THE EFFECT OF THE SEARCH FOR EQUALITY UPON JUDICIAL INSTITUTIONS*

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Four months have passed since Paul A. Freund, a distinguished alumnus of Washington University, launched this symposium entitled "The Quest for Equality" by questing for the meaning of "The Quest." He reminded us that the great egalitarian drive of the past quarter-century is itself a national search for the meaning of equality. We define our destination even as we take the journey. Similarly, the participants in the previous programs have searched for the meaning of "equality" even as they described the successes and failures of "The Quest."

My subject is somewhat different. Rather than looking at what the courts have produced in the way of philosophy, principles, and concepts that comprise those sundry bodies of substantive law which attempt to implement the drive for equality, I consider the effect of the egalitarian thrust on the courts and the orders they enter, their role and functions, their procedures, and their relations with the executive and legislative branches.

The egalitarian thrust flowed more strongly through judicial channels than in other parts of government. Achieving equality and minimal decency in the ongoing programs of the welfare state required the courts to tell the government what to do and how to do it—an unprecedented judicial undertaking. The school desegregation decrees offer the most obvious example, but Judge Arthur Garrity, who presides over the operation of the Boston schools under a desegregation order,[1] also seeks to implement a mandate condemning Boston's Suffolk County Jail as unconstitutional.[2] Another federal judge in Boston pre-

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1. Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976); Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass.), *aff'd*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

2. *See* Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir.), *cert. denied*, 419 U.S. 977 (1974).

sides over a similar action in which state institutions for retarded and delinquent children are being reorganized and upgraded by judicial decree. Still another suit seeks to put the Boston housing authority into receivership because of inadequate service to its tenants. Similar proceedings are so common in other states that many observers perceive constitutional litigation as a major instrument for reforming state institutions.[3]

A quarter-century ago such uses of constitutional adjudication were not only unknown but virtually inconceivable. Since then, constitutional litigation has assumed radically new dimensions in procedure, uses, and remedies. The first part of this article traces the development of constitutional litigation into an instrument of institutional reform, emphasizing the significant characteristics of the new forms of procedure and remedy. The second part then raises questions concerning the ability of the courts to perform these new functions and the wisdom of the undertaking.

I. THE NEW DIMENSIONS OF CONSTITUTIONAL ADJUDICATION

The new uses of constitutional litigation flowed from the change in judicial mood during the 1950's and 1960's. The great constitutional cases of the pre-Civil War era dealt chiefly with the institutional framework of our extraordinarily complex form of government. Between the Civil War and World War II, as the aggregations of financial capital, plant, and equipment and the organization of armies of workers necessary to unlock our immense gifts of natural resources and harness the powers of science and technology spawned injustice, suffering, and abuse, the reformers and the oppressed turned to the political branches of state and federal government. The constitutional question became whether the judges would permit the political branches to impose upon the minority the social and economic measures of the welfare state. When the judges intervened, as in *Lochner v. New York*[4] and *Adkins v. Children's Hospital*,[5] they sought to preserve the past, not to inaugurate

3. The most complete collection of cases is found in *Special Project—The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978) [hereinafter cited as *Special Project*].

4. 198 U.S. 45 (1905).

5. 261 U.S. 525 (1923).

the future. Since 1937 when the judges ceased to intervene,[6] affirmative government and the welfare state have continuously expanded.

After World War II a wave of egalitarianism flowed from the rise of the peoples of Asia and Africa in their native lands and in the places to which they had been transported. The multiplication and magnification of governmental activities increased judicial sensitivity to threats to civil liberty. Humanitarianism, aided by the prevailing teaching of the psychological and social sciences, cast doubt upon the sterner aspects of the criminal law. Responding to these impulses, a majority of the United States Supreme Court under Chief Justice Warren came to feel a sense of special judicial responsibility for minorities, for the oppressed, for the open and egalitarian operation of the political system, and for a variety of other "rights" inadequately represented in the political process.

As late as 1962 Professor Alexander M. Bickel could write with substantial accuracy that, "Continuity is a chief concern of the Court, as it is the main reason for the Court's place in the hearts of its countrymen."[7] No one could say that today. Constitutional law has become a major instrument of reform. The school desegregation cases not only overturned the constitutional precedents built up over three-quarters of a century, but upset the social structure of an entire region.[8] The one-person-one-vote rule asserted that the composition of the legislatures of all but one or two of the fifty states was and always had been unconstitutional.[9] In recent years the pace of judicial change has slowed, but the decisions in the abortion cases, supported by moral themes dominant in American life for over a century, swept aside statutes in at least forty states.[10] The supposed "strict constructionists" rendered similar judicial decisions in the area of women's rights.[11]

The reforming spirit spread to the lower courts. The losers in the political process, and groups too small to have a chance to succeed in it, became more conscious of the potential of constitutional adjudication as an instrument for achieving goals not attainable with political weap-

6. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

7. A. BICKEL, THE LEAST DANGEROUS BRANCH 32 (1962).

8. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954).

9. *See* Reynolds v. Sims, 377 U.S. 533 (1964).

