New England Journal of Public Policy

Volume 30
Issue 1 *Wealth, Power, and the Public Interest: Building Equity Culture and Civic Stewardship | Select writings by Marcy Murninghan*

Article 8

3-20-2018

Getting Power Back: Court Restoration of Executive Authority in Boston City Government (1985)

Marcy Murninghan
marcy.murninghan@gmail.com

Getting Power Back: Court Restoration of Executive Authority in Boston City Government

This article, originally published in 1985, is based partly on the author's experience with the Boston school desegregation case, but goes beyond it. It chronicles some of the events that occurred when a state and a federal court attempted to disengage from active jurisdiction over two Boston public systems: the Boston Public Schools and the Boston Housing Authority. It makes three proposals, which, if enacted, would help to keep the courts out of day-to-day management of municipal operations. It also makes some generalizations about the court-agency interplay that are relevant to the post-remedial phase of institutional reform litigation. The author uses the term "restorative law" to describe this court-controlled process of returning power to the executive branch.

Within Boston, a transition has occurred regarding the governance and management of public services. There is a new structure for the City Council and School Committee and a new administration team in City Hall and School Department headquarters. A populist air surrounds municipal government; terms like *openness* and *access* are used to describe what was previously viewed as an insiders' club.

Besides the changes in representation and mood, another kind of transition has occurred in local government-one that is intergovernmental and pertains to the relationship between the courts and the executive branch. Over the past year, the city's administration has recovered power from the courts to manage two major segments of municipal operations: Boston's public housing and its public schools.

The restoration of administrative authority, autonomy, and accountability is part of an executive recovery process that occurs in the post-remedial phase of institutional reform litigation. In place of a bifurcated decision-making structure, divided between courtrooms and corner offices with their different sets of rules and procedures, the recovery of executive power reestablishes a single structure for implementing public policy. Since this change takes place as the result of court action and final decrees, the concept of "restorative law" is used. Restorative law refers to the executive recovery process; in its broadest context, the concept applies to the process by which defendants in institutional reform cases demonstrate both the commitment and capacity to operate a system in compliance with the law.

This article will treat the issue of executive recovery by advancing the concept of restorative law as it applies to Boston city government. A sketch of historical and contextual factors relevant to the judicial activism debate will be drawn to facilitate an understanding of the controversy, and the special nature of court entry into Boston city services will be described. The article will then identify some of the forces at work that contribute to the executive recovery process and will outline some of the basic conditions of court disengagement from the public housing and public school system. In addition to outlining actions that reduce judicial management activity, this article will make a series of propositions which can help assure that the courts will not have to reassert their influence within the Boston public administrative realm. Put plainly, this analysis will specify general conditions conducive to getting the courts out of the business of day-to-day management of public affairs, and will identify actions which help assure that they don't have to get back in.

Background and Historical Context

More than any other big city, Boston is characterized by a shadow system of government: courtrooms serve as policy-making arenas in addition to corner offices and council or

Reprinted from *New England Journal of Public Policy* 1, no. 2 (1985), article 9.

committee chambers. Many attribute this to a parochial definition of the public interest and sense of ethical responsibility held by many local officials. The management of public affairs through the issuance of remedial court decrees, however, became a special phenomenon of the 1970s and 1980s throughout the country. In part due to the unwillingness or inability of public officials to discharge their duties in a manner consistent with expanding interpretations of constitutional rights, and in part due to greater procedural access to public law litigation activity, the growth of so-called judicial activism has blurred the boundaries among the legislative and administrative branches of government.

Especially since the Supreme Court decision in *Brown* v. *Board of Education*,[1] the use of court-prescribed corrective measures issued to institutions in which constitutional violations are found to exist has complicated the role of agency managers and subjected the judiciary to a great deal of criticism. The equitable remedial powers of a court, when exercised over public policy disputes, often take the form of affirmative decrees that create some form of institutional power realignment.[2]

To some, this judicial behavior is a proper response to the shortcomings of legislative and executive behavior. To others, such behavior represents judicial overreaching and an attack on the very structure of democratic government.

Within the city of Boston, there are several examples of direct court involvement in the resolution of public policy disputes. Since the mid-1960s, federal or state courts have played a role in matters pertaining to school desegregation; education for children with special needs or possessing limited English-speaking ability; public housing; prisoners' rights as affected by facilities at the Charles Street Jail and the Deer Island House of Correction; municipal finance, dramatically represented by state court involvement in the so-called Tregor dispute of 1981; [3] and environmental conditions within Boston Harbor.

The resultant forms of court intervention, most visibly displayed in the cases affecting the Boston School Department, the Boston Housing Authority (BHA), and the Boston Harbor, followed extended periods of attempts to settle disputes through appeals to legislative or administrative action.[4] Following legislative or administrative inaction, or inappropriate action, the courts became ineluctably drawn into public administration. Once in, they stayed in: The remedial phase of the Boston school desegregation case is in its eleventh year; the receivership affecting the BHA lasted five years.

The Courts' New Role: The Judge as Manager

The institutional reform aspect of these cases in particular, and judicial activism in general, raises questions about the validity of the courts' entry into political and administrative realms. The debate over judicial activism centers around two primary issues: the *propriety* or *legitimacy* of the courts' new role, given the separation of powers doctrine contained in the United States Constitution; and the *efficacy* or *capacity* of the courts, as an institution, to carry out responsibilities that are extrajudicial. In either case, the critical response to judicial activism often is further divided into concerns based on principles and axioms or partisan disagreements over the policy outcomes (such as school busing) of judicial decision making.[4]

The Boston Cases and Governmental Abdication

Before turning to the issue of restoring authority for managing the public's business to Boston's mayor, City Council, and School Committee, it is important to begin with an understanding of the special character of judicial intervention.

Neither of the two judges Garrity—Paul and Arthur—retained active jurisdiction over the BHA or the School Department because he had nothing better to do or because he had a secret yearning for public administration. Despite their differences in manner and temperament, each Judge Garrity took pains to facilitate a resolution of plaintiff grievances without the necessity of direct court involvement.[5]

In the *Findings, Rulings, Opinion and Orders* in *Perez* v. *Boston Housing Authority* of July 25, 1979, the court took note of "the history of this case and the repeated efforts by the [Plaintiff Class of] Tenants over the years in seeking and in following up every remedy short of receivership in order to obtain safe, sanitary and decent housing as mandated by law."[6] Neither the presence and good efforts of a master (and staff) to perform services on behalf of tenants, nor the consent decree entered on May 31, 1977, resulted in any significant change in housing conditions for the city's poor. Therefore, the court turned to the only remedy that had not yet been attempted: the appointment of a receiver who would have full authority to administer, manage, and operate the BHA, with control over BHA funds and revenues. The existing BHA's Board of Commissioners was stripped of its powers. Following an appeal to the Supreme Judicial Court, in which it approved the appointment of a receiver, Judge Paul Garrity appointed Lewis H. Spence as receiver on February 5, 1980.

