ADMINISTRATIVE NULLIFICATION AND THE PRECARITY OF CARCERAL REFORM

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INTRODUCTION

Prisons and jails are "total institutions."[1] Incarcerated people, to a large extent, depend on correctional agencies for their basic welfare and have limited power to resist harmful conditions and practices.[2] While incarcerated people and their advocates have historically turned to the courts to remedy dangerous and inhumane conditions,[3] increasingly, state legislatures have become important sites of intervention,[4] especially to address profoundly harmful conditions that courts have, nonetheless, held pass constitutional and statutory muster.[5]

Solitary confinement is one example. Since the 1960s and 1970s, litigation has percolated through the federal courts challenging the use of solitary confinement both as applied to vulnerable groups and more broadly.[6] In these lawsuits, incarcerated people have typically advanced claims under the Eighth Amendment's Cruel and Unusual Punishments Clause[7] and Title II of the Americans with Disabilities Act.[8] Courts

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[1] ERVING GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES, at xxi (Transaction Publishers 2007) (1961).

[2] *See* Craig Haney, *Prison Effects in the Age of Mass Incarceration*, PRISON J. ONLINEFIRST, 2012, at 1, 2, 5–6 (discussing loss of agency as part of a process of "prisonization," *id.* at 5).

[3] *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1558 (2003) ("In 1995, inmates filed nearly 40,000 new federal civil lawsuits — nineteen percent of the federal civil docket." (footnote omitted)).

[4] *Data Tracker*, UNLOCK THE BOX, https://unlocktheboxcampaign.org/data-tracker [https://perma.cc/U5G9-Z6BV] (documenting more than 1,200 solitary confinement reform bills introduced in state legislatures since 2009).

[5] Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 535–39 (2021) (charting history of "retrenchment" of prison reform litigation in the 1980s, *id.* at 539).

[6] *See generally* Keramet Ann Reiter, *The Most Restrictive Alternative: A Litigation History of Solitary Confinement in U.S. Prisons, 1960–2006*, 57 STUD. L. POL. & SOC'Y 71 (2012) (tracing the early history of litigation challenging various forms of solitary confinement in federal courts).

[7] *See* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 889–90 (2009).

[8] *See* Ashley Halvorsen, Note, *Solitary Confinement of Mentally Ill Prisoners: A National Overview & How the ADA Can Be Leveraged to Encourage Best Practices*, 27 S. CAL. INTERDISC. L.J. 205, 220–21 (2017). *See generally* MARGO SCHLANGER, AM. CONST. SOC'Y, HOW THE ADA REGULATES AND RESTRICTS SOLITARY CONFINEMENT FOR PEOPLE WITH MENTAL

have construed these sources of rights as limited and narrow, and as a result, these lawsuits have proven unavailing as tools to eliminate solitary confinement wholesale[9] — even for vulnerable groups.[10] And although Justice Kennedy, citing the "terrible price" that prolonged solitary confinement exacts on human beings, all but invited a constitutional challenge to that practice,[11] courts have largely upheld its use on non-vulnerable groups.[12]

To be sure, litigation played a role in reducing the harm attendant to the use of solitary confinement as a penological tool. Federal court litigation over decades has indeed mitigated some of the most deplorable conditions in solitary confinement units,[13] established limited protections for certain vulnerable people,[14] and secured procedural protections.[15] Given the limited nature of these successes — and because the core practice of solitary confinement continues to exist — anti-solitary litigators have begun to pair litigation approaches with legislative campaigns.[16] Litigators, seeking to secure through the state and local legislatures what they have failed to secure through the courts, have joined incarcerated and formerly incarcerated leaders and other community advocates.[17] In recent years, state and local legislatures have begun to respond to these efforts by attempting to reform solitary confinement through legislative oversight — including hearings and investigations — and, at times, legislation.[18]

DISABILITIES (2016) (explaining evolution in litigation strategies advanced to challenge use of solitary confinement in federal courts).

[9] *See, e.g.*, Madrid v. Gomez, 889 F. Supp. 1146, 1265, 1279–80 (N.D. Cal. 1995) (enjoining challenged solitary confinement practices for incarcerated people with certain disabilities but not for all incarcerated people).

[10] *See* Reiter, *supra* note 6, at 111 ("[E]ven these decisions mandating gentler minimum standards for people with pre-exisiting mental illness fall far short of . . . protecting all people with mental health conditions.").

[11] Davis v. Ayala, 576 U.S. 257, 289 (2015) (Kennedy, J., concurring).

[12] *See, e.g.*, *Madrid*, 889 F. Supp. at 1280; Reiter, *supra* note 6, at 111.

[13] *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 680–81, 686–87 (1978) (affirming remedial measures to the Arkansas Department of Corrections' unconstitutional punitive isolation practices).

[14] *See, e.g.*, *Madrid*, 889 F. Supp. at 1279–80.

[15] *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 564–671 (1974); Wilkinson v. Austin, 545 U.S. 209, 224–30 (2005) (holding that incarcerated people possess a Fourteenth Amendment liberty interest in avoiding placement in supermax confinement).

[16] *See, e.g.*, Hernandez D. Stroud, *Reforming Solitary Confinement Without the High Court*, BRENNAN CTR. FOR JUST. (Feb. 21, 2024), https://www.brennancenter.org/our-work/analysis-opinion/reforming-solitary-confinement-without-high-court [https://perma.cc/F9HF-9URD] (cataloging effective legislative efforts to reform solitary confinement practices).

[17] *See, e.g.*, *About Us*, UNLOCK THE BOX, https://unlocktheboxcampaign.org/about [https://perma.cc/V9FU-T49Q] (describing itself as working with "solitary survivors, family members, advocates, community and faith groups, legislators, and others dedicated to ending state-sponsored torture").

[18] Gerald Rich & Eli Hager, *Shifting Away from Solitary*, MARSHALL PROJECT (Dec. 23, 2014, 1:12 PM), https://www.themarshallproject.org/2014/12/23/shifting-away-from-solitary

As these reform efforts have taken root in New York, its correctional agencies have resisted.[19] For decades, New York's correctional agencies gummed up reform efforts by implementing and permitting the continuance of practices that were inconsistent with the spirit of reform legislation. These practices proved elusive and hard to challenge,[20] often undercutting reform goals.

More recently, however, New York's correctional agencies have hardened their resistance through a practice that we call "administrative nullification." Executive agencies administratively nullify reform legislation when they enact regulations or policies that directly violate the plain language of that legislation, daring coequal branches to respond. Administrative nullification contains three elements, the combination of which renders it distinct from simple abuse of agency authority: First, administrative nullification amounts to a declaration that reform legislation is null and void; second, it affirmatively inflicts harm in ways the legislature specifically sought to prohibit; and third, it carries with it a reactionary ideological valence. We call these elements "suspension," "harm," and "reactionary aims." In a carceral reform context, administrative nullification disempowers incarcerated people and their advocates and thwarts the democratization of carceral power, retrenching that power in the prison system.

New York's implementation of the Humane Alternatives to Long-Term Solitary Confinement Act[21] (HALT), a recently enacted suite of

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[https://perma.cc/WS79-DMLE] (documenting efforts by state legislatures to reign in solitary confinement via oversight, recommendations to agencies, and legislation); *Data Tracker*, *supra* note 4 (cataloguing bills in state legislatures). For an example of local legislation, see also N.Y.C., N.Y. Local Laws of the City of New York for the Year 2024, No. 42 (Jan. 30, 2024). In July of 2024, Mayor Eric Adams issued an emergency order to block the law from taking effect. *See* Derick Waller, *NYC Was Supposed to End Solitary Confinement. Here's Why Mayor Eric Adams Issued an Emergency Order to Delay.,* CBS NEWS (July 29, 2024, 7:31 AM), https://www.cbsnews.com/newyork/news/new-york-city-solitary-confinement-local-law-42-eric-adams-jumaane-williams [https://perma.cc/HB5N-6STT].

19 *See, e.g.*, Victoria Law, *New York Prisons Are Blatantly Violating State Law Limiting Solitary Confinement*, TRUTHOUT (Sept. 21, 2022), https://truthout.org/articles/new-york-prisons-are-blatantly-violating-state-law-limiting-solitary-confinement [https://perma.cc/N828-B5XT]; *Oversight Board: DOC Violating Its Standards for Housing Unit that Restrains Young Inmates to Desks*, SPECTRUM NEWS (Jan. 22, 2017, 3:23 PM), https://ny1.com/nyc/all-boroughs/news/2017/01/20/doc-violating-its-standards-for-housing-unit-that-restrains-young-inmates-to-desks--oversight-board-says [https://perma.cc/6Q74-QTUC].

20 *See, e.g.*, Jacob Kaye, *Jails Oversight Board Blasts DOC for Quietly Opening New Restrictive Unit*, QUEENS DAILY EAGLE (Feb. 13, 2025), https://queenseagle.com/all/2025/2/13/jails-oversight-board-blasts-doc-for-quietly-opening-new-restrictive-unit [https://perma.cc/AG98-8CQV]; Jack Arpey, *Correctional Association of New York Pushes for More Transparency and Oversight in 2024 Recommendations*, SPECTRUM NEWS (Oct. 3, 2024, 7:23 PM), https://spectrumlocalnews.com/nys/central-ny/politics/2024/10/03/correctional-association-wants-more-oversight- [https://perma.cc/VC9C-B9M5].

21 S. 2836, 2021 Leg., Reg. Sess. (N.Y. 2021) (codified at N.Y. CORRECT. LAW §§ 2, 45, 137–38, 401).

solitary confinement reforms,[22] has become a battle against reforms, illustrating the administrative nullification phenomenon and its consequences. New York's corrections agencies — the New York State Department of Corrections and Community Supervision[23] (DOCCS) and the New York State Office of Mental Health (OMH), which provides in-custody mental health treatment[24] — have functionally declared two cornerstone provisions of HALT null and void, inflicting the specific harm the legislature sought to prevent and daring both the legislature and the judiciary to respond.[25] We import the term "nullification" from a historical and constitutional context because, in important ways, New York's correctional agencies' reactionary attempt to nullify these two provisions of HALT resembles the reactionary states' rights Nullification Crisis of the nineteenth century — it is the suspension of a law, inflicting the harms specifically barred by that law, animated by fervent reactionary aims.[26] In both cases, nullifiers framed their activities as necessary to protect extant racist systems.[27] And in both cases, nullifiers recast those systems as benign and reframed their opposition to the reforms in legal, as opposed to ideological, terms.[28] Thus, to illustrate the third element of administrative nullification — "reactionary aims" — we historicize these practices in Part III.

We do not situate our analysis in scholarship concerning the typical misuse of agency power, which involves the implementation of a statute conferring upon an agency quasi-legislative authority.[29] The three elements of "administrative nullification" place our analysis outside that specific scholarly context. First, administrative nullification does not

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[22] *See* Troy Closson, *New York Will End Long-Term Solitary Confinement in Prisons and Jails*, N.Y. TIMES (Apr. 24, 2021), https://www.nytimes.com/2021/04/01/nyregion/solitary-confinement-restricted.html [https://perma.cc/YL2V-LK5U].

[23] *About Us*, DEP'T OF CORR. & CMTY. SUPERVISION, https://doccs.ny.gov/about-us [https://perma.cc/4453-77GZ].

[24] *Central New York Psychiatric Center*, OFF. OF MENTAL HEALTH, https://omh.ny.gov/omhweb/facilities/cnpc [https://perma.cc/FR84-K5N4] ("The Central New York Psychiatric Center provides a full range of care and treatment to people incarcerated in the State and County Correctional Systems.").

[25] *See infra* Part II, pp. 196–205.

[26] *See infra* Part III, pp. 205–13.

[27] *See infra* section III.A, pp. 206–09.

[28] *See infra* sections III.B–C, pp. 209–13. In this piece, we use the definition of racism popularized by Professor Ruth Wilson Gilmore: "Racism, specifically, is the state-sanctioned or extralegal production and exploitation of group-differentiated vulnerability to premature death." RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 28 (1st ed. 2007). The two institutions sought to be protected by South Carolina's nullification of federal tariffs and New York's administrative nullification of solitary confinement reforms — chattel slavery and the punitive aspects of New York's criminal legal system respectively — are racist in that they are state productions of "vulnerability to premature death" among Black people. *See id.*; *infra* section III.A, pp. 206–09.

