Organizational Reform of Public Institutions by Federal Courts: The effectiveness of participatory approaches

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Since the 1950s Federal Courts have become extensively involved in the reform of public institutions in response to the complaints of minority and disadvantaged groups. Many judges, cognizant of the unusual and complex nature of their task, have chosen novel participatory forms of case management. Using the case literature, this paper tries to identify the major forces which influence this choice, and explores the conditions under which participatory structures may or may not be instrumental in achieving institutional reform. Toward these ends, we propose several hypotheses as the basis for future systematic study of the development and outcomes of these non-traditional methods of case management.

Since the 1950's, minority and disadvantaged groups have used the federal courts to obtain relief from violations of their constitutional or statutory rights by public institutions. This represents a historic change in the operation of the judiciary and, therefore, in the American political process. School systems, police departments, prisons, and facilities for the mentally ill and retarded have been among the institutions whose practices have been challenged. The basis for these challenges include federal laws section 1983, 1981 and 1343(3) as well as the Eighth and Fourteenth Amendments to the Constitution (Turner, 1979; Sullivan et al, 1980; Blackmun, 1985). Through these cases, the federal courts have becomes involved in the complex and extensive reform of public institutions. This activity, normally or previously left to the legislative and administrative branches of government, challenges traditional conceptions of the operation of the federal courts (Cox, 1976; Johnson, 1981).

During the 1980's, in part because the Reagan administration acted to restrict access to the federal courts for reform purposes (Rosenberg, 1986), fewer such cases were initiated. Nevertheless, relevant court actions continue and may still be the basis for significant social change. The recent suit filed in Philadelphia challenging the funding practices of the Commonwealth of Pennsylvania regarding public programs for retarded adults may be the beginning of new rounds of important litigation in that area of the law (Hinds, 1989). In addition, the current Americans with Disabilities Act which, at this writing, has passed the House and Senate and is supported by President Bush, may provide a substantial basis for extensive court activity (*New York Times*, 1989; Holmes, 1990a and 1990b).

Political administrations and public sentiments change, but as long as the courts remain sensitive to certain standards of decency, they will need to respond to challenges to existing institutional practices (Eckland-Olson and Martin, 1987). Phillip Cooper (1988), in his study of Federal judges and institutional reform, concludes that regardless of ideology, judges "... simply are not in a position to refuse to respond to proper cases instituted by appropriate parties under provisions of statutory or constitutional law. ...The notion that the controversial remedial decree cases are simply manifestations of a liberal federal judiciary intent upon playing guardian without regard to the consequences of their wide-ranging decisions simply does not withstand empirical analyses." (p. 328) The recent Supreme Court ruling in a Missouri case, that Federal judges may order local governments to increase taxes to remedy constitutional violations like segregation, is a case in point (Lewis, 1990).

Courts and Organizational Processes: Toward a systematic Analysis of Institutional Reform Cases

Because of the non-traditional and complex nature of these institutional reform cases, conventional methods of adjudication have often been regarded as inappropriate or inadequate. If the policies and procedures of complex bureaucratic institutions are found to be in violation of the law, simple remedies are not easily determined, much less implemented. Consequently, many judges have responded by devising unusual court arrangements to accomplish reform. In effect, they have created, under the aegis of the court, new organizational structures within which it can be decided what reforms are needed and how they can be achieved.

A number of observers have noted that in the majority of these cases, some form of participatory organizational structure has been chosen (*Columbia Law Review*, 1978; Diver, 1979; Rebell and Block, 1982; Weinstein,

1980). Participatory organizational structures are those forms of court orchestrated decision making which include direct formal involvement of all or most of the parties to the case in the determination of the problems to be addressed and the development and implementation of a plan for solving them. Participatory structures can be of various types. For example, in the initial stage of remedy finding, when the plan for reform is developed, judges often encourage plaintiffs and defendants to reach negotiated settlements among themselves which the court can then support. Thus Rebell and Block (1982), in their analyses of sixty-five cases of court involvement in educational policy making, found that in 87% of the cases where reform decrees were issued, some "mode of participation played a significant role in shaping the remedy." (p. 61) Masters may be appointed by the court to preside over multi-group negotiations leading to a consent agreement. Sometimes parties other than the plaintiffs and defendants, organized into task forces, panels, or special committees, may be given responsibility for aspects of the implementation of the decree (Dentler and Scott, 1981). In some cases, a judge may preside directly over a courtroom that is transformed into a quasi-open, town meeting-like forum to receive reports, resolve problems and hear grievances by community groups and individuals (Yeazell, 1977; Rosenberg and Phillips, 1981-82). All of these procedures have developed within the unique context of the federal courts and, as a result, they are shaped and limited by legal traditions, rules of procedure and prevailing beliefs about the proper role of courts in the political process.

