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THE MECHANICS OF INSTITUTIONAL REFORM LITIGATION

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I. Introduction

In recent years the courts have experienced an increase in the number of large scale public interest lawsuits. Much of this increase has been in the form of institutional reform litigation directed at state or local governmental bodies to insure their compliance with the growing number of constitutional and statutory rights every individual enjoys. Federal courts have, as a result, become involved in the administration of schools,[1] prisons,[2] mental institutions[3] and many other public bodies.[4]

This new activism of the courts has been the focus of much debate both within and outside the legal profession. Critics argue that too much judicial involvement in the operation of government is constitutionally inappropriate, threatens the health of our democratic institutions, and brings the judiciary into disrepute.[5] Defend-

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1. *See* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977); Milliken v. Bradley, 433 U.S. 267 (1977); School Dist. of Omaha v. United States, 433 U.S. 667 (1977); Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977) (public school placed in receivership to implement desegregation plan). *See* Roberts, *The Extent of Federal Judicial Equitable Power: Receivership of South Boston High School*, 12 NEW ENG. L. REV. 55 (1976); Hart v. Community School Bd., 383 F. Supp. 699 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975); Turner v. Goolsby, 255 F. Supp. 724 (S.D. Ga. 1966).

2. *See* Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in part sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); 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 (1977); Morgan v. Sproat, 432 F. Supp. 1130 (S.D. Miss. 1977); Rhem v. Malcolm, 432 F. Supp. 769 (S.D.N.Y. 1977); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978) [hereinafter cited as Nagel].

3. *See* Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part, remanded in part, decision reserved in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975) [hereinafter cited as The Wyatt Case].

4. *See* Bolden v. City of Mobile, 423 F. Supp. 384 (S.D. Ala. 1976) (reorganization of city government), *aff'd*, 571 F.2d 238 (5th Cir.), *prob. juris. noted*, 439 U.S. 815 (1978).

5. *See* Nagel, *supra* note 2; Aldisert, *The Role of the Courts in Contemporary Society*, 38 U. PITT. L. REV. 437 (1977) [hereinafter cited as Aldisert]; *see also Nat'l Conference on the*

ers note that judicial action is made necessary only because the target institution has failed in its legal obligations and that these suits are generally aimed at protecting the rights of minorities and other politically impotent groups who do not have effective recourse to other branches of government.[6] Professor Chayes has argued that these suits are part of a new breed of lawsuit which he has called public law litigation.[7] He has suggested that these suits are, in fact, structurally different from traditional litigation and have emerged, in part, because of a liberalization of procedural rules allowing many diverse parties to present relatively broad questions for judicial review in a single litigation.[8] As a result, these lawsuits are said to be a very effective way for representative elements of the community to come together and attack major local problems.[9]

The purpose of this article is not to add to the debate, but rather to help make it more informed by providing some insight into the process of litigating these suits.[10] The history of two large public interest lawsuits will be reviewed with special emphasis given to three particular problems: breadth of representation, formulation of remedies and enforcement of court decrees.

The question of breadth of representation is important because of the traditional charge that social reform through the courts is inherently undemocratic[11] and can very well lead to results that are in conflict with the desires and needs of the social groups to be

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Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 79 (1976), especially addresses delivered by S. Rifkind, *id.* at 96, and E. Levi, *id.* at 212. For a more balanced discussion see A. Cox, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 76-118 (1976) [hereinafter cited as Cox].

6. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) [hereinafter cited as Chayes]; Denvir, *Towards a Political Theory of Public Interest Litigation*, 54 N.C. L. REV. 1133 (1976) [hereinafter cited as Denvir]; Note, *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1227-50 (1977) [hereinafter cited as *Developments-Section 1983*].

7. Chayes, *supra* note 6.

8. *Id.* at 1289-92.

9. *See id.* at 1310-13.

10. *See* D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977) [hereinafter cited as Horowitz]; *Developments-Section 1983*, *supra* note 6, at 1227-50; The Wyatt Case, *supra* note 3. For a general discussion of the dynamics of public interest law see B. WEISBROD, J. HANDLER & N. KOMESAR, PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS (1978).

11. *See* Horowitz, *supra* note 10, at 17-19; Denvir, *supra* note 6, at 1153-59.

affected.[12] Protagonists defend contemporary public interest suits from this charge by countering that class action devices, liberal joinder and intervention make the suits akin to a legislative process because all interested groups have an opportunity to be effectively represented.[13] The chosen cases will be reviewed to examine the degree of community participation that they have attracted and will be analyzed in terms of the effectiveness of that participation.

Formulation of remedies in institutional reform cases also presents special problems for the court. The constitutional or statutory standards usually involved rarely give the court guidance as to how violations should be corrected. A finding that defendant's negligence proximately caused plaintiff's personal injury easily suggests the remedy of money damages. However, no simple solution flows from the finding that a large public institution discriminates against a minority or fails to provide adequate treatment for those under its care. In such situations the problem of a remedy becomes much more difficult. For example, the nature of discrimination in a large organization is such that its effects are often widespread and complex, and are manifested in subtle forms that are hard to detect. Judges are trained neither to perceive the unique characteristics of these situations nor to devise solutions that will prevent continued discrimination without unjustifiably burdening the defendant institution. It has been argued, on the other hand, that courts are effectively overcoming this problem by prescribing remedies only after extensive consultation with the defendant, the other interested parties, and in some cases, outside experts.[14] When the relief comes in the form of a consent decree, reached through negotiations between the court and all interested groups, as it often does, there is a further assurance that an appropriate balance has been struck between the competing interests. The chosen cases will be examined to see the roles played by the participants in formulating any relief. They will also be evaluated in terms of the appropriate balance in public interest cases between mediation or negotiation as opposed to traditional adjudication.

Given the formulation of an appropriate remedial decree, the subsequent problem of judicial enforcement remains. If the case is

12. *See* Stewart, *The Reformation of Administrative Law*, 88 HARV. L. REV. 1667, 1760-70 (1975).

13. *See* Chayes, *supra* note 6, at 1310-13.

14. *See id.* at 1298-1302.

politically controversial there is always the danger that the public entity defendant will openly refuse to comply with court orders. In such a situation the judiciary may be unable to enforce its orders. Furthermore, there is also the problem of preventing more subtle forms of noncompliance. It may be impossible, without close court supervision, to assure compliance with a decree which significantly reorders the conduct of a large organization. This is an uninviting prospect, considering the limited judicial resources and the undesirability of continuing judicial intrusion into other public bodies. By reviewing some of the enforcement problems encountered in the selected cases, this article will attempt to determine the extent to which these concerns are justified.

The chosen subjects involve employment discrimination cases brought against the police department of the city of Philadelphia. The first suit, *Pennsylvania v. O'Neill*[15] *(O'Neill)*, was filed in late 1970 and focused on racial discrimination. The second suit, really two consolidated cases, *Brace v. O'Neill*[16] and *United States v. City of Philadelphia*[17] (hereinafter jointly referred to as *Brace*), was commenced in early 1974 and was directed at sex discrimination. Both suits were filed in the United States District Court in Philadelphia and were assigned to different judges.

These cases will be examined because they provide an opportunity to compare and contrast two public interest suits in which different approaches are used to attack similar problems. At the time of this writing, neither case has been prosecuted to a final judgment.[18] Nevertheless, a decade's worth of combined litigation provides ample material for an evaluation of these cases.

II. The Lawsuits — A Summary

A. The *O'Neill* Case

When Frank Rizzo was named Police Commissioner of the Philadelphia Police Department in May 1967, he had already earned a

15. No. 70-3500 (E.D. Pa., filed Dec. 21, 1970).

16. No. 74-339 (E.D. Pa., filed Feb. 12, 1974).

17. No. 74-400 (E.D. Pa., filed Feb. 19, 1974).

18. The city's hiring and promotion practices were challenged in these actions. However, remedial action regarding the city's promotion practices has not been well developed or has been found inappropriate. *See* Pennsylvania v. O'Neill, 465 F. Supp. 451 (E.D. Pa. 1979). Consequently, this article focuses on the hiring question.

negative reputation among some local minority groups.[19] During the next several years he drew national attention as police commissioner with his outspoken manner and reputed harassment of minorities and dissenters, particularly black radicals.[20] In 1970 alone, several suits were filed on behalf of minorities seeking broad equitable relief to protect them from alleged police abuse.[21]

It is not surprising that under these circumstances, the National Association for the Advancement of Colored People (NAACP) became interested in the employment opportunities made available to blacks within the police department. If police-community relations were at a low point, it may have been due, in part, to a paucity of low minority representation on the force. In 1970, Robert Reinstein, a law professor and consultant to the General Counsel of the NAACP, received a number of complaints from blacks who believed that they had been arbitrarily denied employment by the police department. Thereafter, the NAACP spent several months investigating both the racial composition of the police department and the racial breakdown of their new recruits.[22] When the 1970 figures compared unfavorably with data from 1966, there was further reason to suspect that the Commissioner's reputed racial bias affected the hiring and promoting practices of the department.

