THE POWER OF SETTLEMENT AS AN ALTERNATIVE STRATEGY FOR INSTITUTIONAL REFORM: THE CASE OF *DOE V. NAPPER*

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April 30, 1999

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INTRODUCTION

In the early 1990s, the fact that Georgia's juvenile correctional facilities were unsafe, overcrowded, and inhumane was neither subject to serious dispute, nor was it a secret. Local newspapers reported that "[t]hree youths are sleeping in rooms built for one," and that "[m]attresses are tattered, paint peels from walls, roofs have leaked, the food sometimes is poor."[1] Commissioner George Napper of the Department of Children and Youth Services (DCYS), the state agency that administers Georgia's juvenile facilities,[2] announced, "I have about forty pounds of problems on my desk . . . and about two pounds of solutions."[3] National juvenile justice expert Barry Krisberg, president of the National Council on Crime and Delinquency, reported to DCYS officials that "I'm surprised and astonished that you haven't been sued already. . . . You'd be liable, and you would find it hard to defend."[4] At least one Georgia state legislator agreed, saying of these institutions, "This is one area that's been neglected. . . . Sometimes it takes a crisis before we do what we need to do. I think we may be at that point now."[5]

Also undisputed was the fact that the Marietta Regional Youth Detention Center (MRYDC) in Cobb County, located just outside of Atlanta, was part of Georgia's juvenile justice problem. Built in 1956 and thereby the oldest youth detention center in Georgia,[6] the physical structure of the MRYDC was crumbling. And like the nineteen other RYDCs throughout the

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[1] Beverly Shepard, *Youth Services 'Will Change,' Napper Says*, ATLANTA J. & CONST., Aug. 27, 1992, at C2.
[2] O.C.G.A. § 49-4A-5 (1999). In July 1997, the Department of Children and Youth Services was renamed the Department of Juvenile Justice.
[3] Beverly Shepard, *Youth Services 'Will Change,' Napper Says*, ATLANTA J. & CONST., Aug. 27, 1992, at C2.
[4] Beverly Shepard, *Expert: Juvenile Facilities' Conditions Ripe for a Lawsuit*, ATLANTA J. & CONST., Jan. 27, 1993, at D4.
[5] Kathey Alexander, *'93 Georgia Legislature: Legislators Promise Aid for Youth Jails: 'Inhumane' Conditions Cited at Cobb Center*, ATLANTA J. & CONST., Jan. 15, 1993, at F3.

state, the MRYDC was chronically overcrowded. Designed to house 28 boys and 13 girls (a total of 41 children), it often accommodated as many as 60 youths.[7] Though some administrators within the system argued that the Marietta facility was not the worst RYDC in the state,[8] all agreed that it was in need of attention.

The source of these problems, on the other hand, was the topic of much debate. Some blamed the state legislature for refusing to allocate funds to build new facilities or improve the existing ones.[9] Others blamed the leadership within the facilities themselves for turning a blind eye to problems which shocked outsiders, but to seasoned administrators seemed commonplace.[10]

Yet another commonly cited explanation for the deplorable conditions in Georgia's juvenile facilities was the recent surge in violent crimes committed by juveniles. Throughout the late eighties and early nineties, juvenile crime rates in America rose sharply. According to a report prepared for the US Department of Justice's Bureau of Justice Statistics, for example, the rate of arrest of persons age fourteen to seventeen for violent crimes rose between 1989 and 1994 by forty-six percent, in contrast to the twelve percent increase in violent crime arrest rates for adults during that time period.[11] During the same period, homicide arrest rates for those ages fourteen to seventeen rose forty-one percent, in comparison to an eighteen percent rise for those age eighteen to twenty-four, and a nineteen percent drop for those over the age of twenty-five.[12]

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[6] Beverly Shepard, *Five Teens Sue State Over Youth Jail: Inmates Allege Abuse, Unsanitary Conditions*, ATLANTA J. & CONST., March 27, 1993, at C1.

[7] *Doe v. Napper*, Civ. Action File No. 1 93-CV-642-JEC (N.D. Ga 1993), Complaint, at 15 (March 26, 1993).

[8] Interview with Leander Parker, in Marietta, Georgia (March 29, 1999).

[9] *See, e.g.*, Beverly Shepard, *Youth Services 'Will Change,' Napper Says*, ATLANTA J. & CONST., Aug. 27, 1992, at C2 ("Money is one problem. The department has a $78 million budget but more would be needed to upgrade facilities and make other changes.").

[10] Telephone Interview with Kathleen Dumitrescu (Nov. 30, 1998).

[11] James Alan Fox, TRENDS IN JUVENILE VIOLENCE: A REPORT TO THE UNITED STATES ATTORNEY GENERAL ON CURRENT AND FUTURE RATES OF JUVENILE OFFENDING (March 1996).

[12] *Id.* Some experts warn, however that arrest rates overstate the juvenile crime problem, both because they reflect policing practices rather than actual crimes, and because juvenile are more likely to commit crimes in groups. *See,*

The increases in serious violent crime by juveniles, many argued, caused the state's juvenile facilities to fill up with more and more of the kinds of children that the under-trained youth detention workers were least equipped to handle.[13]

Finally, some located the root of the problems in Georgia's secure facilities for youth in the underlying structure of the juvenile justice system in Georgia. Although all twenty regional youth detention centers[14] and four development campuses[15] are operated by the state, [16] children are placed in state custody by the county juvenile court judges. Since the county juvenile courts, and not the state, ultimately have control over how many children are placed in the state's custody, the state is essentially powerless to control the influx of children into its facilities. With no choice but to house every child that the counties send to them, the facilities inevitably become overcrowded, which in turn leads to a whole host of additional problems.[17]

Even more contentious than the source of Georgia's juvenile justice troubles, however, were the complex questions about the most efficient and effective strategies to remedy them. Child advocates, juvenile court judges, state legislators, and members of the state agency responsible for the administration of the juvenile facilities disagreed about who should bear the responsibility for reforming detentions centers such as the MRYDC, and how those actors could best effectuate the necessary changes. Depending upon their theories about who was causing the

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e.g., James Howell, Barry Krisberg, & Michael Jones, *Trends in Juvenile Crime and Youth Violence, in* SERIOUS, VIOLENT, AND CHRONIC JUVENILE OFFENDERS: A SOURCEBOOK 1, 2 (James Howell ed. 1995).

[13] *Id.*

[14] The regional youth detention centers (RYDCs) are short-term facilities where children are sent primarily for two reasons – either they are found to be in need of detention while awaiting their delinquency hearings under O.C.G.A. § 15-11-18, or they have already been adjudicated delinquent and are awaiting assessment and long-term placement. Department of Juvenile Justice Administration, <http://www2.state.ga.us/departments/djj/offices.html>.

[15] The youth development campuses (YDCs) are long-term facilities where youth are confined after being adjudicated delinquent. *Id.*

[16] O.C.G.A. § 49-4A-7 (1999).

[17] Telephone Interview with David Anderson Hooker (Jan. 29, 1999).

deficiencies and their beliefs about the capacity and willingness of actors within the various branches of the state government to bring about reform, interested parties drew very different conclusions.

Traditionally, legal scholars have framed the discussion about the best approaches to institutional reform in terms of a dichotomy between political and legal avenues, or between legislation and adjudication. Neither of these two strategies was effective in reforming the MRYDC, however; instead, it was a third, intermediate approach – that of negotiation and settlement – that ultimately succeeded in bringing about substantial changes in the facilities and services there. Frustrated with the ineffectiveness of legislative attempts in the early 1990's to bring about quick and meaningful reform in Georgia's juvenile justice system generally and in the MRYDC in particular, a group of legal aid attorneys turned in March 1993 to the opposite extreme, filing *Doe v. Napper*,[18] a class action lawsuit that challenged the conditions of confinement in the MRYDC. The parties soon found that the traditional litigation model was likewise an unsatisfactory tool for reform, however, and they quickly initiated settlement negotiations as an alternative method of resolving the problems in the MRYDC.

Using *Doe v. Napper* as a model, this paper seeks to demonstrate the extent to which the settlement process successfully circumvents many of the crucial limitations of both legislation and adjudication, despite also bearing negative attributes of both traditional reform strategies. Part One of the paper lays out the theoretical foundation for the discussion, sketching the key arguments presented by scholars in the field about the merits and shortcomings of adjudication and legislation as institutional reform strategies, as well as some of the more recent work on

[18] Civ. Action File No. 1 93-CV-642-JEC (N.D. Ga 1993). Hereinafter, unless otherwise noted, all citations to court documents refer to this case.

settlement as an alternative to these two approaches. Part Two begins the process of applying these theories to the specific case of Georgia's juvenile justice system, describing the early legislative strategies that sought to bring about reform on both state and local levels, and suggesting some of the reasons why these efforts were unsuccessful. Part Three describes the early stages of the *Doe v. Napper* litigation, and the extent to which this phase illustrates the ineffectiveness of litigation in the institutional reform context. Part Four explains why the parties entered into settlement negotiations, and traces the agreements that were made during the case's first year. Part Five addresses some of the shortcomings of settlement, demonstrating how the process can be frustrated by both political and legal influences. Finally, Parts Six and Seven reveal how *Doe v. Napper* was resolved, first describing the final consent decree, and then assessing its impact on the daily administration of the MRYDC.

I. THE THEORETICAL FRAMEWORK

Scholarly debate about which governmental actors are best-suited for accomplishing necessary institutional reforms developed in the 1970's out of a concern that individuals were increasingly crafting their concerns about state-run institutions into legal claims, and thereby thrusting such issues into the hands of the federal judiciary. Judges, who traditionally speak the language of rights and duties, were beginning to make far-reaching policy decisions about how a whole host of governmental institutions and programs – from welfare agencies to public schools to housing authorities and mental health institutions – should be run.[19] In other words, judges

[19] *See, e.g.,* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1288 (1976) ("Some time after 1875, the private theory of civil adjudication became increasingly precarious in the face of a growing body of legislation designed explicitly to modify and regulate basic social and economic arrangements."); DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 4 (1977) ("The last two decades have been a period of

were more and more often making decisions that historically had been the province of the legislative branch. Scholars such as Lon Fuller, Donald Horowitz, and Abram Chayes explored whether this expansion of judicial power would upset the balance among the three branches of our government, and whether this shift would be beneficial for the institutions over which federal judges had increasing influence.

On the one hand, adjudication is attractive to those seeking governmental reform for several reasons. Judges, unlike legislators, are (at least in theory) politically neutral, and therefore are able to make more rational, objective, and independent decisions.[20] Judges also differ from legislators in their obligation to decide each case that comes before them; unlike those reformers who are unable to marshal the attention of their state legislators, litigants appearing court are guaranteed some response from the judge assigned to their case.[21] Related to this judicial responsiveness is the narrow tailoring of each judicial decision to the specific facts of the litigants' case. While legislative reformers may receive an answer from their legislators which does not address the specific concerns they have raised, a judge is required to make decisions based only on the facts presented in the instant case.[22]

On the other hand, scholars have also identified a litany of features which suggest that adjudication is not well-suited to institutional reform. One major limitation on the judiciary's power to effectuate reform is the framework of rights and remedies within which judges and litigants are confined. Rather than addressing all issues that appear problematic, judges may only consider those problems which constitute violations of the litigants' legal rights, and may only

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considerable expansion of judicial responsibility in the United States. . . . The result has been involvement of courts in decisions that would earlier have been thought unfit for adjudication.").

[20] *See* HOROWITZ, *supra* note 19, at 22; Chayes, *supra* note 19, at 1307.

[21] *See* HOROWITZ, *supra* note 19, at 22; Chayes, *supra* note 19, at 1308.

impose solutions that will remedy such violations.[23] Judges are therefore backward-looking, considering only remedies for violations which have already occurred, rather than how best to structure the state institution in the future. In so doing, judges ignore the secondary effects which their orders will create.[24]

Judges are confined not only by the law but also by the litigants who come before them. They may consider only those issues raised by parties to the instant lawsuit, and therefore overlook both the issues which the parties fail to raise,[25] and the concerns of those individuals and groups who may be interested but who are not named as parties to the action.[26] Furthermore, the judges must assume that the interests of the parties before them are represented accurately and completely, which is not necessarily the case.[27] For these reasons, Lon Fuller has asserted that adjudication is not well-suited to polycentric problems – ones in which there are a broad and inter-related set of causes as well as far-reaching effects of any proposed solution.[28] Legislators, who have a broader view of the problems and a bigger tool-kit of remedies, may be better equipped to address such complex issues affecting multiple groups of individuals.[29]

Judges' and lawyers' ability to resolve institutional problems effectively is further limited by their generalist perspective. Unlike legislators who often develop expertise in a particular area such as education or public housing, judges usually lack the highly specialized knowledge necessary to understand the issues in any given institutional reform case, and therefore to craft

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[22] *See* Chayes, *supra* note 19, at 1308.
[23] *See* Chayes, *supra* note 19, at 1282.
[24] *See* HOROWITZ, *supra* note 19, at 51; Chayes, *supra* note19, at 1296.
[25] *See* HOROWITZ, *supra* note 19, at 38; Chayes, *supra* note 19, at 1283.
[26] *See* Chayes, *supra* note 19, at 1310; Donald Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L. J. 1265, 1292-93 (1983).
[27] *See* Chayes, *supra* note 19, at 1282; Horowitz, *supra* note 26, at 1291-94.
[28] Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 369 (1978).
[29] *See* HOROWITZ, *supra* note 19, at 34; Horowitz, *supra* note 26, at 1289.

effective and practicable remedies.[30] Expert witnesses may inform judges of much of the information they lack; however, their usefulness is limited by the fact that they are chosen by the parties in order to provide a specific viewpoint, and therefore do not always provide the broad-based, objective evidence that judges need to understand the issues thoroughly.

In addition to their narrow scope, adjudication is limited in the way it arises. Rather than viewing the landscape of social problems and sorting and prioritizing the issues accordingly, judges are wholly passive with respect to the problems they address. They make decisions only when litigants bring problems into their courtrooms, and they respond on a first-come-first-served basis.[31] Judicial remedies are therefore imposed in a piecemeal fashion, rather than on the basis of relative need or impact within the community.[32] As a result, scholars such as Lon Fuller have argued that adjudicated is particularly inappropriate in situations that involve the distribution of limited resources among a variety of needs.[33]

Finally, the structure of adjudication limits its suitability to the institutional reform context. The American system has adopted the adversarial process of litigation, which sometimes artificially pits parties who share certain common goals or ideals against each other.[34] In addition, our system of appellate review of judicial decisions makes adjudication both costly and slow.[35] The process of enacting new legislation, by contrast, can more easily incorporate cooperative and collaborative problem-solving techniques, and it sometimes requires fewer intermediate stages before a final decision is achieved.

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[30] *See* HOROWITZ, *supra* note 19, at 31; GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 86 (1991).
[31] *See* HOROWITZ, *supra* note 19, at 38; Chayes, *supra* note 19, at 1283.
[32] *See* HOROWITZ, *supra* note 19, at 35; ROSENBERG, *supra* note 30, at 92.
[33] Fuller, *supra* note 28, at 398-400.
[34] *See* Horowitz, *supra* note 26, at 1294.
[35] *See* ROSENBERG, *supra* note 30, at 87, 92.

Scholars have defined each of these limitations on adjudication by either explicit or implicit reference to their dissimilarity to the legislative process of reform. However, in practice purely legislative or purely adjudicatory strategies are not the only options available to those seeking change in public institutions. Reformers may also pursue a third option, that of filing (or threatening to file) a lawsuit and then entering into negotiations and reaching a settlement agreement. This option is very closely linked to adjudication, because it requires some judicial presence and has as its backdrop the shadow of a lawsuit which may be pursued at any time.[36] At the same time, however, features of settlement such as the collaborative interaction between the parties, the relative freedom from normative constraints, and the ability to think in terms of future consequences rather than just past violations, make settlement more akin to the legislative process than to strict adjudication.

Settlement is of course not a new concept. Lon Fuller himself set forth three systems of dispute resolution, of which elections and adjudication were two, and contract formation through negotiation was the third.[37] Fuller believed that achieving the optimal conditions for effective negotiation would be so difficult, however, that he discarded it as a realistic option from the outset, and proceeded instead "to confine [his] attention here to a comparison of elections and adjudication."[38]

More recently, scholars such as Marc Galanter and Mia Cahill have given more thorough consideration to the merits of settlement, especially since approximately two-thirds of civil cases

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[36] Marc Galanter & Mia Cahill, *"Most Cases Settle" Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1389 (1994).
[37] Fuller, *supra* note 28, at 363.
[38] Fuller, *supra* note 28, at 364.

do ultimately end in settlement.[39] They warn against jumping to the conclusion that since so many cases settle, it must be a preferable alternative to full-blown adjudication, and they point out many of settlement's limitations. For example, they argue that overall effectiveness of settlement is virtually impossible to measure, both because there is never a perfectly analogous adjudicated case to which to compare a settlement,[40] and because there is no objective, quantifiable measure of "effectiveness."[41] Even using speed or cost-minimization as a proxy for effectiveness, we have no conclusive data demonstrating that settlement is preferable to adjudication.[42] Finally, scholars, caution that making broad generalizations about settlements overlooks particularized circumstances such as the persuasive powers and communication skills of the parties' representatives, which almost always have a profound impact on the outcome of a case.[43]

Though *Doe v. Napper* should certainly not be viewed as a template for all institutional reform cases, or even for those cases involving juvenile facilities, it is instructive in revealing how some of the unique features of legislation, adjudication, and settlement can work both to encourage and impede the effective resolution of problems within a state juvenile detention center. In this particular case, the limitations of both legislation and adjudication proved to be prohibitive of meaningful and efficient reform. Settlement was not a perfect alternative, for it carried with it many of the negative features of each of the other two strategies, but ultimately it was effective in effectuating real-world positive changes within the MRYDC.

