"Mastering" Intervention in Prisons*

Since 1970, a series of federal cases have held that general conditions of confinement in prisons[1] can violate inmates' Eighth Amendment rights.[2] The courts have been confronted with situations in which inmates live in filthy, overcrowded conditions, receive inadequate attention for basic needs, and face continual threats of violence.[3] These cases pose a serious challenge to judicial capacity to grant relief.

To compensate for the courts' limitations, judges have begun experimenting with the use of special masters with diverse roles to aid in implementing decrees in suits challenging conditions of confinement.[4]

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1. The term "prison" in this Note refers collectively to jails, prisons, reformatories, and pretrial detention centers.

2. The first such case was Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). The court called the case "the first time that convicts have attacked an entire penitentiary system." *Id.* at 365; *see* 20 DRAKE L. REV. 188 (1971); 84 HARV. L. REV. 456 (1970) (both noting significance of *Holt*). Since *Holt*, other courts have used the totality of prison conditions as the basis for establishing Eighth Amendment violations and awarding broad relief. *See, e.g.*, Palmigiano v. Garrahy, 443 F. Supp. 956 (D.R.I. 1977); Collins v. Schoonfeld, 344 F. Supp. 257 (D. Md. 1972); Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

Before the 1960s courts refused to consider the merits of prisoner petitions concerning conditions of confinement; judges developed the "hands off" doctrine to justify nonintervention. *See, e.g.*, Banning v. Looney, 213 F.2d 771 (10th Cir. 1954) (discretionary acts of administrators nonreviewable). *See generally* Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963). During the 1960s courts abandoned the "hands off" doctrine and held that inmates retain their constitutional rights except those curtailed for legitimate purposes. *See, e.g.*, Cooper v. Pate, 378 U.S. 546 (1964) (per curiam) (right to practice religious beliefs); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971) (right to minimal procedural safeguards in disciplinary hearings). At first, courts addressed the constitutionality of particular practices of prison officials. *See, e.g.*, Castor v. Mitchell, 355 F. Supp. 123 (W.D.N.C. 1973) (practice of awakening prisoners every 30 minutes enjoined). Eventually courts accepted the doctrine that general conditions of confinement could constitute cruel and unusual punishment. *See generally* Comment, *Cruel But Not So Unusual Punishment: The Role of the Federal Judiciary in State Prison Reform*, 7 CUM. L. REV. 31, 32-37 (1976) [hereinafter cited as *Cruel But Not So Unusual Punishment*].

3. *See, e.g.*, Palmigiano v. Garrahy, 443 F. Supp. 956, 979 (D.R.I. 1977) (prisoner "sentenced to a regime in which he will be forced to live in a state of constant fear of violence, in imminent danger to his bodily integrity and physical and psychological well-being, and without opportunity to seek a more promising future"). *See generally Cruel But Not So Unusual Punishment, supra* note 2.

4. *See, e.g.*, Jordan v. Wolke, 75 F.R.D. 696 (E.D. Wis. 1977); Palmigiano v. Garrahy, 443 F. Supp. 956 (D.R.I. 1977). This Note will focus on the use of masters as opposed to other non-Article III officials. To the extent that other non-Article III officials perform a role similar to that of masters, the analysis suggested here may be applicable. For a description of the role of other non-Article III officials in institutional reform litigation, see Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1300-01 (1976); Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338, 1343-47 (1975).

This Note describes and analyzes the role of masters in prison litigation, based on field research conducted in five systems in which masters were appointed.[5] This research reveals that the role of the master is limited because judicial intervention is not well suited to the task of restructuring the patterns of decisionmaking and behavior that have created prison conditions. Even within the limits of judicial involvement, the legitimacy and effectiveness of the master may be compromised due to the conflicts among his multiple roles.[6] Recognizing that masters are bound to have limited success in remedying unconstitutional prison conditions, the Note suggests a variety of useful remedial techniques, ranging from cooperative forms of dispute resolution to coercive imposition of sanctions, and recommends ways to clarify and strengthen the master's role.

I. Prison Conditions and the Role of the Master

A master appointed to aid in the implementation of a prison decree becomes involved in the complex relationships among inmates, staff, and administrators. Because these relationships are responsible for many of the problems precipitating judicial intervention, the master's role is both affected by and directed toward the patterns of interaction in the prison.

A. *Need for Intervention in Prisons*

Prison conditions necessarily impose hardship on inmates who are deprived of liberty, autonomy, sexual relationships, and material comforts, and are forced to live in proximity with potentially dangerous inmates.[7] Although critics have argued that these conditions are suf-

5. To understand the roles masters perform and the perceptions of the various participants in decree implementation, the author conducted unstructured interviews with judges, masters, plaintiffs' attorneys, defendants' attorneys, directors of departments of corrections, sheriffs, wardens, supervisors, counselors, guards, and inmates in five prison systems in which masters were appointed. Interviewees were asked to trace their involvement with the court and the master, to discuss the relationships between various participants in each litigation, and to describe changes in relationships, policies, and prison conditions. Information obtained through interviews was supplemented with memoranda, correspondence, briefs, and newspaper articles concerning each litigation. To preserve confidentiality when possible, the participants are referred to by letter, *e.g.*, Master A; Director B. Similarly, correspondence are referred to by letter and date, *e.g.*, "Letter from Master A to Defendants' Attorney A (July 5, 1973)." The transcripts of tape-recorded interviews, notes of unrecorded interviews, and all supplementary material are on file with the *Yale Law Journal*. The author served as assistant to the special master appointed in Palmigiano v. Garrahy, 443 F. Supp. 956 (D.R.I. 1977).

6. As used in this Note, the pronoun "he" refers to both genders.

7. *See* C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 382-87 (1978); Grosser, *External Setting and Internal Relations of the Prison*, in THEORETICAL STUDIES IN SOCIAL

ficiently cruel to warrant the abolition of prisons,[8] courts have generally refused to declare conditions that are viewed as endemic to prisons unconstitutional.[9] In many prisons, however, inmates also are subjected to the constant threat of physical violence, emotional degradation, and arbitrary decisionmaking.[10]

Most prisons employ a paramilitary approach to administration in which guards and inmates are expected to follow orders without understanding, questioning, or participating in decisionmaking that affects their living and working conditions.[11] Regulations govern every aspect of inmate behavior in order to control movement within the prison.[12]

ORGANIZATION OF THE PRISON 133 (Soc. Sci. Research Council ed. 1960) [hereinafter cited as THEORETICAL STUDIES]. Prison conditions also impose hardship on guards. The combination of working in dirty, violent conditions and maintaining other human beings in a state of deprivation imposes a heavy psychological burden on them. *See* D. FOGEL, ". . . WE ARE THE LIVING PROOF . . .": THE JUSTICE MODEL OF CORRECTIONS 72-82 (1975); J. JACOBS, STATEVILLE 21 (1977). Although guards have no constitutional basis for challenging prison conditions, they have sought to improve working conditions through unionization. *See* J. JACOBS & N. CROTTY, GUARD UNIONS AND THE FUTURE OF PRISONS (1978).

8. *See, e.g.*, Morales v. Schmidt, 340 F. Supp. 544, 548-49 (W.D. Wis. 1972) ("[T]he institution of prison probably must end. In many respects it is as intolerable . . . as was the institution of slavery, equally brutalizing to all involved, equally toxic to the social system, equally subversive of the brotherhood of man, even more costly by some standards, and probably less rational."); K. MENNINGER, THE CRIME OF PUNISHMENT 71-73, 202-04 (Viking ed. 1969).

9. *See* Bethea v. Crouse, 417 F.2d 504, 506 (10th Cir. 1969) (courts will not review deprivations that are necessary concomitants of imprisonment); Spain v. Procunier, 408 F. Supp. 534, 537 (N.D. Cal. 1976) (court must balance institutional needs against applicable constitutional provisions).

10. *See* L. ORLAND, PRISONS: HOUSES OF DARKNESS 69 (1975) (quoting inmate) (" 'The main beef of the prisoners is not the lack of rules governing the prisoners, but . . . the stupidly capricious and arbitrary misapplication of the rules by the guard force and the disciplinary boards.' " (ellipsis in original)); C. SILBERMAN, *supra* note 7, at 417 ("prison officials' ability or inability to maintain order affects inmates' well-being more directly, and far more profoundly, than does any other aspect of prison life").

11. *See* McCleery, *Communication Patterns as Bases of Systems of Authority and Power*, in THEORETICAL STUDIES, *supra* note 7, at 54-56 (inmates); Shrag, *Some Foundations for a Theory of Correction*, in THE PRISON 336-38 (D. Cressey ed. 1961) (guards). This system can be traced to the concept of the penitentiary as a method of rehabilitation, in which regimentation was intended to reform the convict. *See* D. ROTHMAN, THE DISCOVERY OF THE ASYLUM 82-83 (1971). Guards were often subject to some of the same regulation as the inmates they guarded. *See* J. JACOBS, *supra* note 7, at 38-40. Although the justification has been abandoned, the institutions and practices developed to implement it continue to influence the operation of many prisons. *See* D. ROTHMAN, *supra*, at 239-47; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 162-63 (1967) [hereinafter cited as THE CHALLENGE OF CRIME].

12. *See* BOARD OF CONTROL OF STATE INSTITUTIONS, RULE BOOK IOWA STATE PENITENTIARY 1-11 (1961), *reprinted in* THE SOCIOLOGY OF PUNISHMENT AND CORRECTION 87-91 (N. Johnston, L. Savitz & M. Wolfgang eds. 1962).

Therapeutic programs and personnel are often subordinated to the demands of custody. There is often a division of labor between "treatment" and "custody" staff, so that guards are largely excluded from noncustodial programs and counselors' authority over the maintenance of inmates is limited. *See* J. JACOBS, *supra* note 7, at 95-99; McCleery, *supra* note

Guards, the officials immediately responsible for enforcing regulations, often lack official sanctions and incentives to control inmates.[13] They cannot rely on force because of the high inmate/guard ratio, the constraints imposed by law, and the possibility of creating a major disturbance.[14] Guards are often unable to enforce every regulation and are unwilling to use formal disciplinary procedures because frequent reports of inmate misbehavior may be interpreted as evidence of ineffectiveness.[15]

The failures of the official system have contributed to the development of informal means of coercion and control. In many prisons an inmate hierarchy develops in which experienced inmates who are willing to use force, bribes, and illegitimately obtained resources exercise control over newcomers.[16] Guards often rely on the inmate hierarchy to maintain the appearance of order.[17] They give powerful inmates information, goods, and immunity from enforcement of institutional rules in exchange for the maintenance of a facade of order.[18]

This informal system increases the sense of injustice felt by less powerful inmates,[19] aggravates antagonisms between guards and inmates,[20] and, ironically, encourages "the highest possible threat of disruption and violence"[21]—the very result that these informal rela-

11, at 54. The structures of communication and control can hinder the therapeutic effectiveness of counselors. *See* Cressey, *Limitations on Organization of Treatment in the Modern Prison*, in THEORETICAL STUDIES, *supra* note 7, at 86-87, 94-95.

13. *See* G. SYKES, THE SOCIETY OF CAPTIVES 50-52 (1958); Cloward, *Social Control in the Prison*, in THEORETICAL STUDIES, *supra* note 7, at 22-32.

14. *See* C. SILBERMAN, *supra* note 7, at 392-94, 406-08; G. SYKES, *supra* note 13, at 49-50.

