THE LIMITS OF CORRECTIVE JUSTICE AND THE POTENTIAL OF EQUITY IN CONSTITUTIONAL REMEDIES

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INTRODUCTION

The remedial experience of American constitutional law is characterized by two traditions that judges employ to justify ordering or denying constitutional remedies. One tradition, corrective justice, promises much by requiring full correction of the constitutional harms that the state has caused to its citizens. Full correction means restoration of a notional *status quo ante*, by which the victims of illegal conduct are returned to the position they occupied before the wrong, and those responsible for the wrong are made to bear the burden of the restoration. In corrective justice, right and remedy are fused, and the exercise of remedial discretion is guided by considerations of liability and causation which also determine whether rights have been violated. Corrective justice is based on rights and rules, and the exercise of remedial discretion can be subjected to close appellate scrutiny to determine if a trial judge has lived up to or exceeded the demands of causation and restoration. In short, corrective justice promises determinacy and an unambiguous moral force by its focus on the repair of prior wrongs and the assignment of remedial burdens to wrongdoers.

The other tradition, equity, promises little but the trial judge's sense of good conscience and is much more flexible than corrective justice. A trial judge can rely on the breadth and flexibility of equitable remedial powers without careful attention to the demands of causation and restoration. Equity also grants a court discretion not to award intrusive remedies such as injunctions for prudential reasons, including conflicting social interests. It thus allows the disengagement of right and remedy, the most graphic illustration being the delay in the implementation of the rights articulated in *Brown v. Board of Education*.[1] In its method, which stresses flexibility and the appropriateness of pragmatic solutions, equity is also characterized by a relative lack of concern for rules and the restoration of the status quo. Remedies are

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1. 347 U.S. 483 (1954) (segregated schools unconstitutional); Brown v. Board of Educ. II (*Brown II*), 349 U.S. 294 (1955) (gradual school desegregation sanctioned).

reviewed deferentially only to determine if there was an abuse of discretion and the trial judge is allowed to balance all the competing equities that are presented in the circumstances of the particular case. Equity seems more susceptible to abuse both in its emphasis on discretion and the legitimacy it gives to remedies that do not fully repair violations of rights.

Despite this initial characterization of the two traditions, the purpose of this Article is to outline the limits of corrective justice in responding to the remedial problems presented by patterns of constitutional violations embedded in institutions such as segregated schools and inhumane custodial institutions.[2] I will suggest that equity, despite its patent ability to justify delayed and imperfect remedies, has untapped potential. The potential of equity lies in its ability to legitimize relief that does not necessarily address the harms caused by the wrongdoer and goes beyond restoring the notional *status quo ante*. The disengagement of right and remedy in equity allows judges to provide less than rectification demands. It also, however, provides an opportunity to recognize the impossibility of full correction and to respond in a pragmatic fashion to the present needs of those who have been wronged in the past.

The dominant understanding of remedies in American constitutional law, at least since the 1970's, has been that they should be designed to correct the harms that governmental actors have caused to citizens.[3] The courts' understandings of the requirements of corrective justice have varied. At times, remedies have been ordered that respond to broad conditions and effects that are presumed to have been caused by constitutional violations,[4] while at others, courts have insisted that remedies are only justified if they address the harms proven by plaintiffs to be causally connected to the government's constitutional wrongs.[5] Despite the flexibility of corrective concepts in the hands of judges, I will argue that attempts to dilute corrective justice, however well-intentioned and argued, are misguided. The two core elements which remain in any corrective conception are the necessity of establishing a causal link between the defendants' unconstitutional conduct and the harms of the plaintiff that will be remedied, and the remedial goal of returning victims to the positions they occupied before the wrongful event.[6]

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2. I use the terms "institutional reform," "public law," and "structural reform" litigation interchangeably to refer to litigation designed to bring public institutions into compliance with constitutional standards. The seminal articles in this area remain Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

3. *See generally* Goldstein, *A* Swann *Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.-C.L. L. REV. 1 (1978); Rothstein, *The Politics of Legal Reasoning: Conceptual Contests and Racial Desegregation*, 15 VAL. U.L. REV. 81 (1980).

4. Milliken v. Bradley II, 433 U.S. 267 (1977); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402. U.S. 1 (1971); Keyes v. School Dist. I, 413 U.S. 189 (1973).

5. Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977); Pasadena Bd. of Educ. v. Spangler, 427 U.S. 424 (1976); Rizzo v. Goode, 423 U.S. 362 (1976); Milliken v. Bradley I, 418 U.S. 717 (1974).

6. Although a great variety of theories of corrective justice have been produced in modern scholarship, most of them would adhere to this loose structure. *See generally* Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421 (1982); Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728 (1986); Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187 (1981); Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949

The make-whole aim of corrective justice may serve as an important aspiration, but it places unrealistic demands on the courts' ability to undo injustices. Furthermore, it cannot guide a court's sense of priorities in responding to patterns and practices of violations in institutions or in accommodating social interests in devising remedies. The causation requirement makes it difficult to justify remedies that respond to the needs of the plaintiffs and the opportunities for reform, but cannot be deduced from the violation of the constitutional rights at stake, or perhaps even expressed in the language of rights. In the first part of this Article, I will suggest that corrective justice, in both its classic and diluted forms, is flawed as a remedial theory for structural wrongs. It at once demands too much in its conceptual inability to accommodate social interests and to deal with the impossibility of full correction. It offers too little in its constraining demand for proof of causation and restoration and its inability to legitimate remedies which respond to opportunities for reform and the present needs of those grievously wronged in the past.

After having suggested that corrective justice is theoretically unsuited to the task of structural reform, I will suggest in the second part of this Article that the practice of structural remedies cannot be reconciled with corrective justice. One part of this empirical argument will be that corrective justice cannot explain how courts have often tempered their remedies in order to recognize social and third party interests affected by remedial efforts. The procedure and substance of the gradualist approach to desegregation commenced with *Brown II* are incompatible with corrective justice's insistence on full correction and the assignment of remedial burdens to wrongdoers. Contrary to popular beliefs, courts in nearly all institutional reform cases have demonstrated a patience and a deference toward governmental wrongdoers which cannot be explained within the moralistic logic of corrective justice.

The second part of the empirical argument will examine those remedies courts have ordered or sanctioned that cannot easily be justified by a faithful application of corrective principles. Some of the structural remedies which may create the greatest opportunity for reform and reconciliation, such as enriched education in desegregation settings and the establishment of permanent reform structures to govern prisons and schools, are those which appear most dubious under corrective principles. Such remedial efforts may provide a foundation for modest but lasting improvements in the operation of state bureaucracies. Yet, these constructive and manageable remedies, often the de facto product of compromise and negotiation among the affected parties, cannot be supported by a candid application of corrective principles. The empirical record demonstrates, once again, that corrective justice either is too strong in its conceptual demand for full and immediate rectification or too weak in its

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(1988); Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 U.C.L.A. L. REV. 439 (1990).

My arguments are directed at corrective justice in general, but have, of course, been influenced by those theorists I find most compelling. My understanding of what I call "correction classic" is derived primarily from my reading of the work of my colleague Ernest Weinrib who, in my opinion, captures the Aristotelian essence of corrective justice with great lucidity and force. What I call "diet correction" is associated in my mind with the work of my teacher, Paul Gewirtz, who has done an important job in showing the corrective theories that run through much American school desegregation law.

inability to justify remedies which respond to realistic opportunities for reform and the needs of victims. At this point, I hope to have demonstrated both the theoretical and practical limitations of the corrective tradition in institutional reform litigation.

The remainder of this Article suggests that the best alternative to corrective justice lies in the development of the less dominant remedial tradition of equity. The core elements of equity are the breadth and flexibility of equitable remedial powers which allow a trial judge to order remedies without careful attention to the demands of causation and restoration and the requirement that, at the same time, the judge consider and balance the affected interests before ordering intrusive relief.[7] Both the theory and practice of equity fit the demands of structural reform. Equitable doctrine and theory can certainly explain those cases where courts did much less than restore rights. Equity can also justify those more rare cases where courts went beyond what was demanded by the restoration of rights. Although I stress the potential of equity with regard to the latter, I do not see it as a panacea. The modern role of equity in constitutional remedies, traced to *Brown v. Board of Education II*,[8] is problematic because equity was used in that case to delay the dismantling of educational apartheid for an unconscionable period of time. Equity is dangerous because both its practice and theory sanction giving people less than the

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7. It is even more difficult to define equity than corrective justice. The historical distinctions between the two concepts are clear. Equity was developed in the Courts of Chancery where the Sovereign dispensed a personal and discretionary form of justice as a supplement to that dispensed in courts of common law. Equity developed not only its distinctive remedies (i.e., injunctions and specific performance), but also its own procedures (i.e., discovery and class actions) and substantive law (i.e., trusts and mortgages). Douglas Laycock has described the relationship between the courts of equity and common law in the following terms: "The rules of the common law were enforceable only so long as the equity judges did not become dissatisfied with them. The limits on equitable jurisdiction were enforced only by equity's sense of self-restraint and by the risk of political reaction." D. LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 21 (1991). Over time, personal and discretionary equitable justice became governed by legal rules including, at times, the corrective concept that remedies should be tailored to violations of rights. *See generally* Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20 (1905) (equity's flexibility lost by formalist categorization).

At the same time that equity was influenced by common law concepts, including corrective justice, it also retained some distinctive features such as its commitment to broad and flexible remedial discretion and a balancing of the equities. *See* Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627 (1988) (one equitable doctrine requires courts to balance interests and weigh consequences and another aims at the restoration of a rightful position). Other accounts of a distinctive equitable tradition are found in G. MCDOWELL, EQUITY AND THE CONSTITUTION (1982) (equity as restrained and individualistic until the emergence of "sociological equity" with *Brown II*); P. HOFFER, THE LAW'S CONSCIENCE (1990) (*Brown II* as consistent with traditional equitable principles of fairness, practicality and good faith compliance).

I will examine the distinctive remedial dimensions of equity and, in particular, those which require judges to balance interests before ordering intrusive remedies and those which proclaim that judges have a broad and flexible discretion to devise innovative remedies. Both of these equitable principles, balancing the competing interests and broad remedial discretion and power, are controversial. *See* Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983) (discussion of the case for and against interest balancing); Sussman, *The Limitlessness of Judicial Capacity to Right Constitutional Wrongs*, 14 HARV. J.L. & PUB. POL'Y 112 (1991) (criticism of broad or "limitlessness" remedial discretion); Missouri v. Jenkins*: Exploring the Judicial Limits of the Supremacy Clause*, 8 HARV. BLACKLETTER J. 137, 172-77 (1991) (support for the breadth and power of equitable remedial discretion).

8. 349 U.S. 294.

vindication of past wrongs demands. After I have presented the promise of equity, you may conclude its dangers outweigh its benefits. My own view about the limits of corrective justice and, in particular, the dangers of false claims of full restoration or lack of state responsibility leads me to believe that equity, despite its dangers, has greater potential to produce appropriate and meaningful remedies.

In any event, it is timely to take stock of the weaknesses and potential of equity. Notions of corrective justice dominated the remedial decisions of courts since the 1970's. It now seems that equity is making a comeback, although whether it will be used to justify expansive relief remains very much in doubt. Three recent decisions of the United States Supreme Court have overturned broad forms of relief on the basis of equitable concepts.[9] These decisions reveal the dangers of equity being used to blunt corrective claims. I will suggest, however, that they also provide modest grounds to believe that equity can play a positive role in preserving room for the enlightened exercise of remedial discretion. Broad remedies were overturned in these cases not on the moralistic corrective grounds that the court lacked remedial power because the plaintiffs had not proven that the defendant caused the harm and the remedy would rectify that harm or that remedies should be terminated because wrongs had been rectified and justice done. Rather, the remedies were overturned on the prudential grounds that the legitimate remedial goals could have been achieved by more limited remedies, and that wrongs had been addressed to the extent practicable on the basis of good faith compliance.[10] The wisdom and practicality of the exercise of remedial power was questioned; its very existence and legitimacy was not. Whether the equitable concepts employed in these cases will be used to justify remedies that may be dubious under corrective principles remains to be seen.[11] Unless judges embrace this potential of equity, a real danger exists that equity will only be used to blunt corrective demands. Those who have suffered wrongs in segregated and inhumane institutions will continue to receive the short ends of both the corrective and equitable traditions.

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9. Board of Educ. of Oklahoma City v. Dowell, 111 S. Ct. 630 (1991); Spallone v. United States, 493 U.S. 265 (1990); Missouri v. Jenkins, 110 S. Ct. 1651 (1990).

10. The Court in both the *Spallone* and *Jenkins* cases stressed that the trial judge had abused his remedial discretion by not employing "the 'least possible power adequate to the end proposed.'" *Spallone*, 493 U.S. at 272 (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821)); *Jenkins*, 110 S. Ct. at 1663 ("The District Court believed that it had no alternative to imposing a tax increase. But there was an alternative .... The District Court therefore abused its discretion in imposing the tax itself."). The Court, in *Dowell*, stressed the importance of good faith and practicalities in measuring compliance, stating: "The District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable." *Dowell*, 111 S. Ct. at 638.

11. The three cases should not be interpreted as a decisive rejection of the dominant corrective tradition in constitutional remedies. In *Spallone* and *Jenkins*, the Court overturned remedies on equitable grounds, finding it unnecessary to deal with issues concerning whether the trial court had power to enact the remedies. *See Spallone*, 493 U.S. at 274 (unnecessary to decide whether the contempt citations they overturned as too intrusive also violated the Yonkers councilmembers' first amendment rights or their legislative immunities); *Jenkins*, 110 S. Ct. at 1662-63 ("unnecessary to reach difficult constitutional issues" of whether remedy of a tax increase exceeded article III judicial powers or violated the tenth amendment). See also my discussion of corrective overtones in the decision of when remedial efforts should be terminated in *Dowell*, 111 S. Ct. 630. *See also infra* notes 190-94 and accompanying text.

Equity provides judges ample room to justify flexible and pragmatic remedies should they chose to exercise their power in that fashion. The flexibility of equity provides judges an opportunity to address the present needs of plaintiffs and defendants without concentrating on their past rights and wrongs as corrective justice requires. Courts have generally been reluctant to use the language of needs to justify "enriched" remedies, but they have used it to recognize the necessity of granting delayed and imperfect remedies. It is my hope that displacement of the dominance of corrective theory will encourage courts to develop remedies tied to victims' needs as a counterbalance to the inevitability that remedies cannot fully correct structural wrongs but will often recognize society's needs for delayed or imperfect remedies.

Before the remedial concept of need is dismissed out of hand, I would caution it does not mean that a finding of a constitutional violation is a predicate for the satisfaction of all the victim's needs. My point is that once a constitutional violation has been found, remedial options should not be constrained by the corrective requirements of causation and restoration. All of the victim's needs should be considered in the practical balancing of interests that equity demands. Once the constraints of corrective justice are abandoned, I can imagine a justice system in which the needs of the plaintiffs, of affected interests and of society are placed directly on the remedial agenda of courts. Victims will not have to concentrate on tracing the harms which can be attributed to past wrongs, but rather can educate the court about their present needs. Likewise, governmental defendants will not have to channel their energies into claims of innocence and lack of responsibility for harms. They can directly educate courts about the resource constraints they face. For their part, judges could be directly concerned with the practical prospects for genuine reform and reconciliation. They would not have to pretend that the remedies they order inexorably follow, fit and repair the extent of wrongdoing. Equity would allow judges to be more honest and realistic about their use of remedial power. Remedies based on needs can hopefully become more directly relevant to the future of those who have been wronged in the past.

