

PROTECTING THE CONSTITUTIONAL RIGHTS OF MINORITY YOUTH ON RIKERS ISLAND

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In 2014, the United States Attorney’s Office for the Southern District of New York released a report on their investigation into the patterns and practices of treatment of adolescent inmates on Rikers Island, finding systemic defects that result in the pervasive violation of the adolescent inmates’ constitutional rights. Ninety-five percent of the adolescent population on Rikers is Black or Latino. New York is uniquely harsh with its treatment of 16- and 17-year-olds, as it and North Carolina are the only states to set the minimum age of criminal responsibility at 16. Over seventy-five percent of youth on Rikers Island are awaiting trial and have not been convicted of a crime. The prevalence of the unconstitutional conduct on Rikers Island is attributable, in large part, to the lack of accountability among Department of Corrections (DOC) staff members on Rikers Island, which results in a code of silence. To effectively deal with the pervasive pattern and practice of conduct on the part of DOC staff that violates adolescent inmates on Rikers Island’s constitutional rights, it is crucial to understand the differences between adolescents and adults and the power of the DOC staff union. This Note posits that in order to create meaningful reform and protect the constitutional rights of adolescent inmates, the cut-off age for criminal responsibility should be raised so that 16- and 17-year-olds fall under the jurisdiction of the Family Court and are not placed on Rikers Island. Additionally, the portion of the Administrative Code requiring all uniformed DOC ranks to be filled by promotion from within the uniformed force must be amended to obstruct the code of silence and prevent violence against inmates. Without such measures, the abuses against minority youth on Rikers Island will persist.

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I. INTRODUCTION

While resting his head on a desk during class, Inmate H abruptly woke up to a correctional officer who was hitting him in his ribcage.¹ While not ideal, sleeping in class is expected behavior for a 16- to 17-year-old adolescent boy like Inmate H. Yet, this behavior, along with other normal adolescent behavior, is often met with excessive force in adolescent jails on Rikers Island. After jumping up to defend himself, an officer punched Inmate H in the eye hard enough that he fell to the floor.² Three or four more officers joined, kicking Inmate H in his back, head, face and mouth while pepper spraying him an inch from his eye.³ The teacher in the classroom saw Inmate H lying on the floor “looking dazed” and encouraged the class to look away.⁴ She heard an officer shouting at Inmate H, loud thuds, and Inmate H crying for his mother.⁵ Not until four hours after the incident did anyone take Inmate H to see medical staff.⁶

This incident occurred in September of 2012,⁷ and it is one of 200 samples of use of force incidents included in a report (“the Report”) released on August 4, 2014. The report was the product of an investigation by the United States Attorney’s Office for the Southern District of New York into the patterns and practices of treatment of adolescent inmates on Rikers Island.⁸ The 200 samples illustrate the systemic defects that result in the violation of the adolescent inmates’ constitutional rights.⁹

The prevalence of the unconstitutional conduct on Rikers Island is attributable, in large part, to the lack of accountability among Department of Corrections (DOC) staff members on Rikers Island, which

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¹ Letter from Jocelyn Samuels, Acting Assistant Attorney General, Civil Rights Division, Preet Bharara, U.S. Att’y for the S. Dist. of N.Y., Jeffrey K. Powell, Assistant U.S. Att’y, and Emily E. Daughtry, Assistant U.S. Att’y, to Bill De Blasio, Mayor of N.Y.C., Joseph Ponte, Comm’r of N.Y. Dep’t of Corr., and Zachary Carter, Corp. Counsel of N.Y.C. (Aug. 4, 2014) (on file with the U.S. Department of Justice), *available at* <http://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/SDNY%20Rikers%20Report.pdf>.

² *Id.*

³ *Id.*

⁴ *Id.* at 74.

⁵ *Id.*

⁶ *Id.* at 72. This is a common practice referred to as “bus therapy.” According to prison officials familiar with the practice, officers on Rikers Island would take an inmate to the hospital shortly after an incident and drive the inmate around in circles for long periods of time before going to the hospital. In some cases, the hospital was only fifteen minutes away. *See also* Michael Winerip & Michael Schwartz, *Rikers: Where Mental Illness Meets Brutality in Jail*, N.Y. TIMES, July 14, 2014, http://www.nytimes.com/2014/07/14/nyregion/rikers-study-finds-prisoners-injured-by-employees.html?_r=0 (last visited Feb. 27, 2014).

⁷ *Id.* at 72.

⁸ Samuels, Bharara, Powell, & Daughtry, *supra* note 1, at 1.

⁹ *Id.* at 2.

results in a code of silence.¹⁰ The Report concluded that DOC staff members not only insufficiently investigate and report use of force incidents, but also frequently falsify reports.¹¹ The rare times DOC staff members are found to have used force inappropriately, they are nonetheless insufficiently disciplined.¹² While the incident with Inmate H is representative of the common vicious practices that occur daily on Rikers, it is unique in that there were multiple witnesses corroborating Inmate H's version of events, most notably statements from three teachers.¹³ Inmates, medical staff members and teachers rarely report use of force incidents out of fear of retribution from guards.¹⁴ Additionally, it is particularly common for excessive use of force incidents to occur in areas where there are no surveillance cameras, just as was the case with Inmate H, making it difficult to hold DOC staff members accountable.¹⁵ The lack of accountability on Rikers Island persists because DOC officers maintain much political clout as members of the largest municipal jail union in the country, the Correction Officers' Benevolent Association (COBA).¹⁶ Moreover, they are led by a powerful president.¹⁷

Institutional racism also accounts for the persistence of unconstitutional conduct on Rikers Island.¹⁸ Ninety-five percent of the adolescent population on Rikers is Black or Latino.¹⁹ New York is uniquely harsh with its treatment of 16- and 17- year-olds, as it and North Carolina are the only states to set the minimum age of criminal responsibility at 16.²⁰ A recent surge in the prison population over the past decades, the "War on Drugs," over-policing in minority communities, racial profiling and judicial discretion leading to disproportionately harsh sentences for people of color, have largely resulted in a majority-minority prison population.²¹ Black males are most significantly affected, as they are two-and-a-half times more likely to be detained than Latino males, and six times more likely to be detained than White males.²² In 2010, two-thirds of the 800 16- and 17- year-olds incarcerated in New York were Black, 26 percent were Latino and 5 percent were White.²³ The Rikers youth population comes from disenfranchised, marginalized, low-income communities of color that lack political power and resources, making it easy for politicians and officials to ignore the abuses they experience.²⁴ Fifty-one percent of youth on Rikers Island have been diagnosed with a mental illness.²⁵ Over seventy-five percent are awaiting trial and have not been convicted of a crime,²⁶ and

¹⁰ See *id.* at 21.

¹¹ *Id.* at 4.

¹² *Id.*

¹³ *Id.* at 73-74.

¹⁴ *Id.* at 24-25.

¹⁵ *Id.* at 20.

¹⁶ See *About Correction Officer's Benevolent Association*, CORRECTION OFFICERS' BENEVOLENT ASSOCIATION, INC., www.cobanyc.org/about-coba (last visited Feb. 27, 2014), for general information about the size, founding, and mission of COBA, based in the New York City boroughs.

¹⁷ See Michael Winerip & Michael Schwartz, *At Rikers Island, Union Chief's Clout is a Roadblock to Reform*, N.Y. TIMES, Dec. 14, 2014, <http://www.nytimes.com/2014/12/15/nyregion/at-rikers-a-roadblock-to-reform.html?action=click&contentCollection=N.Y.%20%2F%20Region&module=RelatedCoverage®ion=Marginalia&pgtype=article> (last visited Feb. 27, 2014).

¹⁸ Andrew O'Donohue, *Race and Rikers*, HARVARD POLITICAL REVIEW, Nov. 11, 2014, <http://harvardpolitics.com/united-states/race-rikers/> (last visited Feb. 27, 2014).

¹⁹ *Id.*

²⁰ ELLEN YAROSHEFSKY, *RETHINKING RIKERS: MOVING FROM A CORRECTIONAL TO A THERAPEUTIC MODEL FOR YOUTH* 12 n.22 (2014).

²¹ See O'Donohue, *supra* note 18; See also THE NEW YORK ADVISORY COMM., *THE SOLITARY CONFINEMENT OF YOUTH IN NEW YORK: A CIVIL RIGHTS VIOLATION* 5 (2014).

²² *Id.*

²³ *Id.* at 6.

²⁴ O'Donohue, *supra* note 18.

²⁵ Samuels, Bharara, Powell, & Daughtry, *supra* note 1, at 6.

²⁶ Yaroshefsky, *supra* note 20, at 3.

the vast majority of inmates on Rikers Island have been charged with low-level offenses.²⁷ It is common for youth to be sent to Rikers to wait for trial when the charges are ultimately dismissed. For example, at 16-years-old, Kalief Browder, was accused of stealing a backpack and spent three years on Rikers Island, of which two years were spent in solitary confinement. Ultimately, he never stood trial nor was he found guilty of any crime.²⁸ Browder later committed suicide after his release.²⁹ As a result of the culture of violence on Rikers, many youth remain stuck there with charges resulting from incidents with guards and other inmates.³⁰ The racial demographics of the Rikers youth population, along with the systemic disregard for the humanity of such inmates, amounts to a pervasive devaluing of minority youths' lives.

In addition to the lack of accountability and devaluing of minority youth, the unconstitutional conduct at the jail also harms the public at large. Rehabilitation rarely occurs, and the recidivism rate among youth is high.³¹ The average number of previous admissions of youth to DOC in 2013 was 1.02.³² The high recidivism rates also mirrors what occurs across the nation, as each year 70-80% of formerly incarcerated youth reoffend within 2-3 years.³³ Because the culture of violence on Rikers Island harms adolescents in ways that hurt their future prospects, the practices of DOC staff members decrease long-term public safety because such practices encourage criminal behavior³⁴—behavior oftentimes necessary for survival on Rikers Island.³⁵ In addition to the lack of benefit to public safety, incarcerating youth on Rikers is costly. Each adolescent inmate costs New York City taxpayers \$167,000 a year.³⁶

The pattern of excessive and unconstitutional use of force has been going on for thirty years.³⁷ The Report marked the end of a much-needed investigation and recommended the implementation of remedial measures to protect the constitutional rights of adolescent inmates.³⁸ The Report warned that if there were no resolution within 49 days, the Attorney General would initiate a lawsuit against the city pursuant to the Civil Rights of Institutionalized Persons Act (“CRIPA”), 42 U.S.C. § 14141.³⁹ In December 2014, unsatisfied with the city’s implementation of the Report’s remedial recommendations, the Department of Justice (“DOJ”) announced plans to join the ongoing class action, *Nunez v. City of New York*, as part of an effort to sue New York City over constitutional violations outlined in the Report.⁴⁰ *Nunez* alleges that the systemic pattern and practice of unnecessary force against all inmates on Rikers Island amounts to conduct that violates inmates’ constitutional rights.⁴¹ In June of 2015, the City of New York agreed to settle the *Nunez*

²⁷ Dana Goldstein et al., *Inside Rikers Island, Through the Eyes of the People Who Live and Work There*, NEW YORK MAGAZINE, June 29, 2015, <http://nymag.com/daily/intelligencer/2015/06/inside-rikers-island-interviews.html>.