10. *See* Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

11. *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973).

ons. More and more litigation came to be conducted by civil rights and civil liberties organizations, by radical political associations, and later, by law offices funded to stimulate community action and provide legal services to the poor. Each successful appeal to the courts for judicial reform in lieu of the political process added to the momentum from the previous steps.

Procedural changes greatly enlarged the opportunities for use of constitutional litigation as an instrument of reform. They also revolutionized the role of the federal courts and the character of their decrees. The conventional common-law form of action was bipolar. *A*, an individual or corporation, sued *B*, another individual or corporation. The judgment either awarded money to *A* or dismissed the complaint. Constitutional questions were decided when raised by an individual person or corporation in defense of a criminal prosecution,[12] in an action to recover monetary damages for harm already done,[13] or in a suit against government officials to enjoin the imposition of immediate governmental sanctions against a specific plaintiff.[14] A judgment on constitutional grounds, except as it might require the payment of money, was always negative. The court might validate or veto as unconstitutional some action taken by another branch of government, but its role in the dispute ended once it entered its decree.

In the last twenty years the declaratory judgment and the modern class action have burst the old bonds and radically altered the role of courts in constitutional adjudication. The action for declaratory relief enables a person to challenge the constitutionality of a governmental program without awaiting specific and immediate action against him. The class action permits the combining of roughly similar claims of many individuals without even identifying more than a few members of the class. By combining the class action with a request for a declaratory judgment, any organization seeking to promote reform by constitutional litigation need find only a few individuals affected by the program who are willing to lend their names to represent all those whom an entire government program may affect, even though the latter

12. *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941); Lochner v. New York, 198 U.S. 45 (1905).

13. *See, e.g.*, Hall v. DeCuir, 95 U.S. 485 (1877); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

14. Unless these precise requirements were met, the court would dismiss the bill for want of equity. *See* Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935); Fenner v. Boykin, 271 U.S. 240 (1926).

do not know of the case or would not sympathize with the named plaintiffs even if they did.

The school desegregation cases offer the first examples of the consequences. An action by a single black child and her parents, complaining that her assignment to a school for black students denies her the equal protection of the laws in violation of the fourteenth amendment, might lead to a decree requiring her admission to another school. No such simple solution is now possible if the suit is brought as a class action on behalf of all the black schoolchildren in the city. If the judge decides to grant a remedy in a class action, he will be forced to order, and perhaps to prescribe and administer, a reorganization of the entire school system.

The change is not merely in the number of people affected. The decrees must now be affirmative. The central problem is no longer one of compensating or protecting a single plaintiff against an unconstitutional intrusion; rather, it has become one of ensuring that a vast ongoing program of public education will be conducted in a way that accords a large class of plaintiffs—all the black children in the school district—their present constitutional rights and compensates for past defaults. The court must either induce the school authorities to develop a thorough program for the integration of both pupils and teachers or prescribe the program itself.[15]

The affirmative nature of court decrees today lends a strongly legislative quality to judicial action. Affirmative decrees, as exemplified in the school desegregation cases, pertain to the future; they govern thousands, or even hundreds of thousands, of people in ways that benefit some and disappoint or injure others; they require the expenditure of vast monies. Their formulation involves multiple choices for which no legal standards are available; their potential impact will cause many interests to be made parties to litigation in which they can fight among themselves; their effectiveness depends in large measure upon the acquiescence, if not the consent, of the general public, even though the people have not had even a vicarious voice through elected representatives in making the decision.

The necessary components of any program of integrated education in a large city also commit the courts to constant executive or adminis-

15. Probably the clearest examples are the orders relating to the Boston public schools following the decision in Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass.), *aff'd*, 509 F.2d 580 (1st Cir. 1974).

trative supervision of the organization, employment practices, curriculum, and extracurricular activities of entire school systems. In Boston, for example, fear of fiscal disaster induced the city to plan the elimination of 191 teachers. The federal court examined the list, school by school, even hearing the personal pleas of individual teachers, and decided to allow 60 layoffs and disallow 131.[16]

The much-discussed class action brought in the United States District Court in Alabama on behalf of all the patients and some employees at Bryce Hospital, the State's principal mental health facility, affords a second example of the new characteristics of suits to reform state institutions on constitutional grounds. Judge Frank Johnson ruled that because the patients had been involuntarily committed, they "unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition."[17] The assertion of a constitutional right to treatment broke new ground, but many federal courts have ruled that detention of a person in a grossly overcrowded, unsanitary state institution, whether hospital or prison, where subject to brutal neglect or abuse, violates the constitutional guarantee against deprivation of liberty without due process of law.[18]

The problem lies in providing a remedy. If the claim were brought on behalf of a single inmate, the court might simply order the plaintiff's release unless the state conformed to a constitutional minimum standard of care. The mentally ill plaintiff could then choose between liberty and such treatment as the state provides. The prisoner who sued, of course, would choose liberty.

But what is the court to do when, as in the *Bryce Hospital* case, the class of plaintiffs is the entire population of the state's mental health facilities? Or, what should the court do when the suit is brought on behalf of all persons incarcerated or threatened with incarceration in a state penitentiary on the ground that the physical conditions, disciplinary rules, and methods of punishing infractions make confinement in the prison a deprivation of liberty without due process of law or a cruel and unusual punishment in contravention of the eighth amendment? May the court that sustains one of these claims simply open the doors

16. The Boston Globe, Mar. 21, 1976, at 1, col. 5.

17. Wyatt v. Stickney, 344 F. Supp. 373, 374 (M.D. Ala. 1972) (quoting Wyatt v. Strickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971)).

