RE-ENTRENCHMENT THROUGH REFORM:
THE PROMISES AND PERILS OF CATEGORICAL EXEMPTIONS FOR EXTREME PUNISHMENT POLICY

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I. INTRODUCTION .................................................................................... 172
II. LEGAL FOUNDATIONS AND SOCIO-LEGAL FUNCTIONS OF CATEGORICAL EXEMPTIONS TO CAPITAL PUNISHMENT .............................................. 179
   A. The Doctrine of Restricting Who Deserves to Die .................... 180
   B. Socio-Legal Functions and Pitfalls ....................................... 184
III. NEW PATHWAYS TO CATEGORICAL EXEMPTIONS ...................... 188
   A. Life Without Parole Exemptions ............................................. 188
   B. Exempting the Seriously Mentally Ill from Extreme Conditions of Confinement in California’s Prisons ........................................ 191
      1. A Jurisprudence of Effects ............................................... 193
      2. Implementing the Exemption ............................................. 196
   C. Exempting Vulnerable Inmates from Punitive Segregation at Rikers Island ......................................................... 198
      1. Administrative Pathways to Categorical Exemptions .......... 200
      2. Reconfiguring the Realities of Solitary .............................. 202
   D. Exempting the Non-Non-Nons from California’s Prisons ........ 206
      1. Realigning California’s Non-Non-Nons ......................... 208
      2. Reproducing Extreme Conditions ................................. 209

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This Article examines the emergence and functions of categorical exemptions—policy devices that reform particular penal practices by limiting their scope—in today’s extreme punishment landscape. Part I analyzes the promises and pitfalls of the U.S. Supreme Court’s development of categorical exemptions as a doctrinal mechanism to carve out vulnerable classes of offenders whose execution no longer comports with the Eighth Amendment’s ‘evolved standards of decency.’ Part II demonstrates that, despite their problems, categorical exemptions have proliferated beyond the Court’s death penalty docket to reform life without parole sentences and extreme conditions of confinement. This section is centered around three case studies that invoke the logic of exemptions to negotiate contemporary criminal justice controversies—namely, the use of isolation in California’s prisons and in Rikers Island and prison overcrowding in California—and highlights important differences in their institutional pathways and similar defects in their implementation. Part III considers the meaning of categorical exemptions for the penal field, emphasizing their potential to entrench rather than reform extreme punishment.

I. INTRODUCTION

Modern American punishment is a system of extremes. On one hand, its size outpaces every other country and the number of people directly subject to some facet of the state’s criminal justice system is staggering. More than two million individuals are behind bars and, once other forms of state surveillance like parole or probation are considered, this figure rises to nearly seven million. Punishment and society literature has dubbed this explosion of the carceral state “mass incarceration” and has sought to understand the causes and consequences of the turn to the punitive in the late 20th century.


See generally KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (2007) (explaining why and how the incarceration rate in the U.S. has quadrupled since 1970); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001) (following the evolution of control, from mass imprisonment to sex offender registries and zero tolerance policies, in the justice system); RUTH W.

Along with this increase in the dimensions of penalty, a set of extreme punishment practices has also emerged that has resulted in prisoners serving longer sentences in harsher conditions. For example, life without parole sentences (LWOP) proliferated in the 1990s, jumping from 12,000 prisoners serving LWOP in 1992 to more than 49,000 in 2012. A decade earlier, the first supermaximum (supermax) security prisons opened first in Arizona and then in California. By the late 1990s, nearly every state had a supermax facility in which prisoners spend months or even years in their cells for at least twenty-two hours a day with little to no human contact under constant fluorescent lighting. Today, supermaxes hold so many prisoners that some facilities are forced to double-bunk two prisoners in one eighty-square-foot cell. More broadly, isolation as a mechanism to control and manage prisoners has spread beyond the supermax environment. Today, at least 81,622 prisoners are held in solitary confinement in correctional institutions across the country. And, while the rest of the western world has trended towards abolishing the death penalty, the Supreme Court retreated from its self-imposed moratorium on executions in 1976 and the


institution reemerged rather than faded from the American arsenal of punishment. Today, the U.S. is the only Western nation to retain the death penalty and one of only twenty-two countries with recorded executions in 2013 worldwide.

Together, these policies form a constellation of harsh practices that reveal modern American punishment as extreme not only in scope but also in form. These carceral realities comport with modern classics in punishment and society literature tracing America’s turn in the late 20th century from rehabilitative ideals to contemporary policies that incorporate more punitive responses to crime and control over the offender. Against this scholarly background, reliance on old forms of harsh justice like the death penalty and the rise of new forms like life without parole sentences and incarceration in isolation seem almost inevitable and certainly unsurprising. Yet, today’s extreme punishment landscape is more complicated than these macro-level analyses might suggest. Even as these practices continue, a parallel policy of restricting their scope through categorical exemptions has also emerged.

Categorical exemptions, or the policy mechanisms that purport to limit the scope of particular punishments, are facilitating an important yet underappreciated shift in the extreme punishment landscape. Since its reaffirmation of capital punishment in Gregg v. Georgia, the Supreme Court has refocused its death penalty jurisprudence from deciding whether the institution is categorically unconstitutional to policing its periphery. The doctrine of categorical exemptions is a fundamental component of this strategy, enabling the Court to carve out particular classes as exempt from the system’s most severe sentences—the death penalty and LWOP.

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15. GARLAND, supra note 4; GOTTSCHALK, supra note 4; SIMON, supra note 4; WACQUANT, PUNISHING THE POOR, supra note 4; WHITMAN, supra note 4; YOUNG, supra note 4.
Scholars have focused primarily on this line of jurisprudence to speculate about which class of defendants should be exempted next or to analyze how existing exemptions have been implemented. However, the phenomenon of categorical exemptions is broader than those carved out by the Supreme Court’s death penalty and LWOP cases. Numerous other courts and institutions have leveraged the logic of categorical exemptions both to reduce the punitive scope of today’s most controversial punishments, such as the treatment of juveniles and the mentally ill and the use of solitary confinement, and to respond to acute crises in corrections, like prison overcrowding.


The function and meaning of these exemptions is double-edged. On their face, categorical exemptions ostensibly limit the scope of the criminal justice system’s harshest punishments and perhaps signal a retreat from the escalation of punitive polices that have come to represent contemporary American penality. Yet, their proliferation also reveals a more nuanced insight into the evolution of modern punishment. This Article moves beyond their formal legal meaning to analyze categorical exemptions as an adaption to modern sensibilities that preserves the state’s most extreme powers of punishment by carving out the least controversial classes of offenders from their reach. Categorical exemptions are, at their core, an important mechanism of evolution in the contested and variegated terrain that is modern penality.

This Article challenges the traditional approach to categorical exemptions, arguing that the phenomenon is both broader than conventionally conceptualized and more conflicted in meaning than traditionally understood. Part I introduces the series of Supreme Court death penalty cases that developed the doctrine of categorical exemptions in order to lay their foundational logic of restricting rather than reforming. Yet, as this section also explains, the real impact of categorical exemptions must be contextualized against not only their formal promise to reform, but also against how they are implemented in practice. This analysis argues that death penalty exemptions are often more contingent than categorical and may actually function to retrench rather than simply restrict capital punishment.

Part II demonstrates that, despite the challenges documented in the death penalty domain, the logic of categorical exemptions has proliferated to new sites in the extreme punishment landscape. This section begins by tracing their spread to constitutionally restricting LWOP sentences and then proffers three empirical case studies drawn from sites that, while unanticipated by traditional jurisprudence, borrow the death penalty ethos of restricting to ultimately reconfigure and preserve extreme punishments. This analysis moves first to California’s exemption of seriously mentally ill prisoners from confinement in Secure Housing Units and administrative segregation, then to New York City’s exemption of vulnerable inmates from solitary confinement in its jails, and, finally, back to California in order to

examine the state’s decision to exempt non-violent, non-serious, and non-sexual offenders from serving their sentences in the state’s prison system as a response to overcrowding. Each of these sites represents a novel form of and institutional pathway to a categorical exemption and demonstrates that, in order to understand their true impact, they must also be understood in relation to their implementation.

Finally, Part III adjudicates the various forms of categorical exemptions analyzed in Parts I and II in order to contextualize their meaning for the field of modern punishment. On one hand, this section identifies important differences in the institutional pathways these exemptions travel that, when made explicit, reveal how their logic is leveraged to achieve some degree of reform while preserving the essence of extreme punishment practices.24 Categorical exemptions therefore provide insight into how actors in the penal field negotiate changes to the most controversial practices in the contested terrain that is modern punishment. 25

Yet, despite their differences, each utilizes boundary drawing to articulate a normative conception of who should be exempt from the cruelest of our punishments at the risk of ignoring the more fundamental reform of rethinking how we punish. In this sense, categorical exemptions risk functioning as instrumental adaptions that enable the beast that is extreme punishment to evolve and, ultimately, survive.

This Article concludes on a more pragmatic note. Categorical exemptions, albeit imperfect in both form and function, do institute incremental changes that make real differences in how some members of

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exempted groups experience the criminal justice system. Yet, they may also reinforce extreme punishments by obscuring larger reform discourses. Ultimately, categorical exemptions are a recent but instrumental mechanism in the long process that is penal development and, while their final meaning for modern punishment remains to be seen, they are certainly worth examining.

