“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.


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).
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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. 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. 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. 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

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

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. Regulations govern every aspect of inmate behavior in order to control movement within the prison.

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, 549-49 (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 Bethia 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 536-38 (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].


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
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Guards, the officials immediately responsible for enforcing regulations, often lack official sanctions and incentives to control inmates. 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. 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.

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. Guards often rely on the inmate hierarchy to maintain the appearance of order. They give powerful inmates information, goods, and immunity from enforcement of institutional rules in exchange for the maintenance of a facade of order.

This informal system increases the sense of injustice felt by less powerful inmates, aggravates antagonisms between guards and inmates, and, ironically, encourages "the highest possible threat of disruption and violence"—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.


15. See C. Silverman, 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.


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.\(^2\) Inmates often have no internal means of expressing their dissatisfaction or obtaining redress other than resorting to violence.\(^2\)

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.\(^2\) 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 or influenced by staff who are afraid of the consequences of reform. Members of the prison community who benefit from the current structure are likely to resist efforts to reduce their control.

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

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,\textsuperscript{33} to expose prison officials to more effective methods of administration,\textsuperscript{34} and to continue to apply pressure so that these methods are developed.\textsuperscript{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. \textit{The Master as Intervenor in Prisons}

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

\begin{itemize}
\item \textsuperscript{33}See \textit{Commission on Accreditation for Corrections}, \textit{Manual of Standards for Adult Correctional Institutions} xii (1977) (need to establish professional standards for corrections); \textit{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).
\item \textsuperscript{34}See note 25 \textit{supra}.
\item \textsuperscript{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. \textit{See Ex parte Peterson}, 253 U.S. 300 (1919).
\item Rule 53 of the Federal Rules of Civil Procedure establishes a statutory basis for the appointment of a special master. The rule provides:
\begin{enumerate}
\item \textit{[T]he [district] court in which any action is pending may appoint a special master therein}. \textit{[T]he word “master” includes a referee, an auditor, an examiner, a commissioner, and an assessor}.
\item \textit{[T]he word “master” includes a referee, an auditor, an examiner, a commissioner, and an assessor}.
\item \textit{A reference to a master shall be the exception and not the rule}.
\item \textit{The order of reference to the master may specify or limit his powers}.
\item 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.
\end{enumerate}
\item \textit{[T]he court shall accept the master's findings of fact unless clearly erroneous}.
\end{itemize}

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holding hearings, and reporting to the court on the issues under consideration.\textsuperscript{38}

In prison and other civil rights cases,\textsuperscript{39} masters often perform a broader role. Masters' duties in prison cases concern primarily the provision of relief, rather than the determination of liability.\textsuperscript{40} They usually perform some combination of adjudicative and administrative functions to facilitate the implementation of the court decree,\textsuperscript{41} in addition to their traditional fact-finding role.\textsuperscript{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.\textsuperscript{43} It leaves the definition of the master's powers and duties to the discretion of the district court judge.\textsuperscript{44}

\textsuperscript{38} See Kaufman, supra note 36, at 462-68.

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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).


\textsuperscript{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").

\textsuperscript{43} See note 36 supra.

\textsuperscript{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, 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.

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. The master often finds that the decree implementation process is impeded by the parties' disagreement over what specific changes the order requires and whether those changes can be accomplished by the defendants. 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. Because the parties are

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


(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
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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 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.

Masters sometimes perceive that the prison administrator either cannot or will not provide the direction necessary to achieve compliance. They may respond by assuming the role of adviser to the parties. Masters have also attempted to carry out administrative functions such as formulating plans to address problems, 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 . . . .")


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,\textsuperscript{56} and forming advisory
policy groups among inmates and staff.\textsuperscript{57} Finally, when other methods
fail, masters have functioned as enforcement agents. They have acted
formally by instituting proceedings to sanction noncompliance,\textsuperscript{58} and
informally by advising the defendants of the court's dissatisfaction
and the likelihood of more drastic judicial action.\textsuperscript{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.\textsuperscript{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 effec-
tiveness and legitimacy of judicial intervention during implementation
of the decree.

and function of newly planned prison); Final Report of Special Master \textit{In re Orleans}
mends major reorganization of prison administration).
\textsuperscript{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).
\textsuperscript{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 work-
ing 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.
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{60} See pp. 1066-67 \textit{supra}.
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A. Need for Constructive Dispute Resolution

The transformation of the patterns of interaction necessary for prison reform cannot be achieved by decree. 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. Adjudication, which provides for dispute resolution in an adversary proceeding with an outsider presiding, 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, 125 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. Moreover, adjudication may impair relationships when the parties resume their normal roles.

