

USING IMPACT LITIGATION AS A TOOL FOR SOCIAL CHANGE:
JIMMY DOE: A CASE STUDY

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I. INTRODUCTION

“There will come a time when you believe everything is finished. That will be the beginning.” -Louis L’Amour

As civil rights lawyers, we try to get the biggest bang for our buck by aiming impact litigation to bring about the institutional reforms that will affect the greatest number of people who are suffering as a result of unconstitutional practices. For the Children’s Initiative at the ACLU of Illinois (“ACLU”), this attempt to use the law as a means for systemic change has meant taking on two large government bureaucracies that care for children in custody—the Illinois Department of Children and Family Services² and the Cook County Juvenile Temporary Detention Center (“JTDC” or “facility”).³ The purpose of this Article is to explore the use of impact litigation as a tool for social change by examining the history of the litigation effort and reform process at the JTDC and the ways in which effective institutional reform can improve young people’s lives. I will argue that while impact litigation can be a powerful tool for institutional reform, filing a lawsuit and even winning or settling the litigation is often just the beginning of the struggle. The continued presence of a committed organization to monitor the

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²B.H. v. McDonald, 49 F.3d 294 (7th Cir. 1995).

³Doe v. Cook County, No. 99 C 3945, 1999 WL 1069244 (N.D. Ill. Nov. 22, 1999).

implementation of the reform, as well as input and engagement from the community, is required to bring about widespread reform and lasting change.

II. BACKGROUND AND PROCEDURAL HISTORY

With 498 beds, the JTDC is one of the largest free-standing detention facilities for pre-adjudicated youths in the country. Most residents are fifteen to sixteen years old, but residents can be as young as ten and as old as twenty-one. Nearly eighty percent of youths housed there are African American, approximately twelve percent are Latino, and approximately ten percent are girls. The average stay at the facility is nearly thirty days, but many youths are in and out in three days. Those youths who will be transferred to adult criminal court stay for more than a year. It is estimated that nearly 6000 young people are housed at the facility each year. Given the many young people's lives affected by the JTDC each year and the considerable length of time for which a youth might be detained, the institution has the potential to have a lasting impact on a broad range of youths from all over Cook County, Illinois.

In the mid-1990s, the JTDC was a chaotic, overcrowded, mismanaged, and dangerous place. When ACLU lawyers learned about the unsafe conditions and inadequate services, we gained access to the facility in part through clients who were housed there who were also involved in our ongoing child welfare litigation. We were shocked and dismayed by the mistreatment of young residents, many of whom had not been found guilty of any charge or who had been detained for nonviolent status offenses. ACLU filed suit in 1999 in the Northern District of Illinois against Cook County and the facility superintendent

(“defendants”) based on a substantive due process theory.⁴ The complaint alleged that the JTDC abused and neglected the children it housed, confined them in unsafe and unsanitary conditions, denied them access to educational and recreational programs, and provided them with dangerously inadequate health and mental health services. The federal judge certified a plaintiff class consisting of all of the youths who are or will be confined at the JTDC.

The parties negotiated a Memorandum of Agreement (“MOA”), and in December of 2002, after extensive discovery and settlement negotiations, the Court approved and retained jurisdiction to enforce it. The MOA established comprehensive benchmarks for reform in the areas of facility oversight and management, physical and mental health care, social and recreational planning, environmental health and safety, discipline and grievance systems, and security and extraordinary circumstances. Most importantly, the MOA required that the defendants develop an implementation plan to bring the care and services at the JTDC up to minimum standards. The judge appointed two monitors agreed upon by the parties to assist in the reform and to report on compliance.

After nearly three years, the JTDC was still without an effective working implementation plan. According to experts, the monitors, defendants’ own consultants, and plaintiffs’ counsel, the defendants failed to bring the facility into compliance with the

⁴ The due process clause states “nor shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1. The substantive component protects fundamental liberty interests against infringement by the government, regardless of procedures provided. *Reno v. Flores*, 507 U.S. 292, 301–02 (1993). It is well established that the due process clause does not generally impose any affirmative obligation on the state to provide substantive services to citizens. *See Youngberg v. Romeo*, 457 U.S. 307, 317 (1982). There is an exception to this rule, as noted by the Supreme Court in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989): “[I]n certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals.” 489 U.S. at 198. Children in custody fall into that category.

MOA. Plaintiffs filed a Motion to Enforce the MOA in 2005. In the spring of 2006, shortly before an evidentiary hearing was scheduled to begin, the Court approved an Agreed Supplemental Order negotiated by the parties. Pursuant to this Order, the Court appointed independent experts in juvenile detention, medicine and mental health to formulate a plan to bring the JTDC into compliance with the MOA and hired a full-time monitor at the facility to evaluate whether the defendants were implementing the plan crafted by the independent experts.

