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

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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[2] and, once other forms of state surveillance like parole or probation are considered, this figure rises to nearly seven million.[3] Punishment and society literature has dubbed this explosion of the carceral state "mass incarceration" and has sought to understand the causes[4] and consequences[5] of the turn to the punitive in the late 20th century.

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2. *Incarceration*, SENT'G PROJECT, http://sentencingproject.org/template/page.cfm?id=107 (last visited Jan. 12, 2016).

3. MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 1 (2006).

4. *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.

GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA (2007) (explaining the prison boom in California from political and economic standpoints); GOTTSCHALK, *supra* note 3 (discussing the beginnings of American mass incarceration); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2012) (tracing the War on Crime through changes in the governance of daily life like employee drug testing and metal detectors in schools); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2012); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009) [hereinafter WACQUANT, PUNISHING THE POOR] (examining the justice system's criminalizing and punitive approach to poverty); JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003) (discussing the comparative harshness of American justice); JOCK YOUNG, THE EXCLUSIVE SOCIETY: SOCIAL EXCLUSION, CRIME AND THE DIFFERENCE IN LATE MODERNITY (1999) (analyzing the societal exclusion of criminals economically, socially, and politically); Anthony Platt, *Social Insecurity: The Transformation of American Criminal Justice, 1965-2000*, 28 SOC. JUSTICE 138 (2001) (discussing the lack of public safety in the U.S.); Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3.1 PUNISHMENT & SOC'Y 95 (2001) (discussing how the carceral system entraps black men and black communities in a cycle of poverty and crime).

5. *See generally* KATHERINE BECKETT & STEVE HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA (2009) (analyzing the function of "zero tolerance" policies in banishing people from certain areas of Seattle known for illegal activity); MEGAN COMFORT, DOING TIME TOGETHER: LOVE AND FAMILY IN THE SHADOW OF THE PRISON (2008) (following women with loved ones in San Quentin State Prison and their coping mechanisms); JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (2006) (exploring the consequences of polices that disenfranchise felons, which disproportionately affect black men); MARC MAUER & MEDA CHESNEY-LIND, INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (2003) (noting disenfranchisement, ineligibility for public benefits, and family division as collateral consequences of the American justice system); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006) (outlining the economic marginalization of former felons); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937 (2003) (discussing the effects of a criminal record on released inmates); Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151 (2004) (suggesting incarceration as a new stage in the life course of young black men); Sara

Along with this increase in the dimensions of penality, 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.[6] A decade earlier, the first supermaximum (supermax) security prisons opened first in Arizona[7] and then in California.[8] By the late 1990s, nearly every state had a supermax facility[9] 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.[10] Today, supermaxes hold so many prisoners that some facilities are forced to double-bunk two prisoners in one eighty-square-foot cell.[11] 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.[12] 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

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Wakefield & Christopher Uggen, *Incarceration and Stratification*, 36 ANN. REV. SOC. 387 (2010) (discussing the stratifying effects of mass incarceration).

6. MARK MAUER ET AL., THE MEANING OF 'LIFE': LONG PRISON SENTENCES IN CONTEXT 11 (2004), *available at* http://www.sentencingproject.org/doc/publications/inc_meaningoflife.pdf; ASHLEY NELLIS, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 1 (2013), *available at* http://sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf; ASHLEY NELLIS & RYAN S. KING, NO EXIT: THE EXPANDING USE OF LIFE WITHOUT PAROLE IN AMERICA 9 (2009), *available at* http://sentencingproject.org/doc/publications/publications/inc|_NoExitSept2009.pdf.

7. MONA LYNCH, SUNBELT JUSTICE: ARIZONA AND THE TRANSFORMATION OF AMERICAN PUNISHMENT 5 (2010).

8. Keramet A. Reiter, *Parole, Snitch, or Die: California's Supermax Prisons and Prisoners, 1997-2007*, 14 PUNISHMENT & SOC'Y 530, 531 (2012).

9. U.S. DEP'T JUST., SUPERMAX HOUSING: A SURVEY OF CURRENT PRACTICE 4-6 (1997), *available at* http://static.nicic.gov/Library/013722.pdf; Alexandra Naday et al., *The Elusive Data on Supermax Confinement*, 88 PRISON J. 69, 75 (2008).

10. LORNA A. RHODES, TOTAL CONFINEMENT: MADNESS AND REASON IN THE MAXIMUM SECURITY PRISON 2 (2004); SHARON SHALEV, SUPERMAX: CONTROLLING RISK THROUGH SOLITARY CONFINEMENT 3 (2013).

11. Keramet A. Reiter, *Supermax Administration and the Eighth Amendment: Deference, Discretion, and Double Bunking, 1986-2010*, 5 U.C. IRVINE L. REV. 89, 91 (2015).

12. Angela Browne et al., *Prisons Within Prisons: The Use of Segregation in the United States*, 24 FED. SENT'G REP. 46 (2011).

institution reemerged rather than faded from the American arsenal of punishment.[13] 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.[14]

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.[15] 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*,[16] the Supreme Court has refocused its death penalty jurisprudence from deciding whether the institution is categorically unconstitutional to policing its periphery.[17] 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[18] and LWOP.[19]

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13. Gregg v. Georgia, 428 U.S. 153, 187-207 (1976).

14. *Death Penalty*, AMNESTY INT'L, https://www.amnesty.org/en/what-we-do/death-penalty/ (last visited Jan. 12, 2016).

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.

16. *Gregg*, 428 U.S. at 187-207.

17. Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785, 798-801 (2009).

18. *See* Kennedy v. Louisiana, 554 U.S. 407 (2008) (exempting defendants convicted of the rape of a child, and ostensibly, all non-homicide crimes from the death penalty); Roper v. Simmons, 543 U.S. 551 (2005) (exempting juvenile defendants from the death penalty); Atkins v. Virginia, 536 U.S. 304 (2002)

Scholars have focused primarily on this line of jurisprudence to speculate about which class of defendants should be exempted next[20] or to analyze how existing exemptions have been implemented.[21] 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.