By 1984, the achievements wrought by Harry Spence and the staff of the Housing Authority were considered remarkable, both for their contributions to managerial effectiveness and because they helped ignite the public spirit on matters pertaining to housing. These achievements, however, might not have been possible had it not been for the sanctions provided by the receivership. The receiver's court-ordered responsibilities could be carried out without the encumbrances of a five-member appointed board and in spite of the reluctance of other public officials to tackle housing issues. For the duration of Judge Garrity's receivership (the court retained its jurisdiction until late 1984), the board was prevented from exercising any authority.

The receiver enjoyed the benefits of autonomy, felt especially in purchasing and personnel areas. Both figuratively speaking and literally, the task of rebuilding an organization was carried out brick by brick. The development and installation of modern management systems, the negotiation of collective bargaining agreements, the fostering of a preventive approach to capital maintenance, the implementation of performance evaluation systems tied to merit salary increases—these internal initiatives, in the words of one BHA senior staffer, "have one common thread:

> We're attempting to get career employees and the rank and file to buy into what we're doing. They have an opportunity to be involved, and hopefully don't have the impression that we're trying to impose.

The benefits of the receivership were then noted by the same individual:

> The political insulation has been quite useful insofar as management system developments and morale-related achievements [are concerned]. This doesn't mean that we didn't have to discuss things with the public or negotiate with the union, but the removal of the impediment was useful.

A different pattern of court-agency relations emerged in *Morgan* v. *Hennigan*, the school desegregation case. Following the liability opinion of June 21, 1974,[7] the Student Desegregation Plan—the first in a series of over 400 remedial orders—was issued by U.S. District Court Judge W. Arthur Garrity Jr., on May 10, 1975.[8] The scope and sweep of the court's jurisdiction were unprecedented: Although Judge Garrity utilized remedial guidelines set forth in the Denver school desegregation case,[9] the Boston orders were unique and provoked well-known controversy at the local, state, and national level. The raw and noisy politicization and polarization experienced in Phase I and Phase II of the desegregation plan, punctuated by changes in the superintendency, by School Committee judicial appeals, and by extensive media coverage, reached its zenith with the partial receivership imposed on South Boston High School on December 9, 1975.[10]

The breadth and depth of the court's intervention came to dominate all aspects of educational policy-making and practice within the School Department. The bureaucratic labyrinth of School Department operations, coupled with the reluctance of department officials to carry out any responsibilities in connection with desegregation unless they were specifically ordered by the

court, contributed to a gradual displacement of administrative authority. Public opposition to busing, reinforced by the actions of many local officials, became directed to the federal court for "taking over" the school system.

Through administrative default, the court became more involved with management activities. This involvement, however, was not as extensive as many portrayed it to be; the level of detail and the scope of authority contained in the court's orders, from the summer of 1975 and continuing through the years, varied from issue to issue. Some orders were broad, leaving a great deal of administrative discretion to the School Department. Other orders were quite specific, representing judicial usurpation of administrative authority.

In retrospect, there continues to be disagreement as to the judicial style employed during the remedial regime: Some claim that Judge Garrity went too far in the use of his authority; others claim that he did not go far enough. My assessment is that both conclusions are true. As a result, there always was a question as to where administrative authority ended and judicial authority began.

A well-known feature of the Boston case is that the character of Judge Garrity's intervention incorporated educational as well as equity concerns. The creation of magnet schools and institutional pairings, the orders pertaining to vocational-occupational education, the partial receivership imposed on South Boston High School, and the establishment of parent advisory councils all were designed to reform the school system and infuse it with much-needed vitality. These reforms supplemented the other remedial tools—racial composition, school or district consolidation, and transportation—used by the court.

There were managerial byproducts, however, of the court's intervention that affected the capacity of the School Department to carry out its educational mission. Even though the earlier phase of resistance and hostility eventually gave way to greater acceptance of court-ordered responsibilities, a pattern of administrative dependency set in. Owing both to the erosion of authority and limited professional capabilities, the School Department came to rely on the court for directives and, in some cases, used the court to further its own policy or political aims.

Consistent with the political science maxim that institutions in conflict over time begin to look and act alike,[11] the court became entangled with the administrative mechanism it sought to cure, and the School Department became entangled with the principled incrementalism of the advocacy process. A cycle of dependence ensued, and a sort of "psyching out the court" syndrome developed. The department became more passive as the court, since it recognized that its orders were not necessarily self-executing, became more deeply drawn into managerial operations. The orders accumulated and became more detailed.

The appointment of Robert C. Wood as superintendent in 1978 marked a turning point in the court-agency relationship. While progress toward achieving the court's remedial objectives had been made under the leadership of Marion Fahey, Wood's predecessor as superintendent, the Wood administration sought, via its mandate for reorganization, to achieve voluntary compliance with many of the major court orders because the court's remedial objectives were shared. Expected judicial reaction became only one of the many factors considered in the administrative decision making and implementation process. From the court's perspective, many of the extrajudicial factors with which it concerned itself earlier now were viewed, more or less, as forces to be managed by school officials.

Despite Wood's firing in the summer of 1980, there continued to be progress within the School Department toward compliance with outstanding orders; and despite occasional anti-court outbursts and criminal problems associated with contract-fixing, the School Committee displayed a concern for stability and quality in educational operations, a concern that was to become conducive to and reënforced by the promise of court withdrawal. Especially with the election of two black members in the fall of 1981, the governance structure and administrative operations of the Boston public schools became quite different from what existed in 1974 and 1975.

By the time of the city elections of 1983, a succession of actions occurred that set the stage for the restoration of administrative authority for the School Department and the Housing Authority. Both judges Garrity signaled their desire to terminate their active jurisdiction and, with regard to the public schools, began to do so.

The School Case

Four years ago, in May of 1981—six years after the issuance of the Student Desegregation Plan—Judge W. Arthur Garrity Jr., made known his desire to terminate active jurisdiction in the *Morgan* case. The pending departure of former state Commissioner of Education Gregory Anrig, who provided consistently strong and articulate leadership during most of the court's involvement, helped to stimulate a negotiation process designed to produce proposals for final court orders.[12]

Because of the court's tendency to view the State Board of Education as an important force in overseeing local school district compliance, the pending change in state leadership provided an opportune time to initiate what was termed a consent decree process, that is, a negotiating procedure designed to produce a series of proposals for final court orders.[13] Indeed, the State Board already had discussed the implications of federal court withdrawal. In January of 1979, Commissioner Anrig outlined a possible state monitoring role, should the court decide to reduce its involvement. The court was well aware of these earlier suggestions for an expanded State Board role and viewed them favorably. For a variety of reasons, by the spring of 1981, the court was willing to respond to the state's overtures.