II. LEGAL FOUNDATIONS AND SOCIO-LEGAL FUNCTIONS OF CATEGORICAL EXEMPTIONS TO CAPITAL PUNISHMENT

In 1972, the Supreme Court’s decision in Furman v. Georgia invalidated the capital punishment statutes of thirty-nine states, the District of Columbia, and the federal government on Eighth Amendment grounds, which issued a de facto ban on capital punishment across the country.26 Furman’s precise meaning for the future of the death penalty was unclear. The majority opinion was a one paragraph per curiam, appended by five separate opinions written by each Justice in the majority and followed by four separate dissenting opinions.27 Divining coherent constitutional meaning from these nine disparate opinions was, without additional context, impossible.28

Four years later, Gregg v. Georgia clarified the state of the American death penalty.29 Gregg and its quartet of accompanying cases considered revised capital sentencing schemes from five states, approving those proffered by Georgia, Florida, and Texas based on their incorporation of constitutionally sufficient procedural protections.30 Furman’s de facto ban on the death penalty was, as these cases revealed, only a moratorium. Yet, Gregg also contextualized Furman as ushering in a new period of federal

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27. Id.
29. Gregg, 428 U.S. 153 (finding Georgia’s revised capital sentencing scheme constitutional).
oversight of the death penalty, which had historically been subject to primarily local regulation. 31

This section focuses on the line of cases in which the Supreme Court exercises this power to police the death penalty by delineating who deserves to die. It first lays the doctrinal foundations for categorical exemptions by tracing the development of a distinct Eighth Amendment analysis in the U.S. Supreme Court’s contemporary death penalty jurisprudence. Then, it moves beyond legal doctrine to examine the socio-legal functions categorical exemptions serve in maintaining the practices they purport to restrict and challenges their ability to serve as truly categorical limitations on the death penalty’s scope.

A. The Doctrine of Restricting Who Deserves to Die

Just a year after its retreat in Gregg from grappling with capital punishment as perhaps categorically unconstitutional, the Court began assessing the constitutionality of its scope in a series of cases limiting the categories of death-eligible and death-worthy defendants. 32 Since the first of these categorical exemption cases, in which death was deemed an unconstitutionally disproportionate punishment for the crime of rape, 33 the Court has mandated a series of three categorical exemptions that restrict the death penalty’s application against particularly vulnerable classes. First, in Ford v. Wainwright, the Court found the execution of “insane” death row inmates incompatible with the Eighth Amendment’s evolving standards of decency. 34 Then, in Atkins v. Virginia, 35 the Court issued a categorical exemption excluding defendants with intellectual disability from the death penalty’s scope, 36 followed by Roper v. Simmons’ categorical exemption of juvenile defendants. 37 In 2008, the Court returned to death-worthy crimes, extending its ruling in Coker v. Georgia to also exempt defendants convicted of the rape of a child in Kennedy v. Louisiana. 38

31. GARLAND, supra note at 22, at 257; Steiker & Steiker, supra note 28, at 364.
33. Id.
34. Ford, 477 U.S. at 401.
35. Atkins, 536 U.S. at 320.
36. Atkins’ specific ruling exempts the mentally retarded, but the Court has since adopted the term “intellectual disability” to describe its Atkins exemption in order to match contemporary diagnostic language. See Hall v. Florida, 134 S. Ct. 1986, 1990 (2014).
37. Roper, 543 U.S. 551.
The Court has, over the course of these linchpin cases, developed an analytical framework to determine which defendants are no longer deserving of death. In *Coker v. Georgia*, the Court leveraged evidence of “present public judgment, as represented by the attitude of state legislatures and sentencing juries” to determine whether death was an unconstitutionally excessive sentence for the crime of raping an adult woman.\(^3\) Georgia was the only state to authorize capital punishment for rape and, even there, juries still rarely imposed a death sentence in rape cases, suggesting that contemporary public judgment deemed death a disproportionate sentence for rape.\(^4\)

Evidence of legislative and sentencing trends as well as of public opinion continued to find traction as the Court started to carve out classes of vulnerable defendants as exempt from the death penalty. The Court’s analysis in *Ford v. Wainwright* recognized that the states already uniformly prohibited the execution of “insane” death row inmates, which suggested that this historically prohibited practice remained offensive to contemporary Eighth Amendment standards.\(^4\) By *Atkins v. Virginia*, the Court’s two-step categorical exemption analysis emerged as refined and formulaic.\(^4\)

In *Wainwright* and *Coker*, the Court confronted uses of the death penalty that had been nearly uniformly abandoned by state legislative bodies, making the pulse of “present public judgment” relatively simple to define.\(^4\) In *Atkins*, however, state legislative patterns on the issue of executing those with intellectual disability were in flux, rendering the Court’s analysis of how this practice comported with Eighth Amendment’s modern standards of decency more complex.\(^4\) The Court had already confronted the issue in *Penry v. Lynaugh*, which set a baseline for its 2002 analysis of state legislation. In 1989, when the Court considered *Penry*, only Georgia\(^4\) and Maryland\(^4\) had passed legislation banning the execution of individuals with intellectual disability—insufficient evidence of a “national

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40. Id.
41. *Ford*, 477 U.S. at 408-09.
42. *Atkins*, 536 U.S. at 321.
44. *Atkins*, 536 U.S. at 324.
46. GA. CODE ANN. § 17-7-131(j) (Supp. 1988).
consensus” against the practice, especially when compared to the unanimity documented in *Wainwright*.48

By *Atkins*, however, enough states had joined Georgia and Maryland in legislatively exempting the intellectually disabled from execution for the Court to reconsider *Penry’s* holding. The *Atkins* Court counted seventeen states that had already passed relevant legislation since 1989 and noted that two more would likely join in the trend.49 Still, this pattern of consensus was less than the uniformity demonstrated by the states in *Coker* and *Wainwright*. Instead, the Court found that the national consensus against executing individuals with intellectual disability was revealed “not so much [by] the number of these States” but by “the consistency of the direction of change”.50

*Atkins*, perhaps because its national consensus was a matter of interpretation rather than uniformity, introduced a second analytical step: an “independent evaluation” of the challenged punishment’s constitutionality as applied against the class.51 Intellectual disability, the Court found, affects an individual’s ability to “understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”52 As a result, such defendants have, as a class, diminished personal culpability that undermines the core penological concepts of retribution and deterrence and the procedural safeguards that protect against unjust death sentences.53 Ultimately, *Atkins* issued a categorical exemption for those with intellectual disability from execution and provided a new analytical framework against which to assess cruel and unusual punishments.54 Evidence of a sufficient “national consensus” against challenged punishment practices has since become a ritualized framework for evaluating the constitutional viability of categorical exemptions.55

This jurisprudence was deployed to further restrict the death penalty’s scope in *Roper v. Simmons* by categorically exempting juvenile defendants from execution.56 As in *Atkins*, the *Roper* Court was persuaded more by the consistency of change in state legislation prohibiting the imposition of

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50. Id. at 315.
51. Id. at 321.
52. Id. at 318.
53. Id. at 317.
54. Id. at 321.
55. *Atkins*, 536 U.S. at 316.
capital sentences on juvenile defendants than by the pace of change.\textsuperscript{57} The Court’s independent evaluation also deemed juveniles categorically different from adult offenders in light of their impulsivity, immaturity, irresponsibility, vulnerability to negative influences and pressures, and because of the capacity of their character to change as they age.\textsuperscript{58} The categorically diminished personal culpability of juveniles, as in \textit{Atkins}, fatally undermined retribution and deterrence and warranted their exemption from execution.\textsuperscript{59}

Most recently, in 2008, the Court returned to limiting the category of death-worthy crimes in \textit{Kennedy v. Louisiana}, carving out a sentence of death for the rape of a child as an unconstitutionally disproportionate punishment.\textsuperscript{60} Analysis of state legislation on the issue revealed that only six states permitted execution for this crime, indicating that a national consensus finding the punishment disproportionate had formed.\textsuperscript{61} The Court, in its independent evaluation of the constitutionality of executing individuals convicted of child rape, also found retributive and deterrent ends underserved.\textsuperscript{62}

Together, these cases have introduced a defined jurisprudence of categorical exemptions that has filled the void left by the end of the push to constitutionally abolish the death penalty. Legal scholars have leveraged this death penalty precedent to speculate on which additional groups might find constitutional traction in seeking a categorical exemption. Defendants with traumatic brain injuries,\textsuperscript{63} severe mental illness,\textsuperscript{64} or genetic predispositions to violence\textsuperscript{65} and, most recently, veterans with combat-

\textsuperscript{57}. \textit{Id.} at 565-66.
\textsuperscript{58}. \textit{Id.} at 569-70.
\textsuperscript{59}. \textit{Id.} at 571-72.
\textsuperscript{60}. \textit{Kennedy}, 554 U.S. 407.
\textsuperscript{61}. \textit{Id.} at 422-27.
\textsuperscript{62}. \textit{Id.} at 441-47.
\textsuperscript{65}. Cecilee Price-Huish, \textit{Born to Kill? ‘Aggression Genes’ and Their Potential...
related traumas\textsuperscript{66} might someday be categorically exempted from the death penalty. For now, though, \textit{Wainwright, Atkins,} and \textit{Roper} form a trinity of categorical exemptions deeming some classes undeserving of death while \textit{Cocker and Kennedy} constitute the categories of crimes similarly exempted from death.

\textbf{B. Socio-legal Functions and Pitfalls}

The jurisprudence traced above has a dual purpose: legally, it enables to judiciary to police the periphery of capital punishment by retooling its scope to conform with the Eighth Amendment and, socio-legally, it realigns the institution to modern sensibilities by exempting out classes of defendants whose execution has become problematic. The judicial doctrine of categorical exemptions, though articulated through legal concepts such as evolving standards of decency, culpability, and proportionality, is inherently grounded in the moral and ethical determination of who deserves to live—though likely serving life in prison\textsuperscript{67}—or die. This core work of cleaving defendants into exempted from or still deserving of death reveals categorical exemptions as a mechanism through which the Court can adjudicate penal terrain fraught not only with evolving constitutional concerns but also with changes in the meaning of today’s moral world.\textsuperscript{68}

This cultural role implicates a secondary function of categorical exemptions. By removing the most controversial classes of defendants—the mentally ill and disabled, juveniles, and those convicted of non-homicide crimes—categorical exemptions ensure that the death penalty remains aligned with modern American sensibilities by exempting the classes whose execution no longer tracks with contemporary values. Through this process

\textsuperscript{68} See Austin Sarat & Karl Shoemaker, \textit{Between the Promise of Shared Moral World and the Utter Unintelligibility of Death Itself: An Introduction to the Construction of Executable Subjects,} in \textit{Who Deserves to Die? Constructing the Executable Subject} 17-10 (Austin Sarat & Karl Shoemaker eds., 2011).
of narrowing its scope, the death penalty remains palatable rather than indefensibly cruel. As punishment scholar David Garland suggests, this feature of categorical exemptions renders them instrumental adaptations facilitating the death penalty’s survival in American. In this sense, categorical exemptions serve an important evolutionary function in maintaining the very extreme punishments they purport to restrict.