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[39] Galanter & Cahill, *supra* note 36, at 1340.
[40] *Id.* at 1346-49.
[41] *Id.* at 1388-89.
[42] *Id.* at 1364, 1369.
[43] *Id.* at 1349.

II. THE INEFFECTIVENESS OF INITIAL LEGISLATIVE STRATEGIES FOR REFORM

In the years leading up to *Doe v. Napper*, a variety of concerned individuals attempted to bring about broad-based reform in Georgia's juvenile justice system, as well as specific changes within the MRYDC, through traditional legislative means.

A. *State-Wide Efforts*

Throughout the nation, political attention focused on juvenile justice issues during this period as a result of increasing public concern about sharp increases in violent crime committed by juveniles. Outraged and frightened, the American public demanded that the government do something to reverse these alarming trends. The solution most commonly advocated by the public nationwide was to abandon the traditional approach to juvenile justice – emphasizing the individual needs of the child and setting rehabilitation as the primary goal[44] – in favor of charging and trying young offenders as adults, and imposing harsher and more strictly punitive sanctions on juvenile offenders. Juvenile justice experts have written extensively about the "decidedly unsympathetic"[45] public response to the youth who were committing these crimes, and the "crushing public pressure to 'get tough' with juvenile offenders."[46] State legislators across the nation responded to this public outcry by drafting legislation that would enable

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[44] *See* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107-09 (1909).
[45] Barry Krisberg, *The Historical Legacy of Juvenile Corrections, in* CORRECTIONAL ISSUES: JUVENILE JUSTICE PROGRAMS AND TRENDS 45, 48 (American Correctional Association 1996).
[46] Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Centers* 32 U.S.F. L. REV. 675, 677 (1998).

increasing numbers of juveniles to be tried as adults, and lock more youths up in secure correctional facilities for longer periods of time.[47]

Despite the near consensus in favor of this "get tough" reaction to recent increases in juvenile crime, Georgia Governor Zell Miller at least initially adopted a different approach.[48] Governor Miller saw that juvenile courts were increasingly ordering that juveniles be placed in the custody of the Division of Youth Services of the Department of Human Resources, and that the Division's nearly universal response was to warehouse these juvenile offenders in prison-like facilities where they would receive little or no rehabilitative or educational programming. Miller professed to believe that, far from representing a solution to the problem of juvenile crime, that this response was part of the problem.[49] The Governor therefore appointed a legislative study committee to investigate the problems in Georgia's juvenile justice system, and to propose new legislation to address these problems.

The result was a bill, passed by the Georgia legislature and signed into law by Governor Miller on April 17, 1992,[50] that completely restructured Georgia's juvenile justice system. The biggest organizational change required by the new legislation was the removal of the Division of Youth Services from the auspices of the Department of Human Resources, and the creation of the

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[47] *Id.* at 678; *see also* Barry Krisberg, *The Historical Legacy of Juvenile Corrections, in* CORRECTIONAL ISSUES: JUVENILE JUSTICE PROGRAMS AND TRENDS 45, 45 (American Correctional Association 1996). *See generally* Robert B. Acton, *Gubernatorial Initiatives and Rhetoric of Juvenile Justice Reform*, 5 J.L. & POL'Y 277 (1996).

[48] Just a few years later, Georgia would enact the School Safety and Juvenile Justice Reform Act of 1994, mirroring juvenile justice reform initiatives in states around the nation. *See* O.C.G.A. § 15-11-5(b)(2)(A) (1994) (defining seven felonies over which the adult criminal court has exclusive jurisdiction if committed by minors aged thirteen to seventeen).

[4949] Governor Miller's critics question the sincerity of his support for rehabilitation and treatment of children in the juvenile justice system. Robert Cullen, a long-time advocate of juvenile and adult prison reform in Georgia, believes for example that although Miller advocated treatment for juvenile offenders, his conception of what was good for Georgia's youth consisted primarily of "toughening them up" through harsh conditions and military-style training. According to Cullen, Miller never really supported the kinds of rehabilitative and educational programs that juvenile advocates hoped he would implement. Telephone Interview with Robert Cullen (March 4 , 1999).

Department of Children and Youth Services as an independent agency to replace it. More important than the administrative restructuring, however, was the new mission which the new agency was designed to serve. When the bill was first introduced, newspapers characterized this bill as providing a "caring alternative" to a system which was becoming increasingly punitive, and reported, for example, that "[n]ew emphasis on nurturing troubled kids instead of simply punishing them is at the root of a 60-page bill creating a new state Department of Children and Youth Services to oversee programs for juvenile offenders."[51] Rather than simply housing troubled youths in large, centralized detention facilities, the new agency was expected to create new community-based alternatives which would be more effective in providing individualized care and rehabilitation for the juveniles placed in its custody.[52] In addition, the legislation's sponsors hoped that the new agency, whose sole purpose was to address the needs of youth offenders, would be more effective in lobbying the state legislature for increased funding specifically for the improvement of programming and facilities for the children in its custody.[53]

Looking at the plain language of the statute, it appears that the Governor's legislative efforts to install a more preventative and rehabilitative approach to juvenile justice in Georgia

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[50] Mark Sherman, *Agency for Juvenile Offenders Created: Governor Signs Bill Into Law*, ATLANTA J. & CONST., April 18, 1992, at B3.

[51] Phyllis Perry, *1992: The Georgia Legislature: Juvenile Justice: Bill Offers Caring Alternative*, ATLANTA J. & CONST., Feb. 27, 1992, at C3. *See also* Mark Sherman, *Agency for Juvenile Offenders Created: Governor Signs Bill Into Law*, ATLANTA J. & CONST., April 18, 1992, at B3.

[52] Phyllis Perry, *1992: The Georgia Legislature: Juvenile Justice: Bill Offers Caring Alternative*, ATLANTA J. & CONST., Feb. 27, 1992, at C3. Although the media portrayed the new juvenile justice legislation in this light, former Georgia assistant attorney general Cynthia Honssinger, offers an altogether different explanation. According to Honssinger, the creation of a new administrative agency focusing exclusively on juvenile justice was driven not by a desire to prevent and rehabilitate juvenile offenders, but rather was a manifestation of the growing trend toward treating more juvenile offenders more like adult criminals. In creating DCYS, Honssinger argues, Georgia legislators sought to create a clear distinction between the treatment of abused and neglected children, who were served by the old Department of Human Resources, and that of juvenile offenders; they intended to send the message that while the former should be treated as children who are in need of the state's protection, the latter should be treated more like adults who are held accountable for their own actions. In Honssinger's view, the new

were successful. For example, the statute charges the new fifteen-member Board of Children and Youth Services with "developing programs to successfully rehabilitate juvenile delinquents and unruly children committed to the state's custody," and with assisting in the development of "prevention programs for children at risk."[54] In addition to establishing new programs, the statute requires the Department to keep in mind the positive, non-punitive purposes of the more traditional youth detention and treatment centers under its control. For those children for whom incarceration was the appropriate remedy, the Department must "carry out the rehabilitative program provided for by this chapter and to restore and build up the self-respect and self-reliance of children and youths lodged therein so as to qualify and equip them for good citizenship and honorable employment."[55] Other positive measures in the new statute include requirements that that DCYS conduct continuing studies into the effectiveness of its rehabilitative programs for incarcerated youths,[56] and that it ensure that committed youth receive the same quality of educational services as all other public school children in Georgia.[57]

Further evidence of the success of Miller's legislative strategy for juvenile justice reform lies in the resulting appointment of George Napper, a strong believer in the ideals embodied in the statute, as the first Commissioner of the new department. Prior to his appointment as the Commissioner of Children and Youth Services, Napper had been Atlanta's police chief from

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DCYS was not harbinger of a new, nurturing attitude toward juvenile offenders, but rather constituted a miniature version of the adult Department of Corrections. Telephone Interview with Cynthia Honssinger (Jan. 16, 1999).

[53] *Id.*

[54] O.C.G.A. § 49-4A-2(b) (1992).

[55] O.C.G.A. § 49-4A-2(d) (1992). *See also* O.C.G.A. § 49-4A-6(b) (1992) (requiring that board members recognize the same goals as primary purposes of the youth development centers and detention facilities when adopting rules and regulations therefor).

[56] O.C.G.A. § 49-4A-8(n) (1992).

[57] O.C.G.A. § 49-4A-12(c)(1) (1992).

1978 to 1982 (the first African American police chief in a major Southern city),[58] the public safety commissioner of Atlanta until 1990, and then the director of Project Connect, a federally-funded organization seeking to improve drug treatment services in Atlanta.[59] Napper was considered a good choice because he had seen the justice system from both sides; his years as Atlanta's police chief and public safety commissioner made him sympathetic to law enforcement goals and needs, but his work to provide better drug treatment programs, as well as his personal experience as the father of a juvenile delinquent,[60] provided him with the opportunity to view the system from the perspective of those caught in the system.

Napper came to the Department of Children and Youth Services promising to bring a new approach to juvenile justice in Georgia. Napper told reporters that he rejected what he called the "get-tough, kick-butt, take-names" attitude which had prevailed in the Department of Human Resources' Division of Youth Services.[61] He said that the traditional reliance on punishment and incarceration didn't solve the problem of juvenile crime, but rather placed juvenile offenders in an environment which would mold them into hardened criminals. Instead, Napper advocated crime prevention programs, incarceration only for those children who truly posed a threat to public safety, and the development of effective rehabilitation programs which would address the individual needs of juvenile offenders and enable them to become productive members of society.[62]

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[58] Beverly Shepard, *Youth Services 'Will Change,' Napper Says*, ATLANTA J. & CONST., Aug. 27, 1992, at C2.
[59] Kathy Scruggs, *Voices: In the New Job, Napper Eager to Help Youths*, ATLANTA J. & CONST., July 5, 1992.
[60] In July 1991, Napper's seventeen year-old son was arrested for beating and robbing a man. Kathy Scruggs, *Voices: In New Job, Napper Eager to Help Youths*, ATLANTA J. & CONST., July 5, 1992.
[61] Jane Hansen, *Napper Making Waves in Handling Juvenile Justice*, ATLANTA J. & CONST., Sept. 26, 1992, at B1.
[62] Jeff Dickerson, *Let's Hope Napper Turns Around Troubled Lives*, ATLANTA J. & CONST., July 10, 1992, at A10; Beverly Shepard, *Youth Services 'Will Change,' Napper Says*, ATLANTA J. & CONST., Aug. 27, 1992, at C2; Jane Hansen, *Napper Making Waves in Handling of Juveniles*, ATLANTA J. & CONST., Sept. 26, 1992, at B1.

In addition to creating an administrative structure that would be conducive to the achievement of his juvenile justice goals, Governor Miller's legislative strategy appears to have been successful in garnering support for his approach among the public and the child advocacy community in Georgia. In the editorial pages of local newspapers, for example, the legislation was characterized as potentially "the most significant reform of its juvenile justice system in years," and a welcome replacement for "a system that all too often has failed in its mission of turning juvenile offenders away from crime."[63] Another editorial echoed these sentiments: "The focus must remain on ensuring that the thousands on troubled children who come into contact with the juvenile justice system each year are turned away from crime. That means placing greater emphasis on community-based rehabilitation programs and less on incarceration."[64] Rick McDevitt, president of the Georgia Alliance for Children, echoed these comments, telling the *Atlanta Journal and Constitution* that "[i]t's a historic piece of legislation that . . . places emphasis on preventing children from getting into trouble instead of waiting for them to get so bad that they should be incarcerated."[65] Praise for the new commissioner was also strong: one editorial, for example, characterized Napper as being "capable of bringing the innovative approach to juvenile justice Georgia needs."[66]

Though hopes were high for the legislative reforms that Governor Miller initiated, the broad-based support for juvenile justice reform did not translate well into real world changes in

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[63] *A Chance for Juvenile Justice Reform*, ATLANTA J. & CONST., March 20, 1992, at A10.
[64] *Dealing with Those 'Worst Case' Kids*, ATLANTA J. & CONST., Apr. 16, 1992, at A8.
[65] Mark Sherman, *Agency for Juvenile Offenders Created: Governor Signs Bill Into Law*, ATLANTA J. & CONST., April 18, 1992, at B3. *See also* Jeff Dickerson, *Let's Hope Napper Turns Around Troubled Lives*, ATLANTA J. & CONST., July 10, 1992, at A10 (reporting that the judges and child advocates had been among those who had lobbied the state legislature for the creation of an independent agency to administer programs and facilities for juvenile offenders); Ben Smith & Charles Walston, *Shake-Up at Youth Services: Politics: Napper Falls as Crime Issue Drives Campaign*, ATLANTA J. & CONST., Sept. 3, 1994, at C2 ("Children's advocates were pleased when Napper was selected by Miller in July 1992 to head DCYS.").

the state's juvenile justice facilities. The shortcomings by no means resulted from a lack of effort on George Napper's part, however. In his first months as Commissioner of Children and Youth Services, Napper visited all four of the state's youth development centers (the long-term facilities where juveniles are incarcerated post-adjudication), as well as fourteen of the state's twenty regional youth detention centers, and he initiated a policy requiring administrators throughout the department similarly to spend time in the field.[67] Openly recognizing the breadth and depth of the problems within these secure facilities for youth, Napper gathered a team of consultants to "work on everything from overhauling the juvenile system's educational component to exploring new community programs."[68]

Though Napper was widely praised for these efforts, one criticism he regularly received was that he was too idealistic and not politically savvy enough to garner legislative support for his vision.[69] In the fall of 1992, for example, he fought and lost a major battle with the state legislature which resulted in the allocation of $5.6 million for the building of a new maximum security facility for juveniles who commit the most serious crimes.[70] Though DCYS certainly needed as much state funding as it could get, Napper felt that this allocation of money specifically for the purpose of incarcerating more youths – rather than for preventing crime or rehabilitating youthful offenders – directly conflicted with the goals which he was hired to serve.[71] "I can't imagine people would think I could go for that," he told reporters of the

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[66] *Mr. Napper Takes on Juvenile Justice*, ATLANTA J. & CONST., July 7, 1992, at A2.
[67] Beverly Shepard, *Youth Services 'Will Change,' Says Napper*, ATLANTA J. & CONST., Aug. 27, 1992, at C2.
[68] *Id.*
[69] *See, e.g.*, Jane Hansen, *Napper Making Waves in Handling of Juveniles*, ATLANTA J. & CONST., Sept. 26 1992, at B1.
[70] *Id.*
[71] *Id.*

legislators' decision.[72] The Georgia state legislature continued to put money into secure facilities for youth, however, also approving funding in January 1993 to replace old, crumbling detention and development centers in Cobb, Chatham, and Fulton counties.[73]

As time wore on, those who had had thrown their support behind Miller's juvenile justice reforms grew cynical. Visible changes in the treatment of Georgia's youthful offenders, they felt, was not occurring fast enough. An article in the *Atlanta Journal and Constitution*, written one year after the establishment of DCYS, captured this sentiment:

> A year ago, Gov. Zell Miller boasted that a new era had dawned for troubled children in Georgia. . . . The plan was that the troubled teenagers would be enrolled in community-based programs to get counseling, guidance and academic help to return to school, their homes and a crime-free life. But as the Department of Children and Youth Services turned a year old Thursday, the scene in Georgia's juvenile courts, youth jails and youth prisons looked very much as it did last year and the year before that and the year before that.[74]

Though the new statutory provisions and Napper's good faith efforts had seemed promising, they proved ineffective without the willingness of the legislature to provide financial support for Napper's programs, nor of the lower-level administrators and service providers below Napper to develop and implement them.

B. *Local Efforts Within Cobb County*

On the local level, one person who was concerned about the lack of on-the-ground changes in Georgia's secure facilities for youth was Cobb County Juvenile Judge James Morris.

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[72] *Id.*

[73] Kathey Alexander, *'93 Georgia Legislature: Legislators Promise Aid for Youth Jails: 'Inhumane' Conditions Cited at Cobb Center*, ATLANTA J. & CONST., Jan. 15, 1993, at F3.

[74] Mark Shermann & Frances Schwatzkopff, *A Year Later, Youth System Still Troubled: Beaurocracy, Lack of Funds Blamed*, ATLANTA J. & CONST., July 2, 1993, at G1.

Year after year, Judge Morris had seen county grand juries report on the abysmal conditions in the MYRDC, always with no response from the state legislature. Judge Morris had watched the state legislature repeatedly cut funding for the construction of a new juvenile detention center in Cobb County out of the state budget, a pattern which he attributed to the party politics which prevent state legislators from effectuating necessary reforms. Cobb County is a Republican district within a Democratic state. As a result, Cobb County voters lobbying for a new RYDC never received responses from the Democratic state legislators who, unlike their counterparts in the judicial branch, would be politically accountable for their decisions within their home districts, and were entitled to ignore unpopular complainants with impunity. Frustrated by the ineffectiveness of normal political channels for reform, Judge Morris and other county leaders launched a campaign to focus public attention on the MRYDC, and thereby force legislators to do something about the problems therein.