²⁸ Michael Winerip & Michael Schwartz, *Kalief Browder, Held At Rikers Island for 3 Years Without Trial, Commits Suicide*, N.Y. TIMES, June 8, 2015, <http://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html> (last visited Jan. 14, 2016).

²⁹ *Id.*

³⁰ O’Donohue, *supra* note 18.

³¹ Samuels, Bharara, Powell, & Daughtry, *supra* note 1, at 6.

³² *Id.*

³³ Yaroshefsky, *supra* note 20, at 3.

³⁴ *Id.*

³⁵ See O’Donohue, *supra* note 18.

³⁶ Yaroshefsky, *supra* note 20, at 3.

³⁷ See Jennifer Gonnerman, *A Lawsuit to End Abuse at Rikers*, NEW YORKER, Dec. 19, 2014, <http://www.newyorker.com/news/daily-comment/lawsuit-end-abuse-rikers> (last visited Feb. 27, 2014).

³⁸ Samuels, Bharara, Powell, & Daughtry, *supra* note 1, at 51.

³⁹ *Id.* at 64

⁴⁰ Jillian Jorgensen, *U.S. Attorney Preet Bharara Moves to Sue City Over Violence at Rikers Island*, OBSERVER, Dec. 18, 2014, <http://observer.com/2014/12/u-s-attorney-preet-bharara-moves-to-sue-city-over-violence-at-rikers-island/> (last visited Feb. 27, 2014).

⁴¹ Samuels, Bharara, Powell, & Daughtry, *supra* note 1, at 3 n.5.

lawsuit.⁴² While the DOJ's involvement and the city's settlement may seem like a beacon of hope for meaningful reform, there are limitations with proposed federal intervention and the resulting requirements of the settlement agreement.

This Note argues that because of political and organizational undercurrents within the corrections system, and the power of COBA, the settlement of the federal lawsuit will likely create only remedial change, leaving the unconstitutional conduct unabated. In order to end the culture of violence, the cut-off age for criminal responsibility should be raised so that 16- and 17- year-olds fall under the jurisdiction of the Family Court. Additionally, the portion of the Administrative Code requiring all uniformed DOC ranks to be filled by promotion from within the uniformed force must be amended to prevent violence against inmates. Part I provides a description of the laws surrounding inmates' rights, federal authority and the Report. Part II outlines the limitations of the federal lawsuit and the resulting settlement agreement through a discussion of the limitations of federal lawsuits in prison reform efforts and the power of COBA. Part III argues that in order to protect the constitutional rights of adolescent inmates on Rikers Island, the New York Penal Law § 30.00 must be amended so that adolescents are no longer criminally responsible. This section also proposes amending § 9-117(b) of the city Administrative Code so that high-ranking officials in DOC can be appointed from outside the DOC. The last section concludes by discussing the importance of protecting the minority youth on Rikers Island.

II. THE REPORT ON THE NEW YORK CITY DEPARTMENT OF CORRECTION ADOLESCENT JAILS ON RIKERS ISLAND

This section provides a description of the Report and investigation of the New York City DOC adolescent jails on Rikers Island. First, there is a discussion of the background laws surrounding prisoners' constitutional rights. Next, there is a discussion of the laws that provide the federal authority surrounding the investigation and the DOJ lawsuit against New York City. Lastly, there is a description of the Report's findings.

A. The Constitutional Rights of Inmates: The Eighth Amendment

The Eighth Amendment's ban on cruel and unusual punishment applies to the states through the Due Process Clause of the Fourteenth Amendment.⁴³ The Supreme Court has held that when someone is placed under the custody of a jurisdiction and detained against his will, the Eighth Amendment "imposes upon [the jurisdiction] a corresponding duty to assume some responsibility for his safety and general well-being."⁴⁴ The constitution requires officers working in prisons "take reasonable measures to guarantee the safety of inmates."⁴⁵ Courts have required both a subjective and objective inquiry into whether prison officials have violated the Eighth Amendment by failing to protect the safety and wellbeing of inmates.⁴⁶ The

⁴² Benjamin Weiser, *New York City Settles Suit Over Abuses at Rikers Island*, N.Y. TIMES, June 22, 2015, http://www.nytimes.com/2015/06/23/nyregion/new-york-city-settles-suit-over-abuses-at-rikers-island.html?_r=0 (last visited March 10, 2016).

⁴³ *Robinson v. California*, 370 U.S. 660 (1962).

⁴⁴ *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998) (quoting *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989)); *see also Randle v. Alexander*, 960 F. Supp. 2d 457, 471 (S.D.N.Y. 2013).

⁴⁵ *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984); *Hayes v. N.Y.C. Dep't of Corr.*, 84 F.3d 614, 620 (2d Cir. 1996) (citation omitted).

⁴⁶ *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (concluding prison officials violate the Eighth Amendment when two requirements are met).

subjective element requires evidence that there was “deliberate indifference” on the part of prison officials in protecting an inmate’s health or safety.⁴⁷

As mentioned above, 75 percent of the adolescent inmates on Rikers Island are pre-trial detainees, which grants them constitutional rights under standards different from convicted prisoners.⁴⁸ However, courts have regularly held that the Eighth Amendment yields pre-trial inmates “at least those constitutional rights...enjoyed by convicted prisoners.”⁴⁹ The Eighth Amendment and Fourteenth Amendment prohibit disproportionate corporeal force against prisoners and pre-trial detainees.⁵⁰ Courts consider numerous factors to determine whether use of force was reasonably thought to be required in the circumstances. These factors include the magnitude of the inmate’s injury, the necessity for the use of force, the correlation between the need for force and extent officials actually used force, “the threat reasonably perceived by the responsible officials,” and “any efforts made to temper the severity of a forceful response.”⁵¹

B. Federal Authority: The Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997; Section 14141 of the Violent Crime Control and Law Enforcement Act of 1994

The Civil Rights of Institutionalized Persons Act (“CRIPA”), 42 U.S.C. § 1997, gives the Attorney General, acting on behalf of the United States, discretionary authority to file a civil action against a state or its political subdivision for engaging in a pattern or practice of conduct that deprives persons in custody at an institution enjoyment of rights, privileges, or immunities protected by the Constitution.⁵² The term “institution” is defined by the Act, among other things, as a jail, prison, correctional facility or pre-trial detention facility.⁵³ “Institution” is also defined as any facility or institution housing juveniles awaiting trial.⁵⁴

CRIPA gives the Attorney General subpoena authority that permits access to any document, record, material, file, report, memorandum, policy, procedure, investigation, video or audio recording, or quality assurance report relating to any institution that is subject to an investigation concerning allegations of unconstitutional conduct in a prison setting.⁵⁵ CRIPA also provides the Attorney General with authority to initiate a lawsuit regarding the unconstitutional conduct if parties are unable to reach a resolution at least 49 days after the appropriate officials have received notice of the investigation’s findings and measures necessary to remedy the unlawful conduct.⁵⁶

Section 14141 of the Violent Crime Control and Law Enforcement Act of 1994 similarly provides legal grounds to sue any government authority or agent responsible for imprisoned juveniles from participating in a pattern or practice of conduct that deprives juveniles of their constitutional rights.⁵⁷ The

⁴⁷ *Id.* (“Deliberate indifference” is sufficiently proven when the official “knows of and disregards an excessive risk to inmate health or safety.”) *Id.* at 837. “[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Id.* The objective inquiry depends on whether the inmate, “is incarcerated under conditions posing a substantial risk of serious harm.” *Id.* at 834. “Importantly, the objective prong can be satisfied even when no serious physical injury results.” *Randle*, 960 F. Supp. 2d at 473.

⁴⁸ Yaroshefsky, *supra* note 20, at 3.

⁴⁹ *Bell v. Wolfish*, 441 U.S. 520, 545 (1979); *see also* *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000) (stating that the Eighth Amendment deliberate indifference test should be applied by courts to actions brought under the Due Process Clause of the Fourteenth Amendment by pre-trial detainees); *Wyant v. Okst*, 101 F.3d 845, 856 (2d Cir. 1996).

⁵⁰ *See Farmer*, 511 U.S. at 832; *see also* *United States v. Walsh*, 194 F.3d 37, 48 (2d Cir. 1999).

⁵¹ *Hudson v. McMillian*, 503 U.S. 1, 7 (1992).

⁵² 42 U.S.C. § 1997a(a) (2015).

⁵³ 42 U.S.C. § 1997.

⁵⁴ *Id.*

⁵⁵ 42 U.S.C. § 1997a-1.

⁵⁶ 42 U.S.C. § 1997b(a)(1).

⁵⁷ *See* 42 U.S.C. § 14141(a) (2015).

Attorney General has authority to obtain equitable and declaratory relief through a civil action.⁵⁸ The Special Litigation Section of the Civil Rights Division of the DOJ is responsible for enforcing Section 14141.⁵⁹

C. The Report

The DOJ investigated whether the DOC sufficiently protected 16- and 17- year-old inmates from harm.⁶⁰ This inquiry was narrowed down to three sub-issues: whether DOC staff members inflict excessive and unnecessary force on adolescent inmates, whether adolescents on Rikers are sufficiently protected from other inmates, and whether adolescents suffer excessive harm from DOC's frequent use of punitive segregation.⁶¹

Rikers Island is 400 acres of land spanning the East River.⁶² The vast majority of the DOC's 14,000 average daily inmate population is managed in one of the ten facilities.⁶³ Only one of these facilities houses convicted prisoners serving a year or less; the rest are pre-trial detainees.⁶⁴ In 2013, there were 682 adolescents housed on Rikers Island.⁶⁵

The timeline of the investigation was 2011 through the end of 2013.⁶⁶ The DOJ looked at records from the DOC and the agency responsible for providing medical services to detainees on Rikers Island, the Department of Health and Mental Health.⁶⁷ The types of records included use of force investigative files, inmate medical records, policies and procedures, training materials, disciplinary records, and programmatic materials.⁶⁸ The DOJ toured Rikers Island with a consultant with expertise in corrections and use of force.⁶⁹ The DOJ interviewed inmates, staff members, senior staff members, the Commissioner, and members of the Board of Correction.⁷⁰ The DOJ also reviewed materials from the Board of Correction and Legal Aid Society.⁷¹

1. DOC Staff Members Use Force Excessively and Unnecessarily Resulting in a High Frequency of Inmate Violence

The Report discussed the extraordinary frequency of violence in adolescent jails,⁷² and how the excessive and unnecessary force from staff members leads to inadequate protection for adolescent inmates.⁷³ This conclusion was based on the frequency of use of force with no imminent risk of injury, use of force in camera-free areas, and inmate-on-inmate violence. Forty-three percent of the 705 adolescents detained in 2012 experienced force from staff members at least once, a use of force rate higher than what the expert

⁵⁸ See 42 U.S.C. § 14141(b).

⁵⁹ Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State "Pattern or Practice" Statute*, 19 GEO. MASON U. C.R. L.J. 479, 502 (2009) ("Responsibility for enforcing Section 14141 lies with the Special Litigation Section of the Civil Rights Division of the Department of Justice.").

