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# Destabilization Rights: How Public Law Litigation Succeeds

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# DESTABILIZATION RIGHTS: HOW PUBLIC LAW LITIGATION SUCCEEDS

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*"Public law litigation" — civil rights advocacy seeking to restructure public agencies — has changed course over the last three decades. It has moved away from remedial intervention modeled on command-and-control bureaucracy toward a kind of intervention that can be called "experimentalist." Instead of top-down, fixed-rule regimes, the experimentalist approach emphasizes ongoing stakeholder negotiation, continuously revised performance measures, and transparency. Experimentalism is evident in all the principal areas of public law intervention — schools, mental health institutions, prisons, police, and public housing. This development has been substantially unanticipated and unnoticed by both advocates and critics of public law litigation. In this Article, we describe the emergence of the experimentalist model and argue that it moots many common criticisms of public law litigation. We further suggest that it implies answers to some prominent doctrinal issues, including the limits on judicial discretion in enforcing public law rights and the constraints entailed by separation-of-powers norms. Our interpretation understands public law cases as core instances of "destabilization rights" — rights to disentrench an institution that has systematically failed to meet its obligations and remained immune to traditional forces of political correction. It suggests reasons why judicial recognition and enforcement of such rights might be both effective in inducing better compliance with legal obligations and consistent with our structure of government.*

## I. INTRODUCTION

Scorned when not forgotten, yet transformed by its travails, public law litigation is becoming — again — an influential and promising instrument of democratic accountability.

In 1976 Abram Chayes argued that efforts to apply rule-of-law principles to the institutions of the modern welfare state had produced a new kind of litigation.[1] The "traditional" lawsuit involved two private parties and focused on allegations of a discrete past wrong implying a particular remedy, most often a one-time money payment from the defendant to the plaintiff. Chayes showed that an important category of civil rights litigation departed radically from this model. These

* Maurice T. Moore Professor of Law and Arthur Levitt Professor of Law, respectively, Columbia University. We are grateful for various kinds of help to the Hewlett Foundation; to participants in workshops at Columbia, Pennsylvania, Stanford, and Yale; and to Jim Liebman, Mike Dorf, Brad Karkkainen, Archon Fung, Dara O'Rourke, Margo Schlanger, Michael Rebell, Gillian Metzger, Judith Resnik, Mark Tushnet, Susan Sturm, John Boston, Jonathan Chasin, and the practitioners cited in the notes who spoke to us about their work. Our largest debt is to Laura Faer for insightful discussion and prodigious research assistance.

[1] *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284, 1288–89 (1976).

"public law" cases involved amorphous, sprawling party structures; allegations broadly implicating the operations of large public institutions such as school systems, prisons, mental health facilities, police departments, and public housing authorities; and remedies requiring long-term restructuring and monitoring of these institutions.

Chayes argued that the new litigation enriched the institutional repertory of our democracy. In his view, the independence, flexibility, and accessibility of the courts equipped them for the task of holding chronically underperforming institutions accountable to governing legal standards. Public law courts were less susceptible to capture by selfish interests and better able to induce fruitful discussion among the relevant parties than the administrative agencies that might otherwise have oversight responsibility.

Although Chayes's analytic description of public law litigation became canonical, his defense of it remained controversial. Early critics doubted that courts had the necessary information to supervise institutional restructuring effectively. Even if the courts were sufficiently informed, these critics argued, their power seemed too narrow and too shallow for the new task: Too narrow because the problems of public agencies were linked to myriad other institutions and social practices, while a court's power extended only to the parties before it. Too shallow because the operations of the agencies depended on the street-level conduct of subordinates far below the court's view, while a court's direct remedial authority operated mainly against senior officials (and even then, only with severe limitations).[2]

From the outset, the legitimacy of public law litigation was as suspect as its efficacy. For Chayes, such litigation would legitimate itself by solving public problems that other institutions of the administrative state could not. But many critics argued that even effective judicial intervention of this kind was often illegitimate. They emphasized, as Chayes had conceded, that these cases did not fit easily into traditional notions of the judicial role or the separation of powers. They doubted that conventional legal sources of authority and modes of analysis could be made to speak in any direct or determinate fashion to the task of devising remedies that restructured entire organizations. They argued that the courts could not undertake the restructuring of administrative agencies without trenching on the authority of the executive and legislative branches, and that federal courts could not superintend

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[2] *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 11 (1991); Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 46 (1979); Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265.

the restructuring of state and local agencies without compromising principles of federalism and local autonomy.[3]

The United States Supreme Court and other appellate tribunals also expressed disapproval in a range of decisions designed to rein in trial court discretion in public law actions.[4] Legislatures passed statutes — most notably, the federal Prison Litigation Reform Act of 1996 (PLRA)[5] — constraining the courts in these cases. Trial court judges who undertook structural relief in some high-profile cases threw up their hands in apparent exhaustion or despair, dissolving injunctions purportedly because all practicable vindication of the plaintiffs' rights had been achieved, even though little progress was detectable.[6]

Even the liberal defense of Chayes's model took on an anxious tone.[7] Proponents struggled uncomfortably with the jurisprudential phenomenon of rights that did not come with ready-made remedies. They worried about how to limit judicial discretion and preserve the prestige of the courts. There was also increasing worry about the accountability of the advocates to their generally poor and ill-educated clients — the putative right holders. [8]

Yet despite decades of criticism and restrictive doctrines, the lower courts continue to play a crucial role in a still-growing movement of institutional reform in the core areas of public law practice Chayes identified: schools, prisons, mental health, police, and housing. And while they have opposed some judicial interventions, legislatures have acquiesced in and even encouraged others.[9] There is no indication of a

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[3] *See, e.g.*, Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 950–51 (1978); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 664 (1978); John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121 (1996).

[4] *See* cases cited *infra* note 11; *see also infra* pp. 1082–87.

[5] Pub. L. No. 104-34, 110 Stat. 1321 (codified as amended at 11 U.S.C. § 523(a) (2000); at 18 U.S.C. §§ 3624(a), 3626 (2000); and in scattered sections of 28 and 42 U.S.C.).

[6] *See, e.g.*, Morgan v. Nucci, 831 F.2d 313, 326 (1st Cir. 1987) (dissolving the Boston school desegregation decree); MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 115 (1998) (reporting that in the course of the Santa Clara County Jail case, "several judges [were] . . . worn out by the litigation and withdr[ew] from the case").

[7] *See, e.g.*, William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 636 (1982); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 589, 674–79 (1983).

[8] *See* ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT 139–82 (2003).

[9] Examples include the Civil Rights of Institutionalized Persons Act of 1980, Pub. L. No. 96-247, 94 Stat. 349 (codified as amended at 42 U.S.C. §§ 1997–1997j (2000)), which authorizes the Attorney General to bring suits to remedy "flagrant and egregious" conditions in prisons and mental health facilities; the 1990 amendments to federal housing legislation that authorize the Department of Housing and Urban Development to seek judicial receiverships against persistently "troubled" housing authorities, *see* 42 U.S.C. § 1437d(j) (2000); state legislation in Texas and elsewhere responding to judicial findings of unconstitutional school conditions, *see infra* pp. 1026–27;

reduction in the volume or importance of Chayesian judicial activity. The particular forms of this activity, however, have evolved. The remedies of recent years are different in important respects from those that Chayes and his critics focused on.

The evolution of structural remedies in recent decades can be usefully stylized as a shift away from *command-and-control* injunctive regulation toward *experimentalist* intervention. Command-and-control regulation is the stereotypical activity of bureaucracies. It takes the form of comprehensive regimes of fixed and specific rules set by a central authority. These rules prescribe the inputs and operating procedures of the institutions they regulate.

By contrast, experimentalist regulation combines more flexible and provisional norms with procedures for ongoing stakeholder participation and measured accountability. In the most distinctive cases, the governing norms are general standards that express the *goals* the parties are expected to achieve — that is, outputs rather than inputs. Typically, the regime leaves the parties with a substantial range of discretion as to how to achieve these goals. At the same time, it specifies both standards and procedures for the measurement of the institution's performance. Performance is measured both in relation to parties' initial commitments and in relation to the performance of comparable institutions.

This process of disciplined comparison is designed to facilitate learning by directing attention to the practices of the most successful peer institutions. Both declarations of goals and performance norms are treated as provisional and subject to continuous revision with stakeholder participation. In effect, the remedy institutionalizes a process of ongoing learning and reconstruction. Experimentalist regulation is characteristic of the "networked" and "multilevel" governance proliferating in the United States and the European Union — decisionmaking processes that are neither hierarchical nor closed and that permit persons of different ranks, units, and even organizations to collaborate as circumstances demand.[10]

In cases that take the experimentalist approach, the courts are both more and less involved in reconstituting public institutions than they

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and state legislation in New Jersey and elsewhere responding to judicial findings of unconstitutional local land-use regulation, *see infra* pp. 1050–52.

[10] *See generally* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUR. L.J. 1 (2002).

In her study of private employment discrimination cases, Susan Sturm finds a shift in remedial practice from a top-down approach in "first generation" cases to an experimentalist one in "second generation" cases that parallels the course we find in public law litigation. *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 465–75 (2001).

were when Chayes wrote. They are more involved because experimentalist remedies contemplate a permanent process of ramifying, participatory self-revision rather than a one-time readjustment to fixed criteria. But the courts are less involved because the norms that define compliance at any one moment are the work not of the judiciary, but of the actors who live by them. At least in prospect, the demands on the managerial capacities of the court, and the risk to its political legitimacy, are smaller in this continuous collaborative process than in top-down reform under court direction.

To some extent, the experimentalist tendency has been responsive to constraints imposed by the Supreme Court.[11] Although key decisions of the Rehnquist Court sometimes seem unreflectively hostile to public law litigation, they are plausible in their demand that lower courts demonstrate stronger connections between the principles on which their determinations of liability are based and the specific means they impose as remedies. Yet beyond this general demand, the Court's guidance has been ambiguous and incoherent.[12] The experimentalist practice of the lower courts has gone far beyond anything suggested or anticipated in appellate doctrine.

In this Article, we offer an interpretation of the evolving approach to public law intervention as a species of what we call "destabilization rights."[13] Destabilization rights are claims to unsettle and open up public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal processes of political accountability. The term focuses attention on a crucial common element of the claims in the various areas of public law litigation and on a dimension of the remedy that is critical to explaining the prospect of successful intervention. The effect of the court's initial intervention is to destabilize the parties' pre-litigation expectations through political, cognitive, and psychological effects that widen the possibilities of experimentalist collaboration. The regimes of standards and monitoring that commonly emerge from remedial negotiation allow this destabilization, and the learning it generates, to continue within narrower channels.

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[11] *See, e.g.*, Lewis v. Casey, 518 U.S. 343, 362 (1996) (reversing a prison order as "inordinately — indeed, wildly — intrusive"); Bell v. Wolfish, 441 U.S. 520, 562 (1979) (disapproving orders that "enmeshed [lower courts] in the minutiae of prison operations"); Bounds v. Smith, 430 U.S. 817, 832 (1977) (stating that there are multiple acceptable means of correcting a violation and of encouraging "local experimentation"); *cf.* Ruiz v. Estelle, 679 F.2d 1115, 1148 (5th Cir. 1982) ("Directing state officials to achieve specific results should suffice; how they will achieve those results must be left to them unless and until it can be demonstrated judicial intervention is necessary.").

[12] *See infra* section IV.A.

[13] The term and the idea come from ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY 530 (1987).

In Part II we survey the major areas of public law litigation to illustrate the trend away from command-and-control approaches toward experimentalist ones. In Part III we elaborate the idea of destabilization rights and argue, against Chayes, that it points to an important continuity between public law litigation and traditional common law adjudication. Part IV shows how the destabilization rights idea relates to a series of issues that have preoccupied appellate doctrine, including the relation between right and remedy, the separation of powers, respondeat superior, and the problem of interest representation. In each case, we argue that the move to experimentalism suggests a resolution.

Ultimately, our claims for the promise of the new approach remain as inconclusive as Chayes's. We end with the same cautious optimism he expressed in 1976, based, like his, on casual observation. We do, however, offer some ideas as to why the new approach might respond to the concerns that have dominated legal scholarship since he wrote. If our convictions are more firmly rooted than Chayes's, it is only because, in its recent development, public law has passed one critical test of a truly vital idea: it has managed to generate responses to questions that its proponents want to avoid and that its critics think unanswerable.[14]

## II. THE PROTEAN PERSISTENCE OF PUBLIC LAW LITIGATION

Here we survey the five principal areas of structural litigation over public services — education, mental health, prisons, police, and housing. In each we find indication of a growing and promising shift from command-and-control to experimentalist intervention.

The command-and-control orientation has three characteristics: First, an effort to anticipate and express all the key directives needed to induce compliance in a single, comprehensive, and hard-to-change decree. Second, assessment of compliance in terms of the defendant's conformity to detailed prescriptions of conduct in the decree. These prescriptions tend to be process norms that dictate conduct as a means

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[14] In his last work on international public law, Chayes described a trend in that field toward arrangements of the sort we call experimentalist. *See* ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 25–26 (1995). The book argues that sovereignty in the international realm has come to mean less the power to command from above and more the power to engage others in discussion of what needs to be done. It describes numerous international regimes of collaborative standard-setting, monitoring, and continuous revision based in part on comparisons with the experiences of others. Our project can thus be seen as revising Chayes's early efforts to understand linked changes in the judiciary and the administrative state in light of his later intuition about a more encompassing transformation of the character of democratic sovereignty. *See* Harold Hongju Koh, Book Review, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2638–39 (1997) (discussing the relation of Chayes's work on public law litigation to his work on international law).

to the attainment of goals, rather than performance norms that directly mandate and measure goal achievement. And third, a strong directive role for the court or a special master in the formulation of the remedial norms.

There has been a fairly clear and deliberate move away from the first two characteristics. History with respect to the third — judicial direction — is more ambiguous. Courts have encouraged negotiated remedies from the beginning. But judges and special masters appear to have been more directive in the past.[15]

The change has not been strictly linear. Doubts about command-and-control appeared early, and some contemporary remedies continue to have a command-and-control quality. But the general direction and nature of the trend seems clear.

### *A. Schools*[16]

There have been three successive waves of public law litigation concerning schools.[17] The first consisted of federal desegregation suits. The second involved challenges in the state courts to the equity of school finance systems. The third continues efforts in the state courts but shifts the normative focus from "equity" to "adequacy." The shift from top-down, rule-based remedies to decentralized, standards-based intervention is an important theme of this evolution.

The best-known body of public law litigation is the Herculean effort of the federal courts to desegregate the nation's public schools. These efforts met with some early success in a few states, but massive resistance stalled them in the South until Congress passed the Civil Rights Act of 1964. Thereafter, especially between 1968 and 1972, the federal courts oversaw the successful dismantling of segregation in schools attended by millions of children through lawsuits brought by private plaintiffs and by the federal government. Most of these schools were in countywide districts in the rural South.[18]

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[15] *See, e.g.*, Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1365–76 (1991). Surveying cases from the 1970s and early 1980s, Sturm identifies and illustrates five judicial approaches to remedial formulation, four of which involve strong direction by the judge or a special master. Sturm's discussion of the fifth approach, "consensual deliberation," presciently anticipates the developments we report here. *See also* Curtis J. Berger, *Away from the Court House and into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707, 708 (1978) (reporting the experience of a highly directive special master).

[16] This section draws on James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183 (2003).

[17] *See* Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1153 (1995).

[18] *See* ROSENBERG, *supra* note 2, at 94–105; Liebman & Sabel, *supra* note 16, at 195–201. After two decades of stability, some of these gains have eroded in recent years. *See generally* Sean

Outside the rural South, however, desegregation was impeded by the combination of local school control and residential mobility. To establish liability, plaintiffs had to prove that school segregation resulted from official conduct rather than from residential self-segregation by individual choice. Issues of intention and causation were complex, the standards were vague and inconsistent, and the range of potentially relevant evidence was enormous. A policy patently intended to cause segregation and effective in doing so would readily establish liability. In the more common case, however, where officials did not express racist intentions, policies were facially neutral, and their consequences were ambiguous, the going was harder. Even when liability was established, doctrine generally confined the courts' remedial powers to official conduct within the district. Where the district was residentially segregated, or where whites would respond to remedial efforts by fleeing, options were severely restricted. Since the late 1970s, a sense of fatigue and futility has hung over large-scale desegregation efforts.[19]

A second line of school cases has focused on fiscal equity. Although the United States Supreme Court rejected the claim that the federal Equal Protection Clause limits inequality in state school finance,[20] many state courts have struck down school finance systems under state constitutional provisions. In total, the courts of about half the states have held school finance systems unconstitutional.[21] Although equalization of funding is a less daunting remedial task than desegregation in a residentially segregated region, implementation of school finance equity remedies has also met with difficulties and disappointments. Some states, most notably California, seem to have moved toward equality by leveling down — increasing relative contributions to poorer districts but limiting overall support for the school system.[22] In

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F. Reardon & John T. Yun, *Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South, 1990–2000*, 81 N.C. L. REV. 1563 (2003).

[19] *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 83–90 (1995) (intemperately reversing as beyond the district court's remedial powers its mandate of elaborate and expensive efforts to integrate Kansas City schools by inducing voluntary transfers of white suburban students); Morgan v. Nucci, 831 F.2d 313, 315–17, 321 (1st Cir. 1987) (upholding the district court's renunciation of efforts to achieve racial balance in the Boston schools on the ground that segregation was rooted in "intractable demographic obstacles").

[20] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54–55 (1973).

[21] *See* Advocacy Ctr. for Children's Educational Success with Standards, Status of School Funding Litigations in the 50 States (June 27, 2003) (reporting "Plaintiff Victory" in school funding cases in twenty-five states), *available at* http://www.accessednetwork.org/litigation/TableofLitigationStatusfor50states.pdf.

[22] *See, e.g.*, William A. Fischel, *Did* Serrano *Cause Proposition 13?*, 42 NAT'L TAX J. 465, 466 (1989) (describing leveling-down in California).

other states, increased funding has not made a discernible difference in the performance of poorer districts.[23]

In both the desegregation and fiscal equity cases, the courts have felt compelled to address issues of educational quality. The premise of *Brown v. Board of Education* was that segregation was bad — not only in itself, but also because it made for bad education.[24] Desegregation, conversely, was expected to produce better education. Where desegregation appeared unattainable, direct educational improvement seemed an appropriate alternative remedy. Moreover, to the extent desegregation required inducements to whites to remain voluntarily in urban public schools, direct quality improvements could supply them. Thus, the logical link between desegregation and quality ran in both directions.

Remedial practice evolved along with these substantive developments. The implementation of desegregation pushed the courts toward extensive oversight of school administration. Concern for pupil assignment followed directly from the concern with integration. Given the strong connection between race and residence, and the tradition of local school attendance, the courts could not ignore siting decisions for new schools. The courts also had to make efforts to ensure that minority children were not mistreated or tacitly disadvantaged in new schools by, for example, excessive discipline or failure to discipline others who harassed them. Moreover, since minority students would likely be more at ease in a school with minority teachers, personnel policies became relevant. Once the courts saw improving educational quality as a remedial goal, almost every aspect of education policy was potentially relevant. When defendants were recalcitrant, the courts tended to increase both the scope and the detail of their orders. Thus, consent decrees often took the form of highly detailed regulatory codes embracing vast provinces of administration.[25]

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[23] *See* Eric A. Hanushek, *Conclusions and Controversies About the Effectiveness of School Resources*, FED. RES. BANK N.Y. ECON. POL'Y REV., Mar. 1998, at 15–16; *cf.* Abbott v. Burke, 575 A.2d 359, 374–75 (N.J. 1990) (mandating increased funding while acknowledging that "no amount of money may be able to erase the impact of the socioeconomic factors that define and cause these pupils' disadvantages").

[24] *See* 347 U.S. 483, 493 (1954).

[25] *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22–31 (1971) (upholding a decree addressing racial quotas, the presence of one-race schools, attendance zoning, and student transportation); United States v. Montgomery County Bd. of Educ., 395 U.S. 225, 232–37 (1969) (upholding an order prescribing certain ratios of minority students to nonminority students); Singleton v. Jackson Mun. Sch. Dist., 419 F.2d 1211, 1217–19 (5th Cir. 1970) (per curiam) (upholding a decree addressing staff desegregation, student transfers, transportation, new school construction, and inter-school-system attendance); Morgan v. Kerrigan, 401 F. Supp. 216, 265–70 (D. Mass. 1975) (requiring the development of committees and the issuance of detailed reports and proposing a detailed timetable); Carr v. Montgomery County Bd. of Educ., 289 F. Supp. 647, 654–56 (M.D. Ala. 1968) (ordering a desegregation plan addressing faculty and staff, new school con-

The concern with quality is most prominent in the third wave of cases. These are state cases of recent years, based not (or not only) on equality norms, but on provisions of a sort found in most state constitutions requiring "an adequate public education,"[26] "a thorough and efficient system of free schools,"[27] or "an educational program of high quality."[28] In these cases, the state's failure to meet norms of minimal quality and efficacy is the focus of the plaintiff's claim.[29]

Where courts have found liability in these cases, legislatures have responded with both funding and structural support, though frequently not to the satisfaction of the courts or the parties. These judicial efforts have sometimes converged with extensive civic activity around educational reform. In Kentucky and Texas, for example, lawsuits drew on the activities of politically appointed commissions of business, professional, and civic leaders.[30] Civic participation in the remedial phase of school reform litigation is not new, but it seemed to assume greater prominence in both practice and theory in the 1990s. Picking up a theme from our colleague Susan Sturm, counsel in the New York school finance case argued in 1996 that the widespread involvement of parents, teachers, business, and civic groups in the formulation and implementation of remedies was critical to the success of these suits. They proposed a "dialogic" model of reform in which remedies emerge from deliberation among the widest feasible range of stakeholders.[31]

The remedial regimes in the more ambitious of these new public law cases do not involve the comprehensive sets of regulatory instructions of the sort found in many urban desegregation cases. The new regimes do not contemplate judicial micromanagement or administrative centralization. Helen Hershkoff described one of these decrees, from an Alabama case, as "establishing a structure for institutional re-

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struction, and transportation); *see also* Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428, 457 (1977) ("The court order should be quantitative and precise, including timetables for the achievement of specific tasks.").

Looking back at the school desegregation precedents in a public housing case, the Massachusetts Supreme Judicial Court wrote:

> [A]s injunctions meet with indifference or violation on the part of the defendant officials, there is justification for the more detailed directions further confining . . . discretion. . . . The rule of thumb may be that the more indurated the violations of law and the remedial injunction, the more imperative and controlling the later superseding injunction.

Perez v. Boston Hous. Auth., 400 N.E.2d 1231, 1249 (Mass. 1980) (Kaplan, J.) (citations omitted).

[26] GA. CONST. art VIII, § 1, para. 1.

[27] W. VA. CONST. art XII, § 1.

[28] VA. CONST. art. VIII, § 1.

[29] *See* Heise, *supra* note 17, at 1153; Liebman & Sabel, *supra* note 16, at 202–07.

[30] *See* Liebman & Sabel, *supra* note 16, at 233–34, 243–44, 251–55.

[31] *See* Michael A. Rebell & Robert L. Hughes, *Schools, Communities, and the Courts: A Dialogic Approach to Education Reform*, 14 YALE L. & POL'Y REV. 99, 114–36 (1996).

form, and [yet] not fixing the precise content of [the] reform."[32] Instead of directing specific action, the decrees elaborate goals and methods of monitoring achievement.

These more ambitious regimes have been influenced by the "new accountability" movement in educational reform. That movement results from the interaction of both centralizing and decentralizing developments. The centralizing theme emphasizes the importance of comparative performance measurement and material incentives. The decentralizing theme prescribes devolution of authority for classroom instruction away from national and state administrators toward districts, principals, and teachers (and sometimes parents). The combination of standards-based monitoring and local discretion is designed to reconcile systematic accountability with local authority.[33]

The Texas regime is one of the more fully developed along these lines. In 1989 the Texas Supreme Court declared the state's school system out of compliance with various provisions of the state's constitution, including the requirement that the state provide for an "efficient [school] system" and the "general diffusion of knowledge." It subsequently rejected two legislative packages enacted specifically to fix the problems. Then in 1995 the court provisionally accepted a new statutory scheme increasing funding and creating the Texas Public School System Accountability scheme.[34] The statute put the state's Board of Education in charge of the system. The Board is charged with designing "assessment instruments" to test student knowledge in basic subjects and skills and with administering them at specified points in students' careers. Schools are obliged to plan and target resources specifically to improve the performance of their lowest-scoring students, regardless of their race.