Judge Morris' legislative reform efforts took many forms. He negotiated with county officials, convincing them to allocate a piece of county-owned land for a new juvenile detention center, and to support his efforts to convince the state legislature to fund a new MRYDC.[75] He also invited the local media into the MRYDC, which in turn led to a television news report about the conditions in the facility, as well as newspaper coverage of the problems.[76] Finally, Judge Morris called the local high school's media teacher, and invited her students to tour the facility and make a video about the conditions there. This video was then brought to the state legislature by members of the school's civics class, who spent a day talking to state legislators, handing out pamphlets, and showing the video on order to alert the lawmakers' attention to the inhumane

[75] Telephone Interview with James Morris (March 31, 1999).
[76] *Id.*

conditions in the MRYDC. According to Judge Morris, this final strategy was among the most effective; legislators were moved, he says, by the fact that the "good kids" of Cobb County were so concerned about the conditions facing their troubled peers.[77]

Although all of these initiatives helped focus legislators' attention on the problems within the MRYDC, and might even have contributed to the legislature's eventual allocation of funds for a new facility to replace the MRYDC, Judge Morris believed that these efforts alone would be insufficient to achieve the comprehensive overhaul the services and programs that the MRYDC needed. In order to accomplish more than just cosmetic changes in the MRYDC, Judge Morris believed that a more focused, coercive reform strategy would be necessary. He concluded that he needed the power of the federal judiciary on his side to force the state legislature to fund such changes, and MRYDC administrators to implement them.

C. *Funding for a New MRYDC*

Very early on, Judge Morris' predictions about the power of adjudication to bring about quick and concrete changes proved to be very accurate. Even before *Doe v. Napper* was filed, the mere specter of litigation was able to focus the attention of state legislators on the problems in the MRYDC and to spur them to make certain crucial changes almost immediately. On January 14, 1993, the Georgia state legislature appropriated funds to design and construct a new facility to replace the crumbling MRYDC.[78] This budget allocation immediately followed a tour of the old MRYDC by a group of state legislators, who were shocked and appalled by the

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[77] *Id.*

[78] Kathey Alexander, *'93 Georgia Legislature: Legislators Promise Aid for Youth Jails: 'Inhumane' Conditions Cited at Cobb Center*, ATLANTA J. & CONST., Jan. 15, 1993, at F3.

inhumane conditions they saw there.[79] Although the these events actually occurred before *Doe v. Napper* was filed, all parties agree that the legislature's decisions both to tour the facility and to fund a new detention center in Cobb County resulted in large part from their anticipation of a lawsuit over the MRYDC.[80] Legislators undoubtedly knew that a lawsuit was in the works, especially in light of a January article in the *Atlanta Journal and Constitution* reporting that "attorneys at Cobb Legal Aid are interviewing teens for a possible lawsuit, Mr. Morris and legal aid workers said."[81] An employee who has worked in the MRYDC for over thirty years corroborated this interpretation, remarking that "the grand juries had been saying that we needed a new building for years, but it took a lawsuit before the state was willing to put up the money for it."[82]

This explanation that the Georgia legislature funded the new detention center as a preemptive measure in anticipation of litigation is further fortified through consideration of the speed with which the legislature allocated the money. Although the legislators and Governor Miller initially determined that the 1993 budget could only accommodate funds for the design of the new facility, and that the construction money would come in the following year, a last-minute deal was struck and funds for both projects were allocated in 1993.[83] According to Judge Morris, this move by the legislature was highly unusual, marking a break from the established three-year

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[79] *Id.*

[80] Interview with Nathan Davis, in Atlanta, Ga. (March 29, 1999); Telephone Interview with James Morris (March 31, 1999).

[81] Kathey Alexander, *'93 Georgia Legislature: Legislators Promise Aid for Youth Jails: 'Inhumane' Conditions Cited at Cobb Center*, ATLANTA J. & CONST., Jan. 15, 1993, at F3.

[82] Interview with Jake Smith, Volunteer Program Coordinator for the MRYDC, in Marietta, Ga. (March 29, 1999).

[83] Kathey Alexander, *Construction of Youth Detention Center Begins Friday*, ATLANTA J. & CONST., April 21, 1994, at G3.

process, through which design, budgeting, and construction of new juvenile correctional facilities occurred in successive years.[84]

Though the threat of a lawsuit was able to create an initial sense of urgency, it was not able to sustain it. Construction on the new MRYDC began in April 1994,[85] but it wasn't until November 1996 that the *Atlanta Journal and Constitution* reported that the new detention center in Cobb County was ready to open.[86] Youths did not actually began to inhabit the new facility until February 1997.[87]

Despite the considerable lag time between the initial announcement and the actual completion of the new facility, individuals on both sides of the case now view the construction of a new MRYDC as one of the undeniably positive changes that resulted from the litigation. When the new MRYDC was opened, it was hailed as being the state of the art in juvenile corrections, with features such as a centralized electronic locking system, increased classroom and recreational space, and a toilet in every cell.[88] By all accounts the new center is also cleaner, better ventilated, and better heated and cooled than the old building.

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[84] Telephone Interview with James Morris (March 31, 1999).
[85] Kathey Alexander, *Construction of Youth Detention Center Begins Friday*, ATLANTA J. & CONST., April 21, 1994, at G3.
[86] Doug Payne, *Cobb Relieves Overcrowding with State-of-the-Art Center: It's Set to Open 3 Years After Suit Alleged 'Cruel Conditions'*, ATLANTA J. & CONST., Nov. 28, 1996, at E18.
[87] Charles Walston, *New Youth Detention Facility in Cobb a Prototype for Future*, ATLANTA J. & CONST., May 23, 1997, at C11.
[88] Doug Payne, *Cobb Relieves Overcrowding with State-of-the-Art Center: It's Set to Open 3 Years After Suit Alleged 'Cruel Conditions'*, ATLANTA J. & CONST., Nov. 28, 1996, at E18; Charles Walston, *New Youth Detention Facility in Cobb a Prototype for Future*, ATLANTA J. & CONST., May 23, 1997, at C11.

III. SHORTCOMINGS AT THE OTHER EXTREME: THE EARLY STAGES OF *DOE V. NAPPER*

A. *Triggering the Lawsuit*

At the same time that Judge Morris became concerned about the overcrowding and conditions at the MRYDC, attorneys at Legal Aid of Cobb County – a satellite office of the Atlanta Legal Aid Society – started to have similar concerns. Managing attorney Kathleen Dumitrescu claims that she was alerted to the possibility of problems within the MRYDC not by any information she received about that facility in particular, but rather by the steady stream of calls which her office received from inmates at the two adult facilities located down the road from the MRYDC.[89] After receiving so many complaints from adult inmates, Dumitrescu and her colleagues began to wonder why they weren't hearing at all, let alone in similar numbers, from their juvenile counterparts. Mistrustful of the explanation that the conditions at the youth detention center were simply better, Dumitrescu became suspicious enough about situation at the MRYDC to begin investigating.[90]

Dumitrescu started her research late in 1992 by reading the Cobb County grand jury reports on Georgia's correctional facilities.[91] These reports, though not uniform in their assessments of the conditions at the MRYDC, provided enough evidence to convince Dumitrescu that something was amiss in the juvenile facility. The grand jury presentments from the September/October 1987 term, for example, speak of "many disturbing concerns" at the MRYDC, including the lack of counseling services or rehabilitative programs, the excessive time

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[89] Telephone Interview with Kathleen Dumitrescu (Nov. 30, 1998).

[90] *Id.*

[91] As in many states, grand juries in Georgia periodically inspect the county offices, buildings, and authorities in which they sit, they prepare reports based on their findings which become part of the public record. O.C.G.A. § 15-12-71(b) (1999). Although Georgia law requires only that these inspections occur as frequently as the grand juries deem them necessary, grand juries in Cobb County have made a practice of inspecting all of their county-run facilities four times per year. Interview with Nathan Davis, in Atlanta, Ga. (March 29, 1999).

spent by the youths watching television, possible fire hazards created by the number of locked doors in the facility, insect infestation, and a general lack of cleanliness.[92] The grand jury's penal committee concluded its report by remarking that "[t]o say this committee was appalled and extremely dissatisfied with both of our visits would be putting it mildly."[93] The November/December 1988 grand jury presentments are similarly bleak; the penal committee again reported such conditions at the MRYDC as poor lighting, inadequate sleeping arrangements (including mattresses placed directly on the floor), the existence of roaches, and the lack of a mental health counselor.[94] And in the January/February term of 1991, the grand jury presentments reported that "[o]f all the facilities visited by the [penal] committee, [the MRYDC] was by far the most disappointing and distressful to all of the members,"[95] and that conditions in the MRYDC were "dehumanizing and unacceptable."[96]

Outraged by these reports and by the lack of any legislative response to their findings, Dumitrescu decided to talk to some of the juveniles detained in the MRYDC about the conditions there. In order to gain access to the youths, she sought the help of Judge Morris.[97] Eager to help out with yet another effort to bring about reform in the MRYDC, Morris called James Phillips, then the director of the MRYDC, to request that he allow Dumitrescu to tour the facility.[98] Phillips, whom Judge Morris describes as well aware of the problems within the MRYDC but convinced he was doing all he could to alleviate them, agreed to cooperate.[99]

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[92] Grand Jury Presentments, Cobb Superior Court, Cobb County, Georgia 10 (Sept./Oct. 1987).
[93] *Id.* at 11.
[94] Grand Jury Presentments, Cobb Superior Court, Cobb County, Georgia 10-11 (Nov./Dec. 1987).
[95] Grand Jury Presentments, Cobb Superior Court, Cobb County, Georgia 13 (Jan./Feb. 1991).
[96] *Id.* at 14.
[97] Telephone Interview with Kathleen Dumitrescu (Nov. 30, 1998).
[98] Telephone Interview with James Morris (March 31, 1999).
[99] *Id.* According to Judge Morris, Phillips' willingness to cooperate with him and with Dumitrescu in these early stages contributed to the DCYS decision to fire Philips shortly after *Doe v. Napper* was filed. *Id.*

Dumitrescu's visit to the MRYDC in December 1992 cemented her beliefs in the need for immediate corrective action.[100] She found that there was no heat in the building, and that the only children wearing sweaters or coats were those lucky enough to have been wearing them at the time of their arrest. She visited a classroom wherein a teacher was making no apparent attempt to instruct his students. Finally, Dumitrescu was particularly disturbed by the lack of fire safety in the MRYDC; the combination of the absolute failure to conduct fire drills, the lack of a central locking system, and the old, faulty condition of the existing locks amounted in Dumitrescu's mind to a catastrophe waiting to happen.

These threats to the children's health and safety, thought Dumitrescu, were not the kinds of problems that could wait on top-down reforms promised by George Napper and his new DCYS. Even if George Napper made good faith efforts to eliminate inhumane conditions in the RYDCs, Dumitrescu did not trust the state legislature to provide the necessary funding, nor a bureaucratic agency like DCYS to make real-world changes as quickly as the dire circumstances in the MRYDC required.[101] Interestingly enough, then, one of Dumitrescu's reasons for instigating a lawsuit to remedy the MRYDC's ills was to avoid one of the very problems which scholars have identified as one of the limitations of adjudication. While Rosenberg argues, for example, that "[d]elay is built into the judicial system, and it serves to limit the effectiveness of the courts,"[102] Dumitrescu believed that legislative channels of reform were too slow, and that litigation would produce more immediate positive responses.

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[100] Telephone Interview with Kathleen Dumitrescu (Nov. 30, 1998).
[101] Telephone Interview with Kathleen Dumitrescu (Nov. 30, 1998).
[102] ROSENBERG, *supra* note30, at 87.

After three months of interviewing youths and gathering evidence about the MRYDC, Dumitrescu felt ready to file her first major institutional reform lawsuit.[103] Before drafting a complaint and filing it in court, Dumitrescu wrote a letter to George Napper, outlining in detail all of the disturbing conditions which her investigation of the MRYDC had uncovered. Her letter also enumerated the reforms which she believed were necessary to remedy these problems, and expressed a willingness to resolve the dispute amicably if the Department agreed to meet those demands. Shortly thereafter, Dumitrescu received a phone call from Napper, who responded simply: "the world needs more legal aid lawyers." Dumitrescu interpreted this comment as an invitation to sue.[104] According to Cynthia Honssinger, the first attorney who represented DCYS in the *Doe v. Napper* litigation, Napper invited litigation because he viewed it as an opportunity to gain leverage with the state legislature when he sought budget increases. A federal court order, he thought, would place pressure on the legislature to fund the reforms that he had been thus far been unsuccessful in implementing due to budgetary constraints.[105]

Here again, Dumitrescu's practical approach or to institutional reform litigation conflicts with the scholarship in the field. As a plaintiff's attorney, Dumitrescu was encouraged by Napper's non-adversarial approach; she felt that having Napper virtually on her side would make litigation much more likely to produce the positive changes in the MRYDC which she considered necessary. Scholars such as Horowitz, on the other hand, view the collusive approach of many defendants in public law litigation as evidence that adjudication is ill-suited to the project of institutional reform.[106] While Horowitz is concerned by state actors' ability to use

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[103] *Id.*
[104] Telephone Interview with Kathleen Dumitrescu (Nov., 30, 1998).
[105] Telephone Interview with Cynthia Honssinger (Jan. 16, 1999).
[106] *See* Horowitz, *supra* note26, at 1294-95.

litigation as a means of escaping political accountability for unpopular budget allocations and policy decisions, Dumitrescu's only concern was that reform occur within the MRYDC as quickly as possible.

B. *The Complaint*

On March 26, 1993, attorneys at Legal Aid of Cobb County filed *Doe v. Napper*, a class action lawsuit challenging the conditions at the Marietta Regional Youth Detention Center. Targeting a single juvenile institution and speaking the language of plaintiffs, defendants, and constitutional and statutory rights and remedies, the complaint embodied many of the limitations of adjudication identified in the academic discourse on institutional reform.

The case was filed on behalf of five MRYDC residents (by their mothers as next friends), who represented themselves and a plaintiff class defined as "all other juveniles similarly situated who are, or who will be, confined at the MRYDC."[107] The complaint named as defendants Department of Children and Youth Services Commissioner George Napper, MRYDC Director James Phillips, Georgia State School Superintendent Werner Rogers, and the Georgia State Board of Education.[108] In defining the cast of characters so narrowly, the complaint excluded from the debate interested parties on both sides of the case. On the complaining parties' side, it overlooked juveniles in other DCYS facilities, who were suffering equally deplorable conditions, and whose concerns would be devalued if, as a result of the litigation, resources started being siphoned into the MRYDC. Similarly, the complaint prevented administrators in other DCYS

[107] Complaint at 2.
[108] *Id* at 1.

facilities, as well as those in other state agencies, from weighing in on the debate over how limited resources should be allocated to best serve the interests of Georgia's children.[109]

The complaint's factual allegations depicted inhumane and unsafe physical conditions, as well as inadequate programming and services for the youths in the MRYDC. It alleged that the MRYDC, designed to house twenty-eight boys and thirteen girls, was regularly overcrowded; the facility often held up to sixty youths, and the youths who pushed the facility over capacity were typically disproportionately male.[110] For all of these youths, there were insufficient staff, resulting in inadequate supervision particularly on the night shifts.[111]

The physical conditions in the facility were portrayed as generally unsanitary, with poor ventilation,[112] no heat,[113] fungus growing on the walls,[114] and roaches and other insects throughout the facility.[115] Plumbing was a particular problem, with inadequate toilet facilities for all the youth, and only one operational shower for all of the boys.[116] Sleeping arrangements were also insufficient; the rooms designed for one often housed two children, and the youths were often forced to sleep on unsanitary mattresses placed directly on the floor.[117] Compounding this problem, the children in the facility were typically classified only by sex, so that youths of all ages, behavior patterns, and charged offenses were housed side by side.[118]

The complaint also alleged that the physical safety of the children in the MRYDC was substantially endangered. The use of force and mechanical restraints, including such horrific

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[109] *Compare* Chayes, *supra* note 19, at 1310.
[110] Complaint at 15.
[111] *Id.* at 21-22.
[112] *Id.* at 28-29.
[113] *Id.* at 30-31.
[114] *Id.* at 29-30.
[115] Complaint, Exh. 27, at 3.
[116] Complaint at 25-27.
[117] *Id.* at 19-20.

practices as hog-tying[119] children and handcuffing them to their beds,[120] was a particular concern. As an alternative to physical restraints, the youth detention workers made a regular practice of placing youth in indefinite solitary confinement[121] – a punitive measure considered by juvenile advocates as having "potentially devastating effects" on children, especially when imposed for excessive durations or coupled with lack of access to services or particularly austere conditions.[122]

Finally, the complaint alleged that the medical, educational, and recreational services provided to the youths in the MRYDC were inadequate. In the health care area, the complaint pointed to inadequate medical and psychiatric services, both in terms of screening youths for problems upon arrival at the facility, and in providing ongoing care.[123] Included in this area was the facility's failure to provide sufficient prevention and follow-up care for suicide attempts by MRYDC youth.[124]

The alleged problems with educational programming in the MRYDC were many. The regular educational program was deficient in that it did not classify children by age or ability, was inconsistent in the number of hours of programming per day provided to each child, and offered no standard curriculum.[125] In addition, the MRYDC staff provided essentially no special education programming; it neither implemented the individualized education plans (IEPs) of

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[118] *Id.* at 31.
[119] Hog-tying is defined in the complaint as the practice of "tying the child's hands and feet together and leaving the child trussed up for an indefinite period of time, sometimes lying only on the metal bed frame after the mattress has been taken away." *Id.* at 39-40.
[120] *Id.* at 39.
[121] *Id.* at 38-39.
[122] MICHAEL J. DALE ET AL., REPRESENTING THE CHILD CLIENT 2-100 (1999).
[123] Complaint at 31-33.
[124] *Id.* at 32-33.
[125] *Id.* at 33-34.

those children already identified as disabled, nor did they make any efforts to evaluate or develop IEPs for children whose disabilities had not yet been identified.[126]

