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*Carolyn Hoecker Luedtke**

The traditional model of the judge as detached adjudicator, sitting high atop a distant bench, has been blurred in the years since *Brown v. Board of Education*.[1] The legal legacy from the battlefield of school desegregation is a complicated interrelationship between right and remedy. Rather than announcing a right and disappearing into chambers, today's judges are increasingly involved in the detailed development of remedial schemes which overhaul public institutions such as schools, child welfare agencies, prisons, mental health systems, and public housing authorities. This genre of litigation—dubbed "institutional reform litigation,"[2] "structural reform litigation,"[3] and "public law litigation"[4]—has been the source of much academic debate and analysis during the past three decades. As litigation has been increasingly used as a medium of social and political change, judicial remedies have become important tools for lawyers and policymakers to understand.

Receivership, one institutional reform remedy that displaces the government defendant and supplants government actors with a court-appointed receiver, appears on its face to be one of the most invasive remedial tools in a judge's arsenal. Receivership is a relatively new[5] and rarely discussed[6] remedial tool on

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* B.A., Princeton University (1994); J.D., Harvard Law School (1999). The Author is clerking for the Honorable William W. Schwarzer, Northern District of California. She would like to thank Professor Margo Schlanger and Judge William Schwarzer for their helpful insights and suggestions on the initial drafts of this Article. She would also like to thank Julie Levin, Jeffrey Lines, Eugene Jones, and Robert Rosenberg for speaking with her about their experiences in public housing.

1. 347 U.S. 483 (1954).

2. Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979) (arguing that broad "institutional reform litigation" has transformed the judge into a political powerbroker which threatens to undermine judicial legitimacy).

3. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) (finding benefits to "structural reform litigation" despite the problems inherent with it, ultimately adopting a wait-and-see approach).

4. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (generally supporting the development of "public law litigation" in achieving organizational change). *See generally* Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1 (1984).

5. Twelve of fifteen known receiverships in institutional reform litigation occurred in the 1990s. Receiverships occur more frequently in public housing litigation than any other area. *See* Gautreaux v. Chicago Hous. Auth., 178 F.3d 951 (7th Cir. 1999) (partial

the landscape of public reform litigation. Receivership is increasingly requested by plaintiffs and threatened by judges overseeing ineffective consent decrees and contemptuous defendants.[7]

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receivership placing Chicago's scattered-site program under receivership); Velez v. Cisneros, 850 F. Supp. 1257 (E.D. Pa. 1994) (Chester, Pennsylvania); Pearson v. Kelly, No. 94-CA-14030 (D.C. Super. Ct. Aug. 18, 1994) (District of Columbia); Perez v. Boston Hous. Auth., 400 N.E.2d 1231 (Mass. 1980) (Boston). Public housing may be more conducive to receivership because it is viewed more as a business than a public institution because of its extensive asset base and similarity to private real estate enterprises. In addition, there is a statutory avenue for administrative receivership in the housing context. *See infra* note 9. Receivership is also more common in the District of Columbia. *See* Inmates of D.C. Jails v. Jackson, 158 F.3d 1357 (D.C. Cir. 1998) (medical and mental health services in jails); Dixon v. Barry, 967 F. Supp. 535 (D.D.C. 1997) (mental health); LaShawn v. Kelly, 887 F. Supp. 297 (D.D.C. 1995) (child welfare department); District of Columbia v. Jerry M., 738 A.2d 1206 (D.C.), *cert. denied*, 120 S. Ct. 1981 (2000) (Oak Hill youth prison school); Pearson v. Kelly, No. 94-CA-14030 (D.C. Super. Ct. Aug. 18, 1994) (public housing authority). Geographically, receivership in D.C. may be more tenable because it exists in an unusual state of administrative flux between the federal and local governments. For other receivership remedies, see Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976) (South Boston High School); Shaw v. Allen, 771 F. Supp. 760 (S.D. W. Va. 1990) (county jail); Newman v. State of Ala., 466 F. Supp. 628 (M.D. Ala. 1979) (state prison system); Turner v. Goolsby, 255 F. Supp. 724 (S.D. Ga. 1966) (county school district); Judge Rotenberg Educ. Ctr., Inc. v. Commissioner of the Dep't of Mental Retardation, 424 Mass. 430 (1997) (Massachusetts mental health); Wayne County Jail Inmates v. Wayne County Chief Executive Officer, 444 N.W.2d 549 (Mich. Ct. App. 1989) (county jail).

6. Only three case studies have considered true receivership remedies in institutional reform litigation cases. *See* MARK MOORE, CREATING PUBLIC VALUE 241 (1995) (considering the Boston Housing Authority receivership from a public policy perspective); Lynn E. Cunningham, *Washington, D.C.'s Successful Public Housing Receivership*, 9 J. AFFORDABLE HOUS. COMMUNITY DEV. L. 74 (1999) (heralding the success of receivership in D.C.'s public housing agency); Barry Stuart Roberts, *The Extent of Federal Judicial Equitable Power: Receivership of South Boston High School*, 12 NEW ENG. L. REV. 55 (1976) (criticizing the receivership of South Boston High School during the protracted desegregation struggles in Boston); *see also* Lynn Cunningham & Dennis Foley, *Receivership as a Remedy for Poor Agency Performance*, 29 NAT'L CLEARINGHOUSE REV. 1034 (1996) (presenting a brief case study of the *Pearson v. Kelly* housing litigation and analyzing the receivership remedy).

7. For example, Federal District Court Judge Dean Whipple recently threatened receivership in the Kansas City school desegregation litigation. *See* Editorial, *Public Spanking*, KAN. CITY STAR, Nov. 2, 1998, at B4 (noting Judge Whipple's exasperation at the School Board's lack of cooperation with the Desegregation Monitoring Committee and reporting that Judge Whipple "raised the possibility of placing the district in receivership"); *see also* Ellen Borgersen & Stephen Shapiro, G.L. v. Stangler: *A Case Study in Court-Ordered Child Welfare Reform*, 1997 J. DISP. RESOL. 189, 198 (reporting that plaintiffs "favored vigorous enforcement action . . . up to and including a receivership").

Through an analysis of *Tinsley v. Kemp*,[8] a decade-long institutional reform case aimed at changing Kansas City, Missouri public housing, this Article engages in a case study focused on the receivership remedy in practice. Part I chronicles the decade of litigation and remedial results that turned around the troubled Kansas City Housing Authority ("Housing Authority"). Part II examines the efficacy and legitimacy of court displacement of government actors in the context of institutional reform litigation and compares receivership to other remedial alternatives. Part III concludes that while receivership has unique attributes, it is not a wholly extraordinary remedial measure. It was, however, a resourceful response to the organizational incompetence and dysfunction at the Housing Authority.

Public housing generally is in a state of crisis, and institutional reform litigation is often the chosen means to effectuate change.[9] At least twenty-eight housing authorities in the United States are, or have been, the subject of reform litigation.[10] Courtroom battles over public housing center on desegregation and how to modernize run-down facilities. Because the 1937 Fair Housing Act, which created the public housing system, did not provide funds for the modernization of public housing, the majority of the nation's ten thousand aging units of public housing are dilapidated, and often uninhabitable. It is estimated that two-thirds of these public housing units require more than ten thousand dollars each in maintenance and modernization expenditures, amounting to a crisis for most local housing authorities' federally dependent budgets.[11] In 1989, the majority of Kansas City public housing was run-down and desperately in

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8. The subject of this case study is *Tinsley v. Kemp*, No. 89-0023-CV-W-1 (W.D. Mo. filed Feb. 9, 1989), *motion to dismiss*, 750 F. Supp. 1001 (W.D. Mo. 1990).

9. Administrative intervention is another, recently expanded and increasingly utilized, reform tool for public housing. Pursuant to federal statute, the Secretary of the Department of Housing and Urban Development ("HUD") can petition a federal court for the appointment of an administrative receiver (either another public housing agency or a private management corporation) if the public housing agency is classified as "troubled" according to statutory guidelines. *See* 42 U.S.C. § 1437d(j)(3)(A)(ii) (1994). This administrative remedy may make more judges comfortable with imposing receiverships in public housing litigation.

10. *See* ERICA HASHIMOTO, POVERTY AND RACE RESEARCH ACTION COUNCIL, COMPELLING RESPONSIBILITY: A SUMMARY OF LITIGATION ESTABLISHING THE FEDERAL GOVERNMENT'S LIABILITY FOR RACIALLY SEGREGATED HOUSING PATTERNS (1997) (cataloging cases filed against HUD); *see also* Florence Wagman Roisman, *Long Overdue: Desegregation Litigation and Next Steps to End Discrimination and Segregation in the Public Housing and Section 8 Existing Housing Program*, 4 CITYSCAPE 171, 194-96 (1999) (listing desegregation cases involving HUD).

11. *See* Michael H. Schill, *Distressed Public Housing: Where Do We Go From Here*, 60 U. CHI. L. REV. 497, 502 (1993) (arguing that public housing authorities should be allowed to knock down dilapidated projects and rebuild scattered-site developments or encourage private Section 8 vouchers).

need of repair; as a result, Doletha Tinsley, a young single mother living in public housing, joined with five other African-American women and filed suit.

I. THE STORY OF *TINSLEY V. KEMP*

A. Problematic History of the Kansas City Housing Authority

The story of the Housing Authority prior to the *Tinsley* litigation is one of institutional incompetence, extreme dysfunction, and organizational chaos. The Housing Authority was a hybrid government agency, created by state statute,[12] yet almost exclusively financed by federal subsidies. The Housing Authority was governed by a seven member board appointed by the Mayor of Kansas City, Missouri.[13] The Board of Commissioners was responsible for all personnel decisions, including hiring the Executive Director who managed the day-to-day operations of the Housing Authority. In Kansas City, the Commissioners rarely had experience with public housing administration or policy, and the Executive Director was often a job dispensed as a political favor. As appointed officials, the Commissioners and the Executive Director had little accountability for their performance. A *Kansas City Star* editorial described the Housing Authority's problem prior to litigation as "not just years of politics, but incompetence, chicanery and crime which have tainted this authority and hurt tenants."[14]

The Housing Authority was no stranger to class action litigation when the *Tinsley* plaintiffs filed suit in 1989. In 1976, public housing residents residing in Kansas City's Riverview development filed *Vann v. Housing Authority of Kansas City*,[15] which accused the Housing Authority of explicit racial steering in resident placement.[16] The *Vann* plaintiffs asserted that prior to 1973, the Housing Authority reserved two developments—Riverview and Guinotte Manor—exclusively for white residents and relegated all non-white residents to five other public housing developments—T.B. Watkins, Wayne Miner, Chouteau Courts, West Bluff, and Pennway.[17] When the Housing Authority tried to racially integrate Riverview and Guinotte in 1973, a "tipping"[18] effect occurred and by 1977, the Housing Authority stipulated that Riverview was 70%

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12. MO. REV. STAT. §§ 99.010-.230 (1994).

13. MO. REV. STAT. § 99.134 (1994).

14. Rhonda Chriss Lokeman, Editorial, *Public Housing Problems Persist*, KAN. CITY STAR, July 8, 1993, at C6.

15. 87 F.R.D. 642 (W.D. Mo. 1980).

16. *Id.*

17. *Id.* at 652-53.

18. *Id.* at 653. "Tipping" is the sociological phenomenon where white families abandon residential neighborhoods after a certain percentage of minority residents join the neighborhood. *See generally* Rodney A. Smolla, *Integration Maintenance: The Unconstitutionality of Benign Programs that Discourage Black Entry to Prevent White Flight*, 1981 DUKE L.J. 891, 893-97.

non-white; Guinotte was 34% white, 46% African-American, 19% other non-white, and 3% Latino; and the remaining five projects were 98-100% African-American.[19] But in 1980, Federal District Court Judge Russell Clark dismissed the *Vann* segregation litigation as moot because the Housing Authority reformed its admissions practices subsequent to the filing of the lawsuit.[20]

Despite the end of explicit racial steering, centralized public housing and extreme white flight to the suburbs of Kansas City combined to make Kansas City one of the most segregated cities in the nation. A seminal housing study in 1980 defined Kansas City as one of sixteen "hypersegregated" cities as determined by five factors—uneven distribution of races, isolation, clustering, concentration, and centralization.[21] In the 1980s, few white residents lived in non-suburban Kansas City, and almost none lived in public housing.

Julie Levin, the managing attorney at Legal Aid of Western Missouri, works closely with public housing residents on their everyday legal issues such as benefits and family law. Levin has also been actively involved with several class actions against the Housing Authority starting with the *Vann* litigation in 1976.[22] Through her ongoing interaction with public housing tenants, Levin became aware of the horrific[23] conditions at public housing complexes such as T.B. Watkins. Levin personally investigated the situation at T.B. Watkins and attempted to negotiate improvements with the Housing Authority. By 1989, it was apparent that negotiations would not protect her clients, so Levin returned to the federal courts in search of redress from the Housing Authority, Authority Director Mike Fisher, the United States Department of Housing and Urban

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19. *See Vann*, 87 F.R.D. at 652-54.

20. *Id.* at 657-58.

21. DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID 74-75 (1993).

22. Interview with Julie Levin, Managing Attorney of Legal Aid of Western Missouri, in Kansas City, Mo. (Apr. 1, 1999). Levin has spent twenty-two years battling the Housing Authority. She estimates that she filed six to seven class actions against the Housing Authority after *Vann*. *See, e.g.*, Todd v. Housing Auth. of Kan. City, No. 84-0852CV-W-JWO (W.D. Mo. filed 1984). The *Todd* class consisted of all applicants for public housing whose applications had been or would be denied by the Housing Authority. In October 1988, the Housing Authority settled the *Todd* class action and entered into a consent decree promising to improve its administrative procedures for determining the ineligibility of applicants for public housing. *See* Consent Decree, *Todd* (No. 84-0852CV-W-JWO).

23. In a recent article, Doletha Tinsley described the pre-litigation conditions in her housing development, T.B. Watkins. She lived on a "urine-damp hallway" filled with "gangbangers" and "crack addicts" while gunfire could be heard outside. Rodents infested her apartment. Police responding to a call from T.B. Watkins traveled in threes, and one officer always carried a shotgun to protect them from snipers. Residents were afraid for their lives. *See* Ruth E. Igoe, *The Case for Change*, KAN. CITY STAR MAG., May 21, 2000, at 12, 12-17 [hereinafter Igoe, *The Case for Change*]; Ruth E. Igoe, *Activist Works For Sense of Community*, KAN. CITY STAR, Feb. 23, 2000, at 7 (Connie Flowers describes the fear she felt living in Kansas City public housing in 1988).

Development ("HUD"), and HUD Secretary Jack Kemp. The *Tinsley* class action,[24] filed on February 9, 1989, focused on the one project—T.B. Watkins—that presented the most desperate need for modernization and reform. The named plaintiffs were five single, African-American mothers living in T.B. Watkins and one homeless woman on the public housing waiting list.

At the time of the complaint, T.B. Watkins had 118 vacant units out of 288 total units, up from only 35 vacant units the year before. Residents alleged that the conditions of T.B. Watkins exposed them to drug dealers, arsonists, and trespassers who inhabited the vacant units and interior hallways.[25] Many of the vacant units had been stripped of window frames, appliances, and cabinets, and were filled with trash, human waste, rats, and insects.[26] Furthermore, the plaintiffs claimed that the housing conditions placed their lives in danger.[27] The Comprehensive Improvement Assistance Program ("CIAP") study undertaken by the Housing Authority in May 1988 confirmed the problems asserted by the plaintiffs.[28] In the CIAP, the Housing Authority described T.B. Watkins as a high-density development with a vacancy rate of fifty-six percent, "severe" physical problems such as 151 uninhabitable units, "severe" crime problems evidenced by eleven police reports a month for crimes ranging from homicide to drug trafficking, and a stigma among residents as a dangerous public housing development.[29] In 1988, the Housing Authority estimated that it would take nearly ten million dollars to modernize T.B. Watkins.[30] Neither HUD nor the Housing Authority had the funds available to undertake such a capital improvement campaign.

B. The Tinsley *Complaint: 1989*

The *Tinsley* Complaint asserted several causes of action for the T.B. Watkins residents. First, the plaintiffs argued that the Housing Authority's neglect of the conditions at T.B. Watkins amounted to "de facto demolition" of the units without satisfying the regulatory requirements for demolition prescribed in the Fair Housing Act.[31] Section 1437p requires approval by HUD, and HUD cannot grant approval unless the Housing Authority consults tenants in the

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24. The complaint sought certification of the class of all residents of T.B. Watkins and all members of the Housing Authority's one thousand person waiting list for public housing. Plaintiffs' Complaint, *Tinsley* (No. 89-0023-CV-W-1).

25. *Id.* ¶¶ 35-38.

26. *Id.*

27. *Id.*

28. Comprehensive Improvement Assistance Program ("CIAP") Report, Attachment No. 1 to Consent Decree at 7-13, *Tinsley* (No. 89-0023-CV-W-1).

29. *Id.*

30. *Id.* at 13.

