

Beyond the Reach of the Constitution: A New Approach to Juvenile Solitary Confinement Reform

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In the last year, the call to reform the practice of solitary confinement has come from all sides. Most of the attention has been on changes at the federal level, despite the fact that the vast majority of inmates in the United States are held at the local and state level. Additionally, the proposed reforms have centered around constitutional arguments that the use of solitary confinement is a violation of the Eighth Amendment. This Note argues that a constitutional ruling in this area is neither necessary nor sufficient to effect change. Solitary confinement is a problem beyond the reach of the Constitution. Rather, it is a byproduct of chronic underfunding, understaffing, and a pervasive culture within prisons that regards solitary confinement as a means of keeping correctional officers safe and maintaining order.

After carefully analyzing the recent settlement in Illinois, as well as a recent lawsuit in New York, this Note argues that reformers should shift their focus to the state level, and, specifically, to the office of the Attorney General. As defense counsel for the state, the Attorney General controls the course of these litigations — including the decision of if, and when, to settle. Yet, an Attorney General is also duty-bound to represent the interests of the People, even when defending the state and its officers in court. Thus, the state Attorney General must always keep an eye towards the plaintiffs — the juveniles themselves — and their interests during these lawsuits and settlement negotiations. Moreover, as the chief legal officer to the state, the Attorney General is uniquely positioned to bring

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together crucial stakeholders within the government and correctional facilities in order to negotiate a settlement agreement. By examining the filings and transcripts in the New York and Illinois lawsuits, which this Note does for the first time, it becomes clear how crucial state Attorneys General are to ending juvenile solitary confinement.

“This absolute solitude, if nothing interrupts it, is beyond the strength of man; it destroys the criminal without intermission and without pity; it does not reform, it kills.”¹

“A government lawyer ‘is the representative not of an ordinary party to a controversy’ . . . ‘but of a sovereignty whose obligation . . . is not that it shall win a case, but that justice shall be done.’”²

I. INTRODUCTION

On September 12, 2012, the American Civil Liberties Union filed a federal class action lawsuit against the Illinois Department of Juvenile Justice (IDJJ) on behalf of approximately 1000 juveniles confined in the IDJJ system.³ The suit alleged that youth were being placed in “room confinement” in IDJJ youth centers “when not warranted, for excessive periods of time, and in improper conditions.”⁴ The lawsuit named Arthur D. Bishop, then Director of the IDJJ, in his official capacity as the chief executive officer who “oversees IDJJ operations” and “is ultimately responsible for all IDJJ policies, practices and procedures.”⁵

This was not the first lawsuit of its kind. Similar lawsuits had already been filed in New York in 2011,⁶ Ohio in 2004,⁷ and New Jersey in 2011.⁸ And, unsurprisingly, the Attorney General of Illinois acted as defense counsel on behalf of the IDJJ. The Attorney General of Illinois is required by statute to “defend all ac-

1. ALEXIS DE TOCQUEVILLE, ALEXIS DE TOCQUEVILLE ON DEMOCRACY, REVOLUTION, AND SOCIETY 311 (John Stone and Stephen Mennell, eds., Univ. of Chicago Press 1982).

2. *Freeport-McMoRan Oil & Gas Co. v. F.E.R.C.*, 962 F.2d 45, 47 (D.C. Cir. 1992) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

3. Class Action Complaint, *R.J. et al. v. Jones*, No. 1:12-cv-07289 (N.D. Ill. Sept. 12, 2012).

4. *Id.* at ¶ 2(c).

5. *Id.* at ¶ 10.

6. *See Peoples v. Anunci et al.*, No. 1:11-cv-02694 (S.D.N.Y. Apr. 18, 2011).

7. *See S.H. and all other similarly situated et al. v. Taft et al.*, No. 2:04-cv-01206 (S.D. Ohio May 20, 2014).

8. *See Troy D. et al. v. Mickens et al.*, No. 1:10-cv-02902 (D.N.J. Dec. 14, 2011).

tions and proceedings against any State officer, in his official capacity, in any of the courts of this State or the United States.”⁹ Yet, despite being charged with defending the State and its officers, the Illinois Attorney General’s representation of the IDJJ did not look like typical defense work. The Attorney General’s office did not file an Answer nor did they attempt to have the suit dismissed. On September 12, 2012, the same day the ACLU filed its complaint, both parties jointly filed a consent decree and moved immediately into hammering out the details of a settlement order.¹⁰

In the three years following, the ACLU and Attorney General negotiated a settlement and began to implement a number of significant reforms within the Department of Corrections and the IDJJ. However, the Attorney General has notably been absent from the press releases and news coverage of this lawsuit. The news reports suggest that this settlement was engineered solely through the efforts of the ACLU.¹¹ But a deeper look at the details of this case shows how misleading this view would be.

A settlement in a case against a State or its officers happens only if the Attorney General consents — as chief legal officer of the state, the Attorney General controls the course of litigation both when serving in a prosecutorial function and when acting as defense counsel.¹² Despite this crucial role, the part that Attorneys General have been playing in solitary confinement cases has gone largely unexamined by academic literature and news coverage. By closely examining the filings and transcripts in these cases, which this Note does for the first time, it is possible to gain a fuller understanding of the type and importance of the role played by Attorney Generals and their offices. This Note also argues that true change in juvenile justice and the use of solitary confinement is a problem beyond the reach of the Constitution and the Eighth Amendment. This is because solitary confine-

9. Attorney General Act, 15 ILL. COMP. STAT. 205/4 (2010).

10. See Joint Motion For Class Certification And Approval And Entry of Consent Decree, R.J. et al. v. Jones, No. 1:12-cv-07289 (N.D. Ill. Sept. 12, 2012).

11. See Julie Bosman, *Lawsuit Leads to New Limits on Solitary Confinement at Juvenile Prisons in Illinois*, N.Y. TIMES (May 4, 2015), <https://www.nytimes.com/2015/05/05/us/politics/lawsuit-leads-to-new-limits-on-solitary-confinement-at-juvenile-prisons-in-illinois.html> [<https://perma.cc/L94F-K6MLJ>]; Jean Casella, *Lawsuit Secures New Limits on Solitary Confinement in New York’s Prisons*, SOLITARY WATCH (Feb. 21, 2014), <http://solitarywatch.com/2014/02/21/lawsuit-secures-new-limits-solitary-confinement-new-yorks-prisons/> [<https://perma.cc/W354-Z684>].

12. See *infra* Part IV.A and B for further discussion of the AG’s powers and duties.

ment is a byproduct both of chronic underfunding and understaffing of juvenile correctional facilities, as well as of a pervasive view among correctional officials that solitary confinement is an indispensable means of maintaining safety and order within the facilities. Thus, Attorneys General are uniquely positioned and qualified to solve these problems that would go unaddressed in a constitutional ruling.

Part II examines the history of solitary confinement, current proposals for reform, and how the reform movement is typically portrayed in the press. Part III examines constitutional solutions that have been offered by scholars, arguing that without tackling the political realities of solitary confinement, these solutions will not effect real change. Finally, Part IV explores the successes and challenges of the recent settlements in New York and Illinois and proposes that reformers should instead be looking to state Attorneys General as the stakeholders best equipped to push reform forward. In particular, this Note advocates for other states to look to Illinois's approach as a model for their own reform efforts.

II. BACKGROUND

Beginning in 2014, the call to reform the use of solitary confinement has come from all sides: President Barack Obama,¹³ former United States Attorney General Eric Holder,¹⁴ the Council for Juvenile Corrections Administrators,¹⁵ Supreme Court Justice Anthony Kennedy,¹⁶ the American Psychiatric Association,¹⁷ and

13. See President Barack Obama, *Remarks by the President at the NAACP Conference* (July 14, 2015), <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference> [<https://perma.cc/3A7B-M5U2>] (stating he had recently asked the Attorney General to start a review of "the overuse of solitary confinement across American prisons").

14. See *Attorney General Holder Criticizes Excessive Use of Solitary Confinement for Juveniles with Mental Illness*, DEP'T OF JUSTICE OFFICE OF PUB. AFFAIRS (May 14, 2014), <http://www.justice.gov/opa/pr/attorney-general-holder-criticizes-excessive-use-solitary-confinement-juveniles-mental> [<https://perma.cc/PTE7-ZMSB>].

15. See COUNCIL OF JUVENILE CORR. ADM'RS, COUNCIL OF JUVENILE CORRECTIONAL ADMINISTRATORS TOOLKIT: REDUCING THE USE OF ISOLATION 5 (Mar. 2015), <http://cjca.net/attachments/article/751/CJCA%20Toolkit%20Reducing%20the%20Use%20of%20Isolation.pdf> [<https://perma.cc/T6H9-R7BX>] (stating isolation or confinement of youth to his/her room should only be used to protect a juvenile from harming him/herself or others and should always be supervised and for a short period).

16. See *Davis v. Ayala*, 135 S. Ct. 2187, 2208–10 (2015) (Kennedy, J., concurring) ("Of course, prison officials must have discretion to decide that in some instances temporary, solitary confinement is a useful or necessary means to impose discipline and to protect

numerous nonprofit and advocacy groups have all called for a reexamination of the practice, with many pushing for it to be banned completely.¹⁸ Yet much of the current narrative and coverage of the use of solitary confinement has focused on reform at the federal level and the work being done by nonprofit organizations, which have spearheaded many of the lawsuits that have been settled or are currently pending.¹⁹ What has remained unexplored is the role of the defense in these cases — the role played by the State Attorneys General and their offices in making these settlements happen. By examining the other side of these lawsuits, it is possible to not only gain a fuller understanding of these cases, but also to better utilize these settlements as models for other states to emulate.

This Part begins by tracing a brief history of solitary confinement in the United States and its current use in the juvenile justice system.²⁰ Part II.A also chronicles the reform movement that

prison employees and other inmates. But research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price. In a case that presented the issue, the judiciary may be required, within its jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.” (citation omitted).

17. See Mark Moran, *AMA Votes to Oppose Solitary Confinement of Juveniles*, PSYCHIATRIC NEWS (Dec. 17, 2014), <http://psychnews.psychiatryonline.org/doi/full/10.1176%2Fappi.pn.2014.12b13> [<https://perma.cc/YB7A-GEC4>].

18. See generally *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences Before the Subcomm. on Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. (2012), <https://www.judiciary.senate.gov/imo/media/doc/CHRG-112shrg87630.pdf> [<https://perma.cc/74KD-AVDQ>]. Nonprofits and advocacy groups have been leading the charge in pushing for reform in this area, and have been doing so for years. See AM. CIVIL LIBERTIES UNION AND HUMAN RIGHTS WATCH, *GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES* (2012), <https://www.aclu.org/files/assets/us1012webwcover.pdf> [<https://perma.cc/2UMG-B5AY>]; DAVID GOTTESMAN & SUSAN WILE SHWARZ, NAT’L CTR. FOR CHILDREN IN POVERTY, *JUVENILE JUSTICE IN THE U.S.: FACTS FOR POLICYMAKERS* (July 2011), http://www.nccp.org/publications/pdf/text_1038.pdf [<https://perma.cc/BF3X-XJF9>]; HUMAN RIGHTS WATCH, *AGAINST ALL ODDS: PRISON CONDITIONS FOR YOUTH OFFENDERS SERVING LIFE WITHOUT PAROLE SENTENCES IN THE UNITED STATES 21–23* (Jan. 2012), https://www.hrw.org/sites/default/files/reports/us0112ForUpload_1.pdf [<https://perma.cc/Y5A5-ZXK4>].

