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SCHOOL OF EDUCATION STANFORD UNIVERSITY

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August 1985

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Abstract

Court intervention in special education systems and prisons has varied consequences. This paper reviews a series of case studies of court ordered prison and school reform comparatively. Several factors conspire to frustrate attempts to improve public services: the allocation of costs and benefits of the proposed change, the realities of the public bureaucracy, the presence of a professional culture, and external factors beyond anyone's control. The case studies indicate that judicial reform has both positive and negative impacts.

Court Reform of Public Institutions: What Determines Impact?

Court intervention in special education systems and prisons has varied consequences. The quality of services offered usually improves, although not as much as desired by the court or the plaintiffs. The public bureaucracy responsible for delivering a service--administering a jail or a special education program--frequently changes in order to perform its tasks more efficiently, but administrators often complain that court intervention diverts their attention away from efficient administration toward satisfying legal rules. They also say that lawsuits excessively narrow their discretion, crippling their capacity to innovate.

Court attempts to reform public agencies invariably place the matter on a political agenda--for instance, by forcing the legally responsible officials to devote time, fiscal or political resources to its resolution. The press often plays an important role in setting the agenda by heightening public awareness of the issue.

Finally, judicial involvement in reform efforts affects how policy gets made. Legalization, the process of resolving problems through invocation of general rules, adherence to regular procedures, and the like, becomes a dominant policy framework, framing problems and sometimes suggesting solutions. As the process evolves, the role of lawyers is strengthened, especially those representing litigant groups which habitually use the law to secure social change. And the court itself tends to become a permanent actor in the policymaking of the issue area. The discretion of those responsible for service delivery is correspondingly reduced, as is the professionalism, bureaucratic, or

political values they espouse. Professional special educators are less free to resolve problems on the basis of the particularistic issues raised in a given instance. Bureaucrats are less able to operationalize vague mandates of authority by responding to organizational imperatives. Mayors, governors, and legislators can no longer make the preferences of their constitutents their only concern.

Yet puzzles remain. Why can such conditions as filthy jail cells be changed through reform suits with comparative ease, while courts cannot compel guards to change their behavior? Why is it that interest group activity is high in the special education cases, but much less in the jail cases? And can the extreme length of time necessary for reform litigation be explained?

The studies in this volume of institutional reform litigation over time and across issue areas lead to the conclusion that there are four major determinants of the impact of such suits:

1. Issue: every institutional reform suit apportions perceived costs and benefits between the intended targets of change (a jail or a school system) and other affected populations (parents of handicapped children, inmates, or the general public). This distribution of costs and benefits affects the likelihood of successful reform and also gives a better understanding of the politics and policymaking in the issue area;

2. Organizational setting: the organizational structure and the quality of administration exhibited will shape impact;

3. Professionalism: the presence of a professional culture in the issue area may lead policy participants to frame problems in a way that

minimizes or conflicts with legal values, possibly frustrating compliance.

4. Environmental factors: the political, social, and economic factors in which the organization exists can determine whether court-mandated reform will be achieved. To be successful, institutional reform must have political support and there must be enough money to pay for the ordered changes.

Case studies show us that these four determinants often are significant impediments to change, and that, consequently compliance reform decree is likely to be imperfect.

1. Issue

Public policies allocate costs and benefits. Costs, usually expressed in monetary terms, are burdens that someone or something must bear if a policy is adopted. Benefits are any satisfaction that someone or something will enjoy if a policy is adopted. A typical cost associated with a public policy is higher taxes; a typical benefit is the military protection that is purchased with those taxes.[1]

But perceptions also matter. Having more tanks or airplanes may not actually result in a more secure nation, since any potential adversary may match the spending on such weapons. Neveretheless, some Congressmen appprove greater defense spending because they believe that the United States will be better protected as a result. Costs "and benefits are what people perceive them to be"[2], says James Q. Wilson, emphasizing

the importance of citizens' perceptions in determining political activity.

Institutional reform decrees, an example of a public policy, also can allocate or appear to allocate costs and benefits. The costs imposed by such legal actions can include such things as school busing, the taxes used to pay for cleaner jails or for additional special education programs. Benefits may include cleaner jails, more spacious cells, and more students enrolled in special education programs. But perceptions also are critical in institutional reform litigation. It matters less whether institutional reform suits actually allocate costs and benefits than it does that people <u>believe</u> that policies will yield such results.

Institutional reform decrees will always appear to impose costs on the public agency that is the target of change. School systems offer new programs or seek out unserved handicapped children. Corrections officials must change the programs offered to inmates, cease reading prisoner mail or observe new procedures when searching inmates. More generally, the costs for target organizations may include improving service levels, altering standard operating procedures, or coordinating the activity of disparate organizational subunits. These costs are measured by changing organizational behavior (which is difficult) improving service levels (which may be impossible), or increasing budgets (which is a matter beyond the direct control of the organization's managers).

Reform litigation also may impose costs and benefits on those outside the litigation. For example, many parents who have not participated directly in busing litigation may believe that busing plans subject children to hostile environments, destroy the "neighborhood" character of schools, or have other pernicious consequences; they resist cooperation with the provisions of court ordered busing plans as a result. In other cases, reform litigation promises to distribute benefits well beyond the immediate target of the suit. In special education litigation, for example, such suits promise to enroll thousands of additional children in school and to open up the educational system to the direct participation of parents in evaluation and placement decisions. Yet these parents and children are not involved in the original litigation that brought about such change.

Sometimes the costs and benefits of perceived change are confined to the immediate target of the litigation and not distributed beyond it. In the jail suits in New York City and Rhode Island, for example, court ordered reform plans promised benefits to inmates. Citizens not in jail have only the most indirect concern with corrections. Suits to reform public housing agencies or mental hospitals also confine most costs and benefits to the public agency plaintiffs hope to change.