31. *See* Tinsley v. Kemp, 750 F. Supp. 1001, 1003, 1007 (W.D. Mo. 1990).

decision to demolish[32] and then assists displaced tenants in finding safe, affordable housing.[33] The plaintiffs asserted the de facto demolition claim against the Housing Authority and its director as a Section 1983 action.[34] The use of the de facto demolition argument was novel at the time, but Judge Dean Whipple, the federal district judge randomly assigned to the *Tinsley* matter, agreed that there was a private cause of action for de facto demolition inherent in Section 1437p and rejected the defendants' motion to dismiss.[35]

A second main prong of the plaintiffs' complaint was a claim against the Housing Authority, HUD, and HUD Secretary Jack Kemp that the neglect and disrepair of T.B. Watkins had a disparate impact on minority residents, in violation of the prohibition against discrimination in the provision of housing facilities under Title VIII of the Civil Rights Act of 1964.[36] As with numerous other aspects of the 1964 Act, Title VIII plaintiffs need not show discriminatory intent on the part of the Housing Authority; a finding of disparate impact on racial minorities is sufficient to sustain a claim.[37] Since almost all residents of T.B. Watkins were historically and are currently African-American, the discriminatory impact seemed a truism.[38] Judge Whipple denied the defendants' motion to dismiss the Title VIII claim.[39]

The other claims asserted in the *Tinsley* complaint were an Administrative Procedures Act ("APA") claim and a Title VI claim against all defendants for

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32. 42 U.S.C. § 1437p(b)(1) (1994).

33. 42 U.S.C. § 1437p(b)(2) (1994).

34. *See Tinsley*, 750 F. Supp. at 1003.

35. *Id.* at 1009. *See* Concerned Tenants Ass'n of Father Panik Village v. Pierce, 685 F. Supp. 316, 321 (D. Conn. 1988) (finding cause of action for de facto demolition under § 1437p). *But see* Edwards v. District of Columbia, 821 F.2d 651 (D.C. Cir. 1987) (finding § 1437p is limited to actual demolition, not applicable to de facto demolition). For an academic discussion of the de facto demolition argument, see Julia Clayton Powell, *De Facto Demolition: The Hidden Deterioration of Public Housing*, 44 CATH. U. L. REV. 885 (1995) (praising the approach taken by the courts in Kansas City and Connecticut). After *Tinsley*, the Chester, Pennsylvania public housing tenants successfully asserted a de facto demolition claim. *See* Velez v. Cisneros, 850 F. Supp. 1257, 1270-71 (E.D. Pa. 1994). Similarly, the residents of the District of Columbia Housing Authority successfully sustained a de facto demolition claim. *See* Pearson v. Kelly, No. 94-CA-14030 (D.C. Super. Ct. Aug. 18, 1994).

36. 42 U.S.C. § 3604(b) (1994) declares it unlawful to "discriminate against any person . . . in the provision of services or facilities in connection therewith, because of race, color, religion, sex . . . ."

37. *See, e.g.*, Gamble v. City of Escondido, 104 F.3d 300 (9th Cir. 1996); Soules v. HUD, 967 F.2d 817 (2d Cir. 1992).

38. *See* Plaintiffs' Complaint ¶ 46, *Tinsley* (No. 89-0023-CV-W-1) (stating that 99% of T.B. Watkins residents were non-white and historically, T.B. Watkins had been predominantly non-white). All named plaintiffs were African-American.

39. Tinsley v. Kemp, 750 F. Supp. 1001, 1011 (W.D. Mo. 1990).

racial discrimination by a federally funded government agency.[40] Judge Whipple dismissed the Title VI claim because of the plaintiffs' failure to sustain their burden of showing that the Housing Authority and HUD intentionally treated racial minorities "less favorably" because of their race.[41] The plaintiffs asked the court for an injunction halting the de facto demolition and mandating the immediate rehabilitation of all vacant units, an injunction against action creating discriminatory impact, ongoing jurisdiction over the remedial process, and attorney's fees.[42]

C. Consent Decree: Negotiation & Settlement: 1990-1991

The defendants fought hard for their motion to dismiss throughout 1989, but once the court denied the bulk of the motion to dismiss, settlement negotiations began in earnest and lasted for most of 1990. The two main issues under consideration in the negotiations were the modernization of T.B. Watkins and various desegregation remedies. The defendants resisted compromise on both prongs,[43] but ultimately the parties reached agreement. On November 25, 1991, Judge Whipple approved the Consent Decree.

The *Tinsley* Consent Decree primarily provided for the modernization of T.B. Watkins. HUD agreed to fund the project according to the CIAP guidelines, estimated at eleven million dollars.[44] The Housing Authority agreed to hire an architectural firm to design a plan that would make T.B. Watkins safe and "viable" for twenty years.[45] Moreover, the Housing Authority agreed not to demolish the entire T.B. Watkins development until after November 2011.[46] The Consent Decree also sought to increase the occupancy rate at T.B. Watkins. The Consent Decree outlined an extensive promotional campaign that would publicize the improvements and modernization of T.B. Watkins.[47] In addition,

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40. 42 U.S.C. § 2000(d) (1994) prohibits discrimination by any program receiving federal financial assistance.

41. *Tinsley*, 750 F. Supp. at 1011-12. The *Tinsley* complaint did not allege intentional discrimination, rather it claimed mere "discriminatory impact" which Judge Whipple held was insufficient to sustain a Title VI claim. Plaintiffs' Complaint ¶ 93, *Tinsley* (No. 89-0023-CV-W-1).

42. Plaintiffs' Complaint at 21-22, *Tinsley* (No. 89-0023-CV-W-1).

43. Telephone Interview with Julie Levin, Managing Attorney of Legal Aid of Western Missouri, in Kansas City, Mo. (Jan. 27, 1999).

44. Consent Decree ¶ 3C, *Tinsley* (No. 89-0023-CV-W-1).

45. *Id.* ¶ 3A. The defendants promised rehabilitation of all 288 units as well as the playground, park areas, landscaping, outside lighting, and security. Defendants also promised to hire security guards for T.B. Watkins. *Id.* ¶ 3B.

46. *Id.* ¶ 3F.

47. *Id.* ¶ 4. The Consent Decree detailed everything from when press conferences should be held, to how tours for interested applicants should be handled. The promotional campaign was to continue until T.B. Watkins reached an occupancy rate of

the marketing effort promised to increase community awareness of the viability of public housing, with an aim to correcting the negative public image created by years of neglect and decay in Kansas City public housing developments.[48] A related goal of the marketing campaign was to increase the number of non-minority public housing residents.[49]

A third focus of the Consent Decree was desegregation. This was a problematic prong of negotiations because the Housing Authority's resident population was comprised almost entirely of minority residents at the time of the Consent Decree. Moreover, because there was no finding of liability, the plaintiffs' counsel had to be creative in designing a remedy to which the defendants would consent.[50] The primary desegregative solution in the Consent Decree was the marketing campaign discussed above, aimed at desegregating the resident population by attracting non-minority residents to the public housing system.[51] Once the non-minority residents were attracted into the public housing system, the Consent Decree ordered the Housing Authority to develop a voluntary transfer program to encourage tenants in developments where their race was a majority to transfer to developments where their race was a minority.[52] Transfer tenants were to get priority on a waiting list over new applicants, but only after emergency applicants and under- and over-housed

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90%. *Id.*

48. *Id.* ¶ 7C.

49. *Id.* ¶ 7. The target group for the marketing campaign was "families of the race which is least likely to apply for any of the housing programs administered by [the Housing Authority]." *Id.* ¶ 7B. The Consent Decree details the types of marketing (i.e., brochures, posters, etc.), the content of the materials, and even suggests where the materials should be distributed. The marketing campaign also focused on increasing the number of Section 8 landlords in "non-racially impacted census tracts within [the Housing Authority's] jurisdiction." *Id.* ¶ 7A.

50. Interview with Julie Levin, *supra* note 22.

51. As an interesting side note, this solution in 1991 foreshadowed the "desegregative attractiveness" rationale struck down in 1995 by the United States Supreme Court with regard to Kansas City's magnet school system. *See* Missouri v. Jenkins, 515 U.S. 70, 94 (1995) (holding that "desegregative attractiveness" is an impermissible goal and "beyond the scope of [the court's] broad remedial authority"). Kansas City and the State of Missouri poured millions of dollars into transforming all junior and senior high schools in the city into magnet schools with superior facilities and specialized themes. The hope was the magnet schools would attract white suburban students into the predominantly African-American Kansas City School District. *But see* Hill v. Gautreaux, 425 U.S. 284, 298 (1976) (finding that a metropolitan remedy is not per se impermissible where the segregative tactics extended outside the Chicago city limits). It is important to note, however, that *Gautreaux* remedies aimed to push scattered-site public housing developments outside the Chicago limits rather than the Kansas City strategy in schools and public housing of pulling non-minority suburban residents into the city.

52. Consent Decree ¶ 5D, *Tinsley* (No. 89-0023-CV-W-1).

tenants.[53] The final effort of the desegregation remedial scheme was for HUD to request desegregation assistance from other public housing authorities and all HUD assisted non-public housing owners in the Kansas City Standard Metropolitan Statistical Area.[54]

Fourth, the Consent Decree set up a mechanism to monitor compliance. Every three months, the defendant Housing Authority was required to give plaintiffs' counsel access to all applicant files and to Housing Authority property in order to inspect rehabilitation work.[55] The Housing Authority promised to file an annual report detailing the status of their compliance,[56] and every three months, the defendants agreed to file a report with plaintiffs' counsel outlining progress on all obligations under the Consent Decree.[57] The court retained jurisdiction over the case for purposes of adjudicating any dispute over compliance.[58] Finally, the Consent Decree ordered the Housing Authority to pay ninety-five thousand dollars in attorney's fees and noted that none of the attorney's fees would be borne by HUD.[59]

D. A Tale of Recalcitrance, Resistance, and Frustration: 1991-1993

After the court entered the *Tinsley* Consent Decree, there was disagreement and tension among the defendants. HUD classified Kansas City as a "troubled" housing authority and began evaluating the possibility of taking over the Housing Authority. Because of its perception of extreme mismanagement at the Housing Authority, HUD refused to release the eleven million dollars for renovation to which it had agreed in the *Tinsley* Consent Decree.[60] Finally, in late May 1992, Kansas City agreed to turn the Housing Authority over to HUD, and HUD in turn released thirty-two million dollars for Housing Authority improvements, including the *Tinsley* modernization.[61]

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53. *Id.*

54. *Id.* ¶¶ 8-9. The Kansas City Standard Metropolitan Statistical Area encompassed the many suburban and rural municipalities surrounding Kansas City. This provision had little teeth because the contiguous public housing authorities were not parties to the litigation so were not bound by the Consent Decree. The Supreme Court struck down interdistrict remedies in *Milliken v. Bradley*, 418 U.S. 717 (1974) (forbidding interdistrict school busing plan).

55. Consent Decree ¶ 13, *Tinsley* (No. 89-0023-CV-W-1).

56. *Id.*

57. *Id.* ¶ 17. The Consent Decree also outlined an extensive list of documents that HUD and the Housing Authority were required to make available to the plaintiffs for purposes of monitoring compliance. *Id.* ¶ 14-15.

58. *Id.* ¶ 18.

59. *Id.* ¶ 22.

60. April D. McClellan & Diane Stafford, *Resignation of Housing Official Urged*, KAN. CITY STAR, Dec. 5, 1991, at C8.

61. April D. McClellan, *Public Housing in Kansas City to Get $32 Million*, KAN.

During this struggle to gain access to HUD funds, Judge Whipple granted plaintiffs' May 5, 1992 motion for contempt.[62] Then in July 1992, Legal Aid attorney Julie Levin filed *Boles v. Cisneros*,[63] a new class action against the Housing Authority asserting the same "de facto demolition" claims as *Tinsley*, but on behalf of the Riverview housing development tenants. Kansas City's Riverview development boasted a fifty-five percent vacancy rate, dangerous structural deterioration, and a high crime rate because of the prevalence of vacant units.[64] Local HUD officials, now charged with running the Housing Authority, criticized the filing of *Boles* litigation as a "waste of staff's time."[65] Despite this criticism, the *Boles* litigation settled on February 23, 1993. In the *Boles* Decree, the Housing Authority agreed to perform comprehensive modernization of Riverview, and HUD pledged ten and a half million dollars to finance the rehabilitation.[66]

As highlighted by the problems at Riverview, even under HUD management, the Housing Authority remained dysfunctional and in need of extensive organizational reform. By 1993, the vacancy rate of the Housing Authority was the second worst in the nation, and two years after the *Tinsley* Consent Decree, no modernization had been carried out at T.B. Watkins.[67] One million of the eleven and a half million dollars released by HUD was gone, and no one at the Housing Authority could account for how it had been spent.[68] After a year of unsuccessful management, HUD returned the Housing Authority to the City in May 1993, and Kansas City Mayor Emanuel Cleaver appointed his top aide, Luther Washington, as the interim executive director. At the same

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CITY STAR, May 22, 1992, at C1.

62. Judge Whipple ruled on the contempt motion on December 22, 1992. Court's Docket Sheet ¶ 128, *Tinsley* (No. 89-0023-CV-W-1). Reasons cited in the January contempt order were failure to implement the publicity campaign to both publicize modernization and promote a positive image of public housing, failure to offer tours of T.B. Watkins, failure to reconfigure waiting list policies in accordance with the Consent Decree, failure to submit progress reports, and refusal to pay attorney's fees. Court's Contempt Order at 2-4, *Tinsley* (No. 89-0023-CV-W-1). Apparently, none of the defendants opposed the finding of contempt. *See* John T. Dauner, *Housing Authority Has Not Lived Up To Edict, Court Rules*, KAN. CITY STAR, Dec. 22, 1992, at A8.

63. Boles v. Cisneros, No. 92-0526-CV-W-9 (W.D. Mo. filed July 7, 1992).

64. MROP Application for Riverview Housing Development (on file with author).

65. Dan Margolies, *Public Housing Tenants Formalize Impatience*, KAN. CITY BUS. J., Aug. 7, 1992, at 9.

66. Consent Decree ¶ 4, *Boles* (No. 92-0526-CV-W-9). The remainder of the *Boles* Consent Decree is similar to the terms of *Tinsley*, except that it does not provide for a voluntary transfer program or encouragement of cooperation from suburban landlords and contiguous housing authorities. *Boles* was not a desegregation case.

67. *See* Jeffrey Spivak, *Public Housing's Rise and Fall*, KAN. CITY STAR, July 11, 1993, at B1.

68. Tom Jackman & Jeffrey Spivak, *Housing Authority Put in Receivership*, KAN. CITY STAR, July 7, 1993, at A1.

time, Julie Levin filed a second contempt motion[69] and on July 2, 1993, Judge Whipple issued an order to show cause why the Housing Authority was not in contempt.[70] Natalie Coe, general counsel of the Housing Authority, signed a stipulation conceding that the Housing Authority had fallen short of its Consent Decree obligations.[71] In an interview, Coe stated, "'We had not paid the legal fees and we had not started construction. Ethically, I could not make a good faith argument that we had done that.'"[72] With that stipulation came the wrath of Judge Whipple and the ultimate sanction—the imposition of receivership.[73]

E. Receivership, Phase One: 1993-1994

On July 6, 1993, Judge Whipple found the Housing Authority in contempt and placed it in receivership.[74] He appointed Magistrate Judge Robert Larsen as special master to oversee the search for a permanent receiver, and he named Joe James, Regional Counsel for HUD, as interim director to assist Magistrate Judge

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69. Plaintiffs' Motion for Court Order Adjudicating Hous. Auth. of Kan. City in Contempt, *Tinsley* (No. 89-0023-CV-W-1). The plaintiffs' motion set forth areas of noncompliance that included the lack of modernization on T.B. Watkins, the lack of renovation of newly vacant units, the refusal to place tenants in the developments with the least vacancies, and the lack of document production in accordance with monitoring provisions in the Consent Decree. The plaintiffs also indicated that they had information that "fraud and embezzlement [were] taking place at the Housing Authority. Such activity would jeopardize the funds allocated for the rehabilitation of T.B. Watkins." *Id.* ¶ 8. After the judge threw the Housing Authority into receivership, it became public that the FBI was conducting an ongoing investigation of fraud by Housing Authority personnel. This investigation was only tangentially related to the *Tinsley* lawsuit or remedy. Interview with Julie Levin, *supra* note 22.

70. Order to Show Cause, *Tinsley* (No. 89-0023-CV-W-1).

71. Parties' Joint Stipulation of Fact, *Tinsley* (No. 89-0023-CV-W-1). Julie Levin, Natalie Coe, and Alleen Castellani, Assistant United States Attorney for the HUD defendants, signed the stipulation, which set forth the details of the Housing Authority's noncompliance. *Id.*

72. Bill Norton, *Attorney Focus in Takeover of Housing Agency*, KAN. CITY STAR, July 24, 1993, at C1.

73. *See* Jackman & Spivak, *supra* note 68, at A1.

74. Judge Whipple's contempt order cited several reasons for the sanction. First, no construction had begun at T.B. Watkins. Court's Contempt Order ¶ 1(a), *Tinsley* (No. 89-0023-CV-W-1). Second, vacancies occurred regularly at T.B. Watkins, yet the Housing Authority made no effort to rehabilitate the units and turn them into habitable units. *Id.* ¶ 1(b). Third, the Housing Authority was not placing tenants where there were the most vacancies as dictated by the Consent Decree. *Id.* ¶ 1(c). Finally, the Housing Authority did not make application to HUD for making exceptions to fair market rents up to 120% for the Section 8 certificate program in non-racially identifiable areas. *Id.* ¶ 1(d). All reasons for contempt were based on noncompliance with the *Tinsley* Consent Decree. The court also held the Housing Authority in contempt of the January 1993 contempt order for failing to pay attorney's fees to Legal Aid. *Id.* ¶ 2.