A lack of access to attorneys exacerbated all of the above-listed problems in the MRYDC. According to the complaint, children in the MRYDC were never informed that they could contact an attorney to challenge the conditions of their confinement. In addition, they were often denied permission to use the telephone during business hours, so even those youths who were savvy enough to seek legal advice were often unable to do so.[127]

Although the factual allegations asserted by the plaintiffs are extensive, the court would only consider these grievances to the extent that they constituted state action in violation of laws over which the court had jurisdiction. In addition to the general removal of non-legal claims from the judiciary's grasp, the plaintiffs' options were constrained by their choice to litigate in federal rather than state court. The Supreme Court held in *Pennhurst v. Halderman*[128] that pendent jurisdiction over state law claims does not authorize injunctive relief against state officers. By suing state officers in federal court, therefore, the plaintiffs forfeited any state law claims they might have brought. In this case, the sacrifice was quite substantial, because Georgia law arguably provides broader opportunities for establishing a right to treatment for residents of juvenile detention centers.[129] Since the likelihood of prevailing on a right to treatment claim

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[126] *Id.* at 35-36.
[127] *Id.* at 37-38.
[128] *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 117 (1984).
[129] The Georgia juvenile code, for example requires that the Board of DCYS "bear[] in mind at all times that the purpose for existence and operations of such schools facilities, and institutions, and all activities carried on therein shall be to carry out the rehabilitative program provided for by this chapter." O.C.G.A. § 49-4A-2 (1992). A failure to provide rehabilitative program, therefore violates the Department's duty, and the youths' rights, under state statutory law.

under the Federal Constitution was by contrast so slim,[130] the plaintiffs' attorneys were forced to focus on more general claims that the conditions of confinement in the MRYDC violated the youths federal and statutory rights.[131]

The plaintiffs raised claims of federal Constitutional violations arising out of the conditions in the MRYDC both directly under the Constitution,[132] and under 42 U.S.C. § 1983.[133] The central claim was based on the Fourteenth Amendment, asserting that the conditions deprived the youths of liberty without due process of law.[134] Although the complaint only sketches this claim in broad strokes, this was most likely intended as a substantive due process argument, alleging that the a fundamental liberty interest of the children was at stake.[135] The complaint also alleges that the conditions in the facility unlawfully abridged the juveniles' Eighth Amendment right to be free from cruel and unusual punishment, as well as their federal

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[130] Minors confined in juvenile correctional facilities have asserted federal right to treatment claims under three key theories, each of which is fatally flawed. The first theory bases the right to treatment on the fact that the traditional purpose of juvenile courts is to rehabilitate juvenile offenders; since the Fourteenth Amendment Due Process Clause requires a reasonable relationship between the governmental purpose of confinement and the conditions thereof, the state is obliged to serve that purpose by treating confined juveniles. This theory fails, however, because courts have also recognized a legitimate state interest in protecting the public from potentially violent youths. The second kind of due process claim, based on a *quid pro quo* theory that juveniles have a right to treatment in exchange for their surrender of procedural due process rights at the adjudication stage, has likewise been rejected. Finally, Eighth Amendment right to treatment claims fail in the detention center context, because the constitutional freedom from cruel and unusual punishment only attaches to those who have already been convicted of a crime. *See generally* Andrew D. Roth, *An Examination of Whether Incarcerated Juveniles Are Entitled by the Constitution to Rehabilitative Treatment*, 84 MICH. L. REV. 286 (1985).

[131] Telephone Interview with Kathleen Dumitrescu (Nov. 30, 1998). Suing federal rather than state court did have its benefits, and therefore was a rational choice. Plaintiffs' attorneys felt that they stood a better chance of being assigned a fair and impartial judge who would neither feel pressure from the conservative electorate to which she was directly accountable, nor would have other ties, obligations, or aspirations predisposing her to biases in favor of the state government.

[132] *Ex Parte Young*, 209 U.S. 123 (1908), established a cause of action under the Fourteenth Amendment for injunctive relief against violations by state officers of federal Constitutional rights.

[133] Complaint at 42. Section 1983 creates a private right of action for injunctive relief and damages through which private citizens may challenge persons who have violated their federal Constitutional or statutory rights "under color of any [state] statute, ordinance, regulation, custom, or usage."

[134] Complaint at 40.

[135] *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 537 (1979) (holding that adult criminal defendants may only be detained prior to trial to the extent necessary to achieve a legitimate governmental purpose, and not for punitive reasons).

Constitutional right to treatment under the Eighth and Fourteenth Amendments.[136] The confinement of children also allegedly violated their First Amendment rights to freedom of speech and association, as well as a right to placement in the least restrictive environment under the First and Fourteenth Amendments. Finally, the plaintiffs alleged that the denial of access to the courts violated their Sixth Amendment right to counsel.

The primary statutory ground for relief which the plaintiffs asserted arose under the Individuals with Disabilities Education Act (IDEA), which requires all school districts[137] receiving federal funds to provide every disabled student with a "free appropriate public education"[138] in the "least restrictive environment."[139] In addition, the complaint raises a claim under the Juvenile Justice Act, which requires states receiving federal funding to provide alternatives to incarceration where appropriate.[140]

As a remedy for these violations, the plaintiffs sought declaratory and injunctive relief, as well as attorney's fees and costs under 42 U.S.C. § 1988.

C. *The Defendants' Response*

Although Napper had expressed a willingness to be sued, his attorneys in the Georgia Department of Law adopted a much more adversarial attitude toward the litigation. Assistant

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[136] A right to treatment claim under the Eighth Amendment would not likely have been successful in the juvenile detention context, given cases such as *Ingraham v. Wright*, 430 U.S. 651 (1977) and *Youngberg v. Romeo*, 457 U.S. 307 (1982), both of which clearly state that the Eighth Amendment only applies to those who have been convicted of a crime. *See* Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Centers* 32 U.S.F. L. REV. 675, 677 (1998). However, at least one court has held that under a "reasonable relationship" standard, incarcerated juveniles do have a Fourteenth Amendment right to treatment where the state-defined purpose of incarceration is rehabilitation. *Alexander S. v. Boyd*, 876 F. Supp. 773, 796 (D. S.C. 1995).

[137] Under O.C.G.A. § 49-4A-12, the Department of Children and Youth Services is its own school district, and is therefore subject to the same requirements as all other public schools, including the IDEA.

[138] 20 U.S.C. § 1412(a)(1) (1999).

[139] 20 U.S.C. § 1412(a)(5) (1999).

Attorney General Cynthia Honssinger initially reacted with indignation and disbelief. Her response grew partly out of her ignorance about the conditions within the state's juvenile detention centers; having never visited any of the RYDCs, she had no idea that conditions within then could possibly be as problematic as the *Doe v. Napper* complaint claimed.[141]

Honssinger also felt that by filing a complaint when DCYS was sill so new, plaintiffs' attorneys were essentially hitting below the belt. She and her colleagues had been working hard ever since the establishment of DCYS to overhaul completely the "woefully out of date" policies and procedures governing all of the various juvenile facilities administered by the Department. Honssinger had been working tirelessly with DCYS administrators to update the old policies, and, in many cases, to draft entirely new ones. Once this process was complete, Honssinger was confident that the new policies would enable the agency administration to hold the street level bureaucrats within the system accountable for their work, which would in turn lead to real and meaningful changes in the conditions within the facilities. The defendants' resentment of the litigation was also strengthened by the fact that, by the time the lawsuit was filed, the Georgia state legislature had already made an unusually large budget allocation for the construction of a new detention center to replace the MRYDC; attorneys representing DCYS therefore believed that the state was well on its way to remedying the problems that the plaintiffs were alleging. By filing a lawsuit at this stage rather than waiting for DCYS to make the changes on its own, Dumitrescu forced DCYS administrators and attorneys to shift resources and attention away from their reform efforts an on to the extremely burdensome task of defending a lawsuit. In the final

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[140] 42 U.S.C. § 5633(a)(10)(A) (1999).
[141] Telephone Interview with Cynthia Honssinger (Jan. 16, 1999).

analysis, thought Honssinger, Dumitrescu and her colleagues would do more harm for their clients than good.[142]

Honssinger's initial reaction to *Doe v. Napper* provides support for the early theories about the limits of adjudication as an institutional reform strategy. First, the fact that Honssinger responded very differently than did Napper demonstrates Horowitz's assertion about the lack of coherence within the government agencies that are subject to suit.[143] While Honssinger's job was to zealously advocate for the state and defend against allegations of liability, Napper was more concerned with securing needed funding for his Department by any means. As Horowitz rightly points out, there would be no room for resolving these differences among state actors within the adjudicatory framework.

Honssinger's antagonistic instincts also validates the concern that the form of litigation constructs adversarial relationships which are not inherent or natural. Though Dumitrescu and Napper were both dedicated to the common goal of providing effective public programs and services for troubled youths, the lawsuit pitted them against each other rather than bringing them together to resolve their shared concerns.

D. *Discovery*

Believing that the conditions within the MRYDC constituted emergency conditions that must be eradicated immediately, plaintiffs sought to expedite the litigation process by immediately beginning discovery in *Doe v. Napper*. During this phase, Dumitrescu conducted a top-to-bottom inspection of the MRYDC; accompanying her was chief plaintiffs' expert Vincent

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[142] *Id.*

[143] Horowitz, *supra* note 26, at 1292.

Carbone, Ed.D., a certified behavior analyst specializing in the assessment, treatment, and education of children with behavioral disorders and other developmental disabilities.[144] Cynthia Honssinger also attended this inspection (her first ever visit to the MRYDC), as did Nathan Davis, the DCYS Director of the Division of Detention Services.[145]

Determined to be as thorough as possible, Dumitrescu and her experts arrived at the MRYDC at roughly six o'clock on the first morning of her inspection. After inspecting every inch of the facility, talking to the staff, collecting air samples, and poring over records, Dumitrescu was finally ready to leave at two in the morning. At the end of the day, she told Honssinger and Davis that she would be back the next morning promptly at seven, so that she could observe the shift change from the night to the morning staff, and watch the children wake up. Worn down by a long day of unpleasant work, the defendants were outraged by what they considered to be an unreasonable demand by Dumitrescu, and the first major shouting match of the lawsuit ensued. Ultimately, all parties returned to the MRYDC the next morning at seven o'clock, and they stayed through another six hours of inspection.[146]

Looking back, both sides now view that first complete inspection and the arguments that it produced as a pivotal moment in the life of *Doe v. Napper*. From Dumitrescu's perspective, it was crucial because it showed the defendants that she was "in for the long haul" – that she intended to advocate for her clients zealously and to the bitter end. In other words, she demonstrated for the defendants that defending against the lawsuit to the fullest extent would require a huge investment of time and resources on their part. On the other side of the case, the inspection was crucial for Honssinger because it opened her eyes to the reality of life for the

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[144] Telephone Interview with Kathleen Dumitrescu (Nov. 30, 1998).
[145] *Id.*

youths confined in the MRYDC. Between her own personal observations during the plaintiffs' walk-through inspection and the evidence she received from the expert whom defendants had hired to report independently on conditions in the MRYDC, Honssinger became convinced that not only were the factual allegations in the complaint true, but they were legally indefensible.[147] The logical next step for both sides was to begin negotiations.

IV. Establishing a Middle Ground: Early Settlement Negotiations

A. *Party Motivations*

Both the plaintiffs and defendants in *Doe v. Napper* decided to enter into settlement negotiations as a means of circumventing perceived shortcomings of adjudication as an effective means of realizing their goals. From the plaintiffs' perspective, a negotiated remedy would provide the opportunity to break out of the legal framework of rights and remedies. Dumitrescu knew that, if she took her case to trial, it would be hard to establish that many of the inhumane or unjust conditions alleged in the complaint actually constituted violations of the plaintiffs' constitutional or statutory rights. And if she did meet her burden of proving instances of unlawful state action, a judge would be able to issue injunctive relief only to the extent necessary to provide relief.[148] Through settlement, she hoped to convince the defendants to accept a remedy broader in scope and more rigorous in its requirements than any order that a federal judge could be expected to issue in such a case. Especially after having shown the defendants during her NRYDC inspection that she "meant business," she was confident that she

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[146] *Id.*

[147] Telephone Interview with Cynthia Honssinger (Jan. 16, 1999).

[148] *See, e.g.*, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971) ("[I]t is important to remember that judicial powers may be exercised only on the basis of a constitutional violation."); Miliken v.

could persuade defendants to agree to more demanding reforms in exchange for the opportunity to avoid having to put up a long a vigorous defense.[149]

In addition, although Dumitrescu originally believed that adjudication was necessary to speed up the reform process, she now felt that settlement would constitute an even faster track toward relief for her clients. Genuinely concerned about the youths in the MRYDC, Dumitrescu feared that with every day that went by another child would suffer inhuman disciplinary measures, or be denied adequate educational services, or that the facility would catch fire and the children would be trapped inside. The sooner reform efforts got underway, the better.[150]

In the Attorney General's office, Cynthia Honssinger and her colleagues likewise reached the conclusion that entering settlement negotiations would be to their advantage. The walk-through inspection conducted by the plaintiffs' attorneys was eye-opening for Honssinger, leading her to consider many of the plaintiffs' claims legally indefensible, and to predict that going to court would be disastrous for her clients. Having accepted that the implementation of some reforms in the MRYDC were inescapable, she reasoned that her clients would be better off participating in the creation of an appropriate remedy would be preferable to accepting whatever orders were ultimately handed down by a judge. Entering into settlement negotiations would enable defendants to consider a broader range of remedial options, and to ensure that their expertise weighed in to the decision-making process.[151] Honssinger ultimately took on the role of a "middle man" between her client and plaintiffs' counsel: on the one hand, she appreciated DCYS's interest in retaining autonomy over its own facilities, but at the same time she grew to

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Bradley, 433 U.S. 267, 280 (1977) ("[T]he nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation.").

[149] Telephone Interview with Kathleen Dumitrescu (Nov. 30, 1998).

[150] *Id.*

care about the treatment of the children confined in the MRYDC, and wanted to ensure that their needs were met.[152]

The parties' reasons for entering into negotiations thus reflected many of the features of settlement that scholars advocating settlement have identified. Carrie Menkel-Meadow, for example, has written that settlement responds more effectively that adjudication to the parties' needs, because it

> can avoid win/lose, binary results, provide richer remedies than the commodification or monetarization of all claims, and achieve legitimacy through consent. . . . Settlement fosters a communication process that can be more direct and less stylized than litigation, and affords greater flexibility of procedure and remedy.[153]

Once the parties made the initial decision to enter negotiations, the next step was to establish a form for the settlement process and for the agreement itself.

B. *Setting the Ground Rules*

The baseline for the negotiations was the plaintiffs' demand letter, drafted primarily by plaintiffs' experts. This initial offer was critical, because it allowed the plaintiffs to lay out the ground rules for the negotiations, including the form that the consent decree would take. From the very beginning, Dumitrescu insisted that the consent decree be very detailed, that its terms take the form of input rather than outcome measures, that it include self-monitoring devices, and that it designate specific individuals responsible for each reform. Dumitrescu believed that each of these elements would serve her central goal in crafting the agreement: to be able later on to

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[151] Interview with Cynthia Honssinger (Jan. 16, 1999).
[152] *Id.*
[153] Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 504-05 (1985).

monitor compliance with the agreement easily, making strict and efficient enforcement of the agreement possible, and real world changes in the MRYDC therefore almost certain.[154] Even later on in the negotiations, when the defendants took on the primary responsibility for drafting proposed terms, and the plaintiffs were in the position of responders, Dumitrescu's structural ground rules endured.

First, Dumitrescu and her colleagues insisted on an incredible level of detail and precision in all of the agreement's terms.[155] Every requirement was spelled out so exactly that there was as little room for differences of interpretation as possible. Dumistrescu believed that without defining precisely the measures that the MRYDC administrators and staff would be required to take, the plaintiffs would have no way to assess whether or not the defendants were in compliance with the agreement, and no way to hold them accountable.[156] According to Dumitrescu, a settlement agreement whose terms are framed in broad, fuzzy language – requiring, for example, "adequate" services or "reasonable" facilities – inevitably results in endless disputes over their interpretation, and therefore disagreements about the level of defendants' compliance. If the parties are unable to agree even as to whether the defendants have fulfilled their end of the bargain, it becomes impossible to move on to determine remedies for noncompliance. Only if every instance of noncompliance was clearly identifiable, Dumitrescu thought, would the defendants feel compelled to follow the agreement and improve conditions for the children confined in the MRYDC.[157]

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[154] Telephone Interview with Kathleen Dumitrescu (Nov. 30, 1999).
[155] Telephone Interview with Cynthia Honssinger (Jan. 16, 1999).
[156] Telephone Interview with Kathleen Dumitrescu (Nov. 30, 1998).
[157] *Id.*

The accountability and enforceability which Dumitrescu hoped to achieve was the product not only of the degree of detail, but also of the use of input rather than outcome measures to monitor compliance. Take, for example, the allegation that the youth's bedding was often unsanitary. The plaintiffs could have attempted to remedy this problem through an outcome measure such as: "the mattresses, pillows, and sheets on which the youths sleep will be kept clean, that is free of all dirt, mildew, bodily fluids, food particles, and vermin, at all times." This requirement is very detailed, and compliance would be easy to measure – it leaves very little flexibility, for example in the how "clean" bedding is defined. However, by instead requiring input measures – including that linens be washed weekly, that the mattresses be covered with flame retardant and anti-static ticking fabric, and that the mattresses be sanitized between each occupant with a disinfectant that controls bacterial growth and eliminates ectoparasites[158] – the plaintiffs eliminated an additional element of discretion. In addition to dictating the precise outcome, they defined exactly how this outcome would be achieved.