These statistics were brought to the attention of the state's attorney general who, in association with a group of rejected applicants assembled by the NAACP, commenced a class action suit in December 1970 against those city officials responsible for the operation of the police department. The case was assigned to United States District Judge John P. Fullam. Relying on the Civil Rights Acts of 1871, the complaint charged the city with practicing racial discrimination within the police department in violation of the fourteenth amendment.[23] The basis for this claim was the alleged statistical disparity between the racial make-up of the police de-

19. N.Y. Times, May 21, 1967, at 123, col. 3.

20. *See, e.g.*, Groutt, City of (Big) Brotherly Love, COMMONWEAL, May 1, 1970, at 167-69; N.Y. Times, Nov. 8, 1970, at 48, col. 1.

21. *See* COPPAR v. Rizzo, 357 F. Supp. 1289 (E.D. Pa. 1973), *rev'd sub nom.* Rizzo v. Goode, 423 U.S. 362 (1975).

22. Philadelphia Inquirer, Dec. 24, 1970, at 5, col. 5.

23. 42 U.S.C. §§ 1981, 1983 (1976). Plaintiffs, at that time, could not invoke title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. I 1977), as it was not until 1972 that it was amended to reach municipalities. Pub. L. No. 92-261, 86 Stat. 103 (1972).

partment (twenty percent black) and the racial make-up of the city's population (thirty-five percent black).[24] It was further charged that the ratio of blacks to whites decreased sharply in the high ranks of the department[25] and that since 1966 the racial balance had progressively deteriorated.[26] According to the complaint, while blacks comprised thirty percent of the recruits in 1966, by 1970 they represented only eight percent.[27] The complaint attributed this imbalance to a number of causes: 1) a written test for applicants which was not job-related and which had a disproportionately negative impact on blacks; 2) a background investigation of all applicants which was administered in a manner discriminatory towards blacks; and 3) requirements for promotions, which included a non-job-related written test and subjective evaluations of past performance, which operated to disadvantage black policemen.[28] In addition to requesting that these practices cease, the individual plaintiffs demanded that they be hired immediately with retroactive seniority and that the city be required to limit hiring to blacks until the racial composition of the department reflected the racial make-up of the applicant pool between 1966 and 1970. All promotions were to be limited to blacks until the ratio of black to white at each rank reflected the racial composition of the department as a whole. Plaintiffs also requested that the department be ordered to take steps necessary to maintain proper racial balance and that the city's Commission on Human Relations be required to establish procedures to carry out the mandate of its charter and to prevent this kind of discrimination.[29] All the charges were denied by the city.

In April 1972, there were newspaper reports that the city was preparing to hire two thousand police recruits.[30] Though some discovery remained to be completed, plaintiffs moved for a preliminary injunction to restrain hiring and promoting as outlined in their complaint.[31] After hearing five days of testimony, the court

24. *See* Pennsylvania v. O'Neill, 4 Fair Empl. Prac. Cas. 966, 968 (E.D. Pa. 1972).
25. *See* Pennsylvania v. O'Neill, 348 F. Supp. 1084, 1101 (E.D. Pa. 1972).
26. *See id.* at 1087.
27. *See id.*
28. *See id.*
29. *See* Complaint, Pennsylvania v. O'Neill, No. 70-3500 (E.D. Pa., filed Dec. 21, 1970).
30. *See* Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction (filed Apr. 13, 1972), Pennsylvania v. O'Neill, No. 70-3500 (E.D. Pa., filed Dec. 21, 1970).
31. *See* Pennsylvania v. O'Neill, 345 F. Supp. 305, 306 (E.D. Pa. 1972).

issued a lengthy opinion in which it found enough evidence of discrimination in both hiring and promoting to mandate preliminary relief including the imposition of hiring quotas.[32] It ordered the city to refrain from further hiring or from making further promotions unless it did so on the basis of at least one black for every two whites.[33]

The district court's order was initially vacated and remanded on appeal, but when the case was reheard *en banc*, the court of appeals affirmed the order with respect to hiring and vacated the decision as to promotions.[34] With regard to hiring, the order was affirmed simply because the issue had equally divided the circuit court.[35] The court of appeals was puzzled about language in the district court's opinion which questioned the "statistical significance" of the evidence plaintiffs had introduced on the issue of promotions.[36] The court was unsure why, in spite of that uncertainty, the district court had found enough evidence of discrimination in promotions to justify a preliminary injunction. It therefore remanded that part of the order without prejudice to the granting of further interim relief.[37]

On April 11, 1973, just over a month after the circuit court decision, a consent decree was entered which mooted the question of further interim relief.[38] The decree lifted the existing restraining orders in exchange for a number of commitments by the city including the following:

1) The city would develop a new job related written test for police officer candidates and permit any black applicant to reapply if, since 1969, he had been rejected on the basis of the old written test.
2) The city would revise its standards for evaluation of back-

32. *See* 348 F. Supp. at 1086.

33. *See id.*

34. Pennsylvania v. O'Neill, 473 F.2d 1029 (3d Cir. 1973). In its initial ruling, the court of appeals misinterpreted the district court's order as requiring the city to hire blacks even if they had not been shown qualified. Pennsylvania v. O'Neill, No. 72-1614 (3d Cir. Sept. 14, 1972); *see* 348 F. Supp. at 1106. The district court's order, however, specifically applied only to blacks who had proven themselves qualified by being placed on the city's eligibility list. *See id.* at 1106-07.

35. 473 F.2d at 1030.

36. *Id.* at 1031-32; *see* 348 F. Supp. at 1101.

37. 473 F.2d at 1031.

38. *See* Pennsylvania v. O'Neill, 5 Empl. Prac. Dec. ¶ 8559 (E.D. Pa. 1973).

ground investigations to eliminate factors that operated to the detriment of black applicants and would hire an independent organization for advice on making the standards more job-related. Furthermore, those black applicants who, since 1969, had been rejected because of background investigations would be entitled to reapply.

3) Pending implementation of new job-related and non-discriminatory background investigation criteria, all black applicants (including those who reapplied) who had been rejected on the basis of background investigations would be entitled to appeal their rejections to a special review panel. The panel would have three members, two appointed by the city and one by the court. In case of a split decision, a further appeal could be made directly to the court.

4) Black applicants found qualified after a second application would be hired on a preferential basis and be given retroactive seniority.

Although the city's record of compliance was far from perfect, implementation of the decree substantially improved the hiring prospects for black applicants. In May 1975, the new written test was administered and, although black applicants still performed worse than white applicants, the disparity had been reduced.[39] Of the 2800 blacks who passed, 286 took the exam for the second time and were thus entitled to the preferential treatment provided for in the consent decree; of that group, at least 116 were hired.[40] Of those applicants who had initially been disqualified because of background investigations, at least 53 of the 216 blacks who reapplied were favorably reevaluated and joined the department.[41] In April 1976, new background investigation criteria were put into effect; it was estimated that, as a result of the decree the black-white rejection differential was reduced from 2.6 to 1 to 1.6 to 1.[42] The special

39. Sixty-four percent of the blacks passed, while whites passed at a rate of 91%. Philadelphia Inquirer, Jan. 9, 1976, at 3-B, col. 2. This meant that whites were performing 1.42 times better than blacks, an improvement over the old test where whites performed 1.82 times better than blacks. *See* 348 F. Supp. at 1089.

40. Interview with Alan Klein, counsel for plaintiffs (June 23, 1977).

41. Memorandum in Support of Plaintiffs' Motion for Back Pay and Additional Relief (filed Aug. 20, 1975), Pennsylvania v. O'Neill, No. 70-3500 (E.D. Pa., filed Dec. 21, 1970).

42. *See* Memorandum and Order (filed Nov. 19, 1976) and Plaintiffs' Motion to Compel Production (filed July 27, 1976), Pennsylvania v. O'Neill, No. 70-3500 (E.D. Pa., filed Dec. 21, 1970).

review panel operated throughout most of this period and continued to function pending judicial validation of the new background investigation standards.

Plaintiffs continued to challenge both the new written test and the revised background review criteria as discriminatory. In 1976 and 1977 extensive hearings were held on these issues as well as on the problem of discrimination in promotions. Plaintiffs were demanding reimposition of quotas in both areas. However the plaintiffs had informally suggested that, at least with regard to the background review problem, they would settle for a modified version of the existing system with the permanent establishment of a special review panel.[43] The promotions question was finally resolved against the plaintiffs, but as of March, 1980, there had still been no decision on the other issues.[44]

B. The *Brace* Case

The genesis of this sex discrimination case was a long article which appeared in the Sunday magazine of one of Philadelphia's major newspapers during the summer of 1973.[45] The article purported to show the police department's hostile attitude toward women. It described how the small number of policewomen (sixty-four) on the force was restricted to the Juvenile Aid Division, how they were never in a position of authority over male policemen, how opportunities for promotion were much more limited than those for men, and how the head of the Juvenile Aid Division was opposed to giving women an expanded role in the department equal to men, in part, for fear that too many lesbians would be attracted to the job. The general tone of the article was quite critical, and pointed out that the Philadelphia Police Department was behind other major cities in opening its doors to equal employment for women.

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43. The proposal involved using a number of specific criteria as automatic disqualifiers. If none of these factors were present, the applicant would have to be approved unless the department obtained a "variance" from the special review panel. Likewise, a "variance" would have to be obtained if the department sought to hire someone with a disqualifying factor. A rejected applicant could appeal to the panel only to contest the existence of such a disqualifying factor. Interview with Alan Klein, counsel for plaintiffs, (June 23, 1977).