Many scholars have expressed their general approval or disapproval of this participatory development. Some have seen these new decision-making forms as necessary and as a sign of the judicial system's vigor and flexibility (*Yale Law Journal*, 1963; Hill, 1969; *Virginia Law Review*, 1971; Cox, 1976; Robbins and Buser, 1977; Eisenberg and Yeazell, 1980; Oakley, 1980; Katzmann, 1980; Greanias and Windsor, 1981; Johnson, 1981). Others have seen in them a serious threat to the American system of checks and balances (Glazer, 1975 and 1978; Berger, 1977; Roberts, 1977; Nagel, 1978; Mishkin, 1978; Boatright, 1980).

In this paper, our approach is analytic not evaluative. Specifically, we are concerned with the following questions: why and how do these participatory organizational forms develop and what is the relationship between these forms and successful organizational change? Our goal is to identify the structural forces which contribute to the establishment of participatory structures and to examine the role participatory decision-making forms play in the achievement of the objectives of the plaintiffs. Underlying these questions is a general issue of interest to students

of organizational change: to what extent do emergent decision-making forms develop in direct response to organizational goals?

This paper is also an attempt to better understand an aspect of the judicial process discussed by Cooper (1988). In his Remedial Decree Model, Cooper distinguishes between four analytic categories intended to describe the process by which remedial decree cases develop and are resolved: the trigger phase, the liability phase, the remedy phase and the post-remedy phase. Our study is an effort to clarify what we believe are certain general processes which occur during the last two phases. Although we understand the distinction between remedy formulation (the remedy phase) and implementation (the post-remedy phase), we, like Cooper, see these processes as intertwined and reciprocal. As attempts to implement initial decrees experience the complexities discussed in this paper, new decrees are formulated leading to new implementation procedures. Our focus is on the structure of relations between persons selected by judges to oversee and facilitate these phases in the remedial process.

It is also our intention to help in the understanding of the judge's complex role. As Cooper (1988) argues, "... the truly hard choices (judges must make) come from the effort to meet the elements of remedial adequacy while balancing those demands against the need for limits to discretion, both the more formal doctrinal constraints and the less formal judgmental factors associated with a prudent sense of the court's relationship to the community and its administrative and elected officials." (p. 350)

Our exploration of these issues is based on an analysis of a series of case studies of court-ordered institutional reform covering a range of locations and institutional types. (*Yale Law Journal*, 1975; Horowitz, 1977; Harris and Spiller, 1977; *Stanford Law Review*, 1977; Berger, 1978; *Columbia Law Review*, 1978; Boatright, 1980; Reynolds, 1979-80; Rebell, 1981; Rosenberg and Phillips, 1981-82; Rebell and Block, 1982; Kirp and Babcock, 1981; Rothman and Rothman, 1984). To date, no comparative study of the development and effects of different court methods of adjudication in institutional reform cases has been conducted. Of course, existing studies do not necessarily constitute a representative sample of all institutional reform cases. Nevertheless, by studying the court cases that have attracted the most scholarly attention, we hope to identify the most important variables which determine the dynamics or outcomes of these cases in general. From our analysis of these cases, we have derived a series of hypotheses which we believe can constitute a substantial basis for future systematic analysis. In each case, the hypotheses follow the discussion of the relevant research.

The Formation of Participatory Structures

Participatory structures in institutional reform cases appear to develop as a result of three major forces: 1) the multiparty nature of the cases, 2) the role played by secondary parties, and 3) the non-traditional quasi-legislative and/or quasi-executive function required of the court. We believe that these are the primary forces which influence the majority of judges to select participatory forms of case management regardless of the judges' initial intentions or preferences. In addition, we believe that throughout the course of institutional reform cases, these forces have a cumulative effect. That is, decisions made to extend participation at one stage of a case, tend to increase the likelihood of expanded participation at later stages.

Multi-party complexity. In contrast to traditional cases in which the defendants and plaintiffs are likely to be single parties, institutional reform cases typically have a multi-party structure (Chayes, 1976; Diver, 1979). Recognizing the multiple interests to be accommodated and the complexity of both the substantive and human problems to be resolved, courts have often departed from traditional forms of adversarial procedure and established structures of case management that seem better able to accommodate differing interests and handle complex conflict between parties.

Named defendants often include officials from a variety of municipal and state governmental agencies whose interests and objectives are incompatible. In such cases, the likelihood of conflict between defendants is high. For example, in *Hart v. Community School Board* (1974), a Coney Island school desegregation case, the original defendants insisted that the racial segregation of schools in the district was the direct result of municipal and federal policies affecting neighborhood residential patterns. Consequently they enjoined the Mayor, the city, and both local and federal housing authorities as co-defendants. Ensuing negotiations were marked by disagreement and the resistance of the defendants to make joint commitments to a comprehensive plan that would effectively alter the racial distribution of families in the district. In another case, *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania* (1971), involving the rights of retarded children to a public education, two of the defendants, the state and the Philadelphia School District were battling in state courts over the alleged failure of the state to remit millions of dollars of special education funds to the Philadelphia District. During negotiations to develop a plan for the education of retarded students in Philadelphia, these two parties agreed on virtually no issue of importance related to the reform of education for the class that had brought the suit (Rosenberg and Phillips, 1981-1982). These may be extreme cases, but conflict among defendants is not

unusual. It frequently occurs when named defendants are constrained by the demands of different constituencies or by dependence on different funding sources (Kirp et al, 1979; Rosenberg and Phillips, 1981-82; Rothman and Rothman, 1984), or when battles for jurisdiction over institutional functions obstruct agreement within defendant ranks as in the case of *Chance v. Board of Examiners* (1971; see Rebell and Block, 1982).