Larsen in the day-to-day operations of the Housing Authority.[75] The receivership stripped the Board of Commissioners of its power and removed Luther Washington, the Housing Authority's new Executive Director.[76] Upon issuing the order, Judge Whipple immediately dispatched the United States Marshals to the Housing Authority offices to take possession of the agency, and he issued a restraining order banning all Housing Authority employees from the office until invited to return to work by the receiver.[77]

City and Housing Authority officials reacted with shock, and focused their criticism on Natalie Coe's authority to sign the stipulation.[78] Washington and the ousted Commissioners expressed confusion about the purpose of the hearing and surprise that the hearing following the July Fourth weekend had such extreme implications.[79] Mayor Emanuel Cleaver, in a meeting with the *Kansas City Star* Editorial Board after the court's ruling, expressed his "vehement" disagreement with the receivership order.[80] Cleaver, Kansas City's first African-American Mayor, was new to office and had just appointed his top aide to run the Housing Authority. As a resident of public housing growing up, Mayor Cleaver expressed his frustration that he would not be given an opportunity to effectuate change at the Housing Authority.[81] Another voice of dissent regarding the receivership came from three resident leaders who decried the move as racist because it displaced Luther Washington and other African-American Housing Authority officials.[82]

Despite this opposition, an overwhelming number of public housing residents supported the court's intervention. The resident leaders that dubbed the

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75. Receivership Order, *Tinsley* (No. 89-0023-CV-W-1). The court had originally appointed Joe James as the receiver, but rescinded that order because under 28 U.S.C. § 958 (1994), federal employees cannot be receivers. Instead, the court adopted the temporary solution of appointing Magistrate Judge Larsen as special master under 28 U.S.C. § 636(b)(2) (1994) until a non-federal receiver could be appointed.

76. Receivership Order, *Tinsley* (No. 89-0023-CV-W-1).

77. Court's Contempt Order ¶ 8-9, *Tinsley* (No. 89-0023-CV-W-1).

78. Coe later became the target of vituperative criticism about her role in signing the stipulation and resigned from the Housing Authority one month later. *See* Norton, *supra* note 72, at C1.

79. *See* Norton, *supra* note 72, at C1.

80. *See* Tom Jackman, *Housing Offices Searched by FBI*, KAN. CITY STAR, July 8, 1993, at A1.

81. This being said, Cleaver was on the City Council prior to becoming Mayor and yet he had no positive impact on the Housing Authority's problems.

82. A tenant leader said in an interview, "'[w]hen black people try to control our own destiny, some white people come along and try to take it away.'" Of the eight people not called back to work after the receivership order, seven were African-American, including Luther Washington. The tenant leaders called on the black community to join them in protest against Judge Whipple's order. *See* Bill Norton, *Tenant Leaders Oppose Takeover of Kansas City Authority*, KAN. CITY STAR, July 29, 1993, at C4.

move racist were a small voice in a sea of support from the largely African-American resident population.[83] Judge Whipple held a public hearing two days after imposing receivership.[84] The courtroom was packed with residents, and all who spoke about the receivership remedy praised the court's action. The *Kansas City Star* reporter covering the hearing described, "The response [to Judge Whipple's action] was unanimous: Hallelujah and thank you, Judge!"[85] One resident exclaimed: "'We, the residents, feel like a black cloud has been lifted from over our heads.'"[86] Press coverage of the move also lauded the judge's extreme action. The Editorial Board of the *Kansas City Star* supported the remedial choice, imploring the court to finally fix the city's troubled public housing system.[87]

Nevertheless, the receivership began inauspiciously, with the release of a federal study indicating that of forty-four large problem-plagued public housing authorities in the United States, Kansas City's was the worst.[88] The temporary receiver, a HUD attorney, and the special master, a busy magistrate judge with a full docket, faced a formidable challenge of reforming the floundering public agency using largely the same staff.[89] By all accounts, James and Magistrate

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83. Four tenant leaders responded to criticisms of receivership and dismissed race as a factor in the judge's decision. These leaders lauded Judge Whipple's decision as "courageous and necessary." The tenant leaders noted that Judge Whipple brought in Joe James, an African-American, as the interim receiver. *See* Bill Norton, *Tenants Divided on Receivership*, KAN. CITY STAR, July 31, 1993, at C3.

84. Tom Jackman, *Many Grateful to Judge*, KAN. CITY STAR, July 10, 1993, at C1.

85. Jackman, *supra* note 84, at C1.

86. Jackman, *supra* note 84, at C1.

87. *See* Lokeman, *supra* note 14, at C6. The opening of the editorial teases:

> Reportedly there is a white horse hitched to a post in front of the T.B. Watkins public housing development in Kansas City. It's the horse that U. S. District Judge Dean Whipple rode in on. Whipple wants to rescue Watkins and other distressed properties in the Kansas City Public Housing Authority from the dragons of politics and waste.

Lokeman, *supra* note 14, at C6.

88. *See* Special Master's Report on the Status of Housing Authority's Compliance with Consent Decree, *Tinsley* (No. 89-0023-CV-W-1). Magistrate Judge Larsen cited the Annual Public Housing Assessment Program's scoring report which gave the Housing Authority a score of 17.95 out of 100, the lowest score of any housing authority in the United States. *See also* Bill Norton, *A Housing Agency in Chaos*, KAN. CITY STAR, Mar. 28, 1994, at A1. Norton reported that the Housing Authority "resemble[d] a leaky boat sinking in a sea of cash. Never in its history ha[d] the authority had so much to spend: More than $106 million to manage the agency . . . [b]ut because of mismanagement and staff turnover, it's never been in worse shape." *Id.*

89. After Judge Whipple's restraining order temporarily banning all employees from returning to work after the imposition of the receivership, 40-50% of Housing Authority employees were called back to work the next day by Joe James. *See* Jackman, *supra* note 80, at A1. By late August, all but seven of the Housing Authority's over two hundred employees were recalled to work. The employees *not* invited to return were the

Judge Larsen failed to ensure compliance with the *Tinsley* and *Boles* Consent Decrees. An editorial six months after the imposition of the receivership described the Housing Authority as "still an absolute mess."[90] After eight months of receivership, only minor construction had been completed—a recreation center of unknown cost.[91] As of March 1994, there was no modernization at T.B. Watkins or Riverview, and the Housing Authority Projects' Coordinator described the Housing Authority as a "three ringed circus."[92]

When the agreement with temporary receiver Joe James expired on February 15, 1994, it fell to Magistrate Judge Larsen to manage the day-to-day operations of the agency while searching for a replacement director. It was against this backdrop that Mayor Cleaver presented a five-point plan to the court requesting that the Housing Authority be returned to city control.[93] Cleaver's proposed terms included: (1) retaining a national housing law expert and a team of housing consultants, (2) appointing a ninety-day interim director, (3) conducting a national search for a permanent director, (4) appointing a committee of housing experts to advise the mayor, and (5) eventually turning this advisory committee into a new Board of Commissioners.[94] This plan was the first public statement on housing from Mayor Cleaver since the receivership was imposed. Magistrate Judge Larsen expressed skepticism about the plan, and Judge Whipple rejected it without expressing a reason.[95] Next, a relatively unknown figure, Paula Schwach, was named interim receiver.[96] Schwach was the ninth director of the Housing Authority since the *Tinsley* Consent Decree. Five months later, Schwach resigned.[97] By the time Schwach left, the T.B. Watkins project's occupancy rate under receivership had plummeted to a shocking thirty percent.

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top officials, such as Luther Washington, Cleaver's recent appointment as interim director. *See* Bill Norton, *Four Housing Authority Employees Jobs On-Line*, KAN. CITY STAR, Aug. 28, 1993, at C2.

90. Rhonda Chriss Lokeman, Editorial, *Care For the Tenants*, KAN. CITY STAR, Dec. 20, 1993, at B4. The editorial laments that judicial intervention is "straying" and that "despite the court's expression of good intentions, not much has been done." *Id.*

91. *See* Norton, *supra* note 88, at A1.

92. *See* Norton, *supra* note 88, at A1.

93. *See* Bill Norton, *Cleaver Hopes Housing Shifts to City Control*, KAN. CITY STAR, Feb. 17, 1994, at 1. There is no indication on the *Tinsley* docket that the Mayor filed the plan with the court. Julie Levin stated that the plan was never taken seriously or given a public hearing. Interview with Julie Levin, *supra* note 22. It is unclear whether and how Mayor Cleaver actually presented the plan to the court. It may have been primarily a press release intended for the community and the media.

94. *See* Norton, *supra* note 93, at 1.

95. *See* Norton, *supra* note 93, at 1.

96. *Around Kansas City*, KAN. CITY STAR, June 30, 1994, at C2.

97. *Around Kansas City*, *supra* note 96, at C2.

The failure of the first phase of receivership can be attributed to James, Schwach, and Magistrate Judge Larsen's lack of both management and public housing expertise, as well as their shortage of time to devote to the extensive reforms needed at the Housing Authority. The Phase One receivership raises issues of institutional competence—whether a temporary, court-appointed director can truly generate the momentum needed to effectuate change in a broken organization. It illustrates how much the success of receivership remedies turns on the capabilities and resources of the receiver. In his annual report to the court at the end of 1993, Magistrate Judge Larsen emphasized that "the crucial need for a sophisticated executive director in a contemporary housing authority cannot be overstated."[98] Moreover, the first phase receivers operated in a state of ambiguity—staff, vendors, business leaders, and tenants knew this was a temporary situation and no one could predict what would happen next. It is difficult to inspire loyalty from employees, generate confidence among lenders, maintain control over contractors, and create significant organizational change within this limited, temporary context. To ask these Phase One receivers to be responsible for the Housing Authority's reform would be similar to placing the burden for reforming failing schools on the shoulders of a substitute teacher.

F. Receivership, Phase Two: 1994-Present

When Schwach resigned in July 1994, Magistrate Judge Larsen and Judge Whipple launched a more vigorous national search for a permanent receiver who would bring management and housing expertise to the Housing Authority. The special master appointed an Advisory Committee of more than a dozen individuals who screened seventeen bids for the receivership position.[99] After interviewing finalists, Magistrate Judge Larsen recommended TAG Associates ("TAG"), a for-profit Boston management consulting firm specializing in public housing management and reform.[100] TAG had experience working with various failed housing authorities in Boston, D.C., and San Francisco, but had never served as a receiver.[101]

TAG President Jeffrey Lines met with Judge Whipple and expressed concern about the prior model where the receiver reported to the special master. Lines speculated that after a year of failure under receivership, the court was eager to get the Housing Authority fixed; as a result, Judge Whipple told TAG

98. Special Master's Report on the Status of the Housing Authority's Compliance with Consent Decree at 15, *Tinsley* (No. 89-0023-CV-W-1). Magistrate Judge Larsen concluded his report by urging the court to appoint a permanent receiver. *Id.* at 48.

99. *See* Tom Jackman, *K.C. Housing Receiver is Named*, KAN. CITY STAR, Aug. 26, 1994, at C1.

100. *Id.*

101. *Id.*

that they could have full authority to act as long as they were accountable for failure.[102] Judge Whipple made it clear to Lines that TAG would be expected to stay on board unless the court directed the company to leave, and the court could fire TAG at any time.[103] On September 6, 1994, Judge Whipple appointed TAG as receiver of the Housing Authority, conferring on it full power to contract, hire, fire, and administer the funds of the Housing Authority.[104] The court endowed the receiver with all the legal immunities vested in a member of the court.[105] To monitor the receivers, Judge Whipple asked TAG to submit a twelve month strategic plan for the Housing Authority's first year.[106] Thereafter, the receiver was to supply the court monthly reports outlining action taken and funds spent.[107] The receivership order made no provisions for when the receivership would end, but said only that the "receiver will serve at the pleasure of this court."[108]

The community's initial reaction to the appointment of TAG was guardedly optimistic. TAG's first move was to hire Eugene Jones as the Executive Director. Jones, a 38-year old African-American man with years of experience both as a HUD auditor and most recently with the San Francisco Housing Authority, was the twenty-second director in a decade at the Housing Authority,[109] and he found the business community to be particularly skeptical about yet another director coming through the revolving door.[110] However, the Housing Authority's residents and staff welcomed him when it was immediately apparent that he was going to take action and be a hands-on leader.[111] Within his first few days on the job, Jones toured Housing Authority developments talking with residents and staff and responding to problems.[112] Residents had never seen a director show such interest and enthusiasm; as a result, they embraced Jones and supported his new leadership.[113]

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102. Interview with Jeffrey Lines, President of TAG Associates, in Norwood, Mass. (Feb. 12, 1999).

103. *Id.*

104. Receivership Order, *Tinsley* (No. 89-0023-CV-W-1).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Igoe, *The Case for Change*, *supra* note 23, at 15.

110. Telephone Interview with Eugene Jones, former Executive Director of Kansas City Housing Authority and current Executive Director of Indianapolis Housing Authority (Mar. 19, 1999).

111. *Id.*

112. Jones' success through his active involvement in the field is comparable to the activities of the Boston Housing Authority ("BHA") receiver, Harry Spence. For a case study of the BHA receivership, see MOORE, *supra* note 6, at 241 (describing Harry Spence as a "visible presence in the field" at least twice a week touring the properties).

113. Telephone Interview with Eugene Jones, *supra* note 110.

After six weeks on the job, Jones had set up participatory forums for residents, increased security, unlocked languishing HUD funds, employed resident crews to clean up trash at developments, held one-day skills training seminars for Housing Authority staff, and transferred the staff offices from the beleaguered Riverview development to a downtown office building.[114] HUD released funds because of its growing confidence in TAG's management abilities.[115] Elmer Binford, a HUD adviser and longtime critic of the Housing Authority, said HUD gave Jones "'high marks'" for the impressive quickness with which he "'established a presence and quieted things down.'"[116] Within weeks of TAG's appointment, a *Kansas City Star* editorial lauded the signs of improvement apparent at the Housing Authority.[117] Jones brought an aggressive, active management style to the Housing Authority, and the residents and staff who had floundered for a decade without a real leader rallied to support him.

TAG submitted its first twelve month plan to the court in November 1994, and the ambitious plan focused on creating a new decentralized management structure, launching two new maintenance crews devoted exclusively to repairing vacant units, hiring outside firms to perform different jobs rather than one firm to fix an entire unit, modernizing the computer capabilities of the office, and developing incentive pay structures for staff to encourage productivity and quality standards.[118] By March 1995, progress was tangible—the Housing Authority unveiled the first nine newly refurbished units at T.B. Watkins.[119] The opening of these nine units was only a small step, as they were surrounded by a development with a thirty-three percent occupancy rate, but it was a highly visible step toward remedying the de facto demolition problem of the original *Tinsley* litigation.[120]

The Phase Two receivership success confirms the lesson that the ability of the receiver to provide hands-on leadership and credibility is a crucial element for institutional reform. In Kansas City, Eugene Jones' capacity for managing

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114. Jeffrey Spivak, *Housing Chief Quickly Makes His Mark in Kansas City: Eugene Jones Admits the Troubled Authority Needs Much More Work*, KAN. CITY STAR, Oct. 24, 1994, at B1. Jones, upon arrival, proclaimed that his mission was to turn around one of the nation's most troubled housing agencies. He noted, "'I'm young, I'm aggressive and I think I can do it. I'm destined to do it.'" *Id.*

115. *See* Spivak, *supra* note 114, at B1.

116. Spivak, *supra* note 114, at B1.

117. E. Thomas McClanahan, Editorial, *Signs of Improvement*, KAN. CITY STAR, Oct. 27, 1994, at C6. The editorial notes that the biggest challenge facing Jones "will be changing the character of the authority's bureaucracy." The editorial was hopeful, but also adopted a wait-and-see attitude. *Id.*

118. Jeffrey Spivak, *Housing Authority Pledges Influx of Families*, KAN. CITY STAR, Nov. 18, 1994, at C2.

119. Tracey Kaplan, *A Desirable Place to Live at Watkins*, KAN. CITY STAR, Mar. 2, 1995, at C1.

120. *Id.*

a public housing agency made receivership a viable tool. By the end of 1995, Julie Levin, plaintiffs' counsel in *Tinsley*, told the press, "'We hope Gene Jones never leaves.'"[121] Jones continued as Executive Director of the Housing Authority until May 1997 when he resigned to reform a different troubled housing authority in Indianapolis.[122] By all accounts, Jones was an excellent manager and created positive institutional change during his tenure as director.[123]

TAG replaced Jones with Dallas Parks.[124] When Dallas Parks arrived, the Housing Authority was nearly halfway through a $133 million capital improvement campaign, which included large-scale renovations to T.B. Watkins, Riverview, and Guinotte Manor.[125] In August 1998, the Housing Authority opened a new 120 unit mixed income development on the former site of Pennway Plaza. The new development, Villa Del Sol, signaled the future of the Housing Authority. It combined sixty-five units of public housing with fifty-five units of market-rate private housing.[126] In terms of tangible progress, the Housing Authority under receivership moved from the celebrated nine units at T.B. Watkins in early 1995, to a massive overhaul of nearly all Housing Authority facilities. In 1999, Kansas City had approximately 1,600 public

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121. Tracey Kaplan, *Public Housing Makes Gains Under Private Management*, KAN. CITY STAR, Sept. 5, 1995, at A1. The general tone of the article reported that things were improving at the Housing Authority. Occupancy rates for the Housing Authority as a whole increased from 57% to 63% in the year since Judge Whipple named TAG receiver. *Id.* Upon this Author's visit to the TAG offices in Norwood, a plaque displayed on the wall read: "To TAG & Associates. In appreciation of your aggressive approach to overcome obstacles that have plagued the [Housing Authority] and succeeding when no one else could. September 9, 1995. [Housing Authority] Residents & Staff."

122. Telephone Interview with Eugene Jones, *supra* note 110.

123. Jones' leadership continued to be hands-on throughout his tenure at the Housing Authority. A recent article by public housing advocates praised Jones' active role, noting that he was "instrumental in creating a trusting relationship with the residents. He would drive around the developments on weekends and evenings and just stop and ask people what their problems were and write down the information. Within two weeks, they would have a solution." Eric Scott, *Putting Teeth Into Resident Participation*, HOUSING MATTERS (Pub. Hous. Residents' Nat'l Org. Campaign, Washington, D.C.), Feb. 1999, at 7.

