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A Normative Theory of Public Law Remedies

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ARTICLES

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INTRODUCTION

The remedial process in public law litigation[1] is a practice in search of a theory. Courts are actively engaged in attempting to remedy violations of constitutional and statutory norms in complex organizational settings. The traditional adversary conception of adjudication has proven inadequate to the task of structuring remedies and promoting compliance in these settings. In response, lawyers, judges, and litigants are employing a variety of innovative roles and processes that do not conform to the accepted adjudicative ideal. Remedial activity in public law litigation frequently entails negotiation, informal dialogue, ex parte communication, broad participation by actors who are not formally liable for the legal violations, and involvement of court-appointed officials to assist in implementation.

Courts have exhibited an uneasy acceptance of continued judicial involvement in implementing public norms necessitated by the remedial process in public law litigation. Trial courts now oversee compliance efforts in a wide range of public law cases.[2] With prison populations soaring throughout the nation,[3] judicial intervention in prisons and jails is likely to continue.[4]

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1. The definition of public law litigation varies. The term is often used interchangeably with structural or institutional reform litigation to refer to a class of cases involving public institutions and policies, such as school desegregation, prison and mental hospital conditions, environmental management, housing discrimination, and electoral reapportionment. *See Special Project, The Remedial Process in Institutional Reform Litigation,* 78 COLUM. L. REV. 784, 788-89 (1978) [hereinafter *Special Project*]. Abram Chayes identifies the public nature of the legal claims—"the vindication of constitutional or statutory policies"—as the dominating characteristic of public law litigation. Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281, 1284 (1976). Chayes also defines public law litigation structurally, identifying as distinctive characteristics such features as the "sprawling and amorphous" party structure; the forward looking, ad hoc, negotiated character of the relief; and the activism of the judge. *Id.* at 1302. Owen Fiss employs the term "structural reform" litigation to emphasize the significance of the bureaucratic character of the targets of the litigation. *See* Fiss, *Foreword: The Forms of Justice,* 93 HARV. L. REV. 1, 2 (1979). Rather than attempt to provide a universal definition of public law litigation, this article identifies four characteristics that predispose courts to depart from the traditional adversary process in the course of developing remedies for violations of public norms in complex organizational settings. These characteristics both necessitate and define the boundaries of the normative theory of public remedial process developed in this article. *See infra* text accompanying notes 116-23.

2. A recent study of the patterns of remedial decisionmaking by Republican judges in prison cases suggests "that contrary to the fears of some or the hopes of others, more 'Republican' judges on the federal bench does not spell the end of judicial activism in this area; such background characteristics of judges are powerful predictors of neither judicial intervention nor the extent of that intervention." DiIulio, *Introduction: Enhancing Judicial Capacity,* in COURTS, CORRECTIONS, AND THE CONSTITUTION: THE IMPACT OF JUDICIAL INTERVENTION ON PRISONS AND JAILS 8 (J. DiIulio ed. 1990) [hereinafter COURTS, CORRECTIONS, AND THE CONSTITUTION]; Bradley, *Judicial Appointment and Judicial Intervention: The Issuance of Structural Reform Decrees in Correctional Litigation,* in COURTS, CORRECTIONS, AND THE CONSTITUTION, *supra,* at 260-62.

3. According to the most recent Bureau of Justice statistics, the increase from mid-1989 to mid-1990 of more than 80,000 inmates was the largest annual growth in 65 years of prison population statistics. BUREAU OF JUSTICE STATISTICS, PRISON POPULATION GROWS SIX PERCENT DURING FIRST HALF OF YEAR (Oct. 7, 1990) (press release). As of January 1, 1990, the average prison was

School and housing desegregation litigation is also likely to persist.[5] New types of public law litigation are also emerging in areas such as union governance and disabilities.[6] The United States Supreme Court recently reaffirmed the legitimacy and importance of the federal judiciary's role in achieving compliance with constitutional norms.[7] State courts are facing similar remedial challenges in what appears to be a growing docket of public law cases.[8] The courts, however, lack a normative theory to structure and legitimate the role of remedial process in public law litigation.

The courts' public remedial activity has provoked a critical response from the academy. The debate over the judicial legitimacy of this activity has not, however, produced a coherent normative theory of public remedial process. Both sides of the debate proceed based on a conception of the proper judicial role that was developed to address the court's role in determining liability. This conception rests on the assumption that the adversary process is the only means of preserving the norms of judicial legitimacy. Public remedial practice's departure from the adversary model prompts both critics and supporters to question the legitimacy of the court's role in enforcing public law

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operating at 16.2% above its designed capacity. CRIMINAL JUSTICE INSTITUTE, THE CORRECTIONS YEARBOOK: INSTANT ANSWERS TO KEY QUESTIONS IN CORRECTIONS 28 (1990).

4. As of January 1, 1990, eight states and Puerto Rico were operating their prison systems under either a court order or consent decree; thirty-three states and the District of Columbia were operating a major penal institution under court order; and nine states had major prison litigation pending. NATIONAL PRISON PROJECT, STATUS REPORT: THE COURTS AND PRISONS (1990).

5. *See, e.g.*, Board of Educ. v. Dowell, 111 S. Ct. 630, 636-37 (1991); Missouri v. Jenkins, 110 S. Ct. 1651 (1990); Department of Hous. & Urban Dev. v. Blackwell, 908 F.2d 864, 871-74 (11th Cir. 1990); Walker v. Department of Hous. & Urban Dev., 912 F.2d 819, 826 (5th Cir. 1990).

6. *See* United States v. International Bhd. of Teamsters, 905 F.2d 610, 612-13 (2d Cir. 1990) (describing a civil RICO suit alleging racketeering activity of the Teamsters union and the subsequent consent decree that radically altered the union's elections and governance); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-213 (providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities").

7. *See* Missouri v. Jenkins, 110 S. Ct. 1651, 1663-66 (1990) (although district court may not directly impose a tax increase to finance court-ordered desegregation, it may require the school district to levy taxes in excess of the limit imposed by state law if necessary to vindicate constitutional guarantees); Spallone v. United States, 110 S. Ct. 625, 632-34 (1990) (although district court abused its discretion in holding individual council members in contempt, imposition of contempt sanctions against the city for violating desegregation decree was proper).

8. *See, e.g.*, Abbott v. Burke, 100 N.J. 269, 290-91, 495 A.2d 376, 387-88 (1985) (substantial disparities in per-pupil expenditures among school districts violated state constitution); McCain v. Koch, 70 N.Y.2d 109, 113-14, 511 N.E.2d 62, 62-63 (1987) (state court has power to issue affirmative injunction mandating specific conduct to meet minimum standards in housing that city provides for homeless families); C. HAAR & L. LIEBMAN, PROPERTY AND LAW 436-82 (2d ed. 1985) (case study of housing reform litigation in state courts); OF JUDGES, POLITICS AND FLOUNDERS: PERSPECTIVES ON THE CLEANING UP OF BOSTON HARBOR (C. Haar ed. 1986) [hereinafter OF JUDGES, POLITICS AND FLOUNDERS] (analysis of City of Quincy v. Metropolitan Dist. Comm'n, Civ. No. 138477 (Mass. Super. Ct., Norfolk County, filed Dec. 17, 1982), state litigation involving cleanup of Boston Harbor).

norms.[9]

The absence of a legitimate model of public remedial process presents more than a purely theoretical problem. It enhances the potential for the abuse of judicial power and contributes to the perception of the impropriety of judicial intervention in public law cases. This perceived illegitimacy fuels attacks on the court's role as guardian of constitutional and other public values. A normative foundation is crucial to developing, sustaining, and, where appropriate, criticizing public remedial activity.

This article provides a normative framework to guide the practice and evaluation of the evolving public remedial practice. It identifies the distinctive characteristics and goals of public remedial process and shows how the debate regarding its legitimacy fails to account for these differences. The article draws a set of norms for public remedial decisionmaking out of the existing legitimacy debate, and adapts these norms to the particular requirements of public law remedies. It then develops a normative theory of public remedial process, building on the teachings of public consensual dispute resolution and other process theories that emphasize participation and dialogue. By testing this normative theory against existing public remedial practice, the article constructs a model of public remedial decisionmaking that accounts for the particular demands of the remedial process while complying with the requirements of a legitimate judicial role.

Part I of the article describes public remedial practice and the distinctive characteristics that prompt courts and parties to depart from the traditional adversary model. It provides examples of the various forms of public remedial decisionmaking to lay the groundwork for the subsequent evaluation of their legitimacy. Part II exposes and attempts to bridge the gap between the theory and practice of public remedial decisionmaking. It identifies four major categories of criticism and response to the court's public remedial role: (1) the process critique; (2) the allocation of governmental power critique; (3) the competency critique; and (4) the abuse of power critique. This section demonstrates that although the discourse on legitimacy provides a normative framework for the public remedial process, each category of the debate rests

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9. *See* D. HOROWITZ, THE COURTS AND SOCIAL POLICY 17-19 (1977) (questioning the capacity of courts to engage in social policymaking); Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions,* 65 VA. L. REV. 43, 103-06 (1979) (contrasting judge's legitimate role in adjudicatory proceedings with the "political" nature of the judge's role in institutional reform); Fiss, *supra* note 1, at 44-46 (arguing that the judge's role in the development of structural remedies endangers judicial independence); Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy,* 91 YALE L.J. 635, 637 (1982) (arguing that trial court remedial action in public law litigation is "presumptively illegitimate"). *But see* Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation,* 93 HARV. L. REV. 465, 466-67 (1980) (institutional reform litigation has analogues in other types of litigation and presents little that is truly novel).

on a conception of the judicial role that is derived from the liability stage. Part II concludes by grounding the norms identified by the legitimacy debate in the goals and demands of the public remedial process. In Part III, the article summarizes the normative framework for public remedial decisionmaking and applies this framework to current remedial practice. Finally, in light of this evaluation, Part IV develops a deliberative model of remedial decisionmaking that casts the court in the role of structuring and evaluating the adequacy of a participatory process designed to produce a consensual remedial solution.

I. PUBLIC REMEDIAL PRACTICE AND ITS DEPARTURE FROM TRADITIONAL FORMS OF ADJUDICATION

Critics and supporters of public law litigation generally agree that the court's role in formulating and implementing public law remedies departs from traditional conceptions of the adversary process. The scholarly debate over the judicial legitimacy of public law remedies proceeds from this shared assumption. Yet, the standard expositions of public remedial practice fail to reflect the range of forms and procedural innovations that have recently emerged. A fair evaluation of the legitimacy of the court's role must begin with an accurate description of current public remedial practice. This section first explains the factors predisposing courts to depart from traditional adversary processes in the public remedial context. It then describes the nature of public remedial practice, drawing on examples from a variety of public law cases.

A. THE ROOTS OF PUBLIC REMEDIAL PRACTICE'S DEPARTURE FROM TRADITIONAL ADVERSARY PROCESS

The remedial process begins when the court finds that the defendants are liable for violating the plaintiffs' rights and must remedy the harm caused by their unlawful conduct.[10] Traditionally, damages and negative injunctions have been the remedies of choice.[11] The court's role in determining these remedies fits comfortably within established conventions of adjudication.[12]

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10. Many public law litigation cases are resolved by agreement prior to an adjudication of liability. In these situations, the parties proceed directly to the remedial stage. Many of the processes used to develop postliability relief are also used to negotiate consent decrees reached without liability determinations. The consent decree presents particular challenges for a theory of judicial legitimacy, however, because the court's remedial power in the consent decree context is not grounded in its duty to remedy established legal violations, as it is in postliability remedial determinations. *See infra* text accompanying notes 456-457. This article focuses on postliability public remedial process.

11. *See* O. FISS, THE CIVIL RIGHTS INJUNCTION 38-39 (1978); F. MAITLAND, EQUITY 318 (1949); Fletcher, *supra* note 9, at 649.

12. As Theodore Eisenberg and Stephen Yeazell have shown, the court's role in enforcing tradi-

Damages are typically awarded by the jury based upon evidence of the plaintiffs' injuries presented at trial, with the court providing the legal parameters of the jury's deliberations.[13] Courts derive the content of negative injunctions from the wrongful conduct that is the basis for the defendants' liability, again based on proof presented at trial.[14] The remedial determination generally adheres to the traditional adversary model.[15] The parties, through their lawyers, frame the issues and submit evidence and legal arguments to the court through adversary presentation. The court rules on the legal issues submitted by the parties and submits the factual disputes to a jury for resolution.

Remedial decisionmaking in public law cases frequently differs dramatically from the traditional, dispute resolution model of adjudication.[16] In the public law context, the affirmative structural injunction[17] tends to be the remedy of choice, rather than damages or a negative injunction.[18] Public law cases concern ongoing violations of general aspirational norms grounded in statutes or the Constitution.[19] Courts generally consider the resulting inju-

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tional remedies frequently departs from the traditional adversary model. *See* Eisenberg & Yeazell, *supra* note 9, *passim.* They note that the court's role in enforcing traditional remedies has evolved to a point where nonjudicial actors perform many of the executive functions. *Id.* at 478-81. They suggest that public remedial practice may simply be at an earlier stage of procedural development than traditional remedial practice. *Id.* at 512-13.

13. This does not mean that there is necessarily a logical connection between the right and the remedy in damages cases. It is acceptance of the convention of monetary relief as the remedial currency that links the determination of liability and the remedy.

14. For example, the act of trespassing on plaintiff's land—the basis for the liability determination—also constitutes the conduct to be prohibited by the negative injunction.

15. F. JAMES & G. HAZARD, CIVIL PROCEDURE § 1.2, at 4 (1985).

16. *See* Chayes, *supra* note 1, at 1284; Fiss, *supra* note 1, at 17-28.

17. Owen Fiss introduced the term "structural injunction" as the category of injunction "which seeks to effectuate the reorganization of an ongoing social institution." O. FISS, *supra* note 11, at 7.

18. *See* Chayes, *supra* note 1, at 1292; Shane, *School Desegregation Remedies and the Fair Governance of Schools,* 132 U. PA. L. REV. 1041, 1046-47 (1984).

The difficulties of apportioning damages in the public law context may also lead courts to depart from the traditional rules governing the assessment of damages. In some cases in which the defendants' wrongful conduct can only be shown to have affected a group of plaintiffs, it may be difficult to identify the particular members of the group and the extent of injuries suffered by each member. *See* Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System,* 97 HARV. L. REV. 849, 916-24 (1984) (advocating remedial innovation in the form of damages scheduling and insurance fund judgments to address the problems of identifying victims of toxic torts and the expense of individualizing damages awards). In these cases, insistence on traditional remedial conventions, which require proof of individualized causation and injury, prevents any monetary recovery. At least in the context of settlements, courts have played the role of orchestrating settlements involving multiple parties and interests, a role that departs substantially from the traditional concept of adjudication. *See* P. SCHUCK, AGENT ORANGE ON TRIAL 143-67 (1986) (describing the judge's role, the use of masters, and the use of informal processes in overseeing settlement negotiations in the Agent Orange litigation). The court's role in both pretrial consent decrees and damages calculations are beyond the scope of this article.

19. *Cf.* Shane, *Rights, Remedies and Restraint,* 64 CHI.-KENT L. REV. 531, 550-53 (1988) ("aspirationalism" views "the Constitution as a signal of the kind of government under which we would

ries to be irreparable and refuse to allow the availability of monetary compensation to justify judicial toleration of continuing public law violations.[20]

Similarly, courts have generally viewed the negative injunction as an inadequate means of relief in public law cases. Although a prohibition of particular forms of conduct may be sufficient to eliminate certain discrete and blatant illegalities, such as assigning schools by race[21] or using torture and whippings as punishment,[22] negative injunctions are, as a practical matter, both difficult to obtain and inadequate as remedies for most ongoing public law violations. For example, judges rarely use release of prisoners as a remedy for unconstitutional prison conditions,[23] and in many public law contexts the plaintiffs and the public have an entitlement to, or interest in, the defendants' continued involvement in the activities targeted by the litigation.[24] General orders prohibiting cruel and unusual punishment of prisoners or unequal treatment of black and white school children provide no indication of how to rectify the social conditions, behavioral patterns, and organizational dynamics causing the harm.[25] Courts correctly perceive, either initially or

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like to live, and interpret[s] that Constitution over time to reach better approximations of that aspiration"). The aspirational character of constitutional norms refers to the notion that constitutional norms invoke broad and often vague normative purposes and represent "enduring values and principles" toward which we continually aspire and which take on meaning in particular contexts. *Id.*

20. *See* O. FISS, *supra* note 11, at 87 ("The inadequacy [of cash payments as compensation] stemmed from considerations much deeper than difficulties of measurement. . . . [It] stemmed from the group nature of the underlying claim and a belief that only in-kind benefits would effect a change in the *status* of the group." (emphasis in original)); *id.* at 75 (rights should not be reduced to "a series of propositions assuring the payment of money to the victims"); *cf.* Zepeda v. United States Immigration & Naturalization Serv., 703 F.2d 719, 727 (8th Cir. 1985) (injury to plaintiffs from INS violations of fourth amendment rights, if proven, "could not be compensated adequately by money damages").

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

22. *See* Jackson v. Bishop, 404 F.2d 571, 572 (8th Cir. 1968).

23. Fletcher, *supra* note 9, at 650-51. Although courts have ordered limited releases of inmates as a remedy for unconstitutional prison overcrowding, this usually occurs only after affirmative injunctions have failed. *See* Inmates of Allegheny County Jail v. Wecht, 573 F. Supp. 454, 457-58 (W.D. Penn. 1983) (ordering release of prisoners as a contingency plan if deadline for easing jail overcrowding not met); Benjamin v. Malcolm, 564 F. Supp. 668, 688 (S.D.N.Y. 1983) (concluding that denial of motion to modify order limiting population of city jail would not necessitate the releasing of inmates, given the availability of practicable alternatives to release); *cf.* L. YACKLE, REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM 95 (1989) (noting that the court in Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part and remanded sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam), "enjoin[ed] state authorities from 'accepting or permitting the acceptance' of new prisoners into the system until the population of the four major institutions was reduced to the 'design capacity' ").

24. *See* Frug, *The Judicial Power of the Purse,* 126 U. PA. L. REV. 715, 726-29 (1978) (pointing out that even after a finding of legal violations, "the states have no choice but to continue to operate prisons and facilities of some sort for the mentally ill and mentally retarded").

25. *See* Kirp & Babcock, *Judge and Company: Court-Appointed Masters, School Desegregation, and Institutional Reform,* 32 ALA. L. REV. 313, 319 (1981) ("A remedial [affirmative] decree neces-

after years of noncompliance, that the underlying causes of the legal violation disable the defendants from complying with a general directive to cease violating the law.[26]

Consequently, in public law litigation the judge typically endeavors to develop affirmative requirements to govern the defendants' efforts to eliminate the illegal conditions and practices.[27] Because the judge is seeking to implement generally articulated, aspirational norms in highly differentiated contexts, liability norms do not dictate the content of the remedy. In public law litigation, liability norms provide only the goals and boundaries for the remedial decision.[28] For example, a determination that violent and unsanitary prison conditions constitute cruel and unusual punishment delimits the types of problems that the remedy must address. It does not, however, dictate how those problems should be solved. Should the court order the defendants to hire more guards, reduce the prison population, establish screening and training programs for guards, eliminate the inmate trustee system, introduce work and educational programs, improve the classification system, restrict the movement of inmates in the prison or require unit management? There is no single correct remedial approach dictated by the eighth amendment.[29] The choice of remedy is likely to be driven by goals that do not directly relate

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sarily speaks less to a determinate outcome than to a change in fundamental attitudes that inform the process of organizational decisionmaking."); *cf.* Diver, *supra* note 9, at 50 ("From rules traditionally found in the Constitution . . . the Supreme Court and the federal courts of appeal have extracted the broad principle that an individual has a right to . . . humane treatment while confined to a custodial institution. Pronouncing rights, however, does nothing to illuminate the remedy." (footnotes omitted)).

26. *See* O. FISS, *supra* note 11, at 14; Chayes, *supra* note 1, at 1295; Diver, *supra* note 9, at 53-59; Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 864-67 (1990).

27. *See* Eisenberg & Yeazell, *supra* note 9, at 512.

28. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15-18 (1971) (noting that the scope of the violation determines the nature and extent of the remedy and that federal courts have broad power to fashion appropriate relief); Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3 (1975) (describing "substructure of . . . remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions"); Rebell, *Implementation of Court Mandates Concerning Special Education: The Problems and the Potential*, 10 J.L. & EDUC. 335, 344 (1981) (basic applicable legal standard in special education is right to an "appropriate education," a standard which provides little specific guidance concerning the remedy).

29. *See* Fiss, *supra* note 1, at 50; Feeley & Hanson, *The Impact of Judicial Intervention on Prisons and Jails: A Framework for Analysis And A Review of the Literature*, in COURTS, CORRECTIONS, AND THE CONSTITUTION, *supra* note 2, at 29. Examples of a multiplicity of remedial options to cure a legal violation abound in the public law context. In school desegregation cases, remedial disputes have centered on "the relative importance of integration, financial resources, minority control, and ethnic identification in enriching school environments." Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1189 (1982). In special education, remedial decisions involve a choice between mainstreaming and upgrading separate classes. Suits involving the disabled pose a choice between developing community alternatives and upgrading existing institutions. *Id.* at 1190.

to the liability norm, such as conceptions of good management or the proper goals of punishment.

The facts produced to establish the public law violation frequently provide little guidance concerning the appropriate remedy. Both the consequences of the wrongful conduct and the steps necessary to remedy them are mediated through a complex set of formal and informal relationships that may be irrelevant to establishing the legal violation but critical to the development of a remedy adequate to eliminate that violation. The task of correcting the defendants' wrongful conduct raises factual and normative issues that do not arise in the course of determining liability, such as the effectiveness and practicability of various remedial options.[30]

Thus, the court cannot simply rely upon the processes used to generate a liability decision to formulate a structural remedy. The trial on the merits does not provide a sufficient legal or factual basis for adopting a particular remedy. There are no established conventions, such as jury deliberations, to fill this gap between right and remedy. The information and expertise needed to develop the remedy are frequently held by actors who did not participate in the liability determination. Therefore, the court faces the task of crafting both the process and the substance of the remedy.

The process of developing a remedial order that details the steps required to eliminate public law violations presents particular challenges for the adversary system. Remedial fact-finding is prospective, focusing on possible approaches to correcting the target institution's illegal actions.[31] Any remedy that requires significant changes in the institution's conditions and practices will implicate diverse interests beyond those of the parties to the liability determination. These interests often include officials not formally responsible for the legal violations whose participation is necessary for organizational reform.[32] The remedy may also affect the lives of individuals or groups who have no legal entitlement concerning the remedy but are in a position to

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30. *See* Sturm, *supra* note 26, at 861-912 (analyzing the impact of a prison's norms, incentives, and power structure on the effectiveness of various strategies of judicial intervention). For example, the court is unlikely to consider the possibility of parental resistance and white flight in response to a desegregation order in determining whether a school district intentionally segregated the schools. These factors profoundly affect the effectiveness of a school desegregation remedy, however, and courts frequently take them into account at the remedial stage. *See* Berger, *Away from the Courthouse and into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707, 716-17 (1978) (describing special master's experience discovering and integrating parents' concerns into a workable school desegregation plan).

31. *See* Chayes, *supra* note 1, at 1296; *Special Project*, *supra* note 1, at 792-93.

32. Prison and jail overcrowding litigation presents a clear example of this phenomenon. The typical nominal defendants—correctional administrators and governors—lack control over the flow of inmates in and out of the system, and are thus dependent on the legislature, sentencing judges, prosecutors, and parole boards to reduce the population in a particular institution. *See* Sturm, *supra* note 26, at 840-41.

block or disrupt its implementation.[33] Unlike the process of liability determination, the remedy's successful implementation depends on the cooperation of these diverse actors. Thus, the remedial stage poses the challenge of achieving the understanding and acceptance of the remedy by those who must live with it.[34] The process is further complicated by the fact that state and local officials, who have political and legal concerns about preserving their decisionmaking authority, are frequently the target of the court's intervention.

B. THE FORMS OF PUBLIC REMEDIAL PRACTICE

Courts respond to the challenges of the remedial process in public law litigation in diverse ways. Frequently, the judge and the parties perceive that the traditional adversary process provides inadequate tools with which to meet the demands of public remedial decisionmaking.[35] Participants in the public remedial process often employ methods of remedial formulation that deviate substantially from the formal adjudicatory model.[36] Fact-finding, for

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33. For example, individual parents and community groups opposed to busing present perhaps the most significant obstacle to school desegregation. They have dramatically limited the success of court-ordered desegregation by using both violent and nonviolent resistance to court-ordered busing and removal of their children from public schools. *See* Smith, *Two Centuries and Twenty-Four Months: A Chronicle of the Struggle to Desegregate the Boston Public Schools*, in LIMITS OF JUSTICE: THE COURTS' ROLE IN SCHOOL DESEGREGATION 25, 52-72, 96 (J. Fishman & H. Kalodner eds. 1978) [hereinafter LIMITS OF JUSTICE]. Communities opposed to siting prisons or group homes in their midst play a similar role in prison and mental hospital reform. *See* D. ROTHMAN & S. ROTHMAN, THE WILLOWBROOK WARS 180-81 (1984).

34. *See* Ekland-Olson & Martin, *Ruiz: A Struggle Over Legitimacy*, in COURTS, CORRECTIONS, AND THE CONSTITUTION, *supra* note 2, at 74-76; Kalodner, *Introduction*, in LIMITS OF JUSTICE, *supra* note 33, at 7-8; Sturm, *supra* note 26, at 807 n.3.

35. *See, e.g.*, Amos v. Board of School Directors, 408 F. Supp. 765 (E.D. Wis. 1976) (court recognized necessity of appointing master to help formulate school desegregation decree); Hart v. Community School Bd., 383 F. Supp. 699, 762 (E.D.N.Y. 1974) (court acknowledged need for master to help formulate school desegregation plan, noting that the court itself is better suited to presiding at an adversary hearing than to playing role of coordinator); Berger, *supra* note 30, at 711-12 (special master decided not to hold evidentiary hearings based on his perception that they were ill-suited to gain necessary information quickly, economically, and perhaps confidentially, and to mobilize community consensus concerning the remedy); Janger, *Expert Negotiation Brings New Approach to Prison Litigation In Hawaii*, 6 NAT'L PRISON PROJECT J., Winter 1985, at 6-7 (parties relied on expert mediators to meet court-ordered prison specifications, thus eliminating "the adversarial nature of the process"); Kirp, *Legalism and Politics in School Desegregation*, 1981 WIS. L. REV. 924, 939 ("to some courts adversarial behavior [in formulating school desegregation remedies] is itself thought inappropriate, inconsistent with the task at hand"). For a normative discussion of the inadequacies of the adversary process in the context of public remedial decisionmaking, see *infra* text accompanying notes 213-18.

36. Public remedial formulation is not the only area in which the courts routinely depart from the adversary model. Judges play an active role in managing pretrial activities and promoting settlement. *See* F. JAMES & G. HAZARD, *supra* note 15, at 5-6; Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 377-79 (1982). Courts overseeing Chapter 11 reorganizations in bankruptcy also engage in various administrative and managerial activities inconsistent with traditional adjudication.

example, does not proceed primarily through party-controlled, adversarial discovery and formal evidentiary hearings. Instead, the court plays an active role in developing the factual record.[37] In some cases, the judge herself conducts an investigation, consulting with experts and other outside sources. Increasingly, courts have appointed third parties to investigate the status and causes of the legal violations and propose a remedial plan to the court.[38] Although these court-appointed officials typically have the authority to hold formal evidentiary hearings,[39] they frequently rely heavily on direct investigation by site visits, informal interviews with various participants in the system, review of institutional records and documents produced to the court, consultation with outside experts who themselves investigate the target institution, and independent research.[40] In other cases, the parties collaborate to

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See Eisenberg & Yeazell, *supra* note 9, at 485-86. Unlike pretrial or public remedial judicial management, however, the court's role in bankruptcy is structured by statute.

37. Fact-finding at the remedial stage resembles in some respects the inquisitorial methods of fact-finding employed in Germany and other European legal systems. *See* Langbein, *The German Advantage in Civil Procedure,* 52 U. CHI. L. REV. 823, 826-30 (1985) (the major difference between German and Anglo-American civil procedure is that the court rather than the parties' lawyers assumes primary responsibility for gathering and sifting through evidence). For a similar discussion in the criminal context, *see generally* Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study,* 121 U. PA. L. REV. 506 (1973); Damaska, *Presentation of Evidence and Factfinding Precision,* 123 U. PA. L. REV. 1083 (1975). Unlike the inquisitorial model, however, the deliberative model of remedial decisionmaking proposed in this article preserves substantial party involvement in and control over fact-finding, and even affords the parties some degree of control over decisionmaking. *See infra* Part IV.

38. *See* Feeley & Hanson, *supra* note 29, at 35-36 (masters used most frequently to formulate detailed plans for implementing a general court order at postliability stage); Kirp & Babcock, *supra* note 25, at 321-25 (discussing the use of masters in school desegregation cases); Kalonder, *supra* note 34, at 8-10 (courts increasingly turn to masters and experts in school desegregation cases because of the technical nature of the remedial problems and the presumed bias of the parties); Nathan, *The Use of Masters in Institutional Reform Litigation,* 10 U. TOL. L. REV. 419, 420-22 (1979) (masters are used when traditional litigation processes would not produce adequate information and judge could not monitor compliance with a decree); Weinberg, *The Judicial Adjunct and Public Law Remedies,* 1 YALE L. & POL'Y REV. 367, 372, 386 (1983) (examining the role of judicial adjuncts).

39. Masters are often appointed under rule 53 of the Federal Rules of Civil Procedure, which allows masters to hold hearings. FED. R. CIV. P. 53. Rule 53 does not, however, make any specific reference to the remedial context. For a discussion of the source of authority for the appointment of special masters in the remedial stage of institutional reform litigation, see Levine, *The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered,* 17 U.C. DAVIS L. REV. 753 *passim* (1984); Nathan, *supra* note 38, at 434-36; Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure,* 137 U. PA. L. REV. 2131, 2134-36, 2161-68 (1989).

