ARTICLES

The Judicial Adjunct and Public Law Remedies

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Increasingly, courts faced with the problems of providing effective remedies to complex social problems are turning to specialized adjunct personnel for assistance. In the article which follows, Professor Weinberg examines the expanding role of such "judicial adjuncts." She then goes on to propose the creation of a more coherent structure for efficient training and evaluation of these important judicial officers.

-Ed.

In public law litigation,[1] individuals or identifiable groups challenge governmental or institutional priorities. For the plaintiffs in such suits, vindication of their claim in the court may be only the beginning. Unless the obstacles to successful remedy formulation and implementation are surmounted, they will not achieve their ultimate goal.

Courts are becoming more creative in designing and more assertive in overseeing the implementation of remedies in public lawsuits. When a remedy requires complex restructuring of governmental or quasi-governmental institutions, a court often chooses a specific plan from a broad range of possibilities, based on its assessment of the political, social, and legal consequences of each alternative.[2]

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1. The term "public law litigation" is drawn from Abram Chayes' landmark article, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) [hereinafter cited as Chayes-1] expanded upon in his recent article, *Forward: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982) [hereinafter cited as Chayes-2]. As used here, the term "public law" is broader than civil rights or institutional reform, although this article deals primarily with those issues. I would expand the definition of public law to include all complex litigation where a broadly characterized public interest, that is one which extends beyond the particular interests of the parties, is at stake. This definition would include antitrust, securities, and other commercial litigation where the remedy involves, at least in part, a consideration of public interest. It would also include disputes about administrative agency intervention or regulation. Owen Fiss has termed public law remedies which involve institutional or policy restructuring "structural reform." *See, e.g.*, O. FISS, THE CIVIL RIGHTS INJUNCTION (1978); Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) [hereinafter cited as Fiss, *Forward*]. *See also* Conard, *Macrojustice: A Systematic Approach to Conflict Resolution*, 5 GA. L. REV. 415 (1971).

2. *See generally* K. PARKER, MODERN JUDICIAL REMEDIES (1975); Note, *Implementation*

Courts immersed in public law litigation often turn for assistance to a new form of court-appointed officer, a "judicial adjunct."[3] Judicial adjuncts perform roles and functions which range from the traditional ones of "master" or "receiver" to complex roles within panels or committees with broad responsibility for formulating and implementing remedies.[4]

The use of judicial adjuncts has profoundly affected court procedure and the structure of litigation. This paper examines the role of judicial adjuncts and their impact on the judicial system. First, it explores the antecedents of the present-day public law judicial adjunct. It then examines the various roles adjuncts play and the conflicts which arise when they fill multiple roles. It proceeds to analyze the ways the organizational structure within which adjuncts operate limits their effectiveness. Finally, it advocates the establishment of an administrative adjunct agency, as one way both to resolve problems of role conflict and to enhance adjunct effectiveness.

Problems in Institutional Reform Litigation, 91 HARV. L. REV. 428 (1977) [hereinafter cited as Note, *Implementation Problems*]; Special Project: *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978) [hereinafter cited as Special Project]; O. FISS, THE CIVIL RIGHTS INJUNCTION (1978). Because of the fluid nature of the disputes and issues which emerge at the remedial stage, the character of the class action has changed. Traditional class actions are sometimes inadequate to meet the demands of these disputes. *See* Chayes-1 and Chayes-2, *supra* note 1, and D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977). For additional suggestions, see J. VINING, LEGAL IDENTITY (1976).

3. Throughout this paper, the term "judicial adjunct" denotes individuals appointed to assume some of the functions of a judge during the remedial phase. These individuals include the master or special master, receiver, magistrate, review panel, human rights committee, and ombudsman. Several generic terms have been coined: "neoreceivers" (Comment, *Equitable Remedies: An Analysis of Judicial Utilization of Neoreceiverships to Implement Large-Scale Institutional Change*, 1976 WIS. L. REV. 1161 [hereinafter cited as Comment, *Neoreceiverships*]); "masters" (Nathan, *The Use of Masters in Institutional Reform Litigation*, 10 U. TOL. L. REV. 419 (1979) [hereinafter cited as Nathan, *Masters*]); "administrators" (Special Project, *supra* note 2); "monitors" (Note, *Monitors: A New Equitable Remedy*, 70 YALE L.J. 103 (1960) [hereinafter cited as Note, *Monitors*]). Each term has a definition connoting particular duties. At the risk of adding another term to the vast nomenclature, I use the term "judicial adjunct" as a descriptive classification to emphasize more accurately the multiple roles and the relationship with the court.

4. In many cases the judicial adjunct has taken on significant attributes of an administrative agency: the Office of the Special Master in Halderman v. Pennhurst, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part*, 612 F.2d 84 (3d Cir. 1979), *rev'd* as to the federal Developmentally Disabled Act, 451 U.S. 1 (1981), and the Willowbrook Review Panel in N.Y. State Ass'n of Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973); *see also* N.Y. State Ass'n of Retarded Children, Inc. v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975); 409 F. Supp. 606 (E.D.N.Y. 1976); 438 F. Supp. 440 (E.D.N.Y. 1977); 456 F. Supp. 85 (E.D.N.Y. 1978), *aff'd*, 596 F.2d 27 (2d Cir.), *cert. denied*, 444 U.S. 836 (1979); 466 F. Supp. 479 (E.D.N.Y. 1978); 466 F. Supp. 487 (E.D.N.Y.), *aff'd*, 612 F.2d 644 (2d Cir. 1979); 492 F. Supp. 1099 (E.D.N.Y. 1980); 492 F. Supp. 1110 (E.D.N.Y.), *rev'd*, 631 F.2d 162 (2d Cir. 1980); 544 F. Supp. 330 (E.D.N.Y.), *aff'd*, 661 F.2d 910 (2d Cir. 1981); 557 F. Supp. 1165 (E.D.N.Y. 1982), are examples of such structures. The separation of guilt-determination and sentence-imposition in the criminal process also provides a useful analogy. *See, e.g.*, Coffee, *Emerging Legal Issues in the Individualization of Justice*, 73 MICH. L. REV. 1361 (1975).

I. *A Historical Perspective*

A. *Private Law Counterparts*

The "public law" judicial adjunct is not the direct outgrowth of any single private law institution. Rather, it is related to several traditional roles—master, receiver, and magistrate. The earliest "private law" judicial adjuncts in English law were the masters, or "clerks," appointed by the equity Chancellor to select the proper writ for parties seeking relief from the Chancellor.[5] Later, in the United States and England, masters and receivers, single-function officers, were appointed by courts of equity to implement their decrees in "exceptional cases."[6]

Early judicial adjuncts were generally limited to a single role, often performed prior to any verdict or decree. Masters served as factfinders and hearing examiners, and were often experts in accounting and valuation of damage claims.[7] Receivers served as administrators, guarding assets, administering or liquidating property, and, later, taking a direct role in reorganization of corporate enterprises.[8]

Magistrates, by contrast, assumed quasi-adjudicatory functions in both civil and criminal cases. Even today, magistrates act as hearing examiners for certain evidentiary hearings in federal and some state civil courts, and may conduct certain civil trials with the consent of all parties.[9]

B. *Distinguishing Features of the Public Law Judicial Adjunct*

The master, receiver, or magistrate is generally a one-dimensional adjunct, appointed before a decree for a limited task. The public law adjunct is more commonly appointed post-decree, with an open-ended mandate that may require fact-finding, administrative activity, or quasi-adjudicative behavior.[10] The public law adjunct's role thus expands to

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5. *See, e.g.*, Bryant, *The Office of Master in Chancery: Early English Development*, 40 A.B.A.J. 498, 499-501 (1954).

6. *See* Silberman, *Masters and Magistrates, Part I, The English Model*, 50 N.Y.U. L. REV. 1070 (1975), and Silberman, *Masters and Magistrates, Part II, The American Analogue*, 50 N.Y.U. L. REV. 1297 (1975).

7. Note, *Masters and Magistrates in the Federal Courts*, 88 HARV. L. REV. 779 (1975).

8. *See* D. DOBBS, HANDBOOK OF THE LAW OF REMEDIES (1973). The early cases presage a jurisprudence of judicial adjuncts which was not developed by current appellate courts. Courts weighed the intrusiveness of the remedy against the scope of the right being vindicated. *See* Special Project, *supra* note 2, and Goldstein, *A Swann Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.-C. L. L. REV. 1 (1978) [hereinafter cited as Goldstein, *Swann Song*].

9. 28 U.S.C. § 636 (1976).

10. Owen Fiss has documented the emergence of a post-decree stage of litigation in O. FISS, THE CIVIL RIGHTS INJUNCTION (1978), and Fiss, *Forward, supra* note 1. *See also* Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied*, 426

fill the unmet needs of the remedial process. The role may involve use of traditional powers and sanctions, such as contempt,[11] but also includes new functions.

The context within which the public law adjunct functions differs significantly from that of the adjunct's private law counterparts. First, the remedial process may involve a series of incremental disputes, all of which must be resolved before a remedy is complete, but many of which are not evident until *after* a decision on substantive issues has been reached.[12] Thus, one role of the public law adjunct may be to expedite the resolution of disputes without continual judicial intervention by setting up ongoing mediation or problem-solving forums. In *Wyatt v. Stickney*[13] this assistance took the form of monitoring by citizens' Human Rights Committees, implemented three years after the original decree. In *Morgan v. Kerrigan*[14] a receiver was appointed several years after the decree.