15. *See* C. SILBERMAN, *supra* note 7, at 398; Cloward, *supra* note 13, at 36.

16. *See, e.g.*, McCleery, *supra* note 11, at 57 ("The absence of published regulations . . . , the secrecy and the arbitrariness associated with the enforcement of discipline, the shocking unfamiliarity of the prison situation, and the demands that regimentation imposed, all combined to make the newly admitted inmate completely dependent on the experienced prisoner."); McCorkle & Korn, *Resocialization Within Walls*, in THE SOCIOLOGY OF PUNISHMENT AND CORRECTION, *supra* note 12, at 100-01.

17. *See* Note, *Bargaining in Correctional Institutions: Restructuring the Relation between the Inmate and the Prison Authority*, 81 YALE L.J. 726, 734-35 (1972).

18. McCleery, *The Governmental Process and Informal Social Control*, in THE PRISON, *supra* note 11, at 162; Note, *supra* note 17, at 738-41.

19. *See* E. GOFFMAN, ASYLUMS 12-66 (1961) (impact of incarceration on inmates); Grosser, *supra* note 7, at 133 (preincarceration perception of injustice).

20. Antagonisms exist between inmates and guards because guards are the closest visible symbol of the authority restraining inmates. Guards must execute the most degrading aspects of holding individuals in custody. *See* J. JACOBS, *supra* note 7, at 67 (guards required to "keep ear to plumbing" to "tap" inmate conversations); G. SYKES, *supra* note 13, at 22 ("the custodians' task of maintaining order with the prison is acerbated by the conditions of life which it is their duty to impose on their captives"). Informal bargaining contributes to this hostility because of the unpredictability and vulnerability of the informal relationships. McCorkle & Korn, *supra* note 16, at 103; Shrag, *supra* note 11, at 345.

21. Note, *supra* note 17, at 744. Aggression and violence may be precipitated by power struggles among competing inmate groups, by attempts to reestablish adherence to rules,

tionships are intended to avoid. In addition, inmates have become more conscious of their rights and have increasingly identified with particular ethnic or religious groups within the prison. Consequently, they are less willing to participate in the informal system of bargaining and are more outspoken about the inadequacy of prison conditions.[22] Inmates often have no internal means of expressing their dissatisfaction or obtaining redress other than resorting to violence.[23]

To reduce the level of brutality and arbitrariness, therefore, it is necessary to alter the relationship between guards and inmates, to provide inmates with access to goods and privileges on an impartial basis, and to provide a means of productively channelling inmate dissatisfaction so that violence is not perceived as necessary.[24] Prison administrators are often limited in their capacity to restructure patterns of communi-

and by attempts of inmates or guards to sanction each other for failing to adhere to bargains. *See* McCorkle & Korn, *supra* note 16, at 103; McCorkle, *Guard-Inmate Relationships in Prison*, in THE SOCIOLOGY OF PUNISHMENT AND CORRECTION, *supra* note 12, at 110. The power struggle among inmates and guards often divides along racial lines. *See* Carroll, *Race and Three Forms of Prisoner Power*, in CONTEMPORARY CORRECTIONS 43-47, 49-53 (C. Huff ed. 1977).

22. *See* J. JACOBS, *supra* note 7, at 58-67 (informal network of social control undermined by Muslim challenge); Jacobs, *Stratification and Conflict Among Prison Inmates*, 66 J. CRIM. L.C. & P.S. 476, 481 (1975) (prison community "arena where competing groups seek at each other's expense larger memberships and greater power"). In systems with weak leadership and politicization of inmates, the tension between inmates, guards, and administrators is heightened by the emergence of strong inmate factions. *See Inmates, guards in ACI protest*, Providence J.-Bull., Apr. 13, 1978, at 3, col. 5 ("Two groups of prisoners . . . staged protests yesterday because of alleged rough treatment meted out to an inmate . . . , and an entire shift of guards staged a counter protest by refusing to work for several hours."); *ACI guards stop work to protest trash war*, Providence Sunday J., Apr. 30, 1978, at 1, col. 7.

23. *See* J. KEATING, PRISON GRIEVANCE MECHANISMS 19-20 (1977) ("[Inmates] refuse to eat or work, burn their mattresses, break their television sets, and endanger lives with their protests. 'It may seem stupid,' explained one rioter, 'but this is the only time someone ever listened to us.' ")

24. *See* D. FOGEL, *supra* note 7, at 204-36 (justice model of corrections involves self-governance, productive modes of conflict resolution, access to legal aid in prison, just administration of rules, and ombudsman to oversee fairness of system); C. SILBERMAN, *supra* note 7, at 417-23 (by orienting prison program to majority of inmates who want to do their time peacefully and projecting the expectation that inmates will assume responsibility for their actions, program achieved nonviolent environment in which inmates and staff work cooperatively). Arguments against more participatory modes of administration usually focus on the possibility that official procedures will be used by inmates to enhance their own power and harass staff. *See* D. FOGEL, *supra* note 7, at 210-13; J. KEATING, *supra* note 23, at 29. Although there is the danger that such abuse will occur, the likelihood can be reduced by encouraging and carefully defining staff involvement, rotating inmates' tenure in any policymaking role, and carefully delineating the areas of shared decisionmaking. D. FOGEL, *supra* note 7, at 214-15; J. KEATING, *supra* note 23, at 29. Furthermore, violence and abuse of power occur under the current system, so the risks of participatory administration may be no greater than the certainties of the current system.

cation and decisionmaking; they may be unaware of alternative methods of operation[25] or influenced by staff who are afraid of the consequences of reform.[26] Members of the prison community who benefit from the current structure are likely to resist efforts to reduce their control.[27]

The larger political community provides prison officials with little incentive to take the risks inherent in changing the current structure.[28] Individual citizens rarely have a stake in prison conditions, so prison officials often have no external constituency to demand accountability or provide political support.[29] Administrators are often evaluated by their superiors in terms of their success in maintaining low-visibility and low-cost prison conditions.[30] Because public officials are often unwilling to allocate funds necessary to provide adequate resources,[31] existing problems are intensified by shortages of staff, space, and other resources.[32]

Intervention, therefore, is necessary to establish a new norm for

25. There has not been a significant level of exchange of ideas and techniques in the field of corrections management and public administration. *See* Cohn, *The Failure of Correctional Management*, in CORRECTIONS: PROBLEMS OF PUNISHMENT AND REHABILITATION 53-54 (E. Sagarin & D. MacNamara eds. 1972).

26. Those accustomed to an authoritarian regime are often suspicious of reforms introducing therapeutic concerns and professional staff into the prison. *See* J. JACOBS, *supra* note 7, at 82; McCleery, *supra* note 11, at 69-71.

27. Career guards or wardens may perceive such changes as a threat to their autonomy and security within the prison, and strongly resist efforts to alter established methods of operation. *See* J. JACOBS, *supra* note 7, at 82, 85; McCleery, *supra* note 11, at 69-70. Elite inmates are also likely to attempt to maintain guards' and administrators' dependency on them. *See* Cloward, *supra* note 13, at 44-46.

28. To overcome resistance of old-line guards and powerful inmates, *see* note 27 *supra*, administrators may have to challenge their power in the prison, thereby promoting short-term disruptions such as guard walkouts or inmate boycotts, *see, e.g., Prison protest 'power test,' says Moran*, Providence J.-Bull., Apr. 15, 1978, at 1, col. 5 (Director of Department of Corrections attributes protest of inmates following firing of several powerful inmates from prison jobs to ongoing power struggle between inmates and administration); *id.* at 24, col. 1 (guards refuse to work for several hours). Such consequences may generate negative publicity and jeopardize the administrator's political career. Cohn, *supra* note 25, at 51 (correctional administrator unwilling to take risks that may produce conflict with those to whom he is accountable).

29. *See* Grosser, *supra* note 7, at 132.

30. *See* Ohlin, *Conflicting Interests in Correctional Objectives*, in THEORETICAL STUDIES, *supra* note 7, at 122-29.

31. *See, e.g.*, M. HARRIS, AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS—A CASE STUDY OF *Holland v. Donelon* 38 (1976) (one "jail manager" perceived shortage of funds to be major hindrance to implementation of court orders although others did not agree); Comment, *The Role of the Eighth Amendment in Prison Reform*, 38 U. CHI. L. REV. 647, 648 (1971); Letter from Sheriff D to City Council (Nov. 17, 1975) (sheriff informs city council that he cannot comply with court order due to council's failure to appropriate requested funds).

32. *See* THE CHALLENGE OF CRIME, *supra* note 11, at 162, 163.

prison social structure and conditions,[33] to expose prison officials to more effective methods of administration,[34] and to continue to apply pressure so that these methods are developed.[35] The master appointed to aid in the implementation of a prison decree often attempts to fulfill all of these functions. In addition to traditional monitoring and enforcement duties, he performs a variety of roles intended to alter the internal patterns of governance. The remainder of this Note draws on field research to assess whether such efforts can succeed.

B. *The Master as Intervenor in Prisons*

Traditionally, courts have used masters[36] in cases requiring special expertise or imposing an extraordinary burden on the court.[37] Masters have performed specific fact-finding duties that consist of investigating,

33. *See* COMMISSION ON ACCREDITATION FOR CORRECTIONS, MANUAL OF STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS xii (1977) (need to establish professional standards for corrections); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 4-5, 356 (1973) (need to formulate standards and goals to develop support for correctional reform).

34. *See* note 25 *supra.*

35. *See* Cressey, *Sources of Resistance to Innovation in Corrections,* in CORRECTIONAL INSTITUTIONS 447-56 (R. Carter, D. Glaser & L. Wilkins eds. 1972).

36. Courts first based their authority to appoint non-Article III officials to aid in carrying out their judicial functions on the courts' inherent power. *See Ex parte* Peterson, 253 U.S. 300 (1919).

Rule 53 of the Federal Rules of Civil Procedure establishes a statutory basis for the appointment of a special master. The rule provides:

> (a) . . . [T]he [district] court in which any action is pending may appoint a special master therein. . . . [T]he word "master" includes a referee, an auditor, an examiner, a commissioner, and an assessor. . . .
>
> (b) . . . A reference to a master shall be the exception and not the rule. . . .
>
> (c) . . . The order of reference to the master may specify or limit his powers . . . . Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order.
>
> ....
>
> (e)(2) . . . [T]he court shall accept the master's findings of fact unless clearly erroneous.

FED. R. CIV. P. 53. For a discussion of the traditional use of special masters, see Kaufman, *Masters in Federal Courts: Rule 53,* 58 COLUM. L. REV. 452 (1958); Silberman, *Masters and Magistrates Part II: The American Analogue,* 50 N.Y.U. L. REV. 1297 (1975).