(exempting intellectually disabled individuals from the death penalty); Ford v. Wainwright, 477 U.S. 399 (1986) (exempting some mentally ill death row inmates from execution); Coker v. Georgia, 433 U.S. 584 (1977) (exempting defendants convicted of rape from the death penalty).

19. *See* Miller v. Alabama, 132 S. Ct. 2455 (2012) (exempting all juvenile defendants from mandatory life without parole sentences); Graham v. Florida, 560 U.S. 48 (2010) (exempting juvenile defendants convicted of non-homicides crimes from life without parole).

20. Nita A. Farahany, *Cruel and Unequal Punishments*, 86 WASH. U. L. REV. 859, 861-63 (2009); Laurie T. Izutsu, *Applying Atkins v. Virginia to Capital Defendants with Severe Mental Illness*, 70 BROOK. L. REV. 995, 998 (2005); Corena G. Larimer, *Equal Protection from Execution: Expanding Atkins to Include Mentally Impaired Offenders*, 60 CASE W. RES. L. REV. 925, 931-35 (2010); Cecilee Price-Huish, *Born to Kill? 'Aggression Genes' and Their Potential Impact of Sentencing and the Criminal Justice System*, 50 SMU L. REV. 603, 612-18 (1997); Helen Shin, *Is the Death of the Death Penalty Near? The Impact of Atkins and Roper on the Future of Capital Punishment for Mentally Ill Defendants*, 76 FORDHAM L. REV. 465, 513-16 (2007).

21. *See generally* KENT S. MILLER & MICHAEL L. RADELET, EXECUTING THE MENTALLY ILL: THE CRIMINAL JUSTICE SYSTEM AND THE CASE OF ALVIN FORD (1993) (discussing *Ford v. Wainwright*'s exemption of mentally ill death row inmates); John H. Blume et al., *Implementing (or Nullifying) Atkins? The Impact of State Procedural Choices on Outcome in Capital Cases Where Intellectual Disability is at Issue* (2010) [hereinafter Blume et al., *Implementing (or Nullifying) Atkins?*] (focusing on the procedural rules that govern *Atkins* claims, including whether a judge or jury determines intellectual disability, and their effects on cases); John H. Blume et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL'Y 689 (2009) [hereinafter Blume et al., *Of Atkins and Men*] (concerning states that define mental retardation outside of clinical and scientific definitions); Natalie A. Pifer, *The Scientific and the Social in Implementing Atkins v. Virginia*, 40 L. & SOC. INQUIRY (forthcoming Spring 2016) [hereinafter Pifer, *The Scientific and the Social*].

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.[22] Categorical exemptions are, at their core, an important mechanism of evolution in the contested and variegated terrain that is modern penality.[23]

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

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22. *See generally* DAVID GARLAND, THE PECULIAR INSTITUTION (2010).

23. *See generally* Philip Goodman et al., *The Long Struggle: An Agonistic Perspective on Penal Development*, 19 THEORETICAL CRIMINOLOGY 1 (2015) (arguing that penal development is driven by competing and contradictory forces).

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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24. This finding comports with a large body of socio-legal scholarship that interrogates the "gap" between the law's promise on the books and its reality on the ground. *See, e.g.*, Jon B. Gould & Scott Barclay, *Mind the Gap: The Place of Gap Studies in Sociolegal Scholarship*, 8 ANN. REV. L. & SOC. SCI. 323, 323-25 (2013). Scholars have begun to apply this lens to the realm of punishment. *See, e.g.*, Pifer, *The Scientific and the Social*, *supra* note 21; Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 L. & SOC'Y REV. 731, 744-56 (2010); Lori Sexton, *Penal Subjectivities: Developing a Theoretical Framework for Penal Consciousness*, 17 PUNISHMENT & SOC'Y 114, 120-31 (2015); Anjuli Verma, *The Law-Before: Legacies and Gaps in Penal Reform*, 19 L. & SOC'Y REV. 847, 862-73 (2015).

25. *See* Steven Hutchinson, *Countering Catastrophic Criminology Reform, Punishment and the Modern Liberal Compromise*, 8 PUNISHMENT & SOC'Y 443, 444 (2006); Kelly Hannah-Moffat, *Criminogenic Needs and the Transformative Risk Subject Hybridizations of Risk/Need in Penality*, 7 PUNISHMENT & SOC'Y 29, 31 (2005); Paula Maurutto & Kelly Hannah-Moffat, *Assembling Risk and the Restructuring of Penal Control,* 46 BRIT. J. CRIMINOLOGY 438, 442-45 (2006); Pat O'Malley, *Volatile and Contradictory Punishment*, 3 THEORETICAL CRIMINOLOGY 175, 176-79 (1999).

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

26. Furman v. Georgia, 408 U.S. 238, 239-40 (1972).
27. *Id.*
28. Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 362 (1995).
29. *Gregg*, 428 U.S. 153 (finding Georgia's revised capital sentencing scheme constitutional).
30. Proffitt v. Florida, 428 U.S. 242 (1976) (finding Florida's revised capital sentencing scheme constitutional); Jurek v. Texas, 428 U.S. 262 (1976) (finding Texas' revised capital sentencing scheme constitutional); Woodson v. North Carolina, 428 U.S. 280 (1976) (rejecting North Carolina's revised capital sentencing scheme); Roberts v. Louisiana, 418 U.S. 325 (1976) (rejecting Louisiana's revised capital sentencing scheme).

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]

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31. GARLAND, *supra* note at 22, at 257; Steiker & Steiker, *supra* note 28, at 364.
32. *Coker*, 433 U.S. 584.
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.
38. *Kennedy*, 554 U.S. 407.