40. *See* B. CROUCH & J. MARQUART, AN APPEAL TO JUSTICE: LITIGATED REFORM OF TEXAS PRISONS 130-31 (1989); Berger, *supra* note 30, at 711-12; Kirp & Babcock, *supra* note 25, at 339; La Pierre, *Voluntary Interdistrict School Desegregation in St. Louis: The Special Master's Tale,* 1987 WIS. L. REV. 971, 1012-13; Little, *Court-Appointed Special Masters in Complex Environmental Litigation:* City of Quincy v. Metropolitan District Commission, 8 HARV. ENVTL. L. REV. 435, 446-47 (1984). In Texas, as in New Mexico, Rhode Island, and numerous other jurisdictions, masters in prison cases have conducted extensive investigations and filed lengthy reports on such topics as

retain a panel of experts to investigate and make recommendations concerning the institutional practices and conditions that have been held to violate the law.[41]

This informal, inquisitorial fact-finding involves individuals and groups who are not parties to the litigation in the process of remedial formulation. This involvement may be limited to providing information to an expert or the court. Often, however, it extends to taking formal or informal positions concerning proposed remedies, negotiating with court representatives and parties concerning involvement in facilitating implementation of the remedy, and providing resources and support for the remedial effort.[42]

In addition to the mode of fact-finding and the involvement of nonparties in the remedial process, the structure and method of decisionmaking employed by the courts in the public remedial process frequently depart from the adversary model.[43] In the absence of legal standards justifying the adoption of a particular remedy, courts rely on expertise and agreement to guide and justify remedial formulation.

1. Processes Attempting to Adhere to the Traditional Adjudicatory Model

Some judges ignore the challenges of the public remedial process and attempt to adhere to the traditional adjudicatory model.[44] In some cases, this entails delegating the responsibility of formulating and implementing a remedy to the defendants and intervening only in response to formal notification by the plaintiffs of the defendants' failure to act.[45] The court used this deferrer approach in *Holt v. Sarver,*[46] a prison case involving massive and systemic

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augmentation of security staff, crowding, classification, medical and psychiatric care, access to the courts, treatment of mentally and physically handicapped prisoners, occupational safety and health, the use of trustee guards, and conditions on death row. Ekland-Olson & Martin, *supra* note 34, at 87-88.

41. *See, e.g.,* Spear v. Ariyoshi, No. 84-1104, Consent Decree, at 3 (D. Haw. June 12, 1985); McGovern, *Toward a Functional Approach for Managing Complex Litigation,* 53 U. CHI. L. REV. 440, 464 (1984).

42. Diver, *supra* note 9, at 75-76; *see* Smith, *supra* note 33, at 91 (describing involvement of universities and business community in desegregation effort).

43. These emerging remedial structures parallel similar developments in regulatory negotiation and alternative dispute resolution. Participants in both of these areas are experimenting with collaborative forms of decisionmaking that directly involve the participants in the dispute. *See infra* Part III.B.5.

44. *See* D. HOROWITZ, *supra* note 9, at 49 (courts often ignore social policy issues which arise in cases that threaten the traditional judicial role); Burt, *Pennhurst: A Parable,* in IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 327 (R. Mnookin ed. 1985) [hereinafter IN THE INTEREST OF CHILDREN] (judge in case challenging conditions in state mental institution adhered to traditional role as "passive umpire" presiding over disputes that the parties acknowledged between themselves and brought to his attention).

45. In a recent article, I refer to this judicial strategy as the deferrer model of the judicial role. Sturm, *supra* note 26, at 849-51.

46. 309 F. Supp. 362 (E.D. Ark. 1970).

constitutional violations. The court mandated general improvements in prison conditions, and left it to the defendants to develop and implement specific plans accomplishing those remedial goals.[47]

Another strategy for maintaining the traditional judicial posture is to rely on the trial record and formal submissions by the parties as the basis for formulating and imposing a detailed remedy, and to rely on presumptions, remedies in similar cases, logic, and personal judgments to fill in the gaps.[48] The court's approach in the Alabama prison litigation illustrates this strategy.[49] Judge Johnson unilaterally developed and imposed a detailed order governing the conditions of daily life in the prisons, relying on evidence obtained at the trial on the merits and on his own conception of the steps necessary to correct the constitutional violations.[50]

2. The Bargaining Model

One method frequently employed by the courts to address the limitations of the traditional adversary process in the public law context is to induce bargaining between the lawyers for the parties in an effort to produce agreement on the terms of the remedy.[51] Courts may promote bargaining indirectly, by requiring the parties to submit proposed decrees and threatening to impose an order unfavorable to one or more of the parties if an agreement is not reached.[52] Or, the court may directly order the parties to meet and try to reach an agreement, and actively oversee the remedial negotiations.[53] Courts may also appoint third parties to supervise negotiations between the parties.[54]

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47. *Id.* at 383. *See generally* Sturm, *supra* note 26, at 851.

48. *See, e.g.*, Ruiz v. Estelle, 503 F. Supp. 1265, 1276-77, 1385-90 (S.D. Tex. 1980), *aff'd*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); Wyatt v. Stickney, 344 F. Supp. 373, 379-86 (M.D. Ala. 1972). This approach is an example of what I call the director model of judicial intervention. Sturm, *supra* note 26, at 851-54. Judges who employ a deferrer approach in the initial stages of remedial formulation frequently turn to the director approach when the deferrer approach fails to yield a workable remedial solution. *Id.* at 853.

49. *See* Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd sub nom.* Newman v. Alabama, 559 F.2d 283 (1977), *rev'd in part and remanded sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978) (per curiam).

50. *See* L. YACKLE, *supra* note 23, at 101-04; Sturm, *supra* note 26, at 853-54.

51. *See* Diver, *supra* note 9, at 45-46. I refer to this judicial approach as the broker method. Sturm, *supra* note 26, at 854-56. The broker role resembles the court's developing role in promoting pretrial settlements. *See* Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 322-26 (1986) (discussing judge's "managerial" role in pretrial settlement activity); Resnik, *supra* note 36, at 378 (same).

52. *See* Chayes, *supra* note 1, at 1298-99.

53. *See* M. HARRIS & D. SPILLER, AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS 12 (1977) (judge in prison case required parties' counsel to meet and "played a strong role in the process by exerting pressure on both sides to moderate and compromise").

54. *See* La Pierre, *supra* note 40, at 995-1000 (describing special master's supervision of negotia-

In *Liddell v. Board of Education,*[55] the court appointed a third party to oversee remedial negotiations among the parties to a St. Louis desegregation case. Initially, the district court ordered the State, the Board of Education, and the United States Department of Justice to develop both a voluntary and a mandatory interdistrict school desegregation plan.[56] After these initial efforts failed and the United States Court of Appeals for the Eighth Circuit clarified the framework for considering a mandatory interdistrict desegregation plan, the district court appointed a special master "for the purpose of exploring possibilities of settlement."[57] The special master met with attorneys for the parties involved in the case individually or in groups with common interests, shuttling back and forth among the parties with proposals, counter-proposals, and suggestions. The initial meetings were used to gather information, solicit and discuss suggestions about possible settlement, and determine bargaining positions.[58]

After the preliminary, indirect negotiations, the master arranged for direct negotiations to be conducted by the lawyers for the parties.[59] The master asked the attorneys for the interdistrict plaintiffs and the suburban school districts to designate negotiating teams and excused representatives of the Department of Justice, the city, the county, and the special school district.[60] The State participated in the negotiations on a very limited basis. An amicus curiae appointed by the court to represent the public interest helped supervise the negotiations.[61]

After forty hours of negotiations conducted over a three-day period, the participants reached an agreement in principle.[62] Attorneys then submitted the proposed settlement to their clients who, with the exception of one suburban school district, accepted it.[63] The district court then ordered the parties to submit a detailed implementation plan within thirty days. A seventy-five page, single-spaced settlement agreement was filed with the court by the negotiating attorneys prior to its submission to their clients for approval.[64] The

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tions in St. Louis interdistrict school desegregation); Rebell, *supra* note 28, at 349-51 (describing negotiation process involving attorneys supervised by master in Jose P. v. Ambach, 79 C 270, 3 EHLR 551:245 (E.D.N.Y. May 16, 1979), a special education case).

55. 491 F. Supp. 351 (E.D. Mo. 1980), *aff'd,* 667 F.2d 643 (8th Cir.), *cert. denied,* 454 U.S. 1091 (1981).

56. *Id.* at 353.

57. La Pierre, *supra* note 40, at 986-87 (quoting Liddell v. Board of Educ., No. 72-100 C (4), H (1485) 82 (E.D. Mo. Oct. 15, 1982) (order appointing special master)).

58. *Id.* at 995-97.

59. *Id.* at 997.

60. *Id.* at 997 n.89.

61. *Id.*

62. *Id.* at 997.

63. *Id.* at 999.

64. *Id.* at 1000.

State, the city of St. Louis, and the Department of Justice, none of whom had participated in the drafting of the settlement agreement, filed objections to the agreement.[65] The court held a fairness hearing, at which it considered the arguments of proponents of the agreement, the position of the Department of Justice, a wide range of public comments, and the objections of both the State and city of St. Louis.[66] The court also appointed a financial advisor to submit a report concerning the financial ramifications of the proposed settlement. The court then approved the settlement agreement, supplemented by the recommendation of the financial advisor to establish a budget review and planning process to address quality education programs and magnet schools.[67]

3. The Legislative or Administrative Hearing Model

Another model of remedial decisionmaking resembles a legislative committee or administrative hearing, providing the opportunity for direct and informal participation by a broad range of interested actors.[68] An example of this model is *Pennsylvania Association for Retarded Children v. Pennsylvania,*[69] in which Judge Edward Becker conducted extensive informal public hearings and negotiations concerning the implementation of a decree designed to provide mentally retarded children with free public education.[70] The purpose of these informal public implementation hearings was to "collect more information, to settle disputes, and plan and monitor the efforts of the schools to establish appropriate educational programs."[71] Prior to the first public hearing, Judge Becker issued an order creating the Special Education Action Committee (SEAC), an advisory committee composed of representatives of the various groups and organizations who had a stake in the

65. *Id.*

66. *Id.* at 1010-12.

67. *Id.* at 1013-16.

68. This type of broad, informal, and unstructured participation in remedial formulation has been characterized as a town meeting approach. *See* Yeazell, *Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case,* 25 UCLA L. REV. 244, 259-60 (1977). Yeazell characterizes remedial formulation in the Los Angeles school desegregation case, Crawford v. Board of Educ., 17 Cal. 3d 280, 551 P.2d 28, 130 Cal. Rptr. 724 (1976), as a town meeting, based on the broad participation of parties who would be affected by a school desegregation order. The court in such a case becomes "the initial forum for the airing of views," resembling "the hearing stage of a legislative and administrative process." Yeazell, *supra,* at 259.

69. 334 F. Supp. 1257 (E.D. Pa. 1971) (per curiam), *approved and adopted,* 343 F. Supp. 279 (E.D. Pa. 1972) [hereinafter *PARC v. Pennsylvania*].

70. *PARC v. Pennsylvania,* 343 F. Supp. at 288-90; *see* Rosenberg & Philips, *The Institutionalization of Conflict in the Reform of Schools: A Case Study of Court Implementation of the PARC Decree,* 57 IND. L.J. 425, 431-32 (1982). Although this case involves the enforcement of a consent decree, the processes used have direct application to postliability remedial formulation.

71. Rosenberg & Phillips, *supra* note 70, at 431.

outcome of the negotiations.[72] The court also provided for participation in the hearings by any interested persons who chose to attend.[73]

Judge Becker established guidelines concerning the conduct of the hearings. Although transcripts of the hearings were to become part of the court record, the parties agreed that the rules of evidence would be relaxed and that the transcripts would be inadmissible as evidence in subsequent enforcement proceedings.[74] As the negotiations proceeded, the court developed guidelines concerning the conduct of hearings and contacts with the court and the public.[75]

The hearings served as a forum for collecting information on the status of compliance efforts, presenting complaints and opinions by interested participants, and producing agreement over the steps to be taken to implement the decree. In situations in which agreement did not emerge, the judge issued a directive concerning the disputed issue.[76] The court did not appoint an independent fact-finding body to inform the hearings or negotiations, and SEAC had only informal, advisory authority.[77] The judge retained the role of orchestrating the hearing process.[78]

4. The Expert Remedial Formulation Model

A fourth approach to remedial formulation in the public law context is the

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72. PARC v. Pennsylvania, No. 71-42 (E.D. Penn. Aug. 11, 1977) (order granting motion of Philadelphia Federation of Teachers to intervene). SEAC included representatives of the plaintiff class, the Commonwealth of Pennsylvania, the Philadelphia School District, the teachers' union, the Philadelphia Association of School Administrators, community groups interested in special education reform, a member of the black community, and a member of a task force responsible for identifying and enrolling children previously excluded from public schools. Rosenberg & Phillips, *supra* note 70, at 434-35.

In addition to being used in an advisory capacity, representative committees have been used in some cases to oversee implementation of the remedy. This process frequently involves resolving disputes concerning the meaning and precise requirements of the remedy. For example, in the Boston school desegregation litigation, the court "appointed as broadly representative a group as . . . possibl[e]." Smith, *supra* note 33, at 108. The court also created community councils that were to consist of: "(1) five parents of children attending schools in the district, to be elected by district parents; (2) two students attending the district high school, elected by district high school students; (3) a representative of the district teachers; (4) a representative of a business organization working with the district high school; (5) a representative of a college or university paired with a district school; (6) a representative of a labor union paired with a district school . . . ; (7) a representative of the Boston Police Department of the district . . . ; [and] (8) the superintendent of schools for the district." *Id.* at 88-89. *See also* Wyatt v. Stickney, 344 F. Supp. 373, 376 (M.D. Ala. 1972); Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change,* 84 YALE L.J. 1338, 1361 (1975).

73. Rosenberg & Philips, *supra* note 70, at 435.

74. *Id.* at 436.

75. *Id.* at 437.

76. *Id.* at 435-37.

77. *Id.* at 436, 444.

78. *Id.* at 437.

appointment of either an individual expert or a panel of experts to develop a remedial plan.[79] The court may either unilaterally select the individual or panel or may base its selection on the recommendation of the parties. Although the individual or panel has the authority to develop a proposed remedy independently, frequently they use their position to develop both expertise and consensus in support of the plan they propose to the court.[80]

This approach was used by the special master appointed by Judge Jack Weinstein in *Hart v. Community School Board,*[81] to develop an integration plan for the Mark Twain School in Coney Island, New York, and the surrounding community. In addition to affording the master the power to take evidence, consult with the parties, and engage legal aids and other experts, and ask each party to supply him with all relevant data within their control, the Order of Reference directed the master to "solicit the views of commu-

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79. In a prison case employing this approach, the panel included a representative of the Department of Corrections as well as an expert chosen by plaintiffs and defendants. *See* Janger, *supra* note 35, at 6. In litigation involving the conditions in two New York City jails, the parties agreed to the creation of the Office of Compliance Consultants, an independent monitoring unit created by New York City and the Legal Aid Society. Storey, *When Intervention Works: Judge Morris Lasker and the New York City Jails,* in COURTS, CORRECTIONS, AND THE CONSTITUTION, *supra* note 2, at 138, 159.

In the Willowbrook case, a consent decree was approved that ordered the creation of a panel, approved by the court, consisting of "two persons chosen by the defendants, three chosen by the plaintiffs, and two 'recognized experts in the field of mental retardation . . . to be agreed upon by the parties, if possible, or appointed by the court in the event of a dispute." Lottman, *Enforcement of Judicial Decrees: Now Comes the Hard Part,* 1 Mental Disability L. Rep. (A.B.A.) 69, 72-73 (1976) (quoting NYSARC and Parisi v. Carey, No. 72-C-356/357 (final judgment), at 5 (E.D.N.Y. April 30, 1975), *approved,* 393 F. Supp. 715 (E.D.N.Y. 1975). This committee structure resembles the tripartite panel used in labor arbitrations consisting of one member selected by the union, one by management, and a third who is neutral. *See* Fuller, *Collective Bargaining and the Arbitrator,* 1963 WIS. L. REV. 3, 36.

80. The special master in the Boston Harbor Litigation focused less on producing a consensus plan, instead seeking to develop his own expertise on the operation of the Boston sewage system and propose remedies with realistic and feasible performance standards that would encourage agency cooperation. Little, *supra* note 40, at 446, 474. He hired a lawyer to act as deputy special master, consulted with environmental and financial experts, reviewed a vast number of documents, studies, and articles, conducted informal hearings, toured the existing treatment plants, and consulted with public officials. *Id.* at 446-47. Based on all of this information, he prepared a report that evaluated the problems in the sewage system, assessed the status of previous efforts to address them, and proposed and justified remedies for each of the identified problems. A substantial component of his recommendations included the establishment of a planning process involving the defendants, experts, and the court to develop implementation plans that addressed specific issues defined by the court. *Id.* at 466, 475. Ultimately, the court, with the consent of the parties, constructed a collaborative process placing remedial responsibility squarely on the parties, and adopted the master's recommendation to create an independent authority with autonomous funding power responsible for creation and operation of the sewer system. *See* OF JUDGES, POLITICS, AND FLOUNDERS, *supra* note 8, at x-xi.

81. 383 F. Supp. 699 (E.D.N.Y. 1974) (liability decision and order appointing special master), *supplemented,* 383 F. Supp. 769 (E.D.N.Y. 1974) (remedial order), *aff'd,* 512 F.2d 37 (2d Cir. 1975). This case has been the subject of extensive commentary, including an article by the special master describing his experience. *See* Berger, *supra* note 30.

nity groups within District 21 and the advice of staff professionals within the various governmental agencies."[82]

The master set out to "mobiliz[e] . . . a consensus" leading to a school desegregation plan "that the community could live with."[83] He saw himself as "engaged in a joint venture with key agency personnel."[84] In an effort to develop a consensus, the master met with a wide range of individuals and groups to solicit their views of his role and the desegregation plan, including the community school board, the Mayor and his staff, the elected officers of the district schools' parents' associations, and a group of black leaders.[85] The master also organized a team of housing and planning agency specialists to meet weekly with an architect who authored a study of Coney Island's physical future. The team included staff from the relevant government agencies as well as a top executive of the Urban Development Corporation, the principal builder on Coney Island.[86]

In the course of these meetings, the master developed his own views on how integration should be achieved and attempted to build a consensus among the various groups in the community around his ideas. He also worked with the housing and planning team to develop a consensus plan for urban redevelopment.[87] Based on views formed through his research and consultations, as well as what he perceived to be the consensus developed by the agency planning group, the master developed and submitted a remedial plan that recommended the development of Mark Twain as a magnet school and the establishment of an array of housing, relocation, and neighborhood development programs.[88] The court held hearings on the proposed plan, which was opposed by virtually every group the master had consulted.[89] After the hearings, the court rejected the neighborhood renewal plan proposed by the master, and instead instructed the school board to design its own magnet plan.[90]

5. The Consensual Remedial Formulation Model

Finally, courts and parties have developed structures that involve the interested actors in a process of developing a consensual remedy through joint

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82. Berger, *supra* note 30, at 711.
83. *Id.* at 712.
84. *Id.*
85. *Id.* at 712-21.
86. *Id.* at 722.
87. *Id.* at 721-27.
88. *Id.* at 728-30.
89. *Id.* at 731-32.
90. *Id.* at 733; *see* Hart v. Community School Bd., 383 F. Supp. 769, 774 (E.D.N.Y. 1974).

fact-finding and collaborative decisionmaking assisted by a third party.[91] One example of this approach is the mediated resolution of the dispute in *United States v. Michigan,* involving the right to fish in the treaty waters of the Great Lakes.[92] The court was called upon to allocate the waters between the Indian tribes, who had an unfettered right to fish in the treaty waters, and Michigan sport and commercial fishers. Judge Richard Enslen appointed a special master, selected jointly by the court and the parties, to explore the possibilities for settlement and to prepare the case for trial in the event a settlement was not achieved.[93] The participants in the negotiations included the named parties—three Indian tribes, the United States on behalf of both the tribes and the Fish and Wildlife Service, and the State of Michigan—and several groups of commercial and sport fishers named as litigating amici.[94]

The focus of the negotiation process was on "assisting the parties to develop their own allocation plans in accordance with classic integrative bargaining."[95] The first step of this process was "to develop a scorable game that would mimic the actual dispute. The task involved identifying each party's interests, selecting all feasible elements to any allocation plan, stating the parties' priorities, and determining the variety of systems that could be used to organize these interests and elements."[96] The parties' priorities were quantified, fed into a computer, and analyzed by a program that identified the solutions that satisfied the minimum interests of the individual parties. In addition to providing possible solutions, the game served "to teach the parties how to negotiate."[97]

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91. I refer to this judicial approach as the catalyst approach to remedial intervention. Sturm, *supra* note 26, at 856-59.

92. United States v. Michigan, File No. M26-73CA (W.D. Mich. May 7, 1985) (pretrial order in bifurcated allocation trial). For the original suit, see United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), *remanded,* 623 F.2d 448 (6th Cir. 1980), *modified,* 653 F.2d 277 (6th Cir.), *cert. denied,* 454 U.S. 1124 (1981). In this case, the district court ruled that an 1836 treaty between the United States and the Ottawa and Chippewa Tribes gave the tribes the right to fish the Great Lakes free from regulation by the State of Michigan. This led to increased competition with commercial and sport fishers and a reduced catch. McGovern, *supra* note 41, at 457. The tribes then petitioned the court to allocate the Treaty Waters. *Id.* (citing Indian Tribes' Amended Motion to Allocate Resource, United States v. Michigan, Civil Action No. M26.73 (W.D. Mich. Apr. 25, 1984)). The mediated resolution grew out of this petition. This procedural innovation is described by Francis McGovern, the Master who conducted the mediation, in McGovern, *supra* note 41, at 456-68. *See also* L. SUSSKIND & J. CRUIKSHANK, BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES 73-76, 165-68 (1987) (describing a hypothetical dispute resolution process based on the fishing rights mediation).

93. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?,* 53 U. CHI. L. REV. 394, 410 (1986).

94. McGovern, *supra* note 41, at 462-63. These groups "had a participatory role in discovery and at trial, but could not veto a potential settlement." *Id.* at 463.

95. *Id.* at 461.

96. *Id.*

97. *Id.* at 462. The participants ultimately agreed to a plan that closely paralleled one of the solutions identified by the scorable game. *Id.* at 465-66.

The master then asked the parties to propose management plans that they would support at trial.[98] He undertook "an intensive educational effort . . . to broaden the horizons to include additional issues suitable for negotiation."[99] The master "met with the leaders and sometimes virtually all the members of the tribes, officials of the [United States] Department of the Interior, and Michigan's Governor, Attorney General, and the Director of its Department of Natural Resources" to explore their interests and apprise them of the progress of both the negotiations and the litigation.[100] The master also suggested cooperative methods for sharing and acquiring information that led to the development of a joint computer run analyzing the critical variables.[101] Finally, representatives of several parties to a parallel litigation that resulted in a court-managed remedy addressed the participants concerning the court's management of their resources. The negotiations culminated in a settlement reached four weeks before the scheduled trial.[102]

Collaborative remedial processes need not follow judicial determinations of liability. An example of a voluntary collaborative approach to public remedial decisionmaking is the mediated resolution of litigation concerning conditions and overcrowding in the Pennsylvania juvenile justice institutions.[103] The mediation was convened at the initiation of the Juvenile Law Center, counsel to children in two class action law suits challenging the conditions in Philadelphia's juvenile detention center, and, in a third suit, the adequacy of aftercare programs for juveniles in Pennsylvania training schools and residential programs.[104] With the exception of the district attorney, who declined to participate, the mediation involved representatives of all of the key actors in the Pennsylvania juvenile justice system.[105] The actors participated directly in the mediation and were for the most part unassisted by

98. *Id.* at 463.

99. *Id.* at 464.

100. *Id.* at 463.

101. *See id.* at 464. A neutral expert in computer modeling assisted in this process.

102. *Id.* at 465.

103. Unlike the fishing rights case, the juvenile mediation was conducted voluntarily by the participants outside the supervision of the court. Although there was an outstanding decree in the juvenile detention conditions litigation, it was the product of agreement by the parties, without an adjudication of liability by the court. *See* Santiago v. City of Philadelphia, No. 74-2589 (E.D. Pa. Jan. 11, 1988) (consent decree).

104. Schwartz, *Philadelphia Solves Juvenile Crowding by Mediation,* OVERCROWDED TIMES: SOLVING THE PRISON PROBLEM 1, 16 (1991).

105. The participants included a Family Court judge, the Commissioner of Human Services, the Executive Director of Juvenile Justice Services, the Deputy Secretary for the Pennsylvania Department of Public Welfare's Office of Children Youth and Families, the Executive Director of the Pennsylvania Juvenile Court Judges' Commission, the Special Master appointed in *Santiago v. City of Philadelphia,* and attorneys from the City Law Department, the Defender Association, and the Juvenile Law Center. Minutes, Juvenile Justice System Negotiations 1 (Feb. 5, 1990) (copy on file at *The Georgetown Law Journal*); Schwartz, *supra* note 104, at 16.

counsel during the negotiations.[106] The attorneys who did participate in the mediation agreed to appear not in their traditional advocacy capacity, but instead as part of an effort to develop a comprehensive solution to the problems underlying the cases.[107]

The Juvenile Law Center, with the agreement of the other participants, retained the services of a mediator to facilitate the development of a plan acceptable to all the participants.[108] The mediator met with all of the participants individually to learn more about their interests and concerns, prompt their thinking about issues and alternatives, and orient them to mutual interest-based negotiations.[109] The mediator's role was defined as assisting in the process and "developing an agenda for monitoring the process in accordance with established values."[110] The participants agreed to work from a single text rather than from separate, competing proposals, and to circulate community minutes of the sessions. Arrangements were then made for a three-day negotiating session.[111]

The session began with a discussion of the terms and ground rules for participation in the negotiations. Next, the participants developed an agenda defining the scope of the negotiations.[112] The substantive discussions were begun by identifying mutual interests and concerns. The participants then engaged in a brainstorming session on the design of an ideal juvenile justice system and developed priorities concerning the objectives that a remedial plan should meet.[113] Finally, the participants agreed on a short-term plan to address systemically the overcrowding problem in the Youth Study Center and to develop an ongoing process "to design, plan and implement program and systems changes."[114]

The participants in the mediation then "sold" the agreement to the parties whose approval was necessary for the plan's adoption and implementation. Ultimately the agreement was approved by the Mayor, the Family Court, and the Commissioner of the Department of Public Welfare.[115]

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106. *Id.;* Interview with Robert G. Schwartz, Executive Director of Juvenile Law Center, Philadelphia, Pennsylvania (Sept. 28, 1990.)

107. Interview with Robert G. Schwartz, Executive Director of the Juvenile Law Center, Philadelphia, Pennsylvania (Sept. 28, 1990).

108. Schwartz, *supra* note 104, at 16-17.

109. Juvenile Justice System Project Interview Synopsis 1 (Jan. 29, 1990) (copy on file at *The Georgetown Law Journal*).

110. Minutes, *supra* note 105, at 3.

111. Schwartz, *supra* note 104, at 16.

112. *Id.* at 17.

113. *Id.*

114. Agreement with Regard to Overcrowding at the Philadelphia Youth Study Center 4 (copy on file at *The Georgetown Law Journal*).

115. Schwartz, *supra* note 104, at 9. The juvenile detention center mediation produced an agreement that was entered into the federal court record in Santiago v. City of Philadelphia, No. 74-2589

C. THE CHARACTERISTICS OF PUBLIC REMEDIAL DECISIONMAKING: A REPRISE

The expanded roles and novel processes that have evolved in the context of public remedial decisionmaking represent an attempt to respond to the challenges posed in developing an affirmative plan to redress ongoing constitutional and statutory violations involving complex institutions. They deviate substantially from the roles and processes involved in traditional adjudication. In this section of the article, I have identified several characteristics of public law remedial decisionmaking that explain this tendency to employ nonadversarial, participatory mechanisms:

1. Because the relevant liability norms consist of generally articulated, aspirational norms to be implemented in differentiated contexts, they do not dictate the content of the remedy in particular cases;[116]

2. The type of fact-finding needed to devise remedial judgments is predictive and aimed at problem solving rather than at determining truth and responsibility;[117]

3. The targets of remedial activity tend to be organizations and systems involving participants with differing perspectives on, and interests in, the remedy;[118] and

4. Participation in the formulation of a remedy serves an independent value because of the importance of cooperation and respect for the authority of public entities in achieving compliance.[119]

These characteristics help to explain the emergence of new forms of judicial process that challenge existing conceptions of the judicial role. They also provide a set of criteria for determining the situations in which a distinct normative theory of the judicial role is needed. For the reasons described in this section, public remedial decisionmaking tends to satisfy each of these criteria and is thus the focus of the normative theory developed in this article.

I am not suggesting that every remedy in a public law case deviates from the traditional model of judicial decisionmaking.[120] Nor is the public law remedial context unique in its tendency to exhibit these characteristics; bank-

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(E.D. Pa. Jan. 11, 1978) (consent decree), but is not enforceable in federal court against the Department of Public Welfare, which was not a party in that action.

116. *See supra* text accompanying notes 27-29.

117. *See supra* text accompanying notes 30-31.

118. *See supra* text accompanying notes 32-33.

119. *See supra* text accompanying note 34.

120. For example, a statute may clearly and specifically delineate the standard of conduct required as well as the consequences of failing to comply. Similarly, the fact that the defendant is a bureaucracy does not in and of itself require a distinct model of the judicial role. In some situations, the remedy is clear, but the coercive force of the court is necessary to institutionalize it because of the parties' unwillingness to implement it. There may be discrete violations, such as the use of strip

ruptcy and certain other private law contexts share many of these characteristics.[121] Determining the liability norm may also require the court to engage in predictive fact-finding and to develop specific standards from general, ambiguous norms.[122] These characteristics, however, tend to converge in the public remedial context, prompting the proliferation of novel judicial forms and processes. The current debate over the legitimacy of these novel forms and processes focuses on public remedial decisionmaking.[123]

II. BRIDGING THE GAP BETWEEN THEORY AND PRACTICE: THE LEGITIMACY DEBATE AND THE NORMS OF PUBLIC REMEDIAL PROCESS

Although the innovative remedial techniques devised by courts in public law litigation depart from conventional models of adversary litigation, the legitimacy of the court's exercise of coercive power to eliminate ongoing public law violations rests on a solid jurisprudential foundation. The legitimacy of these techniques derives from the widely accepted principle that rights should find vindication in an effective remedy.[124] Damage awards and negative injunctions do not provide adequate relief in the context of much public law litigation.[125] In the absence of affirmative judicial intervention, the wrongful conduct is likely to continue; and the injuries caused by ongoing public law violations—intangible, dignitary harms and deprivation of public norms—cannot adequately be redressed through monetary compensation.[126]

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cells in prison or the explicit assignment of students by race, that can be eliminated through a negative injunction.

