

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

Natalie Pifer, ABD, JD

Dep't of Criminology Law and Society

University of California, Irvine

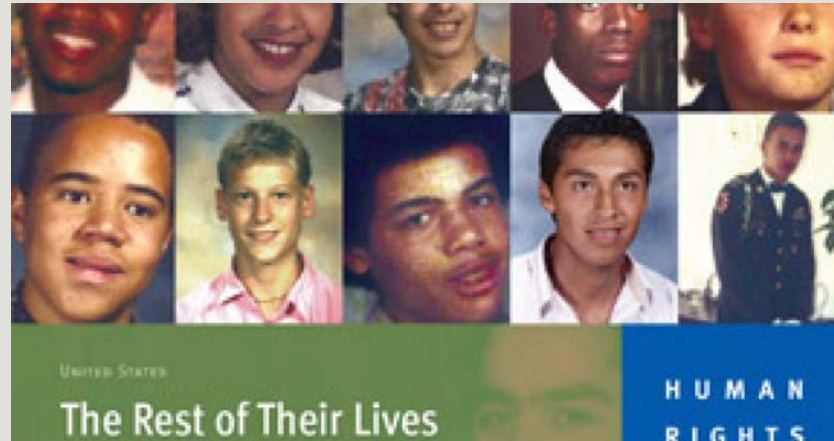
February 9, 2017

Research Agenda

- The role and construction of specialized categories in criminal justice reform



“Secure Housing Unit” at CA’s Pelican Bay



Juvenile Life Without Parole Sentences & Death Penalty



Teen in “Punitive Segregation” at NYC’s Rikers Island Jail

- The role of law in producing—or frustrating—change

Extreme Punishments

THE WORLD'S TOP 5 EXECUTIONERS 2014



None of These Individuals Committed a Violent Crime

They All Got Life.

WHAT IS SOLITARY CONFINEMENT?

Solitary confinement is the practice of keeping prisoners in small, individual cells for most, if not all, of the hours in a day. Prisoners held in such cells are not permitted to have jobs or any human contact, and they can be held there for days, weeks, months — even years.



22-24 HOURS

Number of hours per day prisoners in solitary confinement are in their cells

LITTLE TO NO ACCESS TO:



Education



Recreation



Vocational activities



Magazines or books



Personal possessions

THE WORLD'S TOP 5 EXECUTIONERS 2014



STOP THE #DEATHPENALTY

289+

CHINA
1000+

- A constellation



STOP THE #DEATHPENALTY



Personal possessions

Source: Amnesty

Information

Categorical Exemptions: Death Penalty Jurisprudence

- *Furman v. Georgia* (1972) & *Gregg v. Georgia* (1976): introducing a new era of federal regulation of the death penalty by
 - limiting death-worthy crimes and
 - e.g., *Coker v. Georgia* (1977): the death penalty for the crime of rape is cruel and unusual punishment
 - **limiting death-worthy defendants**
 - *Ford v. Wainwright* (1986): exempting some mentally-ill death row inmates from execution
 - *Atkins v. Virginia* (2002): exempting intellectually disabled defendants from capital punishment
 - *Roper v. Simmons* (2005): exempting juvenile defendants from capital punishment

Categorical Exemptions: Death Penalty Jurisprudence

Which group should the Court *categorically exempt* from the death penalty next?

- **Vets** with combat related trauma (Giardino 2009; Wortzel & Arcihiegas 2010)
- Defendants with **severe mental illness** (Hall 2003; Izutsu 2004; Shin 2007; Larimer 2009)
- Defendants with **TBIs** (Farahany 2009)
- Defendants with **genetic predispositions** towards violence (Price-Huish 1997)
- The “**volitionally incapacitated**” (Blume & Johnson 2003)