[29] *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–44 (1983) (examining the arbitrary and capricious standard of agency decisionmaking); 5 U.S.C. § 706(2) (provision of Administrative Procedure Act outlining stautory limits of agency action).

involve the improper interpretations of ambiguous terms in statutes or abuses of discretion that frustrate the spirit of underlying legislation.[30] Rather, it involves the voiding of unambiguous, substantive, nondiscretionary provisions of reform legislation seeking to rein in the conduct of the agency itself.[31] Second, administrative nullification affirmatively inflicts harm in narrow ways that the underlying legislation specifically prohibits.[32] Third, it is informed by a reactionary valence, in this case aimed at preserving racist institutions in the face of democratic reform.[33] In a carceral reform context, as illustrated by the examples in this piece, administrative nullification directly disempowers incarcerated people and their advocates in legislative and legal arenas. In so doing, it deepens the totalizing nature of carceral spaces, placing them even further outside the reach of democratic accountability.[34]

This piece illustrates the phenomenon of administrative nullification through the trajectory of recent efforts to reform solitary confinement for people in New York state prisons. We start with the historical trajectory of solitary confinement practices in New York's prisons. After decades of litigation opposing these practices, as of 2019, New York continued to hold thousands of people in prolonged and extremely isolating solitary confinement.[35] The state legislature responded to calls from advocates and survivors by adopting two major reform packages: in 2008, the Special Housing Unit (SHU) Exclusion Law,[36] which sought to protect some of the most vulnerable people with mental illness from solitary confinement,[37] and in 2021, HALT, a sweeping reform package that dramatically curtailed the lawful use of solitary for all people in New York state prisons, including people with disabilities.[38]

In Part I, we provide an abbreviated version of this history and a nonexhaustive explanation of DOCCS's and OMH's attempts to frustrate implementation of the SHU Exclusion Law through administrative practices that contradicted the spirit of the legislation.[39] In Part II, we explain DOCCS's and OMH's administrative nullification of HALT — the SHU Exclusion Law's successor — through written policies that

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[30] *Cf.* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 126 (2000) (relying on Congress's "clear intent" to invalidate FDA action).

[31] *See infra* Part II, pp. 196–205.

[32] *See infra* Part II, pp. 196–205.

[33] *See infra* Part III, pp. 205–13.

[34] *See infra* Part IV, pp. 213–15.

[35] N.Y. C.L. UNION, TRAPPED INSIDE: THE PAST, PRESENT, AND FUTURE OF SOLITARY CONFINEMENT IN NEW YORK 4 (2019).

[36] S. 6422, 2008 Leg., Reg Sess. (N.Y. 2008) (codified as amended at N.Y. CORRECT. LAW §§ 2, 137, 401).

[37] *Id.* § 1.

[38] S. 2836, 2021 Leg., Reg. Sess. § 1 (N.Y. 2021) (codified as amended at N.Y. CORRECT. LAW § 2).

[39] During the same period, additional litigation challenged DOCCS's continued unlawful use of solitary confinement on vulnerable groups. *E.g.*, Peoples v. Annucci, 180 F. Supp. 3d 294, 296 (S.D.N.Y. 2016). This litigation is beyond the scope of our discussion.

violate the plain language of the legislation. That Part analyzes the first two elements of administrative nullification: the declaration that a statute is void (suspension) and the infliction of harm in ways the legislature sought to prohibit (harm). In Part III, we draw historical parallels between administrative nullification and the antebellum Nullification Crisis — the crisis from which we draw the name "administrative nullification." This Part uses these parallels to explain the third and perhaps most normatively disquieting element of administrative nullification: reactionary aims. And, finally, in Part IV, we discuss the tragic costs of administrative nullification for the incarcerated New Yorkers that the reform legislation sought to protect. In New York, administrative nullification has sanctioned the continued suffering of incarcerated people, forced incarcerated people, and their advocates to choose where to expend scarce resources, and called into question the prospects for carceral reform via democratic channels.

We articulate the theory of administrative nullification for the benefit of our colleagues in the prisoners' rights space. Only by planning for the threat of administrative nullification can prisoners' rights advocates — particularly advocates in jurisdictions with minimal resources — ensure that legislative reform holds.

I. THE PATH TO NULLIFICATION: THE SHU EXCLUSION LAW AND REFORM CIRCUMVENTED

Between the 1980s and the early 2000s, advocates throughout New York sought to drastically curtail the use of solitary confinement in New York's prisons through individual and class action litigation.[40] Cases typically employed a strategy that later became common in the wake of *Madrid v. Gomez*[41] — the use of civil rights litigation to protect from solitary people with diagnoses that rendered them uniquely suscpetible to deterioriation if placed there.[42] In New York, some of these cases bore fruit. Lawsuits targeting individual prisons led to screening

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[40] *E.g.*, Stipulation at 1, Langley v. Coughlin, 715 F. Supp. 522 (S.D.N.Y. 1989) (84 Civ 5431) (describing plaintiffs' challenge to Bedford Hills Correctional Facility's solitary confinement practices); Complaint at 2–3, Eng v. Coughlin, 726 F. Supp 40 (No. 80-CV-385) (W.D.N.Y. 1989) (challenging Attica Correctional Facility's practice of holding people in solitary confinement); Private Settlement Agreement at 1, Anderson v. Goord, No. 87-CV-141 (N.D.N.Y. Dec. 16, 2003) (describing plaintiffs' challenge to New York's failure to provide adequate mental health care to people held in solitary confinement at Green Haven and Auburn State Correctional Facilities).

[41] 889 F. Supp. 1146 (N.D. Cal. 1995). This case enjoined the challenged solitary confinement practices for incarcerated people with certain disabilities but not for a broader group of incarcerated people. *Id.* at 1279–80.

[42] *See, e.g.*, Complaint at 1, Disability Rts. Network of Pa. v. Wetzel, No. 13-cv-00635 (M.D. Pa. Mar. 11, 2013).

requirements upon placement in solitary,[43] procedural protections[44] and meaningful mental health treatment for those consigned to solitary,[45] and limited exclusions from solitary based on diagnosed, serious mental illness.[46] In a system of more than forty prisons,[47] however, facility-specific litigation would be inadequate. *Disability Advocates, Inc. v. New York State Office of Mental Health*,[48] which was filed in 2002, aimed to effect systemwide change.[49]

Disability Advocates, Inc. attacked New York's policy and practice of warehousing people with serious mental illness in solitary.[50] The case eschewed facility-specific strategies in favor of a broadside against the cycle of misery, identified by Dr. Terry Kupers, where, as people with mental illness are exposed to the deleterious effects of solitary, their condition further deteriorates, leading to their temporary removal from solitary, only to be returned to solitary — the cause and aggravator of the worsening of their mental health in the first place.[51] The resulting private settlement agreement curtailed the State's use of long-term solitary confinement for people with serious mental illness by altering the path into solitary,[52] ameliorating some of the most draconian conditions in solitary units,[53] and carving a path out of and away from solitary confinement for people with serious mental illness.[54]

Recognizing that no settlement agreement lasts forever, the plaintiffs worked with grassroots groups, including Mental Health Alternatives to Solitary Confinement, to push for the passage of the Special Housing Unit (SHU) Exclusion Law.[55] At the time of enactment, the SHU

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[43] *E.g.*, Rule 41 Voluntary Stipulation of Dismissal Subject to Conditions at 3–5, *Eng*, 726 F. Supp 40 (No. 80-CV-385) (implementing policies for "[s]creening on [a]dmission to SHU," *id*. at 3).

[44] *E.g.*, *id.* at 7 (providing access to private interviews for those in SHU); Private Settlement Agreement, *supra* note 40, at 3–4 (implementing protections for people with serious mental illness during disciplinary hearings and training for hearing officers on how to consider mental health and acuity as mitigating factors during disciplinary process).

[45] *E.g.*, Rule 41 Voluntary Stipulation of Dismissal Subject to Conditions, *supra* note 43, at 5–10 (requiring "[p]eriodic [m]onitoring of SHU [i]nmates," *id.* at 5, access to "[p]rivate [i]nterviews" with mental health professionals, *id.* at 7, and "[c]ontinuity of [t]reatment" policies, *id.* at 9).

[46] *E.g.*, *id.* at 3 (implementing "[n]o [s]eriously [m]entally [i]ll [i]nmates in SHU" policy).

[47] *See Facilities*, DEP'T OF CORR. & CMTY. SUPERVISION, https://doccs.ny.gov/facilities [https://perma.cc/8H5D-Z6J6].

[48] 02 Civ. 4002 (S.D.N.Y. Apr. 27, 2007).

[49] Complaint at 52, *Disability Advocs., Inc*., No. 02 Civ. 4002 (S.D.N.Y. May 28, 2002).

[50] *Id.* at 1–2.

[51] Terry A. Kupers, *Repetitive Self-Harm in Solitary Confinement*, 24 CORR. HEALTH CARE REP. 69, 73 (2023).

[52] *See* Private Settlement Agreement at 2–15, *Disability Advocs., Inc.*, 02-CV-4002 (S.D.N.Y. Apr. 25, 2007).

[53] *See, e.g.*, *id.* at 2–3, 17.

[54] *See id.* at 6–15.

[55] N.Y. STATE S., DIVISION OF THE BUDGET BILL MEMORANDUM, S. 2007-6422, at 12–13 (2007), https://digitalcollections.archives.nysed.gov/media/collectiveaccess/images/2/7/4/14775_ca_object_representations_media_27445_original.pdf [https://perma.cc/8V46-HE7Y] (discussing

Exclusion Law was among the most ambitious solitary confinement reform packages in the United States.[56] Its aim was to drastically minimize the use of solitary confinement as a disciplinary response for people with serious mental illness.[57] The law required the State to "divert" certain categories of incarcerated people with serious mental illness in certain circumstances from solitary confinement;[58] create diversion units for people with eligible mental illnesses;[59] adhere to certain requirements for conditions, programming, and treatment in diversion units;[60] provide a heightened level of care to individuals who were not diverted pursuant to "exceptional circumstances";[61] provide periodic "suicide prevention screenings," mental health assessments, and mental health clinical contact;[62] and supply staff training.[63]

The SHU Exclusion Law was informed by a legislative recognition that people with "serious mental illnesses" require "therapeutic care" rather than the harmful restrictions imposed in solitary confinement.[64] But as we detail below, for years, DOCCS and OMH frustrated the implementation of several of the SHU Exclusion Law's most significant provisions by permitting the continuation of administrative practices that undermined the law's major goals. Oversight agencies and advocates uncovered and sought to address this frustration of the law's purpose. Prior to the law's substantial abrogation by HALT, however, many of these practices remained unaddressed. Ultimately, the frustration at issue during the SHU Exclusion Law's operative years charted a path for the State's administrative nullification of important sections of HALT.

A. Executive Frustration of the SHU Exclusion Law's Durational Limit

The SHU Exclusion Law defined "segregated confinement" — or solitary confinement, as we call it here — as in-cell confinement "in a

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advocates pushing further reform following *Disability Adovcates, Inc.* settlement); *see Implementation of Special Housing Unit (SHU) Exclusion Law Providing Effective Mental Health Treatment in Prison Suicides: J. Pub. Hearing on S. 6422 Before Assemb. Comm. on Corr. & Comm. on Mental Health*, 2011 Assemb., Reg Sess. 1, 4–7 (N.Y. 2011) (statement of Sarah Kerr, Staff Attorney, Legal Aid Society Prisoners' Rights Project), https://boottheshu.wordpress.com/wp-content/uploads/2013/04/implementation-of-special-housing-unit-shu-exclusion-law.pdf [https://perma.cc/74KG-VSZV] (counsel for plaintiffs in *Disability Adovocates, Inc.* describing importance of SHU Exclusion Law).

[56] *See* Rich & Hager, *supra* note 18 (documenting solitary confinement reforms across the United States, with the SHU Exclusion Law being "the first . . . of its kind" in banning solitary among people with serious mental illness as early as 2011).

[57] *See* S. 6422, 2008 Leg., Reg. Sess. § 1 (N.Y. 2008).

[58] *Id.* § 4 (codified as amended at N.Y. CORRECT. LAW § 137).

[59] *Id.*

[60] *Id.* §§ 4–5 (codified as amended at N.Y. CORRECT. LAW §§ 137, 401).

[61] *Id.* § 4 (codified as amended at N.Y. CORRECT. LAW § 137).

[62] *Id.* §§ 4–5 (codified as amended at N.Y. CORRECT. LAW §§ 137, 401).

[63] *Id.* § 4 (codified as amended at N.Y. CORRECT. LAW § 137).

[64] *See id.* § 1.