121. *See* Eisenberg & Yeazell, *supra* note 9; Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REF. 647, 669 (1988).

122. *See* D. HOROWITZ, *supra* note 9, at 45-51; Diver, *supra* note 9, at 50-53. For a discussion of the factors to be taken into account in assessing whether the model developed in this article should be applied in determining liability, see *infra* text accompanying note 455.

123. *See infra* Part II.

124. *See* Bell v. Hood, 327 U.S. 678, 684 (1946); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803); Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1533-34 (1972); Ziegler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 666-67 (1987).

125. *See supra* text accompanying notes 17-26.

126. *See* Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946); *supra* note 20 and accompanying text; *cf.* Hague v. Committee for Indus. Org., 307 U.S. 496, 531-32 (1939) (Stone, J., concurring). In theory, damages awards could play an important role in reducing constitutional violations by forcing officials to internalize the costs of their wrongful conduct and deterring illegal conduct when the expected costs exceed the expected benefits. *Cf.* G. CALABRESI, THE COSTS OF ACCIDENTS 68-75 (1970); R. POSNER, ECONOMIC ANALYSIS OF THE LAW 147-97 (3d ed. 1986). However, there are several factors limiting the potential of damages awards as a mechanism for reducing ongoing public law violations. The injuries caused by public law violations frequently are intangible, symbolic, and difficult to measure. *See* Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 284 (1988). Even when the resulting injuries are substantial, fact-finders tend to undervalue

Thus, the need to fulfill the court's remedial duty justifies the use of structural injunctions to remedy public law violations.[127]

The theory of remedial duty that supports the court's use of structural injunctions is the foundation of the legitimate exercise of judicial power in the public law remedial context. However, it leaves open the question of how the court can legitimately develop such a remedy. The court's dynamic and activist role in formulating public law remedies has triggered a heated debate among academics, judges, and politicians concerning the proper role of the court. Four major criticisms of the role of the courts have developed:

1. The courts' public remedial activities fail to conform to the standards of legitimate judicial decisionmaking;[128]

2. The courts violate principles of federalism and separation of powers in carrying out their public remedial function;[129]

3. The courts are not competent to perform the role of public remedial formulation;[130] and

4. The courts are abusing their power and acting unfairly in the execution of their public remedial function.[131]

Each of these areas of debate is based on identifiable norms of legitimate judicial process that are widely accepted within both scholarly and judicial discourse. These norms—participation, impartiality, reasoned decisionmak-

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damages suffered by many public interest plaintiffs. *Id.* Thus, payment of damages awards for ongoing violations is likely to be viewed as considerably cheaper than efforts to achieve compliance with legal norms. The immunity doctrine and indemnification practices further limit the deterrent potential of damages awards. Officials are shielded by broad official immunity, and recent studies indicate that "individual defendants virtually never pay damages to plaintiffs." *Id.*; *see* Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 686 (1987) (recent study of all § 1983 cases in one federal district found no case in which the individual officer personally bore cost of adverse constitutional tort judgment).

127. *See* R. DWORKIN, LAW'S EMPIRE 392 (1986) (justifying the court's "unusual judicial trespass on administrative functions" by the "traditional view" that "judges have a duty to enforce constitutional rights right up to the point at which enforcement ceases to be in the interests of those the rights are supposed to protect"). Although the view presented here is the accepted wisdom, it is not without challenge. For example, a recent report by the Office of Legal Policy advocates a return to what it refers to as "the first principles" of the Anglo-American tradition of equity. Although the report never specifies what this would mean, one can infer from its earlier, historical section that such a return would limit courts to issuing negative injunctions against private persons. The authors of the report support their position by advocating an originalist interpretation of the Constitution. OFFICE OF LEGAL POLICY, JUSTICE WITHOUT LAW: A RECONSIDERATION OF THE "BROAD EQUITABLE POWERS" OF THE FEDERAL COURTS 19-35, 41-46, 156-59 (1988) [hereinafter OFFICE OF LEGAL POLICY]. Although a response to this argument would go beyond the scope of this article, the argument highlights the need for a thorough analysis of the normative and doctrinal underpinnings of the conventional wisdom concerning the duty to provide remedies for legal violations.

128. *See infra* Part II.A.

129. *See infra* text accompanying notes 257-68.

130. *See infra* text accompanying notes 269-87.

131. *See infra* text accompanying notes 288-90.

ing, respect for state and local institutions, and efficacy—reflect the qualities generally viewed as essential to fair and legitimate judicial process. The debate is also based on a set of shared assumptions about the processes and roles necessary to achieve these basic requirements of judicial legitimacy. These shared assumptions are derived from the adversary model of decisionmaking used in making liability determinations. The debate's underlying assumption is that departures from the adversary prototype necessarily compromise the legitimacy of the judicial process.

This section of the article draws on the various strands of the legitimacy debate to parse out a coherent set of norms that properly influence our judgments about the legitimacy of public remedial decisionmaking. At the same time, the section identifies a gap in the existing legitimacy discourse: the absence of a theory of public remedial process. Each of the four categories of criticism fails to take into account the implications of public remedial decisionmaking's distinctive character for the significance and meaning of the norms that define fair and legitimate remedial process. Each category also ignores the possibility that structures and processes other than those prescribed by the traditional adversary model can satisfy basic legitimacy norms.

This section attempts to fill this theoretical gap by rethinking the norms of judicial legitimacy in light of the goals and demands of the public remedial context. The section demonstrates how general process norms assume a particular meaning and dimension when applied to postliability decisionmaking aimed at implementing general aspirational norms in complex organizational environments. In addition to applying insights derived from observing public remedial practice, this analysis is informed by the developing body of literature addressing the issue of process norms in contexts that overlap with, or are analogous in important respects to, public remedial decisionmaking. The most notable of these areas are public consensual dispute resolution[132] and regulatory negotiation.[133] As in public remedial decisionmaking, these

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132. This term refers to the resolution of controversies involving at least one governmental party that concern the distribution of public resources, the setting of public priorities, or the setting of standards through ad hoc, informal processes directly involving the stakeholders in attempting to reach consensus. L. SUSSKIND & J. CRUIKSHANK, *supra* note 92, at 17, 76-79; *see also* Susskind & Ozawa, *Mediated Negotiation in the Public Sector*, 27 AM. BEHAV. SCI. 255, 255 (1983). It can, although it need not, involve the determination of appropriate remedies in a case in which liability has been established. It has been used to resolve public controversies over the allocation of social services block grants, developing affordable housing, and situating waste disposal plants and group homes. *See* L. SUSSKIND & J. CRUIKSHANK, *supra*, note 92, *passim*. It is described in greater detail in Part III.B.5.

133. "Regulatory negotiation" refers to negotiation among representatives of directly affected parties, including administrative agencies, as an alternative procedure to the agency rulemaking process. *See* Smith, *Alternative Means of Dispute Resolution: Practices and Possibilities in the Federal Government*, 1984 MO. J. OF DISPUTE RESOLUTION 9, 11-12; Harter, *Negotiating Regulations:*

areas frequently involve disputes among multiple actors over the proper interpretation or application of public norms. The successful resolution of these disputes often depends on developing standards and plans that will be understood, accepted, and acted upon by interested individuals and groups. Scholars and practitioners in these areas have begun to develop both normative theories and processes of collaborative decisionmaking to guide these activities.[134]

Another perspective that informs the development of a normative theory of public remedial process derives from social psychologists who have studied perceptions of fairness in the resolution of disputes.[135] Finally, there are general normative theories, such as civic republicanism,[136] that emphasize the link between process and outcome, and develop the theme of dialogue as a critical aspect of this linkage.[137] These theories, however, have been developed at a level of abstraction that makes it possible to avoid grappling with

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A Cure for Malaise, 71 GEO. L.J. 1, 28 (1982); Perritt, *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625, 1627 (1986); Susskind & McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133 *passim* (1985).

There are several important differences between regulatory negotiation and public remedial decisionmaking. First, regulatory negotiation produces a rule, not a bottom line result. Enforcement is a separate process. Second, in regulatory negotiation a policy is formulated without a prior adjudication of liability. Third, regulatory negotiation is supervised by an administrative agency charged with effectuating public policy, rather than a court charged with eliminating legal violations. In both contexts, however, the decisionmaker is structuring ad hoc processes to give meaning to vague substantive norms, and the results of that process are subject to review by the court.

134. *See, e.g.*, R. FISHER & W. URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN *passim* (1981); L. SUSSKIND & J. CRUIKSHANK, *supra* note 92, at 16-34; Harter, *supra* note 133, at 42-112; Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 760-61 (1984); Susskind & Weinstein, *Towards a Theory of Environmental Dispute Resolution*, 9 B.C. ENVTL. AFF. L. REV. 311, 336-46 (1980).

135. *See, e.g.*, E. LIND & T. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE *passim* (1988); J. THIBAUT & L. WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS *passim* (1975); Levanthal, *What Should be Done With Equity Theory? New Approaches to the Study of Fairness in Social Relationships*, in SOCIAL EXCHANGES: ADVANCES IN THEORY AND RESEARCH 27-55 (K. Gergen, M. Greenberg & D.R. Willis eds. 1980); Levanthal, Karuza, & Fry, *Beyond Fairness: A Theory of Allocation Preferences*, in JUSTICE AND SOCIAL INTERACTION 167-218 (G. Mikura ed. 1980).

136. *See, e.g.*, B. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 152 (1984); Michelman, *Law's Republic*, 97 YALE L. J. 1493, *passim* (1988); Sunstein, *Beyond the Republican Revival*, 97 YALE L. J. 1539, 1548 (1988). This revival of civic republicanism has stimulated a critical response. *See, e.g., Symposium: The Republican Civic Tradition*, 97 YALE L.J. 1591-1724 (1980); Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567 *passim* (1988) [hereinafter Fitts, *Vices of Virtue*]; Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 934-39, 966-81 (1990) [hereinafter Fitts, *Can Ignorance Be Bliss?*].

137. *See* R. BURT, TAKING CARE OF STRANGERS 124-43 (1979); Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decision Making and the Role of Rules in Structuring the Lawyer-Client Dialogue*, 1980 AM. B. FOUND. RES. J. 1003, 1010-14; Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 303-10 (1975).

the critical issues of implementation that arise in the public remedial context. Moreover, these theories are distinguishable from public remedial decisionmaking in important respects, including their source of legitimacy. Nevertheless, the debate over the merits of theories such as civic republicanism is instructive in developing a normative theory to guide a remedial process that aspires to values of participation and reasoned decisionmaking.

Before turning to the legitimacy debate it is important to put to one side the challenges to the court's remedial role that in actuality reflect dissatisfaction with the underlying substantive norms. At least some of the debate over the court's proper remedial role is a thinly veiled attack on the prevailing interpretation of the Constitution.[138] Although the scope of the liability norm is at times controversial and bears profoundly on the scope of the remedial enterprise, this article focuses on the issues generated by the court's public remedial role, and therefore assumes the legitimacy of the court's role in finding constitutional violations.

A. THE PROCESS CRITIQUE: THE NORMS OF PARTICIPATION, IMPARTIALITY, AND REASONED DECISIONMAKING

The process critique embodies the concern that public remedial decisionmaking necessarily departs from the norms of legitimate judicial process. Two competing models frame the debate over the propriety of the court's role in public remedial decisionmaking: the traditional or dispute resolution model and the structural reform or public law model.[139] These two models are based on different conceptions of the social context and the purpose of

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138. *See, e.g.*, G. MCDOWELL, EQUITY AND THE CONSTITUTION 101-10 (1982) (challenging *Brown I*); OFFICE OF LEGAL POLICY, *supra* note 127, at 109-16, 132-35 (challenging a variety of constitutional determinations leading to broad remedies). At least one commentator sympathetic to the court's role in public law litigation has addressed the connection between a narrow conception of constitutional entitlement and an effort to limit the court's remedial role. *See* Goldstein, *A* Swann *Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.—C.L. L. REV. 1, 57 (1978).

139. These two models are widely described in both the academic literature and casebooks as framing the debate over the proper role of the courts in public law litigation. The literature generally cites Fuller as the exemplar of the dispute resolution model and Fiss and Chayes as the exemplars of the public law model. *See, e.g.*, COUNCIL ON THE ROLE OF COURTS, THE ROLE OF COURTS IN AMERICAN SOCIETY 83-94 (1984) [hereinafter COUNCIL ON THE ROLE OF COURTS]; R. FIELD, B. KAPLAN & K. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 280-81, 322-30 (6th ed. 1990); R. MARCUS, M. REDISH & E. SHERMAN, CIVIL PROCEDURE: A MODERN APPROACH 16-17 (1989); M. MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 357 (1990); O. FISS & D. RENDLEMAN, INJUNCTIONS 805-26 (2d ed. 1984); Chayes, *supra* note 1, at 1282-83; Fiss, *Two Models of Adjudication*, in HOW DOES THE CONSTITUTION SECURE RIGHTS? 36 (R. Goldwin & W. Schambra eds. 1985) [hereinafter Fiss, *Two Models of Adjudication*]; Diver, *supra* note 9, at 47; Eisenberg & Yeazell, *supra* note 9, at 474; Fiss, *supra* note 1, at 18, 39-44; Mamlet, *Reconsideration of Separation of Powers and the Bargaining Game: Limiting the Policy Discretion of Judges and Plaintiffs in Institutional Suits*, 33 EMORY L.J. 685, 685-86 (1984); Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937, 937-38 (1975).

adjudication, and draw opposite conclusions about the propriety of continued judicial involvement in developing and implementing public law remedies.

Yet, these two apparently contradictory models of the judicial role share a basic strength and limitation as a foundation for constructing a normative theory of public remedial process. Both models provide the building blocks for a theory of remedial process by identifying the norms of participation, impartiality, and reasoned decisionmaking as integral to the assessment of public remedial process, and by offering persuasive justifications for the central importance of these norms to legitimate judicial process.[140]

At the same time, the two models are limited by their commitment to the adversary system as the only appropriate framework for defining "the roles that should be played by advocates and by judge and jury in the decision of a controversy."[141] According to these models, the functions of the judge and the advocates must be kept distinct. The judge is the decisionmaker, and proceeds based on partisan presentations by surrogates arguing on behalf of their clients.[142] To protect her objectivity and impartiality, the judge must be excluded from any partisan role and reserve judgment until all of the facts and arguments have been presented.[143]

Both the dispute resolution and structural reform models fault public remedial practice for failing to conform to the roles and processes of the adversary system.[144] Both of these models, however, evaluate the proper role of the judiciary in relation to the processes designed to interpret and apply liability norms. Neither model provides for a theory of public remedial decisionmaking that grounds the norms of participation, impartiality, and reasoned decisionmaking in the distinctive purpose, context, and values of the public remedial process. The resulting insistence on an adversary process, and adherence to the principles and roles developed to structure that process, lead both models to reject the possibility that public remedial practice can satisfy the norms of participation, impartiality, and reasoned decisionmaking.

One response to the process critique of public remedial activity has been to challenge its implicit assumption that courts generally adhere to the requirements of the adversary process. Commentators have persuasively argued that the legal system employs "many detailed, coercive, and intrusive techniques . . . to deal with intransigent litigants before, during, and after tradi-

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140. *See infra* Part II.A.3.

141. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 34 (2d ed. 1971).

142. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 382 (1978).

143. Fuller, *supra* note 141, at 36-37; Resnik, *supra* note 36, at 380-81.

144. *See supra* notes 16-43 and accompanying text.

tional litigation."[145] Moreover, in a variety of other judicial contexts, such as bankruptcy, probate and trusts, family law, administrative law, and sentencing, courts perform roles that deviate considerably from the traditional adversary ideal.[146] However, although this argument challenges a significant aspect of the process critique—that the courts are doing something entirely new—it does not meet the process critique on its own terms. That courts deviate from the adversary model in a range of other contexts does not justify such a departure in the public law context.[147] Nor has there been any meaningful attempt to provide a normative theory of judicial process that justifies the court's role in bankruptcy, sentencing, and pretrial process.[148] Thus, it is important to address the legitimacy challenge posed by the process critique of public remedial decisionmaking.

The process critique's concern regarding the departure of public remedial practice from the roles and processes of the adversary system underlies all four categories of legitimacy challenges. For this reason, considerable attention is devoted to the process critique. This section first summarizes the dispute resolution and structural reform critiques of public remedial practice. It then exposes and analyzes the absence of a normative theory of remedial process in either model. Finally, the section demonstrates that the process critics' insistence on the adversary process as the only method of realizing legitimacy norms is misplaced, and offers a conception of participation, impartiality, and reasoned decisionmaking grounded in the goals and demands of public remedial decisionmaking.

1. An Overview of the Dispute Resolution and Structural Reform Critiques

Lon Fuller provides the most coherent exposition of the dispute resolution critique of public remedial decisionmaking.[149] Fuller's vision of adjudication

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145. Eisenberg & Yeazell, *supra* note 8, at 475.

146. *See id.* at 481-86; COUNCIL ON THE ROLE OF COURTS, *supra* note 139, at 40-44. The analogy to areas such as bankruptcy has significance not only as an example of courts' current performance of nontraditional roles, but also as a potential model for structuring public remedial decisionmaking. *See infra* notes 317 & 402.

147. As Eisenberg and Yeazell point out, it does, however, raise the question of why the debate has centered on the court's role in public law litigation. *See* Eisenberg & Yeazell, *supra* note 9, at 516.

148. *See* Resnick, *Failing Faith: Adjudicatory Procedures in Decline*, 53 U. CHI. L. REV. 494, 546 (1986) ("The 'alternatives' to [the adjudicatory mode] have yet to articulate how we might assess the legitimacy of the outcomes achieved."); Interview with Professor Frank Zimring (Sept. 10, 1990) (criminal law expert reports that sentencing scholarship is dominated by substance, and that procedural jurisprudence of sentencing remains largely unexplored).

149. Fuller's work has been applied by both critics and proponents in the context of public law litigation, and serves as the intellectual foundation for the dispute resolution critique. *See, e.g.*, D. HOROWITZ, *supra* note 9, at 59; Diver, *supra* note 9, at 47; Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410, 426-31 (1978); Fiss,

is based on the traditional private dispute: two individuals have a dispute that implicates the legal rights of one party and the legal responsibilities of the other.[150] They turn to a neutral third party—the court—for "an authoritative determination of questions raised by claims of right and accusations of guilt."[151] According to Fuller, "the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor."[152] Although the judge may, and often should, play an active role in assuring that the parties fully address the issues raised by the dispute, her role remains limited to facilitating adversary presentation and issuing a binding ruling.[153] In Fuller's view, the legitimacy of the court's role in dispute resolution turns on whether a particular process or type of issue enhances or destroys party participation.[154]

Fuller argues that polycentric problems—those involving "interacting points of influence"[155] requiring "spontaneous and informal collaboration, shifting its forms with the task at hand,"[156]—are unsuited to resolution by adjudication.[157] Although Fuller does not define polycentricity precisely, he illustrates the term with examples: the division of valuable paintings bequeathed to two museums in "equal shares,"[158] and the building of a structural steel bridge that requires consideration of the structure as a whole, rather than angle by angle determinations.[159] No one disputes that public remedial decisionmaking, with its multiple parties and complex character, meets Fuller's characterization of polycentricity.[160] Although Fuller does

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supra note 1, at 39-44; Fletcher, *supra* note 9, at 645-49 (1982); *see also supra* note 139. Fuller himself never explicitly addressed the problems of public law litigation. This type of litigation and the academic debate concerning its legitimacy came to fruition twenty years after Fuller first wrote *The Forms and Limits of Adjudication*. The application of his argument to public law litigation may help explain the posthumous publication date of the piece.

150. *See* Chayes, *supra* note 1, at 1285; Fiss, *Two Models of Adjudication*, *supra* note 139, at 37-38.

151. Fuller, *supra* note 142, at 368.

152. *Id.* at 364.

153. Proponents of the public law model frequently portray the dispute resolution model as insisting on a passive role for the judge. This does not accurately describe Fuller's position. *See* Fuller, *supra* note 79, at 41. In fact, the issue of the appropriate degree of passivity for the judge under the traditional adversary model is the subject of some dispute. *Compare id.* (judge may intervene in a trial to ensure orderly resolution of issues) *with* Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1043 (1975) ("Within the confines of the adversary framework, the trial judge probably serves best as a relatively passive moderator.").

154. *See* Fuller, *supra* note 79, at 41.

155. Fuller, *supra* note 142, at 395.

156. *Id.* at 371.

157. For a discussion of the reasons behind Fuller's view, see *infra* text accompanying notes 196 & 240-41.

158. Fuller, *supra* note 142, at 394.

159. *Id.* at 403.

160. *See, e.g.*, Hart v. Community School Bd., 383 F. Supp. 699, 762 (E.D.N.Y. 1974) (describ-

not argue that courts should never undertake polycentric problems,[161] he concludes that the inevitable departure from the form of participation characterizing traditional adjudication results in the forfeiture of the moral force of the judicial role.[162] Adherents to Fuller's model use this reasoning to challenge the legitimacy of public remedial decisionmaking.[163]

Fuller is properly credited with articulating an enduring justification for the roles and processes of the adversary system. Yet, the adequacy of Fuller's conception of adjudication as a framework for structuring and assessing the legitimacy of public law remedies is open to question. Fuller developed his theories with traditional private law litigation in mind. As Owen Fiss has persuasively argued, Fuller's conception of adjudication is "rooted in a world that no longer exists."[164]

The structural reform model,[165] which Fiss advocates,[166] builds on the perception that large-scale organizations, particularly government bureaucracies, define to a substantial degree our social existence,[167] and that the victims of illegal social conditions can best be identified by their status within an organization or their membership in a group.[168] To insist on a model of adjudication that ignores these social realities leaves individuals at the mercy of large-scale organizations and thus deprives them of their constitutional rights—ostensibly in the interest of protecting the individual's right to participate formally in adjudication.[169]

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ing problem of constructing desegregation plan as polycentric); Fiss, *supra* note 1, at 41 ("The reconstruction of a prison, or for that matter the reconstruction of a school system, a welfare agency, a hospital, or any bureaucracy, is as polycentric as the construction of a bridge."); Fletcher, *supra* note 9, at 645-47 (using prison reform and school system resource allocation as examples of polycentric problems).

161. *See* Fuller, *supra* note 79, at 34 (court intervention in polycentric problems may be warranted in some cases, such as when there is clear constitutional direction to do so).

162. *See infra* notes 194-201 and accompanying text.

163. Fletcher argues for the presumptive illegitimacy of judicial intervention in the public remedial context that may be overcome "when there is a structural defect in the political process as a whole" and a political body is "in such serious or chronic default that it clearly cannot or will not remedy that violation itself." Fletcher, *supra* note 9, at 693. Given that this requirement of institutional failure is also imposed by current interpretations of constitutional norms, I question whether Fletcher's presumption places any additional limits on the court's remedial role.

164. Fiss, *supra* note 1, at 44.

165. Scholars writing in the public law tradition use different terms to describe the counterpoint to the private law or traditional model. Chayes uses the term "public law litigation," Fiss uses "structural reform litigation," and others use "institutional reform litigation." Although Chayes presents the attributes of the public law model in his classic article, *The Role of the Judge in Public Law Litigation, supra* note 1, at 1288-1304, Owen Fiss is unique in his effort to propose a normative theory of the judicial role that justifies the structural reform model of adjudication. *See* Fiss, *supra* note 1, at 17-44.

166. Fiss, *supra* note 1, *passim.*

167. *Id.* at 18.

168. *Id.* at 19.

169. *Id.* at 43.

Fuller's conception of adjudication also fails to account for the increasing significance of the court's role in enforcing constitutional and statutory norms. Here, as well as in the common law context, the courts frequently address polycentric problems.[170] Fuller's view of the limits of adjudication renders illegitimate much of what courts do today. According to Fiss, Fuller's view excludes the court's crucial adjudicative function: "to give meaning to constitutional values in the operation of large-scale organizations."[171] Fiss bases the judiciary's unique capacity to perform this role on two aspects of the judicial office: "the judge's obligation to participate in a dialogue . . . and his independence."[172]

Thus, the structural reform model offers a powerful critique of the dispute resolution model and presents a normative theory intended to address and give legitimacy to the court's role in public law litigation. However, as Fiss acknowledges, the remedial stage also poses a thorny problem for the structural reform model, which he never adequately resolves. Fiss recognizes that the remedial stage is a substantial component of the court's involvement in structural reform and is responsible in large part for the procedural transformation he is attempting to justify.[173] He also views the court's role in actualizing rights as necessary to "the integrity of the meaning-giving enterprise itself."[174] For Fiss, however, the remedial stage necessarily threatens the characteristics of dialogue and independence that justify the court's role as interpreter of public values.[175] Although Fiss and Fuller draw opposite conclusions concerning the appropriateness of continued judicial involvement in public remedial decisionmaking, they share many of the same concerns about the dangers of the court's departure from the adversary model.

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170. *Id.*; *see also* Eisenberg, *supra* note 149, at 424 ("[M]any legal problems seem nonpolycentric only because the common law solves them by treating as irrelevant a number of circumstances and ramifications that might be considered perfectly relevant at other times or places.").

171. Fiss, *supra* note 1, at 5.

172. *Id.* at 13.

173. *Id.* at 46.

174. *Id.* at 53; *see also id.* at 52 ("A constitutional value such as equality derives its meaning from both spheres, declaration and actualization, and it is this tight connection between meaning and remedy, not just tradition, that requires a unity of functions.").

175. *See id.* at 53-57; Fiss, *Objectivity and Interpretation,* 34 STAN. L. REV. 739, 761-62 (1982) [hereinafter Fiss, *Objectivity and Interpretation*]. Fiss expresses concern over the threat to judicial independence posed by judges' direct involvement in developing the remedy. He identifies additional problems stemming from judges' attempts to minimize their involvement in remedial decisionmaking by delegating authority to third parties or inducing the parties to settle. Fiss criticizes these approaches for inappropriately removing judges' responsibility for interpreting and actualizing public norms. *See* Fiss, *supra* note 1, at 56-57; Fiss, *Against Settlement,* 93 YALE L. J. 1073, 1082, 1085 (1984) [hereinafter Fiss, *Against Settlement*]; Fiss, *The Bureaucratization of the Judiciary,* 92 YALE L.J. 1442, 1456-57 (1983) [hereinafter Fiss, *Bureaucratization*].

2. The Absence of a Jurisprudence of Remedial Process

Fuller does not directly address the court's remedial role and the extent to which that role departs from his normative framework. Indeed, Fuller does not even consider the implications of his theory for the court's role in equity cases.[176] The absence of a theory of remedial process in Fuller's work is most likely attributable to the close conceptual linkage between right and remedy that typifies the private law conception of adjudication. Because the remedy is thought to flow ineluctably from the right,[177] or to be dictated by the same purposes and processes, there is no need to develop a distinct theory of remedial process. One view generating the expectation of a close conceptual link between right and remedy treats rights as linked definitionally and logically to remedies. The linkage runs in both directions. Rights are simply an abbreviation for the connection between a set of conditioning facts and their operative consequences.[178] Or, as Holmes put it, "[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, —and nothing else."[179] Reciprocally, the remedy follows logically and inexorably from the substantive right. The right or interest is defined to consist of a particular injury, and the remedy consists of redressing that injury.[180] The common law writ system illustrates the close linkage between right and remedy. Under this system, "each writ, in principle, gave rise to its own unique remedy. The pleader's claim was only a claim of a right to a particular remedy."[181]

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176. The only reference to equity in *The Forms and Limits of Adjudication* is a passing reference to Langdell's observation that there are no rights at equity because courts of equity proceed by discretion. Fuller, *supra* note 142, at 370. Fuller does not follow through with the logical implications of his argument, namely, that equity courts act illegitimately. Similarly, in *Collective Bargaining and the Arbitrator,* Fuller simply asserts, without elaboration, that courts perform functions that are not "adjudicative in the usual sense of the word, as in supervising equity receiverships." Fuller, *supra* note 79, at 34.

177. Chayes, *supra* note 1, at 1293-94.

178. *See* H. KELSON, A GENERAL THEORY OF LAW AND STATE 61 (1945) ("If it is assumed that the first norm which forbids theft is valid only if the second norm attaches a sanction to theft, then the first norm is certainly superfluous in an exact exposition of law. If at all existent, the first norm is contained in the second, which is the only genuine legal norm."); Ross, *Tu-tu,* 70 HARV. L. REV. 812, 825 (1957) ("The concept of rights is a tool for the technique of presentation serving exclusively systematic ends, and . . . in itself it means [nothing]."). This view of the instrumental character of rights is shared by some modern lawyers. *See* Bone, *Mapping the Boundaries of a Dispute: Conceptions of the Ideal Lawsuit Structure from the Field Code to the Federal Rules,* 89 COLUM. L. REV. 1, 14 (1989) ("[T]he terms right and remedy are just handy conventions for describing the form of protection that a court will provide to someone whose interests have been harmed.").

179. Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 462 (1897).

180. *See* Chayes, Rights and Remedies in Public Law Litigation, at 4 (unpublished manuscript on file at *The Georgetown Law Journal*) ("In the usual analysis, the right or interest invaded and the appropriate compensatory payment are tightly interlocked and mutually defining.").

181. *Id.*

A second view that closely links rights and remedies, which Fuller appears to have embraced,[182] adopts a functional approach, consonant with the teachings of the legal realists.[183] Under this view, the same policies and normative principles apply in determining rights and remedies.[184] The court's role in the traditional remedial context is to assess these competing purposes and develop rules governing the assessment of damages, to be applied by the jury. The same processes govern the adoption of the right and the remedy. Thus, under both the logical and the functional conception of the right-remedy linkage, there is no need to develop a distinct theory of remedial process.[185]

Structural reform theorists challenge the notion of a tight fit between right and remedy, particularly in the context of public law litigation.[186] These theorists recognize that the characteristics of public remedial decisionmaking preclude the possibility of deducing the remedy solely from the violation.[187] Fiss does, however, acknowledge a loose connection between right and rem-

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182. *See* Fuller & Perdue, *The Reliance Interest in Contract Damages* (pts. 1 & 2), 46 YALE L.J. 52 (1936), 46 YALE L.J. 373 (1937).