Examining how costs and benefits are allocated in reform suits can do much to help understand the politics of reform litigation. When costs are borne by the organizations or officials who are not the immediate target of the court's reform decree, or not affected directly by its outcome, achieving change can be difficult. Full compliance will

require these individuals and organizations to cooperate when participating in the suit. If they see no incentive to do so, they may resist reform. In school busing cases, for example, the opposition of many parents to the transportation of their children for racial integration has frustrated the court's attempt to racially balance the schools.

When reform litigation promises benefits to populations beyond the target organizations, achieving change may be easier. In the two special education studies, the promise of greater educational benefits for handicapped children in Pennsylvania and New York City caused parents and legal aid groups to put legal and political pressure on the Commonwealth of Pennsylvania and the New York City Board of Education to expand their offerings and to offer services to additional categories of handicapped children. Their participation continued during implementation. The perceived benefits gave them incentives to participate in the due process system and to continue to file suit in court about problems that arose.

The interest group activity associated with issues that distribute costs or benefits beyond targeted public organizations can be high. When the social costs of compliance are perceived intensely by people who are not participating in the litigation, they may organize to resist implementation. Parents form groups to pressure school leaders and school principals in resisting the court, or they hire attorneys to intervene in court on their behalf. The court involvement itself may be perceived as illegitimate. The Legal Aid Society in New York City, the

Pennsylvania Association of Retarded Children and many other groups organized to assert legal entitlements. We already have noted one aspect of the policymaking process that accompanies this high level of activity: the case lasts for several years and these outside groups become a permanent part of the policy process as new problems are brought to court and interest in the issue continues. The groups themselves play an important role in implementation.

When the costs and benefits of reform litigation are confined to the immediate target of the suit, as in the two jail cases, change is less dependent on the support of outside groups. Such groups do not clamor to participate in policymaking, and outside interest group activity is low. In these instances the role played by lawyers and administrators in implementing the reform decree is especially important. Public interest law firms become important participants, since the low incentive for social groups to participate gives these attorneys substantial autonomy to make decisions regarding trial tactics and strategy. For example, the public interest law center that filed the original lawsuit in Rhode Island at the behest of inmates continued to work on the case even after inmate power at ACI had been broken by Commissioner Moran. In New York City corrections issues had rarely generated much political activity; only the activist attorneys who claimed to represent inmates continued to litigate jail issues into the 1980s.

In practice, however, because every reform suit is designed to change the workings of a public organization, it inevitably imposes

costs on the public officals working within it. Although some administrators may welcome the way court intervention removes obstacles to making service improvements, few administrators regard the organizational changes necessary for achieving such reform as anything but a burden. Only exceptional administrative leadership, such as that displayed by John Moran in Rhode Island, can force middle and lower level bureaucrats to change in the desired manner. There are no parent groups complaining about the services their children are receiving, or about implementation; lawyers, believing that they represent large plaintiff classes, do it instead.

Since all reform litigation reallocates costs and benefits, such reform is inevitably a political process, involving parents, inmates, legal aid attorneys, bureaucrats and judges, all with different stakes in the outcome and different perceptions of what is to be done. Agencies vitally involved in the delivery of public services may seek to join these groups in trying to influence the final shape of a reform decree. The result is a distinctive kind of judicial client politics, with the courtroom the main focus of activity and the perceived costs and benefits at stake the principal factor determining the shape that client politics will take.

2. Organizational Setting

The working of public bureaucracies can affect the success of reform litigation. Low-level correctional officers may disregard court guidelines for treatment of inmates, bureaucratic inertia may free special education bureaucrats to settle for less than the "appropriate" education required by law, and faulty coordination between special and "regular" bureaucracies may give handicapped children an entitlement that is less than what the court mandate. The characteristics of public organizations that determines the outcome of reform litigation fall into three categories: the structure of the public bureaucracy or bureaucracies that a court seeks to change; the operations of those bureaucracies; and the relationship between the court and those bureaucracies.

Bureaucratic Structure. The hierarchical integration of a public organization affects the implementation of institutional reform. In order to be effective, court directives to executives must be translated into orders that are filtered downward in the organization. In a hierarchically organized bureaucracy, such as custodial prison systems, directives must filter downward from the executives in the corrections department to the wardens of individual institutions and, ultimately, to correctional officers who must control the inmates.

But most public organizations are not rigidly hierarchical and have structural complexities that make changing their behavior considerably

more difficult than this idealized model would suggest. School systems have decentralized regular education bureacracies next to centralized special education bureaucracies, and the classroom teacher possesses considerable autonomy. In jail settings, the lowest level operator in the prison system, the correctional officer, performs many duties that are not routine and hence are also unlikely to be changed easily. Orders issued to prison guards from above cannot anticipate the unpredictability of daily prison life.

An organization's mission, that is, its "distinctive and valued set of behaviors", may also thwart change.[3] Special educators are influenced by training that emphasizes the application of expertise to individual cases, they are likely to resent--and resist--court rules that constrain their discretion. Career corrections officials who see their mission as controlling unruly inmate behavior are unlikely to enhance court reform decrees which appear to undermine their authority or which cannot help them quell a jail disturbance. School principals may see their administration of a school as authority that is absolute, and not subject to challenge in court.

Successful change will depend on whether a court takes into account the power structure of an organization--who is in a formal position of authority, who has access to necessary information and control over needed resources, and other facts of bureaucratic life.[4] In prisons, correctional officers unions often have wielded great power over inmates and in Rhode Island inmate unions themselves controlled much that happened in the ACI; individual correctional officers may use threats of

force in order to keep order in the jails, since they have no weapons. In special education, school principals have enormous influence over the delivery of special education services to the handicapped, and who receives it. Yet guard unions and correctional officers often have been ignored by judges seeking to improve jail conditions, and judges usually do not consider the role of administrators in the individual schools in special education cases. This neglect of power relations within the public organization leads to continued noncompliance, because court orders give no clear direction about how these middle and lower level bureaucrats are supposed to behave. Almost inevitably, new grievances are engendered that all parties bring back to the court.