PART I: CORRECTIVE THEORY

A. Why Remedies?: Thoughts on the Separation of Rights and Remedies

Constitutional remedies inevitably implicate visions of the constitutional rights being remedied.[12] The most prominent conflict over the nature of the rights being remedied concerns the scope of the equal protection rights involved in the school desegregation cases. Corrective remedies have become entangled in a reading of the equal protection clause which prohibits only purposeful and intentional discrimination,[13] while equitable remedies have often

12. Gewirtz, *supra* note 7, at 587; Sharpe, *Injunctions and the Charter*, 22 OSGOODE HALL L.J. 473 (1984).

13. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976). For example, Paul Gewirtz fuses remedial and substantive considerations by arguing that "[a] court may seek to eliminate only those segregated conditions that are found to result from the defendant's purposeful discrimination. No remedy is appropriate, for example, if the racial character of the schools results only from the cumulative effects of *others'* past discrimination or from individual residential choices that are themselves

been accompanied by broader readings of equal protection which mandate integration and a concern with racial balance.[14] Equitable remedies, such as large-scale desegregation and affirmative action programmes, have also been associated with interpretations of equality rights as group rights.[15] Positive rights to government services such as welfare and, in Canada, minority language services are also associated with the more flexible and deferential qualities of equitable remedies.[16]

In this Article, I will try to separate out remedial issues from those concerning the scope of constitutional rights. Although an equitable approach to remedies may be well suited to balancing the broad social interests involved in the implementation of expansive rights, it can also be used as a means to respond to violations of more limited rights. The remedying of intentional acts of discrimination or official misconduct can require comprehensive institutional reform if there has been a long history of discrete wrongful acts and their harms cannot be easily stopped and rectified. Chronic violations of even the most limited rights might be impossible to correct fully and quickly on a case by case basis, but require a more gradual and deferential process of structural reform. In fact, the rights that were violated in many of the institutional

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untainted by the defendant's discrimination." Gewirtz, *supra* note 6, at 783 (emphasis in original). Likewise, Paul Brest argues: "I believe that an individual's moral claim to compensation loses force as the nature, extent, and consequences of the wrongs inflicted become harder to identify and as wrongs recede into the past." Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 42 (1976). Underlying both of these interpretations of equality as an antidiscrimination principle is the assumption that remedies must be closely tailored to the scope of the violation.

14. *Swann*, 402 U.S. 1; *Keyes*, 413 U.S. 189; Fiss, *The* Charlotte-Mecklenburg *Case*, 38 U. CHI. L. REV. 697 (1971); Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 PHIL. & PUB. AFF. 3 (1974).

15. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); Fallon & Weiler, Firefighters v. Stotts: *Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1.

16. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Weiler, *Rights and Judges in a Democracy: A New Canadian Version*, 18 U. MICH. J.L. REF. 51 (1984).

Canadian courts have generally given the rights in their constitutional bill of rights a broader reading than have American courts. For example, only a showing of discriminatory effect as opposed to intent is required to show a violation of constitutional equality rights. Andrews v. Law Soc'y of British Columbia, 56 D.L.R. 4th 1 (1989). Perhaps as a consequence, Canadian courts have upheld violations of constitutional rights for reasons of social policy and have been rather cautious and deferential when devising constitutional remedies. *See* Reference Re Language Rights Under The Manitoba Act, 19 D.L.R. 4th 1 (1985); Mahe v. Alberta, 68 D.L.R. 4th 69 (1990) (court sanctioned delay in the provision of positive rights to language services); McKinney v. University of Guelph, 76 D.L.R. 4th 545 (1990) (mandatory retirement violates equality rights but justified as a legitimate social policy); Collins v. The Queen, 38 D.L.R. 4th 508 (1987) (courts consider degree of police misconduct and effect of exclusion of evidence on the reputation of the justice system before deciding to exclude unconstitutionally obtained evidence). The Canadian experience with constitutional remedies would generally be closer to equity than corrective justice.

On constitutional remedies in Canada, see generally Roach, *Reapportionment in British Columbia*, 24 U. BRIT. COLUM. L. REV. 79 (1990); McLachlin, *The Role of the Court in the Post-Charter Era: Policy-Maker or Adjudicator*, 39 U.N.B. L.J. 43 (1990); Duclos & Roach, *Constitutional Remedies as "Constitutional Hints": A Comment on* R. v. Schachter, 36 MCGILL L.J. 1 (1991) (all discussing remedial strategies in which courts try to induce legislatures to enact remedies or allow them to overturn the court's remedy).

reform cases examined in this Article are rights of an extremely limited and uncontroversial nature.[17]

In another time, in another place, courts might be prepared to recognize constitutional rights to education,[18] to treatment and habilitation,[19] to single cells for prisoners,[20] and to avenues for complaints about police misconduct.[21] The reluctance of courts in America to read these rights into the Constitution in an abstract and permanent manner, should not, however, lead to the conclusion that such reforms cannot be justified in particular remedial contexts. To do so is already to have accepted a major premise of corrective justice, namely the idea that rights and remedies must be fused in a self-executing symmetry which leaves no room for plaintiffs to receive remedies to which they cannot claim, in an abstract and a priori manner, a constitutional right.[22] In order to highlight the potential of a remedial jurisprudence liberated from close tailoring to rights, broad interpretations of the underlying constitutional rights will be avoided as much as possible in this Article.

At the same time that this Article avoids argument about the scope of the rights that have been violated in structural contexts, it also avoids the question of the institutional competence of courts engaging in broad forms of relief. Whatever the resolution of this important public policy debate,[23] the Supreme Court has, in fact, justified extensive judicial relief on the premises of both equity[24] and corrective justice,[25] and American courts continue to engage in such activity.[26] In this Article, I will assume that in some situations drastic relief will be justified and judicial intervention required. My purpose is to assess the consequences of basing judicial remedies on corrective or equitable premises.

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17. M. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS 149-50 (1982).

18. *Contra* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (no constitutional right to education).

19. *Contra* Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) (no right to habilitation in federal law).

20. *Contra* Rhodes v. Chapman, 452 U.S. 337 (1981) (double-celling not a violation of the right against cruel and unusual punishment).

21. *Contra Rizzo*, 423 U.S. 362 (no standing to challenge patterns of police misconduct).

22. For an application of the demand that remedies track substantive rights, see Hutto v. Finney, 437 U.S. 678, 710-14 (1978) (Rehnquist, J., dissenting).

23. The leading critique of judicial competence in this area is D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977). Other accounts are contained in G. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); REMEDIAL LAW: WHEN COURTS BECOME ADMINISTRATORS (R. Wood ed. 1990); L. YACKLE, REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM (1989); COURTS, CORRECTIONS AND THE CONSTITUTION (J. DiIulio ed. 1990); P. COOPER, HARD JUDICIAL CHOICES (1988); H. KALODNER & J. FISHMAN, LIMITS OF JUSTICE (1978). Some of my own views are expressed in Roach, *Teaching Procedures: The Fiss\Weinrib Debate in Practice*, 41 U. TORONTO L.J. 247 (1991).

24. *Brown II*, 349 U.S. at 300. For a defence of broad relief on equitable premises, see P. HOFFER, *supra* note 7.

25. *Milliken II*, 433 U.S. 267. For a defence of broad relief on corrective premises, see Gewirtz, *supra* note 6.

26. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1465-73 (1990); Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1357-58 (1991).

B. Introduction to Various Theories of Corrective Justice

All remedies are, in a sense, corrective because they recognize that a past wrong has occurred and that efforts should be directed towards its repair. Corrective principles can be narrow in insisting on a close connection between remedies and proven wrongful acts, or they can be broad in authorizing remedies which respond to conditions and effects which may only be partially caused by the identified wrongful acts and which, in any event, can be explained only through a complex and often uncertain causal history. The plasticity of the basic concept of correction makes it difficult to analyze and assess. In fact, many remedies can equally be explained by either retrospective corrective justifications which link the remedy to past wrongs through presumptions or approximations of causal histories, or by prospective equitable considerations which justify the remedy as a necessary and practical reform.

In an effort to pinpoint the core features and spirit of correction, I will first examine a classical version of corrective justice which insists on a close symmetry between the identified wrong and the remedy. Classical corrective justice is suited to the rectification of discrete harms and injustices imposed by one person upon another. In the structural context, its modification is inevitable if only to take account of the empirical complexities of proving causal responsibility for longstanding harms which are the product of organizational behaviour and suffered by groups. Nevertheless, "correction classic" serves as an ideal which exposes the logic of corrective principles even if they have often been diluted by judges in order to deal with complex structural contexts.

C. The Real Stuff: Correction Classic

Aristotle, in *The Nicomachean Ethics*, identifies corrective justice as "that which plays a rectifying part in transactions between man and man," as opposed to distributive justice "which is manifested in distributions of honour or money or other things that fall to be divided among those who have a share in the constitution."[27] Corrective justice embodies a make-whole aspiration so that for one who has been subject to an involuntary transfer "it consists in having an equal amount before and after the transaction."[28] The victim is made whole by requiring the wrongdoer to pay back his or her wrongful gains obtained at the expense of the particular victim.[29] Thus, the need for a causal relation between the wrongdoer's acts and the victim's harms is crucial.[30]

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27. II ARISTOTLE, THE NICOMACHEAN ETHICS 111 (D. Ross trans., J.L. Ackrill & J.D. Urmson rev. ed. 1925).

28. IV *id.* at 117.

29. Aristotle wrote:

> [T]he law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it. Therefore, this kind of injustice being an inequality, the judge tries to equalize it; ... the judge tries to equalize things by means of the penalty, taking away from the gain of the assailant.

IV *id.* at 115.

30. "The requirement of factual causation establishes the indispensable nexus between the parties by relating their rights to a transaction in which one has directly impinged upon the other." Weinrib, *Toward a Moral Theory of Negligence Law*, 2 LAW & PHIL. 37, 38 (1983).

In contrast to corrective justice, distributive justice is presented as the pursuit of a geometrical proportion or, in Robert Nozick's phrases, an end result, structural, or patterned principle of justice.[31] Corrective justice is attractive in its "self-contained rationality";[32] its promise that justice can be done through rectification and without "continuous interference with people's lives";[33] and because it does not rely on problematic instrumental judgments about what is needed to achieve reform in the future.[34] Paul Gewirtz has captured both the retrospective and temporary nature of corrective justice: "looking backward, the corrective approach seeks to purge the present of the past; looking forward, it always anticipates the end of its efforts."[35]

Despite its powerful logic, the limits of corrective justice are suggested by the very context in which Aristotle situated it. Corrective justice is best suited to the rectification of bilateral and discrete transactions between individuals. Ominously for American constitutional law doctrine, Aristotle did not believe it was suitable for dividing shares in a nation's constitution.[36]

i) Correction Classic in Historical Context

Classical corrective justice can be better understood by placing it in its historical context. Corrective justice, with its stress on the rectification of wrongful transactions, has most often been defended as appropriate to private law.[37] People brought together temporarily by tort or contract could roll back unjust and involuntary transactions and then go their own ways. A.V. Dicey was one of the first theorists to bring a sense of corrective justice into the more political field of constitutional law.[38] Not incidently, Dicey self-consciously

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See generally Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407, 444-50 (1987), on the "intrinsic" relationship between wrongfulness and causation.

31. R. NOZICK, ANARCHY, STATE AND UTOPIA 153-56 (1974).

32. Weinrib, *The Intelligibility of the Rule of Law*, in THE RULE OF LAW: IDEAL OR IDEOLOGY 59, 70 (A. Hutchinson & P. Monahan eds. 1987). *See generally* Weinrib, *supra* note 6.

33. R. NOZICK, *supra* note 31, at 163.

34. Weinrib, *supra* note 32, at 67.

35. Gewirtz, *supra* note 6, at 735. Weiler and Fallon speak of "the traditional terms of remedial justice which restores to a specific victim that which a specific wrongdoer has taken from him." Fallon & Weiler, *supra* note 15, at 26. *See also* Brest, *supra* note 13, at 43.

36. II ARISTOTLE, *supra* note 27, at 111.

37. Morton Horwitz has described how corrective justice became the dominant understanding of private law:

> If tort law was to be private law, legal thinkers reasoned, its central legitimating function had to be corrective justice, the restoration of the status quo that existed before any infringement of a person's right. The plaintiff in a tort action should recover only because of an unlawful interference with his right, not because of any more general public goals of the state.

Horwitz, *The Doctrine of Objective Causation*, in THE POLITICS OF LAW 201-02 (D. Kairys ed. 1982).

Some dispute the applicability of corrective justice in the private law on empirical and normative grounds. *See* Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980); G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970).

38. Before Dicey, William Blackstone expressed similar comments that "where there is a legal right, there is also a legal remedy." 3 W. BLACKSTONE, COMMENTARIES *23. *See also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting Blackstone on this point). *See also* Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 238-44 (1979).

argued that constitutional law should be an extension of the private law method, and he felt compelled to refute the claims of historians to the understanding of constitutional law before he could interpret constitutional law as if it was private law.[39] Dicey's name is today associated with the slogan of where there is a right, there is a remedy, and he praised the fusion of rights and remedies that he saw in both English and American law.[40] The celebrated fusion of rights and remedies was possible, in large part, because of an underlying corrective model which stressed the prevention of discrete wrongs and applied the private law method to constitutional adjudication as a fundamental tenet of the rule of law.[41] The provision of "remedies for the enforcement of particular rights ... looked at from the other side" became simply the "averting [of] definite wrongs."[42] The definite wrongs were committed by state officials who were considered as private citizens bound by the ordinary law. Corrective justice had become a constitutional concept, but only by maintaining a private law focus on the repair of bilateral and discrete transactions between individuals.

Dicey's version of corrective justice considers state actors abstractly and individualistically, and emphatically rejects the relevance of their public status. It concentrates on the repair of discrete and wrongful events which can be both the measure of the right and the remedy. Boards of education and state governments would be treated as if they were private citizens. On one hand, this limits the state's freedom to commit "definite wrongs"; on the other, it limits its remedial obligations. It is unjust to make governments remedy harms for

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Dicey, however, pioneered this understanding of the relation between rights and remedies in the constitutional context. On Dicey, see Sugarman, *The Boundaries of Liberty: Dicey, Liberalism and Legal Science*, 46 MOD. L. REV. 102 (1983); Sugarman, *Legal Theory, the Common Law Mind and the Making of the Textbook Tradition*, in LEGAL THEORY AND COMMON LAW 26 (W. Twining ed. 1986).

39. For Dicey's criticism of the "religious enthusiasm" and "antiquarianism" of historians and political theorists toward the study of the constitution, and his assertion that the law of the constitution can be expounded like any other branch of English law, see A. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 1-35 (10th ed. 1959). "The true law of the constitution is in short to be gathered from the sources whence we collect the law of England in respect to any other topic, and forms an interesting and as distinct, though not as well explored, a field for legal study or legal exposition as any which can be found. The subject is one which has not yet been fully mapped out." *Id.* at 34.

40. Dicey argued:

> [T]here runs through the English constitution that inseparable connection between the means of enforcing a right and the right to be enforced which is the strength of judicial legislation. The saw, *ubi jus ibi remedium* (where there is a right, there is a remedy), becomes from this point of view something much more important than a mere tautologous proposition.

Id. at 199.

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> The "rule of law" ... may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been ... extended [so] as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land.

Id. at 203.

42. *Id.* at 199.

which they have not been proven responsible.[43] I will argue that this classical corrective framework cannot easily be adapted to respond to structural contexts in which the defendant cannot be conceived as an individual or private wrongdoer responsible for definite wrongs and who should be made to disgorge wrongful gains. First, the inappropriateness of corrective principles in structural contexts can be better demonstrated by examining some contexts in which corrective principles may be appropriate.

ii) Correction Classic Finds a Home?

Despite its limitations in many contexts, corrective justice with its impressive philosophic pedigree and its powerful self-contained logic should not be lightly discarded from the field of constitutional remedies. Courts should not be anxious to take on the task of structural reform when genuine repair can be made through rectification. Corrective justice may be used to repair the discrete harms suffered by individuals at the hands of state officials. Some harms can be isolated and, perhaps, nullified by remedies such as release by way of *habeas corpus*, damages, or exclusion of evidence.[44] These harms will generally be unusual, one-shot wrongs suffered by easily identifiable victims and perpetrated by specific wrongdoers. In the end, commitment to corrective justice should depend on a judgment that the discrete harms can be nullified and that the initial equality and autonomy of the wrongdoer and victim can and should be restored. If the harms are pervasive and likely to continue, then pursuit of a retrospective remedy will not achieve genuine repair. Inadequacies in organizational structures mean that the harms will likely reoccur. It must be remembered that in structural suits, many discrete harms can be identified, but the plaintiffs do not ask for retrospectively oriented relief for each incident of abuse that they can document. This is because such remedies would be cold comfort for those who must remain in the institution.