Under the Texas scheme, schools and school districts are assessed annually on the basis of both test scores and other indicators, such as dropout and graduation rates, attendance rates, SAT scores, and completion of advanced courses. Relative performance is measured against a group of peer schools with comparable characteristics in

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[32] Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1190 (1999) (describing *Harper v. Hunt*, No. CV-91-0117-R (Ala. Cir. Ct. Montgomery County, Apr. 1, 1993)). *Harper v. Hunt* was consolidated with *Alabama Coalition for Equity, Inc. v. Hunt* and reprinted in *Opinion of the Justices No. 338*, 624 So. 2d 107, 110 (Ala. 1993).

[33] The background of the "new accountability" movement is described in Liebman & Sabel, *supra* note 16, at 214–31.

[34] *See* Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 725–30 (Tex. 1995); *see also* TEX. EDUC. CODE ANN. ch. 39 (Vernon 1996 & Supp. 2004) (setting forth the standards and duties under the Public School System Accountability program). Both the Texas scheme and the Kentucky one, which has many comparable features, are described in Liebman & Sabel, *supra* note 16, at 231–66.

terms of such indicators as "past academic performance, socioeconomic status, ethnicity, and limited English proficiency." Outstanding performers are identified and rewarded. Laggards must, with the help of outside technical assistance, develop detailed improvement plans. In the case of continued poor performance, such schools are put into state receivership or reconstituted.[35]

The Texas process is substantially transparent, with school and district ratings and related information available on the Internet. Parents receive "report cards" on their children's schools through the mail. The state supreme court cases provoked substantial mobilization by business and civic groups. At least in some areas, it appears that the reforms have prompted extensive local parental involvement in school affairs.[36]

The new accountability approach is widely regarded as the most promising recent development in public school reform. Some jurisdictions have adopted related initiatives without judicial compulsion.[37] Although it is too soon to claim that the judicial efforts along this line have been successes, there are several jurisdictions where the courts remain key participants in the most ambitious reform efforts.

Finally, we note that trends parallel to those seen in these general education initiatives are evident in the subfield of special education for students with disabilities. The federal Individuals with Disabilities Education Act[38] and various state statutes create duties to refrain from discrimination against disabled students, to make affirmative accommodations for them, and to respond to requests for services on their behalf in accordance with prescribed procedures. Here, too, early structural reform litigation seems to have taken on a command-and-control orientation involving elaborate rule-bound administrative regimes focused on such matters as the timeliness of processing student evaluations, the number and qualifications of personnel, and student placement practices. Practitioners subsequently became dissatisfied with what some characterized as the "input-oriented" approach in both

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[35] TEX. EDUC. CODE ANN. §§ 39.023–.028, 39.051–.054, 39.071–.076, 39.093–.095, 39.131 (Vernon 1996 & Supp. 2004).

[36] *See* Liebman & Sabel, *supra* note 16, at 233–34, 243–46. Not all forms of public participation or "engagement" have this decentralized character. Sometimes such efforts are designed simply to produce information about parent preferences or school practices for use by centralized organizational structures or to generate grassroots support for programs that already have been worked out by those in control of the litigation. The use of focus groups modeled on electoral campaign practices seems more like top-down mobilization than the development of permanent local participatory capacity contemplated by the more ambitious reforms.

[37] The No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified in scattered sections of 20 U.S.C.), which was inspired by the Texas approach, mandates or encourages adoption of some of its features nationwide. *See* Liebman & Sabel, *supra* note 16, at 283–300.

[38] 20 U.S.C. §§ 1400–1487 (2000).

judicial and administrative oversight.[39] In the spirit of the new accountability approach in general education, the 1997 amendments to the federal special education statute required states to set achievement goals and to measure progress with standardized tests.[40]

The emerging "output-oriented" perspective is evident in *Vaughn G. v. Mayor and City Council of Baltimore*. In 2000, when the case was nearly two decades old, the parties agreed that the complexity of the decree hampered both enforcement and renegotiation efforts. Noncompliance was pervasive, and both plaintiffs and defendants were mired in arguments over small details that distracted them from their central goals. They thus agreed to replace their detailed "Long Range Compliance Plan" with a "Consent Order Approving Ultimate Measurable Outcomes." The six-page order prescribes sixteen outcomes and specifies procedures for measuring progress toward attaining them. Some of the outcomes involve data collection and monitoring systems for performance measurement; others involve procedural norms, and here, compliance rates are specified (for example, the order requires ninety-five percent compliance with application processing deadlines).

The other outcomes *Vaughn G.* prescribes concern educational goals. For example, the defendants committed to increase school completion rates for disabled students from fifty percent to fifty-seven percent within three years, to increase the participation of disabled students in vocational programs to the same rate as that of nondisabled students, and to provide at least eighty percent of disabled students with required services in the schools they would attend if they were not disabled. These norms were derived from statewide data on special education performance, with negotiated adjustments. The defendants' performance under the new approach has been mixed, but it seems to have improved, and the plaintiffs find that their own monitoring efforts are more focused.[41]

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[39] *See* Thomas Hehir & Sue Gamm, *Special Education: From Legalism to Collaboration*, *in* LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 205, 234 (Jay P. Heubert ed., 1999).

[40] *See* 20 U.S.C. § 1412(a)(16)–(17) (2000).

[41] *See* Consent Order Approving Ultimate Measurable Outcomes, *Vaughn G.*, No. 84-1911 (D. Md. filed May 4, 2000) (on file with the Harvard Law School Library); Telephone Interview with Donna Wulkan, Plaintiff's Counsel, *Vaughn G.* (March 17, 2003); Telephone Interview with Thomas Hehir, Court-Appointed Expert, *Vaughn G.* (May 20, 2003). Hehir, a Harvard education scholar who strongly influenced the shift of remedial orientation in *Vaughn G.*, is helping to develop a similar approach in a pending Los Angeles special education case, *Smith v. Los Angeles Unified School District*, CV 93-7044-LEW (GHKx) (C.D. Cal.). Regarding an earlier effort in this vein, see Michael A. Rebell, Allen v. McDonough*: Special Education Reform in Boston*, *in* JUSTICE AND THE SCHOOL SYSTEMS: THE ROLE OF COURTS IN EDUCATION LITIGATION 70, 74–87 (Barbara Flicker ed., 1990).

### *B. Mental Health*

Mental health is probably the least controversial category of institutional reform litigation. To be sure, the characteristic judicial experience in this realm has involved the same delay, frustration, and recalcitrance that have plagued efforts in other areas. But at least moderate success is widely conceded in several cases involving developmentally disabled clients. Coincidentally or not, the evolution with which we are concerned — from command-and-control intervention to decentralized and indirect intervention — is especially marked and self-conscious in these cases.

The contours of mental health institutional litigation were shaped by two converging developments. The first was the emergence of a legal doctrine recognizing the rights of people involuntarily confined on grounds of mental disability to treatment and decent conditions. Beginning in the 1960s, the courts articulated such rights as a matter of constitutional law. These rights were elaborated further in state and federal legislation. Congress specifically authorized the Department of Justice to bring suits against mental health institutions in the Civil Rights for Institutionalized Persons Act of 1980, and the Department has done so, with less zeal than activists would like but considerably more than it has shown in the case of prisons. Procedural barriers of the sort created by courts and legislatures for prison litigation have generally not arisen in the mental health field.[42]

The second development was the deinstitutionalization movement. The intellectual origins of this movement are in the treating professions. Reformers argued that most mentally disabled people held in large, public institutions would fare better as outpatients or as residents of small community facilities. Institutionalization limited the range of their personal associations and activities in ways that were stifling and oppressive, and hence impeded rehabilitation. More integration into normal social life would have therapeutic advantages. Small, community-based facilities might be more accessible to formal and informal monitoring by relatives and advocacy groups than large, isolated ones.[43]

The professional critique of institutionalization meshed with the libertarian impulse of the legal doctrine on confinement. Liberal lawyers argued for a right to the "least restrictive" efficacious intervention. This meant that institutionalization was impermissible when community placement was adequate or better. Although the Supreme Court

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[42] *See generally* 2 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL 3–152 (2d ed. 1999); 3 PERLIN, *supra*, at 145–281 (2d ed. 2000).

[43] *See generally* DEINSTITUTIONALIZATION: PROMISE AND PROBLEMS (Richard Lamb & Linda Weinberger eds., 2003).

never fully accepted this principle as constitutional law, statutory and regulatory support for it did emerge.[44]

Strong fiscal incentives also supported deinstitutionalization. The 1970s were a time of fiscal pressure, and even the shabbiest mental health institutions were expensive. The prospect of savings from closing them was appealing to state and local governments.[45]

The move to community facilities had a natural affinity with decentralized, indirect administrative structures. Although public agencies sometimes created and managed their own community facilities, more often they looked to nongovernmental social service agencies or for-profit providers to do so. Even administrators wedded to command-and-control models within government did not think them applicable to public subcontracting of services. As Ronald Wisor put it:

> [The move to community facilities] dramatically transforms the government's function from provider to guarantor of care. In this new role, the state's primary responsibility is to establish detailed quality control standards as the basis for the provider contracts, and then to monitor performance closely to ensure that those standards are followed.[46]

Thus, the mental health cases focused on two kinds of reforms: First, as long as the large public institutions remained open, the courts sought to bring them into compliance with minimum standards of safety, sanitation, humane conduct, and effective medical treatment. Second, courts sought to gradually replace these institutions with community care facilities. The change in remedial orientation from old to new public law can be seen both within the efforts to change the older institutions and in the shift to the community care model.

The command-and-control orientation is evident in the decrees in two of the most famous mental health cases — *Wyatt v. Stickney*,[47] which addressed Alabama's institutions for the psychiatrically and developmentally disabled, and *New York State Ass'n for Retarded Children v. Carey*,[48] which involved the Willowbrook institution for the developmentally disabled in New York City. Each decree declared many rights and duties in general terms, such as a patient's right to "privacy" and a duty to provide "adequate" medical care. Each also incorporated, by reference, the presumably changing standards promulgated by organizations with relevant expertise. For example, the

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[44] *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 14, § 36.4(c)(2) (2003) (requiring a placement plan for discharged mental patients to attempt to "capitalize on strengths to enable the least restrictive community placement possible"); *id.* § 586.1(b) ("Community residences are . . . operated to implement the principle of the 'least restrictive alternative.'").

[45] *See* 3 PERLIN, *supra* note 42, at 65–74.

[46] Ronald L. Wisor, Jr., *Community Care, Competition and Coercion: A Legal Perspective on Privatized Mental Health Care*, 19 AM. J.L. & MED. 145, 154–55 (1993).

[47] 344 F. Supp. 373 (M.D. Ala. 1972).

[48] 393 F. Supp. 715 (E.D.N.Y. 1975).

Alabama decree required a diet meeting nutritional standards prescribed by the National Academy of Science.

As to a broad range of matters, however, the decrees dictated directly and specifically. The *Wyatt* decree, for example, mandated at least one toilet for every eight patients, no more than six patients in a bedroom, at least eighty square feet of floor space per patient in each bedroom, at least ten square feet of space per person in the dining room, air temperature between eighty-three and sixty-eight degrees Fahrenheit, hot water at 110 degrees, and minimum staff-patient ratios for thirty-five job categories.[49]

Five years after the entry of this decree, the defendants petitioned for modification, claiming that the court-ordered procedures were excessively rigid. Various recordkeeping and monitoring procedures, they asserted, were "ritualistic and meaningless." Moreover, many of the treatment standards proved senseless. For example, the requirement of six hours of training per day for each resident was inappropriate for some profoundly retarded residents (who came to constitute the majority of inmates as less disabled residents were transferred to community placements). These patients had shown no capacity to benefit from such extensive training, and it sometimes became an unpleasant and demeaning experience for them. The court denied the motion, however, holding that the provisions in question, including the six-hour training requirement, were essential to the "constitutional right" of each resident to effective treatment.[50]

In the *Willowbrook* case, the defendants fought successfully against many specific requirements[51] but accepted some restrictions that were important to the plaintiffs. One of the latter provisions proved especially contentious. The consent decree required that mildly retarded members of the plaintiff class be transferred to community placements with no more than fifteen beds and that members with more severe disabilities be transferred to placements with no more than ten beds. A few years later, the defendants asked the court to modify the decree to permit patient transfers to facilities with as many as fifty beds. They argued that small community facilities had proven harder to develop than anticipated and that the therapeutic benefits of the larger settings were comparable. Like its counterpart in Alabama, the federal district court in New York denied the request, but its decision was reversed on appeal by the Second Circuit. The circuit court cited a re-

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[49] *See Wyatt*, 344 F. Supp. at 379–86; *id.* at 395–407.

[50] The defendant's motion and the court's ruling are reprinted in 1 PAUL R. FRIEDMAN, LEGAL RIGHTS OF MENTALLY DISABLED PERSONS 813–60 (1979). *See id.* at 816–17, 822–33, 853–55.

[51] *See* DAVID J. ROTHMAN & SHEILA M. ROTHMAN, THE WILLOWBROOK WARS 114–19 (1984).

cent Supreme Court opinion suggesting that treatment consistent with "professional judgment" was sufficient for constitutional purposes, and rejecting a claim of a right to the least restrictive alternative.[52] However, the court relied equally on the principle of deference to administrative officials on matters within the scope of their discretion.[53]

In some respects, the *Wyatt* defendants probably had the better argument. The *Wyatt* court's refusal to modify its order in light of experience seems to have reflected its strong distrust of the defendants more than any view of the merits. Conversely, the Second Circuit's insistence on deference a decade later seemed based mainly on anxiety that courts were being drawn into institutional micromanagement and resolution of public policy issues over which they had no distinctive expertise.

Recent public law cases in mental health forego this type of specification in favor of more indirect modes of control. The decrees emphasize broad goals and leave the defendants substantial latitude to determine how to achieve them; mandate precise measurement and reporting with respect to achievement; and institutionalize ongoing mechanisms of reassessment, discipline, and participation.

The recent decree in a long-pending challenge to conditions at the District of Columbia institution for the mentally disabled is illustrative of this trend. The "Compliance Plan" negotiated by the parties and approved by the court specifically eschewed "detailed prescriptions of . . . policies and procedures and staff training." Instead, it adopted

> [a]n alternative approach . . . , where the parties and experts that they recommend, have a meaningful opportunity to provide input into proposed policies and training initiatives prior to their adoption and . . . the defendants give careful consideration to such input. In each section of the Plan where a need for new or revised policies and procedures is identified, the Plan requires that the process of policy-making will involve close collaboration with the plaintiffs and the plaintiff-intervenor [the U.S. Department of Justice], and experts whom they recommend, prior to the adoption of these policies and procedures. However, the final decision about the policies and procedures and training programs will remain with the defendants, understanding that if they fail to address serious concerns raised by the plaintiffs and the plaintiff-intervenor, this may result in compliance issues down the road. In the final analysis, it is compliance with the specific outcome criteria that is required . . . and the tasks identified are a means to this end.[54]

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[52] N.Y. State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 964–65 (2d Cir. 1983) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 319 (1982)); *see also infra* pp. 1087–88.

[53] *See Carey*, 706 F.2d at 965.

[54] 2001 Plan for Compliance and Conclusion of *Evans v. Williams* at 6–7 (Civil Action No. 76 293 SSH) (D.D.C. filed Jan. 23, 2001) (footnotes omitted) (on file with the Harvard Law School Library) [hereinafter D.C. Plan], *adopted in* Evans v. Williams, 139 F. Supp. 2d 79, 85 (D.D.C.

The plan consists of a series of generally stated "goals" (for example, "Appropriate Individualized Habilitation and Treatment in the Community in the Least Separate, Most Integrated, and Least Restrictive Setting"). Each goal is followed by a series of specific "tasks" (for example, preparing individual service plans at least annually for each patient) and "outcome criteria" (for example, that the patient receive the services identified in the individual service plan). The plan then specifies the "method of assessing compliance" for each set of outcome criteria. Compliance with the service provision goal is to be assessed by review of a computerized database of individual service plan information, documents regarding complaints, direct observation of a random sample of ten percent of the patients in the programs, and interviews with case managers and advocates.

These plans, as elaborated, do not consistently live up to their rhetorical commitment to focus on "outcomes." An outcome is something desirable in itself, such as psychic well-being, physical health, or living skills. Often, however, the plans do not seek to measure these desiderata in the way that the new school regimes try to measure learning. The "outcomes" the mental health plans measure are really procedures. The D.C. plan, for example, measures whether services have been appropriately prescribed and provided in accordance with that prescription, not whether the services have actually improved the life of the recipient. It is a matter of controversy whether this hesitation reflects the difficulties of devising true outcome measures in this field, or the failure of practitioners to appreciate the full potential of the approach they have embraced in principle.[55] In any event, even in its compromised form, the intent and effect of such plans is to reduce reliance on specific ex ante rules.

The D.C. plan institutionalizes short-run participation of the plaintiff class through periodic meetings with the defendant officials conducted by a special master, or "Independent Court Monitor." It also creates a permanent institution designed to facilitate accountability to patients and their families. This institution is a freestanding nonprofit corporation, the Quality Trust for Individuals with Disabilities. The District committed to endow the Quality Trust with $11 million at the outset and to provide it with between $1.5 to $2 million a year for ten

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2001). A comparable example is the Remedial Plan adopted in *United States v. Connecticut*, No. N-86-252 (D. Conn. order of Apr. 21, 1998) (on file with the Harvard Law School Library).

[55] No doubt measurement of psychic well-being is difficult and contested. However, the D.C. plan ignores some easily measured outcomes in favor of less direct measures. For example, compliance with the goal of preventing accidental and intentional physical harm is measured only in terms of adherence to policies for reporting, investigating, and following up on incidents of injury. The "outcome criteria" do not include the number and seriousness of instances of harm, which is surely the most pertinent "outcome." D.C. Plan, *supra* note 54, at 31–32.

years. The board of the trust was appointed by the mayor from a list jointly developed by the parties, and subsequent vacancies are to be filled by a vote of the remaining incumbents. The trust has a broad mandate to monitor the District's programs for the developmentally disabled and to advocate on behalf of patients. This includes the power to take the District to court. Most important, the trust has broad access to information on the performance of the District's programs for the developmentally disabled.

Such judicial interventions seem to have made a difference for the better. Horrific conditions in many custodial institutions have been ameliorated, and many patients have been transferred to community facilities that offer improved conditions and are subject to promising monitoring regimes.[56] To be sure, no case has come close to fulfilling the hopes of those who brought it, and the public mental health system remains plagued by disastrous failings. Many of those formerly incarcerated in large institutions have been released into the community without adequate shelter or care. Some have simply been abandoned, others left at the mercy of poorly monitored or underpaid subcontractors. It would be unfair, however, to blame these failings on institutional reform litigation.

### *C. Prisons*

Challenges to the Arkansas prison system in 1969 and the Texas system in 1972 inaugurated a period of massive judicial intervention in

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[56] *See* Halderman v. Pennhurst State Sch. & Hosp., 995 F. Supp. 534, 548 (E.D. Pa. 1998) (finding substantial improvement for class members from changes ordered in the Pennsylvania litigation); L. RALPH JONES & RICHARD R. PARLOUR, *WYATT V. STICKNEY*: RETROSPECT AND PROSPECT, at xi–xii (1981) (noting positive changes after *Wyatt*); ROTHMAN & ROTHMAN, *supra* note 51, at 177–219 (describing successful efforts to develop community placements and a subcontractor monitoring system under the *Willowbrook* decree); Wisor, *supra* note 46, at 152–53 (favorably appraising the system of community placements and subcontractor monitoring established under a consent decree in Massachusetts litigation, though also noting that litigation's power to bring about such change is "quite limited").

A recent *New York Times* investigation of New York community care facilities for psychiatrically disabled individuals (as opposed to developmentally disabled plaintiffs, as in *Willowbrook*) found appalling conditions. *See* Clifford J. Levy, *For Mentally Ill, Death and Misery*, N.Y. TIMES, Apr. 28, 2002, at A1; Clifford J. Levy, *Voiceless, Defenseless and a Source of Cash*, N.Y. TIMES, Apr. 30, 2002, at A1. The findings illustrate the importance of vigorous monitoring in any system providing services to vulnerable persons. The *Willowbrook* class members appear to have fared much better. The consent decree provides for two protections not available to nonclass members: First, a Consumer Advocacy Board, whose membership is appointed by the state from lists of candidates submitted by the plaintiffs and which has a full-time staff of thirty, advocates on behalf of residents. Second, the Medicaid service coordinators with responsibility for class members have caseloads of only twenty, half the usual number. Telephone Interview with Beth Haroules, Staff Attorney, New York Civil Liberties Union, and Counsel to the *Willowbrook* Class Cince 1994 (Oct. 2002); E-Mail from David J. Rothman, Professor of History, Columbia University, and Consultant to the *Willowbrook* Class, to William H. Simon (July 2002).

the nation's prisons and jails. Prison conditions in forty-one states were held unconstitutional, as were conditions in hundreds of jails throughout the country. In ten states, Malcolm Feeley and Edward Rubin report, judicial intervention was "directed at virtually every aspect of every institution in the state." They continue:

> [F]ederal courts ended up promulgating a comprehensive code for prison management, covering such diverse matters as residence facilities, sanitation, food, clothing, medical care, discipline, staff hiring, libraries, work, and education. The decisions themselves, and often the resulting body of law, specify many requirements in what can be described, depending on one's perspective, as painstaking or excruciating detail; the wattage of the light bulbs in the cells, the frequency of showers, and the caloric content of meals are all part of the code that the federal courts have promulgated.[57]

The implementation phase of many of these cases has lasted for decades.

On the whole, these cases seem to have spurred significant improvement. Especially in the harshest systems in the South, intervention has led to the elimination of the routine or authorized use of torture; to the abandonment of convict-leasing, inmate "trusties," and other managerial structures with high potential for abuse; to personnel, training, and supervisory changes that professionalized management; and to modest improvement, at least, in the physical amenity of confinement. Although many of the institutions are still foul and dangerous places, they are better than they used to be in many ways.[58]

Reform was assisted in some respects but hampered in others by the fact that it occurred amidst a policy-induced explosion of the prison population. On the one hand, the upheaval created by rushed expansion opened the system to change. It meant an influx of new personnel and created pressure, independent of the plaintiffs' demands, for more effective managerial structures. On the other hand, expansion and upheaval also increased fiscal pressures. The reformers had to find resources to fund improvements for current prisoners at a time when the system was expanding to accommodate additional ones.

Writing in 1990, Susan Sturm found some indications of a shift away from command-and-control and toward experimentalist regulation (or what she called the "catalyst approach").[59] She pointed to cases in Hawaii and Pennsylvania in which courts, instead of imposing comprehensive sets of specific rules, ordered the parties and their ex-

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[57] FEELEY & RUBIN, *supra* note 6, at 40–41.

[58] *Id.* at 73, 93–95.

[59] Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 856–59 (1990).

perts to formulate general performance standards and then to set up monitoring bodies with substantial accountability to the plaintiffs.[60]

At about this time, a movement to privatize prison services got underway. This movement involved subcontracting practices analogous to those in the mental health field, though their scale was more modest. Such efforts most commonly concerned low-security, service-intensive facilities, such as halfway houses or pre-release centers, or medical services in secure institutions. Subcontracting sometimes led to standard-setting and monitoring practices like those in mental health institutions. It freed some ambitious administrators from the rigidities associated with civil service rules, union practices, and a workforce immured in convention. According to J. Michael Keating, Jr., some administrators viewed subcontracting as "an opportunity not only to identify and clarify goals, but also to create incentive structures designed to promote the attainment of these goals."[61] (Of course, if unsupervised by public authorities, privatization also opens the way to abuse.) Such efforts increased support for emerging national accreditation processes, especially those of the American Correctional Association and the National Commission on Correctional Health Care of the American Medical Association.[62]

A further development was the formation in several states, through legislative or administrative initiative, of administrative bodies to monitor prisons. Typically, such bodies operate both by responding to grievances and through proactive auditing. Injunctive remedies in

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[60] *See id.* at 859 (discussing *Jackson v. Hendrick*, 321 A.2d 603 (Pa. 1974); and *Spear v. Ariyosha*, No. 84-1104 (D. Haw. June 12, 1985)).

[61] J. Michael Keating, Jr., *Public over Private: Monitoring the Performance of Privately Operated Prisons and Jails*, *in* PRIVATE PRISONS AND THE PUBLIC INTEREST 130, 134 (Douglas C. McDonald ed., 1990).