The loose coupling of school systems--that is, the weak organizational link existing between educational structure and actual school activities--leads judges and plaintiffs to focus their reform efforts on structural aspects of special education. As the case studies demonstrate, court orders focus on the availability of programs, enrollment figures and staffing patterns. Judges seeking to reform school systems will look at such evidence of unworkable and immediate change, think that more has happened than is actually the case and will expend very little effort in determining whether handicapped children actually are learning anything; in fact, that may be impossible to determine with any precision. Meanwhile, parents of the children complain that they have inadequate bus service, or that their child is still on the waiting list for special education services. Underlying the entire waiting list controversy in Jose P., for example, is the

assumption that if the city succeeded in the formal task of eliminating the waiting lists much of the city's legal obligation to the handicapped would be met. In fact, removing students from the waiting lists and placing them in classes often can be accomplished rapidly and without much evaluation. The court and the plaintiff's attorneys continue to look at the length of the waiting lists as a major indicator of compliance. They devote less attention to the more important educational issues.

Yet a special education system that is the target of legal reform is also able to assimilate legal rules more easily than other kinds of organizations. Loosely coupled organizations, like educational systems, can adapt more easily to the centralizing effects of the court rulings than can tightly coupled systems, such as prisons, because "they can more easily deal with impossible or inconsistent centralizing constraints by the avoidance of implementation and the ritualization of implementation."[5] Much of what schools are about--teaching children--is affected little by personnel changes at the district level or consent decrees that bind the state department of education. Life in the classroom goes on regardless of what happens in the courtroom.

The tendency in loosely coupled organizations for administration to be detached from the services the organization actually provides also leads to an emphasis on the formal and observable as evidence of progress toward compliance. Since no one knows for certain how to improve the educational achievement of the handicapped, trouble may follow if reporting requirements are not met. "In loosely coupled

settings, administrative tasks involve less the management of technical work than the management of relations within the environment according to institutionally required rituals."[6] The timely submission of compliance reports by a public defendant is one of the most hallowed of rituals in reform litigation.

Another structural characteristic of public organizations is the dispersal of authority and responsibility among several bureaucracies and levels of government. This, too, may shape the outcome of reform litigation. Suing a state department of education does not encourage local school district officials to work for reform; and suing a local school district may not lead a state to exercise its legal responsibilities in monitoring compliance with education laws. The "resources and authority" necessary to secure and institutionalize the changes set out in a court remedy are distributed among many bureaucratic units.[7]

This fragmentation of authority makes change harder to achieve. Fragmentation associated with federalism disburses responsibility for the delivery of a social service among federal state and local levels of government. In corrections, the operation of penal institutions can be either a federal, state, or local task, but the cooperation of all three levels of government is critical if constitutional standards are to be attained: federal money is needed if state and local prisons are to be effectively administered, while state prisons can sometimes help localities reduce jail overcrowding.

Fragmentation associated with the separation of powers also complicates the task of reform, distributing responsibility for delivery of services to the handicapped or the operation of jails in the hands of more than one political branch. While a corrections department may wish to improve conditions in its jails and a school district may wish to serve more handicapped children, changes can be made only if the legislature or city council appropriates the necessary funds. The support of court-ordered reform by a mayor or a state governor may be important to the implementation of change, as shown by the two New York City cases and the Palmigiano litigation.

Fragmentation in bureaucratic organization may also hinder change. Sometimes the bureaucracies themselves are split into many line and staff offices or committees with competing responsibilities. The bifurcation of educational bureaucracies into "regular" and special educational systems--each organized around differing principles--is but the most obvious example of how bureaucratic fragmentation can complicate implementation.

Court intervention in social policy itself also can encourage fragmentation. The intervention of the courts into educational and correctional settings diminishes the authority of school superintendents, corrections executives and wardens. The size and complexity of the organization increase as subunits within the organization attempt to govern their behavior according to the external standards decreed by the court. The result is an organization whose bureaus are as concerned with observing external rules as they are with

the performance of subordinates or the directives of their executives. Sometimes the need to change to conform to court dictates causes vertical integration to decrease, as new bureaus are formed to deal with the court requirements.

Thus, special education bureaucracies must coordinate their activity not only with "regular" education bureaucrats but with the requirements of court decrees and with those who monitor the implementation of those decrees. Officials hire new staff to cope with court ordered requirements and shift seasoned correctional officials to address the demands placed on the system from the outside, away from their traditional task of exercising authority over the prison guards

That some social services are delivered by several public organizations also may be an obstacle to reform. One study of the implementation of PL 94-142 found that some state agencies have withdrawn their services to handicapped students after the passage of the federal statute, assuming that the schools would automatically provide the services that formerly their responsibility.[8] Competing responsibilities thus may lead to policy that is uncoordinated and change that is sporadic or incomplete: correctional officers work at cross purposes with corrections executives and regular executives resent the new demands of special education professionals for a greater share of fiscal resources.

Courts usually have not taken this organizational fragmentation into account in their reform decrees. The target of most intended

reforms are the executives of an organization, not the various administrative subunits within it, nor middle level bureaucrats and elected political leaders whose responsibilities are less direct. Their duties are not directly specified in the court order. Judges can identify the essential parties whose support can make change possible, but they must do this without clear guidance from either legal rules or established practice. Often they do not know enough about how an agency works to take into account such complexities.

Bureaucratic Operations The tasks of an organization[9] affect the court's ability to reform it. State education commissioners such as Pennsylvania's John C. Pittenger in the PARC litigation may think that the primary responsibility of education officials is to serve regular students, and so may resist court pressure to expand services to the handicapped. Corrections bureaucrats may believe that their major task is to "get criminals off the streets", and view court attempts to improve jail conditions as interference with that goal.

Routine tasks that public officials perform often can be most easily changed by the courts because they "involve little discretion, they can be controlled by providing a detailed set of specifications or 'program' describing how the tasks are to be performed".[10] Correctional officers routinely produce pretrial detainees in court,

wardens inspect jails and prisons; state education officials routinely process the paperwork generated by due process appeals.