The roster of plaintiffs is likely to be even longer than the list of defendants and represent an even more diverse set of interests. In one case, Rizzo v. Goode (1976), involving claims of racial discrimination in the staffing of a municipal police department, the plaintiff list included the State of Pennsylvania which represented all citizens, a sub-class of black citizens, thirty-two community agencies as well as the Southern Christian Leadership Conference (Cox, 1976). One would hardly expect all of these groups to have the same objectives in joining the suit or to be satisfied with an identical remedy. Often subgroups of a class, although enthusiastic about joining a suit to force the reform of an institution, have, in reality, different policy objectives or priorities which reflect the interests of the particular constituencies of each group. For example, state and local chapters of The Association of Retarded Citizens and the NAACP, both important participants in institutional reform litigation, have taken different positions in cases concerning both legal strategies (Kirp et al, 1979; Rothman and Rothman, 1984). In one case, a subgroup of the plaintiff class had such serious policy disagreements with other plaintiffs that it disengaged itself from multi-party negotiations to pursue its own interests through another round of litigation (Rosenberg and Phillips, 1981-82).

As we have suggested, when cases involve this many parties with differing points of view and interests, traditional court procedures are usually viewed as inadequate to secure institutional changes and, at the same time, satisfy all parties. Instead, there are strong pressures to design some method of handling cases to facilitate integration of the views of all parties in the final plan. Therefore:

> Hypothesis A. The greater the number of named parties in a case, the more likely a participatory structure will be designed.
> Hypothesis B. The more divergent the interests among plaintiffs or among defendants, the more likely a participatory structure will be designed.

Secondary Parties. The relaxation of rules of standing and the willingness of judges to allow interest groups to intervene in institutional

reform suits further increase the pressure to change traditional court procedures (Cox, 1976). There are many groups with political, economic or professional interests in a case that seek a formal role by petitioning the court for intervenor status, or join the case as co-plaintiffs or co-defendants.

For example, *Pennsylvania v. O'Neill* (1979) was originally a case in which a group of black men assembled by the NAACP sued the Philadelphia Police Department, alleging discriminatory hiring and promotion practices. Later, the Commonwealth of Pennsylvania and the Guardian Civic League, a black policemen's group, became plaintiffs, while the Fraternal Order of Police, a police union traditionally dominated by whites, joined the Police Department as co-defendant (Reynolds, 1979-80).

Economic interests may be dominant in such cases as those in which labor unions have participated. In *Horacek v. Exon* (1975) a union joined the plaintiffs, asserting that a proposed reduction in staff at a Nebraska institution for the mentally retarded would deprive residents of their constitutional rights (*Harvard Law Review*, 1977), and would, incidently, mean a loss of jobs for union members. In *PARC v. the Commonwealth of Pennsylvania* (1977) the local chapter of the American Federation of Teachers (AFT) petitioned for and was granted standing as a neutral party because of its concern with the integrity of its contractual relations with the Philadelphia School Board. The AFT chapter had complained that the appointment of a master with the authority to oversee the hiring, training and supervision of special education teachers would usurp the functions of the school district and that the transfer of such broad discretion to a master would conflict with its collective bargaining agreement. During the proceedings the chapter was represented by counsel, and was assigned a seat on the panel charged with monitoring the implementation of the remedial plan.

Experts or professional groups, perceiving themselves to have significant interest in a particular case, have also played important roles as *amici*, witnesses and court-appointed masters. Many cases involve complex substantive issues over which there is considerable debate. Issues such as the following have been integral to certain cases: what method of instruction will achieve the optimum results with retarded school children; what kinds of therapeutic services are necessary for the mentally ill; what techniques will lead to truly integrated schools; and how can humane but secure prison facilities be designed? Typically, judges are not experts on these questions and often welcome the participation and advice of professionals. They have even instructed defendants to obtain expert assistance with the formulation of remedial plans (*Columbia Law Review*, 1978; Horowitz, 1977). For example, in *Pugh v. Locke* (1976) the judge, unconvinced of the ability or the

willingness of officials to effectively plan for the reform of the prison system in Alabama, went so far as to order the Corrections Department to confer with the Department of Correctional Psychology at the University of Alabama (*Stanford Law Review*, 1977). Judge Garrity, in the Boston desegregation case *Morgan v. Hennigan* (1974), found it necessary to appoint a panel of six experts, four as masters, which was charged with developing a plan to desegregate the Boston schools and to coordinate the activities of the school district with local universities (Kirp and Babcock, 1981; Dentler and Scott, 1981). In other cases, during the implementation of complex reform plans experts frequently have been appointed as special masters, that is, as officers of the court with considerable power to negotiate a remedy, design a remedial plan and monitor the reform process (Harris and Spiller, 1977; Nathan, 1979; Kirp and Babcock, 1981; Levine, 1984).

