) to recognize non-compliance and (2) to demonstrate non-compliance to the court. The court could easily use its power of contempt to force the recalcitrant party to act, because the individuals who were responsible for the failure to comply could easily be identified. Little effort was needed, after the finding of liability, to conclude the matter.

Again, this approach may have reflected poorly the reality of even

Antidiscrimination Law in the Second Decade after Brown v. Board of Education, 41 U. CHI. L. REV. 742 (1974).

37. 347 U.S. at 483.

38. *See* G. ORFIELD, *supra* note 20.

the traditional lawsuit; in the school desegregation cases, the divergence between theory and reality resulted in the breakdown of the effectiveness of the traditional litigation model and forced the courts to confront the illusionary quality of this approach. In these cases, the systemic nature of the injury meant that a variety of measures could be taken, and had to be taken, in order to produce an outcome which, at best, fulfilled the very amorphous, value-laden and ill-defined standard of equal education, quality education and non-discriminatory education.[39]

The other side of this dilemma was that the defendant institutions could easily fill in the details of the amorphous goals and the means to achieve them in a manner that subverted the intent of the court. Part of the difficulty faced by the courts in dealing with these recalcitrant school districts was the lack of detailed knowledge and resources to counter effectively the defendants' claims that, in order to preserve all the other important goals and functions of the school systems, desegregation at a snail's pace was the only proper remedial approach.

The courts moved towards more explicit and detailed orders as it became apparent that the school systems could easily avoid or subvert less complete decrees. The steady progression of intervention continues to this day, as the more complex causes of segregation in the North demand more complex solutions. The detail has grown from a simple order to desegregate, to a specified form of plan, to a specified plan, to a plan that includes magnet schools, tracking, transportation, police services and the like.[40]

As the courts' remedial orders have become more detailed and all-encompassing, so has the detail of information needed to accurately evaluate the situation. Defendants now often include state and local agencies as well as school systems, so that the courts can get information from those agencies and coordinate their actions to assure desegregation.[41] Extensive orders for documentation and for reports on

39. *See* O. FISS, *supra* note 4, at 7-37.

40. *See* notes 9 & 20 *supra*. The Cleveland case, *Reed v. Rhodes*, is a prime example of how far the courts have come in this area. After the finding of discrimination in August 1976, the Court became deeply involved in a detailed review of the school system's financial management, its purchasing decisions, the lunch program, the types of buses available and the possible uses of public transportation, and other matters which at one time seemed ancillary to desegregation litigation. *See* text accompanying note 18 *supra*.

41. In Hart v. Community School Bd., 383 F. Supp. 699, (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975), the defendants included state and local housing officials, the Police Commissioner, the Commissioner of Recreation, and the Metropolitan Transit Authority. In United States v. Board of School Comm'rs, 332 F. Supp. 655 (S.D. Ind. 1971), *remanded*, 466 F.2d 573 (7th Cir. 1972), *on remand*, 368 F. Supp. 1191 (S.D. Ind. 1973), *aff'd*, 474 F.2d

various programs and operations are also issued to the defendants. Some of these orders are so detailed as to direct the defendants to include specific information in their charts.[42] In addition, the remedial portion of the trial can now last for years—often longer than the liability stage.[43] This reflects not only the complexity of the process of formation of the remedial decree, but also the increasing recognition by the courts that the flexibility of systemic reform requires continued scrutiny throughout the implementation of the remedy. The courts must both oversee compliance to avoid bureaucratic subversion, and allow for reformulation of their own demands when faced with insurmountable problems or conflicts of goals and values.

No single judge, however, could be expected to have the resources, inclination or the time to pursue this sort of detailed and extensive analysis. Nor would he be in a position to conduct so thorough an investigation, bound as he would be by the rules and procedures of the formal adversarial setting. The reliance, therefore, which the judge has placed in the parties to help analyze and structure the remedial decree raised the same problems of capacity and legitimacy which arose in the determination of liability.[44] The necessary breadth of the remedial orders magnified these problems, as the range of interests touched by public institutions and public policy considerations increased. The courts were cut adrift. The systemic nature of the violation made the liability stage complex; it made evaluation of performance, formulation of the decree and evaluation of implementation rootless and amorphous. Judges were being drawn into policy-formation roles where none of the traditional judicial standards of precedent, or other criteria for evaluating choices, were available as measures of success.

Both the Department of Justice and HEW also helped to fill this void. Because the role taken by the judge could be more active than in the liability stage, there emerged a coordinated system for molding proper remedial decrees. The Department of Justice and HEW pro-

81 (7th Cir. 1973), *cert. denied*, 413 U.S. 920 (1973), the district court joined to the suit interested governmental bodies from the towns and counties surrounding Indianapolis, the state attorney general, and the Metropolitan Development Commission of Marion County. 332 F. Supp. at 678-80.