Second, judicial adjuncts work in a setting where the range of possible remedies that might vindicate a particular right is wide. Selection of the specific remedy from the various alternatives is a major function of the adjunct.[15]

U.S. 935 (1976) (panel of experts to hold hearings and make remedial recommendations); Hamilton v. Landrieu, 351 F. Supp. 549 (E.D. La. 1972); Halderman v. Pennhurst, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part*, 612 F.2d 84 (3d Cir. 1979), *rev'd* as to federal Developmentally Disabled Act, 451 U.S. 1 (1981).

11. Courts of equity have routinely used contempt powers to implement decrees. However, contempt, while useful as an enforcement tool, can do little to facilitate implementation, particularly in the political sphere. In N.Y. State Ass'n for Retarded Children, Inc. v. Carey, 492 F. Supp. 1110 (E.D.N.Y.), *rev'd*, 631 F.2d 162 (2d Cir. 1980), the trial court's power to issue contempt citations extended only to the named defendants—the Governor, Lieutenant Governor, and other state officials.

12. For example, in Halderman v. Pennhurst, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part*, 612 F.2d 84 (3d Cir. 1979), *rev'd*, 451 U.S. 1 (1981), the disputants did not argue over whether conditions at Pennhurst State School and Hospital needed improvement—that was generally conceded by both parties (although the propriety of court intervention was not conceded). Following the decree, however, increasingly complex disputes emerged, in which subgroups of plaintiffs sometimes intervened on the side of the defendants. These disputes related to the nature and scope of the remedy and, most specifically, to whether the institution should be closed as the trial court ordered. *See* Bradley et al., "Longitudinal Study of the Court-Ordered Deinstitutionalization of Pennhurst, Historical Overview I" (Unpublished Document, HHS Contract No. 130-79-3, April 7, 1980).

13. 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

14. Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974), *aff'd sub nom.* Morgan v. Kerrigan, 509 F.2d 580 (1st Cir.), *cert. denied*, 421 U.S. 963 (1975). *See also* Morgan v. Kerrigan, 409 F. Supp. 1141 (D. Mass. 1975), *aff'd sub nom.* Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977).

15. *See* Fiss, *Forward, supra* note 1, at 56. Appellate courts have been more inclined to approve a remedy-creating adjunct where defendants have failed to formulate a remedy themselves. See the Boston School Desegregation Case, a series of district and circuit court decisions culminating in Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977); Newman v. Alabama, 466 F. Supp. 628 (M.D. Ala. 1979); Halderman v.

Third, the process of formulating and effectuating public law remedies raises questions not present in private law settings because the goal of public law remedies is to change a social or political structure and to affect behavior.[16] Determination of the remedy often involves use of non-traditional kinds of evidence, such as studies of psychological, social, or demographic conditions. Choices among remedies involve policy considerations that are essentially non-judicial in nature.

Hart v. Community School Board[17] provides an apt example. In *Hart*, the court found *de facto* segregation in Coney Island schools. Judge Weinstein wished to devise a remedy which would integrate the schools without destroying the community. He chose to do so by appointing an "outside" expert to first study alternatives, then creating an outline for a desegregation plan, and finally forging community consensus for such a plan. The expert was chosen not so much for experience in desegregation cases as for his ability to marshall evidence relating to housing and neighborhood planning.[18]

Fourth, the remedial process in public law cases places special emphasis on *non*-adjudicatory dispute resolution techniques such as mediation and negotiation. Many of the parties involved in such litigation (particularly defendants) are accustomed to operating in a political sphere in which negotiation is central. In many cases, the parties have a relationship that will outlast the litigation: for instance, administrator and client, patient, or community. Thus, when the parties participate in implementation of the remedy, the relationship may continue with a minimum of disruption. Reports of adjuncts' activities rate negotiation high on the list of desired adjunct functions.[19]

Pennhurst, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part*, 612 F.2d 84 (3d Cir. 1979), *rev'd*, 451 U.S. 1 (1981).

16. *See* D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977) at 45, 48-49, 274-284. These issues, and others having to do with the political and administrative difficulties of court involvement, are detailed in Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 967, 975-976 (1978); Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978). Professor Mishkin argues that a focus on *form* of remedy rather than on substantive right should cause courts to step back from imposing remedies which encroach on state or local prerogatives. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Connor v. Johnson, 256 F. Supp. 962 (S.D. Mass. 1966). *See also* Comment, *The Case for District Court Management of the Reapportionment Process*, 114 U. PA. L. REV. 504 (1966).

17. 383 F. Supp. 699 (E.D.N.Y.), *supplemented*, 383 F. Supp. 769 (E.D.N.Y.), *appeal dismissed*, 497 F.2d 1027 (2d Cir. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975).

18. Berger, *The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978) [hereinafter cited as Berger, *Odyssey*].

19. Colin Diver points out the importance of negotiation as part of "power-broking" in Diver, *The Judge as Political Power-Broker*, 65 VA. L. REV. 43 (1979) [hereinafter cited as Diver]. In Pennsylvania Ass'n for Retarded Children (PARC) v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1972), the trial judge played an active role in mediating post-decree disputes among and between parties and non-parties, to the point of holding monthly open hearings where grievances could be aired. In Massachusetts, District Judge Tauro took an active mediative

Finally, because a remedy, as a continuous process, repeatedly affects the substantive conflicts which gave rise to the litigation, it is often difficult to separate issues relating to implementation of the remedy from those surrounding consideration of the merits of the dispute. At times courts appear to consider the feasibility of a remedy even when determining liability, particularly where the right asserted is a threshold or novel one.[20] Thus, a court may find that no right exists where a novel or unworkable remedy would be required.[21]

II. *The Role of the Adjunct*

The public law adjunct is a hybrid, not easily defined by terms such as master or receiver. Whether one looks at the tasks courts order adjuncts to perform or at what judicial adjuncts in fact do, it is clear that judicial adjuncts perform several functional roles. These roles are reviewed below. In any particular case, one or more of these roles may form part of a judicial adjunct's mandate.

1. *Investigative*

Factfinding traditionally is ministerial, not involving the actual gathering of evidence. The prototypical master acts solely as a factfinder, hearing evidence, then making findings and recommendations to the judge. In contrast, the public law factfinding adjunct is frequently an active investigator, asked to ascertain what evidence is needed, then discover and obtain it.[22]

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role in several contemporaneous mental health treatment cases, literally demanding that the parties settle the case and devise a remedy, in some instances long before the trial. Boston Globe, July 31, 1977, at 2, col. 2. This role, of course, places a premium on case settlement.

20. *See* J. VINING, LEGAL IDENTITY (1979). In Rizzo v. Goode, 423 U.S. 362 (1976), for instance, the Supreme Court based its condemnation of the district courts decision on a categorical rejection of the standing of the parties and of the existence of a case or controversy, seeing remedy as inseparable from liability. Ironically, the Court's action came a few weeks after the parties had reached a negotiated settlement as to remedy. See also Lawrence Tribe's discussion of the structural justice model in L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1977), at 1143-1144.

21. *See* J. VINING, LEGAL IDENTITY (1979). *See also* Hinkle, *Appellate Supervision of Remedies in Public Law Adjudication*, 4 FLA. ST. L. REV. 411 (1976) [hereinafter cited as Hinkle, *Appellate Supervision*]. Plaintiff "burn-out" is not uncommon during a drawnout remedial process in which substantive issues continually mingle with the implementation remedies, sending the parties repeatedly back to court. Since the administrative system can outlive (and outspend) the less organized plaintiffs, the defendants in such cases may eventually prevail. *See* Lottman, *Paper Victories and Hard Realities*, in PAPER VICTORIES AND HARD REALITIES (Bradley, ed. 1976).

22. The evidence gathering function is not unique to public law adjudication. In the private sector, judicial adjuncts have also been used to gather evidence, particularly when the adjunct's expertise is needed to assemble and interpret such evidence.

Legal evidence is of two types—interpretive and causal.[23] Judicial adjuncts may need to gather and evaluate both types. Interpretive evidence, whether it is scientific, forensic, testimonial or "legislative," is an observation about an object or a state of being.[24] Causal evidence is evidence which asserts a causal connection between independent phenomena, such as empirical or statistical studies of alternative remedies and their effect in a particular case.[25] Judicial adjuncts may use interpretive evidence—even of a "social science" character—to provide a rationale for choosing a particular remedy. For example, evidence that magnet schools do not cause people to move away from a neighborhood, or that community living arrangements are better for the retarded than large institutions, calls for interpretive rather than causal judgments.[26] However, much of the evidence adjuncts accumulate is causal, because it is used as proof of the fact or facts asserted (for instance, that busing will achieve integration).

Hart v. Community School Board provides an example of causal factfinding by a public law adjunct. The court believed that housing patterns were at the root of the school desegregation issue, and that any remedy had to take into account the potential impact on housing. To achieve this goal, Judge Weinstein appointed as master Curtis Berger, a professor at Columbia Law School who specializes in housing. Professor Berger sought out broad segments of the community, including white and black parents without school-age children, federal and state housing officials, political officials, and private foundations such as the Ford Foundation.[27] As Professor Berger perceived his role:

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23. Dworkin, *Social Change and Constitutional Rights—The Dilemma of Uncertainty*, 6 J. OF LAW AND ED. 3 (1977).

24. *Id.* at 3, 4.