18. The most complete collection of these cases is *Special Project*, *supra* note 4.

to the institution? The theoretical answer is that the court may, and perhaps that is just what should be done. On the other hand, simply to open the doors to the entire class, as might be done in the case of a single plaintiff, seems intolerable as a practical matter—perhaps even more intolerable than to allow the confinement to continue under brutish conditions. The court is thus drawn into ordering the development of a detailed program for the renovation and reform of that institution.

In the *Bryce Hospital* case, for example, the court drew up an extensive plan of physical renovation, which even detailed that, "Thermostatically controlled hot water shall be provided in adequate quantities and maintained at the required temperature for patient or resident use (110° F at the fixture) and for mechanical dishwashing and laundry use (180° F at the equipment)."[19] The court also prescribed the exact numbers of medical and support personnel required in each job classification for each 250 patients. The court even directed the doctors how to proceed:

> Each patient shall have an individualized treatment plan. This plan shall be developed by appropriate Qualified Mental Health Professionals, including a psychiatrist, and implemented as soon as possible—in any event no later than five days after the patient's admission. Each individualized treatment plan shall contain:
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> a. a statement of the nature of the specific problems and specific needs of the patient;
> b. a statement of the least restrictive treatment conditions necessary to achieve the purposes of commitment;
> c. a description of intermediate and long-range treatment goals, with a projected timetable for their attainment;
> d. a statement and rationale for the plan of treatment for achieving these intermediate and long-range goals;
> e. a specification of staff responsibility and a description of proposed staff involvement with the patient in order to attain these treatment goals;
> f. criteria for release to less restrictive treatment conditions, and criteria for discharge;
> g. a notation of any therapeutic tasks and labor to be performed by the patient in accordance with Standard 18.[20]

The court was not unaware that its order effectively required the Ala-

19. 344 F. Supp. at 382.
20. *Id.* at 384.

bama legislature to meet in special session and vote large appropriations:

> In the event, though, that the legislature fails to satisfy its well-defined constitutional obligation, and the Mental Health Board, because of lack of funding or any other legally insufficient reasons, fails to implement fully the standards herein ordered, it will be necessary for the Court to take affirmative steps, including appointing a master to ensure the proper funding is realized.[21]

The Alabama case has numerous counterparts. A federal court in Texas undertook to specify the workload of each staff social worker, to require a certain level of training of prison psychologists, to provide classes in reading, mathematics, and languages for inmates, and to regulate the social environment, including "a coeducational living environment," which allowed frequent and regular contacts with members of the opposite sex.[22]

Judicial reapportionment of seats in the legislature among geographical districts presents a third example of the new affirmative decrees. In 1961 the Supreme Court was called upon in *Baker v. Carr*[23] to decide whether a justiciable question arises from an allegation that a state legislative malapportionment is so gross that it violates the fourteenth amendment. Counsel pressing the affirmation all recognized that the hardest question confronting them concerned the kind of judicial relief available. None dared to suggest on the first argument that if the legislature failed to make a constitutional apportionment, the court should assume the responsibility. Even under the one-person-one-vote rule, a statistician using a computer could produce for any state scores of apportionment plans that would conform to the principle. Ten years later no one seriously doubted the power and even the duty of a federal court to make the apportionment with all its political consequences if the state legislature failed to act.

Suits brought to reform the methods of financing public schools provide yet a fourth set of examples. Although the Supreme Court of the United States dismissed a similar action,[24] the highest courts of California[25] and New Jersey[26] have held that the traditional American prac-

21. *Id.* at 394.

22. Morales v. Truman, 383 F. Supp. 53, 100-01 (E.D. Tex. 1974).

23. 369 U.S. 186 (1962).

24. San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1 (1973).

25. *See* Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), *cert. denied*, 432 U.S. 907 (1977).

26. *See* Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973).

tice of financing public education from local property taxes in relatively small self-governing school districts is unconstitutional if the local school districts differ widely in the value of taxable property per pupil. Although the cases are fascinating because of the sweeping changes required of these states to conform to the decisions, they are even more important as examples of another characteristic of the new judicial remedies. The decrees cannot be implemented without the active cooperation of the political branches. Because the courts cannot make tax laws singlehandedly, they cannot implement reform alone.