37. Masters have been used to dispose of overly burdensome fact-finding processes involved in determining procedural and jurisdictional issues during the pretrial stage of litigation, *see, e.g., In re* Hotel Governor Clinton, Inc., 107 F.2d 398 (2d Cir. 1939); Stone v. Southern Pac. Co., 32 F. Supp. 819 (S.D.N.Y. 1940); to supervise discovery, *see, e.g.,* First-Iowa Hydro Elec. Co-op. v. Iowa-Illinois Gas & Elec. Co., 245 F.2d 613 (8th Cir.), *cert. denied,* 355 U.S. 871 (1957); to aid the court in making factual determinations and computing damages in complex cases, *see, e.g.,* Zegers v. Zegers, Inc., 458 F.2d 726 (7th Cir. 1972); Trans World Airlines v. Hughes, 308 F. Supp. 679 (S.D.N.Y. 1969); and to perform ministerial tasks that do not require judicial expertise, *see* Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd,* 405 F.2d 138 (6th Cir. 1968).

holding hearings, and reporting to the court on the issues under consideration.[38]

In prison and other civil rights cases,[39] masters often perform a broader role. Masters' duties in prison cases concern primarily the provision of relief, rather than the determination of liability.[40] They usually perform some combination of adjudicative and administrative functions to facilitate the implementation of the court decree,[41] in addition to their traditional fact-finding role.[42]

Rule 53 of the Federal Rules of Civil Procedure, which authorizes judges to appoint masters, primarily addresses the traditional role of the master as fact-finder during trial.[43] It leaves the definition of the master's powers and duties to the discretion of the district court judge.[44]

38. *See* Kaufman, *supra* note 36, at 462-68.

39. Courts have used masters in school desegregation, voting rights, housing, and mental hospital litigation. *See* Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428, 450-52 (1977); Comment, *Equitable Remedies: An Analysis of Judicial Utilization of Neoreceiverships to Implement Large-Scale Institutional Change*, 1976 WIS. L. REV. 1161, 1162-63.

40. *See* Comment, *supra* note 39, at 1174-75. Courts have used masters in prison cases to intensify and broaden the scope of court involvement after years of noncompliance, *see, e.g.*, Jones v. Wittenberg, 73 F.R.D. 82, 85 (N.D. Ohio 1976) (master appointed after contempt proceedings to check defendants' performance), and to facilitate the process of compliance by mediating between and advising the parties, *see, e.g.*, Palmigiano v. Garrahy, 443 F. Supp. 956, 989 (D.R.I. 1977); Hamilton v. Schiro, No. 69-2443 (E.D. La. Oct. 19, 1971).

41. *See, e.g.*, Palmigiano v. Garrahy, 443 F. Supp. 956, 989 (D.R.I. 1977) (master empowered to hold hearings, make informal investigations at prison at any time, conduct confidential interviews with staff and inmates, recommend firing, hiring, or transfer of staff); Taylor v. Perini, No. 69-275 (N.D. Ohio Dec. 17, 1975), *modified*, 413 F. Supp. 189, 193 (N.D. Ohio 1976) (master granted unlimited access to staff, facilities, and records and empowered to hold hearings, seek contempt orders, and supervise, coordinate, and approve defendants' compliance efforts).

Judges have preferred to avoid direct administrative responsibilities by remaining in the judicial posture of reviewing findings and recommendations and placing upon the defendants the responsibility for compliance, rather than appointing a receiver to carry out court orders. *See, e.g.*, Robbins & Buser, *Punitive Conditions of Prison Confinement: An Analysis of* Pugh v. Locke *and Federal Court Supervision of State Penal Administration Under the Eighth Amendment*, 29 STAN. L. REV. 893, 923 (1977). *But cf.* Morgan v. Kerrigan, 409 F. Supp. 1141 (D. Mass. 1975), *aff'd sub nom.* Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977) (receiver appointed in school desegregation case).

42. *See, e.g.*, Palmigiano v. Garrahy, 443 F. Supp. 956, 986 (D.R.I. 1977) (court designates master "as an arm and as the eyes and ears of the Court").

43. *See* note 36 *supra*.

44. Factors that may affect the nature and scope of the master's power include:

(1) The judge's view of the proper role of the court. One judge defined his role as promoting constitutional conditions in the prison and stated that he "wasn't concerned with the strict mechanics of how it was accomplished." Judge B at 18. The master appointed in that case was delegated broad supervisory powers. Another judge stated that the role of the federal judge is not to resolve social conflict, but rather to resolve constitutional issues that arise in the course of a particular case. Judge E at 1. The master appointed in that case was required to allow counsel to accompany him on visits unless

The judge sets forth those powers and duties, usually in broad terms,[45] in the "order of reference" appointing the master. Aside from the order of reference, few legal standards or informal guidelines exist to help the master determine how to perform his duties.[46]

In the absence of an explicit definition of his role, the master tends to respond to demands imposed by the prison situation and the participants in the suit.[47] The master often finds that the decree implementation process is impeded by the parties' disagreement over what specific changes the order requires[48] and whether those changes can be accomplished by the defendants.[49] To clarify the standards for determining compliance with a court order, the master often functions as an arbitrator. He will, if necessary, offer an interpretation of the order that is in practice binding on the parties.[50] Because the parties are

the parties consented to surprise visits, indicating a greater degree of formality. *Id.* at 2.

(2) The background of the special master. *See, e.g.*, Annual Report of Special Master on Defendants' Compliance with Court Orders at 2, Palmigiano v. Garrahy, 443 F. Supp. 956 (D.R.I. 1977) (correctional administrator appointed) [hereinafter cited as Annual Report of Special Master]; D. SPILLER, AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS—A CASE STUDY OF *Hamilton v. Schiro* 3 (1976) (law professor appointed).

(3) Timing of the master's entry into the case. Masters appointed immediately after prison conditions are declared unconstitutional are usually instructed to formulate relief. *See* Jordan v. Wolke, 75 F.R.D. 696, 701 (E.D. Wis. 1977) (order of reference); Hamilton v. Schiro, No. 60-2443 (E.D. La. Oct. 19, 1971) (same).

(4) Filing of an appeal of the order of reference.

45. *See* note 41 *supra* (examples of broadly framed powers of master).

46. All of the masters interviewed stated that they had received little informal direction from the judge concerning their duties or their role. *See, e.g.*, Master A at 2-3; Master B at 1. Most literature refers only to the traditional role of hearing officers and the appropriateness of a reference. *See* note 36 *supra*.

47. The master will often react to particular inadequacies or requests presented by attorneys, inmates, staff, and administrators. The nature of his response may depend on his perception of the master's role, the stage of the litigation, and the parties' willingness to allow him to participate.

The breadth of the issues before the master in a prison case stems from the ambiguity of and controversy over the standard of "cruel and unusual punishment," U.S. CONST. amend. VIII, the group nature of the parties, the future orientation of the relief, and the magnitude of the task of compliance. *See* Chayes, *supra* note 4, at 1302.

48. *See* Annual Report of Special Master, *supra* note 44, at 38-39, 54-60 (parties contest meaning of court order requiring "adequate" mental health care and "sufficient" job opportunities for over six months).

49. *See id.* at 15 (master recognizes time requirement for separation of pretrial detainees from convicted inmates too short; placing pretrial detainees elsewhere declared unavailable, unsafe, or economically infeasible); Taylor v. Perini, 455 F. Supp. 1241, 1260 app. (N.D. Ohio 1978) (Fifth Report of Special Master) (master reports defendants' attempts to comply with requirements of order created serious problems in infirmary; modification necessary).

50. If either party has taken a position that the master deems inadequate to satisfy the order, he often attempts to persuade the parties to compromise. *See, e.g.*, Master A at 4 ("From the very beginning, we negotiated everything from the number of people to stay in maximum security to the date [the move] was to be done.") If parties do not agree to an interpretation acceptable to the master and the court, then the master develops and

aware that the master will impose a decision if they fail to agree, he can encourage them to reach agreement on an interpretation of the order that is acceptable to the court.

The master will sometimes find that there are conflicts between the parties over issues unrelated to the interpretation of the order[51] and that such conflicts threaten to impede implementation. He may attempt to act as an intermediary both to facilitate communication and to sustain the momentum of efforts to achieve compliance.[52]

Masters sometimes perceive that the prison administrator either cannot or will not provide the direction necessary to achieve compliance.[53] They may respond by assuming the role of adviser to the parties.[54] Masters have also attempted to carry out administrative functions such as formulating plans to address problems,[55] seeking grants and other

imposes an interpretation. *See, e.g.*, Jones v. Wittenberg, 440 F. Supp. 60, 155 app. (N.D. Ohio 1977) (First Report of Special Master) (clarifying court requirements for visitation); Letter from Master A to Correctional Consultants (Apr. 5, 1978) (informing consultants of meeting designed to "develop minimal standards which the Court can employ in monitoring compliance"). The master's authority and willingness to impose judgments defines his role as that of an arbitrator, rather than a mediator. *See* p. 1086 *infra*.

The master's recommendations are not legally binding on the court. *See* FED. R. CIV. P. 53(e). As a practical matter, the master's decisions concerning standards of compliance often prevail. *Compare* Letter from Master to Warden (June 9, 1977) (indicating master's and court's position concerning job assignment system and inmate council) *with* Taylor v. Perini, 455 F. Supp. 1241, 1245-54 (N.D. Ohio 1978) (Agreement and Order) (court adopts similar position concerning inmate council, job assignment system, and grievance mechanism).

51. *See, e.g.*, Director C at 2-3 (lawyers do not understand aspects of prison administration and should not control case); Plaintiffs' Attorney C at 23 (warden bears great deal of resentment toward lawyer because of aggravation resulting from case). Antagonisms may be fostered by the issue of attorneys' fees. *See, e.g., id.* at 21-22 (dispute over fees contributed to attorney's decision to minimize involvement and rely on master to initiate action). Plaintiffs' counsel may perceive that defendants are not acting in good faith and develop hostility toward them. *See, e.g.*, Plaintiffs' Attorney A at 11; Master B at 23-24.

52. *See, e.g.*, Defendants' Attorney C at 3 (master aided progress of litigation by facilitating communication between counsel). This role may entail setting the pace of the compliance process. *See* Deputy Master A at 2:

> I do plaintiffs' and defendants' work. On the jobs issue, the defendants come up with a list that says everyone's got a job. The administration then doesn't know which job is "bogus." I'll go and talk to every inmate in there, and on the basis of that, I'll make recommendations to the administration and the court. [This] does plaintiffs' counsel's work, and tells the administration what's going on.

53. *See, e.g.*, Annual Report of Special Master, *supra* note 44, at 75 (absence of competent administrative management team responsible for continued problems); Master B at 51 ("The court cannot rely on defendants. If they wanted to do it, they would have done it long ago. If they come up with anything, they'll come up with plans that are totally unworkable [and] unrealistic . . . .")

54. *See, e.g.*, Report Concerning Defendants' Compliance as of February 10, at 21, Palmigiano v. Garrahy, 443 F. Supp. 956 (D.R.I. 1977) (master advises defendants of way to improve classification system).

55. *See, e.g.*, Annual Report of Special Master, *supra* note 44, at 73 (master's efforts to provide technical assistance for development of grievance procedures); Letter from Master D to Consultant (Feb. 28, 1972) (requesting technical assistance to determine structure

forms of assistance to establish new programs,[56] and forming advisory policy groups among inmates and staff.[57] Finally, when other methods fail, masters have functioned as enforcement agents. They have acted formally by instituting proceedings to sanction noncompliance,[58] and informally by advising the defendants of the court's dissatisfaction and the likelihood of more drastic judicial action.[59]

Thus, in addition to performing his traditional fact-finding function the master in prison litigation often attempts to function as arbitrator, intermediary, advisor, administrator, and enforcer. There are, however, inevitable constraints on the master and conflicts between these roles that often prevent their successful performance.