[SHU] or in a separate Keeplock housing unit."[65] Those in solitary confinement were confined to their cells for up to twenty-three hours per day.[66] Pursuant to the SHU Exclusion Law, DOCCS was required to divert or remove incarcerated people with serious mental illness from solitary confinement when the period of such confinement could "potentially" be longer than thirty days.[67] In these cases, the law required diversion to a Residential Mental Health Treatment Unit (RMHTU),[68] where incarcerated individuals would receive between two and four hours of out-of-cell mental health treatment and programming per day.[69] Individuals who were not diverted from solitary confinement pursuant to "exceptional circumstances"[70] — meaning that DOCCS determined their diversion would pose "an unacceptable risk to the safety and security of [other incarcerated people] or staff"[71] or that a "mental health clinician . . . determined" that removal from solitary would harm their mental health[72] — were required to be offered at least two hours of out-of-cell treatment and programming per day within solitary confinement units.[73]

In their first joint oversight hearing on the SHU Exclusion Law's implementation, the New York State Assembly Committees on Correction and Mental Health reiterated the legislature's intent in imposing the thirty-day durational limit: "to help ensure that inmates with serious mental illness would not languish in segregated confinement but instead be transferred to an RMHTU and receive proper therapeutic care."[74] Correctional agencies, however, took advantage of unclear drafting —

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[65] *Id.* § 2 (codified as amended at N.Y. CORRECT. LAW § 2). Keeplock was a practice under which people were held in solitary confinement conditions but sometimes with access to personal property and some facility benefits, typically in units other than SHU. *See* N.Y. C.L. UNION, *supra* note 35, at 8.

[66] N.Y. C.L. UNION, *supra* note 35, at 8.

[67] S. 6422, 2008 Leg., Reg. Sess. § 4 (N.Y. 2008) (codified as amended at N.Y. CORRECT. LAW § 137) (setting forth the thirty-day durational limit).

[68] *Id.* § 2 (codified as amended at N.Y. CORRECT. LAW § 2(21)). RMHTU is a broad category that includes several different types of units "includ[ing] the residential mental health unit model, the behavioral unit model, the intermediate care program, and the intensive intermediate care program." *Id.*

[69] *Id.*

[70] *Id.* § 4 (codified as amended at N.Y. CORRECT. LAW § 137(6)).

[71] *Id.* (codified as amended at N.Y. CORRECT. LAW § 137(6)(d)(iii)(B)).

[72] *Id.* § 5 (codified as amended at N.Y. CORRECT. LAW § 401(2)(a)(1)).

[73] *Id.* § 4 (codified as amended at N.Y. CORRECT. LAW § 137(6)(j)(vi)).

[74] N.Y. ASSEMB. COMMS. ON CORR. & MENTAL HEALTH, NOTICE OF PUBLIC HEARING, MENTAL HEALTH TREATMENT IN PRISON, 2011 Leg., Reg. Sess. (Dec. 6, 2011), https://nyassembly.gov/comm/Correct/20111031 [https://perma.cc/J7TE-NSEK]; *see also* N.Y. STATE S., DIVISION OF THE BUDGET B. MEMORANDUM, S. 2007-6422, Reg. Sess., at 12–13 (2007), https://digitalcollections.archives.nysed.gov/media/collectiveaccess/images/2/7/4/14775_ca_object_representations_media_27445_original.pdf [https://perma.cc/8V46-HE7Y] (recognizing "the inhumanity and counterproductive nature of certain forms of punishment for inmates with serious mental illness" as one justification for the SHU Exclusion Law).

specifically, the law's use of the word "potentially"[75] — to implement and permit the continuance of administrative practices that undermined this goal.

First, agencies utilized prehearing confinement — a form of twenty-two to twenty-three hour per day confinement that agencies imposed upon incarcerated people in advance of a disciplinary hearing — against individuals with serious mental illness.[76] DOCCS's utilization of prehearing confinement, in combination with its practice of seeking extensions from the administrative requirement[77] that DOCCS complete disciplinary hearings in five days, resulted in the confinement of people with serious mental illness in solitary conditions for periods greater than thirty days.[78] DOCCS has broadly defended these practices by pointing to regulations classifying prehearing confinement as something other than solitary confinement.[79] DOCCS itself wrote those regulations, however, and retained the authority to promulgate new regulations to bring its practices in line with the spirit of the SHU Exclusion Law.[80]

Second, DOCCS defined units in which all incarcerated people were housed in keeplock confinement as something other than "separate keeplock units,"[81] and thus held people with serious mental illness in those units for periods greater than thirty days.[82] Put differently, DOCCS held people in conditions identical to solitary confinement as defined by the SHU Exclusion Law[83] but placed those units outside the protections of the law by simply calling them something other than

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[75] S. 6422, 2008 Leg., Reg. Sess. § 4 (N.Y. 2008) (codified as amended at N.Y. CORRECT. LAW § 137(6)(d)(i)).

[76] *See Mental Health Services in N.Y. Prisons and Suicides: Hearing Before Assemb. Comm. on Corr. & Comm. on Mental Health*, 2014 Leg., Reg. Sess. 3, 4, 37–38 (N.Y. 2014) [hereinafter *Beck testimony*] (statement of Jack Beck, Director, Prison Visiting Project) (on file with the Harvard Law School Library); Letter from Elena Landriscina, Staff Att'y, Disability Rts. New York, to Denise M. Miranda, Exec. Dir., New York State Just. Ctr. for the Prot. of People with Special Needs (Sept. 6, 2018) (on file with the Harvard Law School Library) (explaining that DOCCS and OMH violated the SHU Exclusion Law and contributed to a person with serious mental illness's death by suicide).

[77] N.Y. COMP. CODES R. & REGS. tit. 7, § 251-5.1(a) (2023) (reflecting a five-day deadline for disciplinary hearings and permitting requests for postponement).

[78] *See Beck testimony*, *supra* note 76, at 4, 37–38 (statement of Jack Beck, Prison Visting Project) (noting that some people with serious mental illness were detained for over thirty days because they were awaiting a disciplinary hearing); *see also* N.Y. COMP. CODES R. & REGS., tit. 7, § 251-5.1(a) (2023) (reflecting a five-day deadline for disciplinary hearings and permitting requests for postponement).

[79] *See, e.g.*, Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment at 9, Suarez v. Annucci, No. 20-cv-7133 (S.D.N.Y. Feb. 27, 2024).

[80] *Laws, Rules & Directives*, DEP'T OF CORR. & CMTY. SUPERVISION, https://doccs.ny.gov/legal [https://perma.cc/G4DC-N53C] ("[DOCCS] is empowered to develop and enforce the rules and regulations it finds necessary to implement laws enacted by the New York State Legislature.").

[81] S. 6422, 2008 Leg., Reg. Sess. § 2 (N.Y. 2008) (codified as amended at N.Y. CORRECT. LAW § 2(23)).

[82] *See, e.g.*, Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment, *supra* note 79, at 9 ("Plaintiff received a sentence of thirty days in keeplock confinement, which in 2017 was not considered segregated confinement at Downstate.").

[83] N.Y. S. 6422 § 2 (codified as amended at N.Y. CORRECT. LAW § 2(23)).

solitary confinement. This administrative practice was a manifestation of carceral agencies' pattern of leveraging terminology and nomenclature to mask the inhumanity — and, in this case, the illegality[84] — of their practices.[85]

Third, in some facilities, DOCCS refused to divert individuals with serious mental illness from solitary confinement unless they had already served thirty days in solitary confinement or had been found guilty for violating prison rules and been sentenced to longer than thirty days in solitary confinement.[86] The protections of the law, however, were not triggered on the thirtieth day an incarcerated person served in solitary confinement. Nor were those protections triggered by a sanction to thirty or more days in solitary confinement. They were triggered when an incarcerated person could "potentially" serve more than thirty days in solitary confinement.[87] That determination logically happens in the first instance when the person is initially charged with a disciplinary infraction and placed in solitary confinement.

This third practice is prominently featured in *Suarez v. Annucci*,[88] litigation brought by a person with serious mental illness who was held in solitary confinement for twenty-nine days at Downstate Correctional Facility in 2017.[89] There, the plaintiff, Elvin Suarez, sued DOCCS and OHM,[90] which argued in their motion for summary judgment that the protections of the SHU Exclusion Law are not triggered until the issuance of a disciplinary sanction.[91] While the court ultimately ruled for the defendants on other grounds at summary judgment,[92] the defendants' narrow, cabined interpretation of the SHU Exclusion Law's durational requirement clearly frustrates the spirit of the legislation.[93] Irrespective of this interpretation's legality or illegality, its result — that people with serious mental illness were permitted to languish in solitary confinement despite their exposure to a potential solitary term of more

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84 N.Y. CORRECT. LAW § 2(23).

85 *See* Beryl Lipton, *"Solitary Confinement" May Go by a Different Name in Your State*, MUCKROCK (June 16, 2015), https://www.muckrock.com/news/archives/2015/jun/16/solitary-confinement-may-go-different-name-your-st/ [https://perma.cc/CT56-4RFX].

86 *See* Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment, *supra* note 79, at 28.

87 N.Y. S. 6422 § 4 (codified as amended at N.Y. CORRECT. LAW § 137) (setting forth the thirty-day durational limit).

88 No. 20-CV-7133, 2024 WL 814664 (S.D.N.Y. Feb. 27, 2024).

89 Complaint and Demand for Jury Trial, ¶¶ 13–14, 85, 87, 115, *Suarez*, No. 20-CV-7133.

90 *Id.* ¶¶ 1–2.

91 Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment, *supra* note 79, at 9.

92 *Suarez*, 2024 WL 814664, at *1.

93 *See Beck testimony*, *supra* note 76, at 4, 37–38 (statement of Jack Beck, Director, Prison Visiting Project)..

than thirty days — was in derogation of the legislative purpose.[94] The effect of DOCCS's and OMH's practice was to frustrate the SHU Exclusion Law's intended reform goal.

Through each of these practices, DOCCS allocated to itself the authority to redefine practices that an objective observer would conclude were solitary confinement subject to the law's limitations. DOCCS then used these formalistic distinctions to evade the law's requirements and continue to subject people with serious mental illnesses to prolonged solitary. As it pertains to the first two practices, this definitional game was clearest. DOCCS simply redefined solitary confinement as something other than solitary confinement. As it pertains to the third practice, where DOCCS altered the point at which the law's protections attached, this definitional game was less perceptible but no less real.

B. Executive Frustration of the SHU Exclusion Law's Presumption Against Discipline

In addition to a durational limit on solitary, the SHU Exclusion Law set out to rein in the overpunishment of people with mental illness. Here again, however, DOCCS undermined the statute's effectiveness. As we discuss below, this time, DOCCS relied less on formalism, instead simply flouting the statute in practice.

The SHU Exclusion Law limited the imposition of discipline in the RMHTU in several ways, including by eliminating restricted diet penalties[95] and "misbehavior reports . . . for refusing treatment or medication"[96] as well as by implementing a "presumption against [pursuing] disciplinary charges" for acts and threats of self-harm.[97] The most significant limitation for our purposes, however, is the law's bar on the issuance of additional solitary confinement time for people already serving solitary confinement time in an RMHTU.[98] As a prerequisite to issuing additional solitary confinement time in those circumstances, the statute required a finding that the underlying conduct posed an "unreasonable risk to . . . safety . . . or . . . security."[99] Advocates for incarcerated individuals repeatedly found that this process lacked integrity, as

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[94] S. 6422, 2008 Leg., Reg. Sess. § 4 (N.Y. 2008) (codified as amended at N.Y. CORRECT. LAW §§ 1, 6, 137, 401) ("While in exceptional circumstances segregated confinement may sometimes be necessary to maintain such safety and security, even for inmates with serious mental illness, the state should strive to maintain such inmates with serious mental illness in less restrictive setting whenever it can safely do so.").

[95] *Id.* (codified as amended at N.Y. CORRECT. LAW §§ 137(6)(j)(iii), 401(2)(b)).

[96] *Id.* § 5 (codified as amended at N.Y. CORRECT. LAW § 401(3)).

[97] *Id.* (codified as amended at N.Y. CORRECT. LAW § 401(3)).

[98] *Id.* (codified as amended at N.Y. CORRECT. LAW § 401(5)).

[99] *Id.* (codified as amended at N.Y. CORRECT. LAW § 401(5)).

DOCCS continued the rampant imposition of disciplinary sanctions in diversion units, including for relatively minor conduct.[100]

Likely partially due to DOCCS' lax implementation of the law's presumption, individuals held in diversion units were disciplined for years at a rate much higher than individuals held in other units in the state prison system.[101] This differential treatment was documented even in the initial years after the law's enactment.[102] It is hard to overstate the extent to which this dynamic undermines the purpose of the SHU Exclusion Law — a law enacted for the principal purpose of reducing the discipline to which people with serious mental illness were exposed.[103]

Solitary confinement sanctions issued in a diversion unit were often unenforceable because the sanctioned individual could not legally be removed to solitary confinement.[104] Such discipline, though, could result in additional time in a diversion unit.[105] Because diversion units did not always afford the same privileges, or time out of one's cell, as general population did, the time that incarcerated people spent there was often more punishing than time spent in general population.[106] And, because diversion units were by definition disability-based,[107] time spent there limited an incarcerated person's ability to spend time in an integrated setting where they could interact with nondisabled people and peers. One of the SHU Exclusion Law's goals was to limit the disciplinary segregation of incarcerated people with disabilities.[108] This goal was frustrated by policies that kept incarcerated people with mental illness

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[100] *See Beck testimony*, *supra* note 76, at 3, 25–26, 32, 34, 59 (statement of Jack Beck, Director, Prison Visiting Project); *Implementation of Special Housing Unit (SHU) Exclusion Law Providing Effective Mental Health Treatment in Prison: Joint Public Hearing Before Assemb. Standing Comm. on Corr. & Standing Comm. on Mental Health*, 2011 State Assemb. 4 (N.Y. 2011) (statement of Sarah Kerr, Staff Attorney, Prisoners' Rights Project of The Legal Aid Society) (on file with the Harvard Law School Library); DISABILITY RTS. N.Y., REPORT AND RECOMMENDATIONS CONCERNING ATTICA CORRECTIONAL FACILITY'S RESIDENTIAL MENTAL HEALTH UNIT 8 (2017) [hereinafter ATTICA REPORT], https://www.dropbox.com/scl/fi/68fwszkhc2blvq9viqi4z/attica-rmhu-report-9–12–2017.pdf [https://perma.cc/KDT5-X5Z3].

