



THE SEGREGATION AND ITS CONDITIONS FOR TRANSGENDER INMATES IN THE TERM OF THE EIGHT AMENDMENT

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ABSTRACT

Incarceration places people in potentially dangerous and inadequate conditions. These conditions get worse for transgenders because they face discrimination and humiliation. One of the reasons causing the victimhood is placing them according to their perceived genital instead of their self-expressed gender identity. In conformity with this placement transwomen and transmen are frequently put in opposite sex's facilities and they mostly experience maltreating. Therefore the prison officials sometimes put them in segregation on the grounds of 'security', 'protective custody' or 'punishment' as a solution. However the segregation effectively causes transgenders to treat as a problem and prevents them from accessing basic human needs such as health care and recreational activities.

In this framework, the question of whether or not the segregation of transgender inmates from the general population is the best solution and it violates the Eighth Amendment shall be considered in this research paper. In Part I, the Eighth Amendment and the definition of the cruel and unusual punishment shall be explained. In Part II, the inadequacy of the basic human needs in segregation shall be discussed by giving court decisions and various experiences from inmates. Consequently, it shall be underlined that the situation of transgender inmates in the segregation and the inadequacy of the basic needs may be a violation of the Eighth Amendment in Part III.

Keywords: human rights, prison, transgenders, incarceration.

Introduction

Most people assume that transgenders are voluntarily placed in solitary confinement or administrative segregation based on the dangers of general population. However the number of transgenders who are in the form of segregation against their will and look for help to avoid it is significant. Although in some cases placement in segregation or change the settlement of a transgender to a cell where the abusive prison staffs don't work or detrimental prisoners do not stay reduces certain forms of violence, that might be even worse rather than staying with general population¹ because the rights of recreational and educational activities, healthcare and diet are generally restricted as will be explained in further pages. Although several courts have recognized the vulnerability of people in prison who do not conform to traditional gender norms², transgenders are often placed in segregation and transgender inmates mostly

¹Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, Vol 18:2 Temp. Pol. & Civ. Rts. L.Rev., 515, 537 (2009).

²See e.g., U.S. v. Gonzalez, 945 F.2d 525, 526-27 (1991), Young v. Quinlan, 960 F.2d. 351, 362 (1992).

face and experience maltreating including sexual assaults. In this sense, the Department of Justice announced rules issuing national standards to assist the termination of sexual abuse in all correctional facilities including prisons, youth detention centers, jails and penitentiaries. According to those standards, when segregation is prolonged, this isolation can amount to torture in some circumstances for the transgender inmates.³ The national standards limit the uses of “protective custody” by stating that all other alternatives must be considered before placing a prisoner in segregation against his/her will.⁴ Moreover the standards add that prisoners in segregated units might also have a limited access to education, recreational programs and jobs and opportunities even though some of them choose to be placed in segregation.⁵ According to the various sources, the number of prisoners who reported being physically assaulted is %16 and sexually assaulted is %15.⁶ Besides, the studies regarding transgenders demonstrate that trans-women have experienced sexual assault in prison thirteen times more likely than general population.⁷ Therefore as a solution for mistreatment and discrimination against transgender people, the prison officials choose putting them in segregation which also causes psychological stress on the transgender inmates. This practice is causing transgenders to regard as a problem, yet instead of treating them so, to reconsider the current placement and policies and to take measurement preventing transphobia in prison might be a more favorable solution.

Although the data regarding the experiences of transgenders in prison is restricted, Testimony of Organizations Supporting LGBT Equality⁸ reached a data that non-transgenders are less often imprisoned than transgenders⁹ and a study by the Injustice at Every Turn shows that the rate of transgenders who had attempted suicide is 41% as a tremendous rate comparing the rate of 1.6% in general population. It is also staggering that suicide attempts get higher at transgender people of color, as the rates at 56% for American Indians and 54% of multiracial people.¹⁰ Furthermore, a qualitative study of psychology underlines the ill effect of solitary confinement in the case of committing suicide since the rate at 70% of the inmates who committed suicide in California prison were placed in solitary confinement¹¹ and therefore solitary confinement as a grand effect in suicidal ideation and suicide attempts was documented.¹²

In this framework, the question of whether the segregation of transgender prisoners from the general population is the best and proper resolution is raised in this research due to the fact that while they face the lack of basic human needs, they also suffer humiliation and discrimination. In addition, physical health problems and increased psychological stress often occur as a result of isolation.