42. *See* note 18 *supra*.

43. In *Reed v. Rhodes*, for instance, the complaint was filed on December 12, 1973, the trial began November 24, 1975, a decision was handed down on August 8, 1976, and the major component of the desegregation plan, busing, did not begin until the opening of the Cleveland schools in the fall of 1979. The other cases cited at notes 9 and 20 *supra* also involved long periods of remedial formulation and implementation, most of which continue up to the present.

44. *See* text accompanying notes 29-31 *supra*.

vided not only the concrete standard for the courts but also the kind of investigatory and analytical resources needed to evaluate and revise the standards of enforcement.[45] The withdrawal of the executive branch from an active role in desegregation litigation after 1969 left the courts again facing these problems with the development and implementation of remedial orders. The increasing complexity and scope of the northern school desegregation cases, moreover, demanded even greater policy administration by the courts in the formulation and enforcement of the decrees.

IV. The Role of the Special Master—A Conceptual Explanation

The special master is used by the courts to solve the problems created by the gap between the old adjudicatory model and the realities of the school desegregation cases. The special master functions as a fusion of the traditional roles of party-plaintiff and judge in response to the demands of this new type of litigation. This development enables the special master to assume much the same role as that played by the Department of Justice in earlier desegregation cases. In fact, the emergence of the Department of Justice as a plaintiff in the 1960s foreshadowed the structural design into which the special master would step. The Department utilized the resources of an administrative organization to gather and evaluate information, as well as providing the elements of advocacy and activism vital to the traditional plaintiff. Also integral to the role of the Department of Justice was its perceived independence as representative of the national, rather than representative of any particular, interest; this is the trait traditionally attributed to the judge, as the impartial arbitrator of the many interests to be reconciled in a suit.

The relationship between the role played by the Department and the traditional roles of plaintiff and judge remained more shadowy and less explicit than its later counterpart with the special master. To begin with, the relative explicitness of the violations in the early, southern state cases left little room to question the Justice Department's role in the liability stage. Certainly the emphasis in the liability segment of the trial was on the single-mindedness of the party in ferreting out information and obtaining a conviction. Perhaps it was this early emphasis on the advocacy elements of its role which led to the Department's entrance into the litigation in the form of party-plaintiff rather

45. *See* O. Fiss, *supra* note 4, at 22–23; Fiss, *supra* note 36.

than in a more formally neutral guise, such as an aid to the court or as an expert assistant to the litigants.

Nevertheless, it was the courts' perception of the Department's lawyers as more impartial than the other plaintiffs, as more removed and rational, that led to the courts' great deference to the Department. In fact, the Department of Justice often usurped the position of the actual plaintiff—to say nothing of the position of the defendant. As a result, the adversarial structure often seemed to collapse into a working partnership between the courts and the Department.[46] As a defense to *de jure* segregation became impossible, the focus of assistance given by the Department of Justice, and looked for by the courts, shifted to the remedial arena. The courts, however, felt less constrained by their traditional role in this area, and so the coordinated action of the courts and the Department became even more explicit. Indeed, the federal judiciary appeared to be abandoning its constitutional role as a check on the executive branch of government, while it appeared to assume the role of coordinator of federal desegregation policy.[47]

Neither plaintiff nor defendant, however, was in a position to complain. The defendants had angered the courts by using legal tactics to delay integration. The plaintiffs, while perhaps on occasion disgruntled, often realized that they were well served by the resources and the respectability that the Department of Justice brought to the case. Moreover, just as the judicial elements of the Department's role resulted in the courts showing it great deference, its activism in desegregation assured the courts that the information they received from the Department and the structure of the advice the Department gave the courts in both the liability and remedial stages would be designed to counteract the intransigence of the school districts and thereby promote the ultimate goal of the litigation.

In the late 1960s, when it became apparent that the Department would no longer fulfill that role nor bring its resources to bear, the courts looked elsewhere to find an assistant who would serve a similar function.[48] The assumption of this function by the special master for the courts, did not, of course, result in an exact replication of the role played by the Department of Justice. A number of factors contributed to differences in their roles. One was the liability-remedy structure of the judicial considerations. Elements of this structure led to the use of special masters in the latter, but not the former, stage of litigation.