In June of 1981, Commissioner Anrig consulted with his board and his staff about the conditions of a viable consent decree process. In that same month, preliminary meetings were held with counsel representing the nine different parties to the case.[14] Immediately prior to his departure from office, Commissioner Anrig sent a letter to Judge Garrity in which he expressed his personal views regarding two criteria for a successful consent decree process:

> For a consent decree process to become a reality, however, the key parties will first have to demonstrate the same kind of good faith and cooperation in the development of a recommended consent decree that will be essential for such a final decree to be implemented. A good beginning has been made but the most difficult decisions lie ahead. . . . On the basis of my experience in school desegregation, I do not believe we will find much precedent for the kind of final consent decree or final order needed in the *Morgan* case. The parties as well as the Court will have to be willing to set precedent.[15]

For the next twenty months, from May 1981 to January 1983, the so-called consent decree process took place under the direction of then-Special Assistant District Attorney General Robert H. Bohn Jr. Finally, on December 23, 1982, the court issued its plan for disengagement, which contained the following major provisions:

- a transitional phase of State Board *monitoring* of school and city defendants' compliance with the court's desegregation orders and voluntary desegregation measures;
- a process of *dispute resolution* with the objective of agreement rather than adjudication;
- a process of *mediation* whereby, in cases in which the parties fail to reach agreement after negotiation efforts, the State Board would intervene and attempt to facilitate agreement;
- a mechanism whereby, should mediation fail to produce an agreement, the State Board would be empowered to prepare a *binding recommendation of resolution*;
- an "*ultimate judicial stopgap*" (that is, judicial resolution), should the process of consensual resolution fail;
- a process to propose *modifications* of outstanding court orders; and
- a mechanism for *further judicial withdrawal* after January 1, 1985, based on a prima facie showing of successful implementation of the transitional administrative processes.

In its cover memorandum, the court stated that an abiding aim of the desegregation plan was consensual resolution, consistent with the earlier hope of entering a final consent decree:

> The court regards the adversarial judicial process as inhibitive of an ideally functioning school system in which compliance with constitutional standards is both voluntary and a matter of course. The process of dispute resolution prescribed by these orders is intended to create a framework for facilitating the consensual resolution of disputes related to the desegregation remedy. This framework is not a substitute for judicial action, but a screen prior to judicial action, to assure that all possible efforts have been expended toward a satisfactory resolution . . . . [T]he remedial process, in our opinion, will now be more effectively pursued under an administrative structure which employs the experience and the common understanding gained over the years, and which provides the parties with an opportunity to confront and resolve issues related to curing the constitutional violation without immediate and inevitable judicial participation.[16]

Legal Squabbling: Quality and Equality

The 1982 Memorandum and Orders of Disengagement capped months of proposals and counterproposals made among the twelve attorneys who met, sometimes with School Department or State Board policy staff, on a regular basis. During the course of the consent decree proceedings, however, a series of legal and extralegal events took place which influenced bargaining direction, pace, and position:

- A new superintendent of schools, Robert Spillane, and a new commissioner of education, John Lawson, were appointed in the summer and winter of 1981, respectively;
- The counsel for black plaintiffs, an attorney named Larry Johnson from Harvard's Center for Law and Education, withdrew from the consent decree proceedings and publicly denounced them, claiming his clients' interests were not being served. Mr. Johnson stated his intent to work with black parents in the design and submission of a voluntary student assignment plan emphasizing educational quality rather than racial balance;
- Boston voters approved a referendum expanding the governance structure of the School Committee and City Council;
- School Committee President Jean Sullivan McKeigue initiated an educational planning process in the summer of 1982, involving parent and community representatives, to supplement the consent decree negotiations (the group was known as the Educational Planning Group); and
- The Boston Compact was developed, constituting an agreement between chief executive officers in the Boston business community and the School Department to provide jobs for high school graduates.

The conditions of proper judicial authority were attended to in a decision handed down by the First Circuit Court of Appeals in September of 1981. In an opinion pertaining to school closings, the Appeals Court upheld Judge Garrity's rulings but advised that the lower court's future decisions should more clearly relate to desegregation than to educational issues.[17]

In addition to influencing the actions of the attorneys engaged in the consent decree process, these managerial, political, educational, social, and legal forces formed a backdrop to the court's deliberations and actions concerning disengagement. Without describing the full effect of these forces, of particular significance was the visible split within plaintiff class.

Upon the withdrawal of plaintiff counsel, Thomas Atkins, formerly of Boston and recent general counsel for the NAACP (one of the original parties filing the complaint), filed a motion

with the court seeking permission to appear as a counsel for black plaintiffs. Judge Garrity's response was to let both Larry Johnson and Thomas Atkins represent plaintiffs in the consent decree proceedings. Each attorney claimed to represent plaintiffs' interests, but each had different objectives for court disengagement: Mr. Johnson's objective was a student assignment plan based on voluntary choice, and Mr. Atkins's was the continuation of mandatory assignments, albeit with some refinement.

The split within plaintiff class created repercussions throughout the community and affected the negotiation process among the attorneys; but the internal disagreements over the nature of the remedy appropriate to Boston were not new.

One segment of the black community preferred integration and improvement of educational quality as a method of redressing the grievances cited by plaintiff class. This approach to desegregation was advocated by those attorneys who filed the original complaint back in 1972. Another segment of the black community preferred educational improvements whether or not the schools were desegregated. Racial mixing was not viewed as the primary remedy to the problem of denial of access to educational quality; an infusion of resources to educationally deficient schools was considered to be a more effective solution. As Derrick Bell and Ronald Edmonds point out, this fundamental difference over policy persists throughout the history of desegregation cases.[18] Therefore, the breach between Mr. Atkins and Mr. Johnson was partially grounded in historical precedent.

Many thoughtful observers, however, considered the public position taken by Mr. Johnson as a natural outgrowth of Judge Garrity's remedial plan. Were it not for the racial balance aspects of the court's numerous orders, which created a foundation of equity from which changes in attitudes and behavior could occur, it might be more difficult to argue persuasively for remedies that did not include racial mixing as a factor. For some, Mr. Johnson's pronouncements concerning the development of a voluntary student assignment plan were interpreted as a logical next step in the lengthy process of achieving quality education in a non- discriminatory environment. For others, though, his actions were viewed as a defection from the ranks of those committed to educational equality. His position, since it contradicted the legal position originally held by plaintiff black parents, raised a question as to whether the *Morgan* case continued to represent the legitimate concerns of all parents.

Transitional Authority: The Road to Recovery

In spite of the procedural uncertainty inherent in the consent decree proceedings, as well as questions about the legitimate representation of clients' interests, the parties produced various working papers and draft proposals throughout 1981 and 1982. There was no submission, however, of a single document representing the parties' proposal for final orders.

After a series of judicial decision points made in response to a variety of circumstances and conditions, Judge Garrity issued his final order for disengagement in the Boston public schools.[19] The court perceived its efforts to promote a consent decree as failing; these orders were intended to return responsibility for protecting the rights of black and other minority parents and schoolchildren to the community and School Committee. The court's orders created mechanisms for monitoring School Department compliance with desegregation and for third-party dispute resolution that vastly reduced the need for direct judicial involvement. In delegating primary responsibilities for monitoring and dispute resolution over the next three years to the State Board of Education, the stage was set for a return to administrative normalcy.