Plaintiffs also regularly enlist the support of experts to strengthen their position and to bring pressure to bear on the decision of the court from interested professional associations or powerful advocacy organizations. The American Psychological Association, the American Ortho-psychiatric Association and the American Civil Liberties Union were invited to enter *Wyatt v. Stickney* (1971), an Alabama mental hospital case, as *amicus curiae*, with rights to present evidence and cross examine witnesses. Their representatives also participated in negotiations and helped to formulate the standards of constitutionally acceptable service that were later stipulated in the final decree (*Yale Law Journal*, 1975). Some of the same organizations took part in the proceedings in *Morales v. Turman* (1973), a Texas case challenging the conditions in reformatories for delinquents (Diver, 1979), and later formed a powerful coalition to support the plaintiffs in the Willowbrook case, *NYSARC and Parisi v. Rockefeller* (1973), a case concerned with conditions in an institution for the mentally retarded (Rothman and Rothman, 1984).

In the Wyatt case, the primary function of these organizations was to provide professional assistance to the plaintiffs. At the same time, local chapters of these national groups saw an opportunity to gain greater influence over practices and over the appointment of personnel in the mental health system of Alabama (Drake, 1981; Eisenberg and Yeazell, 1980; *Yale Law Journal*, 1975). In the Morales case, members of the American Orth-psychiatric Association claimed that the Texas juvenile justice system failed to train, test, or prescreen their correctional staffs, that they used force routinely as the only means of controlling their residents and that they seriously limited the juveniles' contact with professional psychologists (Diver, 1979). Here, too, a professional organization secured a role in a case not only to insure the civil

rights of the plaintiff class but also to insure their own professional presence in the prison system.

Pressure to create inclusive participatory structures are particularly strong during the implementation phase of these cases. In most traditional suits, court involvement ends with a decisions. But in institutional reform cases, judges retain jurisdiction during the complex process of transforming the decree into new institutional practices. The political struggles that were evident earlier in the case are reactivated and sharpened as the parties cope with organizational redesign. Since decrees essentially provide the direction rather than the specific means of attaining the desired reforms, and since there is no one certain way to achieve objectives, the focus shifts to evolving institutional polices (Chayes, 1976; Kirp and Babcock, 1981). The choices that are made have implications for the control and distribution of resources in the organization which is the target of reform. Consequently, groups attempt to position themselves to protect the interests of their constituencies during what is often an intensely political and protracted process of organizational change (see Yeazell, 1977; Kirp, et al, 1979; Rosenberg and Phillips, 1981-82; Rothman and Rothman, 1984; Johnson and Canon, 1984).

Finally, the issues posed in these cases have often led to the involvement of the federal government as an active party. In some cases, judges or plaintiffs have asked the Civil Rights Division of the Department of Justice to enter as a friend of the court (Diver, 1979; Weinstein, 1980). In others, departments of the federal government have initiated civil rights cases or have joined a case in support of one or another party. In the past, the then - Department of Health, Education and Welfare's Office of Education participated in school desegregation cases, and the Law Enforcement Assistance Administration has been involved in early cases of prison reform. The Civil Rights Division of the Justice Department has been influential in an *amicus* role in civil rights suits, many involving institutional reform (Diver, 1979). However, it should be noted that until 1980 the Justice Department usually entered to support the claims of the plaintiffs and encouraged broad reform. Under the Reagan Administration, the Department was more likely to support the claims of defendants. It argued for less comprehensive remedies, and it actively worked for less intrusive involvement of the federal courts into the operation of state and local institutions (Fiss and Krauthammer, 1982; Greenhouse, 1985). Early indications suggest the Bush Administration may follow suit.

It should also be noted that there is a tendency in these cases toward a snowball effect. That is, when a judge establishes a decision-making structure that incorporates the participation of many parties, he or she tends to become more aware of the complexity and the systematic nature of the problem to be

addressed. This, in turn, tends to create ever-increasing pressures for the participation of groups in further stages of the case. Apparently this is what happened in the *Wyatt* case and in *Pugh v. Locke*. In each of these cases, the judge was persuaded that, given the persistence of inhumane and deplorable conditions and the continuing indifference and apparent incompetence of government officials, nothing short of system-wide reform involving the input of many groups could insure even minimal standards of treatment (*Yale Law Journal*, 1975; Robbins and Buser, 1977; Johnson, 1981). As more parties became involved in these situations the social policy issues expanded and, consequently, the number of involved community groups increased.

Although expanding participation can be controlled or limited by the judge, given the nature of these cases as outlined here, even judges with an ultra-traditional point of view find it difficult, if not impossible, to resist the pressures toward a more participatory structure (Yudoff, 1981). It is improbable that any judge hearing these cases can avoid consideration of the various competing interests. At the same time, he or she can not help but be impressed by the enormity of the task of successfully achieving genuine institutional reform. Faced with this problem, judges seek evidence and supporting arguments from many participants and welcome an agreement developed by them which the judge can then ratify. Our hypotheses, therefore, are:

> Hypothesis C. When parties other than the original plaintiffs or defendants are permitted to have formal roles in a case, the likelihood that a participatory structure will be designed increases.
> Hypothesis D. The more the number of groups or agencies that perceive themselves to have an economic, professional or political interest in the outcome of a case, the more likely a participatory structure will be designed.