19. The ACLU and NYCLU were the lead attorneys for the plaintiffs in Illinois and New York, respectively. See *supra* notes 3, 6. The ACLU, in conjunction with the Southern Poverty Law Center, also filed a lawsuit against the East Mississippi Correctional Facility. See Class Action Complaint, *Dockery et al. v. Epps et al.*, No. 3:13-cv-326 (S.D. Miss. May 30, 2013).

20. More extensive histories of solitary confinement can be found in Harry Elmer Barnes, *Historical Origin of the Prison System in America*, 12 J. CRIM. L. & CRIMINOLOGY 35 (1921); Keramet Ann Reiter, *The Most Restrictive Alternative: A Litigation History of*

has gained traction in the last few years, bolstered by recent reports and scientific findings on the effects of solitary confinement. Part II.B then turns to the way that the reform movement is characterized in the press and highlights the shortcomings of the current narrative of reform. Finally, Part II.C focuses in on the recent lawsuits and settlement agreements in New York and Illinois concerning the use of juvenile solitary confinement, setting up a deeper examination of these lawsuits and their successes (and shortcomings) in Part IV.

A. JUVENILE SOLITARY CONFINEMENT IN THE UNITED STATES AND THE PUSH FOR REFORM

The use of solitary confinement in the United States dates back more than 200 years to the Walnut Street Jail in Philadelphia, where penological reformers, spurred by the ideas of the Enlightenment, sought to create institutions where “[p]risoners were to eat, work, and reflect on their need for reform” in complete isolation.²¹ Motivated by a desire to move away from the brutality of corporal punishment, reformers believed that “silence and solitude would induce repentance and motivate prisoners to live a devout, socially responsible life.”²² But by the mid-nineteenth century, both prison reformers and medical professionals were condemning solitary confinement’s effects.

In 1842, Charles Dickens toured the Eastern State Penitentiary in Philadelphia, and remarked, “I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers.”²³ Physicians in both the United States and Europe voiced similar concerns and reported a “distinct pattern of symptoms” — called prison or solitary confinement psychosis — caused by “prolonged isolation with a lack of natural light, poor

Solitary Confinement in U.S. Prisons, 57 *STUD. IN L., POL’Y, AND SOC’Y* 71 (2012); Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 *CRIME & JUST.* 441 (2006).

21. Elizabeth Alexander, “*This Experiment, So Fatal*”: *Some Initial Thoughts on Strategic Choices in the Campaign Against Solitary Confinement*, 5 *U.C. IRVINE L. REV.* 1, 6 (2015).

22. David H. Cloud et al., *Public Health and Solitary Confinement in the United States*, 105 *AM. J. PUB. HEALTH* 18, 19 (2015).

23. Alexander, *supra* note 21, at 9 (quoting CHARLES DICKENS, *AMERICAN NOTES AND PICTURES FROM ITALY* 97–98 (Chapman & Hall Ltd. ed., 1907) (1842)).

ventilation, and lack of meaningful human contact.”²⁴ After a study of more than 4000 people kept in these silent prisons, Francis Gray concluded that the “system of constant separation . . . produces so many cases of insanity and of death as to indicate most clearly, that its general tendency is to enfeeble the body and the mind.”²⁵ By the late 1800s, the push for reform had reached the Supreme Court.

In 1890, the Supreme Court granted a petition for habeas corpus for a prisoner held in solitary confinement under a state statute that had not existed at the time his crime was committed.²⁶ Though the Court made its ruling on *ex post facto* grounds, it noted the deleterious effects of solitary confinement on prisoners:

The peculiarities of this system were in the complete isolation of the prisoner from all human society, and his confinement in a cell of considerable size, so arranged that he had no direct intercourse with or sight of any human being, and no employment or instruction. . . . But experience demonstrated that there were serious objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.²⁷

Though solitary confinement continued to be used through the twentieth century, it was no longer used with any sort of regularity²⁸ and was confined primarily to use as a punishment for misbehavior.²⁹ However, this shift away from the use of solitary confinement was short-lived.

24. Cloud, *supra* note 22, at 19.

25. FRANCIS GRAY, PRISON DISCIPLINE IN AMERICA 181 (1847).

26. *In re Medley*, 134 U.S. 160 (1890).

27. *Id.* at 168.

28. See Cloud, *supra* note 22, at 19.

29. See Alexander, *supra* note 21, at 10.

Beginning in the 1980s, there was a vast expansion of both the prison population and the use of solitary confinement.³⁰ The “tough-on-crime” policies of the 1980s and 1990s, which led to stricter sentencing and release laws,³¹ also saw the creation of “supermax” prisons specifically “designed to hold people in isolation on a massive scale.”³² At the same time, juvenile justice, too, shifted to a stricter, more punitive approach in response to “public outcry against ‘out-of-control’ juvenile crime and fear of a coming generation of juvenile ‘super predators.’”³³

As of 2013, more than 53,000 juveniles were either detained or committed in prisons in the United States.³⁴ The most recent data from the Department of Justice shows that this number has grown to nearly 70,000, and indicates that “the use of isolation, including solitary confinement, in these facilities is widespread.”³⁵ For incarcerated juveniles, the prevalence of solitary

30. See *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences Before the Subcomm. on Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 2 (2012) (statement of Sen. Richard J. Durbin, Chairman, S. Comm. on Constitution, Civil Rights and Human Rights). Between 1972 and 2012, the US prison population grew by 705%. By comparison, between 1925 (the first year national prison statistics were officially collected) and 1972, the prison population increased by 105%. PEW CTR. ON STATES, PRISON COUNT 2010 1 (Mar. 2010), http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/prisoncount2010pdf.pdf [https://perma.cc/GP9H-Z3JS].

31. See PEW CTR. ON STATES, *supra* note 30, at 1.

32. Statement of Sen. Richard J. Durbin, *supra* note 30, at 2–3. In 1984, only one facility in the United States fit the description of a supermax prison: “A supermax is a stand-alone unit or part of another facility and is designated for violent or disruptive inmates. It typically involves up to 23-hour per day, single-cell confinement for an indefinite period of time. Inmates in supermax housing have minimal contact with staff and other inmates.” By 2004, 44 states operated supermax prisons. DANIEL P. MEARS, URBAN INST. JUSTICE POLICY CTR., *EVALUATING THE EFFECTIVENESS OF SUPERMAX PRISONS*, 1 (2005).

33. Anthony Giannetti, Note, *The Solitary Confinement of Juveniles in Adult Jails and Prisons: A Cruel and Unusual Punishment?*, 30 BUFF. PUB. INT. L.J. 31, 33 (2012).

34. Sickmund, M. et al., *Easy Access to the Census of Juveniles in Residential Placement*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (2015), <http://www.ojjdp.gov/ojstabb/ezacjrp/> [https://perma.cc/GG56-5429]. Detained juveniles are those who are held awaiting adjudication, disposition, or placement elsewhere. Committed juveniles are held as part of a court ordered disposition. See *OJJDP Statistical Briefing Book*, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, (Apr. 27, 2015), <https://www.ojjdp.gov/ojstatbb/corrections/qa08401.asp?qaDate=2013> [https://perma.cc/8JGE-LF2B].

35. COUNCIL OF JUVENILE CORR. ADM’RS, *supra* note 15, at 2. Determining the exact number of juveniles that are currently or have been held in isolation is difficult, though the Justice Department puts the figure at about 17,000. This number does not include juveniles held in adult facilities, where they are almost always held in some form of isolation for their protection. See Timothy Williams, *Locked in Solitary at 14: Adult Jails Isolate Youths Despite Risk*, N.Y. TIMES (Aug. 15, 2015), <http://www.nytimes.com/2015/08/>

confinement varies widely from state to state. Many states have, by law or practice, banned the use of punitive solitary confinement, while twenty states have imposed time limits on its use.³⁶ However, ten states still allow juveniles to remain indefinitely in solitary confinement.³⁷ And of those states that have prohibited the use of punitive solitary confinement, at least nineteen still allow solitary confinement to be used for other purposes, such as administrative holds or safety concerns.³⁸ Moreover, juveniles are often placed in solitary confinement at the discretion of correctional officers for reasons that do not warrant “such an intense level of corrective action.”³⁹ The use of solitary confinement persists despite the immense amount of research uniformly finding that youth are “uniquely vulnerable to the consequences of solitary confinement.”⁴⁰

Recent medical research has suggested that juveniles are particularly susceptible to harm when placed in solitary confinement. The American Medical Association (AMA) has determined that the potential consequences of prolonged seclusion include depression, anxiety, and psychosis, and that “[j]uveniles are at particularly high risk for such consequences.”⁴¹ The AMA has called for a complete ban on the use of solitary confinement “except for extraordinary circumstances such as those that involve protection of the juveniles, staff, or other detainees.”⁴² Solitary

16/us/citing-safety-adult-jails-put-youths-in-solitary-despite-risks.html?_r=0
[<https://perma.cc/E3ZB-3BE3>].

36. LOWENSTEIN CTR. FOR PUB. INTEREST, 51-JURISDICTION SURVEY OF JUVENILE SOLITARY CONFINEMENT RULES IN JUVENILE JUSTICE SYSTEMS 2 (Oct. 2015). Those states that have imposed a time limit on the use of punitive solitary confinement constitute a wide range from 6 hours (Delaware) to 90 days (California). *Id.*

37. Alabama, Georgia, Kansas, Kentucky, Louisiana, Michigan, Oregon, Tennessee, Texas, and Wyoming place no limits on the amount of time a juvenile can be placed in punitive solitary confinement. *Id.*

38. *Id.* at 6. Of these nineteen states, only seven set limits on the maximum amount of time a juvenile can spend in non-punitive solitary confinement. Additionally, seven provide that a juvenile should be released when he/she regains self-control, regardless of how long that might take, and often leave this determination wholly at the corrections officer’s discretion. *Id.*

39. Sandra Simkins et al., *The Harmful Use of Isolation in Juvenile Facilities: The Need for Post-Disposition Representation*, 38 WASH. U.J.L. & POL’Y 241, 263 (2012).

40. *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences Before the Subcomm. on Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 237 (2012) (statement of Marty Beyer, Ph.D., Juvenile Justice Consultant; Sandra Simkins, Rutgers School of Law-Camden; and Laura Cohen, Rutgers School of Law-Newark).