One final example may be helpful. In Philadelphia, when a suit was brought as a class action on behalf of all citizens of Philadelphia and a smaller included class of black citizens, by some thirty-two community organizations and the Southern Christian Leadership Conference, to enjoin future, repeated violations of constitutional rights, the district court asserted legal power to supervise the functioning of the Philadelphia Police Department, but instead of exercising that authority in full, it directed the named defendants to draft, for the approval of the court, "a comprehensive program for dealing adequately with civilian complaints," to be formulated along "guidelines" suggested by the court.[27] A fourteen-page document regulating the Philadelphia Police Department was then negotiated between plaintiffs and defendants and incorporated into the final judgment. The five-to-four opinion of the United States Supreme Court reversing the decree reveals a chilly attitude toward such uses of the federal courts, but the decision can rest upon the plaintiffs' failure to prove a sufficient pattern of constitutional violations.[28]

In summary, whenever a court sustains a claim made on behalf of a large class of people that the state is conducting an indispensable affirmative program in a manner that offends the Constitution, the court seems to be drawn into prescribing a revised program for the state and even into superintending its implementation. Such ventures also seem to share five important characteristics: (1) the courts become immersed in promoting change by making new law; (2) the litigation is often multidimensional with a variety of parties and interests rather than a simple, direct confrontation; (3) the judicial remedy often must be

27. Goode v. Rizzo, 357 F. Supp. 1289, 1321 (E.D. Pa. 1973), *aff'd*, 506 F.2d 542 (3rd Cir. 1974), *rev'd*, 423 U.S. 362 (1976).

28. 423 U.S. 362 (1976).

programmatic;[29] (4) the implementation of the judicial decree extends over a long period; and (5) the opportunities for collision between the judge and the political branches multiply, yet the judge nearly always requires their cooperation and frequently depends upon legislative support, which no court can compel.

II. THE CONSEQUENCES

A. *Judicial Competency*

The first set of questions raised by the use of constitutional litigation as an instrument of institutional reform concerns the competency of the judicial branch. Have judges the knowledge and training necessary to perform the new functions? Is judicial procedure suitable or, if not, is it adaptable to the new demands?

Hardly anyone would pick any one federal judge as the individual qualified above all others to develop and administer a plan of school desegregation in a hostile city, *and* to write a program revising collectively bargained seniority rules at all plants of U.S. Steel Corporation so as to provide blacks and women with equal employment opportunities in hiring, layoffs, training opportunities, and promotions, *and* to rebuild and operate a state's mental health institution, *and* to reapportion seats in a state legislature, *and* to reform a state's prison system. The courts simply are not ideal instruments for these purposes.[30]

But the true question is not whether the court is an ideal forum. Because a plaintiff comes to court to say that the nonjudicial system has broken down and that no one else will fix it, the true shortrun question is whether the court will do the job so badly that it is better to let the breakdown continue rather than suffer judicial intervention in desperate last resort. The longrun question for the creators and shapers of institutions is whether some other ombudsman or forum of last resort,

29. To explicate this characteristic more fully, courts assume functions for which one or both of the political branches traditionally holds responsibility. The proportions of legislative and executive activity assumed by courts vary. At one end of the political range—the school desegregation and school finance cases, for example—a very large question of public policy lies at the heart of the issue on the merits. A court decision that mandates reform affects thousands, even hundreds of thousands, of people in the same manner as far-reaching legislation. At the other end of the range, the court becomes the chief executive of institutions typically operated by skilled personnel with specialized training in both management and a profession.

30. *See* D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977).

equipped with expertise and tools that no court commands, can be created to deal with such disasters.

In my view, the judges are not so incompetent nor are the courts so ill-suited that a judicial remedy would be worse than inaction. Sometimes the claim of unconstitutionality may require a judge to decide a very fundamental question of policy, as in the school desegregation, reapportionment, and school finance cases. A judge may pause to sustain the claim, as the Supreme Court apparently did in the school finance cases, because of the revolutionary character of the ruling requested, its broad social impact, and the foreseeable difficulties of its implementation. These questions, however, call for no different kind of wisdom than the major constitutional questions of prior generations.

In litigation seeking to reform state institutions, the initial question usually is whether the institution is so badly mismanaged or starved for resources that the inmates are subjected to conditions shocking to the conscience. If the system has broken down, the judge will usually give those primarily responsible for its management a chance to repair it. If they fail or refuse, the judge may have to develop a new, wide-ranging program, either as one rounded plan or in phases. At this stage, rather than answer a single "yes or no" question, the court must strike balances among numerous interests upon interrelated facets of a program and make predictions concerning the future effect of measures that may differ chiefly in degree. As implementation proceeds over a period of years, the judge may have to evaluate the extent and sincerity of the defendant's compliance, the blame for shortfalls, and the need for revisions because of changing conditions. In these remedial phases of the litigation, the judge's lack of expertise in the operation of schools, hospitals, prisons, or some other specialized institution is likely to be a handicap, but by hypothesis, the experts have already failed abysmally and even the incompetent judge can hardly make matters worse. The formulation and implementation of an institutional program undoubtedly requires a court to make more direct, continuous, intimate, and informal use of expert advice than it needs in the adjudication of even a technical question of liability or damages. The challenge, therefore, is to develop a process that is both effective and fair to the litigants. A number of aids have been developed.[31]

31. For a careful and detailed study of this process, see *Special Project*, *supra* note 4. The reader should consult this study for citations to specific instances of practices and problems mentioned in the present article.

1. *Plaintiffs' Expertise*

Because many of the plaintiffs in cases seeking systemic reform are organizations with experts at their command, plaintiffs often can propose the necessary programs and provide expert monitors to check implementation by the state agency, although it would be unsuitable to rely upon them for active administration. In some cases professional associations have participated as amici curiae. In the *Bryce Hospital* case, for example, the American Psychological Association, the American Orthopsychiatric Association, the National Association for Mental Health, and similar organizations joined in presenting testimony and recommending standards of treatment for incorporation into the judicial decree.