⁶⁰ Samuels, Bharara, Powell, & Daughtry, *supra* note 1, at 1.

⁶¹ *Id.*

⁶² *Id.* at 5.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 6.

⁶⁶ *Id.* at 2.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 7.

consultant had ever seen.⁷⁴ The Report declared that the inappropriate use of force by staff members amounts to a deliberate indifference to the safety of the adolescent inmate population, thereby violating the Eighth Amendment.⁷⁵

The DOC use of force policy states that “force may only be used ‘as a last alternative after all other reasonable efforts to resolve the situation have failed.’”⁷⁶ The policy also requires that “the amount of force used at any time should always be proportional to the threat posed by the inmate at that time.”⁷⁷ Additionally, “staff must start with the minimum amount of force needed and escalate the amount of force used only if the situation requires escalation.”⁷⁸ Despite this policy, staff members frequently use headshots—“blows to an inmate’s head or facial area”⁷⁹—during situations when there is no imminent risk of serious physical harm.⁸⁰ Abusive physical force is frequently used in response to verbal altercations, in response to inmates’ failure to comply with instructions and to punish or retaliate.⁸¹ Staff members frequently yell, “Stop resisting” to appear as if force is justified when the adolescent inmate has already been subdued or never resisted.⁸² The Report described the high frequency of force used in areas without surveillance cameras and found that the most egregious use of force incidents occur in those areas.⁸³

The consultant also reported that he had never witnessed a system with so much inmate-on-inmate violence, another contributing factor to inadequate protections for adolescents.⁸⁴ As a result of excessive violence from both staff members and inmates, there are high numbers of serious injuries and inmates in the adolescent facility are significantly more likely to sustain a serious head injury than inmates in any other Rikers facility.⁸⁵ These injuries include fractures, lacerations and contusions to inmates’ heads.⁸⁶ These findings led the investigation to conclude that the DOC has insufficiently protected adolescent inmates from harm.

2. The DOC System Contains Universal Deficits Resulting in a High Frequency of Inmate Violence

The Report discussed how systemic deficiencies cause excessive force by DOC staff members and frequent inmate-on-inmate violence.⁸⁷ These deficiencies include insufficient reporting of use of force incidents resulting in a code of silence, inadequate consequences for infractions, lack of a grievance policy for inmates, insufficient supervision of inmates and staff members, lack of professionalism, inadequate training

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 11 n.15 (citation omitted).

⁷⁷ *Id.* (citation omitted).

⁷⁸ *Id.* (citation omitted).

⁷⁹ Samuels, Bharara, Powell, & Daughtry, *supra* note 1, at 4.

⁸⁰ *Id.* at 12.

⁸¹ *Id.* at 17; The Report described one of the frequent times when force was used as punishment or retaliation. In June 2012, two correctional officers beat Inmate G in an act of retribution for the mistaken impression that Inmate G had “snitched” on one of the officers for another use of force incident. Inmate G was attempting to get some water from the pantry area when the officers threw him to the ground and repeatedly punched, kicked and stomped him in the head, causing him serious injuries and a lost tooth. Officers again assaulted Inmate G in an attempt to get him to write a false report regarding the incident. This is one of many stories in the Report describing the frequent use of force as a means to punish or seek retribution against adolescent inmates. *Id.* at 15.

⁸² *Id.* at 19.

⁸³ *Id.* at 20.

⁸⁴ *Id.* at 9.

⁸⁵ *Id.* at 10.

⁸⁶ *Id.*

⁸⁷ *Id.* at 20.

and management deficiencies.⁸⁸

First, the Report highlighted the insufficient reporting of use of force incidents by staff members. The DOC policy on reporting use of force incidents states that all “[s]taff who employ or witness force or have been alleged to employ or witness force . . . shall prepare a written report concerning the incident based on their own observations and written independently from other staff members that were involved or alleged to have been involved in the incident.”⁸⁹ Despite this, there is a powerful code of silence, and staff members frequently and deliberately ignore the policy.⁹⁰ Because use of force incidents are under-reported, unlawful uses of force remain unknown and unimpeded. Obstacles that impede use of force reporting perpetuate the code of silence.⁹¹ Surveillance videos frequently go missing.⁹² DOC staff members told DOJ investigators that they had lost 35 percent of incidents in the 200 samples used for the Report, but gave no explanation as to why the surveillance videos could not be located.⁹³

The Report also found that DOC systemically failed to conduct sufficient investigations of use of force.⁹⁴ The Report found this to be one of the central causes for the widespread practice of excessive force.⁹⁵ Use of force investigations occurring at both the facility level and the Investigation Division (ID) are conducted inadequately.⁹⁶ Investigations were found to be untimely, as the average investigation time exceeded DOC policy requirements.⁹⁷ Additionally, the criteria required to initiate an investigation is unclear.⁹⁸ Investigations are conducted poorly⁹⁹ and contradictory statements are often reconciled with a bias in favor of the accounts of correctional officers.¹⁰⁰ The Report found that ID’s review of the facility-level investigation was superficial.¹⁰¹ Most investigations result in findings that staff members operated within DOC policy despite facts to the contrary.¹⁰²

In the rare times that investigations find that staff members inappropriately used force, the consequences are minimal.¹⁰³ According to the consultant, in most correctional facilities, beating a restrained inmate, or using force and failing to report it, necessitates termination.¹⁰⁴ In the Rikers adolescent jails, however, significantly lesser disciplinary measures are taken, sometimes resulting in no consequences at all.¹⁰⁵ Another systemic deficiency leading to excessive force by staff members is that there is no grievance policy for staff-on-inmate assault and harassment.¹⁰⁶ A grievance system is important because it affords inmates an opportunity to raise concerns about their treatment.¹⁰⁷

The Report also found that the insufficient supervision of inmates is a systemic deficiency leading to

⁸⁸ *Id.* at 20-45.

⁸⁹ *Id.* at 21 (citation omitted).

⁹⁰ *Id.*

⁹¹ *Id.* at 25.

⁹² *Id.* at 28.

⁹³ *Id.*

⁹⁴ *Id.* at 28-30.

⁹⁵ *Id.*

⁹⁶ *Id.* at 29-34.

⁹⁷ *Id.* at 34.

⁹⁸ *Id.* at 30.

⁹⁹ *Id.* at 32.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 35.

¹⁰² *Id.* at 36.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 37.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 39.

¹⁰⁷ *Id.*

inadequate protection of inmates from harm.¹⁰⁸ This is due to DOC staff members' inexperience in the corrections system, lack of professionalism, inadequate training and inadequate monitoring of the most difficult adolescents in the jail.¹⁰⁹ Staff members are particularly inexperienced, as the adolescent unit is the first assignment for DOC staff members after initial training.¹¹⁰ Therefore, the most inexperienced correctional officers work in the most explosive environments with impulsive adolescents who have mental and behavioral issues.¹¹¹

The Report provided examples of DOC staff members' unprofessionalism. DOC staff members forced inmates to walk down the hallway undressed, punishment referred to as "walking down Broadway."¹¹² Staff members spat on inmates' food, refused to feed them, and threw away their property.¹¹³ The investigation found that use of force training was inadequate and failed to address the most problematic practices on Rikers, including headshots and false reporting.¹¹⁴ The Report noted that the inadequate supervision resulting in the insufficient protection of adolescent inmates was not due to lack of resources or staff members, as there was nearly a one-to-one inmate-to-staff ratio in 2013.¹¹⁵ Additionally, the Report focused on management issues and their relation to the inability to protect adolescent inmates against harm. It first highlighted the difficulty of implementing any reforms to improve supervision of staff members due to the lack of stability in facility management.¹¹⁶ Lack of stability in leadership trickles down to the captains' supervision of correctional officers, as each shift assignment involves a different captain supervising officers.¹¹⁷ When management fluctuates so frequently, there is little incentive to take responsibility for the jail's problems.

Another management deficiency results from the disconnect between DOC's top administrators and staff members working in excessively violent jails every day.¹¹⁸ The consultant noted how striking the frequency of absence among administrators and head managers was.¹¹⁹ The Report claims that the disconnect leads to noncompliance with use of force policies.¹²⁰ As a result, over the years, prison administrators have attempted to effect multiple reforms, but they have made no thorough or effective effort to change the culture of violence on Rikers.¹²¹ These management deficiencies illustrate the universal deficits in the DOC system, resulting in excessive force from staff members and a high frequency of inmate violence.

3. The Rikers Island Adolescent Jails Have Excessive and Inappropriate Use of Extended Punitive Segregation

The Report discussed the excessive and inappropriate prolonged use of adolescent segregation units.¹²² Adolescent inmates in punitive segregation spend 23 hours a day in six-by-eight foot cells.¹²³ The guards give them one hour a day for recreation in chain-linked cages and access to a shower.¹²⁴ DOC uses

¹⁰⁸ *Id.* at 40.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 41.

¹¹³ *Id.*

¹¹⁴ *Id.* at 31.

¹¹⁵ *Id.* at 40.

¹¹⁶ *Id.* at 41.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 44.

¹¹⁹ *Id.* at 45.

¹²⁰ *Id.* at 44.

¹²¹ *Id.*

¹²² *Id.* at 46.

¹²³ *Id.* at 47.

¹²⁴ *Id.*

punitive segregation excessively.¹²⁵ The average amount of adolescent inmates in punitive segregation on any given day in 2013 was fifteen to twenty-five percent.¹²⁶

Five months after releasing the Report, New York City officials agreed to a plan to eliminate the use of solitary confinement for inmates 21 years and younger.¹²⁷ The elimination of solitary confinement for inmates under 18-years-old and 18-year-old inmates with mental illnesses was required in the settlement agreement agreed upon in June of 2015.¹²⁸ Officials banned the use of solitary confinement for adolescents based on the widespread agreement that punitive segregation had particularly detrimental effects on adolescents, as illustrated by Kalief Browder's suicide, and increased inmate violence.¹²⁹ The ban will take effect in 2016.¹³⁰

4. The Report's Conclusion

The DOJ investigation concluded:

There is a pattern and practice of conduct at Rikers that violates the constitutional rights of adolescent inmates. In particular, we find that adolescent inmates at Rikers are not adequately protected from harm, including serious physical harm from the rampant use of unnecessary and excessive force by DOC staff members. In addition, adolescent inmates are not adequately protected from harm caused by violence inflicted by other inmates, including inmate-on-inmate fights. Indeed, we find that a deep-seated culture of violence is pervasive throughout the adolescent facilities at Rikers, and DOC staff members routinely utilize force not as a last resort, but instead as a means to control the adolescent population and punish disorderly or disrespectful behavior. Moreover, DOC relies far too heavily on punitive segregation as a disciplinary measure, placing adolescent inmates—many of whom are mentally ill—in what amounts to solitary confinement at an alarming rate and for excessive periods of time.¹³¹

The report proposed remedial recommendations and allowed the DOC 49 days to comply.¹³² In December 2014, unsatisfied with the city's efforts to remedy the conduct that violates adolescent inmates' constitutional rights, the DOJ joined the ongoing class action, *Nunez*,¹³³ which alleges that the systemic pattern and practice of unnecessary force against all inmates on Rikers Island amounts to conduct that violates inmates' constitutional rights.¹³⁴ In June of 2015, the City of New York agreed to settle the *Nunez*

¹²⁵ *Id.* at 46.