[101] *See Beck testimony*, *supra* note 76, at 26 (statement of Jack Beck, Director, Prison Visiting Project).

[102] *Id.* at 25 (examining period between 2010 and 2013).

[103] *See* S. 6422, 2008 Leg., Reg. Sess. § 1 (N.Y. 2008) (codified as amended at N.Y. CORRECT. LAW § 401).

[104] *See id.* § 5 (codified as amended at N.Y. CORRECT. LAW § 401(5)).

[105] *Beck testimony*, *supra* note 76, at 3 (statement of Jack Beck, Director, Prison Visiting Project).

[106] *See, e.g.*, *Testimony for NYS Mental Hygiene Budget: Hearing Before the S. Fin. & Assemb. Ways & Means J. Fiscal Comms.*, 2018–2019 Leg. 2–3 (N.Y. 2018) [hereinafter *Testimony on Mental Hygiene Budget*] (statement of Mental Health Alternatives to Solitary Confinement), https://www.nysenate.gov/sites/default/files/article/attachment/mental_health_alternatives_to_solitary_confinement.pdf [https://perma.cc/8S94-HBZT] (describing oppressive conditions and limited out-of-cell time in RMHUs).

[107] N.Y. S. 6422 § 2 (codified as amended at N.Y. CORRECT. LAW § 2(21)).

[108] *Id.* § 1.

in the cycle of rule breaking and punishment.[109] The real consequences of this dynamic — and thus, the consequences of administrative policies that cause it — on the minds and bodies of people with mental health disabilities are perhaps immeasurable but undoubtedly profound.[110]

DOCCS and OMH frustrated the SHU Exclusion Law's purpose in other ways as well. For example, a *ProPublica* investigation revealed a steep decline in diagnoses of "'serious' mental illness," with some individuals having their mental health diagnoses "downgraded."[111] Some have questioned whether the agencies are downgrading diagnoses in order to address the gap between the need for diversion services and the capacity in diversion units.[112] Advocates have also complained about the overuse of statutory mechanisms to deny individuals diversion, including the "exceptional circumstances"[113] and "security"[114] exception mechanisms. Finally, advocates have voiced concerns about substandard training,[115] inadequate mental health screenings and evaluations,[116] and rampant abusive treatment in diversion units.[117]

This Part has described DOCCS's and OMH's frustration of the SHU Exclusion Law, the New York Legislature's first major attempt to rein in solitary confinement in state prisons. As we have shown, the agencies undermined the law's effectiveness through both formalistic and practical means. On the one hand, DOCCS set out to limit the law's applicability by redefining solitary confinement and contorting statutory language to effectively extend the law's durational limit on solitary. On the other hand, the agencies effectively ignored or minimized the impact of the law's provisions through practices that led to

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109 *See Testimony on Mental Hygiene Budget*, *supra* note 106, at 3–5 (statement of Mental Health Alternatives to Solitary Confinement); *Beck testimony*, *supra* note 76, at 25–30 (statement of Jack Beck, Director, Prison Visiting Project).

110 *Testimony on Mental Hygiene Budget*, *supra* note 106, at 2 (statement of Mental Health Alternatives to Solitary Confinement).

111 Christie Thompson, *New York Promised Help for Mentally Ill Inmates — But Still Sticks Many in Solitary*, PROPUBLICA (Aug. 15, 2013, 5:00 AM), https://www.propublica.org/article/new-york-promised-help-for-mentally-ill-inmates-but-still-sticks-many-in-so [https://perma.cc/N6K9-MZUE].

112 *Beck testimony*, *supra* note 76, at 4.

113 *Id.* at 3, 25, 32.

114 *Testimony Before the Joint Legislative Hearing on Mental Health Treatment in Prison: Hearing Before the Assemb. Comms. on Corr. & Mental Health*, 2011 Assemb. 13 n.18 (2011) [hereinafter *Murtagh testimony*] (statement of Karen L. Murtagh, Executive Director, Prisoners' Legal Services of New York) (on file with the Harvard Law School Library).

115 *E.g.*, *Beck testimony*, *supra* note 76, at 47 (statement of Jack Beck, Director, Prison Visiting Project); *Murtagh testimony*, *supra* note 114, at 6–9 (statement of Karen L. Murtagh, Executive Director, Prisoners' Legal Services of New York).

116 *E.g.*, *Beck testimony*, *supra* note 76, at 4 (statement of Jack Beck, Director, Prison Visiting Project); *Murtagh testimony*, *supra* note 114, at 5 (statement of Karen L. Murtagh, Executive Director, Prisoners' Legal Services of New York).

117 *E.g.*, *Beck testimony*, *supra* note 76, at 3, 32–33, 59 (statement of Jack Beck, Director, Prison Visiting Project); *Murtagh testimony*, *supra* note 114, at 15 (statement of Karen L. Murtagh, Executive Director, Prisoners' Legal Services of New York); *Testimony on Mental Hygiene Budget*, *supra* note 106, at 2.

the continued imposition of prolonged solitary on people with serious mental illness. These practices clearly undermined the intent and spirit of the SHU Exclusion Law. And, to the extent DOCCS essentially allocated to itself the power to define the law's contours, these practices also charted the course toward a bolder tactic — administrative nullification — which DOCCS and OMH first piloted in response to HALT.

II. Suspension and Harm: Utilization of Agency Policy to Render HALT a Dead Letter

The New York State Legislature adopted HALT in 2021 after a nearly decade-long campaign led by survivors of solitary confinement and their families, with support from advocates and attorneys.[118] The law is perhaps the most comprehensive reform package addressing solitary confinement thus far adopted in the United States.[119]

Among its core provisions, HALT sets a strict durational limit of fifteen days on solitary confinement,[120] defined as any in-cell confinement "for more than seventeen hours a day," notwithstanding the type of unit in which the individual is housed.[121] The law also limits the types of conduct that can be punished with solitary confinement or confinement in an alternative restrictive housing unit.[122] HALT categorically prohibits the use of solitary confinement for any duration for so-called "special populations,"[123] including people with disabilities, younger and older individuals, and people who are pregnant or postpartum.[124] It also provides a myriad of other procedural and substantive protections, but our discussion focuses on DOCCS and OMH's administrative nullification of HALT's presumption against the use of restraints and disability-based exclusion from solitary confinement, which are addressed in the next section.

A. Executive Suspension of HALT's Presumption Against the Use of Restraints

HALT creates "Residential Rehabilitation unit[s]" (RRUs), which provide qualifying incarcerated people with a therapeutic alternative to solitary confinement.[125] DOCCS must provide people in RRUs at least seven hours of out-of-cell time per day, including access to at least six

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118 *See* Closson, *supra* note 22.

119 *See* Andreea Matei, Urb. Inst. Just. Pol'y Ctr., Solitary Confinement in U.S. Prisons 12 (2022), https://www.urban.org/research/publication/solitary-confinement-us-prisons [https://perma.cc/5QYU-K9PD].

120 S. 2836, 2021 Leg., Reg. Sess. § 5 (N.Y. 2021) (codified as amended at N.Y. Correct. Law § 137(6)(i)(i)) (limiting segregated confinement to fifteen consecutive days).

121 *Id.* (codified as amended at N.Y. Correct. Law § 2(23)) (defining segregated confinement).

122 *Id.* (codified as amended at N.Y. Correct. Law § 137(6)(k)(i)–(ii)).

123 *Id.* (codified as amended at N.Y. Correct. Law § 137(6)(h)).

124 *Id.* § 2 (codified as amended at N.Y. Correct. Law § 2(33)).

125 *Id.* (codified as amended at N.Y. Correct. Law § 2(34)).

hours of "congregate programs" and activities and one additional hour of recreation.[126] The RRU is modeled after alternatives to solitary confinement units in other jurisdictions that emphasize congregate activity over segregation as punishment.[127] Research has shown that congregate activity — whether meals, volunteer programs, recreation, or leisure with other individuals — has significant prosocial benefits and ameliorates and prevents violence far more effectively than solitary confinement and other punitive approaches.[128]

For that reason, HALT also drastically limits the use of restraints in RRUs.[129] Prior to HALT's enactment, people participating in programs in most solitary diversion units reported being restrained during programming.[130] Some program participants were placed in RESTART chairs, which are steel chairs to which program participants are affixed via ankle cuffs.[131] Other program participants were held in "therapeutic cubicles," which resemble dog kennels.[132] HALT provides, however, that "[r]estraints shall not be used when incarcerated persons are participating in out-of-cell activities within a residential rehabilitation unit unless an individual assessment is made that restraints are required because of a significant and unreasonable risk to the safety and security of other incarcerated persons or staff."[133] This statute affords no discretion to the agency; unless it completes an "individualiz[ed] assessment" as required by the statute, it cannot impose restraints on RRU program participants during programming.[134]

The nondiscretionary nature of the statute, however, did not stop DOCCS from administratively nullifying it by formally declaring it null and void. On April 21, 2022, DOCCS's Acting Commissioner, Anthony Annucci, issued a memorandum to all facilities ordering that they restrain RRU program participants during programming[135] — a

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126 *Id.* § 5 (codified as amended at N.Y. CORRECT. LAW § 137(6)(j)(ii)).

127 *See* Jerome Wright, Opinion, *These Programs Work Better than Solitary Confinement*, TIMES UNION (Jan. 20, 2020), https://www.timesunion.com/opinion/article/Commentary-These-programs-work-better-than-14990190.php [https://perma.cc/9756-9CVS].

128 *See* Bandy X. Lee & Maya Prabhu, *A Reflection on the Madness in Prisons*, 26 STAN. L. & POL'Y REV. 253, 259–60 (2014) (noting that even *negative* human contact is better than isolation); David H. Cloud et al., *Public Health and Solitary Confinement in the United States*, 105 AM. J. PUB. HEALTH 18, 21–22 (2015) (discussing higher rates of violence associated with solitary confinement); Bandy Lee & James Gilligan, *The Resolve to Stop the Violence Project: Transforming an In-House Culture of Violence Through a Jail-Based Programme*, 27 J. PUB. HEALTH 149, 153–54 (2005) (discussing reductions in violence among participants in prosocial congregate programming).

129 N.Y. S. 2836 § 5 (codified as amended at N.Y. CORRECT. LAW § 137(6)(j)(vii)).

130 *See* ATTICA REPORT, *supra* note 100, at 2.

131 *Id.*

132 *See id.*

133 N.Y. S. 2836 § 5 (codified as amended at N.Y. CORRECT. LAW § 137(6)(j)(vii)).

134 *See id.*

135 Memorandum from Anthony J. Annucci, Acting Comm'r, New York State Dep't of Corr. & Cmty. Supervision, to All Superintendents, New York State Dep't of Corr. & Cmty. Supervision (Apr. 21, 2022) [hereinafter Annucci Memorandum] (on file with the Harvard Law School Library).

memorandum that directly contradicted HALT's presumption against the use of restraints. The memorandum began by quoting the presumption, conspicuously omitting the word "individual"[136]:

> The Humane Alternatives to Long Term (HALT) segregated confinement Law provides that restraints shall not be used when incarcerated individuals are participating in out-of-cell activities within a Residential Rehabilitation Unit (RRU), unless an assessment is made that restraints are required because of a significant and unreasonable risk to the safety and security of staff or other incarcerated individuals.[137]

It then cited a generalized finding of "an escalation of violence" in the RRUs to justify Acting Commissioner Annucci's instruction that "all Superintendents who supervise an RRU . . . utilize restraints any time an incarcerated individual is under escort and while participating in out-of-cell programming."[138] Acting Commissioner Annucci ordered the implementation of that policy "until further notice."[139] The policy provided further explication:

> Incarcerated individuals will be placed in wrist restraints prior to exiting their cells for escort to the program areas. Upon arrival in the program area, incarcerated individuals will be secured to a RESTART chair with leg restraints and the wrist restraints will be removed. Prior to returning to their cells at the conclusion of the program module wrist restraints will be reapplied, followed by the removal of leg restraints. Incarcerated individuals will then be escorted back to their cells.[140]

During a February 7, 2023 hearing before the New York State Legislature, Acting Commissioner Annucci made clear his intent to declare the presumption null and void, testifying that he had "suspended" it:

> *[R]ight now I've had to suspend the provision of HALT that requires us to basically allow individuals to move from their cell to the program unrestrained and be in the program unrestrained.*
>
> *Given the amount of violence and the attacks, I've temporarily put a halt on that for two reasons. Number one, I'd be violating the 8th Amendment rights of individuals were they to get attacked again because . . . there would be a failure to protect. That's an 8th Amendment violation.*
>
> *And then for staff there's a PESH violation, the Public Employee Safety and Health Act.*[141]

Acting Commissioner Annucci's announcement came on the heels of a reactionary pressure campaign by the New York State Correctional

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136 *Compare id.* (referring to "an assessment"), *with* N.Y. CORRECT. LAW § 137(6)(j)(vii) (referring to an "individual assessment").