2. *State Officials and Agencies*

The defendants, usually the state officials primarily responsible for the challenged program, do not necessarily constitute a monolithic phalanx of opposition. Their attitudes may fall at various points in the remedial spectrum ranging from resistance to reluctance to cooperation. The violations may result from fear of political reprisals or budgetary starvation. The decree on the merits, if followed by continuous judicial pressure, may break the logjam sufficiently to leave much of the problem of remedial action to the defendants, with the plaintiffs serving as monitors and critics.

State agencies other than the named defendants may acknowledge the need for reform. For several years a case seeking the elimination of overcrowding and other brutish and unsanitary conditions in Alabama's prisons has been pending in the United States District Court in Montgomery. Alabama officials resisted reform and forced confrontation. Recently, Alabama elected a new governor, who acknowledged the indefensible conditions in the state prisons. After preliminary consultation Judge Johnson took the novel, but apparently highly constructive, step of appointing the Governor as receiver with full power to manage and reform the prisons, thus superseding the obstructive Corrections Board.[32]

32. Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *appeal dismissed*, 568 F.2d 204 (5th Cir.), *cert. denied*, 438 U.S. 915 (1978).

3. *Judicial Appointments*

The courts may also use impartial experts as court officers. The most intrusive method is to appoint a receiver to manage the institution. Alternatively, the court may choose an expert to act on its behalf as master. The master does not take over operation of the institution, but he may nonetheless go out into the field to observe, cajole, and initiate measures rather than sit in the courthouse in the fashion of the traditional master who hears witnesses and then draws findings of fact and proposes conclusions of law.[33] Sometimes the master serves more as a mediator than an adjudicator, and negotiates not only the provisions of a programmatic remedial decree, but also the solutions to disputes that arise in the course of implementation.

Other courts prefer to assign these duties to an official administrator or appoint monitors to observe and resolve petty disputes over compliance. A few of the monitors, I suspect, also take on the task of helping or nudging the defendants in the process of implementation. Sometimes courts use advisory committees or implementation committees to meet the challenge of formulating and implementing an institutional program of reform.

All in all, no one should suppose that a court labors unhandicapped in its efforts to impel reform of a state institution. Nearly all accounts of such litigation make it plain that judicial intervention suffers from lack of personnel and firsthand information. The variety and flexibility of the procedures developed, however, give evidence that judicial procedure is sufficiently flexible to cope with the new demands as a last resort.

One unavoidable limitation should be emphasized. Although the class action has broadened the scope of litigation, a court's view is narrow in comparison with that of a governor or a state legislature. When a federal court orders the employment of several hundred additional nurses and technicians at a state hospital or the reconstruction of a state prison, the judge has no way to know how the order will be accomplished. The political branches may take the money from some other program to which the court might itself assign a higher priority. In New York State, for example, when a federal judge ruled that an enor-

33. For an account of the odyssey of a special master used in this capacity, see Berger, *Away From the Court House and Into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978).

mous mental health hospital fell short of constitutional standards, the State complied with the decree by transferring to the hospital all the funds appropriated for the prevention and relief of alcoholism.[34] A court cannot prevent this.

Despite the limits on a court's ability to plan and manage systemic reforms, I am inclined to think that the tools available are better than no tools at all. The question of competency is not whether a court can do everything, but whether it can do something to repair a serious failure of the normal processes of government, which severely injures individuals who cannot help themselves.

B. *Compliance and Legitimacy*

The question changes when the focus shifts from competency to legitimacy; *i.e.*, to the courts' ability to obtain compliance with programmatic decrees in litigation that seeks systemic reform of a school system, prison, or police department. The questions become, "Can a court command uncoerced consent and compliance, and can a court, when challenged, marshal sufficient moral and political support to compel obedience?" If the power to secure compliance is lacking, the question next becomes, "How will assumption of this new and broader role affect the ability of the courts to secure compliance with more traditional decrees in the older forms of constitutional litigation?"

My impression is that the use of judicial decrees to accomplish programmatic reforms severely strains, and perhaps overstrains, the enforcement power of the judiciary. The causes of my concern can be best explained in several steps.

1. *Need for Voluntary Compliance to Effectuate Affirmative Decrees*

The judiciary lacks the power of either the sword or the purse. The efficacy of a judicial decree thus depends largely upon its power to command acceptance and compliance without more than occasional resort to force and, if challenged, its power to command the support of the community simply because the decree is the law.

In the past constitutional adjudication often set the judiciary in direct

34. New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973); *see* Stone, *Overview: The Right to Treatment—Comments on the Law and Its Impact*, 132 AM. J. PSYCH. 1125 (1975).

opposition to the other branches of government in situations in which the courts lacked the physical power to enforce their decrees. Yet the branch of government with the muscle yielded to the courts because of the power of legitimacy. There is no better example than the *Steel Seizure*[35] case of 1952. In that case President Truman was confronted with a Supreme Court decision that held unconstitutional his seizure of the plants of basic steel producers to terminate a labor dispute in time of war. Within moments and without waiting for the mandate, he ordered return of the mills simply because the Court had ruled he must.