124. Interview with Jeffrey Lines, *supra* note 102.

125. *See* Glenn E. Rice, *New Look, New Issues for Public Housing*, KAN. CITY STAR, Mar. 1, 1998, at B1.

126. *See* Glenn E. Rice, *Public Housing Seeks Blend of Residents*, KAN. CITY STAR, Aug. 25, 1998, at B1. The Housing Authority continues its expansion into mixed income developments. In April 2000, the Housing Authority purchased twelve acres in Kansas City's Northland region and plans to build a one hundred unit development with at least twenty units of public housing. *See* Ruth E. Igoe, *Clay County Housing Interest Revealed*, KAN. CITY STAR, Apr. 27, 2000, at B4.

housing units, with an anticipated 610 more redeveloped or new units expected by 2001.[127]

While achieving success in management and construction, TAG maintains consistent, open communication with the court. In advance of each calendar year, TAG submits a twelve-month plan and budget to the court and plaintiffs' counsel in accordance with the receivership order.[128] After reviewing the twelve-month plan, the mayor, regional HUD officials, and the Public Housing Residents Council[129] all submit comments to the court.[130] The court privately considers the twelve-month plan and related comments and then decides whether to renew TAG's year-to-year contract.[131] The TAG/Housing Authority director, Jones and now Park, also meets with Judge Whipple twice a month, focusing primarily on policy decisions and "big picture" plans rather than day-to-day operations. Based on these frequent meetings, Jones described Judge Whipple as an intelligent man of common sense who trusted the people he hired and gave them his complete support.[132]

In addition to its accountability to the court, TAG consistently solicits feedback from residents and the greater Kansas City community. For instance, TAG holds "receivership meetings" every two weeks where TAG President Jeffrey Lines meets with interested tenants. These meetings are advertised to the Housing Authority tenants, and usually have a representative or two from each housing development. The receiver and plaintiffs' counsel use the meetings to track compliance with different items in the *Tinsley* Consent Decree.[133] Lines

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127. *See* Ruth E. Igoe, *Spotlight on Public Housing*, KAN. CITY STAR, July 21, 1999, at B1 (praising "dramatic improvements . . . made since receivership began"). For example, the "urban village" mixed income housing redevelopment at Guinotte Manor was heralded a success at its dedication in 1998 despite much controversy surrounding its original architectural design. *See* Lynn Horsley, *Making Progress*, KAN. CITY STAR, Dec. 24, 1998, at 10; *see also* Ruth E. Igoe, *Singing Praises of New Guinotte Manor*, KAN. CITY STAR, May 12, 2000, at B3 [hereinafter Igoe, *Singing Praises*].

128. Receivership Order ¶ 4, *Tinsley* (No. 89-0023-CV-W-1).

129. The Public Housing Residents Council ("PHRC") is an organization created when the receivership began. It was initially led by Emily Wallace, now deceased. The current leader is Connie Flowers. It is a strong organization of tenant representatives from all Kansas City public housing developments. The PHRC has considerable contact with the court directly as well as socially. Judge Whipple interacts with the PHRC at its annual meeting over the twelve-month plan as well as attending its Summer Jamboree. Interview with Julie Levin, *supra* note 22.

130. Telephone Interview with Eugene Jones, *supra* note 110; Interview with Julie Levin, *supra* note 22.

131. There is no public hearing on the renewal of TAG's contract or the provisions of the twelve-month plan or budget. Interview with Julie Levin, *supra* note 22.

132. Telephone Interview with Eugene Jones, *supra* note 110.

133. Interview with Julie Levin, *supra* note 22. A sample Agenda from the March 31, 1999 meeting indicates the discussion focused for five minutes on each of the ten Kansas City public housing developments and also covered general topics such as

explained that TAG wanted "extreme accountability" on all aspects of receivership management.[134] Lines believes if people are continuously informed of what is happening, and if decisions are made "in the light of day," they will feel comfortable and not challenge decisions.[135] A national public housing advocacy newsletter praises the "trusting relationship" built by Lines, due in part to the receivership meetings where residents present reports on their developments and get answers to their questions.[136] It is important to note that this accountability was not mandated by the court; rather, it was the result of TAG's open management style.

After a decade of litigation, reform, and remedial experimentation at the Housing Authority, HUD recently gave the Housing Authority an "A" for their 1998 performance, citing the Housing Authority as a "high performer" in maintenance and management.[137] This accolade can be contrasted with the "F" the Housing Authority received in 1994 at the beginning of TAG's receivership.[138] The results of institutional reform at the Housing Authority are positive and undisputable.[139] Part II will now consider the appropriateness and implications for the methods used to achieve these outstanding results.

"Security" and "Resident Services."

134. Interview with Jeffrey Lines, *supra* note 102.

135. Interview with Jeffrey Lines, *supra* note 102. Lines also explained that for every contract over $25,000, and every significant change in Housing Authority policy, TAG holds a public meeting for any interested party to raise concerns. He reported that few people come to these meetings despite efforts to publicize them. Interview with Jeffrey Lines, *supra* note 102.

136. Scott, *supra* note 123, at 7. The interview is with Eric Scott, the director of the HOPE VI program at the Housing Authority. Scott explains, "We have found that as long as we do everything above the table and the residents underst[and] what our limitations are, they are extremely understanding. It's only when we try to do something behind the scenes and figure that they don't need to know that we have a real argument and start working at cross purposes." Scott, *supra* note 123, at 7.

137. Ruth E. Igoe, *K.C. Agency Makes Honor Roll After Flunking Five Years Ago*, KAN. CITY STAR, May 6, 1999, at B9 [hereinafter Igoe, *K.C. Agency Makes Honor Roll*]. Dallas Parks attributes the success to "a team effort by a top-notch staff . . . [which] start[ed] with the court-appointed receiver, Jeff Lines of TAG Associates, Inc. [and] the residents who g[ave] staff their input . . . ." *Id.* Michael Sturmer, Director of Development for the Housing Authority said, "'We still realize we have more work to do and are going to continue improving.'" *Id.* The Housing Authority received an overall score of 90.25 out of 100 in 1998. In 1994, the Housing Authority received a score of 43.98. The score, calculated by HUD, is a composite of performance in operational areas such as maintenance response time, rent collections, security, capital improvement, and financial management. *Id.*

138. *Id.*

139. *See* Igoe, *The Case For Change*, *supra* note 23; *see also* Igoe, *Singing Praises*, *supra* note 127, at B3.

II. RECEIVERSHIP: AN EXTRAORDINARY REMEDIAL STEP

A. Legal Foundation for Receivership Remedies

Receivership is a remedy with roots in the commercial arena. It is traditionally employed to preserve property for creditors during bankruptcy, corporate reorganization, or other litigation proceedings where the court finds the corporate fiduciaries can not be trusted with the assets of the company pending a decision by the court.[140] In the 1960s and 1970s, a few courts expanded commercial receivership into the area of public institutional reform litigation. *Turner v. Goolsby*[141] is the first known instance of a court employing the receivership remedy to reform a public institution.[142] In *Turner*, the Taliaferro County School District Superintendent secretly closed the county's white school to avoid desegregation and bused all white students to neighboring county schools on Taliaferro buses. This tactic left eighty-seven African-American children, whose transfer to white schools instigated the resistance, with no school to attend. The three judge district court, angered by the subversive tactics of the county, placed the school in receivership and named the Georgia Superintendent of Schools as the receiver. The *Turner* court found this move necessary "to avoid irreparable injury to the white children which would result from enjoining the use of public funds for their education, and to preserve the rights of 87 Negro applicants for transfer."[143]

While scholars and lawyers often talk about "receivership" as a metaphor for the invasiveness of institutional reform litigation,[144] true remedial

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140. For a discussion of the roots of the receivership remedy in the commercial context, see Jason Feingold, *The Case for Imposing Equitable Receiverships Upon Recalcitrant Polluters*, 12 UCLA J. ENVTL. L. & POL'Y 207 (1993) (exploring the changing uses of receivership over the last two centuries from traditional "custodial" business related receiverships to "remedial" receiverships in areas of prisons, housing, and environmental law). *See also* James M. Hirschhorn, *Where The Money Is: Remedies To Finance Compliance With Strict Structural Injunctions*, 82 MICH. L. REV. 1815, 1834 (1984).

141. 255 F. Supp. 724 (S.D. Ga. 1966).

142. For an early analysis of receivership as a remedy in institutional reform litigation, see Note, *Receivership as a Remedy in Civil Rights Cases*, 24 RUTGERS L. REV. 115 (1969).

143. *Turner*, 255 F. Supp. at 730.

144. Several Supreme Court dissenting opinions raise the specter of "federal receivership" as an example of how the Court exceeded its remedial authority in some seminal school desegregation cases. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 525 (1979) (Rehnquist, J., dissenting); Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 257 (1973) (Rehnquist, J., dissenting) (describing court oversight of desegregation as "what is in practice, a federal receivership"); Wright v. City of Emporia, 407 U.S. 451, 477 (1972) (Burger, J., dissenting) ("While we have emphasized the

receiverships are rarely imposed by courts.[145] Before continuing, it is important to distinguish the "receiver" from other third party remedial tools. Of course, anytime the court has ordered a detailed structural injunction, the discretion of the defendants is constrained and the presence of any uninvited third-party is an invasive influence on the organization. However, while the terminology is often used interchangeably, there is a distinct difference between various third party roles, sometimes grouped under the ubiquitous term "neoreceivers."[146] "Special masters" typically assist the court with the formulation of more detailed orders or conduct evidentiary hearings on detailed preliminary factual matters.[147] "Monitors" typically act as surrogates for the plaintiff class to supervise defendants' compliance with a court order.[148] True receivers are the only third-party brought in by the court to *displace* the defendants and assume the power to run an institution,[149] raising unique concerns about the continuing Article III jurisdiction of federal courts to oversee litigation in which there is arguably no longer a "case or controversy." In addition, special masters and monitors are used as early, even as the first, remedial tools to achieve compliance, whereas in public institutional reform litigation, receivership is usually a court's last ditch remedial option.[150] The remedy imposed on the Kansas City Housing Authority is a classic receivership—it displaced the Board of Commissioners and the Executive Director and replaced them with a court appointed third-party who controlled all aspects of the offending organization.

Power to displace government actors falls under judges' broad equity powers to design a remedy best suited for the violation. As stated by the United States Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education,* "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are

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flexibility of the power of the district courts in this [post *Brown II* desegregative] process, the invocation of remedial jurisdiction is not equivalent to having a school district placed in receivership.").

145. For a listing of the fifteen known institutional reform litigation receiverships, see *supra* note 5.

146. *See* Note, *Equitable Remedies: An Analysis of Judicial Utilization of Neoreceiverships to Implement Large Scale Institutional Change,* 1976 WIS. L. REV. 1161 (describes neoreceivers as a new remedial form involving a synthesis of receivers who supervise and masters who advise).

147. *See* Hirschhorn, *supra* note 140, at 1821; *see also* Comment, *Court-Created Receivership Emerging as Remedy for Persistent Noncompliance with Environmental Laws,* 10 ENVTL. L. REP. 10059 n.11 (1980) (clarifying that special masters are different from receivers in that special masters serve merely an advisory role).

148. *See* Hirschhorn, *supra* note 140, at 1821.

149. *See* Hirschhorn, *supra* note 140, at 1821.

150. *See* Robert E. Buckholz, Jr. et al., Special Project, *The Remedial Process in Institutional Reform Litigation,* 78 COLUM. L. REV. 784, 837 n.437 (1978). *See infra* note 157 (discussing test for imposing receivership).

inherent in equitable remedies."[151] Two federal circuits have affirmed the appropriateness of receivership outside the traditional commercial context. In *Morgan v. McDonough*,[152] the First Circuit approved the receivership for South Boston High School in the midst of a protracted desegregation battle, finding that "when the usual remedies are inadequate, a court of equity is justified, particularly in aid of an outstanding injunction, in turning to less common ones, such as receivership, to get the job done."[153] The District of Columbia Circuit reversed an extraordinarily broad receivership order for the D.C. child welfare system because it gave the receiver blanket authority to violate any local law which interfered with the receiver's duties.[154] However, in its analysis, the D.C. Circuit assumed without challenge the validity of the receivership remedy as within the District Court's equitable power.[155]

Because displacement of elected or appointed officials running a public institution is the second most drastic remedial tool available to a judge,[156] it must be ordered only when the violation justifies such an extraordinary response. Courts can only use receivership as a mechanism of "last resort."[157] Years of defiance and recalcitrance speckled with contempt citations usually predate the imposition of receivership. For example, in a case against the District of

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151. 402 U.S. 1, 15 (1971).

152. 540 F.2d 527 (1st Cir. 1976)

153. *Id.* at 533.

154. *See* Lashawn v. Barry, 144 F.3d 847 (D.C. Cir. 1998).

155. *See id.* Judge Silberman's opinion seems to assume the validity of the receivership remedy and even the appropriateness of a receiver overriding local law under more controlled circumstances. He writes, "[s]hould the district court determine . . . that empowering the Receiver to violate District law in a specific instance is warranted, it must identify the specific federal law ground it is using as the justification for the Receiver's authority to transcend local law." *Id.* at 855.

156. The most drastic response available to the judge is the closure of a public institution. Many courts, when deciding to impose a receivership, adopt the rhetorical move of comparing that remedy with the more extreme option of shut-down. *See, e.g.*, *Morgan*, 540 F.2d at 534; Shaw v. Allen, 771 F. Supp. 760, 763 (S.D. W. Va. 1990); Newman v. State of Ala., 466 F. Supp. 628, 635 (M.D. Ala. 1979).

157. *See* Dixon v. Barry, 967 F. Supp. 535, 550 (D.D.C. 1997) (noting receivership is appropriate only when there is no other remedy left); *Shaw*, 771 F. Supp. at 762 (finding receivership an "intrusive remedy which should only be resorted to in extreme cases" where traditional remedies such as injunctions and contempt proceedings fail); *Newman*, 466 F. Supp. at 635 (establishing that under the extraordinary circumstances, the only alternative to noncompliance with the Court's order is the appointment of a receiver); District of Columbia v. Jerry M., 738 A.2d 1206 (D.C. 1999) (reversing receivership order because the trial court did not allow sufficient time for the new superintendent to "turn the tide" in the new school year before ordering the "remedy of last resort"); Perez v. Boston Hous. Auth., 400 N.E.2d. 1231, 1245, 1249 (Mass. 1980) (finding the receivership option the judges "only remaining expedient" with any hope of success; therefore, it was the remedy of "last resort").

Columbia Housing Authority, a court-appointed special master conducted an extensive year-long review before recommending receivership.[158] Upon receiving the recommendation, the federal court ordered receivership, ending thirty years of effort by public housing advocates, HUD oversight committees, tenant protesters, and legislative reform.[159] Receivership was the "last resort" for this troubled and dysfunctional housing authority.[160] An analysis of the published receivership cases indicates that Judge Whipple in *Tinsley* was among the quickest to impose the receivership remedy, ordering receivership after two years of noncompliance under the *Tinsley* Consent Decree and with only one prior contempt citation.[161] Most judges struggled for six to ten years, through numerous contempt citations, before determining that receivership was the only remedial option remaining.[162]

Much of the ultimate fate of the receivership remedy turns on the choice of receiver.[163] The *Tinsley* Phase One receivership illustrates a failure of the

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158. *See* Cunningham & Foley, *supra* note 6. For an additional example, before Judge Garrity placed the Boston Housing Authority ("BHA") in receivership, he appointed a special master to monitor the BHA, issued numerous interim injunctive orders against the BHA, and helped litigants agree on terms of a consent decree that would bind their conduct, but all to no avail. Plaintiffs repeatedly moved for receivership, and Judge Garrity consistently denied these motions. After over four years of struggling with the proper remedial response to the violation of rights by the BHA, Judge Garrity reluctantly imposed a receivership on the BHA. *See Perez*, 400 N.E.2d. at 1236-51.

159. *See* Cunningham & Foley, *supra* note 6.

160. *See* Cunningham & Foley, *supra* note 6.

161. On the other hand, the Housing Authority had been the subject of several other class actions previously and was a "repeat offender."

162. *See Dixon*, 967 F. Supp. at 535 (22 years); Shaw v. Allen, 771 F. Supp. 760, 763 (S.D. W. Va. 1990) (ordering receivership after eight years of noncompliance with the court's remedial decree); Gautreaux v. Landrieu, 498 F. Supp. 1072, 1074 (N.D. Ill. 1980) (denying for the first time plaintiffs' motion for receivership); Newman v. State of Ala., 466 F. Supp. 628, 628 (M.D. Ala. 1979) (six years); Gautreaux v. Chicago Hous. Auth., No. 66-C1459 (N.D. Ill. filed Jan. 13, 1984) (denying for the second time plaintiffs' motion for receivership). Note that receivership was finally imposed in Chicago's scattered-site housing in 1987. *But see* Turner v. Goolsby, 255 F. Supp. 724 (S.D. Ga. 1966) (acting immediately to prevent the county from circumventing school desegregation by imposing receivership).