Practically, however, they may be less categorical in their protection and more contingent on the nuances of implementation. Studies have, for example, identified a gap between their promise to exempt and death row realities, suggesting that these exemptions as implemented may not reliably exempt vulnerable classes from execution or realign extreme punishment practices to contemporary culture. In this sense, categorical exemptions may be a device through which punishment simply reconfigures itself rather than evolves.

The Atkins exemption has, for example, been the subject of both procedural and substantive implementation critiques. The procedural

69. See Garland, supra note 22, at 18.
70. See id.
71. See, e.g., Miller & Radelet, supra note 21, at 36-39; Blume et al., Implementing (or Nullifying) Atkins?, supra note 21, at 18-33; Blume et al., Of Atkins and Men, supra note 21, at 697-732; Pifer, The Scientific and the Social, supra note 21, at 13-14.
73. See infra Part III.
rules, such whether the judge or jury determines intellectual disability, at
what stage in the criminal proceeding the determination occurs, and what
the applicable burden of proof is, governing Atkins claims can have as
significant an impact on their outcome as the substantive implementation
issues, but the inherent definitional challenges of categorical exemptions
like Atkins present a fundamental challenge to their functionality.

These difficulties are exacerbated when the Supreme Court defers, as it
has in Atkins and Wainwright, the challenge of drawing legal boundaries
around complicated categories to the states. In the definitional vacuum left
by the Court’s grants of discretion, states are left to implement definitions
that are so vague as to be meaningless or are so restrictive that protection
becomes under inclusive. In 2014, the Court provided some definitional
clarity to implementing Atkins, ruling in Hall v. Florida that states must pay
a degree of deference to the standards adopted by prevailing professional
organizations when bounding the Atkins category.

Yet, the implementation problem manifests not simply through
inconsistent legal definitions but through the fundamental nature of
categorical exemptions. The categories exempted from death are not self-
defining and their boundaries are especially difficult to translate into the
bright-line legal rules. A rich literature, for example, details the fluid
nature of intellectual disability and how its meaning evolves along with
changes in the social and scientific standards that inform it. This fluidity is


76. Blume et al., Implementing (or Nullifying) Atkins?, supra note 21, at 1.
77. Atkins, 536 U.S. at 317 (“To the [extent] that there is serious disagreement
about the execution of mentally retarded offenders, it is in determining which
offenders are in fact retarded. . . . As was our approach in Ford v. Wainwright, with
regard to insanity, ‘we leave to the States the task of developing appropriate ways
to enforce the constitutional restriction upon its execution of sentences.’” (citing
Wainwright, 477 U.S. 399, 405 (1986))).
78. See, e.g., KENT S. MILLER & MICHAEL L. RADELET, EXECUTING THE MENTALLY ILL: THE CRIMINAL JUSTICE SYSTEM AND THE CASE OF ALVIN FORD 104–09 (1993); Blume et al., Of Atkins and Men, supra note 21; White, supra note 75, at 711.
79. Hall, 134 S. Ct. at 2000 (“The legal determination of intellectual disability is
distinct from a medical diagnosis, but it is informed by the medical community’s
diagnostic framework.”)
81. See generally, e.g., DANIEL J. KEVLES, IN THE NAME OF EUGENICS:
not just limited to historical artifact. As Justice Alito’s dissenting opinion in *Hall* cautions, the meaning of intellectual disability embraced by the professional organizations whose standards are now constitutionally significant has and will likely continue to evolve.\(^{82}\)

That nature of categorical exemptions based on intellectual disability, mental illness, and childhood requires law to negotiate categories that exist on a spectrum with inherently blurry boundaries. The challenge of implementing bright-line rules clearly delineating the protected from the death eligible has seriously undermined *Wainwright* \(^{83}\) and *Atkins*’ \(^{84}\) effectiveness as categorical exemptions. Even *Roper*, which has easily operationalized its exemption by drawing a line at age eighteen, \(^{85}\) runs the risk of excluding deserving defendants from protection since age eighteen is no perfect proxy for bounding adulthood—and its assumption of increased culpability. \(^{86}\) This process of imperfect implementation renders their meaning and protection contingent rather than categorical, raising both micro and macro concerns about today’s “capital punishment complex”. \(^{87}\) First, ostensibly exempted defendants remain vulnerable to unjust punishment and, more broadly, the contemporary American death penalty may be a reconfigured rather than the evolved beast promised by the doctrine of categorical exemptions. \(^{88}\)

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\(^{82}\) *Hall*, 134 S. Ct. at 2006. To prove Justice Alito’s point, in the years between *Atkins* and *Hall*, the APA—one of the professional organizations leveraged by the *Hall* majority—released a new edition of the DSM that significantly retooled the clinical definition of intellectual disability and its diagnostic criteria. See *AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (5th ed. 2013).

\(^{83}\) Miller & Radelet, *Executing the Mentally Ill*, *supra* note 21, at xii.

\(^{84}\) Pifer, *The Scientific and the Social*, *supra* note 20; Blume et al., *Of Atkins and Men*, *supra* note 20, at 711.

\(^{85}\) *Roper*, 543 U.S. at 574 (acknowledging the imperfection as well as the necessity of bounding the protected category at age eighteen).

\(^{86}\) *Id.* (“The qualities that distinguish juveniles from adults do not disappear when an individual turns 18.”)

\(^{87}\) Garland, *supra* note 22 at 14.

\(^{88}\) The case of Marvin Wilson is one example of an *Atkins* defendant unjustly denied protection under *Atkins* and ultimately executed by the State of Texas.
III. NEW PATHWAYS TO CATEGORICAL EXEMPTIONS

The logic of categorical exemptions as limiting legal devices has, despite the implementation difficulties documented in the death penalty context, proliferated throughout the extreme punishment landscape. This section first describes their spread to limit life without parole (LWOP) sentences. This is perhaps an unsurprising extension given LWOP’s characterization as America’s new death penalty, but close analysis of these cases as compared to the death penalty cases reveals subtle differences in the doctrine of categorical exemptions.

The section then makes a novel argument that categorical exemptions have expanded beyond limiting extreme sentences to limit extreme punishment policy more generally by examining three interventions that leverage categories to respond to contemporary controversies in the criminal justice system. These empirical case studies, centered on isolation and overcrowding, reveal that while their pathways may deviate from the Eighth Amendment analysis utilized by the extreme sentences jurisprudence, these novel categorical exemptions are similarly contingent on their implementation and illustrative of the complexities of modern penalty.

A. Life Without Parole Exemptions

Categorical exemptions, stagnant in the death penalty context since Kennedy v. Louisiana, remerged in 2010 to limit the scope of LWOP in two Supreme Court decisions limiting the constitutionality of juvenile LWOP (JLWOP) sentences. In Graham v. Florida, the Court categorically exempted juvenile defendants convicted of non-homicide crimes from LWOP and, in Miller v. Alabama, expanded this exemption to further restrict its application as a mandatory sentence in juvenile cases.


89. LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY (Austin Sarat & Charles Ogletree Jr. eds., 2012).
by the death penalty jurisprudence.\textsuperscript{93} The Court’s analysis of state legislation revealed a national mix rather than consensus about the propriety of JLWOP—six states banned all JLWOP sentences in all instances, seven states permitted JLWOP sentences in homicide cases, and the remaining states as well as the District of Columbia allowed for JLWOP sentences in some non-homicide cases.\textsuperscript{94} The Court, rather than rely on these trends to find no national consensus, examined the actual sentencing practices of jurisdictions allowing JLWOP.\textsuperscript{95} This on-the-ground analysis found that only 123 juvenile offenders were serving LWOP for non-homicide offenses and that seventy-seven of those were concentrated in Florida.\textsuperscript{96} This figure, when compared to the large number of non-homicide crimes committed by juveniles and the number of opportunities to impose JLWOP, suggested a de facto national consensus that the sentence is cruel and unusual.\textsuperscript{97}

The Court’s independent analysis of JLWOP reinforced \textit{Roper’s} finding that juvenile defendants have categorically lowered culpability.\textsuperscript{98} \textit{Graham} went a step furthering, finding that, as the Court narrowed in on non-homicide crimes as the basis for the exemption, this class of offenders had a “twice diminished moral culpability” based on both age and crime.\textsuperscript{99} Penological theory could not, in the face of this twice-lowered culpability, justify imposing JLWOP—the most severe juvenile sentence left to states after \textit{Roper’s} restriction on the death penalty.\textsuperscript{100}

\textit{Miller v. Alabama}, which found mandatory impositions of JLWOP unconstitutional, leverages the precedent set by the Court’s categorical exemption jurisprudence but not its logic. \textit{Miller}, rather than engage the Court’s traditional analysis of evidence of the national consensus and an independent evaluation of Eighth Amendment principles, instead relies on \textit{Roper} and \textit{Graham’s} recognition that juveniles are categorically less culpable than adults to mandate that juveniles, even those convicted of heinous crimes, are constitutionally entitled an individualized sentencing determination.\textsuperscript{101} The mandatory imposition of JLWOP forecloses any

\textsuperscript{93} \textit{Graham}, 130 S. Ct. at 61.
\textsuperscript{94} \textit{Id.} at 62
\textsuperscript{95} \textit{Id.}
\textsuperscript{96} \textit{Id.} at 64.
\textsuperscript{97} \textit{Id.} at 65.
\textsuperscript{98} \textit{Id.} at 68 (citing \textit{Roper}, 543 U.S. at 575).
\textsuperscript{99} \textit{Graham}, 130 S. Ct. at 69.
\textsuperscript{100} \textit{Id.} at 70-75.
\textsuperscript{101} \textit{Miller}, 132 S.Ct. at 2463-69.
possibility that youth—and its constitutional significance—may mitigate the most extreme punishment available.