137 Annucci Memorandum, *supra* note 135.

138 *Id.*

139 *Id.*

140 *Id.*

141 *In the Matter of the 2023–2024 Executive Budget on Public Protection Before the S. Fin. and Assemb. Ways & Means Comms.*, 2023 Leg., Reg. Sess. 452 (N.Y. 2023) [hereinafter *Public Protection Hearing*] (statement of Anthony J. Annucci, Acting Comm'r, New York State Department of Corrections and Community Supervision) (emphasis added).

Officers and Police Benevolent Association (NYSCOPBA). Immediately prior to HALT's enactment, NYSCOPBA and several DOCCS officers and sergeants filed a putative class action lawsuit seeking to enjoin implementation of the law in full.[142] In its lawsuit, NYSCOPBA claimed that limitations on the use of solitary confinement — and other punitive penological practices, like restraints — would imperil officer safety and foster a dangerous prison environment.[143] It argued that this dangerous environment amounted to "state created dangers" from which they should be free under the Fourteenth Amendment.[144] To support its claims, NYSCOPBA cited statistics showing an increase in violence in the prisons since 2011, when the State began limiting the use of solitary confinement in the prisons.[145] It also alleged that due to criminal law reforms enacted during that period, the incarcerated population had become increasingly dangerous[146] and that policies limiting DOCCS's ability to impose solitary confinement upon this population posed a "risk to the safety and security of the correctional facilities and the officials within."[147]

This lawsuit was ultimately dismissed, and HALT came into force on March 31, 2022.[148] But, both prior to and following HALT's enactment, NYSCOPBA and its allies in the state legislature waged a pressure campaign to undermine HALT's implementation. In Part III, we explain the historical parallel at the heart of this Article — the parallel between NYSCOPBA's pressure campaign, which influenced Acting Commissioner Annucci's decision to suspend the presumption, and the sectional pressure campaign at the heart of the Nullification Crisis of 1833. Before turning to this discussion, however, we move now to discuss another provision of HALT that DOCCS and OMH have worked to nullify through adoption of agency policies: the disability-based exclusion.

B. Executive Suspension of HALT's Disability-Based Exclusion from Solitary Confinement

The antirestraints provision was not the only provision of HALT that DOCCS administratively nullified. In concert with OMH, DOCCS nullified — and continues to nullify — HALT's disability-based exclusion.[149] In adopting HALT, the legislature made clear that one of its core purposes was to "end the segregated confinement of vulnerable

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[142] Class Action Complaint for Deprivation of Rights ¶ 343, N.Y. State Corr. Officers & Police Benevolent Ass'n v. Hochul, 607 F. Supp. 3d 231 (N.D.N.Y. 2022) (No. 21-cv-535).

[143] *Id.* ¶¶ 262–309.

[144] *Id.* ¶ 340.

[145] *Id.* ¶¶ 61–63.

[146] *Id.* ¶ 55.

[147] *Id.* ¶ 83.

[148] *Hochul*, 607 F. Supp. 3d at 235–36.

[149] *See infra* pp. 200–04. The exclusion is found at N.Y. CORRECT. LAW § 137(6)(h).

people" for whom the consequences of the practice are "particularly devastating."[150] HALT thus categorically excludes certain "special population[s]" from any placement in solitary confinement, requiring instead that, should separation from the general population be warranted, they be sent to alternative units where they receive at least seven hours of out-of-cell programming and services per day.[151]

Among the special populations HALT protects from solitary confinement are people with disabilities,[152] as defined under the New York State Human Rights Law[153] as:

> (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment.[154]

Thus, rather than leave ambiguity about who was protected under this provision, or attempt to enumerate protected disabilities, the legislature referenced an existing statute and body of law interpreting it.

Courts have broadly interpreted the New York State Human Rights Law's definition of disability to "cover[] a range of conditions varying in degree from those involving the loss of a bodily function to those which are merely diagnosable medical anomalies which impair bodily integrity and thus may lead to more serious conditions in the future."[155] This definition is more capacious than that under the federal ADA, because it does not require meeting the ADA's additional threshold that the condition "substantially limit[] one or more major life activities."[156] By incorporating this broad definition of disability, the legislature made clear that HALT protects individuals with disabilities from the harms of solitary confinement, even if their disability would not be considered sufficiently impairing at present to warrant accommodation under the ADA.

Despite HALT's unambiguous requirements, DOCCS and OMH have each worked to nullify the exclusion through policies that explicitly narrow the scope of protected disabilities. These policies limit the

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150 *See* N.Y. STATE ASSEMB., MEMORANDUM IN SUPPORT OF LEGISLATION, B. 2500, 2019–2020 Reg. Sess. (2019) [hereinafter Legislative Justification for HALT Solitary Confinement Act], https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A02500&term=2019&Memo=Y [https://perma.cc/Y5WW-5PQ8].

151 N.Y. CORRECT. LAW § 137(6)(h).

152 *Id.* § 2(33)(c).

153 N.Y. EXEC. LAW §§ 290–301.

154 *Id.* § 292(21).

155 Krause v. Lancer & Loader Grp., LLC, 965 N.Y.S.2d 312, 396 n.5 (Sup. Ct. 2013) (quoting Davis v. Bowes, No. 97-9496, 1998 WL 477139, at *2 (2d Cir. 1998); State Div. of Hum. Rts. v. Xerox Corp., 480 N.E.2d 695, 698 (N.Y. 1985)).

156 42 U.S.C. § 12102(1)(A); *see Davis*, 1998 WL 477139, at *2 (quoting *State Div. of Hum. Rts.*, 480 N.E.2d at 698) (citing Reeves v. Johnson Controls World Serv., Inc., 140 F.3d 144, 155 (2d Cir. 1998)) (explaining that the New York State Human Rights Law includes a more expansive definition of disability than the ADA).

physical, sensorial, and mental health disabilities that DOCCS considers sufficient to warrant protection from solitary confinement, in derogation of the statute's unambiguous mandate.

After HALT's enactment, DOCCS issued two directives, 4933 and 4933D, regarding the SHU and RRUs.[157] DOCCS also issued an "SHU Exclusions Policy" specifying the categories of people that should not be placed in solitary.[158] OMH adopted a similar policy.[159] These documents together nullify the broad protections afforded to people with disabilities under HALT. DOCCS's SHU Exclusions Policy limits protected mental health disabilities to "Serious Mental Illness" (SMI).[160] It further clarifies that the agency only views people who meet specified criteria as disabled for the purposes of SHU exclusion.[161] Under the policy, one is considered disabled[162] if (1) they are currently housed in an infirmary unit or one of three specialized units for people who have documented developmental disabilities or significant intellectual deficits; (2) they have a "Beta IQ of 70 or below"; or (3) they have "any of the following active medical Problems:

3440	QUADRAPLEGIA
3441	PARAPLEGIA
3442	HEMIPLEGIA
B240	LEGALLY BLIND
HL10	DEAF
V801	WHEELCHAIR REQUIRED INDEPENDENT ADL
V802	WHEELCHAIR REQUIRED NOT INDEPENDENT ADL
V803	SUPPLEMENTAL OXYGEN
V462	WHEELCHAIR USE LONG DISTANCE
SHU-	SHU MEDICALLY CONTRAINDICATED[163]

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157 N.Y. STATE DEP'T OF CORR. & CMTY. SUPERVISION, DIRECTIVE 4933, SPECIAL HOUSING UNITS (Jan. 17, 2024) [hereinafter DOCCS DIRECTIVE 4933] https://doccs.ny.gov/system/files/documents/2024/11/4933.pdf [https://perma.cc/GZR2-S34Z]; N.Y. STATE DEP'T OF CORR. & CMTY. SUPERVISION, DIRECTIVE 4933D, RESIDENTIAL REHABILITATION UNITS (Jan. 30, 2025) [hereinafter DOCCS DIRECTIVE 4933D] https://doccs.ny.gov/system/files/documents/2025/02/4933d_0.pdf [https://perma.cc/3ZYV-BGFP].

158 N.Y. State Dep't of Corr. & Cmty. Supervision, SHU Exclusions [hereinafter DOCCS SHU Exclusions Policy] (on file with the Harvard Law School Library).

159 N.Y. State Off. of Mental Health, Central New York Psychiatric Center Corrections-Based Operations Manual, Policy No. 6.0, Special Housing Unit and Residential Rehabilitation Unit/Special Population Diversion Services (May 2, 2022) [hereinafter CNYPC CBO Policy 6.0] (on file with the Harvard Law School Library).

160 DOCCS SHU Exclusions Policy, *supra* note 158.

161 *Id.*

162 This terminology is not currently preferred in disability justice discourse but is replicated here as it is the language used in the policy document.

163 DOCCS SHU Exclusions Policy, *supra* note 158.

For their part, Directives 4933 and 4933D each cross-reference the definition of "disability" used in HALT, while substantively contradicting it.[164] Regarding mental health disabilities, Directive 4933 likewise provides that only SMI triggers HALT's exclusion from solitary.[165]

In May 2022, shortly after HALT came into force, OMH published Central New York Psychiatric Center Corrections-Based Operations Policy No. 6.0.[166] Like its DOCCS counterparts, Policy No. 6.0 narrows the applicability of the exclusion with respect to mental illness to only those with SMI.[167] These OMH and DOCCS policies rely on a definition of SMI that was codified under the SHU Exclusion Law, comprising only a limited range of diagnoses, including psychotic disorders, bipolar disorder, major depressive disorder, and other conditions involving significant functional impairment or self-harm.[168]

OMH has incorporated this SMI definition into its categorization scheme for people on the agency's caseload as follows: People with mental health treatment needs are categorized into service levels from one to four, and people who OMH determines meet the criteria for SMI receive an additional "S designation."[169] Only people with an S designation are considered to have an SMI for purposes of Corrections-Based Operations Policy 6.0[170] and the corresponding DOCCS policies[171] — to the exclusion of all other people on the OMH caseload, including people OMH recognizes as requiring intensive services at Levels one or two, but who lack an S designation.

Although OMH and DOCCS recognize diagnosed mental illnesses and need for services, people with a vast range of mental health disabilities fall outside the agencies' narrow definition of SMI — including, for example, post-traumatic stress disorder, adjustment disorder, depression

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164 DOCCS DIRECTIVE 4933, *supra* note 157, § 3(A)(1)(c); DOCCS DIRECTIVE 4933D, *supra* note 157, § 2(B)(3).

165 DOCCS DIRECTIVE 4933, *supra* note 157, § 3(A)(1)(e); DOCCS DIRECTIVE 4933D, *supra* note 157, § 2(B). While Directive 4933D does not explicitly list exclusions from solitary, it lists the special populations who will be housed in RRUs, which are created as diversions from SHU. *Id.*

166 CNYPC CBO Policy 6.0, *supra* note 159, at 1.

167 *Id.*

168 *Id.* (referencing "SHU Law"); N.Y. CORRECT. LAW § 137(e).

169 N.Y. State Off. of Mental Health, Cent. N.Y. Psychiatric Ctr., Form No. 167 (on file with the Harvard Law School Library); *see also* N.Y. State Off. of Mental Health, Central New York Psychiatric Center Corrections-Based Operations Manual, Policy No. 9.12, Mental Health Treatment Needs/Service Level Designation Form Policy (Feb. 22, 2022) (on file with the Harvard Law School Library); N.Y. State Off. of Mental Health, Policy 9.13, Serious Mental Illness Designation Form (Dec. 2021) (on file with the Harvard Law School Library).

170 CNYPC CBO Policy 6.0, *supra* note 159, at 1.

171 *See* DOCCS DIRECTIVE 4933, *supra* note 157, § 3(A)(1)(e) (listing "SMI" as excluded population without defining this term, in practice relying on OMH designations); DOCCS SHU Exclusions Policy, *supra* note 158 (same).