25. The quality of evidence in public law disputes is often criticized as "inferior" social fact or legislative evidence, inappropriate for ordinary rules of evidence or forms of proof. Much of the evidence thought to be proof of the discrimination in Brown v. Board of Education, 347 U.S. 483 (1954), 349 U.S. 294 (1955), has been criticized for this reason. Much of the criticism has been addressed to "social science" evidence used as proof of liability during pre-decree stages of litigation. However, the criticism—that somehow this evidence is less reliable—applies to evidence used to determine remedy as well. *See, e.g.*, Horowitz, *supra* note 2. Courts have often expressed frustration with the "game playing" attitude that often characterized such evidentiary interpretations, with social scientists squaring off against one another. See Judge Skelly Wright's lament in Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967) *cert. dismissed*, 393 U.S. 801 (1968). *See* Doyle, *Can Social Science Data Be Used in Decision-making?* 6 J. OF LAW AND ED. 13, 17-18 (1977), citing J. Coleman, Recent Trends in School Education, paper presented to American Educational Research Ass'n (April 2, 1975).

26. Dworkin suggests that it is not the *evidence*, but the *right* determined that is novel and unconventional in public law cases. This, he suggests, happens when a court finds that a particular kind of segregation violates a fundamental constitutional right. Thus the famous footnote 11 evidence in Brown v. Board of Education, 347 U.S. 483, 494-95 (1954), 349 U.S. 294 (1955) showing the harmful effect of segregation on black children, is not necessary for liability, though it is of course relevant in deciding upon a remedy.

27. Berger, *Odyssey, supra* note 18 at 711, 719, 721, 726-727.

> . . . I was looking for more than evidence. I had to learn all that I could about community attitudes, about the readiness of school and other government officials to move collaboratively toward a remedy, and about the obstacles that might confront a remedy plan. . . . I viewed myself . . . not as a surrogate judge, but as a bridge from the court to the community that ultimately would have to obey the remedial order.[28]

Hart illustrates why courts turn to judicial adjuncts to gather and evaluate both interpretive and causal evidence. An adjunct who assesses the need for and gathers evidence, then evaluates the balance and validity of such evidence facilitates the development and implementation of a remedy which is both practical and consistent with the trial court's interpretive judgments.

2. *Remedial: Formulation and Implementation*

The role most often associated with judicial adjuncts is remedy planning and implementation.[29] In cases where a detailed remedial decree has been formulated by the judge or the parties, adjuncts perform the ministerial tasks of organization and administration. Acting as neutral policy analysts, with full access to information and an understanding of conditions surrounding the dispute, adjuncts can bridge the parties' partisan perspectives and the judge's necessarily legal orientation.

But in other cases, where the adjunct is given broad discretion by a general decree, the adjunct may be both architect and engineer, formulating and implementing the remedy. Where this is the situation, the adjunct may formulate or suggest alternative remedies to the judge and the parties, resolve collateral disputes which arise during implementation, or present a completed (and sometimes an implemented) remedy to the court. The interpretive remedial role requires management skills and substantive expertise. The adjunct must have an ability to translate legal mandates into clear directives for administrators and an ability to determine and marshall the evidence necessary to facilitate the creation of appropriate remedies.[30] The adjunct's role thus goes beyond fact-

28. Berger, *Odyssey, supra* note 18 at 711-12.

29. *See, e.g.*, Diver, *supra* note 19; Fiss, *Forward, supra* note 1; Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975). *Contrast* with Mishkin, *Federal Courts as State Reformers*, *supra* note 16, and Glazer, *Should Judges Administer Social Services?*, 50 PUB. INTEREST 64 (1978).

30. *See* Special Project, *supra* note 2, at 809-12. See also the suggested method for courts issuing decrees in Goldstein, *Swann Song, supra* note 8, at 65-68, and the futile, pre-adjunct attempts to have the parties formulate a plan in many of the institutional reform cases already discussed. *Cf.*, Wyatt v. Stickney, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir. 1976), *cert. denied*, 426 U.S. 935 (1976). Judge Frank Johnson has done considerable work gathering and interpreting evidence, and views this as part of the judge's role in such cases. *See* Johnson, *Observation: The Constitution and the Federal District Judge*, 54 TEX. L. REV. 903 (1976). *See also* Morgan

finding and evidence-gathering to incorporate new functions, notably planning, negotiation, and dispute resolution.[31]

The potential usefulness of adjuncts in this area is clear. Formulating and implementing a remedy removes judges from adjudication. Implementation of remedies demands a deep immersion into daily details of institutional behavior, understanding of social planning techniques, and requires coordination of adversary, class, and judicial demands.

Often the remedial role is too broad for a single individual. A single adjunct may need to rely on the goodwill of the parties and third parties, as well as force of personality, and may find it difficult both to formulate a workable remedy and perform the dispute resolution tasks that the remedial process requires. Thus, courts may appoint committees or panels consisting of experts, class representatives, and representatives from community groups and agencies to serve as a judicial adjunct.[32]

3. *Administrative*

Court mandates to judicial adjuncts often include administrative tasks. As noted above, judicial adjuncts may assume some administrative responsibilities when formulating and implementing remedies. In some cases, however, the administrative role may become primary. Public law judicial adjuncts can become temporary co-administrators of

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v. Kerrigan, 409 F. Supp. 1141 (D. Mass. 1975); Rhem v. Malcolm, 377 F. Supp. 995 (S.D.N.Y.), *aff'd in part, remanded in part*, 507 F.2d 333 (2d Cir. 1974). *See generally* Special Project, *supra* note 2, at 823-25.

31. Hart v. Community School Bd., 383 F. Supp. 699 (E.D.N.Y.), *supplemented*, 383 F. Supp. 769 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975); Moore v. Leflore County Bd. of Election Comm., 361 F. Supp. 603 (N.D. Miss. 1972); Pennsylvania Ass'n for Retarded Children (PARC) v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972). *See* Harris, *The Title VII Administrator: A Case Study in Judicial Flexibility*, 60 CORNELL L. REV. 53, 72-3 (1974). *See also* Chicago Housing Auth. v. Austin, 511 F.2d 87 (7th Cir. 1975); Gautreaux v. Chicago Housing Auth., 384 F. Supp. 37 (N.D. Ill. 1974). *See* Halderman v. Pennhurst, 446 F.2d 1295 (E.D. Pa. 1975); *aff'd in part*, 612 F.2d 84 (3d Cir. 1979), *rev'd*, 451 U.S. 1 (1981). *See generally* Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452 (1958); Note, *Masters and Magistrates in the Federal Courts, supra* note 7; Note, *Monitors, supra* note 3, at 103. Fiss has characterized the modern judicial adjunct as a new procedural institution, the most vivid expression of the dilemma of public law structural reform remedies, because "he can be used as an intermediate structure, standing . . . between the judge and the [defendant] organization and also between the judge and the body politic." Fiss, *Forward, supra* note 1, at 56.

32. In Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976). *See also* Morgan v. Kerrigan, 409 F. Supp. 1141 (D. Mass. 1975), the Boston school desegregation case, in which the court appointed a coalition of educators from area colleges, along with school administrators, community activists, and others, to assist with developing a remedy. The Office of the Special Master, created by the court in Halderman v. Pennhurst, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part*, 612 F.2d 84 (3d Cir. 1979), *rev'd*, 451 U.S. 1 (1981), to implement the terms of the court's decree, was a large organization, consisting of the Special Master and the Individual Hearing Master, community mental retardation service planners, parent coordinators, and support staff.

the defendant agency or institution. The existing administrator may remain in place, while the judicial adjunct stands in the position of "shadow" administrator. In one early public law case an adjunct Special Review Committee was established by the trial court to supervise the Department of Labor in its job of regulating state employment agencies.[33] The adjunct is most likely to assume an administrative role where it is difficult to differentiate purely remedial tasks from operational administrative tasks. For example, adjuncts appointed in school desegregation cases are often responsible for setting school district boundaries and for regulating assignment of pupils and teachers.[34]

Receivers in public law suits are simply adjuncts performing administrative roles. The receivers appointed in *Newman v. Alabama* administered Alabama state prisons;[35] those in *Wyatt v. Ireland* administered Alabama state institutions for the mentally disabled,[36] taking over those responsibilities from state employee administrators. In *Morgan v. Kerrigan*, the receiver assumed the responsibilities of both the Boston School Committee and the South Boston High School's headmaster.[37]

4. *Monitoring*

The public law adjunct was first used as a compliance monitor in employment discrimination cases.[38] Remedies in these cases often involve the implementation of a long-term and complex plan for hiring and promoting affected minorities. Courts often appoint a "watchdog" monitor to oversee a defendant company or agency to ensure compli-

33. NAACP v. Brennan, 8 Empl. Prac. Dec. (CCH) ¶ 9634 (D.D.C. 1974). The NAACP had alleged race and national origin discrimination on the part of state employment bureaus under the jurisdiction of the Labor Department. *See* Altman, *Implementing A Civil Rights Injunction: NAACP v. Brennan*, 78 COLUM. L. REV. 739 (1978).