Miller represents an obvious deviation from traditional death penalty precedent in its form of analysis, yet Graham is also subtly different in its form of exemption. The Court’s death penalty jurisprudence has engaged two lines of restrictions: one narrowing the scope of death-eligible crimes and a second narrowing the scope of death-eligible defendants. Graham represents a hybrid exemption, predicated on both a narrowed scope of eligible defendants and eligible crimes. This move has, as Miller demonstrates, centered speculation about LWOP not on which class of defendants should be exempted next or about the practice writ large, but about which application of LWOP is ripe for a categorical challenge and how to resolve the substantive and procedural nuances of Miller and Graham’s implementation.

103. Ford, 477 U.S. 399; Atkins, 536 U.S. 304; Roper, 543 U.S. 551.
105. See, e.g. People of California v. Caballero, 282 P.3d 291 (Cal. 2012) (challenging sentences that are the functional equivalent of JLWOP because their length prevents any meaningful opportunity for release); State v. Layman, 613 S.E.2d 639 (Ga. 2005) (challenging the application of JLWOP in cases of felony murder); State of Ohio v. Long, 8 N.E.3d 890 (Ohio 2014) (challenging sentencing schemes that do not require judges to treat age as a mitigating factor before imposing JLWOP).
107. Courts have also struggled to determine if these categorical exemptions establish a substantive or procedural rule for the purposes of determining whether they should apply retroactively to juvenile defendants already serving LWOP. See Perry L. Morierarty, Miller v. Alabama and the Retroactivity of Proportionality Rules, 17 U. Pa. J. Const. L. 929, 964 (2015); Nikki Morris, Where Do We Go from Here? Mandatory Sentencing and Retroactive Application Post-Miller, 37 UALR L. Rev. 311, 326 (2014-2015); Eric Scab, Departing from Teague: Miller v.
The rise of categorical exemptions to limit the scope of JLWOP is perhaps an unsurprising proliferation of the logic of restricting rather than abolishing extreme punishments to a new site. A life sentence is, after Roper’s elimination of the juvenile death penalty, the harshest sentence the state can impose on a juvenile defendant. JLWOP is therefore, as the Court notes in Graham, a functional analog of the death penalty in both severity and finality. Ultimately, the JLWOP cases, as in the death penalty context, utilize the doctrine of categorical exemptions to deem a certain category of particularly vulnerable defendants undeserving of the system’s most extreme punishment.

The shifts, however, in Graham’s content and in Miller’s doctrinal analysis suggests a subtle evolution of categorical exemptions. Miller’s analysis, for example, constructs categorical exemptions not as a constitutional inevitability in light of the precedent developed in the death penalty context, but as a pragmatic solution to the moral crisis the Court confronts in adjudicating the propriety of mandatory JLWOP sentences. In this sense, the JWLOP cases simultaneously extends the Court’s doctrine of categorical exemptions and suggests that they may be deployed not only as constitutional mandates but leveraged as strategic policy interventions into punishment controversies. The reminder of this section draws from three contemporary case studies in which penal actors restrict the classes of prisoners subject to the most extreme conditions of confinement as a policy solution to trace the proliferation of categorical exemptions.

B. Exempting the Seriously Mentally Ill from Extreme Conditions of Confinement in California’s Prisons

In 1988, California opened its Pelican Bay State Prison, one of the nation’s first modern supermax prisons. Supermaxes are designed to hold prisoners in long-term isolation and personify extreme conditions of

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Al., Invitation to the State’s to Experiment with New Retroactivity Standards, 12 OHIO ST. J. CRIM. L. 213, 222 (2014).

108. Graham, 130 S. Ct. at 2027 (“The State does not execute the offender sentenced to life without parole, but the sentence alters the offender’s life by a forfeiture that is irrevocable.”)

Prisoners remain in cells 23 to 24 hours a day that are constantly illuminated by fluorescent lights, leaving only four or five times a week for showers or brief stints in exercise areas called ‘dog runs.’ Human interaction is limited—meals arrive through automated slots, guards open and close cell doors from a control booth, and the occasional visit with a family member, attorney, or doctor takes place behind glass or from within a cage. The effects of spending prolonged periods of time in these conditions on prisoners’ mental and physical well-being are profound.

California’s use of extreme isolation quickly became the target of a larger campaign of prison conditions litigation. Two such California cases, Madrid v. Gomez and Coleman v. Wilson, are perhaps already recognizable as part of the constellation of California prison litigation that eventually culminated in Plata v. Brown, the 2011 Supreme Court case upholding a population cap as an appropriate and necessary remedy to the abject overcrowding in the state’s prison system. California’s implementation of the Plata holding through A.B. 109, or Realignment, has had sweeping consequences for the state’s prison system, but these two cases have had their own independent effect on the California Department of Corrections and Rehabilitation’s (CDCR) policies governing its use of

111. Reiter, supra note 8, at 44-46.
112. Id.; Reiter, Supermax Administration, supra note 11, at 89.
118. Infra Part III.C.
extreme conditions of confinement.

In Madrid, Federal District Court Judge Henderson considered a class action on behalf of all prisoners incarcerated in Pelican Bay. The court declined to rule incarceration in Pelican Bay’s Secure Housing Unit (SHU) per se unconstitutional and instead exempted only those prisoners with a serious mental illness from confinement in the SHU on Eighth Amendment grounds. Coleman, a class action on behalf of all prisoners with serious mental illnesses in the California prison system, found the CDCR’s mental health care delivery system constitutionally deficient, a ruling that has also had consequences for the CDCR’s policies regarding use of force and segregated housing for Coleman class members.

Together, this section argues that Madrid and Coleman have had the effect of categorically exempting seriously mentally ill prisoners from California’s most extreme conditions of confinement by deeming them too vulnerable to the harmful effects of such incarceration. This section describes the different pathways resulting in this exemption and then raises the possibility that, like the death penalty exemptions that preceded them, the California restrictions are less categorical and instead contingent on their implementation.

1. A Jurisprudence of Effects

Madrid and Coleman deviate from the traditional categorical exemptions framework developed in the extreme sentences context. Madrid’s analysis of whether Pelican Bay’s SHU conditions posed a sufficient threat to the mental health of its prisoners centered on the Eighth Amendment’s prohibition of conditions that are inhumane, deprive basic human needs, or fail to provide minimal civilized measures of life’s necessities. The court found that the “degree of mental injury suffered” by the Pelican Bay population at large did not violate this Eighth Amendment prohibition.

120. Id.
121. The CDC has since undergone a name change–it is now the California Department of Corrections and Rehabilitation (CDCR). OPEC Staff, A Decade Ago, A New Name Affirmed Mission of CDCR, CAL. DEP’T OF CORRECTIONS & REHABILITATION (Aug. 28, 2015), http://www.insidecdcr.ca.gov/2015/08/a-decade-ago-a-new-name-affirmed-mission-of-cdcr/. This Article uses the current acronym for consistency’s sake.
Amendment standard, but for “certain categories of inmates,” confinement in the SHU inflicted a “shocking and indecent” injury analogized as the “mental equivalent of putting an asthmatic in a place with little air to breathe.” With this objective Eighth Amendment standard satisfied, the court then analyzed whether this injury resulted from the defendants’ “wanton state of mind” and found that they were indeed deliberately indifferent to the risk of mental harm SHU conditions inflicted on mentally ill or otherwise vulnerable prisoners.

Coleman assessed whether the CDCR’s mental health care delivery system deprived seriously mentally ill inmates of access to adequate mental health care using a two-step inquiry analyzing a subjective and objective component of the Eighth Amendment’s guarantee to provide for prisoners’ basic human needs. First, the court analyzed whether the prison mental health care system deprived seriously mentally ill prisoners of “adequate mental health care” against a “common sense” standard operationalized by six normative health care system components. Judge Karlton’s opinion characterized CDCR’s mental health care as “a systemic failure” that caused the “thousands of class members” with serious mental illnesses incarcerated in California’s prison system to “languish for months, or even years; without access to necessary care . . . [and to] suffer from severe hallucinations, [or] decompensate into catatonic states.”

Second, as in Madrid, Coleman asked whether the defendants acted with deliberate indifference to the needs of seriously mentally ill inmates for mental health care. To this, Judge Karlton found each defendant—CDCR officials and the California governor—responsible “for the tragic state of affairs” that comprised mental health care and their knowledge of its deficiencies and risk of harm “obvious.” The court ordered the defendants to establish a system of mental health care that could accomplish a constitutionally minimal standard of care capable of:

1. a systematic program for screening and evaluating inmates to identify those in need of mental health care;
2. a treatment program that involves more than segregation and close supervision of mentally ill inmates;
3. employment of a sufficient number of trained mental health professionals;
4. Id. at 1265-66.
5. Id. at 1266.
7. Id. at 1298.
8. Id. at 1315-16.
9. Id.
10. Id. at 1317-19.
maintenance of accurate, complete and confidential mental health treatment records; (5) administration of psychotropic medication only with appropriate supervision and periodic evaluation; and (6) a basic program to identify, treat, and supervise inmates at risk for suicide.\textsuperscript{131}

Today, the court continues to supervise the state’s implementation of Judge Karlton’s ruling in a struggle that has spanned more than a quarter century. In part, this negotiation has invoked the logic of categorical exemptions. In April 2014, for example, the court ordered the defendants to revise their use of force and segregated housing policies as applied to Coleman class members.\textsuperscript{132} The revised policies, submitted to the court in August 2014, provide for the categorical exemption of seriously mentally ill prisoners from non-disciplinary placement in administrative segregation.\textsuperscript{133}

\textit{Madrid} and Coleman have used alternative doctrinal frameworks and institutional pathways to effectively categorically restrict the scope of extreme conditions of confinement in California. Where traditional categorical exemption cases center on whether a particular class of defendants \textit{deserve} the most extreme sentence, these cases ask whether the \textit{effect} of certain prison conditions on a particular class is unconstitutional. Moreover, while these cases ultimately extract a promise from CDCR to exempt prisoners with serious mental illness from incarceration in extreme conditions, the categorical exemption is implemented as an administrative response to remedy the constitutional defects identified by the federal courts.