¹²⁶ *Id.*

¹²⁷ Michael Winerip & Michael Schwartz, *Rikers to Ban Isolation for Inmates 21 and Younger*, N.Y. TIMES, Jan. 13, 2015, <http://www.nytimes.com/2015/01/14/nyregion/new-york-city-to-end-solitary-confinement-for-inmates-21-and-under-at-rikers.html> (last visited Feb. 27, 2014).

¹²⁸ Consent Judgment at page 44, *Nunez v. City of New York*, No. 1:11-cv-05845-LTS-JCF (S.D.N.Y. July 1, 2015).

¹²⁹ *See* Winerip, *supra* note 131..

¹³⁰ *Id.*

¹³¹ Samuels, Bharara, Powell, & Daughtry, *supra* note 1, at 3.

¹³² *Id.* at 64.

¹³³ Jillian Jorgensen, *U.S. Attorney Preet Bharara Moves to Sue City Over Violence at Rikers Island*, OBSERVER, Dec. 18, 2014, <http://observer.com/2014/12/u-s-attorney-preet-bharara-moves-to-sue-city-over-violence-at-rikers-island/> (last visited March 22, 2016).

¹³⁴ Samuels, Bharara, Powell, & Daughtry, *supra* note 1, at 3 n.5.

lawsuit.¹³⁵ The limitations of the settlement agreement are discussed below.

III. THE FEDERAL LAWSUIT’S ABILITY TO EFFECTIVELY REFORM THE CULTURE OF VIOLENCE ON RIKERS ISLAND ADOLESCENT JAILS IS LIMITED BY THE POWER OF COBA

This section outlines the limitations of the federal lawsuit. First, the outcomes of federal lawsuits brought pursuant to Section 14141 and CRIPA, also known as institutional reform litigation, are outlined. Next, the limitations of institutional reform litigation are discussed and those limitations are applied to the situation on Rikers Island, with a discussion of COBA’s power.

A. Outcomes of Institutional Reform Litigation

Relief in institutional reform litigation can come in the form of Investigative Findings Letters, consent decrees, and memoranda of agreements (“MOAs”).¹³⁶ Investigative Findings Letters are merely advisory measures—whether or not an institution decides to implement recommendations is optional.¹³⁷ The policies and procedures outlined in consent decrees and MOAs carry more force. They attempt to improve management and control officer conduct.¹³⁸ Consent decrees and MOAs are created through negotiations between the court and all interested parties.¹³⁹ While a consent decree does not maintain the force of law, it “constitutes a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”¹⁴⁰

Consent decrees and MOAs involve common sets of required reforms including improving use of force directives, grievance systems, training,¹⁴¹ and the appointment of an independent monitor.¹⁴² Independent monitoring bodies oversee the enforcement of consent decrees and MOAs, and determine if the defendant institution is in compliance.¹⁴³ Independent monitors actively participate in reforms by investigating and reporting to the court and public.¹⁴⁴ They provide support, reassurance and warnings for the defendant institution.¹⁴⁵ Consent decrees and MOAs usually last five years and terminate when the independent monitor determines that the institution has met the conditions outlined by the court.¹⁴⁶ The successful enforcement of consent decrees or MOA recommendations depend on effective leadership. In order to create meaningful reform in law enforcement and corrections departments, there must be not only a change in formal procedures, but also a change in culture and organizational values—something that begins from the top-down.¹⁴⁷

¹³⁵ Weiser, *supra* note 42.

¹³⁶ Walker & Macdonald, *supra* note 59, at 6.

¹³⁷ *Id.* at 17.

¹³⁸ *Id.* at 6.

¹³⁹ David Reynolds, *The Mechanics of Institutional Reform Litigation*, 8 FORDHAM URB. L.J. 697 (1979).

¹⁴⁰ Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 518 (1986).

¹⁴¹ Walker & Macdonald, *supra* note 59, at 6.

¹⁴² *Id.* at 17.

¹⁴³ *Id.*; see also Eugene Kim, *Vindicating Civil Rights Under 42 USC § 14141: Guidance From Procedures in Complex Litigation*, 29 HASTINGS CONST. L.Q. 767 (2002).

¹⁴⁴ Walker & Macdonald, *supra* note 59, at 22.

¹⁴⁵ *Id.* at 23.

¹⁴⁶ *Id.*

¹⁴⁷ See *id.* at 495.

B. The Nunez v. City of New York Settlement Agreement

In October of 2015, the Honorable Laura Taylor Swain, Federal District Court Judge, gave final approval of a settlement agreement over the *Nunez* federal lawsuit regarding the culture of violence on Rikers Island.¹⁴⁸ The settlement resulted in a federal consent decree, requiring the DOC to revamp and implement numerous new practices, systems, policies and procedures in order to protect the constitutional rights of inmates with a close focus on adolescent inmates.¹⁴⁹ The agreement will remain in effect until the court finds the City has been substantially compliant with the its terms for 24 months.¹⁵⁰

The reform measures attempting to end the culture of violence on Rikers Island required by the settlement agreement include: the appointment of an independent monitor; the creation of a new use of force policy, reporting requirements and improvements in use of force incident investigations; increased staff member accountability; increased video surveillance of jails; improved tracking systems and the development of an Early Warning System (EWS); improvements in staff member training; and a myriad of provisions particularly for adolescent inmates.¹⁵¹ Each of these requirements is discussed further below.

1. Appointment of an Independent Monitor

The *Nunez* settlement agreement requires New York City to fund an independent federal monitor named Steve J. Martin who will report to Judge Swain and regularly assess DOC's compliance with the conditions of the settlement.¹⁵² Martin is a former correctional officer and General Counsel of the Texas State Prison System.¹⁵³ He has 40 years of professional experience in the corrections department, has served as a federal independent monitor in various prisons and state systems and as an expert consultant for the DOJ.¹⁵⁴

The monitor is required to create a monitoring plan to assess DOC's compliance.¹⁵⁵ The monitor will review all DOC policies and is granted access to the jail, and non-privileged DOC records and documents.¹⁵⁶ The monitor will be permitted to interview inmates and staff members protected by confidentiality requirements, away from other staff members (including supervisors).¹⁵⁷

2. Creation of a New Use of Force Policy, Reporting Requirements and Improvements in Use of Force Incident Investigations

A crucial part of the settlement is its focus on revamping the use of force policy, incident reporting requirements and incident investigations. First, the DOC is required to create a comprehensive use of force

¹⁴⁸ Michael Schwartz, *Judge Approves Settlement of Suit on Rikers Island Brutality*, N.Y. TIMES, Oct. 21, 2015, <http://www.nytimes.com/2015/10/22/nyregion/judge-approves-settlement-of-suit-on-rikers-island-brutality.html> (last visited March 10, 2016).

¹⁴⁹ Filing of Agreement at page 1, *Nunez v. City of New York*, No. 1:11-cv-05845-LTS-JCF (S.D.N.Y. June 22, 2015), <https://www.justice.gov/usao-sdny/file/479956/download>.

¹⁵⁰ *Id.* at 2.

¹⁵¹ *Id.* at 2-5.

¹⁵² Benjamin Weiser, *Deal is Near on Far-Reaching Reforms at Rikers, Including a Federal Monitor*, N.Y. TIMES, June 18, 2015, <http://www.nytimes.com/2015/06/19/nyregion/accord-near-on-sweeping-reforms-at-rikers-jail-including-us-monitor.html> (last visited March 10, 2016).

¹⁵³ Filing of Agreement, *supra* note 149, at 1-2.

¹⁵⁴ *Id.* at 2.

¹⁵⁵ Consent Judgment, *supra* note 128, at 55.

¹⁵⁶ *Id.* at 51.

¹⁵⁷ Weiser, *supra* note 152.

policy to be reviewed and approved by the monitor.¹⁵⁸ The new policy must emphasize when the use of force is permissible and impermissible,¹⁵⁹ and the duty of DOC staff members to protect inmates from harm.¹⁶⁰ The policy also requires explicit bans on blows to the head, face and areas of the body as well as bans against chokeholds and kicks.¹⁶¹ Force is also prohibited as a means to punish, retaliate against or in response to threats or insults from inmates.¹⁶²

To improve use of force reporting, DOC staff members are required to write reports independently of other staff members that may have witnessed or have been involved in use of force incidents, with a prohibition against collusion.¹⁶³ Medical staff must report when an inmate has suffered an injury and whether the medical staff suspects it may have been caused by a use of force incident not reported.¹⁶⁴ With the help of the monitor, the DOC is required to create an Anonymous Reporting System enabling DOC staff members to report use of force violations to a centralized reporting system.¹⁶⁵

To address the deficiencies in use of force investigations, the DOC is required to conduct “thorough, timely and objective investigations into use of force incidents.”¹⁶⁶ From these investigations, DOC staff must summarize their findings, determine whether a use of force policy was violated, and recommend remedial or disciplinary actions.¹⁶⁷ To improve investigations concerning adolescent inmates, the settlement requires the designation of a “Youth ID Team,” specifically for the investigation of use of force incidents involving inmates under 18 years-of-age.¹⁶⁸

3. Increased Staff Member Accountability

The DOC is required to increase staff member accountability through various measures including, requirements to create a new Use of Force Auditor position, by sending notifications to the U.S. Attorney’s Office, and improving staff recruitment, selection and promotion. The DOC is required to “take necessary steps to impose appropriate and meaningful discipline,” and termination must be a possible consequence for a violation of the use of force policy and for failure to report use of force incidents.¹⁶⁹ If a staff member uses force over three times within a six-month period,¹⁷⁰ jail wardens must refer to the staff members’ use of force history to determine whether counseling is needed.¹⁷¹ DOC, with the help of in the independent monitor, must create comprehensive and standardized disciplinary guidelines with discipline for use of force violations.¹⁷²

¹⁵⁸ Weiser, *supra* note 152.

¹⁵⁹ Consent Judgment, *supra* note 128, at 5.

¹⁶⁰ Weiser, *supra* note 152.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Weiser, *supra* note 152.

¹⁶⁵ Filing of Agreement, *supra* note 149, at 4.

¹⁶⁶ *Id.* at 2.

¹⁶⁷ *Id.*

¹⁶⁸ Consent Judgment, *supra* note 128, at 24.

¹⁶⁹ Filing of Agreement, *supra* note 149, at 3.

¹⁷⁰ Consent Judgment, *supra* note 128, at 31.

¹⁷¹ Weiser, *supra* note 152.

¹⁷² Consent Judgment, *supra* note 128, at 25.