³National Center for Transgender Equality, *LGBT People and the Prison Rape Elimination Act*, July 2012, 1, http://transequality.org/Resources/PREA_July2012.pdf (last visited June. 30, 2016).

⁴*Id.* at 2.

⁵*Id.*

⁶Grant, Jaime M., Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011, at 6, available at http://transequality.org/PDFs/NTDS_Report.pdf

⁷Shaun Knittel, *DOJ Standards Protect Transgender Inmates from Rape and Abuse*, available at http://www.edgeboston.com/news/national/features//135458/doj_standards_protect_transgender_inmates_from_rape_and_abuse (last visited July 14, 2016).

⁸Testimony of Organizations Supporting LGBT Equality, Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights, June 19, 2012, available at http://www.lambdalegal.org/sites/default/files/ltr_sjscchr_20120619_solitary-confinement.pdf (last visited July, 14, 2016).

⁹*Id.*

¹⁰*Id.* at 5.

¹¹John J. Gibbons, Nicholas deBelleville Katzenbach, *Confronting Confinement: A Report of The Commission on Safety and Abuse in American's Prisons*, Wahington University Journal Law & Policy, 22 Wash. U. J. L. & Pol'y 385, 471 (2006). (quoting Don Thompson, *Convict Suicides in State Prison Hit Record High*, Associated Press, January 3, 2006).

¹²Ildiko Suto, *Inmates Who Attempted Suicide in Prison: A Qualitative Study*, (Ph.D. Diss., Pacific University, 2007), 43.

I. The Eighth Amendment

A. “Punishment” identified as “cruel and unusual”.

Despite the Eighth Amendment is one of the shortest amendments, it is subject to an extensive litigation, especially on prison conditions. The Eighth Amendment does not outlaw the cruel and unusual conditions, but it outlaws cruel and unusual punishments.¹³ Hence it must be initially stated that a punishment by an official’s treatment is constituted so long as a duly authorized sentencing court pronounces a penalty regarding its infliction in the course of administering.¹⁴ In this regard, prison officials treat as a pions of the State. For these reasons, the prison officials’ acts and decisions whether to provide discipline or security results in a punishment and are appropriately open to Eighth Amendment scrutiny.

Secondly, instead of giving an exact definition of cruel and unusual punishment, the Court preferred to implement standards for whether the punishment can be upheld under the meaning of the Eighth Amendment In *Estelle v. Gamble*¹⁵, the Supreme Court established that so as to consider the prison conditions as a violation of the Eighth Amendment, two doctrinal components have to be satisfied. First, the objective standard indicating that sufficiently serious deprivations have been suffered by the prisoner or that the prisoner has to be subjected to a substantial risk of serious harm while he is incarcerated¹⁶. These serious harms may be serious medical needs¹⁷ and identifiable human needs as diet, recreational activities and warmth.¹⁸ Because the said harms might be “grossly disproportionate” to the crime¹⁹ as a punishment that “involve the unnecessary and wanton infliction of pain”²⁰ and that is at variance with “evolving standards of decency”²¹. The issue of wantonness is explained in *Rhodes v. Chapman*²², as qualified according to the restrictions facing the staff.

Then, the subjective standard requires “official acted with a sufficiently culpable state of mind”.²³ The state of mind is one of “deliberate indifference to inmate health or safety”²⁴ that was mentioned in *Estelle* for the first time. The culpable state of mind requirement was also explained by retired Justice Powell that in order to apply the “deliberate indifference” standard, the received treatment by the prisoner has to be an inhumane condition of confinement or a failure to have to his/her medical needs or the both.²⁵ For instance, in *Estelle*²⁶ while the Supreme Court adopted the Eighth Amendment’s applicability in cases of some deprivations had by the prisoner during imprisonment, it did not acknowledge that prison doctors had inflicted cruel and unusual punishment because the plaintiff could not prove that the doctors possessed a sufficiently culpable state of mind. It may be also explained that the punishment received from the prison official or doctor did not include a deliberate act intended to chastise or deter.²⁷

¹³Farmer v. Brennan , 511 U.S. 1970, 1974 (1994) (A transsexual prisoner brought Bivens suit against prison officials, claiming that officials showed “deliberate indifference” by placing prisoner in general prison population, thus failing to keep him from harm allegedly inflicted by other inmates).

¹⁴Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 87 NYU L. Rev. 881 , 898 (2009).