Another technique plaintiffs used to ensure accountability and enforceability in the settlement agreement was the use of self-monitoring devices, or requirements that defendants maintain documentation of the actions which they were required to perform. In the area of medical services, for example, the agreement required not only that syringes and sharp objects be bundled into groups of ten, placed in zip lock bags sealed with inventory control tape, and stored in a locked cabinet (i.e. very detailed input measures), but also that the medical staff keep an inventory control record of the date, number used, remaining balance, and user for each time a sharp medical tool is dispensed.[159] This extra step would also help ensure full implementation by

[158] Consent Decree, at 18 (Dec. 11, 1997).
[159] Consent Decree, Exh. I, at 15-16.

providing a ready-made tool with which the plaintiffs' counsel could monitor the defendants' compliance, and MRYDC administrators could regulate the actions of lower-level employees.

Finally, Dumitrescu sought to ensure that defendants would be accountable for the terms of the settlement by naming of precise individuals who would be responsible for implementing each reform. The agreement required, for example that one individual be designated as the Key Control Officer,[160] and that a Trades Craftsman be hired to complete weekly and monthly facility inspection checklists (a self-monitoring device) and conduct needed repairs.[161] If the plaintiffs knew precisely who was responsible for each reform, the plaintiffs' counsel (and the defendants) could more easily determine whether or not those persons were performing adequately.

The structure of the settlement agreement thus reflected the parties' newfound freedom from the constraints of full-fledged adjudication. The plaintiffs were able to insist on an outlook that actively contemplated the future consequences of their agreements, rather than limiting themselves to judges' traditionally backward-looking considerations of appropriate remedies for past wrongs. In addition, the parties could consider a broad range of remedial options, a liberty which enabled them to model many of their agreements on the guidelines for juvenile correctional facilities established by the American Correctional Association (ACA).

The use of the ACA Guidelines as a model for the consent decree was beneficial to both parties for a number of reasons. First, using a ready-made set of policies and procedures as a starting point for the negotiations helped speed up the settlement process for issues over which there was little disagreement. In addition, the parties' reliance on the ACA guidelines incorporated expert knowledge from the correctional profession into the decision-making

[160] Consent Decree, at 19.
[161] Consent Decree, Exh. N, at 1.

process. This expertise was helpful not only in compensating for the attorneys' generalist training, but also contributed strongly to the defendants' willingness to buy in to the agreements being made. The defendants were familiar with the ACA, because it ACA reviews the correctional facilities in Georgia each year, and had determined that a handful of the state's youth development centers were already in compliance with its standards.[162] Even more importantly, the defendants knew that the ACA's membership consists of the correctional officers and administrators throughout the country, so the ACA guidelines are ones which people situated similarly to the defendants have designed to impose upon themselves. As a result, the defendants in *Doe v. Napper* were more trusting that the ACA guidelines would not impose unreasonable burdens on them, and they worried less about allowing people who had no expertise or experience in juvenile corrections to dictate the policies and procedures which they would be required to implement.[163] Therefore, the settlement process seemed to succeed in producing a final remedy that the defendants would consider legitimate and reasonable, in a way that full adjudication might not have.

C. *Agreements in the First Year*

Once negotiations got underway, several issues were settled in quick succession, a result that seemed to validate both parties' belief that they could expedite the necessary reforms by abandoning complete adjudication in favor of negotiation and settlement. The first settlement terms accepted by both parties addressed precisely those problems which had led the plaintiffs to seek immediate judicial attention rather than waiting for the legislative process takes its normal

[162] Telephone Interview with Cynthia Honssinger (Jan. 16, 1999).
[163] Telephone Interview with Cynthia Honssinger, Jan. 16, 1999.

course. The defendants quickly agreed to ban hog-tying and restraints to fixed objects,[164] and to conduct one random fire drill on each shift per month.[165] These two agreements enabled the plaintiffs to take their time with the rest of the settlement, because they no longer worried about what they considered the two greatest threats to the MRYDC youths' physical safety. These two major concessions also reassured Dumitrescu that the defendants were willing to negotiate in good faith,[166] and therefore helped establish congenial, trusting relationships between the parties.

Over the course of the next months, the parties settled issues such as food service, the handling of keys and tools, and a comprehensive maintenance plan, without significant disputes.[167] These particular issues were easily resolvable in part because none of them touched on a sphere of the defendants' expertise. Unlike issues such as discipline or classification, correctional officers don't consider themselves experts in the proper handling of tools and keys, or in the service of food to inmates. The defendants were therefore more likely to admit shortcomings in these areas, and less likely to be protective of their discretion over them. As a result, they were more willing to subject themselves to a uniform policy on these issues.

The quickly resolved issues were also in many cases those for which the final settlement agreement closely mirrors the ACA guidelines. In the area of tool control, for example, the consent decree policy follows the ACA model format, includes almost all the same subheadings as the ACA model policy, and even replicates some of the policies themselves word for word.[168] The only difference between the model procedures and those agreed upon by the parties to *Doe v. Napper* is that the latter include certain provisions not covered in the ACA version. For

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[164] Telephone Interview with Kathleen Dumitrescu (Nov. 30, 1998); Consent Decree, at 9 (Dec. 11, 1997).
[165] Telephone Interview with Kathleen Dumitrescu (Nov. 30, 1998); Consent Decree, at 16 (Dec. 11, 1997).
[166] Telephone Interview with Kathleen Dumitrescu (Nov. 30, 1998).
[167] Telephone Interview with Cynthia Honssinger (Jan. 16, 1999).

example, the consent decree includes a section enumerating the types of tools that the youths are allowed to handle, designates storage space for those tools which cannot be displayed on a shadow board, and provides special procedures for the handling of cutting and welding tips. None of these provisions are included in the ACA Guidelines. A similar correlation between adherence to the ACA Guidelines and ease of settlement occurred in the area of key control.[169] In short, it seems that where the defendants were willing to accept the ACA Guidelines wholesale, issues were resolved very easily.

Throughout *Doe v. Napper*'s first year, attorneys on both sides of the case, along with DCYS administrators Nathan Davis(Director of the Division of Detention Services) and Steve Herndon (Director of the Office of Prevention, Program Development, and Evaluation) met on a weekly basis, spending hours at a time going paragraph by paragraph through the terms proposed by each side.[170] As a general rule, the defendants would take the first crack at drafting policies and procedures, and then the plaintiffs' attorneys would propose changes based on evidence provided by their experts.[171] By all accounts, the relationships across the table during this stage were friendly and imbued with mutual respect, despite the contentiousness of many issues.[172]

On April 18, 1994, slightly more than a year after the filing of the initial complaint, the plaintiffs submitted to the court its first report on the status of the settlement negotiations. The report reflected a high level of optimism among the parties, reporting that they had "worked together in a spirit of cooperation, confident that a mutually satisfactory settlement agreement

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[168] *Compare* Consent Decree, Exh. N, *and* American Correctional Association, GUIDELINES FOR THE DEVELOPMENT OF POLICIES AND PROCEDURES: JUVENILE DETENTION FACILITIES 93-94 (1991).
[169] *Compare* Consent Decree, Exh. Q, *and* American Correctional Association, GUIDELINES FOR THE DEVELOPMENT OF POLICIES AND PROCEDURES: JUVENILE DETENTION FACILITIES 91-92 (1991).
[170] Telephone Interview with Kathleen Dumitrescu (Nov. 30, 1998).
[171] *Id.*

can be worked out."[173] To validate this positive outlook, the report indicated that the parties had already made reached agreements or made substantial progress on a virtually every issue; of a total of seventeen different issues mentioned in the report, the parties indicated that all but eight (fire safety, education, discipline, issues relating to the physical plant, population, staffing, training, and the use of restraints) had been fully resolved. As to the remaining eight, the parties set forth a calendar of settlement meetings, and projected that all agreements would be finalized within the next few months.[174]

In addition to the relative speed of these settlement decisions, the settlement negotiations during the first year of *Doe v. Napper* illustrate several positive features of negotiation as opposed to adjudication as a means of effectuating institutional reform. First, negotiation enabled the parties to break free of the rigid rights and remedies framework that underlies all adjudication. Rather than limiting themselves to discussion of which of the plaintiffs' legal rights had been violated and how those violations could be remedied, the parties were able to consider more broadly which reforms would result in a more efficient administration of the MRYDC, and serve the plaintiffs' needs most effectively. Through this process, the parties also overcame the strict adversarial structure of adjudication. Although each side still stayed true to its own interests, the parties were in a better position to work to together, each contributing their own expertise to the discussion, listening to the arguments on the other side, and ultimately deciding on a mutually acceptable result.

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[172] *Id.*; Telephone Interview with Cynthia Honssinger (Jan. 16, 1999), Interview with Nathan Davis, in Atlanta, Ga. (March 29, 1999).
[173] *Doe v. Napper*, Status of Consent Negotiations, Filed April 18, 1994, at 1.
[174] *Id.* at 16.

V. SHORTCOMINGS OF SETTLEMENT

Though the parties achieved a great deal in the first year of negotiations, progress slowed significantly in the years that followed. Indeed, the parties would not sign the final consent decree until December 1997 – more than three and a half years after the first report on settlement negotiations was filed.

This remarkable slowing of the negotiation process was not merely the result of strong differences of opinion as to how the remaining issues should be resolved. Instead, the settlement process got bogged down by several features which are typically considered as special limitations either of legislation or adjudication. Although settlement bears many of the positive features of each of the two traditional strategies – sharing legislation's broader approach to problem-solving, for example, and the defendants' forced responsiveness in adjudication – it also carries with it some attributes of each strategy that serve as obstacles to meaningful institutional reform. By choosing settlement over traditional adjudication, the parties exposed themselves to the influence of such external factors as party politics and subsequent litigation which a judge would have disregarded. At the same time, however, the settlement process occurred in the shadow of the law, and the final agreement would ultimately have to be approved by the court, so the parties also had to concern themselves with certain legal constraints that would have been of no concern to legislative policy-makers.

A. *The Influence of Politics on Settlement Negotiations*

Unlike judges, who are supposed remain impartial and aloof of party politics,[175] the DCYS administrators bargaining for a settlement in *Doe v. Napper* were very beholden to the political climate in Georgia surrounding juvenile justice issues. Their political accountability became an issue of particular significance in *Doe v. Napper*, and substantially slowed down the progress of settlement negotiations, during the events surrounding the 1994 gubernatorial elections in Georgia.

Democratic Governor Zell Miller was seeking re-election, and one of the central issues on both sides of the gubernatorial campaign was the war on crime.[176] Miller came under severe attack from his Republican opponent, Guy Millner, for his progressive, non-punitive approach to juvenile justice.[177] The issue came to a head when the local media ran front page stories about an eleven year-old sex offender, released from a the MRYDC just nineteen days after his delinquency adjudication, who saw his seven year-old victim on the playground just outside the apartment complex where the assault had occurred.[178] Millner capitalized on this encounter,

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[175] *See* Chayes, *supra* note 19, at 1307; HOROWITZ, *supra* note 19, at 22.

[176] Ben Smith & Charles Walston, *Shake-Up at Youth Services: Politics: Napper Falls as Crime Issue Drives Campaign*, ATLANTA J. & CONST., Sept. 3, 1994, at C2.

[177] *Id.*

[178] Doug Payne, *Rapist, 11, Freed After 19 Days in Custody: 'This Is Outrageous': Young Victim, 7, Sees Attacker on Playground*, ATLANTA J. & CONST., Aug. 31, 1994, at A1. According to Cynthia Honssinger, the playground encounter between aggressor and victim that was so widely reported in the media never actually happened. She furthermore recalls that, at that time, George Napper conducted an investigation of the matter and uncovered no procedural errors on the part of the DCYS employees who made the decision to release the youthful offender after nineteen days of detention. Since everything had been done "by the books," Napper refused to take disciplinary action against any of his employees. It was this refusal to admit to any wrongdoing by his subordinates or to take any corrective action, says Honssinger, that led Zell Miller to blame Napper himself, and ultimately, to terminate him. Telephone Interview with Cynthia Honssinger (Jan. 16, 1999).

proclaiming, "When Zell looks in the mirror, he's got to say that he's the one responsible . . . The word on the street is that Georgia is not hard on criminals."[179]

With the public so strongly supporting a "get tough" approach, Miller's political viability suddenly depended upon his ability to prove that the meeting on the playground had happened in spite of, rather than because of, his leadership in the area of criminal justice. Miller had to take decisive, visible action to show that he, too, believed in holding youths accountable for their crimes, and in keeping Georgia's children safe by keeping criminals off the streets.

Miller needed a scapegoat, and he found one in George Napper. Though two years earlier he had hand-picked Napper to be a leader who would emphasize prevention over incarceration and rehabilitation over punishment, Miller now blamed Napper for releasing the juvenile sex offender prematurely, and announced, "The fact that I think we've got to get tough with tough kids has not penetrated that department."[180] To prove that he was as good as his word, Miller fired Napper in September 1994.[181]

By January 1995, Napper had been replaced by Eugene Walker, Ph.D., who has held the position to the present day. Unlike George Napper, whose greatest shortcoming was arguably his inability to play the political game of garnering legislative support for his programs, Walker had made his career in Georgia politics, having served for instance as a state senator for a number of years.[182] Walker demonstrated his political savvy in one of his earliest statements as the new DCYS Commissioner: "I believe in rigid discipline and I think people ought to be held accountable for their actions, but I believe this discipline ought to be administered with love and

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[179] Ben Smith & Charles Walston, *Shake-Up at Youth Services: Politics: Napper Falls as Crime Issue Drives Campaign*, ATLANTA J. & CONST., Sept. 3, 1994, at C2.
[180] *Id.*

appreciation, and not with indifference and hate. . . . We're going to send a message: We love you, but you are going to do right."[183] Unlike Napper, Walker would be no political liability; though he supported the compassionate, loving approach advocated by Democrats, he also took care to reassure voters that he believed in accountability, and would by no means be soft on juvenile criminals.

Just as he brought a new, harder hitting message to DCYS, Eugene Walker would bring a new attitude toward the defense of *Doe v. Napper*. Unlike George Napper, who all but invited Kathleen Dumitrescu to sue him and then adopted a very cooperative, almost collaborative, attitude in settlement negotiations, Walker was much more interested in mounting a strong defense. This difference in the leadership's attitude toward the litigation profoundly affected Cynthia Honssinger's job as lead counsel for DCYS. Unlike Napper, who would sign off on almost any reform that would force the legislature to allocate more funding for his department, Commissioner Walker reviewed the draft agreements with a fine-toothed comb, and firmly rejected any agreements that he thought were unreasonable or unrealizable.[184]

Commissioner Walker frustrated the settlement process in this fashion in the summer of 1996, at a point in the litigation when the parties thought that they had finally reached agreement on virtually every issue. In the final hour, Commissioner Walker insisted that the provisions in the settlement agreement capping the MRYDC's population at one youth per room, or a total of 41 youths, be revised. As far back as April 1994, the parties had reported to the court that they had agreed to make exception to the forty-one person cap only in cases of "extreme emergency ,"

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[181] *Id.*; *see also* John Head, *A Case of Misplaced Blame*, ATLANTA J. & CONST., Sept. 12, 1994, at A11 ("Tough is the image Zell Miller wants to project, so George Napper gets to be the scapegoat.").
[182] Interview with Nathan Davis, in Atlanta, Ga. (March 29, 1999).

and even then only for seventy-two hours.[185] Now, more than two years later, Commissioner Walker proposed a very different settlement term to address the overcrowding problem in the MRYDC:

> a) . . . the MRYDC may exceed the capacity of 41 youth (28 male and 13 female youth) until transfers may be arranged to other facilities, following appropriate notification to courts, law enforcement, case managers and parents/guardians.
> b)After occupying the *new* MRYDC building, DCYS will maintain a capacity of not more than 100 youth housed in the facility. The new MRYDC will be furnished with an adequate supply of temporary beds.[186]

Thus, Commissioner Walker effectively eliminated the emergency requirement prior to placing more than one child in each room of the old MRYDC, and he set the permanent cap for the new facility at two children per room.[187]

Kathleen Dumitrescu now likens this moment in the life of *Doe v. Napper* to that of a perfect soufflé that falls just as it is being carried from the oven to the table.[188] In one fell swoop, Commissioner Walker dismantled months of negotiations, sending the parties back to square one on a highly contentious issue. A letter from Cynthia Honssinger to the Kathleen Dumitrescu and Cathy Vandenberg one month later demonstrates how devastating a blow this modification by the Commissioner proved to be. After explaining at length the reasons why Commissioner Walker believed the modification was necessary, Honssinger concluded:

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[183] Mark Silk & Ken Foskett, *Hammonds Cites Family Concerns in Resigning: 'Hurts to Leave, but Mom Comes First'*, ATLANTA J. & CONST., Jan. 5, 1995, at C2.
[184] Telephone Interview with Cynthia Honssinger (Jan. 16, 1999).
[185] Status of Consent Negotiations, Filed Apr. 18, 1994, at 5.
[186] Substitute Provision for Consent Order, *attached to* Letter from Cynthia Honssinger to Kathleen Dumitrescu (June 4, 1996).
[187] The new MRYDC, which at this point had still not opened, would have fifty sleeping rooms, hence the one hundred person limit in the new facility.
[188] Telephone Interview with Kathleen Dumitrescu (Nov. 30, 1998).

> In recent conversations, you have both expressed understandable frustration over the need to allow for an increased number of youth in the new RYDC when for the last two years we have worked toward a consent order that would include a cap of one youth per room. . . . That the final word on this piece of our negotiations came after Legal Aid and the Department had agonized together for hours around the negotiating table is unfortunate, however, it does not have to cost everything we have all worked so hard to achieve.[189]

More than a year would pass before the final consent decree was signed, a delay caused at least in part by the political turmoil that forced Governor Miller to fire DCYS Commissioner Napper.