44. *See* Pennsylvania v. O'Neill, 465 F. Supp. 451 (E.D. Pa. 1979). Judge Fullam concluded that, despite their racially disproportionate impact, the promotions tests met the minimum critieria for job-relatedness. *Id.* at 465-66.

45. Philadelphia Inquirer, July 15, 1973, Today Magazine, at 8.

Shortly after publication, the local chapter of the American Civil Liberties Union (ACLU) announced that it would provide any women or concerned organization with lawyers and support services to challenge the department's discriminatory practice.[46] The offer was accepted by Penelope Brace, a white policewoman with eight years on the force. In July, 1973, she filed a complaint with the Equal Employment Opportunity Commission (EEOC).[47]

Six months later, upon receiving statutory notice of the right to sue,[48] Brace brought a class action suit charging the city of Philadelphia with sex discrimination. In the meantime, the department began to retaliate against her.[49] First, Brace was reassigned to the division which was the most distant from her home.[50] Police Commissioner O'Neill requested her file for his personal review and several weeks later the Internal Security Unit of the department began a surveillance which continued for over a month.[51] Brace was required to undergo a special psychiatric examination. Finally, charges serious enough to result in dismissal were filed against her with the Police Board of Inquiry. This was the first time she had ever been reprimanded for misconduct while on duty. It was alleged that on six occasions in September, 1973, she made false entries in her "Patrol Log"; that she failed to report injuries sustained in an off-duty accident; and, that on one occasion she had improperly searched a female juvenile. Despite the intervention of

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46. *Id.* Aug. 19, 1973, Today Magazine, at 22.

47. The EEOC was created in title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-4 (1976 & Supp. I 1977), for the purpose of correcting unlawful employment practices. H.R. REP. No. 914, 88th Cong., 2d Sess. (1964). The EEOC investigates charges of discriminatory employment practices and, if the charges are substantiated, it attempts to negotiate a solution with the employer. If they fail to reach an agreement, the EEOC is authorized to litigate the dispute. 42 U.S.C. § 2000e-5(f)(1) (1976 & Supp. I 1977). The aggrieved party may commence his own action if the EEOC does not sue the employer after conciliation discussions fail. However, a jurisdictional prerequisite of the aggrieved party's action is the issuance of a notice of right to sue by the EEOC. Once the notice is issued, the aggrieved party has 90 days to commence an action against the employer. *Id. See* Bukes, *Administrative Prerequisites to Litigation Under Title VII of the Civil Rights Act of 1964—Recent Developments*, 17 DUQ. L. REV. 633 (1978-79) [hereinafter cited as Bukes].

48. *See* 42 U.S.C. § 2000e-5(f)(1) (1976 & Supp. I 1977); *see* note 47 *supra*.

49. *See* description of alleged harassment in Complaint, Brace v. O'Neill, No. 74-339 (E.D. Pa., filed Feb. 12, 1974); Brace v. O'Neill, 13 Fair Empl. Prac. Cas. 482 (E.D. Pa. 1975).

50. *See* Brace v. O'Neill, 13 Fair Empl. Prac. Cas. 485, 487 (E.D. Pa. 1976).

51. The city claimed that the surveillance was triggered by an anonymous letter. *See* Defendants' Request for Findings of Fact and Conclusions of Law (filed March 3, 1974), Brace v. O'Neill, No. 74-339 (E.D. Pa., filed Feb. 12, 1974).

the Law Enforcement Assistance Administration (LEAA), which was investigating the allegations of discrimination, the charges were heard by the Board in early January, 1974. A month later, three days after her class action suit was filed, she was fired.[52]

In Brace's civil suit there were two categories of complaints: those dealing with class claims and those relating to her alone. The class claims alleged a general practice of sex discrimination by the police department and were based on 42 U.S.C. §§ 1983, 1985(3) and 1986, and on title VII of the Civil Rights Act of 1964.[53] The factual predicate of these claims was simple: women were allegedly excluded from the position of "policeman" and any jobs which required experience as a policeman. The effect of this exclusion, according to the complaint, was that in excess of ninety-eight percent of the jobs in the department were held by males.[54] The individual claim was based on title VII and charged defendants with the illegal pattern of harassment set forth above.[55] Brace sought injunctive relief and monetary damages on all counts.

A week after Penelope Brace filed her civil action, the Attorney General of the United States filed a similar suit against the city of Philadelphia.[56] The complaint recited that the LEAA had been investigating charges of sex discrimination within the department and had found their practices to be in violation of LEAA guidelines but had been unable to secure voluntary compliance with those guidelines.[57] The remainder of the government complaint closely paralleled Ms. Brace's allegations. The action was brought under title VII; it sought to enjoin defendants' discriminatory practices and to have defendants cease harassing employees who complain about illegal discrimination.[58] The government requested a new recruitment program, fixed hiring goals, and monetary compensation

52. *See* 13 Fair Empl. Prac. Cas. 485, 487.

53. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. I 1977). In count IV of the complaint class relief was also sought on the basis of article I, § 28, of the Pennsylvania Constitution which prohibits discrimination on the basis of sex.

54. Brace v. O'Neill, 13 Fair Empl. Prac. Cas. 482, 484 (E.D. Pa. 1975).

55. 42 U.S.C. § 2000e-3 (1976 & Supp. I 1977) specifically prohibits an employer from discriminating against an employee who "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under . . . [Title VII]."

56. *See* United States v. City of Philadelphia, 573 F.2d 802, 804 (3d Cir. 1978); Brace v. O'Neill, 567 F.2d 237, 245 (3d Cir. 1977).

57. *See* 573 F.2d at 804; *see also* Bukes, *supra* note 47.

58. 573 F.2d at 804.

to those women aggrieved by defendants' discrimination. On the same day the complaint was filed, the government also moved for an order reinstating Ms. Brace to her former position on the force.[59]

Both suits were assigned to United States District Judge Charles R. Weiner and consolidated. Reflecting Judge Weiner's marked penchant for negotiated solutions, the court tried to move the case along through a series of interim agreements. Several times the case was about to be heard by the court on application for major injunctive relief when, at the eleventh hour, a compromise would be worked out to postpone the pending adjudication. First, in May, 1974, plaintiffs postponed motions for preliminary relief because of the city's promise to conduct an "in house" study of the ability of women to perform police work.[60] Then, in January, 1975, considerations of pending motions for preliminary relief were postponed again when the city agreed that between forty and sixty women (one half of its next police academy class) would be hired for a study of the ability of women to do patrol work.[61] Plaintiffs, however, became dissatisfied because of delays in implementing the order and, within several months, renewed their motions for preliminary relief. In early 1976, there were several days of hearings on the motions before a ruling was postponed a third time by yet another consent decree.[62] This time, the city made three significant commitments: first, it agreed to change job titles from "Policeman" to "Police Officer" and from "Policewoman" to "Juvenile Aid Officer"; second, it agreed to give those policewomen then confined to the Juvenile Aid Division an opportunity to transfer out of that division to positions in the department previously held only by men; and third, it promised that one hundred women would be among the next 471 recruits that it would hire.[63] The decree also permitted the city to undertake a two year study of the ability of women to do police work. The inclusion of this last provision was

59. *See id.* at 804 n.2.

60. Stipulation (filed May 7, 1974), United States v. City of Philadelphia, No. 74-400 (E.D. Pa., filed Feb. 19, 1974); Philadelphia Inquirer, May 8, 1974, at 3-6, col. 3; *see* text accompanying notes 103-04 *infra*.

61. Order (filed Jan. 29, 1975), United States v. City of Philadelphia, No. 74-400 (E.D. Pa., filed Feb. 19, 1974). The contemplated study never took place.

62. Order (filed March 3, 1976), Brace v. O'Neill, No. 74-339 (E.D. Pa., filed Feb. 12, 1974). *See also* 573 F.2d at 804-05.

63. *See* United States v. City of Philadelphia, 17 Fair Empl. Prac. Cas. 162 (E.D. Pa. 1977); United States v. City of Philadelphia, 17 Fair Empl. Prac. Cas. 167 (E.D. Pa. 1978).

important because it allowed the city to interpret its commitment to hire the one hundred women as a limited short-term concession solely for the purposes of the study. The court, however, saw the city's commitment as much broader. Before the two years had run, the city, on several occasions, sought to hire more than the 471 recruits anticipated in the consent decree. Each time, the court ordered that it do so only on the condition that there be at least one woman hired for every four men, a ratio that approximated the sexual balance in the original 471.[64] As a result, approximately two hundred women recruits were hired between 1976 and June 1978.[65]

With the informal help of the court, Ms. Brace was reinstated to her former job in May 1974; in July 1978, again due to court action, she was promoted to detective.[66] The court, however, denied her the right to act as class representative and dismissed her harassment claim against the city.[67] Her appeal of those rulings was dismissed for lack of jurisdiction because her case was viewed as being too closely tied to the government's case to be heard alone.[68] Ms. Brace continued to be an active participant, joining with the government in many of their initiatives.