34. Morgan v. Kerrigan, 530 F.2d 401, 430 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *cert. denied*, 398 U.S. 801 (1968). Thus, the court-appointed Special Master in Halderman v. Pennhurst, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part*, 612 F.2d 84 (3d Cir. 1979), *rev'd*, 451 U.S. 1 (1981), was directed by the court to supervise the State Department of Welfare in its day-to-day responsibilities of administering the agency. The procedure for placing Pennhurst residents in community facilities was delegated by the court to another master, a Hearing Master. In elaborating his view of the majority's action in *Halderman v. Pennhurst*, Justice White, joined by Justices Brennan and Marshall, made clear his distrust of aggressive court intervention in state administrative affairs: "In any event, however, the court should have not assumed the task of managing Pennhurst or to decide in the first instance which patients should stay and which should remain . . . [quoting from Parham v. J.P., 442 U.S. 584 (1979)] 'The mode and procedure of medical diagnostic procedures is not the business of judges,' " 451 U.S. 15, 37, 54 (1981). Ironically, the case is once again before the Supreme Court, this time to consider state statutory issues.

35. 466 F. Supp. 628 (M.D. Ala. 1979).

36. 515 F. Supp. 888 (M.D. Ala. 1981).

37. Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976). *See* Roberts, *The Extent of Federal Judicial Equitable Power: Receivership of South Boston High School*, 12 NEW ENG. 55, 69 (1976).

38. *See* Harris, *Title VII Administrator, supra* note 31, at 58-62.

ance, and to provide the technical information and ongoing compliance measurement necessary to evaluate the remedial process.[39] This role has few counterparts in private law, where monitoring is left to the parties, and the court intervenes only when disputes arise.[40]

When an institution is structurally altered by a court decree, the changes reach deep into the administrative operation and must continue even after the court has withdrawn if they are to be effective. Courts become easily, and justifiably, frustrated with having to engage in meticulous review of details. Yet experience has shown that such surveillance is necessary, particularly where the effectiveness of a remedy cannot be measured for some time.[41] A judicial adjunct, in the role of monitor, observes and reports on the continuing operation of the remedial decrees.[42]

5. *Mediative*

In the role of conflict mediator or ombudsman, the judicial adjunct is a non-adjudicative resolver of disputes. As a mediator, the adjunct may address conflicts which arise while a remedy is under consideration post-decree,[43] may be concerned with disputes arising during the implementation phase,[44] or may act as an ongoing ombudsman or mediator to resolve conflict between an institution and the clients it serves.

Resolution of disputes by non-adjudicatory means, such as negotiation or mediation, is critical to the success of some remedies.[45] It is important that disputes which do not raise legal or constitutional issues be resolved quickly without continuous court involvement.

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39. *See* Hamilton v. Landrieu, 351 F. Supp. 549 (E.D. La. 1972); Gates v. Collier, 349 F. Supp. 881, 900-901 (N.D. Miss. 1972); Miller v. Carson, 401 F. Supp. 835, 898-99 (M.D. Fla. 1975), *aff'd in part, modified in part, and remanded*, 563 F.2d 741, 752-54 (5th Cir. 1977).

40. *See* M. HARRIS AND D. SPILLER, AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS (1977). *See generally* Eisenberg and Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

41. See the decree in Halderman v. Pennhurst, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part*, 612 F.2d 84 (3d Cir. 1979), *rev'd*, 451 U.S. 1 (1981). *See also* discussion in Bradley, *supra* note 12 at 11-12. Such delays are not necessarily due to a defendant's intransigence. Rather, they may occur because agencies and institutions are not static bodies. For example, a decree directing an institution housing the mentally retarded to meet detailed standards and conditions for resident treatment and habilitation may not provide the desired results until the institution's facilities—staff and equipment—are capable of complying permanently with the standards. *See* Special Project, *supra* note 2, at 828-29. *See also* NAACP v. Brennan, 8 Empl. Prac. Dec. (CCH) ¶ 9634 (D.D.C. 1974); Wuori v. Zitnay, No. 75-80-SD (D. Me. June 2, 1980) (findings of special master).

42. *See* Special Project, *supra* note 2, at 828-29. *See also* NAACP v. Brennan, 8 Empl. Prac. Dec. (CCH) ¶ 9634 (D.D.C. 1974).

43. *See* Hamilton v. Landrieu, 351 F. Supp. 549 (E.D. La. 1972).

44. *See* Miller v. Carson, 401 F. Supp. 835, 841 (M.D. Fla. 1975), *aff'd in part*, 563 F.2d 741 (5th Cir. 1977).

45. Curtis Berger's discussion of his experience as master in *Hart* bears this out. *See generally* Berger, *Odyssey, supra* note 18.

Some problems presented to courts arise because the institution or agency has inadequate procedures for resolving internal disputes involving institutional or agency clients (inmates, patients, clients, students).[46] In such situations, a court may require that an adjunct-mediator be incorporated into the permanent institutional structure, as part of an ongoing dispute resolution process.[47]

Even when the mediative role is not mandated by the terms of a decree, or where the mediator is not incorporated into the institution, an adjunct may informally assume the role of mediator, simply because the adjunct is viewed by the parties as a central figure.[48] As information-gatherer and evaluator, the adjunct is in a position to respond to multiple interests. When interest groups emerge (as the adversarial positions of the adjudicatory stage splinter, and sub-classes or interests appear) they may gravitate toward the adjunct.[49] Often, as one commentator has noted, adjuncts supervise "disputes which require . . . continuous mediating, bargaining, and negotiation—in other words, the bulk of the disputes [in any public law case]."[50]

III. *The Structure of the Remedial Process*

Increasingly, courts and commentators express a need to re-examine and redefine the limits of the trial court power in the appointment and management of judicial adjuncts.[51] The judicial adjunct—whether a master, review panel, or receiver—is a microcosm of the public law re-

46. *See, e.g.*, Halderman v. Pennhurst, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part*, 612 F.2d 84 (3d Cir. 1979), *rev'd*, 451 U.S. 1 (1981).

47. *See* Knight v. Bd. of Education, 48 F.R.D. 115 (E.D.N.Y. 1969). *See also* Lesnick, *Grievance Procedures in Federal Prisons*, 123 PA. L. REV. 1 (1975).

48. An analog is the conflict resolution role played by some administrative agencies. Agencies resolve conflicts about their own interpretive decisions, such as challenges to FTC rulings. They also resolve conflicts between competing interests, such as challenges to FCC licenses or disputes between consumers and industry over environmental protection regulations or trade regulation policies. Often this role, by statute or regulation, is a quasi-adjudicative one, with an appeals process culminating in the federal courts. *See* Richardson v. Perales, 402 U.S. 389 (1971). *See generally* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1683-84, 1721-22 (1975) [hereinafter cited as Stewart, *Reformation*]. *See also* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965); Administrative Procedure Act, 5 U.S.C. § 702 (1976).

49. For example, during the course of the remedial planning and effectuation stages in the *Pennhurst* litigation, and while the case was on appeal to the Third Circuit, one group of parents filed separate motions with both district and appellate courts, disagreeing with the remedy being implemented and advocated by the "majority" plaintiffs. Philadelphia Inquirer, June 29, 1979, at B-6.

50. *See* Note, *Implementation Problems, supra* note 2, at 446-47. See also Diver, *The Judge as Political Pawnbroker, supra* note 19, for a sensitive portrayal of the bargaining and negotiation "game" that often colors the remedial process.

51. *See generally* Chayes-2, *supra* note 1; *Symposium: Judicially Managed Institutional Reform*, 32 ALA. L. REV. (1981). *See also* Mishkin, *supra* note 16.

medial process. Any proposal to make the remedial process more successful should therefore begin with the judicial adjunct.

Judicial adjuncts face specific constraints because of the *ad hoc*, arbitrary nature of their present role. This section examines several of those constraints: first, the ill-defined mandate of the adjunct; second, the inherent conflict when adjuncts play multiple roles within the remedial process; third, the lack of defined standards for appellate review of judicial adjunct performance; and fourth, the need for adjunct expertise in a wide variety of fields.

1. *The Judicial Adjunct's Mandate*

The judicial adjunct makes no determination of legal rights, but rather is engaged in a supervisory activity. The adjunct's role is played, however, in the context of litigation, and the adjunct's actions are classified as trial court activities. The adjunct is viewed, by court and opposing sides alike, as a party to the remedial process, at times separate and distinct from the judge.

Given this new orientation, it is not hard to see why both trial and review courts have struggled with defining the legitimate scope of the adjunct's role.[52] If the adjunct is an extension of the trial court, the adjunct's actions must be reviewed by appellate courts in that context. However, because the adjunct has a separate and somewhat independent identity, and because many of the adjunct's activities take place outside the judicial arena, the trial court's actual control is limited.

There are no guidelines delimiting the behavior and authority of judicial adjuncts. To put the issue simply, much of the lack of clarity in the role of the judicial adjunct stems from the fact that the adjunct is a bureaucrat functioning within a judicial or "rights" model.

Most public law disputes have emerged within the "rights" model framework of protection of fundamental individual or group rights against encroachment by state or private policies. The judicial or "rights" model[53] emphasizes the paramount importance of individual rights within institutions; the adversary style of dispute resolution; and the hierarchy of appellate court review. Proposed remedies generally

52. The district court's decree in Halderman v. Pennhurst, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part*, 612 F.2d 84 (3d Cir. 1979), *rev'd*, 451 U.S. 1 (1981), while comprehensive and extensive, still does little more than give a general outline to the master's job. The first opinion of the Third Circuit in *Pennhurst*, 612 F.2d at 111-16, in its discussion of the role of the master, struggled to reach for more than a delineation of duties.