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. 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.

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. 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 problem-solving "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.


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.
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sequent inattention to the substance of the court decree. 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. They develop the view that every controversial judicial action presents an opportunity to challenge the court's authority.


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.")
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; 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.

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. Some apparently believe that federal court support significantly enhances their power in the institution. Thus, inmates sometimes insist on confronting every issue, rather than attempting to compromise.

As the decree implementation process proceeds, plaintiffs sometimes become increasingly disillusioned with the court and the master be-
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cause of the persistence of arbitrary treatment by guards and prison officials, violent conditions, and the destructive relationships underlying both phenomena. 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, and counsel will lose the motivation and patience necessary to explore methods of problem-solving through the decree implementation process. Plaintiffs may eventually become unwilling to cooperate with the master's attempts to function as intermediary, adviser, or administrator within the prison.

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-I 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.\textsuperscript{81} The adversarial presentation of issues places prison officials in a defensive posture.\textsuperscript{82} The intervention of counsel often accentuates the adversary presentation\textsuperscript{83} and predisposes parties to avoid dealing directly with the needs, demands, and objections of the other side.\textsuperscript{84} The polarization of the opposing parties obscures and intensifies their conflicts.\textsuperscript{85} and diverts resources from identifying and confronting issues.\textsuperscript{86}

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

\textsuperscript{81} See notes 63-65 supra.
\textsuperscript{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.
\textsuperscript{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).
\textsuperscript{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).

\textsuperscript{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).
\textsuperscript{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 56-54.
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.

\textsuperscript{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).
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tention to their particular interests. The master may deal, therefore, primarily with named plaintiffs who, although often the most powerful and articulate inmates, are not necessarily representative of the general population's interests. 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, so that guards, counselors, and even wardens are excluded from negotiating and decisionmaking.

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. 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. 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 15-17 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.\textsuperscript{95} They may, therefore, avoid informing the master of problems underlying their failure to achieve compliance,\textsuperscript{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.\textsuperscript{97} In such situations, the parties will perceive the master as biased and will refuse to cooperate with his informal efforts.\textsuperscript{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.\textsuperscript{99} Instead, he will respond to specific

\textsuperscript{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, \textit{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.

\textsuperscript{96} See, \textit{e.g.}, Defendants' Attorney A at 1 (staff avoided master and gave him misinformation); cf. Felstiner, \textit{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).

\textsuperscript{97} Some prison officials view the master with suspicion, because he communicates openly with inmates. See, \textit{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, \textit{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, \textit{supra} note 19, at 7-9.

\textsuperscript{98} See, \textit{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.'")

\textsuperscript{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, \textit{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, \textit{supra} note 67, at 172 ("To act wisely, the economic manager must take into account every
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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
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.\footnote{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.\footnote{107} In addition, a master's informal suggestions may be interpreted as formal requirements for compliance.\footnote{108}

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

\footnote{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).}

\footnote{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."}

\footnote{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).}
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impinge on his capacity to maintain the passive, impartial posture of a fact-finder. It is often unclear whether the master should act on his own motion, whether he should communicate ex parte with counsel or the judge, whether he should testify in the case, or whether he can communicate with the media. 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).

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. 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, 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. This lack of accountability creates the possibility of abuse, 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. 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
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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{123} Short of such radical

order of reference, that standard will prevail. \textit{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).

\textsuperscript{120} \textit{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. \textit{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.").}}

\textsuperscript{121} \textit{See, e.g., Sheriff B at 3 ("We felt the attorney had to be our buffer zone.")}

\textsuperscript{122} \textit{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).}

\textsuperscript{123} \textit{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, helps develop methods of selecting representatives of the conflicting groups, clarifies the areas of conflict, facilitates communication, and encourages cooperative approaches to problem-solving.

A grievance mechanism is an ongoing internal system of negotiation and dispute resolution. 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. Any inmate can invoke the grievance mechanism by filing a complaint; the committee initially determines if the complaint is "grievable," 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. The inmate may always appeal the decision to an external review committee.

Despite their potential effectiveness, such informal techniques have not been widely instituted. 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.

Despite their potential effectiveness, such informal techniques have not been widely instituted. State and federal governments should...
create incentives for prisons to use mediation and grievance mechanisms.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{144} Moreover, the continuing
possibility of a court's imposition of coercive measures may serve as incentive for administrators to develop standards and institute adequate dispute-resolution mechanisms.  

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, granting inmates' requests for damages, or ordering the prison to be closed.

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. 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.


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. 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).