163. *See* Cunningham & Foley, *supra* note 6, at 1034 (cautioning that "receivership is merely a tool and may prove harmful if it is badly designed or improperly used"). Cunningham and Foley illustrate this admonition with reference to the Chester, Pennsylvania temporary receiver imposed by HUD in 1990. HUD placed the Chester Housing Authority in the hands of a private real estate management company as an "informal receiver." Cunningham and Foley note that since the real estate company was not qualified to run a complex public housing authority, and as a result made bad public policy decisions, the problems of the Chester public housing tenants continued after the informal receivership began. This slow start can be contrasted with the housing

remedy under a weak "substitute teacher" receivership model. On the other hand, the appointment of the aggressive, business-oriented TAG receiver illustrates how one or two dynamic, experienced people acting as receiver can positively impact an organization.[164] Courts have named two different types of receivers—either a government official or a private individual, often acting under the auspices of a for-profit company. All current or previous public housing receivers—D.C., Chicago, Boston, Chester, and Kansas City—are private individuals or businesses with no ties to state or local government.[165] This can be contrasted with school and prison receiverships, almost all of which were reallocations of power within the state or local government.[166] The two camps continue to coexist with no legal mandate to prefer one form over the other.[167]

Overall, the verdict is divided on the appropriateness of receivership as a remedy in institutional reform litigation. Critics often point to "receivership" as

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expert, Rob Rosenberg, appointed as the permanent receiver by the court in 1994. *See* Massaro v. Chester Hous. Auth., 1999 WL 624485 (E.D. Pa. Aug. 5, 1999).

164. *See* Cunningham, *supra* note 6, at 81 (describing the selection of David Gilmore as the receiver of the D.C. Housing Authority as "one of the most important elements of the litigation." Gilmore was a housing expert from outside the D.C. community who had experience running a Housing Authority.).

165. Daniel Levin and Habitat, Co., a real estate brokerage, development, and management company, act as court-appointed receiver for Chicago's scattered-site program. Robert Rosenberg, President of the for-profit Rosenberg Housing Group, is the court-appointed receiver of the Chester Housing Authority. Harry Spence, a private public housing consultant, served as Boston's receiver. From Harry Spence's Boston Housing Authority receivership sprang up a cottage-industry of housing receivers. Jeffrey Lines, President of TAG and serving as receiver in Kansas City, worked under Spence at the BHA. David Gilmore, the Deputy of Operations in the BHA receivership, is the court-appointed receiver of the D.C. Housing Authority.

166. *See* Morgan v. McDonough, 540 F.2d 527, 535 (1st Cir. 1976) (affirming the appointment of the school district superintendent as receiver of South Boston High School); *Newman*, 466 F. Supp. at 635 (naming the Governor the receiver for a state prison system); *Turner*, 255 F. Supp. at 730 (naming the state Superintendent of Schools as the receiver for a county school district); Wayne County Jail Inmates v. Wayne County Chief Executive Officer, 444 N.W.2d 549, 558-60 (Mich. Ct. App. 1989) (affirming appointment of Wayne County executive as receiver of county jail system, displacing the sheriff who failed to comply with consent decree). *But see Shaw*, 771 F. Supp. at 764 (appointing an assistant professor at Marshall University with experience in corrections as the receiver of the county jail).

167. In *Perez v. Boston Housing Authority*, the highest court of Massachusetts approved a private individual as receiver of Boston public housing, but reserved the legal question of whether a receiver needs to be a state official. Perez v. Boston Hous. Auth., 400 N.E.2d 1231, 1250 n.30 (distinguishing *Morgan*, *Turner*, and *Newman*, all of which appointed a state official rather than a private person such as Harry Spence, the receiver of the Boston Housing Authority).

a symbol of all the dangers associated with judicial activism.[168] It is rare, however, for discussion of "receivership" to leave the general dialog about judicial restraint and the proper role of courts to consider actual cases of the true dissolution of recalcitrant defendants. One study of the receivership remedy in action at South Boston High School mildly criticizes the remedy and speculates that Judge Garrity's sweeping use of judicial power would never withstand Supreme Court review.[169] Conversely, a public management study of Harry Spence's activities as the receiver of the Boston Housing Authority provides a positive image of the opportunities for reform afforded by the court displacing incompetent defendants.[170] The Boston study illustrates one of the most distinctive features of receivership, also seen in *Tinsley*—receivership gives the court an opportunity to bring effective management skills into a troubled, often paralyzed organization.[171]

B. Implications and Effects of Receivership in Kansas City

1. The Guinotte Controversy

The controversy surrounding the redevelopment of Kansas City's Guinotte Manor provides a tangible example with which to ground the discussion of the legitimacy and efficacy of the receivership remedy in practice. Under Kansas City municipal zoning laws, all Housing Authority developments must be approved by the City Council,[172] and elected members of the City Council are accountable to their constituents for these decisions. TAG assisted the Housing

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168. *See, e.g.*, Donald Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1302 (cautioning against letting "frustration with organizational change litigation prople [sic] too much enthusiasm for procedural innovations" such as receivers). Horowitz worries that the growing use of receivers threatens the judicial process because of the informal ex parte nature of their conversations with the judge. *Id.* at 1300, 1302. For further critique of the receivership remedy, see Diver, *supra* note 2, at 100 (expressing concern that the receivership remedy creates martyrs within the recalcitrant organization).

169. *See* Roberts, *supra* note 6, at 109-10 (rejecting a per se bar on receivership for public institutions, but suggesting a case-by-case "rule of reason" analysis of the particular circumstances of the noncompliance).

170. *See* MOORE, *supra* note 6; *see also* Cunningham, *supra* note 6 (heralding the success of receivership in D.C. Public Housing); Cunningham & Foley, *supra* note 6 (praising the effectiveness of the receivership remedy for public agencies, particularly public housing authorities, and presenting a practical guide for public interest advocates on how to secure a receivership remedy on behalf of poor people). *See generally* Note, *Receivership as a Remedy in Civil Rights Cases*, *supra* note 142, at 141 (providing general praise for the expansion of receivership into public institutional reform cases).

171. *See* MOORE, *supra* note 6; *see also* Cunningham, *supra* note 6.

172. *See, e.g.*, KAN. CITY, MO., MUNIC. CODE §§ 66-43 & 80-270 (1998).

Authority procure a large $47.5 million HOPE VI grant[173] to renovate the city's oldest and largest housing development, the 412 unit Guinotte Manor.[174] The Housing Authority plan called for a three hundred unit development to be rebuilt on the current site of Guinotte Manor, with the remaining one hundred plus units being built in scattered-site developments throughout the city.[175] Though many cities used HOPE VI grant money to fund Section 8 vouchers for private housing,[176] TAG, supported by plaintiffs' counsel, chose not to pursue that policy for public housing. Residents of Columbus Park mounted strong opposition to this redevelopment plan and the City Council delayed approval of the zoning permits.[177]

At Guinotte, the stage was set for what normally would be a political struggle. The plaintiffs' counsel and the receiver pushed for redevelopment of current public housing, fearing a loss in total public housing units if replacement housing was pursued through a private voucher system.[178] Columbus Park residents advocated a classic not-in-my-backyard ("NIMBY") position, worrying about the decline of area property values. However, it was not only a selfish

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173. HOPE VI is an acronym for "Homeownership and Opportunity for People Everywhere." It is a program created by Congress in 1992 to revitalize severely distressed public housing developments. *See* 42 U.S.C. § 1437aaa (1992) (repealed 1998). "Local public housing authorities may use HOPE VI grant monies for a variety of purposes, including . . . planning revitalization projects, demolition, renovation, providing Section 8 rent vouchers, social services, and . . . building replacement dwellings." Gautreaux v. Chicago Hous. Auth., 178 F.3d 951, 954 (7th Cir. 1999).

174. *See* Bill Norton, *HUD Aid Will Finance Rebirth of Guinotte*, KAN. CITY STAR, Aug. 27, 1993, at C1.

175. A 300 unit public housing development is substantial in size even considering the reduction in units from the prior development.

176. Section 8 vouchers enable a potential public housing tenant to take a government voucher to a cooperating private landlord. The government then pays or subsidizes the private market rent for that tenant. These vouchers are often used as a means to disperse public housing residents in non-public housing neighborhoods.

177. *See* Jim Davis, *Renovation Dispute Still Ablaze Over Guinotte*, KAN. CITY BUS. J., Dec. 6, 1996. Columbus Park is one of the most diverse neighborhoods in Kansas City. It has a large, multi-ethnic population with a significant number of Vietnamese-Americans. The community is 39% white with a historical Italian-American tilt. The Columbus Park community borders the River Market area, which experienced remarkable redevelopment and gentrification in the late 1990s. Many residents of Columbus Park felt the success of River Market could be theirs without the stigma and crime associated with the public housing complex in the community. *Id.*

178. The drawback to the Section 8 program is often private landlords are not interested in taking Section 8 tenants because of bias and/or the administrative burden associated with the vouchers. Also, there is no guarantee that the landlord will allow Section 8 tenants to continue living in the apartment, so they are an uncertain means of replacement housing for demolished developments. The replacement housing concern was the primary reason behind the decision not to pursue a strategy of Section 8 housing. Interview with Julie Levin, *supra* note 22.

NIMBY position on the other side of the receiver's Guinotte plan. A national trend in public housing emphasized the benefits of "moving to opportunity" programs, seeking to disperse public housing through scattered-site developments, mixed income projects, and an increase in private vouchers.[179]

Upon a complaint from the Housing Authority receiver, Judge Whipple reprimanded the City for their delay in approving the receiver's redevelopment plan for Guinotte and even stated that the City Council's inaction might violate the Fair Housing Act.[180] Judge Whipple ordered the City Council to file a written explanation to show cause for the delay.[181] Mike Burke, attorney for the Columbus Park residents, expressed concern that this dispute should be "settled on a negotiated basis, not a litigated basis."[182] Judge Whipple held hearings to determine whether to override the City Council and impose the receiver's redevelopment plan.[183] The court ultimately agreed to wait while the City Council came up with a compromise plan that would please the court and the receiver.[184] One month later, in March 1997, the City Council unanimously approved a compromise plan, which reduced the number of public housing units on site at Guinotte from 300 to 219, and provided for some full market rate apartments.[185] The remainder of the replacement housing would be built as scattered-site units.[186] The City agreed to contribute nine million dollars to subsidize additional costs associated with the compromise plan.[187] The court and the receiver agreed to the City's plan, and the reconstruction recently finished with the praise of the Columbus Park community and city officials.[188]

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179. *See, e.g.*, Schill, *supra* note 11, at 502 (arguing that public housing authorities should be allowed to knock down dilapidated projects and rebuild scattered-site developments or encourage private Section 8 vouchers).

180. *See* Chris Lester, *Delay in Project Examined*, KAN. CITY STAR, Jan. 9, 1997, at C2.

181. *Id.*

182. *Id.*

183. *See* Chris Lester, *Council Balks on Guinotte: Stage is Set for Court Hearings*, KAN. CITY STAR, Jan. 31, 1997, at C1.

184. *See* Chris Lester, *Judge Gives Kansas City Time to Develop Guinotte Manor Alternatives*, KAN. CITY STAR, Feb. 4, 1997, at B1.

185. Metro Digest, KAN. CITY STAR, July 6, 1997, at B2.

186. *Id.*

187. Interview with Jeffrey Lines, *supra* note 102.

188. *See* Horsley, *supra* note 127; *see also* Igoe, *Singing Praises*, *supra* note 127, at B3 (announcing the current support of public housing residents and the President of the Community Council for the newly rebuilt Guinotte). Lines attributes this community support for the project in large part to the community's participation in the compromise plan and ownership in its success. A community evaluation committee was put in place by TAG/Housing Authority to get input from the community, and as a result of the committee, the Housing Authority worked with the city to offer expanded social services for the entire Columbus Park community. Interview with Jeffrey Lines, *supra* note 102. In February 1999, a national public housing advocacy newsletter applauded the reforms

2. The Expanding Scope of Receivership Intervention

While the Kansas City community and Columbus Park residents applauded the final compromise redevelopment plan resulting from the Guinotte controversy, the process raised serious questions about the scope of the court's equitable role in reforming a public institution. While it is the receiver's traditional duty to protect the assets of the offending organization,[189] and Guinotte Manor was certainly a significant asset of the Housing Authority, the dispute seemed to be one of conflict between two common philosophies of how to utilize public housing assets. Improving the Housing Authority's asset mix, by replacing dilapidated, dangerous buildings with scattered-site units and private vouchers, would reflect a predominant national trend in public housing, as well as a statutory option under the HOPE VI program.[190] Furthermore, the City Council was within its rights as the legislative branch of the city government to choose to follow the legitimate philosophy of "moving to opportunity" advocates without court intervention.

The court's interference in the Guinotte redevelopment was a remedy far removed from the court's original mandate to protect the rights of the *Tinsley* class, all residents of T.B. Watkins and persons on the waiting list, and the *Boles* class, all residents of Riverview. Neither the *Tinsley* nor *Boles* complaints or consent decrees even mention Guinotte Manor or its residents, and the court was not presented with facts concerning the violation of any statutory or constitutional rights of Guinotte residents. Hence, the court's interference raises serious concerns given the Supreme Court's dictates regarding the tight fit between right and remedy— "A federal remedial power may be exercised 'only on the basis of a constitutional violation' and '[a]s with any equity case, the nature of the violation determines the scope of the remedy.'"[191] For example, in order to expand a segregation remedy outside one school district, there must be a showing that there was a violation of rights outside that school district.[192] Similarly, it seems, that for a court to have remedial powers over Guinotte Manor, the court should have found upon entering the Consent Decree that the

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at Guinotte Manor that resulted from the HOPE VI grant, particularly focusing on the positive use of resident input. *See* Scott, *supra* note 123.

189. The plaintiffs' counsel Julie Levin explained the expansion of TAG and the court's involvement into Guinotte as necessary to protect the assets of the Housing Authority, which is a traditional duty of the receiver. Interview with Julie Levin, *supra* note 22. This is consistent with the use of receivership in commercial and bankruptcy litigation.

190. *See supra* note 173 and accompanying text.

191. Milliken v. Bradley, 418 U.S. 717, 737 (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)).

192. *Milliken*, 418 U.S. at 745. "[W]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy." *Id.*

rights of the residents of all Kansas City public housing developments were intertwined with the rights of T.B. Watkins and Riverview residents such that the de facto demolition of one complex resulted in statutory violations in another complex. Alternatively, the court should have found that the de facto demolition of unnamed housing developments such as Guinotte implicated the rights of the *Tinsley* plaintiffs on the public housing waiting list. The court, however, did not make either of these findings which might have justified the extraordinary scope of its remedial intervention.

This problem of scope illustrates a potential difference between receivership and other institutional reform litigation. When a receiver displaces a defendant organization, an expansion of the scope of reform could be justified under the banner of "protection of institutional assets." Guinotte illustrates this practice in action. Pre-receivership, the courts could not have intervened in the Guinotte controversy absent the filing of a new complaint.

3. The Never-Ending Duration of the Receivership Remedy

The most troubling aspect of the receivership remedy, particularly as applied in *Tinsley*, is the court's failure to provide an explicit exit plan for the receivership while there was still jurisdiction over a "case or controversy." The receivership order was very vague, merely stating that the receiver "will serve at the pleasure of this Court."[193] Now, seven years later, there is still uncertainty surrounding when and how the receivership remedy will end, despite the recent accolades from HUD, public housing residents, and the greater Kansas City community. TAG's most recent Annual Report to the court, approved November 1999, established a post-receivership governance task force charged with defining an exit plan and structuring the Housing Authority upon the conclusion of receivership.[194] The task force includes participation from the Mayor's office.[195] The goal is for the task force to meet monthly and ultimately submit governance recommendations to the court by the end of 2000.[196] The issues currently under consideration by the task force include the proper size and composition of the new Board of Commissioners, how to retain the organizational effectiveness and qualified professionals working in the Housing Authority under the receiver, and how to transition from redeveloping a troubled agency to effective asset management.[197] Assuming the court accepts the task force's recommendations in early 2001, the new Board would likely report to the

193. Receivership Order ¶ 1, *Tinsley* (No. 89-00230CV-W-1). The Order "may be modified as necessary to assure the success of the receivership, and eventually, to return the operation of the [Housing Authority] to the [Housing Authority] Board." *Id.* ¶ 7.

194. Telephone Interview with Jeffrey Lines, President of TAG Associates and the Receiver of Kansas City Housing Authority (Apr. 17, 2000).

195. *Id.*

196. *Id.*

197. *Id.*

receiver during a transitional period.[198] The receiver reasserts that the objective is for TAG to "go away"; in fact, the receiver explains that his financial incentive to remain as receiver is eliminated once all Housing Authority developments are rebuilt and modernized, which should occur by the end of 2000.[199] An ad hoc exit strategy is beginning to develop seven years after the receivership order took power over public housing away from Kansas City officials.

This uncertainty over an exit strategy is not uncommon among receivership remedies, which often leave the terms and conditions for ending receivership open and ambiguous.[200] This indefiniteness is a problem because under receivership, "the defendant" is a legal fiction—the receiver controls all decision-making within the defendant organization. Where there is no longer a

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198. *Id.* During this transitional period, legislative changes to MO. REV. STAT. §§ 99.010-.230 (1994) will be necessary.