46. *See* note 36 *supra.*

47. *See* note 20 and accompanying text *supra.*

48. *See* note 21 and accompanying text *supra.*

There were a number of reasons why the liability stage could more reliably be left in the hands of the organizational plaintiff, without much concern for the limited breadth of representation. First, the elements of proof in the liability stage of the desegregation suit were more clearly recognized and delineated by 1969, even in the northern *de facto* segregation cases, than were the elements of proof appropriate to the remedial decree. Second, the many interests to be considered in the reform of public institutions did not need to be considered in the liability stage because the existence of a constitutional violation touching on only one distinct segment of the community is the essence of liability under the Fourteenth Amendment. Finally, the courts themselves were more comfortable with an activist stance in the remedial, rather than the liability, stage of the suit. Once they began to rely on a judicial auxiliary molded and controlled by the court, rather than on a separate, autonomous, albeit court-appointed auxiliary, the legitimacy of using such a person in the liability stage became more questionable. The courts had to maintain their judicial legitimacy by remaining neutral when passing upon the ultimate question of guilt or innocence.[49] After a determination of liability, however, direct participation by the court in the proceedings, through a court-appointed person, seemed more easily justified.

The nature of the defendants also encouraged the use of the special master solely in the remedial stage of the litigation. While the difficulty of proving the liability of governmental institutions for segregation grew with the shift in emphasis to northern school districts, the court could still rely on the myth that the defendant acted as a rational individual to draw inferences from various "acts"[50] of the school bureaucracy—such as building decisions and transfer policies.[51] In dealing with remedies for bureaucratic discrimination, however, the

49. The courts have eased the burdens of the plaintiffs by allowing liberal discovery, by doing much of their own analysis and by drawing their own inferences from the data presented at trial. An examination of the cases cited at note 9 *supra* and the district court opinion in United States v. Board of School Comm'rs, 368 F. Supp. 1191 (S.D. Ind. 1973), demonstrates the lengths to which district courts believe they must go in such cases in laying out the factual predicates and resultant inferences which support the finding of liability. Maps, statistical analysis and lengthy quotations from the trial record are not unusual.

50. *See* note 32 *supra*.

51. In *Reed v. Rhodes, supra* note 9, the first district court opinion in the Indianapolis case, *supra* note 41, and *Morgan v. Kerrigan, supra* note 9, the courts all relied heavily on such inferences of "rationality". The Supreme Court, as indicated in the cases cited at note 30 *supra*, has dealt in a more problematic manner with the issue of drawing inferences based on a model of organizations acting like rational individuals. *See also* Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317 (1976); G. ALLISON, THE ESSENCE OF DECISION (1971).

courts could not ignore the reality of the complex process by which decisions were made and implemented. Nor could they ignore the complex way by which other political policy processes affected, and were affected by, the school institutions. The remedial stage, therefore, demanded not only a more searching analysis but also consideration of the many idiosyncrasies of each particular situation, including the inter-relationships and intra-relationships of the bureaucracies.

The conceptual situation was identified and its solution suggested in a Columbia Law Review article published at the time that the courts first were introducing the new actor:

> The peculiar nature of relief in civil rights cases suggests that they are not the ordinary kind of case. Suits against discriminatory practices arguably bear a closer resemblance to actions in rem than to actions in personam. What is really being determined is the interests of all the world in the alleged discriminatory practice. The decree should be calculated to produce a plan which will attempt to reconcile the diverse interests in the subject matter of the suit. The practice of retaining jurisdiction to oversee the implementation of the plan recognizes that the court's jurisdiction is as much over the practice as the people. Similarly, the court should be willing to make liberal use of guardians to represent absent interests (*cf.* Hatch v. Riggs, 361 F.2d 559 (D.C. Cir. 1966)) and special masters to identify the various competing interests. These devices will often be essential to the exercise of jurisdiction over the challenged practice.[52]

In some ways the special master is more ideally suited for the tasks of school desegregation cases in the 1970s than is the Department of Justice. As an individual brought into the litigation on an ad hoc basis, the master is not as resourceful as an institution like the Department of Justice. The master has neither the cumulative experience and knowledge of a continuing bureaucracy nor the track record of effectiveness to help establish his legitimacy. Nevertheless, the unusual remedial decrees in the desegregation cases of the 1970s are best fashioned by an individual who is not wedded to previously advocated positions or to prior remedial solutions. The master is less susceptible to a continuing organization's tendency to categorize and treat uniformly all similar situations; he is therefore more likely to look for the subtle and often crucial differences in individual situations. Certainly the breadth and fine tuning of the northern cases demonstrate the necessity of that ad hoc flexibility.