Exclusion of unconstitutionally obtained evidence can be justified as an appropriate remedy for discrete harms and disadvantages suffered by those subject to state investigation.[45] Causation analysis, although difficult, can determine if the constitutional violation led to the obtaining of evidence. Exclusion of such evidence can nullify the wrongdoing and ensure that the victim not suffer further harms from the violation. The strong remedy of exclusion of evidence may only be available to a relatively small number of identi-

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43. In Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 513 (1979), Justice Rehnquist complained that the majority's justification of a system-wide remedy meant that "[a] duty not to discriminate in the school board's own actions is converted into a duty to ameliorate or compensate for the discriminatory conduct of other entities and persons." Corrective justice rejects arguments that the school board, as a public institution, should bear the duty of compensating for the wrongs of others.

44. Weeks v. United States, 232 U.S. 383 (1914) (exclusion of evidence required to enforce fourth amendment); Jeffries, *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82 (1989); K. COOPER-STEPHENSON, CHARTER DAMAGES CLAIMS (1990) (corrective understandings of constitutional torts). *But see* Whitman, *Government Responsibilty for Constitutional Torts*, 85 MICH. L. REV. 225 (1986) (limitations of corrective justice in constitutional tort context).

45. *Weeks*, 232 U.S. 383; Schrock & Welsh, *Up from* Calandra*: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974); Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983).

fied victims so that social interests can be ignored, as they must, given the rectificatory and bipolar focus of corrective justice. In the modern era, however, American courts have resisted conceptualizing exclusion of evidence as a matter between the police who inflict wrongdoing in the form of a constitutional violation, and suspects who suffer such wrongdoing. Despite the intelligibility of corrective justice as a means to rectify wrongful dealings between the police and suspects, a corrective approach to exclusion of evidence has been rejected by American courts. It is strongly resisted by those who oppose the social costs of the exclusionary remedy. Moreover, it is also opposed by those who believe that the ambition of the exclusionary remedy should be deterrence of police misconduct.[46] Paradoxically, American courts have used equitable concepts of excusing good faith attempts at compliance and structural ambitions of control of official misconduct in the very context where the corrective concepts they proclaim in structural cases make the most sense.[47]

It is important to understand that in both the police conduct and structural reform contexts, courts do not adhere rigorously to the equitable or corrective models that they have chosen to stress. For example, although claims made by individuals wronged in transactions with the police are sacrificed in the pursuit of the regulatory goal of the deterrence of police misconduct with its utilitarian cost/benefit gloss, corrective concepts of standing and causation have also been used to deny access to the exclusionary remedy. Thus, if an individual was not harmed personally by the constitutional violation, evidence will not be considered for exclusion even if granting a remedy could deter police misconduct.[48] Broad standing may provide a suspect with an unjustified windfall of exclusion from the individualistic and moralistic perspective of corrective justice; it is, however, a legitimate regulatory tool if the deterrence rationale is taken seriously. Similarly, the rigour of causation analysis in American exclusionary doctrine only makes sense within a corrective, not a regulatory, framework.[49] A demand for a close causal relation between police misconduct and the discovery of evidence determines the extent of harm suffered by individual suspects, but it frustrates the regulatory ambitions of the

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46. For a cost-benefit approach to the social costs of exclusion of evidence, see United States v. Leon, 468 U.S. 897 (1984). For a deterrence approach, see Elkins v. United States, 364 U.S. 206 (1960), and Mapp v. Ohio, 367 U.S. 643 (1961).

47. United States v. Calandra, 414 U.S. 338 (1974); *Leon*, 468 U.S. 897; Massachusetts v. Sheppard, 468 U.S. 981 (1984). In his *Leon* dissent, Justice Brennan argued against the deterrence rationale and appealed to corrective justice:

> By remaining within its redoubt of empiricism and by basing the rule solely on the deterrence rationale, the Court has robbed the rule of legitimacy.... Rather than seeking to give effect to the liberties secured by the Fourth Amendment through guess work about deterrence, the Court should restore to its proper place the principle framed seventy years ago in *Weeks* that an individual whose privacy has been invaded in violation of the Fourth Amendment has a right grounded in that Amendment to prevent the government from subsequently making use of any evidence so obtained.

468 U.S. at 943 (Brennan, J., dissenting).

48. United States v. Payner, 447 U.S. 727 (1980); Rawlings v. Kentucky, 448 U.S. 98 (1980); Rakas v. Illinois, 439 U.S. 128 (1978) (cases limiting exclusionary claims to those with personal standing). *See generally* Doernberg, *"The Right of the People": Reconciling Collective and Individual Interests under the Fourth Amendment*, 58 N.Y.U. L. REV. 259 (1983).

exclusionary rule in the face of proven police misconduct that may not have led to the discovery of evidence.[50] In fact, American courts have given suspects the worst of both worlds: their claims must survive corrective standing and causation hurdles only to risk being sacrificed for reasons of regulatory strategy. A similar argument will emerge in this Article about the treatment of groups in the structural cases. They too have received the worst of both worlds with their remedial demands having to meet the corrective requirements of causation and restoration, only to be balanced against equitable considerations of deference and strategy and recognition of social and third party interests.

D. Difficulties of Applying Corrective Principles to Organizational Contexts

As has been outlined above, classical corrective principles are suited to rectifying discrete wrongs committed by one person upon another. The causation requirement focuses on a retrospective analysis of past transactions for evidence of individual fault. Even in the private law context, the applicability of this form of causal analysis is very much in contention with many insisting that such analysis must become more functional in order to accommodate the complexities of organizational (mis)behaviour.[51] The individualistic images of a wrongdoer committing "a definite wrong" against a victim, invoked by Dicey and others, seem increasingly unrealistic in many modern contexts. This is especially true in the context of governmental bureaucracies. In such settings constitutional wrongs often occur through organizational failure. For example, inadequacies in supervision contribute to prisoners being brutally attacked in their cells. The police engage in discriminatory misconduct in part because of the lack of effective training or complaints systems.

Transaction-based causation analysis has led courts to find the state not liable in many situations in which no state official may be responsible for the wrongdoing in a individualistic sense, but where only organizational reform can effectively prevent further wrongdoing.[52] For example, in *Rizzo v. Goode*,

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49. Segura v. United States, 468 U.S. 796 (1984); Oregon v. Elstad, 470 U.S. 298 (1985) (rigourous causation standards).

50. Canadian courts dealing with similar problems have abandoned the need for a showing of a causal relation between a constitutional violation and the obtaining of evidence. R. v. Strachan 46 C.C.C. 3d 479 (S.C.C. 1988). At the same time (and following their constitutional text), Canadian courts only exclude evidence if they determine that its admission could bring the administration of justice into disrepute. At this stage they have re-introduced some elements of causation analysis. Evidence that exists irrespective of the constitutional violation will only be excluded if there is serious police misconduct, but if there is serious misconduct, a causation requirement will not prevent the court from excluding the evidence. R. v. Collins, 33 C.C.C. 3d 1 (S.C.C. 1987). On the issue of standing to raise exclusionary claims, the Canadian experience more closely resembles the American experience and the corrective model. *See* Roach, *Section 24(1) of the Charter: Strategy and Structure*, 29 CRIM. L.Q. 222, 235-38 (1987).

51. Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven Jr.*, 43 U. CHI. L. REV. 69 (1975); Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984).

52. Davidson v. Cannon, 474 U.S. 344 (1986) (lack of care by prison officials facilitating a prisoner being beaten); *Rizzo*, 423 U.S. at 377 ("no affirmative [link]" between remedy of a complaints procedure and harms suffered by plaintiff); Oklahoma City v. Tuttle, 471 U.S. 808 (1985) (fatal shooting involving rookie officer). In these cases, the Court was undeniably inclined to give the substantive rights at stake a narrow reading. Nevertheless, they

Justice Rehnquist refused to hold administrators responsible for the actions of police officers under their supervision and, in the absence of findings of individual wrongdoing directed against identified victims, overturned the constructive remedy of a police complaints system that was formulated by the courts below in response to proven patterns of police misconduct.[53] In *Oklahoma City v. Tuttle*,[54] Justice Rehnquist refused to order damages against the police because he found no "affirmative link" between their training policies and a police shooting.[55] Likewise, in *Davidson v. Cannon*,[56] Justice Rehnquist distinguished a case in which prison authorities did nothing upon receiving a note from a prisoner warning that he would be beaten from cases in which prison officials administered the beating themselves.[57] In all of these cases, the corrective demand for close linkage between the defendant's actions and the plaintiff's suffering proved to be a barrier to constructive court-ordered reform or the use of damages to influence organizational behaviour. Notions of intervening breaks in causal chains[58] and the corrective demand that victims and perpetrators be matched have frustrated attempts to provide meaningful constitutional remedies.

The analysis required to justify structural reform will invariably seem like "amorphous propositions"[59] from the mechanistic and individualistic perspective of classical corrective justice. The demand for an unambiguous find-

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also demonstrated attitudes about the centrality of causation that are consistent with classical corrective principles.

53. *Rizzo*, 423 U.S. at 377. Contrast this with Judge Swygert's comments that "it makes no difference whether the plaintiffs' constitutional rights are violated as a result of police behaviour which is the product of the active encouragement and direction of their supervisors or as a result of the superiors' mere acquiescence in such behaviour." Schnell v. City of Chicago, 407 F.2d 1084, 1086 (7th Cir. 1969).

54. 471 U.S. 808.

55. *Id.* at 823.

56. 474 U.S. 344.

57. *Id.* at 348.

58. Schuck has described the transactional causation paradigm of classical corrective principles:

> [Traditional causation analysis] conceives of reality as a set of quite specific, limited propositions about how particular antecedent behaviours influenced certain discrete, historical events. It seeks to freeze reality in space and time, asking who did what to whom, when and with what effect.

P. SCHUCK, SUING GOVERNMENT 156 (1983).

Liebman has commented that the individualistic and mechanistic world view of corrective justice does not make sense in the context of school desegregation:

> Law traditionally determines wrongs and requires that they be righted. Here, however, the attenuations are too great; that children C be bused because politician P once offended; that parents F [and] M have their lives altered even though they did not vote for politician P, did not know P was misbehaving, did not themselves specifically benefit; all while other cities, and friends and relatives who had just enough money or initiative to move to the suburbs during the great migration are spared.

Liebman, *Constitutional Values and Public Education*, in RACE AND SCHOOLING IN THE CITY 253, 257 (A. Yarmolinsky, L. Liebman & C. Schelling eds. 1981) [hereinafter RACE AND SCHOOLING]. *See also* Liebman, *supra* note 26, at 1509-23.

Vining has argued that lawyers attempt to impose individualistic causation analysis on a "hopelessly multi-causal world" and that it will often be impossible to reconstruct the historical cause of events as is required under traditional causation analysis. J. VINING, LEGAL IDENTITY 89-92, 140 (1978).

59. *Rizzo*, 423 U.S. at 376.

ing of causal responsibility before courts undertake remedial action will, in many institutional contexts, frustrate reform because courts will be unable to find individual state actors responsible for harms which only the state as an organization can begin to remedy and prevent. As corrective justice is modified to respond to the organizational context of structural cases, the requirement of a finding of causal responsibility to justify remedies will be relaxed, but as will be examined in the next section, it cannot be abandoned if the remedial philosophy is to be corrective in any meaningful sense. The causation requirement is the most significant shortcoming of corrective principles in institutional contexts.

As corrective justice is modified to meet the challenges of structural injustices, its central requirement that the wrongs to be remedied be causally attributed to acts of a wrongdoer will be finessed or ignored. Presumptions of causation are used and defendants are held responsible for harms that they might not be actually responsible for causing. A faithful application of corrective causation requirements in the school desegregation context would require the court to:

> determine how much incremental segregative effect [identified] violations had on the racial distribution of the ... school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference....[60]

The *Dayton I* test tries, as best it can, to be loyal to corrective principles, by holding the school board only responsible for the "incremental segregative effect" caused by its actions.[61] True to the spirit of classical correction, the wrongdoer only pays for the harms he or she creates. Under corrective justice, it would be unjust to hold either a person or a school board responsible for injuries that they did not inflict. If remedies exceed the scope of violations for which defendants are responsible, the judge would not be restoring an equality that existed between the parties before the wrongful event, but rather would be using the defendants as means to pursue social goals. Once the court does more than rectify the specific injury caused, the dualistic structure of wrongdoer and victim breaks down. From the perspective of classical corrective justice, the claims of all in society should be considered in resolving what has become an issue of distributive justice.

E. New and Improved?: Diet Correction

American courts do not always demand the rigorous proof of causal responsibility that classical corrective justice and the *Dayton I* test demands. Indeed, remedies that respond to victims' needs, balance interests, and attempt to gain the consent of the affected parties have been presented in the language of corrective justice. Although corrective principles can be modified and stretched to respond to structural contexts, my argument is that they offer an unstable foundation for structural remedies because of their limitations as principles best suited to the rectification of discrete wrongs committed by one

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60. *Dayton I*, 433 U.S. at 420.
61. *Id.*

individual against another. These modifications have created many jurisprudential dilemmas and proved to be remarkably unstable in practice. Courts at different times appear more or less willing to finesse the requirements of causation and restoration that any corrective theory demands.

i) Causation

Even the broadest corrective approach must have a causation requirement. This requirement presents formidable difficulties of empirical proof for those who seek remedies for pervasive harms they suffer from the institutions which surround them. For example, an application of the causation requirement in the school desegregation context would require courts to perform what David Kirp has described as "awesome mental experiments, imagining what the school district would be like if no illegal segregation had occurred."[62] Likewise, Frank Goodman has recognized that causation principles would require "inevitably speculative historical judgments" about what proportion of the racial composition in each school is attributable to the defendant's wrongs.[63] Problems of determining the causal nexus between injuries and wrongdoing can be finessed by the use of rebuttable presumptions[64] or through expansive liability rules,[65] but these techniques are unstable. Although they justify expansive remedies in the hands of sympathetic courts, the underlying corrective structure invites retrenchment.

The use of presumptions about causation allows the burden of proof required by corrective justice to be avoided while at the same time maintaining the legitimacy of requiring such proof. Courts have not always demanded the degree of proof required by Justice Rehnquist in *Dayton I*, but when they do, it is difficult to understand how their actions can be criticized on the basis of corrective principles. The Court is insisting on what has always been admitted to be the ultimate requirement. It may, however, be argued that once some wrongdoing has been proven, the victims should be given the benefit of all causal doubts.[66] In situations of causal uncertainty, this benefit of the doubt may often prove decisive and hence be effective in justifying expansive remedies. Nevertheless, it cannot be ignored that by accepting corrective principles,

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62. Kirp, *Legalism and Politics in School Desegregation*, 1981 WIS. L. REV. 927, 931.

63. Goodman, *Some Reflections on the Supreme Court and School Desegregation*, in RACE AND SCHOOLING, *supra* note 58, at 45, 62.

64. *Keyes*, 413 U.S. 189.

65. *See* Note, *School Desegregation After* Swann: *A Theory of Government Responsibility*, 39 U. CHI. L. REV. 421 (1972) (emphasis on reasonable foresight); Gewirtz, *supra* note 6, at 774-75 (broad reading of the effects of discrimination). *See also* Fiss, *Racial Imbalance in Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965) (hold government responsible for remedy as long as state discrimination is a "concurrent" cause of the condition to be remedied).

In the face of the complexities of causal attribution in modern society, even a philosopher as logically rigorous as Robert Nozick sanctions the liberal use of approximations and "rough rule[s] of thumb for rectifying injustices" and determining who should receive compensation and who should pay for it. R. NOZICK, *supra* note 31, at 231. Nozick is willing to tolerate considerable over and under-inclusiveness "unless it is clear that no considerations of rectification of injustice could apply to justify" any particular remedy. Some unexplored outer limits exist, however, because "to introduce socialism as the punishment for our sins would be to go too far...." *Id.*

66. Gewirtz, *supra* note 6.

the victims receive expansive remedies on the basis of doubt and uncertainty. A school board that could prove lack of responsibility for some increment of segregation would have a just claim to avoid remedial burdens for remedying that increment and the victims would have no legitimate claim to such a remedy.