199. *Id.*

200. In *Velez v. Cisneros*, the public housing authority receivership began in 1994 and is still ongoing. The receivership order provides "[t]he Receiver's appointment shall be terminated when the court determines, either *sua sponte* or upon petition by the Receiver or any party, that CHA has cured all breaches . . . . The court may also terminate the Receivership upon the court's conclusion that to do so would be in the best interests of CHA." Receivership Order, Velez v. Cisneros, 850 F. Supp. 1257 (E.D. Pa. 1994) (No. 90-6449). The order further provided for an annual hearing to "consider progress in achieving the overall purposes of this Order, and whether this Order and the Receivership should be terminated." *Id.* In Boston, the receivership order provided for renewal of the public housing receivership at an annual public hearing. *See* Perez v. Boston Hous. Auth., 400 N.E.2d 1231, 1251-52 (Mass. 1980). The receivership exit strategy in D.C.'s mental health receivership order was vague, providing that "this Order shall remain in effect until such time as the SDP and the orders of this Court have been fully implemented, and the receivership is no longer necessary to assure the ongoing operation of the District of Columbia's mental health system in accordance with all legal requirements." Dixon v. Barry, 967 F. Supp. 555, 556 (D.D.C. 1997). *See also* Newman v. State of Ala., 466 F. Supp. 628, 637 (M.D. Ala. 1979) (receivership ordered "until such time as the receivership is no longer needed to assure compliance with minimal constitutional standards"); Wayne County Jail Inmates v. Wayne County Chief Executive Officer, 444 N.W.2d 549, 561 (Mich. Ct. App. 1989) (receiver must report quarterly to the court so "the court will retain the flexibility immediately to order an end to the receivership when the need for it expires"). A couple receiverships did provide more explicit exit plans. *See* Vernon Loeb, *D.C. Cedes Control of Housing Agency*, WASH. POST, May 5, 1995, at A1 (D.C. Housing Authority receivership would end if they received a score of 70 from HUD's annual review two out of three years; the receivership had a built-in sunset of 2000). The receivership order for the McDowell County Jail ordered a one-year receivership, but provided the parties an opportunity to petition the court to end receivership if the receiver succeeded in his goals, or alternatively, to extend receivership if "the McDowell County Jail remains in noncompliance and/or is of yet unable to remain in compliance without [the receiver's] supervision." Shaw v. Allen, 771 F. Supp. 760, 765 (S.D. W. Va. 1990).

defendant, it is unclear who would petition the court to end receivership. In Kansas City, the City Council and Mayor have not intervened to call for an end to the remedial intervention and appear to suffer from democratic debilitation.[201] The plaintiff residents are happy with the receiver and unlikely to ask the court for an end to receivership. The for-profit receiver has a financial disincentive to move to end receivership so long as the Housing Authority is receiving HUD grants to build and redevelop new housing units. Hence, it appears the remedy will continue until Judge Whipple decides *sua sponte* to end receivership or until the financial incentive for TAG Associates dwindles with the transition of the Housing Authority from an agency under construction to an asset management agency. The problem of ending the receivership remedy is not unique to Kansas City public housing; in fact, no receivership imposed in the last decade has yet to end.[202] This uncertainty could be the result of a lack of any ongoing case or

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201. For a discussion of democratic debilitation, see *infra* Part II(B)(6). In contrast, newly elected D.C. Mayor Anthony Williams has taken an interest in regaining control of the five D.C. agencies under court-ordered receivership. In February 2000, he appointed Grace Lopes as Special Counsel for Institutional Reform Litigation to work with the courts and the receivers of the five agencies in hopes of devolving control back to the city. Grace Lopes describes that one of her jobs is to work with the courts and receivers "developing and implementing legal strategies for successfully resolving . . . receiverships, and transitioning back to the control of the D.C. government." She is also prepared to intervene in the litigation if necessary. *See DC Child and Family Services Receivership: Testimony of Grace M. Lopes Before the Subcomm. on D.C. Comm. on Gov't Reform and Oversight of the House of Representatives*, 2000 WL 19303374 (May 5, 2000).

202. Two receiverships imposed in the 1990s will come to an end at the end of 2000 or early 2001. On March 6, 2000, Judge Thomas Hogan approved an agreement between advocates for the mentally ill and the D.C. government designed to end the failed D.C. mental health receivership and return control to the city. *See* Bill Miller, *Plan Approved to Restore D.C.'s Control of Mental Health*, WASH. POST, Mar. 7, 2000, at B4. The agreement is part of D.C. Mayor Williams' plan to regain control of the five D.C. agencies under receivership. *Id.* Under the agreement approved by Judge Hogan, a new interim receiver will create a plan to transfer control of the mental health system to the city in the first half of 2001 and the receiver will then remain as a monitor during a transition period, with the power to ask the court to reinstate the receivership if the city fails in its initial management of the agency. *Id.* In addition, the D.C. public housing receiver is currently planning for the transfer of power back to the city by the end of 2000, the designated sunset for the receivership delineated in the original receivership order. *See* Carol Leonnig, *Housing Chief in D.C. Seeks Autonomy for Agency*, WASH. POST, May 12, 2000, at B7. Uncertainty surrounds the exit strategy for other receiverships, including the three remaining D.C. agencies. The Chicago Housing Authority's scattered-site receivership continues thirteen years after it began. *See* Gautreaux v. Chicago Hous. Auth., 178 F.3d 951 (7th Cir. 1999). In the Chester public housing receivership, they have begun talks about how to end receivership, and the receiver's Interim Status Report submitted for 1999 outlines at least two more years of work for the receiver to accomplish. *See* Interim Status Report from Robert Rosenberg,

controversy, a constitutional requirement under Article III.[203] Where litigation is "not in any real sense adversary," we will not have "a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court."[204]

Given the lack of adversity under receivership, the original receivership order should present a clear and defined exit strategy for how, when, and on what conditions the receivership is to end. This order should be drafted while a live controversy still exists between an aggrieved plaintiff and a noncomplying defendant. On the other hand, too much specificity on the exit plan could render the remedy less effective. Plaintiffs' counsel in *Tinsley* explains that the receivership order was intentionally short and brief in order to provide greater flexibility for unforeseeable issues that might arise during the receivership.[205] A balance of a defined exit strategy imposed while there is adversity between two parties and the requisite flexibility to make the order workable is the answer. The D.C. Housing Authority presents an excellent example of how litigants can negotiate and suggest objective criteria for the receivership order that can trigger an eventual end to the receivership coupled with a reasonably distant but defined sunset that automatically ends the remedial intervention. In the D.C. order, the

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Receiver, Chester Housing Authority, to United States District Court for the Eastern District of Pennsylvania (Dec. 1999) (on file with author). For examples of earlier receiverships ending, see Newmann v. Graddick, 740 F.2d 1513, 1517 (11th Cir. 1984) (noting the Alabama prison receivership ended in 1983 when the receiver, Governor Fob James, was replaced by Governor George Wallace, who did not petition to intervene in the litigation and become the receiver); Morgan v. McDonough, 456 F. Supp. 1113, 1115 (granting Boston School District's motion to end the two year long South Boston High School receivership); Turner v. Goolsby, 255 F. Supp. 724, 733-34 (S.D. Ga. 1965) (granting receiver's motion to terminate receivership in Taliaferro County School District after one school year). Boston's public housing was in receivership for five years and turned over to the mayor in 1984 after an annual review hearing. *See* Patrick Reardon & Stanley Ziemba, *HUD and Mayor Vow Assistance*, CHI. TRIB., Apr. 29, 1987, at 1.

203. Generally, "Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'" Allen v. Wright, 468 U.S. 737, 750 (1984). Further probing on the "case" or "controversy" requirement applied here raises an interesting question, beyond the scope of this Article, about the private rights and public rights models of adjudication. The private rights model of adjudication contends that the federal courts should limit themselves to the more traditional case-by-case method of adjudication, where an actual "case" or "controversy" involving specific litigants and particular facts is resolved. The public rights model offers a broader view of the role of federal courts. It includes institutional reform litigation where courts exercise broad remedial powers to reform public housing, jails, and schools. For a discussion of these models, see RICHARD FALLON ET AL., THE FEDERAL COURTS AND THE FEDERAL SYSTEM 78-82 (4th ed. 1988). *See also* Susan Brandeis, *The Idea of a Case*, 42 STAN. L. REV. 227 (1990); Chayes, *supra* note 4; Fiss, *supra* note 3; Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

204. United States v. Johnson, 319 U.S. 302, 305 (1943).

205. Telephone Interview with Julie Levin, supra note 43.

court provided that the receivership would end automatically when the authority achieved a HUD performance rating of seventy for two out of three years.[206] The order also contained a fixed sunset; if the authority failed to achieve the desired ratings after six years, the receivership would end.[207]

It is time for the receivership in Kansas City to end.[208] The causes of action found in *Tinsley* and *Boles* no longer exist; thus, there is no longer a violation of rights justifying remedial intervention in the municipal government's discretion over public housing.[209] Last year, plaintiffs' counsel in the *Tinsley* litigation, Julie Levin, proclaimed, "'The receivership was the last resort, and it's worked.'"[210] A HUD study gave the Housing Authority in 1998 an "A" and dubbed it a "high performer."[211] By the summer of 1999, T.B. Watkins was completely modernized with all brand-new units.[212] A remedy must be closely tailored to the right violated; nonviolators cannot be punished.[213] The First

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206. *See* Loeb, *supra* note 200, at A1.

207. *See* Loeb, *supra* note 200, at A1.

208. If there were a defendant still in place in *Tinsley*, it could petition for termination of the court's involvement. *See* Oklahoma City Pub. Sch., Ind. Sch. Dist. No. 89 v. Dowell, 498 U.S. 237, 248 (1991) (finding school desegregation decrees "are not intended to operate in perpetuity"). The *Dowell* Court defined the standard of review for dissolving a desegregation decree after "the local authorities [had] operated in compliance with it for a reasonable period of time" and that compliance was judged by a relatively forgiving "good faith" standard. *Id.* at 248-49.

209. As discussed above, the Supreme Court limits the equitable power of the federal courts and instructs that "the nature of the violation determines the scope of the remedy." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971). Moreover, the "remedy is justifiable only insofar as it advances the ultimate objective of alleviating the initial constitutional violation." Freeman v. Pitts, 503 U.S. 467, 489 (1992).

210. Rice, *supra* note 125, at B1.

211. *See* Igoe, *K.C. Housing Agency Makes Honor Roll*, *supra* note 137, at B9. More accolades came at the end of 1999 when a housing watchdog group, Housing Comes First, honored agency officials for their "steady improvement to a high-performing agency during recent years." A Housing Comes First representative described the reform as "phenomenal." *See* Shawna Hamel, *Housing Praise*, KAN. CITY STAR, Dec. 22, 1999, at B1.

212. *See* Igoe, *The Case For Change*, *supra* note 23.

213. Milliken v. Bradley, 418 U.S. 717 (1974) (holding that you cannot impose the costs of injunctive relief on nonviolators). In the school desegregation context, courts have held that a finding of past discrimination was not enough to sanction a remedy of indeterminable length which may extend after the initial violation of rights was dissipated. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 494 (1992) (noting that "once the racial imbalance due to the de jure violation ha[d] been remedied, the school district [wa]s under no duty to remedy imbalance that [wa]s caused by demographic factors"); Wessmann v. Gittens, 160 F.3d 790, 801-02 (1st Cir. 1998) (invalidating Boston Latin High School's affirmative action policy which aimed to remedy intentional discrimination in the past, but was unable to find a current violation of a Constitutional

Circuit's test for ending the South Boston High School receivership was that the receivership "should last no longer than the conditions which justify it make necessary."[214] When conditions improved and the attitude of South Boston High School officials changed to support desegregation, the judge granted the district's motion to terminate the receivership.[215] Applying the *Morgan* test to *Tinsley*, it is unlikely one could assert a de facto demolition argument or a Title VIII disparate impact claim as applied to the sparkling new T.B. Watkins homes.

Whether the reforms of the receiver have been institutionalized is central to the success of ending receivership. The TAG receivers have applied their expertise and efficient business management for six years with great accolades, but it is unclear how much of Jeffrey Lines, Eugene Jones, and Dallas Parks' reforms have been assimilated by the two hundred plus permanent Housing Authority staff. The challenge of retaining the capable civil servants currently serving under the receiver is an issue facing the new governance task force.[216] The Kansas City press has begun to worry that the success at the Housing Authority was the exclusive result of TAG, and that the new management processes may not have been sufficiently institutionalized to survive post-receivership.[217] The other two public housing authorities under receivership, D.C. and Chester, are both struggling with the same question of how to end receivership in such a way that the important reforms are preserved under government management.[218]

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right to justify the remedy in the present).

214. Morgan v. McDonough, 540 F.2d 527, 535 (1st Cir. 1976).

215. Two years after ordering receivership, Judge Garrity terminated the receivership of South Boston High School upon observation that the physical conditions of the building improved, the School Committee's demonstrated commitment to desegregation through programs such as the affirmative action plan for the city's examination schools, and the Department of Implementation's demonstrated good faith intentions to monitor compliance with the desegregation decree. *See* Morgan v. McDonough, 456 F. Supp. 1113, 1115 (D. Mass. 1978) (acting on motion of defendant school district to end receivership). It is important to observe that the Boston schools case is different from *Tinsley*, however, because Judge Garrity only displaced one school's officials. The School District defendants still had power and were in a position to move to end receivership once conditions improved.

216. Telephone Interview with Jeffrey Lines, *supra* note 194.

217. *See* E. Thomas McClanahan, Editorial, *The Murky Future of Kansas City's Public Housing Authority*, KAN. CITY STAR, Apr. 5, 1998, at L1.

218. D.C. expects to end its six year receivership in the fall of 2000. There are currently talks underway over how that transition will work. *See* David Gilmore, *Close to Home*, WASH. POST, Oct. 10, 1999, at B8 (suggesting measures to maintain the receivership's success after judicial supervision ends); *see also* Leonnig, *supra* note 202, at B7. It was decided in D.C. that the new Board of Commissioners would be comprised of three elected tenant Board members and six members appointed by the Mayor. The elections for the tenant representatives occurred in March 2000. *See D.C. Housing Residents Pick Board*, WASH. POST, Mar. 10, 2000, at B4. Chester is also planning for

This ambiguity over how to institutionalize receivership may highlight a differentiating aspect of the receivership remedy as opposed to consent decrees and structural injunctions. With consent decrees, there is concern that the policy directives mandated by the decree will not continue once the decree is lifted. For example, as courts are vacating school desegregation plans with findings of unitary status, education advocates worry that the schools will drift back to segregationist ways. There is anxiety that desegregation efforts have not been sufficiently institutionalized in society to remain after the judicial compulsion is removed. With receivership, particularly in the context of public housing authorities taken over because of dysfunction and organizational paralysis, the problem is more institutionalization of administrative processes and management capabilities rather than policy priorities and social norms. All institutional reform litigation faces the challenge of institutionalizing the desired goal for the institution so that it is sustainable without court enforcement. Receivership has the added burden of teaching the staff and agency leaders how to run the agency, how to keep billing records, how to make a budget, and other basic public management skills. This difficult task of institutionalization would benefit from a clear exit plan, both as to when, and how, receivership will end.

4. Removal From Influence by the Majority

A significant implication of the *Tinsley* receivership has been the removal of all public housing decisions in Kansas City from any check by the democratic process. This countermajoritarian concern is a common response to institutional reform litigation and, more generally, to judicial activism.[219] In Kansas City, under receivership, there is no democratic official accountable to the majority for public housing. Prior to the imposition of receivership in 1993, Mayor Cleaver appointed the Board of Commissioners and conceivably a voter could have expressed her distaste for the deterioration of public housing or the redevelopment of complexes like Guinotte through the politically accountable Mayor. Alternatively, a voter could have voiced her concern to her City Councilperson. However, under receivership, TAG Associates is not directly accountable to the voters of Kansas City. Furthermore, TAG does not report to city, state, or federal elected officials who might serve as conduits of the popular

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the ultimate transition out of receivership. The Receiver's 1999 Interim Status Report recognizes "this Receivership is a finite measure," so the report has "begun to formulate an endgame for the recovery strategy" which includes among other things a two year time frame for training the staff to operate under a site-based asset management structure, two years to finish construction, and an ongoing effort to recruit and train a "competent and informed Advisory Board" from the ranks of which the "new Board of Commissioners would likely be created . . . at the conclusion of the Receivership." *See* Interim Status Report from Robert Rosenberg, *supra* note 202.

219. *See, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

will. Though TAG has been conscientious about consulting with the citizenry and elected officials through regular "receivership meetings," nothing in the receivership remedy compelled such consultation.

However, any majoritarian criticism of receivership must contend with the reality that "politics" can be a toxic influence on public institutions, justifying drastic judicial intervention in order to protect individual rights from the will of the majority. Judge Whipple considered "politics" a dangerous institutional influence in Kansas City, particularly on the Housing Authority.[220] Upon issuing the receivership order, Judge Whipple instructed the new receiver to "put a tape recorder on his phone 'so you can record conversations by these so-called do-gooding politicians, claiming to help tenants when in fact they're helping themselves.'"[221] In the context of public housing boards, the day-to-day managers and decisionmakers ousted by receivership are not elected officials; rather, they are municipal bureaucrats, appointed by the mayor with no direct accountability to the voters. The democratic critique of Judge Whipple's receivership order loses power in this bureaucratic context.[222] Professor Matthew Adler points out that the administrative state is growing and bureaucracies such as the Board of Commissioners are no more democratic than a federal judge.[223]

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220. Tom Jackman & Jeffrey Spivak, *Housing Authority Put In Receivership*, KAN. CITY STAR, July 7, 1993, at A1. Conversely, ousted Housing Authority Director Luther Washington defended politicians in the press, commenting that "'[w]e're in a democracy that is based upon politics and arriving at some kind of consensus. If politics is bad, so is the entire government that we live under.'" *Id.*

221. *Id.*

222. Robert Rosenberg, the court-appointed receiver of the Chester Housing Authority, attributes receivership's success in Chester in large part to depoliticizing public housing administration, an area where positions were previously filled through political patronage. Telephone Interview with Robert Rosenberg, Receiver of Chester Housing Authority (Jan. 20, 2000). A case study of the Boston Housing Authority and the *Perez* litigation employs "politically" as a word with negative connotation, noting that the receiver "could do no worse than the old, politically controlled board." CHARLES M. HAAR & LANCE LIEBMAN, PROPERTY AND LAW 461 (Little, Brown, and Co., 2d ed. 1985). A case study of the D.C. Housing Authority reforms noted the Mayor's appointments "perpetuated the old practice of sending incompetent political appointees to run it." Cunningham & Foley, *supra* note 6, at 1034. Assessing the success of the D.C. housing receivership, *The Wall Street Journal* noted "Mr. Gilmore has a big advantage over most housing directors: He doesn't have to dicker with City Hall." John J. Fialka, *Washington's Housing Director Makes the Leap From Talking about Reform to Really Doing It*, WALL ST. J., Nov. 13, 1996, at A24. Outgoing receiver Gilmore's recommendation for the post-receivership D.C. Housing Authority was that appointments to the governing board "should be made on the basis of merit, not political allegiance, and should be beholden to no particular faction or officialdom...." Gilmore, *supra* note 218, at B8.