[62] An important part of the American Correctional Association (ACA) accreditation process is a set of about one hundred "Outcome Measures," including "[n]umber of worker compensation claims filed for injuries that resulted from the physical environment" (divided by the number of staff positions); "[n]umber of instances in which force was used" (divided by the offender population); and "[n]umber of offenders released in the past 12 months who continue substance abuse treatment for six months after release" (divided by the number of offenders released in the past 12 months). The adjustments in parentheses are designed to make the numbers comparable across institutions. *See* Am. Corr. Ass'n, ACRS Outcome Measure Worksheet, *available at* http://www.aca.org/images/form_acrsoutcome.pdf (last visited Jan. 11, 2004).

Prisoner advocates disparage ACA accreditation, emphasizing that the process includes only corrections personnel and that audits are not public. They also fault the ACA for lax compliance monitoring. *See, e.g.*, Elizabeth Alexander, *What's Wrong With the ACA?*, 15 NAT'L PRISON L. PROJECT J. 1 (2001); Telephone Interview with David Fathi, Staff Attorney, ACLU Prison Project (July 18, 2002). However, consent decrees sometimes incorporate ACA standards into more elaborate customized monitoring regimes. *See* William J. Rich, *Prison Conditions and Criminal Sentencing in Kansas: A Public Policy Dialogue*, 11 KAN. J.L. & PUB. POL'Y 693, 702–04 (2002); Telephone Interview with Mellie Nelson, Deputy Chief, Special Litigation Section of the Civil Rights Division of the U.S. Department of Justice (Sept. 23, 2002).

lawsuits sometimes also provide for the creation of these monitoring bodies.[63]

These efforts were never as ambitious as the comparable initiatives in education and mental health. There is, of course, much stronger public resistance to participation in policymaking and administration by prisoners and their advocates than by mental health patients and their advocates, and a fortiori, by parents of schoolchildren. And the natural resistance of administrators to public disclosure of performance data has been less subject to challenge in the prison sphere.

A powerful backlash against judicial intervention developed in the late 1980s. Since then, Supreme Court cases and congressional enactments have prescribed deference to administrative expertise and have insisted that judicial intervention be narrowly circumscribed. For example, one Supreme Court case reversing lower court prison injunctions vehemently condemned the level of detail (as well as the scope) of an injunction regarding prison libraries:

> It specified in minute detail the times that libraries were to be kept open, the number of hours of library use to which each inmate was entitled (10 per week), the minimal educational requirements for prison librarians (a library science degree, law degree, or paralegal degree), the content of a videotaped legal-research course for inmates . . . , and similar matters.[64]

All the Justices agreed that this went too far.

In 1996, Congress stepped in and enacted the Prison Litigation Reform Act, which imposed an array of procedural restraints on such litigation in the federal courts.[65] As in the mental health field, appel-

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[63] For administrative bodies, see, for example, CAL. PENAL CODE §§ 6125–6129 (Deering 2003) (creating an Inspector General for prisons); FLA. STAT. ANN. § 20.315(6) (West 2003) (creating the Florida Corrections Commission); 37 TEX. ADMIN. CODE § 251 (West 2003) (specifying the practices and procedures of the Commission on Jail Standards).

For litigation remedies providing for monitoring procedures, see the consent decrees in *United States v. Michigan*, No. 97-CVB-71514-BDT (E.D. Mich. Aug. 17, 1999), and *United States v. Arizona*, No. 97-476-PHX-ROS (D. Ariz. Mar. 11, 1999) (providing for grievance procedures for complaints of sexual misconduct and creating an administrative office to monitor the process and recommend systemic responses to recurring problems), *both available at* http://www.usdoj.gov/crt/split/findsettle.htm#Settlements. *See also* Settlement Agreement, United States v. Nassau County Sheriff's Dep't (E.D.N.Y. Apr. 22, 2002) [hereinafter Nassau County Settlement Agreement] (providing for the creation of a "quality assurance and improvement" system for medical and mental health care), http://www.usdoj.gov/crt/split/documents/Nassa_sher_agreem.htm.

[64] Lewis v. Casey, 518 U.S. 343, 347 (1996). Justice Thomas describes the decree in more detail over three pages of his concurrence. *See id.* at 390–92 (Thomas, J., concurring).

[65] Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended at 11 U.S.C. § 523(a) (2000); at 18 U.S.C. §§ 3624(b), 3626 (2000); and in scattered sections of 28 and 42 U.S.C.). The statute requires, among other things, that injunctions against prison administrators be "the least intrusive means necessary to correct the violation"; that after two years courts vacate injunctions on the defendant's motion unless the plaintiffs prove continuing violations; that prisoners exhaust administrative remedies; that prisoners be sanctioned for "frivolous" petitions; that damage actions be dismissed unless physical injury is alleged; and that court-awarded attorneys' fees be subject to

late courts became increasingly intolerant of lower court orders that imposed detailed restrictions, such as minimum space requirements, or restrictions only indirectly related to the legal violations, such as training or staffing requirements.[66]

Despite a growing number of legal and political constraints, however, the volume of prison litigation remains substantial, and although structural orders tend to be narrower than in the past, they are still common.[67] Among these structural orders, at least some seem to have moved toward more experimentalist modes of intervention.

Consider *Sheppard v. Phoenix*,[68] a challenge to use-of-force practices in maximum security units of the New York City jails. In 1998, the parties entered a settlement obligating the Department of Corrections to develop and implement new policies under the guidance of two designated experts with extensive prison reform experience and within broad parameters set out in a 104-paragraph "stipulation." In its report on the implementation process, the court noted that "the Stipulation . . . was implemented to achieve its goals, not to restrict it to its exact terms."[69]

Although the Department adopted extensive written policies, the court's report emphasized the process of ongoing revision, training, and monitoring, not the specifics of the policies. Monitoring efforts included an improved inmate grievance system, handheld videotaping of anticipated uses of force, cameras mounted in secluded places where incidents were likely to occur, detailed reporting and investigation procedures for each incident, and oversight by the Department's Inspector General, an officer independent of the staff line of authority. As prob-

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limits not applicable to most civil rights actions. *See generally* John Boston, *The Prison Litigation Reform Act*, *in* 1 16TH ANNUAL SECTION 1983 CIVIL RIGHTS LITIGATION 687, 693 (PLI Litig. & Admin. Practice Series, Course Handbook Series No. H-640, 2000) (summarizing PLRA doctrine); David M. Adlerstein, Note, *In Need of Correction: The "Iron Triangle" of the Prison Litigation Reform Act*, 101 COLUM. L. REV. 1681, 1685–87 (2001) (discussing PLRA's exhaustion requirement). Comparable state legislation has inhibited state court litigation in some jurisdictions. *See* Christopher E. Smith, *The Governance of Corrections: Implications of the Changing Interface of Courts and Corrections*, *in* 2 CRIMINAL JUSTICE 2000: BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS 113, 141 (Charles M. Friel ed., 2000).

66 *See, e.g.*, Ruiz v. Estelle, 679 F.2d 1115, 1144, 1148 (5th Cir. 1982) (reversing decree provisions requiring no more than one inmate per cell and reorganizing the prison's management structure).

67 In 1984, 24.3 percent of state prison facilities were subject to court orders; in 2000, 22.7 percent were. The figures for jails were 15.1 percent in 1984 and 13.4 percent in 2000. The change in the scope of orders is more marked. One-third of prison orders in 1984 reported twelve to thirteen regulated matters, and one-third reported one to three. By 1995, however, only 20 percent reported twelve or more regulated matters, and nearly two-thirds reported one to three. Margo Schlanger, Inmate Litigation After the Deluge: Part II, Court Order Cases 9, 19 (July 26, 2002) (unpublished manuscript, on file with the Harvard Law School Library).

68 210 F. Supp. 2d 450 (S.D.N.Y. 2002).

69 *Id.* at 452.

lems were disclosed, policies were revised. For example, incident reports showed that a large number of violent altercations between inmates and guards arose from inmate refusals to close food slots. These refusals, often accompanied by shouting, were considered disruptive and frequently prompted the guards to enter the cells to force compliance. Inquiry disclosed that these inmates were often protesting failures to address legitimate demands for services. The Department responded by providing training for guards on the appropriate reaction to service requests and by assigning social services counselors to the unit. Inmates who repeatedly refused to close their boxes were placed in specially designed cells that minimized inmate-guard contact.[70]

The court based its dismissal of the stipulation on measured performance improvement. Measures included the number of injuries, the number of use-of-force incidents, the processing times for investigations and disciplinary charges against guards, and guard sick days and worker's compensation claims (which the court treated as a proxy for both physical welfare and morale).[71] The court talked only about the internal trend. It made no comparative assessment and did not explain why the current scores should be deemed adequate. Nonetheless, it is clear that the court defined compliance by performance in relation to basic goals, not by conformity to rules.

While agreeing that the jails had made important progress, plaintiffs' counsel in *Sheppard* have pointed to areas where compliance has lagged. The specificity of their criticisms demonstrates, however, that the monitoring system already in place is sufficiently informative to guide further reforms. Plaintiffs' counsel can, for example, document a tendency for use-of-force incidents to rise when new staff arrive, leading them to recommend changes in the training and supervision of recruits. They can also attribute specific reporting failures to specific personnel and monitor the sanctions applied for violations of the decree.[72]

*Plata v. Davis*, one in a series of recent challenges to prison medical care, points to a similar degree of progress.[73] In a widely noted settlement, the California Department of Corrections agreed to structural relief centered on a quality assurance system with significant accountability to outside professionals and the plaintiff class. The stipulated relief in *Plata* contains virtually no substantive commands. Rather,

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[70] *Id.* at 455.

[71] *See id.* at 456–60.

[72] *See* Plaintiffs' Report to the Court on the Stipulation of the Settlement, Sheppard v. Phoenix, 210 F. Supp. 2d 450 (S.D.N.Y. 2002) (No. 91 Civ. 4148 (RPP)).

[73] Stipulation for Injunctive Relief, Plata v. Davis, No. C-01-1351 TEH (N.D. Cal. Jan. 29, 2002) [hereinafter *Plata* Stipulation], *available at* http://www.prisonlaw.com/platastip.pdf. For another case in this vein, see Nassau County Settlement Agreement, *supra* note 63.

the defendants have agreed to promulgate written policies and to monitor adherence to them in specified ways.

First, the plan provides for a panel of experts, to be agreed upon by the parties, and for the development by the parties and the experts together of an "Audit Instrument" to score compliance with the policies. The plan also specifies the minimum number of cases to be audited, their manner of selection, a procedure for resolving disputes among the auditors, and the minimum score required for compliance. The plaintiffs are entitled to seek unspecified further relief in the event of noncompliance.

The Audit Instrument has about 125 compliance elements. Many are procedural, and these tend to take a rule-like form typical of old public law: Were patients seen within specified time frames? Was the complaint and medical history adequately documented? Was treatment provided as ordered? Others specify thresholds that require appropriate treatment but leave it to professional judgment to decide what constitutes appropriate treatment in each individual case. For example, blood pressure above 140/90 requires intervention with a normal patient; blood pressure above 130/80 requires intervention with a diabetic patient. The experts expect to integrate the audit process with a "quality improvement" system of performance measures under development for prisons generally. The system will specify indicators for the classification of patients with various diagnoses by condition ("good," "fair," and "poor" control) in terms that will facilitate comparisons across prisons.[74]

The *Plata* plan emphasizes flexibility. The defendants are free to revise policies as long as they give notice to the plaintiffs (who are free to challenge them in court). Treatment provided to individual inmates will be deemed compliant if it is consistent with the department's policies or if "[t]he practitioner documents in the medical notes that he/she is deviating from adopted policies and procedures and that such deviation is consistent with the community standard."[75]

The agreement provides plaintiffs' counsel with extensive access to information, including broad categories of documents, contact with prisoners, oral interviews with staff, and periodic tours of the defendants' facilities. It also provides for mediation of disputes between the parties.

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[74] Telephone Interview with Dr. Ronald Shansky, Consultant to the California Department of Corrections (Oct. 15, 2002). An overview of the "quality improvement" approach reflected in the settlement appears in Gordon Schiff & Ronald Shansky, *Challenges of Improving Quality in the Correctional Setting*, *in* CLINICAL PRACTICE OF CORRECTIONAL MEDICINE 12, 12–25 (Michael Puisis ed., 1998).

[75] *Plata* Stipulation, *supra* note 73, at 11.

As presently structured, the relief in prison cases is less ambitious than comparable interventions in mental health cases. So far, it has not provided for monitoring institutions with stakeholder accountability, such as the Quality Trust in the District of Columbia,[76] that will survive termination of the decree. Nor has it provided for general public access to performance data in the manner of the Texas education reforms. Nevertheless, even at this early stage, its general thrust seems to be in the spirit of the experimentalist approach, and this aspect is likely to grow in time.

The extent to which experimentalist development is constrained by the Prison Litigation Reform Act of 1996 remains unclear. The Act is intended to restrict intervention generally, but some of its provisions could be interpreted to encourage movement in an experimentalist direction. Consider two of the most discussed provisions: the requirement that prisoners exhaust administrative remedies before filing suit[77] and the requirement that injunctive orders terminate after two years unless the court makes a new finding that relief is still required to remedy current violations.[78] At least on its face, each provision seems compatible with an ambitious regime of experimentalist intervention.

The exhaustion provision acknowledges that the administrator has the presumptive responsibility for making the relevant determination. From an experimentalist perspective, exhaustion contributes to the goal of developing ongoing, autonomous capacity for learning and self-reform on the part of the prison. Some such principle would be essential to any experimentalist approach.

But an effective approach would have to provide safeguards against the misuse of exhaustion to thwart serious review by, for example, establishing administrative routines that impose abusive delays or technical requirements on inmates. It would also have to provide for outside review of the prison's grievance procedures, both to resolve individual disputes and to generate information useful for addressing systemic problems.

We have a model for such an exhaustion requirement in the Civil Rights of Institutionalized Persons Act of 1980, which authorized the Justice Department to initiate suits to vindicate the rights of prison inmates and mental health patients. The exhaustion requirement in this statute was specifically limited to "such plain, speedy, and effective administrative remedies as are available" and only to procedures that have been certified by the federal Attorney General as "in substantial compliance with minimum acceptable standards."[79] In effect,

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[76] *See supra* pp. 1033–34.

[77] 42 U.S.C. § 1997e(a) (2000).

[78] 18 U.S.C. § 3626(b)(1)(A)(i), (b)(3) (2000).

[79] 42 U.S.C. § 1997e(a)(1)–(2) (Supp. IV 1980) (repealed 1996).

the statute used the exhaustion defense as an inducement to prisons to submit to a federal accreditation regime. Apparently, however, the inducement was insufficient. Among the Attorney General's certification conditions was a requirement that inmates participate in the process of developing and implementing the procedures. Few prisons sought certification, in substantial part because of their objection to the participation requirement.[80]

Although the exhaustion provision of the PLRA does not explicitly require that internal procedures be adequate or certified, it would have been plausible for the courts to imply an adequacy condition. For the most part, however, they have declined to do so[81] — in deference, we suspect, less to any coherent interpretation of the statute than to the visceral hostility to prisoners associated with its passage.

The second key provision of the PLRA — that injunctions terminate after two years unless there is proof of current violations — was intended by its drafters and has been perceived by practitioners as a major impediment to structural relief. It takes more than two years of implementation to make major improvements in a prison with serious violations. Moreover, the process of discovery and trial associated with the initial establishment of violations is costly and time-consuming. If this process must be repeated every two years, the costs will be prohibitive.

But it is not clear that the termination provision will have such an effect. To the extent that remedies take an experimentalist cast, there should be no need for costly efforts to reestablish violations, for experimentalist remedies create transparency. Once liability is found, the process of proof merges with that of implementation: a major focus of implementation is the continuous measurement of compliance. The parties should agree in the remedial negotiation on criteria and processes of measurement and on minimal performance thresholds. Measured performance below the agreed-upon threshold should suffice to establish a violation.[82]

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[80] *See* Adlerstein, *supra* note 65, at 1686 & n.27.

[81] *See* Booth v. Churner, 532 U.S. 731, 740–41 (2001) (holding that a prisoner seeking only money damages must exhaust nonmonetary administrative remedies); Boston, *supra* note 65, at 724–25 nn.74–76 (citing cases holding that the inadequacy of an administrative remedy does not excuse failure to exhaust the remedy). Note that the consequence of failure to exhaust under the PLRA is not, as under the Civil Rights for Institutionalized Persons Act, a stay of the court action pending the administrative proceeding, but rather a dismissal, even if an administrative remedy is no longer available because the period for filing has passed. *Id.* at 726.

[82] Some ambiguity about the space for experimentalist remediation arises from the requirements of the PLRA and federal equitable principles that the relief be the "least intrusive means necessary" or "extend no further than necessary to correct" the violation. 18 U.S.C. § 3626(a). This precept could be interpreted to constrain experimentalist remedies, but it is also susceptible to an interpretation that would encourage experimentalism. On one interpretation, the least intrusive injunction would attempt to spell out minimal compliance conditions in detail. In the

In some respects, then, doctrine on prison reform reflects the shift from command-and-control to experimentalist approaches. On the other hand, the doctrine is far less sympathetic to judicial intervention of any kind than is comparable doctrine in the other areas we are considering.

### *D. Police Abuse*

Acceptance of institutional reform litigation in policing has been slower than in the other areas. There are both political and doctrinal explanations for this phenomenon. The political explanation is that popular fear of crime — and associated sentimentality about the police — make judicial intervention seem costlier and riskier here.

The doctrinal explanation arises from the judicial perception that police are less closely supervised and are in less continuous contact with citizens than public servants in the other areas. This perception had led to two procedural obstacles distinctive to the police context. The first is a reluctance to infer systemic practices from discrete instances of misconduct. Chayes, for example, criticized the Supreme Court's 1976 decision in *Rizzo v. Goode*.[83] The lower court, having found nineteen specific incidents of unconstitutional police brutality, issued an injunction requiring the police department to establish a procedure for handling citizen complaints. The Supreme Court reversed, holding that nineteen proven episodes of street-level misconduct did not establish the necessary authorization or condonation to find the department or its senior officials liable.[84]

Another problem has been courts' insistence in many cases that a plaintiff has standing only if she can show, not just that she has been the victim of abuse, but that there is a high probability that she will be abused again in the future.[85]

Recently, however, two competing developments have widened the possibilities for judicial intervention, and the initiatives encouraged by both are, in their early stages, taking an experimentalist direction. The first development occurred in 1994, when, in response to the Rodney King case and the ensuing riots, Congress enacted a statute specifically prohibiting any "pattern or practice of conduct by law enforcement of-

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competing view, an injunction — such as that in *Plata* — that mandated extensive restructuring of background processes in order to leave agents more flexibility in dealing with individual cases would be less intrusive.

In cases outside the prison context, as long as the parties agree on relief, there is no need for the court to reach such issues. However, the issues are pressing under the PLRA, because the relief restrictions there apply to settlements as well as coercive decrees. 18 U.S.C. § 3626(c)(1).

[83] Chayes, *supra* note 1, at 1305–07; *see also* Rizzo v. Goode, 423 U.S. 362 (1976).

[84] *See Rizzo*, 423 U.S. at 367–69, 375–81.

[85] *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 101–10 (1983).

ficers" that deprived people of federal rights. The statute authorizes the Attorney General to seek injunctive relief "to eliminate the pattern or practice."[86]

The Department of Justice has investigated several police forces and has brought five lawsuits that have resulted in consent decrees providing for extensive structural reforms. The reforms are considerably more elaborate than the decree reversed in *Rizzo*. The recent decrees vary in detail, depending in part on the preexisting organization of the department in question, but they tend to have general elements in common.

Typically, the defendant is obliged to promulgate or revise explicit policies with respect to specified matters, such as the use of force. Minimum substantive requirements are sometimes specified, but the defendant retains broad discretion. Data collection efforts are prescribed, often in minute detail. The department must instruct officers to document such matters as use-of-force incidents, arrests, traffic or pedestrian stops, searches and seizures, and discretionary charges (such as loitering or disturbing the peace). Officers must record the reason for their intervention, the race and other characteristics of the citizens involved, and what happened. Sometimes the decree requires videotaping. The departments sometimes agree to provide officers with handheld computers or videorecorders. Officer-reported data must be recorded and stored in a way that permits aggregation with other data, such as citizen complaints (and compliments), disciplinary proceedings, lawsuits, internal investigations, and audits. Other data on officer performance, such as sick days, missed court appearances, and accidents may be added. Training for officers in the policies and the data collection procedures is prescribed. The Department of Justice may participate in designing the training or may have a right to sign off on it.[87]

The decrees also prescribe overlapping compliance procedures. Line supervisors must monitor certain data and follow up on indications of policy violations. In addition, the department must install or refine a specialized internal compliance unit outside the chain of command, such as an inspector general or an internal affairs bureau. Finally, the court appoints a monitor (ideally someone jointly recommended by the parties) with broad access to information. The monitor oversees compliance as an agent of the court.

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[86] 42 U.S.C. § 14,141(b) (2000).

[87] *See, e.g.*, ROBERT C. DAVIS ET AL., TURNING NECESSITY INTO VIRTUE: PITTSBURGH'S EXPERIENCE WITH A FEDERAL CONSENT DECREE 25–33 (Vera Inst. of Justice 2002), http://www.vera.org/publications/publications_5.asp?publication_id=180; Consent Decree, United States v. City of Los Angeles, Civil No. 00-11769 GAF (C.D. Cal. June 15, 2001) [hereinafter Los Angeles Consent Decree], http://www.usdoj.gov/crt/split/documents/laconsent.htm.

The decrees contemplate that the data will be used as an "Early Warning System," providing indicators of systemic problems.[88] Use-of-force incidents are routinely investigated. So, too, are complaints by citizens and other officers, whom the decree may oblige to report wrongdoing by colleagues. In addition, the department is required to perform various analyses of its data. For example, it must track the frequency of use-of-force incidents, complaints, and discipline for individual officers. It analyzes use of force and other kinds of police-citizen interaction in relation to geographic area, race, shift, and squad. Benchmarks or thresholds are developed based on statistical comparisons. A quarterly index of more than a standard deviation above the mean of a prescribed comparison group (a squad or shift or set of squads or shifts) might trigger a mandatory inquiry.

Line supervisors are obliged to follow up indications of noncompliance with nondisciplinary "interventions" that may include direct observation of the officer, counseling, or counseling combined with additional training. Although the decrees emphasize nonpunitive responses, they also mandate discipline when necessary. Disciplinary procedures must meet certain prerequisites. The threshold of proof for a finding of misconduct cannot be higher than a preponderance of the evidence, and there can be no presumption that police witnesses are more credible than citizen ones. Charges and dispositions are to be periodically reported to senior officials and monitors.

The decrees also mandate procedures for "audits" by line managers or internal compliance officials. Audits are designed both to determine whether officer and supervisor conduct indicated in the records is consistent with stated policy and to test the integrity of the reporting processes. For the latter purpose, auditors examine samples of documents for completeness and surface credibility (the routine use of "canned" language is a negative signal). Smaller samples may be investigated more actively by interviewing participants, and "sting audits" with undercover monitors posing as citizens may be prescribed.[89]

Usually some of the data must be reported publicly. Audit reports with overall observations on compliance and correlations of police interventions with race and locality are commonly disclosed, while information about specific incidents and officers typically is not.[90]

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[88] *See* Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 821–41 (1999).

[89] *See, e.g.*, Los Angeles Consent Decree, *supra* note 87, at paras. 124–40.

[90] *See, e.g.*, *id.* at paras. 156, 174. A study of experience under the Pittsburgh consent decree, though unable directly to assess effects on street-level conduct, found major effects on management practices and an improvement in public perceptions of the police. Supervisors monitor performance indicators and make interventions based on them daily. DAVIS ET AL., *supra* note 87, at 10–33.

The other development favoring police abuse litigation is the growing public awareness of and protest against racial profiling.[91] One of the Justice Department lawsuits under the 1994 federal statute — against New Jersey — focused on such claims.[92] Allegations of racial profiling have also been the subject of private suits, and so far they have not been blocked by the strict procedural doctrines of the earlier police cases. Persistent unexplained statistical disparities in the racial incidence of police actions can warrant an inference of institutional condonation. Moreover, with activities such as traffic stops, the likelihood that a law-abiding minority person will suffer a repeated injury is often demonstrably high enough to satisfy standing requirements.[93] There has been parallel legislative activity: at least thirteen states and many local governments have enacted legislation prohibiting racial profiling and requiring specific compliance procedures.[94]

The progression from the *Rizzo* plaintiffs' concern with general abuse to the current focus on racial targeting might seem the reverse of the movement of the school cases from desegregation to "adequacy." But relief in the current profiling cases seems more likely to resemble relief in the school adequacy cases than the command-and-control injunctions of the desegregation cases. The approach agreed to in an early private lawsuit against Montgomery County, Maryland, which has emerged from the Justice Department's suit against New Jersey and which has been widely mandated by state and local enactments, focuses on monitoring rather than dictating ex ante the specifics of policing. The regimes commit the police not to use racial criteria (except when they are seeking a previously identified suspect). The department must promulgate written criteria for stops and searches and then document them in a way designed to permit assessment of whether the conduct is consistent with its policy. The rules provide for analysis and (sometimes public) reporting of the racial incidence of such stops and searches. At least internally, the department should be able to compare racial incidence by officer, squad, or region. The New Jersey decree mandates the development of "benchmarks" — indicators based on the racial correlations of the criteria used as triggers for stops, such as vehicle type, driving behavior, and dress. The benchmarks are derived through analysis by social scientists of photographic records of

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[91] *See generally* Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41 (2001); Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651 (2002).