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.[39] 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.[40]

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.[41] By *Atkins v. Virginia*, the Court's two-step categorical exemption analysis emerged as refined and formulaic.[42]

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.[43] 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.[44] The Court had already confronted the issue in *Penry v. Lynaugh*,[45] which set a baseline for its 2002 analysis of state legislation. In 1989, when the Court considered *Penry*, only Georgia[46] and Maryland[47] had passed legislation banning the execution of individuals with intellectual disability—insufficient evidence of a "national

39. *Coker*, 433 U.S. at 585.
40. *Id.*
41. *Ford*, 477 U.S. at 408-09.
42. *Atkins*, 536 U.S. at 321.
43. *Coker*, 433 U.S. at 585.
44. *Atkins*, 536 U.S. at 324.
45. Penry v. Lynaugh, 492 U.S. 302 (1989).
46. GA. CODE ANN. § 17-7-131(j) (Supp. 1988).
47. MD. CODE ANN., Art. 27, § 412(f)(1) (1989).

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

48. *Penry*, 492 U.S. at 334.
49. *Atkins*, 536 U.S. at 314-15.
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.
56. *Roper*, 543 U.S. 551.

capital sentences on juvenile defendants than by the pace of change.[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.[58] The categorically diminished personal culpability of juveniles, as in *Atkins*, fatally undermined retribution and deterrence and warranted their exemption from execution.[59]

Most recently, in 2008, the Court returned to limiting the category of death-worthy crimes in *Kennedy v. Louisiana*, carving out a sentence of death for the rape of a child as an unconstitutionally disproportionate punishment.[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.[61] The Court, in its independent evaluation of the constitutionality of executing individuals convicted of child rape, also found retributive and deterrent ends underserved.[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,[63] severe mental illness,[64] or genetic predispositions to violence[65] and, most recently, veterans with combat-

57. *Id.* at 565-66.
58. *Id.* at 569-70.
59. *Id.* at 571-72.
60. *Kennedy*, 554 U.S. 407.
61. *Id.* at 422-27.
62. *Id*. at 441-47.
63. Nita A. Farahany, *Cruel and Unequal Punishments*, 86 WASH. U. L. REV. 859, 889-93 (2009).
64. Laurie T. Izutsu, *Applying Atkins v. Virginia to Capital Defendants with Severe Mental Illness*, 70 BROOK. L. REV. 995, 1011-25 (2005); Corena G. Larimer, *Equal Protection from Execution: Expanding Atkins to Include Mentally Impaired Offenders*, 60 CASE W. RES. L. REV. 925, 941-48 (2009); Helen Shin, *Is the Death of the Death Penalty Near? The Impact of Atkins and Roper on the Future of Capital Punishment for Mentally Ill Defendants*, 76 FORDHAM L. REV. 465, 493-513 (2007).
65. Cecilee Price-Huish, *Born to Kill? 'Aggression Genes' and Their Potential*

related traumas[66] might someday be categorically exempted from the death penalty. For now, though, *Wainwright*, *Atkins*, and *Roper* form a trinity of categorical exemptions deeming some classes undeserving of death while *Cocker and Kennedy* constitute the categories of crimes similarly exempted from death.

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[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.[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

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Impact on Sentencing and the Criminal Justice System, 50 SMU L. REV. 603, 612-22 (1997).

66. Anthony E. Giardino, *Combat Veterans, Mental Health Issues, and the Death Penalty: Addressing the Impact of Post-Traumatic Stress Disorder and Traumatic Brain Injury*, 77 FORDHAM L. REV. 2955, 2979-81 (2009); Hal S. Wortzel & David B. Arciniegas, *Combat Veterans and the Death Penalty: A Forensic Neuropsychiatric Perspective*, 38 J. AM. ACAD. PSYCHIATRY L. 407, 407-08 (2010).

67. Jessica S. Henry, *Death-in-Prison Sentences: Overutilized and Underscrutinized*, *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY 66 (Charles Ogletree, Jr. & Austin Sarat eds., 2012) (employing the phrase "death-in-prison" sentence).

68. *See* Austin Sarat & Karl Shoemaker, *Between the Promise of Shared Moral World and the Utter Unintelligibility of Death Itself: An Introduction to the Construction of Executable Subjects*, *in* WHO DESERVES TO DIE? CONSTRUCTING THE EXECUTABLE SUBJECT I 7-10 (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.[69] In this sense, categorical exemptions serve an important evolutionary function in maintaining the very extreme punishments they purport to restrict.[70]

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[71] or realign extreme punishment practices to contemporary culture.[72] In this sense, categorical exemptions may be a device through which punishment simply reconfigures itself rather than evolves.[73]

The *Atkins* exemption has, for example, been the subject of both procedural[74] and substantive[75] implementation critiques. The procedural

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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. .

72. Pifer, *The Scientific and the Social*, *supra* note 21, at 20-21.

73. *See infra* Part III.

74. Blume et al., *Implementing (or Nullifying) Atkins?*, *supra* note 21, at 5; Elaine Cassel, *Justice Deferred, Justice Denied: The Practical Effect of Atkins v. Virginia*, 11 WIDENER L. REV. 51 (2004); J. Amy Dillard, *And Death Shall Have No Dominion: How to Achieve the Categorical Exemption of Mentally Retarded Defendants from Execution*, 45 U. RICH. L. REV. 961, 969 (2010); Carol S. Steiker & Jordan M. Steiker, *Atkins v. Virginia: Lessons From Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DEPAUL L. REV. 721, 738 (2007); Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution*, 30 J. LEGIS. 77, 85 (2003); Sarah E. Wood et al., *A Failure to Implement: Analyzing State Responses to the Supreme Court's Directives in Atkins v. Virginia and Suggestions for a National Standard*, PSYCHIATRY, PSYCHOL. & L. 1 (2013).

75. Judith M. Barger, *Avoiding Atkins v. Virginia: How States Are Circumventing Both the Letter and the Spirit of the Court's Mandate*, 13 BERKELEY J. CRIM. L. 215, 229 (2008); Blume et al., *Of Atkins and Men*, *supra* note 21, at, 691–92; Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing Atkins v. Virginia: How Legislatures and Courts Can Promote Accurate Assessments and*

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,[76] 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.[77] 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.[78] 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.[79]

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.[80] 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.[81] This fluidity is

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Adjudications of Mental Retardation in Death Penalty Cases, 41 U. RICH. L. REV. 811 (2006); Lois A. Weithorn, *Conceptual Hurdles to the Application of Atkins v. Virginia*, 59 HASTINGS L.J. 1203, 1209 (2007); Penny J. White, *Symposium: Treated Differently in Life but Not in Death: The Execution of the Intellectually Disabled after Atkins v. Virginia*, 76 TENN. L. REV. 685, 691 (2008).