53. The "rights" model is a composite developed from the writings of H.L.A. Hart, Ronald Dworkin, and others. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 184-205 (1977). The administrative or bureaucratic model is best described by J. FREEDMAN, CRISIS AND LEGITIMACY 4-5, 15-20 (1978) and Stewart, *Reformation*, *supra* note 48, at 1671-76.

also follow this model.[54] However, remedies are administered in a bureaucratic context—an organizational scheme which treats individuals as recipients of a privilege or service offered through the skill and knowledge of the institutional provider.[55]

It has been suggested that by expanding the definition of the rights of recipients of services, the "rights" model correspondingly reduces the powers and responsibilities of the administrators of services. Indeed, Nathan Glazer has argued that "one undoubted influence of an increase in [recipient] rights is a reduction of power and discretion of working administrators, and a simultaneous shifting of power and discretion from below to further up the chain of command."[56] Thus, when courts appoint judicial adjuncts, existing administrative power and discretion are threatened, not only by the court itself, but also by the "substitute" bureaucracy the court creates.

Public law remedies should be designed and implemented in a manner which recognizes the tension between bureaucratic behavior and individual rights. A satisfactory system would employ the most appropriate features of the judicial model, so that individual rights would be recognized and vindicated, but would implement these rights in a manner consistent with principles of bureaucratic management. This would eliminate both the polarization created by adversary process, and the stark reliance on authority demanded by a bureaucratic model.

2. *Conflicting Roles of Judicial Adjuncts*

As judicial adjuncts assume increased responsibility for administering public law remedies, and become a more permanent institution within the judicial system, concerns arise which go beyond mere managerial complexities.

The court's mandate to the judicial adjunct often requires the adjunct to perform several different types of functions within the same time frame and context—evidence-gathering, remedy design and evaluation, day-to-day administration of the institution, and follow-up monitoring of the remedy. These tasks are not easily performed by one person without conflict. For instance, a factfinding adjunct who first designs, then implements a remedy may have a stake in the initial design and may tend to ignore later-discovered information that should prompt a

54. *See* J. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM 1-42 (1978) for a discussion of the law reform model of social change.

55. *See* Perlmutter, *The Executive Bind: Constraints Upon Leadership*, in LEADERSHIP IN SOCIAL ADMINISTRATION (Perlmutter and Slavin, eds. 1980).

56. Glazer, *supra* note 29, at 77.

change in design. In the hands of a more impartial adjunct the remedy might be adjusted to adapt to changing factual patterns.

Changes in the issues central to the remedial process may necessitate reevaluation of remedial priorities.[57] An adjunct who formulates and implements a remedy may not be effective in the role of neutral monitor if there is perceived or actual bias in favor of the adjunct's own design. Similarly, a neutral monitor may be unable to act as a mediator without becoming partisan.

Monitoring and mediative tasks may pose problems for adjuncts. If a judicial adjunct is responsible for planning or implementing a remedy, he or she may not be able to resolve disputes over implementation impartially. Adjuncts who have performed the remedial role may ally themselves with one or more of the parties, particularly if one party (usually plaintiffs) is pressing for compliance, and the other (usually defendants) is resisting compliance. When that happens, it may be difficult for an adjunct to also assume a neutral, monitoring role.

Finally, the skills required to function as an administrator in a political arena are in many ways antithetical to the other possible roles of an adjunct. It is difficult for adjuncts who hold temporary administrative positions to engage in the political and practical bargaining that accompanies administrative roles in agencies or institutions. The adjunct does not necessarily have credibility with superiors in the bureaucracy. The temporary nature of the adjunct's role here may make difficult long-term planning involving state legislative and bureaucratic institutions.[58]

The experience of the Office of the Special Master (O.S.M.) in *Halderman v. Pennhurst* illustrates the problems of conflicting roles. The O.S.M. had to monitor and implement the decree, enforce it against defendants'

57. The chronology of many structural reform cases is filled with repeated modifications initiated by judge, parties, or adjunct. See the lengthy history and series of citations in Wyatt v. Stickney, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir. 1976), *cert. denied*, 426 U.S. 935 (1976). See also Donald Horowitz' discussion of *Hobson v. Hansen* and *North-City Area-Wide Council v. Romney* in D. Horowitz, *supra* note 2, at 106-70, 68-105. *See also* Harris, *Title VII Administrator, supra* note 31. For a discussion of the discrete techniques of adjudication and neutral monitoring, see Diver, *supra* note 19, at 96. *See also* Anderson v. Redman, 429 F. Supp. 1105 (D. Del. 1977).

58. See Owen Fiss' discussion of legislative failure and footnote 4 of United States v. Carolene Products Co., 304 U.S. 144, 652 n.4 (1938), in Fiss, *Forward, supra* note 1, at 6-9. *See* Rizzo v. Goode, 423 U.S. 362 (1976). See also the discussion by the Massachusetts Supreme Judicial Court in Perez v. Boston Housing Auth., 400 N.E.2d 1231, 1252-53 (Mass. 1980). *But see* Eisenburg and Yeazell, *supra* note 40, at 494-506. One may question the court's authority to take on agency administrative roles, then delegate them to an adjunct. Delegation of administrative responsibility is justified on grounds that state or federal (legislative or executive) corrective means have failed. Such delegation is fraught with both conceptual and practical problems, however. Doctrines of federalism and separation of powers call into question the constitutionality of such delegations, at least in some instances.

non-compliance, *and* work constructively with the defendants to meet its terms. Thus,

> [t]he unique position occupied by the Office of the Special Master results in numerous ironies and political contradictions. For instance, [the Special Master's] major role as a policeman in the system is in conflict with its program development responsibilities . . . In addition to being enforcers, however, staff . . . must also function as intermediaries and facilitators . . . Further, many observers in Pennsylvania see [the Special Master] as merely an arm of the plaintiff's counsel . . . The expectation that [the Master] should be a value-neutral entity represents a misunderstanding of the circumstances that brought about its creation. Since the plaintiffs won the case, they had the major influence on the judge with regard to the structure of the remedy.[59]

These problems highlight the need for clarity when defining an adjunct's role. If it is not clear whether an adjunct should be neutral, or whether appointment of an adjunct *after* a decree presupposes an orientation in favor of successful plaintiffs, the adjunct has few guidelines. Particular behavior may be approved or disapproved depending on which view prevails.

It is unlikely that the same adjunct can adequately perform all the roles discussed above. Yet these and other conflicts rarely receive scrutiny because many of the day-to-day activities of adjuncts are insulated from review. Only egregious behavior, and formal activities—written reports and other communications such as hearings—are reviewed.

3. *Judicial Adjuncts and Judicial Review*

Judicial review by appellate courts remains a desirable check on the evolutionary process of court-interpreted law. However, appellate court response to utilization of judicial adjuncts has been episodic.[60] Trial courts have little guidance as to how and when adjuncts should be utilized.[61] For the most part, appellate courts have limited their comments

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59. Bradley, *supra* note 12, at 65-66.

60. See Robert Hinkle's discussion of the review process, comparing review of the *adequacy* of a remedy with review of the *appropriateness* of a remedy, in Hinkle, *Appellate Supervision, supra* note 21, at 418. Hinkle concludes that although appellate courts have not appeared to change their standard for reviewing public law cases involving structural reform, they have done so by exercising more stringent control over specific remedies. The fault, he points out, is that only *ad hoc* supervision without clearly-defined standards exists. *Id.* at 425.

61. See the discussion of the Massachusetts Supreme Judicial Court in Perez v. Boston Housing Auth., 400 N.E.2d 1231, 1248-9 (Mass. 1980). *See also* Nathan, *Masters, supra* note 3; Note, *Receivership as a Remedy in Civil Rights Cases*, 24 RUTGERS L. REV. 115 (1969); Note, *Master Intervention in Prisons*, 88 YALE L.J. 1062 (1979); Note, *supra* note 7; Note, *Rizzo v. Goode: Federal Remedies for Police Misconduct*, 62 VA. L. REV. 1259 (1976); Roberts, *supra* note 37; Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1398 (1975); Berger, *Odyssey, supra* note 18, M. HARRIS AND D. SPILLER, AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS; Fishman, *The*

to whether trial courts have abused their discretion to create remedies or whether trial court actions intrude too deeply into areas of state administration.[62]

The judicial adjunct's position in relation to appellate procedure is likewise unclear. Courts sometimes use judicial adjuncts to perform semi-autonomous non-adjudicatory functions in the remedial process. However, the more adjuncts perform such functions, the more substantial the alteration in the structure of litigation. This is true in part because the trial judge may not exercise complete control over the behavior of a judicial adjunct.

An appellate court cannot easily determine when or whether a judicial adjunct has overreached the mandate if the limits of an adjunct's mandate are not clear. However, the legitimacy of adjunct appointment or activities can be ensured in several ways. Appellate courts can attempt to define the limits of trial court discretion to appoint and delegate tasks to adjuncts. This is the manner by which official administrative behavior is commonly reviewed.[63] However, defining discretion may not assure the *appropriateness* of adjunct activity in public law cases, since behavior is measured against an absolute standard of judicial legitimacy. Where an adjunct assumes local government functions, appellate courts may need to inquire into how deeply a judicial adjunct's activities intrude into the activity of state officials. An otherwise appropriate remedy might usurp the administrative prerogatives of a state agency,[64] inhibit functions belonging to other state interests,[65] or go beyond issues in litigation.[66]

Not all incursions into state or local affairs constitute abuses of discretion. *Wyatt v. Stickney*[67] and *Newman v. Alabama*[68] were both Alabama

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Limits of Remedial Power: Hart v. Community School Board, in LIMITS OF JUSTICE (H. Kalodner and J. Fishman, eds. 1978).