Much of what reform litigation seeks to change is not routine and is for that reason difficult to control. In the Jose P. case, requiring a prompt evaluation of each handicapped child necessitated that prolonged observations be made of thousands of the city's pupils--hardly an easy task for New York City special educators, and one that was certainly not routine. The PARC due process regime tried to introduce regularity into the diagnosis and placement decisions of the Commonwealth of Pennsylvania. However, insuring that the educational prescription was "appropriate", as required by law, required an inquiry into the circumstances of each individual case. Similarly, corrections officials must undertake all kinds of discretionary tasks every day: when conducting searches of inmates and their cells, when confiscating property, and making detailed determinations of fact concerning individual inmate behavior that are the prerequisite of a properly functioning classification system.

One study of a Massachusetts law very similar to Pennsylvania's PARC settlement found that the mandate to serve the handicapped vastly increased paperwork and added to the workload of special educators. School officials did not have all the staff needed to meet the requirements of the law, including its provision for more detailed education plans, and there resulted an inevitable tension between the values of individualized education and mass processing.[11]

To cope with these demands, education officials in Massachusetts cut corners. They did not assess all the relevant educational needs of their handicapped children and they scheduled assessments of children that were not likely to cost school districts extra money. Officials gave more attention to children whose needs met their specialties, favored group over individual treatment, and did not fully comply with reporting requirements designed to protect the interests of parents. They tried to ration resources and developed other strategies that allowed them to secure their work environment.

Much the same held true in the PARC and Jose P. cases. Pennsylvania's special educators sought to routinize the myriad of problems that had to be settled, while accommodating district placement decisions to bureacratic reality. In New York City, teachers tried to secure their environment by "dumping" students who posed threats to classroom control into special education classes, while the board of education neglected the reporting requirements favored by the court as a compliance monitoring strategy.

Court decisions concerning the due process rights of inmates during disciplinary proceedings and decisions establishing inmate grievance mechanisms seek to restrict the discretion that prison guards have long possessed. Yet these court actions, say the guards, undermine the critical tasks of their job: maintaining order in the jails and preserving safety in the institution. Said one penologist who has worked with prison guards, the guard functions "as a manager of violent, explosive men but he's not recognized as a manager. He's only a guard,

a watcher. He's regarded as an individual functioning at a low level. He's expected to go by the book, but the book doesn't work."[12]

Correctional officers have devised, not surprisingly, strategies for coping with problems caused by court reform suits. Judicial orders affecting the essentials of their job are disregarded if they conflict with the need to maintain order or otherwise jeopardize the safety of the guards.

Another response by street level bureaucrats has been to organize into public employee unions which can act as countervailing forces in the implementation of institutional reform decrees.[13] Correctional officers unions establish a form of "criminal justice syndicalism" to protest job conditions and the lack of status enjoyed by their members. They oppose the push by administrators and the courts to expand academic, vocational, and other prison programs for inmates, and complain that the courts neglect the professional needs of guards. In education, teacher unions have been organized to press for their interests in negotiations with school districts, and these unions sometimes are not sanguine about court control of the schools. This public service syndicalism has grown in places such as Rhode Island to embrace the formation of inmate unions which insist on participating in decisions about the purposes and methods of prisons. Collective bargaining has brought guards more job security, control over their work assignments and more influence in decision making at all levels of prison administration. Collective bargaining is also a

common phenomenon in education. Many members of teacher unions resent the special status given to education for the handicapped, believing that it diverts needed resources and attention from other educational issues. Teacher unions also challenge management decisions concerning teacher performance, the use of sick and vacation leave, curriculum development and the use of specialists.

One strike by New York state correctional officers was settled when the state agreed to provide stress training for the state's 11,000 correctional officers. Job actions such as one taken by militant New York City prison guards on Riker's Island can frustrate the achievement of court ordered changes in jail conditions. The Adult Correctional Institutions in Rhode Island had a long tradition of guard activism (and of obstructing court reform), until John Moran's authoritarian rule broke their power--and those of inmate unions--in the late 1970s. Some guard unions have even included modification of court ordered changes as items to be pressed in negotiations with management.

The problems inherent in being a special educator and correctional officer makes changing professional behavior very difficult. Their occupations call for individual initiative. Those who hold them must interact directly with citizens in the course of their work. The personal and organizational resources supporting them, as with many social service jobs, are limited in relation to the tasks they are asked to perform. And the demand for their services will always be as great as their ability to provide these services.

These impediments to change are especially difficult for the courts to modify. Street level bureaucrats tend to routinize procedures, modify goals, ration their services, assert priorities and limit or control their clientele. "In other words, they develop practices that permit them in some way to process the work they are required to do. The work of street level bureaucrats is inherently discretionary." Since the "work objectives" for street-level bureaucrats are usually vague and contradictory, it is almost impossible to devise valid work performance measures for them and the consumers of services are relatively insignificant as a reference group.[14] Here again, it seems that despite the hierarchical organization of many public bureaucracies, orders from the top cannot easily control the actions of street level operators.

Relationship between Court and Targeted Bureacracies. The court's relationship with a targeted bureaucracy affects compliance with the reform decree. This interaction includes the communication between judge and public officials, the resources that public agencies possess to make the required changes, and the dispositions of the implementors in the bureaucracy charged with making changes.[15]

Courts are often faulted for their inability to transmit their decisions clearly. The personnel who are responsible for complying with a judicial reform decree must understand what it is what they are

supposed to do. Officials must know how to operationalize the requirement that each handicapped child receive an "appropriate" education, and corrections officials must understand what it is to treat inmates in a "nondiscriminatory" fashion. Other judges do not necessarily read a decision once it is published, and it is claimed that the legal profession itself is a poor channel for the transmission of information. Court decisions are criticized for ambiguity, vagueness, and that each pertains only to the facts of the case. Sometimes judges write their opinions broadly so that legislators and members of the executive branch of government will develop their own solutions. Uncertainty is increased by the focus of courts on only those issues raised in a particular dispute, not on all possible issues that may be germane. Judges also wait until a controversy comes before them before making a decision, and cannot reach out to deal with a controversy before it generates a formal lawsuit.[16]

Many of these accusations have only limited validity with regard to institutional reform litigation. The transmission of information to interested parties is seldom a problem, because of the unusually high publicity that such cases generate. These court directives tend not to be vague, but comprehensive and detailed in character. Moreover, most judges monitor implementation of reform either directly or indirectly. They encourage parties unsure of the meaning of a directive to ask the court to resolve the uncertainties. Communications difficulties in implementing institutional reform litigation lie less in the uncertainty

generated by the original decision than with the need to adapt a decree's provisions in light of new circumstances.