183. *See* L. KALMAN, LEGAL REALISM AT YALE 1927-1960 29-30 (1986) (describing legal realists' functional approach as a shift in focus from legal rules to factual contexts).

184. Guido Calabresi and Douglas Melamed illustrate this approach to the relationship between right and remedy in their classic article *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089-98 (1972). They argue that considerations of efficiency and distribution of wealth govern both the establishment of initial entitlements and the selection of the appropriate form of remedy. *Id.* at 1093-1105. Paul Gewirtz also seems to adopt this view of the relationship of rights and remedies in *Remedies and Resistance*, 92 YALE L.J. 585, 676-77 (1983) (arguing that considerations of practicalities, compromise, and strategy do and should govern the determination of rights as well as remedies).

185. The Supreme Court has reasserted this close, formalistic linkage in some of its public law jurisprudence. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983) (petitioner did not have standing to seek injunction against police use of "choke hold" when he could not show a likelihood that he would be a victim of "choke hold" in the future); Milliken v. Bradley, 418 U.S. 717, 745 (1974) (federal court may not impose multidistrict remedy for school segregation where de jure segregation practiced in only one district); *see also* Chayes, *supra* note 180, at 47 ("Justice Rehnquist has mounted a serious effort to reimpose the right-remedy linkage as a way of limiting the power of judges. . . . [P]reoccupation with the right-remedy analysis has prevented the Court from developing any other basis for effective supervision of the remedial discretion of trial courts."); Goldstein, *supra* note 138, at 53-57 (identifying the apparent reassertion by the Supreme Court of a private law model adopting a formalistic relationship between right and remedy). The Court has not consistently followed the private law model, however, and has approved injunctions that reflect only a loose, instrumental relationship with the underlying liability norm. *See, e.g.*, Missouri v. Jenkins, 110 S. Ct. 1651, 1663-66 (1990) (district court may require school district to levy taxes in excess of state law limit in order to fund school desegregation plan); Hutto v. Finney, 437 U.S. 678, 685-88 (1978) (district court may impose a 30-day limit on punitive confinement as proper remedy for eighth amendment violations in Arkansas prisons); Milliken v. Bradley, 433 U.S. 267, 286-88 (1977) (district court may remedy past discrimination by adopting special education and remedial programs). In many public law areas, the Court has spoken infrequently on the issue of the appropriate substantive or procedural standards governing the remedy.

186. *See* Fiss, *supra* note 1, at 47; Chayes, *supra* note 1, at 1293-94.

187. *See supra* text accompanying notes 27-29.

edy, noting that the violation of a constitutional or statutory norm "identifies *occasions* for a strong independent use of judicial power,"[188] and describes the object of the remedy "in a prospective, dynamic and systemic sense."[189] For Fiss, the relationship of right to remedy is instrumental:

> First, the remedy exists for and is determined by some finite purpose, protecting the constitutional value threatened; second, the remedy actually chosen is one among many ways of achieving that purpose; and third, the remedy incorporates considerations that might not be rooted in any direct and obvious way in the constitutional value that occasions the intervention.[190]

Given his recognition of the inadequacy of the liability norm as the determinant of the terms of structural injunctions, Fiss is confronted with the issue of how the judge is to develop an appropriate remedy. On this issue, however, Fiss' vision is blocked by the liability model of judicial process. Fiss fails to extend his insights concerning the *substantive* relationship of right and remedy in public law litigation to the *processes* of remedial formulation in these cases. His discussion of the range of possible judicial roles and structures assumes that the judge or her delegate must unilaterally frame the remedy through active involvement in the target institution, and that courts which rely on party agreement as a substitute for judicial decision abdicate their essential interpretive role.[191] Fiss laments the fact that the judge's formulation of the remedy requires making instrumental judgments that bear no connection to "the core processes of adjudication."[192] This view ignores the richness of recent procedural innovations in public remedial decisionmaking.[193] More importantly, Fiss fails to explore the possibility that the values he considers central to the court's special claim to competence—reasoned dialogue and judicial independence—may be preserved through a reconceptualization of judicial role and process at the remedial stage of public law litigation.

3. Process Norms in the Public Remedial Context

Three shared norms of judicial legitimacy underlie both the dispute resolution model and the structural reform model: (1) the preservation of party or interest participation; (2) the maintenance of judicial independence and impartiality; and (3) the reliance on reasoned decisionmaking.

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188. Fiss, *supra* note 1, at 9 (emphasis in original).
189. *Id.* at 47-48.
190. *Id.* at 50.
191. Fiss, *Against Settlement, supra* note 175, at 1085.
192. Fiss, *supra* note 1, at 52.
193. *See supra* Part I.B.

a. Participation. Both Fuller and Fiss identify participation as central to legitimate judicial process.[194] The parties must have an opportunity to address the decisionmaker and offer proofs and arguments concerning the relevant issues.[195] Fuller's work in particular raises the concern that public remedial practice violates this participation norm. In Fuller's view, because of the polycentric nature of remedial problems, "it is simply impossible to afford each affected party a meaningful participation through proofs and arguments."[196] Both Fuller and Fiss view formal adjudication as necessary to preserve the value of participation.

The process critics' insight concerning the importance of participation to judicial legitimacy is widely shared by legal scholars and supported by the work of social psychologists and other dialogic theorists.[197] Fuller and Fiss do not, however, consider how the participation norm can best be realized in the public remedial context. The next step in building a normative theory of public remedial process is grounding the participation value in the goals and demands of the public remedial context.

The process critics' insistence on conformity to the formal adversary model rests on a theory of the value of participation. Within the traditional adjudicatory framework, participation serves two basic values. First, it re-

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194. *See supra* note 152 and accompanying text; Fiss *supra* note 1, at 42. The importance of participation to judicial legitimacy is widely acknowledged in the legal literature. *See, e.g.*, Rhode, *supra* note 29, at 1198; Subrin & Dykstra, *Notice and the Right to be Heard: The Significance of Old Friends*, 9 HARV. C.R.-C.L. L. REV. 449, 451 (1974); Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORN. L. REV. 1, 20-21 (1974).

195. Fuller notes that meaningful participation presupposes dialogue with and response by the judge, and argues in favor of judicial intervention as a means of enhancing the parties' capacity to participate meaningfully. *See* Fuller, *supra* note 142, at 41. Eisenberg identifies three norms that emerge from Fuller's *Forms and Limits*, and shows that these norms do not all proceed from Fuller's participation thesis, but instead assume an independent norm of "strong responsiveness." Eisenberg, *supra* note 149, at 411-12.

Eisenberg's expanded view of participation comports with Fiss' concept of dialogue. Judges must "listen to a broad range of persons or spokesmen" and "are compelled to speak back, to respond to the grievance or the claim . . . . Judges must also justify their decisions." Fiss, *supra* note 1, at 13. Although Fiss contests Fuller's insistence on individual participation, he embraces the significance of interest participation in promoting dialogue and reasoned decisionmaking. *Id.* at 42.

196. Fuller, *supra* note 142, at 394-95. Fuller's basis for this conclusion does not rest solely on the "huge number of possibly affected parties," although that feature concerns him. "A more fundamental point is that [each possible solution] would have a different set of repercussions and might require in each instance a redefinition of the parties affected." *Id.* at 395. Traditional adjudication provides no mechanism for performing this function.

Fiss agrees that individual participation is seriously compromised by class representation in a structural suit. Fiss, *supra* note 1, at 40-41. For Fiss, the value underlying Fuller's insistence on individual participation is adequately served "through the arguments of the spokesmen for all the interests represented and through the decision of the judge." *Id.* at 42. This response, however, does not address Fuller's concern that the adversary form of presentation does not easily accommodate problems with "interacting points of influence." Fuller, *supra* note 142, at 395.

197. *See supra* note 194; *infra* text accompanying notes 198-205.

spects the dignity of the individual by affording those "affected by the decisions which emerge from social processes . . . [a] formally guaranteed opportunity to affect those decisions."[198] The opportunity to introduce information and arguments, to have one's perspective heard, underlies this value and enhances the perceived fairness of the decisionmaking process.[199]

Second, participation serves the instrumental value of enhancing the prospect of a reasoned and accurate decision.[200] The adversary model emphasizes the importance of indirect participation through professional advocates to achieve this goal. Lawyers possess the expertise in the technical rules necessary to conduct discovery, frame legal arguments, and narrow the issues before the court.[201]

The values of individual dignity and accurate decisionmaking both relate to the court's function of determining rights and liabilities. The adversary concept and structure of participation fails, however, to accommodate the goals and demands of public remedial practice. At the remedial stage, with its focus on institutionalizing the liability decision, participation also serves broader values. Unlike the court's role in adjudicating liability or assessing

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198. Fuller, *supra* note 79, at 19; *see also* Goldberg v. Kelly, 397 U.S. 254, 364-65 (1970) (participation "foster[s] the dignity and well-being of all persons"); Rubenstein, *Procedural Due Process and the Limits of the Adversary System,* 11 HARV. C.R.-C.L. L. REV. 48, 48 (1976) (adversarial participation lends legitimacy to justice system). In *Formal and Associational Aims in Due Process,* in DUE PROCESS: NOMOS 18 127-28 (J. Pennock & J. Chapman eds. 1977) [hereinafter *Formal and Associational Aims*], Michelman incorporates dignity values into participation: "to have played a part in, to have made one's apt contribution to, decisions which are about oneself may be counted as important." Michelman links the value of participation and revelation to informal processes, however. In *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights,* 1973 DUKE L.J. 1153, 1172-73, Frank Michelman treats dignity values separately, and identifies both dignity and participation values to be served by litigation. This apparent inconsistency may be explained by Michelman's use of a broader, more psychologically linked conception of participation in *Formal and Associational Aims.*

199. *See* E. LIND & T. TYLER, *supra* note 135, at 4-5 (research shows that "people usually feel more fairly treated when they have had an opportunity to express their point of view about their situation."); Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts,* 29 BUFFALO L. REV. 487, 526 (1980) ("Theorists maintain that when a party is intimately involved in the adjudicatory process . . . he is more likely to accept the result whether favorable or not."); Subrin & Dykstra, *supra* note 194, at 454-57 (noting the dignity values served by the right to be heard).

200. Fiss, *supra* note 1, at 42; Fuller, *supra* note 1, at 366-67; Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value,* 44 U. CHI. L. REV. 28, 28-30, 46-59 (1976); Subrin & Dykstra, *supra* note 194, at 452. Justice Frankfurter identified these two values in the oft-quoted statement from his concurrence in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951):

> No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and the opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

Id. at 171-72 (Frankfurter, J., concurring).

201. Fuller, *supra* note 142, at 383-84; Landsman, *supra* note 199, at 495-96.

damages, its role in implementing a public law remedy depends upon the cooperation of the actors who must live with it.[202] Participation in the formulation of the remedy serves the instrumental goal of increasing the likelihood that the remedy will succeed by promoting a higher level of acceptance of and commitment to the remedy.[203]

Participation at the remedial stage also serves an integrative function by defining the community that is responsible for implementing the remedy.[204] Participation charges them with a common goal: the development of a plan to eliminate ongoing illegal conditions and practices. The process of involvement serves the value of identifying the group of parties responsible for a particular social problem and involving those parties in the problem solving enterprise.[205]

The instrumental value of producing better substantive outcomes is also served by participation at the remedial stage, but the dynamics of realizing this value differ from those at the liability stage. The goal of the remedial stage is not to determine where fault lies, but rather to develop a plan that fairly and effectively realizes the substantive norm. This process often requires taking account of and integrating differing perspectives on the causes of the problem and the impact and feasibility of proposed solutions. The various actors often possess different information and perspectives that influence their views of the practicability and fairness of a remedy.[206] Participation affords an opportunity to obtain and synthesize these varying perspectives and insights, and thus to shape the views of both the partici-

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202. *See supra* note 34 and accompanying text.

203. *See* C. PATEMAN, PARTICIPATION IN DEMOCRATIC THEORY 33 (1970); L. SUSSKIND & J. CRUIKSHANK, *supra* note 92, at 27; J. THIBAUT & L. WALKER, *supra* note 135, at 94; Elmore, *Organizational Models of Social Program Implementation*, 26 PUB. POL. 185, 215, (1978); Kirp & Babcock, *supra* note 25, at 329.

204. *See* C. PATEMAN, *supra* note 203, at 33 (discussing integrative function of participation).

205. For example, the process of developing a remedy for prison overcrowding often involves actors such as the governor, prosecutors, legislators, and sentencing judges who might otherwise disclaim responsibility for addressing prison conditions.

206. Curtis Berger offers a vivid example of this phenomenon that arose in the development of the Coney Island desegregation plan. Through consultation with black parents, Berger learned of their concern that integration would lead to the brutalization of minority youngsters in public schools. Berger notes:

> This is one of the ironies about integration of which few whites seem aware. Too many assume that blacks welcome the chance to attend all-white schools and to reside in all-white neighborhoods and that those blacks who break the color barrier gain only benefit in doing so. We do not see the sacrifice involved in leaving congenial neighbors or the emotional trial that often accompanies minority status. In the name of racial desegregation whites expect blacks to accept permanent minority status; yet few whites are willing to accept that same status for themselves or their children. . . . Social scientists may easily explain this white man's double standard, but it took this session [with black parents] to force me to see it through the black man's eyes.

Berger, *supra* note 30, at 718.

pants and the court.[207]

Participation also serves an educative function at the remedial stage.[208] Involvement in remedial formulation educates those responsible for implementing institutional reform about obstacles and potential solutions to problems.[209] Participation also educates the plaintiffs about the workings of complex institutions and the skills and approaches necessary to effectuate change in such institutions.[210]

Finally, the autonomy and dignity values served by participation at the remedial stage may be broader than at the liability stage. The direct, informal, and collaborative nature of remedial participation serves the values of promoting the self-respect and autonomy of the participants.[211] Participation in the remedial process assumes a particularly significant role in situations involving public institutions because self-determination and institutional autonomy are independently valued in those contexts.[212]

The adversary model is ill-suited to serve the participation values that are so important at the remedial stage. The type of party participation contemplated by the adversary model—indirect and formal submissions through counsel—is not designed to promote either effective communication and acceptance of legal norms or identification with the remedial enterprise. In fact, adversary participation tends to produce the opposite effect: hostility and resistance.[213] Lawyers' control over the process tends to detract from

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207. This emphasis on shaping views and preferences is in contrast to the bargaining model, which seeks only to maximize preferences. *See infra* text accompanying notes 327-29.

208. *Cf.* B. BARBER, *supra* note 136, at 152 (noting that "civic activity educates individuals how to think publicly as citizens").

209. *See* Sturm, *supra* note 26, at 878.

210. *See* White, *Mobilization at the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 REV. L. & SOC. CHANGE 535, 540 (1987-88).

211. *Cf.* Michelman, *Formal and Associational Aims*, *supra* note 198, at 127-28 (dignity values served by participation in decisionmaking process).

212. *See*, e.g., Missouri v. Jenkins, 110 S. Ct. 1651, 1663 (1990) ("[O]ne of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions."); *supra* note 34 and accompanying text.

213. *See* B. BARBER, *supra* note 136, at 175 ("speech in adversary systems is a form of aggression, simply one more variety of power"); Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 660 (1976) ("The prospect of subjection to [an adverse] judgment, coupled with the lack of control over the process leading up to the judgment, tends both to generate a state of tension and to drive the disputants irreconcilably apart, whatever the outcome."); Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. 63, 70-71 (1974) (adversarial adjudication's focus on disputant's behavior may alienate losers); Harter, *supra* note 133, at 19-22 (noting propensity of adversary system to drive parties to extreme positions); Landsman, *supra* note 199, at 529 ("Adversary procedure may exacerbate rather than resolve tensions and may not foster the kind of compromise essential to the restoration of harmony."); Susskind & Weinstein, *supra* note 134, at 319-21 ("the adversary system introduces an unfortunate 'gaming' aspect to the judicial process that discourages the search for 'win-win' solutions to a dispute").

the client's sense of autonomy and responsibility.[214] Similarly, the stylized interaction and win-lose character of the adversary process prevents the exchange and integration of multiple perspectives necessary to produce effective and fair remedial decisions.[215] Dialogue mediated exclusively through lawyers dilutes, and in some instances prevents, the sharing and challenging of perspectives by those who must live with the remedial outcome. Lawyers cannot help but filter the discussion through the lens of their own perspective.[216] This phenomenon is particularly pronounced when the lawyer's interests clash with those of the client.[217]

Exclusive reliance on lawyers to communicate among the parties and the court is unnecessary at the remedial stage. The principles and considerations likely to govern the determination of the remedy do not derive solely from legal norms and argumentation. The parties' perspectives are likely to bear directly on the workability and appropriateness of a particular remedial approach. The adversary mode of fact-finding, largely controlled by lawyers through discovery, is not structured to produce the comprehensive, prospective factual record necessary for remedial decisionmaking.[218]

A fair assessment of the capacity of public remedial practice to preserve participation requires that the criteria of meaningful participation be recast to reflect the broader remedial values of promoting cooperation; defining,

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214. S. OLSON, CLIENTS AND LAWYERS, SECURING THE RIGHTS OF DISABLED PERSONS 140 (1984) ("norms of legal advocacy inhibit client autonomy and responsibility by imposing the authority of a supposedly neutral expert on the client"); Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U.L. REV. 213, 215 n.3 (1990) ("in practice the attorney often shapes the litigation without much input from her client"); Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 92-97 (tort plaintiffs in survey perceived a lack of communication with their lawyers and little personal control over their law suits).

215. *Cf.* B. BARBER, *supra* note 136, at 179, 193; Aubert, *Competition and Dissensus: Two Types of Conflict and Conflict Resolution*, 7 J. CONFLICT RESOLUTION 26, 32-36 (1963); Pruitt & Lewis, *The Psychology of Integrative Bargaining*, in NEGOTIATIONS: SOCIAL AND PSYCHOLOGICAL PERSPECTIVES 181 (D. Druckman ed. 1977).

216. *See* Eisenberg, *supra* note 213, at 658-60 (lawyers in litigation tend to impose structure on a lawsuit according to their understanding of adjudication, as opposed to through direct negotiation in which the parties' understanding controls the progress of dispute resolution).

217. *See, e.g.*, D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 106-16 (1974) (discussing conflicts of interest between attorney and client in large, lengthy suits); Mnookin, *The Paradox of Child Advocacy*, in IN THE INTEREST OF CHILDREN, *supra* note 44, at 51-55 (discussing conflicts of interest between attorney and client when client is a child); Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 482-93 (1976) (detailing conflicts of interest between civil rights bar and parents in desegregation cases); Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15, 28-31 (1967) (discussing general conflicts of interest between attorneys and clients); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 41 (same); Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOLUTION 52, 69-70 (1971) (same).

218. *See* D. HOROWITZ, *supra* note 9, at 45-51; Kirp & Babcock, *supra* note 25, at 320.

integrating, and educating a community of responsible participants; facilitating the exchange and synthesis of competing perspectives; and preserving autonomy and dignity.[219] Such an assessment must also take into account the characteristics of public law litigation that affect the potential to realize these broader participation values. In the public law context, participation is important not only to the parties, but also to the range of individuals and groups responsible for or in a position to disrupt implementation.[220] Consequently, the identity and diversity of participants assumes significance in a normative theory of remedial process.[221] Moreover, because the relevant actors in this context frequently are groups or organizations, a theory of remedial participation must address the issue of how members of those organizations or groups select representatives to articulate their interests and perspectives, and how those representatives are held accountable to the constituencies they represent.[222]

Finally, participation can aid the various stakeholders in the public remedial process who lack the capacity to participate effectively in public remedial decisionmaking. The plaintiffs frequently are poor, politically powerless, and unorganized, and thus may be less able to influence the remedial decision.[223] Yet, the values served by participation at the remedial stage depend on some direct involvement by those who must live with the results. An important criteria of remedial participation, therefore, is the capacity of a particular form of remedial practice to control for unequal power, resources, and sophistication.

This reformulation of the concept and structure of participation in the public remedial context expands our conception of the structures and processes that are best suited to achieve meaningful participation, and changes our assessment of the capacity of public remedial practice to conform to norms of judicial legitimacy.[224]

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219. *See supra* text accompanying notes 201-12.

220. *See supra* text accompanying notes 32-34.

221. *Cf.* L. SUSSKIND & J. CRUIKSHANK, *supra* note 92, at 103 (discussing the importance of diverse participation in resolving public disputes); Perritt, *supra* note 133, at 1637 (same).

222. *Cf.* L. SUSSKIND & J. CRUIKSHANK, *supra* note 92, at 101 (emphasizing the importance of representatives' accountability to the legitimacy and effectiveness of public consensual dispute resolution); Harter, *supra* note 133, at 54-55 (same).

223. *See* White, *Subordination, Rhetorical Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFFALO L. REV. 1, 4 (1990) (discussing conditions that undermine "the capacity of many persons in our society to use the procedural rituals that are formally available to them."); *cf.* Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 YALE L. J. 1651, 1660-61 (1988) (arguing that the poor are less likely to understand or participate fully in the debates of social elites). The psychological literature on group process supports the conclusion that educational level is likely to affect the level and degree of participation in a diverse group. *See* R. HASTIE, S. PENROD & N. PENNINGTON, INSIDE THE JURY 137-38 (1983) (noting that less educated jurors participated less in jury deliberations).

224. *See infra* Part IV.B.

b. Impartiality and Independence. Impartiality and independence are basic norms of legitimacy under both the dispute resolution and structural reform models of the judicial role. Both models require the judge's detachment and distance from the participants in the controversy to ensure judicial impartiality and independence.[225] The models assume that the goal of adjudication is to discover truth, and that the judge can best discover truth through noninvolvement.[226] The requirement of impartiality follows from Fuller's participation thesis. If the judge is biased or interested, she will not properly assess and respond to the parties' arguments and proofs.[227] Fiss adds the concern that involvement will generate personal preferences and political pressures that will compromise the judge's capacity to decide issues based on principles and reason.[228]

The dispute resolution and structural reform models both view the informality and interaction that characterizes the remedial process as a threat to the court's impartiality and independence. For Fuller, active involvement by the court in fact-finding and in the exploration of remedial solutions is likely to lead to "premature cataloguing" that commits the decisionmaker to a set perspective and filters all of the proofs and arguments accordingly.[229] This preconception of the case on the part of the decisionmaker limits the effectiveness of the parties' participation because the decision flows not from the parties' input but rather from the decisionmaker's preconceived theory of the case.

For Fiss, the public law remedial process poses a threat to the ideal of judicial independence because:

> [t]he desire to be efficacious leads the judge to attempt the remarkable feat of reconstructing a state bureaucracy . . . and that ambition in turn forces the judge to abandon his position of independence and to enter the world of politics.[230]

During the remedial process, the judge becomes involved in a network of relationships and "is likely to lose much of his distance from the organization."[231] Fiss views this process of identification by the judge with the parties

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225. *See* Fiss, *supra* note 1, at 14; Fuller, *supra* note 142, at 382-91; *see also* Resnik, *supra* note 36, at 376, 384, 445 (describing and embracing distance, disengagement, and detachment as the appropriate model of judicial impartiality). In a subsequent article, Judith Resnik describes the tensions between formal expectations and judicial practice regarding impartiality, and employs feminist methodology to question both the possibility and desirability of disengagement and detachment as the path toward fair and good judging. *See* Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for our Judges,* 61 S. CAL. L. REV. 1877 (1988).

226. *See* Fiss, *supra* note 1, at 9; Fuller, *supra* note 142, at 366-67.

227. *See* Fuller *supra* note 142, at 365.

228. *See* Fiss, *supra* note 1, at 14.

229. *See* Fuller, *supra* note 142, at 386.

230. Fiss, *supra* note 1, at 46.

231. *Id.* at 53.

as threatening to the ideal of judicial independence. The judge's dependence on the cooperation of the parties for the practical success of the remedy leads her to compromise the objective of the remedial process by "tailor[ing] the right to fit the remedy."[232]

Scholars and judges have questioned the adversary model's assumption that judicial detachment and noninvolvement best serves the truth-seeking function of adjudication.[233] Moreover, at the remedial stage, the assumptions that traditionally underlie the insistence on adversary process to preserve impartiality do not apply. The adversary model assumes that the judge's role is to produce a binding decision that correctly interprets and applies the law. This assumption does not apply to either the goal or the structure of the decisionmaking process in the public law remedial context. The court has defined the governing norms and determined the defendants' failure to follow them prior to the remedial stage. Instead of truth seeking, the goal in the remedial stage is to institutionalize these norms, a process that properly—indeed, necessarily—presupposes a perspective concerning the propriety of defendants' conduct.

If truth seeking is not the goal of remedial decisionmaking, what is left of the process critique's concern that impartiality and independence will be compromised? The concern about bias in the determination of retrospective facts is unwarranted at the remedial stage. There remains at this stage, however, Fiss' concern that the judge will be biased in assessing an appropriate solution—that she will favor (or be perceived to favor) the views of a particular party, or take into account her own interests, in structuring a remedy.[234] The potential for unfairness resulting from biased decisionmaking continues to play a significant role at the remedial stage. Thus, the impartiality value identified by the process critics remains operative in a theory of public remedial practice, albeit in a narrower form.

Fiss' response to the potential for bias in remedial decisionmaking is to throw up his hands and admit conceptual defeat.[235] This response ignores

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232. *Id.* at 54-55. Fuller shared Fiss' concern that a court engaged in informal activity "may reformulate the problem so as to make it amenable to solution through adjudicative procedures." Fuller, *supra* note 142, at 401. Fuller located the cause of this compromise in the polycentricity of the problem at issue, rather than the court's dependency on others to achieve remedial success. *Id.* at 394-404; *cf.* Fletcher, *supra* note 9, at 658 ("The right of the legally protected party may be vulnerable to modification or even redefinition because of the court's solicitude for the interests of those who are not legally protected.").

233. *See, e.g.*, G. HAZARD, ETHICS IN THE PRACTICE OF LAW 120-36 (1978); E. LIND & T. TYLER, *supra* note 135, at 25; Damaska, *supra* note 37, at 581-82; Frankel, *supra* note 153, at 1052-54; Minow, *The Supreme Court 1986 Term: Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 45-46, 74 (1987); Resnik, *supra* note 225, at 1905, 1933-40.

234. Fiss, *supra* note 1, at 55; Fiss, *Bureaucratization*, *supra* note 175, at 1463.

235. Fiss resorts to an argument of necessity to justify the judicial role in remedial practice; the judge must continue to assume responsibility for implementing constitutional norms "as a way of

the possibility and desirability of procedural innovation as a means of preserving impartiality in the remedial context. What is missing from Fiss' analysis is a recognition that impartiality may be achieved through processes other than those contemplated by the traditional adversary model. Contrary to Fiss' assumption,[236] the judge need not choose between developing a remedy based on her political perceptions of what will work and delegating the task of structuring a remedy to a special master.

The goals of the remedial stage suggest the appropriateness of a more interactive division of function among the court, the parties, and the lawyers in public remedial decisionmaking. Unlike the liability determination, which is viewed as uniquely the province of the judge (or jury), responsibility for remedial decisionmaking may best be shared between the judge and the parties.[237] By expanding our vision of possible remedial structures and roles, it is possible to allocate responsibility for developing the remedy so as to both preserve participation and minimize the incentives and opportunities for judicial bias.

c. Reasoned Decisionmaking. Finally, Fuller and Fiss share the concern that the public law remedial process departs from the norm of reasoned decisionmaking.[238] Both identify the distinguishing characteristic of adjudication as its commitment to rationality: judicial decisions must be the product of reasoned argument based on norms that are persuasive to others,[239] rather than power, personal preference, or bargaining.[240]

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preserving the integrity of the meaning giving enterprise" despite the resulting compromise of the court's legitimacy. Fiss, *Objectivity and Interpretation, supra* note 175, at 761.

236. *See* Fiss, *supra* note 1, at 54-57.

237. There is research suggesting that processes which allow for some party control over decisionmaking enhance the perceived fairness of both the processes and their results. *See* S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 181 (1985) [hereinafter DISPUTE RESOLUTION]; Brett, *Managing Organizational Conflict,* 15 PROF. PSYCHOLOGY RES. & PRAC. 664, 674-75 (1984).

238. Fiss persuasively refutes the argument that remedial decisionmaking fails to comport with the dictates of consistency and "formal justice," as evidenced by the varying remedial patterns that have emerged in implementing identical legal norms. "[T]here may well be differences between the various communities that justify the different treatment. Neither formal justice nor the ideal of a single, nationwide constitution requires that *all* communities be treated identically, but only that *similar* communities be treated alike." Fiss, *supra* note 1, at 51 (emphasis in original).

239. *See* Fiss, *Objectivity and Interpretation, supra* note 175, at 754 (the results must be justified "in terms that are universalizable"); Fuller, *supra* note 142, at 366 ("Adjudication is, then, a device which gives formal and institutional expression to the influence of reasoned argument in human affairs."); *see also* Resnik, *supra* note 36, at 378 n.13 ("When ruling, judges are obliged to provide reasoned explanations for their decisions, and the parties, in turn, are obliged to obey.").

240. Fuller argues that "[w]e demand of an adjudicative decision a kind of rationality we do not expect of the results of contract or of voting." Fuller, *supra* note 142, at 367. Although reason may play a role in deciding elections or the terms of a contract, "there is generally no formal assurance" that it will. *Id.* at 366. In contrast, adjudication "assumes a burden of rationality not borne by any other form of social ordering." *Id.* Fiss, among others, concurs in this assessment of the impor-

For Fuller, the problem with public remedial decisionmaking is the difficulty of reaching reasoned decisions through formal party participation in polycentric situations.

> There is no single solution, or simple set of solutions, toward which the parties meeting in open court could address themselves. If an optimum solution had to be reached through adjudicative procedures, the court would have had to set forth an almost endless series of possible divisions and direct the parties to deal with each in turn.[241]

Fuller's adherents extend this observation to the public law context. Because the legal norm does not provide a basis for choosing between possible remedial approaches, "the conventional means of control within the judiciary—legal rule and principle applied through the traditions of judicial reasoning and craft—are . . . unavailable as a base upon which to legitimate this exercise of power."[242]

Fiss' concern is with the court's involvement in the remedial decisionmaking process and its consequences for the quality of the dialogue concerning public values. The demands of public remedial decisionmaking predispose courts to rely on the parties' agreement, rather than on judicial interpretation, in formulating a remedy. This reliance fails to discharge the court's duty "to interpret [constitutional] values and to bring reality into accord with them."[243] Fiss appears to assume that the formal interactions of the

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tance of rationality in adjudication. *See* Fiss, *supra* note 1, at 42 (Fuller "rightly celebrates the role of reason in human affairs, and sees the important connection between reason and adjudication"); *see also* Diver, *supra* note 9, at 46, 48 (contrasting adjudication's emphasis on "principled elaboration of authoritative norms" with politics' emphasis on power and bargaining).