62. *E.g.*, Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977) *cert. granted in part and remanded sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978), *cert. denied*, 438 U.S. 915 (1978) (prisons) and Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (mental institutions), disapproving the open-ended Human Rights Committees appointed to "supervise" the institutions.

63. Professor Stewart has categorized the emerging role of administrative law as an "interest representation" model. Elaboration of that model in the context of defining the adjunct's role in the remedial process is a partial aim of this proposal. *See* Stewart, *Reformation*, *supra* note 48, at 1813. The administrative law model is particularly helpful in exploring the parameters of judicial—and adjunct—discretion in the remedial process, and for viewing the adjunct's role in policymaking (rulemaking), in part, as representative of a public interest. *See also* Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972).

64. *E.g.*, Rizzo v. Goode, 423 U.S. 362 (1976).

65. *E.g.*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

66. *E.g.*, Milliken v. Bradley, 418 U.S. 717 (1974).

67. 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

68. 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd in part*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975).

cases: *Wyatt* involved a constitutional attack on the state's institutions for the retarded; *Newman* involved conditions in the prisons. The district court's remedial decree in each case mandated creation of a permanent Human Rights Committee. The Committees were to be composed of outside experts in the respective fields (institutions for the mentally disabled in *Wyatt*, and correctional institutions in *Newman*).[69] Both cases were decided by the same district court judge, Frank Johnson, then of the Middle District of Alabama. In both cases the Court of Appeals for the Fifth Circuit rejected the Committees as intrusive in scope (beyond the scope of the original controversy) and in time (both Committees were continuing bodies whose role would continue after the court's jurisdiction had ceased).[70] Yet, in those same cases, the Fifth Circuit upheld other remedial measures appointing adjuncts to formulate and implement other remedies affecting the day-to-day operation of the institutions.[71] Thus, in both cases, it was the permanence of the intrusion rather than the intrusion itself that seemed to concern the appellate court.

Another barrier to appellate review is the fact that many cases do not culminate in a final trial and judgment, but in a consent decree.[72] As a rule, consent decrees are not appealed; if they are, the appeal comes after one party's failure to carry out a provision of the decree.

The consent decree issue raises serious concerns because of the multiple interests involved in public law issues. Even if the immediate parties decide to settle and to institute remedial procedures through a consent decree, outside interests and "splinter" class interests should not be excluded from remedial planning and implementation. For this reason, consent decrees in such cases ideally should be supervised closely by the court, and subject to careful scrutiny on appellate review. If outside and dissenting quasi-party interests are not protected, the result is often multiple or sequential lawsuits.[73] This presents an ironic dilemma: while consent settlements conserve judicial energy, they may also turn a public dispute into a private settlement, leaving public interests unmet.

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69. 503 F.2d 1305 (5th Cir. 1974); 559 F.2d 283 (5th Cir. 1977), *cert. granted in part and remanded sub nom.* Alabama v. Pugh, 438 U.S. 781, *cert. denied*, 438 U.S. 915 (1978).

70. *Id.*

71. 503 F.2d at 1314-15; 559 F.2d at 290.

72. *See* Fed. R. Civ. P. 23(e). *See also* N.Y. State Ass'n for Retarded Children v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975); Rhem v. Malcolm, 377 F. Supp. 995 (S.D.N.Y.), *aff'd in part and remanded in part*, 507 F.2d 333 (2d Cir. 1974).

73. *See* Bronson v. Bd. of Educ., 525 F.2d 344 (6th Cir. 1975); *cert. denied*, 425 U.S. 934 (1976). This issue is currently the subject of considerable controversy in the private class action area where evidentiary hearings on settlement are required. *See, e.g.*, Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589 (1974). *See* Note, *Implementation Problems, supra* note 2; Comment, *Community Resistance to School Desegregation: Enjoining the Undefinable Class*, 44 U. CHIC. L. REV. 111 (1976).

Perhaps the most telling statement of appellate concern about the inconsistent mandate and activities of judicial adjuncts comes from Justice White's dissent in the Supreme Court's first opinion in *Halderman v. Pennhurst*. Justice White expressed grave concern over the level of interference which court appointment of adjuncts potentially could bring to state bureaucratic and institutional activities:

> More properly, the court should have announced what it thought was necessary to comply with the Act and then permitted an appropriate period for the State to decide whether it preferred to give up federal funds and go its own route. If it did not, it should propose a plan for achieving compliance, in which event, if it satisfied the court, a decree incorporating the plan could be entered and if the plan was unsatisfactory, the further use of federal funds could be enjoined. In any event, however, the court should not have assumed the task of managing Pennhurst or deciding in the first instance which patients should remain and which should be removed. . . . Congress eschewed creating any specific guidelines on the proper level of institutionalization, leaving the question to the States to determine in the first instance. A court-appointed Special Master is inconsistent with this approach.[74]

4. *Inconsistent Levels of Skill, Expertise, and Access to Data*

Disparities among court mandates and inconsistencies of appellate review highlight the varied levels of skill and expertise of judicial adjuncts. In the implementation phase and the remedial process a lawyer or judge may have too narrow a perspective on issues of administrative or management policy, because the legal questions seem paramount. Yet an adjunct who has previously played a role in administration or policymaking may fail to understand why the legal process appears to ignore what to him or her seem to be necessities of the bureaucratic process.

In the absence of any standardization of qualifications for appointment of judicial adjuncts, courts have used a variety of criteria. Some courts have appointed as adjunct a lawyer with prior experience in the substantive area of the dispute.[75] Others have looked to a person with a particular expertise useful to the resolution of the underlying dispute.[76]

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74. Halderman v. Pennhurst, 451 U.S. 1, 54-55 (1981) (White, J. dissenting).

75. Vincent Nathan, a law professor with expertise in criminal law, was master in the prison cases, Taylor v. Perini, 413 F. Supp. 189, 198 (N.D. Ohio 1976) and Jones v. Wittenberg, 440 F. Supp. 60, 66 (N.D. Ohio 1977). Michael Lottman, an expert in mental health law, was a member of Willowbrook Review Panel in N.Y. State Ass'n for Retarded Children, Inc. v. Carey, 596 F.2d 27, 32 (2d Cir. 1976), *aff'g* 409 F. Supp. 606 (E.D.N.Y.), and Special Hearing Master in Halderman v. Pennhurst, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part*, 612 F.2d 84 (3d Cir. 1979), *rev'd*, 451 U.S. 1 (1981).

76. Judge Weinstein appointed Curtis Berger, a law professor and expert in property law and housing, as master in a school desegregation case, because he was concerned about the

Courts have also selected adjuncts who have been employees, administrators, or evaluators of the agency involved or a similar agency, or who have served in the public sector in that or a related field.[77] Often, an existing administrator is chosen as adjunct for his or her administrative expertise.[78] Increasingly, courts have tried to combine essential qualities by appointing a committee to serve as adjunct. This has the advantage of broadening the scope and depth of the adjunct's resources and perspectives.[79]

Faced with a need for policymaking in the formulation of a remedy, most trial courts have used adjuncts as a last resort. Courts tend first to request that the parties propose and implement a remedy, or even to request that the legislature enact specific reforms. However, such successive references have a limited effect; they lack the comprehensive perspective which delegation to an adjunct with ongoing oversight responsibilities can provide.

IV. *An Administrative Adjunct Agency*

A. *The Need for an Independent Remedial Agency*

The remedial process in public law disputes is essentially nonadjudicatory, requiring skills that do not depend upon an adversarial posture. Negotiation and mediation play central roles in this process, and the partisan orientation that characterizes the pre-decree stages of litigation can easily defeat the objectives of the remedial phase.

Many of the features which make the adversary process uniquely effective at championing rights and duties in substantive decisions are counterproductive when applied to remedies, particularly those remedies which raise issues of policy or politics rather than law. Because the adversary process focuses on extremes, as presented by advocates with

desegregation and housing patterns. Hart v. Community School Bd., 383 F. Supp. 699 (E.D.N.Y.), *supplemented*, 383 F. Supp. 769 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975).

77. Carla Morgan, who served as Acting Special Master in the remedial phases of *Halderman v. Pennhurst* until that office was disbanded in December of 1982, had served in the MH-MR office of one of the defendant counties in the litigation, and worked in the mental health law unit of a public interest law firm representing some of the plaintiffs in the case, before assuming the adjunct function.

78. In Newman v. Alabama, 466 F. Supp. 628, 636 (M.D. Ala. 1979), Judge Johnson appointed the governor as receiver. The district superintendent of schools was appointed receiver in Morgan v. Kerrigan, 509 F.2d 580 (1st Cir.), *cert. denied*, 421 U.S. 963 (1975), and the state superintendent in Turner v. Goolsby, 255 F. Supp. 724, 730 (S.D. Ga. 1966).