2. *Perceived Legitimacy of Affirmative Decrees*

The power to secure voluntary obedience to a court order seems to depend, at least in part, on the notion that the court itself is acting legitimately, *i.e.*, according to law.[36] When a court acts as an agent of fundamental change, as courts did act in the school finance cases, neither legal precedent nor history nor uniform practice supports the claim that it is acting according to law. When a court undertakes a part of the normal functions of the legislative or executive branch, its claim to legitimacy is far less apparent and the opportunities for friction, even confrontation, between it and the political branches increase.

3. *"Playing Chicken" with Affirmative Decrees*

It is harder—indeed, it may often be impossible—to obtain compliance with a decree that reshapes a large governmental program than with a decree that simply bars enforcement of an unconstitutional law. How can a court make a legislature appropriate funds or enact a statute? Legislative inaction is not readily assimilable to defiance; it may result from inability to agree upon the appropriate measure for accomplishing the objectives fixed by judicial decree.[37] Responsibility for

35. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

36. I use the word "legitimacy" in connection with court decisions in two senses: (1) adherence to some charter that delimits, however vaguely, the proper scope of the judicial function and its performance; and (2) the power to command compliance and acceptance, which are forms of consent. The two points closely intertwine. Judges' own interpretations of their charter—their notions of what it is legitimate for them to do—determine what they *will do*. The judgment of the rest of the legal profession, the political branches, the publicists and other public persons, and ultimately, the people on whether the judges have stayed within their charter determines what the judges *can do* over a long period, for that judgment determines what is perceived to be, and therefore is, "legitimate" in the sense that the judgment commands an uncoerced consent.

37. The reapportionment cases provide a dramatic example. *See* text following note 25

noncompliance is often hard to fix even within the executive branch. Programmatic reforms become mired in the dismal swamp of bureaucracy or weakened by inadequate appropriations.

The New Jersey school finance case affords one example, even though it had a happy ending. The New Jersey Supreme Court undertook to particularize a broad ideal of equality into a ruling that the number of dollars spent on a child's education in the public schools may not be dependent upon the value of the taxable property in each local school district.[38] The court handed down this opinion on April 3, 1973. After further argument the court gave the legislature eight months—until December 31, 1973—to comply by enacting appropriate legislation.[39] The legislature failed to act. On May 23, 1975, the court entered a decree that required executive officials to divert appropriations for state aid to education away from the legislatively prescribed purposes to achieve a degree of equalization.[40] The court intended this decree to be only a partial remedy, and retained jurisdiction. During 1975 the legislature enacted a new program that would satisfy the judicial mandate if, but only if, the plan were funded by taxation and appropriation. The legislature failed to provide either. In January 1976 the court upheld the program, if funded, and gave the legislature until April 6—a little over two months—to provide the funding.[41] The legislature again failed to act. On May 13 the court tightened the screw by issuing an injunction against any expenditure of funds on public education after June 30 unless the legislature provided equalized funding.[42] Now the court and the legislature "stood eyeball to eyeball." The legislature blinked.

In New Jersey the court had the strong support of the governor.

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supra. The choice between constitutionally adequate apportionment plans depends upon altogether different questions. How many "safe" districts shall be created for the major parties? Should the plan protect incumbents or pit them against each other? Which party will be favored? Shall an area heavily populated by a self-conscious racial or ethnic minority be made a single district, in which case it may elect one truly representative figure, or shall it be divided, in which case the minority may under some circumstances lose all power, but under other circumstances exert decisive influence in two or three districts? Should the district lines follow existing municipal and county lines? How much use should be made of multimember districts? The answers have tremendous political consequences.

38. Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973).
39. Robinson v. Cahill, 63 N.J. 196, 306 A.2d 65 (1973).
40. Robinson v. Cahill, 67 N.J. 333, 339 A.2d 193 (1975).
41. Robinson v. Cahill, 69 N.J. 449, 355 A.2d 129 (1976).
42. Robinson v. Cahill, 70 N.J. 155, 358 A.2d 457, *cert. denied*, 426 U.S. 931 (1976).

Without it, I suspect, the necessary legislation would not have been adopted. What would have happened? Perhaps the schools would have been closed for the summer; the timing of the decree shows that judges do not lack for political skill. Could the judges have kept the schools closed into the fall and winter? I wonder. If not, the judicial ruling would stand *brutum fulmen*—a revelation with the same potential as the observation that the emperor wore no clothes.

The difficulties and dangers of judicial efforts to reform state institutions are further illustrated by the litigation over Boston's ancient, overcrowded, and ramshackle Charles Street jail. In June 1973 the federal district court ruled unconstitutional the use of the Charles Street jail as a correctional institution and place of detention pending trial.[43] The resulting decree prescribed detailed rules for the interim conduct of the facility,[44] prohibited confining two inmates awaiting trial in one cell, and forbade use of the jail to detain persons awaiting trial after June 30, 1976.[45] On January 4, 1975, the court set a hearing date to consider rival plans for a new facility. On October 20, 1975, the court approved and ordered the defendants to carry out a specific plan to construct a new Deer Island facility. It also postponed from June 30, 1976, to July 1, 1977, the ban against use of the Charles Street jail, and further postponed the ban on double occupancy of cells until new facilities became available.[46] More than two years now had passed from the original adjudication.