In a transitional sense, though, the road to recovery meant a change in the relationship between the city and the state: at the least, the expanded State Board role required an increase in the level of interaction with the School Department. In its 1982 order, the court required the State Board to submit a written report to the court, parties, and Citywide Parents Council by January 15 and July 15 of each year the disengagement order remains in effect. In a sense, one form of dependence was replaced by another.

In carrying out its court-ordered responsibilities, the State Board made every effort to be as unobtrusive as possible. The good-faith efforts emanating from both the State Department of

Education and the School Department represented a departure from an earlier era of suspicion and mistrust. Heightened knowledge of School Department operations, coupled with a greater willingness to cooperate in responding to requests for information, data, and reports, contributed to a state-local relationship marked by collaboration rather than control.

Adding to the involvement of the State Board of Education in School Department activities was the appointment of two new members with local ties. Mary Ellen Smith and Loretta Roache joined the board in 1984 and brought with them a great deal of knowledge and sensitivity about the desegregation case. In some instances, their presence affected the philosophy and direction of the State Board; for example, the board became more overtly critical of the court in late 1984 and revised its own monitoring procedures to make them less detailed and more broadly consultative.

Nevertheless, the intent of the federal court was that there be an interim period for bringing the case to a close and that the monitoring role of the State Board, as outlined in 1982, be temporary. While the board continued to generate monitoring reports, the court continued to reduce its role. In early 1985, the court terminated its jurisdiction in several areas in which remedial orders were entered, including special education, bilingual education, the institutional pairings, and student/school safety. It also approved modifications of the student desegregation plan advanced by school defendants, most notably those creating an experimental district with greater flexibility in student assignments.

The Restoration of Executive Control: The Court Closes the Case

In July of 1985, Judge Garrity issued his long-awaited draft final judgment for closing the desegregation case.[20] In this memorandum he cited several factors, similar to those referenced in December 1982, for his action:

- The parties' infrequent use of the dispute resolution process during the interim period suggested a "common understanding of rights and responsibilities under the remedial plan'';
- The apparent willingness of the new thirteen-member School Committee to implement the remedial plan;
- The strong public commitment of Boston Mayor Raymond L. Flynn to educational excellence and desegregation;
- The 88.5 percentage level of pupil attendance during the 1985 school year, which was the highest since 1970–71; and
- The monitoring reports generated by the State Board, which provided an appraisal of progress made and steps to be taken to fulfill the requirements of the remedial plan.[21]

Judge Garrity also described the experience of proposing modifications to the desegregation plan. Although there were several disparate initiatives for modifying the plan throughout 1984, none was cohesive enough to be subjected to the formal modification process. By December 20, 1984, however, the School Department proposed a series of modifications to final court orders. Following negotiations among the parties, eight of the eleven proposed modifications were adopted by the court, in early 1985.

At a court hearing on August 7, 1985, the court outlined a set of principles that would be used to measure School Department performance. The court's intent was to provide the department with discretionary authority to carry out its administrative responsibilities without judicial oversight. This done, Judge Garrity finally ended the court's involvement in the school case when he issued his final orders on September 3, 1985. These orders returned to the School Committee the authority to run Boston's public schools.

Clearly, the circumstances, structure, and individuals affecting the Boston public schools have changed since the liability finding of 1974. While one cannot make the claim that racism has been eradicated (centuries of conflict cannot be remedied in a decade), few can dispute the progress of the department, in both attitude and action, toward achieving desegregation. In short, the school system has regained the right to manage its own affairs.

Ironically, this restoration of local executive authority has occurred at a time when state government is beginning to play a more prominent role. The educational reform bill signed into law by Governor Michael S. Dukakis in July 1985 broadened the authority of the state to provide incentives for educational excellence. Other trends—such as the devolution of the federal governmental role, the limitations on school district authority imposed by Proposition 2½, continued public concern with, and interest in, the quality of education, and increased demand for accountability and performance standards—contribute to the expansion of the state's influence over local district operations. For now, however, the opportunity exists for the Boston public schools to demonstrate that the recovery of its executive power is warranted. Judge Garrity seemed to feel that it is; if he didn't, he would have retained active judicial oversight or transferred the court's authority to the state.

The final section draws some general conclusions about the optimal process of disengagement. In attempting to specify basic conditions for the return of agency authority, the experience of the Boston Housing Authority is used as well. Both Boston cases—differing with respect to style and scope of judicial intervention, focus of policy, and organizational characteristics—serve to illuminate more general principles for public management.

The Boston Housing Authority Case

Although the process for withdrawal was neither as formal nor as public as that affecting the School Department, former superior court judge Paul G. Garrity withdrew active jurisdiction over the BHA in late 1984. "I'm not 'sick and tired' or desperate to get rid of it, but all good things have to come to an end," he stated prior to his action. "I'm predisposed to withdraw because I think the other branches [of government] should be permitted to assume responsibility for the operations of the BHA and be held accountable."[22] His desire to go into private practice also contributed to his decision.

Harry Spence resigned as receiver in the fall of 1984 to return to the private sector. Mayor Flynn appointed former state representative Doris Bunte as his successor in November of 1984. Because of Ms. Bunte's experience with and commitment to public housing, her appointment was greeted enthusiastically by the court and the community.

The Development of System Capacity

There have been many accomplishments since the receivership was imposed on the Authority six years ago. The progress in such areas as vacancy reduction, rehabilitation, tenant selection, fiscal management, and security are partly the result of the day-to-day efforts of the receiver and his or her staff to create a climate of professionalism, thus enabling managerial capability and a sense of pride to emerge. The gains made in the provision and maintenance of low-income housing in Boston, however, are not just the result of the actions of committed and capable individuals.

They are also an outgrowth of the special kind of autonomy the receivership afforded. As pointed out earlier in this article, the receiver was endowed with extraordinary powers relative to the operations of a highly politicized system. Without the encumbrances of a politically appointed board and with such benefits as centralized authority, the BHA has been able to make real improvements in the provision of housing for the poor.

Historically, the BHA was a stepchild of City Hall, with diffuse control and little administrative or political support. Currently celebrating its fiftieth anniversary year, the BHA now reports directly to the mayor, with a much broader base of administrative and political support. A special concern, however, is the extent to which the public housing function can be effectively discharged without relying too heavily on goodwill or political favoritism.

This is an interim period, then, for the BHA**.** While the executive administrator reports directly to the mayor, no final organizational plan has been adopted. In fact, there is some disagreement as to the best structure for governance and oversight. One view is that an oversight committee, comprised of tenants, should be delegated responsibilities for monitoring BHA operations. This position is strongly advocated by Tenants United for Public Housing Progress, a tenants' rights group that has done important work organizing resident task forces at the local

project level.