The individual nature of the special master may be a decided advantage over the Department of Justice in other ways as well. The

52. Note, *supra* note 28, at 910-11 n.106.

courts certainly are more comfortable with the synthesis and presentation by an individual of information upon which the courts must pass judgment. For not only is the individual closer to the traditional adjudicatory model of a party, but the use of the individual special master also avoids the problem of the bureaucratic voice of the Department of Justice, speaking to the courts—part of the very problem which the courts are trying to overcome in the first instance in these cases. In a sense this is simply explicit recognition of one of the failings of the traditional model of adjudication, because one can argue that the individual internalizes the same processes of compromise of values, filtration of information to fit pre-established beliefs, standard operating procedures, projection, and other malaises which we explicitly identify in the process by which an organization "speaks." The courts are, nevertheless, comfortable with the internalization of these problems in the individual, perhaps because adjudication would otherwise be impossible. But the more explicit manifestations of these distortions in the bureaucratic "voice" may seem unnecessary and avoidable to the courts. The ad hoc, individual master avoids this problem.[53]

The master provides not only the advocacy normally associated with parties but also the plaintiff's single-minded immersion into the issues of the case. The special master does not suffer from any of the traditional temporal and procedural constraints of the judge. The special master can survey, interview, investigate, hold hearings, examine records, and more, in order to understand all aspects and elements of the bureaucratic structure which produced and reinforced the discriminatory result. He can gather all the threads, tie them together, and then present them in a coherent manner to the court. Like a party, the master is not aloof and disinterested, but concerned and knowledgeable. The courts have not appointed former judges, but lawyers who are experts in desegregation and community planning. These masters are, like a party and unlike a judge, free to reach out into the community

53. The use of an internal mechanism of the judicial branch eliminates the explicit collapse of the separation of the judicial and executive branches, an element of the constitutional structure of government which has long been considered fundamental. This, again, may seem to be subterfuge, in that the judicial assumption of executive functions occurs implicitly, rather than the explicit collapse of functions apparent in the earlier use of the Department of Justice. However, such an analysis confuses two different elements of judicial and executive separation: 1) the judicial usurpation of executive policy formulation functions; and 2) the co-ordination of judicial and executive power to bring to bear pressure on a commonly conceived evil. Whatever the validity of the first criticism which would apply to the use of either actor, at least the use of the special master eliminates the applicability of the second criticism, one which I would contend presents a more serious threat to the rights of both individuals and the public-at-large.

for opinion, call upon other experts for analysis and expand the agenda of considerations.[54]

In addition to providing the advocacy of a plaintiff, the special master can buttress that advocacy with force unavailable to a plaintiff. The special master can use the coercive power of the court to collect data and generate effective responses to his investigations. Although the parties have had available for a long time the coercive power of the courts to aid in the development of information, in the form of discovery,[55] the masters have been able to use that power much more widely, informally and flexibly. The courts have almost always endorsed such activity of the special masters, no matter how widely the masters have ranged or how intrusive they might have appeared. For the masters are more than parties; they are perceived by all the participants in the litigation as having the power of the court, at least in their investigatory function.

Perhaps more importantly to the courts, the special master has the broader perspective attributed to the judge in traditional adjudication. The master, while acting as an advocate of desegregation, does not exclusively represent the interests of either the nominal plaintiff or the *de facto* organizational plaintiff. Because of the overriding public interests he must consider in fashioning a remedy, the special master, like the judge, is one step removed from the narrow self-interest which is the traditional stance of the party-plaintiff.

The master does see his primary constituency as the class of plaintiffs. This much of the traditional adjudicatory model is preserved, because the threshold responsibility of the special master is to remedy the violation found in the liability stage. The master, in other words, is working under at least one clear mandate, dictated by the process which invests him with his functions and power: that of formulating effective relief.[56]

While the court can accept the representations of the plaintiff relating to the discriminatory injury, the master cannot passively accept the plaintiff's advocacy of a remedial solution as representative of the desires of the class of people he or she represents in the liability stage. If the court felt confident in that approach, there would be no need for a special master, or at best, he would play a minor clerical role in the litigation. The breadth of available remedies, however, makes it clear that different approaches would affect even members of the plaintiff's

54. *See, e.g.*, notes 9, 14, 15 & 18 *supra.*

55. *See* FED. R. CIV. P. 26-37.

56. *See* note 9 *supra.*

class differently, let alone upon the broader class of persons directly or indirectly affected by any changes in the structure of the school system and related government services.[57]

The special master, therefore, combines the flexibility and advocacy of a party-plaintiff with the independence and coercive power of the court in order to bring the judicial system closer to representing these varied interests in its deliberations, as is ultimately required by the traditional notion of the judicial function. This conceptual description of the special master helps to illuminate the relationship of the judge to the master. The courts have helped fuse the roles of judge and party in the master by choosing experts and advocates, allowing them flexibility and backing them up with the courts' coercive power. The courts, however, have not in all instances rubber-stamped the recommendations of the special masters. Recognizing the special masters' court-like detachment and independence, the courts have shown great deference to their work. But, recognizing the masters' party-like attributes, the courts have always allowed the other parties to submit their own recommendations and to critique those submitted by the special master. Thus the courts have exercised and preserved their ultimate discretion to pass upon the master's report in its entirety.[58]