The new Use of Force Auditor position is required to report to the Commissioner, analyze all use of force data and submit quarterly reports.¹⁷³ The DOC is required to “promptly” notify the U.S. Attorney’s Office if a staff member’s conduct in a use of force incident appears to be criminal.¹⁷⁴

In order to improve staff recruitment, selection and promotion, the DOC must implement various measures. First, they must create a staff recruitment program to attract qualified applicants selected through an “objective” process and subject applicants to a criminal background check.¹⁷⁵ To improve DOC staff promotions, the settlement requires the DOC to review the staff member’s involvement in use of force incidents and verify there is no cause for concern in his or her qualifications for promotions to Captain or higher.¹⁷⁶

4. Increased Video Surveillance of Jails

The settlement agreement also requires the installment of comprehensive video surveillance of the jails including, the implementation of a body worn camera pilot program and requirements for use of force hand-held video cameras.¹⁷⁷ The DOC is required to install a minimum of 7,800 additional wall-mounted surveillance cameras by February 2018, with a goal of obtaining complete coverage of the jails with some narrow exceptions.¹⁷⁸ Additionally, the settlement agreement requires a pilot program using 100 body worn cameras worn by DOC staff members in areas of the jail that have high frequencies of violence.¹⁷⁹ Further, DOC is required to develop and implement policies concerning hand-held video cameras requiring staff members to record situations such as responses to use of force incidents.¹⁸⁰

5. Improved Tracking Systems and the Development of EWS

The settlement agreement requires the DOC to improve tracking through the use of enhanced computerized systems and the development of EWS.¹⁸¹ The computerized tracking systems are required to track data on use of force incidents, investigations and disciplinary actions imposed on staff members for violations.¹⁸² The development of EWS is subject to approval and periodic review of the monitor,¹⁸³ and is created to identify staff members in need of corrective action¹⁸⁴ and to track use of force incidents.¹⁸⁵

6. Improvements in Staff Member Training

The DOC is required to work with the monitor to develop new training programs in various areas including, use of force policies, crisis intervention and conflict resolution, probe team training, and direct supervision training.¹⁸⁶ The DOC and monitor are also required to work together to improve the

¹⁷³ Jillian Jorgensen, *U.S. City and Bharara Reach Settlement in Federal Lawsuit Over Rikers Island*, OBSERVER, June 22, 2015, <http://observer.com/2015/06/city-and-bharara-reach-settlement-in-federal-lawsuit-over-rikers-island/> (last visited March 23, 2016).

¹⁷⁴ Filing of Agreement, *supra* note 149, at 4.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 3.

¹⁷⁸ Consent Judgment, *supra* note 128, at 28.

¹⁷⁹ Weiser, *supra* note 152.

¹⁸⁰ Filing of Agreement, *supra* note 149, at 3-4.

¹⁸¹ *Id.*

¹⁸² *Id.* at 4.

¹⁸³ *Id.* at 3.

¹⁸⁴ Consent Judgment, *supra* note 128, at 31.

¹⁸⁵ *Id.* at 12.

¹⁸⁶ *Id.* at 35-39.

effectiveness of existing training policies including, defensive tactics, cell extraction and investigator training.¹⁸⁷ Additionally, all staff members working regularly with adolescent inmates are required to complete training focusing on conflict management and crisis intervention skills specific to the adolescent population as well as strategies to manage adolescent inmates with mental illnesses and suicidal behaviors.¹⁸⁸

7. Provisions for Adolescent Inmates

There are various provisions within the settlement agreement that specifically focus on the treatment of adolescent inmates. Such inmates are called “Young Inmates” and are defined as under the age of 19 years-old.¹⁸⁹ Among the relevant provisions are the requirements to improve the supervision of young inmates, review inmate disciplinary policies, identify an alternative housing site for adolescent inmates, and as mentioned above, a prohibition against the use of punitive segregation.¹⁹⁰

In order to improve the supervision of young inmates, the DOC must meet certain inmate-to-staff ratio requirements, perform daily inspections of young inmate housing areas, develop and implement a “direct supervision model” to prevent inmate-on-inmate conflicts by requiring frequent interactions between inmates and DOC staff members.¹⁹¹ The settlement agreement also requires the DOC to appoint an outside consultant to review the DOC infraction policies.¹⁹² The consultant must make recommendations, which the DOC is required to implement unless doing so would be unduly burdensome.¹⁹³ Finally, the agreement requires the DOC, the monitor and the Mayor’s Office of Criminal Justice to make “best efforts” to remove adolescent inmates from Rikers Island by finding an alternative placement for such inmates.¹⁹⁴ The new site must provide access to recreational and education services, and public transportation for adolescent inmate family members.¹⁹⁵

The settlement agreement demands many changes on Rikers Island. While Judge Swain championed the agreement as a model for correctional departments across the country,¹⁹⁶ creating meaningful change on Rikers Island is a daunting task and violence continues.¹⁹⁷ The requirements in the settlement agreement reflect the common sets of requirements in consent decrees, such as improving use of force directives, grievance systems, training and developing EWS. Such measures have a history of failing to create meaningful reform. Moreover, reform efforts outlined in the settlement underestimate the power of COBA whose members are tasked with implementing such efforts into operational policy.

C. Limitations of the *Nunez v. City of New York* Institutional Reform Litigation and the Power of COBA

While one should not undervalue the extent to which Section 14141 or CRIPA brought about success and valuable institutional reform litigation, such efforts suffer from significant limitations in actually protecting the constitutional rights of inmates on Rikers Island. The failure of reform initiatives prior to the settlement agreement and long history of use of force lawsuits to protect inmates’ constitutional rights underscore these limitations. There are numerous systemic disincentives throughout DOC operations that

¹⁸⁷ *Id.* at 37.

¹⁸⁸ *Id.* at 38.

¹⁸⁹ Filing of Agreement, *supra* note 149, at 4.

¹⁹⁰ *Id.* at 5-6.

¹⁹¹ *Id.* at 5.

¹⁹² *Id.* at 6.

¹⁹³ *Id.*

¹⁹⁴ Consent Judgment, *supra* note 128, at 46.

¹⁹⁵ Weiser, *supra* note 152.

¹⁹⁶ Schwirtz, *supra* note 148.

¹⁹⁷ *Id.*

create significant impediments to reform efforts. These disincentives include the jail's primary concern of maintaining order and the status quo, dynamics on the ground-level, civil services laws, COBA, and COBA's president, Norman Seabrook.

1. Failure of Recent Reform Initiatives and the Long History of Lawsuits

The Report included recent initiatives¹⁹⁸ to address the problem of inappropriate use of force and lack of accountability. In doing so it illustrated the limitations of consent decrees resulting from institutional reform litigation. These initiatives included (1) the creation of a hotline that provides inmates with the opportunity to anonymously report abuse, and (2) the addition of new management positions in adolescent facilities, such as a Deputy Warden for Adolescents and an Integrity Control Officer.¹⁹⁹ The Report's findings and the persistence of the code of silence illustrate the failure of these reform efforts.

In addition to the recent initiatives, there is a long history of use of force lawsuits failing to protect inmates' constitutional rights on Rikers Island. The DOC has been involved in six class-action lawsuits involving excessive use of force from the 1980's until *Nunez*.²⁰⁰ Both *Nunez* and each case before has settled, agreeing on limited injunctive relief and specific reforms regarding use of force policies and practices.²⁰¹ These past efforts were not sustainable, and *Nunez* alleges their demise.²⁰²

The court cannot effectively reform the culture of violence in correctional facilities on its own. While the independent monitor is meant to ensure implementation by acting as an officer of the court, even this presents limitations to actual enforcement of reforms. In order to create lasting reform, adherence from the top down—from both managers and officers—is required.²⁰³ The culture of violence perpetrated by the lowest-rank-and-file DOC staff members up to the Corrections Commissioner frustrates consent decree and enforcement efforts. This is because the ultimate responsibility for translating a consent decree into enforced operational policy falls on the officials within the institution.²⁰⁴ If the internal culture does not tolerate or encourage compliance, it is unlikely that officers will carry out the letter or spirit of the directives.²⁰⁵ The failure of reform efforts to translate into a new internal culture resulted in recent initiatives and six class-action lawsuits against DOC.

2. The Primary Concern of Jails Hinders Reform Efforts

Maintaining order and the status quo is the primary concern of jails. This hinders reform and perpetuates the culture of violence in adolescent inmate facilities. Because the primary concern is maintaining order and the status quo, every situation is treated as if it may escalate and explode.²⁰⁶ There is an ever-present threat of violence and disorder in adolescent jails, resulting in extreme measures that harm inmates.²⁰⁷ Guards are evaluated on their ability to control inmates and maintain order.²⁰⁸ Therefore, progression in officers' careers may depend on proving they are tough and able to control inmates, incentivizing excessive

¹⁹⁸ Samuels, Bharara, Powell, & Daughtry, *supra* note 1, at 51.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 44.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *See id.* at 7.

²⁰⁴ Walker & Macdonald, *supra* note 58, at 493.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 817 n.33 (1990).

²⁰⁸ *Id.*

force.²⁰⁹ The costs of maintaining the status quo and disregarding consent decree orders are not as significant as the costs associated with the uncertainty of complying with such orders.²¹⁰ Thus, the incentive system on Rikers Island reinforces the status quo.²¹¹

3. Disincentives on the Ground

A correctional officer on Rikers Island may have few incentives to implement *Nunes* reforms because the net expected cost of complying with, for example, a new use of force directive, may be greater than continuing to use excessive and unnecessary force. There are many reasons an officer may use excessive force, including fear for life or of serious bodily injury, desire for revenge, failure to understand a use of force policy, or simply because it is more expedient to use force than it is to ensure cooperation.²¹² In these situations, and especially when an officer fears for his or her life, the potential costs of complying with consent decree orders and implementing reforms are much greater than the certainty of not complying and continuing to use excessive force.²¹³ Therefore, the settlement agreement's requirements calling for a new comprehensive use of force policy, even one that explicitly bans certain use of force techniques²¹⁴ and has disciplinary policies that call for potential termination for use of force violations,²¹⁵ does not necessarily guarantee an effect in operations on the ground due to strong disincentives such as fear for life or serious bodily injury. Ultimately, these requirements are just words on paper unless they are actually implemented by DOC staff members.

Supervisors are incentivized to hide facility conditions from the courts to avoid further court intervention.²¹⁶ There are few incentives to identify problems and take responsibility for fixing them and it is easier to turn a blind eye.²¹⁷ The costs of managing a facility that adequately reports and holds staff members accountable are greater than never identifying problems. Therefore, the measures required by the settlement, including suggestions to ensure staff members involved in use of force incidents write reports independently of other staff members,²¹⁸ are unlikely to be enforced because doing so would cost more than maintaining the status quo. It is important to note that the old use of force reporting policy had a similar requirement that staff members report use of force incidents independently and such requirement was frequently ignored.²¹⁹ Additionally, the requirement that the DOC conduct "thorough, timely and objective investigations into use of force incidents,"²²⁰ will likely have a minimal effect. Such policy is similar to the old policy, which resulted in superficial, backlogged investigations.²²¹ Policies like these and many others were ignored before the settlement and are unlikely to be enforced through the consent decree. For DOC staff members on the ground, complying with the settlement agreement is likely to cost more than maintaining the status quo.