41. Moran, *supra* note 17.

42. *Id.*

confinement presents unique harms to juveniles because adolescent brains are particularly sensitive to “the traumatic impact of physical isolation, and even a short stay in a confinement setting can have a long-term deleterious impact on an adolescent.”⁴³ Adolescents, unlike adults, often do not see their isolation as a temporary state, causing them to suffer more than adults in the same situation.⁴⁴ This makes adolescents particularly vulnerable in those states that do not limit the use of solitary confinement.⁴⁵

Furthermore, juveniles who are or have been isolated are at particular risk of suicide.⁴⁶ A study by the Office of Juvenile Justice and Delinquency Prevention found that of 110 juvenile suicides in juvenile facilities between 1995 and 1999, 62% had a history of room confinement.⁴⁷ Half were being held in some form of solitary confinement at the time of death.⁴⁸ Moreover, the majority of juvenile offenders in residential facilities have at least one mental illness, and two-thirds of those surveyed reported symptoms associated with high aggression, depression, and anxiety, putting these juveniles at a heightened risk of harm.⁴⁹

Though the movement to reform the use of solitary confinement is not new,⁵⁰ it has gained significant momentum in the

43. *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences Before the Subcomm. on Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 493 (2012) (statement of Elizabeth Clarke, President, Juvenile Justice Initiative).

44. See Statement of Marty Beyer et al., *supra* note 40, at 238 (“Because youth lack the future orientation of adults, they may not be able to see the temporariness of isolation and, as a result, fall deeper into depression.”).

45. See *id.*

46. See Moran, *supra* note 17; see also FAQ, SOLITARY WATCH, <http://solitarywatch.com/facts/faq/> [<https://perma.cc/2TU8-U65R>] (2015) (“According to the Campaign for Youth Justice, data shows that . . . juveniles are 19 times more likely to kill themselves in isolation than in general population.”).

47. LINDSAY M. HAYES, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, CHARACTERISTICS OF JUVENILE SUICIDE IN CONFINEMENT 6 (Feb. 2009), <https://www.ncjrs.gov/pdffiles1/ojjdp/213691.pdf> [<https://perma.cc/HE9R-PHTM>]. 70% of those who committed suicide had been confined for nonviolent offenses. *Id.*

48. *Id.* (also noting that 85% of the juveniles died during waking hours).

49. See Gottesman, *supra* note 18, at 3; see also Statement of Marty Beyer et al., *supra* note 40, at 239–40 (finding that between 50% and 75% of incarcerated youth have diagnosable mental health problems, which the use of solitary confinement exacerbates, and even those youth who had not previously expressed thoughts of suicide or harming themselves “can become desperate, hopeless and suicidal in isolation”).

50. See Dana Liebelson, *This is What Happens When We Lock Children in Solitary Confinement*, MOTHER JONES (Jan./Feb. 2015), <http://www.motherjones.com/politics/2014/01/juveniles-kids-solitary-confinement-ohio-new-york> [<https://perma.cc/7U2Y-LE3B>] (noting, under President George W. Bush, lawyers in the Justice Department’s Civil Rights Division were arguing that solitary confinement was dangerous for juveniles).

past three years, largely due to scientific studies that have demonstrated that solitary confinement has serious and lasting deleterious effects and that juveniles are particularly at risk.⁵¹ Yet, the overarching narrative of this movement continues to fall short of capturing the whole story.

B. THE NARRATIVE OF REFORM

The coverage of the reform movement has focused primarily on two threads: a push for reform at the federal level, including constitutional challenges under the Eighth Amendment to the use of solitary confinement, and the plaintiffs' side of settled or currently-pending state-level litigation. The result has been an incomplete picture of on-the-ground actions that make these settlements happen. By failing to thoroughly assess the roles played by state Attorneys General, the narrative that remains is woefully incomplete, and unhelpful to reformers seeking to replicate the success achieved in other states.

In December 2013, there were 215,866 prisoners in the United States held in federal facilities.⁵² More than six times that — 1,358,875 — were held in state or local facilities.⁵³ Despite this, much of the media coverage and proposed solutions take place at the federal, not the state, level. Former Attorney General Holder's remarks on the "excessive" use of solitary confinement received a great deal of press.⁵⁴ President Obama also called for reform of solitary confinement, though he acknowledged that presidential power to enact reforms is limited.⁵⁵ A recent bill in-

51. *See id.* The push for reform was likewise bolstered by a more sympathetic federal administration under President Barack Obama.

52. ANN CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013 3, Table 2 (Sept. 2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf> [<https://perma.cc/7A4T-A9HW>].

53. *Id.*

54. *Attorney General Holder*, *supra* note 14; *see* Steven Hsieh, *Watch Eric Holder Blast the 'Excessive' Use of Solitary Confinement in Juvenile Facilities*, THE NATION (May 15, 2014), <http://www.thenation.com/article/watch-eric-holder-blast-excessive-use-solitary-confinement-juvenile-facilities/> [<https://perma.cc/US4J-Z2JF>]; Timothy M. Phelps, *Attorney General Holder criticizes solitary confinement for juveniles*, L.A. TIMES (May 14, 2014, 11:58 AM), <http://www.latimes.com/nation/la-na-holder-criticizes-solitary-confinement-20140514-story.html> [<https://perma.cc/WJ7F-V7WG>]; Ryan J. Reilly, *Eric Holder Calls for Rollback of 'Excessive' Use of Juvenile Solitary Confinement*, THE HUFFINGTON POST (May 14, 2014, 2:09 PM), http://www.huffingtonpost.com/2014/05/14/holder-solitary-confinement_n_5324768.html [<https://perma.cc/39DP-SDU6>].

55. *See* President Barack Obama, *supra* note 13; Editorial, *President Obama Takes on the Prison Crisis*, N.Y. TIMES (July 16, 2015), <http://www.nytimes.com/2015/07/17/opinion/>

troduced in the Senate by Senator Cory Booker would prohibit the solitary confinement of juveniles within the federal system.⁵⁶ Though these reforms are supported by high-profile advocates, their scope is still limited. The vast majority of juveniles are held at the state and local levels, which would remain unaffected by such measures.

Six months after requesting that the Justice Department investigate the use of solitary confinement by the Federal Bureau of Prisons, President Obama announced a series of executive actions that would ban the use of solitary confinement for juvenile offenders and prohibit corrections officers from using solitary confinement as a punitive measure against “low-level infractions.”⁵⁷ Though this was a welcome announcement, these reforms impact only a small minority of prisoners — those held in federal correctional facilities.⁵⁸ For the vast majority of prisoners, these reforms will change nothing.

president-obama-takes-on-the-prison-crisis.html?mtrref=www.nytimes.com&assetType=opinion [https://perma.cc/CB3U-ZUF2].

56. See THE LIMAN PROGRAM, YALE LAW SCH., TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON 4 (2015); Cory Booker, *Booker Introduces Legislation Banning Juvenile Solitary Confinement* (Aug. 5, 2015), http://www.booker.senate.gov/?p=press_release&id=293# [https://perma.cc/3DZH-JPLZ]; Carl Hulse & Jennifer Steinhauer, *Sentencing Overhaul Proposed in Senate With Bipartisan Backing*, N.Y. TIMES (Oct. 1, 2015), <http://www.nytimes.com/2015/10/02/us/politics/senate-plan-to-ease-sentencing-laws.html> [https://perma.cc/N8Q2-ZLYE?type=image]. The MERCY Act bans the use of room confinement in juvenile facilities, except as a temporary measure in response to behavioral issues that pose “serious and immediate risk to any individual” and limits the use of solitary confinement to no more than 3 hours for juveniles who pose a risk of harm to others, and no more than half an hour to those who pose a risk of harm to themselves. The bill also requires the use of de-escalation techniques by staff members or discussions with a qualified mental health professional. Booker, *supra*. As of February 2017, the bill has been referred to the Committee on the Judiciary. MERCY Act, S. 329, 115th Cong. (2017).

57. Barack Obama, Op-Ed., *Barack Obama: Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html?tid=a_inl [https://perma.cc/XV45-UURA]; Juliet Eilperin, *Obama Bans Solitary Confinement for Juveniles in Federal Prisons*, WASH. POST (Jan. 25, 2016), https://www.washingtonpost.com/politics/obama-bans-solitary-confinement-for-juveniles-in-federal-prisons/2016/01/25/056e14b2-c3a2-11e5-9693-933a4d31bcc8_story.html?postshare=281453771933678 [https://perma.cc/Y5A6-L6QM]. In addition to prohibiting solitary confinement as a punishment for minor infractions, the new rules also cap the length of time a prisoner may be held in punitive solitary confinement for a first offense at 60 days. The current maximum is 365 days. Eilperin, *supra*.

58. The ban is expected to impact only about 10,000 prisoners in total, both juvenile and adult. See Eilperin, *supra* note 57. Moreover, given the change in administrations, it is unclear whether these reforms will even remain in place.

Similarly, much of the current scholarship on solitary confinement focuses on constitutional challenges to its use.⁵⁹ Though it is possible that the Supreme Court would find solitary confinement a violation of the Eighth Amendment given its rulings in *Roper v. Simmons* (finding the imposition of capital punishment unconstitutional for crimes committed while under the age of eighteen) and *Graham v. Florida* (holding juvenile offenders cannot be sentenced to life imprisonment without parole for non-homicide offenses),⁶⁰ a constitutional ruling would not solve the larger issue facing reform efforts: facilities cannot merely end the use of solitary confinement.⁶¹ Any reduction in the use of solitary confinement must be matched by an increase in alternate tools and resources within the facilities. A deeper dive into the current cases themselves is vital to understanding the root problems underlying the use of solitary confinement and determining viable alternatives to pure constitutional challenges.

C. LAWSUITS AND SETTLEMENTS

1. *New York*

After prison officials ruled that Leroy Peoples had filed false legal documents, he was placed in solitary confinement. For 780 consecutive days, Peoples was held in his cell for 23 hours a day entirely alone, with meals delivered through a slot in the door.⁶² New York's Department of Corrections and Community Supervision (DOCCS) permitted prisoners to be placed in "extreme isolation" — isolation in a single room or in a cell with only one other prisoner for up to 23 hours a day — without a showing that a prisoner needed to be removed from the general prison population

59. See *infra* Part III for further discussion.

60. See *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010).

61. As explained in depth in Part III.B, the use of solitary confinement stems from systemic problems of understaffing and underfunding. In order to end solitary confinement, states need to put funding in place to increase staffing, and Departments of Corrections need to develop new trainings to change the current culture within these facilities that encourages continued reliance on solitary confinement.

62. See *NYCLU Lawsuit Secures Historic Reforms to Solitary Confinement*, N.Y. CIV. LIBERTIES UNION (Feb. 19, 2014), <https://www.nyclu.org/en/press-releases/nyclu-lawsuit-secures-historic-reforms-solitary-confinement> [<https://perma.cc/SBD5-5AA2>]; Third Amended Class Action Complaint at 3, *Peoples v. Fischer*, No. 11-cv-2694 (S.D.N.Y. Mar. 6, 2013).

in order to protect staff or other prisoners.⁶³ DOCCS policies contained no restrictions on the use of solitary confinement for juveniles.⁶⁴ The average length of a solitary confinement sentence imposed by the DOCCS was 150 days — five to ten times longer than the maximum time period recommended by mental health, legal, and human rights experts.⁶⁵

On April 18, 2011, Peoples filed a pro se complaint in the United States District Court for the Southern District of New York alleging that the DOCCS violated his Eighth Amendment rights by confining him to the Special Housing Unit, where inmates are held in solitary confinement for administrative or punitive reasons, for three years.⁶⁶ On August 22, 2012, the New York Civil Liberties Union (NYCLU) joined the lawsuit as counsel for Peoples.⁶⁷ On March 6, 2013, the NYCLU filed a new complaint expanding the lawsuit to encompass all individuals incarcerated in state prisons who had similarly been subjected to “arbitrary and unnecessary” solitary confinement.⁶⁸ The lawsuit involved a high level of traditional defense work on the part of the New York Attorney General, who represented the DOCCS.⁶⁹ On February 19, 2014, the DOCCS and the NYCLU announced a settlement agreement requiring the removal of juveniles from solitary confinement and placing limits on the use of isolation in the future.⁷⁰

63. See Third Amended Class Action Complaint at 14, *Peoples v. Fischer*, No. 11-cv-2694 (S.D.N.Y. Mar. 6, 2013). Solitary confinement sentences were given out for violations such as: untidy cell or person, no ID card, unreported illness, and unauthorized legal assistance. *Id.* at 14–15.