(excluding major depressive disorder), and anxiety disorders.[172] Two independent watchdog agencies, the Justice Center for the Protection of People with Special Needs and the Correctional Association of New York — both charged with monitoring prison conditions, including compliance with HALT — as well as HALT's lead legislative sponsors, have each confronted the agencies, making clear that all people on the mental health caseload fall within the statutory definition of disability.[173] But the agencies have doubled down.

As was the case when DOCCS nullified the presumption against restraints, DOCCS and OMH have not been coy in nullifying the disability-based exclusion from solitary confinement. In 2022, the Justice Center — the agency statutorily mandated to monitor compliance with HALT[174] — issued a report and recommendations based on its investigation of the first year of the law's implementation.[175] Among the recommendations was to divert all people on the OMH caseload from SHU as HALT requires.[176] DOCCS's Associate Commissioner for Mental Health, James Donahue, replied:

> In regard to your recommendation of expanding the mental health criteria for who falls within the category of special population, DOCCS and OMH are in agreement that individuals who are Seriously Mentally Ill (SMI), are not defined as a Special Population in the HALT law but are specifically excluded from restricted housing under Correction Law 137(6)(d)(ii)(C). The determination for "persons with a disability" was made based [on] a number of pre-existing laws/agreements, as well as[] based on community standards and in consultation with the Office of Mental Health.[177]

This response, convoluted as it may be, is nevertheless an unmistakable claim by the agencies that they have, "in consultation," declared HALT's protections null and void for people with a wide range of mental health disabilities.[178] First, the response implies, without explication, that because people with SMI were diverted from segregated

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[172] *See* N.Y. CORRECT. LAW § 137(e)(i) (defining SMI to include only certain diagnoses); *cf.* JUST. CTR. FOR THE PROT. OF PEOPLE WITH SPECIAL NEEDS, 2022 ANNUAL REPORT ON HUMANE ALTERNATIVES TO LONG-TERM SOLITARY CONFINEMENT 4 (2022) [hereinafter JUSTICE CENTER 2022 HALT REPORT] (advising that all people on the OMH caseload be moved to an RRU or alternative program with "better access to therapeutic programming").

[173] Letter from New York State Sen. Julia Salazar et al. to Cathy Sheehan, DOCCS Deputy Comm'r & Couns. (Feb. 27, 2023) (on file with the Harvard Law School Library); CORR. ASS'N OF N.Y., ASSESSING THE EARLY MONTHS OF IMPLEMENTATION OF THE HALT SOLITARY CONFINEMENT LAW IN NEW YORK STATE PRISONS 24 (2023); JUSTICE CENTER 2022 HALT REPORT, *supra* note 172, at 4.

[174] *See* N.Y. CORRECT. LAW § 401(a).

[175] *See* JUSTICE CENTER 2022 HALT REPORT, *supra* note 172, at 2.

[176] *Id.* at 4.

[177] Letter from James Donahue, Assoc. Comm'r, DOCCS, to Davin Robinson, Deputy Dir., Off. of Outreach, Prevention & Support, New York State Just. Ctr. for the Prot. of People with Special Needs (July 20, 2023), *in* JUSTICE CENTER 2022 HALT REPORT, *supra* note 172, at 11.

[178] *Id.*

confinement under a different provision in the Correction Law, excluding people with mental health disabilities from SHU would "expand[]" the protections of HALT's special populations provision.[179] But the Justice Center's call had nothing to do with expanding HALT. The Center was merely calling on DOCCS and OMH to follow the statute's clear command, referring to the New York Human Rights Law definition, which uncontroversially includes a broad range of mental health disabilities.[180] Second, Associate Commissioner Donahue indicates that it was for the agencies to determine who would be a person with a disability, based not on the statute but on unspecified "pre-existing laws/agreements" and "community standards."[181] Of course, HALT doesn't call on the agencies to define which disabilities would fall within "special populations."[182] It prescribes a definition that the agencies must follow.[183] In the face of this nondiscretionary command, the agencies nullified the provision as applied to a vast population of people with mental health disabilities, exposing them to the devastation of solitary confinement.

DOCCS's SHU Exclusions Policy, referenced above, similarly narrows the protections for people with other types of disabilities, despite their clear inclusion under the statutory definition. People who are hard of hearing but not deaf, and people who are low vision but not blind, for instance, are at risk of being placed in solitary confinement in violation of HALT.[184] So too are people with chronic medical conditions like epilepsy, lupus, or limb paralysis, because they do not require the use of oxygen or a wheelchair.[185] For vulnerable populations like these, which the legislature sought to shield from the devastating harms of solitary,[186] the agency has nullified one of HALT's core protections. Watchdog agencies have highlighted how, as with mental health disabilities, people with certain sensorial, mobility, and other disabilities have been unlawfully deprived of HALT's protection under DOCCS's policies.[187] Still, the agency has remained steadfast in its obstinance.

The nullification of HALT's disability-based exclusion is the subject of active litigation. *Anthony v. New York State Department of*

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179 *Id.*

180 *See supra* notes 152–56 and accompanying text.

181 Letter from James Donahue to Davin Robinson, *supra* note 177.

182 N.Y. CORRECT. LAW § 2(33).

183 *Id.*

184 *See* DOCCS SHU Exclusions Policy, *supra* note 158.

185 *See id.*

186 *See* Legislative Justification for HALT Solitary Confinement Act, *supra* note 150.

187 *See* Chris Gelardi, *Prisons Are Illegally Throwing People with Disabilities into Solitary Confinement*, N.Y. FOCUS (Sept. 26, 2022), https://nysfocus.com/2022/09/26/prisons-are-illegally-throwing-people-with-disabilities-into-solitary-confinement [https://perma.cc/2A7P-UMBN] (documenting objections from oversight groups, legislators, and incarcerated individuals to DOCCS and OMH policies defining "disability" for purposes of HALT).

Corrections & Community Supervision[188] is a putative class action brought by a group of incarcerated people with disabilities that are carved out from DOCCS and OMH SHU exclusion policies and who have been subjected to solitary confinement in the SHU pursuant to those policies.[189] The suit seeks to enjoin DOCCS and OMH SHU exclusion policies and the agencies' unlawful practice of holding people with disabilities in segregated confinement conditions in units other than the SHU.[190]

This Part has documented how DOCCS and OMH nullified critical provisions of the HALT Solitary Confinement Act by adopting agency policies that explicitly contradict the statute's unambiguous commands. In the case of HALT's presumption, DOCCS unilaterally "suspended" the statute,[191] simply refusing to implement it. Regarding HALT's protections for all people with disabilities, DOCCS and OMH adopted policies that narrow the scope of its application to a small subset, in direct contradiction of the statute. In both cases, the agencies affirmatively inflicted the narrow harm the legislature sought to prohibit. We use the term "nullification" not only because of its intuitive appeal in setting apart the unlawful agency conduct highlighted in our case study from more typical interbranch conflicts but also because of its origin in constitutional history. There are loud echoes between administrative nullification and its progenitor, the Nullification Crisis of 1833. Those echoes sound most prominently in the reactionary aims animating the nullifiers, the focus of the next Part.

III. Reactionary Aims: The Rhetoric of Nullification Toward the Preservation of an Old Order

In this Part, we use historical parallels to illustrate the third element of administrative nullification: reactionary aims. New York's nullifiers have suspended cornerstone provisions of HALT in furtherance of reactionary aims they have repeatedly articulated. The reactionary nature of their declaration of the nullity of duly enacted law resembles the reactionary nature of South Carolina's declaration that the duly enacted federal tariffs of 1828 and 1832 were a nullity. In both cases, nullifiers articulated their reactionary aims through three principal rhetorical moves: first, asserting that nullification is necessary to protect extant practice ("protection"); second, claiming that nullification is necessary to forestall unwarranted reform ("recasting"); and third, arguing that nullification is necessary as a matter of law ("reframing"). We explain each of these tactics below.

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188 No. 512871/2024 (N.Y. Sup. Ct. May 7, 2024).

189 *See* Complaint, *Anthony*, No. 512871/2024, at 58–59.

190 *Id.*

191 *Public Protection Hearing*, *supra* note 141, at 452 (statement of Anthony J. Annucci, Acting Comm'r, New York State Department of Corrections and Community Supervision).

A. Reaction as Protection

The Nullification Crisis began when South Carolina "declared the federal tariffs of 1828 and 1832 null and void within its borders."[192] Congress had enacted those tariffs in response to intense pressure from Northern manufacturers who believed that the absence of such protective trade policy disadvantaged them relative to European manufacturers.[193] There was, however, a broader ideological and cultural rationale animating the South's concerns about the tariffs. Southerners expressed concern that the new federal government — at this time less than forty years old — reflexively "supported the interests of Northern manufacturers at the expense of the South."[194] Southerners feared that if this trend continued, economic and cultural institutions central to the Southern way of life — like, most prominently, chattel slavery — would be imperiled.[195] For that reason, the Nullification Crisis became a battle over the future of chattel slavery.[196] South Carolina's nullifiers repeatedly articulated their desire to forestall protectionist trade policy as an outgrowth of their desire to protect chattel slavery.[197]

NYSCOPBA and DOCCS have also repeatedly articulated a desire to protect old institutions. In its press conference announcing its lawsuit seeking to enjoin the implementation of HALT, NYSCOPBA placed HALT in the context of broader legislative efforts to reform New York's criminal legal system, characterizing the legislature as a body that "cater[s] to individuals who can't conform to society's rules."[198] Union members cast the interests of "criminals" and the legislature at loggerheads with the interests of law enforcement, concluding that HALT was "designed to help the most violent incarcerated individuals . . . [and] hurt those who protect and serve the State of New York."[199] These arguments mirror those of South Carolina's nullifiers who insisted that Congress served the interests of Northern manufacturers to the detriment of Southern planters. And, like the position of South Carolina's nullifiers, lurking beneath NYSCOPBA's position was an interest in the preservation of a racist institution. For South Carolina, that institution

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192 Edward R. Mahaffey, *The Nullification Crisis and Andrew Jackson's View of Federalism*, CONCORD REV., Summer 2011, at 37, 37; *see also* Adam El-Sahn, *Conflict and Compromise: The Nullification Crisis*, 12 ALEPH: UCLA UNDERGRADUATE RSCH. J. FOR HUMANS. & SOC. SCIS. 7, 14 (2015).

193 *See* El-Sahn, *supra* note 192, at 8.

194 *Id.* at 10.

195 *See id.* at 11.

196 *See* Richard B. Latner, *The Nullification Crisis and Republican Subversion*, 43 J.S. HIST. 19, 19 (1977).

197 *See id.* at 23–24, 26.

198 NYSCOPBA Inc., *NYSCOPBA HALT Press Conference May 10, 2021*, YOUTUBE, at 3:40 (May 11, 2021) [hereinafter HALT Press Conference] https://www.youtube.com/watch?v=L66MSW8vJts [https://perma.cc/6V44-DWVT].

199 *Id.* at 11:32.

was chattel slavery. For NYSCOPBA, that institution is solitary confinement, and, more broadly, New York's punitive criminal legal system.

It is beyond debate that chattel slavery was a racist institution. There should also be no meaningful debate about the racism inherent in New York's solitary confinement regime or its broader punitive criminal legal system, either. In New York, prison discipline and solitary confinement are disproportionately inflicted upon Black and Hispanic people.[200] And solitary confinement, as a practice, produces increased rates of morbidity and mortality among that disproportionately Black population.[201] Similarly, controlling for the prevalence of behavior defined as criminal across racial groups, the broader criminal legal system touches Black people far more readily than it touches white people.[202] And criminal legal system involvement is associated with increased morbidity and mortality across many indicators.[203] As such, these systems produce "vulnerability to premature death" among Black people.[204] They are therefore racist systems.[205] This is true irrespective of the underlying motivations of jailers and state actors, the circumstances accounting for one's criminal legal involvement, or the circumstances accounting for one's placement in solitary confinement.

As part of their reactionary campaign, union leaders explicitly framed HALT as the next step in a years-long effort by advocacy groups to eliminate these racist systems.[206] And although NYSCOPBA's

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[200] Micheal Schwirtz, Michael Winerip & Robert Gebeloff, *The Scourge of Racial Bias in New York State's Prisons*, N.Y. TIMES (Dec. 3, 2016), https://www.nytimes.com/2016/12/03/nyregion/new-york-state-prisons-inmates-racial-bias.html [https://perma.cc/CXH9-LSWK]; Erika Eichelberger, *How Racist Is Solitary Confinement?*, THE INTERCEPT (July 16, 2015, 5:29 PM), https://theintercept.com/2015/07/16/rikers-study-black-inmates-250-percent-likely-enter-solitary/ [https://perma.cc/N6HM-3R8C].