The monitor's reports described a continued and pervasive culture of mismanagement and incompetence nearly five years after approval of the settlement agreement. After years of failed efforts and an apparent lack of leadership and political will, plaintiffs' counsel concluded that the defendants would never improve the conditions and services at the JTDC. Plaintiffs filed a Motion to Appoint a Receiver in the spring of 2007—an extraordinary remedy—to finally put an end to the suffering of the thousands of young people housed at the JTDC year after year.

On August 14, 2007, shortly before an evidentiary hearing concerning the plaintiffs' Motion, the parties submitted, and the judge approved, an Agreed Order appointing Earl Dunlap as Transitional Administrator ("TA")—in many respects, a receiver by another name. Dunlap is a nationally renowned expert with a long track record of reforming juvenile detention facilities. The Agreed Order granted the TA broad authority to bring the JTDC into compliance with the Court's orders. The TA was authorized to create and revise JTDC policies; administer all property relating to the operation of the facility; prepare and submit budgets; hire, train, promote and terminate staff; restructure

management and administrative functions; acquire, dispose of, and lease equipment and property; retain consultants; and take any other actions necessary to bring the JTDC into compliance with the Court's orders. Without the continued oversight by the federal court and involvement by plaintiffs' counsel, it is likely that the facility would still be a dangerous and disorderly place.

III. THE REFORM PROCESS

The reform process under the TA did not move forward with full force until the spring of 2008.⁵ Some of the initial changes made during the first year dealt with basic safety and sanitation at the JTDC. The TA made clear, for example, that he would not tolerate physical or sexual abuse of residents. He promptly filled long-vacant positions with qualified individuals assigned to investigate allegations of abuse and other misconduct. He retained an outside janitorial service to bring the facility into compliance with basic sanitation standards. The TA provided clean underwear and other clothing so that the children would no longer be forced to wear filthy clothes for days on end. He changed the process for review of disciplinary decisions by low-level staff to eliminate the practice of imposing needlessly harsh and unfair discipline.

While all of these changes were critical for increased safety and accountability at the facility, one effort of particular importance was the TA's initiative for a comprehensive culture change at the JTDC. For years, the facility operated under a Department of Corrections mentality, treating the youths as if they were adults convicted of serious crimes rather than young detainees. Through interviews with hundreds of clients, we

⁵This delay was due in part to issues related to disputed third party rights of union members working at the facility. These issues are outside the scope of this discussion.

learned that many of the young people came from troubled homes, violent neighborhoods, lower socioeconomic means, and underperforming schools. Many, if not most, were detained for nonviolent charges, including an overwhelming number of youths who were locked up for probation violations. Many had special education⁶ and mental health⁷ needs, and many experienced trauma from witnessing violence in their neighborhoods or abuse or neglect in their homes. Many of these young people would cycle in and out of the JTDC until something or someone helped them change the way they saw their lives and opportunities.

Recognizing that one of the goals of juvenile justice is rehabilitation,⁸ the TA believed that he would have to complete a major overhaul of current operations in order to achieve effective reform that would not only make the facility safer and more manageable, but could help change the direction of at least some young people's lives. This involved an extensive redesigning of the training curriculum for staff who worked directly with residents to focus on a youth-centered approach that incorporated cognitive

⁶ Research indicates that there is a disproportionately high percentage of children with disabilities in juvenile facilities. See Peter E. Leone et al., *Special Education Programs for Youth with Disabilities in Juvenile Corrections*, 53 J. CORRECTIONAL EDUC. 46 (2002) (noting high percentage of students in juvenile detention that are learning disabled); Harriet R. Morrison & Beverly D. Epps, *Warehousing or Rehabilitation? Public Schooling in the Juvenile Justice System*, 71 J. NEGRO EDUC. 218, 224 (2002) (finding that 70% of the population in a maximum security correctional facility for youthful offenders in a Southern state qualified for special education services).

⁷ Studies estimate that two-thirds to three-quarters of detained youths have one or more psychiatric disorders. Linda A. Teplin et al., *Detecting Mental Disorder in Juvenile Detainees: Who Receives Services*, 95 AM. J. PUB. HEALTH 1773, 1773 (2005).

⁸ For decades, courts have differentiated the appropriate treatment of youths in detention and corrections from that of adults. The Supreme Court in *In re Gault*, 387 U.S. 1 (1967), recognized that “[t]he early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. . . . The child was to be ‘treated’ and ‘rehabilitated’ and the procedures, from apprehension through institutionalization, were to be ‘clinical’ rather than punitive.” 387 U.S. at 15–16. Under federal law, detained and incarcerated youths have a right to rehabilitative treatment under the due process clause of the Fourteenth Amendment. See *Nelson v. Heyne*, 491 F.2d 352, 360 (7th Cir. 1974).

behavior therapy. The new curriculum was used to train veteran employees and all new staff. The youth-centered approach also drove the creation of Centers—facilities within a facility. These centers broke the monolithic 498-bed facility into smaller units with designated counselors and leadership to allow for relationship-building and consistency. This culture change has already led to fewer reports of staff-on-resident abuse and resident-on-resident violence and hopefully will lead to less recidivism over time.