64. See *id.* at 16.

65. See *id.* at 19.

66. See First Complaint at 5, *Peoples v. Fischer*, No. 11-cv-2694 (S.D.N.Y. Apr. 18, 2011).

67. See Notice of Appearance by Pro Bono Counsel, *Peoples v. Fischer*, No. 11-cv-2694 (S.D.N.Y. Aug. 22, 2012).

68. *Peoples v. Fischer*, N.Y. CIV. LIBERTIES UNION, <http://www.nyclu.org/case/peoples-v-fischer-challenging-policies-governing-use-of-solitary-confinement-new-yorks-prisons> [<https://perma.cc/E8PY-JRNF>] (last visited Nov. 21, 2015) (challenging policies governing use of solitary confinement in New York’s prisons).

69. See *infra* Part IV.B.

70. See *id.* Isolation is somewhat distinct from solitary confinement. Solitary confinement refers to the practice of confining inmates alone or with one other individual for 22 to 24 hours a day. Isolation can be used for legitimate purposes — sometimes an inmate is placed in isolation temporarily while on a psychiatric watch or after a fight breaks out in order to keep inmates and correctional officers safe. Isolation can be a legitimate tool within prisons as long as there are clearly defined boundaries on when and for how long it can be used. Solitary confinement, however, occurs when an individual is placed in

2. *Illinois*

Unlike the case in New York, the Illinois Department of Juvenile Justice (IDJJ) did not file any responsive pleadings in *R.J. et al v. Jones*.⁷¹ The progress of the case indicates a high level of coordination between the plaintiffs and the State Attorney General's office. The complaint and consent decree were filed on the same day.⁷² Though the remedial plan was not approved until about eighteen months later,⁷³ both the filings and court proceedings show a very different role played by the Attorney General's office and the IDJJ than in the New York case.

The Illinois settlement prohibits the use of punitive solitary confinement and limits the use of confinement for safety reasons to a maximum of 24 hours.⁷⁴ In addition, the remedial plan requires that a mental health professional meet with the juvenile at regular intervals throughout the confinement period and that safety checks are performed by corrections officers every fifteen minutes.⁷⁵ Juveniles also may not be denied reading materials and must continue to receive ordinary mental health services and educational services while in confinement.⁷⁶

Both of these cases shed light on the varied and crucial roles that State Attorneys General can play. Although State Attorneys General serve as defense counsel, their duties are much broader and more complex than those of private defense attorneys, which allows them crucial flexibility in these cases.

isolation (sometimes for an initial, legitimate reason, and sometimes not) and left there at the discretion of the correctional officers or administration.

71. See Dkt. 1–13, *R.J. et al. v. Jones*, No. 12-cv-07289 (N.D. Ill. Sept. 12, 2012).

72. *Id.*

73. See Remedial Plan, *R.J. et al. v. Jones*, No. 12-cv-07289 (N.D. Ill. Apr. 7, 2014).

74. See LOWENSTEIN CTR. FOR PUB. INTEREST, *supra* note 36, at 29–30.

75. See *id.*

76. See *id.*

III. THE LIMITS OF CONSTITUTIONAL REFORM

Scholarly work on solitary confinement has focused largely on constitutional paths to reform.⁷⁷ Though occasionally noting the potential for a Fourteenth Amendment Due Process argument,⁷⁸ these works mostly focus on Eighth Amendment claims against solitary confinement. This Part first surveys these scholarly proposals for constitutional reform and then, by examining the findings of the appointed experts in *R.J. et al. v. Jones*,⁷⁹ illustrates why these proposals will not eliminate solitary confinement.

A. CONSTITUTIONAL PATHS TO REFORM

The Supreme Court has held that “[t]he Constitution ‘does not mandate comfortable prisons,’ but neither does it permit inhumane ones”⁸⁰ Determining what is inhumane requires a fact-intensive analysis of whether a particular condition involves “unnecessary and wanton” inflictions of pain — “those that are ‘totally without penological justification.’”⁸¹ Moreover, the Court has held that the standard for “cruel and unusual” is not static, but “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁸²

77. See Alexander, *supra* note 21, at 27–29; Tamar R. Birkhead, *Children in Isolation: The Solitary Confinement of Youth*, 50 WAKE FOREST L. REV. 1, 48–61 (2015); James Alex Gelin, *Unwarranted Punishment: Why the Practice of Isolating Transgender Youth in Juvenile Detention Facilities Violates the Eighth Amendment*, 18 U.C. DAVIS J. JUV. L. & POL’Y 1 (2014); Rep. Cedric Richmond, *Toward a More Constitutional Approach to Solitary Confinement: The Case for Reform*, 52 HARV. J. ON LEGIS. 1 (2015); Giannetti, *supra* note 33, at 38–52; Shira E. Gordon, Note, *Solitary Confinement, Public Safety, and Recidivism*, 47 U. MICH. J.L. REFORM 495 (2014).

78. See Alexander, *supra* note 21, at 25–29 (noting, in the case of juveniles held in solitary confinement, claims are often filed under both the Due Process Clause of the Fourteenth Amendment as well as the Eighth Amendment, whereas cases involving adults typically proceed only under an Eighth Amendment theory). Alexander further argues that it does not matter which constitutional provision is used, because courts typically apply a “deliberate indifference” standard in both the Eighth Amendment and Fourteenth Amendment contexts. *Id.* at 26.

79. *R.J. et al. v. Jones*, No. 12-cv-07289 (N.D. Ill. Sept. 12, 2012).

80. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (citation omitted) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981)).

81. *Rhodes v. Chapman*, 452 U.S. 337, 346 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

82. *Trop v. Dulles*, 356 U.S. 86, 101 (1958); see also *Inmates of Boys’ Training Sch. v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972) (“The prohibition on cruel and unusual punishment is not a static concept . . . but may acquire meaning as public opinion becomes enlightened by a humane justice.” (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910))).

Alleged Eighth Amendment violations are subject to a two-pronged inquiry: an objective showing that the “conditions of [the plaintiff’s] confinement result ‘in unquestioned and serious deprivations of basic human needs’” and a subjective showing that “the defendant prison officials imposed those conditions with deliberate indifference” to the potential for harm.⁸³ “In essence, [t]he question under the Eighth Amendment is whether prison officials . . . exposed a prisoner to a sufficiently substantial ‘risk of serious damage to his future health.’”⁸⁴ Though courts have found instances of solitary confinement to violate the Eighth Amendment,⁸⁵ they are generally loathe to make broad statements concerning the constitutionality of solitary confinement.⁸⁶ For example, the court in *Lollis v. New York State Dept. of Social Services* found a constitutional violation in the case before the court but nevertheless noted:

In so holding, I do not mean to intimate that the isolation of children under any circumstances is unconstitutional, but merely that the treatment of Lollis in this case violated permissible bounds. I share the hesitancy of fellow judges in interfering with the administration of custodial institutions, and sympathize with the difficult problems which disciplinary matters present to administrative officials.⁸⁷

Indeed, no court has found solitary confinement to be per se unconstitutional.⁸⁸ Cases in which plaintiffs that have successfully proven an Eighth Amendment violation are generally those that involve sensory deprivation.⁸⁹

83. *Davidson v. Coughlin*, 968 F. Supp. 121, 128 (S.D.N.Y. 1997) (citations omitted) (quoting *Jolly v. Coughlin*, 76 F.3d 468, 480 (2d Cir. 1996)); see also *Farmer*, 511 U.S. at 837 (1994) (holding that deliberate indifference requires that an “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”).

84. *Birckhead*, *supra* note 77, at 48 (quoting *Farmer*, 511 U.S. at 843).

85. See *Lollis v. New York State Dep’t of Soc. Servs.*, 322 F. Supp. 473, 481 (S.D.N.Y. 1970) (finding that placing a young girl in a bare room without recreational facilities or reading material was “cruel and inhumane” as well as “equivalent to ‘sensory deprivation’” and that such treatment was “punitive, destructive, defeats the purposes of any kind of rehabilitation efforts and harkens back to medieval times”).

86. See *id.* at 482–83.

87. *Id.*

88. See *Birckhead*, *supra* note 77, at 49.

89. See *id.* at 49–50; see also *Lollis*, 322 F. Supp. at 481.

Even so, scholars continue to argue that solitary confinement is a per se violation of the Eighth Amendment.⁹⁰ Citing the recent decisions in *Roper v. Simmons* and *Graham v. Florida*, these articles posit that the Court has a clear path to declare solitary confinement cruel and unusual punishment for juveniles.⁹¹ In *Roper*, the Supreme Court held the Eighth Amendment barred the imposition of the death penalty on any offender for a crime they committed while under the age of 18.⁹² Importantly, the Court based its decision in large part on a distinction between the maturity of juveniles and adults.⁹³ “The susceptibility of juveniles to immature and irresponsible behavior means ‘their irresponsible conduct is not as morally reprehensibly as that of an adult.’”⁹⁴ Five years later, the Supreme Court again acknowledged that juveniles are treated differently under the Eighth Amendment by holding that juveniles may not be sentenced to life without parole for a non-homicide crime.⁹⁵

Based on these rulings, a number of recent articles have argued that solitary confinement constitutes cruel and unusual punishment under the Eighth Amendment.⁹⁶ Yet, the spate of recent cases and settlements indicates that while a constitutional ruling certainly could help reformers, and may make litigation more straightforward, it is not necessary to juvenile justice reform. Indeed, a close examination of *R.J. et al v. Jones* suggests a constitutional ruling may not even be sufficient to reform the use of solitary confinement. The problem goes much deeper than the Eighth Amendment alone can reach.

90. See Giannetti, *supra* note 33, at 57 (arguing legislative solutions are unlikely, instead pressing for a Supreme Court ruling).

91. *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005). See Gelin, *supra* note 77, at 7; Giannetti, *supra* note 33, at 34–35.

92. See *Roper*, 543 U.S. at 568.

93. See *id.* at 570.

94. *Id.* (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)).

95. See *Graham*, 560 U.S. at 48 (“It remains true that ‘[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.’” (quoting *Roper*, 543 U.S. at 570)).

96. See Gelin, *supra* note 77; Giannetti, *supra* note 33. Though Gelin’s article centers on transgender youth, his article cogently argues that past Supreme Court cases coupled with “evolving standards of decency” support a broad finding by the Court that the Eighth Amendment prohibits the use of solitary confinement on juveniles.