B. *The Influence of Subsequent Lawsuits*

Although judges are certainly bound by the holdings of similar cases that came *before* the one at hand, they may not include in their analysis the likely effect of their decisions on similar cases *still pending* in other courthouses. Instead, each case proceeds wholly independently, and not until final judgment has been in reached in one case may it have any effect on the outcome of the others. Under a settlement regime, however, nothing a bars a repeat defendant from taking into consideration all of the cases which it is then litigating. Such was the case in *Doe v. Napper*, in which DCYS considered the facts and possible remedies not only of that case, but also of other institutional reform cases subsequently filed.

In the spring of 1996, two similar cases were filed within a month of each other: the first was filed in March to challenge conditions in the Gwinnett RYDC in Lawrenceville, Georgia,[190] and the second, filed in April, addressed conditions in the Dalton RYDC.[191] Knowing that the kinds problems alleged in the three suits filed thus far were not isolated cases but rather were

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[189] Letter from Cynthia Honssinger to Kathleen Dumitrescu and Cathy Vandenberg (July 5, 1996).
[190] Maria Elena Fernandez, *Suit Alleges Crowding at Gwinnett Juvenile Jail*, ATLANTA J. & CONST., March 19, 1996, at E6.

representative of conditions throughout the system, DCYS administrators began to fear that they would ultimately have to face as many as twenty separate lawsuits -- one for each RYDC in the state of Georgia.[192]

This fear forced DCYS to adopt a more systemic approach to the negotiations in the Marietta case, such that they would agree to incorporate into the *Doe v. Napper* consent decree only those policies and procedures that they anticipated being able to adopt across the state. In a letter to the plaintiffs' attorneys, Cynthia Honssinger explained how the filing of additional lawsuits contributed to the unraveling of prior agreements about the population in the MRYDC:

> It simply is not feasible to cap the population at one center without creating an unrealistic expectation that the same standards will be applied in the other nineteen RYDCs. Throughout our negotiations . . . Nathan Davis and Steve Herndon regularly have reminded the rest of us that while our attention is focused on Marietta, they have to maintain a broader view of the entire system . . . The recent filing of two more conditions suits has validated their concerns and has contributed to a difficult decision on the commissioner's part to allow for accommodating more youth in Marietta.[193]

While these two lawsuits alerted the defendants to the need for policies and procedures that could be implemented throughout the state, a Department of Justice investigation of all Georgia's secure juvenile facilities, initiated on March 3, 1997, made this mandate explicit. *Doe v. Napper* was instrumental in attracting federal attention to Georgia's juvenile justice system. Attorneys in the US Department of Justice became aware of the inhumane conditions in Georgia's secure facilities for youth throughout the state largely via a book entitled *Modern Capital of Human Rights?: Abuses in the State of Georgia*,[194] which was published by the Human

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[191] *C.N.H. v. Walker,* Civil Action No. 4:96-CV-0078-HLM (N.D.Ga. 1996).
[192] Interview with Nathan Davis, in Atlanta, Ga. (March 29, 1999).
[193] Letter from Cynthia Honssinger to Kathleen Dumitrescu and Cathy Vandenberg (July 5, 1996).
[194] HUMAN RIGHTS WATCH, MODERN CAPITAL OF HUMAN RIGHTS?: ABUSES IN THE STATE OF GEORGIA (1996).

Rights Watch on the occasion of the 1996 Summer Olympic Games in Atlanta,[195] and brought to the attention of federal officials by former President Jimmy Carter. The book's chapter about children in confinement draws a great deal of its factual information from *Doe v. Napper*, citing affidavits of MRYDC inmates gathered in preparation for the lawsuit, the complaint, and interviews with Kathleen Dumitrescu and Cathy Vandenberg, throughout.[196] Drawing on this evidence, the chapter concludes that "many children [in Georgia] are confined in shamefully overcrowded, squalid and unsanitary institutions with inadequate programming."[197]

Once the Department of Justice informed Governor Zell Miller of its intention to use its power under the Civil Rights of Institutionalized Persons Act[198] to initiate a thorough state-wide inspection of Georgia's juvenile facilities, DCYS understood that the comprehensive policies and procedures which would inevitably be adopted would take on an entirely new character than they had initially envisioned. Rather than self-imposed aspirations, the new state-wide policies might now take the form of court-enforced mandates strictly monitored by the US Department of Justice. Fearing that the agreements reached in *Doe v. Napper* would be used as a model for an agreement that the state might negotiate with the Department of Justice, DCYS became much more cautious in its settlement negotiations with the plaintiffs in Marietta.

Although the state-wide perspective that defendants adopted during the course of negotiations in *Doe v. Napper* slowed the process down somewhat and translated into less stringent settlement terms in Marietta, this development can also bee seen as positively affecting the ultimate outcome of the case. If one of the chief criticisms of adjudication is that it occurs in

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[195] Interview with John Harbin, in Atlanta, Ga. (March 29, 1999).
[196] HUMAN RIGHTS WATCH, MODERN CAPITAL OF HUMAN RIGHTS?: ABUSES IN THE STATE OF GEORGIA 120-39 (1996).
[197] *Id.* at 120.

a piecemeal fashion, taking into consideration only one in set of interrelated problems at a time,[199] then the defendants' shift in focus toward a more holistic view of the problems in Georgia's detention centers was a step in the right direction.

Indeed, far from discouraging the development of comprehensive state-wide policies and procedures for Georgia's juvenile justice facilities, the plaintiffs' attorneys had strongly advocated such a change in focus. From very early in the litigation, Kathleen Dumitrescu became concerned not only with conditions in Cobb County's RYDC, but rather came to consider *Doe v. Napper* as a first step in a long term strategy to reform youth detention facilities throughout the state.[200] Similarly, John Harbin, who later took over the case for the plaintiffs,[201] repeatedly asserted that he hoped *Doe v. Napper* would lead DCYS not only to implement changes in the MRYDC, but also to reconsider its policies throughout the state. When the new MRYDC was completed, for example, Harbin told reporters that although he was pleased with the new facility and hoped that it would alleviate some of the overcrowding in Cobb County, "[t]hese things really need to be addressed statewide."[202] The plaintiffs' counsel, therefore, were constantly placed in the awkward (and ethically problematic) position of having to choose between fighting for the best bargain for their clients – the plaintiff class in *Doe v. Napper* – and accepting a solution that, while not the ideal result for the Cobb County youths, would on balance be the best solution for children across the state. Only through settlement negotiations could they attempt to strike a balance between these competing concerns.

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[198] 42 U.S.C. § 1997(a) *et seq.* (1998).
[199] *See* HOROWITZ, *supra* note 19, at 35; ROSENBERG, *supra* note 30, at 92.
[200] Telephone Interview with Kathleen Dumitrescu (Nov. 30, 1998).
[201] *See* discussion *infra* Part V.C.2.
[202] Charles Walston, *New Youth Detention Facility in Cobb a Prototype for the Future*, ATLANTA J. & CONST., May 23, 1997, at C11.

C. *Legal Constraints on the Settlement Process*

Political concerns and subsequent lawsuits both influenced the outcome of the *Doe v. Napper* settlement negotiations, even though they would not have played a role in a judge's decision if the case had gone to trial; both of these factors *would* have been influential in a purely legislative effort at reforming the MRYDC, however. At the same time, the settlement process in *Doe v. Napper* was also slowed down by two new statutory limitations on institutional reform litigation that were signed into law by President Clinton on April 26, 1996. These statutes represent the converse of the first two factors that impeded the course of settlement; in contrast to the political influences and subsequent cases, these statutory provisions *would* have played a role had the parties stayed within the traditional adjudicatory framework, but *not* if they had chosen to seek reform through purely legislative channels. In the final analysis, then, it seems that settlement sometimes represents the worst of both worlds.

1. The Legal Services Reform Act. – The first of these two statutes, the Legal Services Reform Act,[203] prohibits recipients of funding from the federal Legal Services Corporation (LSC) from initiating or participating in any new class action lawsuits;[204] for pre-existing class action suits, the Act requires recipients to cease participation in such lawsuits by August 1, 1997.[205]

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[203] *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134 , 110 Stat. 1321, 1321-53 - 57 (1996).
[204] Pub. L. No. 104-134, § 504(a)(7), 110 Stat. 1321, 1321-53 (1996).
[205] Pub. L. No. 104-134, § 508(b)(2)(B), 110 Stat. 1321, 1321-57 (1996).

For Kathleen Dumitrescu, who worked for a legal aid organization that received nearly half of its annual funding from the LSC,[206] this legislation was a knock-out punch. *Doe v. Napper* clearly fell within the Act's prohibition on class action litigation. And just in case she had any hopes of continuing to represent the children of the MRYDC by moving to decertify the class, she still would likely have been stymied by another provision prohibiting LSC funding recipients from representing prisoners.[207] After working tirelessly for three and a half years on what she considered to be the most important and the most rewarding case of her career, her only choice was to withdraw.[208]

This effect was just as true for a lawsuit in the midst of settlement negotiations as it would have been for one going to trial. As Galanter and Cahill have rightly pointed out, "settlement is not an 'alternative' process, separate from adjudication, but is intimately and inseparably entwined with it."[209] Parties to a settlement are constantly cognizant of the possibility that negotiations might break down and opposing counsel might take the case to court; in order to prevent this eventuality, each side must be careful not to demand substantially more than they could expect to get at trial.[210] When Congress enacted a statute prohibiting legal aid attorneys like Kathleen Dumitrescu from seeking adjudication in cases like *Doe v. Napper*, it was also therefore prohibitive of her ability to negotiate settlements in such cases.

Though Dumitrescu and her colleagues at Legal Aid of Cobb County did file a motion to withdraw from *Doe v. Napper*, they were unwilling to abandon their clients completely or to let the case die. Once it became clear that they would not be able to reach a final settlement by the

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[206] Motion of Plaintiffs' Attorneys to Withdraw, Filed July 26, 1996, at 2.
[207] Pub. L. No. 104-134, § 504(a)(15), 110 Stat. 1321, 1321-55 (1996).
[208] Telephone Interview with Kathleen Dumitrescu (Nov. 30, 1998).
[209] Galanter and Cahill, *supra* note 36, at 1389.

August 1 deadline, they started searching for private attorneys to take over the case for the plaintiffs. Dumitrescu recalls that the case was a hard sell, because the settlement negotiations had been deadlocked over the population and staffing issues for some time, which meant that the new attorneys would likely have to take the case to trial.[211] Combined with the recent Congressional restrictions on the recovery of attorneys' fees in prison conditions cases (see infra section VI.F), the case looked to prospective plaintiffs' attorney first and foremost like a huge drain on time and resources.

Ultimately, Dumitrescu persuaded Powell, Goldstein, Frazier, & Murphy, a major Atlanta firm where her husband was a partner, to take over the case for the plaintiffs. John Harbin, a partner in the firm's litigation department specializing in real estate and intellectual property work,[212] would take over as lead counsel on August 1, 1996. Harbin had been active throughout his career in pro bono activities, serving for example as the President of the Atlanta Volunteer Lawyers Foundation, but never before had he been involved in large-scale institutional reform litigation like *Doe v. Napper*.[213] He agreed to take over the case despite the unlikelihood of financial returns, because he believed it would present an interesting challenge, address important community issues, and potentially have a significantly impact on juvenile justice in Georgia.[214]

This turnover in representation for the plaintiff class significantly influenced the outcome of *Doe v. Napper*. Unlike Dumitrescu, who had devoted her entire career to representing the indigent, and could spend one hundred percent of her time on public interest work, Harbin

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[210] *Id.*
[211] Telephone Interview with Kathleen Dumitrescu (Nov. 30, 1998).
[212] *John Harbin*, <http://www.pgfm.com/attorneys/harbin.html>.
[213] Interview with John Harbin, in Atlanta, Ga. (March 29, 1999).

always had to balance his pro bono activities against his extremely demanding fee-generating work for the firm. He was not able to invest himself in *Doe v. Napper* in the same way that the legal aid attorneys had, both because of the time constraints under which he was working, and because he had not developed the same emotional interest in the plight of the MRYDC residents that Dumitrescu had acquired over the course of the litigation.[215]

John Harbin's inability to invest fully in *Doe v. Napper* manifested in his handling of the case over the course of the events that followed. Judge Carnes had administratively closed the case *sua sponte* almost two years earlier on September 9, 1994,[216] but the parties had continued negotiations as usual, and this judicial action had not up until now significantly influenced the progress of the case. By the fall of 1996, however, when settlement negotiations had come to a standstill and a trial seemed virtually unavoidable, it meant that the plaintiffs could only move forward by filing a motion to reactivate the case and reopen discovery.[217] Judge Carnes held a conference on this motion on December 17, 1996, and decided to hold the motion in abeyance while the parties made final efforts to settle the case. She ordered the parties to report back to her on the status of the negotiations by February 1.[218]

The first of February came and went, and John Harbin did not submit a status report to the court. To be fair, the previous weeks had marked a relatively turbulent time in the life of the lawsuit, as Cynthia Honssinger left the state of Georgia and David Hooker took over as the sole attorney for DCYS. Harbin attempted to contact opposing counsel about the report on January

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[214] *Id.*
[215] Telephone Interview with Cynthia Honssinger (Jan. 16, 1999); Telephone Interview with Kathleen Dumitrescu (Nov. 30, 1998).
[216] Order of Dismissal, Issued Sept. 9, 1994.
[217] Plaintiffs' Motion to Reactivate Case and Reopen Discovery, Filed Oct. 29, 1996.
[218] Affidavit of John W. Harbin, Filed July 15, 1997, at 2.

31[219] and again on February 3,[220] but received no response. Three weeks later, on February 24, Judge Carnes issued a decision denying the plaintiffs' motion to reopen the case, and setting March 28 as the final deadline by which plaintiffs could renew their motion.[221]

March 28, like the deadline before it, passed without any response to the court by Harbin. Instead, Harbin attempted to continue settlement negotiations, presenting the defendants with a new proposed consent decree in early April.[222] David Anderson Hooker, whose primary goal was to be a zealous advocate DCYS rather than to settle the case amicably, saw that he now had the upper hand, and he refused to continue to negotiate a settlement for a case that seemed to be officially closed.

Faced with the reality that *Doe v. Napper* was on the verge of evaporating before his very eyes, John Harbin finally filed a renewed motion to reopen the case on July 15, 1997. His explained his failure to file this motion by the March 28 deadline as follows:

> When I received the Court's February 24, 1997, Order, I was upset, both at myself for failing to ensure a report was filed by February 1, 1997, and at the situation in that the difficulties in obtaining a signed agreement seemed to be continuing. Because of being upset, I did not read all of the Court's Order of February 24, specifically the portion containing the March 28, 1997, deadline for making a new submission to the Court.[223]

Although the court responded by ordering the parties to continue negotiations in good faith[224] and ultimately reopened the case in October 1997,[225] John Harbin's involvement in *Doe v. Napper* certainly created setbacks in the case's progress toward settlement. During his first year

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[219] *Id.* at Exh. 1.
[220] *Id.* at Exh. 2.
[221] Order Denying Plaintiffs' Motion to Reactivate case and Reopen Discovery, Issued Feb. 24, 1997.
[222] Affidavit of John W. Harbin, Filed July 15, 1997, at 5.
[223] *Id.*
[224] Letter from David Anderson Hooker to Judge Julie E. Carnes 1 (Sept. 23, 1997).
[225] Joint Report to the Court, Filed Oct. 27, 1997, at 1.

as plaintiffs' counsel, Harbin not only failed to alleviate the impasse in negotiations which he had inherited, but he exacerbated it by allowing the case to be officially closed, thereby enabling the defendants to refuse to negotiate, and nearly losing the case altogether. When the case finally got back on its feet, Harbin was in a much weaker bargaining position.

2. The Prison Litigation Reform Act. – On the very same day as the Legal Services Reform Act became law, so did the Prison Litigation Reform Act (PLRA),[226] which severely limited prisoners' ability to obtain injunctive relief in a federal court action challenging the conditions of their confinement. As with the Legal Services Reform Act, *Doe v. Napper* clearly fell within the PLRA's scope; the statute defines "prison" broadly as "any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for violations of criminal law."[227] And just as with the Legal Services Reform Act, this new piece of legislation significantly influenced the progress of the case, despite the fact that the parties had attempted to free themselves of the legal constraints of adjudication by opting for settlement.

Indeed, one of the central provisions of the PLRA is specifically designed to prevent parties in prison reform litigation from escaping the narrow focus characteristic of traditional adjudication. Specifically, the PLRA undercuts the parties' ability to broaden their inquiry by prohibiting federal courts from ordering any injunctive relief in prison conditions cases broader in scope than would be necessary to remedy actual violations by the defendants of the plaintiffs' federal rights; the Act further requires that all injunctions ordered in such cases be narrowly

[226] 18 U.S.C. § 3626 (1996).
[227] 18 U.S.C. § 3626(g)(5) (1996).

tailored to provide relief through "the least intrusive means necessary to correct the violation."[228] Unlike Chayes and Horowitz, who identified the narrowness of adjudication as one of its drawbacks, and the ability to consider a broader range of problems and solutions as one of the merits of alternative forms of problem-solving, the PLRA sought to confine judges to the traditional limitations of adjudication in the prison reform context. This limitation reaches not only to those remedies ordered directly by the court, but also to court-enforceable consent decrees.[229] Therefore, at least in theory, the PLRA permitted the court to enter the *Doe v. Napper* consent decree only if its terms imposed upon the defendants only those remedies which were necessary to eliminate admitted or proven federal Constitutional or statutory violations.[230]

This limitation on the scope of consent decrees had the potential to dismantle almost completely the agreements that the parties to *Doe v. Napper* had reached through three years of negotiations. The parties could not have agreed that all the settlement terms constituted remedies for violations of the plaintiffs' federal rights, because the defendants had not admitted to having violated their rights. Some of the terms, such as the tool control and staff training provisions, could only with difficulty be framed as remedies for rights violations even if the defendants were willing to admit shortcomings in these areas, because they did not directly abridge any of the plaintiffs' Constitutional or statutory rights. Only if problems such as inadequate staff training or lack of tool control led to violations of the plainitffs' legally cognizable rights would such remedies be narrowly tailored enough for the purposes of the PLRA.