In June, 1978, the report of the city's study was finally submitted to the court. Predictably, it found that women were generally unsuited for patrol work. Further hearings were held and in February, 1979, the court formally ruled that the city's bar to the hiring of women violated title VII.[69] The city was ordered to cease any practice which had the purpose or effect of discriminating on the basis of sex and to submit for court approval new criteria for hiring and promotion. The city appealed the decision and continued to obstruct the hiring of women.[70] In September, 1979, the city sought to

64. *See* 17 Fair Empl. Prac. Cas. 162, 167, *aff'd*, 573 F.2d 802 (3d Cir.), *cert. denied*, 439 U.S. 830 (1978).

65. *See* Memorandum of Plaintiff United States in Response to Defendant City of Philadelphia's Notification of Hiring (filed Oct. 27, 1977) and Defendants' Notification of Compliance (filed Feb. 24, 1978), United States v. City of Philadelphia, No. 74-400 (E.D. Pa., filed Feb. 19, 1974).

66. Order (filed July 3, 1978), Brace v. O'Neill, No. 74-339 (E.D. Pa., filed Feb. 12, 1974), *aff'd*, No. 78-2084 (3d Cir. Mar. 20, 1979).

67. *See* 13 Fair Empl. Prac. Cas. at 484; 13 Fair Empl. Prac. Cas. at 488.

68. Brace v. O'Neill, 567 F.2d 237, 241 (3d Cir. 1977).

69. United States v. City of Philadelphia, 19 Fair Empl. Prac. Cas. 849 (E.D. Pa. 1979).

70. For example, the city adopted a new physical fitness performance test as part of its hiring examination which had the effect of excluding most women applicants. The use of this test was enjoined by the court. United States v. City of Philadelphia, 20 Empl. Prac. Dec. ¶ 30,277 (E.D. Pa. 1979).

enroll an all male police class. The court ordered at least one quarter of the class had to be female.[71] Little appears to have changed and Judge Weiner's involvement in the affairs of the Philadelphia Police Department is not likely to end soon.

III. The Problem of Representation

A. Participants in the *O'Neill* Case

The scope of the interests represented in *O'Neill* was quite broad. What began as a simple employment discrimination lawsuit by several unsuccessful black police officer candidates against various city officials mushroomed into a dispute involving representatives of most of the interests that could be affected by the personnel policies of the police department.

The individual plaintiffs were first joined in their complaint by the Commonwealth of Pennsylvania suing as *parens patriae* on behalf of its citizens to vindicate their general interest in eliminating employment discrimination. The named plaintiffs were then formally certified as class representatives. The class was made up of all black men and women who, since January 1, 1966, had sought or would seek to join the police department and all black policemen and policewomen who had sought or would seek to be promoted within that same period.

On the defense side, the named city officials were joined by the Fraternal Order of Police (FOP), the local police officer's union. It intervened as an additional defendant to represent the interests of all police officers, both black and white.[72] The move was prompted by the court's issuance in mid-1971 of a discovery order which, it was feared, would improperly expose confidential police personnel files.[73] In addition to objecting to the discovery order, the FOP joined the city in opposing the imposition of any kind of quota, arguing that it would seriously impair the morale of the department.

The FOP's participation alongside the defendants had raised questions about the plaintiffs' claim to representation of active

71. *See id.*

72. *See* Transcript of hearing (filed July 5, 1971), Markert v. Pennsylvania, No. 71-1916 (E.D. Pa., filed Aug. 3, 1971). The intervention initially took the form of this separate lawsuit which the court construed as a petition to intervene.

73. *See* text accompanying notes 117-19 *infra* for a discussion of this discovery episode.

black police officers.[74] Doubts were resolved, however, when the Guardian Civic League, the black police officers' association, intervened on the side of the plaintiffs. It adopted essentially the same complaint as filed by the original plaintiffs and was represented by the same counsel.

Because of *Brace,* representation of black women posed a unique problem. That case made it clear that the female element of the plaintiff class had been doubly injured; not only had they suffered because of their race but also because of their sex. However, most of the remedies sought and obtained by the plaintiffs in *O'Neill* were directed toward benefitting black males and in some instances this ran counter to the efforts being made in the *Brace* suit to improve the status of women.[75] The problem was brought to the attention of the court by a motion to intervene filed in January 1976. Penelope Brace and Barbara Cassel, a black ex-policewoman and therefore a member of the *O'Neill* class, formally sought to enter the case on behalf of themselves and a class of all past, present and potential female employees of the department. Limited intervention was requested to establish some coordination between the *Brace* and *O'Neill* suits and to insure that any relief granted in the sex discrimination litigation would not be nullified by inconsistent relief granted in the *O'Neill* case. Because of the special situation of black women, one might have expected the court to welcome the participation of these new representatives. All the parties, however, opposed their intervention, fearing that after five years of litigation the new arrivals and their new attorney would only further complicate the lawsuit. The court agreed and intervention was denied.[76]

B. Participants in the *Brace* Case

As in *O'Neill,* the *Brace* litigation enjoyed the participation of a broad variety of groups and individuals. The consolidated litigation was initiated by the United States and Ms. Brace against the city of Philadelphia and the same assortment of city father defendants

74. The media have also noted discord over this suit among black policemen. Philadelphia Inquirer, Dec. 26, 1970, at 13, col. 3.

75. For example, in April, 1975, the city decided to enroll a small, all male, class at the police academy. Efforts by the *Brace* plaintiffs to enjoin the class unless it included women were opposed by the *O'Neill* plaintiffs because half the class enrollees were black men. The class was not enjoined and it proceeded without the participation of women.

76. Order (filed Oct. 26, 1976), Brace v. O'Neill, No. 74-339 (E.D. Pa., filed Feb. 12, 1974). The court did give Ms. Brace's counsel permission to attend and observe proceedings.

present in *O'Neill*. The FOP subsequently became a party and other groups such as the NAACP, National Organization of Women, and Women Organized Against Rape appeared as amicus curiae. There was also the participation of representatives from the *O'Neill* litigation who attended several conferences.

The FOP's role in the case deserves special attention. It entered the case as an intervening defendant and, until implementation of the 1976 consent decree, had been firmly aligned with the city. Since then, however, it has split with the city on several occasions to support the plaintiffs. Thus, while it continued to oppose court actions imposing hiring quotas on the city, it actively supported those policewomen who sought to transfer to more desirable jobs within the department. For example, its efforts led to a court order restoring to her former rank of sergeant a policewoman who had been punitively demoted because she sought to transfer out of the Juvenile Aid Division.[77] This unusual posture of the FOP, acting sometimes as a plaintiff and sometimes as a defendant, is characteristic of many participants in public interest litigation. The FOP joined the litigation not because of a specific claim involving one of the other parties but simply to protect the interests of its constituency. Among those interests was a general concern for the fair treatment of all its members, including policewomen, and protection from what organized labor has regarded as a serious threat: preferential treatment of women and minorities. In view of the multiplicity of issues, the FOP had to act alternatively as an intervening plaintiff or as an intervening defendant in order to advance its interests.

Another unusual aspect of the case was the court's failure to make use of the class action device. From the outset, Ms. Brace

77. Motion of Intervenor, Fraternal Order of Police, for Relief for Cecile Williams (filed Dec. 17, 1976), United States v. City of Philadelphia, No. 74-400 (E.D. Pa., filed Feb. 19, 1974). Other actions include a request for the court to order the reassignment to non-sector patrol duty of a woman, hired under the 1976 decree, who had become pregnant, Intervenor's Motion for Relief to Officer Rita Royster (filed Dec. 30, 1976), United States v. City of Philadelphia, No. 74-400 (E.D. Pa., filed Feb. 19, 1974), denied by Order (filed March 25, 1977), United States v. City of Philadelphia, No. 74-400 (E.D. Pa., filed Feb. 19, 1974), and a request for an order compelling the city to cease the practice, adopted for the purpose of the study, of assigning rookie officers to sector patrol duty without being accompanied by experienced officers, Motion of Intervenors, Fraternal Order of Police, for Preliminary Relief (filed Jan. 3, 1977), United States v. City of Philadelphia, No. 74-400 (E.D. Pa., filed Feb. 19, 1974), denied by Order (filed March 24, 1977), United States v. City of Philadelphia, No. 74-400 (E.D. Pa., filed Feb. 19, 1974).

had sought to be certified as a class representative for all present and future policewomen. The court rejected her demands and refused to give her case class status on the ground that the members of her putative class were being adequately represented in the parallel government suit.[78] However, despite the court's position, denying policewomen an advocate responsible solely to them could not help but to adversely affect the quality of their representation. That such a class representative was needed became apparent during implementation of the 1976 consent decree. At that time many individuals who would have been members of the class besieged the court with petitions for intervention, for informal requests for assistance and, in one instance, a separate class action law suit.[79] These individuals tended to fall into two general categories: policewomen applicants who felt they had been wrongfully denied employment[80] and veteran policewomen complaining that the city was not complying properly with consent decree provisions enabling them to transfer to better jobs.[81] The court handled these claims as part of its chore in policing the consent decree without, however, formally authorizing new interventions into the case. Had there been a class representative through whom these complaints could have been filtered much judicial energy would have been saved.

C. The Advocates

In large public interest suits, especially when class actions are involved, counsel tends to play pivotal roles not only in formulating strategy but also in controlling and defining the objectives of the lawsuit. In many cases the named plaintiffs are simply individuals who volunteer to be the tools with which others can attack an important local problem. Analyzing the lawyers and their affiliations often provides further information about the interests being represented.