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.")

80. Pifer, *The Scientific and the Social*, *supra* note 21.

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 todays "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]

GENETICS AND THE USES OF HUMAN HEREDITY 78-84 (1985); JAMES W. TRENT JR, INVENTING THE FEEBLE MIND: A HISTORY OF MENTAL RETARDATION IN THE UNITED STATES (1995); MENTAL RETARDATION IN AMERICA: A HISTORICAL READER (Steven Noll & James W. Trent Jr, eds.) (2004).

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,[89] 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 penality.

A. Life Without Parole Exemptions

Categorical exemptions, stagnant in the death penalty context since *Kennedy v. Louisiana*,[90] 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*,[91] the Court categorically exempted juvenile defendants convicted of non-homicide crimes from LWOP and, in *Miller v. Alabama*,[92] expanded this exemption to further restrict its application as a mandatory sentence in juvenile cases.

Graham v. Florida, the first case to consider a categorical challenge to a term of years sentence, borrowed the familiar two-step analysis pioneered

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despite a clinical diagnosis of intellectual disability. *See* Andrew Cohen, *Of Mice And Men: The Execution of Marvin Wilson*, THE ATLANTIC (Aug. 8, 2012), http://www.theatlantic.com/national/archive/2012/08/of-mice-and-men-the-execution-of-marvin-wilson/260713/.

89. LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY (Austin Sarat & Charles Ogletree Jr. eds., 2012).

90. *Kennedy*, 554 U.S. 407.

91. *Graham*, 130 S. Ct. 2011.

92. *Miller*, 132 S.Ct. 2455.

by the death penalty jurisprudence.[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.[94] The Court, rather than rely on these trends to find no national consensus, examined the actual sentencing practices of jurisdictions allowing JLWOP.[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.[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.[97]

The Court's independent analysis of JLWOP reinforced *Roper's* finding that juvenile defendants have categorically lowered culpability.[98] *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.[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 *Roper's* restriction on the death penalty.[100]

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. *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 *Roper* and *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.[101] The mandatory imposition of JLWOP forecloses any

93. *Graham*, 130 S. Ct. at 61.
94. *Id.* at 62
95. *Id.*
96. *Id.* at 64.
97. *Id.* at 65.
98. *Id.* at 68 (citing *Roper,* 543 U.S. at 575).
99. *Graham*, 130 S. Ct. at 69.
100. *Id.* at 70-75.
101. *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[102] and a second narrowing the scope of death-eligible defendants.[103] *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,[104] but about which application of JWLOP is ripe for a categorical challenge[105] and how to resolve the substantive[106] and procedural[107] nuances of *Miller and Graham's* implementation.

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102. *Coker*, 433 U.S. at 585; *Kennedy*, 554 U.S. 407.

103. *Ford*, 477 U.S. 399; *Atkins*, 536 U.S. 304; *Roper*, 543 U.S. 551.

104. Natalie A Pifer, *Is Life the Same as Death?: Implications of Graham v. Florida, Roper v. Simmons, and Atkins v. Virginia on Life without Parole Sentences for Juvenile and Mentally Retarded Offenders*, 43 LOY. L.A. L. REV. 1495, 1528-29 (2010) (examining why there has been no move to exempt intellectually disabled defendants from LWOP that parallels the JLWOP litigation).

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).

106. Determining whether a lengthy term-of-years sentence constitutes a "de facto" life without parole sentence or "death in prison" sentence presents a fundamental substantive implementation challenge. *See* Henry, *supra* note 67, at 66; Therese A. Savona, *The Growing Pains of Graham v. Florida: Deciphering Whether Lengthy Term-of-Years Sentences for Juvenile Defendants Can Equate to the Unconstitutional Sentence of Life Without the Possibility of Parole,* 25 ST. THOMAS L. REV. 182, 197 (2013); Adam S. Liptak, *Is 100 Years a Life Sentence? Opinions are Divided*, N.Y. TIMES (Apr. 29, 2013), http://www.nytimes.com/2013/04/30/us/supreme-court-ruling-on-sentencing-yields-split-interpretations.html.

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.[108] 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.[109] Supermaxes are designed to hold prisoners in long-term isolation and personify extreme conditions of

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Alabama's Invitation to the Sate'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.")

109. *California Dedicates New High-Tech Max Security Prison,* CORRECTIONS DIGEST, June 27, 1990, at 9.

confinement.[110] 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.'[111] 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.[112] The effects of spending prolonged periods of time in these conditions on prisoners' mental and physical well-being are profound.[113]

California's use of extreme isolation quickly became the target of a larger campaign of prison conditions litigation.[114] Two such California cases, *Madrid v. Gomez*[115] and *Coleman v. Wilson*,[116] 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.[117] California's implementation of the *Plata* holding through A.B. 109, or Realignment, has had sweeping consequences for the state's prison system,[118] 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

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110. *See* Michael B. Mushlin, *Solitary Confinement: New York's Hidden Problem*, N.Y. L. J. (Sep. 5, 2012), http://www.newyorklawjournal.com/id=1202570044326/Solitary-Confinement-New-Yorks-Hidden-Problem?slreturn=20160210211740.

111. Reiter, *supra* note 8, at 44-46.

112. *Id*.; Reiter, *Supermax Administration*, *supra* note 11, at 89.

113. *See generally* Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477 (1997); Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQUENCY 124 (2003) [hereinafter *Mental Health Issues in Long-Term Solitary*]; Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature,* 34 CRIME & JUST. 441, 457 (2006).