241. Fuller, *supra* note 79, at 33. Eisenberg clarifies and elaborates on the limits of traditional adjudication in situations involving multiple criteria:

> Often, however, the criteria cannot be reduced to one or objectively weighted, except by seriously impoverishing the solution. Where that is the case, and where the situation does not lend itself to a negotiated outcome, an optimum solution can normally be arrived at only by vesting a single decisionmaker with "managerial" authority—by which I mean authority not only to apply relevant criteria, but to determine how much weight each criterion is to receive and to change those weights as new objectives and criteria may require.

Eisenberg, *supra* note 149, at 425. Eisenberg's approach fails to recognize that courts frequently address issues governed by multiple standards and criteria, balancing their weight and applicability in a given situation. *See* Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

242. Fletcher, *supra* note 9, at 694. This view idealizes the extent to which legal norms constrain courts' exercise of discretion, even at the liability stage. It also fails to take into account that courts can and do determine issues based on reasoning in relation to a norm, even in the absence of a definitive legal standard. *See* Mnookin, *A Dilemma: The Legitimate Role of Courts*, in IN THE INTEREST OF CHILDREN, *supra* note 44, at 28-31 (arguing that framers of the Constitution intended for future decisionmakers to interpret ambiguities in light of both precedent and contemporary values).

243. Fiss, *Against Settlement*, *supra* note 175, at 1085; *see also* Resnik, *Due Process: A Public*

adversary process constitute the only possible method of preserving the court's reasoned involvement in remedial formulation.

Fiss also worries that judges' involvement in constructing an effective remedy predisposes the judge to "settle for something less than what he perceives to be the correct interpretation" of the underlying norm.[244] Although Fiss acknowledges the risk that judges will enact their personal preferences into law at the liability stage,[245] he looks to the institutional attributes of the judiciary—dialogue, independence, and the disciplining rules of the profession—to enable the judge to be objective in determining liability.[246] In contrast, he assumes that remedial decisions are not "constrained by the disciplining rules that characteristically govern judicial interpretation,"[247] and are thus more likely to be the product of judicial self-protection and bargaining.[248]

The process critics assume that the stylized discourse of the adversary process constitutes the only possible method of achieving reasoned decisionmaking in remedial formulation. Fuller and his adherents insist on formal presentation in open court and dispositive legal standards to preserve reasoned decisionmaking in the remedial process.[249] Fiss assumes that "the processes that give the courts their special competency" depend on the role allocation and formal dialogue of the adversary process.[250] This equation of reasoned decisionmaking with the adversary system is the basis of the process critics' rejection of the norm-based character of remedial decisionmaking.

Perhaps because the process critics did not develop their normative framework with the public remedial context in mind they do not consider whether methods other than formal adversary process may in fact better promote reasoned decisionmaking in that context. Reasoned decisionmaking need not proceed through traditional adjudication based solely on legal norms.[251] Other decisionmaking methodologies, such as structured negotiation,[252] may

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Dimension, 39 U. FLA. L. REV. 405, 409, 417-18 (1987) (arguing that public norms are generated in the course of interaction among disputants and adjudicator, and criticizing the literature of alternative dispute resolution for failing to provide a role for the public).

244. Fiss, *Objectivity and Interpretation*, *supra* note 175, at 761.

245. *See* Fiss, *supra* note 1, at 11.

246. *Id.* at 12-13; Fiss, *Objectivity and Interpretation*, *supra* note 175, at 754.

247. Fiss, *Objectivity and Interpretation*, *supra* note 175, at 761.

248. Fiss, *supra* note 1, at 54-55; Fiss, *Objectivity and Interpretation*, *supra* note 175, at 762.

249. *See* Fuller, *supra* note 79, at 33; Fletcher, *supra* note 9, at 694.

250. Fiss, *supra* note 1, at 51.

251. Eisenberg, *supra* note 213, at 639.

252. Negotiation has been defined as "communication for the purpose of persuasion." DISPUTE RESOLUTION, *supra* note 237, at 19. It can take place with or without the assistance of third parties. Negotiation conducted with the assistance of a neutral third party who lacks the power to impose a binding decision is referred to as mediation. *Id.* at 7. The academic literature presents two different conceptions of negotiation. Adversarial, or distributive negotiations, treat negotiation as a zero-sum game in which gains to one party constitute losses to the other. *See* H. RAIFFA, THE

be better suited to generating reasoned public remedial decisionmaking when legal norms alone provide an insufficient basis for choosing among possible remedies.[253] The court's discretion can be effectively structured through the development of norms of public remedial process that can be articulated by the trial judge and reviewed by appellate courts.[254] Moreover, the court's interpretive role may be preserved by a model of remedial decisionmaking premised on the view of the court as the enforcer of a deliberative process.[255]

The foregoing analysis accepts the process critics' premise that the values of participation, impartiality, and reasoned decisionmaking are important to judicial legitimacy. Some supporters of public law litigation consider the importance of the substantive norms to be an adequate response to the process critique.[256] This response correctly highlights the important connection between substantive and procedural legitimacy. Unless a particular process is reasonably calculated to produce compliance with basic constitutional princi-

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ART AND SCIENCE OF NEGOTIATION (1973). Problem solving or principled negotiation or integrative bargaining focuses on identifying the parties' interests and creating solutions which satisfy the needs of both parties. *See* R. FISHER & W. URY, *supra* note 134, at 9; Menkel-Meadow, *supra* note 134, at 794-829. As Carrie Menkel-Meadow points out, although any particular dispute may contain aspects of both models, behavior and results in any particular negotiation are likely to be a product of the orientation one brings to the negotiation. *Id.* at 759-60. This article proposes that negotiation can be oriented toward solving problems on the basis of norms and develops a structure designed to facilitate reasoned negotiation. *See infra* Part IV.A.

253. Dispute negotiation is in some instances more likely to be "principled":

> "A stranger adjudicator is likely to treat as irrelevant some principles the disputants themselves regard as relevant, and consequently to have at his command less than the sum total of principles potentially applicable to a dispute. In a real sense, therefore, traditional adjudication may actually be a less principled process than dispute negotiation."

Eisenberg, *supra* note 213, at 657; *see* R. FISHER & W. URY, *supra* note 134, at 85-98 (detailing concept of principled negotiation); Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 16 (1981) (Joint net gains in environmental mediation require that parties "attempt to understand the complex ecological systems involved and to generate appropriate compromises that go beyond their self-interests."). Eisenberg draws a distinction between dispute negotiation, which he defines as directed toward settling disputes arising out of past events, and rulemaking negotiation, directed toward establishing rules to govern future conduct. Eisenberg, *supra* note 213, at 638. However, as Eisenberg realizes, many cases actually involve a combination of these two functions. Public remedial decisionmaking is not taken into account in either of Eisenberg's categories. Although there is a dispute concerning the conduct of one of the parties, the conduct or the resulting injury is ongoing and requires future-oriented intervention to resolve the dispute. At the same time, remedial intervention is constrained by the scope of the legal norm and the supervision of the court. The structure of the remedial process and the intervention of the court can dramatically limit the significance of bargaining power in determining the outcome. *See infra* text accompanying notes 419-20.

254. *See infra* text accompanying note 417.

255. *See infra* Part IV.

256. *See* Chayes, *supra* note 1, at 1316 ("[T]he ability of a judicial pronouncement to sustain itself in the dialogue and the power of judicial action to generate assent over the long haul become the ultimate touchstones of legitimacy . . . . [T]he American legal tradition has always acknowledged the importance of substantive results for legitimacy and accountability of judicial action.").

ples, it fails to fulfill the court's constitutional role and therefore lacks legitimacy. Thus, remediation constitutes an important element of a theory of public remedial process.

However, the equation of substantive outcomes with procedural legitimacy ignores the importance of process in maintaining institutional legitimacy. Continued respect for and acceptance of the exercise of judicial power depends on preserving the perceived and actual fairness and integrity of the processes by which decisions are made. The absence of an affirmative vision of the judicial role that responds to concerns about fairness and proper allocation of governmental power fuels the political and theoretical attack on legitimacy, which in turn contributes to a public perception of judicial illegitimacy. The court's capacity to bring about compliance with substantive norms—the linchpin of the competency defense of judicial activism—suffers as a result. Moreover, like the process critics, I believe that process values such as fairness and participation bear independent significance as indicators of the court's legitimacy. Thus, process as well as outcome assume importance in the normative theory of public remedial process taking shape in this article.

B. THE ALLOCATION OF GOVERNMENTAL POWER CRITIQUE: THE NORM OF RESPECT FOR THE INTEGRITY OF LOCAL AND STATE GOVERNMENTAL INSTITUTIONS

A second strand of the debate over the legitimacy of public law remedial process concerns the proper allocation of functions and power between the federal and state governments and among the three branches of government. Critics charge that the court's role in public remedial process exceeds the boundaries of judicial authority.[257] The courts express this same concern in terms of federalism and the limits of equity power. District courts are frequently admonished by appellate courts for intruding on the legitimate discretion of state and local executive branches, and assuming functions that exceed the appropriate judicial role.[258] Neither the Supreme Court nor the

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257. *See, e.g.*, Fletcher, *supra* note 9, at 648-49; Frug, *supra* note 24, at 742, 748, 750; Mamlet, *supra* note 139, at 685-86; Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 723-24 (1978). For a summary of the legitimacy arguments concerning the proper boundaries of the judicial role in public law litigation, see M. MINOW, *supra* note 139, at 356-72; Mnookin, *supra* note 242, at 25-42.

258. *See* Rizzo v. Goode, 423 U.S. 362, 380 (1976) ("principles of federalism which play such an important part in governing the relationship between federal courts and state governments . . . . have applicability where injunctive relief is sought . . . against those in charge of an executive branch of an agency of state or local governments."); Inmates of Occoquan v. Barry, 844 F.2d 828, 844 (D.C. Cir. 1988) ("In this setting of institutional conditions litigation, courts must, as the Supreme Court has said time and again, craft remedies with extraordinary sensitivity. Here, courts work in an arena that represents a crossroads where the local political branches of government meet the Article III branch and the higher commands of the Constitution."); Ruiz v. Estelle, 679 F.2d

United States courts of appeals, however, have provided much elaboration or direction beyond these general admonitions.

Some academic critics of public remedial decisionmaking have attempted to provide doctrinal and normative support for the allocation of governmental power critique. These critics argue that state and local governments are the repository of governmental authority in areas such as education and criminal justice and that federal court intervention through the public law remedial process interferes with this local decisionmaking prerogative.[259] The focus of their concern, however, is on the proper division of responsibility among the judicial, legislative, and executive branches of government.[260] They argue that the court's current role in public law remedial process departs from the core judicial function and intrudes into the functions of the legislative and executive branches.[261] They base their insistence on defined functional spheres on a traditional conception of the judicial role, the constitutional preference for democratic decisionmaking, and the judiciary's insulation from political accountability.[262]

Although the allocation of governmental power debate generally focuses on *whether* the court's public remedial role is legitimate,[263] the disagreement

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1115, 1145 (5th Cir.) (per curiam) ("As a matter of respect for the state's role and for the allocation of functions in our federal system . . . the relief ordered by federal courts must be 'consistent with the policy of minimum intrusion into the affairs of state prison administration that the Supreme Court has articulated for the federal courts.' " (quoting Ruiz v. Estelle, 650 F.2d 555, 571 (5th Cir. 1981))), *vacated in part, amended in part*, 688 F.2d 266 (5th Cir. 1982).

259. *See* Frug, *supra* note 24, at 743-49; Nagel, *supra* note 257, at 663.

260. Commentators recognize the current doctrinal limitations on applying separation of powers analysis to vertical government relationships between federal and state or local government. *See* Frug, *supra* note 24, at 749; Mamlet, *supra* note 139, at 688; Nagel, *supra* note 257, at 666. Some commentators argue that current interpretations of the separation of powers doctrine are wrong and should be changed. *See* Mamlet, *supra* note 139, at 694-702; Nagel, *supra* note 257, at 666-81. Others take the position that the concerns underlying the separation of powers doctrine can be addressed through equitable principles. *See* Frug, *supra* note 24, at 787. For a critical response to these arguments, see Eisenberg & Yeazell, *supra* note 9, at 495-506.

261. *See* Frug, *supra* note 24, at 740-42; Mamlet, *supra* note 139, at 686; Nagel, *supra* note 257, at 662. Even scholars critical of the court's remedial activities in enforcing constitutional norms have recognized that their arguments lose much of their force when courts act pursuant to statute. *See* Frug, *supra* note 24, at 784 ("Most complaints about unwarranted judicial interference with democratic decisionmaking would not survive an explicit congressional decision to authorize the judicial action in question.").

262. *See, e.g.*, Frug, *supra* note 24, at 732-50; Mamlet, *supra* note 139, at 694-702.

263. Proponents of public law litigation offer several arguments in response to the allocation of governmental power critique. First, they argue that the judiciary's constitutional role in interpreting and enforcing public norms requires and justifies an expansive judicial role, *see* M. MINOW, *supra* note 139, at 358; Eisenberg & Yeazell, *supra* note 9, at 509; Fiss, *supra* note 1, at 6-11, and that the failure of the court to perform this function will compromise its legitimacy by depriving the disempowered of their constitutional rights.

Second, proponents challenge the assumption that courts are necessarily intruding on the functions of other branches, pointing to the court's emphasis on achieving agreement concerning the remedy. *See, e.g.*, Chayes, *supra* note 1, at 1308; Eisenberg & Yeazell, *supra* note 9, at 492-93, 506.

actually concerns *how* courts should exercise their public remedial role. Both the courts and academic critics acknowledge that the Constitution permits, indeed requires, continued judicial involvement in enforcing constitutional and statutory norms.[264] Their concern is that trial courts go too far. Yet, they have been unable to come up with a satisfactory theory of the appropriate limits of judicial involvement in the remedial process.[265]

Thus, the allocation of governmental power critics identify an important attribute of legitimate public remedial decisionmaking: respect for the integrity of state and local governmental institutions. Yet, they fail to provide either guidelines for pursuing this value or standards for assessing whether it has been satisfied. This failure is attributable, at least in part, to a view of the judicial role that ignores the remedial stage. The allocation of governmental power critique incorporates the process critique, with its assumptions and

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Scholars who are more concerned with the separation of powers issue concede that courts tend to act with more restraint than the critique typically acknowledges. *See* R. Mnookin, *supra* note 242, at 521; Fletcher, *supra* note 9, at 649.

Finally, proponents challenge the functional conception of separation of powers that assumes clear boundaries between the branches of government. They argue that this conception ignores the role of checks and balances, that each branch of government necessarily exercises a mix of functions under our constitutional scheme. *See* Chayes, *supra* note 1, at 1307; Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 433-44 (1987); Shapiro, *Stability and Change in Judicial Decision-Making: Incrementalism or State Decision?*, 2 L. TRANSITION Q. 134 (1965). They offer a more dynamic conception of separation of powers that focuses on "whether the branches all remain able to participate in the process of mutually defining their boundaries." M. MINOW, *supra* note 139, at 362; *see* Chayes, *supra* note 1, at 1316; Eisenberg & Yeazell, *supra* note 9, at 495.

264. *See, e.g.*, Fletcher, *supra* note 9, at 696 (court may use remedial discretion "when there exists no practical alternative for the protection of the constitutional right at stake"); Frug, *supra* note 24, at 748 (federalism-based "bar to federal judicial power must be strictly interpreted in light of the established federal judicial power to provide a remedy for proven state violations of individual rights"); Mamlet, *supra* note 139, at 689 (acknowledging that "affirmative judicial intervention is appropriate . . . when state officials oppose a substantive constitutional right").

265. Diver, *supra* note 9, at 91-92; Eisenberg & Yeazell, *supra* note 9, at 509-10; *see, e.g.*, Fletcher, *supra* note 9, at 694-95 (proposing that a court should assume a remedial role in a public law suit only when the legislature or other relevant political body has shown unwillingness or incapacity); Frug, *supra* note 24, at 787 (proposing standards of "practicality," "workability," and "feasibility" to be exercised to "avoid excessive federal judicial invasion"); Nagel, *supra* note 257, at 707-12 (proposing "breadth" and "depth" standards). Diver proposes measuring the value of judicial intrusiveness "by considering the process rather than the substance of judicial intervention. Under this approach, whether intrusiveness is excessive depends upon the degree to which the court has left room for the exercise of governmental choice in the remedial process." Diver, *supra* note 9, at 92. This approach fails, however, to provide a normative theory of the judicial role that reconciles the value of effective implementation of constitutional norms with the value of respecting governmental choice. Diver argues that although a political model of litigation is best suited to realizing these dual values, it necessarily compromises the legitimacy of the judiciary. This conclusion shares the assumptions of the process critique, which I challenge for failing to take into account the distinct character of the court's role in public remedial decision making. *See supra* notes 176-93 and accompanying text.

limitations, as a crucial step in its reasoning.[266] It assumes that the role of the judiciary is to decide cases through the adversary process. When judges depart from this role, they are not acting as judges. Instead, they are exercising powers that belong to other branches of government, without the restraints imposed by either the political accountability of the other branches or the internal discipline of legal norms and the adversary process traditionally associated with the judiciary.

Like the process critique, however, the allocation of governmental power critique fails to account for the widely accepted judicial role of providing remedies for legal wrongs.[267] This failure in turn prevents the development of meaningful standards for limiting the court's exercise of remedial power. It also blinds allocation of governmental power critics to the possibility that a theory and practice of public remedial process can be developed which comports with the requirements of legitimate judicial decisionmaking and preserves the legitimate role of state and local institutions in remedying public law violations.[268]

C. THE COMPETENCY CRITIQUE: THE REMEDIATION NORM AND JUDICIAL CAPACITY

A third strand of the legitimacy debate concerns the court's capacity to perform the functions called for by the public law remedial process. Critics of the court's public remedial role argue that the attributes of adjudication disable courts from resolving issues of "social policy" and that courts necessarily perform a policymaking function in developing public law remedies.[269] The competency critique characterizes judicial processes as necessarily focused and piecemeal,[270] "ill-suited to the ascertainment of social facts,"[271]

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266. *See* Jennings, *The Chancellor's Foot Begins to Kick: Judicial Remedies in Public Law Cases and the Need for Procedural Reforms*, 83 DICK. L. REV. 217, 229 (1979) (noting critics of judicial innovation in public law cases who focus on courts' departure from traditional role as neutral umpire). Also implicit in separation of powers analysis is a theory of judicial competence that reflects a liability-based theory of judicial process. *See* D. HOROWITZ, *supra* note 9, at 33-56; Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 551-55 (1988).

267. *See supra* notes 176-93.

268. *See infra* Part IV. By identifying a set of structures and processes that constrain courts within a procedural framework, it is possible to develop effective limits on the court's exercise of remedial power. This approach will not satisfy the critics who subscribe to a view of separation of powers defining fixed and exclusive functions for each branch of government. This view of separation of powers is not widely accepted, however, and does not reflect the terms of the debate in the public remedial context.

269. Donald Horowitz is the principal architect of the competency critique. *See* D. HOROWITZ, *supra* note 9, *passim*. Horowitz does not distinguish between the court's role in determining liability and formulating a remedy in public law litigation.

270. *Id.* at 34-36.

271. *Id.* at 45-51.

lacking provision for policy review,[272] and inhospitable to negotiation.[273] Although the competency critics acknowledge that competency and legitimacy are separate issues, they quite properly assert that judicial competency is relevant to the question of legitimacy because "[a] court wholly without capacity may forfeit its claim to legitimacy."[274] It is the relationship of judicial capacity to legitimacy that is of concern here.[275]

Proponents of public law litigation concur that effective remediation—providing a remedy reasonably calculated to eliminate public law violations—is essential to legitimate judicial decisionmaking.[276] Thus, the competency debate provides an additional element of a normative theory of public remedial process. The validity of the competency critique, however, has been challenged on several grounds. First, scholars have pointed out that courts have attributes which empower them to perform the tasks of the public remedial enterprise, such as insulation from narrow political pressures,[277] the capacity to tailor solutions to the needs of particular situations,[278] access to formal and informal incentives to alter conduct,[279] the ability to gather information,[280] a nonbureaucratic structure,[281] and the potential for a high degree of participation.[282] Second, scholars charge that the competency critique ignores "the value of a successful performance, and the success rate of alterna-

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272. *Id.* at 51-56.

273. *Id.* at 22-23.

274. *Id.* at 18; *see* Cavanagh & Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence,* 14 LAW & SOC'Y REV. 371, 375 (1980).

275. Much of the debate over judicial competence takes place through competing case studies that reach varying conclusions about the effectiveness of the court in a particular case. These studies, although extremely important, are unlikely to provide a definitive answer to the capacity question. As others have noted, each case involves a number of variables that could account for its results and the studies typically fail to establish the linkage between the court's intervention and particular outcomes. *See* Hanson, *Contending Perspectives on Federal Court Efforts to Reform State Institutions,* 59 COLUM. L. REV. 289, 338 (1988); Zimring & Soloman, Goss v. Lopez: *The Principle of the Thing,* in IN THE INTEREST OF CHILDREN, *supra* note 44, at 491. Evaluations of competence will vary depending on the criteria of effectiveness used, the expectations of the researcher, and the relative assessments of other agents of change. Moreover, as I point out in my earlier article, judicial capacity is likely to vary with the context and strategies of judicial intervention. *See* Sturm, *supra* note 26, *passim.*

276. *See* Chayes, *supra* note 1, at 1315-16 (judicial legitimacy in public law context is measured by achievement of substantive results); *cf.* Summers, *supra* note 194, at 2 ("If a process is a significant means of achieving good results, it is in that respect good *as a process.*" (emphasis in original)).

277. *See* Chayes, *supra* note 1, at 1307-08; Sturm, *supra* note 26, at 846.

278. Chayes, *supra* note 1, at 1308.

279. Sturm, *supra* note 26, at 846.

280. *See* Chayes, *supra* note 1, at 1308; Sturm, *supra* note 26, at 898-99.

281. Chayes, *supra* note 1, at 1308. *But see* Fiss, *Bureaucratization, supra* note 175, at 1444-49 (criticizing the increasingly bureaucratic nature of the federal judiciary).

282. Chayes, *supra* note 1, at 1308; Sturm, *supra* note 26, at 891-92. For attempts to balance the strengths and limitations of courts in public remedial implementation, see Diver, *supra* note 9, at 88-105; Sturm, *supra* note 26, at 861-910.

tive institutions performing comparable tasks."[283]

Finally, and for our purposes most importantly, scholars have noted the failure of the competency critique to take into account the procedural innovations that enhance courts' capacity to find social facts, consider competing solutions, and facilitate negotiation.[284] Most proponents of an activist judicial role have failed to discuss the values or consequences of the competency critics' narrow view of the judicial role.[285] The critics' view proceeds from the now familiar assumption that courts necessarily operate within the framework of the adversary system and that processes and norms developed to determine liability can and should be transposed to the remedial stage.[286] Thus, the competency critique is subject to the same arguments developed earlier concerning the failure of the process critique to address the goals and demands of the public remedial process.[287]

D. THE ABUSE OF POWER CRITIQUE: THE IMPORTANCE OF FAIRNESS AND A DEMONSTRABLE RELATIONSHIP BETWEEN THE LEGAL VIOLATION AND THE REMEDY IMPOSED BY THE COURT

Critics of the court's role in the public remedial context also point to particular instances of injustice or unfairness caused by courts' undisciplined exercise of power. These abuse of power arguments fall into several categories. Some critics express concern about the imposition by judges or their agents of remedial requirements that do not relate to the underlying legal violation and instead stem from the personal preferences of the decisionmaker.[288] This concern introduces an additional element necessary for a

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283. Fiss, *supra* note 1, at 32; *see also* M. REBELL & A. BLOCK, EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM 144, 194 (1982) (documenting examples of legislatures' lack of capacity for systematic fact gathering and analysis); Yudof, *Plato's Ideal and the Perversity of Politics*, 81 MICH. L. REV. 730, 738 (1983) (noting that testimony is often entered in legislative hearings for the purpose of generating public reaction rather than for decisionmaking purposes).

284. *See supra* Part I.B.

285. *But see* Cavanagh & Sarat, *supra* note 274, at 377-86 (critiquing the "relatively fixed and unchangeable" conceptions of court structure that underlie the competency critics' arguments).

286. *See* D. HOROWITZ, *supra* note 9, at 34. Horowitz' description of the attributes limiting judicial competence is fraught with the process critique's normative assumptions about the requirements of legitimate judicial decisionmaking. *See id.* at 33, 38-39, 59.

287. *See* Part II.A.3.

288. *See, e.g.*, Baier, *Framing and Reviewing a Desegregation Decree: Of the Chancellor's Foot and Fifth Circuit Control*, 47 LA. L. REV. 123, 125 (1986) (charging that in a school desegregation case, the judge decided *ex parte* to close a neighborhood school, fashioned a plan outside the scope of the evidence and the government expert's advice, and justified his plan by saying "I also feel I am the best expert I know"); Brakel, *Special Masters in Institutional Litigation*, 1979 AM. B. FOUND. RES. J. 543, 554-55 (documenting unprecedented programs adopted at master's insistence in prison litigation, and examining perception of prison officials that court impose its desires on the institu-

theory of legitimate remedial process: a demonstrable relationship between the remedy imposed by the court and the underlying legal norm justifying some courts' exercise of coercive authority.

Abuse of power critics also challenge the failure of some judges to provide an adequate opportunity for those affected by a proposed remedy to express their views and some courts' failure to explain or justify remedial decisions.[289] The fairness of the process may also be compromised by an actual or perceived conflict between the formal and informal roles performed by the judge or her agent.[290] Each of these potential abuses of power contributes to a public perception of judicial illegitimacy that threatens to diminish the public's respect for the court. They also provide vivid support for the importance of the values identified by the process critics—participation, impartiality, and reasoned decisionmaking—to the fairness and legitimacy of the public remedial process.

Instances of abuse and perceptions of illegitimacy are not, however, inevitable. They are a product of the current gap between the theory of judicial process and public remedial practice. Without a normative framework, the participants in public remedial practice lack the standards necessary to both guide their own conduct and structure the conduct of others. Observers of the public remedial enterprise currently have no basis for distinguishing between good and bad remedial processes and must base their legitimacy judgments on erroneous preconceptions of how courts operate.

III. NORMS OF PUBLIC REMEDIAL DECISIONMAKING AND THEIR IMPLICATIONS FOR CURRENT PRACTICE

This section applies the norms of public remedial process to current practice. Part III.A summarizes the normative framework for public remedial decisionmaking developed in the previous section. Part III.B then evaluates current remedial practice in light of these norms to current remedial practice to test both the power of the norms and the adequacy of current practice in relation to them.

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tion); Note, *"Mastering" Intervention in Prisons*, 88 YALE L.J. 1062, 1083 n.109, 1084 n.115 (1979) (same).

289. *See* Baier, *supra* note 288, at 138-42 (describing failure of a district court to hold a hearing or otherwise provide parties with an opportunity to offer their views concerning the remedial plan unilaterally formulated by the court and upheld by the United States Court of Appeals for the Fifth Circuit in Davis v. East Baton Rouge Parish School Bd., 721 F.2d 1425 (5th Cir. 1983)). Courts often present their remedial orders without any explanation or justification for their terms. *See* Fiss, *supra* note 1, at 52 n.105 ("one of the most striking features of opinions in structural cases [is] the failure to discuss the remedy with any specificity at all").

290. *See* Note, *supra* note 288, at 1082-85 (ambiguity and confusion over the master's role, the inappropriate combination of formal and informal power, and the lack of accountability of master create possibility of abuse and perception of illegitimacy of judicial process).

A. THE NORMS OF PUBLIC REMEDIAL PROCESS

The analysis in Part II of the debate concerning the legitimacy of the public remedial process identified a set of norms and characteristics that properly influence our judgments about public remedial decisionmaking. These norms and characteristics provide the basis for a coherent theory of the legitimacy of public remedial process—the standards against which to assess the "goodness" of particular remedial actions. This theory does not specify the particular form or structure that remedial processes must take; rather it identifies the salient qualities that emerge from translating general process norms to the public remedial context. These qualities can be summarized as follows:

1. Participation: The decisionmaking process must afford a meaningful opportunity to participate to those affected by or responsible for a remedial decision.[291] Meaningful participation requires that:

a. Individuals, groups, and organizations directly affected by, responsible for, or in a position to block implementation of the remedy are involved in the process;[292]

b. Representatives of groups or organizations directly involved in the decisionmaking process are accountable and responsive to the constituencies they represent;[293]

c. The forms of interaction used in the decisionmaking process promote involvement, cooperation, education, and consensus;[294]

d. The process mitigate the unequal power, resources, and sophistication of the participants; and[295]

e. The process respect the integrity of local and state governmental institutions.[296]

2. Impartiality: The court must strive to ensure that its decisions are fair, unbiased, and based on reason supported by fact, rather than on factors unrelated to redressing the legal wrong at issue, such as personal preferences or a desire to terminate judicial involvement in the controversy.[297]

3. Reasoned decisionmaking: The process by which a remedy is formulated must employ reasoned analysis and the results of that process must be

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291. *See supra* notes 194-224 and accompanying text.

292. This norm follows from the characteristics of the public remedial context. *See supra* text accompanying notes 220-21. The extent of a particular actor's participation may vary depending on her responsibility for or interest in a particular remedial issue. At a minimum, meaningful participation requires the opportunity to present facts, respond to factual submissions by others, and to offer and comment on proposed remedial solutions. *See supra* note 195 and accompanying text.

293. *See supra* text accompanying notes 221-22.

294. *See supra* text accompanying note 219.

295. *See supra* text accompanying note 223.

296. *See supra* text accompanying notes 265-66.