Late in 1975 Mayor White submitted to the Boston City Council a resolution to appropriate $8.5 million to carry out the court's order. The Council refused and voted funds for a study of alternate sites. Months later the court ordered the members of the City Council to show cause why they should not be held in contempt of court for failing to vote the appropriation. After two more months the court backed off and withdrew its order for the construction of a new Deer Island facility. Apparently, it had become possible for the City to sell the land for a large sum, and political support for that order had dissipated.

43. Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir.), *cert. denied*, 419 U.S. 977 (1974).

44. As one means of achieving the desired remedy, the district court later ordered the State Commissioner of Corrections to transfer certain prisoners to other facilities. 494 F.2d 1196 (1st Cir.), *cert. denied*, 419 U.S. 977 (1974).

45. Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 691 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir.), *cert denied*, 419 U.S. 977 (1974).

46. Inmates of the Suffolk County Jail v. Kearney, 573 F.2d 98 (1st Cir. 1978).

In October 1976 the court appointed a master to develop a plan for a new facility. Much pushing and hauling over the use of other facilities for the temporary housing of detainees ensued. On November 2, 1977, the district court ordered the City Council to appropriate funds to use an adjoining facility, but that plan also broke down.

Next, the Mayor sought funds with which to construct a new facility if a satisfactory site could be found. The City Council also defeated that plan and voted a modest appropriation for the renovation of the Charles Street jail.[47] In March 1978 the Court of Appeals for the First Circuit ordered the Charles Street jail closed on October 2, 1978, to any inmate awaiting trial unless satisfactory steps had been taken to submit either a constitutional plan for the renovation of the Charles Street jail or plans for a new facility on an agreed site.[48] At the present time the Charles Street jail is still in use, but plans for its renovation are supposedly going forward.

Close observers tell me that the *Charles Street Jail* case was by no means fruitless despite the long delays and very limited progress after six long years. The jail will be modernized, they say, and that would not have happened without court intervention. Surely, that is all to the good. Yet the delays, the frustration, and the embroilment of the court in the city politics of rival plans and site selection give point to the questions about the long-range effects of judicial intervention where the courts are forced to "play chicken" with a state legislature or city council, where the implementation of their mandates is delayed and even thwarted by the dismal swamp of bureaucracy, where the court must trade off desirable elements of the judicial program for greater political cooperation, and where the legislature may ultimately defeat the entire judicial program by withholding necessary appropriations.

4. *Affirmative Decrees as a Threat to General Obedience to the Law*

Professor Abram Chayes, perhaps thinking of litigation like the *Charles Street Jail* case, wrote:

> [J]udicial participation is not by way of sweeping and immutable statements of *the* law, but in the form of a continuous and rather tentative dialogue with other political elements—Congress and the executive, administrative agencies, the profession and the academics, the press and

47. *Id.*
48. *Id.* at 99.

> wider publics. . . . [T]he ability of a judicial pronouncement to sustain itself in the dialogue and the power of judicial action to generate assent over the long haul become the ultimate touchstones of legitimacy.[49]

A state senator, Professor Chayes would say, may argue for a large appropriation for the construction of a new prison facility on the ground that the deplorable conditions in the existing facility inflict such barbaric treatment as to be unconstitutional. A governor also may press the demand for funds on this ground. Each will carry weight. If a court holds the conditions unconstitutional, Professor Chayes would continue, the decision also becomes an element in the process of deciding whether to build the new prison, and the court's decree, which will carry even more weight than the senator's speech or the governor's message, may be enough to get the job done.

There is substance to this description, but it also points to the basic difficulty. What will happen if some judicial decrees are not enough to get the job done? What will be the longrun consequences if judicial decrees come increasingly to be perceived as a senator's speech or a governor's message—as elements in a political dialogue? Would President Truman, who was deeply convinced of the necessity and moral righteousness of the steel seizure in 1952, have acted so promptly to comply with the Supreme Court's decision if it had become familiar to treat the Court's judgments as no more than one set of voices in a continuing political dialogue? Might he not have been encouraged to open negotiations instead of surrendering the mills to their owners? In 1973 and 1974, President Nixon did indeed seek to negotiate for less than full compliance with court-ordered subpoenas for the Watergate tapes. Would the Special Prosecutor have been inclined to hold out for, or been able to secure public support for insisting upon, full compliance if the court order had been only a political measure? Even Professor Martin Shapiro, who views the power of the Supreme Court as ultimately resting upon the ability to build a clientele of interest groups, believes that if the myth of the Court is destroyed in the law schools, the Court loses power.[50] Surely, part of the myth derives from the reality that courts do not simply add weight to one view in the push and haul of interest groups, but enter decrees that as "law" are entitled to immediate and unequivocal obedience.

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49. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1316 (1976).

