

Re-Entrenchment Through Reform: The Promises and Perils of Categorical Exemptions for Extreme Punishment Policy

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Categorical exemptions first emerged as a U.S. Supreme Court mechanism to carve out vulnerable classes of offenders whose execution no longer comported with the Eighth Amendment's 'evolved standards of decency'. Today, their logic of reforming by restricting has proliferated beyond the Court's death penalty docket to reform extreme punishments like life without parole sentences and extreme conditions of confinement. Yet, these exemptions are often predicated on ill-defined categories like "the disabled," "the mentally ill," or "juveniles" that render them vulnerable to imperfect implementation. I use three case studies that invoke the logic of categorical exemptions to negotiate contemporary criminal justice controversies—the use of isolation in California's prisons and in New York City's Rikers Island Jail and prison overcrowding in California and to consider their meaning for the penal field, emphasizing their potential to re-entrench rather than reform extreme punishments.

Today, not only are more people entangled in the criminal justice system, but they are serving longer sentences in harsher conditions. Life without parole sentences have proliferated and the U.S. has retained capital punishment where other western nations have abolished it. Conditions of confinement are also more extreme—nearly every state has a super-maximum security prison where prisoners spend months or even years in their cells for at least twenty-two hours a day with little to no human contact and isolation as a mechanism to control and manage prisoners has spread into prisons and jails across the country. These extreme punishment practices are at the center of criminal justice policy debates and *categorical exemptions* are a key policy tool that reforms by reducing the scope of today's most controversial punishments. Yet, my analysis shows that, despite their promise to exempt certain classes from extreme penal practices, the practical function of categorical exemptions for reforming extreme punishment is contingent on the often over-looked nuances of implementation.

Key Points:

- ◆ Categorical exemptions rarely define the protected class at the reform's core, leaving criminal justice practitioners to navigate this critical implementation decision on the ground. As a result, the substantive scope of these reforms can be unfairly disparate across jurisdictions and/or under-inclusive.
- ◆ Policies that narrow the scope of certain penal practices frequently fail to consider what alternatives criminal justice practitioners will implement.

- ◆ As a result of these narrow policies, for example, individuals who are categorically exempted from isolation may still be housed in units that are the functional, if not formal, equivalent of solitary confinement.
- ◆ Categorical exemptions may re-entrench the very extreme punishments they seek to reform by framing reform efforts around who is punished rather than around the nature of extreme punishments, obscuring larger reform agendas.

Implications for Policy

Policymakers should be mindful of how categorical exemptions to penal practices unfold on the ground and of the larger criminal justice system into which these policies intervene. First, difficulties in defining the protected class (e.g., who is considered a "seriously mentally ill inmate"?) or the relevant penal practice (e.g., what is a "life without parole sentence"?) render these reforms less categorical in action than they appear on the books. Second, relying on categorical exemptions to reform extreme punishment practices may impede more fundamental transformation of our penal system by focusing attention on who, rather than how, to punish.

Note: My full analysis is available in a recently published article: Pifer, Natalie A. (2016) "Re-Entrenchment Through Reform: The Promises and Perils of Categorical Exemptions for Extreme Punishment Policy" *Alabama Civil Rights & Civil Liberties Law Review*, Vol. 7:2: 172-218.