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78. 13 Fair Empl. Prac. Cas. at 485.

79. A group of women who had been found ineligible for or dismissed from the police academy filed a separate class action suit. Sanford v. O'Neill, No. 78-1154 (E.D. Pa., filed Apr. 10, 1978). The suit was dismissed upon motion for summary judgment. Opinion and Order (filed May 17, 1979), Sanford v. O'Neill, No. 78-1154 (E.D. Pa., filed Apr. 10, 1978).

80. Motion of Darlene McGuire for Intervention as Party Plaintiff (filed May 14, 1976), United States v. City of Philadelphia, No. 74-400 (E.D. Pa., filed Feb. 19, 1974); Motion of Adelle McDermott to Intervene as Party Plaintiff (filed June 25, 1976), United States v. City of Philadelphia, No. 74-400 (E.D. Pa., filed Feb. 19, 1974).

81. See discussion in Opinion and Order (filed Feb. 2, 1977), United States v. City of Philadelphia, No. 74-400 (E.D. Pa., filed Feb. 19, 1974).

In *O'Neill,* for example, the individual plaintiffs and class representatives were represented by the cluster of attorneys assembled at the outset by the NAACP.[82] It was these attorneys, in fact, who were really in control of the litigation. Most of Penelope Brace's attorneys were related in some way to the ACLU and one of them was employed directly by that organization's national office.[83] Furthermore, some of the applicants for intervention in *Brace* were backed by lawyers from the Public Interest Law Center of Philadelphia (PILCOP) and Community Legal Services, a non-profit organization providing free legal services for the poor. Thus, the involvement of several more community interest groups emerges when attorney affiliations are examined.

D. Evaluation: The Adequacy of Community Representation

Although these employment discrimination cases involved only the personnel practices of one city police department, they showed how public interest litigation attracts the participation of a broad spectrum of interests. Apart from the immediate victims of the alleged discrimination, the cases, between them, drew appearances by the state and federal governments, the NAACP, the ACLU, the National Organization of Women, the Fraternal Order of Police and various other groups and individuals who felt they would be affected by the outcome of the litigations. The real question, though, is not how many advocates appeared, but rather whether all affected interests were, in fact, adequately represented. It is only when all affected receive meaningful representation that we can be truly comfortable in using public interest litigation for social reform. Unfortunately, certain aspects of these cases suggested cause for concern in this regard.

In *O'Neill,* for example, there were two occasions where the same constituency was claimed by different advocates. At one point, both the individual plaintiffs, who were not then members of the

82. This included a law professor and one of the largest and most prominent law firms in Philadelphia. The NAACP was never formally a party to the suit although its general counsel signed the complaint and it participated as *amicus curiae* in the appeal of the district court's preliminary injunction.

83. As of mid-1978, she had had at least four attorneys. Her first, Steven Waxman, and his replacement, Herbert Newburg, were connected with the Philadelphia chapter of the ACLU. They were succeeded by Kathleen Peratis who worked directly for the ACLU's head office in New York. She has also had one other attorney, Helen McCaffrey, who did not appear affiliated with any particular group.

police force, and the FOP claimed to speak for black policemen. Later in the case, the legitimacy of the plaintiffs' claim to represent black women was challenged by Ms. Brace's and Ms. Cassel's requests to intervene. How could the court know which advocate really spoke for black police officers and which really spoke for female police officers? The question could not have been answered with any degree of certainty. Most likely there were some black policemen who would defend the city as well as some black policewomen who felt that their opportunities were most seriously restricted by discrimination against women. The only real solution in these situations is to allow both points of view to be represented in some fashion. This is especially important if the legitimacy of social reform litigation depends on the degree to which there is input from all elements of the affected populations. However, this did not occur in the case of black females and occurred with regard to black males only because the FOP was made a party in its own right. Similarly, in *Brace,* action was taken that was inconsistent with effective community participation. A class action was never certified and only one of the many petitions to intervene was formally granted.

The experience of these cases obviously raises doubts about the degree to which all interests will be effectively represented in these kinds of cases. One problem is that the legal standards governing expansion of the litigation through intervention and class representation are not concerned with maximizing input into the lawsuit because they are not concerned with legitimizing social reform through litigation. Rather, the standards are concerned primarily with promoting judicial efficiency when dealing with multiple interrelated but discrete legal disputes of the traditional variety.[84] These standards are sufficiently flexible, however, so that in each of the instances referred to above a decision for or against expansion of the litigation would have been defensible. This illustrates how much the breadth of participation lies within the discretion of the trial judge. Furthermore, with institutional reform litigation becoming increasingly complex and often running on almost indefinitely, a trial judge's decision on a procedural matter can become practically unreviewable. With such power vested in the trial judge and with the governing standards indifferent to the needs of insti-

84. *See* FED. R. CIV. P. 23 & 24; Chayes, *supra* note 6, at 1289-92.

tutional reform litigation, effective representation of all affected interests so necessary to legitimize the process of social reform can never be assured.[85]

IV. The Problem of Remedy Formulation

A. The *O'Neill* Case

The shaping of the remedy in *O'Neill* took place essentially in two steps. Judge Fullam took the first step by issuing a preliminary injunction to require that any future hiring be in the ratio of one black for every two whites.[86] The second step was the substitution of a consent decree for that quota order.[87]

The process began in April, 1972, when plaintiffs moved for a preliminary injunction.[88] During lengthy hearings they presented statistical evidence showing that the police department's written employment test and subsequent background investigation procedures tended to eliminate a disproportionately large number of black applicants.[89] Given this prima facie case of discrimination, the court was asked to order that the city hire only black applicants, *i.e.*, members of the plaintiff class, pending final resolution of the case. Following completion of the hearings, Judge Fullam urged the parties to meet and try to agree on their own to an acceptable arrangement for the protection of the plaintiff class.[90] It was only after an agreement seemed unattainable that the court acted.[91]

After issuing a lengthy opinion in which it made detailed findings of discrimination, the court enjoined further hiring except on the basis of one black for every two whites.[92] The court chose this ratio as it represented approximately the racial make-up of the ap-

85. Professor Chayes points out that one of the features of public law litigation is the important role played by the trial judge as "creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge's continuing involvement in administration and implementation." Chayes, *supra* note 6, at 1284.

86. *See* note 32 *supra* and accompanying text.

87. *See* note 38 *supra* and accompanying text.

88. *See* 345 F. Supp. at 306.

89. *See id.* at 307.

90. *See id.* at 306.

91. During negotiations, plaintiffs had softened their position to demand a one to one black-white ratio. They reasoned that this would be an appropriate half-way measure because they believed the court could order that hiring be stopped altogether.

92. 348 F. Supp. 1084 (E.D. Pa. 1972).

plicant pool.[93] This solution was preferred over the plaintiffs' request because it preserved the status quo and prevented further discrimination without requiring the affirmative corrective steps that would be implicit in an order limiting hiring exclusively to blacks. Operating under a quota of any form was politically unacceptable to the city and it appealed the court's order. The order was first reversed, but then, after a rehearing *en banc,* it was affirmed.[94]

When it appeared that the district court's order was going to stand, the city began to negotiate seriously toward a solution less offensive to them and the police union than operating under a quota. It first promised to voluntarily reform its testing procedures.[95] The question then became what substitute for the quota order could be applied to govern hiring pending the development and implementation of new procedures. During negotiations, in which the court and all of the parties were involved, the city proposed to eliminate some of the disqualifying factors used in the background review which had been found to operate more harshly against black applicants.[96] It further proposed that any black disqualified because of a background investigation be given the opportunity to appeal to a special review panel.[97] The court's response to the city's plan was quite enthusiastic, Judge Fullam suggesting that it could form the basis for final relief in the case.[98] Assuming that an acceptable non-discriminatory written test could be prepared, the proposal seemed to provide adequate protection for the plaintiff class while being politically acceptable for the city. Though at first insisting that a target quota be retained to insure

93. *Id.* at 1086.

94. 473 F.2d 1029, 1031 (3d Cir. 1973); *see* 348 F. Supp. at 1106-07.

95. This promise was first made by counsel for the city during oral arguments on the appeal of the preliminary injunction order. *See* Transcript of Sept. 22, 1972 hearing (filed Oct. 4, 1972), Pennsylvania v. O'Neill, No. 70-3500 (E.D. Pa., filed Dec. 21, 1970).

96. *See* 348 F. Supp. at 1092-101 for a thorough discussion of the background investigation.

97. *See* Transcript of Jan. 10, 1973 conference (filed Jan. 12, 1973), Pennsylvania v. O'Neill, No. 70-3500 (E.D. Pa., filed Dec. 21, 1970).