Communication between the presiding judge of a case and public administrators often is inadequate, because the law prohibits the chief executive officer in a public organization from communicating directly with a judge in most circumstances. Messages from the executive to the judge can be channeled through intermediaries, but such messages are subject to misinterpretation and error. Sometimes messages even can be transmitted through the news media, but such efforts are even more liable to distortion.[17]

Other Organizational Factors. The success of court ordered institutional reform depends, in part, on two other properties of public orgarizations: the resources available to the organization, such as adequate staff and facilities, and the adequacy of the information available to its executives and the court about what is taking place within it.

All public organizations complying with reform decrees must possess adequate staff. There must be enough personnel to achieve change in the public organization and sufficient staff to assist the court in monitoring the decree.[18] In Pennsylvania, for example, the early due process hearings were less successful in assuring the uniformity of outcome that the original PARC consent decree envisioned due to considerable personnel turnover in the state attorney general's office.

Courts also face a staffing problem. Because courts have too few staff to monitor the implementation of their decrees, they frequently use special masters to perform that task or rely on plaintiff attorneys. Yet even when they depend on outside assistance to help gather information about compliance, court efforts to monitor implementation sometimes are unsuccessful. Judges have difficulty monitoring prison guard behavior and cannot superintend special education placements.

Information is another important requirment securing court reform of social institutions.[19] Such information is of two kinds: public officials must know what they are supposed to do and courts must monitor the response of the target agency in order that court decrees can be enforced.

Yet the lengthy character of institutional reform cases presents distinctive information problems for the trial court and targeted public organizations. Even after a remedial blueprint is developed, information concerning the constantly changing issues that occur during implementation must be gathered. In the Jose P. case, for example, the court may someday have to address many of the long deferred issues concerning the quality of special education services received by New York City's students, and this would require that the court gather and evaluate new data on special education in the city. In Rhode Island, Judge Pettine's continuing concern with facilities renovation and overcrowding at the ACI required that he monitor the size of inmate population and the progress of building renovations, even though the

remedy was ordered into effect long ago. In order to manage these complex tasks the court must have access to a continuous and accurate flow of information about what is taking place within the defendant public institution:

> implementor resistance... may result in only pro forma(sic) or ineffectual change, or no change at all. But implementation difficulties usually stem... from factors that emerge during the implementation process. Prosaic but nonetheless difficult problems may arise--inhospitable personnel policies, communication breakdowns, changes in leadership or staff for example. Or, once into implementation, unanticipated requirements may surface--for example, need for special training, new facilities or special expertise. Similarly, competing demands on system resources may deflect implementation efforts. Or, the assumed "policy solution" may, in practice, turn out to be misspecified or wrong.[20]

The several ways that courts can acquire this sort of information have already been suggested. Court-appointed masters such as J. Michael Keating and Allen Breed in Rhode Island, or retired Judge Marvin Frankel can perform monitoring duties that assist the trial courts in enforcing the decree.[21] The attorneys in the litigation, such as those in the jail litigation in New York City, can gather information concerning compliance in public sevices and report back to the court. Some combination of these mechanisms can be used by the judge and it can be supplemented by data provided by other public bodies such as the New York City Board of Correction. Unlike appellate judges, trial judges in institutional reform cases possess considerable flexibility to modify their reform decrees, or to issue coercive orders to enforce change in the behavior of defendants; but as can be seen, the organizational structure of a public bureaucracy sometimes frustrates compliance

nonetheless. Moreover, a formal court order can only be modified after a hearing, and these are sometimes difficult to schedule due to the court's often crowded docket. It is not surprising, therefore, that some administrators find many reform decrees unrealistic. and "unrelated to the actual operations of institutions"

3. Professionalism and the Issue Area

The outcome of a court's institutional reform efforts can depend on whether the issue is one that has been traditionally dominated by powerful professionals such as special educators and doctors, who view public policies through lenses that differ significantly from those of the lawyer. The conflict among contending norms may result in the resistance of these professionals to change or the warping of a judge's decrees--with the result that there is less improvement in public services than a court wishes.

The professional model of decisionmaking focuses on achieving desirable results through the application of expertise to individual cases. "Results rather than principles, discretion rather than rules, and groups rather than individuals are emphasized."[22] Robert Wood, who served as the superintendent of the Boston public schools during the implementation of court ordered integration in that city, later described the ethos of "professionalism" possessed by many teachers:

> ...school administration had been regarded as a piece of cake. Its mission was clear: educating and socializing children. It functioned in a separate, autonomous structure, with independent sources of revenue. It was held to be "above" politics, Its

policymakers, the members of the school board, were thought to be civic-minded laymen, motivated solely by the concern of what was "best" for the students". Professionals in the system were supplied by schools of education and screened by state certification.[23]

The intended beneficiary of a service provided by professionals--for example, a handicapped student--plays a passive role in this system and defers to the presumed expertise of the professional. The professional, in turn, provides the service based upon distinctive characteristics of the individual case before him.