[92] Consent Decree, United States v. New Jersey, Civ. No. 99-5970 (MLL) (D.N.J. Dec. 30, 1999) [hereinafter New Jersey Consent Decree], www.state.nj.us/lps/jointapp.htm.

[93] *See* Gross & Barnes, *supra* note 91, at 727–29; Brandon Garrett, Note, *Standing While Black: Distinguishing* Lyons *in Racial Profiling Cases*, 100 COLUM. L. REV. 1815, 1834–39 (2000).

[94] Gross & Barnes, *supra* note 91, at 729.

traffic flow. When police stop or search minorities at rates above the benchmarks, an inference of racial profiling may arise, and intervention is called for.[95]

An important contested issue concerns the role of citizen groups in these regimes. "Community policing," in which police devise local crime control strategies in collaboration with neighborhood groups, is now widely promoted. In various forms it has had promising trials in several cities, including Philadelphia, Boston, and Chicago. The Justice Department consent decrees, however, require police consultation with community groups only in vague terms. Most importantly, they do not require that the monitoring data they generate be made available to such groups. Critics assert that such groups have important information bearing on the interpretation of the data that is unlikely to be available to professional monitors. These groups also arguably have the strongest incentives to promote enforcement. Citizen groups in Los Angeles and New Jersey have brought suits seeking expansion of the relief in the consent decrees to afford broader access and participation.[96]

### *E. Housing*

In housing, there has been a shift away from large-scale desegregation efforts toward regimes focused directly on housing quality that parallels the course of school litigation from desegregation toward "adequacy." Concomitantly, judicial efforts to address municipal discrimination against low-income housing development have evolved in an experimentalist direction.

In 1969, in *Gautreaux v. Chicago Housing Authority*, a federal district court found that the Authority, through siting and tenant assignment decisions, had unconstitutionally segregated the city's vast public housing system. The court entered a broad decree, since revised many times, to remedy the violations. The core of the decree was a mandate that for every new unit the Authority built in a predominantly minority neighborhood, it had to build three units (later reduced to one) in a nonminority neighborhood.[97]

More than thirty years later, plaintiffs and a receiver are still struggling to implement the decree. Only about seven percent of the units constructed under the receiver are in white neighborhoods. Political resistance in nonminority neighborhoods and the shift in federal hous-

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[95] *See* New Jersey Consent Decree, *supra* note 92, at 554–56; Garrett, *supra* note 91, at 76–80; Gross & Barnes, *supra* note 91, at 717–28;.

[96] *See* Garrett, *supra* note 91, at 98–115; Livingston, *supra* note 88, at 841–56.

[97] *See* Gautreaux v. Chi. Hous. Auth., 304 F. Supp. 736, 737–39 (N.D. Ill. 1969); Gautreaux v. Landrieu, 498 F. Supp. 1072, 1073 (N.D. Ill. 1980); Gautreaux v. Chi. Hous. Auth., 4 F. Supp. 2d 757, 758 (N.D. Ill. 1998).

ing support away from new public housing construction have stalled further progress. As with schools, integration has become more difficult as whites have migrated out of the city. In addition, major problems in public housing quality persist.[98]

Some civic and tenant groups have charged that the *Gautreaux* focus on integration has impeded rehabilitation of housing projects and revitalization of minority neighborhoods. They further argue that the integration effort has made housing development too expensive. In two recent lawsuits, members of the *Gautreaux* class seeking to rehabilitate housing in minority neighborhoods have aligned themselves against the *Gautreaux* receiver and plaintiffs' counsel.[99]

There has been some success. Some units have been built in neighborhoods from which public housing was once excluded. A service-intensive program that tries to help holders of "Section 8" housing-assistance certificates find apartments in the suburbs appears to be working. On the whole, however, the experience has been disappointing.[100]

The landmark example of the shift of litigation focus to housing quality is *Perez v. Boston Housing Authority*,[101] in which the Massachusetts Supreme Judicial Court affirmed an order placing the Housing Authority in receivership. The principal substantive basis of the order was the state sanitary code requiring all landlords, public and private, to maintain housing in minimally safe and habitable conditions.[102] The plaintiffs presented voluminous evidence showing that the Authority's projects were far from compliant. They also presented evidence of corrupt and incompetent management, showing, for example, that the board and managers lacked skills and knowledge necessary to perform their duties, paid little attention to key aspects of their

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[98] *See* Joseph Seliga, Gautreaux *a Generation Later: Remedying the Second Ghetto or Creating the Third?*, 94 NW. U. L. REV. 1049, 1062 (2000).

[99] *See* Gautreaux v. Chi. Hous. Auth., 1999 U.S. Dist. LEXIS 17439 (N.D. Ill. Nov. 3, 1999); Cabrini-Green Local Advisory Council v. Chi. Hous. Auth., 1997 U.S. Dist. LEXIS 625 (N.D. Ill. Jan. 22, 1997).

[100] *See generally* Seliga, *supra* note 98; William P. Wilen & Wendy L. Stasell, Gautreaux *and Chicago's Public Housing Crisis*, 34 CLEARINGHOUSE REV. 117 (2000).

Another notable large-scale desegregation case that took an enormous toll in terms of material expense and acrimony but generated disappointing results is *United States v. Yonkers Board of Education*, 624 F. Supp. 1276, 1545 (S.D.N.Y. 1985). For the depressing story in full, see Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 HARV. C.R.-C.L. L. REV. 289, 324–64 (2002).

[101] 400 N.E.2d 1231 (Mass. 1980).

[102] Another basis for structural relief recognized since *Perez* is "constructive demolition," a doctrine holding that extreme failure to maintain or repair can constitute violation of a statute requiring federally subsidized authorities to demolish only in accordance with a process involving HUD approval. 42 U.S.C. § 1437p (2000); *see also* Concerned Tenants Ass'n of Father Panik Vill. v. Pierce, 685 F. Supp. 316, 321 (D. Conn. 1988) (recognizing an implied cause of action for "*de facto* demolitions" under the statute).

jobs, allowed available resources to go unused, and ignored opportunities to apply for new resources.

The federal government has sought to establish a system for assessing public housing performance that supports public actions for structural relief. Pursuant to congressional mandate, the U.S. Department of Housing and Urban Development (HUD) operates the Public Housing Assessment System, which scores local agency performance according to a range of indicators in four general areas: (1) physical condition (compliance with building and sanitation standards); (2) financial condition (for example, the number of months the authority can operate on its Expendable Funds Balance without additional resources; the average number of days tenant receivables are outstanding; the expense per unit of utilities, maintenance, and security; and the amount of unobligated capital funds); (3) management operations (for example, vacancy rates, number and age of outstanding work orders, and unit turnaround time); and (4) resident service and satisfaction (based on responses from a resident survey on issues such as maintenance and repair, safety, management communication, recreation, and other services). Each indicator is measured and then summed to produce scores comparable across sites for each of the four areas and a total score on a hundred-point scale. Authorities that receive scores of at least sixty percent of the available points for physical condition, finance, and management and a total score above ninety are considered "high performers" and are subject to relaxed reporting and monitoring requirements. An authority with passing scores in each area and a total score between sixty and ninety is considered a "standard performer." These authorities are expected to formulate improvement plans and to demonstrate progress under them. A failing score on physical condition, finance, or management or a total score below sixty leads to designation as "troubled" and subjects the authority to intensive monitoring.[103]

In an effort to make scores comparable across sites, HUD prescribes measurement procedures in minute detail. However, the system contemplates periodic revision in consultation with "owners, residents, and affected communities."[104] The tendency is toward a system

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[103] *See* Public Housing Assessment System, 24 C.F.R. pt. 902 (2003); U.S. Dep't of Hous. & Urban Dev., Public Housing Assessment System: Information About PHAS, 64 Fed. Reg. 26,160 (May 13, 1999).

[104] OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF HOUS. & URBAN DEV., AUDIT REPORT NO. 2001-DP-0004, at 15–17 (Sept. 28, 2001), *available at* http://www.hud.gov/oig/ig1d0004.pdf (reporting criticisms by HUD's Inspector General and the Government Accounting Office that the initial weights HUD assigned to physical condition indicators did not reflect stakeholder priorities, and prescribing more effective consultation).

of specific rules, but one that is continuously revised in light of its purposes through a participatory process.

In 1990, Congress directed HUD to petition a court to place in receivership housing authorities whose performances failed to improve after being rated "troubled" under the assessment system.[105] Reports suggest that receivers have found their work difficult but have made substantial improvements.[106] In principle, the receiver's goal is not just to manage the property through a crisis, but to restructure its processes in a way that makes effective operation possible without judicial intervention. As with reform of schools and mental health facilities, a major theme of many receiverships is decentralization. In housing, decentralization includes tenant participation, which has been a prominent theme in federal public housing policy since the 1980s. HUD mandates resident advisory councils and encourages tenant management of the projects it subsidizes.[107] Some receivers have had notable success in strengthening these processes.[108]

A final, convergent instance of judicial initiative involves private housing development. It arose from the New Jersey Supreme Court's 1975 *Mount Laurel* decision.[109] The court held that a local zoning ordinance that largely precluded low- and moderate-income housing violated a state constitutional provision granting various general rights including the right "of acquiring, possessing, and protecting property." It interpreted this provision to require a local government to structure its zoning code so as to "make realistically possible an appropriate variety and choice of housing," including its "fair share of the present and prospective regional need" for low- and moderate-income housing.[110] This holding is a housing analogue to the recognition by state supreme courts of the right to an adequate education.

*Mount Laurel* differs procedurally from the other cases considered here. The New Jersey court was not dealing with one or a few institutions in a single case with a single structural decree. It was attempting to deal with practices of local governments across the state, and it acted in a series of cases, each involving a single locality. Yet its goals

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105 *See* 42 U.S.C. § 1437d(j) (2000).

106 *See* MARK H. MOORE, CREATING PUBLIC VALUE: STRATEGIC MANAGEMENT IN GOVERNMENT 193–200, 240–55 (1995) (Boston); Lynn E. Cunningham, *Washington D.C.'s Successful Public Housing Receivership*, 9 J. AFFORDABLE HOUSING & COMMUNITY DEV. 74 (1999); Carolyn Hoecker Luedtke, *Innovation or Illegitimacy: Remedial Receivership in* Tinsley v. Kemp *Public Housing Litigation*, 65 MO. L. REV. 655 (2000) (Kansas City).

107 *See generally* U.S. DEP'T OF HOUS. & URBAN DEV., COMMUNITY BUILDING IN PUBLIC HOUSING: TIES THAT BIND PEOPLE AND THEIR COMMUNITIES (1997).

108 *See* MOORE, *supra* note 106, at 250–53; Luedtke, *supra* note 106, at 672.

109 S. Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975), *cert. denied*, 423 U.S. 808 (1975).

110 *Id.* at 724.

were structural and its practices managerial in ways strongly analogous to those in the other new public law cases.

The first *Mount Laurel* opinion simply announced the new doctrine in general terms and struck down the particular ordinance in question, leaving development of the doctrine to future cases. The case encouraged the civil rights groups that had brought it and mobilized developers. Many municipalities resisted strongly. A movement to amend the state constitution to eliminate the doctrine formed but never succeeded.

In 1983 the court issued an opinion reaffirming its commitment to the doctrine and further guiding its implementation. *Mount Laurel II* did not prescribe comprehensive or specific directives for the determination of a locality's "fair share." Instead, it incorporated the methodology of a "Development Guide" promulgated by a state agency. The court prescribed that judges would be guided by the agency's revisions of the methodology. It provided an illustrative list of ways in which a municipality might satisfy its duties, including density bonuses and inclusionary zoning. It also prescribed a "builder's remedy," by which a builder who prevailed on a *Mount Laurel* challenge to a zoning ordinance would be permitted to build unless the municipality could show that the project violated some valid regulation. This obviated the possibility that, when a locality lost a *Mount Laurel* challenge, all development would cease until it came up with a valid zoning code. This remedy also gave developers strong incentives to challenge noncompliant codes. Finally, the court established a procedure by which it would appoint lower court judges to hear *Mount Laurel* zoning appeals. It would designate three judges to hear all the appeals statewide, one judge for each of three regions.[111]

This arrangement made possible a complex series of negotiations among municipalities and across cases that produced considerable agreement on the assignment of responsibility. When the Urban League sued twenty-three municipalities, one of the *Mount Laurel* judges ordered the planning experts of all the parties to meet to negotiate a formula for allocating "fair shares" of new affordable housing. The effort produced a consensus that became the basis for subsequent allocation decisions throughout the state.[112]

In 1985, the legislature responded to the *Mount Laurel* decisions with the New Jersey Fair Housing Act, establishing an administrative agency, the Council on Affordable Housing, to assume the primary role in monitoring compliance with *Mount Laurel* obligations. The statute

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[111] *See* S. Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390, 422–513 (N.J. 1983).

[112] *See* CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES 57 (1996).

also charged the Council with providing research and technical support and facilitating negotiations among local governments. Although the statute and the Council's activities have retreated from some aspects of *Mount Laurel*, much of the framework established by the courts has been preserved.[113]

Although opinion is divided, *Mount Laurel* can plausibly be viewed as a "marginal success."[114] The efforts it prompted do not appear to have led to integration of the suburbs, but they have increased the supply of low- and moderate-income housing in New Jersey.[115] Moreover, the court prompted the legislature to create an administrative process that seems significantly more responsive to the interests articulated by the plaintiffs, both by creating pressures for local accommodation of low-income housing and by making the zoning process more transparent. A few other state courts have followed *Mount Laurel*'s lead in finding state constitutional restraints on exclusionary zoning, though generally in a weaker form, and several state legislatures have instituted statutory schemes resembling the New Jersey Fair Housing Act, with and without judicial prompting.[116]

### *E. Conclusion*

In all of these areas, though to varying degrees, there has been a tendency for remedial practice to move away from command-and-control toward experimentalist methods.

It is possible that this tendency has partly been a function of changes in substantive issues. For example, in prison litigation, many cases in the 1970s and 1980s focused on crowding. Today's cases more commonly focus on inmate medical care. It is much easier to formulate specific directives for crowding than for medical care.

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[113] *See* N.J. STAT. ANN. § 52:27D-302(c) (West 2001). *See generally* HAAR, *supra* note 112, at 89–116.

[114] Henry Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 72 (2001). Haar views it as more than marginally successful. *See generally* HAAR, *supra* note 112. But there are negative assessments. *See* Schuck, *supra* note 100, at 315–19. The authors of DAVID KIRP ET AL., OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA (1995), view the judicial regime created by *Mount Laurel II* as highly promising and the results of the administrative regime that replaced it as meager. *See id.* at 112–64.

[115] Based on Commission on Affordable Housing data, Span estimates that from 1987 to 2001 the *Mount Laurel*–inspired statutory regime added 40,000 units of affordable housing and perhaps a larger number of market-rate middle-income units that otherwise would not have been built. Span, *supra* note 114, at 65–68.

[116] *See id.* at 37–84. Span views Oregon, where a judicial decision was also followed by a legislative response, as the most successful case: "[T]he Oregon experience shows that if a court can manage to provoke a state legislature into creating a state agency with jurisdiction over land-use and housing policy, such an agency can go further than its original mandate if given significant interest group, as well as judicial, support." *Id.* at 72–73.

To some extent, however, the move reflects a general sense of the inadequacy of command-and-control approaches. Courts found they lacked both the information and the depth and range of control to properly formulate and enforce command-and-control injunctions. Moreover, command-and-control interventions exacerbated resistance on the part of defendants — or at least, top-down measures had little capacity to neutralize such resistance.

Any assessment of the comparative efficacy of the two approaches would have to be tentative and qualified. In general, where clearly bad practices (and the available bad substitutes for them) can be specifically described and are not too numerous, a negative injunction in specific mandatory terms will often seem promising. Thus, the courts desegregated many countywide school districts in the rural South with more or less command-and-control-style decrees. The early prison cases made substantial improvements with traditional top-down prohibitions of practices such as convict-leasing and torture.

Even where the conditions for command-and-control intervention are not satisfied, experimentalist approaches will not always be promising. Jennifer Hochschild argues that the most successful Northern school desegregation cases, such as that of Wilmington, Delaware, were those in which the courts mandated practices specifically and quickly. She contends that in cases such as Boston's, the emphasis on stakeholder participation impeded progress.[117]

Nevertheless, the new approaches are promising in many contexts. In the following Part, we suggest some reasons why they might succeed where the older ones have failed.

## III. PUBLIC LAW LITIGATION AS DESTABILIZATION RIGHTS ENFORCEMENT

### *A. Right and Remedy*

The feature of Chayesian public law litigation that has most troubled legal analysis is the relation of right and remedy. Determination of right, or liability, looks familiar. Normatively, it seems like a judgment about entitlement of a sort courts customarily make. Methodol-

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[117] *See* JENNIFER L. HOCHSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION 92–145 (1984). It may be, however, that the success stories Hochschild emphasizes depended on stakeholder participation mobilized after the formulation of the remedy as part of its implementation. And the most important explanation for the failure of cases like Boston's may be that remedies there were confined to a single urban district, rather than, as in Wilmington, operating across several. *See* JEFFREY A. RAFFEL, THE POLITICS OF SCHOOL DESEGREGATION: THE METROPOLITAN REMEDY IN DELAWARE 120–53, 208–17 (1980).

ogically, it seems to arise from the application of conventional legal analysis to traditional sources.

But as Chayes emphasized, the remedial implications of a public law determination of right are more ambiguous than those of the paradigmatic private law determination. A judgment of tort or contract liability usually implies a limited range of specific interventions.[118] A public law liability determination speaks with some clarity only about the broadest goals of intervention. It has only vague implications for the specific forms intervention should take. Moreover, remedial design requires a different type of decisionmaking from rights determination. It does not directly involve the elaboration of normative principles or the interpretation of texts. Remedial design involves more technical, strategic, and contextual forms of thought.

Drawn from a practice that was more transitional than he anticipated, Chayes's formulation of the public law relation between right and remedy was inconclusive. It invited two contrary, symmetrically unsatisfactory interpretations. Daryl Levinson calls the first of these "rights essentialism."[119] This view sees liability determination as the core judicial function and remedial formulation as derivative and secondary. The declaration of substantive rights draws its legitimacy directly from the role of the courts in elaborating and protecting entitlements. Prescribing remedies is an ancillary activity necessary to give practical effect to the liability judgment but less grounded in legal principle.

The evolution of public law traced in Part II suggests important objections to this view. To portray the core of judging as the declaration of rights independent of the effort to actualize them in particular circumstances ignores the practical dimension of adjudication. It also misrepresents the psychology of judicial decisionmaking to suggest that the anticipated difficulties of implementing rights do not strongly influence their declaration. Furthermore, if Holmes's "bad man," who cares only about tangible sanctions and rewards,[120] captures any dimension of social life, then the remedy will determine the impact of the case on future conduct.[121]

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[118] *See* Chayes, *supra* note 1, at 1282–83. Nonetheless, the difference can be exaggerated. Some of the classics of modern legal scholarship have been devoted to showing that the remedial implications of private law rights are not as definite as people sometimes think. *See, e.g.*, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages I*, 46 YALE L.J. 52 (1936).

[119] Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999).

[120] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

[121] *See generally* Levinson, *supra* note 119.

The contrary view insists, with Holmes's "bad man," that only the remedy is important. But this crude positivism is even less satisfactory than the exaltation of rights. It ignores that the remedy arises from a reflective effort to give meaning to the right. Both rights essentialism and crude positivism understate the interdependence of rights declaration and remedial formulation. The remedy is an elaboration of the rights in question: it is not a technical effort to execute an already defined norm, as rights essentialism implies; nor is it an exercise of instrumental discretion, as crude positivism suggests.

Moreover, neither perspective captures the two most important distinctions between the two phases of decisionmaking in the new public law. First, the move to the remedial phase in experimentalist cases will often involve a shift in process, personnel, and methodology. The judge's role changes from that of directly determining the merits to facilitating a process of deliberation and negotiation among the stakeholders. The judge's determination in the liability phase can take into account the anticipated results of this process only to a small extent, because the same limitations of the judge's knowledge that force him to initiate the process also constrain his ability to anticipate its results.[122]

Second, the incentive or deterrent effect on potential future defendants does not depend on the specifics of the remedy in any particular case. Unlike the social engineer trying to regulate the Holmesian "bad man," the experimentalist lawmaker does not try to calibrate remedies precisely to induce the desired pattern of conduct, because she does not know with any specificity what the desired pattern of conduct is. The message that the new public law sends to prospective defendants is not that they will suffer any specific set of consequences in the event of default, but that they will suffer loss of independence and increased uncertainty. Uncertainty does not represent a failure of articulation but the deliberate crux of the message.

A critical aspect of both the declaratory and the remedial dimension of the new public law litigation is captured in Roberto Mangabeira Unger's notion of "destabilization rights." This idea is part of the detailed institutional program of "empowered democracy" that concludes Unger's 1987 work, *False Necessity*: "Destabilization rights protect the citizen's interest in breaking open the large-scale organizations or the extended areas of social practice that remain closed to the destabilizing effects of ordinary conflict and thereby sustain insulated hierarchies of power and advantage."[123]

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[122] When the defendant concedes liability in negotiation, the shift from liability to remedy is less marked. There may be little change in process or personnel, but there is likely to be a change in perspective and methodology.

[123] UNGER, *supra* note 13, at 530.

Destabilization induces the institution to reform itself in a process in which it must respond to previously excluded stakeholders. Although Unger describes the idea only briefly, he gives Chayesian public law litigation as an illustration. We think the practice in public law cases in the years since Unger's book appeared might be considered both a vindication and an elaboration of his idea.

Destabilization usefully describes both the remedy and the process by which the meaning of the background substantive right is articulated in these cases. In the new public law, the judge does not exercise discretion in each case to choose among an infinite array of potential responses to the particular problem. Rather, having found a violation of some broad norm — the right to an adequate education, the right to access to justice — she imposes the single remedy that the liability phase has shown to be appropriate: institutional destabilization. This remedy has a common structure across fields. Moreover, judicially and publicly accountable standard-setting in the experimentalist liability phase bridges the gulf between the initial affirmation of the substantive right and the eventual remedy.

In the remainder of this Part, we elaborate on the understanding of the new public law as destabilization rights. We start by noting precedent for destabilization rights in traditional private law. Here we suggest that Chayes's distinction between "traditional" and "public" law obscures an important feature of the former that foreshadows the experimentalist version of the latter. We then describe public law rights and remedies as forms of deliberate, reflective destabilization. Experimentalist intervention is a public institutional analogue of the ongoing destabilization induced by common law norms in the private market. Such intervention subverts entrenchment by subjecting institutions both to ongoing scrutiny by their stakeholders and to the feedback of disciplined performance comparisons with peer institutions.

The inauguration of these experimentalist regimes is preceded by remedial negotiations. These negotiations are induced and fueled by an intense destabilization that results from the initial intervention of the court. The parties define the remedies, but it seems unlikely that they could do so without this intervention. The court's principal contribution is to indicate publicly that the status quo is illegitimate and cannot continue. We show that this very general intervention can have a series of effects that may make it possible for the adversaries to collaborate productively to design a specific remedial regime.

### *B. The Destabilization Theme in Private Law Litigation*

Chayes's article built on a contrast between the "traditional model" of private litigation and actions against public officials for structural injunctive relief. He characterized traditional litigation as "bipolar" (affecting only two parties), retrospective (concerned with past facts),

involving claims of right that implied definite remedies proportional to the harm alleged, "self-contained" (in the sense that judgment terminated the court's involvement), and "party-controlled" (implying a passive judicial role).[124]

But even when it operates primarily as a mechanism of dispute resolution, the common law has precedential effects that ramify beyond individual cases and shape the backdrop of general rules that regulate social interaction. In areas such as tort and bankruptcy, moreover, the common law is intended to operate as much as a system of social regulation as one of dispute resolution. By ignoring the way the systemic and self-consciously regulatory aspects of traditional adjudication entailed polycentricity and destabilization, Chayes exaggerated the novelty of public law litigation.