4. Recent Promotions within the DOC Illustrate the Disincentives

During the DOJ investigation of the adolescent facilities on Rikers Island, the warden and deputy warden at the time, William Clemons and Turhan Gumusdere respectively, were responsible for omitting

²⁰⁹ *Id.* at 829.

²¹⁰ *Id.* at 830.

²¹¹ *See id.* at 828.

²¹² Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 33 (2012).

²¹³ *Id.*

²¹⁴ Weiser, *supra* note 152.

²¹⁵ Filing of Agreement, *supra* note 149, at 3.

²¹⁶ *See* Sturm, *supra* note 199, at 900.

²¹⁷ *See id.* at 828-830.

²¹⁸ Weiser, *supra* note 152.

²¹⁹ Samuels, Bharara, Powell, & Daughtry, *supra* note 1, at 21 (citation omitted).

²²⁰ Filing of Agreement, *supra* note 149, at 2.

²²¹ Samuels, Bharara, Powell, & Daughtry, *supra* note 1, at 34-35.

hundreds of inmate fight records.²²² In May of 2014, the Commissioner, Joseph Ponte, promoted Clemons to chief of the department and highest-ranking uniformed officer.²²³ The Commissioner also promoted Gumusdere to warden of the largest jail on Rikers Island.²²⁴ The Report noted that both Clemons and Gumusdere “abdicated responsibility” for reporting violence and “turned a blind eye” to submitted falsified reports.²²⁵ The DOJ recommended the demotion of both Clemons and Gumusdere.²²⁶ Instead, Commissioner Ponte, appointed by Mayor de Blasio,²²⁷ promoted officers who encouraged the code of silence. Clemons has since retired, likely due to public outrage.²²⁸ However, Commissioner Ponte maintains that both Clemons and Gumusdere demonstrated “exemplary leadership” and were “fully committed to the department’s reform agenda.”²²⁹ Therefore, the settlement agreement’s requirements, such as the attempt to increase staff member accountability by requiring jail wardens to refer to a staff member’s use of force history and determine whether counseling is needed,²³⁰ will likely have a minimal effect since the wardens renounce reform efforts and promote the code of silence themselves.

The settlement agreement also seeks to remedy this problem with the requirement that the DOC review staff members’ history of use of force incidents during promotional considerations and verify there is no cause for concern in his or her qualifications for promotion.²³¹ Such determinations are ultimately made by Commissioner Ponte, who has already shown disregard for reform efforts. Further, the settlement agreement allows Commissioner Ponte to determine “exceptional circumstances exist,”²³² bypassing the rule and allowing the promotion regardless of a history of excessive use of force. The Commissioner of corrections from 2003 to 2009, Martin F. Horn, admitted that Commissioner Ponte does not have many options to choose from when looking to promote leaders likely to enforce reforms.²³³ When such disregard for DOC rules and management, as exhibited by Commissioner Ponte, is valued throughout the department, young officers learn to emulate such practices. Consequently, the culture of violence and code of silence persists throughout the system. The promotion of Clemons and Gumusdere indicates that leadership rewards turning a blind eye to the use of excessive force by officers, underscoring the obstacles to meaningful reform.

5. Disincentives from Civil Service Laws

Civil service laws also have significant effects on correctional officers’ behavior, thereby hindering reform efforts. Civil service laws dictate the recruiting, promoting, demoting, transferring, and terminating of public employees including correctional officers.²³⁴ Most significantly, civil services laws, such as Section 9-117(b) of the New York City Administrative Code, place significant hiring restrictions on DOC staff members.²³⁵ These laws make it difficult for corrections departments to hold staff members accountable by

²²² Editorial, *The Shake-Up at Rikers Island*, N.Y. TIMES, Nov. 3, 2014, <http://www.nytimes.com/2014/11/04/opinion/the-shake-up-at-rikers-island.html>. (last visited March 22, 2016).

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Weiser, *supra* note 152.

²³¹ Filing of Agreement, *supra* note 149, at 4.

²³² Consent Judgment, *supra* note 128, at 34.

²³³ Michael Winerip & Michael Schwartz, *To Fix Rikers, de Blasio Wants Outside Help at Jail Agency*, N.Y. TIMES, Sept. 23, 2014, http://www.nytimes.com/2014/09/24/nyregion/de-blasio-seeks-to-enlist-outside-help-in-fixing-rikers.html?_r=1.

²³⁴ Rachel Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 796 (2012).

²³⁵ *See id.*; N.Y.C. Administrative Code § 9-117(a)(b).

managing, disciplining or terminating officers.²³⁶ Therefore, DOC staff members, backed by civil service laws, will likely oppose fitness assessments for staff members that use excessive or unnecessary force, and will likely strongly oppose the creation of tracking systems such as EWS.

6. Disincentives from COBA and Norman Seabrook

Unions play a significant role in the creation of the Civil Service laws that hinder reform efforts,²³⁷ as they have considerable influence over executives, legislators and judges.²³⁸ COBA has a strong interest in the state laws that regulate Civil Service law and funding for correctional officers and contributed \$500,000 to political campaigns in 2012, the majority of which went to legislative elections.²³⁹

For the past two decades, COBA's president, Norman Seabrook, has gained immense control over the DOC and outmaneuvered many mayors and commissioners.²⁴⁰ Former DOC commissioner Martin F. Horn commented that DOC wardens believed Seabrook exerted more control over their careers than he did as commissioner.²⁴¹ Seabrook's leadership has been instrumental in the large gains in salaries and pension benefits that correction officers have recently received.²⁴² Seabrook gained his power through relations with commissioners, high-ranking corrections leaders and most recently, Mayor de Blasio.²⁴³ He also exerts public influence on his radio show.²⁴⁴ While Seabrook's influence has greatly benefitted DOC staff members, it has also helped feed the culture of violence on Rikers by undermining accountability and hindering reform.²⁴⁵

Seabrook influences the political process by exerting power over DOC. Seabrook prevented hundreds of inmates from attending their court dates to bar an inmate from giving testimony that would help convict a correctional officer in a brutality case.²⁴⁶ Seabrook prevented buses from taking inmates off the island, which effectively shut down the city's courts.²⁴⁷ In 1993, before he became president, Seabrook and 200 DOC staff members blocked off the bridge that connects Rikers Island to Queens in a protest against contract negotiations.²⁴⁸ Seabrook imposes significant costs on not only DOC leadership and staff members for complying with reform efforts, but also on the political process and public at large.

Seabrook's ability to force out the chief investigator of the DOC, Florence Finkle—someone who began exposing and disciplining prison officials who brutalized inmates—illustrates his ability to stall reform.²⁴⁹ Seabrook harassed Finkle by unexpectedly visiting her office and criticizing her on his radio show.²⁵⁰ Seabrook ultimately replaced her with one of his childhood friends, Michael Blake.²⁵¹ Seabrook vehemently resisted harsher disciplinary measures for DOC staff members who used excessive force.²⁵²

²³⁶ See *id.* at 797.

²³⁷ See *id.* at 797-799.

²³⁸ See *id.* at 813.

²³⁹ See Winerip & Schwartz, *supra* note 17, at 9.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ See *id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

Like Finkle, guards have few incentives to follow reform efforts.²⁵³ The union vehemently resists high-ranking officials who attempt to implement disciplinary measures.²⁵⁴ If officers do follow reform efforts against the wishes of the union, they are often informally disciplined.²⁵⁵ Seabrook gains much of his influence as a result of fear he instills in others who go against him, and this influence frustrates reform efforts.²⁵⁶

7. Empathy Does Not Incentivize Reform: The Phenomenon of Black on Black Violence

DOC staff members' lack of empathy for adolescent inmates is an interesting phenomenon, as they often come from the same neighborhoods and communities as the inmates they oversee. As mentioned in the introduction, 95 percent of the adolescent population on Rikers Island is Black or Latino.²⁵⁷ In 2010, two-thirds of the 800 16- and 17-year-olds incarcerated in New York were Black.²⁵⁸ The overwhelming majority of COBA members, including Seabrook, Clemons and Blake, are Black.²⁵⁹ Other Black minorities from the same disenfranchised communities perpetuate the pervasive devaluing of minority youth's lives.

Both the DOC staff employed on Rikers Island and adolescents inmates come from marginalized, low-income communities of color that lack resources and opportunities. Concentrated poverty and failing schools in these neighborhoods make both crime and the dangerous and difficult work of a correctional officer appealing. Becoming a DOC staff member only requires a high school diploma, but they benefit from job security, advantages from their union, and a medium annual income of \$57,100 with top earners receiving \$72,000.²⁶⁰ This kind of job is appealing to low-income minorities isolated in neighborhoods where opportunity is scarce. These communities are desperately trying to live out the American dream and make due with the resources they have. Some end up on Rikers Island because they are charged with a crime, others end up there because of the benefits of holding such a difficult and dangerous job.

Seabrook grew up in a low-income family of eight children in the Bronx.²⁶¹ Much like the adolescent inmates on Rikers Island, Seabrook was a troubled youth and was committed to a juvenile center.²⁶² Despite this fact, Seabrook advocates for DOC staff members at the expense of adolescent inmates.²⁶³ He expresses no empathy towards the adolescent population that is markedly similar to the young man he was growing up.²⁶⁴ One may think that the commonality of backgrounds would provide DOC staff members with the ability to recognize the humanity in adolescent inmates on Rikers Island. Commonalities among guards and inmates that could potentially result in empathy are overshadowed by Black-on-Black violence. Thus, empathy does not act as an incentive for reform.

IV. IN ORDER TO PROTECT THE CONSTITUTIONAL RIGHTS OF ADOLESCENT INMATES ON RIKERS ISLAND, NY PENAL LAW SECTION 30.00 AND SECTION 9-117(B) OF THE NEW YORK CITY ADMINISTRATIVE CODE MUST BE AMENDED

²⁵³ Winerip & Schwartz, *supra* note 17.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ O'Donohue, *supra* note 18, at 1.

²⁵⁸ *Id.* at 6.

²⁵⁹ Winerip & Schwartz, *supra* note 17.

²⁶⁰ Allen Ury, *5 Reasons to Become a Correctional Officer*, EVEREST, Oct. 11, 2011, <http://news.everest.edu/post/2011/10/5-reasons-to-become-a-correctional-officer/#.VngaW5ODGkp> (last visited Dec. 21, 2015).

²⁶¹ Winerip & Schwartz, *supra* note 17.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

This section proposes that protecting the constitutional rights of adolescent inmates on Rikers Island's depends on statutory amendments within NY Penal Law Sec. 30.00 and Sec. 9-117(b) of the New York City Administrative Code. NY Penal Law Sec. 30.00 sets the age of criminal responsibility at 16 years. Sec. 9-117(b) of the New York City Administrative Code establishes that only uniformed force members are eligible for promotion within DOC.

First, this section advocates for the amendment of NY Penal Law Sec. 30.00 and discusses reasons for doing so, including the widespread recognition of differences between adults and juveniles. Next, this section addresses recent proposals to amend the law, and the counterarguments. Then, this section discusses Sec. 9-117(b) of the Administrative Code, the problems brought about by the law and Mayor de Blasio's proposal to amend the law, and various counterarguments. Finally, this section outlines additional recommendations for improving the morale of DOC correctional officers.