The quasi-legislative or quasi-executive function of the court and questions of legitimacy. Judges who are convinced of the necessity for comprehensive institutional reform confront questions of whether or not the court has a legitimate role in these cases and what it might be. Issues of legitimacy are raised, for example, when a federal judge believes it necessary to issue complex, affirmative decrees consisting of 21 pages of standards governing the treatment of mentally handicapped clients as was done in the *Wyatt* case (1971; see Lottman, 1976; Drake, 1981), or specifies that standards of sanitation, nutrition, personal hygiene, medical and rehabilitative services must be met to insure the constitutional rights of prisoners as in *Pugh v. Locke*

(1976) (see Robbins and Buser, 1977), and Palmigiano v. Garrahy (1977). Such comprehensive remedies do raise questions about the extent to which a federal court can command the behavior of government officials in state jurisdictions and the degree to which a judge may preempt the legislative and executive functions of government in specifying social policies for local institutions.

There is also the issue of the courts' capacity to enforce decrees in a political environment dominated by principles of separation of powers and complicated by the defendants real control of the operation of institutions and by legislative power over state revenues and their distribution. In reality, the Federal courts have limited power to directly intervene in the operation of state institutions and possess relatively few means of assuring the compliance of defendants. Therefore, in order to legitimate what is viewed by many to be a problematic enterprise, judges may introduce a participatory structure for adjudication that is more compatible with the democratic legal maxim "what touches all should be approved by all." (Richardson, 1983) As Schattschneider says, "democracy not only implies a set of procedures but is also a moral system." (1969, p. 43) This moral system involves an attitude toward people deeply embedded in the American polity which posits that decisions based on democratic procedures have added moral authority. Further, by accepting the agreements arrived at by the litigants and their respective supporters, the judge can effectively distance himself or herself from the details of political bargaining and avoid the appearance of arbitrarily expanding the policy-making function of the court. Judges are also influenced by the widely held utilitarian belief that representational systems are more effective in arriving at workable agreements related to controversial social policy than are unilateral systems (Lipsky, 1971; Van Meter and Van Horn, 1975; Berman 1978; Elmore, 1978).
Therefore:

> Hypothesis E. As the power of the court to command institutional change becomes more problematic, participatory structures will be more frequently employed as a means of legitimating court processes and outcomes.
> Hypothesis F. The more a court's actions become preemptive of traditionally-defined legislative and executive governmental functions, participatory structures will be more frequently employed as a means of legitimating court processes and outcomes.

Participatory Structures and Pressures for Change

Given that participatory structures are created by the forces outlined above, our next question is: are they truly conducive to the achievement of organizational change? The answer to this question appears to depend on one's point of focus and on the amount and immediacy of change one expects.

Participatory Structures as Conducive to Change. Participatory procedures have led to the establishment of routine methods of dispute resolution which have diminished the intensity of conflict among the parties (Rosenberg and Phillips, 1981-82). These procedures also tend to create regular avenues of communication between the parties inside and outside of the court and provide for an institutionalized means of examining alternative program choices. To the extent that such procedures promote cooperation and lead to a reconciliation of problems, they facilitate organizational change.

During both the trial and implementation phases of litigation the involvement of many interested groups often brings to light damaging facts about defendant institutions that are disseminated through the media. The spread of this information is often instrumental in creating a constituency sympathetic to reform. It does not help the defendants, for example, as in the *Wyatt* case (1971), when prestigious organizations such as the American Association on Mental Deficiency, the American Civil Liberties Union, The American Orthopsychiatric Association, the American Psychological Society, The National Association for Mental Health, and the National Association for Retarded Citizens, jointly file a friend of the court brief describing the death and debilitation of institutionalized children and adults that have resulted from the alleged indifference and brutality of staff and the lack of administrative supervision (*Yale Law Journal*, 1975).

Public concern can turn to outrage in response to testimony concerning the resistance of officials to change or to reports by court-appointed monitors of inhumane conditions still uncorrected, or worse yet, to horror stories of victimization and neglect (*Yale Law Journal*, 1975; Harris and Spiller, 1977; Diver, 1979; Woestendick, 1984; Rothman and Rothman, 1984). Such reports give more credibility to the plaintiff's concerns and legitimate to the public and to potential critics the interventions and the sanctions imposed by the federal courts on institutional administrators who apparently fail to meet their constitutional obligations.