98. Judge Fullam had proposed a similar, but more limited, plan at an earlier meeting. At that time, he suggested that all rejections after background review include a statement of reasons for the rejection. The statement could be used as a basis for appeal to the court. Plaintiffs believed such a procedure would prove too much of a burden to the court. Transcript of Sept. 22, 1972 hearing (filed Oct. 4, 1972), Pennsylvania v. O'Neill, No. 70-3500 (E.D. Pa., filed Dec. 21, 1970).

the city's good faith, plaintiffs relented and agreed to a consent decree based on the city's proposal.[99] Plaintiffs exchanged the security of a quota for the commitment that, until they were finally satisfied with the city's procedures, hiring would be limited to filling vacancies without expanding the size of the department. Background review standards were revised and the special review panel was established. The panel had three members, one of whom was unaffiliated with the city. Any panel decision that was not unanimous was appealable to the district court. The decree also gave to members of the plaintiff class who had been previously disqualified the right to be reevaluated under the new procedures.

The decree was designed as a temporary measure to be operative only until the city could devise and implement new hiring procedures and prove them to be non-discriminatory. This has not been done. In 1975 a revised written exam was administered and although the performance of black applicants improved, they still continued, as a group, to score much lower than white applicants. Plaintiffs disputed the validity of the new test as well as the validity of new background review procedures implemented in 1976. The court has not yet decided whether to approve the city's new procedures. During this whole period the special review panel continued to operate. In view of a proposal from plaintiffs that the panel continue to function indefinitely, it may become the basis for a final decree, operating as a quasi-permanent institution to hear appeals from black applicants who believe they were wrongly denied employment.

B. The *Brace* Case

The evolution of remedial action in the *Brace* case was in marked contrast to *O'Neill*. *Brace* progressed through a series of ambiguously worded interim agreements all negotiated with the active participation of the court. Each agreement or consent decree gave plaintiffs a promise of further relief. However, because the city was adamant in refusing to concede the fitness of women for patrol work,[100] each was disguised as a short-term measure to test the ability of women to do police work. Unfortunately, this allowed the city to avoid its commitments by hiding behind the ambiguous

99. Pennsylvania v. O'Neill, 5 Empl. Prac. Dec. ¶ 8559 (E.D. Pa. 1973).
100. *See* Brace v. O'Neill, 19 Empl. Prac. Dec. ¶ 9012 (E.D. Pa. 1979).

wording of the decrees. Finally, in 1977, after three years of attempts to compromise, the court began to force on the city its own schedule for the hiring of women.

Judge Weiner's strong inclination towards negotiated solutions was evident from the outset of the case. In lieu of ruling on early motions to have Ms. Brace reinstated after she was fired, he met on his own with top city officials to urge that she be rehired.[101] The outcome of the meeting was a recommendation by the city officials that Ms. Brace allow a pending appeal to the Civil Service Commission run its course. Several week later the Commission ruled in her favor and she was reinstated.[102]

The court then persuaded plaintiffs to withhold action seeking a preliminary injunction pending the completion of a projected "utilization study" that it had successfully urged the city to undertake.[103] The study would require that the city place women on patrol duty and monitor their performance. The agreement broke down, however, when, several months later, it was learned that the city intended to employ only twenty-two women for the study.[104] Motions were then formally filed to preliminarily enjoin the police department from continuing to discriminate against women and to set up quotas in hiring and promotion to correct past discrimination.

Although adjudication appeared inevitable, it was again postponed by a new agreement negotiated with the active participation of the court. In January, 1975, just as hearings on the pending motions were to commence, proceedings were stayed with the announcement of a new study of women on patrol duty. This time, however, the study period was specifically limited to six months and the city was committed to hiring between forty and sixty women.[105]

The form of the agreement was an interesting illustration of the

101. Conference report (filed Apr. 9, 1974), Brace v. O'Neill, No. 74-339 (E.D. Pa., filed Feb. 12, 1974).

102. The Commission decided that, while the charges against her had been substantiated, they did not justify more than a suspension.

103. *See* Philadelphia Inquirer, Dec. 8, 1974, at 1-H, col. 3; Stipulation (filed May 7, 1974), United States v. City of Philadelphia, No. 74-400 (E.D. Pa., filed Feb. 19, 1974).

104. *See* Philadelphia Inquirer, Sept. 26, 1974, at 1-C, col. 2.

105. *See* Order (filed Jan. 29, 1975), United States v. City of Philadelphia, No. 74-400 (E.D. Pa., filed Feb. 19, 1974). Ms. Brace did not join in the agreement, seeing no purpose in further delay.

contortions that may be gone through in this type of litigation. Rather than formulating a consent decree, the court issued an order that was accompanied by a stipulation between counsel for the United States and the city stating simply that such a study may be of assistance to the court in resolving pending legal issues.[106] This unusual procedure, designed to avoid the appearance that the city had voluntarily agreed to hire women for patrol work, was probably necessitated by the strong opposition from the mayor's office to the making of any concessions.[107]

Within a few months this agreement was also repudiated because of an ambiguity in the court's order. Plaintiffs believed the six month study was to begin with the next class at the police academy which they expected to commence in the very near future. The city, however, interpreted it as beginning with the first class after the administration of the revamped written test that had been prepared for the *O'Neill* case. Although the order did contemplate that the female recruits would be hired off the eligibility list to be created from administration of the new test, it also stated without qualification that the women would be hired in the "next class" at the academy. This problem came to surface in April, 1975, three months after the order, when a class commenced without any women on the ground that the new written test had yet to be given. Plaintiffs realized then that under the city's interpretation of the order it would be many months before the study would begin. When the city refused to consider an alternate means of selecting women for the study plaintiffs renewed their demands for a preliminary injunction.

After much delay, hearings on the plaintiffs' motion began anew in February, 1976. They were aborted in midstream and adjudication was again avoided when lengthy negotiations mediated by Judge Weiner yielded yet another compromise agreement. The new consent decree provided for another study of women as patrol officers, this time involving a minimum of 100 women to be hired within nine months, the study itself to be completed within two years.[108] As the city had represented that it was not planning to

106. *See* 13 Fair Empl. Prac. Cas. at 486.

107. Several days after the order, Mayor Rizzo was quoted as saying that men and women would never occupy the same patrol car. Storck, *A Charming Chauvinist*, Philadelphia Inquirer, Feb. 10, 1975, at 7-B, col. 1.

108. *See* United States v. City of Philadelphia, 14 Fair Empl. Prac. Cas. 1375, 1376 (E.D. Pa. 1977).

hire more than 500 new recruits within that two year period, this meant that 20% of them would be women. The decree also contained elaborate provisions to allow for the transfer of women in the Juvenile Aid Division to other more desirable positions within the department.

Ambiguities in the decree, including the fact that affirmative hiring commitments continued to be linked with performance studies, again caused problems. In April, 1977, well before the two year period had run, the city gave notice that it was going to hire several hundred more recruits than had been projected. No provision for such an eventuality had been made at the time of the consent decree other than the city's promise, contained in a separate letter to the government, to give sixty days notice of plans to hire in excess of the projected number. As it turned out, only two weeks notice was given of plans to exceed projections by enrolling an all male recruit class at the police academy.[109] Plaintiffs sought a preliminary injunction, arguing that further hiring must conform to the same 4 to 1 male/female ratio that had been in effect for the first 471 recruits.[110] The city, on the other hand, denied that the decree imposed any obligation beyond its hiring 100 women for the study. The ambiguous nature of the decree had made it possible for both sides to view its meaning quite differently.

There was no time for Judge Weiner to seek out an agreeable compromise and for the first time he was forced to take significant action without concurrence of the parties. Reflecting his perception of the true meaning of the decree, he enjoined the start of the pending recruit class unless at least twenty women were included.[111] From that point on, the city refused to be a willing participant in any further decrees. In early 1979 the court formally declared that the city's policy was in violation of title VII.[112] The event did not change the city's attitude. In September, 1979, it sought to enroll in the police academy an all-male class of 225 only to be blocked by court order.[113] In the many months of Judge Wei-

109. *See* Memorandum in Support of Motion for Preliminary Injunction (filed Apr. 11, 1977), United States v. City of Philadelphia, No. 74-400 (E.D. Pa., filed Feb. 19, 1974).

110. 17 Fair Empl. Prac. Cas. 162 (E.D. Pa. 1977).

111. *Id.*

112. *See* United States v. City of Philadelphia, 19 Fair Empl. Prac. Cas. 849 (E.D. Pa. 1979).

113. *See* United States v. Philadelphia, 20 Empl. Prac. Dec. ¶ 30,277 (E.D. Pa. 1979).

ner's attempts at conciliation it appeared that little in terms of reform had taken place.

C. Evaluation: The Role of Mediation

O'Neill and *Brace* presented their respective judges with a formidable task: eradication of racial and gender-based discrimination from within the Philadelphia Police Department. To varying degrees, the judges in both cases relied on their negotiations with the parties to produce appropriate remedies. In employment discrimination cases the traditional judicial remedy, to be imposed after hearings and formal argument, has been the quota. Apart from the rising political pressure against the use of quotas, it is not really an effective device for long term institutional reform as it fails to attack the root causes of discrimination. Thus, it is hardly surprising that these two judges looked away from the traditional approach to seek other solutions through the more flexible method of informal negotiations. Pursuit of the latter course did not mean that the judges had relinquished their judicial responsibilities: on the contrary, both became involved, in varying degrees, in the negotiating process. The roles they played were interesting ones: by their participation they learned of the various alternative solutions most acceptable to each side, thus educating themselves should a ruling ultimately have to be made; and through their comments they became barometers suggesting to the parties what the outcome might be if they failed to reach agreement.[114] What resulted were consent decrees that were often better adapted to the particular characteristics of each case than anything that could have been unilaterally imposed by the court.