B. A PROBLEM BEYOND THE REACH OF THE CONSTITUTION

As part of the consent decree, the ACLU and the IDJJ agreed to appoint three expert witnesses to go into IDJJ facilities and recount their findings therein: Peter E. Leone, Ph.D., charged with reporting on educational services within the IDJJ; Louis Kraus, M.D., appointed to report on mental health services; and Barry Krisberg, Ph.D., tasked with reporting on general juvenile justice issues.⁹⁷ Their reports provide a window into both the conditions of the IDJJ facilities and the main roadblocks to change. Krisberg's initial report states, "IDJJ makes extensive and varied use of its confinement units. . . . The rooms . . . were generally unclean, with the noticeable smell of feces and trash in the room and in the unit corridors."⁹⁸ His report further notes that while in confinement, youths received no schooling, received only brief counseling (typically less than five minutes), and minimal recreation.⁹⁹ Yet, the monitoring reports suggest that these failings were not due to indifference or malice on the part of corrections officers or the IDJJ, but rather were a result of chronic understaffing.¹⁰⁰

The IDJJ is a relatively recent creation in Illinois. In 2006, the state legislature created the IDJJ and separated its operations from the Illinois Department of Corrections (IDOC).¹⁰¹ Though both the judiciary and juvenile justice advocates supported the move, the agency faced significant challenges.¹⁰² Because the IDJJ absorbed existing staff from the IDOC, as well as existing facilities, the IDJJ also absorbed a culture responsive to adult

97. See Joint Motion For Class Certification And Approval And Entry of Consent Decree, *supra* note 10, at 2.

98. Expert Report of Barry Krisberg, Ph.D., Ex. 2 at 12, R.J. et al. v. Jones, No. 1:12-cv-07289 (N.D. Ill. Sept. 23, 2013). Louis Kraus' report also noted that confinement rooms were "noticeably dirty" with chipped paint, food and other debris on the floors. "I spoke with security about this. They stated that essentially they don't have enough staff to clean the rooms. Security would not give the youth a broom to clean the rooms." Expert Report of Louis Kraus, M.D., Ex. 1 at 10, R.J. et al. v. Jones, No. 1:12-cv-07289 (N.D. Ill. Sept. 23, 2013).

99. See Expert Report of Barry Krisberg, *supra* note 98, at 14. Youths were generally given about 90 minutes per day of recreation, which often meant placement in a holding room, alone with a bench and no exercise or sports equipment.

100. See *id.* at 9–10.

101. See *id.* at 5.

102. See *id.*

inmates and inhospitable to the needs of juvenile inmates.¹⁰³ Krisberg notes that “[t]he continuing legacy of that prison culture is a major challenge faced by IDJJ.”¹⁰⁴ Both Krisberg and Kraus comment that this culture and the use of room confinement stems primarily from a lack of staffing within the facilities.¹⁰⁵ Though there is no national standard for staffing levels, the Council of Juvenile Corrections Administrators suggests that youth to staff ratios should be 12:1 or even lower for high-risk youth and in mental health units.¹⁰⁶ The federal Prison Rape Elimination Act (PREA) standards establish a target ratio of 8:1 during waking hours and 16:1 during sleeping hours.¹⁰⁷ Yet, “[i]n many living units [in IDJJ facilities], the ratio of youth to direct care staff can be as high as 18 to 1 during the day.”¹⁰⁸ In confinement units, this shortage resulted in units that were “often very chaotic in nature,”¹⁰⁹ with “not enough staff on duty to resolve many individual youth problems with dialogue and conflict resolution approaches.”¹¹⁰ “[F]acility administrators, mental health staff, and

103. See *id.* Not only is the culture one that does not serve the needs of its inmate population, the report indicates that while staff misconduct only very rarely crossed over into physical mistreatment or mishandling, verbal abuse was a persistent complaint by the youth. *Id.* at 15–17. “Some staff confidentially confirmed with me the youth reports of verbal abuse. The explanation given was that this conduct was a legacy of the days when IDJJ was run by IDOC. The current top leadership of IDJJ does not condone this staff misconduct but feel that a change in traditional adult prison staff culture was difficult to achieve very quickly.” *Id.* at 17. Here too, the lack of adequate staffing levels had profound impacts — both in the sense of an “old guard” propping up an abusive culture, and in that “[t]he staffing problems at IDJJ also limit the number of personnel that can be assigned to [investigations of alleged staff misconduct]” with the result that many (if not most) complaints were ignored. *Id.*

104. *Id.*

105. See Expert Report of Barry Krisberg, Ph.D., *supra* note 98, at 10; Expert Report of Louis Kraus, M.D., *supra* note 98, at 3–4.

106. See Expert Report of Barry Krisberg, Ph.D., *supra* note 98, at 9.

107. *Id.* at 9–10; 28 C.F.R. § 115.313(c) (2012).

108. Expert Report of Barry Krisberg, Ph.D., *supra* note 98, at 9. Krisberg notes that these shortages are the result of a multitude of factors:

Staffing problems are created by a number of factors, including inadequate budgets, a temporary state hiring freeze, union rules regarding staff assignments, lack of unit management teams, and paid leave for health and injury reasons that limit the amount of staff that can be actually deployed on the living units. Further, past limits on the training academy offerings also limit the number of newly hired staff that can be assigned to the living units and are adequately prepared for these assignments.

Id. at 10.

109. *Id.* at 14.

110. *Id.*

middle-level managers were not very visibly present in the confinement units.”¹¹¹

Indeed, Louis Kraus identified inadequate staffing as the main bar to youths’ basic rights within the facilities.¹¹² At one facility, the chief of security reported that the security staff is understaffed by about 30%.¹¹³

This is not just a safety issue. . . . [W]hen one is down this level of security, there are other basic rights that youth have which simply cannot occur. Youth will not have a right to treatment because security staff are not going to be able to get them consistently to groups and other interventions. Youth are not going to be able to get their basic educational needs met because staff would not be able to get them to school. Also, staff cannot give youth time outside, or recreation time. Youth are spending excessive amounts of time in their cells, which leads to greater levels of frustration, higher levels of fighting, lower tolerance levels for working with staff, and not surprising greater conflicts with security and staff.¹¹⁴

Of course, identifying the problem only begins the conversation. It is clear that reform cannot happen without addressing the realities of these facilities. Though the use of solitary confinement did not necessarily begin due to staffing shortages, there is simply no question that its abuse is exacerbated by them. Furthermore, as this case makes clear, solitary confinement reform cannot happen without addressing systemic problems like chronic understaffing of facilities. These issues are beyond a constitutional ruling. Though it is conceivable, even likely, that the Supreme Court would find that solitary confinement is a violation of the Eighth and Fourteenth Amendments, the Court is not going to mandate specific staffing or funding levels.¹¹⁵ This is where the role of State Attorneys General is crucial.

111. *Id.*

112. *See* Expert Report of Louis Kraus, M.D., *supra* note 98, at 7.

113. *See id.*

114. *Id.* at 9.

115. The reluctance both by the Supreme Court and lower courts to wade too deeply into addressing systemic problems is clearly seen in *Brown v. Plata*, a case addressing unconstitutional conditions in California prisons. *See Brown v. Plata*, 563 U.S. 493 (2011). Despite the finding of a Special Master that deteriorating mental health care was due to a

IV. ATTORNEYS GENERAL AS CHANGE AGENTS

The Office of Attorney General is situated in the executive branch,¹¹⁶ and as the chief legal officers of the states, commonwealths, and territories of the United States, Attorneys General “serve as counselors to their legislatures and state agencies and also as the ‘People’s Lawyer’ for all citizens.”¹¹⁷ Attorneys General typically “have enjoyed a significant degree of autonomy” in their roles.¹¹⁸

The duties and powers of the office are generally not “exhaustively defined by either constitution or statute,” and, in the absence of a federal or state statute to the contrary, most state attorneys general retain common law powers.¹¹⁹ As a result, the

variety of factors including understaffing, the court order focused entirely on reducing prison populations to ease overcrowding. *Id.* at 524–25. To some extent, the reluctance of courts to create more complex remedial schemes can be traced to the Prison Litigation Reform Act, which limits prospective relief to “extend no further than necessary to correct the violation of the Federal right” and directs that a “court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary . . . , and is the least intrusive means to correct the violation of the Federal right.” 18 U.S.C. § 3626(a)(1)(A) (2011). But more broadly, the necessary solutions to a problem that is like “a spider web, in which the tension of the various strands is determined by the relationship among all the parts of the web, so that if one pulls on a single strand, the tension of the entire web is redistributed in a new and complex pattern,” is one that requires a “multifaceted approach.” *Plata*, 563 U.S. at 525–26 (internal quotations omitted). The political branches, not the courts, are the ones best equipped to root out and address the systemic issues at play in these cases.

116. This has not always been true — in many states, the office of attorney general began as a part of the judicial branch. In most states the attorney general is now, either by constitution or statute, explicitly fixed within the executive branch. A few states have left the office’s “constitutional locus” unclear. Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 Rev. Pol. 525, 529 (1994).

117. NAT’L ASS’N OF ATTORNEYS GENERAL, *What Does an Attorney General Do?*, http://www.naag.org/naag/about_naag/faq/what_does_an_attorney_general_do.php (last visited Jan. 3, 2016). See also 7A C.J.S. *Attorney General* § 2 (2017) (“The office of the state attorney general exists to properly insure the enforcement and administration of the laws of the state. The purpose of the office of state attorney general includes litigating matters on behalf of the people of the state and in matters of state interest, providing legal services required by state agencies, officers, boards, and commissions relating to their official duties, and providing the legal representation or defense of public officials when engaged in official acts”); Scott Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL’Y 1 (1993–94) (providing an overview of the constitutional status and role of the State Attorney General).

118. *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 268 (5th Cir. 1976).

119. *Id.* But see Justin Davids, Note, *State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers*, 38 COLUM. J.L. & SOC. PROBS. 365, 372 (2005) (noting a “significant minority” of states have abandoned the common-law powers and maintain that the attorney general does not have any powers beyond those granted by the legislature and state constitution. Davids argues that under an *expressio*

Office of Attorney General is typically one in which the specifics of its powers and duties over time have evolved.¹²⁰ In the absence of legislative action to the contrary, the Attorney General “may exercise all such authority as the public interest requires. And the Attorney General has wide discretion in making the determination as to the public interest.”¹²¹ The Attorney General is a peculiar office in that it is at once both the chief legal officer of the state — charged with managing all litigation on behalf of the state, defending the state in court, and offering legal advice to other state officers, executive departments, and even the legislature — while at the same time bound to represent the people and the public interest.¹²² Thus, an attorney general actually has two sets of clients: state officers and the people — clients whose interests may not always align.¹²³

Part IV.A examines this tension inherent in the position of Attorney General and suggests that it is this dual responsibility that allows the Attorney General to effectively push for reforms. Parts IV.B and IV.C delve into two recent lawsuits and settlements in New York and Illinois, respectively. These lawsuits serve as illuminating case studies of the role the Attorney General plays in brokering settlement agreements. The Illinois case, in particular, is illustrative due to the existence of numerous court transcripts, which shed significant light on the political process of settlements.

unius est exclusio alterius canon of statutory interpretation the abandonment of common-law powers is logical — “the legislature chose to enumerate certain powers, leading to the conclusion that it must have decided to exclude every power not mentioned.”)