A. Amend New York Penal Law Section 30.00

New York Penal Law Section 30.00 establishes the minimum age at which someone can be prosecuted for an offense in criminal court, or the age of criminal responsibility.²⁶⁵ It states that any person under the age of 16 who has allegedly engaged in conduct that would constitute a criminal offense is permitted to use infancy as a defense and adjudicate the proceedings for such offense in Family Court.²⁶⁶ Sec. 30.00 has various exceptions for the use of the infancy defense. For example, 13- to 15-year-olds are criminally responsible for second-degree murder.²⁶⁷ Fourteen and fifteen-year-olds are criminally responsible for first-degree kidnapping, arson, assault, manslaughter, rape, criminal sexual acts, aggravated sexual abuse, burglary and robbery.²⁶⁸ Fourteen and 15-year-olds are also criminally responsible for second-degree burglary, arson, robbery, and for possessing machine guns on school grounds.²⁶⁹

NY Penal Law Sec. 30.00(1) should be amended to raise the age of criminal responsibility from 16 to 18. This would effectively remove adolescent inmates from Rikers Island and place them under the jurisdiction of the Family Court, as "juvenile delinquents."²⁷⁰ As a result, the Family Court would oversee their rehabilitation, precluding DOC staff from exacting violence against them.

Family Court emphasizes rehabilitation as opposed to punishment.²⁷¹ This focus is reflected in the dispositional placements available to youth adjudicated in Family Court, including Close-to-Home placements, which are similar to group homes within adolescents' communities,²⁷² and the Office of Children and Family Services placements.²⁷³ These facilities are designed for adolescents and are staffed by people who are trained to work with adolescents and understand their development and behavior.²⁷⁴ These settings are clearly more appropriate for 16- and 17-year-olds than the jails and prisons designed for adult offenders and staffed by DOC staff members.

There is widespread recognition of the differences between youth and adult offenders, and the

²⁶⁵ McKinney's Penal Law, N.Y. Penal Law § 30.00(1) (2007).

²⁶⁶ *Id.* at § 30.00(3).

²⁶⁷ *Id.* at § 30.00(2).

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *See id.*

²⁷¹ In the Matter of Meleick H., 170 Misc. 2d 230, 236 (Fam. Ct. 1996).

²⁷² New York State Office of Children and Family Services, *Close to Home Initiative*, http://ocfs.ny.gov/main/rehab/close_to_home/ (last visited Feb. 12, 2016).

²⁷³ New York State Office of Children and Family Services, *Division of Juvenile Justice and Opportunities for Youth*, <http://ocfs.ny.gov/main/rehab/> (last visited Feb. 12, 2016).

²⁷⁴ *See id.*

necessity for different treatment that satisfactorily corresponds to the needs of youth.²⁷⁵ New York and North Carolina are the only two states that have failed to fully recognize such a distinction.²⁷⁶ Because of this, adolescent youth on Rikers Island are suffering. They are subject to a multitude of abuses, usually in response to conduct that is typical adolescent behavior. Further, as mentioned above, over 75% of youth on Rikers Island have not been convicted of a crime.²⁷⁷ Therefore, even the retributive theory, often used to justify punishment, cannot justify the culture of violence adolescent inmates experience on Rikers Island.

The widespread recognition of the differences between adolescents and adults is reflected in a long line of Supreme Court precedent.²⁷⁸ In 2005, *Roper v. Simmons* held that the imposition of the death penalty on a 17-year-old juvenile offender violated the Eighth Amendment.²⁷⁹ The court reasoned that juveniles are “categorically less culpable than the average criminal” and outlined the differences between juveniles and adults contributing to the diminished culpability of juveniles.²⁸⁰ The court looked to the rest of the world and the national consensus rejecting the juvenile death penalty to inform its decision.²⁸¹ The rationale behind the decision was based on the differences between adolescents and adults, contributing to the diminished culpability of adolescents. The court discussed adolescents’ lack of maturity and under-developed sense of responsibility.²⁸² The court noted that recognizing these differences justified affording fewer rights to adolescents, such as the right to vote, serve on juries, or to marry without parental consent.²⁸³ The court also discussed how adolescents are more vulnerable to outside pressures including peer pressure.²⁸⁴ Additionally, the court noted that the character of juveniles is not well-formed and their personality traits are less fixed, which also contributes to their diminished culpability.²⁸⁵ The court stated that for these reasons, juveniles are also less susceptible to deterrence.²⁸⁶ These differences justified treating adolescents and adults differently, and also barring the death penalty for juveniles.

Graham v. Florida, *Miller v. Alabama*, and *Jackson v. Hobbs* reaffirmed the differences between adolescents and adults outlined in *Roper*.²⁸⁷ In 2010, *Graham* held that the Eighth Amendment does not permit sentencing a 16-year-old juvenile offender to life without parole for a non-homicidal crime, citing *Roper*’s reasoning.²⁸⁸ In 2012, it was held in *Miller* and *Jackson* that the Eighth Amendment forbids mandatory life without parole for juvenile homicide offenders.²⁸⁹ Both cases also cited the reasoning from *Roper* outlining the differences between adolescents and adults.²⁹⁰

As shown from Supreme Court precedent, there is widespread recognition of the differences between adolescents and adults, leading to the diminished culpability of adolescents. Because of these recognized differences, the overwhelming majority of the nation does not hold 16- and 17-year-olds criminally responsible. However, New York has failed to follow the national consensus and continues to

²⁷⁵ Yaroshefsky, *supra* note 20, at 3.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ See *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48, 50 (2010); *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Jackson v. Hobbs*, 132 S. Ct. 548 (2011).

²⁷⁹ *Roper*, 543 U.S. at 553.

²⁸⁰ *Id.* at 552.

²⁸¹ *Id.* at 553-554.

²⁸² *Id.* at 569.

²⁸³ *Id.*

²⁸⁴ *Id.* at 601-602.

²⁸⁵ *Id.* at 569.

²⁸⁶ *Id.* at 553.

²⁸⁷ See *Graham v. Florida*, 560 U.S. 48, 50 (2010); *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Jackson v. Hobbs*, 132 S. Ct. 548 (2011); *Roper v. Simmons*, 543 U.S. 551 (2005).

²⁸⁸ *Graham*, 560 U.S. at 50.

²⁸⁹ *Miller*, 132 S. Ct. at 2455.

²⁹⁰ *Id.* at 2458.

subject adolescent inmates on Rikers Island to a culture of violence and conduct that violates their constitutional rights.

Despite the fact that New York is virtually alone in setting the age of 16 as the cut-off age for criminal responsibility, recent reforms have indicated recognition on the part of the City of the differences between adolescents and adults, leading to differential treatment. For example, Rikers Island houses their adolescent population in different jails than the adults.²⁹¹ The separation of adolescents from adults indicates recognition of the differences between adolescent inmates and adult inmates and a need for their separation.

New York also has recognized the need for a different treatment for adolescent and adult inmates, which is illustrated through the policy change eliminating solitary confinement for persons under the age of 21.²⁹² The extremely harmful effects that solitary confinement has on adolescents prompted this policy change.²⁹³ For example, adolescent inmates who have been subjected to solitary confinement suffer from severe psychological impacts, including suicidal ideations and other self-injurious acts, anxiety and trouble sleeping, post-traumatic stress disorder, irrepressible rage and psychosis (such as hallucination).²⁹⁴ Such resulting behaviors are caused by standard adolescent neurodevelopment.²⁹⁵ The practice of solitary confinement has been found to increase aggressive, impulsive, violent and disobedient behavior in adolescents.²⁹⁶ Eliminating solitary confinement for inmates up to the age of 21 reflects New York's recognition of the differences between adolescents and adults. This recognition should extend to raising the age of criminal responsibility.

The settlement requires the DOC and the Mayor's office of Criminal Justice make best efforts to remove adolescent inmates from Rikers Island.²⁹⁷ However, this requirement does not extend to removing adolescents from the jurisdiction of Criminal Court. While this reform recommendation and the specific focus on adolescents in many provisions of the settlement agreement clearly indicate recognition of the differences between adolescent and adult inmates and a need for differential treatment, there is no justification provided for why such adolescents should still continue to be held criminally responsible like adults. Removing adolescents from Rikers Island while still holding them criminally responsible will not end the deep-seated culture of violence and code of silence perpetrated by DOC staff members in other contexts. Due to the institutional culture engendered by DOC staff members—who are supported by the powerful incentives to maintain the status quo outlined above— adolescent inmates are likely, even if removed from Rikers Island, to still be subjected to patterns and practices of unconstitutional conduct. Therefore, in order to protect adolescent inmates' constitutional rights, the age of criminal responsibility should be amended so that such inmates are not subjected to the oversight and culture of violence of DOC staff members.

1. Proposals to Amend New York Penal Law Section 30.00

New York's Governor, Andrew Cuomo, recognizes the dire need to raise the age of criminal responsibility to 18-years-old.²⁹⁸ Governor Cuomo created the Raise the Age Commission and has proposed that the legislature amend NY Penal Law Sec. 30.00. The plan proposes the gradual increase of the age of

²⁹¹ See Samuels, Bharara, Powell, & Daughtry, *supra* note 1, at 5.

²⁹² Jake Pearson, *NYC Jail Commissioner: No Solitary Confinement for 16-year-old, 17-year-old Inmates by the End of the Year*, HUFFINGTON POST, Sep. 29, 2014, http://www.huffingtonpost.com/2014/09/29/nyc-teen-solitary_n_5904116.html (last visited Feb. 27, 2014).

²⁹³ *Id.*

²⁹⁴ Yaroshefsky, *supra* note 20, at 20.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 21.

²⁹⁷ Consent Judgment, *supra* note 128, at 46.

²⁹⁸ *Democrat & Chronicle: Keep Teens Out of NY prisons*, RAISETHEAGE, <http://raisetheage.com/newitem/democrat-chronicle-keep-teens-ny-prisons> (last visited Feb. 27, 2014).

criminal responsibility.²⁹⁹ In 2017, the age of criminal responsibility would be 17-years-old, and would go up to 18-years-old by 2018.³⁰⁰ Such juvenile offenders would be housed in state and privately-operated youth facilities.³⁰¹ The plan would still allow for the criminal conviction of the most serious crimes, such as murder and other violent offenses, per judicial discretion.³⁰² Governor Cuomo's plan aims to decrease adolescent recidivism rates vis-a-vis reduced prison sentences and more court intervention for youth.³⁰³

Another proposal in favor of supporting raising the age of criminal responsibility is the Record Expungement Designed to Enhance Employment Act (REDEEM Act), sponsored by Senator Rand Paul. The REDEEM Act, among many other things, incentivizes states to raise the age of criminal responsibility to 18 years by giving preference for grant applications to states that have established 18 years as the age of criminal responsibility.³⁰⁴ Recent proposals brought by the Raise the Age Commission and REDEEM Act indicate the widespread recognition of a need to amend New York Penal Law Sec. 30.00.