When a "professional" issue is placed on the public agenda it is done so in ways that leave little room for the client to define the nature and extent of the benefit; often the professionals themselves, who may dominate the public agency charged with the delivery of services, define this benefit, and the task of program accountibility in such organizations is carried out by other units of the bureaucracy. This professional approach to decisionmaking has characterized vocational education and human service settings such as mental health, public welfare and probation.[24] Before the 1960s it was the approach taken to special education.

Legalization, by contrast, focuses on the individual as the possessor of rights, stresses the importance of regularized procedures and the public articulation of values that underlies a decision in order to minimize arbitrariness.[25] Accountibility under this approach rests on the willingness of the individual to police his own interests, including his interest in fair procedures. Legalized public decisions can take the form of court action, but need not (The federal special

education statute, PL 94-142, for example, uses legal devices such as the due process hearing to attain its purposes). Many private disputes between citizens are settled through legalization, as are a large number of criminal matters. Prison issues, as we have seen, have traditionally not been the object of legalization, but have been allowed considerable autonomy.

Institutional reform litigation seeks to legalize the workings of the public agencies that are the focus of court scrutiny. In special education litigation, for example, the provision of education services is made liable to parental challenge through a due process hearing. To be sure, this legalization was not intended to fully supersede the traditional professional approach to special education--the role of the special education "expert" was supposed to play a critical role in the system. But the role of the professional was intended to be severely circumscribed by the law.

Judicial reform of special education places the law squarely in conflict with the professional mode of decisionmaking. Frank Macchiarola, former Chancellor of the New York City schools, described to the federal court how this conflict affected educational policymaking in New York City. The courts, he said, tend

> to misunderstand the nature of the educational handicaps we are most frequently called upon to address and (to overestimate) the capacity of the profession as a whole to identify and remediate poorly defined behavioral difficulties These issues are central to understanding the conflict between rigid time limits and quantitative measures of progress, and to our efforts to develop appropriate, effective, and non-restrictive services for handicapped children...[26]

> The judgment's preoccupation with time limits creates a bias in favor of standardized evaluation instruments and against individualized evaluations based on in-depth observations of the child and consultations with appropriate staff members...
>
> ...The judgment creates a bias in favor of reliance on pre-existing, clinical, diagnostic categories (mentally,retarded, learning disabled, emotionally handicappped) and discourages a more defined analysis of individual problems and needs ...Finally, the pressure of time makes it more difficult to develop programmatically meaningful recommendations for services and thereby insures that the child's educational program rather than merely his or her placement or classification, will be cnanged in educationally appropriate ways...[27]

Unfortunately, many learning and emotional difficulties are functional and contextual in nature and must be disagnosed by professionals examining individual cases. The invocation of general legal categories thus has only limited usefulness. Many of the categorical definitions of handicap are largely illusory,[28] and have cures that are not readily identifiable or which are in dispute.

The constantly changing state of the art in special education makes it quite possible that the evolution of the field will outpace the ability of the courts to modify their reform decrees accordingly. Moreover, the very process of labelling a student as possessing a certain handicap may aggravate his condition (Richard Weatherly points out that teachers have different expectations of labelled children than for children they believe not to possess a handicap.)[29] Often the

services a student receives are less important than where he acquires them and in which educational environment, and in the correct environment a child's handicap may disappear.

This inappropriate fit between legalism and special education professionalism leads to the problems that were evident in the two special education case studies. Judges trying to determine compliance usually will rely on quantifiable measures of class enrollments, educational offerings and the like, but in reality those measures say very little. In New York City this difficulty has contributed to the recycling of many students through the special education system, as misdiagnosis has led to placement in inappropriate classes and to futher referral for evaluation once the improper placement has been discovered.

In Pennsylvania the triumph of legalism has been more complete. There the role of the special educator has diminished considerably in the past decade, due to the growth of legalism. Debate in the courtroom has focused in that state not on professional issues such as curriculum and staffing matters, but on issues whose outcomes can be measured such as whether organizations have changed their procedures. In both case studies data on the success of the reform litigation indicates that substantial progress has been made in terms of the numbers of students enrolled and classes offered. But these fugures indicate far less than they may at first seem.

In prison reform cases a professional culture is absent. The custodial orientation of most penal institutions means that issues of inmate rehabilitation, which is the issue area's most vexing

professional issue, have little operational significance for a court seeking reform. Court reform decrees order that better sanitary conditions be provided, that guard behavior change, or that prisoners be served better food. There is little concern with the application of a technical body of knowledge to an individual's needs. This absence of a professional culture on penal issues indicates that changes in jails can more easily be achieved and that measures of change will more accurately reflect imporovement in services. It also suggests that institutional reform in an issue area where there is a dominant group of professionals will be problematic or difficult.

4. Environmental Factors

The impact of the reform suits in all four case studies: on special education reform in Pennsylvania and New York City, on jail and prison reform in New York City and Rhode Island, was affected by social, political and other contextual factors external to the immediate focus of the litigation. Overcrowding caused compliance difficulties in the two jails cases, while a lack of money frustrated compliance in the special education cases. These factors display quite vividly the difficulty of achieving complete compliance with a court's reform decree.

Courts seeking to improve public services cannot anticipate many of the problems that impede their reform efforts, problems that are beyond the authority of the court to address. The jail overcrowding that is now so pervasive a phenomenon has done much to frustrate the compliance with court orders in Rhode Island and New York City. This overcrowding

was in large part due to the rise in the crime rate, changed sentencing patterns, and other factors which cannot be affected by a lawsuit.

Political factors external to the immediate focus of the litigation also can hinder compliance. Paying for the added costs of improvements in a jail system, or the costs that accompany the expansion of special education programs, require the support of elected officals in the statehouse or in city hall. This support is often difficult to enlist because the very fact of judicial intervention in social services is a highly political act that usually engenders opposition from political leaders. A judge seeking to reform a public institution must be sensitive to the political role to be played when presiding over such suits.