\textit{Madrid} offered the defendants two solutions to their constitutional problem: either conditions in the SHU must change or the “two categories” of prisoners who suffered constitutional harm—those who are already mentally ill or those who face an “unreasonably high risk” of becoming mentally ill because of confinement in the SHU—must be exempt.\textsuperscript{134} Madrid’s effect of categorically exempting the mentally ill from Pelican Bay’s SHU is therefore the product of an administrative response to a legal

\begin{itemize}
\item \textsuperscript{131} Id. at 1298 n. 10.
\item \textsuperscript{134} Madrid, 889 F. Supp. at 1267.
\end{itemize}
ultimatum. Similarly, Coleman’s indictment of the prison’s mental health care system expanded Madrid’s restriction on the SHU at Pelican Bay to the use of segregation and segregated housing in all CDCR facilities through a negotiated mix of judicial and administrative pathways in which the CDCR again deploys the logic of categorical exemptions to comply with a legal mandate.135

2. Implementing the Exemption

Despite the differences in its pathways, the Madrid/Coleman exemption must navigate similar implementation challenges to those identified by empirical studies of death penalty exemptions. Defining the protected category is, as in Wainwright and Atkins, particularly critical to understanding the practical function of this exemption in the actual context of California’s prisons.

Madrid provides some specific language to operationalize the two categories Judge Henderson deemed likely to experience an unconstitutional injury when incarcerated in the SHU: those who are already mentally ill and those who are most vulnerable to serious mental illness if confined in the SHU, including the “persons with borderline personality disorders, brain damage or mental retardation, impulse-ridden personalities, or a history of prior psychiatric problems or chronic depression”.136 In contrast, Judge Karlton’s ruling in Coleman follows the Supreme Court’s approach in Wainwright by declining to offer a definition of mental illness. The opinion concludes that, since the term “has a readily available definition in a medical context, in a legal context, and, as a result of at least two major studies conducted by or for the CDC, in a penological context,” there is no judicial need to provide a specific meaning of the category.137 The difficulties documented in implementing Wainwright and Atkins, however, suggest defining categories that distinguish normalcy from the abnormal and determining who properly fits within its boundaries is no easy process, and that context matters.138

In practice, implementing the Madrid/Coleman exemption has largely been a matter of administrative discretion exercised through a series of CDCR practices and policies revised in response to the litigation.139 For

139. Keramet Reiter & Thomas Blair, Punishing Mental Illness: Trans-Institutionalization and Solitary Confinement in the United States, in EXTREME
example, recent CDCR policies, submitted to the Eastern District Court of California in August 2014 in response to a court order mandating that the CDCR revise how its use of force and segregated housing policies applied to Coleman class members, make clear that only prisoners who meet the criteria for treatment by the CDCR’s Mental Health Delivery System are exempt from the most extreme conditions of confinement. The so-called Coleman Ten delineated in the Program Guide describe ten conditions defined as Axis I disorders in the American Psychiatric Association’s (APA) Diagnostic and Statistics Manual of Mental Disorders (DSM) that qualify a prisoner for treatment in the Mental Health Services Delivery System—and exemption from administrative segregation (ad-seg) and the SHU. Prisoners identified as having: (1) schizophrenia; (2) delusional disorder; (3) Schizophreniform Disorder; (4) Schizoaffective Disorder; (5) Brief Psychotic Disorder; (6) Substance-Induced Psychotic Disorder (excluding intoxication and withdrawal); (7) Psychotic Disorder Due To A General Medical Condition; (8) Psychotic Disorder Not Otherwise Specified; (9) Major Depressive Disorder; or (10) Bipolar Disorders I and II qualify for treatment and Madrid/Coleman protection.

Defining the category is, however, only one nuance of implementation.

PUNISHMENTS: COMPARATIVE STUDIES IN DETENTION, INCARCERATION, AND SOLITARY CONFINEMENT 177, 188-89 (Keramet Reiter & Alexa Koenig eds., 2015).


142. Earlier editions of the DSM distinguished between Axis I and Axis II disorders: Axis II included personality and developmental disorders and all other disorders were considered Axis I. Personality Disorders, AM. PSYCHIATRIC ASS’N, http://www.dsm5.org/Documents/Personality%20Disorders%20Fact%20Sheet.pdf (last visited Mar. 10, 2016). The fifth and most recent edition of the DSM has shifted to a single axis system because “there is no fundamental difference between disorders described on DSM-IV’s Axis I and Axis II.” Id. It is unclear how and if this conceptual shift will affect how the CDCR categorizes mental illness for Madrid/Coleman purposes.

143. Order, supra note 132, at 4 n.9.

144. Id. Prisoners can also receive temporary treatment–and protection– if it is deemed a “medical necessity” or if they demonstrate “exhibitionism.” Id.
Even accepting the CDCR’s delineation of the category as a satisfactory operationalization of the Madrid/Coleman exemption, how prisoners are identified as suffering from one of these disorders remains a potentially problematic implementation nuance in an institution driven by penal rather than the care logics inherent to the DSM. The judicial intervention in the CDCR’s response to mental illness has undoubtedly improved the quality of and access to mental health care afforded to California prisoners, but understanding how the system distinguishes between “mad” and “bad” behavior on the ground\textsuperscript{145} is a critical element for assessing the functionality of the Madrid/Coleman exemption in protecting the seriously mentally ill on the ground.

Further, even once prisoners are identified as exempt from non-disciplinary confinement in the SHU or ad-seg, it is unclear where Coleman Ten class members will be housed. The plan for their alternative placement is, as a footnote in the CDCR’s August 2014 policies mentions,\textsuperscript{146} still in development, leaving the actual conditions of confinement for the seriously mentally ill in California’s prisons unclear. Together, these challenges suggest that the promise of Madrid/Coleman’s categorical exemption is contingent, and perhaps compromised, by how the CDCR elects to exercise its powers of implementation.\textsuperscript{147}

\textit{C. Exempting Vulnerable Inmates from Punitve Segregation at Rikers Island}

Rikers Island serves as New York City’s main jail complex and is one of the country’s largest and most notorious jail complexes.\textsuperscript{148} A series of recent investigations have revealed horrific violence, abuse, and neglect at Rikers, especially against mentally ill and adolescent inmates.\textsuperscript{149}

A 2013 report commissioned by the New York City Board of Corrections (BOC), the city’s jail oversight and rulemaking agency, found

\begin{itemize}
\item \textsuperscript{145} See RHODES, TOTAL CONFINEMENT, supra note 10, at 4.
\item \textsuperscript{146} Defendants’ Plans and Policies, supra note 133, at 12 n.1.
\item \textsuperscript{147} Coleman v. Brown, Order 2:90-cv-00520 LKK-DAD, p. 16, fn. 1 (E.D. Cal. August 1, 2014).
\item \textsuperscript{149} See Amended Complaint, Nunez v. NYC Department of Corrections, et al. 11-cv-5845 (LTS)(THK) (May 24, 2012) (stating that the extreme conditions at Rikers, however, affect its population writ large. The plaintiffs’ complaint in the ongoing Nunez lawsuit provides narratives of the horrific violence inmates experience while incarcerated in New York City).
\end{itemize}
that the number of people with mental illnesses in punitive segregation was almost double the number in the city’s jail population generally and concluded those inmates were disproportionately placed into punitive segregation. In addition to experiencing extreme isolation and the psychologically debilitating effects of solitary, other reports revealed that the mentally ill also experience extreme violence and neglect at Rikers. A four-month New York Times investigation conducted in 2014, for example, described brutal assaults of inmates, especially those with mental illnesses, by correction officers as a “common-occurrence.” That same year, Jerome Murdough, an inmate who was taking anti-psychotic and anti-seizure medications that may have increased his sensitivity to heat, was found dead in his cell, which had reached at least 100 degrees. Murdough’s autopsy results were inconclusive, but an anonymous city official said that “[h]e basically baked to death.”

Adolescents also experience particularly harsh conditions at Rikers. A second 2013 BOC report identified adolescents with mental illnesses as especially vulnerable to placement in punitive segregation. According to one daily-snap shot statistic cited in the report, 27% of Riker’s adolescent population, which comprises only 5% of the institution’s average daily population, were in punitive segregation and some 71% of those were diagnosed as mentally ill. Most recently, a Department of Justice (DOJ) report released in August 2014 has focused much of the discussion on the

151. Id.
153. Id.
155. Id.
157. Id.
“deep-seated culture of violence” incarcerated adolescent males experience at Rikers. The DOJ report found that correction officers regularly used unnecessary and excessive force against teenage inmates and, as in the 2013 BOC report, relied heavily on punitive segregation as a means of control and management. The report proposed over seventy specific remedial measures and warned that without significant reforms, the federal government would sue the city.

Against this background of controversy over conditions in its jails, the city initiated a piecemeal process of revising its policies that included developing a series of categorical exemptions from punitive segregation. This section traces these administrative exemptions and suggests that they, though undoubtedly progressive reforms, may also facilitate maintaining extreme conditions in Rikers.