To be sure, the continuity with traditional litigation was far less salient in the command-and-control practices that prevailed when he wrote. But this continuity has become more visible in the experimentalist practice of recent years. The tendency of the common law to destabilize congealed social practices anticipates a central theme of experimentalist public law.

*1. Precedent and Polycentricity.* — Common law adjudication produces both a resolution of the dispute between the parties and a norm — the precedent — that is supposed to guide future cases and, by implication, social conduct. Chayes acknowledged the doctrine of precedent but associated it principally with appellate courts. He portrayed trial courts as concerned with factfinding and noted that this function was characteristically remitted to the "black box" of jury determination.[125] Because juries do not explain their verdicts, their decisions are ambiguous and have little formal precedential effect.

But juries decide cases under instructions from judges about the law; judges can make rulings that keep cases from juries or overrule their decisions, and they also make many decisions that influence the issues and evidence that go to the jury. All these decisions are formally subject to stare decisis. A trial court decision is binding on subordinate tribunals, if any exist, and on the court itself in future cases; further, it is persuasive authority for courts in other jurisdictions. Most trial court decisions are not officially published, but they are often published online and reported in the press and through informal channels. As a practical matter, we know that many trial court rulings and jury verdicts do influence conduct, as indications of the likely behavior of courts in future cases.[126] And, of course, appellate cases start

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[124] Chayes, *supra* note 1, at 1282–83.

[125] *See id.* at 1285–88.

[126] *See generally, e.g.*, Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47 (1992).

out as lower court cases, and their outcomes are often strongly influenced by conduct in the lower court both in making legal rulings and in the framing of the record.

In their precedential dimension, then, trial court decisions in traditional common law cases share characteristics Chayes attributed to public law litigation. They have effects that extend beyond the immediate parties. Institutional litigants show their awareness of this when they coordinate trial strategies with each other or monitor cases in which they are not directly involved. Judges, in making common law decisions, often try to take account of their precedential effects. These future effects are not necessarily proportional to or predictable from the particular harm alleged by the plaintiff before the court. To the extent that the case creates precedent, the lawsuit is not "self-contained"; the court will revisit the precedent in future cases. In applying and elaborating precedent, the court looks to its own past decisions and those of other courts, not just to the record created by the parties before it.

Finally, the precedential aspect of common law decisions blurs the distinction between simple or self-contained and complex or ramifying problems that is so prominent in the literature on public law litigation.[127] Chayes associated private law litigation with self-contained disputes and public law litigation with what Lon Fuller called "polycentric" problems.[128] Fuller's metaphor for the polycentric problem was the spider's web: tugging at one point on a single strand produces movement that ripples throughout the entire web. Adjudication, he suggested, was most appropriate for localized, self-contained problems. When the effects of resolving a particular dispute ramify broadly, he suggested, adjudication was not well-suited. A key example mentioned by Fuller and taken up by later commentators is the allocation of resources under a fixed budget.[129] A decision to increase funding for a particular activity requires that resources be directed away from others (and perhaps also toward others, to the extent that the new commitment requires complementary expenditures — for example, more spending on police may require more spending on courts and prisons). Public law litigation proponents point to problems courts routinely handle that seem polycentric, such as probate[130] and divorce.

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[127] *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 135–36 (Thomas, J., concurring) (1995); Fletcher, *supra* note 7, at 645–50.

[128] *See* Chayes, *supra* note 1, at 1304 (citing Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395–98 (1978)). Fuller's article circulated in manuscript for many years before it was published, and Chayes cited this version. *See id.* at 1304 n.94.

[129] *See* Fuller, *supra* note 128, at 394–96.

[130] *See* Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 479–86, 488–93 (1980).

Moreover, every judicial order implies an allocation of public funds sufficient to enforce it; the enforcement costs of even routine private litigation are often substantial, and enforcement often depends on the discretionary initiative of public officials, such as sheriffs charged with finding and executing on a defendant's assets.

If we focus on the precedential aspects of common law adjudication, we see a further striking respect in which the most traditional private law adjudication is polycentric. Whatever the direct mandatory effects of a common law decision, its precedential effects often ramify in myriad and partly unforeseeable ways.[131] A negligence case, for example, will often set a standard that raises the costs of a practice or product — costs that may or may not be passed on to customers. Satisfying the standard may increase or decrease the demand by the producer for other goods or services. The modification of the producer's conduct or product may either increase or decrease its attractiveness to consumers relative to other goods. The modification may induce technological developments providing benefits that spill over to other products, or alternatively, the decision may encourage technological stagnation. Yet the court typically must decide on the basis of only a small fraction of the relevant information. That such doctrines can have very large but uncertain effects is a pervasive premise of contemporary legal thought.[132] This premise is prominent, for example, in the contemporary debate over tort liability. Although they do not agree on what the effects of tort liability are, most of the commentators assume they are large, and even those who regard the effects as unfortunate view them as objections to particular doctrines[133] rather than as reasons why courts are not qualified to adjudicate those kinds of cases.

*2. The Destabilization Aspect of Common Law Regulation.* — Joseph Schumpeter coined the phrase "creative destruction" to emphasize that the market processes that generate economic development depend on frequent and often abrupt institutional subversion and redeploy-

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[131] *See* Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 39–44 (1979) (suggesting that all judicial norm declaration is polycentric).

Although he associated traditional common law adjudication with unicentric problems, Fuller acknowledged that precedent gave it a polycentric dimension. *See* Fuller, *supra* note 128, at 398. He did not elaborate on this insight, however, except to speculate in passing that the fact that precedential norms were developed flexibly and gradually might make them adaptable to polycentric problems. Most public law critics who built on the polycentricity idea ignored this qualification.

[132] Two prominent histories attribute large social effects to the nineteenth-century common law. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977); J. WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956).

[133] *See, e.g.*, PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 3–18 (1988).

ment.[134] Common law norms play an important role in this process. Consider two especially important examples from tort law — the duty of care to strangers and the immunity for competitive injury.

The duty of care holds industries responsible, usually through damages, for the consequences of socially unreasonable practices. Reasonableness is measured in both efficiency and fairness terms. While industry custom is often used as a proxy for both efficiency and fairness, it is not a trump; even longstanding and universal practices are sometimes found unreasonable.[135] When a common law court enforces prevailing industry standards, it puts pressure on weaker, less adept firms. Some will improve their practices; some will go out of business. When a court raises standards for the industry, it puts pressure on all firms. The reasonableness norm is continuously revisable; it is elaborated in the context of current social circumstances. So firms can rarely sit back, confident that today's practices will be sufficient. They are likely to experience some pressure to improve.

The competitive injury norm is the opposite of a liability norm — it presumptively shields those who compete successfully through price or product quality from claims by unsuccessful producers injured by their activities.[136] This norm subjects economic actors to pervasive vulnerability and potentially devastating loss and thus promotes improved performance. As with the duty of care, the immunity for competitive injury creates pressures for continuous adjustment, and it often causes disruption and loss.

Common law norms like the duty of care and the immunity for competitive injury regulate indirectly and partially. Sometimes, however, common law courts engage in more direct and comprehensive restructuring of business institutions. Two areas are especially important — antitrust and insolvency.

Antitrust is a set of tools designed to destabilize enterprises that have reduced their vulnerability to competitive pressures. In effect, the doctrine forces enterprises to remain open to these pressures. Sometimes damages and the prohibition of specific practices are deemed sufficient for enforcement. At other times, when an enterprise or group has acquired monopoly or oligopoly power, courts are obliged to undertake direct and comprehensive restructuring. Over the years, major portions of the oil, tobacco, cement, and movie industries,

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[134] JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 81–86 (3d ed. 1950).

[135] *See, e.g.*, The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).

[136] The norm became firmly established only in the nineteenth century. Prior to that time, established enterprises in many lines of business could sometimes recover from successful competitors for "loss of custom." *See* HORWITZ, *supra* note 132, at 114–16.

among others, have been restructured by court decree under antitrust laws.[137]

Insolvency is another area in which courts undertake direct and comprehensive reorganization. Chayes noted in passing that "[f]rom 1870 to 1933, federal judges, acting through equitable receivers, reorganized over 1,000 railroads," but he considered this activity outside the core work of common law courts.[138] Much of this reorganization work is concentrated in the federal bankruptcy courts. Nevertheless, state courts of general jurisdiction have substantial power to restructure organizations in situations where there is insolvency or a risk of insolvency. Insolvency law has aspects of both restabilization and destabilization. One of its principal purposes is to protect enterprises against the *excessively* destabilizing pressures that can result when creditors assert their claims individually without coordination. The resulting scramble risks both a disorderly distribution and the destruction of potentially viable enterprises. Insolvency law mitigates the destructive destabilizing effects of the common law of contract. In another dimension, however, insolvency law destabilizes: it disentrenches the position that the owners or managers of the debtor might otherwise have. Once the race to judgment is halted by public intervention or agreement among the creditors, the debtor has some advantages. It has the best information about the condition and prospects of the business, and it can coordinate its strategy without the difficulties that a diverse creditor coalition faces. Other aspects of the insolvency process are thus designed to level the field by forcing the debtor to disclose information, assisting creditor coordination, and at the extreme, mandating displacement of the debtor or its management.[139]

On a more general level, the destabilization theme is reflected in two pervasive characteristics of common law norms. First, a common law precedent, in its paradigmatic form as a damage judgment, regulates indirectly. It indicates that those in the position of the defendant will have to pay damages for comparable future injuries, but it does not specifically dictate conduct. In many cases, it leaves the defendant free to choose between compensating future victims and reducing harm, as well as free to decide how to reduce future harm. Second, a common law norm is open-textured and open-ended. It is open-textured in the sense that it states a principle rather than a rigid or specific rule, and the principle is embedded in a set of facts. Its future

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[137] *See generally* Robert A. Skitol, *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century*, 9 CORNELL J.L. & PUB. POL'Y 239 (1999).

[138] Chayes, *supra* note 1, at 1303 n.92.

[139] *See* THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 7–19, 193–208 (1986).

applicability has to be determined through informal, analogical reasoning. A common law norm is open-ended in the sense that it is always open to revision, modification, and elaboration. Whether this process is portrayed as a quest to delineate a timeless but amorphous principle or as a process of continuous regulatory adjustment, common law norms have a provisional quality.

Chayes ignored these destabilizing, regulatory aspects of common law for two related reasons. First, as we noted, he saw the common law largely as a dispute-resolution mechanism that resolved cases one by one without disturbing the settled practices of the market. Second, he associated effective regulation in the age of the administrative state with the command-and-control model of a comprehensive set of fixed and rigid rules. Public law adjudication in his conception was primarily an innovation in the process of rulemaking, not in the kind of rules made. Thus, he was doubly indisposed to detect the regulatory current of "traditional" law.

But the evolution of public law itself demonstrates the limitations of this perspective. The trend in structural remedies, we have seen, is away from command-and-control toward initiatives that build on and even systematize the very qualities of indirection and provisionality characteristic of common law norms.

### *C. Destabilization Rights*

A public law destabilization right is a right to disentrench or unsettle a public institution when, first, it is failing to satisfy minimum standards of adequate performance and, second, it is substantially immune from conventional political mechanisms of correction. In the typical pattern of the new public law suit, a finding or concession of liability triggers a process of supervised negotiation and deliberation among the parties and other stakeholders. The characteristic result of this process is a regime of rolling or provisional rules that are periodically revised in light of transparent evaluations of their implementation.

*1. The Prima Facie Case.* — The prima facie case for public law destabilization has two elements: failure to meet standards and political blockage. The first element is explicit and is the focus of evidence and argument in the liability phase. The second is less discussed but remains an important background premise.

The determination regarding compliance with minimum standards is the least controversial aspect of institutional reform adjudication. Often the plaintiff's claim that the institution fails to meet minimum

standards is uncontested.[140] Often, operating managers are sympathetic to, and even supportive of, the claims because they themselves have been struggling to bring the institutions into compliance. Even senior public officials, including governors and mayors, are sometimes willing to concede the point, especially when they can blame prior administrations. Thus, the Dukakis administration, explicitly declining to defend the "indefensible," conceded that Massachusetts's mental health facilities failed to meet minimum standards, and the Williams administration in the District of Columbia conceded that the District's facilities for mentally retarded persons were unacceptable. Arkansas's prison administrator encouraged a federal court challenge to the institutions he ran and cooperated with the plaintiffs and the court. In the Texas prison litigation, a lawyer for the Texas corrections department informed the state attorney general that conditions in its facilities were in some respects worse than the plaintiffs alleged. In the Kansas City desegregation case, the school district initially joined the parents as a plaintiff against the state and was only later realigned by the court as a defendant. In Pittsburgh, a new police chief embraced monitoring procedures sought by the Department of Justice in the course of distancing himself from the mixed reputation of the prior administration.[141]

To the extent liability is disputed, the court's role is virtually identical to its role in traditional tort litigation. In effect, the court looks to industry standards to define minimum performance. Standards are proved through expert testimony about customary practice by experienced practitioners or academics and through judicial notice of norms promulgated by accrediting or standard-setting organizations within the relevant field. In education, the courts look to student performance on standardized tests, to teacher qualifications in relation to standards of accrediting organizations, and to school facilities under standards promulgated by accrediting organizations. In prison cases, standards promulgated by the American Correctional Association and the Federal Bureau of Prisons have played a critical role. National standards regarding police conduct emerged only recently, but the

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[140] The frequency of agreement between the parties on both liability and remedy is emphasized in SANDLER & SCHOENBROD, *supra* note 8, at 122; Rebell, *supra* note 41, at 90; and Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2012–13 (1999).

[141] *See* Ricci v. Okin, 537 F. Supp. 817, 820–21 (D. Mass. 1982) (noting the Dukakis administration's acknowledgement of "indefensible" conditions); Evans v. Williams, 139 F. Supp. 2d 79, 96–97 (D.D.C. 2001) (noting that officials had stipulated that "[t]he District government has fundamentally failed its obligation to disabled persons" but had insisted that the failure had occurred under prior administrations); FEELEY & RUBIN, *supra* note 6, at 59–63 (Arkansas); *id.* at 88–89 (Texas); Missouri v. Jenkins, 495 U.S. 33, 37 (1990) (Kansas City); DAVIS ET AL., *supra* note 87, at 7 (Pittsburgh).

Commission on Accreditation for Law Enforcement Agencies now plays a significant role. Courts in public housing litigation look to HUD's performance assessment system, as well as to the Uniform Housing Code promulgated by the International Conference of Building Officials. Sometimes these standards have been incorporated explicitly into the laws on which plaintiffs' claims are based, as with housing code standards in some public housing cases. More often, courts have to determine the standards' relevance to general constitutional or statutory norms. Although disputes over specifics are common, the principle of using such standards in interpreting the general norms has been largely uncontroversial.

The second element of the prima facie case — immunity to political correction — is distinctive to the public law arena.[142] The traditional common law process operates in an environment of market competition. When private actors immunize themselves from competition, antitrust law may intervene. By contrast, government institutions tend to be monopolistic. Their principal accountability mechanisms tend to be electoral and political. Public law norms play a role analogous to antitrust law in disrupting institutions that have become steeled to political pressures.[143]

The political element of the prima facie case is generally not explicit, but it seems an important premise of most cases. Three patterns recur. The first involves majoritarian political control unresponsive to the interests of a vulnerable, stigmatized minority.[144] The minority can be a racial group, as in some versions of the education, housing, and police cases. Or it can be a group that has been socially stigmatized on the basis of conduct or disposition, as with prisoners and mental health patients.

Some cases seem to fit a second pattern — the "logic of collective action" — in which a concentrated group with large stakes exploits or disregards a more numerous but more diffuse group with collectively larger but individually smaller stakes.[145] Chayes emphasized this pattern. He saw institutional reform as comparable to then-recent admin-

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[142] Because we reject the idea that courts are uniquely, or even — by themselves — adequately, qualified to elaborate public law rights, we disagree with Owen Fiss's claim that the courts' traditional law-declaring function is a sufficient basis for public law litigation in the absence of political failure. *See* Fiss, *supra* note 131, at 6–13.

As we indicate above, in most cases finding egregious performance failure, some form of political failure is also evident. But there are exceptions in which the political process seems adequate to address performance failures and the court should stay its hand. *See, e.g.*, Marisol A. *ex rel.* Forbes v. Giuliani, 185 F.R.D. 152, 164 (S.D.N.Y. 1982) (discussed *infra* note 222).

[143] John Hart Ely's phrase "[c]learing the [c]hannels of [p]olitical [c]hange" seems pertinent here, though he applies it to the narrower function of policing the electoral process. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 105–34 (1980).

[144] *See generally id.*

[145] *See generally* MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION (1965).

istrative law developments influenced by the notion that regulatory agencies were susceptible to "capture" by the industries they regulated, at the expense of more dispersed groups of consumers (in the case of price regulation) or local residents (in the case of environmental regulation).[146] The courts responded to such concerns by increasing the access of resident, consumer, or citizen group representatives to the administrative process and heightening agency accountability to such groups.[147] In public law litigation, the most common concerns about "capture" centered on public employees. At the upper tiers, public housing or prison officials might exploit their control of public institutions to do favors for friends and supporters or even to turn a profit. At the lower tiers, patrol-level police officers or mental health custodians might take personal satisfaction from abusing their power over citizens or inmates, or they might simply shirk.

And in all the areas, one can also see a third pattern overlapping one or both of the other two — the prisoner's dilemma, in which groups are caught in a low-level equilibrium that is susceptible to generally beneficial improvement, but only through a kind of coordination that existing institutions are inadequate to induce.[148] The minority oppression and "capture" views do not explain the great discretion that defendants often retain in the remedial phase. How can it be, Colin Diver asks, that the defendant, after being found to have systematically and pervasively violated the rights of the plaintiffs, is permitted to take the leading role in designing and implementing the remedy for its own wrongs?[149] Of course, the defendant is not always allowed such a role. Some restrictions on and adjustments to its authority invariably follow a finding of liability, and at the limit — when the court opts for receivership — the defendant may be displaced or restructured. But Diver's question is surely pertinent in the many cases in which the court leaves the defendant to play a dominant role.

Part of the answer lies in the fact noted earlier that defendants, or important constituents within the defendant institutions, are often sympathetic to the plaintiffs' claims. Even more often, defendants welcome the new resources that the decree induces nonparty governmental and private sources to volunteer. In many cases, the federal government has withheld funds because of the same derelictions of which the plaintiffs complain. The remedy makes these resources

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146 *See* Chayes, *supra* note 1, at 1310.

147 *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1723–57 (1975).

148 *See generally* RUSSELL HARDIN, COLLECTIVE ACTION (1982).

149 *See* Diver, *supra* note 2, at 82–83.

available. Universities and civic organizations also sometimes make major resource commitments to educational reform decrees.[150]

In principle, the defendants could negotiate such arrangements on their own without lawsuits. It is possible that they are not inclined to do so, but it is also possible that they face major coordination obstacles to doing so. Local executive agencies may be limited in their ability to provide the kind of credible assurances that would make the federal government and nongovernmental organizations feel comfortable extending new resources to them.

There is some analogy here to the role of the bankruptcy court or the equitable receiver in business insolvency. Part of the role of the court is to resolve coordination problems among the various stakeholders in the enterprise. Left to act as individuals, the stakeholders would behave in collectively destructive ways. Those in control of the organization would squander its assets rapidly in the expectation of being displaced. Anticipating this, each outside stakeholder would scramble to grab what she could before everything was gone. The resulting distribution would be arbitrary and would destroy any going-concern value of the enterprise. The court's intervention facilitates stakeholder coordination. The court organizes a process in which the stakeholders scale back their claims to permit fair distribution and, if the enterprise has ongoing value, its continuation. When the enterprise is viable, this process makes it possible to attract new investment. The process also allows for replacement or supervision of management by or on behalf of the stakeholders.[151]

This second element of the prima facie case — political blockage — sometimes becomes salient in later phases of a case in which the court assesses the adequacy of an administrative or legislative response to an initial declaration of liability. For example, both the New Jersey Supreme Court in *Mount Laurel* and the Texas Supreme Court in *Edgewood* eventually sustained legislative settlements of the issues in these cases.[152] No doubt there was substantial political pressure for the courts to do so (though the Texas court had rejected two prior leg-

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[150] *See* Morgan v. Kerrigan, 401 F. Supp. 216, 246–48 (D. Mass. 1975) (describing state and federal financial support for programs pairing universities and schools as part of a Boston desegregation decree); MOORE, *supra* note 106, at 243–44 (noting a grant of federal modernization funds to the Boston Housing Authority); RAFFEL, *supra* note 117, at 120–53 (describing community organizations' support for implementation of a school desegregation order in Wilmington, Delaware); *Pioneering Panel Hastens Pace of Child Welfare Reform*, CASEY CONNECTS (Annie E. Casey Found., Baltimore, Md.), Spring 2000, at 1, *available at* http://www.aecf.org/publications/data/connects_spring_00.pdf (describing foundation support for child welfare reform implementation).

[151] *Cf.* DAVID G. EPSTEIN ET AL., BANKRUPTCY 737–41, 745–48 (1993).

[152] *See* Hills Dev. Co. v. Township of Bernards, 510 A.2d 621, 654–55 (N.J. 1986); Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 750 (Tex. 1995).

islative efforts). But it also seems likely that the courts were influenced by the fact that the statutes emerged from processes involving broad mobilization by diverse constituencies, including representatives of the plaintiff class.

*2. Remedy: The Experimentalist Tendency.* — Sometimes decrees in public law cases take an in terrorem or punitive form — threatening or, far less often, imposing sanctions in order to induce compliance with other orders.[153] These background sanctions function as a kind of "penalty default" — a result that no one is likely to prefer, intended to induce the parties to negotiate a better one.[154] In extreme cases, judicial intervention may temporarily preempt the authority of incumbent managers of defendant institutions, as with a receivership. But the most characteristic public law decree makes substantive provision for the management of the institution. Although these decrees can take the form of relatively simple negative injunctions of limited scope, they are often more comprehensive.

We have seen a tendency for comprehensive relief to move away from detailed command-and-control prescriptions toward an experimentalist approach. This tendency is usefully captured in a model with three general features. None of the cases we have examined fully expresses all these features, but some come close, and the model systematically connects the distinctive and promising aspects of all of them.

The basic features of this experimentalist tendency are these:

First, *stakeholder negotiation.* The parties come together to negotiate a remedial plan.[155] Other interested stakeholders can join under

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[153] *See, e.g.*, Evans v. Williams, 35 F. Supp. 2d 88, 94 (D.D.C. 1999) (levying a $5 million contempt sanction against D.C. officials), *rev'd*, 206 F.3d 1292 (D.C. Cir. 1999), *consent order approved by* 139 F. Supp. 2d 79 (D.D.C. 2001); Ramos v. Lamm, 485 F. Supp. 122, 169–70 (D. Colo. 1979) (ordering a Colorado prison closed); Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491, 498–99 (Tex. 1991) (approving an order barring state funding of education unless a constitutionally adequate plan of school financing was developed); ROBERT COVER ET AL., PROCEDURE 378 (3d ed. 2003) (noting that a trial judge in a Texas prison case ordered an $800,000 per day contempt sanction but later rescinded it after finding progress); FEELEY & RUBIN, *supra* note 6, at 124–25 (reporting a state court's repeated, but never executed, threats of contempt against the Santa Clara County Board of Supervisors in a jail case).

[154] Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 97 (1989). Ayres and Gertner emphasize the function of "penalty defaults" in contract law to induce the more informed party to disclose information. In our context, the key function is to force to the table a party who otherwise might not be willing to negotiate at all.

[155] For an extensive analysis of such negotiations, including illustrations of the role of parties in formulating remedies, see Sturm, *supra* note 15, at 1365–76. At least since *Lewis v. Casey*, 518 U.S. 343 (1996), the trial court must give a defendant institution the "first opportunity" to propose a remedial plan. *See id.* at 362 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973)) (internal quotation marks omitted). But since the court is likely to treat respectfully the objections to such a plan from plaintiffs who have prevailed on the merits, the defendant still has strong incentives

liberal intervention standards. Groups that claim significant interests will be admitted to the negotiations even if they are not formal parties. Groups whose participation is thought important to the success of reform may be actively courted if they do not come on their own.

The negotiations may be superintended by a special master or mediator appointed by the court. These parajudicial officials, perhaps along with expert advisers recruited by the court or the parties, will help the parties to talk to each other in an organized way and to set an agenda and ground rules for discussion. They will also assist in gathering information.

The negotiations are deliberative. The stakeholders meet face to face, and they defend their positions with reasons. They are expected to listen to each other in good faith and to remain open to learning. To the extent that a party's proposals rest on factual premises, the party must make available relevant information within her control.