II. The Insufficiency of the Master as Intervenor

In reforming prisons, courts often order substantial changes that cannot be achieved unless patterns of interaction within the prison are transformed.[60] Although the master in some cases can serve as a catalyst for change, the ways in which courts and masters act and are perceived by the parties can prevent the master from promoting new patterns of interaction. Even when it is limited to those functions that he can perform, the master's role may create problems that impair the effectiveness and legitimacy of judicial intervention during implementation of the decree.

and function of newly planned prison); Final Report of Special Master *In re* Orleans Parish Prison at 16, Hamilton v. Schiro, 338 F. Supp. 1016 (E.D. La. 1970) (master recommends major reorganization of prison administration).

56. *See, e.g.*, Letter from Master B to Director of National Institute of Corrections (Mar. 8, 1978) (requesting funds for evaluation of grievance system); Letter from Master B to Consultant (Dec. 9, 1976) (summarizing master's role in obtaining grant to develop psychological test for screening correctional officers).

57. *See, e.g.*, Master B at 16 (master formed inmate advisory council); Memo from Master A to Prison Staff (Dec. 8, 1977) (informing staff of formation of advisory group). One master noted:

> I spent an awful lot of time working with inmates individually and collectively, basically in the hope of stimulating them into understanding that there were some positive, constructive ways we could go about bringing about change, and that working with the court was the most sensible way to do it at this time. I also worked with the [correctional] officers in terms of what they perceived their needs to be, and did some work in developing some ways of meeting their needs.

Master A at 6-7.

58. *See* Jones v. Wittenberg, 73 F.R.D. 82, 85 (N.D. Ohio 1976) (empowering master to seek contempt citation for defendants' failure to comply with order).

59. *See, e.g.*, Letter from Master A to Director A (Mar. 8, 1978) (informing director of problems confronted in course of monitoring); Letter from Master C to Director C (May 11, 1976) (reminding that psychological screening was ordered by court and that master would take formal action if necessary).

60. *See* pp. 1066-67 *supra*.

A. *Need for Constructive Dispute Resolution*

The transformation of the patterns of interaction necessary for prison reform cannot be achieved by decree.[61] Such patterns are so integral to the daily routine of the prison that staff and inmate participation in resolving disputes between members of the prison community is necessary.[62] Adjudication, which provides for dispute resolution in an adversary proceeding with an outsider presiding,[63] is unlikely to be effective because the process remains separate from and foreign

61. To reduce violence courts sometimes require administrators to increase the surveillance of inmates and to use more repressive measures against them. *See* C. SILBERMAN, *supra* note 7, at 381-82. These measures reinforce the system of governance that has contributed to violent conditions and fail to provide for the protection of inmates from each other.

Some of the worst abuses in prisons, such as torture and filthy, dark, vermin-infested isolation cells, have been eliminated by judicial intervention. R. GOLDFARB & L. SINGER, AFTER CONVICTION 370-403 (1973). Coercive intervention appears to be necessary to provide a constituency for inmates so that resources and energy are devoted to improving prison conditions.

Court intervention raises a number of theoretical and practical problems. First, the physical improvements ordered may not persist over time, due to failure of prison officials to structure adequate incentives for inmates and staff to maintain conditions. When the level of hostility between members of the prison community is high, destruction of physical property may be the only perceived means of expressing this hostility.

Second, because legislators are resentful of federal-court intervention in the political process, *see* Assistant to Sheriff D at 18, they may refuse to allocate funds to implement the court's orders. Third, court-ordered expenditures have engendered a controversy over the proper role of courts in a federal system. *See, e.g.*, Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978); Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978). Finally, court-ordered improvements of antiquated facilities may predispose legislatures to devote resources to maintaining large institutions rather than to developing less destructive, more humane, community-based programs.

62. Disputes may arise over the unfair treatment of an inmate by a guard, over an inmate's sense that his pride has been compromised by the behavior of a guard or another inmate, or over a policy that a group of inmates perceives to be unfair, *e.g.*, inadequate visiting privileges, unavailability of ethnic or religious foods, unequal worship services, or unfair classification procedures. *See* Mediation Agreement between Administration of Washington State Reformatory and Representatives of the Resident Ethnic Groups (Jan. 28, 1976) (on file with *Yale Law Journal*) [hereinafter cited as Washington Mediation Agreement].

63. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. 63, 69 (1974). In adjudication, the "persuasive conflict" that occurs before the arbiter is an offshoot of a dispute that precedes the dispute-settling process. Golding, *Preliminaries to the Study of Procedural Justice*, in LAW, REASON, AND JUSTICE 71, 86 (G. Hughes ed. 1969). The technical nature of adjudication often limits the disputants' capacity to participate effectively, so that each disputant participates through an intermediary (usually a lawyer) who assumes a large degree of control. Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 659 (1976). Adjudication presupposes that the "binding" decision of the adjudication will "resolve" the dispute.

to those directly affected.[64] Moreover, adjudication may impair relationships when the parties resume their normal roles.[65]

There is a need for a constructive dispute-resolution process that provides a forum for airing disputes within the prison community, opens channels of communication so that mutual understanding can develop, and helps provide a favorable atmosphere for confronting and settling issues.[66] Although the master attempts to perform various informal roles aimed at improving the parties' day-to-day interactions, his efficacy will depend on their attitudes toward judicial intervention and willingness to cooperate.[67]

B. *The Parties' Lack of Faith in the Process*

The parties are not committed to judicial intervention as a way of addressing prison problems. The defendants frequently question the court's legitimacy, and hence the master's continuing involvement in what they consider to be a responsibility of the executive branch.[68] Their resistance to judicial intervention is initially reflected in their failure to accept the seriousness of the court's demands and their sub-

64. *See* Felstiner, *supra* note 63, at 71 ("The psychological consequence [of the adjudicative process] is frequently to alienate the loser . . . .") The person-oriented factors in the dispute, such as political alliances within the prison or the intensity of inmates' dissatisfaction with a seemingly trivial practice, may be crucial to settlement of the dispute, but are likely to be considered irrelevant by an arbiter. *Id.* at 70.

65. Prison officials, who are subjected to public scrutiny and criticism, are likely to feel hostile toward those who are challenging their actions, namely the inmates. *See* Eisenberg, *supra* note 63, at 660 (prospect of "judgment [recognizing one party as 'right' and branding other as 'wrong'], coupled with the lack of control leading up to the judgment, tends both to generate a state of tension and to drive the disputants irreconcilably apart, whatever the outcome"). Inmates are returned to the custody of the opposing parties in the litigation, creating a situation ripe for continuing hostility and reprisals. Greenwald, *C.R.S.: Dispute Resolution Through Mediation*, 64 A.B.A.J. 1250, 1254 (1978); *cf.* M. DEUTSCH, THE RESOLUTION OF CONFLICT 351-52 (1973) (calling such competitive modes of problemsolving "destructive conflict," characterized by tendency to expand and escalate).

66. The process of dispute resolution is as important as the outcome in the prison context, for one of the sources of the conflict is the absence of mechanisms for dealing with problems. *See* pp. 1064-66 *supra*.

67. *See* Project, *Judicial Intervention in Corrections: The California Experience—An Empirical Study*, 20 U.C.L.A. L. REV. 452, 529-30 (1973); *cf.* L. FULLER, THE MORALITY OF LAW 216-21 (rev. ed. 1969) (adherence to law depends on interlocking expectations and voluntary collaboration of lawmaker and governed); Hazard, *Law-Reforming in the Anti-Poverty Effort*, 37 U. CHI. L. REV. 242, 248-50 (1970) (necessity of maintaining legitimacy limits judicial lawmaking).

68. *See, e.g., ACI Jobs top list of Moran's concerns*, Providence J., July 10, 1978, at A-3, col. 5 (Department of Corrections Director said "[s]ometimes I think that courts in general go beyond basic human needs . . . , and begin to dictate things that really should be left to the individual state"); *Proposals For Jail Visitation, Discipline Opposed By Sheriff*, Toledo Blade, Jan. 6, 1978, at 15, col. 4 (sheriff contended that master was interfering in matters that should be left to administrative judgment of staff). *See generally* Kimball & Newman, *Judicial Intervention in Corrections Decisions: Threat and Response*, 14 CRIME & DELINQUENCY 1, 7-9 (1968). Elected officials express the view that their responsibility is to the people, not the federal court or the master. *See, e.g.*, Sheriff B at 1.

sequent inattention to the substance of the court decree.[69] When the master imposes demands that require a change in policy or an increase in expenditures, defendants often become hostile toward the court and the master.[70] They develop the view that every controversial judicial action presents an opportunity to challenge the court's authority.[71]

69. *See, e.g.*, Palmigiano v. Garrahy, 448 F. Supp. 659, 664 (D.R.I. 1978) (contempt opinion and order) (enforcing 443 F. Supp. 956 (D.R.I. 1977)) (staff responsible for implementing court-ordered reclassification not informed of duties and took no action to implement order until contempt hearing); D. SPILLER, *supra* note 44, at 3 (reporting defendants' failure to take lawsuit seriously during initial stages).

Although some judges and commentators have viewed defendants' decision not to appeal the court's order as a form of cooperation, *see Prison Reform: The Judicial Process*, 23 CRIM. L. REP. (BNA) 3 (Supp. Aug. 2, 1978), defendants formal position is not necessarily an indication of their acceptance of the legitimacy of court intervention. Officials may decide not to appeal an order for a range of strategic and political reasons. *See, e.g.*, Director C at 4 (appeal withdrawn as concession of defendants in plea-bargaining session following criminal contempt charges for noncompliance); Plaintiffs' Attorney C at 2 (implying that defense counsel had inadequate resources for appeal); Warden C at 1 (indicating that he was pressured by his superiors who were not named defendants to accept consent order).

70. *See* Master A at 8:

> The new director . . . turned out to be as defensive about the court's order as the original director . . . . [O]ther directors, commissioners of corrections, and wardens . . . have frankly admitted that, even when the court has come down with an order with which they were in agreement, the fact that it was imposed on them made them react negatively to it.

This hostility stems in part from the perception of prison administrators and staff that the court and master are challenging their authority and control, thereby limiting their ability to manage. *See* Sheriff B at 1:

> [The master] has completely taken the ability of the sheriff's department and corrections in general away from the sheriff, because I can set no goals. He dictates the goals, the direction in which I must go, and he jumps from one goal to another. . . . I'm like a ship without a sail. I'm just drifting because I can't logically progress toward a goal.

Administrators express resentment that the master imposed decisions, but did not bear responsibility for misjudgments. *See, e.g., id.* at 1-2 ("The ultimate thing is that he can say all kinds of things and require all kinds of things, but I . . . will take the ultimate responsibility, not the special master. He has all the goodies and none of the problems."); Warden C at 1 (indicating resentment that prison officials' judgment viewed as "self-serving," but same decision by court viewed as "law-serving"). Administrators' resentment is compounded by their sense that the court and the master are naive about the problems and limitations of prison administration. *See id.* at 4 ("[The master] is not knowledgeable enough of the corrections system. Courts have problems understanding why we do things. That can't be learned in a book.")

Some administrators have welcomed court decisions as a means of reforming prisons. *See, e.g.*, D. SPILLER, *supra* note 44, at 36 (sheriff was "friendly" defendant and used court suit to effectuate prison reform). Administrators who have used this approach have sometimes encountered resistance from their superiors or from the legislature. *See id.* at 47.