1. Administrative Pathways to Categorical Exemptions

In June 2013, the city’s BOC considered a petition proposing significant revision to the city’s solitary confinement policies. The petition, organized by the New York City Jails Action Coalition, sought to end the DOC’s use of punitive segregation except as a last resort to prevent violence and to place limitations on the number of days and daily hours an inmate could spend in solitary. Under the proposal, vulnerable populations—inmates with mental or physical disabilities or serious injuries and those under 25 years old—would be categorically exempted from isolation and, as a last resort to prevent violence, would instead be placed in

159. Id.
160. Id. at 51-63.
162. Id.
an “alternative safety restriction” providing for a therapeutic plan, out of cell time, and positive incentives.\textsuperscript{165} At its June 2013 meeting, the BOC voted against initiating a rulemaking process that would implement these revisions but designated the use of solitary confinement, especially as applied to mentally ill and adolescent inmates, as an area of concern.\textsuperscript{166} The Board promised to revisit the issue in the fall.\textsuperscript{167}

At its September 2013 meeting, the BOC indeed voted to review the city’s solitary policies, beginning a process that would eventually culminate in a series of categorical exemptions to the city’s use of punitive segregation for housing vulnerable classes.\textsuperscript{168} By the end of 2013 the “Mental Health Assessment Unit for Infraacted Inmates” (MHAUII), which functioned as Riker’s punitive segregation unit for inmates with mental illnesses, closed and all inmates were transferred to other units.\textsuperscript{169} Then, in 2014, the city announced a series of exemptions for adolescents, first eliminating punitive segregation for 16- and 17-year old inmates at Rikers\textsuperscript{170} and then, in January 2015, expanding the exemption to eventually include all inmates under 21-years-old.\textsuperscript{171} The move came on the heels of the DOJ’s report on the dire conditions adolescents experience at Rikers and the federal government’s subsequent move to join\textsuperscript{172} an existing class-action

\textsuperscript{165}.  Id.
\textsuperscript{166}.  New York Board of Corrections, supra note 161, at 4.
\textsuperscript{167}.  Id. at 5.
\textsuperscript{172}.  Memorandum of Law in Support of the United States of America’s Motion to Intervene, 11 Civ. 5845.
lawsuit filed in 2011 on behalf of a group of present and former inmates.\footnote{173} The DOC announced that Rikers’ youngest inmates had all been moved from punitive segregation less than three months after the \textit{New York Times} broke the story but that its policy to exempt all inmates under 21-years-old will not be implemented until 2016.\footnote{174}

The BOC officially amended the Minimum Standards, the regulations governing the city’s jails, in January 2015.\footnote{175} These new rules officially incorporated the categorical exclusion of inmates under 18 and inmates with serious mental or physical disabilities or conditions from punitive segregation.\footnote{176} They also provide that inmates age 18 to 21 should be exempted from punitive segregation by January 2016, if the DOC is afforded the resources necessary for additional staffing and alternative programing.\footnote{177} Notably, while these policy shifts developed against the background of a DOJ investigation and lawsuit, these exemptions were implemented via entirely administrative rather in direct response to lawsuit as in the California example described above.\footnote{178}

2. Reconfiguring the Realities of Solitary

The city’s revised punitive segregation policies, especially its exemption of adolescents, have garnered it praise as a “leader in solitary confinement reform.”\footnote{179} This title is likely to be cemented once settlement negotiations are finalized in the \textit{Nunez} lawsuit, which the city’s mayor

\footnote{173.  Amended Complaint, \textit{Nunez v. NYC Department of Corrections}, et al., 11-cv-5845 (LTS)(THK) (filed May 24, 2012).}
\footnote{177.  \textit{Id.}}
\footnote{178.  \textit{Supra} Part II.1}
\footnote{179.  Winerip & Schwirtz, \textit{supra} note 171, at 3.}
hopes will make Rikers “a national model of what is right.”\(^ {180}\) The tentative settlement agreement, along with implementing a host of other reforms targeted at reducing violence at Rikers, incorporates the city’s existing administrative exemption of 16- and 17-year olds from punitive segregation and would include additional restrictions against placing 18-year-old inmates with serious mental illnesses in isolation.\(^ {181}\) Praise for the city’s series of categorical exemptions from punitive segregation is not misplaced—adolescents, the mentally ill, and the disabled are especially vulnerable to the devastating effects of solitary confinement’s extreme isolation\(^ {182}\) —but a closer analysis reveals the concurrent power of categorical exemptions to maintain the very extreme punishments they purport to restrict.

At its most explicit, this power is revealed by the practical implementation of categorical exemptions through special housing units. The city has created a series of alternative units to house inmates who would otherwise be eligible for punitive segregation, but gaps in their operation risk undermining the ability of categorical exemptions to provide vulnerable groups with meaningful alternatives to punitive segregation.\(^ {183}\) For example, inmates with serious mental illness are now housed in the “Clinical Alternative to Punitive Segregation” (CAPS), which is modeled after a psychiatric hospital, while inmates with less serious mental health diagnoses are housed in the “Restricted Housing Unit” (RHU), which combines time spent in solitary with access to therapeutic services.\(^ {184}\) Adolescents who commit low-level or non-violent infractions are now sent to the Second Chance Housing Unit where they are provided special programing while those who commit more serious infraction are sent to the Transition Repair Unit (TRU) where they have access to individual support and therapy.\(^ {185}\)


\(^{181}\) Id.


\(^{184}\) Id.

\(^{185}\) *De Blasio Administration*, *supra* note 174.
Yet, the practical operation of these units raises questions about how these exemptions truly function to limit the experience of extreme conditions. For example, at a December 2014 BOC hearing, DOC Commissioner Ponte acknowledged that no written policy directive existed for the TRU and could not clarify the number of hours of out-of-cell time provided to the adolescents currently housed there.\footnote{186} A January 2014 BOC meeting similarly revealed that the city had no uniform manual describing the program and operation of RHU units.\footnote{187} Mentally ill inmates housed in the RHU should have access to therapeutic services\footnote{188} but, in practice, these units have struggled to provide even minimal services,\footnote{189} suggesting that they may be a functional reincarnation of the MHAUII where mentally ill inmates spend time in solitary and receive little to no treatment. Ultimately, gaps in the operation of alternative housing units that facilitate the practical implementation of categorical exemptions raise the possibility that these simply reconfigure rather than eliminate the experience of extreme conditions for vulnerable groups.

Second, the administrative pathway to these categorical exemptions reveals their subtle ability to facilitate the entrenchment of extreme conditions more generally. The January 2015 revisions to the Minimum Standards codified the categorical exemption of the most vulnerable inmates from punitive segregation while simultaneously creating a new isolation unit termed the “Enhanced Supervision Housing” (ESH).\footnote{190} The ESH is a non-punitive units for those inmates deemed to constitute the “most direct security threats.” Inmates will be locked in their cell for up to

\footnote{186. It was suggested that the TRU provides two hours of out of cell time in the morning and two in the afternoon, which means that adolescents functionally spend 20 hours per day locked down in their cells. This is the functional equivalent of solitary confinement. Transcript of Proceedings, NYC.GOV 19-20 (Dec. 19, 2014), http://www.nyc.gov/html/boc/downloads/pdf/Variance_Documents/2015113/12.19.14%20-%20Board%20of%20Correction%20Public%20Hearing%20Transcript.pdf.}


\footnote{188. De Blasio Administration, supra note 174.}

\footnote{189. New York Board of Corrections, supra note 187.}

\footnote{190. The rules also reformed the use of punitive segregation more generally by eliminating earned time and limiting the number of consecutive days an inmate can spend in punitive segregation to sixty days. Memorandum from Ashley D’Inverno, Dir. Of Research & Compliance to Members of the Board of Correction (May 8, 2015), available at http://www.nyc.gov/html/boc/downloads/pdf/reports/Punitive%20Segregation%20Report.050815.pdf.}
seventeen hours a day and have restrictions on visiting, using the law library, and other activities.191 Those inmates exempted from punitive segregation are also exempted from EHS.192

DOC Commissioner Ponte has explained that EHS units are not “a backdoor punitive segregation unit”193 but EHS seemed to represent the proliferation of isolation as a mechanism of managing and controlling inmates.194 In comparison, inmates in punitive segregation spend at least 20 hours a day locked down in their cells,195 have reduced or no access to the law library196 and restrictions on activities like showering.197 Punitive segregation houses inmates who infract while in DOC custody,198 but EHS is more expansive, housing inmates who “pose a credible threat to the safety, security, and good working order” of DOC facilities.199 Inmates may be moved to EHS if they: (1) are identified as gang leaders or members; (2) have committed stabbings or slashings; (3) have possessed scalpels; (4) have engaged in serious and persistent violence, participated in riots, protests or other disturbances or; (5) are seen as threats to safety and security.200 These categories leave a considerable amount of discretion in deciding which inmates are eligible for EHS, which could lead to overuse and misuse of the unit—and the imposition of isolation for inmates at Rikers.201

192. Id.
194. Id.
197. Id. at §1-03(b)(2).
199. Id. at 1.
201. Letter from Thomas M. Susman, Director of Governmental Affairs Office American Bar Association, to Gordan J. Campbell & Board Members, N.Y.C.
The recently adopted rules combined reforms to punitive segregation with the creation of EHS; BOC members had no choice but to approve either both or neither.\textsuperscript{202} How the BOC’s fall 2013 vote to initiate the process of reviewing the city’s solitary policies\textsuperscript{203} culminated in new rules combining three categorical exemptions to punitive segregation with the expansion of isolation as a mechanism of control at Rikers suggests the power of categorical exemptions to protect the very extreme punishment they purport to restrict. The city’s simultaneous restrictions on isolation and creation of the EHS reveals that its policy shift is perhaps aimed not at eliminating extreme conditions but at reconfiguring their form. Isolation remains a viable policy—so long as the most vulnerable groups are exempted, as they are from both punitive segregation and the EHS in New York. In this sense, the city’s categorical exemptions may function to make new forms of isolation politically palatable and maintain a carceral culture of extremes.

\textit{D. Exempting the Non-Non-Nons from California’s Prisons}

California’s prison system is, even in a country of punitive extremes, notorious. Its 2009 prison population—some 171,275 inmates—vastly exceeded every other U.S. state, all but eight countries worldwide, and even its own prison system design capacity.\textsuperscript{204} The vast dimensions of the state’s prison population caused extreme overcrowding—the system was operating at or above 200\%—\textsuperscript{205} that, in turn, “produced a permanent state of chaos” that further strained its already inadequate health care delivery system and forced a perpetual state of emergency.\textsuperscript{206} Governor Arnold Schwarzenegger’s official proclamation of a state of emergency in California’s prisons described a set of inhumane conditions that cause a

\begin{footnotesize}
\begin{itemize}
\item Board Of Correction (Dec. 18, 2014), \textit{available at} http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014dec18_lettertonycboc.authcheckdam.pdf (Regarding Proposed Rules Revisions and Creation of Enhanced Supervision Housing).
\item \textit{See} STEVEN RAPHAEL & MICHAEL S. STOLL, WHY ARE SO MANY AMERICANS IN PRISON? 4 (2013).
\item JONATHON SIMON, MASS INCARCERATION ON TRIAL 113–17 (2014).
\end{itemize}
\end{footnotesize}
“substantial risk to the health and safety” to those who work in and are incarcerated in the prison system.207

To manage the logistics of housing in an overburdened system, some prisoners were housed in “bad beds”—the practice of triple-bunking inmates in unconventional spaces such as gyms and dayrooms.208 Consequences for prisoner health were substantial; Governor Schwarzenegger’s proclamation, for example, identified an increased risk of infectious disease transmission and declared that the weekly suicide rate was approaching an average of one per week. Overcrowding simultaneously increased health risks while undermining the system’s ability to provide adequate medical and mental health care by straining staffing resources, thwarting the proper classification of prisoners according to their health needs, and undermining the development of a medical records system.209 Simply, overcrowding imposed a set of extreme, and ultimately unconstitutional, conditions in California’s prison system that could only be remedied by decreasing the prison population.