297. *See supra* text accompanying notes 234, 288 & 290.

justified by reasoned argument.[298] Reasoned decisionmaking requires that:

a. Decisions are supported by a reliable factual foundation;[299]

b. Discussions and decisions concerning the appropriateness or desirability of a proposed solution are based on reasoning in relation to identified, persuasive norms;[300]

c. The process takes into account the range of perspectives and concerns that are likely to affect the fairness, effectiveness, and practicability of a particular proposal.[301]

4. Remediation: The remedy that emerges from the process must be reasonably calculated to produce compliance with the underlying substantive norm[302] and must relate to that underlying norm.[303]

These norms provide a framework for assessing the legitimacy of public remedial practice and a guide for structuring the remedial process in a particular case. At least in current practice, some of these norms may be in tension. For example, structures and processes designed to promote reasoned decisionmaking may give short shrift to the norm of participation. Conversely, structures that afford broad participation may complicate the effort to proceed through reasoned processes. Exclusive concern for the value of respect for state and local government may also tend to compromise the values of participation, reasoned decisionmaking, and remediation.

The existence of these tensions does not undercut the utility of developing norms of public remedial process. Similar tensions among competing values exist in any procedural system.[304] Rather, their existence illustrates the role that legitimacy norms can play in structuring and assessing public remedial practice. They provide a set of aspirations to be pursued in developing structures of remedial process. A legitimate model is one that takes each of these norms into account, strives to satisfy all of them, and strikes an appropriate balance among them given the demands and constraints of the particular remedial problem before the court.

B. PUBLIC REMEDIAL PRACTICE REVISITED: AN ASSESSMENT OF CURRENT REMEDIAL DECISIONMAKING

This section evaluates the models of remedial practice identified in Part I in relation to the norms of public remedial process. The purpose of this dis-

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298. *See supra* text accompanying notes 238-40 & 288.

299. *See id.*

300. *See supra* text accompanying notes 239-40.

301. *See supra* text accompanying notes 252-54.

302. *See supra* text accompanying notes 256, 274-75.

303. *See supra* text accompanying notes 258 & 288.

304. *See, e.g.*, Summers, *supra* note 194, at 42-43 (describing clashes of process values within traditional adjudication).

cussion is not to provide an in-depth evaluation of each model, but rather to identify tendencies of various forms of remedial practice to comply, or fail to comply, with the norms of public remedial legitimacy. This analysis reveals that many of the current structures of public remedial decisionmaking focus on satisfying one or two of the basic legitimacy norms at the expense of the others. The failure to account for and pursue the full range of legitimacy norms compromises the perceived legitimacy of the public remedial enterprise. New structures and processes are emerging, however, that offer the potential for accommodating the full range of legitimacy norms.

1. Processes Attempting to Adhere to the Traditional Adjudicatory Model

Models of public remedial formulation that are based on the traditional adversary model of adjudication do not adequately accommodate the range of remedial legitimacy norms. The deferrer model of remedial process—delegating the task of remedial formulation to the defendants—emphasizes the value of respect for state and local decisionmaking.[305] It also avoids the risk of compromising the court's impartiality by assuming responsibility for developing and implementing a remedy, and becoming committed to its success. This approach, however, undermines the court's legitimacy in other important respects. Deference to defendants does not afford all of the relevant participants an opportunity to participate in development of the remedy. It may also create the appearance of favoring the interests of the defendants at the expense of those entitled to relief. Furthermore, such deference does not provide courts with an adequate basis or opportunity to evaluate the defendants' proposed remedies using reliable factual support and identified normative standards. It does not allow for the integration of the multiple perspectives that bear on the development of an appropriate remedy. It also frequently fails to produce a remedy that promises to redress the underlying legal violation.[306]

The director model strikes a different balance between the remedial process norms in its effort to use traditional adversary methods for remedial formulation.[307] The court's willingness unilaterally to impose a remedy reflects a commitment to the norm of remediation. The hearings preceding the court's imposition of a remedy under this model afford the opportunity for

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305. *See supra* notes 44-45 and accompanying text. This approach was used in Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), when the court assigned the defendants exclusive responsibility for remedying unconstitutional prison conditions. *See* Sturm, *supra* note 26, at 851.

306. *See* Shane, *supra* note 19, at 558-59; Sturm, *supra* note 26, at 864-67. The ineffectiveness of the deferrer approach leads many judges to abandon it in favor of a more directive posture. *See id.* at 853. Thus, the short-term success of the deferrer in satisfying the norm of respect for state and local governmental decisionmaking must be reconsidered in light of the likelihood that deference will give way to more intrusive measures imposed by the court.

307. *See* Sturm, *supra* note 26, at 851-54.

formal participation by a wide variety of interested groups and organizations. The court's reliance on the adversary form of participation, however, prevents the realization of the participation values critical to the remedial stage.[308] The court's imposition of requirements over the objections of the defendants also generates the perception of intrusion into the domain of state and local institutions.[309]

The director court's unilateral formulation of the remedy also threatens to compromise judicial impartiality. As the process critics have noted, this approach places the court in the position of developing and evaluating the adequacy of its own plans.[310] In addition to creating an appearance of unfairness by merging these two roles, the remedy fails to adhere to the norm of reasoned decisionmaking because courts that are charged with evaluating the remedies they devise typically fail to articulate the normative assumptions underlying the adoption of a particular remedy and rarely offer a reasoned basis for their remedial decisions. This failure is not surprising in light of the inadequacy of the adversary process as a mechanism for either developing an adequate factual record to guide remedial decisionmaking or providing a persuasive justification for the adoption of particular remedial requirements.[311]

Finally, the director court's failure to afford meaningful participation and use reasoned decisionmaking processes contributes to the perception, if not the reality, that the remedy is unrelated to the conditions underlying the legal violation. This perceived illegitimacy, along with the limited information available to the court and the inadequate participation by the affected individuals and organizations, undermines the court's remedial effectiveness.[312]

2. The Bargaining Model

The bargaining approach to remedial decisionmaking employs negotiations among the lawyers, sometimes under the supervision of the court, as the means of producing an agreement that the court adopts as the remedial plan.[313] Although this model in theory can account for the norms of participation, impartiality, reasoned decisionmaking, and remediation, there are

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308. *See supra* text accompanying notes 219-24.

309. *See* Sturm, *supra* note 26, at 268-69.

310. *See id.*, at 901; Note, *supra* note 288, at 1084.

311. *See supra* text accompanying notes 28-31 & 253. Eisenberg points out that a neutral third party typically has little "standing" to dictate behavior based on person-oriented norms, which usually depend upon intimate familiarity with the parties. Eisenberg, *supra* note 213, at 656-57. Similarly, a stranger "typically lacks the moral authority to order a person-oriented remedy even when he believes it would be efficacious." *Id.* at 658.

312. *See* Sturm, *supra* note 26, at 868-69.

313. *See supra* text accompanying notes 51-67.

structural and procedural factors that limit the realization of each of these norms in practice.

The bargaining model affords the parties, through their counsel, a substantial amount of control over the process and outcome of remedial decisionmaking. The involvement of lawyers also reduces the impact of unequal sophistication, familiarity with the system, and power by interposing the lawyers' skill, expertise, and emotional distance.[314] Particularly when the lawyers have substantial experience and expertise in remedial implementation and the techniques of collaborative decisionmaking, they can structure a process that overcomes many of the limitations of the adversary model. The reliance on agreement of the parties also appears to both give due respect to state and local government institutions and eliminate the concern that the court will impose a remedy unrelated to the violation. Moreover, dispute resolution through negotiation can be norm-based.[315] Supervision of the bargaining process by a special master, as in the St. Louis case, can enhance both the quality of the negotiations and the likelihood of reaching an agreement.[316] Finally, in theory, a remedy produced by agreement is more likely to reflect the expertise of those who must implement it and to be accepted and implemented by those who must live with it.

However, as the examples in Part I illustrate, in practice the bargaining model tends to compromise each of the norms of public remedial process.[317] First, the bargaining model frequently compromises the participation value because there is no guarantee that the range of people and organizations with a stake in the remedial outcome are included in the negotiations. Indeed, those participants interested in achieving agreement frequently attempt to

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314. *See* Eisenberg, *supra* note 213, at 660-61.

315. *See supra* text accompanying notes 252-53.

316. *See supra* text accompanying notes 55-61.

317. The bankruptcy reorganization process shares many of the features and limitations of the bargaining approach to public remedial formulation. In Chapter Eleven reorganizations, a structure is established to encourage the consensual development of a reorganization plan by the debtor and one or more creditors' committees. *See generally* M. BIENENSTOCK, BANKRUPTCY REORGANIZATION 243 (1987).

This system appears to provide for meaningful participation by relevant stakeholders in the process of developing a consensual remedy. However, the system in operation fails to meet that expectation. Frequently, the members of the creditors committee negotiate through their lawyers and insulate the negotiations from exposure to the constituents of the committee. In large bankruptcies, a group of bankruptcy lawyers that are repeat players in the system manage the negotiations and create pressures, incentives, and constraints toward agreeing to the proposed plan. *See* LoPucki & Whitford, *Bargaining over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. PA. L. REV. 125, 156-57 (1990). In some instances, the judge creates additional pressures to accede to the proposed plan. *Id.* at 157. Although all of the impaired creditors are entitled to vote on a proposed plan, they are faced with a take-it-or-leave-it choice, and the consequences of rejecting the plan may be more damaging than the confirmation of an inadequate plan. *Id.* at 158. Thus, the bankruptcy system in practice fails in significant respects to satisfy the requirements of meaningful participation.

limit the involvement of actors perceived to have hostile interests.[318] For example, in the St. Louis school desegregation case, the State of Missouri—the primary source of funding for the desegregation plan—was not included in the negotiations.[319] It subsequently objected to the settlement agreement and became a major obstacle to compliance.[320]

Second, the bargaining model fails to provide a mechanism for fostering the accountability of the participants in the negotiations to those they represent. Although bargaining is conducted informally, the lawyers' role typically conforms to the adversary model of representation. Those individuals and organizations whose interests are at stake are rarely involved in the negotiations, and lawyers control the agenda and the process of negotiation.[321] Group participants in public interest litigation face particular difficulties in holding their lawyers accountable because of their group character, divergent individual interests, and relative powerlessness.[322] The rules governing class actions fail to provide processes, standards, or incentives for attorneys or class representatives to solicit or take into account the views of class members.[323] In the St. Louis school desegregation case, the clients were not involved in the process of remedial formulation until after the implementation plan negotiated by the lawyers had been filed with the court, thus creating substantial pressure on the clients to approve the plan.[324]

Although members of government agencies do not typically confront these obstacles to effective representation, they do face difficulties in holding their bargaining representatives accountable. For example, they may be represented by elected officials, such as the attorney general, who have separate

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318. *See* Harris v. Pernsley, 654 F. Supp. 1042, 1045 (E.D. Pa.) (plaintiffs opposed, and district court denied, motion of district attorney to intervene in jail litigation), *appeal dismissed,* 820 F.2d 592 (3d Cir.), *cert. denied sub nom.* Castille v. Harris, 484 U.S. 947 (1987); Jones v. Caddo Parish School Bd., 704 F.2d 206, 224 (5th Cir. 1983) (Goldberg, J., dissenting) (by refusing to allow a hearing on a proposed plaintiff intervenor in a school desegregation case, court is "acting more like a child whistling in the dark than a court of justice, afraid to look out the window and see if the mournful cries actually emanate from somebody or are just the products of a frightened imagination"); Rhode, *supra* note 9, at 1203-07.

319. *See* La Pierre, *supra* note 29, at 997 n.89.

320. *See id.* at 1028.

321. *See* D. ROTHMAN & S. ROTHMAN, *supra* note 33, at 63 (in class action suit on behalf of patients in a state institution for retarded children, plaintiffs' lawyer, "not the clients or their guardians, set the terms of the suit" and "treated the [agreement] as a private treaty, not circulating it to any of the other parties, not even the parents named as plaintiffs").

322. *See* J. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM 25 (1978) ("Strong, rich and confident clients direct their lawyers; on the other hand, lawyers dominate the relationship when clients are poor, or deviant, or unsophisticated."); Rhode, *supra* note 29, at 1210-12 (class counsel in Pennhurst litigation took the position that his obligations ran solely to residents of facility for the retarded, and made little effort to expose or express views of parents and guardians who favored patients' institutionalization); *supra* note 223 and accompanying text.

323. *See* Rhode, *supra* note 29, at 1202-21.

324. *See supra* text accompanying note 64.

and often conflicting interests.[325] Even if the head of a state bureaucracy is directly involved in the negotiations, she is unlikely to articulate the interests and perspectives of the internal and external constituencies comprising the organization.[326]

The negotiation process under the bargaining model also tends to prevent meaningful participation by those who must live with the remedy. Because of their limited direct involvement in and knowledge of the negotiations, the stakeholders do not gather and exchange information, generate and consider solutions, and thus become educated by and invested in the remedial process. Their expertise and perspectives may never be tapped, and the remediation values served by participation are therefore unfulfilled.

Third, the emphasis of the bargaining process is on reaching agreement. Under this model, negotiations typically proceed according to an adversary structure. The emphasis on "winning" the negotiation tends to narrow the terms of the discussion and inhibit meaningful exchange. Frequently, the result is a remedy that splits the difference between the parties' positions or occupies the area of greatest overlap in a negotiation involving multiple parties.[327] This approach does not promote the type of substantive, problem-oriented interchange necessary to fulfill the broad participation values of the public remedial process.[328] In the absence of external pressure to proceed based on reasoned, normative arguments, bargaining power can dominate the negotiation process. This is particularly true when, as in the context of public remedies, the negotiations are directed at developing rules to govern future conduct. Furthermore, the participants need not have engaged in the process of developing an adequate factual foundation and of considering the range of possible remedial solutions in order to produce an agreement.

Finally, the bargaining model limits the court's capacity to conform to the norm of the reasoned decisionmaking processes. The court is not equipped to evaluate the remedy in terms of the process by which it was reached or its

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325. *See* The Attorney General's Role as Chief Litigator for the United States, 6 Op. Off. Legal Counsel 47, 55 (1982) (acknowledging the inherent potential for conflict between client agencies and the Attorney General).

326. *See* Sturm, *supra* note 26, at 835-37.

327. *See* Eisenberg, *supra* note 213, at 668; Menkel-Meadow, *supra* note 134, at 767-72. The involvement of a third-party mediator with a substantive agenda can limit the impact of pure bargaining power and assure that normative considerations play some role in the outcome of the negotiations. The St. Louis case provides an example of the role third parties can play in injecting reasoned decisionmaking into the discussions. In that case, the master used a law review article that he wrote before his appointment as the framework for settlement negotiations. *See* La Pierre, *supra* note 40, at 995.

328. *See supra* text accompanying notes 206-07. Lawyer dominated negotiations frequently structure "solutions that are 'legal' rather than what the client might desire if the client had free rein to determine objectives." Menkel-Meadow, *supra* note 134, at 782-83.

substantive adequacy.[329] Therefore, agreement, rather than reasoned analysis, provides the justification for the remedy produced through bargaining. Even if particular provisions result from reasoned consideration by the negotiating parties, the court typically is not privy to the substance of the dialogue leading to their adoption. Indeed, the secretive character of remedial negotiations can contribute to perceptions of unfairness and illegitimacy on the part of the public or those who have been excluded from participating in the negotiations.[330]

Judicial efforts to obtain substantial information concerning the content and process of the negotiations by presiding over the settlement negotiations threaten the norm of judicial impartiality.[331] Active involvement in promoting settlement creates the danger that the court will become excessively committed to the outcome of the negotiations, thereby compromising the appearance or reality of the judge's fairness in assessing the adequacy of the remedy.[332]

3. The Legislative or Administrative Hearing Model

The committee hearing form of remedial decisionmaking, which was used in *PARC v. Pennsylvania,*[333] affords the opportunity for direct and informal participation by a wide range of interested parties. By creating an advisory committee consisting of representatives of the groups affected by and responsible for remedial decisionmaking, the court assures diverse participation. The value of participation is pursued, however, at the expense of the values of remediation and reasoned decisionmaking. Moreover, the form and extent of participation under the legislative or administrative model are not well-suited to satisfy the norms of accountability and meaningful participation.

The narrow and unstructured role played by most of the participants under the committee hearing structure dramatically limits the nature of their participation. The role of the participants in the hearings and their capacity

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329. *See* Fiss, *Against Settlement, supra* note 175, at 1082. In the St. Louis litigation, the signatories to the settlement agreement submitted a joint memorandum and coordinated their testimony in support of settlement. *See* LaPierre, *supra* note 40, at 1101. Thus, the court had only an after the fact justification, without the arguments and facts that led to its adoption. The objectors to the settlement did not have access to the counter-arguments considered and rejected during the negotiations. *Id.*

330. *See* Baier, *supra* note 288, at 134; Resnik, *Failing Faith: Adjudicatory Procedure in Decline,* 53 U. CHI. L. REV. 494, 553-54 (1986); Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example,* 53 U. CHI. L. REV. 337, 362 (1986).

331. Judge Weinstein's role in promoting the Agent Orange settlement is a prominent example of this practice. *See* P. SCHUCK, *supra* note 18, at 143-167.

332. Schuck, *supra* note 330, at 361; *see In re* "Agent Orange" Product Liability Litigation, 611 F. Supp. 1396, 1410 (E.D.N.Y. 1985) (judge believed that the settlement was "the only reasonable formula for distribution").

333. 334 F. Supp. 1257 (E.D. Pa. 1971) (per curiam), *approved and adopted,* 343 F. Supp. 279 (E.D. Pa. 1972); *see supra* notes 69-78 and accompanying text.

to influence the remedial decision remains ambiguous. This lack of clarity is likely to limit the commitment of participants to the remedial process and the quality of the exchange.[334] In the absence of shared responsibility for remedial formulation or clear norms governing the interactions of the parties, the extent and effectiveness of participation is likely to be a function of power.[335]

The committee hearing structure also provides no mechanism for structuring a reasoned dialogue among the participants. In *PARC v. Pennsylvania,*[336] as in many cases employing the use of participatory committees and panels, the court never clarified the responsibilities of the advisory panel, or set forth a structure or process for working collaboratively to produce and implement a remedy.[337] Members of the committee and participants in the hearing typically lack experience with the roles they must play, and their lack of focus undercuts the potential to produce positive results.[338]

The flexible, open-ended hearing process is better at airing differences than developing solutions or consensus.[339] It provides little opportunity or incentive to grapple with the arguments and proposed solutions of those with conflicting interests. Even in those situations in which the opportunity for broad participation produces incentives to reach agreement, the process of remedial formulation is likely to proceed through bargaining, rather than reasoned decisionmaking.[340] Furthermore, in a situation in which there are hostile relations or basic differences in perspective among the parties, the parties are unlikely to be able to structure productive discussions without assistance.[341] Without a mechanism for confronting and channeling conflict, the participants are likely to bring to the hearings "the hardened perspectives of their

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334. *See* W. PHILLIPS & J. ROSENBERG, ORGANIZATIONAL REFORM OF PUBLIC INSTITUTIONS BY FEDERAL COURTS: THE EFFECTIVENESS OF PARTICIPATORY APPROACHES 23 (1990) (in *PARC v. Pennsylvania,* participants in hearings lacked clearly defined roles and authority, causing some groups to withdraw from participation).

335. *See id.* (panel's deliberations were "marked by continued conflict and its procedures became a target of struggle for control among the major parties").

336. 334 F. Supp. 1257 (E.D. Pa. 1971) (per curiam), *approved and adopted,* 343 F. Supp. 279 (E.D. Pa. 1972).

337. *See, e.g.,* D. ROTHMAN & S. ROTHMAN, *supra* note 33. In discussing a panel selected to implement a consent decree regarding New York State's Willowbrook Hospital for the mentally retarded, the authors wrote: "When the seven members of the Willowbrook Review Panel first met together in June 1975, neither they nor plaintiffs' lawyers nor Judge Orin Judd had a coherent design for action . . . . [H]ow the panel was to [work] remained obscure." *Id.* at 127.

338. For a discussion of the limited success of particular committees in promoting compliance, see Lottman, *supra* note 79, at 70-73; Smith, *supra* note 33, at 109.

339. Michael Fitts has exposed the likelihood that unstructured attempts to reach political consensus through deliberation in the legislative context are likely to delay or prevent the adoption of any concrete program. *See* Fitts, *Vices of Virtue, supra* note 136, at 1635-37.

340. *See supra* notes 327-28 and accompanying text.

341. *See* L. SUSSKIND & J. CRUIKSHANK, *supra* note 92, at 136-37.

constituencies."[342] Efforts by the court to produce results by imposing a decision or pressuring agreements will present impartiality problems.[343]

4. The Expert Remedial Formulation Model

The obvious strength of the expert remedial formulation model is its capacity for proceeding efficiently based on reasoned decisionmaking.[344] Court-appointed experts typically have the technical ability to gather and assess vast quantities of information in a short period of time.[345] In the course of gathering information, experts may consult with a wide range of affected parties, thereby affording those parties the opportunity to present their views and to react to the solutions under consideration.[346] The expert's involvement also serves the norm of judicial impartiality by enabling the court to maintain a disinterested posture with respect to the remedy ultimately proposed. In situations involving highly technical issues in which the remedy can be implemented without extensive involvement by the affected parties, expert remedial formulation may provide an effective remedy for the underlying legal violation.

Expert remedial formulation tends to give participation values short shrift, however, as the Coney Island case illustrates. Interested parties must depend on the master or court-appointed expert's initiative and openness for access to the decisionmaking process, thus undercutting the representativeness of the remedial process. In the Coney Island litigation, the master developed closer relationships with white parent groups and government officials than with black community groups and their legal representatives.[347] This created a perception of unfairness and exclusion that later surfaced in the hostility to the master's proposals.[348] Because the consultations with the master took place privately, there was also no mechanism for holding the spokespeople for particular interests accountable to their constituencies.

The form of participation under the expert remedial formulation model also detracts from the meaningfulness of whatever participation does occur. Under this model, the expert, rather than the stakeholders in the dispute, gets the benefit of integrating the range of information and perspectives on

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342. Smith, *supra* note 33, at 109.

343. *See supra* text accompanying notes 309-12 & 331-32.

344. For a description and examples of expert remedial formation, see *supra* notes 79-90 and accompanying text.

345. Curtis Berger produced a plan to integrate the Coney Island schools and redevelop the neighborhood in three months. Berger, *supra* note 30, at 710. In the Boston harbor cleanup litigation, Charles Haar produced a report and proposed remedies in thirty days. Little, *supra* note 40, at 445-46.

346. *See supra* notes 84-87 and accompanying text.

347. *See* Berger, *supra* note 30, at 736.

348. *See id.* at 736-37.

the remedy. The participants do not have the opportunity to hear and respond directly to the information and arguments of those with differing views because they do not control the gathering of information, the development of alternative solutions, and the selection of a remedial alternative. They are dependent on the expert to create the agenda, frame the issues, gather the information, propose solutions, and make decisions.[349] This lack of control is likely to contribute to a perception of unfairness and to alienate participants from the remedial process and its outcome. The expert remedial formulation model also fails to control for unequal resources and power; the degree of consultation by the expert is likely to reflect the technical sophistication and resources of the participant.

The parties' limited involvement in remedial decisionmaking also affects the expert's capacity to justify particular remedial decisions. A unilateral decisionmaking process may preclude the development of persuasive reasons for the expert's recommended remedy. In the course of developing specific approaches to realizing the underlying legal principles, the expert must in some situations pursue goals and norms that are not dictated by those underlying principles.[350] These choices can be justified only by the expert's view of the wisdom of those norms;[351] and those who must live with the remedy may have a different perspective on the norms and how they should be implemented. In some cases there may be a reasoned basis for striking a particular balance among competing norms and applications in a particular context. Achieving and justifying this balance, however, requires a participatory process of exploring the interests of, and the factual bases and reasoned justifications offered by, the various participants. This process is bypassed by expert remedial formulation.

Expert remedial formulation also affects the court's capacity to conduct a meaningful review of the process and outcome of the remedial decisionmaking process. Because the judge is insulated from the development of the remedy and no record is kept of the expert's information gathering and consideration of remedial alternatives, the court is hampered in its ability to assess the fairness and adequacy of the suggested remedy.

Finally, remedies developed by experts may collide with the norm of re-

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349. *See* Brazil, *supra* note 93, at 415. In the Boston Harbor case, the parties "had no control over [the informal information gathering] process and apparently were not afforded an opportunity to probe the reliability or balance of the sources, or to add materials to the informational hopper." *Id.* The special master compensated for this initial lack of party control by recommending the adoption of procedures of consensual decisionmaking to develop specific implementation plans. *Id.* at 415-16.

350. *See supra* text accompanying notes 28-29.

351. In Curtis Berger's description of how he arrived at a proposed remedy, he acknowledges that his perception that "forced attendance should not be the preferred alternative" and his "preference for a magnet school" determined the remedial direction. Berger, *supra* note 30, at 715, 721.

spect for state and local governmental decisionmaking. In the Coney Island litigation, the master attempted to minimize the concern for local governmental autonomy by organizing an interagency council with representatives from the relevant government agencies to aid in the development of a neighborhood plan.[352] Apparently, however, the staff who participated were not in a position to bind their respective agencies, which subsequently objected to the plan.[353] Moreover, the master's plan was presented to the court as the master's recommendations, rather than as the parties' agreement. The master's proposals to desegregate the schools and redevelop the Coney Island neighborhood were in large part rejected by the court on the ground that local officials, not the court, should make basic policy decisions concerning educational philosophy and neighborhood planning.[354]

5. The Consensual Remedial Formulation Model

The forms of remedial decisionmaking that employ third-party facilitators to assist the stakeholders in developing a consensual remedy grow out of the developing area of public consensual dispute resolution.[355] Dispute resolution theorists have divided the process of consensus building into three stages: prenegotiation, negotiation, and implementation. Prenegotiation begins with the decision to bring the participants in the dispute together to attempt to negotiate a resolution.[356] The next step in the prenegotiation phase involves identifying the individuals and groups to be involved in the negotiations and "choosing representatives empowered to speak for the groups they claim to represent."[357] The process identifies and involves the individuals and groups directly affected by, responsible for, or in a position to block implementation of the remedy.[358] The model considers the short-term logistical advantages of limiting involvement in the negotiations to be outweighed "by the problems that arise if someone decides they have been unfairly excluded."[359]

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352. *Id.* at 722.

353. *Id.* at 732.

354. *See* Hart v. Community School Bd. 383 F. Supp. 769, 775 (E.D.N.Y. 1974).

355. *See supra* notes 132-33. Alternative dispute resolution, or ADR, encompasses many different procedural mechanisms. *See generally* DISPUTE RESOLUTION, *supra* note 237, at 7-13. This article discusses only one aspect of ADR—processes used to promote consensual resolution of public disputes.

356. L. SUSSKIND & J. CRUIKSHANK, *supra* note 92, at 94-97.

357. *Id.* at 101.

358. *Id.* at 103.

359. *Id.* The potential managerial problems that can accompany such broadly defined participation are addressed by setting up categories of participants with similar interests and providing a mechanism for each of these groups to select representatives to participate directly in the negotiations. *Id.* This procedure was used in a negotiation for the distribution of social services block grants. Each of four categories of participants selected twenty five representatives and a team leader. These individuals then participated directly in the negotiations, through meetings with the

The relevant groups or organizations select representatives, sometimes with the assistance of a third party.[360] These representatives serve "to amplify the concerns of larger groups, to carry messages and information to them, and to return with a sense of the group's willingness to commit to whatever consensus emerges."[361] The representatives must have the authority to speak and to act authoritatively on behalf of their group or organization.

Once the representatives have been selected, they establish the ground rules and identify the key issues and concerns to be addressed by the negotiations.[362] The final step in the prenegotiation phase consists of joint fact-finding. The participants identify what they know, what they need to know, and where the conflicts in their factual assumptions lie. They then obtain the information and expertise necessary to inform their assessment of possible solutions to their shared problem.[363]

The parties then begin the negotiation process.[364] They first outline their concerns and brainstorm about possible solutions that would address the concerns identified by the group. Once the range of options is identified, the parties attempt to reach a consensus on particular responses to each agenda item. They attempt to establish objective criteria by which an ultimate agreement can be judged and determine the appropriate remedy based on those criteria.[365] They may trade items that are valued differently by the participants.[366] If a consensus is reached, the next step is to produce a written

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mediator, involvement on subcommittees assigned to generate possible responses to agenda items, and structured discussions with other participants. *See id.* at 101, 172-74.

360. *Id.* at 103, 105. Each group caucuses to select its own spokespeople to enhance the credibility of the representation. Existing organizational leadership may be the appropriate representative. Depending on the issues under discussion, ad hoc representatives of the complete range of affected interests may be warranted.

361. *Id.* at 105.

362. *Id.* at 108-13. Ground rules include such issues as scheduling meetings, maintaining minutes, establishing a discussion format, and developing a policy governing press coverage and public attendance at meetings.

363. *Id.* at 113-16. Susskind and Cruikshank identify several joint fact-finding processes that may be utilized simultaneously. Their example below refers to a hypothetical dispute resolution between advocates and opponents of the construction of a dam.

> The participants might commission an independent forecast of the impacts the project is likely to have on future utility rates. They might also jointly select a consultant to prepare an environmental impact assessment . . . . They could hire mutually agreed-upon experts to prepare brief case histories of similar situations in which mitigation efforts were attempted.

Id. at 116.

364. This process may proceed initially by a subcommittee or series of subcommittees with diverse representation responsible for a particular aspect of the problem.

365. Harter, *supra* note 133, at 88.

366. *See* L. SUSSKIND & J. CRUIKSHANK, *supra* note 92, at 120-21, 146-47.

agreement,[367] which must then be ratified by the groups or organizations represented.[368] Finally, the implementation stage involves linking the ad hoc agreement to the formal decisionmaking processes of government, and establishing a structure for monitoring its implementation.[369]

Consensual public dispute resolution usually requires the assistance of a third party who acts as the keeper of the process.[370] The level of activism of the third party may vary, depending on the requirements of the particular situation.[371] In many instances, the third party assumes responsibility for convening the deliberations, assisting groups in choosing spokespeople, helping to establish ground rules and an agenda, identifying and obtaining expert assistance, facilitating fact-finding, coordinating subcommittees, facilitating the process of collaboration, assuring meaningful participation, preparing detailed minutes of the sessions, and helping to build consensus.[372] The third party does not, however, have independent substantive responsibility for deciding on a plan.

The two examples of consensual public remedial formulation described in Part I are attempts to apply this model of consensual dispute resolution in the context of public law remedies.[373] In both cases, the range of stakeholders interested in the remedial outcome had the opportunity to participate in the negotiations.[374] Some effort was also made in both cases to assure the

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367. Harter, *supra* note 133, at 93, 97-99; L. SUSSKIND & J. CRUIKSHANK, *supra* note 92, at 123. Consensus is used here to mean "general agreement"; no party dissents significantly from the shared position.