An alternative view is that the public housing function should be integrated with other housing and development functions in City Hall. In this model, the BHA would not occupy a direct reporting relationship to the mayor. Organizationally, it would be placed at the same middle-management level with other offices, such as economic development, community development, construction and preservation, and public facilities, under the jurisdiction of a senior official reporting directly to the mayor.[23]

For now, the BHA continues its work and continues to make progress in such areas as resident participation and decision making, labor relations, code compliance, and desegregation. The post-receivership state did not result in uncertainty and confusion, as some observers feared it would. Under Doris Bunte's leadership, the process of improving performance, professionalizing tasks, perfecting newly developed management systems, and upgrading morale has continued.

Normalizing Race Relations: The Unfinished Agenda

Perhaps the greatest vulnerability in the tenure of the receivership is the issue of race relations. There currently are three housing developments that remain segregated. As the City resumes administrative control over the operations of the BHA**,** it becomes subject to the equity requirements of state and federal constitutional, statutory, and regulatory provisions. Should these segregated conditions not change, chances are that new lawsuits will be filed.

The receivership, with its alliance to the court, acted as a buffer in helping to resolve racial problems. The Authority therefore was able to employ persuasion rather than confrontation and encouraged a voluntary approach to dispute resolution. One major example of this mode of operation was the desegregation of the Charlestown and South Boston developments. After a year's discussion, minority families moved peaceably into Charlestown in February of 1984. There is no question that the full support and backing of Mayor Flynn was needed to help assure the peaceable desegregation of Charlestown. Indeed, the full support of many city and neighborhood officials was necessary. The extent to which such support continues to be forthcoming, as well as the relative success of the Charlestown experience, will affect continued autonomy. Stated one official, "The Authority would have failed if Charlestown didn't work."

Structural Implications and Resources Requirements

The preceding discussion of the BHA receivership and the Boston school desegregation case is intended to provide a context for understanding what needs to be done to preserve the simple justice gains made as a result of court intervention. The relinquishment of active court supervision provides an opportunity, mentioned earlier, for executive and legislative action, which assures that the courts will not have to reassert their authority. Although controversy will continue to exist over whether or not the efforts of either Judge Garrity "worked," concern over the fate of the schools and public housing could be more productively directed toward initiatives which commit the provision of municipal services to principles of fairness and dignity, thus precluding the reentry of the courts into public administration.

Restorative Law and the Boston Public Schools

It's been eleven years since the liability opinion was issued in the school desegregation case. Since then, there have been many changes in conditions of schooling in Boston that have helped bring the system into greater compliance with constitutional requirements. These changes—the increased level of electoral responsiveness achieved through district representation, the internal managerial reforms initiated by former superintendent Wood and continued by former superintendent Spillane, the demographic shifts affecting the school system's population and constituents, the current attention to public education which supports new partnerships between the school system and other important sectors—provided the federal district court with confidence that the parties to the case could find common ground for resolving outstanding

issues: hence the consent decree process throughout 1981–82 and the transitional disengagement phase of 1983–85.

The transitional phase of State Board monitoring was essentially smooth. Still to be determined, however, is the appropriate administrative configuration once the court enters its final judgment. What are the administrative conditions most conducive to School Department autonomy which also promote the quality and equality goals of the court?

The propositions in the following sections are made with the hope that they will contribute to a dialogue about making government work.

Fixing Accountability: Strengthening the Superintendency

One chronic problem affecting the School Department concerns the constraints on the managerial authority of the superintendent.[24] Prior to 1978, the superintendent had no control over business, facilities, or clerical operations; these functions reported directly to the School Committee. With the passage in 1978 of Chapter 333, the formal powers of the superintendent were strengthened: All department operations were brought under the jurisdiction of the superintendent; the middle-management tier of associate superintendents was abolished; cabinet-level senior staff units were created; and the superintendent was given the authority to dismiss certain senior staff members without School Committee approval.[25] Chapter 333 also provided a mandate for further reorganization of key managerial operations.

It soon became apparent, however, to those in the superintendent's office that Chapter 333 was more sizzle than steak. While it represented a step in the direction of improved managerial accountability, it did not provide the superintendent with discretionary authority in personnel or certain budget areas. The School Committee retains the power of appointment for all categories of personnel and the power of dismissal for most. The committee also retains authority over the award of all contracts, and continues to remain involved in certain expenditure-control procedures. Given the legacy of patronage and the minimal educational inclinations of many previous committee members, continued involvement of the committee in these aspects of department operations carries potentially unprofessional consequences.

Every Boston superintendent has learned this over the past ten years. On July 31, 1985, Dr. Laval Wilson became Boston's new school superintendent. His appointment provides an opportunity for a redefinition of the position.

Proposition 1: Chapter 333 should be revised in order to strengthen the managerial authority of the superintendent

The proper role of the School Committee is to set citywide educational policy and oversee general system adherence to stated policy objectives. The School Committee should function as trustee or steward of the Boston public schools, not as manager. With the expansion of the committee from five members to thirteen, the need for distinguishing between policy-making and policy-implementing responsibilities became more critical. As we have seen in the past several months, the behavior or style of some incumbents is not enough to safeguard the School Department from committee meddling. There needs to be *structural* reinforcement of managerial authority so that coherence and accountability in department operations can be achieved.

In 1974, the U.S. District Court declared that the Boston public schools were unlawfully segregated and that such segregation was the product of purposeful and intentional behavior on the part of the School Committee. The allocation of resources and the hiring and placement of personnel were two major categories within which deliberate violations of constitutional principles were said to have occurred. In 1985, these managerial functions still reside with the committee, in spite of the trend toward decentralization as represented by school-based management. While overall allocation of resources is clearly one of the general policy responsibilities of the School Committee, excessive or minute interference can be confusing and demoralizing. Judge Garrity's disengagement order of 1985 restores executive authority to the School Department. *Genuine* executive authority should be restored to the superintendent's office, and, in turn, that authority could be more genuinely delegated to the local level as the

result of a new home rule petition that would revise the provisions of Chapter 333.

Maintaining Professionalism: The Need for a Comprehensive Planning Function

In addition to the problem of segmented administrative authority, another chronic managerial problem affecting School Department operations is the absence (or inadequacy) of a comprehensive planning function. Currently, responsibilities for long-range planning are ad hoc and scattered throughout several offices; no office or unit is formally designated to reconcile individual long-range projections—in areas such as curriculum, facilities, professional support, personnel, budget, and so on—with system-wide objectives and priorities.

Furthermore, given the deficiency in the strategic planning capacity, there continues to be an absence of reliable information concerning the effects of various educational initiatives taken in the past few years. Responsibilities for testing and evaluation have been shuffled around; a variety of programs (externally funded as well as city funded) have been installed and left to function without being integrated into regular operations; policy pronouncements have emanated from either the committee or the superintendent's office with little rationale to back them up. Like most public agencies, the School Department experiences great difficulty when it comes to assessments of programmatic initiatives.

Proposition 2: A senior-level planning office should be established within the School Department for the purpose of allowing the system seriously to address long-range educational policy objectives in light of resource availability and desegregation considerations.