In 2010, a special three-judge panel convened pursuant to the Prison Reform Litigation Act ordered the state to bring its prison population to within 137 % of the system’s design capacity within two years by ostensibly reducing its prison population by some 40,000 prisoners or building new prisons.210 The state appealed and, just as the order’s two-year window was set to expire, the U.S Supreme Court upheld the prison population reduction order as a necessary means to remedy constitutionally-deficient medical and mental health care systems in California’s prisons.211 Plata is considered the country’s most radical prison injunction212 and

208. See Brown v. Plata, 131 S.Ct. 1910, 1949–50 (2011) (including three photos of depicting the conditions in California’s prisons: one of the “dry cages” designed to hold mentally ill inmates awaiting treatment and two capturing the chaotic “bad beds”); Coleman, 922 F.Supp.2d at 888; Id.
209. See Schwarzenegger, supra note 207.
California’s implementation of the reduction order by ‘realigning’ California corrections is considered the “the biggest penal experiment in modern history.” This section argues that California’s AB 109—commonly called Realignment—utilizes the logic of categorical exemptions to comply with *Plata* and may very well reproduce a similar set of extreme conditions in the state’s jails.

1. Realigning California’s Non-Non-Nons

In order to reduce its prison population rather than release prisoners or build new prisons, California elected to transfer responsibility for supervising a portion of the state’s post-conviction population from the state to the counties and reform the state’s parole system. This section focuses on the “non-non-nons,” a legislatively constituted class now excluded from the state prison system under Realignment. California’s creation and treatment of the non-non-nons invokes the logic of categorical exemptions as a partial remedy to the crisis of overcrowding. A.B. 109 defines the non-non-nons as those offenders who have been convicted of a nonserious, nonviolent, nonsexual crimes and mandates that, unless they have a prior serious or violent felony conviction, non-non-nons serve their sentences—the lengths of which are unchanged by Realignment—and post-release supervision under county control.

The offenses constituting the category of non-non-non are legislatively delineated; realignment eliminated the possibility of a prison sentence for some 500 offenses by amending California’s Penal, Health and Safety, and Vehicle Codes. However, individuals convicted of a prior or current serious or violent felony under Penal Code 1192.7(c) or 667.5(c) or

*and Politics, 48 HARV. C.R.-C.L. L. REV. 165, 165 (2013).*


218. This section lists forty-two categories of serious crimes. CAL. PENAL CODE § 1192.7(c) (West 2012).

219. This section lists twenty-three categories of violent crimes. CAL. PENAL
those required to register as a sex offender under Penal Code 290 are, for example, still required to serve their sentences in state prison. Together, this legislative exemption has funneled an average of 1,716 non-non-non offenders per month to serve their sentences in county jail rather than state prison since Realignment’s enactment in October 2011.

2. Reproducing Extreme Conditions

Realignment’s exemption of the non-non-nons from state prison is intended to alleviate the system’s chronic and unconstitutional levels of overcrowding. Yet, its focus on shifting bodies rather than addressing root causes of California’s bloated prison population has had a significant impact on the state’s jails. The average daily population in county jails has increased by approximately 8,600 prisoners—a 12% increase—between June 2011 and June 2012. Jails have also been transformed from facilities that typically housed individuals serving sentences of less than one year and awaiting trial to institutions where non-non-nons may serve much longer sentences. Fresno County is, for example, housing one inmate serving an eighteen-year sentence and in Los Angeles County, one inmate is serving almost fifty years.

These examples are particularly dramatic, but long sentences are proliferating in the jails. In April 2014, the California State Sherriff’s Association reported 1,635 jail inmates sentenced to five to ten years and

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CODE § 667.5(c) (West 2014).
222. CAL. DEP’T OF CORRECTIONS & REHAB., supra note 220, at 2.
224. Id. at 6.
124 serving more than ten years across fifty-two reporting counties. 226 In short, Realignment’s categorical exemption of the non-non-nons has shifted more prisoners serving longer sentences to the jail and perhaps reproduced the very conditions that required judicial intervention into California’s prisons. 227

Criminal justice stakeholders across California have described jail overcrowding—in 2014, jail systems in thirty-seven counties were operating under either a self-imposed or court-ordered population cap. 228 As in the prison system, this overcrowding has been accompanied by increases in violence and strains on medical and mental health services in the jails that have exacerbated conditions. 229 The state’s ten largest jails have, for example, reported 2,000 more assaults on inmates and 165 more assaults on staff in 2013 as compared to 2012 levels. 230 Sheriffs have described more lock downs to cope with increased violence and maintain inmate safety by keeping inmates in their cells. 231 Further, since jails were not typically designed to hold long-term inmates, they often are not equipped with extensive medical facilities. 232 As a result, jail inmates have reported waiting weeks for before receiving medical or mental health care. 233 An inmate in the Fresno jail system, for example, was hospitalized after a slash wound inflicted by an untreated, mentally ill inmate was left untreated by staff. 234

It seems that the deterioration of jail conditions has borne out Margo Schlanger’s hydra-threat prediction that Plata, by “chopping off the head of unconstitutional conditions” in the prisons, would proliferate both poor conditions and reform litigation aimed at the counties. 235 The Prison Law

229. Id. at 12.
231. Id.
233. Id. at 15.
235. Schalnger, supra note 212, at 210.
Office, responsible for the litigating much of the California prison conditions suits, has already replicated its Eighth Amendment strategy to bring judicial attention to jail conditions, filing suits in both Fresno\(^{236}\) and Riverside\(^{237}\) counties, and is actively negotiating with county officials in San Bernardino.\(^{238}\) Other organizations have also filed suit in Alameda\(^{239}\) and Monterey\(^{240}\) counties alleging unconstitutional conditions in the jails.\(^{241}\)

The spread of extreme conditions of confinement and reform litigation to the very jails tasked with supervising the non-non-nons reveals the flaws in reconfiguring criminal justice policy through exemptions rather than reforming the essential causes and qualities of extreme punishment. Exempting particular offenders from state supervision has helped to alleviate some of California’s prison overcrowding crisis,\(^{242}\) but it has failed to address the complexities that contributed to the parallel rises of tough-on-crime politics and mass incarceration.\(^{243}\) Instead, this exemption has


\(^{239}\) Legal Services for Prisoners with Children v. Ahern, No. RG 12656266 (Cal. filed Nov. 18, 1990).


\(^{241}\) For a discussion of the content of these jail condition complaints, See Reiter & Pifer, supra note 212, at 9-10.


\(^{243}\) See, e.g., VANESSA BARKER, THE POLITICS OF IMPRISONMENT 47-84 (2009) (arguing that a neopopulist political order facilitated the rise of California’s punitive regime); Allen Hooper et al., Shifting the Paradigm or Shifting the Problem? The Politics of California’s Criminal Justice Realignment, 54 SANTA CLARA L. REV. 527, 534-44 (2014) (explaining the transformation of California’s crime policies). See generally GILMORE, supra note 3 (explaining the political and economic shifts that contributed to the expansion of California’s prison system); JOSHUA PAGE, THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS UNION IN CALIFORNIA (2011) (identifying the key political organizations that have entrenched California’s tough on crime politics).
functioned to reproduce state problems at the local level and, while
litigation emulating the *Plata* reform strategy has already commenced in
several counties, the diffuse nature of the “hydra-threat” makes reproducing
the reform strategy difficult. California’s counties, unlike its prison system,
cannot be joined into a single entity, so lawyers must work county by
county to win the reforms that have taken more thirty years to achieve in the
prisons.244

More fundamentally, Realignment’s allocation of $4.4 billion by 2016-
2017 to help jails cope with its new responsibilities, including supervising
the non-non-nons,245 may further entrench the culture of incarceration that
helped facilitate the rapid and significant growth of California’s prison
population. AB 109 encourages counties to invest in evidence- and
community-based alternatives to incarceration, but counties retain
significant discretion over how to allocate the funds.246 Some counties are
indeed investing in alternatives to incarceration to supervise their non-non-
non populations. For example, Santa Clara has developed a program to
divert eligible individuals from jail to house arrest, a temporary housing
unit, or a sober living environment and Riverside County has increased its
pretrial ankle-bracelet program from 500 to 2000 individuals.247 Yet,
research reveals that thirty-nine of California’s counties have adopted a high
or medium “control-orientation” in their Realignment spending plans,
meaning that punishment, incarceration, and surveillance are prioritized in
their budgetary decisions.248 The legislature also has earmarked an
additional $7 billion in the Public Safety and Offender Rehabilitation Act to
help jails expand their capacity.249 By 2013, twenty-one counties had plans
to construct additional jail facilities that would add a theoretical 10,811
beds across the state’s jails.250

This is a particularly ironic implementation of Realignment in light of
the bill’s statement of legislative intent characterizing policies that rely on

Are Spending Their Public Safety Realignment Funds*, STAN. CRIM. JUST. CENTER
1, 7 (2014).
246.  Sonya Tafoya et al., *Corrections Realignment and Data Collection in
249.  *AB 900 Jail Construction Financing Program Board of State and
Community Corrections Project Status Update – Phases I and II*, CAL. BOARD OF
STATE & COMMUNITY CORRECTIONS (Jan. 25, 2013), http://www.bscca.gov/
downloads/AB_900_Project_Status_Update_for_BSCC_web_012513.pdf.
250.  Id.
building more prisons as neither sustainable nor an improvement for public safety.\textsuperscript{251} It is, however, perhaps not surprising. The imminent expansion of the state’s jail systems to cope with the influx of non-non-nons to the local level echoes the rapid expansion of the prison system just a few decades earlier—an expansion that tracked with the rise of tough on crime policies and the entrenchment of mass incarceration.\textsuperscript{252} Shifting the expansion of California’s incarceration capacity—along with the state’s non-non-nons—to the jails perhaps signals the spread of California’s addiction to incarceration in the local rather than the turning of the carceral tides Realignment suggests. Tellingly, against this background, California’s jail population continues to grow and conditions continue to deteriorate.\textsuperscript{253}