114. Malcom Feely & Edward L. Rubin, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISON 490 (2000); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 961; Haney & Lynch, *supra* note 113, at 539-66; Keramet Ann Reiter, *The Most Restrictive Alternative: A Litigation History of Solitary Confinement in U.S. Prisons, 1960-2006,* 57 STUDIES IN L., POL., & SOC'Y 71, 81; Reiter, *Supermax Administration*, *supra* note 11 at 89.

115. Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995).

116. Coleman v. Wilson, 912 F. Supp. 1282 (E.D. Cal. 1995).

117. Plata v. Brown, 131 S. Ct. 1910 (2011).

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.[119] 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.[120] *Coleman*, a class action on behalf of all prisoners with serious mental illnesses in the California prison system, found the CDCR's[121] 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.[122]

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.[123] The court found that the "degree of mental injury suffered" by the Pelican Bay population at large did not violate this Eighth

119. *Gomez*, 889 F. Supp. at 1146.
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.
122. *Coleman*, 912 F. Supp. at 1319-23.
123. *Gomez*, 889 F. Supp. at 1260.

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."[124] 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.[125]

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.[126] 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 heath care system components.[127] 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."[128]

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.[129] 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."[130] 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)

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124. *Id.* at 1265-66.
125. *Id.* at 1266.
126. *Coleman*, 912 F. Supp. at 1297-98.
127. *Id.* at 1298.
128. *Id.* at 1315-16.
129. *Id.*
130. *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.[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.[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.[133]

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 *deserve* the most extreme sentence, these cases ask whether the *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.

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.[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

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131. *Id.* at 1298 n. 10.

132. Order at 72-74, Coleman v. Brown, No. 2:90-cv-00520-LKK-DAD 72-74 (E.D. Cal. Apr. 10, 2014).

133. Defendants' Plans and Policies Submitted in Response to Apr. 10, 2014 and May 13, 2014 Orders at 56-61, Coleman v. Brown, No. 2:90-cv-00520-LKK-DAD (E.D. Cal. Aug. 1, 2014) [hereinafter Defendants' Plans and Policies].

134. *Madrid*, 889 F. Supp. at 1267.

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

135. *Coleman*, 912 F. Supp. at 1320-21.
136. *Madrid*, 889 F. Supp. at 1265.

137. *Coleman*, 912 F. Supp. at 1300-01.
138. Pifer, *The Scientific and the Social*, *supra* note 21.
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[140] are exempt from the most extreme conditions of confinement.[141] The so-called *Coleman* Ten delineated in the Program Guide describe ten conditions defined as Axis I[142] 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.[143] 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.[144]

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).

140. The Program Guide describes the CDCR's policies and procedures for providing constitutionally acceptable mental health care to prisoners. CDCR MENTAL HEALTH PROGRAM GUIDE (2009). It was developed directly in response to Coleman and submitted to the court in 1997. *Mental Health Program (MHP)*, CAL. DEP'T OF CORRECTIONS & REHABILITATION, http://www.cdcr.ca.gov/DHCS/Mental_Health_Program.html (last visited Jan. 31, 2016).

141. Defendants' Plans and Policies, *supra* note 133, at 56-61.

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[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,[146] still in development, leaving the actual conditions of confinement for the seriously mentally 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.[147]

C. Exempting Vulnerable Inmates from Punitive 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.[148] A series of recent investigations have revealed horrific violence, abuse, and neglect at Rikers, especially against mentally ill and adolescent inmates.[149]

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

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145. *See* RHODES, TOTAL CONFINEMENT, *supra* note 10, at 4.

146. Defendants' Plans and Policies, *supra* note 133, at 12 n.1.

147. *Coleman v. Brown*, Order 2:90-cv-00520 LKK-DAD, p. 16, fn. 1 (E.D. Cal. August 1, 2014).

148. James Ridgeway & Jean Casella, *America's 10 Worst Prisons: Rikers Island,* MOTHER JONES (May 14, 2013), http://www.motherjones.com/politics/2013/05/america-10-worst-prisons-rikers-island-new-york-city.

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).

that the number of people with mental illnesses in punitive segregation[150] was almost double the number in the city's jail population generally and concluded those inmates were disproportionately placed into punitive segregation.[151] 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.[152] 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."[153] 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.[154] Murdough's autopsy results were inconclusive, but an anonymous city official said that "[h]e basically baked to death."[155]

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.[156] 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.[157] Most recently, a Department of Justice (DOJ) report released in August 2014 has focused much of the discussion on the

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150. Punitive segregation describes when inmates are placed into isolation for disciplinary reasons. JAMES GILLIGAN & BRANDY LEE, REPORT TO THE NEW YORK CITY BOARD OF CORRECTION 3 (2013), *available at* http://solitarywatch.com/wp-content/uploads/2013/11/Gilligan-Report.-Final.pdf.

151. *Id.*

152. Michael Winerip & Michael Schwirtz, *Rikers" Where Mental Illness Meets Brutality in Jail,* N.Y. TIMES (July 14, 2014), http://www.nytimes.com/2014/07/14/nyregion/rikers-study-finds-prisoners-injured-by-employees.html?_r=0.

153. *Id.*

154. Jake Pearson, *NYC Inmate Baked To Death in Cell,"* ASSOCIATED PRESS (Mar. 19, 2014), http://bigstory.ap.org/article/apnewsbreak-nyc-inmate-baked-death-cell.

155. *Id.*

156. New York City Board of Correction, Staff Report, *Three Adolescents with Mental Illness in Putative Segregation at Rikers Island*, NYC.GOV ii (Oct. 2013), http://www.nyc.gov/html/boc/downloads/pdf/reports/Three_Adolescents_BOC_staff_report.pdf.