71. *See, e.g.*, Letter from Master B to Sheriff B at 3 (Oct. 11, 1977) (master troubled by defendants' suggestion that development of effective psychological test was beyond scope of order); Memorandum in Support of Application for Rehearing, Hamilton v. Landrieu, 351 F. Supp. 549 (E.D. La. 1972) (challenging most provisions in court order as sole responsibility of Sheriff, or as beyond scope of court's authority).

The litigiousness of the defendants may increase if court intervention does not subside after the most serious violations have been addressed. *See, e.g.*, Assistant to Director A at 1 ("As we went along I wasn't sure that we were talking about the Eighth and Fourteenth Amendment. [The master] just became a thorn in our side."); Minutes of Meeting

If defendants maintain this antagonistic posture, the master is prevented from promoting a cooperative approach to implementation. Defendants are often unwilling to involve the master actively in the resolution of the prison's problems;[72] they will tolerate the master's presence, but will attempt to structure channels of communication that minimize his "disruptive" effect by depriving him of the opportunity to identify and address problems.[73]

Inmates and their attorneys also have resisted the use of the implementation process to confront internal problems. Inmates often appear more concerned with the court's implicit recognition of their status as individuals with inalienable rights than with the outcome of a particular legal issue.[74] Some apparently believe that federal court support significantly enhances their power in the institution.[75] Thus, inmates sometimes insist on confronting every issue, rather than attempting to compromise.[76]

As the decree implementation process proceeds, plaintiffs sometimes become increasingly disillusioned with the court and the master be-

of Ad Hoc Committee on Corrections (Columbus, Ohio Apr. 20, 1976) (director said that court was nitpicking, and that prison was in compliance with significant standards in court order) (minutes on file with *Yale Law Journal*).

72. *See* Master A at 7 (director requested master not to bring in any more experts to "mess the situation up for him"); Letter from Defendants' Attorney B to Master B (June 5, 1978) (requesting master not to become involved in forming new program).

73. *See, e.g.*, Letter from Master A to Director A (May 3, 1978) (reiterating master's willingness to honor director's desire to have control of all departmental matters, although master reminds director of his unlimited access to staff and facilities); Director of Treatment B at 1 ("I used to have direct contact with him. Not any more. We only deal through attorneys, because there were too many problems.") In some systems prison administrators have appointed institutional liaison officers to handle all communication with the master and the court. *See* Institutional Liaison Officer B at 1 (indicating that he had no line authority or institutional responsibilities other than to keep master happy). *But see* Taylor v. Perini, 455 F. Supp. 1241, 1255-56 app. (N.D. Ohio 1978) (Fifth Report of Special Master) (master notes spirit of cooperation that has characterized defendants' behavior).

74. *See* R. GOLDFARB & L. SINGER, *supra* note 61, at 360 ("Fundamental to [inmates' grievances] is a desire to be treated with some measure of personal dignity."); Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 137 (1974) ("have-nots" often litigate to achieve symbolic rather than material gratification, which undermines their ability and enthusiasm to achieve tangible gains). The emphasis on inmate rights may derive in part from the administration's unwillingness to acknowledge the legitimacy of inmate participation.

75. *See, e.g.*, Deputy Master A at 3 ("As soon as the court issues a decree, the attitude of the inmates is 'I've got you.'"); Warden C at 1 (inmates who bring suits do so primarily for personal gain); *cf.* COMMUNITY DISPUTE SERVICES, AMERICAN ARBITRATION ASSOCIATION, REPORT AND RECOMMENDATIONS REGARDING THE DEVELOPMENT OF AN INMATE DISPUTE RESOLUTION PROCEDURE IN RHODE ISLAND 43 (1977) (inmate councils in control of dispute-resolution process may create real or perceived power blocs within institution).

76. *See, e.g.*, Plaintiffs' Attorney C at 2:

> I held a meeting with [inmates], at which I announced to them that I'd just about negotiated a consent decree with the attorney general's office . . . . They were outraged at a consent decree on anything. They did not want to consent, to be sold out as they believed it. They wanted a battle. They wanted a fight . . . .

cause of the persistence of arbitrary treatment by guards and prison officials, violent conditions, and the destructive relationships underlying both phenomena.[77] They may perceive that the court is reluctant to deal directly with inmates or to impose sanctions on defendants for clear violations of the court order, and may infer that the court accepts the current status of inmates in the prison social structure. In such a situation, inmates will tend to conclude that the court is not fulfilling its role as protector of constitutional rights,[78] and counsel will lose the motivation and patience necessary to explore methods of problem-solving through the decree implementation process.[79] Plaintiffs may eventually become unwilling to cooperate with the master's attempts to function as intermediary, adviser, or administrator within the prison.[80]

C. *Limitations Imposed by the Adversary System*

During implementation, the nature of the adversary process also defines the role of the master and the parties; the opposing sides per-

77. *See* Inmate A-1 at 1 (expressing frustration, disappointment, and sense that he was getting squeezed out of litigation and had little access to master except on infrequent prison inspections, and that nothing that affected inmates' daily lives had changed since court intervened).

78. Plaintiffs' Attorney A at 1:

> [T]he sort of order we received . . . raises hopes so high among prisoners that if things don't change for the better within a relatively reasonable period of time, the dashing of hopes is much more destructive than never having created the hopes, and it also very much calls into question in prisoners' minds either the effectiveness of the judicial system or the willingness of the judicial system to really act in their behalf.

79. *See* Plaintiffs' Attorney C at 3 ("It was only the next few years which taught me that all I'd produced were a bunch of pieces of paper."); Master D at 1 (plaintiffs' counsel was frustrated and dissatisfied with progress and seemed to lose interest). Plaintiffs' attorneys will often tend to view issues in terms of legal principles and political ideals, rather than in terms of satisfying their clients' interests. *See* Plaintiffs' Attorney C at 3 (identifying Constitution as his other client); M. Hermann, *Rhem v. Malcolm:* A Case Study of Public Interest Litigation: Pre-trial Detention 48 (May 1977) (unpublished Harvard Law School thesis) (describing failure of plaintiffs' counsel to represent interests of inmates adequately); *cf.* Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 483 (1976) (describing "rights" orientation of plaintiffs' attorneys in school desegregation cases). In some situations they will refuse to negotiate because of a desire to avoid compromising those ideals, or to establish what they believe to be a desirable constitutional standard. *See* Plaintiffs' Attorney A at 1:

> [P]laintiffs have said, "We don't have to give ground because we're 100% right." At least that's the plaintiffs' perception, and legally, they've never been proven wrong when they've taken that stand. . . . They may not have gotten the relief they wanted, but in fact they were right. There was no reason to compromise their position.

80. *See* Deputy Master A at 2 ("My relationship with inmates is far more fragile. There's been a year of the master, and as far as the inmates are concerned, nothing has happened. They are hostile. They're not even interested in talking to me."); Master D at 1 (plaintiffs' counsel frustrated, and turned from conciliatory to adversary position in hearing).

ceive themselves as competing for a favorable decision.[81] The adversarial presentation of issues places prison officials in a defensive posture.[82] The intervention of counsel often accentuates the adversary presentation[83] and predisposes parties to avoid dealing directly with the needs, demands, and objections of the other side.[84] The polarization of the opposing parties obscures and intensifies their conflicts,[85] and diverts resources from identifying and confronting issues.[86]

The master is likely to find that he must accept and work with power relationships that precede court involvement.[87] Inmates and guards who are not active in the litigation are unlikely to call the court's at-

81. *See* notes 63-65 *supra.*

82. *See, e.g.,* Assistant to Director A at 1:

> It's hard to stay level headed when you're getting your rear-end kicked. I looked at [the master] as an adversary. . . . We took it on the chin, knowing that you're going to be held in contempt [and it would be] all over the front page. It builds up natural animosity, and you look at the people who present the evidence as an adversary.

83. *See, e.g.,* Letter from Master B to Sheriff B (Oct. 11, 1977) (defense attorney's strategy of treating master as opposing counsel called "counter productive"). Counsel often have separate organizational interests that may determine their stance in the case. *See, e.g.,* Bell, *supra* note 79, at 488-93 (discussing ideological and psychological basis for principled approach of plaintiffs); Defendants' Attorney A at 1 (Attorney General wants to minimize involvement in prison litigation because of adverse political response).

84. Plaintiffs' Attorney C at 3 (defendants' report, prepared by Attorney General's office, "almost wholly conclusory," making it impossible to tell whether changes made). Defendants sometimes challenge the plaintiffs' proposals on the basis that they are not required by the Constitution or the decree, rather than because they are not needed. *See, e.g.,* Brief of Defendant Board of County Commissioners at 3, Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971) (questioning whether additional plumbers are required by order).

85. *See* Frazier v. Donelon, 381 F. Supp. 911, 913 (E.D. La. 1974), *aff'd,* 520 F.2d 941 (5th Cir. 1975), *cert. denied,* 424 U.S. 923 (1976) ("resolution of disputes by litigation, due to the combatant win or lose attitude of litigants, generally has the effect of driving the parties further apart instead of bringing them together"); Deputy Master A at 3 (litigation has made communication within prison even more difficult than under normal circumstances).

86. The progress made by the defendants in Palmigiano v. Garrahy, 443 F. Supp. 956 (D.R.I. 1977), in instituting a jobs program is illustrative of this problem. The court ordered defendants to create enough "meaningful" jobs to provide every inmate with the opportunity to work. *Id.* at 988. The director also supported the establishment of jobs for inmates. *After 75 days at ACI, Moran can see changes,* Providence J., May 14, 1978, at 1, col. 5. Plaintiffs agreed that idleness was one of the foremost concerns of inmates. *See* Plaintiffs' Attorney at 2. Yet the parties subsequently engaged in a vigorous dispute over what constitutes a meaningful job, whether jobs existed, and whose fault it was that inmates remained idle one year after the order was entered. *See* Annual Report of Special Master, *supra* note 44, at 36-54.

Some masters have attempted to minimize the antagonisms by avoiding formal hearings and communication directly with prison officials and inmates. *See, e.g.,* Final Report of Special Master *In Re* Orleans Parish Prison at 4, Hamilton v. Schiro, 338 F. Supp. 1016 (E.D. La. 1971). Although this process may reduce the level of disruption and resentment, if the master imposes a decision on the defendants, they are likely to resume their adversary stance. *See* note 70 *supra.*

87. *Cf.* D. HOROWITZ, THE COURTS AND SOCIAL POLICY 38-45 (1977) (courts often forced to deal with unrepresentative litigants); Galanter, *supra* note 74, at 137-38 (courts limited to solutions within existing institutional framework).

tention to their particular interests.[88] The master may deal, therefore, primarily with named plaintiffs[89] who, although often the most powerful and articulate inmates, are not necessarily representative of the general population's interests.[90] The defendants may insist that the master restrict his involvement with staff and inmates to finding facts about compliance with particular provisions of the order; he must then rely on the administration to filter his decisions through the institution's hierarchy,[91] so that guards, counselors, and even wardens are excluded from negotiating and decisionmaking.[92]

Adversary definition of issues also affects the accuracy and type of information available to the master and the court. Plaintiffs are likely to focus the court's and master's attention on violations of the order to convince the court of the necessity of more drastic sanctions.[93] The defendants also may attempt to control the information available. They often realize that a master attempting to function as intermediary, adviser, or administrator will make judgments concerning the adequacy of their compliance efforts.[94] Prison officials have expressed fears of being held personally liable for noncompliance, of retaliation by their superiors for revealing damaging information, and of losing their jobs

88. Inmates with short prison terms and strong ties to the outside community are unlikely to develop power within the prison, *see* note 16 *supra*, are not usually concerned with long-term change, and, because they lack power in the inmate community, are particularly vulnerable to retaliation by guards for court involvement. Inarticulate and passive inmates, who are also more vulnerable to retaliation, may be unaware of the court's intervention or reluctant to assume the position of visibility accompanying involvement.