50. M. SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT 31 (1964).

5. *Affirmative Decrees: A Qualified Endorsement*

These misgivings do not quite convince me that the courts should withdraw entirely from these novel undertakings. The largest and most dangerous of the new adventures was school desegregation. The results are uneven by any standard, but surely, we all would be the poorer in spirit had no courts entered integration decrees. We should be the poorer because there was no other way of showing that *Brown v. Board of Education*[51] was not merely an abstract declaration and that, insofar as the judicial branch could manage, the ideal of racial equality was thenceforth to be real. Similarly, between judicial initiatives and leaving prisoners to torture and disease in the prisons of Arkansas, I cast my vote in favor of judicial intervention.

At the same, however, I counsel three notes of caution.

First, bold judicial strokes that effect broad social or systemic institutional reforms should be reserved for truly exigent occasions. The process of judicial lawmaking may furnish a helpful analogy. From time to time the Supreme Court of the United States makes new constitutional law by bold strokes that rest upon little more than sensitive perception of the needs and enduring values of the nation. The reapportionment cases are the best examples. The power to strike such blows successfully flows, I think, from earlier restraint. The power of legitimacy can best be summoned for new departures by a court that normally preserves and builds a body of law and confines itself to decision according to law.

Second, the key decision that a federal district court must make in a case looking toward systemic reform of a state institution is not the ruling upon the merits, but the choosing between issuing a purely negative decree forbidding or limiting further use of an unconstitutional facility and embarking upon the court's own judicial program of affirmative action. The course followed by the Supreme Court of New Jersey in the school finance case illustrates one alternative; the course taken in the *Bryce Hospital* and *Charles Street Jail* cases illustrates the other. More progress might have been made in the *Charles Street Jail* case had the court not been drawn into local controversies over the location of a new facility, its financing, and the like, but had contented itself with prohibiting use of the facility after a specified date to detain persons charged with crime. Furthermore, the negative decree forces

51. 347 U.S. 483 (1954).

officeholders and other public figures in the political process to face their responsibilities instead of sloughing them off on the courts.

Third, for the long run we should seek remedies other than constitutional litigation to remedy governmental breakdowns that allow state institutions to deteriorate to the point where inmates are subjected to brutal treatment or inhuman neglect. The failure of the political process is a chief cause of the explosion of the judicial function in the past quarter-century. In a civilized society, not only is it inevitable but good that individuals who suffer constitutional affronts have recourse to the courts when no other relief is available. The availability of the courts, however, should not lead us to assume that judicial proceedings are the normal and most appropriate means to correct the failures of the legislature or the bureaucracy. When the breakdown in the machinery of state government is so severe that it violates the Constitution, our imagination should be equal to the challenge of providing remedies other than constitutional litigation.

These reflections make me highly skeptical of the legislation reportedly being prepared by the Civil Rights Division of the Department of Justice, which would authorize it to sue to enforce the constitutional rights of convicts and other inmates of state institutions. That constitutional rights should be protected is plain. The need for some form of public support also is fairly obvious; few prisoners have resources adequate to finance such expensive litigation. Nor should one worry about use of the courts to vindicate the rights of a particular individual. My skepticism flows from a concern that enactment of the measure would go far to identify litigation as the proper vehicle for systemic reform of state institutions and even to identify courts as appropriate institutions for the development and implementation of minimum federal standards in programmatic decrees.

There may be a much better alternative.[52] Under section five of the fourteenth amendment Congress has wide power to frame legislation to protect constitutional rights, and even to lay down additional requirements necessary and proper to the creation of a larger protective zone about the core of rights guaranteed by the Constitution.[53] Congress,

52. The alternative was brought to my attention in a seminar paper by Donald G. Rez and Cass R. Sunstein, two members of the Harvard Law School Class of 1978.

53. *See* Griffin v. Breckenridge, 403 U.S. 88 (1971) (statute allows damages action for private conspiracy aimed at denial of equal protection); Katzenbach v. Morgan, 384 U.S. 641 (1966) (statute prohibits enforcement of requirement for literacy in English as applied to New York residents

therefore, by careful draftsmanship, could articulate minimum protective standards and delegate further particularization and refinement to a legislative court or administrative agency. The constitutional power would be even clearer if the duties were brought to bear upon a particular state institution only upon proof of a previous constitutional violation. A legislative court or administrative agency of this sort could be equipped with staff and expertise. Its orders might be enforced by cutting off federal financial aid to the state or even by authorizing it to direct expenditures and charge them against other federal assistance. Either sanction would be more effective than any court could apply. Moreover, its orders would carry the sting of an authorized federal body, but the costs of its entrance into the push and haul of political dialogue, its embarkment upon a process of negotiation and cajolery, and its toleration of noncompliance while waiting for the state to act should not rub off on more conventional judicial decrees in the same way that these costs would in an article three court.

The suggestion admittedly requires elaboration before it could be brought to fruition. Perhaps further study would prove it empty, but I suspect that it carries less danger and greater promise of success than the conventionalization of federal judicial reform of state institutions.

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from Puerto Rico, if requirement denies them the right to vote); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (statute allows temporary suspension of a state's voting tests or devices, provides for procedures for review of new voting rules during suspension period, and permits use of federal examiners to qualify applicants for registration to vote).