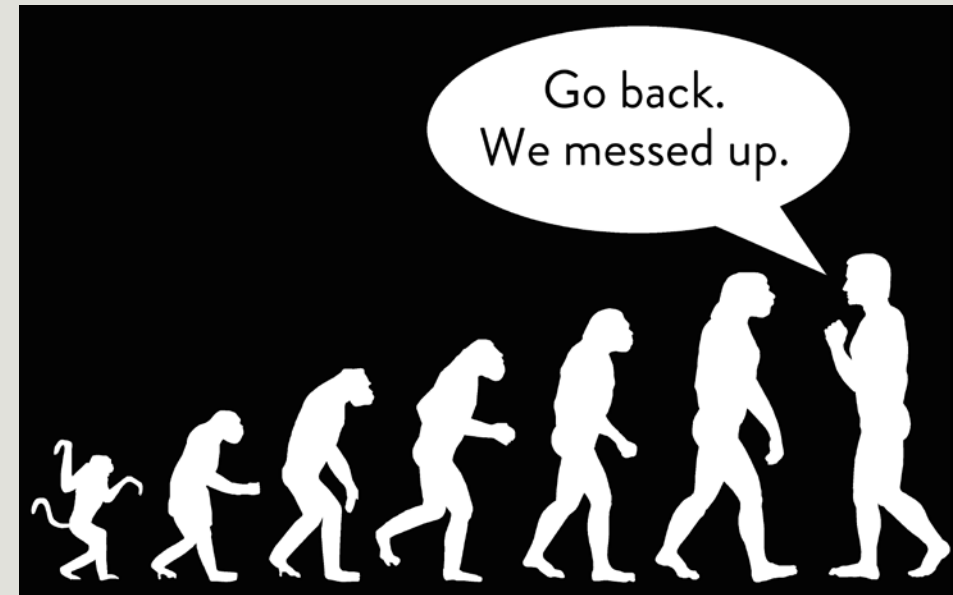
Categorical Exemptions: Socio-legal Functions

Categorical exemptions as instrumental adaptations (Garland, 2010)

- Realigning the death penalty with contemporary values
 - Ensuring evolution rather than extinction

An Empirical Question

- How do these exemptions function in practice?



Implementing the Exemptions

Easier said than done...

- *Wainwright* (Miller & Radelet 2003) and *Atkins* (Blume et al. 2008) particularly crippled by definitional woes
- Categorical exemptions like *Atkins* fundamentally dysfunctional limitation on extreme punishments (Pifer, 2016)



Marvin Wilson, Intellectually Disabled, yet executed by TX in 2012

Tracing Their Proliferation

- Life Without Parole

- *Graham v. Florida* (2010): juveniles exempt from LWOP for non-homicide crimes
- *Miller v. Alabama* (2012): juveniles exempt from mandatory LWOP

- Case Studies: Conditions of Confinement

- Exempting “severely mentally ill” inmates from Secure Housing Units in California Prisons
- Exempting inmates 21 and younger from “punitive segregation” (isolation) in New York City’s Rikers Island Jail
- ‘Realigning’ California’s “non-non-nons” from unconstitutionally crowded state prisons to local jails

Restricting the Scope of Extreme Conditions of Confinement in CA Prisons

- *Madrid v. Gomez* (N.D. Cal. 1995): unconstitutional to confine to prisoners with pre-existing mental illnesses in the SHU in CA's supermax prison, Pelican Bay
- *Coleman v. Wilson* (E.D. Cal. 1995) : class action suit on behalf of all seriously mentally ill CA prisoners finding “systemic failure to provide adequate mental health care”
 - April 2014: CDCR ordered to revise policies on the use of segregated housing involving *Coleman* class members
 - August 2014: Revised CDCR policies submitted court exempt seriously mentally ill inmates from non-disciplinary placement in administrative segregation

Restricting the Scope of Extreme Conditions of Confinement in CA Prisons

Madrid

“[F]or a certain category of inmates . . . placing them in the SHU in the mental equivalent of putting an asthmatic in place with little air to breathe” (p. 1265)

Coleman

Housing mentally ill prisoners in “administration segregation and segregated housing at Pelican Bay SHU and *statewide*” violates the 8th Amendment (p. 1380 emphasis added)

Creating the Category

Madrid

“those who are already mentally ill and those who, as identified above, are at an unreasonably high risk of suffering serious mental illness as a result of present conditions in the SHU.” (p. 1267)

Coleman

“The court concludes that the phrase ‘serious mental disorder’ 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.” (p. 1301).

Implementing the “Categorical” Exemption

The *Coleman* 10

1. Schizophrenia (all subtypes)
2. Delusional Disorder
3. Schizophreniform Disorder
4. Schizoaffective Disorder
5. Brief Psychotic Disorder
6. Substance-Induced Psychotic Disorder (exclude intoxication and withdrawal)
7. Psychotic Disorder Due To A General Medical Condition
8. Psychotic Disorder Not Otherwise Specified
9. Major Depressive Disorders
10. Bipolar Disorders I and II

Re-Entrenching Through Reform

- Identifying?
- Placing?
- Helping?
- Maintaining Extreme Punishment?



Pelican Bay SHU cell

Project Support and Thanks

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.

- Funding provided by the UC Irvine Center for Law, Society, and Culture
- Thanks to Elliott Currie, Keramet Retier, Alexandra Natapoff, and Phil Goodman, who provided insightful and helpful comments on early versions of this article

Natalie Pifer (npifer@uci.edu)

UC Irvine, Department of Criminology, Law and Society