As Schattschneider points out, "...all political conflict consists of two parts: the actors at the center of the conflict and the audience or spectators who are drawn into the conflict. The spectators are an integral part of the situation, for as likely as not, the audience determines the outcome of the fight." Hence, "...the outcome of all conflict is determined by the scope of its

contagion." He further argues that "the most important strategy of politics is concerned with the scope of conflict. So great is the change in the nature of any conflict likely to be as a consequence of the widening involvement of people in it that the original participants are apt to lose control of the conflict altogether." (Schattschneider, 1975, pp. 2-3)

With open participatory structures, defendants do not "lose control of the conflict altogether," but they do lose their ability to operate free from public scrutiny. Since the court maintains jurisdiction in the majority of institutional reform cases, it becomes increasingly difficult, given the attendant publicity, for the defendants to resist cooperation indefinitely. This does not mean that, by itself, participatory structures of adjudication guarantee that the defendants will meet the demands of the plaintiffs, but it does mean that it will be increasingly difficult, as time passes, for them to ignore the remedial mandates of the court.
Therefore, we hypothesize:

> Hypothesis G. If a participatory structure institutionalizes routine procedures for the resolution of disputes between the parties and regularizes avenues of communication, organizational reform is more likely to occur.
> Hypothesis H. If, through a participatory structure, the plaintiffs use the mass media to create a sympathetic political constituency then organizational reform is more likely to occur.

Participatory Structures as Impediments to Change. Though on-going systems of participation can help disadvantaged classes achieve some of their objectives, the very inclusiveness of the system that allows for this can also significantly impede the process of reform. By creating a participatory structure in which all relevant (and some not so relevant) parties are included, the judge may in effect create a decision-making structure, under the aegis of the court, which simply replicates the political relations among the groups outside of the court. In doing this, often the same power inequities which contributed significantly to the plaintiff's grievances in the first place are reestablished in another form. Inclusive decision-making bodies, however well-intentioned their creation, may not inherently be able to solve the problems of organizational change unless those bodies are part of a clearly focused, positive plan for change which alters the balance of power between the parties to the case. In other words, it is the way the court structures the participation process rather than the group participation itself which most clearly affects the likelihood of implementation. Important elements of an

effective structure include attention to the parties to be represented, and to the mission of the decision-making groups which are formed, as well as their prerogatives and authority.

Two contrasting examples which illustrate the operation and interaction of these structural elements are the *Willowbrook* case (*NYSARC and Parisi v. Rockefeller*, 1973; also see Rothman and Rothman, 1984) and the *PARC* case (*PARC v. Pennsylvania*, 1971; also see Rosenberg and Phillips, 1981-82). As mentioned earlier, *Willowbrook* involves the reform of a state system for care and habilitation of retarded citizens, and *PARC* concerns the reform of special education services in an urban school district. In each case the judge faced similar problems: a need existed for vast reorganization of a complex service bureaucracy that had a history of resisting significant change. Both judges were committed to the principle of multi-party participation in the planning and implementation of change and both established representative panels to facilitate this process. The panels however, differed in their membership, the degree of authority they were given, and, consequently, the outcome of their activities.

The *Willowbrook* case was filed in federal district court in 1972. Its purpose was to reform the New York state system for the care of retarded citizens, close down massive state institutions, and provide care in the community for the majority of former clients. Intense professional and political conflict among the parties delayed the adoption of a consent agreement until 1977 (Rothman and Rothman, 1984).

Finally, under pressure from the court, the parties agreed to the establishment of a review panel consisting of seven member: two appointed by the defendants, three by the plaintiffs, and two neutral persons approved by the major parties but actually chosen by the plaintiffs. The panel was charged with refining the remedial plan and auditing the performance of the Department of Mental Health, the state agency responsible for implementing the decree. A sufficient budget to cover the costs of operation was charged to the State of New York, professionals were hired to do the actual work of the panel, and its members were compensated at a fair rate for their time.

During the three years of its existence, despite internal disputes among its members, the panel was effective in changing the organization of service to the retarded. The group, dominated by professionals sympathetic to a policy of deinstitutionalization, worked out orderly operating procedures, kept close watch on Willowbrook and other state facilities, and took aggressive action to force change in the face of what they considered bureaucratic resistance and indifference to continued abuse of clients. Their complaints to the court, and the notoriety given the situation through shrewd use of the press, finally made it obvious that it was no longer politically feasible to resist change. Under

pressure, the Governor replaced the administration of the Department of Mental Health with personnel pledged to policies compatible with the consent decree. For a time, less contentious relationships among the parties and a less adversarial approach to the issues resulted in an acceleration of plans and actions that substantially altered the policies and institutional practices related to serving New York's retarded population. By 1980, when the review panel was abolished by the State legislature in a move to reassert the power of the bureaucracy, the majority of mentally retarded clients had been moved into community settings or somewhat less restrictive environments.

A panel was also appointed in the *PARC* case. In this case, a consent decree was arrived at in less than a year, guided by a state administration in sympathy with the objectives of the plaintiffs. However, five years later, according to the plaintiffs, the Philadelphia school system still had not implemented important stipulations of the decree. Consequently, the judge, after formal hearings, reorganized the system of implementation. As one part of the reorganization, the Special Education Action Committee (SEAC) was established. Its official charge was to act as an ombudsman in disputes between parents and schools or between all other parties involved in special education. It was also required to keep records and report to the court on the progress made by the schools in planning and instituting new programs for retarded students. These reports were made on a regular basis during open implementation hearings held in open court. Bowing to objections from defendants, the judge refrained from charging SEAC with responsibilities for monitoring the implementation process (Rosenberg and Phillips, 1981-1982).