120. See Memorandum from James E. Tierney, Esq., Attorney General of Maine (1980–1990) and Director of the National Attorneys General Program at Columbia Law School to all Attorneys General-Elect 1 (Nov. 20, 2008), <http://web.law.columbia.edu/sites/default/files/microsites/career-services/Overview%20of%20the%20Powers%20and%20Duties%20of%20the%20Office%20of%20State%20Attorney%20General,.pdf>.

121. *Florida ex rel. Shevin*, 526 F.2d at 268–69.

122. See Davids, *supra* note 119, at 371–74.

123. See *id.* at 374–75. Justin Davids’ Note, *State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers*, does an excellent job of surveying the various ways in which courts have determined which client’s interests, those of the people or the state, prevail when the two conflict with each other. See Davids, *supra* note 119. Though Davids’ work focuses on those instances where Attorneys General have brought suit against the state or else declined to represent the state in the name of the public interest, the ways in which the courts have responded to these decisions sheds light on the complicated role of the Attorney General in the solitary confinement context. *Id.*

A. THE MANY HATS OF THE ATTORNEY GENERAL

In *Feeney v. Commonwealth*, the Massachusetts Supreme Court held that even when representing the Commonwealth and state officers, the Attorney General must always “consider the ramifications of that action on the interests of the Commonwealth and the public generally, as well as on the official himself and his agency. To fail to do so would be an abdication of official responsibility.”¹²⁴ For an Attorney General, “the public interest comes first, even when the attorney general is representing state officers. . . . The public interest is the *actual* client.”¹²⁵ The Illinois Supreme Court made a similar finding in *People ex rel. Sklodowski v. State*, stating, “the Attorney General serves the broader interests of the State rather than the particular interest of any agency.”¹²⁶ Despite the Attorney General’s duty to serve as counsel for state agencies and officers, they are not ultimately charged with protecting the interests of these officers, but rather the interests of the People.

In the case of juvenile solitary confinement, this tension is much more subtle than in those cases, such as *Feeney*, where the Attorney General seeks to appeal a decision despite objections by the officers they represent, or those like *State ex rel. Condon v. Hodges* where they sue executive officers.¹²⁷ As of yet, no Attorney General has sued a Department of Corrections to stop the use of solitary confinement — these are not cases of overt struggles within a divided executive branch. Yet, the struggle between conflicting interests is no less at work in these cases. Even while acting as defense counsel for the State and the DOC, it is possible to see Attorney Generals working also in the interest of the people — the juveniles themselves. As the settlements in New York and Illinois demonstrate, Attorney Generals work in varied ways to serve the public interest while also defending the state.

124. *Feeney v. Commonwealth*, 373 Mass. 359, 365 (1977).

125. *Dauids*, *supra* note 119, at 378.

126. *People ex rel. Sklodowski v. State*, 642 N.E.2d 1180, 1181 (Ill. 1994); *see also* *EPA v. Pollution Control Board*, 69 Ill.2d 394, 401 (1977) (“The Attorney General’s responsibility is not limited to serving or representing the particular interests of State agencies, including opposing State agencies, but embraces serving or representing the broader interests of the State.”).

127. *See State ex rel. Condon v. Hodges*, 562 S.E.2d 623, 628 (S.C. 2002) (holding the Attorney General may bring an action against the Governor “when it is necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights”); *Feeney v. Commonwealth*, 373 Mass. 359, 365 (1977).

B. NEW YORK

Unlike the lawsuit in Illinois, *Peoples v. Fischer* did not begin as a lawsuit over juvenile solitary confinement.¹²⁸ Leroy Peoples, an adult inmate, originally filed the matter pro se alleging a violation of his Eighth Amendment right to be free from cruel and unusual punishment under 42 U.S.C. § 1983.¹²⁹ Even after the NYCLU came on as plaintiffs' counsel, the case involved adult prisoners, not juveniles.¹³⁰ The decision to phase out the use of juvenile solitary confinement came about as an element of the

128. About six months after the Stipulation was filed, the NY DOCCS and the Prisoners' Legal Service of New York (PLS) reached a settlement in another case, *Cookhorne v. Fischer*, which stemmed from the November 22, 2011 sentencing of then 17-year-old Paul Cookhorne to four years in solitary confinement as a result of a disciplinary hearing for allegedly assaulting a correctional officer. Press Release, Prisoners' Legal Services of New York, Prisoners' Legal Services Reaches Landmark Settlement for Juveniles 1 (Oct. 22, 2014), <http://plsny.org/assets/PLS-Landmark-Settlement-for-Juveniles.pdf> [<https://perma.cc/2X9F-5V39>]. PLS filed the action in the New York State Supreme Court alleging deliberate indifference to the medical and mental health needs of 16 and 17-year-olds. *Id.* at 2. PLS sought a declaratory judgment that (1) solitary confinement of 16 and 17 year-olds violates the prohibitions against cruel and unusual punishment under both the New York State and Federal Constitutions and (2) DOCCS' regulations allowing solitary confinement of 16 and 17-year-olds was unconstitutional because the regulations did not require DOCCS to consider a person's age when deciding appropriate punishments at disciplinary hearings. *Id.*

The Settlement Agreement built on the stipulation terms of *Peoples*, requiring all juveniles placed in confinement for disciplinary purposes to be offered four hours of out-of-cell programming five days per week and two hours of out-of-cell recreation seven days per week, effectively eliminating solitary confinement for disciplinary purposes. Settlement Agreement at 3, *Cookhorne v. Fischer*, No. 2012-1791 (N.Y. Sup. Ct. Oct. 17, 2014). The settlement also required DOCCS to enact new regulations and amend all applicable sections of Title 7 of the New York Codes, Rules and Regulations to "[p]rovide that age is a mitigating factor in disciplinary proceedings where a juvenile has been accused of misconduct." *Id.* Hearing officers are now required to include a statement in the written record of how age affected the disposition of the hearing. *Id.* Furthermore, the settlement mandates new training materials for hearing officers and all staff who are regularly assigned to work with juveniles. *Id.* at 4–5. For the first two years following the settlement agreement, the DOCCS must share all reports and data, as well as new training materials, with plaintiffs. *Id.* at 5.

129. See Declaration in Support of Request to Proceed In Forma Pauperis at 5, *Peoples v. Fischer*, No. 11-cv-2694 (S.D.N.Y. Apr. 18, 2011). Peoples' original complaint alleges numerous causes of action, including a First Amendment claim and a Fourth Amendment claim to be secure in his person and papers. Complaint, *Peoples v. Fischer*, No. 11-cv-2694 (S.D.N.Y. Apr. 18, 2011). The vast majority of these claims were ultimately dismissed, and the crux of the lawsuit became the Eighth Amendment and Fourteenth Amendment claims of whether SHU sentences that were handed down were disproportionately long given the underlying infractions, and whether confinement in SHU was inappropriate in the case of nonviolent disciplinary infractions. See Third Amended Complaint, *supra* note 63.

130. Indeed, neither of the other two named plaintiffs in the case, Tonja Fenton and Dewayne Richardson, were juveniles or ever held in juvenile facilities.

stipulation for a stay of litigation while a settlement agreement was negotiated.¹³¹ The stipulation laid out a number of actions “voluntarily undertaken by the Defendants and DOCCS to implement policy goals shared by the parties,”¹³² including making sure that juveniles had access to out-of-cell programming and limiting the amount of time that they spent in their cells.¹³³ By agreeing to limit in-cell time to no more than 19 hours a day (from 23 hours a day), the DOCCS eliminated solitary confinement for inmates under the age of 21.¹³⁴ The settlement, filed on December 23, 2015, affirmed these new policies.¹³⁵

Peoples v. Fischer proceeded, at least at first, in a fairly adversarial manner. The docket reveals rather typical defense work — parties filed motions to dismiss,¹³⁶ the Assistant Attorney General did his best to prevent other plaintiffs from being added into the case,¹³⁷ and parties disputed the scope of discovery.¹³⁸ This is

131. See Stipulation for a Stay with Conditions at 3, *Peoples v. Fischer*, No. 11-cv-2694 (S.D.N.Y. Feb. 19, 2014). New York is one of only two states that automatically processes all 16 and 17-year-olds in the adult criminal justice system, regardless of the offense. See Press Release, Governor Andrew M. Cuomo, Governor Cuomo Signs Executive Order to Separate Teens from Adult Prisoners (Dec. 22, 2015), <https://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-separate-teens-adult-prisoner-s>. [<https://perma.cc/8ZFA-FZTR>]. As a result, these juveniles are often placed in Special Housing Units not as a disciplinary measure, but for their own safety in order to keep them separated from the general (adult) prison population. *Id.* On December 22, 2015, Governor Cuomo signed an Executive Order directing the DOCCS to implement a plan to remove all female minors and all medium- and minimum-security male minors from adult prisons into juvenile facilities by August 2016. *Id.* NYS EXEC. ORDER No. 150 (Dec. 22, 2015), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO150.pdf> [<https://perma.cc/9W5A-3ZAM>].

132. Stipulation for a Stay with Conditions, *supra* note 131, at 2. The stipulation does note that the actions are voluntary and that “none of the terms of this Stipulation . . . shall constitute ‘So Ordered’ prospective relief enforceable in any court, nor do such terms constitute contractual obligations of the Defendants or DOCCS enforceable as binding provisions of a stipulation or settlement agreement.” *Id.*

133. *Id.* at 3.

134. *Id.* See also Press Release, N.Y. Civil Liberties Union, NYCLU Lawsuit Secures Historic Reforms to Solitary Confinement (Feb. 19, 2014), <http://www.nyclu.org/news/nyclu-lawsuit-secures-historic-reforms-solitary-confinement>. [<https://perma.cc/E9ES-DDYF>].

135. See Order Granting the Parties’ Joint Motion for Preliminary Approval of Class-Action Settlement at 21–22, *Peoples v. Fischer*, No. 11-cv-2694 (S.D.N.Y. Dec. 23, 2015).

136. See Motion to Dismiss, *Peoples v. Fischer*, No. 11-cv-2694 (S.D.N.Y. Aug. 15, 2011); Motion to Dismiss, *Peoples v. Fischer*, No. 11-cv-2694 (S.D.N.Y. Nov. 30, 2011); Motion to Dismiss, *Peoples v. Fischer*, No. 11-cv-2694 (S.D.N.Y. July 10, 2012); Motion to Dismiss, *Peoples v. Fischer*, No. 11-cv-2694 (S.D.N.Y. Apr. 9, 2013).