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[228] 18 U.S.C. § 3626(a)(1)(A) (1996).
[229] 18 U.S.C. § 3626(c)(1) (1996).
[230] For a more complete discussion of the effect of this PLRA provision on the crafting of consent decrees in conditions cases, see Deborah Decker, *Consent Decrees and the Prison Litigation Reform Act of 1995: Usurping Judicial Power or Quelling Judicial Micro-Management?*, 1997 WIS. L. REV. 1275 (1997).

In many cases, terms in the settlement agreement overreached the scope not only of rights violations admitted to by the defendants, but also of violations alleged in the *Doe v. Napper* complaint. Though the draft consent decree required defendants to develop and distribute a new orientation manual for youths in the MRYDC,[231] for example, nowhere in the complaint did the plaintiffs make allegations concerning the inadequacy or absence of such a manual prior to the lawsuit. It seems unlikely that such provisions – designed to address problems that were not alleged, much less admitted – would pass muster under the PLRA.

In addition to the limitations on the scope of consent decrees, the PLRA imposes a ban on prisoner release orders,[232] defined as any order "that has the purpose or effect of reducing or eliminating the prison population,"[233] at least until other less restrictive remedies for overcrowding have been tested and failed. This requirement also had the potential to undo a major part of the consent agreement that had been negotiated thus far. One of the major sticking points in the negotiations had been the issue of how adequately to alleviate the acute overcrowding in the MRYDC without over-burdening other RYDCs, which themselves were routinely operating over capacity. With the enactment of the PLRA, the defendants suddenly gained a great deal of bargaining power with which to hold off the plaintiffs' demands for a strict population cap at the MRYDC.

The PLRA also limits the extent to which prevailing plaintiffs' attorneys in prison conditions cases can recover attorneys' fees under 42 U.S.C. § 1988. Specifically, Section 803(d) of the PLRA, codified as 42 U.S.C. § 1997e, places limits on the hourly rates used to determine fee awards for prevailing plaintiff's attorneys in prison reform cases. Under the Act,

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[231] Status of Consent Negotiations, Filed Apr. 8, 1994. at 8.
[232] 18 U.S.C. § 3626(a)(3)(A) (1996).

attorney's fee awards cannot exceed 150 percent of the maximum hourly rate for court-appointed counsel under the federal criminal code,[234] which generally caps attorney's fees at sixty dollars per hour for in court expenses, and forty dollars per hour for out-of-court expenses.[235] These provisions are much more restrictive than the Section 1988 fee awards for other types of civil rights cases, for which a judge may base attorney's fees on an hourly rate commensurate with prevailing market standards, determined relative to the fees of other attorneys in the community with comparable skills.[236] By imposing these restrictions on fee awards, the PLRA severely limits the financial feasibility for plaintiffs' attorneys of investing as much time in prisoner cases as necessary to represent their clients effectively. In *Doe v. Napper*, this limitation on attorney's fees made it all the more difficult for Kathleen Dumitrescu to locate a private attorney willing to take over the case for the plaintiffs after the Legal Services Reform Act became effective.

Finally, the PLRA makes all prospective injunctive relief in prison conditions cases subject to a motion to terminate by any party after two years; the judge may grant such a motion unless the plaintiffs successfully demonstrate that an ongoing necessity to remedy still present violations of federal rights. [237] Though this provision did not directly effect any of the settlement terms which the parties had already agreed upon when the PLRA came down the hatch, it did impose a restriction on the kinds of monitoring and enforcement arrangements which they would likely be able to implement. The parties apparently interpreted this provision to mean that, since no rights violations were ever proven in *Doe v. Napper*, no defense would be available to the plaintiffs should the defendants move to terminate two years after the decree was entered.

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[233] 18 U.S.C. § 3626(g)(4) (1996).
[234] 42 U.S.C. §1997e(d)(3) (1996).
[235] 18 U.S.C. §3006A(d)(1) (1999).
[236] *See, e.g.*, City of Riverside v. Rivera, 477 U.S. 561 (1968).

Though this interpretation was almost certainly erroneous, it led the parties to impose only a two-year period of monitoring and continuing court jurisdiction subsequent to the decree.

The combination of all of these provisions threatened to unravel the draft consent agreement in *Doe v. Napper* almost completely, and the limitations on attorney's fees placed a high cost for the plaintiffs' attorneys on continuing their efforts to the fullest extent. Luckily for the plaintiffs, however, the defendants chose not to insist upon strict enforcement of the PLRA with respect to the *Doe v. Napper* consent decree.

It might seem odd that David Hooker, who had adopted a much more adversarial approach than Honssinger from the very beginning, did not jump at the opportunity to free his client of the many burdensome requirements that the consent agreement would impose. He did however have well-reasoned justifications for not using the PLRA to this effect despite his full awareness of its potential.[238] First, Hooker knew that the alternative to completing the settlement negotiations would be to take the case to trial. Given the time and resources that would be necessary to try the case, and Hooker's belief that Judge Julie Carnes would be sympathetic to the plaintiffs' juvenile justice reform efforts, a full-blown trial was hardly an attractive option.[239] Completing the settlement negotiations seemed comparatively painless, given the extensive progress which had already been made. In addition, the defendants' strategy of using the settlement agreement in Marietta as a model for the policies and procedures that DCYS planned to implement across the state made the consent decree seem less burdensome for the defendants than one might otherwise expect. Since DCYS was careful to bind itself to only those terms

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[237] 18 U.S.C. § 3626(b)(1)(A)(i) (1996).
[238] Telephone Interview with David Anderson Hooker (Jan. 29, 1999).
[239] *Id.*

which it was prepared to implement in all 20 RYDCs, having those policies spelled out in a court-enforced consent decree imposed little additional burdens upon the defendants.[240]

The defendants' willingness to circumvent many of the PLRA's limitations did not, however, mean that the enactment of the PLRA had no effect upon the progress of settlement negotiations in the case. If nothing else, it slowed the process down by imposing upon the parties the extra burden of drafting a consent decree that would be satisfactory to Judge Carnes and enforceable by the court despite its failure to comply with the Act's restrictions on consent decrees. A 1997 letter from David Hooker to Judge Carnes, which "details the obstacles to final settlement,"[241] indicates that the issue of how to meet the requirements of the PLRA was one such stumbling block.[242] A joint report to the court, filed on October 27, 1997, also demonstrates that the PLRA issue gave rise to disputes between the parties, and indeed was one of the last issues to be resolved: "only two issues remain outstanding: (1) language contained in the Preamble and (2) certain minor adjustments to the educational provisions . . . [T]he parties have not yet reached agreement concerning what language to include in the preamble of the settlement documents to meet the stated requirements of the Prison Litigation Reform Act."[243]

The final consent decree in *Doe v. Napper* contains a few sentences which summarily dispose of the obstacles raised by the PLRA; they simply provide that "the parties agree that this Stipulation and Consent Decree complies in every respect with the provisions of 18 U.S.C. Section 3626(a),"[244] and that "the relief set forth herein is narrowly draw, extends no further than necessary to correct prior and alleged violations of federal rights of the Plaintiffs, and is the least

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[240] *Id.*
[241] Letter from David Anderson Hooker to Judge Julie E. Carnes 1 (Sept. 23, 1997).
[242] *Id.* at 3.
[243] Joint Report to the Court, Filed Oct. 27, 1997.

intrusive means necessary to correct any such violations."[245] Though these efforts to contract around the PLRA might very well be struck down if ever challenged in court, the fact that the defendants bargained for and agreed to them suggests that they won't ever be subject to such judicial scrutiny.

VI. The Consent Decree

Though the handling of the PLRA issue in the *Doe v. Napper* consent decree is simple and concise, the rest of the document is everything but that. Approximately five hundred pages long, the consent decree contains exhaustive policies and procedures covering eighteen different aspects of the MRYDC's administration: population and staffing, recreation, orientation, post orders, staff training, use of force, logging, urine check procedures, medical and mental health services, education, discipline, classification, fire safety, facility maintenance, sanitation and hygiene, food service, key control, and emergency planning.[246] Though scholars such as Marc Galanter would consider it impossible to measure the success of the *Doe v. Napper* settlement without an identical adjudicated case to compare it to,[247] it is possible to assess the extent to which the settlement process succeeded in overcoming the limitations inherent in the traditional adjudication and legislation paradigms.

For example, one key criticism of adjudication is that it provides too narrow a set of remedies, both by addressing only those problems that constitute rights violations, and by limiting the scope of each remedy to the minimum action necessary to stop the violation. To the

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[244] Stipulation for Consent Decree, Entered Dec. 11, 1997, at 2.
[245] *Id.* at 3. Interestingly enough, the preamble also stipulates that by entering the consent decree the defendants have not admitted to having violated any of the plaintiffs' federal rights. *Id.*
[246] Consent Decree, Entered Dec. 11, 1997.

extent that the *Doe v. Napper* consent decree reflects a broader spectrum of remedies, we can consider it a success.

The breadth of remedial options included in the consent decree is reflected in the variety of ways and extents to which the parties utilized the ACA Guidelines in crafting an agreement to alleviate different problems in the MRYDC. In several areas, the terms of the consent decree essentially mirror the ACA model policies and procedures for juvenile detention centers. In addition to the provisions for tool and key control discussed above,[248] the ACA Guidelines were followed quite strictly in such areas as staff training, medical and mental health services, and emergency planning.

In each of these sections there are also minor points of divergence from the ACA standards, thus demonstrating the parties' flexibility to negotiate compromise solutions well-suited to the particular circumstances of the case. These deviations from the ACA norms usually take the form of additional provisions in the consent decree not suggested by the ACA. In the emergency procedures section, for example, the consent decree provides detailed plans not only for such eventualities as hunger strikes, riots, bomb threats, hostage crises, and suicide attempts as suggested by the ACA, but it also details procedures not contemplated by the ACA Guidelines, including steps to be taken in case MRYDC staff go on strike, or should a youth get caught in the razor wire while attempting to flee the facility.[249] Similarly, though the consent decree's provisions regarding mental health and medical screening, routine health care, distribution of medication, and medical facilities and equipment are clearly modeled after the

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[247] Galanter, *supra* note 36, at 1346-47.
[248] *See* discussion *supra* Part IV.C.
[249] *Compare* Consent Decree, at Exh. R, *and* American Correctional Association, GUIDELINES FOR THE DEVELOPMENT OF POLICIES AND PROCEDURES: JUVENILE DETENTION FACILITIES 100-02, 111-12 (1991).

ACA standards, the consent decree goes the extra mile in its health care section by including specific medical staffing requirements.[250]

Certain parts of the consent decree – most notably the sections relating to discipline, education, and population – differ more significantly from the ACA Guidelines than those sections discussed thus far. With respect to education and discipline, the *Doe v. Napper* consent decree imposes much more extensive requirements than the ACA contemplates, but in the area of population, the consent decree's requirements are more lenient than those set forth by the ACA.

Despite the parties' flexibility in considering a variety of remedial options, their negotiations by no means constituted some kind of remedial free-for-all; instead, certain well-established legal norms clearly remained within the parties' cognizance, and served as limits on their creativity. In the area of education, for example, the parties disagreed widely about what kinds of services would adequately meet the needs of the youths within the MRYDC, but ultimately they were constrained by the legal framework imposed by the federal Individuals with Disabilities Education Act(IDEA), [251] and the Georgia Board of Education Special Education Rules[252] promulgated under it. Accordingly, the final agreement requires educational staff in the MRYDC to identify and evaluate children with disabilities, and develop and implement individualized education plans (IEPs) that will ensure that their educational needs are met in the least restrictive environment available.[253] For those youths who were already receiving special education services prior to confinement, the consent decree requires that the MRYDC obtain

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[250] *Compare* Consent Decree, at Exh. I, *and* American Correctional Association, GUIDELINES FOR THE DEVELOPMENT OF POLICIES AND PROCEDURES: JUVENILE DETENTION FACILITIES 156-73 (1991).
[251] Consent Decree, at Exh. J.
[252] Georgia Board of Education Division for Exceptional Students, Chapter 160-4-7, Special Education Rules, *reprinted in* Consent Decree, at Exh. J.
[253] *Compare* Consent Decree, at Exh. J *and* 20 U.S.C. § 1412 *et seq.*

their IEPs from their home school districts and implement them fully.[254] For each aspect of these requirements, the consent decree additionally requires that the MRYDC teaching staff maintain detailed documentation of their actions.[255]

Though the establishment of DCYS as a separate school district under Georgia law[256] quite clearly imposes upon the Department all the same legal obligations incurred by all school districts in the state (including special education provisions), the defendants in *Doe v. Napper* strongly resisted the educational terms of the consent decree. Given the high turnover rate of children in the MRYDC, and the relatively high percentage of those children who have special educational needs, the defendants knew that subjecting themselves to IDEA compliance would impose monumental burdens on its educational staff.[257] Ultimately, however, DCYS felt that it had no choice but to agree to comply with the special education mandates insisted upon by the plaintiffs and required under federal law.

In addition to the limited problem-solving freedom which settlement provides, it also allows the parties to incorporate a rich consideration of expert opinions into their decision-making process. In so doing, the parties overcome another key criticism of formal adjudication: that it places critical decisions about the administration of highly specialized institutions in the hands of generalist judges.[258] Throughout the negotiations in *Doe v. Napper*, DCYS administrators Nathan Davis and Steve Herndon actively participated in decision-making, as did plaintiffs' expert Dr. Vincent Carbone. Though each of these experts would also have been able to testify had the case gone to trial, their participation was more meaningful in the settlement

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[254] Consent Decree, at Exh. J.
[255] *Id.*
[256] O.C.G.A. § 49-4A-12 (1999).
[257] Telephone Interview with Cynthia Honssinger (Jan. 16, 1999).

process. Rather than limiting their input to answering the attorney's direct and cross-examination questions, the experts were able to discuss issues with each other directly – each presenting all evidence to support their views, listening to the other side, raising concerns, and responding accordingly.

The expert's participation in the crafting of the *Doe v. Napper* consent decree manifests perhaps most clearly in the section on disciplinary practices. Certain parts of this section are relatively conventional, falling in line to a large extent with the guidelines set forth by the ACA. The consent decree requires, for example, that every child receive a handbook outlining the disciplinary rules, that youths not be confined for more than twenty-four hours for minor violations or seventy-two hours for major violations without the Director's approval, and that a disciplinary hearings be conducted when youths are confined for major violations.[259]

The centerpiece of the consent decree's disciplinary section, however, is the comprehensive behavior management system which it requires the MRYDC staff to implement, the likes of which is nowhere in the ACA standards. The behavior management system, master-minded by plaintiffs' expert and behavioral specialist Vincent Carbone,[260] is an intricate point system through which youths can earn points for enumerated positive behaviors during each part of the daily routine (e.g. two points may be earned at breakfast, five during recreation, and three at bedtime), and lose points for violating the disciplinary rules. Points are recorded throughout the day on a special card which each child is responsible for carrying, and then transferred each night onto a master point record. Youth may then use these points to buy certain privileges, such

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[258] *See* HOROWITZ, *supra* note 19, at 31.
[259] *Compare* Consent Decree, at Exh. K, *and* American Correctional Association, GUIDELINES FOR THE DEVELOPMENT OF POLICIES AND PROCEDURES: JUVENILE DETENTION FACILITIES 117-22 (1991).
[260] Telephone Interview with Kathleen Dumitrescu (Nov. 30, 1999).

as phone calls (seventy-five points), sleeping in on Saturday (fifty points), and extra library privileges (twenty-five points).[261]

Kathleen Dumitrescu and Cynthia Honssinger both recall that the behavior management system was one of the most contentious issues of the lawsuit, with the plaintiffs insisting that it be adopted, and the defendants maintaining that their staff needed to have the discretion to use more punitive practices to control the juveniles' behavior.[262] Because he had the opportunity to produce copious evidence and examples that these kinds of behavior management systems can and do work, Carbone was eventually able to persuade the defendants that it was worth trying.[263]

Finally, the settlement process in *Doe v. Napper* was successful in ensuring that the problems within DCYS would not be addressed in the piecemeal fashion that is typical of formal adjudication.[264] Instead, the defendants were able to consider the negative consequences that each decisions would have on all of the other RYDCs, and to make demands accordingly. The defendants' system-wide approach had the greatest impact on the resolution of the overcrowding problem in the MRYDC. Unlike the draft consent decree submitted to the court in April 1994, which capped the population at one child per room,[265] the final version entered by the court allowed the defendants to house as many as one hundred youths, or two per room, in the new MRYDC.[266] The only limitations on this population cap are that male and female youths must be housed in separate wings, that all rooms must be filled with one youth before a second youth is placed in any room, and that decisions about which youths to double-bunk be based on

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[261] Consent Decree, at Exh. K.
[262] Telephone Interviews with Cynthia Honssinger (Jan. 16, 1999) and Kathleen Dumitrescu (Nov. 30, 1998).
[263] *Id.*
[264] *See* HOROWITZ, *supra* note 19, at 35.
[265] Status of Consent Negotiations, Filed Apr. 18, 1994, at 5.
[266] Consent Decree at 4.

such factors as the seriousness of their alleged crimes, their expected dangerousness or vulnerability, and their health.[267]

These population requirements do not satisfy the ACA standards for juvenile detention centers. The ACA requires that rooms be "primarily designed for single occupancy" and contain thirty-five square feet of unencumbered floor space per occupant, and that no more than twenty percent of the total population reside in double or multiple occupancy rooms.[268] Based on my observation of the rooms in the new MRYDC, I would be willing to believe that each room has thirty-five square feet of unencumbered space, but certainly not double that, as would be required for two person occupancy.[269] The consent decree also does not impose upon the defendants the ACA requirement regarding the percentage of the facility's rooms that may accommodate more than one youth.