A department-based planning office would promote greater autonomy on another front as well: Since current public attention on education is likely to result in a number of proposals resembling ''quick fix'' solutions rather than serious propositions for improving educational quality, school districts are more vulnerable than ever to the whims of public opinion, political forces, private ventures, and popular trends. Coupled with greater mayoral and City Council interest in school operations, a real need exists for the sort of informed and balanced perspective a well-structured and well-staffed planning office could provide.

Restorative Law and Equal Protection

The focus of this analysis has been on the special circumstances of court-agency relations that promote court disengagement and eventual administrative normalization. "Getting the court out" is taken as a desirable objective, but it carries attendant assumptions about what a system and its leadership need to do to make court withdrawal happen. After all, court intervention in the first place occurred as the result of institutional behavior that violated somebody's rights.

Court disengagement can occur only with the knowledge that the institution has somehow changed, and that individual or group rights will not be violated again.

This article has laid out some structural administrative considerations for the return of executive power to the Boston public schools. There are, of course, other considerations conducive to judicial restoration of executive power: changes in the public mood; leadership personalities and styles; greater political access; public awareness, through the media or other vehicles, about the operations of public systems; and the development of alternative mechanisms for resolving conflict without always having to go to court.

The presence of a new mayoral administration and an expanded City Council and School Committee represent a turning point in the management of public affairs in Boston. The entry of newcomers into City Hall and Court Street who care about making government work for people in the neighborhoods throughout the city contributes greatly to institutional accountability and the restoration of public trust. By all accounts, we are likely to see greater involvement with and commitment to the provision of public services that are professional and fair. We are, perhaps, on the verge of an era in which Boston will become known as a city that cares for its people in truly nondiscriminatory terms and whose public agenda has shifted from equity to economic concerns.

The forces at work seem to point in this direction.

The hostilities that were directed toward Asians during the summer of 1985 indicate that prejudice has not disappeared within the City of Boston. Racial incidents continue, and the list of minority groups discriminated against expands. In the summer of 1984 the Boston City Council passed a human rights ordinance that outlawed individual or institutional behavior which occurs in a discriminatory fashion. Still needed, however, is an enforcement mechanism for the ordinance's provisions.

There have been many proposals over the years for the creation of a city agency endowed with the authority to investigate and prosecute charges of discrimination. These proposals are worth considering, especially given the deëmphasis on federal enforcement of civil rights protection.

Proposition 3: An Office of Equal Protection within City Hall should be established and charged with responsibilities for monitoring the performance of all city agencies, resolving disputes that are the result of complaints and, if necessary, making case referral to the Corporation Counsel for litigation on matters pertaining to the violation of individual or group rights as outlined in relevant federal, state, and local laws and regulations.

Such an office should be staffed with individuals who are knowledgeable about public bureaucratic behavior and skilled in such areas as mediation, bargaining, and negotiation. Reporting directly to the mayor, the office should have guaranteed access to information, data, and records and should operate in an "inspector general" fashion. Besides responding to specific grievances, the office would provide periodic public reports on city performance with regard to the protection of human rights and the promotion of equal opportunity.

There are several local groups—as well as regional offices of federal agencies—that are active in the areas of human rights and affirmative action. These groups provide important pressure and are a source of valuable information as to ways in which government can be made more accessible. What they lack is the credibility and clout a highly placed, internally based office can provide. Mayoral establishment of an Office of Equal Protection could draw upon numerous resources from throughout the city and mobilize them to fruitful action.

Conclusion

This analysis of court-agency relations in Boston is incomplete. While the school case and the public housing case represent the most dramatic forms of court intervention, there are other examples. Federal court involvement continues regarding facilities at the Charles Street Jail; still unresolved in this case are conditions affecting improvement and location of the facilities. Similar problems continue to exist at the Deer Island House of Correction, which is currently operating under the terms of a consent decree.

In another area, a dramatic example of court involvement with the management of public affairs concerned Boston Harbor. As a result of a suit filed against the Metropolitan District Commission (MDC) by the City of Quincy, former superior court judge Paul G. Garrity appointed a master in the summer of 1983 to work with the parties to develop harbor cleanup proposals. Underlying the problems affecting the harbor was an enormous lack of intergovernmental cooperation. Both federal and state agencies were remiss in maintaining the harbor, according to the Conservation Law Foundation (CLP). The CLP filed suit in federal court against both the state and federal governments for failure to curb harbor pollution. For years, the MDC and the U.S. Environmental Protection Agency (EPA) have failed to produce either plans or a timetable for cleaning up the harbor. State court action was therefore sought to force development of such plans, as well as to cause jurisdictional cooperation.

Harvard Law Professor Charles M. Haar, the court-appointed master, attempted to negotiate a remedial plan among the parties. One by-product of these efforts—aided by the support of state Senate President William Bulger and the work of a gubernatorial harbor study commission first headed by former governor Francis Sargent—was a legislative bill that created a Massport-like

Metropolitan Water Resources Authority. The Authority was given responsibilities for initiating and maintaining a massive cleanup effort serving forty-three communities and featuring the transfer of relevant personnel and equipment from the MDC.

The legislation languished for almost the entire year, not an unusual fate for such a reform-oriented proposal. By the fall of 1984, Judge Paul Garrity's response to this inertia was to take a highly public profile and threaten court receivership if the legislature did not act. This colorful display of judicial power worked; the bill creating the Water Resources Authority was passed, the eleven- member board appointed, and an interim director appointed in February 1985. A permanent director was expected to be named by the end of the summer. If the court had not acted in response to legislative inaction, there probably would be no administrative structure to clean up the harbor.

A bias running throughout this article is the belief that public administrators and other officials should discharge their duties in a manner that precludes the necessity of court intervention and oversight. Sometimes, however, those elected or appointed to public office are unwilling to perform, or incapable of performing, in accordance with certain constitutionally or statutorily based standards. As a result, lawsuits are filed, claims are made, and judicial action is sought to reform agency operations. While the consequences of such reform initiatives are multiple and public reactions to them mixed, few judges enjoy their managerial role. Speaking to the senior executive program at Harvard's Kennedy School of Government, Judge William Wayne Justice described the averse judicial attitude toward executive intervention:

> I believe that I echo the sentiments of all the so-called activist federal judges, throughout the country, when I tell you I had just as soon have a live rattle- snake thrust at me as a lawsuit dealing with constitutional claims against an administrative agency.[26]

Restorative Law and Administrative Normalization: Some Principles

What are we to conclude about the intergovernmental system if, as often is the case in Boston, one branch constantly is intervening into the other? Beyond the aforementioned structural propositions, what more general principles or conclusions might we draw from recent state and federal court efforts to restore administrative authority to local officials? What are the optimal conditions for court disengagement?