137. See Transcript of Proceedings, *Peoples v. Fischer* at 2, No. 11-cv-2694 (S.D.N.Y. Mar. 25 2013) (“The Court: I have a February 13 letter from Mr. Harben and Ms. Okereke [the Assistant AGs assigned to the case] opposing the notion of a voluntary dismissal of

likely due, at least in part, to the fact that the case began as a pro se case with a single plaintiff. As the case proceeded, and as more plaintiffs were added with indications that the lawsuit would likely become a class action, the defense work also changed. The Assistant Attorney General stated in a hearing, “[N]ow that there are class action ramifications, I have many people who get paid more than me above me who are going to want to take a look at it.”¹³⁹ In fact, within two weeks of a determination that the case would proceed as a class action, the parties had agreed to enter into settlement negotiations.¹⁴⁰

The settlement that was ultimately negotiated after three years of work between plaintiffs and defendants was signed off by the DOCCS and approved by New York Governor Andrew Cuomo. Yet it is clear that a key role was played by the Attorney General’s office despite a lack of focus on this office in the press.¹⁴¹ The New York Attorney General is the head of the Department of Law¹⁴² and controls all litigation “affecting the prop-

the Richardson action and a consolidation of that action into the Peoples action, which would include Mr. Richardson as a plaintiff.”).

138. See *id.* at 35–36 (disputing a discovery request for every SHU penalty since 2005 as overly broad).

139. *Id.* at 30. Mr. Harben, the Assistant Attorney General on the case, notes that because of the class action implications, “I have to get draft briefs a week in advance of the due date to my supervisor, and he has five people above him.” *Id.* at 32.

140. See Endorsed Letter from Taylor Pendergrass, *Peoples v. Fischer*, No. 11-cv-2694 (S.D.N.Y. Apr. 24, 2013) (“Subsequent to a phone call this morning among counsel for the plaintiffs, the Attorney General, and the Department, the parties confirmed a mutual interest in exploring settlement”); Stipulation And Order, *Peoples v. Fischer*, No. 11-cv-2694 (S.D.N.Y. May 1, 2013); Endorsed Letter from Richard W. Brewster, *Peoples v. Fischer*, No. 11-cv-2694 (S.D.N.Y. July 29, 2013); Endorsed Letter from Taylor Pendergrass, *Peoples v. Fischer*, No. 11-cv-2694 (S.D.N.Y. Oct. 1, 2013); Endorsed Letter from Taylor Pendergrass and Richard W. Brewster, *Peoples v. Fischer*, No. 11-cv-2694 (S.D.N.Y. Dec. 19, 2013); Motion for Daniel Mullkoff to Withdraw As Attorney, *Peoples v. Fischer*, No. 11-cv-2694 (S.D.N.Y. Dec. 20, 2013); Endorsed Letter from Richard W. Brewster, *Peoples v. Fischer*, No. 11-cv-2694 (S.D.N.Y. Jan. 28, 2014).

141. See Editorial Board, *New York takes steps to make the use of solitary confinement more humane*, WASH. POST. (Jan. 8, 2016, 7:33 PM), https://www.washingtonpost.com/opinions/new-york-takes-steps-to-make-the-use-of-solitary-confinement-more-humane/2016/01/08/dcc017f2-a50d-11e5-9c4e-be37f66848bb_story.html [https://perma.cc/6XVS-4N9Y]; Michael Schwirtz & Michael Winerip, *New York State Agrees to Overhaul Solitary Confinement in Prisons*, N.Y. TIMES (Dec. 16, 2015), <http://nyti.ms/1ZcbyxM> [https://perma.cc/5WQJ-XAHE]; Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces Dramatic Reform in Use of Special Housing for Inmate Discipline (Dec. 16, 2015), <https://www.governor.ny.gov/news/governor-cuomo-announces-dramatic-reform-use-special-housing-inmate-discipline> [https://perma.cc/Z9GQ-Y8PE]; Press Release, New York Civil Liberties Union, *Historic Settlement Overhauls Solitary Confinement in New York* (Dec. 16, 2015), <http://www.nyclu.org/news/historic-settlement-overhauls-solitary-confinement-new-york> [https://perma.cc/9R23-6MTB].

142. N.Y. CONST. Art. V, § 4.

erty or interests of the state.”¹⁴³ As the chief legal officer, the Attorney General is positioned to advise both the Governor and other state officials in legal matters. In a case such as this, which involves massive changes in one of the largest state prison systems in the nation,¹⁴⁴ the stakeholders are more than simply the DOCCS and the inmates themselves. As this case makes evident, regardless of how “historic” the settlement might be, it cannot be successful without buy-in from crucial stakeholders.

Despite pouring millions of dollars into increasing staffing within prisons and improving programs for inmates,¹⁴⁵ the New York City Correctional Department (NYCCD) has recently announced that it is seeking to delay eliminating solitary confinement as required under the terms of the settlement agreement.¹⁴⁶ Though the agreement was scheduled to go into effect on January 1, 2016, the NYCCD requested an extension until June to implement the plan.¹⁴⁷ The main reason for the delay is a lack of support for the reforms among corrections officers.¹⁴⁸ The president of the correction officer’s union, Norman Seabrook, has stated, “We’ve been saying all along that the department’s plan to end punitive segregation for young adults was never well thought out and lacked serious input from our members.”¹⁴⁹ Seabrook had also spoken out previously about the fact that union officials

143. N.Y. EXEC. LAW § 63 (2014) (“No action or proceeding affecting the property or interests of the state shall be instituted, defended or conducted by any department, bureau, board, council, officer, agency or instrumentality of the state, without a notice to the attorney-general apprising him of the said action or proceeding, the nature and purpose thereof, so that he may participate or join therein if in his opinion the interests of the state so warrant.”).

144. New York State’s prison system encompasses 54 facilities that hold nearly 60,000 inmates. Schwirtz & Winerip, *supra* note 141.

145. The settlement agreement is a five-year, \$62 million agreement (contingent on funds being approved by the Legislature). *See* Schwirtz & Winerip, *supra* note 141; *see generally* Order Granting the Parties’ Joint Motion for Preliminary Approval of Class-Action Settlement, *supra* note 135.

146. *See* Michael Schwirtz & Michael Winerip, *New York Jail Agency Seeks to Delay Ending Isolation for Young Adults*, N.Y. TIMES (Jan. 8, 2016), http://www.nytimes.com/2016/01/09/nyregion/new-york-jail-agency-seeks-to-delay-ending-isolation-for-young-adults.html?em_pos=small&emc=edit_ur_20160109&nl=nytoday&nliid=72012680&ref=headline. [<https://perma.cc/QSJ5-FT43>].

147. *See id.*

148. *See id.*

149. *Id.* Corrections officers’ concerns are not unfounded. The delay comes as a result of a series of assaults on guards at Rikers Island — in one week, five officers were sent to the hospital due to altercations with teenage inmates. According to prison officials, teenage inmates are responsible for a third of the violence in Rikers, despite being only twelve percent of the total population. *Id.*

and corrections officers felt excluded from settlement discussions, and had no input on policy decisions.¹⁵⁰

This case illustrates that an effective settlement requires much more than simply putting terms down on paper. Success depends in large part on the behind-the-scenes negotiations and coordination among diverse departments and stakeholders — something that an Attorney General is uniquely positioned to do effectively. In this way, New York’s settlement is an example of what other states ought to avoid — a cautionary tale of the risks of pushing forward with a settlement without obtaining “buy-in” from important stakeholders (namely, the corrections officers). Fortunately, the case in Illinois managed, by and large, to avoid these pitfalls.

C. ILLINOIS

R.J. et al. v. Jones and the path Illinois has taken to juvenile solitary confinement reform should be a model for other states. First, as discussed in Part III.B., this lawsuit and settlement negotiations reveal the true nature of solitary confinement as a vicious circle — lack of adequate funding leads to understaffing, which creates safety concerns and reliance on room confinement to keep both inmates and staff safe, compounding (or creating) behavioral problems and increasing safety concerns. Second, it lays out a roadmap for other Attorneys General of how to break this cycle. Attorneys General are uniquely positioned to bring the required stakeholders to the table in order to help push funding to these facilities.

1. *The Attorney General as “Defense” Counsel*

The Illinois Department of Juvenile Justice filed no responsive pleadings in *R.J. et al v. Jones*.¹⁵¹ Instead, the ACLU and IDJJ

150. See Michael Winerip & Michael Schwirtz, *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> [https://perma.cc/9TMJ-3A37].

151. During the course of the litigation the Director of the IDJJ, Arthur Bishop, stepped down and Candice Jones was appointed to replace him. Thus, though Bishop was the named defendant in the case originally, the caption was changed in 2014 to reflect the change in leadership. See Order, *R.J. et al., v. Jones*, No. 12-cv-07289 (N.D. Ill. Feb 26, 2014).

jointly filed a consent decree concurrently with the Complaint.¹⁵² As discussed in depth in Part III.B., the consent decree proposed to appoint three experts to conduct long-term analyses and reviews of IDJJ's facilities, practices, and policies, and to make recommendations as to the terms of the ultimate settlement agreement.¹⁵³ What is most striking about this case is how smoothly it progressed.¹⁵⁴ Judge Matthew D. Kennelly noted at one point during proceedings that it was clear that "everybody's done a lot of work, obviously, before the case got filed and pretty much everything . . . has been, more or less, agreed to."¹⁵⁵ Indeed, in many ways the ACLU's lawsuit seems to have been the perfect spark to set off changes that the IDJJ wanted or intended to make anyway.

The Attorney General's office noted at one point that although work still needed to be done, "[s]ince . . . 2010, the department has really aggressively been making efforts to reform the juvenile justice system."¹⁵⁶ Illustrating the high level of coordination at play, the office also noted that it had "the governor's office involvement from day one as we negotiate this consent decree."¹⁵⁷ Additionally a "tort line" had been incorporated into the fiscal

152. See Complaint, R.J. et al. v. Jones, No. 12-cv-07289 (N.D. Ill. Sept. 12, 2012); Joint Motion For Class Certification And Approval And Entry of Consent Decree, *supra* note 10; Memorandum In Support of Motion To Certify Class, R.J. et al. v. Jones, No. 12-cv-07289 (N.D. Ill. Sept. 12, 2012).

153. See Memorandum in Support of Motion To Certify Class, *supra* note 152, at Ex. 1. The three experts appointed were Peter E. Leone, Ph.D., Professor in the Department of Special University of MD, designated to report on education practices within the IDJJ; Louis Kraus, M.D., Chief, Child and Adolescent Psychiatry, Rush University Medical Center, to report on mental health; and Barry Krisberg, Ph.D., Director of Research and Lecturer in Residence, Chief Justice Earl Warren Institute on Law and Social Policy, University of California, Berkeley School of Law, appointed to review general juvenile justice concerns. *Id.*

154. Indeed, in reviewing the docket this author only came across one real instance of dispute between the parties. During negotiations for the final settlement agreement, plaintiffs objected to the IDJJ's initially proposed policies on confinement and mechanical restraint of juveniles and whether the proposals complied with standards set by the Prison Litigation Reform Act 18 U.S.C. § 3626. See Objections, R.J. et al. v. Jones, No. 12-cv-07239 (N.D. Ill. Nov. 3, 2014). The Court scheduled an evidentiary hearing to resolve the dispute, but before the hearing parties amicably resolved their dispute through meeting with each other and the court appointed monitors. See Memorandum Regarding IDJJ's Revised Confinement and Restraint Policies, R.J. et al. v. Jones, No. 12-cv-07239 (N.D. Ill. Feb. 18, 2015).