In addition to its lengthy substantive requirements, the consent decree sets forth a much shorter list of terms governing the monitoring and enforcement of its implementation. It names Dr. Vincent Carbone as the expert monitor, and also empowers the plaintiffs' attorneys to monitor defendants' compliance with the consent decree.[270] It requires Dr. Carbone to conduct on-site monitoring visits and produce written reports semi-annually, and requires defendants to produce for the plaintiffs' attorneys a whole host of records documenting their compliance three times per year.[271] In addition, the decree requires defendants to pay for Dr. Carbone's monitoring work.

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[267] *Id.* at 4-5.
[268] American Correctional Association, GUIDELINES FOR THE DEVELOPMENT OF POLICIES AND PROCEDURES: JUVENILE DETENTION FACILITIES 70-71 (1991).
[269] On-Site Visit to the Marietta Regional Youth Detention Center (March 29, 1999).
[270] Consent Decree at 20.
[271] *Id.*

In the event that plaintiffs discover instances of noncompliance, they must first notify defendants of the problem; if the defendants' response is unsatisfactory to plaintiffs, the parties must attempt to resolve the dispute through mediation before going back to court.[272] Defendants are allowed to make good faith modifications to the consent decree, but only if such changes are presented to the plaintiffs in writing; again, disputes must go to mediation before the parties can return to court.[273] Finally, the consent decree specifies that the plaintiffs' right to monitor compliance and the court's jurisdiction over the case will automatically terminate two years after the decree is entered, unless there is a contempt motion pending, or the court otherwise orders.[274] Although the decree conditions "automatic" termination upon "satisfactory compliance with the terms and conditions of the Consent Order," it does not set a clear standard for the circumstances under which the judge could elect not to terminate jurisdiction.[275]

VII. Implementation and Monitoring

Since the consent decree was entered a year and a half ago, the implementation of its terms has progressed steadily and uneventfully. Throughout the new facility, visible, tangible signals of the lawsuit's impact abound. The facility as a whole is extremely clean and odor free, and the temperature in the building is comfortable. Each individual cell contains a bed raised off the floor, as well as a toilet and wash basin. Post orders are prominently displayed on the walls throughout the facility. In the central control room, restraints and pepper spray are each stored in their own locked cabinets along with a log where each use is recorded, and rings of keys are

[272] *Id.* at 26.
[273] *Id.* at 27.
[274] *Id.*
[275] *Id.*

organized on a shadow board in a key cabinet that also contains a special log. Fire safety is ensured through such features as a sprinkler system, centralized electronic locking system, and strategically located fire extinguishers.[276]

Despite the defendants' initial reservations, the behavior management system is being implemented, and according to MRYDC staff, it is working.[277] Every youth carries in his chest pocket a three-by-five inch card where points earned, lost, rebated, and spent are meticulously recorded.[278] MRYDC Director Leander Parker reports that he was resistant to the behavior plan at first, but after a six month struggle to fine-tune the system and to inure his staff it, he became a strong advocate for it.[279] He says that the success of the behavior management system depends on the full cooperation of the staff who implement it, but once he overcame that hurdle he found it to be "a very useful tool to control the kids' behavior."[280] Even if it were not required by the consent decree, says Parker, he would continue to use the behavior management system in the MRYDC. Parker even believes that the behavior management system designed by Carbone for the MRYDC should and probably will eventually be implemented in RYDCs across the state.[281]

Other aspects of the consent decree, such as the educational component, have yet to be fully implemented. According to Leander Parker, the paperwork required to maintain updated educational records, and to develop and implement IEPs for every disabled student, is simply too burdensome for his teachers to sustain. As a result, Carbone's first monitoring relates that

[276] On-Site Visit to the Marietta Regional Youth Detention Center (March 29, 1999).
[277] Interviews with Jake Smith and Leander Parker, in Marietta, Ga. (March 29, 1999).
[278] On-Site Visit to the Marietta Regional Youth Detention Center (March 29, 1999).
[279] Interview with Leander Parker, in Marietta, Ga. (March 29, 1999).
[280] *Id.*
[281] *Id.*

> the procedures for identifying all special education students is inadequate and therefore does not comply with the consent decree. . . . In addition, lesson plans designed to meet individualized goals on students IEPs could not be identified . . . suggest[ing] that IEPs may be documents developed to meet a compliance obligation but have limited connection to individualized classroom instruction required for all special education students.[282]

Not only has compliance with the special education requirements been inadequate to date, but it does not seem likely to improve. Parker reports that he has a very hard time finding and then keeping teachers certified in special education, and he believes that the teacher currently in that position is doing the best job that could be hoped for.[283] He also doubts that as high a percentage of the children in the MRYDC have disabilities as Carbone estimates, and therefore does not agree that as many children require special education services.[284]

Another area of continuing concern is overcrowding in the MRYDC. Although defendants have complied with the terms of the consent decree,[285] the children's sleeping rooms are too small,[286] and the other facilities are simply inadequate to house as many youths as the consent decree allows. On the day of my visit, for example, one group of students was having class in a makeshift classroom created by partitioning off a portion of the gym, and the girls were using a group of tables in the cafeteria as their classroom. Leander Parker also complained that the medical clinic is woefully small, and that there was inadequate space for meetings and staff

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[282] Monitoring Report, Prepared by Dr. Vincent J. Carbone, at 3 (Nov. 1998).
[283] Interview with Leander Parker, in Marietta, Ga. (March 29, 1999).
[284] *Id.*
[285] On the day of my visit, for example, 51 boys and 10 girls were housed in the MRYDC -- more than one child per room, but well under the 100 person limit. *See also* Monitoring Report, Prepared by Dr. Vincent J. Carbone, at 1 (Nov. 1998).
[286] Monitoring Report, Prepared by Dr. Vincent J. Carbone, at 1 (Nov. 1998) ("While the rooms do not seem to sleep more than 2 youths at any one time they do appear to be quite small and cramped for even 2 persons. They do not meet the standards of the American Correctional Association for double occupancy.")

training.[287] Parker hopes that some of these space constraints will soon be alleviated, however, as the state has contracted to build an addition on to the current facility in the coming months.[288]

The relatively successful implementation of the consent decree can be attributed in large part to two factors. First, Kathleen Dumitrescu's prediction that compliance with the agreement would depend upon the thoroughness and precision of its terms turned out to be very wise. In Leander Parker's words, the consent decree is easy to follow because "either you're following it or you're not; there's not a lot of room for guessing or for doing it halfway."[289] In this regard, Parker contrasts the *Doe v. Napper* consent decree with the one reached in *C.N.H. v. Walker* and with the Memorandum of Agreement that resulted from the Department of Justice investigation. Since both of those documents are framed in more general, loose terms, directors of other facilities use the MRYDC decree to flesh out the requirements imposed upon them.[290]

Secondly, Leander Parker, who has been the Director of the MRYDC since September 1997, should be applauded for his positive attitude and consistent efforts toward compliance with the consent decree. He openly admits that he considers many of the terms of the consent decree – including the education, training, and preventive maintenance sections – unduly burdensome, and he also believes that his superiors did not fight *Doe v. Napper* as vigorously as they ought to have.[291] He speaks enviously of the consent decree reached in *C.N.H. v. Walker*, remarking that "Dalton got off easy."[292] Nonetheless, Leander Parker seems to take the responsibility of implementing the *Doe v. Napper* consent decree very seriously, and he makes admirable efforts to adhere to the letter of the law. He has insisted on compliance from his staff, even though it

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[287] Interview with Leander Parker, in Marietta, Ga. (March 29, 1999).
[288] *Id.*
[289] *Id.*
[290] *Id.*

has caused virtually every staff member who worked in the MRYDC prior to December 1997, and many since then, to quit their jobs. Without his commitment, all the hard work invested in drafting and negotiating the agreement would have been for naught.

VIII. Conclusion

Despite the imperfections of settlement (including the parties' forced deference to political concerns, consideration of concurrent claims, and adherence to new legal requirements), it appears to have been an effective strategy for reform in the MRYDC. The *Doe v. Napper* consent decree brought about real on-the-ground changes in the facilities and services provided at the MRYDC, and thereby achieved a major accomplishment that purely legislative strategies were unable to produce. Through settlement, the plaintiffs forced DCYS administrators to respond to their concerns and to implement remedies in a timely fashion. A variety of observers agree that the lawsuit brought about reforms more quickly than could otherwise have been expected, even though the negotiations phase did consume nearly five years. Judge Morris and DCYS Division of Detention Services Director Nathan Davis both assert that the lawsuit forced the state to focus immediate attention on the problems in the MRYDC,[293] for example, and even David Hooker admits that change might not have occurred as quickly if *Doe v. Napper* had never been filed.[294]

In addition to the relatively quick and readily identifiable changes which it produced, another measure of the success of the *Doe v. Napper* settlement is the degree of party

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[291] *Id.*
[292] *Id.*
[293] Telephone Interview with James Morris (March 31, 1999); Interview with Nathan Davis, in Atlanta, Ga. (March 29, 1999).

satisfaction. Looking back on their accomplishments, individuals on both sides of the case applaud the role of the lawsuit in securing funding for a new facility, and consider the new policies in areas such as health care, fire safety, and behavior management as positive contributions to the functioning of the MRYDC. The parties also seem to agree that the positive effects of *Doe v. Napper* have extended not only to the MRYDC itself, but throughout the state's juvenile justice system, by providing the necessary impetus for the state to draft comprehensive policies that could be implemented state-wide.[295] Finally, the parties appear to be equally satisfied with the form of the consent decree; even MRYDC Director Leander Parker, who bears the burden of implementing the mammoth document, concedes that the level of detail and the precise language makes his job easier by keeping him from always second guessing the intent of the drafters.[296]

These forms of evidence of the settlement's success are not responsive to the lurking question of whether these same positive outcomes would also have resulted from full-fledged adjudication. In previous sections I suggested that settlement might have produced results that would have been unobtainable through adjudication, because, for example, adjudication would have required a more focused view of the problems in the MRYDC, a more limited use of expertise, and a less colorful palate of remedies. To the extent that judges have in recent years remodeled the adjudication paradigm to meet the needs of institutional reform litigation, however, the accuracy of this characterization is no longer so clear. A judge might have cured the expertise problem by marshaling the help of a special master with expert knowledge about juvenile detention centers, or broadened the scope of the adjudication by ordering that children in

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[294] Telephone Interview with David Anderson Hooker (Jan. 29, 1999).
[295] Interviews with John Harbin and Nathan Davis, in Atlanta, Ga. (March 29, 1999).

other RYDCs be joined as parties to the suit. In short, it is very difficult in the absence of any satisfactory point of comparison to determine whether the positive features of the consent decree truly mark a liberation from the limits of adjudication, or it they differ only from an idealized vision of adjudication that currently exists purely in the academic imagination.

Upon reconsideration of the reasons listed in Part Seven for the successful implementation of the decree, the reforms in the MRYDC appear even less to be the result of the unique features of negotiation. Though Kathleen Dumitrescu happened to have the foresight to negotiate an extremely detailed consent decree with built in mechanisms to ensure accountability, for example, so might Judge Carnes have ordered such a decree. And just as Leander Parker has been instrumental in making sure the consent decree has been implemented, there is no reason to believe that he would not likewise have insisted that his staff adhere to a judicially ordered remedy. In the final analysis, then, *Doe v. Napper* seems to support Marc Galanter's characterization of the real driving force behind effective settlements; he writes that, for the most part "outcomes of negotiation are not the product of negotiations per se but of negotiation by particular negotiators in a particular legal setting."[297]

An examination of *Doe v. Napper* is admittedly therefore not a scientific study from which we can generalize about the potentials and constraints of all negotiated remedies in all institutional reform cases or even in all juvenile detention center conditions cases. However, it does illustrate the extent to which, given the right circumstances, settlement can provide an

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[296] Interview with Leander Parker, in Marietta, Ga. (March 29, 1999).
[297] Galanter, *supra* note 36, at 1349.

alternative reform strategy to both adjudication and legislation, one which achieves efficient and effective solutions to the real problems facing youths caught in our juvenile justice system.

APPENDIX A:
DOE V. NAPPER TIMELINE

1956	Marietta Regional Youth Detention Center (MRYDC) is built.
4/17/92	Georgia Governor Zell Miller signs into law new legislation which will make the old Division of Youth Services of DHR into its own separate agency, the Department of Children and Youth Services (DCYS).
7/1/92	DCYS is established to oversee Georgia's juvenile justice system. George Napper is appointed as its first Commissioner.
1/14/93	Georgia state legislators promise state funds for a new MRYDC.
1/15/93	*Atlanta Journal-Constitution* reports that Cobb County Legal Aid attorneys are interviewing youths at the MRYDC for a possible lawsuit.
3/26/93	Legal aid attorneys file *Doe v. Napper.*
4/18/94	Plaintiffs' attorneys file a status report on consent negotiations; they report that the parties have agreed to a population cap of 41 children (with exception only for emergencies), and to specific staffing ratios.
4/22/94	Construction of the new MRYDC begins.
9/94	Governor Zell Miller fires George Napper.
9/9/94	Judge Julie Carnes administratively closes *Doe v. Napper* case *sua sponte*.
1/95	Eugene Walker takes over as the new Commissioner of DCYS.
1996	Human Rights Watch publishes *Modern Capital of Human Rights?: Abuses in the State of Georgia*, with a chapter about the juvenile justice system.
3/13/96	A suit is filed on behalf of two boys being held at the Gwinnett RYDC in Lawrenceville to address conditions there.
4/96	*CNH v. Walker* is filed to challenge conditions at the Dalton RYDC.
4/16/96	Plaintiffs' give defendants' the first draft consent decree.
4/26/96	The Legal Services Reform Act and Prison Litigation Reform Act become effective.

6/4/96	DCYS attorney Cynthia Honssinger informs plaintiffs' attorneys of DCYS Commissioner's revisions to the proposed settlement agreement, including the elimination of precise staffing ratios, an increase of the population cap, and a waiver provision for daily education hour requirements.
7/25/96	Legal aid attorneys file motion to withdraw.
8/1/96	John Harbin of Powell, Goldstein, Frazier, & Murphy takes over as lead plaintiffs' attorney.
10/29/96	Plaintiffs move to reactivate the case and reopen discovery.
12/17/96	Judge Carnes conducts conference on reopening the case, holds the motion in abeyance, and orders parties to submit status reports on settlement by 2/1.
1/97	Cynthia Honssinger leaves Georgia. David Anderson Hooker takes over as the lead attorney for DCYS.
2/97	New "state of the art" MRYDC opens.
2/24/97	Having never received the parties' status reports, Judge Carnes denies plaintiffs' motion to reopen the case, and sets 3/28/97 as deadline for parties to submit new requests to the court.
3/3/97	U.S. Department of Justice (DOJ) informs Governor Miller of its intention to investigate Georgia's secure facilities for juveniles.
4/4/97	Plaintiffs give defendants a second proposed consent decree.
5/8/97	Defendants reply that they refuse to consider plaintiffs' draft consent decree because the case has not been reopened.
7/15/97	Harbin files a motion to re-open the case.
8/27/97	Court orders parties to meet in good faith to resolve the case, and to report back if settlement is not reached.
9/23/97	Hooker reports to the court that settlement has not been reached.
10/6/97	Judge Carnes reopens the case.
12/11/97	*Doe v. Napper* consent decree is entered by the court.
3/18/98	DOJ and Governor Miller sign a Memorandum of Agreement.
9/22/98 - 9/23/98	First Monitoring visit to MRYDC by Dr. Vincent Carbone.
12/11/99	Monitoring by the plaintiffs and jurisdiction of the court is set to terminate.

APPENDIX B:
INTERVIEW LIST

Telephone Interview with Katheleen Dumitrescu, Managing Attorney, Legal Aid of Cobb County (Nov. 29, 1998).

Telephone Interview with Cynthia Honssinger, Former Assistant Attorney General, Georgia Department of Law (Jan. 16, 1999).

Telephone Interview With David Anderson Hooker, Former Assistant Attorney General, Georgia Department of Law (Jan. 29, 1999).

Telephone Interview with Robert Cullen, Lead Plaintiffs' Attorney, *C.N.H. v. Walker* (March 4, 1999).

Interview with Nathan Davis, Director of the Division of Detention Services, Georgia Department of Children and Youth Services, in Atlanta, Ga. (March 29, 1999).

Interview with Leander Parker, Director, Marietta Regional Youth Detention Center, in Marietta, Ga. (March 29, 1999).

Interview with Jake Smith, Volunteer Program Coordinator, Marietta Regional Youth Detention Center, in Marietta, Ga. (March 29, 1999).

Interview with John Harbin, Partner, Powell, Goldstein, Frazier, & Murphy, in Atlanta, Ga. (March 29, 1999).

Telephone Interview with James Morris, Judge, Cobb County Juvenile Court (March 31, 1999).