Bureaucratic environmental concerns also can make compliance difficult. The process of changing public services sometimes requires the cooperation of many public agencies, not just those that are defendants in a reform suit, and difficulties in coordinating the operations of these agencies can prove to be formidable. Improving the special education offerings of the public schools in New York City required the expansion of the school buildings in many of those areas, and that could only be accomplished by resort to the lengthy bidding procedures that must take place before new public construction in that city can begin. Judge Pettine in Rhode Island faced the same construction problems with regard to the Adult Correctional Institutions in Cranston, as did Judge Frankel concerning the New York City jails. Successful implementation of the PARC mandate in Pennsylvania required

substantial changes in the way that local school districts in the commonwealth addressed the needs of their handicapped children--changes that necessitated the hiring and training of new staff, as well as enlisting the cooperation of "regular" education personnel.

The press, one environmental element that often plays a major role in institutional reform, sometimes is quite helpful. In all four case studies, the widespread publicity that accompanied the intervention of the courts in the issue area helped raise public awareness of the need for change. In the two special education cases the press greatly assisted the court in enlisting the help of elected political leaders for institutional reform. In the two special education cases the media salience that the filing of a lawsuit gave to the needs of the handicapped did more to place the issue on the public agenda than anything else. Unfortunately, publicity does little to help the court cope with the difficulties posed by the other factors we have discussed. After the initial entry of a reform decree, press coverage of the suit tends to be sporadic, and the coverage of the more intractable impediments to reform, such as the inattention to the role of the street level bureaucrat, is meager.

This shifting influence of the environment on a judge's reform regime argues for a lowering of expectations about what such suits can achieve, and for a sober realization that a reform regime, no matter how carefully devised, may fall afoul of factors that are beyond the reach of the court. In both special education and jail reform, change was less than complete. Several factors conspire to frustrate attempts to

improve public services: the allocation of costs and benefits of the proposed change, the realities of the public bureaucracy, the presence of a professional culture, and external factors beyond anyone's control.

Conclusion: Do Court Reform Decisions Make a Difference?

The making of policy by courts seeking to reform public institutions occurs in three analytically distinct stages: an issue is first placed on the public agenda. A decision about that issue is then reached. Finally, the decision is implemented.[30]

The decision to go to court to seek institutional reform placed the issues of penal reform or special education on the public agenda. Suits were filed by the PARC group only after the retarded had been excluded from education for many years. The ensuing consent decree forced the commonwealth of Pennsylvania to try to meet the educational needs of the retarded. The Jose P. plaintiffs in New York City tried court action to eliminate the waiting lists for educational services. After a decade of resisting, New York City finally attempted to eliminate the waiting lists. The ACI prison lawsuits forced corrections officials in Rhode Island to make improvements in an institution described by Judge Raymond Pettine as the only prison he had ever visited about which he had nothing good to say. The laws suits concerning conditions in the Tombs, and later, all the New York City houses of detention, undoubtedly led to efforts the city of New York to ameliorate conditions in those institutions.

The filing of a lawsuit, of course, not the only way that citizens can expand the agenda or influence the adoption of new programs. Powerful interest groups may exert political pressure or the opinions of political elites may change. A crisis such as widespread inmate rioting may occur.[31] But one of the unique characteristics of court involvement in public policy is the opportunity it presents to

individual litigants or to public interest lawyers claiming to represent minorities for shaping the political agenda. These groups need not pay the onerous costs of intensive legislative lobbying campaigns. The plaintiffs do not have to develop the cohesiveness that is a prerequisite for success when help is sought from legislatures or administrative agencies.

The courts also are policy decisionmakers. As can be seen from all four case studies, the remedies entered by the federal judges specify what levels of service will pass constitutional muster. The remedies set standards about prison cleanliness, programs and inmate classification. They ordered that certain special education classes be offered and they revised evaluation and placement procedures. They decreed that certain procedural guarantees be observed when prison guards police inmates in the jails.

The judges in all four case studies sought to make decisions about both both substantive outcomes and organizational procedures. The substantive decisions included ordering that certain types of special education programs be provided, that jails be cleaned up, or that they give each inmate more cell space. The procedural orders included the provision of due process guarantees for handicapped children in the schools, the extension of guarantees to jail inmates on disciplinary and mail issues, and orders that required defendants file timely compliance reports with the court. The courts were successful in raising the most grossly deficient levels of service. They also were successful in

changing through rule those administrative practices that could be changed by organizational executives.

Courts can implement public policy. They do this when they directly supervise the delivery of educational services or the administration of prison systems. They also implement policy when supervising the operations of public agencies as they put into operation the reform decree.

Courts try to implement policy both directly, by holding hearings on problems that arise, and indirectly, by appointing surrogate mediators such as Special Masters. In three of the four case studies the court appointed a master to monitor or enforce its remedy. In the fourth institutional reform case, the jail litigation in New York City, the federal court preferred to rely on the plaintiffs' attorneys to monitor implementation.

Court involvement in policymaking also has other important characteristics, for this separation of court policymaking into three distinct stages is somewhat artificial. For the courts, as with other institutions, policy decisionmaking and policy implementation are almost always intertwined. When courts retain jurisdiction in an institutional reform case, they often continue to formulate policy as it is implemented. The reform decree is modified by the court to meet any exigencies that arise, and new problems are brought to the courthouse by litigants as they come to perceive the court as a forum where redress can be had for their grievances.

The Constitution does not distinguish between the attainment of certain constitutional minima in public services and the achievement of a more perfect, but more elusive level of services that may be beyond the capacity of any social system to provide. The legal confusion that results from this uncertainty is predictable: in all four case studies the courts became bogged down for years in implementation controversies and apparently endless wrangling over policy problems as they sought to secure compliance. Old reform suits never seem to die; they often do not even fade away. The involvement of the court in each of these four case studies has continued for a decade and shows no signs of ending.

Other factors contribute to the extreme length of institutional reform litigation. There are no accepted rules for court disengagement in institutional reform litigation. Procedures governing the initiation of class action suits, for gathering and presenting evidence, and even for appointing special masters have some guiding principles. But there is little in the evolving forms of public law litigation which inform a judge seeking to determine when the control of a public institution should be returned to those elected or appointed to run it.