2. Opponents of the Amendment of New York Penal Law Sec. 30.00

One of the main arguments against amending Sec. 30.00 is rooted in the public safety rationale and the "tough on crime" approach. While this Note argues that the differences between adolescents and adults justify differential treatment, one could argue that such differences are aggravating factors, making adolescents more dangerous than adults. Adolescents' lack of maturity and under-developed sense of responsibility make them more prone to violence.³⁰⁵ Likewise, they are more prone to violence because adolescents are more vulnerable to outside pressures, and the character of their personality traits are less fixed.³⁰⁶ These reasons could lead one to think that adolescents should be subject to the harshest punishments for the sake of deterrence.

However, the high recidivism rates resulting from charging 16- and 17-year-olds as adults refutes these arguments. As mentioned, the recidivism rates of adolescents from Rikers Island are high.³⁰⁷ The average number of previous admissions of youth to the Department of Corrections (DOC) in 2013 was 1.02.³⁰⁸ These statistics indicate that being "tough on crime" does not increase public safety. Further, studies from states like Connecticut and Illinois found that juvenile recidivism rates decreased when adolescents were given options other than the jails and prisons designed for adults.³⁰⁹

It is worth noting that COBA is likely to be vehemently opposed to any proposals to raise the age of criminal responsibility. Such initiatives would remove around 800 adolescent inmates currently under DOC oversight³¹⁰ and would significantly affect employment positions COBA is likely to rigorously protect. Additionally, raising the age will not solve the underlying issue of the culture of violence and lack of accountability on Rikers Island. Raising the age would only protect adolescent inmates and the constitutional

²⁹⁹ See Joseph Spector, *NY Prefers Detention Centers Over Prison for Youth*, ITHACAJOURNAL, Jan. 19, 2014, <http://www.ithacajournal.com/story/news/public-safety/2015/01/19/ny-juvenile-detention-facilities/22012743/> (last visited Feb. 27, 2014).

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ See *The REDEEM Act*, CORYBOOKER.SENATE.GOV, <http://www.booker.senate.gov/?p=general&id=33> (last visited Feb. 27, 2014).

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ Samuels, Bharara, Powell, & Daughtry, *supra* note 1, at 6.

³⁰⁸ *Id.*

³⁰⁹ See Spector, *supra* note 287.

³¹⁰ *Id.*

violations of adult inmates' rights would persist. As such, this Note proposes the amendment of Sec. 9-117(b) of the Administrative Code to end the pattern and practice of conduct that violates the constitutional rights of all inmates on Rikers Island.

B. Amend Section 9-117(b) of the New York City Administrative Code

Section 9-117(a) of the New York City Administrative Code outlines the composition of the uniformed force of the DOC and establishes that DOC staff members are limited to correctional officers, captains, assistant deputy wardens, deputy wardens and wardens.³¹¹ Section 9-117(b) states that the composition of the DOC may only be altered by the creation of new positions within the DOC, which may only be filled by the promotion of DOC staff members.³¹² This provision prohibits the appointment of any person from outside the DOC to any position therein.³¹³ Therefore, all uniformed officers within DOC started as correctional officers and spent years within the DOC moving their way up the hierarchy.³¹⁴

Section 9-117(b) creates numerous problems for the enforcement of reform initiatives. All DOC staff members have operated within the culture of violence present on Rikers Island, as allegations of brutality and corruption along the chain of command on Rikers Island have persisted for decades.³¹⁵ Therefore, it is challenging to find candidates for promotion that have not been tainted by the culture of violence and code of silence. This dilemma is illustrated by the promotions of Clemons and Gumusdere.³¹⁶ Therefore, Section 9-117(b) creates a significant obstacle for meaningful reform on Rikers Island. In order to avoid this obstacle, Section 9-117(b) should be amended to allow for the appointment of uniformed officers from outside of the DOC. This will allow new people who have not spent years within the culture of violence to occupy leadership positions and implement meaningful reform.

Mayor de Blasio has proposed amending Section 9-117(b) to allow for flexibility in promotion of leadership in order to effectuate significant and lasting change.³¹⁷ However, he faces rigorous opposition from labor unions he has normally favored.³¹⁸ In addition to the DOC, the amendment would affect the fire and police departments, which comprise a workforce of 350,000.³¹⁹ This powerful municipal workforce can pressure City Council and the legislature, upon whom the approval of amending Sec. 9-117(b) depends.³²⁰

1. Opponents of the Amendment of Section 9-117(b) of the New York City Administrative Code

Those opposed to amending Sec. 9-117(b) highlight the negative impacts that changing Civil Service laws will have on the DOC functioning. First, they argue that Civil Service laws like Sec. 9-117(b) of the city

³¹¹ N.Y.C. Administrative Code § 9-117(a)(b).

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ Michael Winerip & Michael Schwartz, *To Fix Rikers, de Blasio Wants Outside Help at Jail Agency*, N.Y. TIMES, Sept. 23, 2014, http://www.nytimes.com/2014/09/24/nyregion/de-blasio-seeks-to-enlist-outside-help-in-fixing-rikers.html?_r=1.

³¹⁶ *See id.*

³¹⁷ Matthew Chayes, *De Blasio Bid to Change Civil Service Rules Faces Opposition*, NEWSDAY, Nov. 30, 2014, <http://www.newsday.com/news/new-york/de-blasio-bid-to-change-civil-service-rules-faces-opposition-1.9667050> (last visited Feb. 27, 2014).

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

Administrative Code safeguard against cronyism, inappropriate political influence and corruption.³²¹ The laws seek to avoid the appointment, promotion or termination of employees based on their political affiliation.³²² Such laws also support the balance between executive and legislative branches.³²³

However, Civil Service laws like Sec. 9-117(b) have the opposite effect. Sec. 9-117(b) promotes cronyism by significantly limiting the amount of candidates the Commissioner can promote to leadership positions,³²⁴ as illustrated by former commissioner's comment about the difficulty commissioner Ponte faces in making promotional decisions.³²⁵ Actions on the part of Seabrook illustrate COBA's inappropriate use of political influence and corruption, most blatantly in the instances when he shut down access to and from Rikers Island, and obstructed the functions of district courts.³²⁶

Opponents also argue that changing Sec. 9-117(b) would jeopardize DOC staff members' promotional opportunities and that DOC staff members know the system better than candidates from outside.³²⁷ It is clear that allowing the appointment of persons outside of DOC would create more competition for staff members within DOC. However, if DOC staff members are not performing their job properly, for example by failing to protect inmates' safety and constitutional rights, such staff members do not deserve promotional opportunities. The mindset that staff members are entitled to promotions if they maintain the status quo is precisely what impedes effective reform.

Similarly, it is clear that DOC staff members know the system well because they have worked within it for years. However, that is precisely the problem that amending Sec. 9-117(b) seeks to resolve. The fact that DOC staff members know the system well means that they have incentives to control the inmate population through unnecessary and excessive force, thereby obstructing any mechanisms to hold DOC staff members accountable. Appointing persons from outside DOC would ameliorate the culture of violence and code of silence and pave the way for meaningful reform.

2. Improving the Morale of DOC Staff members

As this Note illustrates, the morale of DOC staff members is deeply troubled, and DOC staff members are not given the proper resources to improve their morale.³²⁸ We cannot hold DOC staff members accountable for the safety of inmates without providing them with the proper resources. In order to really effectuate meaningful reform the treatment of correctional officers must also be addressed. The goal of the amendment of Sec. 9-117(b) is to allow for flexibility in the promotion of high-ranking DOC leadership to improve the morale of DOC staff members and eliminate the pattern and practice of conduct that violates adolescent inmates' constitutional rights. Other initiatives can improve the morale of DOC staff members and contribute to the elimination of DOC staff members' misconduct.

Correctional officers in the DOC need mental health services.³²⁹ A study done by a psychologist in 2013 found that 31 percent of correctional officers suffer from posttraumatic stress disorder (PTSD) at a rate

³²¹ Jonathan Fineman, *Cronyism Corruption and Political Intrigue: A New Approach for Old Problems in Public Sector Employment Law*, 8 CHARLESTON L. REV. 51, 54 (2013).

³²² *Id.*

³²³ *Id.*

³²⁴ Chayes, *supra* note 307.

³²⁵ See Winerip & Schwartz, *supra* note 233.

³²⁶ Winerip & Schwartz, *supra* note 17.

³²⁷ Chayes, *supra* note 307.

³²⁸ See Oscar Lopez, *Prison Officers Need Help, but They Won't Ask for It*, NEWSWEEK.COM, May 27, 2014, <http://www.newsweek.com/2014/06/06/prison-officers-need-help-they-wont-ask-it-252439.html> (last visited Feb. 27, 2014).

³²⁹ *Id.*

similar to veterans returning from war.³³⁰ Additionally, 17 percent of correctional officers in the study suffered from depression in conjunction with PTSD.³³¹ The study also found that correctional officers suffering from PTSD used alcohol more frequently.³³² Correctional officers are 39 percent more likely to commit suicide than all other professions combined.³³³ Correctional officers are more likely to experience high-blood pressure, ulcers and heart attacks, contributing to a reduced life expectancy.³³⁴ Correctional officers are also more likely to get a divorce than the general population.³³⁵

It is likely that the incredibly stressful environment correctional officers work in, coupled with inadequate mental health support, serve as contributing factors that explain why correctional officers violate the inmates' constitutional rights through excessive and unnecessary force.³³⁶ While this Note focuses on protecting adolescent inmates' rights, it is important to emphasize the need to also protect correctional officers by improving their work conditions. This is a critical step in any effort to effect meaningful reform.

DOC staff members need training to address not only inmates' mental health issues, but also their own mental health needs. Most correctional academies provide 16-week trainings on mental health.³³⁷ In New York City, correctional officers only receive 35 hours, much of which is focused on the mental health of inmates.³³⁸ The settlement agreement provides no requirements to improve mental health services for correctional officers. Unless we provide DOC staff members with the resources they need, including adequate mental health support, holding them accountable will not necessarily get to the root of the problem.

V. CONCLUSION

In order to end the culture of violence on Rikers Island, legislators should amend New York Penal Law Sec. 30.00 so that 16- and 17-year-olds are placed under the jurisdiction of the Family Court. Legislators should also amend Sec. 9-117(b) of the Administrative Code, which concerns promotional policies for DOC staff members. While the *Nunez* federal lawsuit and resulting settlement agreement have served as a catalyst for reform, their effect on meaningful and lasting change likely will be minimal.

Unless the proposed laws are amended, the patterns and practices of conduct that violate adolescent inmates' constitutional rights on Rikers Island will persist. The state of New York can no longer continue to subject minority youth to unconstitutional conduct. Doing so endangers public safety and puts enormous strains on the state's financial outlook. It is an injustice to rip children from their families and hold them accountable before they have been found guilty of a crime, particularly when the nation and world at large recognize that adolescents have diminished culpability. It is an injustice to correctional officers to subject them to the working conditions on Rikers Island without adequate resources. It is an injustice to the shared communities of both the correctional officers and adolescent inmates to subject them to such horrific and inhumane circumstances. It is an injustice for all to allow the culture of violence to persist on the hellhole that is Rikers Island.

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *See id.*

³³⁷ *Id.*

³³⁸ *Id.*