Given that negotiation or mediation must play an important role in the process if institutional reform litigation is to be effective, the question remains as to how it should be integrated with traditional adjudication. Some light can be shed on this by analyzing these two cases in terms of the relative mix of adjudication and mediation seen therein.

In *Brace,* the court showed a marked preference for resolving disputes through negotiations and mediation. The case was characterized by incremental progression from consent order to consent or-

114. *See, e.g.,* Transcript of Jan. 10, 1973 conference (filed Jan. 12, 1973), Pennsylvania v. O'Neill, No. 70-3500 (E.D. Pa., filed Dec. 21, 1970).

der. Fundamental disagreements were consequently never addressed and ultimately when they could no longer be concealed the court was forced to step in and order the city to hire women on a quota basis. By contrast, in *O'Neill* the court's approach was more traditional. Court adjudication of wrongdoing came very early in the case and only then was followed by consent order remedies. Judged in terms of their respective accomplishments, the *O'Neill* approach must be considered the more effective. Although both cases notably increased the number of women and blacks employed as police officers, the *O'Neill* litigation produced a new, purportedly less biased written test, forced the city to revise its background review criteria, and created a special review panel designed to insure that hiring practices remain non-discriminatory. Little in terms of lasting reforms has yet to be produced by the *Brace* case.

Outside of public interest litigation it has become increasingly common for lawsuits to be resolved through negotiation without the court ever making a finding of liability. The extent of such negotiations are usually confined to determining what amount of money would be appropriate compensation for the plaintiff's loss. Once agreement has been reached, the case ends and the parties may have no further contact with each other. However, negotiating a solution to a bona fide public interest suit against a large public body presents quite different problems. The issue is never limited to the simple question of how much, but rather the parties must choose between an almost infinite variety of options. If there has been no initial finding of wrongdoing, as in *Brace,* meaningful results may be very difficult to achieve. Defendants, clinging to the hope of possible exoneration, will resist any long term solution. Whatever concessions that are made are likely to be concealed so as to avoid any admission of wrongdoing. While this is a common practice in any negotiated settlement, it can be a particular problem in institutional reform suits where the terms of the negotiated agreement have to be implemented over time by the litigants. In *Brace,* the sharp disagreement over how to interpret the various accords was common and could be attributed, in part, to the ambiguous position of the litigation. For example, each side could legitimately see the 1976 consent decree as either a permanent commitment to affirmative action or a temporary accommodation for the purpose of a study. The differences caused by such ambiguities are likely to grow over time as leadership within the defendant in-

stitution changes, further confusing any shared understanding.

When such negotiations take place only after a judicial finding of wrongdoing, these problems are reduced. To begin with, focus of the discussion is narrowed. The problem becomes what should be done to correct what has been adjudicated as an institutionally deficient arrangement rather than simply what might defendants do to improve a presumably tolerable state of affairs. The reluctance towards seeking long term solutions is reduced and since the remedial objectives become clearer there is less likelihood of fundamental differences developing over the meaning of a consent decree. Finally, the fact that the court has made a formal finding of wrongdoing gives much more weight to the ever present threat of judicial coercion should a negotiated solution not be attained. In *O'Neill,* the city knew from the outset that the court would act if they would not agree to meaningful reforms, whereas in *Brace* this message was much less clear until the very end.

An approach similar to the one used in *O'Neill* was suggested as a model for all institutional reform cases in a recent law review comment.[115] It was proposed that, after a judicial declaration that violations of the law had been established, the defendant public body should be given a series of opportunities to devise adequate remedial measures. The court's function should be the supervision of negotiations, stepping in to mandate its own solution only when and if the negotiations proved fruitless.

Consultation and negotiation among the court and the parties are essential to the effectiveness of public interest litigation. However, *O'Neill* and *Brace* indicate that they are devices best used only after more traditional forms of adjudication have narrowed the case to a question of appropriate remedies.

V. The Problem of Enforcement

A. Noncompliance With Discovery Orders

Enforcement of remedies and policing of consent decrees presented unique problems in both cases because of Philadelphia's particular political setting during the 1970's. City politics was dominated by Mayor Frank Rizzo, the former police commissioner who had risen through the ranks from patrolman. A vigorous and outspoken defender of the police department, he strongly resented the

115. *See Developments-Section 1983, supra* note 6, at 1247-50.

charges of wrongdoing represented by the two lawsuits.[116] The attitude of the city administration toward these suits can be best illustrated through an incident which occurred in 1971 as discovery was beginning in the *O'Neill* case.

Plaintiffs wanted to inspect the background investigation files of all job applicants over the past five years. They felt that review of the files was essential if they were to determine why background investigations disqualified blacks at twice the rate of whites. The court agreed with the plaintiffs and on July 15, 1971, ordered that the files be opened despite the city's objection that the integrity and confidentiality of their investigations would be compromised.[117] Several days later, on July 21, plaintiffs' counsel, Mr. Sawyer, and a number of law student assistants reported to the police commissioner's office to begin reviewing the files. The time and place had been prearranged with the city solicitor. Nonetheless, they encountered unusual, if not comic, resistance. At first they were told that the commissioner was not expecting them and that he was unavailable. Next it was learned that he was out and that the inspection could not begin until he approved the court order. After further delays, Mr. Sawyer asked an official if he could see the senior officer on duty to present him with the order of the court. After making inquiries, the official returned with the response that he was not authorized to tell Mr. Sawyer who the senior officer was.[118] As plaintiffs' frustration continued, a meeting was arranged for later in the day between all counsel and the court. At that meeting the city solicitor informed the court for the first time that the order could not be complied with until approved by the mayor who was then out of the country. Unimpressed, the court ordered that the inspection begin the following morning. The next morning, Mr. Sawyer was informed that the mayor had refused to permit compliance with the order and that the city was filing a motion for reargument. Later that day the court heard reargument, reaffirmed its previous orders and directed that inspection commence forthwith. Still, the police department refused to comply. On July 26 the

116. *See* Philadelphia Inquirer, Dec. 23, 1970, at 1, col. 1.

117. In the order compelling discovery, the court gave the city permission to blot out names and addresses to protect the confidentiality of the files. Order (filed July 15, 1971), Pennsylvania v. O'Neill, No. 70-3500 (E.D. Pa., filed Dec. 21, 1970).

118. For a complete account of these events see Affidavit of Henry W. Sawyer, III (filed July 3, 1971), Pennsylvania v. O'Neill, No. 70-3500 (E.D. Pa., filed Dec. 21, 1970).

court of appeals denied the city's request for a stay and on the 28th a contempt hearing was held by the district court. The city then indicated that it was prepared to open the files for inspection only if its most recent application for a stay was turned down by the Supreme Court. Suggesting that its leniency was due to defendants' status as public officials, the court imposed fines of $500 should there be immediate compliance with its order and $5,000 if the city insisted on awaiting the outcome of its Supreme Court appeal.[119] When, on August 3, Justice Brennan denied the application for a stay the city finally opened its files for inspection.

Although the 1971 episode was the most dramatic example of the city's resistance to court orders, it was just one of many occasions in both suits where the city either balked at complying with a court order or ignored commitments made in consent decrees. In *O'Neill*, the city's record of compliance with the 1973 consent decree was poor. It failed to give rejected black applicants the required notice both of the reasons for their disqualification and of their right to appeal.[120] It was several months late in providing plaintiffs with the files of those rejected applicants who desired an appeal.[121] It delayed compensating the independent member of the special appeals panel until he threatened to quit.[122] Under pressure to make up for its poor performance, the city formally committed itself by consent decree to refrain from all hiring until completion of the appeals process for those rejected applicants then awaiting review.[123]

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119. *See* Transcript of July 27, 1971 hearing (filed July 30, 1971), Pennsylvania v. O'Neill, No. 70-3500 (E.D. Pa., filed Dec. 21, 1970). There is no record that the fine was paid.

120. Plaintiffs' Motion for Contempt and Sanctions (filed July 25, 1974), Pennsylvania v. O'Neill, No. 70-3500 (E.D. Pa., filed Dec. 21, 1970). After a hearing on July 31, 1974, the city was found in contempt, fined $750 in counsel fees and given 10 days to complete notification of the rejected applicants.

121. *See* Transcript of Nov. 26, 1973 conference (filed Dec. 7, 1973) and Defendants' Motion for Protective Order (filed Apr. 4, 1974), Pennsylvania v. O'Neill, No. 70-3500 (E.D. Pa., filed Dec. 21, 1970).

122. The failure to pay the independent member of the review panel was raised in a contempt motion. *See* note 121 *supra*. The court ordered the city to complete outstanding payments within ten days. Several months later, the court was forced to act again because the city refused to enter into a firm contract with that same panel member. The court ordered the city to submit an appropriate contract within five days. *See* Transcript of Oct. 17, 1974 hearing (filed Oct. 31, 1974), Pennsylvania v. O'Neill, No. 70-3500 (E.D. Pa., filed Dec. 21, 1970).