157. *Id.*

"deep-seated culture of violence" incarcerated adolescent males experience at Rikers.[158] 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.[159] The report proposed over seventy specific remedial measures and warned that without significant reforms, the federal government would sue the city.[160]

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.[161] 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.[162] The petition, organized by the New York City Jails Action Coalition,[163] 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.[164] 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

158. U.S. Department of Justice, *CRIPA Investigation of the New York City Department of Correction Jails on Rikers Road*, N.Y. TIMES 3 (Aug. 4, 2014), http://www.nytimes.com/interactive/2014/08/05/nyregion/05rikers-report.html.
159. *Id*.
160. *Id.* at 51-63.
161. New York Board of Corrections, *Minutes*, NYC.GOV 3-4 (June 3, 2013), http://www.nyc.gov/html/boc/downloads/pdf/Minutes/BOC%20Minutes%20130603%20with%20handout.pdf.
162. *Id*.
163. A progressive, grassroots advocacy organization "working to promote human rights, dignity and safety for people in New York City jails." *About*, *N.Y. CITY JAILS ACTION COALITION*, http://www.nycjac.org/about/ (last visited Mar. 15, 2016).
164. Jail Action Coalition, *Petition to the New York City Board of Correction for Adoption of Rules Regarding the Use of Isolated Confinement* 2, http://static1.1.sqspcdn.com/static/f/1734328/24320420/1391482381200/JAC+Petition+to+BOC.pdf?token=wae50UEYylu%2BL1Nl%2BMMSfI6r5ww%3D___(last visited Mar. 10, 2016).

an "alternative safety restriction" providing for a therapeutic plan, out of cell time, and positive incentives.[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.[166] The Board promised to revisit the issue in the fall.[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.[168] By the end of 2013 the "Mental Health Assessment Unit for Infracted Inmates" (MHAUII), which functioned as Riker's punitive segregation unit for inmates with mental illnesses, closed and all inmates were transferred to other units.[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[170] and then, in January 2015, expanding the exemption to eventually include all inmates under 21-years-old.[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[172] an existing class-action

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165. *Id*.
166. New York Board of Corrections, *supra* note 161, at 4.
167. *Id.* at 5.
168. New York Board of Corrections, *Minutes*, NYC.GOV 12 (Sept. 9, 2013), http://www.nyc.gov/html/boc/downloads/pdf/Minutes/BOCMinutes_20130909.pdf
169. *See* New York Board of Corrections, *Minutes*, NYC.GOV 3 (Jan. 14, 2014), http://www.nyc.gov/html/boc/downloads/pdf/Minutes/BOCMinutes_20140114.pdf (discussing the MHAUII units); *NYC Department of Corrections Closes Mental Health Assessment Unit for Infracted Inmates,* NYC.GOV 1 (Jan. 6, 2014), http://www.nyc.gov/html/doc/downloads/pdf/press-releases/jan6-2014.pdf (discussing the closing of MHAUII and the transfer of inmates).
170. Michael Schwirtz, *Solitary End for Youngest at Rikers Island*, N.Y. TIMES (Sept. 28, 2014), http://www.nytimes.com/2014/09/29/nyregion/solitary-confinement\-to-end-for-youngest-at-rikers-island.html.
171. New York Board of Corrections, *Minutes*, NYC.GOV 6 (Jan. 13, 2015), http://www.nyc.gov/html/boc/downloads/pdf/Minutes/BOCMinutes_20150113.pdf ; Micheal Winerip & Michael Schwirtz, *Rikers to Ban Isolation for Inmates 21 and Younger*, N.Y. TIMES (Jan. 13, 2015), http://www.nytimes.com/2015/01/14/nyregion/new-york-city-to-end-solitary-confinement-for-inmates-21-and-under-at-rikers.html.
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.[173] The DOC announced that Rikers' youngest inmates had all been moved from punitive segregation less than three months after the *New York Times* broke the story but that its policy to exempt all inmates under 21-years-old will not be implemented until 2016.[174]

The BOC officially amended the Minimum Standards, the regulations governing the city's jails, in January 2015.[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.[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.[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.[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."[179] This title is likely to be cemented once settlement negotiations are finalized in the *Nunez* lawsuit, which the city's mayor

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(LTS)(JCF) (filed Dec. 18, 2014), *available at* https://www.justice.gov/file/188666/download.

173. Amended Complaint, Nunez v. NYC Department of Corrections, et al., 11-cv-5845 (LTS)(THK) (filed May 24, 2012).

174. *De Blasio Administration Ends Use of Punitive Segregation for Adolescent Inmates on Rikers Island*, NYC.GOV (Dec. 17, 2014), *available at* http://www1.nyc.gov/office-of-the-mayor/news/566-14/de-blasio-administration-ends-use-punitive-segregation-adolescent-inmates-rikers-island#/0 [hereinafter *De Blasio Administration*].

175. *Report on the Status of Punitive Segregation Reform*, NYC.GOV (May 8, 2015), http://www.nyc.gov/html/boc/downloads/pdf/reports/Punitive%20Segregatiion%20Report.050815.pdf.

176. NEW YORK CITY BOARD OF CORRECTION, NOTICE OF ADOPTION OF RULES § 1-17(b)(i), (iii), *available at* http://www.nyc.gov/html/boc/downloads/pdf/BOCRulesAmendment_20150113.pdf (last visited Mar. 10, 2016).

177. *Id.*

178. *Supra* Part II.1

179. Winerip & Schwirtz, *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]

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180. Benjamin Weiser, *Deal Is Near on Far-Reaching Reforms at Rikers, Including a Federal Monitor,* N.Y. TIMES (June 18, 2015), http://www.nytimes.com/2015/06/19/nyregion/accord-near-on-sweeping-reforms-at-rikers-jail-including-us-monitor.html?smid=tw-share&_r=0.

181. *Id.*

182. Haney & Lynch, *supra* note 113*;* Haney, *Mental Health Issues in Long-Term Solitary*, *supra* note 113.

183. *NYC Department of Corrections Closes Mental Health Assessment Unit for Infracted Inmates*, NYC.GOV (Jan. 6, 2014), http://www.nyc.gov/html/doc/downloads/pdf/press-releases/jan6-2014.pdf.