89. Inmate A-2 at 1 (inmates who are neither named plaintiffs nor "head honchos" never knew what was going on and never saw anyone from court).

90. *See* notes 16-17 *supra*.

91. *See* note 11 *supra*. Defendants may base their attempt to restrict the master's involvement on formal limitations of his role. Although masters often have unlimited access to the prison, as well as authority to conduct confidential interviews with staff, *see* p. 1069 *supra*, in some instances access has been limited to investigation for specific factfinding and enforcement purposes. *See* Judge E at 2 (limited purpose of master's inspections). Prison officials can often impose de facto restrictions on the master's involvement by refusing to cooperate with his informal functions and by withholding information. Because of his dependence on the defendants' cooperation, the master will often accede to defendants' requests for limited involvement. *See* note 73 *supra*.

92. Line staff and lower management rarely participate in negotiations with the master and are usually informed of outcomes of the negotiations through the normal chain of command. *See, e.g.*, Director of Treatment B at 3 (order of master processed through normal chain); Defendants' Attorney C at 1 (only involvement of staff is to supply information).

93. *See, e.g.*, Plaintiffs' Attorney D at 1 (plaintiffs look for and vigorously present violations of order); Plaintiffs' Attorney A at 3 (plaintiffs point out violations of order to court even when compliance deadlines have not yet expired).

94. *See, e.g.*, Assistant to Director A at 1 ("When [the master] was down here on a factfinding tour, I knew that much of the stuff would bury us at court."); M. HARRIS, *supra* note 31, at 48 (reporting staff's fear of master because he acted in place of judge).

due to judicial dissatisfaction with their performance.[95] They may, therefore, avoid informing the master of problems underlying their failure to achieve compliance,[96] and may thereby limit his understanding of the reasons for their failure.

If the parties perceive that the information available to the master is not a true reflection of prison conditions, their resulting lack of confidence in the master will limit his capacity to mediate effectively. Furthermore, the parties often draw conclusions about the master's allegiances from his reliance on the other side for information.[97] In such situations, the parties will perceive the master as biased and will refuse to cooperate with his informal efforts.[98]

The adversary mode will also affect the master's capacity to frame effective remedies. Administrative problemsolving strategies are appropriate in the prison context because the problems necessitate continual adjustments of procedures and relationships. The decisionmaker must use a systemic approach to define the problem accurately, to establish objectives, and to create incentives for individuals to achieve those objectives. The adversary process prevents the master from using that approach to prison problems.[99] Instead, he will respond to specific

95. The sense of vulnerability is especially noticeable when the court has used or threatened to use its power to transfer or remove particular staff members. *See, e.g.*, Director C at 5 (director informed staff that they were all in jeopardy of being personally held in contempt); Defendants' Attorney A at 1:

> The Director's fear was the Department's fear: that at any time he would be fired. The staff thought, if that guy fires the Director, who's going to come in then? . . . [The master] didn't recognize the feeling that the Department was out on a limb and that he would be the one to cut it off. He was a guy who could take away their livelihood. . . . People wouldn't talk to [the master] for fear the administration would take action against them.

96. *See, e.g.*, Defendants' Attorney A at 1 (staff avoided master and gave him misinformation); *cf.* Felstiner, *supra* note 63, at 75 (tendency of parties to restrict communication with third-party decisionmaker to matters that they believe will promote their own interests).

97. Some prison officials view the master with suspicion, because he communicates openly with inmates. *See, e.g.*, Defendants' Attorney A at 2. A similar reduction in credibility may occur among inmates if the master attempts to cooperate with prison officials. *See, e.g.*, Inmate A-1 at 1 (fear that master would believe reports of prison administration and accept as genuine defendants' "sham" compliance). Information often assumes symbolic meaning in a prison, and the master's efforts to maintain neutrality by treating all members of the prison community equally violates established patterns of communication. *See generally* E. GOFFMAN, *supra* note 19, at 7-9.

98. *See, e.g.*, Sheriff B at 3 ("When he gets out of what the original order said, we have to say, 'That's not in the original order, so it's none of your business.' ")

99. In framing the remedy, the master does not ask, "What is the problem here and how can we solve it?" but rather "What does the order mean and what measurable changes must take place to achieve compliance?" *See, e.g.*, Master A at 7-8 (describing process of transforming broad, ambiguous order into specific provisions that could be monitored); Master D at 1 (indicating that he established priorities for decree and focused on developing specific provisions in areas he deemed most important); *cf.* L. FULLER, *supra* note 67, at 172 ("To act wisely, the economic manager must take into account every

conditions by developing minimal standards and by requiring that those standards be met.[100] He lacks the power to modify the prison's internal delegation of responsibility for defining and solving problems.[101]

This process often results in artificial or partial solutions to complex problems,[102] so that the parties feel that the problems that precipitated the lawsuit remain after technical compliance is achieved.[103] In addition, the adversary process discourages the court and the master from considering the impact of the order on prisons outside its jurisdiction.[104] As a result, state officials will sometimes perceive the implementation process as merely transferring problems from one prison to another.[105]

circumstance relevant to his decision and must make himself assume the initiative in discovering what circumstances are relevant. . . . The judge, on the other hand, acts upon those facts that are in advance deemed relevant under declared principles of decision.")

100. For example, in Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971), *additional relief granted*, 440 F. Supp. 60 (N.D. Ohio 1977), the court found, *inter alia*, that violence in the prison violated inmates' constitutional rights. 323 F. Supp. at 99-100. To remedy the situation, the master interpreted the order to require two guards on every floor, 24-hours each day, and focused his enforcement efforts on maintaining this minimum standard. 440 F. Supp. at 114-29. The master did not address the issue of informal bargaining relationships or destructive patterns of communication. For other examples, see Master's Report Concerning Defendants' Compliance as of February 10, at 20-21, Palmigiano v. Garrahy, 443 F. Supp. 956 (D.R.I. 1977) (master recommends that defendants take specific steps to achieve compliance and that court impose sanction for failure to comply); Letter from Master B to Warden B (Oct. 11, 1977) (insisting on compliance with agreement concerning posting notices).

101. Although the master does have authority to carry out specific administrative functions, such as planning, he lacks the formal power to assume general administrative responsibility for the execution of plans. Parties can challenge the master's authority to intervene in areas not specifically mentioned in the order. *See* note 71 *supra*.

102. *See, e.g.*, Warden C at 1 (court's solution to racial segregation was to assign beds according to race, allowing Spanish inmates to be treated as "wild cards" (either black or white)); Defendants' Attorney C at 1 (court's solution to problem of guard brutality was to develop experimental psychological screening test for guards; problem of strained working conditions, inadequate training, and hostile relationships with inmates not addressed); *cf.* Levin, *Education, Life Chances and the Courts. The Role of Social Science Evidence*, LAW & CONTEMP. PROB., Summer 1975, at 217 (limited usefulness of social science evidence in aiding courts to develop solutions to complex social problems).

103. *See, e.g.*, Defendants' Attorney C at 1-2:

> The clients think they've been taken down the road. I don't agree. They say they've been in the litigation for 10 years. They've paid the special master somewhere between $50,000 and $100,000. They've paid the plaintiffs' counsel somewhere between $30,000 and $50,000. They've paid defense counsel $150,000. You're looking at between $500,000 and $1,000,000. What are the most important things they have—a grievance procedure and an inmate council, both of which were in existence before.

104. *See, e.g.*, Special Master's Report on Overcrowding in Orleans Parish Prison at 34, Hamilton v. Landrieu, 351 F. Supp. 549 (E.D. La. 1972) (master recommends that local sheriff be directed to refuse to accept 500 state inmates to deal with overcrowding problem caused by population limit imposed on only state institution by another district court judge in separate case).

105. *See* Director C at 3 ("The April 9 order imposed a population limit. . . . They were going to establish a prima donna institution out of all the institutions. At all the other institutions, the ratio would continue to climb.")

D. *Problems Stemming from the Master's Multiple Roles*

The master attempts to play a number of roles that require conflicting skills and relationships with the parties. In his informal capacity as intermediary, adviser, and administrator, the master attempts to perform functions that require the consent of the parties, familiarity with the problems and personalities of the prison, and involvement in the daily interactions of the parties. In his formal capacity as fact-finder, arbitrator, and enforcer, the master is expected to impose judgments on the parties regardless of their consent. He must maintain a disinterested, impartial posture and provide the parties with equal opportunity to challenge his formal actions. If the formal and informal roles conflict or are perceived by the parties to conflict, the master's legitimacy and effectiveness will be compromised.[106]

Confusion over the master's role in a particular situation can cause tension among the parties. They may feel they have been treated unfairly when the master performs roles with conflicting purposes. Parties will sometimes discuss problems informally with the master, and perceive him to be performing an advisory or administrative role, only to discover that their extemporaneous comments were used against them in a compliance report.[107] In addition, a master's informal suggestions may be interpreted as formal requirements for compliance.[108]

Another source of confusion concerns the extent to which the master can or should depart from his traditional role. Certain actions may

106. The time, energy, and training of the individual will affect his capacity to perform the master's role effectively. In some cases, masters continue to have major professional responsibilities elsewhere. Consequently, they must limit the extent of their participation, and in some cases break the momentum of implementation. *See, e.g.*, Master D at 1 (complaining that other responsibilities of master took precedence for six months); Master B at 2 (master will resume supervision when school year ends). There are few active masters in prison litigation, and they are scattered throughout the country. *See* notes 4 & 41 *supra* (citing cases). Masters reported having no preparation for the job and little idea of what their roles would be at the outset of their tenure. *See, e.g.*, Master A at 6 ("I started with a base of ignorance and have experimented with different approaches."); Director C at 3 (master took year to become oriented).

107. *See, e.g.*, Director of Treatment B at 1:

> We used to deal on a direct basis, but you might say something and it might be interpreted through [the master] to your superiors. Things you might have said in a casual discussion, such as, "If you had five more men, could you run a recreation program?" and you say "yes," and then it might come out, once you get to court or once the parties and the master would be talking to someone else, "Well, the officer says you should have five men."

108. The likelihood of confusion may increase in cases in which the master has the power to supervise compliance, in addition to acting as investigator and hearing officer. *See, e.g.*, Case Work Supervisor B at 1 (describing confusion over status of visitation program due to conflicting initiatives from special master and sheriff); Letter from Sheriff B to Master B (Feb. 6, 1978) (expressing frustration at master's issuance of orders orally outside of presence of administration or counsel, and at master's role as "advocate" to press).

impinge on his capacity to maintain the passive, impartial posture of a fact-finder.[109] It is often unclear whether the master should act on his own motion,[110] whether he should communicate ex parte with counsel[111] or the judge,[112] whether he should testify in the case,[113] or whether he can communicate with the media.[114] If the master takes an activist view of his enforcement role, he will sometimes use the position

109. *See, e.g.*, Director C at 4 (court's intervention was "complete, unbridled use of the power of the court to force [the courts' and masters'] desires on the institution"); Warden B at 1 ("I don't even look at the order any more. It's just negotiating with [the master] as to what we can do. I don't know if he's looked at it either, because he's interpreted it differently than anyone else would have interpreted it.")