In an important sense, this preservation of discretion by the courts is crucial to the success of the special master. It enables a court to combine elements of party and judge without compromising its own position as ultimate arbiter. It is central to our notion of due process that the person rendering final judgment not have an interest in the matter before him. Only then are we confident that he will bring to bear only his rationality and sense of justice to render a judgment, unpolluted by self-interest or emotional commitment. While this element of traditional adjudication is probably the one most subject to attack as mythical, we do attempt to eliminate the cruder forms of self-interest from those who sit as judges, at least insofar as we can without paralyzing the judicial institutions. For the court, therefore, to move towards assuming the attributes of a party, even in the remedial stage, would be to impair the legitimacy of its passing ultimate judgment on the remedial plan.

There is seemingly great tension of constitutional dimensions lurking not far beneath the surface here. If the courts, by establishing the master as a fusion of judge and party, are responding to an inadequacy of the traditional paradigm which separated the functions of the two

57. *See* note 34 *supra*.

58. *See* text accompanying notes 15-18 *supra*.

actors, is not this very reformation an admission that the judge is inadequately positioned to pass judgment upon the results? This is basically a reformulation of the substantive criticism of the new judicial activism, which points to formal innovations as evidence of the illegitimacy of the enterprise.[59] This tension, however, dissolves upon close examination of the issue. The special master combines elements of advocacy and independence that enable him to generate information and analysis such that he may avoid the pitfalls faced by the nominal and *de facto* plaintiffs in these cases. This very movement away from a judicial attitude, however, means that the dangers of distortion of perspective which advocacy can entail may creep into the work of the special master.[60] The judge, on the other hand, preserves his impartiality, which, with the special master as an auxiliary, he is better able to exercise. The judge can now exercise his judgment in a structured universe of information more closely paralleling the input of information in traditional adjudication.

In addition, the lack of finality of the special master's report palliates the judge-like qualities of his work and power, and thereby allows the special master more leeway to exercise his party-like investigatory and analytical functions. In these circumstances, the special master will feel less obliged, and the parties will feel less threatened by his failure to preserve all the trappings of impartiality—all concerned know that the parties will get another crack at the still-impartial final arbiter.

Just as the solution to the problems in the liability stage did not initially solve the problems presented in the remedial formulation stage (they may, in fact, have been responsible in some ways for increasing those problems[61]) the solutions of the remedial formulation stage did not leave implementation simple and problem-free. The same historical and analytical factors which caused the dilemmas posed by the finding of liability and the formation of a remedy—the inadequacy of the party-plaintiffs, the nature of the bureaucratic violation, the lack of standards for evaluating success—left the courts with a new problem in implementation. The inadequacy of the old procedures and actors in the liability and remedial formulation stages also plagued the implementation stage. The complexity of the bureaucratic operation made monitoring by outside parties difficult. The traditional withdrawal of the courts from the problem after the issuance of the remedial order

59. *See* text accompanying note 7 *supra.*

60. *See* Berger, *supra* note 14.

61. *See* text accompanying notes 34-35 *supra.*

soon proved impossible, as southern, and later northern, school districts continued to place obstacles in the way of effective implementation. On the other hand, recognition of the many competing considerations and interests in these public institutions and the diffused nature of action and inaction made the blunt instrument of contempt of court inappropriate and probably ineffective. In addition, there was a recognition by the courts that the remedial order, with its complexity and balancing of competing considerations, needed managerial fine-tuning, with continued appropriate readjustments, without penalizing the bureaucrats. The courts had to differentiate, of course, between the impossibility of implementation, which would call for policy adjustment, and bad faith obstruction. This was a task not easily done by a judge with other pressing matters to consider.

It is not surprising, therefore, to see elements of this same fusion of judicial and party functions in the newest personnel of the federal courts in desegregation cases, the court officer placed into the school bureaucracy to oversee its reform.[62]

The considerations behind, and therefore the conceptual structure of this new actor vary from the earlier stages of the litigation. Considerations of judicial restraint are all but gone by the time the remedial stage is reached; the court's power to enforce injunctions is, in fact, relatively unencumbered by procedural protections.[63] The court, therefore, does not appoint a bureaucrat because the judge's personal oversight would threaten the court's legitimacy, but rather because it is impossible, due to time and functional restraints, for the court itself to generate effectively the necessary information and feedback.

The two central elements of advocacy and independence remain fused in the new court auxiliary. He gets his sense of mission, to fulfill the mandate of the remedial order, from the court, just as the special master gets his mandate from the finding of liability. This implementation bureaucrat, like the special master, is free from the constraints of the court and is thus able to reach into the bureaucratic process to develop information and to reform the institution. Like the special master, this new court auxiliary sees his responsibility as being to the broader interests of all the affected parties, not just the plaintiffs. As with the special master, the court effectively preserves its own impartiality and discretion by delegating the responsibility for direct supervision of the remedy, thereby protecting the court from co-option by the

62. *See* text accompanying note 19 *supra*.