Causation analysis not only invites retrenchment when proof is not presumed, it simplifies complex realities. Despite the complex interactions between school segregation and residential patterns, causation analysis can lead to a presumption that the wrongdoing of the school board accounts for all present racial imbalance, regardless of the intervention of factors, such as residential choice, which are more or less independent from the constitutional violation.[67] A presumption of causation, not rebutted, encourages an absolutist approach to remedial decisionmaking by ignoring the socioeconomic background of the violation, the involvement of other parties and interests, and the possibility that intervening forces will work against the court's remedy. The absolutist quality of causation analysis produces unequivocal findings of either guilt or innocence that ignore the complexities of phenomena such as school segregation and prison or police violence. The on/off form of the causation question discourages open balancing of interests or addressing intervening forces that can threaten remedial ambitions. Presumptions of causation encourage a lack of candour and they force plaintiffs and defendants into making moralistic bluffs that do not capture the complex and ambiguous nature of the structural problems to be remedied.

Modifications of causal analysis have been profoundly unstable in practice. The Supreme Court has waxed and waned in its use of presumptions and burdens, only sometimes being drawn to the logic expressed by Justice Rehnquist in *Dayton I*.[68] At other times, the Court has recognized the interactive causal effects of discrimination, and instead of trying to specify the "incremental segregative effect" of the defendant's actions, has presumed that racial imbalance in school populations has been caused by the state's intentional discrimination.[69]

Although corrective principles are flexible, the Court has also found it necessary to use equity to help justify structural remedies. The following passage from a school desegregation case illustrates how the unrealistic standards

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67. Owen Fiss noted that the presumption of the school board's causal responsibility in *Swann* involves "no more than theoretical possibilities and obviously involve significant elements of conjecture. The Court's response was to announce an evidentiary presumption that in effect resolves all uncertainties against the school board." Fiss, *supra* note 14, at 700.

68. 433 U.S. at 420. For accounts of the changes in causation requirements from *Swann* to *Keyes* to *Dayton I* to *Columbus*, see Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Rothstein, *supra* note 3; Goodman, *supra* note 63.

69. The most notorious example of this technique is Keyes v. School Dist. No. I, 413 U.S. 189 (1973), in which a showing of intentional segregation in part of a school district was held sufficient to justify a rebuttable presumption of official segregation throughout the system. Corrective principles are ill-suited to structural reform because, if only in theory, they demand such an impossible demonstration of causation and thus beg the legitimacy of departures such as that sanctioned in *Keyes*. If structural wrongs are to be remedied, public institutions will have to bear the burden of remedies for harms that they might not have "caused" in a mechanistic and individualistic sense. Corrective justice, with its private law origins, inhibits the development of public responsibility for remedying structural injustices.

of proof demanded by the corrective model can be tempered by appeal to equitable principles.

> The basic rule which governs federal courts' remedial powers in eliminating *de jure* school desegregation is that "[i]n fashioning and effectuating the desegregation decrees, the courts will be guided by equitable principles." *Brown II*, 349 U.S. at 300, 75 S. Ct. at 756. The task, as defined in *Swann* and refined in *Milliken I*, is to correct by a balancing of the individual and collective interests "the condition that offends the Constitution." *Swann*, 402 U.S. at 16, 91 S. Ct. at 1276; *Milliken I*, 418 U.S. at 738, 94 S. Ct. at 3124. The touchstone of these "equitable principles" is that 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." *Id.*... Once invoked, however, "the scope of the district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann*, supra, at 15.[70]

The corrective shell of the nature of the violation determining the scope of the remedy exists alongside equitable concepts of balancing individual and collective interests, responding to social conditions and relying on the breadth and flexibility of remedial powers.

In sympathetic hands, "diet correction" facilitates broad structural remedies, but it does so on the basis of avoidance of theoretical rigour and reliance on the empirical uncertainty of the very causation requirement it demands. This approach also obscures the profoundly different implications of the traditions of correction (remedies fitted to proven violations) and equity (response to practicalities and balancing of interests) and allows courts to pick and choose which of the traditions to appeal to without justifying their choice. Moreover, judges who use "diet correction" to justify broad remedies will carry with them the seeds of retrenchment when other judges choose to apply corrective principles, no less faithfully, but more narrowly.

ii) Restoration

Even diluted forms of corrective justice will have trouble justifying remedies that are not designed to restore those who have suffered constitutional wrongs to the position they occupied before the wrong. Remedies which respond to the plaintiffs' needs but may not be closely tied to an identified wrong are dubious under corrective principles. Such "enriched" remedies may prevent, but do not necessarily repair, constitutional violations. They may provide victims of structural wrongs with participatory structures and other reforms which improve their lives but cannot easily be seen as responding to an effect of the defendant's wrongdoing. In a Boston school desegregation case,

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70. Tasby v. Wright, 520 F. Supp. 683, 705 (N.D. Tex. 1981), *aff'd*, 713 F.2d 90 (5th Cir. 1983). Gewirtz has recognized: "The courts ... simply have not used any consistent standard of causation-in-fact in discrimination cases; they seem instead to vacillate between the position that the defendant's discrimination must be a 'but for' cause and the position that it need only be a 'contributing' cause of the condition to be remedied." Gewirtz, *supra* note 6, at 783.

for example, Judge Garrity noted the impossibility of full correction, but then used this insight to justify broad preventive measures.

> The plaintiffs in this case do not seek a remedy that would compensate them, as a class, for the injury already wrought by the defendants' long-practised racial discrimination. That injury, of course, is immense.... The desegregation plan that the court orders cannot make the plaintiffs whole, nor for that matter, anyone who has been affected by the racial divisions in this city, which are in part traceable to the defendants' segregative practices. Rather, the remedy must go beyond an order that forbids further acts of affirmative discrimination in order to assure that past discriminatory practices will work no further harm.[71]

The lost generation of schoolchildren,[72] the mental patients who have regressed because of poor institutional care, and the prisoners who have endured inhumane conditions, are those who suffer before courts order structural remedies. An open admission of the inability to correct countless individual acts of wrongdoing should haunt judges and persuade them to order enriched remedies where feasible. Judicial silence about uncorrected wrongs cannot even be justified on "tragic choice"[73] grounds as little in the way of integrity of social decisionmaking or ideals is protected by the subterfuge of silence. If anything, silence can foster an unjustifiable sense that justice has been done and the illusion that wrongs can always be fully corrected. Perhaps the most damaging feature of continued adherence to corrective principles is their ability to delegitimate remedies that cannot easily, or perhaps ever, be seen as a response to harms causally attributed to the defendant's wrongdoing.

Courts have justified enriched remedies under the slogan of restoring the victims to the position they would have enjoyed in the absence of illegal discrimination,[74] but they cannot really know that they have done so, or even that such restoration is ever possible.[75] A false sense of complacency, even smugness,[76] is fostered by pretending that all harms, even those embedded in collective histories and psyches, can be undone. The myth of nullification and restoration encourages termination of remedial efforts on the high moral

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71. Morgan v. Kerrigan, 401 F. Supp. 216, 231 (D. Mass. 1975). Judge Garrity ordered numerous educational reforms and participatory structures to improve Boston schools, as well as busing to achieve racial balance.

72. D. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 102-23 (1987).

73. G. CALABRESI & P. BOBBITT, TRAGIC CHOICES (1978). It is doubtful that a recognition of past uncompensated wrongs will inflict dignitary harm on the victims or provide incentives for further wrongdoing.

74. *Milliken II*, 433 U.S. 267.

75. "The Court's notion of 'make-whole relief' assumes that reconstruction of a previous condition, the *status quo ante*, is possible." Goldstein, *supra* note 3, at 42 (quoting Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976)). *See also* Dworkin, *Social Sciences and Constitutional Rights: The Consequences of Uncertainty*, 6 J.L. & EDUC. 3, 9 (1977) (busing, as a remedy, does not restore plaintiffs to positions they would have occupied if no prior injustice existed).

76. Owen Fiss argues that the restorative orientation of the corrective model "presupposes a social world that is essentially harmonious." Fiss, *supra* note 2, at 9. *See also* Fiss, *Coda*, 38 U. TORONTO L.J. 229 (1988). This is certainly true of the *Dayton I* formulation

ground that justice has been done. In many cases it would be far more honest to confess, reluctantly, and with a sense of shame, that no more can be done.

F. Must the Past be Forgotten?

A rejection of corrective justice with its emphasis on causal responsibility and restoration does not mean that structural remedies cannot be related in a general sense to past wrongs. Too often the stark alternatives presented have been a choice between free-wheeling and present-minded distributive justice, in which the claims of those who have suffered constitutional wrongs would have to compete with the entire range of social interests, or corrective justice, with its unrealistic focus on the rectification of identified wrongs.

An alternative is to give the specific histories of those who have been wronged their due respect and to recognize that prospective relief is often the best way to make some effort at compensating these victims. In the context of school desegregation remedies, Gewirtz has identified a "broad corrective approach" in which "corrective steps are directed toward the continuing effects of our country's long history of racial discrimination."[77] This approach has the virtue of not abandoning the historical claims which can be made by many beneficiaries of structural remedies. Nevertheless, it is fair to ask in what sense such an approach remains corrective. Would not determining causal responsibility become impossible if the focus was on generations of injustice as opposed to discrete acts of wrongdoing? At the least, this sort of broadly historical causation analysis could not determine remedial priorities. Likewise, if history is seen broadly, the goals of nullification and restoration become increasingly unrealistic. Structural wrongs adhere to the fabric of institutions and societies and may make permanent differences in those who have suffered. Slavery and apartheid cannot be erased. Neither can entrenched patterns of discrimination and brutality in institutions such as prisons and the police. A wrongful past should be remembered as an aspiration to do better, but it cannot be used as the standard by which to measure remedial efforts. The wrongs are too pervasive; the patterns of causality too complex; and the remedial resources too limited.

In summary, classical corrective justice is best suited to rectifying wrongful bilateral transactions. It is not sensitive to questions of organizational or public responsibility for constitutional violations. Attempts to broaden the corrective approach and ease the burden of proving causation have proven unstable in practice and they disguise the understandably prospective orientation of structural remedies. Diet correction finesses causation requirements through presumptions but invites retrenchment. It pretends that victims are made whole without knowing that this was done or ever could be accomplished.

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which concentrates on the incremental effects of the school board's discrimination and presumes that the background is a product of free choice and not housing or employment discrimination.

77. Gewirtz, *supra* note 6, at 731. There is some doubt, however, that courts will look at past wrongs in such broadly historical terms. Morton Horwitz has commented on the inability of American courts to account for history in the broad sense and their tendency to view racial discrimination through "legally anonymous generations." Horwitz, *The Jurisprudence of* Brown *and the Dilemmas of Liberalism*, 14 HARV. C.R.-C.L. L. REV. 599, 610 (1979).

PART II: CORRECTIVE PRACTICE

If corrective theory is unable to explain structural wrongs and remedies, how has it worked in practice? The short answer is that courts have often ignored the implications of corrective theory in structural cases. In some cases, this has led to enriched remedies that cannot easily be justified as a response to the defendant's identified wrongs. More often than not, however, courts have departed from corrective justice by leaving wrongs uncorrected and by sanctioning remedial delay. The first part of this section will analyze how social interests have time and time again tempered what have been understood as corrective claims. The second part examines some remedies which were appropriate and feasible but not easily seen as a response to the scope of proven violations. Once again my argument will be that corrective principles are too strong in their demand for full rectification and their conceptual blindness to social interests while, at the same time, too weak in their inability to justify practical remedies which respond to harms not necessarily caused by identified wrongdoing.

A. Imperfect and Delayed Remedies

The behaviour of courts in institutional reform cases cannot easily be explained as a working out of corrective principles. Judges first invite parties to submit their own remedial plans and then often try to negotiate some sort of a compromise between the parties and other affected interests. When remedies are ordered, they are often formulated in a tentative and incremental fashion and not as a discrete act of justice that rectifies wrongdoing. The remedies are often tempered by the interests of society and third parties so that the corrective focus on doing justice between the wrongdoer and the victim is diffused.

Remedial delay has been a pervasive characteristic of structural remedies, yet delay is difficult to explain within corrective justice. The most prominent example of remedial delay was the Supreme Court's behaviour in *Brown II* in delaying remedial hearings for a year and then fashioning an ambiguous "all deliberate speed" formula, thus ensuring, at best, incremental desegregation with local variations.[78] From the perspective of corrective justice, the defendants in *Brown* were treated with a deference inconsistent with their status as proven wrongdoers and the plaintiffs were robbed of their rightful claim to full repair. As Robert Carter has observed:

> Until *Brown II*, constitutional rights had been defined as personal and present. In the exercise of that ephemeral quality [courts call] judicial statesmanship, the Warren Court sacrificed individual and immediate vindication of the newly discovered right to desegregated education in favor of a mass solution.[79]

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78. 349 U.S. at 301.

79. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 243 (1968). Similarly, see Lusky's comments:

> Conceptually, the "deliberate speed" formula is impossible to justify.... Since [its beginning], judicial review has been founded in the judicial duty to give a litigant his rights under the Constitution. But the apparently successful plaintiff

In *Brown II*, the Court stated that they would wait for school boards to devise their own remedial plans and compliance would be judged on the deferential standard of whether the "the action of school authorities constitutes good faith implementation of the governing constitutional principle."[80] Why would judges intent on correcting the proven wrong of segregation act in such a fashion? American courts did not live up to their promise of corrective justice.

The treatment accorded both plaintiffs and defendants in *Brown* is by no means unusual in structural cases. For example, the procedural staple of requiring defendants to devise and submit their own remedial plans is difficult to explain if the court is only concerned with a retrospective assessment of the extent of wrongdoing.[81] When remedies are ordered, judges often are content to order only that the defendant make a start in addressing the problem.[82] As a result, the wrongdoers are treated with a deference inconsistent with their status under corrective theory.

When courts have ordered expansive structural remedies, they have often justified their actions not only by a finding of liability and wrongdoing, but also a more amorphous finding that the state defendants had not been cooperating in remedial efforts on a good faith basis. Even after a determination of liability, defendants in structural cases will find themselves with a safety net of judicial deference. Plaintiffs will have to demonstrate bad faith before the court intervenes. My point at this juncture is not to assess such techniques but to point out their inconsistency with corrective ideals. Corrective justice requires not only that a wrong be proven, but that the proven wrongdoer bear the remedial burdens. It is often impossible to treat defendants in the moralistic manner that corrective principles require because they are simply too powerful and their cooperation too important to the success of remedial efforts.

Remedial delay and the accommodation of social interests in structural remedies are related themes. The finding of a constitutional violation in cases concerning conditions in a custodial institution means, in a conceptual sense,

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> in the *Brown* case got no more than a promise that, some time in the indefinite future, other people would be given the rights which the Court said he had.

Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 COLUM. L. REV. 1163, 1172 n.37 (1963). *See also* Missouri *ex rel* Gaines v. Canada, 305 U.S. 337, 352 (1938) (ruling that African-American petitioner be admitted forthwith to segregated state law school).

80. *Brown II*, 349 U.S. at 299. The equitable notion that all that is required is good faith compliance is still an important part of remedial doctrine. *See Dowell*, 111 S. Ct. 630.

81. It is, however, easy to explain as a means of assessing feasibility and trying to gain a political compromise. *See generally* Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979); Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805 (1990).

82. See, for example, the Arkansas prison litigation described in M. HARRIS & D. SPILLER, AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS 68 (1977); L. YACKLE, *supra* note 23.