368. L. SUSSKIND & J. CRUIKSHANK, *supra* note 92, at 127. One participant or a small group of participants prepares a single draft, which is then molded by the group.

369. *Id.* at 130-31.

370. *See id.* at 93-94.

371. The third party may act as a facilitator, whose role is essentially to aid the process of meeting, investigation, and communicating. *Id.* at 152. In more complicated or problematic cases, the third party may act as mediator, whose role includes helping the parties devise and present options. *Id.* at 162; Fuller, *Mediation—Its Forms and Functions,* 44 S. CAL. L. REV. 305, 325 (1971); *see* W. SIMKIN, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING 77-106 (1971) (describing three different functions of the mediator: procedural, communicative, and substantive).

372. *See* L. SUSSKIND & J. CRUIKSHANK, *supra* note 92, at 142-43; Susskind & McMahon, *supra* note 133, at 146.

373. *See supra* notes 92-115 and accompanying text. Robert Schwartz, the plaintiffs' counsel who initiated the Philadelphia juvenile justice system negotiations, explicitly attributed his interest and successful involvement in the mediation to his participation in a negotiation simulation developed by the Harvard Program on Negotiation dealing with prison overcrowding and his reading in the area of public consensual dispute resolution. Telephone interview with Robert G. Schwartz, Sept. 28, 1990. The master in the fishing rights dispute "studied extensively the various theories and strategies of dispute resolution," Brazil, *supra* note 93, at 412, and worked directly with the Harvard Program on Negotiation. McGovern, *supra* note 41, at 461.

374. *See supra* text accompanying notes 94-102 & 105-15. In the juvenile justice system mediation, the district attorney declined to participate. *See supra* text accompanying note 105. Although his absence may in fact have eased the process of reaching agreement, it also posed the risk that the agreement would fail to reflect his legitimate concerns or would be thwarted by his lack of coopera-

accountability of the actual participants to their constituencies. The design of public consensual dispute resolution explicitly provides a process to identify and include the relevant stakeholders. The provision for selecting representatives and ratifying any remedies proposed by the negotiating group yields some basis for holding the direct participants in the negotiations accountable to the larger group.[375] The form of involvement in these cases was designed to facilitate meaningful participation. The stakeholders participated directly in the process and had access to counsel, but they did not rely on their lawyers to negotiate for them.

Direct involvement by stakeholders in informal processes does create the potential that parties' power and sophistication will define their success in the negotiations.[376] Three factors, however, minimize this concern in the consensual dispute resolution model. First, if the stakeholders are not in a position to be able to articulate their own interests, they may be assisted or represented by attorneys in the negotiations. Lawyers' involvement does present concerns about the impact of lawyer dominated negotiations on meaningful participation.[377] Lawyers involved in consensual remedial formation, however, may self-consciously adopt a problem solving, rather than an adversary approach to representing their clients' interests.[378] Second, the mediator can control for the impact of inequalities in skill or bargaining power by assuring that the concerns of each participant in the negotiation are effectively communicated and addressed.[379] Third, the remedial negotiations

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tion in the remedial endeavor. However, it may well have been that the only politically safe way to "participate" for the district attorney was to allow the negotiations to go forward without his involvement or his public opposition.

375. In the fishing rights case, accountability was fostered directly by the mediator, who assisted the tribes in selecting representatives, keeping them apprised of the progress of the discussions, and setting up a procedure for ratifying any proposed agreement. *See* L. SUSSKIND & J. CRUIKSHANK, *supra* note 92, at 165-66. In the juvenile mediation, steps were taken by both the participants and the mediator to assure that the representatives of the participating agencies had adequate knowledge and authority to engage in meaningful negotiations. *See supra* text accompanying notes 106-10. However, no steps were taken to assure that plaintiffs' counsel was accountable to his clients, the juveniles in preadjudication confinement.

376. *See supra* note 223 and accompanying text; *cf.* Steinzor & Strauss, *Building a Consensus: Agencies Stressing 'Reg Neg' Approach,* Legal Times, Aug. 3, 1987, at 16 (in negotiations regarding asbestos cleanup in schools, public interest stakeholders feared that industrial representatives would "swamp" negotiations with better resources).

377. *See supra* notes 321-28 and accompanying text.

378. *See* Memo from Robert G. Schwartz, Nov. 19, 1990 (describing lawyers' role as stakeholders in juvenile mediation).

379. For example, in the fishing rights dispute, the mediator assisted the tribes in developing an internal allocation plan and educating them in the use of negotiation. He also met regularly with them to inform them of the progress of the negotiations and promote their involvement in them. *See supra* text accompanying notes 98-102.

There is a disagreement within the dispute resolution community over whether it is appropriate for a mediator to take an active role in ensuring adequate participation and fair results. *Compare* Susskind, *supra* note 253, at 13-18 (advocating that mediators prompt consideration of absent inter-

occur in the wake of a liability determination by the court. Judicial recognition of legal entitlements elevates plaintiffs' status and the authoritativeness of their claims. Moreover, the parties to the deliberation are not dependent solely on their own resources to amass the information necessary to inform the decisionmaking process because issues are jointly investigated, and the process offers the assistance necessary to compile a comprehensive shared factual basis for the remedial decision.[380]

The participatory process used in the consensual remedial formulation model accommodates the value of respect for state and local institutions. The process of negotiation under this model allows for the participation of affected governmental agencies. Participation in the negotiations in no way compromises the agency's authority to judge for itself whether to approve a proposed agreement. Thus, the negotiation process preserves the legitimate decisionmaking authority of state and local governmental officials, while enabling a remedy to emerge that redresses the underlying legal violation.

The informal but structured process of exchanging information, brainstorming, and attempting to reach consensus offers the potential to educate the parties, develop working relationships, integrate differing perspectives, and generate creative solutions.[381] The flexibility and variety of available

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ests, facilitate adequate participation, and encourage fair results) *with* Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind,* 6 VT. L. REV. 85, 97-106 (1981) (mediator should only address process and promote agreement among parties to negotiations). Susskind looks to mediation of international disputes rather than labor mediation as the appropriate model for public consensual dispute resolution. In international mediation, the mediator plays a much more active role in protecting the quality of the process and outcome. *See* Susskind & Ozawa, *supra* note 132, at 272-73.

380. The court or a third-party intermediary may obtain jointly selected experts, facilitate the sharing of information, structure simulations, help the parties commission studies, and otherwise assist in the fact-finding process. *See* L. SUSSKIND & J. CRUIKSHANK, *supra* note 92, at 145-46.

381. In the fishing rights case, the mediator facilitated the joint fact-gathering process and enabled the participants to gather the information and expertise needed to reassess their own interests and develop a solution that could accommodate all of the stakeholders. The parties agreed to pool data concerning Great Lakes fishing. "A tripartite group of biologists from the tribes, the state, and the United States had cooperated in developing consensus recommendations based upon shared information. In addition, the tribes turned over all of their fish catch reports to the state so that the data could be computerized and made available to everyone." McGovern, *supra* note 41, at 464 (footnote omitted). The biologists were then asked to develop a joint computer model of the five critical variables. Negotiations over the model revealed that the biologists were generally in agreement. Thus, the process of developing the model resolved most of the biological issues. *Id.* at 464-65.

Similar fact-finding mechanisms were not utilized in the juvenile mediation, in part because of limitations of time and expense. The negotiations were conducted over a three day period. They were preceded by a period of about two months of preparation and consultation with the mediator. The participants attempted to compensate for this limitation by creating a long-term process that would develop a shared information base. *See* Schwartz, *supra* note 104, at 6; Agreement with Regard to Overcrowding at the Philadelphia Youth Study Center 3 (copy on file at *The Georgetown Law Journal*). These limitations affected both the adequacy of the participation and the reasoned quality of the decisionmaking process.

forms of involvement of public consensual remedial formulation enhance the opportunity for meaningful participation by a wide variety of participants.[382] It also provides a structure that can accommodate the effective involvement of large numbers of people.[383]

The process of collaborative decisionmaking used in both examples enables the parties to develop a set of norms that can be used to evaluate the adequacy of any proposed remedy.[384] These norms emerge from the process of identifying the interests of the various participants in the process. They provide the basis for evaluating the information gathered through the process and accommodating the varying perspectives of the participants. If the result is justified in relation to the norms identified and information gathered by the parties, it satisfies the legitimacy norm of reasoned processes of decisionmaking.

Finally, the consensual remedial formulation model accommodates the norm of judicial impartiality by insulating the judge from the negotiation process. At the same time, the mediators who do assist in the remedial negotiations are not charged with the responsibility of recommending a remedy or assessing the adequacy of the participants' actions for the court, thus protecting the remedial process from some of the perceptions of unfairness associated with the expert remedial formulation.[385]

There are several aspects of the public dispute resolution model that detract from the reasoned character of the decisionmaking process. The process of reaching consensus may proceed based on pure bargaining rather than through principled decisionmaking. Consequently, the result of the negotiation process may satisfy the participants in the negotiation and yet fail to conform to the requirements of the particular statute or constitutional provision at issue.[386] The public and the court may not be informed of the basis

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382. *See* White, *supra* note 223, at 40-41 (open-ended, informal procedures more accessible to those outside professional, dominant culture than adversary, rule-bound processes).

383. *See* L. SUSSKIND & J. CRUIKSHANK, *supra* note 92, at 175 (consensus building can take place among large groups of participants). Although Harter proposes 15 to 25 as the limit on the number of individuals who can successfully participate in a negotiation, Harter, *The Role of the Courts in Regulatory Negotiation—A Response to Judge Wald,* 11 COLUM. J. ENVTL. L. 51, 56 (1986), he provides no basis for this particular number. Susskind and McMahon disagree with this limitation and describe several cases in which public consensual dispute resolution achieved consensus among groups of significantly more than 25. *See* Susskind & McMahon, *supra* note 133, at 155-56.

384. For example, in the juvenile mediation, the participants focused on the following major interests: achieving a system that insures care for youth and public safety; reducing the Youth Study Center population; integrating the courts into one system; developing objective criteria; matching resources to needs; doing a better job with current dollars; and coming to agreement. Minutes, *supra* note 105, at 7.

385. *See supra* note 351 and accompanying text.

386. *See* Fiss, *Against Settlement*, *supra* note 175, at 1085; Resnik, *supra* note 330, at 554; *cf.* Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA's*

upon which a particular option was adopted or rejected, or, even worse, the interests of less powerful groups may be coopted or ignored in the process of producing an agreement.[387] Parties who might otherwise insist on realization of substantive norms may be induced to compromise their interests by the threat of confrontation with others.[388]

The process of public consensual dispute resolution also fails to ensure that the judge is in a position to determine whether the remedy emerging from the negotiations adequately remediates the underlying substantive norm. As with expert remedial formulation, the judge is insulated from the entire process of formulating the proposed remedy. Indeed, in the juvenile mediation experiment, the agreement of the parties constituted the only basis for the remedy's adoption. The court's minimal role in evaluating the adequacy of the process and outcome of remedial development poses the risk that the remedy will be rubber stamped, even if it was reached unfairly or fails to effectuate the underlying norm.

Finally, the consensual remedial process provides no assistance to the court in the event that the parties are unable to reach agreement. In this event, the court must simply start from scratch, forced to adopt one of the other remedial processes despite their legitimacy deficits. Thus, consensual remedial decisionmaking fails to address adequately certain aspects of the public remedial legitimacy norms.

IV. A MODEL OF PUBLIC REMEDIAL DECISIONMAKING

This section proposes a deliberative model of public remedial decisionmaking that builds on both the strengths of public consensual dispute resolution and civic republicanism's celebration of deliberation as a mechanism for generating fair and just decisions.[389] Under this model, the court's role is to structure a deliberative process whereby the stakeholders in the public dispute develop a consensual remedial solution using reasoned dialogue, and to evaluate the adequacy of this process and the remedy that it produces.[390]

Woodstoke Standards, 18 ENVTL. L. REV. 55 (1987) (offering similar criticism of regulatory negotiation).

387. *See* Amy, *The Politics of Environmental Mediation*, 11 ECOLOGY L.Q. 1 (1983); Delgado, Dunn, Bron, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1394-95; Fiss, *Against Settlement*, *supra* note 175, at 1076-78.

388. *Cf.* Abel, *The Contradiction of Informal Justice*, in 1 THE POLITICS OF INFORMAL JUSTICE 267, 280-95 (1982); Delgado, Dunn, Bron, Lee & Hubbert, *supra* note 387, at 1370.

389. *See supra* text accompanying notes 136-37.

390. *Cf.* R. BURT, *supra* note 137, at 124 ("The touchstone for court interventions in these disputes is to foster and even to provoke prolonged conversation between the immediate parties—not to offer an apparently definitive resolution to the dispute which effectively shuts it off."); Spiegel, *supra* note 137, at 1013 (advocating the creation of structures to create dialogue, rather than scripts that prescribe remedies); Tribe, *supra* note 137, at 301 ("The judiciary's most important role be-

This model forces the court and the participants in the public remedial process to take account of each of the norms of legitimate remedial decisionmaking.

The deliberative model set forth in this section provides the outline of a process that can serve as a template for structuring and evaluating the adequacy of the remedial process in cases exhibiting the characteristics of public remedial decisionmaking set forth in Part I.[391] This section begins with an overview of the deliberative model. It then explains and justifies the choices reflected in the model, both in relation to the norms of public remedial decisionmaking and to possible objections to its adoption. This model is not intended as a blueprint that can be applied uniformly in every context, but rather as a framework that can be adapted to the demands of particular remedial settings and a starting point for further study and elaboration.

A. DESCRIPTION OF THE DELIBERATIVE MODEL: STRUCTURE, PLAYERS, AND ROLES

The deliberative model of remedial decisionmaking largely follows the structures and processes used in public consensual dispute resolution, with several important additions and modifications designed to address the limitations of the consensual model identified above. The model follows the three stages of prenegotiation, negotiation, and implementation.[392] As in public consensual dispute resolution, the stakeholders participate in a process of attempting to reach consensus about a remedy. Unlike public consensual dispute resolution, however, the court plays a significant role in setting up the deliberations, establishing their normative parameters and procedural standards, and evaluating their substantive and procedural adequacy. The deliberative model also addresses the court's role in the event that the parties do not reach a consensual remedy.

1. The Structure

The deliberative process begins with the court's finding of liability. The court then defines the structures and processes by which the remedy is to be developed. The court's first step is to articulate the normative parameters of the remedial enterprise, which are determined by the liability norms that

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comes that of giving structure to the evolution, or rather participating in the structure of the evolution, of social norms and understandings as they come to find expression in the law.").

391. These characteristics include: (1) generally articulated liability norms that do not dictate the content of the remedy; (2) predictive, problem oriented fact-finding; (3) multiple participants, organizations, and systems; and (4) participation as an independent value. The deliberative model need not be used in situations involving a simple negative injunction, such as the invalidation of a statute or the reinstatement of an illegally discharged employee. *See supra* text accompanying notes 116-19.

392. *See supra* text accompanying notes 356-72.

have been violated. This entails defining the targets of the remedial process.[393] Although these normative parameters do not provide the basis for selecting among the remedial alternatives designed to realize the liability norm, they do define the remediation norm as both the driving force and constraint of the deliberative process.

The process then moves to the prenegotiation stage. The judge performs several important functions at this stage. First, she introduces and endorses the deliberative model as the method of remedial formulation. Second, with the assistance of the parties, she performs an initial assessment of the individuals and organizations whose participation in the remedial stage is necessary to developing and implementing a fair and workable remedy.[394] The judge then invites these participants to join in the formulation of the remedy.[395]

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393. For example, a judge finding that the conditions of confinement in a prison violate the eighth amendment may list the aspects of prison life that need to be remedied in order to eliminate the violation, such as violence, environmental sanitation, medical care, and overcrowding.

394. *Cf.* Brunet, *A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria,* 12 GA. L. REV. 701, 719-26 (1978); Rhode, *supra* note 29, at 1253. The issue of the appropriate standards and processes for determining who should participate at the remedial stage of public law litigation is an important one that has not been adequately addressed in the literature and warrants further study. Under the deliberative model, the net is cast broadly to include the range of individuals directly affected by, responsible for, or in a position to block implementation of a remedy. Instead of attempting to create a substantive standard to address the management problems inherent in broadly defined participation—an effort that has been notably unsuccessful in defining a limiting principle for intervention—the deliberative model establishes a process to identify the actual participants in the decisionmaking process and structure their involvement. For example, in situations involving groups or individuals with overlapping interests, a facilitator can assist in identifying categories of interested participants, who then select representatives to participate directly in the deliberations. *See supra* notes 357-59 and accompanying text. These participants are then accountable to the constituency they represent.

395. For example, in the fishing rights cases, the court determined that the State represented competing interests: state commercial fishers, the sport fishing and tourism industry, Indian citizens living outside the reservations, and the public peace. At the outset of the negotiations, the court named the groups of state fishers as litigating amici: they had a participatory role but could not veto a settlement. McGovern, *supra* note 41, at 463. The issue of nonparty involvement in remedial decisionmaking is addressed more fully below. *See infra* notes 442-43 and accompanying text.

Several procedural mechanisms are available to enable the participation of actors who were not involved in the liability determination. First, those actors can intervene as parties at the remedial stage under FED. R. CIV. P. 24. *See, e.g.,* United States v. Crucial, 722 F.2d 1182, 1190-91 (5th Cir. 1983) (allowing intervention to separate organization of parents and organization claiming that county failed to fashion adequate educational program for minority students); Berkman v. City of New York, 705 F.2d 584, 588 (2d Cir. 1983) (Firefighters' union allowed to intervene at remedial stage in Title VII case to participate in design of nondiscriminatory firefighters' test). Second, FED. R. CIV. P. 19(a) provides for the joinder of parties in whose absence "complete relief cannot be accorded among those already parties." Courts can also retain parties absolved at the liability stage to assist in the development of a remedy. *See* Zipes v. Trans World Airlines, 455 U.S. 385, 400 (1982) (directing union to remain in litigation as a defendant "so that full relief could be awarded to the victims of the employer's . . . discrimination"); Morgan v. Kerrigan, 509 F.2d 580, 582 n.4 (1st Cir. 1974) (requiring statewide education officials who did not participate in local segregation to remain as defendants to help devise remedies). Third, courts can appoint litigating amici, as in the

Third, she oversees a process by which the participants select a third party facilitator or mediator to assist them in structuring and engaging in the process of consensual decisionmaking.[396]

Fourth, the court outlines for the participants the characteristics of the process by which they are to attempt to craft a remedy. These include: (1) direct involvement by representatives of the stakeholders in the deliberative process; (2) consideration of each proposed remedial alternative using reasoned argument supported by facts introduced in the deliberations; (3) development of a remedy that is reasonably calculated to redress the violations in each of the areas identified by the court; (4) development of a remedy that is acceptable to the participants in the remedial process; and (5) maintenance of daily minutes, to be reviewed by the group.[397] The court also informs the participants as to the standards it will use to assess the adequacy of the proposed remedy. Finally, the court, in consultation with the participants and the facilitator/mediator, establishes deadlines for the completion of the deliberative process and the submission of a proposed remedy.[398]

The facilitator/mediator then assists the participants in structuring the decisionmaking process, educating themselves about the steps of the deliberations, defining the various roles of the participants and the third party, and undertaking the deliberations. The stages of the deliberative process correspond to those identified in the description of public consensual dispute resolution: identifying the relevant stakeholders, assuring adequate representation by participants in the deliberations, defining ground rules and an agenda, engaging in joint fact-finding, identifying interests and norms, brainstorming on possible solutions, and selecting a remedy that best accommodates these interests and norms in light of the factual record.[399]

If the participants reach a consensus, they then reduce the agreement to

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fishing rights case described above. Fourth, the court can consult informally with various participants and include them in the deliberations without any formal status.

396. *See supra* note 93 and accompanying text; *cf.* L. SUSSKIND & J. CRUIKSHANK, *supra* note 92, at 172 (in social services block grant dispute, mediator was selected by a mediator-selection committee that included five of the initial organizers from each of four interest groups).

A facilitator or mediator is necessary in public remedial decisionmaking for several reasons, some of which may not apply in other public dispute resolution contexts. First, the parties must overcome hostilities that are likely to carry over from the adversarial determination of liability and will likely require assistance in interacting, at least initially. Second, the issues and number of parties involved typically introduce a level of complexity that requires assistance. Third, many of the participants are likely to be inexperienced with the processes of consensual dispute resolution. Finally, third-party involvement is necessary to ensure that the procedural requirements established by the court are followed. For a discussion of the distinction between a facilitator and a mediator, see *supra* note 371.

397. The justification for these instructions is discussed below. *See infra* Part IV.B.

398. Deadlines are important, both to provide a structure for the process and to limit the capacity of participants to use delay strategically. *See infra* note 432 and accompanying text.

399. *See supra* notes 356-72 and accompanying text.

writing, often with the assistance of the facilitator/mediator. Remedies negotiated by representatives must be approved by their constituent organizations or groups. The agreement is then presented to the court, along with a jointly filed supporting memorandum, the minutes of the deliberations, and any factual reports or information considered by the participants in reaching their decision. The court then holds a public hearing on the proposed remedy, at which objections to the remedy may be presented to the court, including challenges to the remedy's factual foundation. The court then evaluates the remedy in terms of the adequacy of the deliberative process—its compliance with the principles articulated to the participants at the outset of the deliberations, its responsiveness to the concerns raised through the deliberations, and its capacity to redress the underlying legal violation—and issues an opinion justifying its conclusions. If the judge finds the process or outcome of the deliberations inadequate, she remands the remedy to the participants to address the bases for her concern.[400]

If the parties are unable to reach consensus through the deliberative process, they submit to the court a document setting forth the areas in which they have reached agreement, the information gathered in the course of the deliberations, the minutes of the deliberations, and the areas in which agreement has not been reached. The participants may also present the court with separate factual submissions, arguments, and proposed remedial solutions. The court then holds formal hearings on the disputed aspects of the remedy, rules on the adequacy of any agreements produced through the deliberative process, and formulates a remedy for the remaining areas, based on the information produced through the deliberations, the articulated views of the participants, and any additional information deemed necessary.[401]

2. The Players and Their Roles

The players in the deliberative decisionmaking process include the judge, a neutral facilitator/mediator, a recorder of the deliberations, the parties to the litigation, representatives of the stakeholders, and the parties' lawyers.

The judge's role consists of structuring the decisionmaking process, defin-

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400. The court's adoption of the remedy depends on the adequacy of both the process and the outcome. Without an adequate process of fact-gathering and deliberation, the adequacy of particular remedial choices may be difficult to assess. More importantly, a remedy reached through unfair or exclusive processes violates norms that are important to preserving the legitimacy of the remedial process.

401. It is important that, in the event consensus cannot be reached, the court impose a remedy based on the deliberations rather than attempt to produce an agreement among the lawyers through pure bargaining. The traditional bargaining process is unlikely to produce a reasoned remedy. *See supra* text accompanying notes 327-28. Moreover, the possibility that the parties may resort to bargaining poses the risk of unraveling the central commitment to reasoned decisionmaking from the outset of the deliberations.

ing the principles for assessing the adequacy of the process and any proposed remedy, overseeing the selection of a facilitator/mediator, evaluating the adequacy of the decisionmaking process and the proposed remedy, and deciding upon a remedy in the event the stakeholders fail to reach a consensus.[402] Thus, the deliberative model does not eliminate the court's role in formulating an appropriate remedy; instead, it recasts the court's involvement into the more familiar but still challenging tasks of establishing standards, structuring the process, and evaluating the process' conformity to substantive and procedural norms.[403]

The facilitator/mediator's role is to assist the participants in setting up the deliberative process, adhering to the guidelines established by the court, communicating with one another, developing the necessary factual foundation for the deliberations, identifying possible remedial solutions, and developing a consensus. She may meet individually with the participants to assist them in defining their interests and goals, selecting representatives, and dealing with internal conflicts.[404] The role and intensity of involvement of the third party varies depending on the demands of the particular case—the degree of complexity of the issues, the number of parties, the level of hostility and mistrust among the stakeholders, and the sophistication of the participants.[405] The facilitator/mediator always plays a crucial role in ensuring

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402. The court's role in the deliberative process is analogous in important respects to the court's role in bankruptcy reorganization. *See generally* M. BIENENSTOCK, *supra* note 317. The bankruptcy system establishes a structure supervised by the court that enables multiple parties with diverse interests to achieve a consensus plan for reorganization. The court evaluates the adequacy of a reorganization plan, both in terms of its conformity with the requirements of the Bankruptcy Code, 11 U.S.C. § 1129(a)(2) (1988), and its feasibility. The court's feasibility determination involves a substantive evaluation of a negotiated plan involving a myriad of fact-specific issues and predictions about how some actors, particularly the debtor, will behave in the future. If a consensus plan cannot be reached, under certain circumstances the court undertakes the task of valuing the firm for purposes of determining whether the plan is fair, equitable, and does not discriminate unfairly. *Id.* § 1129(b). If a plan cannot be confirmed, then the case may be converted to a Chapter 7 bankruptcy, resulting in the liquidation of the company. *Id.* § 1112(b)(5).

Most reorganizations involving large, publicly held corporations are achieved through a consensual plan. *See* LoPucki & Whitford, *supra* note 317, at 157. Multiple parties with divergent interests work out a solution that is then assessed by the court in relation to the requirements of the Bankruptcy Code. For a description of the aspects in which the bankruptcy reorganization process deviates from the deliberative model, see *supra* note 317.

403. *Cf.* Wald, *Negotiation of Environmental Disputes: A New Rule for the Courts*, 10 COLUM. J. ENVTL. L. 1, 17 (1985).

404. In a model negotiation developed by Susskind and Cruikshank based on the fishing rights case, the mediator met with the tribes to negotiate an intertribal allocation plan. The mediator perceived the intertribal negotiations to serve several functions. They resolved potential conflicts between the tribes that would exist regardless of the results of the broader negotiations, educated the tribal negotiators in their negotiation skills, and encouraged the state to "bargain seriously." L. SUSSKIND & J. CRUIKSHANK, *supra* note 92, at 166.

405. *See id.* at 149-50. Susskind and Cruikshank distinguish between different roles depending on the degree of the third party's procedural involvement. A facilitator focuses almost entirely on process, taking care of the mechanics of negotiation and promoting communication and under-

that the process abides by the standards articulated by the court, that participants have the opportunity to communicate their views, and that the process proceeds based on reasoned argument.[406]

The recorder's role is to prepare minutes reflecting the issues, data, proposals, and progress of the deliberations, and to revise those minutes in light of corrections offered by the deliberating group.[407] The identity of the recorder may vary, but it is important that the individual be perceived as neutral by the participants. In some situations, the facilitator/mediator may be able to perform this role.

The stakeholders include parties and nonparties responsible for, directly affected by, or in a position to block implementation of the remedial outcome. Their role is to work with the facilitator/mediator and, when appropriate, their lawyers[408] to identify appropriate representatives to conduct the discussions, identify ground rules for the deliberations, develop a factual foundation for the discussions, facilitate their participation in the deliberations through their representatives, and determine whether to approve any agreement reached through the deliberations. The extent of the stakeholders' involvement will vary. Some may be involved only with respect to discrete issues. If there are numerous stakeholders, the group may designate representative subcommittees to develop remedial options to present to the larger group.[409] Factors relevant to determining the scope of participants' involvement include whether they have legal interests that may be affected by the remedy, the degree to which they are responsible for or affected by a particular aspect of the remedy, their knowledge of particular aspects of the remedy, and the extent to which their agreement is a necessary component of an effective solution.

The deliberative model revises the concept of legal representation devel-

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standing. *Id.* at 152. A mediator takes a more active role in the substantive development of the agreement without removing control of the outcome from the parties. *Id.* at 162-63.

406. This role conflicts with a vision of the facilitator's role as simply serving the interests of the parties and promoting an agreement that satisfies those interests. *See* Stulberg, *supra* note 379, at 97-106. This approach would undercut the court's capacity to promote reasoned processes of decisionmaking and to control for unequal political power. Moreover, because the deliberations take place under the supervision of the court, some of the concerns underlying the insistence on mediator agnosticism concerning the quality and substance of the deliberations are less pressing. It is the court, rather than the mediator, that sets the terms of the negotiations. Moreover, the mediator is accountable to the court as well as to the participants in the negotiations.

407. The minutes are not verbatim transcripts of the discussions. In fact, they need not reflect the identity of the proponents of various positions. Their importance is to reflect the interests, values, factual information, proposed solutions, and justifications for particular decisions by the group.

408. Nonparty participants need not be represented by counsel to participate in the deliberations.

409. *See, e.g.*, L. SUSSKIND & J. CRUIKSHANK, *supra* note 92, at 172-73 (in dispute over social service block grant allocations involving over one hundred participants, subcommittees with two people from each area of interest were assigned to generate possible responses to agenda items).

oped under the adversary model.[410] Under the deliberative model, the lawyer's role is to facilitate her clients' effective participation in the process of remedial decisionmaking. This role may involve assisting individuals or groups in organizing and selecting representatives.[411] In some instances, such as when the client has the capacity to articulate her own interests and to participate fully in the dialogue, the lawyer may simply monitor the progress of the discussions, provide ideas, and draft proposals implementing the agreements reached.[412] In other cases, when the client is unable to participate fully in the deliberations, the lawyer may play a more substantial role in the deliberations.[413] She may act as the representative of the clients' interests and perspective in the deliberative process. Lawyers acting in this capacity are subject to the accountability requirements governing any representative speaking on behalf of a group or organization under the deliberative model.

B. EXPLANATION AND ASSESSMENT OF THE DELIBERATIVE MODEL

The deliberative model is designed to enable the process of remedial decisionmaking to satisfy the basic norms of legitimate public remedial process. It incorporates the strengths of the public consensual dispute resolution model—the emphasis on meaningful participation by the stakeholders, the flexible but structured decisionmaking processes, the maintenance of judicial impartiality, and the involvement of state and local governmental actors.[414] There are several important differences, however, between public consensual dispute resolution and the deliberative model that enhance the capacity of the decisionmaking process to satisfy the norms of legitimate public remedial process.

First, the model serves the norm of reasoned decisionmaking by requiring that the participants base any agreement on reasoned argument in relation to identified norms. Pure exchange is not sufficient.[415] This does not mean that

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410. *See supra* text accompanying notes 213-17.