63. *See, e.g.*, Walker v. City of Birmingham, 388 U.S. 307 (1967) (concerning the irrelevancy of constitutional defenses in the face of citations for contempt of court).

bureaucracy, the inevitable risk of using the new court appointed bureaucrat.

It remains to be seen how effective this new actor will be.[64] The courts have certainly followed the lessons of the past. By creating an auxiliary court official who may be able to penetrate the problems presented by the bureaucratic process—and who will contribute the advocacy skills, investigative desires and flexibility of the traditional party-plaintiff as well as the independence and power of the judiciary—the courts have forged a new and effective method of dealing with the problems of implementation while, at the same time, protecting the essential features of traditional litigation.

V. Conclusion—What of Legitimacy?

The question of legitimacy[65] arises with any structural change in the institutions by which societies govern themselves. In our society, such questions are formulated in terms of the constitutional validity of the actions of the institution, because our heritage suggests that the Constitution is to serve as the mediating device between our value system and our legal and governmental institutions, particularly on the federal level but increasingly on the state and local levels as well. The legitimacy question is seldom asked, however, of institutions that do not change, even as the circumstances in which they operate, and from which they derive their legitimacy, evolve. Much of the conflict between our value system and our functioning institutions is accepted simply because the institutions are so well established in our society. They derive their continued legitimacy from their historical legitimacy,

64. As indicated at note 19 *supra*, the record of the deputy superintendent in charge of desegregation has been a mixed one. One deputy superintendent has been forced to resign, but it remains true that the position has served to facilitate the court's successful implementation of the remedial plan. The dualism of the deputy superintendent's role is evident, moreover, in a number of incidents which have arisen since the establishment of the position. In April of 1978, for instance, Judge Battisti ordered that the deputy superintendent, Dr. Leftwich, be given control of the business, computer, research and development, and community relations departments of the school system's administration. He also ordered that the School Board hire seven people chosen by Dr. Leftwich to fill top administrative posts. N.Y. Times, Apr. 23, 1978, § 1, at 22, col. 6. In March, 1979, on the other hand, when the NAACP asked that the School Board be found in contempt of court for establishing all Black classes for 300 junior high school students who were being bused into previously all white schools, it was the deputy superintendent in charge of desegregation, Dr. Margaret Fleming, who responded to the charge by stating that five of seven such classes had already been dismantled and the other two were in the process of being eliminated. *Id.*, Mar. 28, 1979, § A, at 18, col. 6.

65. For a similar evaluation in a related area of remedial innovation, see Harris, *The Title VII Administrator: A Case Study in Judicial Flexibility*, 60 CORNELL L. REV. 53 (1974).

often until some traumatic event overwhelms this inertia. On the other hand, it is perhaps for this reason that it is particularly appropriate to examine questions of legitimacy in times of flux because, after the institutional changes have become part of the framework of society, we tend to accept them without further question. It is nevertheless important to keep in mind that the failure of institutions to change in order to preserve more fundamental values in the face of changing circumstances, should raise at least as many questions of legitimacy as the attempt to respond by institutions.

The question of legitimacy particularly pervades a consideration of the special master because of the obvious relationship of public-law litigation, and its effects on the forms of adjudication, to one of our fundamental beliefs about the structure of constitutional government: the separation of powers. That phrase is not used here in its narrow context,[66] but rather as the broader and more fundamental notion that certain actions lie outside the competency of the courts and lie within the competency of the legislative and administrative branches of government. These questions of legitimacy also arise from a belief that, under our constitutional arrangements, it is the purview and the specialty of elected representatives, not judges, to do the kind of interest-balancing and policy fine-tuning which the courts find themselves doing in these school desegregation cases. This issue lies at the heart of all discussion of the constitutional legitimacy of judicial reformation of public institutions. The suggestion is that, if the courts find themselves drawn into this kind of policy-making role, they will inevitably, in the name of righting one wrong, create an even greater harm by subverting the fundamental division of responsibility that underlies our constitutional structure.

I would argue that the courts are steering a fairly effective course, given the basically ad hoc method by which this sort of judicial reform takes place. Had the courts slavishly clung to old forms without considering the underlying structure and rationale of those forms, they would have faced the danger of complete ineffectiveness. In one sense, they have simply been forced, in a rather dramatic fashion, to face the myth of what Abraham Chayes calls the "dramatic unities" of traditional litigation.[67] In another sense, however, these cases have chal-

66. The constitutional problem has been alluded to. *See* note 53. The use of the Department of Justice seems to come closer to crossing this constitutional barrier than does the use of judicial devices such as special masters.