An important issue to remember is the centrality of the court-agency relationship. Institutional reform may occur piecemeal and with the participation of many actors, but it occurs in remedial cases as the result of court decrees. Making interpretations of rights and responsibilities, a court directs an agency to act in accordance with its perception of the agency's capacity to do a better job. Judicial style may vary, but the intent is the same: to provide sanctions on administrative practices so that a system operates without violating certain guaranteed rights.

As there are several populations affected by court decrees, it is easy to dismiss the primacy of the court-agency relationship. The plaintiff population and various groups that provide legal representation to plaintiffs or that represent plaintiffs' interests are, of course, crucial; until their rights are vindicated, a case remains active. Another sector affected by court decrees is what has been termed a *secondary population:* comprising public officials, the media, special interest groups, and public opinion (or, more specifically, public concerns about judicial policies), this group is not directly involved with remedial law cases but strongly influences them—and is influenced by them.[27]

Within Boston, members of the secondary population often are vocal in their opinions about court and agency behavior. One sometimes wonders, in fact, whether a sort of tradition has developed whereby courts are expected to withstand criticism and intervene, handling administrative hot potatoes others are more reluctant to deal with.

The point to be made is that although members of a secondary population are not directly affected by or involved with carrying out judicial policies, their response to the court-agency interplay carries a great deal of weight. Public statements made by the mayor, news coverage and

editorials in the local media and press, the behavior of the state legislature and government, the efforts of the private sector—all of these forces contribute to a court's assessment of the readiness of the community in general and the agency in particular to take back management responsibility.

One generalization, then, to be made about court disengagement is that there needs to be some evidence, expressed by members of the secondary population, of commitment to the public provision of services which are both equitable and just. This demonstration of essential agreement with basic principles governing the remedial regime provides assurance to a court that the environment can provide sanctions on administrative behavior without the necessity of active judicial oversight.

The nature of the secondary population's role leads to a second generalization: the greater the extent to which it can provide assistance to the agency in the post-remedial phase, the greater the likelihood of disengagement. For example, the involvement of the business and finance communities with the Boston public schools generates much-needed local support but also sets a standard for further interaction. The same can be said for the involvement of The Boston Foundation with the city's schools and the Housing Authority. The commitment and engagement of civic leaders to the restoration of public services constitutes a public-private partnership of the highest order; this fortification, upon emergence from court oversight, is essential to the growth and well-being of an autonomous system. After all, it took years of neglect and isolation to establish the characteristics of those systems destined for court intervention.

A third generalization with regard to executive recovery concerns the implementing agency. As we have seen, agencies often are limited in their capacity to implement judicial decrees. An agency's tradition and policy preference, resource base, and organizational characteristics all contribute to its capacity to comply with remedial principles. One would expect that, if anything, the remedial phase would have fostered new organizational values, patterns, and behaviors; ideally, these new traits could withstand the transition to a post-remedial state. The apparent internalization of new attitudes and practices becomes another measure, then, of system readiness to regain its authority. The educational function of the remedial phase—that is, the extent to which it helps an organization focus on changing its ways—helps determine the extent of this internalization and whether or not it can last.

Related to this is another generalization regarding court disengagement. In both the school desegregation and public housing cases, the court signaled its intent to withdraw and then provide an interim transition period aimed at closure. There were differences in the transition process used just as there were differences in the mode of intervention, but in each case it was necessary to formalize an interim period. It is not easy to move a system from dependence to independence overnight; both courts and agencies need to recognize that divorce needs to be preceded by a period of trial separation.

During the interim transitional period, the presence of a set of monitoring procedures provides a gauge as to organizational readiness to absorb greater responsibilities. As with State Board monitoring of the Boston public schools, the monitoring process needs to generate information about what has been accomplished with regard to compliance. In addition, as was learned by the State Board, the monitoring process must be oriented toward institutional self-sufficiency. This forward-looking characteristic of institutional review is a tricky one for a regulatory agency to maintain; the State Board sometimes lost sight of this part of its role. Therefore, a fifth generalization regarding court disengagement is that the monitoring period should be specifically directed toward agency autonomy. Maintaining the tension between oversight and deliverance requires special skills and procedures; a clear understanding of the monitoring mandate permits a more effective deployment of staff resources. The evaluation process should be carried out by individuals who recognize their educational responsibilities as well.

Perhaps the most visible characteristic of the disengagement process affecting the school desegregation case was the active participation of the parties in the negotiation process. It took months before the attorneys representing the parties, accustomed as they were to courtroom ritual, could develop a productive negotiating style. Indeed, the adversarial process does not lend itself easily to long range policy formulation, especially when it is carried out by representatives

of key actors. Two more generalizations, therefore, are that elements of the negotiation process should be understood by the parties from the outset, and a commitment to this process should be obtained and maintained. The consent decree process in the school case was crippled by the uneven participation of plaintiff attorneys. A commitment to participate fully in negotiations for modification of court orders might have speeded up the disengagement process.

Finally, a major lesson emerging from the remedial experience is the need for greater knowledge and experience of the world of the court and the world of public management. While it may sound trite, the language, customs, and procedures of these two worlds are different. In the remedial and post-remedial stages of institutional reform litigation, the two worlds are bound together in a manner that can be irritating. To achieve the desired status of institutional compliance and self-sufficiency, there must be more intelligence on both sides of the bench. A final generalization, then, is that public managers, judges, and lawyers should be made aware of the subtleties and requirements of both the world of judicial review and the world of public management. In this way, the precepts of the Constitution and the public interest will be better served.

Notes

[1] 349 U.S. 294 (1955). Throughout our nation's history, there have been cycles of judicial activism followed by quiescence. Such activism, prior to *Brown,* usually took the form of proscriptions upon corporations, the Congress, or the presidency in areas concerning economic and commerce activity. See especially Nathan Glazer, "Towards an Imperial Judiciary?" *The Public Interest* 41 (1975): 118; Donald Horowitz, *The Courts and Social Policy* (Washington, D.C.: Brookings Institution, 1977); Nathan Glazer, "Should Judges Administer Social Services?" *The Public Interest* 50 (1978): 64; Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, Mass.: Harvard University Press, 1977).

[2] The special qualities of public law litigation are discussed in Abram Chayes, "The Role of the Judge in Public Law Litigation," *Harvard Law Review* 89 (1976): 1281; A. Chayes, "The Supreme Court 1981 Term-Forward: Public Law Litigation and the Burger Court," *Harvard Law Review* 96 (1982): 4; Colin Diver, "Superintending Structural Change in Public Institutions," *Virginia Law Review* 65 (1979): 43; Judith Resnick, "Managerial Judges," *Harvard Law Review* 96 (1982): 376.

[3] In the early 1980s during the administration of Mayor Kevin H. White, Boston was experiencing severe financial pressures, among them a court order to give tax rebates to previously overassessed property owners. See Norman Tregor, trustee, vs. Board of Assessors of Boston (and seven companion cases), 377 Mass. 602 (1979). A so-called "Tregor bill" subsequently was filed as a home rule petition with the state legislature as an attempt to bail the city out—not just to offset the abatement, but due to "runaway spending" in the Boston Public Schools and the impact of Proposition 2½, a 1980 statewide referendum limiting future property taxes that took effect in 1982—via a $75 million bond offering. See Rushworth M. Kidder, "Political potholes abound along Boston's road to fiscal stability," *Christian Science Monitor*, Oct. 20, 1981, https://m.csmonitor.com/1981/1020/102023.html.