123. Order (filed Apr. 4, 1974), Pennsylvania v. O'Neill, No. 70-3500 (E.D. Pa., filed Dec. 21, 1970).

Despite this commitment, new recruits were soon hired and a new class began training at the police academy, even though there were appeals still pending. Because of possible hardship to those already enrolled, the court declined plaintiffs' invitation to enjoin the class. However, to temper the discouraging effect of "this latest example of seeming intransigence," it ordered letters of apology sent to those black applicants hurt by the city's conduct.[124] Due to plaintiffs' frustration with the city's recalcitrant behavior, they filed a massive contempt motion in November, 1974.[125] It recounted in detail the many instances where the plaintiffs' counsel had to seek the court's assistance to enforce outstanding court orders.[126] The plaintiffs sought reimposition of a hiring quota as well as a penalty assessment of $260,000 to be distributed among class members who had been prejudiced by the delays. In view of the city's long history of contumacious conduct, the motion was a significant test of the court's willingness to defend the integrity of its process. The court's response was simply not to rule on the motion.[127]

The city's performance in *Brace* was not notably better. Its promised studies of the performance of women on patrol duty were forever being delayed. Although it had been ordered in 1977 to continue making twenty percent of its recruit classes female, only 11.5% of the next 450 recruits were women.[128] Especially trying was the implementation of the transfer provisions in the 1976 consent decree. Under that decree senior policewomen then in the Juvenile Aid Division could transfer into other more desirable areas of the department if they could demonstrate the equivalent of one year's

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124. Memorandum Opinion and Order (filed Aug. 2, 1974), Pennsylvania v. O'Neill, No. 70-3500 (E.D. Pa., filed Dec. 21, 1970).

125. *See* Plaintiffs' Motion for Contempt (filed Nov. 13, 1974), Pennsylvania v. O'Neill, No. 70-3500 (E.D. Pa., Dec. 21, 1970).

126. According to their motion, plaintiffs were forced to seek the imposition of contempt sanctions at least eight times in the past. *Id.*

127. Although the contempt motion itself remained undecided, Judge Fullam, in awarding attorneys' fees, took into consideration the efforts of plaintiffs' counsel in attempting to obtain the city's compliance with court orders. *See* Pennsylvania v. O'Neill, 431 F. Supp. 700, 702-12 (E.D. Pa. 1977).

128. *See* Memorandum of Plaintiff United States in Response to Defendant City of Philadelphia's Notification of Hiring (filed Oct. 27, 1977), United States v. City of Philadelphia, No. 74-400 (E.D. Pa., filed Feb. 19, 1974). Subsequently, the court ordered that further hiring continue only if this deficiency were corrected. United States v. City of Philadelphia, 17 Fair Empl. Prac. Cas. 166 (E.D. Pa. 1977); *see also* United States v. City of Philadelphia, 20 Empl. Prac. Dec. ¶ 30,277 (E.D. Pa. 1979) (police academy class enjoined unless one out of four enrolled are women).

experience in "police officer work."[129] Otherwise transferees would face demotion and assignment to sector patrol duty with all the other new recruits.[130] Although the decree required it to act "promptly," the city took six months to determine the degree of "police officer work" experience in the transferees' backgrounds. During that time, six of thirteen original applicants dropped out. Police Commissioner O'Neill then found that none of them had any of the necessary "police officer" experience though most of them had been with the department for many years. Accordingly, they were all assigned to the police academy to be retrained for sector patrol duty. Exercising its right of review under the consent decree, the court rejected the commissioner's findings and restrained the city from assigning the transferees to sector patrol work.[131] When the city reacted by simply not reassigning any of the women out of the police academy, the court specifically ordered that they be transfered to non-sector patrol assignments.[132] It was only several weeks later, after a contempt motion had been filed and after elaborate negotiations took place involving personal interviews between the court and each of the seven women, that they were assigned to non-sector patrol positions.[133]

B. Evaluation: Coping With Noncompliance

Two types of city behavior were usually responsible for most of the enforcement problems. Either court orders were openly defied or else they were simply disregarded. What follows is a brief analy-

129. *See* 573 F.2d at 808-09.

130. The requirement that transferees have one year of "police officer work" or equivalent experience was an intentionally ambiguous provision included to avoid the issue of whether women who transferred would be required to do patrol work. Many policewomen wanted the advantage of the greater mobility and increased opportunity for promotion available to policemen without having to do patrol work. The city, less eager to give women these opportunities and anxious to prove them unsuited for police work, opposed giving women the advantages of full equality within the department without also subjecting them to the rigors of patrol duty. The ambiguous provision permits the issue to be confronted on a case by case basis where factors such as the policewoman's prior experience and the type of work she intended to perform (*e.g.*, traffic control) would be considered.

131. Opinion and Order (filed Feb. 2, 1977), United States v. City of Philadelphia, No. 74-400 (E.D. Pa., filed Feb. 19, 1974); *see* 573 F.2d at 808-09.

132. Memorandum Opinion and Order (filed March 24, 1977), United States v. City of Philadelphia, No. 74-400 (E.D. Pa., filed Feb. 19, 1974), *aff'd*, 573 F.2d 802 (3d Cir. 1978).

133. *See* Motion by the United States for an Order to Show Cause why Defendants should not be found in Civil Contempt (filed May 3, 1977), United States v. City of Philadelphia, No. 74-400 (E.D. Pa., filed Feb. 19, 1974).

sis of these two forms of noncompliance with suggestions as to how they might be controlled.

The threat of open defiance of court orders, although it occurred only rarely in either case, is a serious problem in any public interest suit where there is a public entity defendant. It is often argued that successful defiance of judicial mandates will lead to a loss of public respect for the judicial system.[134] Obviously, sustained and open repudiation of judicial commands would seriously threaten the continued viability of the rule of law. Short-lived defiant behavior which gives way to compliance, however, should not precipitate such a crisis in credibility. This was the nature of the city's resistance to the discovery orders in *O'Neill,* as well as its resistance to the transfer of policewomen in *Brace,* and in neither instance did the case suffer as a result. This is not to suggest that the city's recalcitrance should be condoned. Nonetheless, recognition must be afforded to the broad impact of minor orders in institutional reform litigation and to the pressures exerted on public officials by adversely affected interest groups to resist such orders. Some of this friction could be reduced if courts, as a policy, would briefly postpone execution of potentially controversial orders. Such advance notice would give the responsible authorities and affected interests the opportunity to evaluate more rationally and deliberately their predicaments. Further negotiations might ensue and an outstanding order could be modified to be made more palatable. If this approach were taken confrontations similar to those described above could be avoided.

The most persistent enforcement problem witnessed in these cases was the city's simple disregard, deliberate or otherwise, of its legal obligations. This problem was most pronounced during implementation of the various consent decrees. Each time the plaintiffs complained to the court the city would defend itself either by invoking a strained interpretation of its obligation, by citing limitations upon personnel available to perform the particular task or by simply pleading inadvertent neglect. One might have expected the city to show greater goodwill in respecting the *Brace* consent decrees as, unlike *O'Neill,* they had not been negotiated under the pressure of a judicial finding of wrongdoing. If there was any consequent difference, it was not detectable from the city's behavior.

134. *See, e.g.,* Aldisert, *supra* note 5, at 475; Cox, *supra* note 5, at 103-07.

Should the subtle resistance experienced in these cases be at all representative of conduct in other institutional reform cases then serious questions of manageability must be faced. Many of these suits often culminate in consent decrees or court orders which require a complex reordering of the defendant's behavior well into the future. If anything close to the degree of non-compliance seen here can be expected, then enforcement of these remedies could tie up judicial resources for years after the principal issues in the case have been resolved. A partial solution to this problem might be for the court to establish independent monitoring bodies, akin to the special review panel in *O'Neill,* to relieve the court of most of the enforcement burden. Such bodies could be designed to oversee the implementation of relief and be given the authority to find a defendant in breach of its obligation and to order compliance.[135] The extent to which the court's workload could be reduced would depend on the degree of real power given to the monitoring agency. It is possible that continued court involvement could be limited to reviewing an occasional progress report and to hearing appeals from the monitoring agency of certain very important issues. Unless some solution to these problems is found, institutional reform litigation threatens to flounder because of its sheer unmanageability.

VI. Conclusion

In this article an attempt has been made to lay bare the mechanics of institutional reform litigation as reflected through two cases from Philadelphia. It is hoped that it will help the reader appreciate the dynamics of this type of litigation as well as provide him with some basis for an appraisal of its effectiveness. Furthermore, in singling out for analysis three problem areas, an effort has been made to highlight procedural concerns unique to this genre of litigation that merit special attention.

It is important to analyze the functioning of these types of cases for at least two reasons. First, institutional reform litigation shows signs of being here to stay and, if so, the legal community has every interest in learning how to make it work as effectively as possible. Second, even if measures curtailing such litigation are feasible, to do so would be undesirable given the positive contribution institu-

135. *See* Note, *Implementation Problems in Institutional Reform Litigation,* 91 HARV. L. REV. 428, 459-60 (1977).

tional reform litigation has made toward implementing social change. It is thus important that these suits be studied, their failings analyzed and every effort made to insure their continued viability. This article has explored only a few facets of the phenomenon as reflected in the limited context of two large employment discrimination suits. Institutional reform litigation extends over a much broader area and it is hoped that this article will help encourage further study of the mechanics of the process in those other contexts.