Compliance, measured by conventional standards of the law, is never as complete as initially anticipated, and the resulting changes often take unanticipated directions. A considerable amount of judicial time is spent "adjusting and readjusting, allocating and reallocating" [32] the many aspects of court involvement in the suit. The court may find that the original remedy did not take into account all the important facts, or that its orders need to be modified in light of changed facts.

Parties to the suit may bring new problems to the court which were beyond the scope of the original lawsuit. The court is dragged ever deeper into oversight of the public agencies. Delays in meeting renovation deadlines for jail improvements, for example, can cause a judge to investigate delays in those areas of city government responsible for construction, and, in turn, to scrutinize the bidding process for city contracts. These entanglements greatly lengthen the implementation stage of the lawsuit.

This tendency for the courts to enlarge and prolong both the domain of their influence and length of their involvement is due to the "tar-baby effect" that occurs whenever any government body--not just the courts--seeks to govern the behavior of another enterprise. The regulating organization gets bogged down in correcting unforseen mistakes or consequences, in trying to regulate additional aspects of the enterprise to insure that the initial rule "comes out right". Its involvement is deepened.

The "tar baby" phenomenon occurred in each of our case studies. Improving the conditions of confinement at the Adult Correctional Institution in Cranston, Rhode Island meant that Judge Pettine had to supervise the details of jail construction in that state; insuring the educational "appropriateness" guaranteed by the PARC consent decree meant that Federal Judge Becker investigated the transportation system that brought handicapped children to school, and listened to parent complaints that the buses in Philadelphia were always late. Judge Nickerson in New York City explicitly made reference to the

"polycentric" nature of the special education problems raised by the Jose P. suits, and appointed a Special Master with experience in school litigation to attend to the scores of problems that the case engendered. There, too, Judge Frankel was forced to range widely on special education issues.

Still another reason for the prolonged court involvement in institutional reform suits is that people affected by the litigation come to perceive the court as a forum where any problems relating to the public agency under investigation can be brought. Parents of special education children complain to the court about all aspects of handicapped education--from the monumental to the trivial. Lawyers in jail cases complain about issues that were not part of the original conditions of confinement suits. Legal advocacy groups quickly became important participants in policymaking "Often attorneys from [The National Prison Project] know as much about a prison as the officials do", said one observer of prison reform suits.

The court's role in the policies and politics of institutional reform has evolved in all four of the cases examined. The issues raised by plaintiffs were initially narrow. In Rhode Island, the first concern of the courts and plaintiffs was with extending due process protections to ACI inmates; only later did the case blossom into a full legal challenge to the prison system in that state. In New York City, the Tombs controversy began as a protest by inmates of conditions in the Manhattan House of Detention; by the end of the decade the federal courts were scrutinizing the operations of all the New York City jails.

Similarly, the PARC controversy in Pennsylvania first concerned the demand of the severely handicapped for an education, but by 1980 the courts had expanded their concern to every category of handicapped, gifted and talented children. The Jose P. litigation commenced as a challenge to the existence of waiting lists for children desiring educational services; later it became a broader legal challenge to New York City's special education system.

This evolutionary character of court involvement in the reform of public institutions indicates that most judges are wary of becoming too meddlesome in the workings of administrative agencies. In these case studies, the judges were enlisted in the detailed operations of those agencies only after the continued unwillingness of public administrators to make improvements in services became evident and systemwide reform suits were filed.

The Future of Reform Litigation

The "long summer" of social reform that occurred after midcentury, is now drawing to a close in courts, as elsewhere,[33] Recent pronouncements of the Supreme Court and several critical studies of the role of the courts in public law litigation indicate that there is considerable sentiment that is less than hospitable to institutional reform lawsuits.

Yet the courts are unlikely to abandon completely this kind of involvement in public policy. The public law trend not only reflects

the ideology of a particular generation of federal judges but also a more pervasive change in the way we think about the political system and the role the law plays within it. The use of the legal system to reform public services followed the growth of the welfare state. As the federal government reallocated public benefits for special populations, the legal system, long the means of settling public controversies, was modified to handle disputes concerning these new claims. Forcing the courts to give up their role in social services would require a "transformation of the underlying political and legal culture as vast as that by which it was intially produced. The Supreme Court can contribute to such a transformation over time but cannot accomplish it."[34] Only if government stopped following distributive and redistributive public policies and the people ceased organizing themselves into political groups based on racial, ethnic or social lines could this take place..

The usefulness of this judicial activity is that it provides one way of controlling the bureaucracy. It exercises an oversight function on behalf of interest groups and those affected by the bureaucracies. Even the political branches have been wrestling with these problems of bureaucratic control.

But if this type of court involvement in policymaking is to be defended, it must be done in ways that destroy the institutional myths that its supporters rely upon to support reform litigation: that courts respond to the demands of actual minority groups, not their lawyers, and that substantive legal rights are somehow different enough from other

government entitlements that discussions of their merits cannot proceed along the lines of normal political discourse. Attempting to find legal fault, as understood in private litigation, is foolish when government action is so dependent on the coordinated activity of a a large number of public organizations at all levels, each with personnel subject to a variety of pressures and each working for many different motives. And calling a distributive or redistributive policy a "remedy" does little to help the public official cope with the complexities that accompany the task of implementing it. Courts are as susceptible to interest group lobbying, albeit, a distinctive form, as are bureaucracies and some judicial norms are very inappropriate for administering public services.

The four case studies show that judicial reform does some good. And some not so good. But whether the end is good or ill, the courts often behave in these suits much like the unaccountable bureaucracies they are called upon to reform. What is unfortunate is that our political system provides little opportunity for the average citizen to say which he prefers.

FOOTNOTES

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25. Neal and Kirp, pp. 4-11.

26. Macchiarola Affidavit, p.11.

27. Ibid. p.13.

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34. Ibid., p. 7