79. *E.g.*, N.Y. State Ass'n for Retarded Children v. Carey, 409 F. Supp. 606 (E.D.N.Y. 1976) (Willowbrook Review Panel); Pugh v. Locke, 406 F. Supp. 318, 331 (M.D. Ala. 1976), *rev'd*, 559 F.2d 283, 290 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); Wyatt v. Stickney, 344 F. Supp. 373, 378, 398 (M.D. Ala. 1972), *modified*, 503 F.2d 1305, 1317-19 (5th Cir. 1974); Morales v. Turman, 383 F. Supp. 53, 120-21, 126 (E.D. Tex. 1974), *rev'd*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977), *on remand*, 562 F.2d 993 (5th Cir. 1977).

varying levels of skill, it is often unable to envision a comprehensive social policy. Furthermore, presentation of evidence, and analysis of remedial alternatives may be hamstrung by rules of admissibility of evidence and standing.

The creation, through legislation or judicial rule, of a remedial agency within the federal judiciary is an attractive alternative to the current *ad hoc* approach. Establishment of a remedial agency would not alter the process by which substantive right and liability are determined. However, the process by which specific remedies are developed and implemented would take on a form more suited to its substance.

The proposed agency would perform the tasks of a judicial adjunct whenever so ordered by a judge in a specific case. A party or parties would be able to appeal a judge's refusal to order use of the remedial agency, just as parties can presently appeal a refusal to appoint a master under Fed. R. Civ. P. 53. Specific statutory authority would define the limits of agency discretion for the specific remedial task undertaken.

Establishment of the proposed agency would allow coordination of evidence-gathering techniques and sharing of available remedial resources. Appointment of a judicial adjunct, particularly one who will administer, enforce, or monitor a remedy necessarily implies staff and resource needs. An agency could perform much of the ministerial work—evidence-gathering and study of remedial alternatives and policy considerations. Ideally the individual relationship between adjunct, judge, and parties would be maintained, but at lower cost, with greater expertise, and increased effectiveness. The proposed agency could also serve a comprehensive and acceptable monitoring role. The availability of such a monitor would minimize the need for the open-ended intrusion into a defendant's administration that has been criticized by appellate courts. The remedial process is essentially an exercise in management and organization. Admittedly, the litigation that precedes this stage of management and organization colors its perspective and increases its complexities. However, improving the management and organization of the institution or services remains the primary goal of the remedy.

The proposal to create a semi-autonomous remedial agency to perform the functions that judicial adjuncts presently perform on an *ad hoc* basis formally separates liability determination from remedial planning and implementation. It places primary responsibility for managing the remedy in semi-autonomous administrative hands, hence minimizing the conflict between the judicial model of dispute resolution and the demands of the remedy. Although responsibility for formal approval and enforcement of the remedy would remain with the trial court, a

remedial agency would assume its duties once the substantive liability decision has been reached. It would incorporate skills and procedures specifically designed for the remedial process.

The concept of separating liability determination from remedy formulation has solid roots in at least two current practices: the separation of functions in American administrative procedure[80] and the bifurcated post-verdict sentencing procedure of the criminal justice system.[81] Both the administrative model and sentencing procedure separate adjudicative, liability-determining functions from remedial, administrative ones.

The proposed remedial agency need not be entirely autonomous. Given the complex issues and the overlapping participation of government branches at state and federal levels, full separation from the judicial branch would be difficult to achieve. Thus, while many of the problems faced by *ad hoc* judicial adjuncts could be resolved through the creation of a remedial agency, a new set of dilemmas might arise.

B. *The Remedial Agency: Forms and Functions*

The remedial agency proposed above would incorporate the duties currently performed by judicial adjuncts. As envisioned, it would centralize and accord consistency to the remedial process; more clearly define the judicial, quasi-judicial, and other tasks that judicial adjuncts presently perform; and facilitate closer scrutiny of the remedial process by trial judges and appellate courts. Particularly with regard to separation of powers and levels of discretion, the remedial agency would be a civil law counterpart of the criminal law probation and sentencing bureaucracy.

As discussed earlier, judicial adjuncts face a number of systemic constraints. The mandate and degree of discretion given the adjunct by the trial judge are often unclear. The network of relationships among adjunct, court, and parties in public law disputes is complex. Adjuncts

80. Freedman, *supra* note 53, at 137-46, 172-73. *See also* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965); Stewart, *Reformation*, *supra* note 48, at 1698-1702.

81. Separation of sentencing from guilt-determination, for the most part, has come about informally because of presentence report requirements and similar sentence-preparation provisions, *see* Coffee, *supra* note 4, and by the presentence post-verdict motion procedures. Under the proposed Model Sentencing and Corrections Act a presentence report is required in all felony cases, and the sentencing hearing is a separate stage of the trial, held following the verdict. MODEL SENTENCING AND CORRECTIONS ACT (U.L.A.), §§ 3-203, 3-206 (National Institute of Law Enforcement and Criminal Justice, L.E.A.A., U.S. Dept. of Justice 1979). Different types of evidence and a separate system of "proof" are required. Evidence at sentencing is informal and tailored to the needs of a particular case. *See* Coffee, *supra* note 4, at 1370-81, 1399-1404. It should be noted that the informality of the sentencing courts has been strongly criticized by Coffee and others. This does not lessen the value of permitting *some* flexibility and openness in the "sentencing" or remedial process.

may be asked to perform multiple roles—quasi-adjudicative duties and negotiating or informational responsibilities need to be separated; a system for training and appropriately using existing expertise needs to be devised. The method of and necessity for appellate review are ill-defined. This final section describes how the proposed remedial agency might alleviate the problems of the existing *ad hoc* judicial adjunct system and examines the disadvantages and advantages of formalizing the remedial process.

1. *Mandate and Discretion*

A remedial agency can streamline the remedial process in complex cases only if its functions are defined and the limits of its discretion carefully drawn. Judicial adjuncts whose activities usurp the policymaking functions of a defendant agency or institution can be likened to administrative officials who exceed statutory authority or act arbitrarily. Under administrative law, disputes over abuse of discretion are resolved according to statutory or regulatory provisions governing agency behavior. Where regulations are unclear, courts have specific procedures to clarify the standard of discretion. At present, however, no such standard procedure exists to review and limit a judicial adjunct's exercise of discretionary authority pursuant to a court order. Disputes between parties, or between parties and adjunct, are sometimes negotiated by the adjunct, sometimes negotiated or adjudicated by the trial court, and sometimes treated as substantive issues by appellate courts.[82]

The statute or court rule establishing a remedial agency could set standards by which to measure and monitor adjunct behavior. The trial court could then refer the mechanics of the remedy to the agency, while retaining jurisdiction over disputed substantive issues.

2. *Separation of Roles Within the Remedial Agency*

The distinct phases of the remedial process—remedy planning, implementation, administration, and monitoring—should flow consistently while remaining distinct from one another. This is particularly true where the agency must be sensitive to the possible need for "recalibration" or reevaluation of the remedy as conditions change over time.

82. The practice of using judicial adjuncts as informal conflict resolvers has been noted by commentators. *See* Special Project *supra* note 2. In some cases, the trial court has expressly made this one of the judicial adjunct's functions, for instance, where biracial committees were created to facilitate party communication. *See, e.g.*, Valley v. Rapides Parish School Bd, 434 F.2d 144, 160 (5th Cir. 1970). In the *Pennhurst* case, the parties and the Special Master have also turned repeatedly to the trial court to resolve differences, even while the substantive issues were being appealed. Bradley, *supra* note 12.

Clear delineation of roles may also permit more closely tailored remedies.

Separation of functions is a critical element of the proposed administrative adjunct agency. Separation should be achieved by procedures which closely parallel those in existing administrative agencies, both civil and criminal.[83] Different personnel should be responsible for quasi-adjudicative tasks, negotiating, ministerial roles, and evidence-gathering. Most importantly, to reduce the potential for conflicts that exists under the present *ad hoc* system ministerial functions should be separate from adjudicative functions.

3. *Appellate Review and Relationships with the Judiciary*

In the past, as noted earlier, appellate court condemnation of intrusive remedies has concentrated on the need to refine the *scope* or duration of the remedy, without concommitantly analyzing the remedial *process* or the specific role of judicial adjuncts.[84] In this sense the actions of both trial courts and adjuncts appear to be largely discretionary. In fact, though, appellate courts have kept a tight, if ill-defined, rein on the actions of judicial adjuncts. In *Pennhurst* the Supreme Court may have sounded the death knell for unbridled adjunct activity.[85]

A specific procedure for review of remedial agency actions is essential to defining the boundaries of remedial activities. Review procedures should not diminish or remove trial court discretion to devise creative and issue-responsive equitable remedies.[86] But trial court creativity

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83. See *supra* notes 63, 80, and 81.

84. Bradley v. School Bd, 324 F. Supp. 456, 459 (E.D. Va. 1971); Halderman v. Pennhurst, 448 U.S. 905 (1980). A continuing difficulty with the appellate court review is the uncertain finality of the remedial process; an apparently "final" substantive decree may be followed by numerous remedial decrees. The doctrine of "practical finality" recognized by the Supreme Court in Gillespie v. United States Steel, 379 U.S. 148 (1964) provides at least the legal basis for appellate review soon after the substantive decree. As noted earlier, practical review remains difficult, particularly where no stay or only a partial stay of a remedial plan is involved. *See, e.g.*, Halderman v. Pennhurst, 448 U.S. 905 (1980) (stay of judgment granted in part, denied in part). The problem of achieving the appropriate balance between consistency and the need for individual remedial tailoring continues. *See* Special Project, *supra* note 2, at 851-52. A stay was denied in Kelley v. Metropolitan County Bd. of Educ., 436 F.2d 856 (6th Cir. 1970), *cert. den.*, 409 U.S. 1001 (1972). In the various stages of Morgan v. Kerrigan, 409 F. Supp. 1141 (D. Mass. 1975), either no stay was sought or no stay was granted; certiorari was denied in each instance by the Supreme Court.