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.[186] A January 2014 BOC meeting similarly revealed that the city had no uniform manual describing the program and operation of RHU units. [187] Mentally ill inmates housed in the RHU should have access to therapeutic services[188] but, in practice, these units have struggled to provide even minimal services,[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).[190] The EHS 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

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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/20150113/12.19.14%20-%20Board%20of%20Correction%20Public%20Hearing%20Transcript.pdf.

187. *See* Sean Gardiner, *Solitary Jailing Curbed*, WALL ST. J. (Jan. 5, 2014), http://www.wsj.com/articles/SB10001424052702304617404579302840425910088 ; New York Board of Corrections, *Minutes*, NYC.GOV 136 (Jan. 14, 2014), http://www.nyc.gov/html/boc/downloads/pdf/Minutes/BOCMinutes_20140114.pdf

188. *De Blasio Administration*, *supra* note 174.

189. New York Board of Corrections, *supra* note 187.

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%20Segregatiion%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 library[196] 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]

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191. N.Y.C., N.Y., RULES tit. 40, ch. 1, §1-16(b) (2008).
192. *Id.*
193. DEPARTMENT OF CORRECTION PUBLIC HEARING TRANSCRIPT OF PROCEEDINGS 14 (2014), *available at* http://www.nyc.gov/html/boc/downloads/pdf/Variance_Documents/20150113/12.19.14%20-%20Board%20of%20Correction%20Public%20Hearing%20Transcript.pdf.
194. *Id.*
195. Paul von Zielbauer, *Report Says Many Inmates In Isolation Are Mentally Ill*, N.Y. TIMES (Oct. 22, 2003), http://www.nytimes.com/2003/10/22/nyregion/report-says-many-inmates-in-isolation-are-mentally-ill.html?pagewanted=all&pagewanted=print.
196. *See* N.Y.C., N.Y., RULES tit. 40, ch. 1,§1-08(f)(6) (2008).
197. *Id.* at §1-03(b)(2).
198. *See* Memorandum from Ashley D'Inverno, Dir. Of Research & Compliance to Members of the Board of Correction 6 (May 6, 2015), *available at* http://www.nyc.gov/html/boc/downloads/pdf/reports/ESH_2nd_report_final.pdf.
199. *Id*. at 1.
200. *See* N.Y.C., N.Y., RULES tit. 40, ch. 1, §1-16(b) (2008).
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.[202] How the BOC's fall 2013 vote to initiate the process of reviewing the city's solitary policies[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.

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.[204] The vast dimensions of the state's prison population caused extreme overcrowding—the system was operating at or above 200%—[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. [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

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Board Of Correction (Dec. 18, 2014), *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).

202. New York Board of Corrections, *Minutes*, NYC.GOV (June 3, 2013), http://www.nyc.gov/html/boc/downloads/pdf/Minutes/BOC%20Minutes%2020130603%20with%20handout.pdf.

203. New York Board of Corrections, *Minutes*, NYC.GOV (Sept. 9, 2013), http://www.nyc.gov/html/boc/downloads/pdf/Minutes/BOCMinutes_20130909.pdf.

204. *See* STEVEN RAPHAEL & MICHAEL S. STOLL, WHY ARE SO MANY AMERICANS IN PRISON? 4 (2013).

205. Coleman v. Schwarzenegger, 922 F.Supp.2d 882, 924 (E.D. Cal./N.D. Cal. 2009).

206. JONATHON SIMON, MASS INCARCERATION ON TRIAL 113–17 (2014).

"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 40,0000 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 injunction[212] and

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207. Arnold Schwarzenegger, *Prison Overcrowding State of Emergency Proclamation*, CA.GOV (Oct. 4, 2006), http://gov.ca.gov/news.php?id=4278.

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.

210. *See* Magnus Lofstrom et al., *Evaluating the Effects of California's Corrections Realignment on Public Safety*, PUB. POL'Y INST. OF CAL. 11(Aug. 2012), *available at* http://wee.ppic.org/content/pubs/report/R_812MLR.pdf.

211. *Brown*, 131 S.Ct. at 1947.

212. *Id.* at 1950-51 (Scalia, J., dissenting); KERAMET REITER & NATALIE PIFER, *BROWN V. PLATA* (2015), *available at* http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935383.001.0001/oxfordhb-9780199935383-e-113; Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts,*

California's implementation of the reduction order by 'realigning' California corrections is considered the "the biggest penal experiment in modern history." [213] 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. [214] 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, [215] non-non-nons serve their sentences—the lengths of which are unchanged by Realignment— and post-release supervision under county control.[216]

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.[217] However, individuals convicted of a prior or current serious or violent felony under Penal Code 1192.7(c)[218] or 667.5(c)[219] or

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

213. Joan Petersilia & Jessica Synder, *Looking Past the Hype: 10 Questions Everyone Should Ask about California's Prison Realignment*, 5 CAL. J. POL. & POL'Y 266, 266 (2013).

214. *See* Paige St. John, *Gov. Jerry Brown's Prison Reforms Haven't Lived Up to his Billing*, L.A. TIMES (June 21, 2014), http://www.latimes.com/local/politics/la-me-ff-pol-brown-prisons-20140622-story.html#page=1 ("Brown's realignment solution when he took office in 2011 required creating a new category of criminal — the non-serious, non-violent, non-sex-offender felon.")

215. *See* CAL. PENAL CODE § 1170(h) (West 2011).

216. *See* 2011 Cal. Legis. Serv. Ch. 15 (A.B. 109) (West 2011) (codified at CAL. PENAL CODE § 1170 (West 2010)).

217. *See* Petersilia & Synder, *supra* note 213, at 270.

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.[220] 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.[221]

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.[222] 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.[223] 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.[224] 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.[225]

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).

220. CAL. DEP'T OF CORRECTIONS & REHAB., REALIGNMENT REPORT AN EXAMINATION OF OFFENDERS RELEASED FROM STATE PRISON IN THE FIRST YEAR OF PUBLIC SAFETY REALIGNMENT OFFICE OF RESEARCH 1 (2013), *available at* http://www.cdcr.ca.gov/Adult_Research_Branch/Research_Documents/Realignment_1_Year_Report_12-23-13.pdf.