[201] *See* Andrea Fenster, *New Data: Solitary Confinement Increases Risk of Premature Death After Release*, PRISON POL'Y INITIATIVE (Oct. 13, 2020), https://www.prisonpolicy.org/blog/2020/10/13/solitary_mortality_risk/ [https://perma.cc/5GRF-432R] ("[S]olitary confinement increases the risk of death after release from prison, including deaths by suicide, homicide, and opioid overdose."); Sebastian Daza et al., *The Consequences of Incarceration for Mortality in the United States*, 57 DEMOGRAPHY 577, 581 (2020) (finding that solitary confinement "increase[s] the risk of fatal self-harm" and that prison conditions generally may contribute to "drug abuse, depression, chronic anxiety, poor self-rated health, and plummeting life satisfaction").

[202] *See* SUSAN NEMBHARD & LILY ROBIN, URB. INST., RACIAL AND ETHNIC DISPARITIES THROUGHOUT THE CRIMINAL LEGAL SYSTEM 3–4 (2021), https://www.urban.org/sites/default/files/publication/104687/racial-and-ethnic-disparities-throughout-the-criminal-legal-system.pdf [https://perma.cc/2PSA-X7ZR]; NAZGOL GHANDNOOSH, CELESTE BARRY & LUKE TRINKA, THE SENT'G PROJECT, ONE IN FIVE: RACIAL DISPARITY IN IMPRISONMENT—CAUSES AND REMEDIES 8 (2023), https://www.sentencingproject.org/app/uploads/2023/12/One-in-Five-Racial-Disparity-in-Imprisonment-Causes-and-Remedies.pdf [https://perma.cc/ATG9-7D59].

[203] *See* Michael Cao et al., *The U.S. Criminal Legal System and Population Health*, CURRENT EPIDEMIOLOGY REPS., Jan. 25, 2025, art. 5, at 3–4.

[204] GILMORE, *supra* note 28, at 28.

[205] For the definition of racism that we employ here, see *id.*

[206] *See, e.g.*, HALT Press Conference, *supra* note 198, at 15:54, 21:48.

lawsuit was dismissed in 2022,[207] the union continued its reactionary campaign to "eliminate HALT."[208] In many of its press conferences and press releases advocating for HALT's repeal, NYSCOPBA and its supporters pointed to HALT as the product of a broader factional ideology — the movement to reform New York's punitive criminal legal system — that stands at odds with its own law-and-order interests.[209] This ideological framing took such strong root that NYSCOPBA no longer bothered to even place its opposition to HALT in constitutional terms. For example, in August 2022, during back-to-back press conferences in front of Five Points and Elmira Correctional Facilities, NYSCOPBA and its supporters framed their battle for HALT's repeal in factional, ideological terms:

> It is the one-party rule of coddling criminals that allows this to happen. The whole attitude of defund the police, it's coddling criminals at every aspect and every level of our criminal justice system. Part of our criminal justice system is punishment. Like it or not, punishment is part of our criminal justice system. And those that are the most unruly and disruptive[] inmates behind prison walls need to be disciplined.[210]

One legislator even framed HALT as part of the legislature's "continual operation" to prioritize the interests of "illegal immigrants . . . who are coming across the southern border," who "are receiving more rights and more protections than our corrections officers."[211] Per NYSCOPBA's supporters, this project, pushed by a "progressive, socialist democratic majority in the state legislature," has the effect of "enabl[ing] criminals to do what they do."[212] One legislator explicitly suggested that Governor Hochul declare a state of emergency to "suspend" implementation of HALT.[213]

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[207] N.Y. State Corr. Officers & Police Benevolent Ass'n v. Hochul, 607 F. Supp. 3d 231, 235 (N.D.N.Y. 2022).

[208] HALT Press Conference, *supra* note 198, at 23:25.

[209] *See, e.g.*, Cara Chapman, *N.Y. COs Union, Lawmakers Call for Pause on HALT Solitary Legislation*, PRESS-REPUBLICAN (Mar. 30, 2022, 7:58 AM), https://www.corrections1.com/solitary-confinement/articles/ny-cos-union-lawmakers-call-for-pause-on-halt-solitary-legislation-oGus7YlKXdXxk6xl [https://perma.cc/3LWM-G9AV]; Jay Mullen, *Elected Officials, Union Call for HALT Act Repeal*, ADIRONDACK DAILY ENTER. (Jul. 22, 2022), https://www.adirondackdailyenterprise.com/news/2022/07/elected-officials-union-call-for-halt-act-repeal [https://perma.cc/XEJ6-LAXC]; NYSCOPBA Inc., *Five Points Correctional Facility Press Conference August 16, 2022*, YOUTUBE (Aug. 16, 2022) [hereinafter *Five Points Correctional Facility Press Conference*], https://www.youtube.com/watch?v=gl6wjwOhZQ [https://perma.cc/G3KK-BYZ2]; NYSCOPBA Inc., *Elmira Correctional Facility Press Conference 8/17/22*, YOUTUBE (Aug. 17, 2022) [hereinafter *Elmira Correctional Facility Press Conference*], https://www.youtube.com/watch?v=zyjz8jw6PF4 [https://perma.cc/GRS8-TE6N].

[210] *Elmira Correctional Facility Press Conference*, *supra* note 209, at 5:04 (statement of Thomas O'Mara, N.Y. State Sen.).

[211] *Id.* at 9:10 (statement of Christopher S. Friend, New York Assemb.).

[212] *Five Points Correctional Facility Press Conference*, *supra* note 209, at 14:51 (statement of Philip A. Palmesano, New York Assemb.).

[213] *Id.* at 17:48 (statement of Philip A. Palmesano, New York Assemb.).

NYSCOPBA's reactionary campaign panned out, and New York's extant solitary confinement practices were partially protected. In late 2022 and early 2023, DOCCS officials cited NYSCOPBA's talking points as justification for the administrative nullification of HALT's presumption. Prior to his formal suspension of the presumption, Acting Commissioner Annucci issued a memorandum repackaging and reiterating NYSCOPBA's concerns that HALT would compromise facility safety.[214] Annucci then recited similar language in legislative testimony justifying what he explicitly called a "suspen[sion]" of HALT's presumption.[215]

B. Reaction as Recasting

Reactionary campaigns do not seek to merely protect extant practices, however. They also seek to prospectively deflect criticism of those practices by recasting them as relatively benign. During his testimony, Annucci adopted this rhetoric from NYSCOPBA by recasting New York's racist pre-HALT practices as benign. First, Annucci repeated the talking point that the Department's segregated confinement practices did not constitute solitary confinement or, in his words, "extreme isolation."[216] Like the union and its leaders, Annucci downplayed the level of isolation in segregated confinement.[217] By omitting the full picture of the conditions in segregated confinement, instead emphasizing the minimal and truncated daily interactions between staff and people housed in segregation, Annucci minimized conditions that oversight bodies and the legislature have recognized as distinctly punitive.[218] Annucci's testimony resembled the union's claim that:

> An offender in a special housing unit gets more services in a day than an inmate in General Population can get in weeks . . . . They're not dark, dungeon like atmospheres. They see nurses, they see medical, they see their counselors, they see clergy, . . . they've got iPads, tablets, phone services to their family. They have more connections in a Special Housing Unit than an inmate in General Population gets.[219]

Second, Annucci overstated the scope of reform. In formally announcing the Department's suspension of HALT's presumption, Annucci framed that presumption as "requir[ing] us to basically allow individuals to move from their cell to the program unrestrained and be in the program unrestrained."[220] This framing is false. The provision

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[214] *See* Chapman, *supra* note 209.

[215] *Public Protection Hearing*, *supra* note 141, at 452 (statement of Anthony J. Annucci, Acting Comm'r, New York State Department of Corrections & Community Supervision).

[216] *Id.* at 451.

[217] *See id.*

[218] *See id.; supra* notes 104–10 and accompanying text.

[219] HALT Press Conference, *supra* note 198, at 19:36.

[220] *Public Protection Hearing*, *supra* note 141, at 452 (statement of Anthony J. Annucci, Acting Comm'r, New York State Department of Corrections and Community Supervision).

codifies a mere presumption that the Department permit individuals to remain unrestrained during out-of-cell programming.[221] It explicitly permits the Department to override that presumption with a determination that an incarcerated person must be restrained because they pose an "unreasonable risk to the safety and security of other incarcerated persons or staff."[222] By recasting a presumption as a requirement, Annucci fueled a false union narrative that the presumption against the use of restraints constituted reckless legislative overreach. He also recast extant restraint policies as beneficent rather than punitive. This rhetoric resembles the rhetoric of South Carolina's nullifiers, who claimed that chattel slavery was a necessary — or even beneficent — practice.[223]

C. Reaction as Reframing

Finally, nullifiers manifest their reactionary aims by reframing them in patently frivolous legal terms. During the Antebellum Nullification Crisis, Southerners, fearing backlash, were reluctant to publicly link their trade concerns with their broader concerns about the future of the "peculiar institution" of slavery.[224] They instead partially buried the lede by also articulating a position about constitutional structure.[225] This blueprint — the partial recasting of racist motivations as tortured legal motivations, or what we call reframing — has been leveraged by reactionary movements since the Jacksonian era, including the "states' rights" movements that felled Reconstruction and marred the Civil Rights Era.[226]

Like the South Carolina of the Nullification era, New York's correctional interests initially placed their opposition to HALT in ideological, rather than constitutional, terms. They then partially buried the lede by engineering a frivolous legal position to frame alongside their ideological opposition.[227] In NYSCOPBA's case, that legal position failed

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221 N.Y. CORRECT. LAW § 137(6)(j)(vii) (2024).

222 *Id.*

223 *See* Lacy K. Ford, *Republican Ideology in a Slave Society: The Political Economy of John C. Calhoun*, 54 J.S. HIST. 405, 421–23 (1988); *see also* Bennett Parten, *John C Calhoun*, YALE & SLAVERY RSCH. PROJECT, https://ysrp.yale.edu/john-c-calhoun [https://perma.cc/SZ9H-245N] ("Calhoun authored what's known as the 'positive good' thesis. Whereas slaveholders in previous generations tended to regard slavery as a 'necessary evil,' Calhoun argued instead that slavery was a great gift to American society. Slavery, he argued, civilized the otherwise savage slave, produced enormous amounts of wealth, and provided a perpetual underclass, which afforded White slaveholders like himself the freedom to focus on finer pursuits like law or politics.").

224 *See* Albert L. Samuels, Crucible of Reaction: The Antebellum Origins of the Southern Strategy 29–30 (Mar. 8, 2017) (unpublished manuscript) (on file with the Harvard Law School Library).

225 *See id.* at 29.

226 *See id.* at 30–32.

227 N.Y. State Corr. Officers & Police Benevolent Ass'n v. Hochul, 607 F. Supp. 3d 231, 237 (N.D.N.Y. 2022) (noting plaintiff's claims that the NYCLU settlement and HALT Act violate their Fourteenth Amendment rights by exposing them to greater danger).

spectacularly in court.[228] Not to be outdone, though, Acting Commissioner Annucci cited a variant of NYSCOPBA's legal position to support his suspension of the presumption. Annucci claimed he had suspended the presumption because "I'd be violating the 8th Amendment rights of individuals were they to get attacked again because . . . there would be a failure to protect. That's an 8th Amendment violation."[229] Presumably, Annucci meant that if the Department permitted an RRU resident to participate in RRU programming unrestrained after previously attacking another RRU resident, it would be liable for an Eighth Amendment violation under a failure to protect theory.

In *Farmer v. Brennan*,[230] the Supreme Court articulated the prima facie elements of an Eighth Amendment failure to protect claim.[231] As with most species of Eighth Amendment claims, the scienter requirement for a failure to protect claim is "deliberate indifference."[232] To prevail, the plaintiff must show that the defendant — typically a corrections officer or prison staff member — knew of and failed to "respond[] reasonably to the risk" to the plaintiff's health or safety.[233]

In Annucci's hypothetical situation, DOCCS's restraint of the RRU resident would almost certainly constitute a reasonable response to the risk. If HALT's presumption barred such restraint, it would likely pose failure to protect concerns. But the provision permits restraint. It merely requires that the Department first make an individual determination that restraints are required.[234] It was therefore false for Annucci to suggest that the Department's implementation of the provision would constitute a per se failure to protect. As with the constitutional theory at the heart of *NYSCOPBA v. Hochul*,[235] however, Annucci's spurious legal theory performed a powerful function. It was meant to bolster the legitimacy of the Department's nullification of the presumption, just as South Carolina's spurious reference to constitutional structure was meant to bolster the legitimacy of its nullification of the Tariffs of 1828 and 1832.[236] This reframing is an important manifestation of reactionary aims.

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[228] *Id.* at 242–45 (dismissing NYSCOPBA's lawsuit seeking to enjoin HALT and finding it "clear that Defendants' actions do not shock the contemporary conscience," *id.* at 242, and that plaintiffs' claims "strain[] credulity," *id.* at 245).