The goal of the negotiation is consensus. The stakeholders should be open to the possibility that, within the constraints imposed by the determination of liability, they can agree on a remedial regime. The master or facilitator strives for consensus. Ultimately, of course, consensus may not materialize. The master may have to return to the court with multiple proposals, or with a proposal supported by the master herself and some subset of the stakeholders. But the consensus standard plays a valuable role even when no consensus is reached. It prevents premature closure and reinforces the threshold commitment of openness and mutual respect.[156]

In practice, the extent to which deliberation occurs in remedial formulation varies. Hostile defendants may resist dealing with the plaintiffs, even if such resistance increases the risk that the court will reject their own proposals. Special masters sometimes prefer to meet with stakeholders *seriatim* and then try to craft an acceptable plan on their own, rather than encouraging direct negotiations.[157] Nevertheless, direct negotiations, with or without masters, are common. In *Plata*, the California prison medical case, the parties agreed not to seek

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to negotiate with the plaintiffs. *See id.* at 410 (Stevens, J., dissenting) (noting the "process of court-supervised negotiation that should generally precede systemic relief").

[156] For case studies of stakeholder deliberation in public policy contexts, see THE CONSENSUS BUILDING HANDBOOK (Lawrence Susskind et al. eds., 1999). Note especially the account of negotiation among state and local government entities over the allocation of responsibility for affordable housing — the same general issue implicated in the *Mount Laurel* litigation. *See* Lawrence Susskind & Susan L. Podziba, *Affordable Housing Mediation*, *in* THE CONSENSUS BUILDING HANDBOOK, *supra*, at 773–99.

[157] Berger recounts his experience with this practice and illustrates its disadvantage. After the master developed a plan intended to incorporate all the concerns expressed in separate meetings with the stakeholders, nearly every stakeholder group attacked it, and the court felt compelled to reject it. *See* Berger, *supra* note 15, at 730–33.

a special master or other intermediary because they wanted to deal with each other without any intermediation.[158]

Second, the intervention takes the form of a *rolling-rule regime*.[159] The rules that emerge from the remedial negotiation are provisional. They incorporate a process of reassessment and revision with continuing stakeholder participation.

The stakeholders recognize that they cannot effectively elaborate a regime of fixed and specified rules. Even with the judicially supported factfinding process, they have limited information. They cannot fully express their intentions; they will inevitably leave gaps and ambiguities; and they cannot anticipate all future contingencies.[160]

We have seen that one response to this problem is to focus on outcome norms that leave broad discretion to those subject to them. Such norms can be expressed in a variety of ways, ranging from the relatively specific and formal to the relatively general and informal. Since the problems of incomplete knowledge and articulation also apply to outcomes, informal norms that defer elaboration to the course of implementation have some appeal. But such an approach has important disadvantages. First, it relieves the stakeholders of the responsibility to clarify their understandings as much as possible. In addition, it defers the task of specification to situations in which the people governed by the norms will have more saliently divergent interests. At the time of the initial negotiation, some stakeholders will have a general sense of their self-interest in the norms. But for many, and perhaps most, stakeholders, there will be a good deal of uncertainty about how the norms will mesh with self-interest. As implementation proceeds, particular actors will develop interests in particular interpretations of general norms. For example, public employees whose performance is being evaluated will develop a stake in interpretations most consistent with their performance.

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158 *See Plata* Stipulation, *supra* note 73; Telephone Interview with Don Specter, Staff Attorney, Prison Law Office (July 16, 2002). The Prison Litigation Reform Act of 1996 constrains the typical use of masters as intermediaries by requiring that all their activities be on the record. It is not clear whether the limitation applies only to appointees with the factfinding powers of traditional masters or more broadly to more informal roles, such as court-appointed mediators or monitors. *See* Boston, *supra* note 65, at 722.

159 CHARLES SABEL ET AL., BEYOND BACKYARD ENVIRONMENTALISM 7 (2000).

160 Looking back on a New York special education case, plaintiff's counsel wrote:

> What the lawyers for both sides did not fully appreciate at the outset, however, was that Dr. Gross's reorganization plan did not constitute a proven educational system that could be fully implemented over time if sufficient resources were provided. Rather, it was an imaginative proposal for beginning a structural reform process whose direction and substance would be subject to ongoing reformulation.

Michael A. Rebell, Jose P. v. Ambach: *Special Education Reform in New York City*, *in* JUSTICE AND THE SCHOOL SYSTEMS, *supra* note 41, at 35.

The model we are considering is inclined to deal with the problems of limited information, articulation, and foresight less through informality than through provisionality. At the outset, stakeholders try to derive performance measures that are as specific as possible. These measures will leave the parties substantial discretion, but they will specify precise targets. Moreover, some processes, most often including documentation and reporting, will be specified in detail. Such specification facilitates assessment of compliance. But it is expected that the application of the norms will also be an occasion for their reassessment and revision. Stakeholders continue to be involved in the processes of monitoring and assessment. To the extent that any of them come to believe that the norms no longer capture the appropriate expectations, the norms can be revisited and revised through the assessment process. If educational test scores are high because teachers have inappropriately narrowed the curriculum to "teach to the test," the test should be revised or the weighting of the scores changed. If housing managers are neglecting long-term maintenance in order to respond more quickly to tenant complaints, a new performance measure focused on long-term tasks might be introduced. Participants seeking to excuse failures of compliance by criticizing the standards must both give reasons for their criticisms and propose revised standards to which they will be held accountable in the future.

Of course, at each iteration, participants will seek to renegotiate the standards in ways that benefit their private interests. The same checks on opportunism that operate in the initial negotiation — the awareness of common interests, the psychological pressures toward honesty in the process of deliberative persuasion, and the prospect of a penalty default in the absence of agreement — work at these later stages. Moreover, in the later stages, defendants may face an additional pressure: to the extent they are attacking agreed-upon standards that they have failed to meet, they have a higher burden of persuasion.

Reformers in Texas, for example, report significant progress in dealing with the phenomenon of "teaching to the test." The first assessment test adopted under the Public School Accountability System emphasized rote learning in a way that encouraged teachers to focus on instruction that had little use outside the test. Students learning to distinguish area from perimeter might be taught that area is "about multiplication" and perimeter is "about addition." Even this relatively crude regime produced important surprises. Some teachers who had lost all hope in their pupils' aptitudes were shocked to discover that they could be taught to take the test. But when complaints about "teaching to the test" arose, collaboration between teachers and administrators produced a new testing regime that focused less on algorithmic pedagogy and more on conceptual learning. Students preparing for the test now learn that area is about coverage and is measured by multiplying the lengths of the sides and that perimeter is about

framing and is measured by addition of the lengths of the sides. "Teaching to the test" is coming to mean teaching the power of abstraction.[161]

In many cases, the decree is often limited to general descriptions of the parties' goals, prescriptions for measuring their progress toward them, and commitments to make information available. But the complete regime also often includes a variety of other norms that set out, perhaps in great detail, practices or operating procedures. These practice norms will likely be set out in "plans," which may or may not be filed in court, but which generally are not expected to be reviewed and approved by the judge. The plans are intended to be easily revisable.[162] Sometimes the defendants can revise them unilaterally with notice to the plaintiffs and the court. Other times the plaintiffs must consent to revisions, and the court may intervene in the event of a dispute, but such intervention is expected to be rare. The decree may order the defendant to comply with the plans in force, but the norms in the plans are generally not directly or immediately enforceable through contempt. In principle, a further specific judicial directive could be a predicate for contempt. In practice, courts usually intervene only in cases of systemic noncompliance.

Thus, whatever the technical legal status of the plans, their function is not so much to coerce obedience as to induce internal deliberation and external transparency. Forcing the defendant practitioners to agree on a clear description of their practices puts pressure on them to reflect on and explain what they are doing. Moreover, the practice norms enable outsiders to determine what the practitioners are up to. They complement the performance norms by describing the inputs that generate the outputs indicated by those norms.[163]

The third element of the model is *transparency*. At a minimum, this element restates the requirement that the policies and operating norms of the rolling-rule regimes must be explicit and public. More ambitiously, transparency means that there must be agreed-upon measures and procedures for assessing compliance, and that these procedures and their results must be made public.

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[161] Interview with W. David Hill, Deputy Director, Charles A. Dana Center, University of Texas at Austin, in Austin, Tex. (Aug. 15, 2002).

[162] Rule 23(e) of the Federal Rules of Civil Procedure requires that the court approve a class action settlement, and under *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), a party seeking to modify a consent decree over the objection of the other party must demonstrate "a significant change in facts or law." *Id.* at 393. Although the doctrine is not explicit, it seems unlikely that either requirement applies to practice norms that are not directly incorporated into the decree.

[163] For a discussion of the distinction between performance and practice norms, see Am. Corr. Ass'n, *supra* note 62, at xxii–xxviii.

Transparency is both an accountability norm and a learning device. It is intended in part to facilitate practices of disciplined comparison. In deciding what level of performance can reasonably be expected, the court and the parties can look to the performances of comparable units. Once the frontrunners have been identified, the laggards should be able to learn from the frontrunners' practices. Successful performers should be rewarded with greater autonomy and perhaps formal honors or tangible rewards. The laggards should receive sanctions, remedial assistance, or both.

The intuitions here are obvious, but transparency requires processes that are not widely found and that are often achieved only with great difficulty. The obstacles are both political and technical. Organizations of all kinds often resist transparency. The poor performers may resist it because it makes them vulnerable; the good performers sometimes resist it because it deprives them of a competitive advantage. In practice, decrees typically require that information be made available to the parties and other involved stakeholders, but not to the public. The Texas education regime, partly nationalized by the No Child Left Behind Act,[164] is an important exception: it mandates that school and district performance data be publicly available.

Moreover, disciplined comparisons require that performance data be formulated in a manner that permits comparative assessment. A common set of metrics must be devised, and participants must be induced to report data in these terms. In the public sector, this process is most developed in the educational field. HUD's Public Housing Assessment System represents another sophisticated development along these lines.[165] In other areas, such as police conduct and prisons, even fairly sophisticated monitoring systems have not yet developed the kind of reporting and metrics that permit such comparisons.

A more difficult issue is figuring out what interventions courts should make once performances have been ranked. While tangible rewards for high performance are possible, as in some statutory education schemes, the principal reward for good performance in the judicial context will be the autonomy that comes from relaxed judicial scrutiny and termination of the decree. Disciplined comparisons may also generate intangible rewards in the form of respect and prestige for high-performing institutions.

As for poor performance, the trick is to balance remedial support, loss of control, and outright punishment. Administrators are quick to claim that inadequate performance is the result of insufficient resources. To some extent, disciplined comparisons of performance rela-

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164 *See* 20 U.S.C.A. § 9622(c)(1)(A) (West Supp. 2003).

165 *See supra* pp. 1049–50.

tive to resource levels can check such claims. Where such claims are substantiated, targeted resources may be the answer, as they are in some of the statutory "new accountability" education regimes. Where bad performance is unexcused, then the choices are increased outside intervention or punitive sanctions. If increased intervention takes the form of specific dictation of conduct, it will incur the disadvantages of command-and-control regulation and may allow the defendant administrator to shift responsibility for problems to the court or the plaintiffs. Outright replacement of the failing administrators, as in the receivership remedy that Congress has approved for poor housing authority performance, does not result in these problems, but such a remedy is only available in extreme situations. Punitive sanctions are difficult to calibrate, and there are many doctrinal and political obstacles to applying them.[166] Moreover, they deter the cooperation and information-sharing among stakeholders upon which the rolling-rule regime depends.

Experimentalism does not provide determinate guidance on the question of sanctions. It pins its hopes largely on the effects of transparency. By exposing poor performance as clearly as possible, it opens the system to general scrutiny and exposes it more readily to nonjudicial intervention.

### *D. Destabilization Effects*

The practical questions that parallel the jurisprudential question of the relation of right and remedy are: What happens in the litigation that makes agreement among adversaries possible? And why should the resulting agreement be generally beneficial? In some cases, agreement on remedy follows a hard-fought battle on liability. Even when liability is conceded, plaintiffs and defendants are often at loggerheads. Yet with surprising frequency the fighting is followed by substantial agreement on a remedial framework that contemplates ongoing cooperation.[167] What is going on?

The idea of destabilization rights suggests an important part of the answer. The liability determination imposed or ratified by the court and subject to the experimentalist discipline of the remedial phase can

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166 *See* Evans v. Williams, 206 F.3d 1292, 1295–97 (D.C. Cir. 2000) (discussing doctrinal barriers to imposing punitive fines).

167 *See, e.g.*, HAAR, *supra* note 112, at 57 (reporting that after years of hard-fought litigation, the parties agreed on an implementation methodology for *Mount Laurel*); Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338, 1367 (1975) (noting that although defendants in the Alabama mental health case initially resisted judicial intervention, after a finding of liability, they and the plaintiffs were able to agree on "over 90 percent of the required standards").

have a series of disentrenching effects.[168] These effects work at the individual, institutional, and inter-institutional or social levels. At the individual level, these effects appear rooted in much-discussed cognitive and psychological features of human sociability that are at odds with traditional conceptions of human actors as either calculating private utility maximizers or dispassionate Kantian moralists.

There are six principal effects:

*1. The Veil Effect.* — The struggle for selfish advantage is impeded at the outset of remedial negotiations by the fact that the parties find themselves partially veiled in ignorance. They cannot count on their prior positions, and it may be hard for them to anticipate what their positions will be like in the alternative future regimes under consideration.

The more daring the reforms under consideration, and the more the parties are committed to continuous self-revision, the harder it will be for any particular player to anticipate what a particular reform will mean for her with respect to such matters as compensation, resources, authority, job satisfaction, and workload. The ability to pursue selfish interests is constrained by the inherent uncertainty of how selfish goals will be served in as yet untried arrangements, and by the difficulty of entrenching any particular arrangement in a regime of continuous self-assessment and revision.

Consider the position of a school principal in a case challenging the system of which her institution is a part. She may believe that her institution is exceptionally capable of excelling on particular performance measures, or she may believe that it is exceptionally likely to fare poorly. In such a case, where the likely outcomes are known, self-interest may push her to favor particular remedies. (We will call this a "stakeholder effect" in a moment.) But it seems likely that at least as often, she will be uncertain about how her institution will fare. She may not know how her performance would compare with peer institutions. In addition, she may not know whether the consequences of poor performance, which initially are likely to include remedial assistance, are on balance good or bad for her.

Or consider the representative of a prison guard union responding to a proposal in a remedial negotiation to improve safety by screening

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[168] In some cases that are settled without judicial findings of liability, notably in the area of police misconduct, the defendants do not explicitly concede wrongdoing, and the settlement agreement may even disclaim such a concession. *See, e.g.*, Los Angeles Consent Decree, *supra* note 87, at para. 3. Such disclaimers, however, are largely for the purpose of obviating evidentiary admissions that might fuel later damage actions. In order to enter the remedial negotiations and conclude a remedial agreement, the defendant has to acknowledge at least a substantial probability that the plaintiff might prevail on her claim. Such a concession should often be sufficient to induce the psychological effects we describe.

and segregating prisoners with certain psychiatric diagnoses. The proposal undoubtedly implicates the selfish interests of her constituents. A new class of specialized roles will be created; mental health professionals will play a larger role in the institution. Yet how such contingencies map onto the selfish interests of the guards is harder to say. Perhaps the newcomers will diminish the authority and autonomy of the guards; perhaps they will make the guards' jobs easier or less stressful. On the other hand, the impact of the reform on the interest in safety that the guards share with the other stakeholders seems easier to assess and predict. In such situations, stakeholders may have no better prediction of their own interests than their intuitions of the general interest.

By blurring the distinction between particular and general interests, the liability judgment approximates in actuality the conditions that political theorists such as John Rawls have considered hypothetically as aids to democratic decisionmaking. Rawls urges us to assess proposed public decisions by asking if they would be adopted if we were unaware of how they would affect our selfish interests.[169] There is a crucial difference, however, between Rawls's "original position" and the situation created by the liability judgment. In entering the "original position," participants in a political discussion are exiting the world. The impartiality of their exchange depends on abstracting from all the features of their actual activities and selves. There is considerable debate about whether it is possible to obtain such a neutral "view from nowhere," and if so, whether arrangements figured from this remove are specific enough to be translated into reality.[170]

The veil of ignorance arising from the finding or concession of liability does not require that the participants remove themselves from the world, but rather that they open themselves to it in a new way. The mutual learning that prudence suggests may cause them to change their view of the possibilities — even as they put their identities at risk by reorienting their goals, their ideas of potential collaborations, and their understanding of fruitful problem-solving strategies.

*2. The Status Quo Effect.* — The liability determination reverses the normal presumption in favor of the status quo. Without knowing what the new regime will be, the parties presume that it will be different from the way things have been. The condemnation of the status quo has a distinct cognitive effect: it releases the mental grip of conventional structures on the capacity to consider alternatives.

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169 JOHN RAWLS, A THEORY OF JUSTICE 195–201 (1971).

170 *See, e.g.*, AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 37–39 (1996).

Recent empirical psychology emphasizes that there are powerful cognitive tendencies toward entrenchment of the status quo. The "availability heuristic" suggests that contingencies that can be more readily visualized are likely to be given more consideration or greater weight than equally relevant but less easily imagined alternatives. The "endowment effect" suggests that people tend to demand more to give up something they already have than they would offer to acquire the same thing from someone else. Study of attitudes toward risk has indicated that people are more averse to dangers they perceive as losses rather than as failures to gain, even though these perceptions are quite manipulable. (A price differential for cash or credit will be regarded differently depending on whether it is called a credit surcharge or a cash discount.)[171]

The liability determination mitigates these effects. It counters the relative availability of the status quo by stigmatizing it. It signals that various positions entailed by the status quo are not entitlements of those who argue for them. The pronouncement that current arrangements will not continue should cause the perception of relative risks to change. The former regime no longer represents a potential loss but is simply one of many possible arrangements, and indeed a relatively unpromising one. The willingness to consider alternatives should thus broaden.

*3. The Deliberation Effect.* — The parties' increased openness to alternatives goes hand in hand with increased pressure to support positions by giving reasons grounded in public values. Unable to appeal to institutional inertia, the parties have greater incentives to devise arguments that persuade by the validity of their reasons. It is a core premise of a venerable, recently revived tradition of politics that justifying one's position by giving reasons and responding to reasoned arguments for competing views can alter a person's understanding of her factual circumstances and her interests, disclosing previously unseen opportunities.[172]

For example, in a recent settlement of a "racial profiling" case, the California Highway Patrol agreed to stop its practice of asking motorists to "consent" to a search in cases where there was no probable cause. The plaintiffs objected that the incidence of such requests was racially biased and that the consents that were invariably given were not voluntary. The highway patrol agreed to abandon the practice when it learned during the negotiations that the practice was producing virtually no evidence or arrests. Until the highway patrol was sub-

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[171] *See* Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 194–96, 197–99 (1991).

[172] *See, e.g.*, GUTMANN & THOMPSON, *supra* note 170, at 37–39.

jected to pressure to justify its position, it had not systematically evaluated the practice. Once it did, it had to concede its indefensibility.[173]

*4. The Publicity Effect.* — The vindication of the plaintiff's claim will focus public attention on the problems. Public scrutiny of all the stakeholders, and especially of the defendants, may increase. This increased scrutiny will generate diffuse but sometimes powerful pressures for responsible behavior. Public officials trying to reform their institutions may find that they can capitalize on publicity to mobilize support for their efforts. Officials who might have preferred simply to duck the issues will now feel pressure to take a position. The result could be irresponsible demagoguery; but given the pressure for public reason-giving exerted by the deliberation effect, the outcome in the setting of the new public law is perhaps more likely to be constructive engagement. In the early prison cases, for example, publicity about horrific conditions — sometimes welcomed by officials, sometimes not — appears to have played an important role in facilitating remedial progress.[174]

*5. The Stakeholder Effects.* — There are three stakeholder effects: the balance of power between plaintiff and defendant shifts; internal pressures are generated within the plaintiff class and the defendant institution; and new stakeholders are motivated or empowered to participate.

First, the liability determination empowers the plaintiffs vis-à-vis the defendants. It provides official legitimation of their claims. The plaintiffs now have the power, simply by objecting to the defendant's proposed remedy, to expose the defendant to further risk and uncertainty. Consequently, the defendant has stronger reason to deal with the plaintiffs.

Second, the remedial situation may transform both plaintiffs and defendants. The plaintiffs' lawyers or the organizations for which they work may now be eligible for attorneys' fees. Additionally, the court may induce the defendant or some other institution to provide resources for the negotiation, or private contributions may be induced by

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[173] *See* Terms and Conditions of Settlement Agreement, Rodriguez v. Cal. Highway Patrol, No. C 99-20895-JF/HRL (N.D. Cal. Feb. 27, 2003), *available at* http://www.aclunc.org/police/030227-rodriguez.pdf; E-mail from Michelle Alexander, Plaintiffs' Counsel, *Rodriguez*, to William H. Simon (Mar. 2, 2003) (on file with the Harvard Law School Library).

[174] For consideration of the influence of litigation-related publicity on prison reform, see Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1678–80 (2003). In a paper assessing negotiated resolutions of water-quality issues, David J. Hayes identifies the degree of general public interest in the negotiations as an important variable favoring success. David J. Hayes, Federal-State Decision-Making on Water: Applying Lessons Learned 15–16 (2002) (unpublished manuscript, on file with the Harvard Law School Library).

the plaintiffs' success.[175] Accordingly, plaintiffs will be strengthened both by the prestige that accompanies success and by new resources.

There may be internal effects on the defendant as well. As an institution, the defendant is typically composed of diverse constituencies. The liability finding or concession may upset accommodations among them. Constituencies with views and interests overlapping those of the plaintiffs will see the determination as an opportunity to enhance their influence. The craft pride of some rank-and-file workers and the professionalism of some managers will lead them to resent the shoddy or corrupt practices attacked by the plaintiffs and to favor higher standards. Some senior managers may see in the remedial process the prospect of more resources or greater prestige.

Colin Diver speculates that there is a tendency for power to shift within the defendant institution from senior executive officials with general supervisory responsibilities to "operating managers" and, at a lower level, from nonprofessional staff, such as guards and orderlies, to professional staff, such as lawyers and doctors.[176] The operating managers have the kind of detailed knowledge necessary to plan compliance, and the professionals are most likely to understand and be committed to the standards the court has applied. The tendency, on this view, is to decentralize to the level of the institution but to centralize within the institution.

This view may have been generally true of the old public law cases. It arguably describes, for example, the trajectory of early reform in Southern prisons. However, it mischaracterizes change under the new public law because it presupposes the command-and-control style of intervention that is being superseded in practice. Experimentalist regimes often involve dramatic *de*centralization within institutions, as lower-tier workers get increased discretion to cope with contingencies with which they are most familiar. For example, teachers in the "new accountability" scheme have more flexibility in classroom planning

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[175] Ross Sandler and David Schoenbrod argue that stakeholder participation is dominated by lawyers with little effective accountability to their putative clients. *See* SANDLER & SCHOENBROD, *supra* note 8, at 124–29. We find this argument implausible. It is specifically contradicted by many case histories recording substantial and meaningful stakeholder participation. *See, e.g.*, MOORE, *supra* note 106, at 240–55 (Boston Housing Authority); ROTHMAN & ROTHMAN, *supra* note 51, at 114–18 (Willowbrook); Liebman & Sabel, *supra* note 16, at 67–108 (Kentucky and Texas education cases). It is true that stakeholders in these cases are commonly underorganized and vulnerable and that there are many failures of professional loyalty and accountability. However, Sandler and Schoenbrod's implication that structural litigation *reduces* the effective participation of plaintiff class members is counterintuitive. If we assume that stakeholders are so poorly organized and vulnerable that they cannot hold accountable the lawyers purporting to represent them, there is no reason to expect that they would do better in the general electoral or administrative processes. Moreover, the remedial mechanisms designed to enforce defendant accountability can also strengthen the accountability of plaintiff representatives. *See infra* pp. 1093–94.

[176] *See* Diver, *supra* note 2, at 70–73.

than before. One of the first moves of public housing receivers is to increase the responsibility for maintenance of individual project managers relative to the central office.

At the same time, the relatively objective and transparent accountability mechanisms of experimentalism can also facilitate more effective monitoring from above the institution. This monitoring reduces reliance on unspoken, insider knowledge by forcing participants to produce important information in a form that can be used by outsiders not directly involved in the process. The principal goal is to facilitate accountability to diverse stakeholders, but the practice is compatible with some forms of recentralization.