110. A master may be granted specific power to move the court to hold defendants in contempt for failure to comply with the decree. *See* Jones v. Wittenberg, 73 F.R.D. 82, 86 (N.D. Ohio 1976). Although the power granted in *Jones* did not lead to a formal contempt motion by the master, masters sometimes informally initiate action by suggesting to plaintiffs' counsel the existence of serious violations. *See, e.g.*, Master B at 2-3 (indicating master's role in initiating contempt action and consequent plea bargaining); Plaintiffs' Attorney C at 1 ("I have really followed his wishes and advice on my role.") Some of those interviewed said it was important that a master not assume responsibility for initiating action so that he could maintain at least some neutrality. *See, e.g.*, Master D at 1 (plaintiff as activator in hearing process). *But see* Master A at 8 (master should have authority to initiate action through counsel).

111. Masters and parties were ambivalent about whether there should be informal communication between them, although participants indicated that some amount of informal communication did take place. For example, see Master A at 8:

> I tended to try to keep close contact with counsel on both sides. When I was working full time, there wasn't a day in which I didn't talk to counsel for both sides. But the more I did this, the more the parties depended on the fact that the master's office was coordinating the whole process.

See Master D at 1 ("The special master became the focal point for the litigation. The sheriff and I were in contact on a regular basis. I would talk to counsel and let them know what I decided to do on priorities.") *But see* Judge E at 2 (indicating that ex parte interviews compromised rights of parties, absent previous agreement).

112. Masters reported a significant amount of informal communication with the judge, both about conditions in the prison and appropriate remedies. *See* Master A at 5 ("I would also discuss [my ballpark estimates for compliance] extensively with the judge, and determine whether, if that's where we came out, it would be acceptable to the court."); Judge B at 10:

> We've met periodically, as frequently, and when [the master] wants to meet . . . . What we would usually do is before he would make these formal reports is he would explore the problems and the things he was doing and the direction he was going. He would either ask me for direction or he would suggest how he thought he should move, and see if I would agree with the moves that he made.

Other masters indicated less frequent informal contact with the judge, although they did communicate. *See, e.g.*, Deputy Master A at 3.

113. Only one master reported testifying in court. *See* Master D at 1 ("I testify all the time. . . . I sit next to plaintiff's attorney. He is the activator, and will put me on the stand and ask me detailed questions . . . .")

114. All participants tend to be concerned with press coverage, because it is the major form of communication with the public. *Cf.* M. HARRIS & D. SPILLER, AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS 36-38 (1976) (role of media coverage in case of judicial intervention in prison). Although the masters interviewed reported differing levels of activism, most were willing to use the press as an informal sanction and means of building public support for court intervention. *See, e.g.*, Master D at 1 (judge encouraged master to maintain ongoing relationship with press).

of fact-finder and arbitrator to increase the effectiveness of his administrative and enforcement functions.[115] However, this may lead the master to advocate a particular interpretation of the order and take steps to ensure implementation that include consulting informally with the judge and the parties. If the master actually helped formulate the compliance plan, he will necessarily report to the court on the adequacy of a program that he developed,[116] thus impairing his capacity to act as an impartial hearing officer.

The master's advisory, intermediary, and enforcement roles are outside the court's visibility and control unless the parties formally challenge their legality.[117] This lack of accountability creates the possibility of abuse,[118] a possibility that is likely to compromise the parties' perception of the legitimacy of the judicial process. The master's report to the court may contain both facts gathered in his formal capacity and information gathered through his informal role. The entire report is treated as findings of fact under Rule 53, subject to review according to a clearly erroneous standard.[119] Parties do not have the opportunity

115. One master sought and obtained funds to develop an unprecedented psychological testing device to screen correctional officers. This test was later incorporated into the order, along with a number of other programs developed by the master. Agreement for these provisions was obtained in conjunction with a criminal-contempt motion brought by the court against the director of the department. In exchange for a continuance in the contempt trial, the master obtained agreement from the director on almost every outstanding issue in the case. *See* Director C at 4.

116. Although this problem may exist whenever a regulatory official establishes standards that he will then enforce, *see* K. DAVIS, ADMINISTRATIVE LAW TEXT § 13.01-.08 (3d ed. 1972), the likelihood of bias and abuse is significantly increased by the activist nature of the master's informal roles.

117. The absence of standards against which to measure the master's informal actions, the absence of a record of such activity, the lack of precedent for the master's actions, and the broad discretion afforded the master by the court make it difficult for the judge to supervise the master's informal actions. The parties can challenge a formal action of the master that allegedly exceeds the scope of his powers. *See* FED. R. CIV. P. 53(e). In some instances, however, there are strong incentives not to challenge the authority or decisions of the master. *See, e.g.*, Plaintiffs' Attorney B at 1 ("Basically, we're letting the master have his head. We're taking the issues he wants to take, we're stowing discovery. . . . [Otherwise] we might have to go to a series of contempt hearings."); Director C at 4 ("Whatever [the master] wants, give it to him.")

There are no provisions for challenging the master's informal actions, unless they are included in the order of reference and appealed immediately following the master's appointment. *See* p. 1070 *supra; cf.* Newman v. Alabama, 559 F.2d 283, 288-90 (5th Cir. 1977) (state challenged scope of informal powers of Human Rights Committee).

118. The master could, for example, use privileged information gathered in his informal advisory capacity to influence decisions of the judge. He could reveal to the judge what he believed were the plaintiffs' "real" motives for bringing the suit, or inform the judge of what he considered examples of a particular individual's incompetence.

119. FED. R. CIV. P. 53(e); *see* United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948) ("A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.") If courts specify another standard of review in the

to challenge the informally obtained findings until they go before the judge. Moreover, judges are likely to follow the master's recommendations because of his relative familiarity with the case.[120] This minimal review provides little opportunity or incentive for the judge to scrutinize the master's findings.

Parties sometimes respond to the conflicts created by the master's multiple roles by attempting to formalize all direct contact with the master.[121] This response reduces the master's direct contact and familiarity with the dynamics of the prison situation and increases the formality of enforcement.

In sum, the master cannot fully compensate for the limitations on courts' capacity to transform the patterns of communication and decisionmaking in prisons. Moreover, his attempts to do so by combining formal and informal roles can compromise the legitimacy of decree implementation. Despite these problems, the potential usefulness of masters in implementation justifies a reformulation of their roles in light of a range of dispute-resolution techniques.

III. Suggested Reforms

The complex problems confronting prisons are unavoidable within the current structure.[122] Ultimately, decisionmakers would be wise to take a systemic view of the problems and direct energy and resources away from prisons and toward less damaging sanctions, such as community-based facilities, restitution, and fines.[123] Short of such radical

order of reference, that standard will prevail. *See, e.g., In re* Van Sweringen Corp., 180 F.2d 119, 121 (6th Cir. 1950) (master's recommendations not given final or presumptive effect); Carpenter, Babson & Fendler v. Condor Pictures, Inc., 110 F.2d 317, 319 (9th Cir. 1940) (master's findings purely advisory).

120. *See, e.g.*, Judge B at 10 (judge did not recall any incidence of disagreement with master's recommendations); Master A at 2 (judge willing to modify orders on master's recommendation). Masters reported framing their recommendations within their sense of what the judge would accept. *See id.* at 5 ("As time went along, I sensed where the judge's limits were, and was able to deal with that without having to touch base with him in advance."); Defendants' Attorney A at 2:

> What [the master] says seems to be what the court ends up doing. It behooves you that you try to get his support for it. When you sit down and talk about buildings, [and] he doesn't initially approve, before you would say, "Tough. I'll go into court." . . . Now you must convince him that this is what would work best.

121. *See, e.g.*, Sheriff B at 3 ("We felt the attorney had to be our buffer zone.")

122. *See* R. GOLDFARB & L. SINGER, *supra* note 61, at 526; Rothman, *Decarcerating Prisoners and Patients*, CIV. LIB. REV., Fall 1973, at 8; *cf.* note 9 *supra* (courts believe some deprivations inevitable).

123. *See* THE CHALLENGE OF CRIME, *supra* note 11, at 165-66 (community-based facilities can provide less expensive, more humane treatment for majority of offenders currently incarcerated); THE ECONOMIST, Sept. 16, 1978, at 53 (program to avoid use of institutions for delinquents more humane, less costly, and almost equally effective as programs relying primarily on institutionalization).

measures, the use of masters to reform prisons represents an attempt to remain within the judicial system of dispute resolution and yet introduce characteristics of more informal approaches. The flexibility and breadth of the master's role often enables him to expedite fact-finding, to coordinate information from various parts of the prison system, and to use a variety of techniques to promote prison reform.[124]

Yet the role of the master is limited because he has neither the tools nor the mandate to restructure the patterns of decisionmaking and behavior that perpetuate prison conditions.[125] Furthermore, the increase in efficiency that results from the combination of roles in the master is sometimes achieved at the expense of the perceived legitimacy of the process.[126] Nevertheless, the use of masters should not be discontinued; instead, the master's role should be limited to situations in which he is most likely to be effective. Moreover, the method of dispute resolution employed in prisons should be tailored to the nature of the dispute and the willingness of the parties to bargain.

A. *Alternatives to Judicial Intervention*

If prison officials acknowledge the need for change and the parties demonstrate a willingness to bargain, then mediation and introduction of grievance procedures are likely to be more effective in resolving many disputes than litigation.[127] In mediation, a neutral, noncoercive third party coordinates negotiations with the aim of identifying and resolving issues of concern.[128] The mediator establishes the framework

124. *See* pp. 1070-72 *supra.*

125. *See* pp. 1076-81 *supra.*

126. *See* pp. 1082-83 *supra.*

127. Mediation has enabled inmates and administration to reach mutually acceptable settlements on numerous issues that would otherwise have resulted in litigation. *See, e.g.*, Frazier v. Donelon, 381 F. Supp. 911, 915 (E.D. La. 1974), *aff'd*, 520 F.2d 941 (5th Cir. 1975), *cert. denied*, 424 U.S. 923 (1976) (mediation undertaken pursuant to request of judge culminated in binding agreement on access to religious services, public telephone service, grievance procedures, and visiting privileges); Washington Mediation Agreement, *supra* note 62 (agreement reached, *inter alia*, on method of representation at classification meetings, recruitment of minority staff, availability of ethnic food and group celebrations, visiting room policy, method of notification of status and eligibility for assignments, and review process). Mediation has also promoted cooperative relationships between members of the prison community that enable the development of participatory modes of problem-solving. *See* Frazier v. Donelon, 381 F. Supp. 911, 915 (E.D. La. 1974), *aff'd*, 520 F.2d 941 (5th Cir. 1975), *cert. denied*, 424 U.S. 923 (1976) (high level of rapport between authorities and inmates resulted from negotiations, and "indoctrination of mediation" as viable and permanent alternative to courts in resolving complaints of inmates).

Effective grievance procedures have been found to improve management, to deter violence, and to promote justice and fairness in correctional institutions. *See* J. KEATING, *supra* note 23, at 15-25.