85. See discussion *supra* note 52.

86. Much of the procedure would resemble the present system of appeal from decisions of federal administrative agencies. Appellate courts have a similar relationship with judges (or sentencing authorities) in criminal proceedings. Except where statutes or rules provide otherwise, appellate courts review of criminal sentences is limited to matters of discretion and illegality of sentence; *de novo* review of sentence appropriateness is impermissible. Even where sentence appeal is permitted, the circumstances are narrowly defined and separate from appeal of substantive issues. *See* 18 U.S.C. § 3576 (1976) (added by the Organized Crime Control Act of 1970 P.L. 91-452). *See also* United States v. DiFrancesco, 449 U.S. 117 (1980).

should be tempered by clearly articulated views of adjunct discretion and authority, placing the primary burden for planning and implementing a remedy on the remedial agency. This model parallels the traditional appellate review model in administrative law, although here trial courts retain the first-level review (as well as approval and enforcement powers) of the agency's remedial decision.

The relationship between remedial agency and "regulated" defendant agency or institution should also be clearly defined. An appeal structure should be available to check the remedial agency's activities; existing sanctions for violation of court orders should be retained. Note that under the remedial agency proposal a defendant agency would no longer be forced into an adversary relationship with a court-controlled adjunct while the court is adjudicating the defendant's claims relating to the remedy.

Changes beyond mere establishment of the agency might be required to successfully coordinate appellate procedure and remedy implementation. At present, the remedy, or elements thereof, may be stayed pending appeal. In most cases, however, the remedy is implemented while both the substantive issues of the litigation and the nature of the remedy are appealed.[87] The practical effect of this is to limit appellate review to that part of the remedy which is in place when the substantive appeal is heard. Subsequent phases of a remedy may be appealed separately, but appellate courts may never have an opportunity to review a remedy in its entirety. Moreover, because trial courts and adjuncts meanwhile continue planning, implementing, and even monitoring the original remedy, almost any modification of a decree on appeal will disrupt an ongoing process, at the expense of time, money, and effort.

Perhaps if public law remedies were not only administered by a semi-autonomous agency but were appealable in separate, parallel proceedings, some of these problems of coordination could be avoided. An alternative solution might be for appellate courts to set down specific procedural guidelines for remedy implementation pending review.

4. *Tasks and Skills*

Once the tasks to be performed by the remedial agency are defined, it becomes essential to articulate the skills and expertise needed to carry out those functions.

87. This occurred in Rizzo v. Goode, 423 U.S. 362 (1976), where the trial court negotiated with the parties to devise a civilian-police review board mechanism. Shortly after a settlement was agreed upon by all parties, the Supreme Court reversed the entire case on the underlying substantive issue. The court and parties in *Halderman v. Pennhurst* experienced similar frustration when parties were negotiating with one another while they were adversaries in court.

The tasks of the proposed remedial agency should mirror those presently undertaken by court-appointed adjuncts or experts: formulation, implementation, administration, and monitoring of a remedy tailored to the needs of a specific case.

Thus, the remedial agency should be structured to provide not only the technical skill necessary to develop appropriate remedies, but also the policy skills necessary to effectuate those remedies and the expertise necessary to monitor the remedy with sufficient detachment. Ideally, those who are planners will draw upon the available range of social, legislative, and behavioral information, without the restrictions of the adjudicatory structure. They should be able to assess alternative methods of implementing a court's order. The requisite policy decisions should not be made by adversary players, but by people with the appropriate skills to make such judgments.

5. *Disadvantages*

There are some drawbacks to institutionalizing a remedial agency, even if, as proposed, it remains part of the judicial branch. A single agency which performs functions ranging from remedy planning to monitoring may be open to conflicts of interest similar to those which affect *ad hoc* adjuncts. Also, while there is benefit to be gained from consistency among remedies in similar cases, institutionalization may pose a danger of rigid standardization. Removal of the conflict resolution process from the community in which the dispute was generated may slow down the remedial process. Unless special care is taken, the removal may decrease both the effectiveness and the legitimacy of a remedy.

A persistent concern is that of "bureaucratization" of the judiciary and creation of self-perpetuating bureaucracies.[88] Organization theory teaches that institutions quickly take on the goal of self-perpetuation as they become larger. An adjunct becomes an institution when the tasks to be performed require expertise and services that are beyond the management capacity of one individual.[89] An adjunct agency that occupies even a temporary line in a state or city's budget, as many court-appointed adjuncts do, may come to reflect the policies of the bureaucracy that it was established to oversee.[90]

In *NAACP v. Brennan*, described earlier, the adjunct bureaucracy be-

88. *See, e.g.*, Chayes-2, *supra* note 1. Fiss, *Forward, supra* note 1.

89. *See* Note, *Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy*, 89 YALE L.J. 513 (1980).

90. The funds required to support an adjunct bureaucracy can be monumental. The Office of the Special Master appointed in *Halderman v. Pennhurst* received over $850,000 annually (during 1978-1980) for 16 professionals, 5 support staff, and 7 parent liaisons. *See* Bradley, *supra* note 12, at 133.

came a "shadow agency" that mirrored many of the functions of the U.S. Department of Labor.[91] In Willowbrook, a review panel of experts established to monitor implementation of the consent decree, came under attack in part because of its drain on state resources.[92] The Office of the Special Master in *Pennhurst*, which was criticized for similar reasons, had many of the characteristics of the institutional adjunct. Its scope was broad—to formulate as well as to implement and monitor a remedy.[93] The Special Master was eased "out of business" by the court during the last half of 1982.

Danger inheres in the continued successful functioning of an adjunct bureaucracy when success is measured by the promised vindication of the rights secured by the decree instead of by specified structural changes in the system. "[T]he more successful [the adjunct] is in carrying out the complex tasks set out in the order, the more it is likely to relieve the defendants of their statutory responsibilities for system planning and development."[94] Moreover, it is difficult for the adjunct to simply pack up and move away when implementation is complete. Permanent changes must be made in the defendant agency if the remedy is truly to succeed.

Finally, a remedial agency may find it difficult to terminate its responsibilities. At present, termination of court involvement usually comes about by judicial order, although a court may retain jurisdiction for a time to see a remedy put in place. If responsibility for planning and implementing a remedy shifts to a remedial agency, the point of termination is less clear. A clear termination mechanism is essential to avoid the hazard of ceaseless intervention. There must be a point at which the defendant agency is deemed capable of managing alone.

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91. The case involved a suit by farmworker groups against the Department of Labor for failing to enforce federal statutes requiring state employment offices to provide job training and other employment services for minorities. NAACP v. Brennan, 360 F. Supp. 1006 (D.D.C. 1973), supplemented by 8 Empl. Prac. Dec. (CCH) ¶ 9634 (D.D.C. 1974). *See, e.g.*, Altman, *Implementing a Civil Rights Injunction: A Case Study of NAACP v. Brennan*, 78 COLUM. L. REV. 739 (1978).

92. N.Y. State Ass'n for Retarded Children, Inc. v. Carey, 492 F. Supp. 1099 (E.D.N.Y. 1980); 492 F. Supp. 1110 (E.D.N.Y.), *rev'd*, 631 F.2d 162 (2d Cir. 1980). When the New York State Legislature refused to fund the review panel for fiscal year 1980-1981, citing other priorities and questioning the authority of a federal court to mandate a permanent state bureaucracy that duplicated the existing state welfare department, the dispute was thrust back into the federal courts. District Judge Bartels ordered Governor Carey to submit a supplemental budget request to the legislature to fund the panel operation. N.Y. State Ass'n for Retarded Children, Inc. v. Carey, 492 F. Supp. 1110, 1115 (E.D.N.Y. 1980). The Governor and Comptroller appealed and the Court of Appeals reversed. 631 F.2d 162 (2d Cir. 1980). The district court was thus faced with three choices: finance the Review Panel in some other way, appeal to the Supreme Court, or reframe the *mandamus* action in such a way that the Court of Appeals would approve it.

93. 612 F.2d 84, 111 (3d Cir. 1979), *rev'd*, 451 U.S. 1 (1981).

94. Bradley, *supra* note 12, at 68.

The point of termination could be determined in one of three ways. First, courts could retain jurisdiction until some appropriate point of "completion" and then issue a final order. Second, specific time limits could be imposed in advance. The initial order of reference from the court could set a time limit for remedial agency involvement which the court could extend if necessary. Alternatively, the legislation or regulations creating the remedial agency could specify a precise term of intervention (six months, for instance) renewable at designated periods. Finally, the task of terminating remedial agency involvement could be left to the discretion of the remedial agency. In this case, a party should have the option to appeal to the court if it feels that the adjunct has abused its discretion.

Summary and Conclusion

The judicial adjunct can potentially provide tremendous assistance to courts struggling with the complex remedies of public law litigation. Under the present *ad hoc* approach to appointment, training, and supervision, however, this potential is not fully realized. An adjunct agency could reduce the problems of ill-defined or conflicting roles, allow fuller development of adjunct expertise, and permit independent evaluation and monitoring of court orders, while still permitting adjunct appointments to be tailored to the specific needs of particular lawsuits. In so doing, it would help assure that the courts' intent in public lawsuits will become reality, and that those who win in the courts will truly prevail.