In the school desegregation context the Supreme Court has stressed "[r]emedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.... In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system." *Swann*, 402 U.S. at 16. *See also* Johnson, *The Role of the Federal Courts in Institutional Litigation*, 32 ALA. L. REV. 271 (1981).

that inmates in those institutions are presently having their rights violated. The logical remedy would be the release of unconstitutionally detained prisoners.[83] This, however, is not practical because of society's interest in the continued detention or treatment of such prisoners.[84] It is ironic that judges who profess adherence to the corrective paradigm do not acknowledge that their remedies do not correct the wrongdoing and bring about its full nullification. The imperfections of structural remedies from a corrective perspective are inevitable. Institutions cannot be changed overnight; courts will not open the gates of bad prisons. Given this, courts should at least balance injustice with mercy by ordering whatever practical remedies will work, regardless of whether they can be easily justified through corrective theory. In the absence of such a counterbalance, corrective theory is indeed a hypocritical promise to those who have suffered and continue to suffer from structural wrongs that cannot be easily or quickly rectified.

One attempt to break out of the harness of corrective theory was made by Justice Powell in his concurrence in *Keyes*.[85] He was prepared to abandon the requirement that remedies match harms caused by constitutional violations[86] in favour of an approach that balanced[87] a variety of interests. Parental desires for neighbourhood schools,[88] the effects of busing on school children,[89] and the interest in local control of schools[90] would, under Justice Powell's approach, be balanced against the constitutional interest in integration. Arguably, Justice Powell did not place enough weight on the interests of the plaintiffs, but nevertheless, his candid recognition of the role that social factors have in tempering

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83. As William Fletcher notes:

> [T]he legal right at stake in a prison case is a present right of prisoners not to be subject to unconstitutional conditions of confinement. Under this definition habeas corpus is not only an easy but also the obviously correct remedy. For if the court enjoins state officials to improve prison conditions, the present right will not be vindicated because there will inevitably be delays in improving the prison.

Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 658-59 (1981).

84. *But see* L. YACKLE, *supra* note 23, at 196-221 (release of some unconstitutionally detained prisoners to stimulate government to take remedial measures). Damages could also be used in such an instrumental and strategic fashion and perhaps also as a corrective form of compensation.

85. 413 U.S. at 227 (Powell, J., concurring).

86. In *Keyes*, unlike in many of his other desegregation decisions in which corrective justice was used to restrict busing remedies, Justice Powell recognized that: "Public schools are creatures of the State, and whether the segregation is state-created or state-assisted or merely state-perpetuated should be irrelevant to constitutional principle." *Id.*

For a repudiation of this non-corrective approach and an appeal to Justice Rehnquist's rigorous "incremental effect" test of causation, see Austin Indep. School Dist. v. United States, 429 U.S. 990, 995 (1976) (citing *Davis*, 426 U.S. 229). "[L]arge-scale busing is permissible only where the evidence supports a finding that the extent of integration sought to be achieved by busing would have existed had the school authorities fulfilled their constitutional obligations in the past." *Id.* (Powell, J., concurring in part).

87. Justice Powell endorsed the "even-handed spirit with which equitable remedies must be approached. Overzealousness in pursuit of any single goal is untrue to the tradition of equity and to the 'balance' and 'flexibility' which this Court has always respected." *Keyes*, 413 U.S. at 240 (Powell, J., concurring).

88. *Id.* at 245.

89. *Id.* at 247-48.

90. *Id.* at 246.

remedies is preferable to judicial silence.[91] Furthermore, open balancing of interests without the constraints of correction works in two directions: not only are social interests balanced with the victims' remedial claims, but remedial claims can be expanded to include the victims' present needs even though those needs may not easily relate back to past wrongdoing. Victims are free to throw all their remedial goals and priorities into the balance.

Although courts have maintained rhetorical adherence to corrective principles, they have often qualified corrective demands with social and third party interests irrelevant under classical corrective principles.[92] Given the frequent qualification of corrective demands, corrective theory now serves primarily to limit the remedial claims of victims by requiring causal responsibility. This requirement of causal proof taints the legitimacy of the constructive and appropriate remedies examined in the next section.

B. Enriched Remedies

In some structural cases, courts have ordered remedies that respond to the needs of those harmed and accommodate the various interests at stake. These remedies are often not easily seen as a direct response to correct a proven violation. As much as those which delay and temper repair of wrongs with social interests, they would not be considered just under corrective principles.

These "enriched" remedies include remedial education and guidance in desegregated school systems, participatory and supervisory structures to reform institutions, and various programs beyond minimal constitutional standards to benefit those confined in institutions with unconstitutional conditions. Although these remedies are not *ad hoc* reforms unrelated to constitutional violations, they cannot easily be justified under corrective principles because of the difficulties of proving that they respond to harms causally related to identified wrongdoing. My argument is that the search for corrective justifications should be unnecessary given an appreciation of the full context of the case. Misgivings about the legitimacy of these remedies as a form of corrective justice can be transformed into an understanding that they are a just response to a situation in which wrongs cannot be fully corrected.

Educational "sweeteners," such as remedial education, teacher training, reform of school discipline and development of parental and community partic-

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91. Remedial approaches that do not provide for a balancing of interests may lead to a narrow interpretation of rights. In the school desegregation context, a case can be made that a rejection of the balancing proposed by Justice Powell may have led to narrower interpretations of the right at stake, and insistence on rigorous causal justifications for remedies in *Milliken I* and *Dayton I*. Owen Fiss comments:

> The remedial stringency of *Keyes* and *Swann* — requiring the board to take all possible steps to eliminate the segregation — may be rooted in the notion of past discrimination. Past discrimination has the aura of intentional wrongdoing, and those cases may reflect the same sentiment that underlies the tort rule which holds an intentional wrongdoer accountable for *all* the consequences of his actions.

Fiss, *supra* note 14, at 35.

92. *Brown II*, 349 U.S. at 300.

ipation structures have been included in school desegregation decrees.[93] They have often been justified as "second choice" remedies in situations in which residential segregation and a judicial reluctance to include the suburbs in busing remedies have made the achievement of racial balance impossible.[94] In *Milliken II*, the Supreme Court attempted to provide a corrective justification for such educational remedies as required "to restore the victims of discriminatory conduct to the position they would have enjoyed in terms of education had these ... components been provided in a nondiscriminatory manner in a school system free from pervasive *de jure* racial segregation."[95] This appeal to corrective principles invites a speculative historical inquiry that identifies the effects of segregation on the education of African-American schoolchildren in the Detroit school system.[96] Although some courts may be content to order expansive educational remedies on the basis of approximations of causal histories and presumptions of causation,[97] others will be unwilling to use such devices. Their refusal is not without moral significance, but it is difficult to criticize on the basis of corrective principles.

Another example of an enriched remedy is the procedures established by the Third Circuit in the *Pennhurst* litigation.[98] There, the court involved parents and advocates in devising individual plans for the community care of those institutionalized in a mental health care institution.[99] The *Pennhurst* plaintiffs understandably tried to make new law by interpreting statutory and constitutional rights to include the right to habilitation, but a more particularistic remedial strategy was available to them. Even if a right to habilitation is not recognized, such a requirement could be justified as appropriate for the residents of Pennhurst who have suffered in ways that cannot be fully corrected.[100] More traditional remedies such as damages or release which attempt to nullify

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93. *See generally* Leubsdorf, *Completing the Desegregation Remedy*, 57 B.U.L. REV. 39 (1977); Chesler, Crowfoot & Bryant, *Institutional Change to Support School Desegregation: Alternative Models Underlying Research and Implementation*, 42 LAW & CONTEMP. PROBS., Autumn 1978, at 174; H. KALODNER & J. FISHMAN, *supra* note 23; Morgan, *What is Left to Argue in Desegregation Law?: The Right to Minimally Adequate Education*, 8 HARV. BLACKLETTER J. 99 (1991).

94. *Milliken II*, 433 U.S. 267.

95. *Id.* at 282.

96. As Peter Shane has stated: "What the educational status of minority students in a segregated district would have been but for the history of race discrimination is at least as immeasurable and unknowable as is the pattern of racial attendance that a history of nondiscriminatory assignments would have yielded." Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041, 1118 n.237 (1984).

97. "[D]iscriminatory student assignment policies can themselves manifest and breed other inequalities.... Federal Courts need not, and cannot close their eyes to inequalities shown by the record which flow from a longstanding segregated system." *Milliken II*, 433 U.S. at 283.

98. Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part*, 612 F.2d 84 (3d Cir. 1979), *rev'd on other grounds*, 451 U.S. 1 (1981).

99. 446 F. Supp. 1295. *See also* Wyatt v. Stickney, 334 F. Supp. 373 (M.D. Ala. 1972) (appointment of a permanent human rights committee to supervise reform), *aff'd sub. nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th. Cir. 1974) .

100. The suffering of the named plaintiff is described by the trial court:

> During her eleven years at Pennhurst, as a result of attacks and accidents, she has lost several teeth and suffered a fractured jaw, fractured fingers, a fractured toe and numerous lacerations, cuts, scratches and bites. Prior to her admission to Pennhurst, Terri Lee could say "dadda", "mamma".... She no longer speaks.

Halderman, 446 F. Supp. at 1309.

the past wrongdoing would be inappropriate for these people. The corrective image of restoring victims to a *status quo ante* makes little sense given the more immediate and constant needs of those who live in a "total institution."[101] As will be discussed in the third part of this Article, responding to these needs involves its owns dangers,[102] but that does not change the inadequacy of corrective strategies in situations where those who have been wronged are dependent on the wrongdoers.

Enriched remedies may be an important way to respond to unconstitutional prison conditions. Because of the intractable nature of prison overcrowding or problems with antiquated facilities, a court will often find itself unable to cure the constitutional violations. Enriched remedies may then be used to ameliorate conditions that still fall below constitutional standards. In the course of lengthy litigation over conditions in Alabama prisons, a judicial order mandating the provision of recreational facilities was upheld by the Fifth Circuit on the ground that "such facilities may play an important role in extirpating the effects of the conditions which undisputedly prevailed in these prisons at the time the District Court entered its order."[103] This suggests that something above constitutional minimum standards could be justified in particular remedial contexts. Once recognized, however, the only limit on enriched remedies are those imposed by the practicalities and not by the nature of either the constitutional right or the particular violation. The Fifth Circuit did not go this far. In the same case, they overturned remedies such as visitation standards, rehabilitation programs and the appointment of a human rights committee on the basis that they could not be derived from minimal eighth amendment standards. The trial judge had, however, ordered these remedies for the same reasons he had included recreational facilities in his decree: to respond in a practical manner to continuing unconstitutional conditions in the prison.[104]

Enriched remedies can be defended as necessary for the successful implementation of the court's remedy.[105] This makes them vulnerable to cost considerations and their own instrumental shortcomings.[106] It is important to recognize that instrumental and compensatory rationales for enriched remedies are not mutually exclusive.[107] In most cases in which courts have been pre-

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101. E. GOFFMAN, ASYLUMS (1961).

102. *See generally* M. MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 121-45, 350-72 (1990).

103. Newman v. Alabama, 559 F.2d 283, 291 (5th Cir. 1977). The court upheld the remedy "on the facts of the case" and despite concluding that as a matter of law, "[f]ailure of prison authorities to provide a rehabilitation program, by itself, does not constitute cruel and unusual punishment.... The Constitution does not require that prisoners, as individuals or as a group, be provided with any and every amenity which some person may think is needed to avoid mental, physical, and emotional deterioration." *Id.*

104. Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976).

105. Bradley v. Milliken, 402 F. Supp. 1096, 1118 (E.D. Mich. 1975), *aff'd*, 433 U.S. 267 (1977).

106. See, for example, the attitude of contempt towards educational "sweeteners" in Justice Kennedy's concurring opinion in Missouri v. Jenkins, 110 S. Ct. at 1676 (Kennedy, J., concurring). On the effect of costs on such remedies, see Weinstein, *The Effect of Austerity in Institutional Litigation*, 6 LAW & HUM. BEHAV. 145 (1982).

107. Although the constraints of corrective justice will frustrate enriched remedies, it is not necessary for recipients of such remedies to give up the moral force created from past wrongs and look only at the future. On the moral force created by a recognition of past wrongs,

pared to order enriched remedies, there has been a pattern of uncompensated wrongs. This was certainly the case in the Philadelphia police case in which an injunction providing for a police complaints procedure was approved as a valid remedy to help prevent future police abuse.[108] The trial court approved the remedy only after close to forty discrete incidents of brutal and discriminatory police actions were described in detail.[109] These wrongs were not going to be corrected; the slate could not be wiped clean. The prospective and instrumental aim of the police complaints remedy was built on the moral foundation of these uncompensated injuries. The Supreme Court ignored this reality and insisted on a tight symmetry between the rights of the named plaintiffs and the duty of the defendant police department. Justice Rehnquist held that such corrective symmetry was shattered by the intervening cause of individual police misconduct and the likelihood that those injured would not suffer abuses in the future.[110] Justice Rehnquist's application of corrective principles refuses to recognize any demand for compensation that cannot be met by rectification between a perpetrator and a victim. The individualism of his version of corrective justice requires that the perpetrator and victim be found locked in personal combat and thus ignores the organizational determinants of police behaviour, the effect police behaviour has on a wide segment of the public, and the practical means that are available for preventing abuse in the future.

This section has tried to demonstrate that because of the inappropriateness of corrective theory in structural contexts, courts have often departed from its requirements. In most cases, this has entailed ordering remedies that jump the bipolar orientation of corrective theory and take into account the interests of society or affected third parties. In other cases, courts have finessed the causation requirement of corrective theory and ordered remedies that, although appropriate and feasible, are not easily causally related to the defendant's wrongdoing. Once again, my aim has been to show that corrective justice is too strong in its conceptual inability to accommodate interests other than those of the plaintiff or defendant. On the other hand, corrective justice is too weak because it cannot comprehend that some injustices can never be cor-

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see B. BITTKER, THE CASE FOR BLACK REPARATIONS (1973); Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 232. (1987).

108. Council of Orgs. on Philadelphia Police Accountability and Responsibility (*COPPAR*) v. Rizzo, 357 F. Supp. 1289 (E.D. Pa. 1973), *aff'd sub nom.* Goode v. Rizzo, 506 F.2d. 542 (3d Cir. 1974), *rev'd sub nom.* Rizzo v. Goode, 423 U.S. 362 (1975).

109. *See COPPAR*, 357 F. Supp. 1289.

110. *Rizzo*, 423 U.S. at 371-76 (1976). *See also* City of Los Angeles v. Lyons, 461 U.S. 95 (1983). In contrast, in *Hutto*, 437 U.S. 678, the Court approved a thirty day limit on solitary confinement in an Arkansas prison in order to prevent cruel and unusual punishment. Justice Stevens noted that the rule was justified in the context of "the inmates' diet, the continued overcrowding, the rampant violence, the vandalized cells and the 'lack of professionalism and good judgment on the part of maximum security personnel' ... [as well as] ... the long and unhappy history of the litigation." *Id.* at 687. Justice Rehnquist dissented on the grounds that the rule:

> in no way relate[d] to any condition found offensive to the Constitution ... [and was] not remedial in the sense that it "restore[d] the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct" ... [because] it [did] nothing to remedy the plight of past victims of conditions which might well have been unconstitutional.

Id. at 712 (Rehnquist, J., dissenting) (quoting *Milliken I*, 418 U.S. at 746).

rected and it cannot justify practical remedies which respond to the needs of those who have suffered irreparable harm.

PART III: THE THEORY AND PRACTICE OF EQUITY

If the theory and practice of corrective justice are not appropriate in structural contexts, the question remains what can take their place. The rest of this Article suggests that despite significant dangers, the equitable tradition is the most fertile source for an alternative to corrective justice. When I refer to equity, I mean the complex of theory and doctrine which requires, on the one hand, balancing of the affected interests before intrusive remedies are ordered, and on the other, affirms the trial judge's broad and flexible remedial discretion.[111] The trial judge's exercise of remedial discretion will be reviewed deferentially and not be subject to the requirements of causation and restoration. It will be suggested that both the theory and practice of equity can meet the demands of structural reform. The collectivistic orientation of equity's theory explains better than corrective justice the frequent delay or sacrifice of the restoration of rights because of other important social interests. Although this collectivism legitimizes imperfect remedies that sacrifice the rights of some individuals, it also provides a source for the development of collective responsibility which would allow courts to order remedies for harms that the state may not have caused. On the empirical side, an equitable doctrine that allows judges to withhold remedies on prudential grounds can explain those cases in which relief was not ordered or delayed. Most optimistically, the breadth and flexibility of equitable remedial powers and the equitable notion of remedies responding to present needs justifies those cases in which trial judges have ordered remedies that appear dubious from the perspective of corrective justice.