221. *See* BOARD OF STATE & COMMUNITY CORRECTIONS, JAIL PROFILE SURVEY 3–4 (2014), *available at* http://www.bscc.ca.gov/downloads/2014_2nd_Qtr_JPS_Full_Report.pdf.

222. CAL. DEP'T OF CORRECTIONS & REHAB., *supra* note 220, at 2.

223. MAGNUS LOFTSROM AND STEVEN RAPHAEL, EVALUATING THE EFFECT OF CALIFORNIA'S CORRECTIONS REALIGNMENT ON PUBLIC SAFETY 5 (2013).

224. *Id.* at 6.

225. Scott Shafer, *California Prison Changes Largely Unnoticed in Gubernatorial Race,* KQED NEWS (Oct. 25, 2014), http://ww2.kqed.org/news/2014/10/25/jury-out-on-gov-browns-criminal-justice-reform/.

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

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226. *Updated Survey of Long Term Offenders in County Jails,* CAL. STATE SHERIFF'S ASS'N (May 25, 2014), https://calsheriffs.org/images/CSSA_SURVEY-LONG_TERM_SENTENCES_IN_JAIL_042514.pdf.

227. Reiter & Pifer, *supra* note 212, at 7-8.

228. Joan Petersillia, *Voices from the Field: How California Stakeholders View Public Safety Realignment*, STAN. CRIM. JUST. CENTER 1, 15 (2014), *available at* https://law.stanford.edu/publications/voices-from-the-field-how-california-stakeholders-view-public-safety-realignment/.

229. *Id.* at 12.

230. Don Thompson, *California Prison Reforms Linked to Jail Violence*, HUFFINGTON POST CRIME (Nov. 28, 2013), http://www.huffingtonpost.com/2013/11/28/california-prison-reforms-linked-to-jail-violence_n_4357690.html.

231. *Id.*

232. Petersillia, *supra* note 228, at 16.

233. *Id.* at 15.

234. Hall v. Mims, No. 1:11-cv-02047-LJO-BAM, 2012 U.S. Dist. LEXIS 59452, at *4 (E.D. Cal. 2011).

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

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236. *See Hall*, 2012 U.S. Dist. LEXIS 59452, at *4.

237. Gray v. County of Riverside, No. 5:13-cv-00444, 2014 U.S. Dist. LEXIS 150884 (C.D. Cal. 2011).

238. Joe Nelson, *San Bernardino County Jail Conditions Subject of Meeting*, SAN BERNARDINO SUN (Oct. 13, 2014), http://www.sbsun.com/general-news/20141013/san-bernardino-county-jail-conditions-subject-of-meeting.

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

240. *See* Hernandez v. County of Monterey, No. 5:13-cv-02354-PSG, 2014 U.S. Dist. LEXIS 138247 (N.D. Cal. 2014).

241. For a discussion of the content of these jail condition complaints, *See* Reiter & Pifer, *supra* note 212, at 9-10.

242. Data Analysis Unit, *Monthly Total Population Report Archive*, CAL. DEP'T OF CORRECTIONS & REHABILITATION (May 31, 2015), http://www.cdcr.ca.gov/reports_research/offender_information_services_branch/monthly/TPOP1A/TPOP1Ad1505.pdf.

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

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244. Reiter & Pifer, *supra* note 212, at 9.

245. Jeffrey Lin & Joan Petersillia, *Follow the Money: How California Counties 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 California*, 2014 PUB. POLICY INST. OF CAL. 1, 1 (2014).

247. Petersillia, *supra* note 228, at 16.

248. Lin & Petersillia, *supra* note 245, at 10.

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.bscc.ca.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.[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.[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.[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,[254] the intellectually disabled,[255] children,[256] or defendants who do not take a life,[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.[258]

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251. CAL. PENAL CODE § 17.5(a)(3) (West 2010).
252. GILMORE, *supra* note 243.
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).
254. *Ford*, 477 U.S. 399.
255. *Atkins*, 536 U.S. 304.
256. *Roper*, 543 U.S. 551.
257. *Kennedy*, 554 U.S. 407; *Coker*, 433 U.S. 584.
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. [259] 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.[260]

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."[261]

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.[262] In

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.[263] 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.[264] 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.[265] 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.[266] 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.[267] 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.
265. *See* JEANNIE SUK, AT HOME IN THE LAW (2009); Alexandra Natapoff, *Misdemeanor Decriminalization,* 68 VAND. L. REV. 1055, 1056 (2015); Revia B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy,* 105 YALE L.J. 2117, 2176 (1996) (describing how "preservation through transformation" occurs when seemingly progressive reforms actually serve to modernize and strengthen the status quo).
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.

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268. *See* Goodman et al., *supra* note 23.
269. *Id*.
270. COLO. REV. STAT. § 17-1-113.8 (2014).
271. Stipulation, *Parsons v. Ryans*, No. CV-12-00601-PHX-DJH (D. Ariz. Oct. 14, 2014).
272. Julie Bosman, *Lawsuit Leads to New Limits on Solitary Confinement at Juveniles Prisons in Illinois*, N.Y. Times (May 4, 2015), http://www.nytimes.com/2015/05/05/us/politics/lawsuit-leads-to-new-limits-on-solitary-confinement-at-juvenile-prisons-in-illinois.html?_r=0.
273. *See* Reiter & Blair, *supra* note 139; Eli Hager and Gerald Rich, *Shifting Away from Solitary*, THE MARSHALL PROJECT (Dec. 12, 2014), https://www.themarshallproject.org/2014/12/23/shifting-away-from-solitary (describing reforms to solitary between 1998 and 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."[274]

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

274. *Madrid,* 889 F. Supp. at 1129.

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 an 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.

275. John H. Blume et al., *An Empirical Look at Atkins v. Virginia and Its Application in Capital Cases*, 76 TENN. L. REV. 625, 635 (2008).
276. *De Blasio Administration*, *supra* note 174.
277. Goodman et al., *supra* note 23, at 16.