128. Administrators have sought mediation at prisons in which an inmate protest is imminent, a disruption has occurred, or a suit has been filed by inmates alleging violation

and setting of the negotiations,[129] helps develop methods of selecting representatives of the conflicting groups,[130] clarifies the areas of conflict,[131] facilitates communication,[132] and encourages cooperative approaches to problemsolving.[133]

A grievance mechanism is an ongoing internal system of negotiation and dispute resolution.[134] A grievance committee is usually composed of equal numbers of inmates and staff under the chairmanship of a neutral third party. Introducing and maintaining a grievance system requires external assistance to train, evaluate, and provide outside review of members of the committee.[135] Any inmate can invoke the grievance mechanism by filing a complaint; the committee initially determines if the complaint is "grievable,"[136] and if it is, then attempts to negotiate a settlement. If agreement is not reached, the committee either recommends a course of action to the responsible official or, in appropriate cases, imposes its own decision.[137] The inmate may always appeal the decision to an external review committee.[138]

Despite their potential effectiveness, such informal techniques have not been widely instituted.[139] State and federal governments should

of their constitutional rights. *See* Holman, *The Agencies Which Can Help: The Federal Government's Role*, 29 BUS. LAW. 1025, 1026-28 (1974).

Neutrality in mediation and adjudication requires different roles of third parties. In adjudication the third party has the power to impose decision, so his role must include guaranteeing each party a meaningful opportunity to present its case. The processes used by a mediator to facilitate reconciliation cannot successfully be performed within this framework. *See* Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 24.

129. Paterson, *The Agencies Which Can Help: Local Non-governmental Organizations*, 29 BUS. LAW. 1017, 1023 (1974).

130. Greenwald, *supra* note 65, at 1252. The process for selecting inmate and staff representatives is crucial to the success of the negotiations. The process must be regarded as fair by the parties, and interest groups within the inmate population should be broadly represented to avoid domination by any one group. *See, e.g., id.* at 1253.

131. *See* M. DEUTSCH, *supra* note 65, at 382-83 (mediator helps identify issues by such techniques as interviewing parties separately and focusing discussion).

132. *Id.* at 383. This includes the responsibility of ensuring that the views of less articulate parties are expressed and understood. *Id.*

133. The mediator promotes cooperation by recognizing the legitimacy of the parties to the dispute, curbing unrealistic expectations, emphasizing the importance of developing solutions based on mutual satisfaction, and suggesting potential agreements that could be acceptable to both sides. *Id.* at 385-86.

134. To be effective, the mechanism must: (1) involve inmates and line staff in its development and operation; (2) promptly respond, in written form, to all complaints, as well as disclose reasons for all decisions; (3) provide for impartial external review; (4) provide all inmates with access to the mechanism and guarantees against reprisal; (5) apply to as broad a range of issues as possible; and (6) contain means for determining whether a complaint is grievable. J. KEATING, *supra* note 23, at 9-12.

135. *Id.* at 12, 42-44.

136. *Id.* at 2, 12.

137. *Id.* at 11-12.

138. *Id.* at 10-11, 43-44.

139. *See* Holman, *supra* note 128, at 1028; Greenwald, *supra* note 65, at 1254. For a compilation of various organizations that have served as mediators, see J. KEATING, *supra*

create incentives for prisons to use mediation and grievance mechanisms.[140] Granting agencies can designate their use as dominant factors in funding decisions. In a case of prison violence, executive officials, rather than creating a "blue ribbon" committee to investigate, can more effectively prevent a recurrence by hiring a mediator to help the parties resolve underlying disputes.[141] Judges and lawyers can encourage alternative modes of dispute resolution by advising litigants to try mediation before resorting to the courts. This procedure has been effectively employed in a number of cases.[142]

There are, however, situations in which informal methods of dispute resolution will not work. The court is sometimes called in precisely because the parties are unwilling to cooperate with each other. Furthermore, even if the parties are willing to negotiate, mediation may be ineffective in dealing with some issues, such as those involving changes that are outside the control of the parties.

B. *Development of a Proper Role of the Master*

1. *Situations in Which the Master Can Be Effective*

When nonadversarial methods of resolution fail and litigation ensues, courts must intervene.[143] In situations in which administrators have been unable or unwilling to intervene effectively and in which major physical or program reforms are required, masters and courts may be necessary as catalysts for change.[144] Moreover, the continuing

note 23, at 36. Although a 1974 survey indicated that out of 209 correctional institutions, 160 had a formal grievance procedure, many of these mechanisms were found to be "more shadow than substance." McArthur, *Inmate Grievance Mechanisms: A Survey of 209 American Prisons*, FED. PROBATION, Dec. 1974, at 41, 46; *see* J. KEATING, *supra* note 23, at 15.

140. *See* H.R. 9400, 95th Cong., 2d Sess. § 6 (1978) (attorney general to promulgate minimum standards for prison grievance mechanism and to develop certification procedure; requirement that inmates invoke grievance procedure prior to instituting suit unless grievance not settled within 90 days).

141. Investigations by prominent laymen in the community have not been a successful means of affecting internal prison conditions. *See* T. MURTON, THE DILEMMA OF PRISON REFORM 82 (1976). Such committees may nevertheless perform the important function of involving the community in prison problems.

142. *See, e.g.*, Frazier v. Donelon, 381 F. Supp. 911, 915 (E.D. La. 1974), *aff'd*, 520 F.2d 941 (5th Cir., 1975), *cert. denied*, 424 U.S. 923 (1976) ("The fruits of these mediation sessions culminated in a binding agreement . . . a higher level of rapport between the authorities and the inmates, . . . [and] the indoctrination of mediation to both sides as a potentially viable and permanent alternative to the courts in resolving the complaints of inmates.")

143. *See* note 2 *supra*. Prison administrators should have strong incentive to develop reasonable standards that can be respected by courts, legislatures, and administrative agencies, for this process would afford them input into the criteria used to measure their performance.

144. *See* M. HARRIS & D. SPILLER, *supra* note 114, at 19-27.

possibility of a court's imposition of coercive measures may serve as incentive for administrators to develop standards and institute adequate dispute-resolution mechanisms.[145]

The master can enhance the immediate impact of judicial intervention on otherwise uncooperative parties by serving as a visible reminder of the court's jurisdiction. By appointing a master to participate in implementation, the court can give the defendants an opportunity to develop solutions gradually but leave open the possibility of future sanctions. In prison systems in which there is insufficient knowledge about possible programs or about the level of resources necessary to meet court-imposed requirements, the master can play a useful role in consulting experts and forcing prison officials to consider new approaches.

In some cases, however, the expertise and vigilance of a master may not be sufficient to achieve compliance with the court's decree. If defendants fail to assume their responsibility, the court may be unable to force compliance without relying on other remedies such as imposing fines for contempt of court,[146] granting inmates' requests for damages,[147] or ordering the prison to be closed.[148]

2. *Procedural Reforms*

Even in situations in which a master granted expanded authority can perform a useful function, procedural reform is necessary to minimize the possibility of unfairness and abuse created by the master's multiple roles. One reform strategy is to separate the master's functions and delegate them to different officials.[149] This approach would eliminate role confusion and clarify the master's duties. However, it would also require additional expenditures on regulation, rather than on improvement of prison conditions, and would promote the bureaucratization of the judiciary. Furthermore, separation of functions could decrease the

145. *See* J. KEATING, *supra* note 23, at 22-23 (avoidance of litigation is powerful incentive for using grievance mechanisms). Several administrators stated that the specter of court intervention "kept them on their toes" and prompted them to develop other ways of improving prison conditions. *See, e.g.*, Sheriff D at 25.

146. *See, e.g.*, Landman v. Royster, 354 F. Supp. 1292 (E.D. Va. 1973) (enforcing 333 F. Supp. 621 (E.D. Va. 1971)).

147. *See* Zagaris, *Recent Developments in Prison Litigation: Procedural Issues and Remedies*, 14 SANTA CLARA LAW. 810, 815 (1974) (citing cases).

148. *See* Comment, *Equitable Remedies Available to a Federal Court After Declaring an Entire Prison System Violates the Eighth Amendment*, 1 CAP. U.L. REV. 101, 106-09 (1972).

149. *Cf.* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.09 (1958) (rejecting notion that administrators cannot perform several overlapping functions).

efficiency of fact-finding and the impact of the master as a catalyst for change.

Another strategy for reducing unfairness and abuse would be to maintain the current structure but institute procedural reforms that would serve both to prevent the inappropriate intermingling of roles and to clarify the master's functions. Increasing the extent of the parties' participation could expedite implementation, provide prison officials with access to expertise, and encourage fresh approaches to prison administration. If the master is appointed immediately after serious constitutional violations are found, he can involve the parties at an early stage in reaching agreement on the requirements of relief or he can develop reasonable standards when agreement cannot be reached. Early involvement of the master also may minimize confusion by enabling participants to develop a sense of their roles and duties.

Judges can increase the likelihood that the parties will be willing to cooperate with the master by attempting to choose a full-time master with the consent of the parties and by considering both parties' preferences regarding the master's professional orientation. Experience in mediation or arbitration is an important consideration in selecting a master, since it may train an individual to balance multiple roles.[150]

The master can enhance his capacity to persuade by informing the parties early in the implementation process of what must be accomplished to achieve compliance. He can expedite implementation by holding negotiating sessions on every section of the order at the beginning of his tenure to establish clear, easily measured standards. In order to reduce misunderstandings and confusion regarding interpretation of the order and to encourage fair, reasonable relief, it is important that, wherever possible, prison administrators and inmates participate directly in the negotiations. Such direct involvement will also expose staff and inmates to different views of the prison's problems and may force them to rethink their approaches.

The judge can encourage clarification of roles and procedures by framing the order of reference to state both the powers of and the limitations on the master. Such specification is likely to induce the parties to think carefully about the master's duties and his relationships to the parties. It may also provide the judge and the parties with

150. A master with experience as a labor arbitrator stated that his arbitration skills were his most useful resource in enabling him to carry out his duties as a master. *See* Master F at 1.

Masters can also increase their effectiveness by meeting early in their tenure with other masters. Several masters have followed this practice. *See, e.g.*, Master A at 4. Masters serving in other types of civil rights litigation should be included in these conferences.

guidelines for supervising the master's actions and for challenging those perceived to be unfair.

Judges can further reduce the possibility of unfairness by reviewing the master's findings according to a substantial evidence standard.[151] This scope of review would provide the parties with the opportunity to challenge findings and would increase the judge's responsibility. At the same time, the master could continue to perform a useful fact-finding function.

Congress should encourage judges to clarify the master's role and to provide greater accountability. One approach would be to revise Rule 53 to include a section on the use of masters in the disposition and implementation of cases. The revised rule could educate judges concerning the expanded use of masters by codifying the practice of using masters in investigative, advisory, and administrative, as well as fact-finding roles.

Conclusion

Until recently, courts have been forced to assume full responsibility for the protection of inmates' civil rights. This Note has shown that the use of masters may increase courts' effectiveness in carrying out monitoring functions, but cannot compensate fully for the limitations of the judicial process. Effective intervention requires a range of strategies with the goal of empowering the actors in the prison context to develop constructive ways to resolve their own disputes.

151. *Cf.* K. DAVIS, *supra* note 149, § 29.01 (use of substantial evidence standard in review of administrative action).