A. Why Equity?: Other Non-Corrective Explanations of Structural Remedies

Before equity is accepted as the main alternative to corrective justice, it is necessary to survey other contenders. This will not take long because much of the work done on structural remedies has documented them as novel empirical phenomena rather than as an activity which could either find justification in legal traditions or require a new remedial theory.

In his 1976 *Harvard Law Review* article, Abram Chayes identified a developing public law remedial model.[112] A separation of right and remedy was required so that the remedy could be fashioned to influence future events and accommodate the interests of the parties and others affected by the remedy.[113] Remedies are no longer deduced from the scope of the violation, but

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111. *See supra* note 7 for a more complete definition of what I mean by equity.
112. Chayes, *supra* note 2.
113. As Chayes notes:

> [T]he prospective character of the relief introduces large elements of contingency and prediction into the proceedings. Instead of a dispute retrospectively oriented toward the consequences of a closed set of events, the court has a controversy about future probabilities. Equitable doctrine, naturally enough, given the intrusiveness of the injunction and the contingent nature of the harm, calls for a balancing of the interests of the parties.

fashioned instrumentally in order to achieve goals and balance interests.[114] Factors not considered in determining liability play an important role in formulating the public law injunction.[115] Although far from oblivious to the important role of equity in public law litigation, Chayes came close to blurring any distinction between public law remedies and legislative acts. He noted that structural remedial decrees resembled legislative acts and that courts were beginning to engage in "a continuous and rather tentative dialogue with other political elements."[116]

The analogy of structural remedies to legislation was developed by other commentators who more explicitly examined structural remedies as a form of political activity between courts, the parties and the affected interests.[117] The political process analyses of structural remedies were extremely helpful in understanding the behaviour of trial judges faced with complex remedial problems, but the odour of illegitimacy hung over them. In large part, this was the result of an unstated assumption that open-ended political bargaining was the only alternative after empirical analysis confirmed that judges were not basing their remedial choices on retrospective measurement of the scope of the constitutional violation. The following analysis by Thomas Nagel illustrates how the dichotomy of corrective and distributive justice motivated both friendly and unfriendly interpretations of the structural remedial enterprise as political activity:

> The power to make and implement policy governing the affairs of individuals who have committed no legal wrong is, of course, a classical description of the legislative and executive functions; the power to coerce individuals who have committed a legal wrong in order to redress that wrong is a classical judicial role.[118]

Despite its robust explanatory power, the political process school often ignored or discounted the specifically remedial dimensions of the court's actions. Even if they acted as "political powerbrokers" once they got in structural contexts, judges did not descend on school systems and custodial institutions out of the blue. Their remedial efforts did respond to carefully proven wrongs even if they were not always closely tied to the scope of the violation. The remedial decrees remained a response to wrongdoing even if they were tempered by political considerations.

Id. at 1292-93.

114. *Id.* at 1302.

115. Chayes has commented that in the school desegregation context, the appropriate mix of policies in the remedial stage "has not been a function of the liability-creating conduct. Instead, it has responded to practical considerations about the operation of the school system, resource availabilities, and perhaps the preferences of the parties. These factors are quite distinct from, and even irrelevant to, the liability determination." Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 1, 47 (1982).

116. Chayes, *supra* note 2, at 1316.

117. Two of the most perceptive analyses in this tradition are Fletcher, *supra* note 83; and Diver, *supra* note 81.

Recently, Susan Sturm has formulated a proposal for use of a non-adversarial deliberative decisionmaking process involving all of the affected interests as a means of devising structural remedies. Her theory posits the judge playing a supervisory role but it also relies on negotiation among the affected interests. Sturm, *supra* note 26.

118. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 710-11 (1978).

Although conceding much of the accuracy of the political process accounts, Owen Fiss stands out as a theorist who sought to resist the flight to politics by tying structural injunctions to a new understanding of constitutional rights. Fiss interpreted the underlying rights as group rights[119] and maintained that the structural injunction was a necessary adjustment to the bureaucratic and group-oriented fabric of modern society.[120] His ambitious theory has provided much of the theoretical support that structural injunctions have enjoyed, but it is vulnerable on two counts. Many do not accept Fiss's expansive interpretation of the underlying rights, and once his robust sense of constitutional values is rejected, there is little in his theory to legitimate structural injunctions.[121] Moreover, Fiss sends off his own warnings of illegitimacy by criticizing many of the bargaining features[122] that have come to characterize structural injunctions. Thus, his theory fails to justify much of the practice of structural reform.[123]

Both the political process and constitutional values schools provide shaky foundations for structural injunctions. Thus, it may be better to try to reinvigorate an older remedial tradition that is already an established feature of structural cases. Equity, at both the theoretical and practical level, has made its mark on the structural reform experience.

B. The Theory of Equity

As with many of its features, the theory of equity comes with both dangers and potential. Equity, with its stress on balancing the interests of all affected by a remedy, has a world view based on social connection and interdependence. On the one hand, this theory can be used to justify delaying and not fully recognizing the claims of those, such as prisoners, subject to unconstitutional conditions of confinement. As with the delay sanctioned in *Brown II*, equity's emphasis on correction can easily be used to maintain a status quo that systemically disadvantages those who have suffered wrongs. On the other hand, equity's emphasis on correction creates a potential for developing a robust sense of social as opposed to individual responsibility to those who have suffered from structural injustices. If this potential is developed,[124] equity would not only be a means to advantage the majority by qualifying and delaying the corrective claims of aggrieved minorities; it could also generate a sense of civic responsibility to improve the condition of aggrieved minorities, regardless of whether such remedies would be required under corrective theory.

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119. *See generally* Fiss, *supra* note 15.

120. *See generally* Fiss, *supra* note 2.

121. In a sense, Fiss's theory fuses remedies with rights like corrective justice, but defines both rights and remedies in sociological or structural terms. *But see* Fiss, *Reason in All its Splendor*, 56 BROOKLYN L. REV. 789, 791 (1990) (remedies involve "instrumental rationality" distinct from substantive rationality).

122. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Fiss, *Justice Chicago-Style*, 1987 U. CHI. LEGAL F. 1.

123. *See generally* Roach, *supra* note 23, at 270-72, 284-86.

124. I will suggest that the potential of equity can be developed through the use of need as a remedial construct and compromise and reconciliation as remedial methods. *See infra* notes 168-86 and accompanying text.

It is helpful to contrast the theory of equity with that of corrective justice. The world view of corrective justice is individualistic in its aspiration to rectify wrongful transactions so that the original equality and independence of the parties are restored and the world can continue to function "without continuous interference with people's lives."[125] The role of law is to enforce the boundaries between individuals. Remedies are necessary to restore these boundaries once they have been violated.[126] Under corrective justice, remedial burdens are assigned on the basis of blame, and the parties have profoundly different moral statuses during the remedial phase of the lawsuit. At the same time, the focus is always on completing the act of rectification so that the court no longer has to be involved and the parties can return to their original position of equality and independence.

In contrast, equity approaches remedies in a collectivistic and pragmatic fashion. The interests of everyone affected by a remedy must be balanced and, with this balance, the moral status of the parties becomes blurred. As was stated in *Lemon v. Kurtzman*:

> The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between compelling private claims.[127]

Equity celebrates its pragmatism, announcing that it will not order the impossible and will try to accomplish only what is feasible.[128] The image here is not a world in which injustice is an anomaly that can be quickly rectified; rather injustice is an intractable fact of life that judges must struggle against. It is a long term project involving interdependence and compromise.

As has been examined, corrective justice is based on an application of a private law methodology to all disputes, including constitutional ones. The focus is on rectification, and the procedures used are bipolar. As a point of principle, a governmental defendant will be treated no better and no worse than a private individual. In contrast, equity recognizes the public nature of a dispute. Gene Shreve[129] has commented that one of the maxims of equity is that:

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125. R. NOZICK, *supra* note 31, at 163. The Reagan administration championed a narrow and individualistic form of corrective justice. *See* Reynolds, *Individualism vs. Group Rights: The Legacy of* Brown, 93 YALE L.J. 995 (1984).

126. Rectification can be seen as a necessary corollary of boundary theory which the late C.B. MacPherson described as "a concept of liberty which is mechanical and inertial [and can only] be imported from mechanics to politics if ... one postulates, as Hobbes did, that every man's motion is opposed and hindered by every other man's." C.B. MACPHERSON, DEMOCRATIC THEORY 103-04 (1973).

127. 411 U.S. 192, 200-01 (1972) (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944)).

128. Chief Justice Burger has stated:

> [I]n constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable.... In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots.

Id.

129. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382 (1983).

> Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.[130]

The broader nature of equitable powers when the public interest is at stake allows courts to break out of the bipolar procedural mould set by corrective justice. For example, Justice Murphy has stated that when the public interest is involved:

> equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. Power is thereby resident in the District Court in exercising this jurisdiction "to do equity and to mould each decree to the necessities of the particular case." It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice.[131]

Thus, equity, with its stress on practical resolution of conflicting interests and its recognition of the public dimensions of structural injustices, is a much better candidate as a remedial theory than is corrective justice.

One of the most thoughtful and optimistic accounts of the role equity could play in constitutional remedies was provided by Alexander Bickel.[132] Sensitive to both the origins of equity and its role in judicial review,[133] Bickel recognized that the patience and gentleness of equity could, at its best, foster accommodation, persuasion and reconciliation. This is brought out in his famous statement in relation to *Brown II*: "The task of the Court is to seek and to foster assent, and compliance through assent."[134] In the short term, the assent that Bickel sought was gained by catering to the racism of those who

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130. *Id.* at 382 (quoting Virginian Ry. v. System Federation No. 40, 300 U.S. 515, 552 (1937)).

131. Porter v. Warner Co., 328 U.S. 395, 398 (1946) (citations omitted).

132. A. BICKEL, THE LEAST DANGEROUS BRANCH 244-72 (2d ed. 1986).

133. Bickel explained *Brown II* as involving:

> the recognition that, on occasion, the law proposes but, for a time at least, the facts of life dispose. The mainstream of Anglo-American legal development has been the common law, administered by judges who evolved and reasoned from principle. But there soon flowed alongside the common law another stream, the equity jurisdiction, whose headwaters were in the discretionary royal prerogative. Equity was a more flexible process, more unprincipled, initially quite *ad hoc*. It often worked the accommodation that made the rigorous principles of the common law fit to live with. Our courts in general now combine both functions — common law and equity — and so does the process of judicial review.

Id. at 250.

134. *Id.* at 251. Or, as Peter Charles Hoffer has stated: "the chancellor is vitally concerned with the workability and fairness of his decrees. He will not be disobeyed, but he will not decree the impossible." P. HOFFER, *supra* note 7, at 4.

resisted integration often with violence. There is little to be proud about this kind of assent, and with the benefit of hindsight, Bickel seems overly romantic and optimistic in his approval of *Brown II*. Nevertheless, Bickel's hopes for equity and the assent it sought were in the long term. He hoped that the gradualism of equity would allow for the sort of internalization that would produce long-lasting reforms and genuine reconciliation.[135]

Equity has medieval roots but there are grounds to believe that it can be re-invigorated and made more sensitive to modern conditions by recent developments in legal theory, including those in civic republicanism, feminism and practical reasoning or pragmatism.

The balancing of interests that equity requires is in part fueled by inarticulate visions of the public interest. Theorists of republicanism are grappling with reconciling the notion of the public interest with the reality of the unequal status and positions of citizens in American society.[136] The role of the judge at equity can be seen as one who guides the participants to consider their common interests.[137] Often, remedies are formulated after the judge encourages the affected interests to deliberate in a manner that considers the common interest by, for example, submitting remedial proposals for approval or negotiating directly with other parties. As in civic discourse, a premium is placed on the good faith of all participants and those who do not contribute to the deliberative process can deservedly be sanctioned. At other times, judges can appoint experts as masters who will, in turn, be charged with developing remedies that promote the common good. This process is more elitist than the deliberative model,[138] but also finds support in the republican tradition. In institutional reform litigation, the judge must ensure that the remedy advances the common good.

Feminism also helps elucidate some of the distinctive features of equity which have been repressed in contemporary legal discourse. Carrie Menkel-Meadow has suggested both that equity has been submerged in legal reasoning and that its flexible remedial approach may be more amenable to what she

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135. In describing *Brown II*, Bickel wrote:

> The problem was not simply one of enforcement. The task of the Court is to seek and to foster assent, and compliance through assent.... [I]n achieving integration, the task of the law — and all the more, the task of judicial rather than legislative law — was not to punish law breakers but to diminish their number.

A. BICKEL, *supra* note 132, at 251.

136. *See, e.g.*, Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

137. For example, Susan Sturm has called for a "deliberative model of remedial decisionmaking that casts the court in the role of structuring and evaluating the adequacy of a participatory process designed to produce a consensual remedial solution." She makes explicit the connection between such a process and theories of civic republicanism which stress deliberation and dialogue as a means to find the common good. Sturm, *supra* note 26, at 1360, 1381-82. *See also* Sturm, *supra* note 81 (role for deliberative model in prison reform litigation with the judge playing the role as the "catalyst").

138. *See, e.g.*, Burger, *Away from the Courthouse and into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978) (special master's plan met by resistance by most affected interests). *But see* La Pierre, *Voluntary Interdistrict School Desegregation in St. Louis: The Special Master's Tale*, 1987 WIS. L. REV. 971 (special master assists the negotiation of a multi-party remedial agreement).

identifies as a distinctive female voice in the lawyering process.[139] The place of care and difference are contested among feminists.[140] Nevertheless, this debate lets us see that equity stresses interdependence with others while corrective justice stresses independence. Moreover, equity reflects conflicts and ambiguities in moral reasoning, while corrective justice is based on a confident sense of right and wrong.

Feminist theorists have also explored differences in status and perceptions and the dilemmas they create.[141] In equity, a judge is forced to try to understand the perspectives of the parties affected by a remedy, if only to ensure that the remedy that he or she orders is not disobeyed.[142] This requires the judge to attempt to assume the perspectives of all those affected by the decree. The negotiation between affected interests, which is a pervasive feature of complex remedial processes, also encourages each party to consider the other's perspective on the problem and the remedial options.[143] If needs are a useful remedial construct and if they are, at times, based on difference, then judges should be aware of the dangers in either ignoring or stigmatizing difference.[144] In short, judges aware of these feminist insights will be in a better position to craft remedies that are sensitive to all those affected and will find the language of equity more suitable than that of corrective justice.

Equity also draws on the renewed tradition of pragmatism in American thought. An important part of Alexander Bickel's attraction to equity was its celebration of pragmatism. The judge at equity is concerned not to order the impossible or to be disobeyed and is given the widest latitude to respond to particular circumstances. In Bickel's terms, that judge must exercise "prudence," not the "arithmetic" and "philosophy" which underlies corrective justice and its insistence that causation and restoration dictate the remedies.[145] Equitable discretion places a premium on the ability of the trial judge to engage in practical reasoning that fits the circumstances and personalities of a particu-

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139. Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMAN'S L.J. 39, 49-50, 60-63 (1985).

140. *Compare* C. GILLIGAN, IN A DIFFERENT VOICE (1982) *with* C. MACKINNON, FEMINISM UNMODIFIED (1987).

141. M. MINOW, *supra* note 102.

142. Shreve, *supra* note 129, at 405. Judge Jack Weinstein has commented: "Without the ameliorating effect of a sensitivity to the needs of others, the law functions as a rapacious machine whose impartiality will ultimately consume us all." Weinstein, *Justice and Mercy — Law and Equity*, 28 N.Y.L. SCH. L. REV. 817, 820 (1984).