Performance scoring in "new accountability" education reform is designed to have both centralizing and decentralizing effects. State agencies are supposed to use the data to allocate resources among districts and to pressure low-performing districts; the provision of data on individual schools is designed to encourage and assist parental participation in efforts to improve children's schools. Both effects have been observed in some areas of Texas.[177]

The stakeholder effect on the defendant cannot be assessed solely in terms of the distribution of knowledge and competences at the time negotiations begin. Implementation often involves significant training of existing personnel, recruitment of new personnel, and sometimes, departure of incumbents. Thus, while the internal effect on the defendant is potentially dramatic, we cannot generalize strongly about its direction. Many trajectories are possible, depending on the type of remedial regime the parties favor.

Finally, the third stakeholder effect is that new stakeholders are likely to appear. The court's judgment may lead a variety of actors to see their interests as threatened, or to see opportunities that induce them to seek to participate. *Wyatt v. Stickney*, the seminal mental health case, began as a protest by mental health workers, who invoked the interests of residents to protest planned staff cutbacks.[178] The prospect of the "builder's remedy" in *Mount Laurel* mobilized real estate developers to side with the plaintiffs on various issues.[179] We

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[177] *See* Liebman & Sabel, *supra* note 16, at 241–47.

[178] *See* Wyatt v. Stickney, 344 F. Supp. 373, 373 (M.D. Ala. 1972); Note, *supra* note 167, at 1347. We don't suggest that these new stakeholders will always be helpful to reform efforts. Police and prison guard unions, for example, often actively resist reforms. *See* Pamela A. MacLean, *The Strong Arm of the Law*, CAL. LAW., Nov. 2002, at 24 (reporting on how the California prison guard union uses extensive political power to impede efforts to hold guards accountable for abusive conduct). Also, public employee unions sometimes promote featherbedding. *See* SANDLER & SCHOENBROD, *supra* note 8, at 78–81 (suggesting that a social workers' union persuaded the judge in a special education case to force a school board to include social workers on assessment teams unnecessarily).

[179] *See* HAAR, *supra* note 112, at 44–45.

have noted that some of the education cases have mobilized business groups and universities to participate in planning and implementing remedies. In Texas, for example, the *Edgewood* regime prompted the creation of two statewide nonprofit organizations — Just for Kids and the Educational Innovation Network — devoted to helping local groups use performance data to improve their schools.[180]

In the *Willowbrook* case, the shift from institutional to community placement was accompanied by the emergence of nonprofit groups that wanted to run the new facilities and of real estate interests that wanted to profit from their development. Both groups gave important support to the plaintiffs' efforts, leading close observers of these events to conclude that "the process of opening group homes, like that of contracting with the voluntary agencies, created a constituency for deinstitutionalization."[181]

*6. The Web Effect.* — Just as the court's liability determination destabilizes relations and practices within the defendant institution, so does it ramify to other institutions and practices. These ramifications, and their monitored feedback on the institutions in the case, are the web effect. The web effect makes it possible to address sequentially — in a sequence determined in the course of problem-solving itself — reforms too complex to be addressed whole. This effect is polycentricity viewed as an aid, not an obstacle, to problem solving.

Of course, the notion of "positive polycentricity" was an oxymoron to post-Chayes commentators on public law remedies. As we saw, they assumed that if courts cannot control all the effects of intervention, the collateral effects will undermine their efforts. Better to leave the problem to an institution that can intervene comprehensively or, in a world where all institutions have limited information and limited control, to do nothing. These commentators thus assumed away the possibility that gives rise to the web effect and that helps explain the promise of new public law generally: that under favorable conditions the partial interventions that limited information does allow can be informative enough to allow subsequent corrective measures, giving rise to new rounds of interventions and corrections.

Albert Hirschman anticipated this possibility in his "unbalanced growth" criticism of both comprehensive central planning and laissez-faire in economic development. Hirschman pointed out that economic development in market societies occurs through "chain[s] of disequilib-

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[180] *See* Liebman & Sabel, *supra* note 16, at 243–46; *see also* RAFFEL, *supra* note 117, at 120–53 (discussing community organizations' support for the implementation of the Wilmington school desegregation decree).

[181] ROTHMAN & ROTHMAN, *supra* note 51, at 195. *See generally id.* at 150–99.

ria."[182] A discrete disturbance causes pressures that ramify throughout other areas. In particular, pressures spill back and forth between public and private realms. Private activity generates demand and pressure for complementary public goods (in, say, roads or education), and vice versa. Using the same metaphor as Fuller but reaching the opposite conclusion, Hirschman suggested that the "cobweb" structures of market disruptions and adjustments are not imperfections to be minimized or superseded by more coordinated processes. The process of iterative disequilibration and readjustment is, in fact, a learning process that cannot be readily short-circuited. It potentially generates valuable human capital and creates incentives in a distinctively efficient way:

> In other words, our aim must be to *keep alive* rather than to eliminate the disequilibria . . . . If the economy is to be kept moving ahead, the task of development policy is to maintain tensions, disproportions, and disequilibria. That nightmare of equilibrium economics, the endlessly spinning cobweb, is the *kind* of mechanism we must assiduously look for as an invaluable help in the development process.[183]

One indication of the web effect in new public law litigation is the tendency for the focus of concern to shift in the course of litigation. Thus, in education and housing, concerns about discrimination often quickly lead to concerns about quality of service. In prisons, concerns about conditions lead to concerns about length of confinement. In all areas, issues of personnel, training, and recruitment typically surface. So do resource questions. These connections were not invisible before

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[182] Hirschman maintains that "nonmarket forces are not necessarily less 'automatic' than market forces." ALBERT O. HIRSCHMAN, THE STRATEGY OF ECONOMIC DEVELOPMENT 64 (1958). He elaborates:

> [For example, w]hen supply difficulties arise in the course of uneven progress in sectors — such as education and public utilities — where private enterprise is not operating, strong pressures are felt by public authorities to "do something"; and since the desire for political survival is at least as strong a motive force as the desire to realize a profit, we may ordinarily expect some corrective action to be taken.

*Id.*

[183] *Id.* at 66. The strategy of "import substitution" — subsidies and trade protection for local businesses producing for local demand, which policymakers derived from Hirschman's idea — overlooked the possibility that self-interested groups would exploit the turmoil of disequilibrium to slip into and entrench themselves within the state machinery of developing countries. When this happened, Hirschman's prescriptions for government economic policy lost favor. *See, e.g.*, Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291, 302 (1974). But the subsequent emergence in business practice of continuous improvement disciplines using induced disequilibria vindicated Hirschman's basic intuition that such disequilibria might provide important learning opportunities. *See, e.g.*, Paul Adler, *Time and Motion Regained*, HARV. BUS. REV., Jan.–Feb. 1993, at 97. These disciplines combined the kind of destabilization mechanisms Hirschman favored with monitoring and transparency procedures that checked opportunism. *See* Charles F. Sabel, *Learning by Monitoring: The Institutions of Economic Development*, *in* HANDBOOK OF ECONOMIC SOCIOLOGY 137, 137–65 (Neil J. Smelser & Richard Swedberg eds., 1994).

the liability determination; they just come to seem more prominent and urgent.

The web effect is also evident in the institutional complementarities induced by public law. Just as investment in, say, office building construction may prompt investment in steel and concrete by increasing the prospective returns to the latter, in the institutional reform context, one intervention within an institution can lead to further interventions. Critics of institutional reform litigation continually point out that courts lack the ability to compel the appropriation of funds for the improvements they mandate. Yet in each of the areas discussed in this Article, legislatures, agencies, or nongovernmental organizations volunteered resources once the courts acted.[184] For these supporters, the court's intervention appeared to raise the prospective return on investments in the institution.

## IV. THE EXPERIMENTALIST APPROACH AND DOCTRINAL ISSUES

If our descriptive account in Part II is right, then much academic and appellate doctrinal discussion of public law litigation is not responsive to the most promising elements of recent practice. We now address how the experimentalist approach relates to four key areas of doctrinal controversy: the scope of the equitable discretion of the trial court, the separation of powers, the problem of attribution of agent misconduct to government institutions, and the problem of interest representation. In each case, the newer model has promising suggestions for the resolution of persistent concerns.

### *A. Remedial Discretion*

The Rehnquist Court has been unsympathetic to public law litigation. In a series of decisions, the Court has purported to derive constraints on remedial discretion from the nature of the rights in question. It would be a mistake to dismiss the Court's hostility as merely ideological. For one thing, in some of its key attacks on public law, the Court took issue with remedial regimes that were manifestly ineffective. Moreover, these decisions identified important conditions for the effectiveness of structural remedies. Nevertheless, the Court's rationales for its decisions have been individually implausible and mutually incoherent.

Three cases illustrate the problems. First, *Missouri v. Jenkins*[185] proposed that trial courts limit their remedial discretion through a

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[184] *See supra* pp. 1065–66 & n.150.

[185] 515 U.S. 70 (1995) (*Jenkins IV*).

complex exercise of factual determination. Second, *Lewis v. Casey*[186] proposed that, to the extent remedial issues were indeterminate, the lower court should defer to the defendant. On reflection, the *Jenkins* approach proves impossible to execute, and the *Lewis* approach self-defeating. The shared premise of these cases is that remedial indeterminacy must be resolved either through the court's own decision or through deference to the agency. In fact, the experimentalist approach shows that this is a false dichotomy that excludes the most promising alternative. We find a partial acknowledgment of greater complexity in an earlier case — *Youngberg v. Romeo*,[187] which even as it tries to preempt judicial intervention points the way to its experimentalist variants.

Upon finding unlawful segregation in the Kansas City, Missouri School District by the district and the state, the *Jenkins* trial court issued a series of orders with the declared goal of "elimination of all vestiges of state imposed segregation," particularly the low "student achievement."[188] Given the small fraction of nonminority students in the district, pupil reassignment would make little progress toward racial balance. So the decrees focused on measures designed to improve the quality of education enough to attract students away from the suburbs through voluntary interdistrict transfer. In the absence of any precise idea of what actually makes schools effective and therefore attractive, this program of "desegrative attractiveness" became a program of establishing "suburban comparability": making the Kansas City schools as much like their best suburban counterparts as the initially vast reserves of goodwill and funding (the latter enhanced by new contributions from the state) would allow.[189]

Under the decree, class sizes were reduced to the levels required for certification in the highest category of the state Board of Education's ranking system. The salaries of virtually all of the 5000 staff members were increased. The school district made an early childhood development program, full-day kindergarten, expanded summer school, and before- and after-school tutoring available to all students. Some fifty-five schools were renovated, eighteen closed, and seventeen new ones constructed. In ordering the renovations, the district court rejected the state's "'patch and repair' approach" because it "would not achieve suburban comparability or the visual attractiveness sought by the Court as it would result in floor coverings with unsightly sections of mismatched carpeting and tile, and individual walls possessing differ-

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[186] 518 U.S. 343 (1996).

[187] 457 U.S. 307 (1982).

[188] *Jenkins IV*, 515 U.S. at 74 (quoting *Jenkins v. Missouri*, 69 F. Supp. 19, 23, 24 (W.D. Mo. 1985)) (internal quotation marks omitted).

[189] *Id.* at 78, 98.

ent shades of paint."[190] The plan called for air conditioning and fifteen personal computers in every high school classroom. Other facilities included:

> a 2,000-square-foot planetarium; greenhouses and vivariums; a 25-acre farm with an air-conditioned meeting room for 104 people; a Model United Nations wired for language translation; broadcast capable radio and television studios with an editing and animation lab; a temperature controlled art gallery; movie editing and screening rooms; a 3,500-square-foot dust-free diesel mechanics room; 1,875-square-foot elementary school animal rooms for use in a zoo project; [and] swimming pools . . . .[191]

The district court's plan was plausibly described as "the most ambitious and expensive remedial program in the history of school desegregation."[192]

Set against the district court's goal of eliminating the "vestiges of segregation," however, the benefits of the first rounds of this program, as reflected in performance on standardized tests, were meager. The district court noted a "trend of improvement" in academic achievement but found the district "still at or below national norms on many grade levels." It provided no guidance on how to accelerate reform. Instead, the court observed almost wistfully that it had "allowed the District planners to dream" and "provided the mechanism for th[ose] dreams to be realized."[193]

When the state appealed, the Supreme Court held this remedial scheme improper on the ground that it was not adequately connected to the proven violations of the plaintiffs' rights. Writing for the majority, Chief Justice Rehnquist emphasized the untethered character of the district court's order:

> The District Court's pursuit of "desegregative attractiveness" cannot be reconciled with our cases placing limitations on a district court's remedial authority. It is certainly theoretically possible that the greater the expenditure per pupil within the KCMSD, the more likely it is that some unknowable number of nonminority students not presently attending schools in the KCMSD will choose to enroll in those schools. Under this reasoning, however, every increased expenditure, whether it be for teachers, noninstructional employees, books, or buildings, will make the KCMSD in some way more attractive, and thereby perhaps induce nonminority stu-

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190 *Id.* at 78.

191 *Id.* at 79 (quoting *Missouri v. Jenkins* (*Jenkins II*), 495 U.S. 33, 77 (1990) (Kennedy, J., concurring)).

192 *Id.* at 78 (quoting *Jenkins ex rel. Agyei v. Missouri*, 19 F.3d 393, 397 (8th Cir. 1994) (Bean, J., dissenting from denial of rehearing en banc)).

193 *Id.* at 79–80 (quoting the appendix to the petition for certiorari) (internal quotation marks omitted).

> dents to enroll in its schools. But this rationale is not susceptible to any objective limitation.[194]

The "objective limitation" the Court had in mind was the doctrine announced in prior cases that remedial practice should be limited to undoing the "incremental segregative effect" of particular official acts in violation of the Constitution — that is, "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."[195] From this point of view, the district court's excesses resulted from its initial failure to "identif[y] the incremental effect that segregation has had on minority student achievement or the specific goals of the quality education programs."[196]

The Supreme Court's objection to the aimless and undisciplined character of the lower court's efforts is understandable, but the "incremental effect" doctrine has little promise of improving things. The effort to isolate such effects poses insuperable factfinding burdens because of the "polycentricity" that critics of public law litigation have emphasized. Public law problems invariably result from the complex interaction of conduct by myriad actors. It is highly unlikely that courts could ever command the evidence or methodology necessary to isolate the effects of particular unlawful decisions.

Moreover, even if a court could isolate the present effects of specific past unlawful acts, it is not clear how this finding would constrain its remedial authority. If the court must limit its orders to the same matters as those involved in the past unlawful conduct — for example, pupil assignment — then it may find that its only permissible options are unlikely to mitigate the harm. Pupil reassignments, for example, have little remedial potential where minority students predominate the entire system. Ineffectuality, of course, was a critical objection to the *Jenkins* decree. Alternatively, the incremental effect doctrine might mean that the trial judge has authority to order remedial measures of any kind as long as they are demonstrably likely to produce improvements proportional to the proven harm of past illegality. But this does not seem like much of a limit. There are innumerable potential ways of producing any given measure of improvement.

Finally, the narrow, specific decrees urged by the *Jenkins* majority can be both inefficiently rigid and unnecessarily intrusive on executive authority. Although Ross Sandler and David Schoenbrod endorse the *Jenkins* approach, one of their prime illustrations of inappropriate judicial intervention is a provision imposing strict deadlines for processing pupil assessments in the New York City special education pro-

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[194] *Id.* at 98 (citing *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)).

[195] *Id.* at 87 (quoting *Milliken v. Bradley*, 418 U.S. 717, 746 (1974)) (internal quotation mark omitted).

[196] *Id.* at 101 (citing *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 417 (1977)).

gram. They plausibly object that these requirements induced school personnel to sacrifice quality and to divert resources from other important programs in order to meet the deadlines. But the deadlines were among the provisions of the decree derived directly, *Jenkins*-style, from the (in this case) statutory right.[197]

A second approach to remedial discretion is illustrated by *Lewis v. Casey*. In an earlier case — *Bounds v. Smith*[198] — the Court affirmed an order, based on the constitutional right of access to the courts, requiring a state prison system to maintain law libraries. In *Lewis*, inmates challenged the Arizona prison libraries as inadequate under *Bounds*. After finding for the plaintiffs, the district court appointed a special master to determine "how best to accomplish the goal of constitutionally adequate inmate access to the courts" and adopted, substantially unchanged, his twenty-five-page proposal as a permanent injunction.[199] This "microscopically detailed order" included provisions dictating the hours of operation for the libraries, the amount of time prisoners must be permitted to use them, the minimum credentials of library staff, the forms to be used for requesting books, permissible noise levels in the libraries, the curriculum of the introductory course on legal research for prisoners, and the books and other materials to be made available.[200]

The Supreme Court struck down the order. Writing for the majority, Justice Scalia criticized the lower court for acting as if the constitutional right in question were "the right to a law library." In fact, the right recognized in the court's prior cases was a "right *of access to the courts*."[201] The remedy was thus objectionable in two respects. First, it was not supported by an adequate showing of violation of right. The plaintiffs needed to show not simply that the library was inadequate, but also that they had claims that they had been unable to present to the courts. Second, even if the plaintiffs had shown an impairment of access, it would be error to mandate this particular response when a variety of other ones — different types of libraries or different combinations of written materials and professional assistance — might be equally effective. The lower court should have given the defendant more opportunity to design a responsive remedy before it imposed one over its objection.

Arguably, the trial court in *Lewis* had followed the mandate of *Jenkins* to define the constitutional harm as narrowly and precisely as

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197 SANDLER & SCHOENBROD, *supra* note 8, at 68–72, 92–93, 197–204.

198 430 U.S. 817 (1977).

199 Lewis v. Casey, 518 U.S. 343, 347 (1996) (quoting the appendix to the petition for certiorari) (internal quotation marks omitted).

200 *Id.* at 390 (Thomas, J., concurring).

201 *Lewis*, 518 U.S. at 350.

possible. The Supreme Court, by insisting that the right in question was considerably more general than the trial court assumed, made the remedial possibilities broader and more indeterminate. The *Lewis* opinion proposed to resolve this indeterminacy by deferring to the agency. However, such deference is a crude solution to the problem of indeterminacy exacerbated by the Court's expansive approach to defining rights. In any given case, there is likely to be a dispute about how much deference is appropriate given the defendant's proven misconduct. Justice Stevens's dissent in *Lewis* argued that the agency had had opportunities to develop remedial plans in both this and a prior case involving similar claims, and that its record of noncooperation justified the district court's decision to preempt it.[202] Moreover, there has to be some limit to deference, and *Lewis* says little about what it should be.

A possible response can be found in our third case, *Youngberg v. Romeo* — a challenge to the conditions of confinement at Pennhurst, a now notorious institution for the mentally retarded in Pennsylvania.[203] The plaintiff asserted that, as an involuntarily committed resident, he had constitutional rights to reasonable safety, freedom from unnecessary restraint, and minimally adequate habilitation, all of which were violated by Pennhurst's shoddy practices. After affirming that civilly committed inmates had constitutional rights of the sort the plaintiff alleged, the Court considered how those rights should be delimited. It rejected the lower court's holding that measures infringing an inmate's liberty or safety interests required a "'compelling' or 'substantial' necessity." It concluded that this standard would pose "an undue burden on the administration of institutions such as Pennhurst" and would require judges to "second-guess" institutional judgments they were unqualified to assess. Yet instead of requiring the general administrative deference proposed by *Lewis*, the *Youngberg* Court spoke of "deference to the judgment exercised by a qualified professional":

> [L]iability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.[204]

This precept is a more limited form of deference than the *Lewis* standard. We have noted that professional service providers in defen-

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[202] *Id.* at 411–14 (Stevens, J., dissenting).

[203] 457 U.S. 307 (1982). *Youngberg* was an individual damage action rather than an institutional reform case, but the issue it raised about the constitutional standard of care was the core issue in institutional reform cases, and the holding was thus influential in subsequent institutional cases. *See, e.g.*, Soc'y for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239, 1248–49 (2d Cir. 1984).

[204] *Youngberg*, 457 U.S. at 322–23.

dant institutions often agree with a substantial range of the plaintiffs' claims, and that top administrators sometimes concede that their own decisions do not comply with applicable standards and hence are not "professional decisions" in the Court's sense. Although the *Youngberg* standard was prescribed for mental health cases, it expresses the practical reality in many cases in other areas: professional staff acquire increased influence over compliance regardless of the express provisions of the decree.[205]

Nevertheless, the Court's approach is subject to two objections. First, in accepting as "presumptively valid" any official decision not so egregious as to be disqualified as unprofessional, the Court is not substituting administrative expertise for amateurish judicial speculation. Rather, it gives preference to the opinion of an administratively appointed expert over the opinion of a judicially appointed expert. When courts impose remedies in public law cases, they do not devise them ex nihilo but rather formulate them from the advice of experts they have appointed. The library system in *Lewis*, for example, was not designed by the court, but by "a law professor from Flushing, New York."[206] Even granting the Court's criticisms of some of these remedies, there is no reason to regard the expertise of an authority chosen by a judge to review the decisions of other experts as systematically inferior to the judgment of one of the experts under review.

Perplexity only increases when — here the second objection — the official to whose judgment the Court would defer inhabits an institution that the larger body of professional opinion condemns. This is of course precisely the circumstance at Pennhurst. Looking back at its ruling in another case against Pennhurst, the district court observed that "no one took issue with the many professionals in the field of mental retardation who testified that 'normalization' [i.e., deinstitutionalization] has been universally accepted as the only successful method of habilitating a retarded person."[207] There are no doubt better and worse ways of managing an institution that fails to meet its legal and other obligations to those it serves. A court, however, is unlikely to discern the better choices simply by deferring to the views of the officials of the condemned institution.

The Pennhurst litigation, as it evolved after the Supreme Court's decision, reflected a further, more general shift in the character of professional opinion. *Youngberg* assumed the traditional picture in which an individual practitioner, drawing on a particular, specialized discipline, confronts and resolves problems in a substantially tacit and soli-

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205 *See* Diver, *supra* note 2, at 70–73. But note the qualification in *supra* pp. 1078–79.

206 *Lewis*, 518 U.S. at 363.

207 Halderman v. Pennhurst State Sch. & Hosp., 784 F. Supp. 215, 220 (E.D. Pa. 1992).

tary way. In the decades during which the Pennhurst litigation proceeded, this conception changed. Increasingly, professional decisionmaking came to be seen as the serviceable but provisional product of an ongoing, mutually critical discussion among experts with backgrounds in different disciplines. The more pronounced this tendency, the less sense it made to speak of deference to the views of a particular professional: individual professionals did not "have" views, collaborative groups of experts did.

The Pennhurst Final Settlement Agreement showed succinctly how this change could transform the meaning of "professional" underlying *Youngberg*: the Agreement specified that the services provided by the Commonwealth and other government entities to the class members were to be determined "by a professional judgment, expressed through the interdisciplinary team process."[208] This usage was hardly singular. By the mid-1980s, "interdisciplinary team" appeared often in cases involving the rights of the mentally retarded as a term of art requiring little or no further definition.[209]

The key characteristics of this revised conception of professional decisionmaking are collaborative dialogue, provisionality, and transparency[210] — the very characteristics of what we call the experimentalist approach. To the extent this view of professionalism converges with experimentalism, it suggests a way out of the problem of judicial discretion. The court need not choose between deriving remedies from ambiguous substantive norms on the one hand and deferring to manifestly unreliable executive officials on the other. Instead, it can try to create a process in which the stakeholders collaboratively derive standards, procedures for revising them, and mechanisms of accountability for those subject to them. The court can then facilitate implementation of these standards and procedures. In doing so, there is a sense in which the court might be said to be deferring to professional judgment, though of a different sort from that assumed in *Youngberg*. Before the court can defer to this new kind of judgment, however, it will have to oversee the creation of the processes that make it possible.

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[208] *Id.* at 218.

[209] *See, e.g.*, Sermak v. Manuel, No. 98-3345, 1999 WL 801571, at *4–5 (6th Cir. Oct. 1, 1999); S.H. v. Edwards, 860 F.2d 1045, 1049 (11th Cir. 1988); Ky. Ass'n for Retarded Children v. Conn, 718 F.2d 182, 186 (6th Cir. 1983).

[210] *See, e.g.*, INST. OF MED., CROSSING THE QUALITY CHASM: A NEW HEALTH SYSTEM FOR THE 21ST CENTURY 111–63 (2001). For an example from one of our contexts, see Schiff & Shansky, *supra* note 74, at 21–25, which asserts that "multidisciplinary teams are the real guts" of an effort to improve prison medical care and gives examples of situations in which medical problems required doctors to collaborate with administrators, guards, dieticians, and maintenance personnel.

### B. Separation of Powers

The trend toward experimentalism in public law cases should mitigate separation-of-powers concerns about structural remedies. Indeed, it suggests a role for the courts, which might be called accountability-reinforcing, that fits well with familiar notions of the separation of powers.