[229] *Public Protection Hearing*, *supra* note 141, at 452 (statement of Anthony J. Annucci, acting Comm'r, New York State Department of Corrections & Community Supervision).

[230] 511 U.S. 825 (1994).

[231] *Id.* at 834.

[232] *Id.* (quoting Wilson v. Seiter, 501 U.S. 294, 302–03 (1991)) (citing Helling v. McKinney, 509 U.S. 25, 34–35 (1993); Hudson v. McMillian, 503 U.S. 1, 5 (1992); Estelle v. Gamble, 429 U.S. 97, 106 (1976)).

[233] *Id.* at 844.

[234] *See supra* notes 221–22 and accompanying text.

[235] 607 F. Supp. 3d 231 (N.D.N.Y. 2022).

[236] *See* Samuels, *supra* note 224, at 29.

The Department and OMH performed the same reframing by articulating a legal justification for their nullification of HALT's disability-based exclusion from solitary confinement — essentially, that the agencies have authority to adopt internal policy definitions that contradict unambiguous statutory commands.[237] And at the time of publication, the Department has rejected every opportunity to lift its functional suspension of this provision. In addition to the opportunities addressed in section II.B, New York State Senator Julia Salazar again asked departmental leadership, during the 2024 Public Protection Budget hearing, why it continued to place people with mental health disabilities in solitary confinement.[238] As with its defense of its suspension of the presumption against restraints, the Department doubled down.[239] Such insistence amounts to an invitation that a coequal branch respond, and both coequal branches have taken notice. The legislature has introduced legislation to reemphasize what HALT's plain language already clarifies — that the exclusion has broader applicability than that embraced by the Department.[240] And the putative *Anthony* class has challenged the Department and OMH's nullification of the exclusion.[241] Until a coequal branch responds effectively, however, the nullifiers will win the day.[242]

This Part concludes our explanation of the concept of administrative nullification. Under the approach we have presented, administrative

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[237] *See supra* section II.B, pp. 199–205.

[238] *In the Matter of the 2024–2025 Executive Budget on Public Protection: Hearing Before the State S. Fin. & Assemb. Ways & Means Comms.*, 2024 Leg., Reg. Sess. 231 (N.Y. 2024) (statetment of Sen. Salazar, Chair, S. Comm. on Crime Victims, Crime & Corr.), https://www.nysenate.gov/transcripts/286 [https://perma.cc/268P-DBJ4].

[239] *Id.* at 231–32.

[240] Assemb. 911, 2024–2025 Leg., Reg. Sess. (N.Y. 2025).

[241] Verified Class Action Complaint at 58–59, Anthony v. N.Y State Dep't of Corrs. & Cmty. Supervision, No. 512871/2024 (N.Y. Sup. Ct. filed May 7, 2024).

[242] After this article was submitted for publication, on February 20, 2025, DOCCS Commissioner Martuscello issued a memo "suspending the elements of HALT that cannot safely be operationalized under a prison wide state of emergency until we can safely operate the prisons." Memorandum from Daniel F. Martuscello III, Comm'r, Dep't of Corrs. & Cmty. Supervision, to All Superintendents (Feb. 20, 2025) (on file with the Harvard Law School Library). The scope and duration of the suspension are not specified. The memo purports to rely on provisions of HALT that permit suspension in "exceptional circumstances," *id.*, however, no such general suspension provision exists in HALT and the "exceptional circumstances" language appears only with reference to individualized exceptions to the application of certain HALT provisions. *See* N.Y. CORRECT. LAW § 137(6)(d)(ii)(E). And, as we have discussed earlier, an unelected agency official does not have authority to unilaterally suspend a duly enacted law. *See supra* section II.A, pp. 196–99. Martuscello's memo was issued in response to a strike by corrections officers demanding, among other things, repeal of HALT, and the memo addresses other of the strikers' demands. *See "Made Them More Angry": NYS DOCSS Issues Memo on "Path to Restoring Workforce" as Prison Strike Enters Day 4*, WKBW BUFFALO (Feb. 20, 2025, 6:49 PM), https://www.wkbw.com/news/local-news/nys-docss-issues-memo-on-path-to-restoring-workforce-as-prison-strike-enters-day-4 [https://perma.cc/XD5G-J932]. So, while the Commissioner's motivations have not been made explicit, the context of the purported suspension suggests it is a significant escalation of the Department's and the correction officers' union's attempts to nullify HALT.

nullification is comprised of three core elements: (1) suspension by agencies of duly enacted statutory provisions, (2) infliction of harm the statute seeks to prevent, and (3) reactionary aims animating the nullifiers. We turn now to assess the consequences of administrative nullification for carceral reform.

IV. The Consequences of Administrative Nullification for Carceral Reform Praxis

We have thus far focused on the features and structural consequences of administrative nullification. There is little doubt that to the extent it succeeds, administrative nullification skews the constitutional balance and defangs the legislature as an instrument of humanizing reform. The consequences of administrative nullification of prison reform legislation fall principally on incarcerated people, however. Contrary to NYSCOPBA's position, solitary confinement does exist in New York's prisons. Despite the implementation of certain HALT provisions, the conditions in New York's segregated confinement units meet the penological definition of solitary confinement,[243] and the harms of these conditions are well documented and profound: from severe psychological trauma and psychosocial deterioration to physiological manifestations that lead to demonstrable increases in morbidity and mortality.[244] Through its administrative nullification, the Department has exposed a far broader group to these conditions than is legislatively authorized. The toll on their bodies and minds and the deprivations exacted on the families from whom they are further isolated is immeasurable but no doubt devastating.

The impacts of solitary are more severe on people with disabilities. People with existing mental illness are at risk of having their conditions worsen to the point of acute decompensation and suffering irreversible psychological trauma.[245] People with low vision or hearing loss can

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[243] *See* U.N. Off. on Drugs & Crime, The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) 14 (2015), https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf [https://perma.cc/QG5Z-GR67] (defining solitary confinement as "confinement of prisoners for 22 hours or more a day without meaningful human contact"); Craig Haney, *Restricting the Use of Solitary Confinement*, 1 Ann. Rev. Criminology 285, 286 (2018) ("The definition of what constitutes solitary confinement turns less on the exact amount of in-cell time to which a prisoner is subjected and more on the deprivation of normal, direct, and meaningful social contact and access to positive environmental stimulation."); Just. Pol'y Inst., A Moment of Reckoning: A Blueprint for Resolving the Ongoing Crisis and Transforming New York State's Prison System 5 (2025) (noting limited out-of-cell time even in "purported alternatives to solitary confinement" in New York prisons).

[244] *See, e.g.*, Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 Crime & Just. 441, 443, 488–93 (2006); Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 J. Rsch. Crime & Delinq. 124, 130–41 (2003); Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J.L. & Pol'y 325, 328 (2006).

[245] *See* Haney, *supra* note 244, at 142–45.

experience further sensorial deterioration due to the absence of grounding sensory stimuli.[246] Likewise, people with mobility disabilities are deprived the space and opportunity to exercise and preserve their remaining range of motion.[247] Indeed, because the risks are known to be so serious, New York's state legislature was particularly solicitous in offering people with disabilities protections from any exposure to solitary. Yet, due to administrative nullification, thousands of New Yorkers must bear the severe and lasting consequences. Similarly, many RRU residents continue to suffer in mechanical restraints — blanketly authorized by the Department's administrative nullification of the presumption. As people who are protected by HALT's special populations provision, many RRU residents are people with disabilities.[248]

Administrative nullification also imposes costs on prison-conditions litigators. As in prison systems around the country, New York's prison system is plagued with inhumane and unlawful conditions including unsanitary physical conditions,[249] inadequate access to quality medical and mental health care,[250] abuse by correctional staff,[251] failure to offer reasonable accommodations to people with disabilities,[252] among myriad other issues.[253] Advocates receive scores of letters and calls each week from incarcerated people seeking support to remedy these deplorable conditions.[254]

Legislation like HALT should be the end of a fight to resolve inhumane conditions, not the beginning. Indeed, the law sets such clear and detailed limits, that, if followed, it would have ended the practice of prolonged solitary confinement and its imposition on vulnerable people, freeing up litigators to focus on other harmful and unlawful conditions. Instead, litigators must choose between enforcing reform legislation or

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246 *See* WORLD HEALTH ORG., PRISONS AND HEALTH 27–33 (Stefan Enggist et al. eds., 2014), https://iris.who.int/bitstream/handle/10665/128603/9789289050593-eng.pdf [https://perma.cc/JK42-6D67].

247 *See* Jamelia N. Morgan, *Caged In: The Devastating Harms of Solitary Confinement on Prisoners with Physical Disabilities*, 24 BUFF. HUM. RTS. L. REV. 81, 116–17, 126–27 (2017–2018).

248 *See* N.Y State Dep't of Corrs. & Cmty. Supervision, HALT MONTHLY REPORT — FEBRUARY 2025 (2025) (showing the percentage of RRU with an OMH designation).

249 *See, e.g.*, Victoria Law, "*The Worst Prison in New York State*," THE NATION (Nov. 10, 2021), https://www.thenation.com/article/society/great-meadow [https://perma.cc/JK9S-D465].

250 *See, e.g.*, CORR. ASS'N OF N.Y., MONITORING VISIT TO MID-STATE CORRECTIONAL FACILITY: POST-VISIT BRIEFING AND RECOMMENDATIONS 12–17 (2023), https://www.correctionalassociation.org/s/2023_PVB-11-MidState.pdf [https://perma.cc/S43L-6A6E].

251 *See, e.g.*, *id.* at 20–21.

252 *See, e.g.*, Elizabeth Weill-Greenberg, *Disabled and Abandoned in New York's Prisons*, N.Y. FOCUS (Oct. 25, 2021), https://nysfocus.com/2021/10/25/disabled-new-york-prisons-five-points-discrimination-lawsuit [https://perma.cc/R5EC-KZ8K] (discussing litigation against a DOCCS prison for discrimination against people with disabilities).

253 *See, e.g.*, *Other Reports, Fact Sheets, Issue Briefs, & Policy Papers*, CORR. ASS'N OF N.Y., https://www.correctionalassociation.org/other-reports [https://perma.cc/TVE2-2EED] (compiling the agency's oversight reports on various issues impacting people in New York State prisons).

254 *See* Memorandom from Riley D. Evans & Kyle Guzman, Legal Aid Soc'y (Mar. 4, 2025) (on file with the Harvard Law School Library).

seeking to remedy other concerns and risking that the agency will have the last word on the depth and breadth of legislative reforms. The *Anthony* case described above reveals how administrative nullification saps the scarce resources of prison-conditions litigators to enforce statutory reforms that shouldn't require litigation at all. The *Anthony* case is staffed by at least ten attorneys across three organizations,[255] and it will likely take years of litigation to ultimately secure HALT's protections. Downstream, incarcerated people again bear the ultimate burden, as they must continue to endure other unlawful conditions that go unaddressed.

Finally, administrative nullification undermines democracy. People in prison and their families are among the least politically powerful constituencies in state politics. Accordingly, their concerns are unlikely to be among the top priorities of state legislatures. So, when states adopt legislation like HALT, it reflects not only the tireless advocacy of directly impacted people and their allies, but also a public consensus about the need for reform. Indeed, HALT was adopted with overwhelming majorities in both the State Assembly and Senate, reflecting the broad consensus among New Yorkers about the urgent need for limits on solitary.[256] Administrative nullification through agency rules and informal policies or practices thus undermines the will of the electorate. It retrenches power in the prison rather than the democratic process.

CONCLUSION

This Article has introduced and examined the phenomenon of administrative nullification in the context of prison reform legislation, drawing on the historical analogue of the Nullification Crisis of the 1830s. The recent history of solitary confinement reform in New York reveals how executive agencies nullify reform legislation by adopting formal rules and informal policies and practices that are in clear derogation of the statute's unambiguous commands. The immediate result is that the harm barred by the underlying legislation is inflicted in service of a reactionary desire to preserve old institutions. In a prison reform context, the intended beneficiaries of reform legislation are deprived of its protections, and prison-conditions advocates are forced to choose whether to deploy scarce resources to enforce reform legislation or to pursue litigation to resolve other unlawful conditions. Further, administrative nullification represents an erosion of the democratic balance of power, as the executive branch ignores or contradicts the legislature's commands. As illustrated by the trajectory of solitary

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[255] Verified Class Action Complaint at 59–60, Anthony v. N.Y State Dep't of Corrs. & Cmty. Supervision, No. 512871/2024 (N.Y. Sup. Ct. filed May 7, 2024) (caption listing ten attorneys representing plaintiffs).

[256] *See Senate Bill S2836*, N.Y. STATE SENATE, https://www.nysenate.gov/legislation/bills/2021/S2836 [https://perma.cc/BX6W-USEY].

confinement reform in New York, prisoners' rights advocates must be carefully attuned to the administrative nullification phenomenon as they craft and pursue reform strategies in their jurisdictions.