223. *See* Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759 (1997) (arguing that the

Moreover, it is the court's role in a democratic system of government to protect individual rights from the will of the majority. Elected representatives' discretion to carry out the will of the majority is limited by the Constitution. Advocates of judicial activism often call upon the famous *Carolene Products* footnote, reasoning that "discrete and insular minorities" in a democratic system do not have the power to protect themselves in the voting booth so the courts must intervene.[224] The rationale is even more cogent when applied to the context of public housing where residents are an "anonymous and diffuse" group.[225] Public housing in Kansas City was stigmatized because of years of neglect, decay, and corrupt management; as a result, Kansas City residents generally did not support public housing.[226] Moreover, residents of public housing are economically powerless, rarely vote, and are a numerical minority of the municipal population—a group particularly vulnerable to the will of the majority. Professor Owen Fiss, who generally criticizes the *Carolene Products* footnote logic, concedes that the argument works best in public housing authorities and welfare departments that "might be seen as posing threats to distinct subgroups that are politically powerless."[227] Elected officials have little political incentive to support public housing because of the relatively small number of voters who place priority on public housing reform. Under this rationale, Judge Whipple's role in protecting a vulnerable class of citizens whose rights were being violated is not anti-democratic, but rather a necessary and important check in a majoritarian system.

In comparison, consent decrees and structural injunctions are similar to receivership in their limitation on the discretion of future elected officials. Michael McConnell's notable critique of consent decrees criticized that the will of the majority in one year, manifested in a voluntarily negotiated consent decree, could shackle the popular will a decade later through the judicially entered mandates of a consent decree.[228] Voters a decade after *Tinsley*'s Consent

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democratic justification for judicial restraint is lost when applied to an administrative agency with democratically unaccountable bureaucrats).

224. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

225. Bruce Ackerman criticizes *Carolene Products* "discrete and insular" terminology because it fails to consider the fact that "prejudice against 'impoverished and uneducated minorities' may call for a more searching judicial inquiry." Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 723-24 (1985). He professes that "discrete and insular" minorities are often politically advantaged interest groups with influential voices in the political process. *Id.* He argues that the *Carolene Products* rationale should be used to protect "groups that are 'anonymous and diffuse' rather than 'discrete and insular.'" *Id.*

226. Interview with Jeffrey Lines, *supra* note 102; Interview with Julie Levin, *supra* note 22.

227. Fiss, *supra* note 3, at 8.

228. *See, e.g.*, Michael McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, U. CHI. LEGAL F. 295, 297 (1987) (arguing

Decree cannot express a policy preference different from the content of that Decree. The will of the majority is limited. Receivership, through displacement of appointed and elected officials, similarly eliminates government discretion, but remains different because of the all-encompassing scope and ambiguous duration of receivership remedies in practice, often taking an infinite array of a government organization's decisions out of the democratic realm.

5. Blurred Accountability: Who Is In Charge Here?

Receivership can distort who people identify as government decision-makers. Who does a resident of Columbus Park, angry about the compromise plan for Guinotte, hold accountable? Her local city councilwoman for approving the compromise plan? The mayor for not intervening in the litigation?[229] Judge Whipple's mandate to the City Council to show cause and later to develop an alternative plan for Guinotte perverts the normal lines of accountability in the eyes of the average Kansas City resident unaware of courtroom battles. Justice Kennedy, in striking down the Kansas City desegregation court's judicial tax, observed that "a legislative vote taken under judicial compulsion blurs lines of accountability by making it appear that the decision was reached by elected representatives when the reality is otherwise."[230]

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that consent decrees are anti-majoritarian and "violate the democratic structure of government").

229. The mayor is technically the "boss" of the Housing Authority as the chief executive of the municipality. As such, the mayor likely would have standing to intervene as of right under Rule 24(a) because he had an "interest relating to the property or transaction which is the subject of the action" and was "so situated that the disposition of the action may as a practical matter impair or impede" his interest. Fed. R. Civ. P. 24(a). Yet, Mayor Cleaver made no effort to intervene in the *Tinsley* and *Boles* litigation or in the Guinotte zoning controversy. For a mayoral challenge in practice, see the litigation surrounding the District of Columbia public housing receivership. D.C. Mayor Sharon Pratt Kelly filed for reconsideration of the trial court's imposition of receivership. Upon losing that challenge, she filed an appeal in the District of Columbia Circuit. Mayor Pratt Kelly was ultimately unsuccessful in her challenge, but it illustrates how a mayor could and did fight the receivership remedy. *See District of Columbia Fights Receivership Order*, WASH. POST, Sept. 17, 1994, at C5.

230. Missouri v. Jenkins, 495 U.S. 33, 68 (1990) (Kennedy, J., concurring). *See also* Spallone v. United States, 493 U.S. 265 (1990) (holding a judge could not fine individual city councilmen for their refusal to vote to support scattered-site housing development). This logic is also seen in the Tenth Amendment jurisprudence protecting state autonomy by limiting the federal government's ability to "commandeer" the states as enforcement or implementation vehicles of the federal government. *See* New York v. United States, 505 U.S. 144 (1992) (focusing on the legislative branch of the federal government which unconstitutionally tried to require states to dispose of their own nuclear waste). *See also* Printz v. United States, 521 U.S. 898 (1997) (striking down as unconstitutional a federal executive branch mandate that required states to perform

Problems of blurred lines of governmental authority are seen with the increased privatization of government functions. In the prison and education contexts, privatization is sometimes used to improve service and cut costs through private companies that contract with the state to run traditionally public enterprises.[231] For public housing, the President's Commission on Privatization recently recommended private management as an alternative to traditional housing authority management.[232] Private companies operating as quasi-state actors create confusion as to who is responsible for running a traditional public function. This problem is compounded when a private company is imposed on elected officials by a court. If Texas chooses to out-source its prison management, and the citizenry is outraged, they can express their discontent by electing a new legislature and governor. This is not an option if the court has imposed the outsourcing, as is the case with Kansas City public housing. The citizenry has two options in Kansas City. One is to oust current elected officials whose only responsibility for the situation lies in not challenging the court's receivership order.[233] Or, the voters can simply feel frustrated in their inability to act through democratic outlets.

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background checks to purchase a gun). A central concern of the "commandeering" case law is the blurring of lines of accountability.

231. In the prison context, a few states have contracted with private companies to confine a portion of the state's prisoners. *See generally* Warren Ratliff, *The Due Process Failure of America's Prison Privatization Statutes*, 21 SETON HALL LEGIS. J. 371 (1997) (noting that in 1997, the private correctional system holds as many as 74,000 prisoners with an annual growth rate of 30%). While the 74,000 privately held prisoners are a small proportion of the 1.8 million prisoners in the United States, it is a trend which introduces many of the accountability problems seen in the receivership context. Advocates of educational reform are increasingly pointing to privatization and quasi-public charter schools, particularly in light of the success of for-profit groups such as the Edison Project and Sabis International, as a solution for a perceived education system failure. *See generally* Norman Atkins, *Charter Schools Are Public Schools*, N.Y. TIMES MAG., June 14, 1998, at 48-49 (describing the popularity of the charter school model); Nancy J. Zollers & Arun K. Ramanthan, *For Profit Charter Schools and Students with Disabilities*, PHI DELTA KAPPAN, Dec. 1998, at 297-304 (considering how the profit-motive may corrupt the equitable provision of public services, particularly to students with disabilities who are more expensive to educate because of federal special education requirements).

232. *See* Peter Salsich, *Solutions to the Affordable Housing Crisis: Perspectives On Privatization*, 28 J. MARSHALL L. REV. 263, 278-84 (1995) (noting that increasing numbers of public housing reformers are calling for "load shedding privatization of troubled public housing units" through private for-profit and non-profit companies experienced in managing housing developments); *see also* Vanessa Gallman, *Private Managers Hired for Public Housing*, PITTSBURGH POST-GAZETTE, Sept. 8, 1996, at B4 (interviewing the for-profit receiver of the Chester Housing Authority who predicted "privatization of public housing is definitely the wave of the future").

233. The Mayor of Kansas City arguably has standing to intervene in the *Tinsley* litigation to challenge the receivership remedy. *See supra* note 229.

But again, the receivership remedy does not appear significantly different for purposes of political accountability than traditional institutional reform litigation remedies. It is unrealistic to assume that a citizen of Kansas City can tell the difference between a receiver running the Housing Authority, when it operates out of government buildings and with government titles, versus Kansas City running the Housing Authority under the compulsion of a detailed consent decree. In both scenarios, the voters may hold the city accountable when it is the federal judiciary that is pulling the strings behind the scenes. The biggest difference between the two remedies is how and whether the popular will is heard. A mayor who is not accountable for public housing is less likely to poll the public and solicit feedback on the proper direction of the city's public housing initiatives. A mayor who operates under a consent decree still appoints commissioners and arguably is in touch with the responsibilities and policy directives of the Housing Authority. While both can deflect criticism with "the court made me do it," there is some autonomy value in retaining power over that government function.

6. Debilitation: The Escape Hatch Problem

A related consideration of accountability is the incentive for public officials to hide behind receivership as a means of escaping responsibility for reforming a troubled public institution. Professor Mark Tushnet dubs this problem "democratic debilitation."[234] This "pass the buck" philosophy gives officials an escape hatch from a difficult governmental problem and puts the onus on the judge, through a court-appointed receiver, to do the job free of the complications of answering to an electorate. In Kansas City, public housing was a vexing municipal burden for years. While there was no collusion on the part of the *Tinsley* defendants in the imposition of the receivership remedy, one can imagine a scenario where a city could ask the judge to take over a problematic institution to get it off the government's hands. Here, perhaps the City Council did not appeal the court's involvement in the Guinotte controversy because it was easier to hide behind the court's mandate and tell voters that the unpopular redevelopment plan was "forced" on them by the judge and the "carpetbagging" receiver.

Political debilitation can be contagious. Debilitation may be one explanation behind the clustering of institutional reform receivership remedies. Of fifteen receivership remedies imposed to reform public institutions, five are in the District of Columbia and three are in Massachusetts.[235] This indicates a

234. Tushnet explains democratic debilitation in the context of the Canadian system of judicial review, arguing that active judicial review endangers stable and vigorous constitutional democracy. *See* Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245 (1995).

235. *See supra* note 5.

trend that once a receivership remedy is issued, the novelty has passed and it becomes acceptable practice. It might even be a remedial step *supported* by the political power structure eager to avoid responsibility for the problem-laden institution. For example, Judge Arthur Garrity's receivership order for South Boston High School came after Boston Mayor Kevin White filed a motion with the court to abandon hope of desegregation and close the school.[236] A few years later, Judge Paul Garrity ordered receivership for the Boston Housing Authority and again Mayor White expressed his relief saying, "'That's all right. If they want it, they can have it.'"[237] The Boston Mayor's frustration with public housing and education manifested itself in a desire for, rather than a resistance to, a receivership remedy. Similarly, the Kansas City press reported a rumor that Mayor Cleaver supported a judicially imposed receivership for the Kansas City schools because he was frustrated with the desegregation quagmire after years of unsuccessful efforts to achieve quality education for Kansas City students.[238] As the debilitation spreads, the implications of receivership extend beyond the particular successes of the Kansas City public housing authority. Receivership is a tool that could distort and debilitate traditional channels of responsibility within the democratic system.

The debilitation danger appears to be one problem that is more acute in the context of receivership than with structural injunctions or consent decrees. A receiver displaces the defendant, truly relieving the government of all responsibility and accountability for the institution, whereas, a consent decree makes the government go on record as either a recalcitrant protestor, a wary facilitator, or a committed reformer. Receivership silences public officials, which confuses voters when it is time to hold some political actor accountable for institutional reform. In the Kansas City scenario, Mayor Cleaver issued few statements after 1993 about the drastic public housing reforms implemented by TAG as receiver of the Housing Authority. Moreover, in the April 1999 mayoral election, it was unclear where the candidates stood on the new mixed income and scattered-site development strategy because there was no discussion of public housing in the campaign. Newly elected Mayor Kay Barnes appears to be silent on public housing issues. If there had been a consent decree rather than

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236. *See* Roberts, *supra* note 6, at 65 (noting the mayor's request followed an unsuccessful plea for Federal Marshals to occupy the school).

237. HAAR & LIEBMAN, *supra* note 222, at 456. A case study of the D.C. Housing Authority indicates that Mayor Mario Barry, Jr. agreed to a court-appointed receivership, but it was evidently after some pressure by HUD. *See* Cunningham & Foley, *supra* note 6, at 1034. More case studies are needed to learn about the dynamics of other receivership cases.

238. *See* Phillip O'Connor, *Cleaver Suggests School Overseer*, KAN. CITY STAR, Nov. 5, 1998, at C1 (reporting Cleaver's support of education receivership was announced in the Mayor's October 30th newsletter to supporters); *but see* Editorial, *Cleaver's Curious Role With Schools*, KAN. CITY STAR, Nov. 6, 1998, at C6 (pondering Cleaver's denial that he ever said he favored receivership).

a receivership, it seems likely that the mayor's stance on important municipal policy decisions would be on record—whether at contempt of court hearings for resisting reforms or at ribbon-cutting ceremonies taking credit for the innovations.

Moreover, the receivership remedy has a tangible effect on the government's workload. By eliminating an entire segment of the municipal bureaucracy in Kansas City, the Mayor was able to free his time to focus on other municipal policy concerns. This creates a practical political incentive to encourage receivership over other commonly employed institutional reform remedies. When imposing a receivership on a public institution, courts would be well advised to consider the potential debilitating effects the remedy might have on the operations of the government, as well as considering the motives of the government actors involved.

7. Judicial Role: "The Imperial Whipple" or "The Accidental Activist"

Judge Dean Whipple is a pivotal, colorful character in the story of reform at the Kansas City Housing Authority. The receiver attributes the success of the public housing reforms to the support and leadership of Judge Whipple.[239] Plaintiffs' counsel describes Judge Whipple as playing a positive, instrumental role in reforming the Housing Authority.[240] Previously a small-town Ozark prosecutor and state circuit judge before being appointed by President Ronald Reagan to the federal bench, Judge Whipple has been dubbed in jest "The Imperial Whipple" because of his power over so many public institutions in Kansas City.[241] Taking a different spin, a front-page profile of Judge Whipple in 1994 labeled him "The Accidental Activist" because his conservative ideology seemed incompatible with the high number of public institutions he actively managed.[242] Aside from the Housing Authority, Judge Whipple presides over

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239. Interview with Jeffrey Lines, *supra* note 102; Telephone Interview with Eugene Jones, *supra* note 110. Jeffrey Lines speculates that Judge Whipple was initially angered by the waste of government resources at the Housing Authority, but he came to be primarily concerned with protecting the rights of poor people. Similarly, the original special master in the D.C. housing case attributes "the lion's share of the credit" for reforming the D.C. Housing Authority "to Judge Steffen Graae, the wise, patient and caring Superior Court jurist who has presided over the agency's turnaround." James G. Stockard, Jr., Editorial, *The Receiver Cleaned House, Now Its Up To The City*, WASH. POST., June 27, 1999, at B8.

240. Interview with Julie Levin, *supra* note 22.

241. *See* Joe Stephens, *Judicial Ethics Law Contains Few Loopholes*, KAN. CITY. STAR, Apr. 5, 1998, at A12 (explaining that the power of Mayor Cleaver pales beside that of Judge Whipple).

242. *See* Tom Jackman, *The Accidental Activist: Judge Dean Whipple, Conservative By Reputation, His Rulings In Notable Cases Defy Image*, KAN. CITY STAR,

the Jackson County jail litigation, holding the County in contempt and imposing fines for noncompliance with an order intended to alleviate jail overcrowding.[243] Judge Whipple also supervises the Jackson County Division of Family Services.[244] Moreover, when Judge Russell Clark fell ill, the massive ongoing Kansas City school desegregation litigation was added to Judge Whipple's docket where he threatened to impose the receivership remedy in 1998.[245]

Judge Whipple is outspoken about his role "supervising part or all of [various municipal and county] agencies."[246] Judge Whipple explained that "'I feel I'm being drawn in . . . I don't want to be an activist judge, I don't feel it's my place to run any institution. But once I'm drawn in, I'm going to do the best I can, and rectify what they force me to do.'"[247] Similarly, after a public hearing for the first annual receivership report, Judge Whipple publicly elucidated:

> First of all, you need to understand, I don't want to run [the Housing Authority]. I don't think Legal Aid wants to run [the Housing Authority]. . . . For heavens sake, I don't want to run it. I am looking after foster care now. I have got juvenile detention, and I've got jail overcrowding. My goodness, if I start running HUD, all I [haven't] got is City Hall and County Government. I don't want to get into that business.[248]

Regardless of whether Judge Whipple intentionally pursues a judicially activist approach or whether this record of institutional reform was an accidental result

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May 23, 1994, at A1.