143. Susan Sturm's vision of the remedial process seems to be an amalgam of feminism and republicanism. She has commented: "The various actors often possess different information and perspectives that influence their views of the practicability and fairness of a remedy. Participation affords an opportunity to obtain and synthesize these varying perspectives and insights, and thus to shape the views of both the participants and the court." Sturm, *supra* note 26, at 1393-94.

144. Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); White, Goldberg v. Kelly *on the Paradox of Lawyering for the Poor*, 56 BROOKLYN L. REV. 861 (1990).

145. On Bickel's understanding of the need for prudence in the exercise of political power, including the qualities of patience, deference and sensitivity to context, see Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1599 (1985).

lar case.[146] Appellate review is limited in part because "the factors relevant to an equitable-jurisdiction inquiry are so variable that decisions posed for courts are rule-resistant."[147]

Despite the promise of equity taking guidance from these recent developments in legal theory, it remains a more incomplete theory than corrective justice. Because equitable doctrines concentrate on granting and shaping remedies, they do not guarantee the justice of the rights being implemented. For many at the turn of the century, the injunction was the enemy to be contained as tightly as possible.[148] Yesterday's labor injunction, however, becomes today's civil rights injunction which may tomorrow become something else again. The theory of equity is strikingly indeterminate. It does not pretend to present the judge with an answer, let alone the best answer. The power it bestows on the judge can be used for better or worse.[149] More so than other parts of the law, what is accomplished at equity will depend on the values of judges and of the times.

Even if one suspects that today's judges will not be creative and enlightened in their use of remedial discretion, the overtly discretionary nature of equity has some advantages. Equity, with its invitation to the judge to refuse to exercise remedial discretion, unmasks the judicial choices that corrective justice so easily hides. Instead of findings of no causal responsibility, equity forces judges to confront their discretion not to award remedies. Equitable discretion, even if exercised unwisely, does not hide that those who have suffered constitutional wrongs have a legitimate claim and that courts have chosen not to enforce it because of strategic and political considerations. Equity may not deliver, but it is more honest about its refusal to do so.

A more compelling critique of the theory of equity is that it allows judges to sacrifice and minimize the rights claims of disadvantaged groups. As such, it is open to the same criticisms as rights critiques which ignore the perspective of those who have no reason to rely on the good will of the majority.[150] In many respects, the gradualism and reliance on the good faith of the wrongdoers in *Brown II* backfired by encouraging resistance. As will be seen in the next section, there is little in the practice of equity to satisfy those who fear that equity will legitimize the bargaining away of rights. Nevertheless, it

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146. *See generally* Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1343 (1988) (pragmatic defence of considering the effects of busing remedies on those they were designed to help).

147. Shreve, *supra* note 129, at 411-12. Although warning that courts should resist the urge "to create wooden rules out of the protean material of equity," Shreve does believe that equitable discretion should be guided by "the requirements of imminent, substantial and irreparable harm, no adequate remedy at law, and manageability...." *Id.* at 419. These concepts have been attacked as too rigid by other commentators. *See* O. FISS, THE CIVIL RIGHTS INJUNCTION (1978); D. LAYCOCK, *supra* note 7.

148. Gregory, *Government by Injunction*, 11 HARV. L. REV. 487 (1898); F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1930).

149. *See generally* O. FISS, *supra* note 147.

150. Matsuda, *supra* note 107; Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 412-13 (1987) (limitations of needs analysis).

is far from clear that the alternative of corrective justice works better. Corrective justice allows rights to be narrowed by requiring stricter proof of causation and restoration. Moreover, it maintains the illusion that justice has been done while equity, at least, begs the question.

C. The Practice of Equity

Whatever its theoretical potential, equity in practice has been disappointing. It has often sacrificed whatever corrective claims the victims of structural injustices have been able to make. American courts, starting with the Supreme Court in *Brown II*, have invoked the rhetoric of equity to justify remedial delay and the recognition of social and third party interests in remedial decrees. Time and time again, the logic of corrective demands for rectification has been compromised through use of the grand slogans of equity. In some cases, however, courts have stressed the "breadth and flexibility" of their equitable powers in ordering enriched remedies for which the defendant may not be causally responsible.

In *Brown II*, the Supreme Court switched from the language of rights to the language of needs in order to justify remedial incrementalism and delay. In referring to the role of the District Courts in developing remedial plans in conjunction with the parties, the Court commented:

> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power.[151]

The public's need for time to adjust to school desegregation and, perhaps, the plaintiffs' immediate needs for safety were thus recognized in *Brown II*.[152] Through resort to equity, the Court could address itself to the necessities of ongoing events, not the scope of past wrongdoing.[153] Given the racist nature of the public needs catered to in *Brown II* and the extreme delay it sanctioned, it is understandable if some want to reject *Brown II* and its equitable foundations. The subsequent use of equity is only a little more promising because, more often than not, equity has been used to justify remedial delay and interest balancing. Equity has emerged as a gloss which tempers and qualifies the rigorous and absolutist demands of corrective justice.

Despite the manifest dangers of its past use to blunt remedial claims, I think it would be a mistake to reject equity because several of its features make it well suited to structural reform. First, equity provides an authentic language to express the instrumental and consequentialist judgments judges must make to

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151. *Brown II*, 349 U.S. at 300 (citations omitted).

152. For a justification of remedial delay in *Brown II*, see Gewirtz, *supra* note 7.

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> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessity of the particular case. The qualities of mercy and practicality have made equity the instrument of nice adjustment and reconciliation between the public interest and private needs as well as between compelling private claims.

achieve structural reform. With its deference to the discretion of the trial judge, equity also recognizes the crucial role that individual members of the judiciary play in structural reform. Structural remedies often bear the mark and personality of a single judge: a Judge Garrity, Johnson or Weinstein. They became "a striking instance of the personification of the law."[154] Hopefully, they will exercise their power wisely and courageously.[155] In the end, the exercise of their powers will be judged on whether they have abused their discretion.

Second, equity limits remedial authority on the basis of the wisdom and efficacy of its exercise, and not by trying to deduce boundaries to remedial powers from the scope of past wrongdoing. In two recent cases, the Supreme Court used the equitable concept of a trial judge abusing his or her discretion to overturn broad remedies. In one case, contempt citations of councilmembers resisting integration of public housing in Yonkers, New York were overturned.[156] In another, a judicial order raising taxes to finance school desegregation in Kansas City, Missouri was rejected.[157] In both cases, the Court did not reach the question of whether the court's authority was limited by rules of legislative or state immunity or the limits of article III powers. Rather, relying on traditional equitable doctrine, the Court concluded that the trial courts had not exercised the "*least possible power adequate to the end proposed.*"[158] Note that this formulation assumes that the court has the power to achieve its instrumental ends.

In the Yonkers case, the Court assumed that contempt sanctions against the City alone would have obtained compliance with the housing plan, and suggested that only after this had failed, should the judge have used the contempt sanction against the councilmembers.[159] In the Kansas City case, judicial relief from state limits on tax increases alone would have allowed the necessary taxes to be raised. Crucial in this judgment was the fact that the school board was willing to raise taxes itself once the court relieved it from the burdens of the state law.[160] If the school board was not willing to devise its own remedy, then on the Court's reasoning, it may well have been permissible for the trial judge to have raised the taxes directly.

Lemon, 411 U.S. at 200-01 (citing Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944)).

154. O. FISS, *supra* note 147, at 28. Judges become personally involved in structural cases. In one prison case, Judge Garrity and his law clerk visited a prison, unannounced, and spent the night there. P. COOPER, *supra* note 23, at 230 n.77 (1988).

155. On the situation faced by trial judges after *Brown*, see J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1961).

156. *Spallone*, 493 U.S. 265.

157. *Jenkins*, 110 S. Ct. 1651.

158. Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821) (quoted in *Spallone*, 493 U.S. at 272 (emphasis in original)). *See also Jenkins*, 110 S. Ct. at 1663.

159. *Spallone*, 493 U.S. at 278 ("reasonable probability that sanctions against the city would accomplish the desired result").

160. Justice White stated:

> one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions. Especially is this true where, as here, those institutions are ready, willing, and — but for the operation of state law curtailing their powers — able to remedy the deprivation of constitutional rights themselves.

Jenkins, 110 S. Ct. at 1663.

The Court's judgments of what was necessary in these two cases can be questioned, and were indeed questioned in a vigourous dissent in the Yonkers case,[161] yet the important point is that the Court assumed that the power to achieve the remedial ends was available. They simply focused on whether that end could have been achieved with more respect for other social values.[162] Although there will continue to be disagreements about what is necessary to achieve remedial ends, this at least seems to be the right question to ask.

Finally, equity also requires that judges attempt to appreciate the perspectives of those affected by their remedial power. Judges do not act with the confidence that comes from the deductive powers of corrective justice. Instead, they worry about their ability to achieve compliance, hedge their bets, set out a gradual sanctioning process and rely on vague concepts of "good faith compliance...."[163] Hence the traditional maxim that "[e]quity's view is that of a wise parent dealing with his children; it is best not to issue orders unless you can be absolutely sure of effecting compliance."[164] The heightened personal responsibility of judges forces them to consider the perspectives of the parties to the litigation because they dread the prospect of parties calling their bluff and forcing imposition of contempt sanctions.[165] Although equity's caution risks according those opposing remedies a heckler's veto, it also provides the potential for understanding the perspectives of those the remedy is intended to benefit. This can help ensure remedies are meaningful to the priorities and aspirations of the groups they are supposed to benefit.[166] By requiring an

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161. Justice Brennan's dissent relied in part on the trial judge's "intimate contact for many years with the recalcitrant councilmembers and his familiarity with the city's political climate." *Spallone*, 493 U.S. at 281 (Brennan, J., dissenting).

162. Contrast this with Justice Kennedy's stress on the limits of judicial power in his concurrence in *Jenkins*, 110 S. Ct. at 1667 (Kennedy, J., concurring). Invoking the bipolar image of corrective justice, Justice Kennedy reasoned that a taxation remedy violated due process:

> The exercise of judicial power involves adjudication of controversies and imposition of burdens *on those who are parties before the Court*.... Where money is extracted from parties by a court's judgment, the adjudication itself provides the notice and opportunity to be heard that due process demands before a citizen may be deprived of property.

Id. at 1671 (emphasis added) (Kennedy, J., concurring). On the power of equity to justify robust remedial powers, see Little, *supra* note 7, at 172-77.

163. *Brown II*, 349 U.S. at 300. For an example of how judges exercise their equitable powers with "caution and reluctance" and defer to those who make "a conscientious endeavour to fulfil their duty to the state," see Hawks v. Hamill, 288 U.S. 52, 60-61 (1933).

164. H. HANBURY & R. MAUDSLEY, MODERN EQUITY 44 (10th ed. 1976).

165. For an account of the reluctance of Judge Garrity to issue contempt sanctions, see Smith, *Case Study of Boston Desegregation*, in LIMITS OF JUSTICE (H. Kalodner & J. Fishman eds. 1978). As Dobbs has noted in the context of traditional injunctive practice:

> The Chancellor who issues an *in personam* order backed by contempt powers is not in the same position as the judge who renders a common law judgment; and he is required to consider problems of practicality that ordinarily do not plague the common law judge. ... If the defendant is recalcitrant, enforcement may present problems for the chancellor and he must think ahead to this stage before laying down a decree.

D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 62 (1973).

166. Equity may help prevent judges from devoting resources to remedies that are not really wanted by those who are supposed to benefit from them. *See* Bell, *Serving Two Masters: Integration Ideals and Client Interests in Desegregation Litigation*, 85 YALE L.J. 470 (1975); D. BELL, *supra* note 72; White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 REV. L. & SOC. CHANGE 535 (1986-87).

understanding of the perspectives of the wrongdoers, equity also provides an opportunity to obtain their cooperation in the implementation of the remedy.[166]

I have now outlined a tradition of equity that is an alternative to corrective justice. At a theoretical level, equity stresses social connection and thus allows the balancing of interests that has characterized structural remedies. It directs attention to the wisdom of the judge's exercise of power in relation to the attainment of instrumental goals rather than defining the limits of remedial authority through a tracing of the scope of the violation. Equity fits the practice of remedial claims being delayed or balanced against other social interests. The legitimacy that the theory and doctrine of equity give to delay and balancing presents obvious dangers. In the remainder of this Article, however, I concentrate on the potential of equity and suggest that the best of what courts have done in structural cases can be seen as balancing the needs of both victims and society and attempting to facilitate compromise and reconciliation between the parties involved. Courts have not often explained their remedial tasks in these terms and sometimes have tried to justify structural remedies by reference to corrective principles. As we have seen, such principles are too demanding in their insistence on rectification regardless of social consequences, and too weak in their blindness to the present needs of the victims and the opportunities for reform.

D. The Potential of Equity

i) Need as a Remedial Construct

When the concept of need has been used in remedial decisionmaking it has served as a single-edged sword to recognize social or third party needs and temper remedial claims. A consideration of needs can, however, serve to broaden the scope of legitimate remedial claims to include the needs of those who have suffered from structural wrongs. These needs will, in turn, be balanced against social interests and the prospects for reform. An appeal to the needs of those who have suffered constitutional wrongs can broaden their remedial claims beyond those which satisfy the causation and restoration requirements of even broad forms of corrective justice.

Despite its suitability, the concept of need has not been used to justify enriched remedies. Courts persist in giving dubious corrective justifications for practical remedies that can best be explained as responses to the needs of those who have suffered constitutional wrongs.[167] A sense of unease and illegitimacy surrounds remedies which are not tailored to identified violations, whereas the compromise of corrective claims by the needs of the public is, as in *Brown II*, presented as an obvious necessity. The circle should, however, be completed. If courts cannot deliver corrective justice and are forced to recognize the public's needs for delayed or imperfect remedies, then they should include the needs of victims in the balance.

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167. The need for the defendant's cooperation will be discussed in the next section, *infra* notes 179-86 and accompanying text.

168. For a justification of remedial education in terms of corrective justice, see *Milliken II*, 433 U.S. 267.

Need is not a familiar construct in contemporary legal or political discourse. In part, I appeal to such a broad and indeterminate concept so that no constructive remedial option is cut off in the manner that the causation and restoration requirements of corrective justice disqualify many remedial options. The concept of need initially embraces all the demands that victims make, subject to a balancing of the affected interests and the courts' independent judgment as to what is best. It thus serves a pragmatic purpose in legitimizing the remedial demands of victims which then will be balanced against other social interests. If victims are allowed to participate in the litigation, the concept of needs can allow them to push the courts' remedial agenda in the direction they believe is appropriate.

As we have seen, balancing is often inevitable in structural contexts and the appeal to needs, as opposed to corrective principles, fits better with the courts' balancing tasks as needs claims do not present themselves as rigid fault-based claims tied to the historical facts of wrongdoing. Although the most basic of needs should never be denied, the contingent nature of many needs makes them more suited to qualification through a general balancing of interests.

In the context of constitutional remedies, the concept of need can be used in two different senses. One sense refers to the basic needs of food, shelter, health, warmth and medical care. Although advantaged people take fulfillment of these basic needs for granted, courts have had to force governments to fulfill them in some institutional cases. When faced with a prison or mental hospital which has become a nightmare, courts have insisted that the inmates' basic necessities be met as a constitutional minimum.[169] In these cases, the court uses the instrument of the structural injunction to enforce the most basic rights of inmates, such as untainted food, sanitation, and hot water. In *Wyatt v. Stickney*,[170] Judge Johnson included a patient's bill of rights in his remedy, which spelled out rights and duties which seem to be the obvious prerequisite for a minimal existence. Needs in this sense are basic, and courts have rightly eschewed cost considerations or claims of state inability when they have not been met in custodial institutions.

Courts have, at times, tried to satisfy needs of another, more contingent, variety. These are needs which cannot easily be deduced from the scope of a violation of a right or perhaps even expressed in the language of rights.[171] Many remedies designed to respond to needs for dignity, participation and belonging were discussed in the assessment of enriched remedies above. Examples would include: a human rights committee to hear and represent the

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169. *See, e.g., Rhodes*, 452 U.S. at 337; *Hutto*, 437 U.S. at 678; Estelle v. Gamble, 429 U.S. 97 (1977); Youngberg v. Romeo, 457 U.S. 307, 317 (1984). *See also* Liebman, *Implementing* Brown *in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349 (1990) (litigation to enforce minimum education standards).