67. Address by Abraham Chayes at the Yale Law School Legal Theory Workshop (Oct. 18, 1978).

lenged the courts to fulfill their fundamental function—the redress of actions, wrought by individuals or groups, which run counter to law or custom. For the courts to have, in effect, thrown up their hands in these cases by relying on the traditional, independent plaintiff and the traditions of the old ajudicatory structure, would have been to insure a *de facto* bar to relief. That would have been an even more fundamental blow to the court's legitimacy than was the change of forms. The seemingly mythical nature of the traditional model of adjudication supports this analysis; the courts have often ignored formal barriers to expedite performance of their more fundamental, one could even say constitutional, task—to do justice under law. To allow the forms of the litigation paradigm in this instance to bar the administration of justice would be to allow the tail to wag the dog.

Once the courts recognized the fundamental defects in the traditional forms and began to change those forms—easing standing considerations, class actions and discovery rules, for example—the danger loomed that the courts would lose the impartiality, independence and narrow focus on redress of grievances under law which are the underpinnings of judicial legitimacy. The courts developed the special masters precisely to avoid the dangers inherent in involving the courts in the reform of governmental institutions. In order for the courts to retain jurisdiction in these cases and remain effective and legitimate, they had to develop an auxiliary in the form of the special master to function in the zone between judge and party.

Questions of legitimacy can only be answered by examining the existing sources of legitimacy and by considering how those sources are threatened or enhanced by innovation. Examining the Constitution in a search for legitimacy in our system, however, only brings one back to the fundamental elements which justify the exercise of judicial power in a republican, constitutional structure, preeminently principles of adjudicatory competency and efficacy. These sources of legitimacy for the courts are clearly enhanced by the use of special masters because of its result—the effective achievement of justice for the injured parties. One cannot doubt that a continued failure of the courts to render justice to individuals and groups who are harmed by acts contrary to the substantive commands of the Constitution would subvert the fundamental roots of the courts' legitimacy in that constitutional scheme. All other principles we point to as sources of legitimacy—independence, impartiality, rule of law and others—really only function as the means of serving and preserving that ultimate end.

Faced with this problem, the courts responded with a system

which effectively protected the values underlying their legitimacy, while also maintaining most of the protections of the liability stage against excessive litigation and prejudiced verdicts present in the traditional adjudicatory structure. While the use of the Department of Justice seemingly collapsed this structure in the 1960s, the clear prohibition against *de jure* segregation required the use of the Department primarily in the formulation of the remedial decree. It is interesting, moreover, that the courts have not substantially stepped into the liability stage of these suits subsequently, even as the difficulties of proving liability have increased. The reforms that have occurred in the liability stage have centered around the entrance of the organizational plaintiffs; little has been lost by such an approach and much gained in effectiveness. Most important, at this sensitive stage of the litigation, where the coercive power of the courts to force change in the status quo of society is triggered, the courts have preserved the traditional paradigm, and thus the legitimacy of the system, by leaving the parties in control of the litigation.[68]

Once the threshold of liability has been passed, however, some tampering with the triadic structure became more necessary and less objectionable. The central elements of the traditional legal paradigm were aimed at the avoidance of tyrannical coercion. Once there has been a finding of liability in ajudication characterized by party independence and judicial restraint, and the courts' coercive power has been triggered to correct the wrong, the question then becomes the proper use of that power in the choice and implementation of a remedy. As the earlier discussion indicated, there is no more appealing or more equitable remedy available than injunctions designed to reform the processes of bureaucratic decision-making within the defendant institutions.[69]

The courts, then, must employ decrees that are clearly fraught with dangers. The role of the special master, however, is designed to mitigate those dangers, while insuring effectiveness. The special masters allow the courts to avoid being co-opted by having to take direct roles in remedial formulation, while, at the same time, giving the courts the independent voice needed to avoid reliance on bureaucrats who have a stake in the status quo. The special master brings into the litigation the consideration of the many affected interests which must be considered to assure fairness without abandoning the focus on the remedy for a

68. For a negative view of the control exercised by the parties in school desegregation cases, see Bell, *supra* note 34.

69. *See* notes 28-32 and accompanying text *supra*.

specific wrong. The special masters, in other words, by fusing aspects of judge and advocate, serve two functions simultaneously: (1) the liberation from the limitations imposed upon school desegregation cases by the traditional litigation paradigm; and (2) the preservation of the traditional values of independence and dispassionate rationality which bolster the courts' legitimacy in the constitutional division of powers as surely as do the technical elements of the traditional paradigm. Many people attack the special masters because they see only the collapse of traditional litigation; they fail to perceive the legitimacy-protecting function which the special masters also serve.