[4] With regard to the city's public schools, "free" black parents petitioned the General Court for access almost two hundred years ago in "Petition to the State Legislature," October 17, 1787. In 1849, the father of young Sarah Roberts went to court to challenge the Boston School Committee on its practice of excluding blacks from schools reserved for whites in *Roberts* v. *City of Boston,* 59 Mass. 1871, 209 (1849). In 1850, the State Supreme Judicial Court in *Roberts* upheld the power of local school committees to maintain separate facilities for black and white children. Black parents again turned to the General Court, which enacted state legislation in 1855 prohibiting restricted admission to Commonwealth public schools on the basis of race, color, or religious preference.

[5] Most people continue to confuse the two Garritys and the cases over which each presides. Many think that they are related. They are not. W. Arthur Garrity Jr., is a federal district court judge and presided over the school desegregation case. A native of Worcester, Massachusetts, Judge Arthur Garrity is soft-spoken and charming; he remains fastidiously polite and patient under even the most trying of circumstances and exempts himself from discussions of the case outside his courtroom. Now in private practice, Paul G. Garrity was initially a housing court judge who was subsequently appointed as an associate justice of the State Superior Court. A native of Boston, Paul Garrity is outspoken and more colorful in his manner; his public demeanor occasionally revealed his impatience at some action and he was not reluctant to provide his opinions or views of judging and how Boston government functions. While they differ in their

approach to their roles, one is struck by how deeply each man feels about the job of judging. In addition, they are both meticulous thinkers who choose their words carefully and remain conscious of public perceptions of their work.

[6] Superior Court Civil Action No. 1722, Commonwealth of Massachusetts.

[7] *Morgan* v. *Hennigan,* 379 F. Supp. 410 (D. Mass. 1974), *aff'd sub nom. Morgan* v. *Kerrigan,* 509 F. 2d 580 (1st. Cir. 1974), *cert denied,* 421 U.S. 963 (1975).

[8] There is no record anywhere, and no one directly involved with the *Morgan* proceedings over the past nine years can say with certainty exactly how many court orders have been issued. Some were issued orally from the bench; others were apparently lost.

[9] *Keyes* v. *School District No. 1,* 413 U.S. 189 (1973).

[10] *Morgan* v. *Kerrigan,* "Order Concerning South Boston High School;' December 9, 1975 and "Order Suspending Appointive Power of School Committee," December 9, 1975. Because the court never took upon itself the direct authority for implementing a remedy, the receivership imposed on South Boston High was considered to be "partial," preserving the authority of the existing chain of command.

[11] James Q. Wilson, *Political Organizations* (New York: Basic Books, 1973).

[12.] The court expressed its hope for bringing the *Morgan* case to a close on numerous occasions since the August 1976 order appointing the Citywide Coordinating Council. Since 1979, in oral statements as well as in written opinions, there were many expressions of confidence in the School Department's progress toward compliance; the court often hinted that such progress would lay an important foundation for disengagement.

[13.] Participants in the negotiations acknowledged that, in the strictest sense, the use of the term "consent decree" was a bit misleading. It seemed unlikely, for example, that full consent among all the parties would ever be achieved. The question remained as to "how much" consent was necessary to signify "real consent." This, among other factors, led to the attorneys' use of the term "proposed final orders" as a descriptor. Public references, however, continued to be made to the consent decree process.

[14.] Those parties who occupied formal standing in the Boston case at the time the consent decree proceedings got under way included the certified class of all black children enrolled in the Boston public school system and their parents ("plaintiffs"); the Boston School Committee and the superintendent of the Boston public schools ("school defendants"); the commissioners of the Public Facilities Commission, the director of the Public Facilities Department and the mayor of Boston ("city defendants"); and the State Board of Education and commissioner of education ("state defendants"). Intervening parties were El Comite de Padres pro Defensa de La Educacion Bilingue ("El Comite"); the Boston Association of School Administrators and Super- visors, AFL-CIO (BASAS); the Boston Teachers Union (BTU); the Boston Home and School Association; and Concerned Black Educators of Boston (CBEB).

[15.] Letter from Commissioner Gregory R. Anrig to Judge W. Arthur Garrity Jr.

[16.] *Morgan* v. *McKeigue,* "Memorandum and Orders of Disengagement" (December 23, 1982).

[17] *Morgan* v. *McDonough,* 689 F. 2d 265, 280 (1st Cir. 1982) (Campbell, J.).

[18] See Derrick Bell, "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation," *Yale Law Journal* 85 (1976): 470; Ronald Edmonds, "Advocating In- equity: A Critique of the Civil Rights Attorney in Class Action Desegregation Suits," *The Black Law Journal* 3 (1974): 176.

[19] For a detailed analysis of the deliberations and actions of court and counsel throughout the twenty-month-long disengagement activity, see Marsha Murninghan, *Court Disengagement in the Boston Public Schools: Toward a Theory of Restorative Law* (Cambridge, Mass.: unpublished thesis for Harvard Graduate School of Education, 1983).

[20] *Morgan* v. *Nuce,* "Memorandum, Draft Final Judgment and Notice of Hearing" (July 5, 1985).

[21] Ibid. at 2.

[22.] Interview, Nov. 5, 1983.

[23.] For a discussion of the benefits of centralizing the housing and development functions, see *Boston's Development and Housing Functions: A Reorganization Proposal* (Boston: Citizens Housing and Planning Association, November 1983); Joseph S. Slavet, *Housing Issues in Boston: Guidelines for Options and Strategies* (Boston: McCormack Institute, University of Massachusetts Boston, December 1983); Phillip Clay, *Issues Facing Boston: 1984* (Boston: McCormack Institute, University of Massachusetts Boston, December 1983); Rolf Goetz, *Boston's Housing in 1984: Issues and Opportunities* (Boston: McCormack Institute, University of Massachusetts Boston, December 1983).

[24.] For an analysis of these constraints, see Robert C. Wood, "Professionals at Bay: Managing Boston's Public Schools," *Journal of Policy Analysis and Management* 4 (1982): 454; Marcy Murninghan, *Behind the Numbers: Conditions of Schooling in Boston* (Boston: Boston Municipal Research Bureau, 1981).

[25.] Chapter 333 of the Acts and Resolves of the Commonwealth, 1978.
[26.] "Address by the Honorable William Wayne Justice" at the Senior Executive Program at the John F. Kennedy School of Government, Harvard University, Aug. 8, 1980.
[27.] See Charles A. Johnson and Bradley C. Canon, *Judicial Policies: Implementation and Impact* (Washington, D.C.: Congressional Quarterly Press, 1984).