The panel was co-chaired by a parent who played a major part in the movement to reform special education and a liaison officer from the Philadelphia School District's Office for External Operations. Other members included three parents of retarded children, the executive director of the Philadelphia chapter of the Association for Retarded Citizens, a state education adviser, a representative of special education classroom teachers, a special education supervisor from the school system, a representative of the Association of School Administrators, a member from the Philadelphia School Board, and an administrator from the Office of Mental Health and Mental Retardation. The panel was provided space and supplies by the school district. It operated with volunteer help from its members and others and had a budget to hire two clerks on a per diem basis as needed.

The membership of the panel was structured to insure the broadest formal participation of parties claiming a serious interest in the case. However, because of the diversity of their interests and a split in the leadership of the group, the panel could not reach agreement on the scope of

its activities, the establishment of operational guidelines, or on any major policy issues involved with remediation of the system. Its deliberations were marked by continued conflict and its procedures became a target of struggle for control among the major parties. The members had relatively open access to the court; they could communicate directly with the judge and could speak freely in open court hearings. But they had no specific authority to recommend policy or independently collect data that could be used in court to assess the progress of reform. SEAC continued for almost three years. However, long before it was officially dissolved by the court, factions of the plaintiffs had withdrawn their representatives and its operations were virtually at a standstill. Not given the power to monitor change, blocked from free access to the schools, given little authority or budget for operations, the SEAC panel, though representative and, in that sense, participatory, never became an effective instrument for implementing the decree.

A comparison of the two cases suggests the following: In both *Willowbrook* and *PARC*, the judges were seriously committed to the reform of the defendant institutions, and were sensitive to the political situation in their decisions about implementation. But beyond this, the cases clearly differ. In *Willowbrook*, the implementation process was far from smooth and was subject to complex political forces. Nevertheless, because of the composition of its membership and because it was given sufficient autonomy, resources and authority, the panel was able to play a more effective role in the change process. Its leadership clearly supported the guidelines of reform implicit in the consent agreement and, with the approval of the court, organized the panel to counterbalance the power of state authorities and to challenge bur :aucratic efforts to slow or block implementation.

The PARC panel was unable to do this. The seats on that body were assigned to insure the representation of the widest number of possible interests. Nonetheless, a weak and divided leadership, a lack of authority to monitor the schools and a very limited budget created a situation in which the plaintiffs were given no means of probing the bureaucracy to more rapid and comprehensive change in educational programs. In short, when considering the organization of the panel, the critical issue of unbalanced power, the problem at the heart of the plaintiff class's inability to press its claims through conventional legislative and administrative forums, was not taken into account. Consequently, the panel was simply a recreation in microcosm of the political situation that existed before the case was brought to court, one in which adversarial relations flourished without a structure of inducements designed to encourage the parties to arrive at a consensus on step-by-step objectives and reasonable means of achieving them. Therefore, we hypothesize:

> Hypothesis I. If a participatory structure is designed so that it simply replicates the political relations among the parties outside of the court, then organizational reform is less likely to occur.

Designing Participatory Structures to Insure Institutional Change. Although organizational change may not always be desirable or necessary for the achievement of the legitimate goals of the plaintiffs, it is not our intention to judge in which cases change is required. Rather, our aim is to clarify the conditions which encourage or retard organizational reform, assuming that this change is more consistent with the law and constitutional principles.

We have argued that when a participatory structure within the court mirrors the political situation outside of it, the plaintiffs are at a distinct disadvantage. This handicap further aggravates an already disadvantageous position created, in part, by the political nature of reform cases. Deference of one branch of government to the prerogatives of others is essential for the functioning of our political system, and accounts for some of the restraint and cautious use of judicial power in the management of institutional reform cases. Consequently, though judges are willing to remodel court procedures to accommodate the special nature of the cases, they are sensitive to "the limits of their capacity to refashion the existing order." (Yudoff, 1981, p. 969) Nevertheless, when the court couples a failure to send unambiguous signals to the defendants concerning expectations about the extent and timing of change with a structure of participation that too closely resembles the political arrangements that helped to create the original problem, it is clear that, other things being equal, attempts at significant reform can be stalled, if not aborted. Consistent with this conclusion is a finding reported by Bullock (1984) in his detailed analysis of several non-judicial civil rights policy implementation cases. Among the major variables which are found to be most associated with successful implementation is the extent to which policy goals are clear, precisely stated in terms of quantitatively measurable standards, and focused on specific effects rather than general intents.

Creating a participatory structure of decision-making which simply reproduces the power relations among the parties outside of the court may also contribute significantly to extensive delay in the resolution of institutional reform cases. As Pressman and Wildavsky (1973) point out in another context, when powerful parties have a veto power which enables them to block the implementation of complex policy, then delay and departure from agreed-upon plans are bound to result. The same is true in court reform. Cases often drag on for many years without adequate implementation plans

much less actual institutional change. This protracted delay usually benefits the position of the defendants.