Courts will use the concept of need to minimize legal obligations to reform unconstitutional institutions. They do not, however, think through the positive implications of their move from liability and correction to needs.

170. 325 F. Supp. at 781; *Wyatt*, 334 F. Supp. at 1341; *Wyatt*, 344 F. Supp. at 373. *See also* New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973).

171. M. IGNATIEFF, THE NEEDS OF STRANGERS 13 (1984).

grievances of inmates;[172] compensatory education and upgraded facilities in a formerly segregated school system; advisory committees to ensure that parents and the community are informed and play a role in school systems being desegregated; and individualized treatment plans for mental patients aiming, where possible, for their integration with the community. In short, these needs-based remedies attempt to reconcile victims with the community in a manner that respects the harms they have suffered in the past and strives to provide them with dignity and self-determination for the future.[173]

The dangers of going beyond "survival needs,"[174] which can be expressed in the language of rights, to the "higher needs," which pre-suppose some "shared language of the good,"[175] are many. Not the least of which is that courts will often fail in achieving these lofty goals.[176] In attempts to satisfy higher needs, courts will not moralistically try to correct past wrongdoing based on accusatorial determinations of the extent of the wrongdoing, but will ask for cooperation and even benevolence from the wrongdoers. Corrective justice, with its emphasis on the rectification of wrongful transactions, celebrates the autonomy of the parties by attempting to restore the *status quo ante* so that they can proceed with their lives. It leaves no conceptual room for recognizing that victims may have constant needs that only wrongdoers can fulfill. Courts ignore such needs at the peril of those who reside in total institutions.

Corrective justice's focus on undoing wrongs can harm victims by refusing to recognize continuing needs. For example, it may be a logical corrective response to close an institution in response to unconstitutional conditions. Such

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172. *See* Reich, *Bargaining in Correctional Institutions: Restructuring the Relation Between the Inmate and the Prison Authority*, 81 YALE L.J. 726 (1972); Jackson, *Justice Behind Walls—A Study of The Disciplinary Process in a Canadian Penitentiary*, 12 OSGOODE HALL L.J. 1, 83-100 (1974).

173. As Michael Ignatieff has argued:

> [I]t is possible to forget about the range of needs which cannot be specified as rights and to let them slip out of the language of politics. Rights language offers a rich vernacular for the claims an individual may make on or against the collectivity, but it is relatively impoverished as a means of expressing individuals' needs *for* the collectivity. It can only express the human ideal of fraternity as mutual respect for rights, and it can only defend the claim to be treated with dignity in terms of our common identity as rights-bearing creatures. Yet we are more than rights-bearing creatures, and there is more to respect in a person than his rights. The administrative good conscience of our time seems to consist in respecting individual rights while demeaning them as persons. In the best of our prisons and psychiatric hospitals, for example, inmates are fed clothed and housed in adequate fashion; the visits of lawyers and relatives are not stopped; the cuffs and clubs are kept in the guard house. Those needs which can be specified in rights are more or less respected. Yet every waking hour, inmates may still feel the silent contempt of authority in a glance, gesture or procedure.

M. IGNATIEFF, *supra* note 171, at 13 (emphasis in original).

174. *Id.* at 15.

175. *Id.* at 14. Likewise, Michael Sandel has stated: "Where the morality of right corresponds to the bounds of self and speaks to that which distinguishes us, the morality of good corresponds to the unity of persons and speaks to that which connects us." M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 133 (1982).

176. Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975). The human rights committee appointed in the *Wyatt* case was unable to gain cooperation from the authorities and may have done more harm than good. In 1979, Judge Johnson was forced to put the hospital into receivership and settlement negotiations have continued. *See* P. COOPER, *supra* note 23, at 163-204.

a remedy could nullify the violation, (the state no longer imposes unconstitutional conditions on the patients) and provide some compensation for past wrongs. Nevertheless, such a remedial response ignores the position of those who need special care. The Third Circuit, in the *Pennhurst* litigation, overruled the trial judge's decision to close the institution because:

> in making this wholesale judgment, the trial court did not adequately canvass the discrete needs of the *individual* patients. For some patients a transfer from Pennhurst might be too unsettling a move. Longterm patients, for example, may have suffered such degeneration in the minimum skills needed for community living that habilitation outside an institution is a practical impossibility.... All that we need recognize is that there may be some individual patients who, because of their advanced age, profound degree of retardation, special needs or for some other reason, will not be able to adjust to life outside of an institution and thus will be harmed by such change. The case must therefore be remanded for individual determinations by the court, or by the Special Master, as to the appropriateness of an improved Pennhurst for each such patient.[177]

Appeals to notions of difference and "special" needs always carry the danger of re-enforcing stigma.[178] However, remedies produced from corrective principles have the equal danger of not being meaningful to the victims because of their retrospective orientation. A needs-based approach can be far more sensitive to the present desires and aspirations of victims than retrospectively oriented corrective approaches.

ii) Compromise and Reconciliation as Remedial Methods

Constitutional remedies designed to respond to higher needs will often require compromise among the affected parties. Once again, an equitable appeal to compromise suspiciously suggests that the rights of those who have suffered wrongs will be sacrificed. Nevertheless, compromise among all parties is often the first step to the genuine reconciliation to which a higher needs approach aspires. The continuing participation and belonging of those who have suffered wrongs is not likely to be produced by fault-based corrective principles which take a finite amount from the wrongdoer, transfer it to those who were wronged, and declare that justice has been done.

In practice, courts faced with structural injustices have often sought compromise, encouraged negotiations among the parties and have recognized that the good faith cooperation of the wrongdoers is necessary for a successful remedy. For example, in the Philadelphia police litigation, a judge was able to construct a police complaints procedure as a remedy, largely because of consent elements in the decree and a recognition that "lambasting the police [would get]

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177. *Halderman*, 612 F.2d at 114 (emphasis in original).

178. M. MINOW, *supra* note 102, at 121-45, 350-72. For example, pursuit of educational reforms in the place of racial balance may risk further stigmatization of African-Americans, but it may be a better response to their needs than busing to achieve a limited degree of racial balance. The desires of victims would be very relevant in determining their present needs. *See generally* Bell, *supra* note 166.

nothing ... accomplished."[179] Compromise, by gaining the cooperation of defendants, can be a better vehicle to support the victims' needs than moralistic imposition of a remedy based on retrospective determination of the scope of a violation. Consent decrees have the virtue of integrating the victims' needs and priorities into the remedy and gaining the defendant's consent and good will.[180] Retrospective corrective relief relates only incidentally to what the victims want or what defendants can tolerate; it depends only on what each deserves based on an assessment of the harms plaintiffs can prove defendants caused.

Provision for the higher needs will often involve setting up permanent structures of reform.[181] Participatory structures can provide the victims with a voice in the institution which previously harmed them.[182] These institutional reforms will, however, only work with the active cooperation of those who run the institutions. Remedial delay and the courts' tendency to allow defendant institutions a large hand in shaping the remedy may be justified if eventually the remedy responds to the victims' higher needs by providing them with a sense of belonging and efficacy in the functioning of the institution.[183]

Expansive remedies that reorder the participatory lives of institutions require a large measure of consent to succeed. For example, in *Rizzo v. Goode*, a minority in the Supreme Court was prepared to uphold the establishment of a police complaints procedure as a legitimate remedy for police misconduct largely because the police had been included in the remedy formulation: "[T]he remedy is carefully delineated, worked out within the administrative structure rather than superimposed by edict upon it, and essentially, and concededly, 'liveable.'"[184] Justice Blackmun went on to note that the remedy responded to an important need, saying "[i]t is a matter of regret that the Court sees fit to nullify what so meticulously and thoughtfully has been evolved to satisfy an existing need relating to constitutional rights that we cherish and hold

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179. P. COOPER, *supra* note 23, at 316. The judge's deferential attitude extended to finding no conscious police department policy to violate constitutional rights and to sanction the remedy without holding the plaintiffs could claim such a right. Both of these attempts to seek compromise and reconciliation proved fatal on review in the Supreme Court. *See COPPAR*, 357 F. Supp. 1289.

180. *See, e.g.*, Armstrong v. Board of School Dir., 616 F.2d 305 (7th Cir. 1980) (consent decree including remedial education and an oversight body). On consent decrees, see generally *Symposium*, 1987 U. CHI. LEGAL F. 1.

181. "[T]he focus is not on what the court itself can do to remedy a violation of rights, but rather on what it can do to induce the maladjusted institution to cure itself." Starr, *Accommodation and Accountability: A Strategy for Judicial Enforcement of Institutional Reform Decrees*, 32 ALA. L. REV. 399, 401 (1982). *See also* Kirp, *supra* note 62, at 941. "What the trial court wishes to achieve is less a good outcome than the inauguration of a decisionmaking apparatus which will continue to function even after the order is entered."

182. For an example of this approach in the school desegregation context, see Shane, *supra* note 96.

183. Bell, *Waiting on the Promise of* Brown, 39 LAW & CONTEMP. PROBS. 341, 355 (1975). Derrick Bell notes the importance of participatory structures: "[R]eal equality and educational effectiveness demand that public schools be responsive and responsible to those they serve. Courts must recognize that groups long denied participation in school policy-making, and ill-equipped to monitor their children's educational progress, must have at least the judicial support and protection that have made current levels of desegregation possible." *Id.* at 355.

184. *Rizzo*, 423 U.S. at 387 (Blackmun, J., dissenting).

dear."[185] The remedial method of compromise goes hand in hand with the substantive recognition of needs.

In order to obtain reforms that will respond to higher needs, courts have to promote compromise and recognize that in contexts involving ongoing relationships of dependency, it may sometimes be a vice to insist on full justice.[186] Insistence on the rectification of rights will likely frustrate the negotiation of permanent reform structures which require the good will of all to succeed. Compromise can be an important step in structuring the future so that the harms of the past are not repeated. It is necessary to reconcile the victims of past wrongs with the institutions they must live with. This does not mean, however, that findings of wrongdoing have no place in the liability phase. Wrongdoing should be recognized, but the formulation of the remedy should not be a moralistic, fault-driven process as is required under corrective justice.

E. Termination of Remedies: A Final Comparison of Corrective Justice and Equity

Courts trying to devise remedies that respond to needs will have a very different task in judging when remedial efforts should be terminated from those courts which adhere to corrective principles. Under corrective justice, remedial activities are concentrated in a period during which a past wrong is, at a conceptual level, undone and repaired.[187] The termination of judicial efforts has great significance because it signifies not only the end of remedial interference with the status quo, but that justice has been done. Remedies that do not end with this flourish are not corrective in any meaningful sense.

In contrast, remedial efforts under equitable principles may continue indefinitely and, in the case of permanent reform structures, are designed to merge into the standard operating procedures of the institution. Remedial efforts may be terminated when an institution no longer needs or will no longer benefit from further "treatment."[188] Health can be defined in various ways and, as with people, the institution discharged after a serious illness will rarely be the same person as before the illness. If and when a court terminates its remedial efforts, it will not be making a moral declaration that justice has been done by the nullification of the wrongdoing.[189] Rather, the judgment will be an instrumental and prudential one that the institution has developed an internal dynamic which integrates the victims in its decisionmaking process and that little more can be accomplished by judicial sponsorship of reform. At other

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185. *Id.*

186. M. SANDEL, *supra* note 175, at 35 (context of family relations).

187. Gewirtz, *supra* note 6, at 750-51.

188. *See* Ruiz v. Estelle, 679 F.2d 1115, 1145 (5th Cir. 1982) (comparing the need for remedies as "massive curative doses" or "lesser therapeutic measures" in the prison context).

189. The moral significance of termination under corrective justice causes unease for those who cannot believe the legacy of racial injustice in America can easily or ever be erased. Paul Gewirtz, for example, notes the importance of termination to the logic of corrective justice, but is reluctant to sanction it in the school desegregation context.

> If judicial remedial efforts are really justified so long as any harmful effects of discrimination persist, there is the possibility that remedies might continue almost indefinitely because the taints of past discrimination may persist in some form almost indefinitely. Indeed, as a society we will probably never completely free ourselves from our racial history....

times, it may be the more tragic judgment that little more can be done to address wrongs that cannot be corrected.

The Supreme Court's recent judgment in *Board of Education of Oklahoma City v. Dowell*,[190] illustrates how competing theories of corrective justice and equity influence the standard for termination of remedial efforts. In that case, the Court set out a relatively vague standard for termination. Chief Justice Rehnquist stated: "The District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination have been eliminated to the extent practicable."[191] In its rejection of restraining rules and its reliance on the concepts of "good faith" and "practicalities," this test follows *Brown II* in stressing equitable considerations. In contrast, Justice Marshall, in dissent, used a diluted corrective approach to hold that "a desegregation decree cannot be lifted so long as conditions likely to inflict the stigmatic injury condemned in *Brown I* persist...,"[192] adding in a more equitable vein, "and there remain feasible methods of eliminating such conditions."[193]

It is important to understand that the corrective dimensions of both judgments forced the judges to imbue the termination of remedial efforts with great moral significance. Chief Justice Rehnquist still referred to the notion of eliminating the vestiges of past discrimination, although subject to the qualifying glosses of practicalities and good faith. Here, again, we see a combination of equity and corrective justice that gives the state the advantages of equity's qualifications while granting it the high moral ground set by the notion of correction. Although making vigourous use of the broad corrective approach identified earlier, Justice Marshall, as part of a theoretical quid pro quo, was forced to concede the possibility of a day when "the job of school desegregation [will] be fully completed"[194] and corrective justice accomplished.

If the tradition of equity were stressed over that of corrective justice, termination would not be a moral issue. Remedies would be terminated on the basis that they were no longer practical and feasible. This would allow Justice Marshall to continue to make much the same pragmatic case against termination as he did in *Dowell*, without having to accept the illusion that when remedies are no longer practical or helpful, justice has been done and the wrongs suffered by African-Americans undone. It would also reveal the termination decision as a practical and strategic matter and deprive it of the moral significance that the corrective overtones of Chief Justice Rehnquist's decision gives it.

CONCLUSION

The remedial tradition of equity has the potential to introduce an appreciation of the needs and the perspectives of those affected by remedies. But this

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Gewirtz, *supra* note 6, at 796.

190. 111 S. Ct. 630 (1991).

191. *Id.* at 638.

192. *Id.* at 639 (Marshall, J., dissenting). The effects of discrimination were defined broadly, in part through the use of presumptions.

193. *Id.*

194. *Id.* at 646 (Marshall, J., dissenting).

is only a potential. Much will depend on the willingness and commitment of the judiciary to listen to and advance such concerns. With its potential, equity presents many dangers. The danger that judges will use the flexibility of equity and the need to obtain compromise and reconciliation to defer to majoritarian preferences cannot be denied. *Brown II*, whatever its theoretical potential, was not a proud moment in America's history. Nevertheless, if judges are not up to their anti-majoritarian role, their use of corrective justice is not likely to produce any better remedies. Moreover, it will promote harmful illusions that the state is not responsible for the plight of the victims of structural injustices or that justice has been done. The Burger and Rehnquist Courts have been able to curb remedial activity using either the language of equity or correction. The language of equity at least forces judges to be explicit about interest balancing and to own up to their personal responsibility for the refusal to exercise remedial discretion.

A refusal to develop the potential of the equitable tradition in constitutional remedies risks leaving equity as a one-way excuse to accommodate social interests. Remedies should not only recognize society's needs for imperfect or delayed remedies but also attempt to satisfy the needs of participation and belonging of those harmed by structural wrongs. A concern with needs will often require a reconciliation between wrongdoers, victims and other affected interests. In a world in which correction of structural injustices is often impossible, it is better to be honest about this tragedy than to pretend that the state bears no responsibility or that justice has been done. The needs of those injured by structural wrongs should, at least, be understood as legitimate interests for courts to pursue.