The new implementation actor appears to be following in these same footsteps. Again the court is reaching into the bureaucratic framework for accurate feedback. The courts, recognizing the unique qualities of school desegregation litigation, are not prepared to use the blunt instrument of contempt to force-feed policy changes. They are more concerned, and properly so, with continuing to protect all of the interests at stake and with protecting their own ability to respond independently to changing circumstances and knowledge.

By tapping directly into the bureaucracy, the court will be able to learn more effectively and more fairly where challenged institutional decisions begin. They will have an understanding of the subtleties that shape the when, how, and why of bureaucratic decision-making and activity. This approach will also enable the courts to tune more finely the remedial order, and to tinker here and there with the details of the remedy until the structural injunction is truly fair and effective. Finally, this approach will allow the courts to understand more fully the limits on reform through injunction imposed by the nature of a bureaucracy's structure. These factors are difficult to translate into the confines of the litigation setting and it is certainly next to impossible for the typical plaintiff or defendant to do so. The use of a new form of the special master to perform this function enhances the courts' ability to render fair, impartial and rational decisions, albeit in a continuing, and not a discretely isolated, single—and, I would say, artificially structured—decision.

The danger still remains that the courts will be co-opted and become policy makers with less legitimacy than the elected representatives. The use of the special master, as it has developed over the last fifteen years, contains no guarantees to the contrary. Its efficacy and its preservation of legitimacy lies in the delicate balance of the relationship between the court and special master on the one hand, and the special master and the affected interests on the other. One must remain

concerned by the use of such an evolutionary structure in a system normally guided by precedent. For that reason, a public discussion of the role of these masters, their relationship to the courts and the bounds beyond which they will reduce, rather than protect, the legitimacy of the courts would seem in order. No such discussion has yet appeared in the literature, and the danger of ad hoc evolution remains clear. Movement of the courts towards more involvement with the bureaucracy, towards direct meddling in public institutions, may erode their sources of legitimacy. Legitimacy will only be preserved as long as court personnel, like the special masters, are used as partial buffers against the dangers of judges-as-bureaucrats, and are not used simply to spur the courts' co-option into that role.

On the other side of the fence, a failure of the special masters to consider and aggressively protect the wide range of interests affected by this type of litigation, or to maintain the court mandate to provide for effective desegregation, or to generate the kind of information flow necessary for the courts to render accurate and fair final judgments, would undermine the overall legitimacy of this new adjudicatory structure.

The special master, no doubt, is not the perfect answer to the demands of this type of public-law litigation.[70] There might be something to be said, for example, for the establishment by the courts of a more permanent institution as a resource for use in desegregation litigation and similar cases involving the examination and reformation of administrative organizations—something which is more of a cross between the ad hoc special master and the Department of Justice.[71]

Yet, despite its imperfections, this thread of evolutionary adaptation shows the judicial system working at its best, evolving new devices from old forms in order to preserve the fundamental values and purposes of the adjudicatory process while dealing effectively with new types of problems. The courts have molded an old device, the master, to perform a new function, that of fusing judge and party, in a type of case which the old structure was impotent to handle effectively and fairly. In making this adaptation, the courts have solved problems presented by this new litigation, by allowing for effective contributions to the courts' final adjudications, as well as protecting the interests of those who are touched by the courts' actions. The courts have not abdi-

70. There are clear indications that the usefulness of special masters may be limited in some situations. Their ineffectiveness, however, suggests a need for greater innovation in dispute resolution rather than a return to the equally inadequate traditional judicial forms. *See* Note, "*Mastering*" *Intervention in Prisons*, 88 YALE L.J. 1062 (1979).

71. *See* Note, *supra* note 10.

cated responsibility for dealing with this pressing legal issue, nor have they trampled over fundamental legal values in pursuit of a just end. They may have trampled on some myths along the way, but, in doing so, the courts seem to have enhanced fundamental values rather than undermined those values in the name of the myths. This evolution of judicial forms, therefore, does not suggest the intrusion of the courts into constitutionally forbidden activity. Rather, the evolution suggests that the courts have moved to preserve the very elements central to the constitutional notion of judicial power, but in a manner which avoids abandonment of the mandate, also embodied in the Constitution, that the people of the United States are entitled to the equal protection of the law. Civil rights litigation has contributed much new life to the American judicial system, and the use of special masters is but one example of the creative response of the courts to the challenge of this new type of litigation.[72]

72. For a contrary evaluation of the increased judicial intervention in matters which concern public policy formulation and the structure of public institutions, see D. HOROWITZ, THE COURTS AND SOCIAL POLICY 1-67, 255-98 (1977). For a thorough discussion of the various issues faced by, and alternatives open to, a court in institutional reform litigation, see Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978).