**IV: REFORMING OR RECONFIGURING?**

Categorical exemptions have proliferated across the extreme punishment landscape. The U.S. Supreme Court has deployed its doctrine of categorical exemptions to constitutionally limit the scope of defendants and crimes subject to the criminal justice system’s most extreme sentences. In the death penalty context, the Court has carved out the classes whose execution is no longer consistent with the Eighth Amendment’s evolving standards of decency—those classes, such as mentally ill death row inmates,\textsuperscript{254} the intellectually disabled,\textsuperscript{255} children,\textsuperscript{256} or defendants who do not take a life,\textsuperscript{257} who do not deserve death. The Court has extended, and in some way stretched, its capital punishment jurisprudence to also categorically exempt juveniles from some applications of life without parole (LWOP) sentences.\textsuperscript{258}

\textsuperscript{251} Cal. Penal Code § 17.5(a)(3) (West 2010).
\textsuperscript{252} Gilmore, supra note 243.
\textsuperscript{253} Magnus Lofstrom & Brandon Martin, Public Policy Institute of California California’s County Jails, PUB. POL’Y INS. CAL. (Apr. 2015), available at http://www.ppic.org/main/publication_show.asp?i=1061 (discussing the rise in California’s jail population and how this contributes to jail overcrowding).
\textsuperscript{254} Ford, 477 U.S. 399.
\textsuperscript{255} Atkins, 536 U.S. 304.
\textsuperscript{256} Roper, 543 U.S. 551.
\textsuperscript{257} Kennedy, 554 U.S. 407; Coker, 433 U.S. 584.
\textsuperscript{258} Miller, 132 S. Ct. 2242 (exempting all juvenile defendants from mandatory life without parole sentences); Graham, 130 S.Ct. 2011 (exempting juvenile defendants convicted of non-homicide crimes from life without parole).
In both lines of jurisprudence, the Court leverages categorical exemptions to cleave out those classes whose punishment by the most extreme sentences undermines contemporary cultural sensibilities. Though steeped in constitutional analysis, these cases reflect an inherently moral judgment about who deserves to die at the state’s hand either directly by execution or indirectly by lingering on death row or serving LWOP. In this original articulation, categorical exemptions serve as a doctrinal mechanism that enables the judiciary to police the periphery of extreme sentences in accordance with the Court’s post-

_Furman v. Georgia_ pivot to constitutional oversight rather than abolition of the death penalty.

The logic of exempting has also proliferated beyond the Supreme Court’s extreme sentences docket to, as a novel analysis moving from SHU and ad-seg units in California’s prison to the use of punitive segregation in New York City’s Rikers Island and back to California’s unconstitutionally overcrowded prison demonstrates, other sites in the penal field. On their face, the policies that intervene into the extreme conditions of confinement analyzed above resemble traditional categorical exemptions in important ways.

Substantively, each utilizes the logic of carving out classes as a mechanism of reforming extreme punishments by narrowing their scope. Yet, the function of these ostensible restrictions on prison conditions cannot be understood separate from their implementation and it appears that these novel exemptions may not be as categorical as they appear. For example, similar to the definitional challenges that undermine _Wainwright_ and _Aktins_, California’s exemption of seriously mentally ill prisoners from SHU and ad-seg units may suffer from fundamental defects in defining the protected class. Under CDCR regulations, ten DSM Axis-I disorders constitute the protected class, yet this operationalization may not sufficiently capture the universe of prisoners who, as Judge Henderson’s analogy frames the class, experience isolation as “an asthmatic [experiences] a place with little air to breathe.”

Yet, even if policymakers draw perfect definitional boundaries around the class, the alternative punishments applied to exempted classes may do little to alleviate the core concerns prompting reform in the first place. For example, as the CDCR’s August 2014 regulations acknowledge, the state’s plan for implementing alternative housing placements for California prisoners identified as seriously mentally ill and therefore exempt from non-disciplinary placement in ad-seg or the SHU is still in development.

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259. See GARLAND, supra note 22, at 18.
260. See id. at 257.
261. See Madrid, 889 F. Supp. at 1265.
262. Defendants’ Plans and Policies, supra note 133.
New York City’s jails, new units that serve as alternatives to punitive segregation for exempted inmates, without careful attention to actual levels of therapeutic services and out-of-cell time, risk creating a functional equivalent of isolation. California’s transfer of the non-non-nons from the state to the local has reproduced conditions of overcrowding, violence, and deficient medical and mental health care in its jails. Just as a lengthy term-of-years sentence may functionally impose a JLWOP sentence, how these policies are implemented in practice may reconfigure and reproduce rather than eliminate the realities of extreme conditions for exempted classes in new spaces.

More broadly, even as they reject applying the most controversial punishments to particular groups, categorical exemptions offer a way to maintain and even expand the use of harsh penal practices. New York City’s categorical exemption of vulnerable classes from punitive segregation, for example, comes with limitations of the practice but also creates a new housing unit that continues and even expands the use of isolation in the city’s jails beyond discipline as a fundamental management strategy for other inmates. Similarly, California’s transfer of the non-non-nons to local jails alleviates some degree of overcrowding in the state’s prisons but does not address the fundamental policies of mass incarceration that have contributed to its overwhelming prison population. By framing reform efforts around who is punished rather than around the nature of modern punishment, categorical exemptions enable the status quo.

Noting the disparate pathways these novel exemptions travel further demonstrates that category drawing is a fundamental strategy through which policymakers are navigating penal reform. Each of the three novel categorical exemptions analyzed above emerge not as a result of a constitutional mandate as in the extreme sentences context but as an instrumental policy solution adopted by political actors that achieves enough reform to alleviate external pressures while not fundamentally

263. Jail Action Coalition, supra note 164.
264. CAL. STATE SHERIFF’S ASS’N, supra note 226.
266. See supra Part II.2.
267. See Lofstrom & Martin, supra note 253.
changing the status quo. In the California examples, federal courts identify fundamental aspects of the state’s prison system as unconstitutional but leave the nuances of reform to the state’s discretion. Employing the logic of restricting—whether by promising the categorical exemption of the state’s seriously mentally ill prisoners from confinement in extreme forms of isolation or precluding the non-non-nons from serving time in prison—offers state actors a mechanism that promises legal compliance without fundamental transformation. Carving out classes in this context then is not a moral expression of who does not deserve harsh punishments, but an explicitly political mechanism that facilitates the ongoing process of contestation that undergirds the modern penal field.268

These case studies are not outliers, but instead part of a larger constellation of contestation in the penal field.269 Categorical exemptions are an instrumental manifestation of this struggle and the logic of restricting has been deployed in a variety of jurisdictions grappling with how to reform extreme conditions of confinement. There has been, for example, an unprecedented push to reform the use of solitary confinement against juveniles and the mentally ill through various institutional pathways: Colorado enacted legislation banning the solitary confinement of the seriously mentally ill in June 2014;270 an October 2014 settlement agreement negotiated by the Arizona Department of Corrections and the ACLU provides mentally ill prisoners held in solitary with increased access to mental health care and time outside their cells;271 and, most recently, in May 2015, Illinois banned the use solitary confinement for juveniles as a result of a settlement negotiation between the Illinois Department of Juvenile Justice and the ACLU.272 This list is not exhaustive and similar campaigns invoking categorical exemptions in order to reform the use of isolation continue to percolate across the country.273 It is clear that categorical exemptions will be a central mechanism of negotiating reform.

268. See Goodman et al., supra note 23.
269. Id.
270. COLO. REV. STAT. § 17-1-113.8 (2014).
Yet, their promise to reform may very well ensure the survival of our cruelest practices. Strategies predicated on carving out classes—whether they exempt out vulnerable groups from the death penalty, LWOP, or isolation or shift the non-non-nons from prison to jail—risk obscuring fundamental realities about modern punishment. The discourse of categorically exempting risks losing site of rethinking how we punish in favor of rethinking who we punish, a tradeoff with real consequences. For example, the categorical exemption of seriously mentally ill prisoners from Pelican Bay’s SHU still leaves others incarcerated to Pelican Bay to experience the:

“overall effect of the SHU is one of stark sterility and unremitting monotony. Inmates can spend years without ever seeing any aspect of the outside world except for a small patch of sky. One inmate fairly described the SHU as being ‘like a space capsule where one is shot into space and left in isolation.’”

Insofar as categorical exemptions enable policymakers to grapple with these realities by tinkering with the edges rather than transforming institutions, they may entrench rather than reform the punitive status quo.

V. CONCLUSION

It is clear that categorical exemptions have proliferated as an instrumental strategy of reforming punitive criminal justice practices ranging from extreme sentences to extreme conditions of confinement. However, their ultimate meaning for the penal field is uncertain. On a practical level, their impact on penal practices is, as this Article has demonstrated, inextricably contingent on the nuances of their implementation, a process that requires policymakers to navigate both defining protected classes and developing meaningful alternatives to prohibited practices. Imperfect implementation can produce a gap between the promise of categorical exemptions and carceral realities that are reconfigured and reproduced rather than reformed.

Yet, categorical exemptions also make tangible differences in the lives of the very real individuals who move through the criminal justice system. For example, eighty-eight intellectually disabled offenders were exempted

from the death penalty in the first six years following *Atkins v. Virginia*.275 Similarly, the ninety-one adolescents held in punitive segregation at Rikers Island in 2014 have all been transferred to other housing units.276 These effects should not be discounted, but instead contextualized against the broader role of categorical exemptions in the evolution of the penal field.

Changes to the penal field unfold over the long-term and as a result of constant struggle.277 Thus, determining the ultimate meaning categorical exemptions hold for modern punishment is premature, but regardless, their role as a contemporary mechanism through which various criminal justice stakeholders negotiate change, renders them a critical lens through which to analyze the development of the penal field.