155. Transcript of Proceedings, R.J. et al. v. Jones, No. 12-cv-07239 (N.D. Ill. Feb. 25, 2015).

156. Transcript of Proceedings at 9, R.J. et al. v. Jones, No. 12-cv-07239 (N.D. Ill. Aug. 23, 2013).

157. *Id.* at 6-7.

year budget in order to cover anticipated litigation costs relating to the case.¹⁵⁸ In another status hearing, the Assistant Attorney General noted that “throughout the process, the department has been working with key legislators with the Office of Management and Budget” in order to ensure that the budget provided for additional staff required to meet the terms of the settlement agreement.¹⁵⁹ All these references illustrate not just how much coordination there was behind the scenes in this litigation, but how much was *required* to make a settlement happen.

The Illinois settlement is a perfect example of why, though a constitutional ruling may facilitate litigation or expedite reform in certain areas, one is neither necessary nor sufficient to reform. A constitutional ruling is clearly not necessary because this case, like all of the others mentioned in Part II, came to a settlement agreement banning solitary confinement without any rulings handed down on the constitutionality of the practice.¹⁶⁰ Furthermore, this case makes clear that even if a constitutional ruling were to come down, actually ending the use of solitary confinement requires an overhaul of most states’ prison systems — courts must appoint monitors, states must hire and train new corrections officers, and revise and implement departmental policies.¹⁶¹ It also sheds light on the crucial role that the Attorney General plays in these litigations both at a legal and a political level.

The Illinois Constitution of 1970 establishes the Attorney General as part of the executive branch of the government,¹⁶² and provides that “the Attorney General shall be the legal officer of the State, and shall have the duties and powers that may be prescribed by law.”¹⁶³ The Attorney General of Illinois is required to “defend all actions and proceedings against any State officer, in his official capacity, in any of the courts of this State or the United States.”¹⁶⁴ Yet Illinois also recognizes a strong common law

158. *See id.*

159. Transcript of Proceedings at 10, R.J. et al. v. Jones, No. 12-cv-07239 (N.D. Ill. May 14, 2014).

160. *See supra* Part II.

161. *See supra* Part III.B.

162. ILL. CONST. art. V, § 1.

163. ILL. CONST. art. V, § 15. The principal duties and responsibilities of the Attorney General are laid out in Section 4 of the Attorney General Act. 15 ILL. COMP. STAT. 205/4 (2010).

164. Attorney General Act, 15 ILL. COMP. STAT. 205/4 (2010).

authority of the Attorney General to represent the People.¹⁶⁵ Indeed, “serving the public interest is established as the paramount obligation of the Attorney General.”¹⁶⁶ The Illinois Supreme Court has held that it is the Attorney General, not the officer or agency that she represents, who controls the course of the representation.¹⁶⁷ Thus, the Attorney General, even when acting as defense counsel for the State and its officers, cannot act as a private defense attorney might. Even if named to defend a state officer, the interests that the Attorney General protects must be those of the People, not solely of the officer.

The Attorney General is also charged with consulting with and advising the Governor and other state officers on all legal and constitutional questions relating to the duties of their offices.¹⁶⁸ The Attorney General is thus a uniquely positioned stakeholder in these cases: though she represents the department and state officers being sued, she must view the case from all sides, because the plaintiffs — the juveniles held in IDJJ facilities — are just as much her client.¹⁶⁹ In addition, because a large part of the AG’s job is to advise on legal questions, the AG is in a position to influence policies and practices in a way that an external organization cannot. This element of the AG’s role is quite clear in *R.J. et al.* Both the Assistant Attorney General and a representative of the IDJJ indicated that, in addition to organizing between offices and between the State and the ACLU, the AG’s office had been advising many different state actors that they should settle the case and how best to do so.¹⁷⁰ At one point in the proceedings, the Assistant AG explained to the Court that

165. See Shawn W. Denney, Former Senior Counsel to the Attorney Gen., *History of the Office of the Illinois Attorney General*, ILL. ATTORNEY GEN., <http://www.illinoisattorneygeneral.gov/about/history.html> [https://perma.cc/8BU6-XMZC] (last visited Jan. 4, 2016).

166. *Id.*; see also *EPA v. Pollution Control Bd.*, 69 Ill.2d 394, 401 (1977).

167. See Denney, *supra* note 165; see also *Newberg, Inc. v. Ill. State Toll Highway Auth.*, 98 Ill.2d 58 (1983) (finding it is the Attorney General, not the state agency that he represents, who has the authority to reject or approve a settlement agreement, and that without said approval, a settlement agreement has no binding force on a state agency — in other words, it is the Attorney General, rather than the “client” (i.e., the State) who controls the course of the litigation).

168. See Attorney General Act, 15 ILL. COMP. STAT. 205/4 (2010).

169. The Court notes as much during one status hearing, stating “You folks [the IDJJ and the ACLU] are not the only people in the world who have an interest in [this settlement].” Transcript of Proceedings, *supra* note 159, at 7.

170. See Transcript of Proceedings, *supra* note 156, at 9.

they immediately filed the consent decree partially because of their recommendation to the IDJJ and the Governor:

[O]ne of the thoughts we had when we entered into this consent decree is that the state is going to end up having to pay some money somehow regardless of how we proceed and that, as opposed to litigating the case, spending money, you know, on discovery and experts and attorneys' fees for that, this would actually be the more cost effective approach.¹⁷¹

This ability to navigate the political aspects of these cases is crucial, particularly for the Illinois lawsuit. At numerous points during the negotiations, the Court brought up, *sua sponte*, the practical constraints on any settlement agreement.

My concern is that in doing whatever . . . improvements are needed, you know, once we go through this whole process of the consultants giving reports and everybody consulting and so on, that's going to involve money. . . . Unless, you know, Illinois' ship comes in sometime between now and then, which I wouldn't be holding my breath waiting for, it's going to have to come from somewhere else within the already deficit-ridden state budget.¹⁷²

The remedial plan agreed upon by the IDJJ and ACLU required hiring a significant number of people in order to meet minimum staffing levels and to ensure the kind of monitoring envisioned for the newly limited uses of confinement.¹⁷³ Yet even these changes

171. *Id.*

172. *Id.* at 11–12; *see also* Transcript of Proceedings, *supra* note 159, at 9–10 (“The Court: [I]t’s no secret that the state of Illinois kind of doesn’t have a whole lot of cash lying around these days. . . . You know, some of the things in here contemplate hiring a person. Some of them probably contemplate hiring more than one person. Have people given thought to where that money is coming from?”); Transcript of Proceedings at 13–14, R.J. et al. v. Jones, No. 12-cv-07239 (N.D. Ill. May 6, 2015) (“The Court: [E]very time I hear something out of Springfield, it’s . . . that there’s not enough money for anything and we’re cutting this, cutting that, cutting the next thing.”); Transcript of Proceedings, *supra* note 156, at 4–6 (“The Court: I think pretty much everybody in the room knows that the state of Illinois isn’t exactly rolling in cash right now. And the way things tend to work in government budgeting . . ., when money has to come from something, it doesn’t appear out of the clouds”).

173. *See* Supplemental Order at 4–5, R.J. et al. v. Jones, No. 12-cv-07239 (N.D. Ill. July 17, 2014) (outlining both full- and part-time staff to be hired and the minimum levels to be maintained at each facility. The plan specifies nearly thirty discreet positions that

seem to have been enacted smoothly. When the Court asked when the IDJJ envisioned being in compliance with the proposed staffing levels of the remedial plan, the IDJJ responded that the new staff had already been hired and put in place.¹⁷⁴ Indeed, again indicating the amount of coordination and negotiation put into this settlement, the IDJJ's chief legal counsel and an Assistant Attorney General, Beth Compton, stated that the Governor's introduced budget contained no cuts to the IDJJ.¹⁷⁵ Despite widespread cuts in the budget generally, the IDJJ's budget was actually increased in order to facilitate these changes,¹⁷⁶ which is no small feat in Illinois.¹⁷⁷ And, as the transcripts make clear, it was primarily through the efforts of the Attorney General's office that the Governor and other crucial offices were brought on board to ensure a successful settlement. Illinois was able, without a legal ruling, to set in motion the exact changes that reformers seek to obtain with a constitutional determination. And, as the transcripts make clear, it was the Attorney General's office that brought the critical stakeholders to the table to ensure a successful settlement.

need to be filled, with all subject to any "significant change in the number or special needs of youths at any of the DJJ facilities").

174. See Transcript of Proceedings, *supra* note 170, at 12–13 ("The Court: . . . as I recall from an earlier date . . . there were issues about getting enough of these licensed mental health professionals hired. . . . [Y]ou've got to post positions, you've got to find people that are qualified, people actually have to apply, et cetera, et cetera. . . . Ms. Compton: I don't want to represent that we have everyone hired that we need to have hired, but we do have enough in place to meet [the immediate requirements of the remedial plan].").

175. See *id.* at 13–14.

176. See *id.* ("Ms. Compton: I think it's a matter of public record that the governor's budget did not include any cuts for the . . . Department of Juvenile Justice . . . [a]nd, in fact, included some increases. And I can represent to the Court that, you know, this consent decree . . . was certainly discussed.").

177. As of 2016, Illinois is operating with a \$5.5 billion operating deficit, \$7.7 billion in unpaid bills, and approximately \$111 billion in unfunded pension liabilities. Illinois also currently has the lowest credit ratings of any state. THOMAS WALSTRUM, FED. RESERVE BANK OF CHICAGO, THE ILLINOIS BUDGET CRISIS IN CONTEXT: A HISTORY OF POOR FISCAL PERFORMANCE 1 (2016), <https://www.chicagofed.org/~media/publications/chicago-fed-letter/2016/cfl365-pdf.pdf> [<https://perma.cc/U4UW-RQ84>].

V. CONCLUSION

Though Illinois' settlement has not been without issue,¹⁷⁸ it is a remarkable testament to the power of the office of Attorney General. Charged with representing the People, Attorneys General are duty-bound in these litigations to maintain an eye always to the interest of the plaintiffs — the juveniles themselves — as well as to the broader implications that an inadequate juvenile correctional system has on society at large. Thus, true reform of the use of solitary confinement goes far beyond a court declaration that solitary confinement violates the Eighth or Fourteenth Amendments. Without a ruling by the Court on this matter (or even if and when one comes down), reformers should be looking not to the judiciary, and certainly not to the federal government, but to State Attorneys General. Charged with defending the public interest, Attorneys General are not typical defense attorneys. Yet, as they typically control the course of any litigation in which the State is a party, a settlement can and will only happen at their discretion. Moreover, as political figures, Attorneys General are able to push for budget allocations and policy reforms where they matter most — within the Department of Corrections and facilities that house juveniles. As seen in the case of Illinois, it is simply not possible to end the use of solitary confinement, regardless of a constitutional ruling, if there are not enough staff members on the ground able to meet the needs of the youth in their care.

178. See Joint Submission of Monitor Report By Candace Jones Ex. A at 16, R.J. et al. v. Jones, No. 12-cv-07239 (N.D. Ill. Nov. 4, 2015) (Though Louis Kraus, M.D., notes that “progress has been quite positive,” confinement time continues to be a “significant concern” at a few facilities. “In general, the most significant concern is the amount of confinement time that has now greatly increased because of what is rationalized as staffing issues.”).