Neither the federal Constitution nor state constitutions specifically delineate the spheres of the branches of government, and they do not appear to intend any rigid segregation of activities among them.[211] Separation of powers is an implied constraint, and it has to be given meaning in terms of traditional governmental practice or some principled understanding of democracy.

The objection to structural injunctions from tradition has been precisely the discontinuity between the "traditional model" and public law litigation that Chayes emphasized.[212] The objections from democratic principle point to two roles assigned to the separation of powers in American constitutional thought. The first is the fragmentation of powers as a barrier to tyranny; the second is the allocation of responsibility as a mechanism of ensuring accountability to the electorate.[213] Structural injunctions are accused of subverting these principles by excessively concentrating power in the court at the expense of the electoral branches.[214]

In fact, we have noted that there is substantial traditional precedent for public law litigation. Chayes exaggerated the discontinuity between traditional private law adjudication and actions for structural relief.[215] Moreover, there is clear precedent for structural cases in the

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[211] *See, e.g.*, THE FEDERALIST Nos. 45–46, at 308–23 (James Madison) (Jacob E. Cooke ed., 1961).

[212] *See, e.g.*, Lewis v. Casey, 518 U.S. 343, 349 (1996) (Scalia, J.) ("It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.").

[213] Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1740–42 (1996).

[214] *See Lewis*, 518 U.S. at 385 (Thomas, J., concurring) ("Broad remedial decrees strip state administrators of their authority to set long-term goals for the institutions they manage and of the flexibility necessary to make reasonable judgments on short notice under difficult circumstances. . . . [They] override the 'State's discretionary authority over its own program and budgets and forc[e] state officials to reallocate state resources and funds to the [district court's] plan at the expense of . . . other government programs . . . .'" (second and third alterations in original) (quoting *Missouri v. Jenkins*, 515 U.S. 70, 131 (1995) (Thomas, J., concurring))).

When a federal court adjudicates a claim against a state executive defendant, separation-of-powers concerns are mediated by federalism. Notwithstanding occasional suggestions to the contrary, however, the federal courts tend to view separation-of-powers issues in public law cases against state institutions as analogous to those that arise in cases against federal executive defendants. *See* Robert F. Nagel, *supra* note 3, at 665–67.

[215] *See supra* section III.B.

traditional public law practice of enjoining administrative officials to perform mandatory legal duties — a core feature of the "rule of law" in the Anglo-American tradition.[216] To be sure, such injunctions were narrower and less frequent in the past, but so was the executive activity they were designed to check. Some expansion of remedies seems necessary to give meaning to the rule-of-law principle in an era of vastly changed and expanded government activities. Moreover, it is uncontroversial that there are important constitutional limits on a legislature's authority to constrain (or even to fail to provide for) the enforcement of substantive rights — even the rights the legislature itself has created.[217]

To portray the judicial activity in structural reform as encroaching on executive and legislative discretion ignores the complexity of the relations among the branches in many of these cases. Sometimes, as in housing and mental health cases, the legislature has authorized structural relief. Only in the prison area do we find a prominent, categorical expression of legislative hostility — the Prison Litigation Reform Act of 1996 — and even here the statute could have been interpreted plausibly to impose more modest limits than those the courts have inferred.[218]

Moreover, the remedial regimes that emerge from public law cases sometimes involve elaborate and creative legislation. Legislatures in Texas and Kentucky enacted innovative educational reforms in response to the school "adequacy" cases there, and legislatures in New Jersey and Oregon developed statewide programs to supervise local decisions affecting affordable housing. After courts in Maryland and New Jersey vindicated complaints about racial profiling, many state and local governments enacted legislation mandating monitoring regimes in the same spirit as the early judicial remedies. In all these instances, the legislatures would probably not have acted as they did without the courts' provocation, but the schemes that emerged were substantially their own creations.[219]

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[216] *See* EDITH HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW: CERTIORARI AND MANDAMUS IN THE SEVENTEENTH CENTURY (1963). On judicial control of administrative action as a core rule-of-law principle, see A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 388–90 (10th ed. 1959).

[217] *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542–43 (2001); Goldberg v. Kelly, 397 U.S. 254, 260–62 (1970).

[218] *See supra* p. 1042. Even after the restrictions of the PLRA, *see supra* pp. 1041–42, the Civil Rights of Institutionalized Persons Act of 1980, 42 U.S.C. §§ 1997–1997j (2000), continues to authorize Department of Justice suits for structural relief against state prisons.

[219] *See, e.g.*, *supra* pp. 1026–27 & statute cited n.35; p. 1046; pp. 1051–52 & 1052 n.116.

Turning to the executive branch, we have seen that internal dissensus is a pervasive theme.[220] More often than not, agency heads or operations officers welcome the suit or at least concede many of the plaintiffs' allegations. Perhaps under separation-of-powers principles, it is the position of the jurisdiction's chief magistrate — the governor, in the case of a state defendant — not that of junior officers, that matters the most. However, even conceding this point, it is remarkable how rarely the practices that the plaintiffs attack seem to have been the result of an exercise of authority by anyone. The situation is more often the consequence of a failure or refusal to make policy. The most characteristic component of current structural decrees is a demand that the defendant simply promulgate *some* policy, often with minimal or uncontroversial constraints as to what it shall be.

Consider in this regard the background of a recent state institutional case.[221] Plaintiffs' counsel determined that the practices of a state agency in one of the areas we surveyed in Part II were woefully out of compliance with the applicable legal duties. They approached the senior officers of the agency with their allegations. The officers largely conceded the violations and expressed a willingness to negotiate a resolution that could be embodied in a statute or a consent decree. The parties tentatively agreed on the broad outlines of a resolution. When the officers approached the governor's office, however, they were told that the governor was unwilling to take the political heat for approving measures that would require additional expenditures for the benefit of a politically unpopular group. Efforts to persuade the governor that refusal to settle would involve the state in expensive litigation that it would eventually lose failed to weaken his resolve. When the institution's officials included a substantial item in their budget for defense of the litigation, however, one of the leaders of the legislature noticed it and balked. The legislator then successfully pressured the governor to agree to a settlement. The plaintiffs, the legislature, and the governor preferred that the settlement be embodied in a judicial decree rather than in a statute, so the plaintiffs filed the case with the state's assurance that it would settle promptly, which it did.

The story is more elaborate than most, but the basic theme of avoidance rather than exercise of responsibility by legislative and

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220 Since state executive power is formally more fragmented than federal executive power, division among state officials often makes it difficult to discern what judicial deference to the executive branch would mean. For example, in the Santa Clara, California, jails case, the sheriff — an elected official who was named as a defendant along with the Board of Supervisors — crossed the courtroom to sit at the plaintiff's counsel table. The sheriff and the Board were feuding. The sheriff attributed the jails' problems to inadequate funding; the Board, to the sheriff's mismanagement. *See* FEELEY & RUBIN, *supra* note 6, at 116.

221 As recounted to us in confidence by two of the participants.

elected executive officials is common. The most plausible separation-of-powers objection to the role of the court in this case is not that it usurped executive responsibilities, but that it allowed the use of its office to give political cover to a governor who should have taken responsibility for the decision on his own. Yet without the possibility of judicial challenge, a situation that no one could defend in good faith would have persisted.[222]

To the extent that old-style command-and-control regimes comprehensively preempted executive authority, both fragmentation and accountability concerns may have been implicated. But because the experimentalist approach leaves the agency more discretion than the command-and-control approach does, these concerns seem much less pressing.[223]

Moreover, the experimentalist approach seems in important respects to vindicate separation-of-powers concerns. This appears particularly clear with respect to accountability. Experimentalist intervention directly serves electoral accountability by requiring executive officials to make explicit policies and to subject themselves to mechanisms of measurement and monitoring that make their performance more readily assessable. This scheme potentially makes the executive more accountable to the legislature and to the electorate, as well as to the court.[224]

These transparency mechanisms should also enhance the accountability of plaintiffs' counsel, other stakeholder representatives, and the court itself. The new regime makes clear the goals to which the repre-

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[222] Sandler and Schoenbrod make the "political cover" version of the diminished accountability claim. *See* SANDLER & SCHOENBROD, *supra* note 8, at 117–38, 153–61. Their concern is important, but their proposals to restrict judicial intervention cannot enhance accountability when the executive is disposed to passivity and feels no pressure to act.

No doubt there are examples of underperforming agencies that have independently initiated promising reform projects in ways that have opened themselves up to stakeholders. Sandler and Schoenbrod's account of the reorganization of New York's Administration for Children's Services suggests that it may be an example. But in the case brought against that agency, the court proved able to recognize the quality of the agency's efforts and responded appropriately, declining to enter the type of intrusive orders to which Sandler and Schoenbrod object. *See id.* at 193–97; *see also* Marisol A. *ex rel.* Forbes v. Giuliani, 185 F.R.D. 152, 164 (S.D.N.Y. 1999) (noting that even if the plaintiffs established liability at trial, "the Court may not have been in a position to provide for more relief than simply encouraging continued effort and improvement by [the defendant]"). Our conception of destabilization rights anticipates such situations by requiring as conditions of ambitious structural relief both performance failure and political entrenchment.

[223] *See* Nagel, *supra* note 3, at 708–10 (discussing how "detail in decree" intensifies separation-of-powers concerns).

[224] To be sure, the legislature could prescribe regimes of monitoring, participation, and accountability on its own. When the court mandates such regimes, it is thus asserting power in relation to the legislature. But the separation of powers permits and even requires judicial mandates that constrain legislative practice when the constraints are of the sort that induce the legislature to perform its own function properly. Think of reapportionment, void for vagueness, or the delegation doctrine.

sentatives have committed their constituents and makes progress measurable in terms of criteria to which the representatives have agreed. Where progress is not being made, constituents will sometimes be in a position to put pressure on or to replace their representatives. Similarly, lack of progress will reflect on the court. Although the direct mechanisms of judicial accountability are limited, judges are likely to be reluctant to continue spending the exceptional effort and suffering the public criticism these cases often provoke when they do not feel that tangible progress is being made.

Experimentalist intervention serves both fragmentation and accountability in another, less traditional way. It opens up the underperforming institution to the influence of and participation by dissatisfied citizens through stakeholder negotiation. The stakeholder process is by definition a fragmentation of power and, when it works, it enhances accountability to those with the greatest interest in the institutions. As a form of direct rather than representative democracy and as an informal process without fixed criteria of standing or operation, the stakeholder process departs from the traditional premises of American constitutionalism. But it is potentially a valuable elaboration, one that serves the broader values of fragmentation and accountability in circumstances in which, by themselves, traditional political processes would be unable to do so effectively.

Public law litigation rejects the notion that accountability can be assumed from the fact that an agency is nested in a larger administrative structure formally headed by an elected official. Such an assumption would turn separation-of-powers doctrine into empty formalism. The electorate as a whole has limited information about and interest in the operations of particular public institutions, and issues about these institutions are bundled with myriad other ones when they are presented at the polls. The senior officers of all three branches have limited information and interests and a vast range of responsibilities as well. The stakeholder process permits a more informal and ad hoc kind of power-sharing and accountability to those who are most strongly concerned.[225]

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[225] Thus, the experimentalist style of public law remedy partakes of the same spirit as a variety of recent reforms that draw on direct citizen participation in areas including policing, environmental protection, and local economic development. *See generally* JEFFREY M. BERRY, THE NEW LIBERALISM: THE RISING POWER OF CITIZEN GROUPS (1999); DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE (Archon Fung & Erik Olin Wright eds., 2003); WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, AND THE NEW SOCIAL POLICY (2001).

### C. *The Problem of Attribution*

The next doctrinal issue might be called the problem of attribution. The plaintiff seeks structural relief against the government or senior officials. Sometimes, as with de jure segregation, she will be able to prove systematic misconduct by the senior officials. Often, however, her proof consists of a series of discrete episodes of misconduct by lower-level agents. The question then arises of when these episodes will be deemed to demonstrate systemic misconduct, or to put it differently, when they will be attributed to the government or senior officials against whom relief is sought.

The issue is theoretically present in all of the contexts surveyed above, but it arises most prominently in police abuse cases. Federal relief under 42 U.S.C. § 1983 against local government or senior state officials on the basis of misconduct by subordinates requires a showing that misconduct was a matter of explicit "policy" or a tacitly condoned "pattern or practice."[226] In addition, both the traditional "irreparable injury" requirement for equitable relief and standing requirements depend on a showing that the conduct is likely to be repeated on a significant scale in the absence of structural relief.[227]

Since the misconduct in question is rarely explicitly authorized, plaintiffs try to show an ongoing "pattern or practice." Typically, proof takes the form of evidence of a number of episodes of misconduct, and of knowledge and unresponsiveness on the part of the superiors. At some level, evidence of repeated discrete instances compels an inference of condonation.

Acts of subordinate misconduct do not establish supervisor liability by themselves, however, except insofar as they permit an inference about state of mind. The core case is intentional participation or encouragement. More recent cases, however, rarely fit this scenario. The courts have not narrowed the liability of senior officials to cases in which they have been active wrongdoers. Yet neither have the courts been comfortable with the idea that officials' failure to stop the conduct is enough. They require a showing of a state of mind between intention and indifference. Thus, we get standards such as "deliberate indifference."[228]

The elaborate body of doctrine that wrestles with these issues has two salient deficiencies. First, it treats what are basically institutional

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[226] *E.g.*, Porter v. Nussle, 523 U.S. 516, 530 (2002). Sovereign immunity principles survive sufficiently to preclude general respondeat superior liability for officials performing public functions of the sort considered here. The principal rationale is that public tasks require significant discretion, and officers are entitled to substantial deference by virtue of their position in the executive branch. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 676–83 (1978).

[227] *See, e.g.*, Rizzo v. Goode, 423 U.S. 362, 371–73 (1976).

[228] *E.g.*, City of Canton v. Harris, 489 U.S. 378, 388 (1989).

issues in psychological terms and, indeed, incoherent psychological terms. "Deliberate indifference" is an oxymoron. It misapprehends the most pertinent psychological and institutional realities. In the typical case these days, the senior officials neither desire nor actively promote the misconduct. If they could have eliminated it costlessly, they would have done so. Their problem is that eliminating the conduct would involve substantial costs of many kinds — economic, political, emotional — and for reasons that may be both selfish and public-regarding, they have made tradeoffs that permit the misconduct to continue. The important question is whether these tradeoffs are acceptable, or whether they give certain values less weight than the applicable law requires. Preoccupation with states of mind simply diverts energy and attention from the pertinent considerations.

Second, the focus on the officials' mental states risks creating strong disincentives for the kind of internal monitoring that is critical to addressing many of the problems involved in these lawsuits. If liability depends on intent, then officials might reasonably conclude that ignorance is the best defense.[229] We do not usually think of people as intending consequences of which they are unaware. Of course, courts will at some point assume that officials "must have known" about conduct that was widespread and salient, and they will sometimes conclude that deliberate avoidance of knowledge is tantamount to knowledge. However, courts do not reach such conclusions easily; they often require a fairly elaborate showing by the plaintiffs. The official who concedes knowledge of ongoing misconduct will often be in a worse position than the one who can plausibly deny it. Officials are rarely in a better position for having sought out knowledge.

The experimentalist perspective suggests two improvements on the current standards of institutional liability. First, it directs assessment of the defendant institution's performance failures away from the motivations of the individuals who occupy its senior offices. It suggests that these failures are more likely to be the product of a series of political compromises in which the values to which the plaintiffs appeal have been slighted or, relatedly, the result of a kind of low-level political equilibrium in which everyone fares less well than he might, but in which no single actor has both the incentive and the power to make changes without prodding.

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[229] At the trial of a case challenging prison medical conditions, the head of the California Department of Corrections testified that he had resisted developing a procedure to screen inmates for mental illnesses "because he knew that once mentally ill individuals were identified he would be responsible for treating them." Craig Haney & Donald Specter, *Treatment Rights in Uncertain Times*, *in* TREATING ADULT AND JUVENILE OFFENDERS WITH SPECIAL NEEDS 51, 70 (José B. Ashford et al. eds., 2001).

Second, it argues for a reversal of the penalty for monitoring implicit in the mental-state approach. If the most promising remedial approach to public rights enforcement failure involves monitoring, participation, and disciplined comparisons, then defendants who have initiated these practices should get credit for doing so. Good-faith initiation should weigh against the finding of political entrenchment that, on our view, is a prerequisite for liability. These practices tend both to create compliance pressures on lower-tier workers and to open the larger system up to political pressures toward compliance. They thus give credibility to the defense that nonjudicial political processes are sufficient to induce reform. Conversely, the failure of defendant institutions to adopt state-of-the-art compliance procedures ought to count against them in liability determinations.

The experimentalist approach in public law parallels recent trends in private organizational liability. In the corporate area, for example, the same tendency to reject executive liability for failure to supervise compliance with legal duties and to treat ignorance of even routine subordinate misconduct as exculpatory was long prominent. This tendency has changed significantly in recent decades. As a matter of practice, it has become the norm for corporations to have compliance programs in a variety of sensitive areas, such as environmental and securities law. The 1991 Federal Sentencing Guidelines for corporate defendants broke ground by making good-faith compliance monitoring efforts an important mitigating factor in sentencing in federal criminal prosecutions of corporations.[230] The courts have begun to suggest that the duty of care of corporate executives includes an affirmative obligation to monitor.[231] A shift in focus in public law litigation away from a focus on mental states and toward institutional efficacy would be in line with such private law developments.

### *D. The Problem of Interest Representation*

Chayes's article concluded with a discussion of the "problem of interest representation."[232] Public law litigation requires representation of affected people. Most participation must be through representatives. So the court must identify the affected people, assess the representativeness of those who purport to speak for them, and sometimes assign weights to the competing interests asserted in the process.

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230 U.S. SENTENCING COMM'N, GUIDELINES MANUAL ch. 8 (1994).

231 Chancellor Allen discussed these developments in *In re Caremark International, Inc. Derivative Litigation*, 698 A.2d 959, 969–70 (Del. Ch. 1996). Another analogous private context is sexual harassment employment discrimination, in which such notions as "hostile work environment" have shifted the inquiry from the motivations of individual managers to institutional structures and have led to an implied duty to monitor. *See* Sturm, *supra* note 10, at 480–90.

232 Chayes, *supra* note 1, at 1310–14.

Chayes argued that courts are not ill-equipped to identify affected interests and routinely do so under federal joinder and class action rules. He approved of the tendency of joinder doctrine and remedial practice toward inclusiveness. He noted various techniques for inducing the representation of groups that did not appear on their own initiative. These techniques included broad notice of the suit and its processes, refusal to proceed until the original parties procure the representation of specified interests, recruitment efforts by special masters, and invitations to amici curiae. With respect to the problem of weighing of interests, Chayes said without elaboration, "[a] part of the answer may be found in the suggestion that the decision, or at least the remedy, involves a species of negotiation among the parties."[233]

Our perspective suggests some elaborations on this response. To begin, the experimentalist tendency treats participation not just as an aspect of the initial remedial formulation, but as a core feature of the remedy itself. The substantive remedial terms are provisional. They are expected to be renegotiated in the light of experience. Thus, a critical element of the decree is the establishment of participatory processes for such renegotiation. The task of identifying affected interests and inducing their participation does not need to be fully accomplished at the outset. New constituencies will appear in the course of implementation, and because the rules are revisable, these constituencies will have an opportunity to challenge them.

Further, Chayes's suggestion that the difficulty of weighing interests can be remedied in part through "a species of negotiation among the parties" is more powerful in the experimentalist perspective. Chayes's discussion of negotiation was ambiguous. On one reading, he conceived of it as a kind of pluralist bargaining in which groups compromise their particularistic interests in a resolution that reflects their relative power. Under this reading, the problem of weighing interests raises a dilemma. Either the negotiated resolution would simply reflect the preexisting balance of power among the affected groups, in which case it would be tainted by the inequities that the lawsuit was brought to redress. Or alternatively, it would reflect a reallocation of power through the court's declaration of entitlements in its liability determination. In this case, however, the court would have to be able to specify the parties' entitlements, and that would require something like the specific weighing of interests that Chayes conceded would be difficult.

On another reading, Chayes discusses the remedial negotiation in terms of the deliberative consensus of democratic experimentalism. In contrast to bargaining, deliberation is centrally committed to reason-

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[233] *Id.* at 1312.

giving and openness to persuasion. It insists that the parties remain open to the possibility that they may not fully understand their self-interest and that they be at least hopeful of finding solutions that vindicate common values. It aspires to be a process of learning and solidarity-building rather than simply dispute settlement.

Destabilization rights and experimentalist remediation complement the consensus approach, but they are not helpful and may even be harmful to pluralist bargaining. Pluralist bargaining proceeds through implicit threats by the parties about the costs each can impose on the other by failing to agree. The more the parties agree on what these costs are, the more likely they will find it in their self-interest to come to some agreement. The more divergence in the parties' estimations about the costs of failing to agree, the more likely pluralist bargaining will fail.[234] Moreover, each party in the pluralist process assesses the benefits of settlement primarily in terms of her selfish interests, and the opposing party calculates her strategy in terms of the behavior she anticipates given her understanding of her adversary's self-interest. To the extent that the parties are uncertain about their own interests, both the parties' decisions about what outcomes to accept and their predictions about what their adversaries will accept become more difficult. This makes pluralist negotiation more strenuous. Destabilization rights are designed to increase uncertainty about both the parties' interests and the costs of refusing to agree. Thus, they may amplify the impediments already inherent in pluralist bargaining. On the other hand, this uncertainty potentially enhances deliberative bargaining in the ways discussed above. It can open the parties to the broader cognitive and moral orientations that produce creative solutions.

If we follow the destabilization perspective in understanding remedial negotiation as deliberative, we can give some substance to Chayes's suggestion that such negotiation responds to the problem of weighing interests. From the pluralist perspective, weighing private interests is important because the solution is viewed as an effort to maximize the satisfaction of diverse interests. By contrast, deliberation is an attempt to approximate a common interest. Even to the extent they know their current interests and powers, deliberative practitioners assume that these understandings may change in the course of deliberation; they cannot assume that there is any strong relation between the power position of a particular participant and her capacity to contribute to the discovery of generally valuable solutions.

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[234] *Cf.* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 975–80 (1979) (arguing, on pluralist assumptions, that divergence in expectations about the litigated outcome tends to reduce the likelihood of settlement).

This claim, however, should not be exaggerated. Under the best circumstances, deliberators will have definite commitments to particularistic interests and will be influenced by some sense of their fallback positions in the event of nonagreement. Those with the better fallback positions will have more power in the negotiation. Parties will benefit from greater capacities and resources in the negotiation process itself and from cultural and psychological advantages. In this sense, the dynamics of unequal bargaining power affect deliberative as well as pluralist negotiations. Moreover, even a negotiation that produces an ostensibly consensual result may appear to an outside observer or to one or more of the participants to be coerced. The intuition behind destabilization rights suggests only that there are resources of goodwill and creativity that can be tapped by a combination of uncertainty and opportunity. "Interests" in the pluralist sense will continue to play a role, but the role will be a more provisional one. But to the extent that the destabilization effects induce deliberative negotiation, the burden on the court to define and weigh interests should be less than under pluralist bargaining.

## V. CONCLUSION

Recent discussion has tended to underrate the potential of public law litigation because it has tended to misperceive its forms. Much criticism has been directed at a model of judge-centered, hierarchical, and rule-bound intervention that has ceased to correspond to trial court practice. In fact, trial judges and litigants have crafted more decentralized and indirect forms of intervention that rely on stakeholder negotiation, rolling-rule regimes, and transparency. No definite assessment of the efficacy of this "experimentalist" approach is possible yet, but the approach seems to avoid the defects emphasized by the critics in the older one, and early returns on some efforts give reason for optimism.

The experimentalist approach is also responsive to concerns about the legitimacy of judicial intervention in public law cases. Experimentalist intervention is both more consistent with judicial practice in common law cases and more compatible with electoral mechanisms of democratic accountability than most accounts of public law litigation recognize. Experimentalist remedies expose public institutions to pressures of disciplined comparison that resemble the market pressures enforced by common law norms. At the same time, the transparency they induce facilitates related forms of democratic intervention, including electoral ones.

The features of experimentalist intervention that respond to concerns about both efficacy and legitimacy are captured by the idea of destabilization rights. In stigmatizing the status quo, the court's intervention opens the defendant institution up to participation of previ-

ously marginalized stakeholders and clears the way for the redefinition of relations among more established ones. Counterintuitively, destabilization through new public law creates opportunities for collaborative learning and democratic accountability that the more certain world of pluralist bargaining under the aegis of courts or legislatures often precludes.