411. *See* Hoffman-LaRoche Inc. v. Sperling, 110 S. Ct. 482, 485 (1989) (counsel assisted employees in forming a group to challenge the legality of employers' reduction in force).

412. For example, in the fishing rights mediation, the lawyers were "assigned the task of drafting a document consistent with the commitments the parties had made to each other." L. SUSSKIND & J. CRUIKSHANK, *supra* note 92, at 167-68.

413. The Pennsylvania juvenile justice system mediation is a good example of such a situation. *See supra* notes 103-07 and accompanying text. In that mediation, members of the plaintiff class—juveniles incarcerated in the Youth Study Center—were both unavailable for the negotiations because of their incarceration and limited in their capacity to participate because of their youth and relative unsophistication.

414. *See supra* notes 374-85 and accompanying text.

415. Some have argued that insistence on reasoned decisionmaking may complicate the process of reaching consensus. *See* Fitts, *Vices of Virtue, supra* note 136, at 1636-37 (arguing that ideologically tinged discussions tend to make compromise and consensus more difficult among elite political actors and the public). Others express more confidence that sharing competing perspectives can bring about important shifts and enable us to become less rigidly attached to our own perspective.

agreement and parties preferences can play no role in the deliberations. Agreement can be an independent value in the remedial context if it is needed to achieve implementation of the remedy. Moreover, there may be situations in which the only bases for selecting among several remedial solutions are the preferences of the parties. In these situations, agreement may appropriately be used to distinguish among remedial solutions, provided that the remedy adopted effectuates the liability norm and meets the other process requirements of the deliberative model.

This insistence on reasoned decisionmaking disciplines the participants and the judge to reach results based on the merits of particular remedial proposals, rather than on considerations of power or convenience. Moreover, the deliberative model provides a normative dimension to the remedial formulation process. The process and outcome are not purely private; their adequacy must be publicly assessed by the court in relation to substantive norms. The deliberative model produces a record of the deliberations, which provides a basis for assessing the adequacy of a proposed remedy. Indeed, the deliberative process informs the judge's normative assessment, and thus better equips the court to fulfill its interpretive function at the remedial stage in public law litigation.[416]

The deliberative model further serves the norm of reasoned decisionmaking by structuring the current practice of informally involving multiple actors in remedial development to provide the opportunity for all participants to respond to all of the arguments presented. The model also provides a mechanism for exposing the court's role in structuring the remedy to review by both the public and the appellate courts. The procedural and substantive standards articulated by the trial court at the outset of the deliberations, and the conformity of the remedial process to those standards, provide a basis for meaningful appellate review of public remedial decisionmaking.[417]

Over time, courts' decisions assessing the adequacy of particular remedial efforts may reveal patterns of effective remedial processes and outcomes in particular institutional contexts. These decisions have the potential to contribute to the normative development of remedial process. They may also

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See Lesnick, *A Perspective on Perspectives*, 1991 DUKE L. J. (forthcoming). One's view of the transformative potential of deliberation appears itself to be a product of perspective. In any case, the range of ideological debate in the remedial context is constrained by several factors. First, the court has determined the normative framework for the enterprise, which is not open for negotiation. Second, the goal of the process is implementing rather than establishing legal norms. Third, agreement is itself an independent, although not dispositive value. Finally, the precedential value of the remedial decision is limited.

416. *See* L. SUSSKIND & J. CRUIKSHANK, *supra* note 92, at 170.

417. The issue of the role of appellate courts in public law litigation is the subject of a forthcoming article.

produce greater clarity concerning the substantive norms informing the remedial decisionmaking in particular contexts.

Second, the deliberative model avoids many of the hazards of informality by locating the informal interactions of the participants within a framework of judicially established standards and oversight. As in formal jury deliberations, the participants become part of the judicial process, and are thus induced to act based on reason rather than bias.[418] The deliberative model, like formal adjudication, recognizes and accounts for inequality by requiring reasoned responses to the views of all participants.[419] Disagreements about the appropriate means of realizing values are not concealed, but rather provide the mechanism for forging an informed consensus.[420] The combination of formal and informal processes minimizes the risk that informality will leave inequality unchecked. Furthermore, because participants in the process are accountable both to their respective constituencies and to the court, the deliberative model minimizes the risk of cooptation.

It is the judicial supervision of informal decisionmaking processes that enables the deliberative model to strike a balance that accommodates the legitimacy norms of participation, impartiality, reasoned decisionmaking, and remediation. This juxtaposition of collaborative and coercive structures and processes, however, raises a number of potential challenges to the propriety and viability of the deliberative model.

How can the court ensure compliance with norms such as meaningful participation and reasoned decisionmaking if it does not participate directly in the deliberations and is involved only at the outset and the conclusion of the deliberations, and in the event of breakdown of the remedial process? In fact, no system or set of rules can ensure compliance with these norms, and attempts to achieve fairness and equality by instituting rigid rules and standards only enhances the possibility of strategic manipulation, perversion of the process, and reemergence of inequalities in new and less visible forms.[421]

Instead of a rule-based approach, the deliberative model utilizes actors, processes, and incentives to promote compliance with the norms of legitimate remedial process. The court introduces incentives for the participants

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418. *See* S. KASSIN & L. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 185 (1988); Delgado, Dunn, Brown, Lee, & Hubert, *supra* note 387, at 1370.

419. *But see* Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 *passim* (1974) (showing that adversary system systematically favors repeat players).

420. *See supra* text accompanying notes 365-69.

421. *See* Galanter, *supra* note 419, *passim* (showing the long-term advantages of "repeat players" in the adversary system); *cf.* R. BURT, *supra* note 137, at 134 (a fixed hierarchy of authority is destructive of reasoned, effective, and dynamic decision making); Spiegel, *supra* note 137, at 1010-14 (rigid ethical rules tend to stifle rather than expand attorney-client communication); Tribe, *supra* note 137, at 286, 306-08 (rule-oriented adjudication avoids important societal discourse about changing norms).

to aspire to norms such as meaningful participation and reasoned decisionmaking by making it clear that the process and results will be evaluated in relation to them.[422] The facilitator/mediator plays a crucial role in setting up and monitoring a process that conforms to these norms. She takes steps to assure that the views of less powerful participants are addressed. The facilitator/mediator injects into the ongoing discussion the importance of reasoned decisionmaking and prompts the participants to offer persuasive justifications for their views. Lawyers may also play an important role in protecting the fairness of the process.[423] Finally, the requirement that each stakeholder accept the result of the process plays a critical disciplining role. No interest can be effectively excluded from the process without jeopardizing the success of the proposal.

Perhaps the most fundamental objection to the deliberative model is the argument that it just will not work. People will refuse to cooperate, will abuse the process, and will never reach consensus. The court simply cannot force the parties to cooperate, and yet cooperation is essential to the success of the deliberative model.

The most powerful response to these challenges is the emerging remedial practice itself. The deliberative model *has* worked, at least to the extent of producing consensus on a public law remedy among diverse stakeholders who were themselves skeptical about the process and its prospects for success.[424] Thus, stakeholders can and do reach consensus in situations in which their involvement in a cooperative process is required, particularly if they have independent incentives to participate in the process.[425]

Such incentives are often present in the remedial context, where the parties face certain imposition of a court-ordered remedy if they are unable or unwilling to deliberate. The defendants have an interest in maintaining some control over the remedial process and avoiding the imposition of a remedy designed unilaterally by the court. The plaintiffs have an interest in involving the defendants in the remedial process because it enhances the likelihood of developing a workable remedy that will be promptly implemented. Nonparties have an incentive to participate lest they be frozen out of a process that will dramatically affect their interests. In contrast, even limited experience with the adversary process at the remedial stage teaches that the parties'

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422. If the deliberative model were widely adopted, the seriousness of the court's monitoring role would be easier to convey, because it would be reflected in judicial decisions assessing the adequacy of public remedial processes.

423. *See supra* notes 410-13 and accompanying text.

424. *See supra* notes 92-115 and accompanying text (Great Lakes fishing rights dispute and Pennsylvania juvenile justice mediation).

425. *Cf.* Sullivan, *The Difficulties of Mandatory Negotiation (the Colstrip Power Plant Case)*, in RESOLVING ENVIRONMENTAL REGULATORY DISPUTES 56, 73-74 (1983) (comparing a successful mandatory negotiation with one that failed to produce an agreement).

interests are unlikely to be served through the adversary model.[426] The threat of formal adjudication predisposes participation in deliberation.

There are additional factors favoring the successful marriage of deliberation and judicial supervision. The deliberative process identifies and brings to the forefront the interdependence of interests of the participants. Some participants must deal with each other regularly over a long period of time and depend on each other's cooperation to satisfy personal and institutional objectives. To the extent that the participants share the desire to reduce or eliminate judicial involvement in their institution, they are dependent on each other's willingness to cooperate in the formulation of an acceptable remedy. Yet, factors such as their formal institutional positions, lack of structured contact, and fragmented authority reduce their capacity to act on this interdependence in the absence of the type of supplementary structure provided by the deliberative model.[427]

Involvement in the deliberative process also enhances the possibility of cooperation in the implementation of the remedy by initially reluctant participants. By involving the participants in setting up a procedural mechanism for establishing the remedy, the deliberative model enhances the perceived legitimacy and acceptance of the remedy ultimately adopted by the court.[428] The process of trying to develop a consensual resolution of the remedial dispute increases the participants' identification with the problem-solving group, their commitment to the process, and their desire to reach a consensual resolution.[429] The existence of hostile relations between the parties does not prevent their productive involvement, although it may bear on the particular form of the deliberations.[430] The deliberations also offer such tangible benefits as expertise and resources that induce involvement. As the delibera-

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426. *Cf.* Scholtz, *Cooperation, Deterrence, and the Ecology of Regulatory Enforcement,* 18 LAW & SOC'Y REV. 179, 185-86 (1984) ("the expected rewards for both agency and firm . . . from mutual cooperation exceed the punishment . . . that an evading firm and deterring agency can expect to receive when they confront each other in legalistic battles"); Winter, *Bargaining Rationality in Regulation,* 19 LAW & SOC'Y REV. 219, 236-37 (1985) ("Cooperation, negotiation, bargaining, bartering are not only the rule in regulatory law enforcement, but given the reality of social life, they are the preferred way of dealing with regulatory problems.").

427. *See* Sturm, *supra* note 26, at 837-46.

428. *Cf.* Fitts, *Can Ignorance Be Bliss?, supra* note 136, at 967-68 (identifying procedural advantages to having people agree to procedure up front, before they can predict substantive outcome).

429. *See* Eisenberg, *supra* note 213, at 679-80. For a discussion of the conditions fostering the evolution of cooperation in a two-party setting, see R. AXELROD, THE EVOLUTION OF COOPERATION (1984). However, the opportunities for strategic behavior increase dramatically in a multiparty setting. For a discussion of the features of the deliberative model that limit the opportunity for at least some forms of strategic behavior, see *supra* notes 431-32 and accompanying text.

430. L. SUSSKIND & J. CRUIKSHANK, *supra* note 92, at 188 ("Many disputants assume that because relations between the parties are hostile, productive negotiations cannot take place. Negotiation researchers have shown that this is not true. Negotiations can proceed even when the parties have no trust in each other at all.").

tive process unfolds and the parties devote time and energy to it, they are likely to become committed to its success. Thus, the deliberative process has the potential to counteract the polarization created by the adversary system and the liability determination.

Furthermore, the deliberative model does not assume or require that consensus be reached. The model provides the backstop of a judicially-imposed remedy in the event the participants are unable to reach agreement. Although a court-imposed remedy may undermine norms of remedial legitimacy, the court's adoption of this role derives support from the parties' failure to reach agreement. Moreover, the court's remedial decision following unsuccessful deliberations retains some of the values of the deliberative model. Prior to the issuance of a court-ordered remedy, the participants will have had a substantial opportunity to express their views both informally through the deliberations and in formal hearings. The court's remedial decision, therefore, will be informed by the data, diversity of perspective, and reasoning produced by the deliberations.

Another possible objection to the deliberative model is the possibility that the participants may either attempt to use the process as a tool for delay, or attempt to formalize or subvert the deliberations. The possibility of strategic manipulation of the remedial process, however, exists under all forms of remedial decisionmaking.[431] Under the deliberative model, the facilitator/mediator and the court can minimize the opportunity for these tactics by establishing and enforcing deadlines for the negotiations.[432] If it becomes clear that the deliberations are being stonewalled by a particular participant, the other participants may seek the court's assistance in either enforcing the requirements of deliberation or, if necessary, imposing a remedy based on the record produced by those who were involved in the deliberations.

The deliberative model calls upon the court to establish a supplemental structure to formulate the remedy. This poses the question of the source of the court's authority to establish and manage this process. This aspect of the model, however, is neither novel nor problematic. The court's well-established authority to use its coercive powers to provide meaningful remedies—the foundation of the court's involvement in public law remediation[433]—justifies the imposition of supplemental processes designed to remedy legal

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431. For a discussion of how defendants act strategically when the court assumes the director approach to remedial formulation in prison cases, see Sturm, *supra* note 26, at 887-89.

432. The ability to prevent sustained delay and subversion of the deliberative process depends on the court's willingness to use its coercive sanctions. Although judges have been reluctant to use their coercive powers to enforce their decrees, many judges have used their contempt power to prompt defendants' compliance. *See* Sturm, *supra* note 26, at n.353. Judicial reluctance to enforce orders will limit the potential success of any remedial endeavor. *See* M. HARRIS & D. SPILLER, *supra* note 53, at 20.

433. *See supra* notes 124-27 and accompanying text.

violations.[434]

The deliberative model also raises the related issue of the court's authority to order direct involvement by the stakeholders in the deliberative process. Does the requirement of stakeholder participation unduly interfere in the attorney/client relationship? Does it subject participants to the risk of further litigation? Does it coerce parties into settlements? Although these concerns are legitimate, they can all be adequately addressed within the framework of the deliberative model. First, there is support for the court's inherent authority to require direct party appearance at court-ordered settlement negotiations as early as the pretrial stage.[435] Second, the deliberative model does not prescribe the precise form or extent of the stakeholder's participation. Because the lawyer and client are free to determine the division of roles in the deliberations, the autonomy of that relationship is preserved. Finally, the risk of adverse legal consequences flowing from direct involvement is less pressing at the remedial stage because liability has already been determined. Moreover, the court can take steps to minimize this risk by limiting the use or admissibility of the record of the deliberative process to remedial formulation.[436]

The deliberative model's insistence that different branches or sub-groups within a hierarchical governmental system participate separately in the remedial process presents another area of concern. Can the court, consistent with the norm of respect for state and local government, insist that the government speak with other than one voice? Is there a justification for deviating from the traditional hierarchical model of governmental authority?[437] There

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434. Indeed, even in the pretrial context, the Supreme Court has recognized that courts have inherent authority, buttressed by the Federal Rules of Civil Procedure, "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Hoffman-La Roche v. Sperling, 110 S.Ct. 482, 487 (1989) (quoting Link v. Wabash Railroad Co., 370 U.S. 626, 630-31 (1962)).

435. *See* G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 652 (7th Cir. 1989) (en banc) (district court had power to order represented litigant to appear in person at pretrial conference); *In re* LaMarre, 494 F.2d 753, 756 (6th Cir. 1974) (to compel appearance of party's insurer at pretrial conference and to enforce order was well within scope of district court's authority). There were a number of dissenting opinions filed in *Joseph Oat*. Part of the dissents' concern was the majority's reading of Rule 16 of the Federal Rules of Civil Procedure, and the possibility of abuse and unfairness presented by the court's active involvement in pressuring pretrial settlements. *Id.* at 661-62 (Coffey, J., dissenting). This concern is much less weighty at the remedial stage.

436. Judge Becker used this approach in *PARC v. Pennsylvania*. *See supra* text accompanying note 74.

437. This model of governmental authority is reflected in the statutes, executive orders, and opinions vesting litigating authority for all cases in which the United States is a party in the Attorney General. *See* 5 U.S.C. § 3106 (1988); The Attorney General's Role as Chief Litigator for the United States, *supra* note 325. As of 1978, however, "some 31 Executive Branch and independent agencies have been granted litigating authority independent of the Department of Justice." *Id.* at 53. Moreover, this authority has been interpreted to reserve to the agencies substantial control over policy judgments in areas in which the agency has developed special expertise and "in which the agency is vested by law with flexibility and discretion to make policy judgments." *Id.* at 55. The

are several responses to this concern. First, it is important to remember that the deliberative process occurs in a limited set of circumstances—when an organization's normal institutional processes and roles have failed. Deferring to the formal organizational leadership under such circumstances would compromise the basic norms of legitimate public remedial process.[438]

Second, the empirical premise that state and local governments can and do present a unified front in public law litigation is not necessarily accurate. The formalistic conception of a completely organized and centralized governmental structure with a single spokesperson at the top has broken down in the public law litigation context. Different governmental entities have different and sometimes conflicting political and legal interests that frequently lead them to take divergent positions in litigation and regularly prompt judges to provide for separate representation of governmental departments within the same executive branch.[439] Even within a particular institution, such as a prison, groups may have independent interests that are not taken into account by existing structures of government.[440] Moreover, the leaders of governmental agencies held liable for public law violations may lack the formal authority over other branches of government whose involvement is necessary to achieve implementation of the remedy. Under these circumstances, the top-down model of remedial implementation is unlikely to work.

Finally, this concern fails to take account of a fundamental premise of the deliberative model. The deliberative decisionmaking process does not replace the formal governmental structure; it only supplements it for purposes of developing a meaningful remedy. The deliberative structure is both temporary and focused. The court is in effect deputizing the participants in the process as agents of the court to develop and propose a consensual remedy.[441] The decision to approve a consensual remedy remains in the hands of

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deliberative model is not necessarily inconsistent with those cases in which the Attorney General retains sole litigating authority because the Attorney General has the authority to approve or reject the proposed remedy.

438. *See supra* notes 305-06 and accompanying text.

439. *See* R. BURT, *supra* note 44, at 315-22 (detailing differences between Department of Justice and the Department of Health, Education and Welfare in *Pennhurst* litigation).

440. *See* Sturm, *supra* note 26, at 813-46. Indeed, these groups have themselves sued the leadership of their organizations for failing to alleviate illegal conditions and practices in the organizations. For example, guards have brought suit against the commissioner of the department of corrections challenging overcrowding in prisons. *See* Council 13, Am. Fed. of State, County and Mun. Employees v. Pennsylvania, Petition for Review, Commonwealth Court of Pennsylvania (Apr. 3, 1990) (guard union seeking injunctive relief "to ameliorate life-threatening working conditions at the State Correctional Institution at Graterford") (copy on file at *The Georgetown Law Journal*).

441. Thus, the deliberative model builds on the current practice used in both jail and school desegregation cases of calling upon the staff of the defendant organizations to investigate and develop remedies for the court. *See* Smith, *supra* note 33, at 73 (describing the appointment of a special department of the school board to develop a desegregation remedy for the court); Storey,

those with official power to act for the government. Thus, the court is not ordering the restructuring of governmental decisionmaking; it is only requiring that governmental parties fulfill their responsibility to assist the court in developing a fair and workable remedy.

The involvement of nonparties in remedial decisionmaking under the deliberative model presents another potential problem: what if important nonparty stakeholders are unwilling to participate voluntarily in the deliberations? One possible response is to join or retain these actors as parties whose involvement in remedial formulation is necessary to provide complete relief to the parties.[442] Although parties not subject to liability may not be subjected to the same remedial responsibilities as those imposed on a liable party, they may "be retained in the lawsuit and even subjected to such minor and ancillary provisions of an injunctive order as the District Court might find necessary to grant complete relief."[443]

Another possible approach to increasing third-party involvement in the deliberative process is to extend the opportunity to participate to all stakeholders, and to preclude those who refuse to participate from challenging either the process or the resulting remedy. Although this approach avoids the difficulty of coercing participation in the deliberative process, it may result in the exclusion of significant perspectives and information.

Another concern regarding the deliberative model applies equally to any collaborative process involving lawyers: the inconsistency between the collaborative model and the traditional adversary conception of the lawyers' role.[444] The deliberative model, like other forms of collaborative decisionmaking, casts lawyers in a somewhat unfamiliar role. Not only is the lawyer charged with the responsibility of facilitating a collaborative decisionmaking process, in at least some contexts she also takes a back seat to the client's direct involvement in the deliberations. Implementation of the deliberative

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supra note 79, at 159 (describing the creation of a monitoring and enforcement panel including two staff from the department of corrections).

442. Rule 19(a) of the Federal Rules of Civil Procedure provides for the joinder of parties in whose absence "complete relief cannot be accorded among those already parties." FED. R. CIV. P. 19; *see also* Zipes v. Trans World Airlines, 455 U.S. 385, 400 (1982) (directing union to remain in litigation as a defendants "so that full relief could be awarded to victims of . . . discrimination"); Teamsters v. United States, 431 U.S. 324, 356 n. 43 (1977) (same); Morgan v. Kerrigan, 509 F. 2d 580, 582 n.4 (1st Cir. 1974) (requiring statewide education officials who did not participate in local segregation to remain as defendants to help devise remedies), *cert. denied,* 421 U.S. 963 (1975).

443. General Bldg. Contractors Ass'n. v. Pennsylvania, 458 U.S. 375, 399 (1982) (citing *Zipes,* 455 U.S. at 399-400).

444. *See generally* Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us,* 1985 MO. J. DISPUTE RESOLUTION 25, 32-33; Riskin, *Mediation and Lawyers,* 43 OHIO ST. L.J. 29, 43-48 (1982). The Code of Professional Responsibility shares this exclusive focus on the lawyer's adversarial role. *See generally,* Note, *The Mediator-Lawyer: Implications for the Practice of Law and One Argument for Professional Responsibility Guidance—A Proposal for Some Ethical Considerations,* 34 UCLA L. REV. 507, 511-15 (1986).

model requires a reasonable expectation that lawyers will be able or willing to perform this nonadversarial role.

There are several responses to the concern about lawyers' involvement in the deliberative process. First, the vision of lawyer as gladiator does not apply to a number of areas, such as client counseling, bankruptcy, and in-house corporate representation, in which the lawyer's role has already begun to evolve in this nonadversarial direction.[445] Second, in public law litigation, lawyers have already begun the process of reconceptualizing their roles to incorporate a more collaborative aspect to their involvement, particularly at the remedial stage. For example, in some prison cases, lawyers encourage their clients and the experts their clients select to assume direct responsibility for remedial fact-finding and development. The lawyers' role in such situations is to help establish the agenda, provide data, and assess the adequacy of the result in relation to their clients' legal interests.[446] Third, this problem could be addressed by bringing in new lawyers at the remedial stage with particular skills in the area of remedial development and mediation.[447] Finally, law schools have begun expanding and reworking the curriculum to reflect the more collaborative, problem solving aspects of the lawyers' role.[448] Lawyers and clients must begin to look at their roles differently if the deliberative model is to succeed. Although much work in this direction is needed, the evolution of the lawyer's role has already begun.

A final concern about the deliberative model involves its potential cost and efficiency. The process of involving substantial numbers of stakeholders, lawyers, experts, mediators, and the court in the remedial formulation is likely to be expensive and time consuming.[449] Is the time and expense entailed by the deliberative model justified? First, there is some evidence suggesting that although the deliberative model is costly it may compare favorably to the expense and delay associated with litigation.[450] Second, it is

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445. *See generally* K. MACKIE, LAWYERS IN BUSINESS: AND THE LAW BUSINESS (1989); L. PATTERSON & E. CHEATHAM, THE PROFESSION OF LAW 131 (1971); Gilson, *Value Creation By Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 249-56 (1984); Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 675-77 (1978).

446. Interview with Claudia Wright, National Prison Project, in Philadelphia, Pennsylvania (Mar. 5, 1990).

447. *Cf.* Mode & Steiner, *The Litigation Partner and the Settlement Partner*, LITIGATION, Summer 1986, at 33 (discussing the private law development of the practice of appointing a litigation partner and a settlement partner to a case). There are, of course, disadvantages to this approach. Lawyers often develop substantial expertise in the course of preparing a case for trial that may be useful at the remedial stage. Moreover, the plaintiffs' power to resort to the adversary process if necessary may be an important component of the defendants' willingness to take the deliberations seriously.

448. *See* Riskin, *supra* note 444, at 49-50.

449. In the fishing rights case, direct expenses totalled approximately $200,000 for masters, experts, and expenses. McGovern, *supra* note 41, at 466-67.

450. *Id.* at 467 ("On balance there was a trade-off between identifiable additional expenses associ-

important to look at the remedial formulation process as the first step in the process of implementing the remedy.[451] Even if other forms of remedial development proceed faster than deliberation, the overall remedial process may be more efficient and less costly because of the initial investment in collaborative, informed decisionmaking. Finally, the cost of the deliberative model is a price that we must be willing to pay for a legitimate judicial process. Unless the costs of deliberation undercut the court's capacity to pursue the norms of legitimate public remedial decisionmaking, they fail to provide a persuasive argument for rejecting the deliberative model.[452]

I do not claim that the deliberative model will be successful in achieving a consensual remedy in every case. However, there are several reasons for resisting the temptation to limit the applicability of the deliberative model, at least at the outset, to a narrow subset of the general class of cases exhibiting the characteristics of public remedial decisionmaking. First, the model addresses the valid concerns raised by the legitimacy debate and offers a structure that accommodates the norms of legitimate public remedial decisionmaking. Second, it is very difficult to identify in advance those cases in which the model will not work.[453] Third, in the absence of a participatory process of remedial formulation, public law remedies have a tendency to fail and to violate norms of procedural legitimacy. Fourth, the deliberative model offers several mechanisms for minimizing the costs and risks of abuse, such as the establishment of deadlines, the involvement of the mediator, and the oversight of the judge. Finally, even if the deliberative process is unsuccessful in producing a consensus, it enhances the legitimacy of a subsequent court-ordered remedy.

V. CONCLUSION

This article proposes a normative theory of public remedial process. Building on existing practice, the legitimacy debate about that practice, and process theories in analogous areas such as public consensual dispute resolution, it provides a coherent normative framework to guide the performance and assessment of current public remedial practice. It develops a deliberative model of remedial decisionmaking that is tailored to the goals and functions

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ated with the master's work and unidentifiable savings because of the expedited trial preparation process and the abbreviated trial.").

451. This conception of remedial formulation also provides an argument for placing the costs of the facilitator and experts on the defendants.

452. Due process under the adversary model can be extremely costly and inefficient. We tolerate those burdens, however, because of the importance of fairness, individual dignity, and other important values that would be compromised under a more efficient system.

453. In many of the reported disputes resolved through public consensual dispute resolution, the participants at the outset were extremely skeptical about the possibility of achieving consensus. *See supra* notes 424 & 430 and accompanying text.

of the remedial stage, and yet remains in keeping with the norms of judicial legitimacy.

The legitimation of a deliberative model of the judicial role is a response to a basic concern over the role of the court in public law litigation. The model suggests a legitimate judicial role of effective restraint. It is the actors responsible for and affected by the legal violation, rather than the court, who develop remedial priorities and plans. Yet this form of judicial restraint also fulfills the court's constitutional obligation to develop remedies that will institutionalize public norms.

Both the normative theory and the deliberative model of remedial process may have applications beyond the public remedial context. Areas such as bankruptcy and antitrust exhibit many of the characteristics of the public remedial context. They too may involve the implementation of open-ended, aspirational norms requiring predictive and remedial fact-finding, and the cooperation of diverse parties and organizations. These areas may profit from the remedial approach developed in this article.[454]

It is also important to consider the ramifications of the deliberative model for liability determinations in the public law context. Public law liability determinations exhibit some of the characteristics that predispose courts to depart from traditional adversary process. They sometimes call upon the court to develop and apply standards effectuating general, aspirational norms in particular contexts, and to make sense of competing social facts and theories of causation. Indeed, some constitutional provisions have been interpreted to require the court to divine the community's "evolving standard of decency" or "community morality."[455] The deliberative model may be useful in aiding the court in performing these adjudicatory roles.

Application in the liability stage would, of course, dramatically expand the reach of the normative approach suggested in the model. Before proceeding in this direction, careful consideration must be given to the factors that distinguish the liability and remedial roles of the court. The nature of the court's liability task—interpreting norms and determining parties' responsibility—differs in important respects from the remedial task—implementing those norms in a particular context. We insist on developing uniform, general rules at the liability stage, but recognize that different contexts may require different remedial approaches to implement those norms. The court's role in determining liability does not depend on the parties' acceptance and cooperation, as it does in developing an implementing a remedy. Retrospec-

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454. The analysis may also be useful in remedial disputes primarily involving private parties in situations requiring cooperation by a range of interdependent parties, such as family law and partnership.

455. *See* Rhodes v. Chapman, 452 U.S. 344, 346 (1981) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)); Miller v. California, 413 U.S. 15, 24 (1973).

tive, adjudicative fact-finding plays a much more significant role in determining liability than in developing a remedial plan to eliminate legal violations. These differences bear on both the need and justification for adopting a judicial role of structuring deliberation. They only begin, however, to identify the range of considerations that must be taken into account in assessing the relevance of the deliberative model to public law liability determinations.

Another important area for future inquiry is the implication of the deliberative model for the legitimacy and processes of consent decree negotiations. Settlement of public law litigation prior to a finding of liability constitutes an important area of activity. Yet consent decrees are viewed with skepticism by both courts and legal theorists because they lack a theory that adequately justifies their vigorous judicial enforcement.[456] The deliberative model may provide such a theoretical justification. Consent decrees reached through processes that conform to the deliberative model may satisfy basic requirements of legitimate judicial intervention. Indeed, the consent decree context avoids one of the potential limitations of the deliberative model, namely, the unwillingness of the parties to cooperate. At the same time, however, the consent decree context lacks the normative check on the process that constitutes a critical legitimating element of the deliberative model. These issues warrant further examination.[457]

The courts continue to play a vital role in remedying violations of public law norms. Thus far, the challenges to the legitimacy of this role have proceeded without a normative conception of the public remedial process. This article aspires to bridge the gap between theory and practice by constructing a normative theory of public remedial process and a deliberative model of public remedial practice. Hopefully, it will provoke deliberation by the legal and academic community about an area that continues to require our attention.

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456. *See generally Symposium, Consent Decrees: Practical Problems and Legal Dilemmas*, 1987 U. CHI. L. FORUM 1.

457. The issue implications of the deliberative model for the legitimacy and structure of consent decrees is the subject of a forthcoming article.