243. *See* Gromer Jeffers, Jr., *Jail Count Results In $5,000 Fine*, KAN. CITY STAR, Nov. 30, 1994, at C1 (reporting that when jail population reached 625 for one day, Judge Whipple fined the County $5,000); Joe Lambe, *Jackson County Ordered to Ease Jail Crowding*, KAN. CITY STAR, Apr. 27, 1994, at C1 (reported that court held the County in contempt for noncompliance with order to alleviate overcrowding); Robert P. Sigman, Editorial, *Meeting Jail Needs*, KAN. CITY STAR, June 17, 1994, at C6 (describing the court order capping the County jail population at 624).

244. *See generally* Borgersen & Shapiro, *supra* note 7 (discussing G.L. v. Stangler, 873 F. Supp. 252 (W.D. Mo. 1994)).

245. *See* Editorial, *Public Spanking*, *supra* note 7, at B4 (noting Judge Whipple's exasperation at the school board's lack of cooperation with the Desegregation Monitoring Committee and reporting that Judge Whipple "raised the possibility of placing the district in receivership"); *see also* Barbara Shelly, *Hopeful Signs For Kansas City Schools*, KAN. CITY STAR, Nov. 20, 1998, at B1. *See generally* Jenkins v. School Dist. of Kan. City, 460 F. Supp. 421 (W.D. Mo. 1978).

246. Jackman, *supra* note 242, at A1.

247. Jackman, *supra* note 242, at A1.

248. Special Master's Report on the Status of Housing Authority's Compliance With Consent Decree, *Tinsley* (No. 89-0023-CV-W-1). Magistrate Judge Larsen is quoting Judge Whipple at the December 17, 1992 hearing. *Id.* at 3.

of extreme mismanagement in Kansas City institutions, his role as an instrumental character in the *Tinsley* case is unquestionable.

The insertion of a judge into the active, policy-making decisions of a government agency transforms the traditionally dispassionate, detached judicial role.[249] Judge Whipple is involved in an ongoing, continuous relationship with the *Tinsley* parties, the plaintiffs' counsel, and the court-appointed receiver, placing him in a highly activist managerial position for a federal judge. For example, he meets with the Public Housing Residents Council, the representative organization for the *Tinsley* plaintiffs, at least once a year at the presentation of the receiver's annual report, and Judge Whipple attends the Residents Council's Summer Jamboree every summer.[250] In addition, Judge Whipple confers with the TAG receivers every two weeks.[251] Through all of this, Judge Whipple must engage in prospective thinking about the future of the Housing Authority which transcends the traditional piecemeal, motion-by-motion dispute resolution model commonly associated with the judicial role.

Institutional reform litigation generally raises issues of the appropriateness of the judicial role for such reforms, and the extraordinary remedy of receivership amplifies the concern because it places *all* authority over the public institution in the hands of the judicial branch. One could argue that when a judge creates a receivership, she lacks the capacity to oversee the receiver and must look to other experts to monitor the receiver's management. In the case of the receiver appointed to run the D.C. child welfare system, the court appointed a policy expert from the Center for the Study of Social Policy to oversee the receiver.[252] There, the receivership remedy created a vicious cycle of monitoring that spiraled into a judicially created fiefdom within local government. However, this is not that exceptional within the context of institutional reform litigation. One could similarly criticize special masters and monitors as unnecessary judicial bureaucracy outside the proper role of the judicial branch.

Receivership may be viewed as a shift in judicial role, potentially challenging the legitimacy of the judicial function. A prevalent concern is what impact this continuing relationship will have on the judge's ability to be

249. *See* Diver, *supra* note 2 (worrying that the judge transformed into a political "powerbroker" loses the legitimacy of the adjudicative function); *see also* Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805 (1990) (describing four models of judicial decision making: deferrer, director, broker, and catalyst). Under Sturm's model, Judge Whipple would seem to be a "director" judge because of his utilization of contempt sanctions and the ultimately intrusive receivership remedy.

250. Interview with Julie Levin, *supra* note 22.

251. Telephone Interview with Jeffrey Lines, *supra* note 194.

252. *See* Hamil P. Harris, *Receiver Walks Off Job At Child Welfare Agency*, WASH. POST, Oct. 9, 1997, at D1 (noting the battle that goes on within government agencies to be elevated to the position of court-appointed receiver).

impartial.[253] Colin Diver worries that a managerial judge will engage in "partisanship, manipulation, and guesswork offensive to accepted judicial virtues of neutrality, passivity, and objectivity."[254] Judge Whipple, like most adjudicators, has an interest in the outcome of the litigation, both because of his principled commitment to helping the residents of public housing, as well as his professional interest in vindicating his choice of remedy. The choice of receivership, given its unusual nature, might create even more of a judicial stake in the final result if a judge is seeking to confirm the appropriateness of his remedial risk.[255]

On the other hand, a judge's impartiality might not be dramatically altered because the traditional judicial role encompasses broad equitable powers. Without judicial intervention, the mandates of *Brown v. Board of Education*[256] would never have materialized. In the 1950s, the judicial role exercised in *Brown* was novel and exceptional, but it was necessary to prevent *de jure* violations of Constitutional rights.[257] The receivership remedy is supposed to be a last resort tool necessary to protect the rights of citizens. In turning over the Alabama state prison system to a receiver, the federal court noted that "federal courts time after time have been required to step into the vacuum left by the state's inaction."[258] The *Newmann* court regretted the loss of governmental autonomy that resulted from the receivership, but it noted that the action was essential to protect continuing day-to-day violations of citizen's fundamental rights.[259] Assuming the receivership in the Housing Authority case was the last available remedial alternative, Judge Whipple acted within the traditions of the

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253. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 427 (1982) (criticizing judicial management because it fosters frequent interactions over time that lead to "intense feelings [of] admiration, friendship, or antipathy" which become "a fertile field for the growth of personal bias"); *see also* Fiss, *supra* note 3, at 53 (worrying that structural injunctions place the judge in an "architectural relationship with the newly reconstituted state bureaucracy," a situation that threatens the judge's objectivity because he identifies with the problems, frustrations, and actions of the litigants).

254. Diver, *supra* note 2, at 89.

255. When Judge Whipple imposed the receivership remedy in *Tinsley*, only one other public housing authority, Boston, had been placed in receivership. It was not an unprecedented remedy, but it was not the commonly used path of special masters, monitors, and continued contempt citations.

256. 347 U.S. 483 (1954).

257. *See* Fiss, *supra* note 3. Owen Fiss describes the role of adjudication as the means "by which judges give meaning to our public values." Fiss, *supra* note 3, at 2. He notes that the structural injunction in prisons, mental health, and police had strong roots in the school desegregation cases that adapted judicial function to cope with the emergence of expanding state bureaucracy. Fiss ultimately decides that structural injunctions and judicial management of public institutional reform is a remedy with potential viability, but a remedy that must be monitored. *See* Fiss, *supra* note 3, at 2-4.

258. Newman v. State of Ala., 466 F. Supp. 628, 636 (M.D. Ala. 1979).

259. *Id.*

judicial role to seize control and stop the violation of the residents' statutory rights.

A related implication of the receivership remedy is its lessons about judicial capacity. Judge Whipple was not an expert on housing, and his crowded docket and case-by-case method of adjudication did not allow him to become an expert on public housing reform sufficient to remedy a dysfunctional agency. Because he lacked the information and expertise necessary to competently resolve the Housing Authority's problems, he eventually turned to the receivership remedy that brought in a national housing expert to act as a judicial surrogate. Critics of general institutional reform litigation point to problems inherent in the nature of the judicial role and argue that judges are ill-suited for reforming public institutions.[260] It would be curious to know whether their criticisms about judicial competence would yield to the receivership innovations employed by Judge Whipple, or whether the critics would view the solution to the judge's lack of expertise as worse than the problem.[261]

The federal judiciary plays a role in the relations between nation and state in our federal system. A common critique of judicial activism on the federal bench is that it violates the principle of federalism by imposing the federal will on the state's traditional functions of education, fighting crime, and caring for the poor.[262] As a result of this concern, most courts utilizing the receivership remedy in the context of schools and prisons have appointed a state official to take over the county or city institution, thus diluting somewhat the federalist critique.[263] There is less of a federalism effect for the housing authority receiverships because the institutions are hybrids—created by state law, but almost entirely dependent on federal funds for their operation. Additionally, housing is not viewed as a traditional local concern because public housing is heavily regulated by federal regulations and statutes. Finally, public housing

260. *See, e.g.*, DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 25-38 (1977) (listing criticisms of judicial competence to handle reform litigation; judges are generalists, judges can only hear problems on a piecemeal basis, judges cannot balance priorities, judges have no incentive to specialize whereas Congresspersons do, and the fit between right and remedy allows for little flexibility); Diver, *supra* note 2 (noting, among other limitations on judicial capacity, that the judge rarely exercises contempt or other disciplinary sanctions against litigants who fail to comply); *but see* Chayes, *supra* note 4, at 1308 (praising the flexibility, immediacy of action, and avoidance of multi-layered bureaucracy which results from an adjudication in public law litigation).

261. This analysis is not unique to receivership remedies, however. It could apply to other third-party actors such as special masters or monitors who bring institutional expertise to the judicial remedy. For illustration of the vicious monitoring cycle that can be created to compensate for the lack of judicial capacity, see discussion of D.C. child welfare agency receivership. *See supra* note 252 and accompanying text.

262. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 44 (1971) (federalism involves "the belief that the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate way").

263. *See supra* notes 166-67 and accompanying text.

authorities are commonly viewed as businesses that operate rental property on behalf of the government.[264] As a result, no state officials serve as receivers in the housing context, and little federalism protest has been voiced in these cases.

III. CONCLUSION

Receivership does have unique advantages as a remedy in the tool belt of institutional reform litigation. It can unite two usually divergent camps. Conservatives find receivership appealing because it places faith in the efficiency of the private market, appointing private businesses to streamline previously bloated government bureaucracies and eliminate government waste. Advocates of judicial activism, traditionally more liberal in political affiliation, support receivership as an important rights-based exercise of judicial discretion. Second, receivership is unique because it *enables* a failing organization, rather than simply mandating change and walking away. Receivership is uniquely effective for public institutions suffering from mismanagement, incompetence, or dysfunction as opposed to animus or illegal policy preferences. Many public institutions, such as Kansas City's Housing Authority, fail to conform to consent decrees not as much out of disregard for their mandates, but rather because of the inability to redirect a failing agency in accordance with court directives.[265] By infusing court-appointed expertise into the public agency, the receivership is uniquely able to give a defendant agency the capacity to conform with court orders or consent decrees.

However, there are dangers particular to the receivership remedy. Receivership can create political debilitation, giving government officials incentives to support court takeovers of failing institutions in order to avoid responsibility and to remove the onerous organization from the government's workload. The court may be opening the door for a reallocation of responsibility from traditionally executive functions to the judicial branch. In addition, open-ended receivership orders, both in terms of scope and duration, raise serious questions of Article III jurisdiction and judicial legitimacy. Because receivership supplants the defendant organization with a court-appointed surrogate, there is a danger that in the wrong hands the receivership remedy could be an undemocratic usurpation of power. Giving the court power over all decisions impacting a public agency's assets is essentially writing a blank check. In *Tinsley*, the receiver and the judge acted with meritorious principle in protecting

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264. The state courts in *Perez* noted that the Boston Housing Authority was different than other institutions involved in institutional reform litigation because "it functions in many respects as a business corporation to which receivership is readily adapted." *Perez* compared the BHA to a turnpike authority. Perez v. Boston Hous. Auth., 400 N.E.2d. 1231, 1251 (Mass. 1980).

265. Chester, D.C., and Kansas City all involved "de facto demolition" claims illustrating likely organizational paralysis prior to remedial intervention. *See supra* note 35 and accompanying text.

the interests of poor people while consulting the citizenry, but structurally that was perhaps more by luck rather than design.

While the initial reaction to receivership is that it is a unique and extraordinary exercise of judicial power, the realities of receivership illustrate that it is not significantly different than other institutional reform litigation remedies such as consent decrees, special masters, monitors, or structural injunctions. The most prevalent countermajoritarian, legitimacy, scope, and judicial capacity concerns raised in opposition to the receivership remedy can be applied to all institutional reform litigation remedies. In fact, one could argue that the receivership remedy is just a more honest admission of judicial intervention into the operations of executive and legislative functions, acknowledging displacement rather than cloaking judicial management in more traditional remedial language. Moreover, concerns about receivership creating new judicially managed bureaucracies can be similarly applied to the use of special masters and monitors which do not displace, but rather oversee, public institutions. Finally, the concern that a receivership's success depends heavily on the abilities of the particular receiver are not particularly unique. The success of any remedy is going to turn on the capabilities of the organization carrying out the court's mandate. All of these factors combine to illustrate that receivership, while extraordinary on its face, in practice is not a wholly exceptional remedial intervention.

Throughout the analysis of the implications and effects of the receivership remedy in the *Tinsley* litigation, this Article has questioned the court's means while celebrating the end result. It is hard to deny the remarkable turnaround of the public housing authority in Kansas City.[266] Residents of T.B. Watkins now live in completely modernized facilities where tenants occupy nearly all units. The expansion of mixed-income developments has been heralded by tenants and the business community as a successful new direction for Kansas City's public housing. The means versus ends comparison is a common theme in institutional reform litigation. If the judges are creating positive outcomes, does that justify the process employed?

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266. Similarly, receivers in Chester and D.C. have conducted remarkable turnarounds as well. For accounts of the progress in the District of Columbia, see Fialka, *supra* note 222, at A24 (praising D.C. housing receiver David Gilmore's success as providing "a rare glimmer of good news" in D.C.); Stockard, *supra* note 239, at B8 (giving "the lion's share of the credit" for reforming the housing authority in D.C. to the judge and David Gilmore). For a brief account of the success in Chester, see Gallman, *supra* note 232, at B4. Gallman reports that the judge "was pleased"; the tenant council president proclaimed, "They came in and pulled us out of the mess we've been in"; and a $23 million renovation project in one of Chester's five housing projects was completed in 1996, answering "years of prayers." Gallman, *supra* note 232, at B4. *But see Oversight Hearing on the D.C.'s Child and Family Service Agency: Testimony of Rep. Tom Davis*, 2000 WL 19303372 (May 5, 2000) (declaring all D.C. receiverships failures with the exception of the public housing receivership).

One conclusion that can be drawn from the analysis of the receivership remedy in Kansas City is that the parties were lucky because there were few procedural safeguards in place to prevent an abuse of power by the receiver or the court. Alternatively, the receivership remedy can be viewed as an extraordinary measure which, when employed effectively in Kansas City, produced striking and tangible change benefitting the plaintiff class. The very nature of the intrusive remedy woke up the public housing community and mandated change. A third assessment is that the receivership remedy is so fundamentally flawed from a legal and political perspective that the ends would never justify the means.

In reaching a verdict, it is helpful to consider what other alternatives were available to protect the rights of the *Tinsley* class. First, there were few alternatives outside of litigation and institutional reform through the courts. Owen Fiss notes that critiques of institutional reform litigation "might have more appeal if it were clear that there were alternative institutions that could better perform this worthwhile but perilous activity."[267] Fiss is unable to find any more appropriate alternatives for reform.[268] Prior to *Tinsley*, the Housing Authority in Kansas City was replete with corruption and incompetence. In 1991, Judge Whipple could arguably have given then-newly elected Mayor Cleaver an opportunity to try to reform the Housing Authority. The problem was that Mayor Cleaver would have had to have acted *through* the crippled institution that was the Housing Authority in 1993. Without the power of the court to force compliance, it is not clear that Mayor Cleaver would have experienced any more success than his predecessors. This appears to be a case where litigation was the best means of achieving political change.

A separate question is whether receivership specifically was the best means to achieve the end of a reformed housing authority. Receivership seems most appropriate as a remedy in cases such as *Tinsley* where there is extreme organizational incompetence as opposed to resistance driven by animus or difference of policy opinion. While corruption caused some of the violations in Kansas City, much of the failure to comply with the 1991 *Tinsley* Consent Decree was likely driven by institutional dysfunction and management inexperience. The Housing Authority was a public institution without the will *or the ability* to reform itself under the guidance of traditional modes of judicial activism, here manifested in a consent decree. Within this lack-of-ability context, it is unclear what benefit would come from further contempt citations or court monitoring through a special master or monitor.

In the end, the Housing Authority's receivership success does seem to justify the means employed. It is hard to overlook the rights of the T.B. Watkins residents, living at one point in a development with a thirty-three percent

267. Fiss, *supra* note 3, at 33-35.

268. *See* Fiss, *supra* note 3, at 33-35 (rejecting the diversion alternative of creating administrative agencies with special expertise capable of reorganizing social institutions).

occupancy rate, and a complex filled with human waste, rats, and open drug dealing in the hallways. One million dollars of the initial eleven million dollar HUD grant mysteriously disappeared. HUD refused to release further funds because of the severely corrupt and mismanaged character of the Housing Authority. In a theoretical vacuum, one could argue that the judicial role is inappropriately suited for such drastic activism as that employed by Judge Whipple, but then one must ask whether the residents at T.B. Watkins should have been forced to wait even longer for relief. It is true that Judge Whipple could have built more checks into the receivership remedy and provided a clear exit plan for ending the remedy. Moreover, the employment of a for-profit receiver raises important questions about the disclosure of profits gained and the extension of receivership outside the initial scope of the two offending developments. Finally, the source of Judge Whipple's authority to act in the Guinotte controversy is dubious. With these reservations aside, however, the result is an almost complete overhaul of what was considered the worst public housing in the country. Consequently, we are likely to see more of the receivership remedy in institutional reform litigation.