There are two basic reasons for delay in the resolution of institutional reform cases. First, it occurs because of the political and organizational complexity of the reform process and second, it is sometimes used as a tactic by one or another party as a component of an overall case strategy.

These cases go through many phases and the parties' willingness to negotiate and reach agreement does not remain steady throughout (Johnson & Cannon, 1984 and Cooper, 1988). The adoption of consent agreements, for example, does not guarantee that programmatic changes will be adopted and implemented. As in other organizational contexts, there is a remarkably loose fit between plans and action. State officials under pressure to accept consent agreements often have little intention, or for that matter capacity, to implement the organizational changes implicitly or explicitly agreed to. The agreement may simply signal the postponement of conflict. As a result, the implementation phase can go on for years without significant change in the target organization and with continuing violations of the plaintiff's rights (see Bardach, 1976).

Between the time it takes to reach agreements and to effect complex bureaucratic change, unanticipated events inevitably occur that influence the stability of the relationships among the parties. Objectives of subgroups within the parties may change in response to new developments (Dentler and Scott, 1981; Rosenberg and Phillips, 1981-1982; Rothman and Rothman, 1984). Leadership changes can result in the formation of new coalitions realigning factions of either or both paries. As a result, matters that seemed to have been previously settled may be reopened and seemingly trivial issues politicized. In sum, the process of implementation can be both chaotic and iterative. Participants may enter the decision-making process and then leave for a variety of reasons. Plans, though rooted in formal agreements, are, in reality, tentative. They are affected by so many political, legal and economic contingencies and may be modified so often, that at any given time there may be no clear relationship between the original remedy as expressed in the court decree and the practices that exist in the defendant organization.

This pattern of delay and instability is far more burdensome to plaintiffs than to defendants. The former are generally in weaker positions because of limited financial resources and their dependence on public law centers, professional advocacy groups, and support of the Federal government. As mentioned earlier, the Federal government was a major supporter of plaintiffs pressing for institutional reform during the 1960's and 1970's. The withdrawal of its support and its reversal of position concerning school desegregation, affirmative action, prison reform and the treatment of

handicapped people has weakened and jeopardized the position of plaintiffs whose cases were seemingly resolved prior to the Reagan and Bush incumbencies (Rosenberg, 1986). In the late 1970's, the Burger Court had already added to the increasing burden of plaintiffs by decisions which limited the "availability, scope, and duration of remedial orders." (Cooper, 1988, p. 342)

A major political shift can, of course, benefit plaintiffs, as it did in earlier decades. However, the shift in the 1980's has resulted in a loss of power and resources that formerly gave plaintiffs significant leverage in negotiating disputes with powerful state authorities. Parties that negotiate from significantly weaker positions than their adversaries' can rarely achieve their objectives regardless of the forum in which they operate (Merry and Silbey, 1987). Consequently, court-created participatory structures may have less value for plaintiff groups now than in the past.

Clearly, the risks and costs associated with the extraordinarily long process of institutional reform, though a strain on the resources of all parties, are more easily absorbed by defendants than by plaintiffs. With easier access to money, legal expertise, and supportive constituencies, institutional defendants can not only tolerate delay but may welcome it or use it as an effective means of exhausting the relatively meager resources of weaker parties. Or, they can play for time, hoping that political shifts and changing public sentiment will relieve them of the necessity of implementing unwelcome change. Therefore, our hypotheses are:

> Hypothesis J. Within a participatory structure, the more explicit the expectations for organizational reform and the more explicit the timetables for reform established by the judge, the more likely organizational change is to occur.
> Hypothesis K. If the management of a participatory structure allows for repeated delays in implementation, then organizational reform is less likely to occur.

Conclusion

We have focused both on the factors which are associated with the development of participatory structures in institutional reform cases and on the variables which influence the extent to which these structures are effective in implementing change. Our review of existing case studies suggests that although a variety of factors tend to create strong pressures for the adoption of participatory methods of case management, there is no clear connection between the use of participatory methods, as such, and institutional reform.

In fact, under some conditions, participatory structures can actually be used to reinforce the prevailing practices of defendant organizations. Of course, the outcomes of these court cases, because of the characteristics we have outlined, are likely to be strongly influenced by a variety of political forces both inside and outside the court (Cooper, 1988). While each case has unique characteristics and its own tangle of complexities, the method of management and implementation employed by the court remains a significant element.

Our aim in this paper has been to describe the form of case management which appears to develop most frequently, to explore the reasons why it develops, and to locate its role in the larger realm of political forces. We do not mean to imply that the form of case management is the sole or even the primary force determining outcomes. Far-reaching political conflicts such as these are subject to many influences. Nevertheless, our hope is that future research will be able to specify more precisely the conditions under which participatory structures can and cannot serve as effective means of accomplishing change. We have offered several hypotheses drawn from an analysis of a number of case studies to serve as a basis for the achievement of that goal.

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