The reform process did not end at the facility. The TA acknowledged the importance of reaching out to the communities that impact the young people who are court-involved, including the schools and the courts. Providing effective educational programs in juvenile justice facilities, for example, is linked to reduced recidivism rates.⁹ Many youths at the facility were not attending school before they entered the JTDC. These youths arrived with academic deficits and could greatly benefit from intensive academic services and extended school hours while housed at the JTDC. The school on-site at JTDC has operated as a traditional public school, holding classes from 7:30 a.m. – 2:30 p.m. The TA has worked closely with the principal of the school and Chicago Public Schools (“CPS”) administration to redesign the use of the physical plant so that the school facility mirrors the Centers and is a safer and more appropriate learning

⁹ See OPEN SOC’Y INST., EDUCATION AS CRIME PREVENTION: PROVIDING EDUCATION TO PRISONERS, RESEARCH BRIEF, OCCASIONAL PAPER SERIES, No. 2 (1997), available at http://www.prisonpolicy.org/scans/research_brief_2.pdf; Stephen J. Steurer et al., Three State Recidivism Study 39–41, 48–49 (Sept. 30, 2001) (unpublished report, available at <http://www.ceanational.org/PDFs/3StateFinal.pdf>). Youths who receive education while incarcerated are more likely to return to school upon release. See Thomas G. Blomberg et al., *Juvenile Justice Education, No Child Left Behind, and the National Collaboration Project*, CORRECTIONS TODAY (Am. Corr. Ass’n, Alexandria, Va.) Apr. 2006, at 143. They are also more likely eventually to be employed. James H. Keeley, *Will Adjudicated Youth Return to School After Residential Placement? The Results of a Predictive Variable Study*, 57 J. CORRECTIONAL EDUC. 65, 67 (2006); Leone et al., *supra* note Error: Reference source not found, at 46–47.

environment. Today, plaintiffs' counsel continues to advocate for adequate and legally required educational services for the youths detained at the JTDC.

While the structure and curriculum of the school are important, what happens to the youths once they leave the JTDC is also of great concern. Juvenile court judges often mandate that youths return to school as a condition of their release or probation.

According to a CPS spokesperson, during the 2007-2008 CPS school year, 94% of detained youth re-enrolled in school, but only 25% were still attending school after two weeks. Within a year, *none* were still in a CPS school. JTDC and CPS administrators are now working on a pilot program that would assist students in the transition back to a CPS school upon release.

The TA has also discussed probation with the juvenile court. Plaintiffs' counsel and the TA have pushed to reduce the number of youths in detention by advocating that juvenile court judges utilize alternatives to detention and that the juvenile court does not rely on the JTDC to punish youths for probation violations.¹⁰ The TA estimates that as many as one-fourth of the nearly 360 youths housed there currently do not need to be in a locked facility.

The cooperation between the schools and the courts on these initiatives suggests both the potential for evoking meaningful change beyond the walls of the facility and the

¹⁰ Groundbreaking work has occurred in Cook County and elsewhere through the Juvenile Detention Alternatives Initiative. *See* About JDAI, <http://www.jdaihelpdesk.org/overview/aboutjdai/Pages/default.aspx> (last visited Apr. 8, 2010). In particular, Family Court Judges Steven Teske (Clayton County, Ga.) and Brian Huff (Birmingham, Ala.) have made a great deal of progress working with school systems, law enforcement, probation, and detention facilities to reduce the number of youths involved in the criminal justice system. *See* School Referral Reduction Program: Narrowing the School-to-Detention Pipeline (Aug. 7, 2009), [http://www.jdaihelpdesk.org/Docs/Documents/Narrowing%20the%20School-to-Detention%20Pipeline%20\(Teske\).pdf](http://www.jdaihelpdesk.org/Docs/Documents/Narrowing%20the%20School-to-Detention%20Pipeline%20(Teske).pdf); Jefferson County Family Court's School Offense Protocol (Aug. 7, 2009), [http://www.jdaihelpdesk.org/Docs/Documents/Narrowing%20the%20School-to-Detention%20Pipeline%20\(Huff\).pdf](http://www.jdaihelpdesk.org/Docs/Documents/Narrowing%20the%20School-to-Detention%20Pipeline%20(Huff).pdf).

start of the next chapter in the reform process at the JTDC. Without the continued oversight by the federal court and the engagement of plaintiffs' counsel over the last decade, the hard-fought settlement agreement would have little meaning to the thousands of young people detained at the JTDC every year. Though implementation has been an uphill battle, we have learned many lessons through this litigation, and we are finally seeing some meaningful reform that has the potential to have lasting effects. Though we are nowhere near the finish line, it no longer feels like the start of the race.