¹⁵Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (claiming that he was subjected to cruel and unusual punishment in violation of the Eighth Amendment for inadequate treatment of a back injury assertedly sustained while he was engaged in prison work).

¹⁶Helling v. McKinney, 509 U.S. 25, at 35 (1993).

¹⁷Estelle, *supra* note 16, at 104.

¹⁸*Id.*, at 304.

¹⁹Coker v. Georgia, 433 U.S. 584, 592 (1977).

²⁰Gregg v. Georgia, 428 U.S. 153, 183 (1976).

²¹*Id.* at. 173.

²²Rhodes v. Chapman, 452 U.S. 337 (1981).

²³Estelle, *supra* note 16, at 298.

²⁴Wilson v. Seiter, 501 U.S. 302-303, 300 (1991)., see also Helling, *supra* note 19, at 34-35.

²⁵*Id.* at 391-392.

²⁶Estelle, *supra* note 16.

²⁷Wilson v. Seiter, 501 U.S. 300 (1991).

In this regard the term of deliberate indifference appears that the Supreme Court avoided articulating a definition of deliberate indifference until *Farmer v. Brennan*.²⁸ The Court clearly urged that prison officials are not responsible under the Eighth Amendment for denying an inmate humane conditions of confinement. However if the officials know of and disregard an excessive risk to inmate health and safety they must be aware the substantial risk of serious harm.²⁹

Even though applying the objective and subjective standards in order to define cruel and unusual punishment under the Eighth Amendment seems proper, these standards may fall to satisfy in some circumstances. For instance, a prison official who does not provide adequate nutrition to a prisoner may act without deliberate indifference. It means the conditions cannot be defined as cruel when prison staffs fail to notice or discover risks. Especially, the said recklessness may be occurred in case of transgender prisoners due to the fact that the prison officials are more careless and blind to their needs.

On the other hand, the term of substantial risk of harm and serious harm is unclear. The harm depends on the person and on the conditions. Therefore establishment of an physical harm or a pain degree particularly may not be enough. It should also cover physiological harm to prisoners particularly considering the transgenders suffering from ill treatment and humiliation in the prison. Thus, cruel and unusual punishment issue and the above two standards should be interpreted in a larger concept and the matter of harm should be held a case by case.

II. Restrictive Confinement

A. Forms

From the start, prisoners are housed according to their gender.³⁰ Because of such placements, transgender inmates who have not undergone genital transformation are the inmates identified with the perceived genital. Transgendered inmates suddenly find themselves in a place encircled by inmates of opposite sex. At worst, they became the victims of rape by the prison staff or other prisoners since an estimated rate of 4.0% prisoners in state and federal prisons and a rate of 3.2% of jail inmates reported that they had been sexually abused at least once by another inmate or facility staff.³¹

Nevertheless the prisons follow the segregation policy in some circumstances regarding transgendered inmates. The segregation may be based on punitive or non-punitive reasons although the common sense dictates isolation of transgender prisoners from the general population. The names of the segregation forms sometimes depend on the states or the sources. To illustrate, according to the 28.C.F.R. Federal Regulation³² the segregation is called special housing units (SHU) ruling as below;

“When placed in the SHU, you are either in administrative detention status or disciplinary segregation status.

- (a) Administrative detention³³ status. Administrative detention status is an administrative status which removes you from the general population when necessary to ensure the safety, security, and orderly operation of correctional facilities, or protect the public. Administrative detention status is non-punitive, and can occur for a variety of reasons.
- (b) Disciplinary segregation status. Disciplinary segregation status is a punitive status imposed only by a Discipline Hearing Officer (DHO) as a sanction for committing a prohibited act(s).”³⁴

²⁸See *supra* note 14.

²⁹*Id.* at 837.

³⁰Darren Rosenblum, *Trapped*” in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 Mich. J. Gender & L. 499, 523-24 (2000).

³¹Allen J. Beck, *Sexual Victimization in Prisons and Jails Reported by Inmate 2011-12- Update*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, NCJ 241399 (December 9, 2014), available at <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=4654>.

³²28 CFR § 541.20- 541.33, revised as of July 1, 2016.

³³Even though it was described as Administrative Detention, the same explanation is used for the Administrative Segregation in various resources.

³⁴28 C.F.R. § 541.22, 2016.

In extreme cases, some people, particularly those vulnerable to violence or sexual assault from other inmates, may be placed in “protective custody” involuntarily in order to avoid violence from others held within the prison. Prison officials use solitary confinement, or SHU, to deprive individuals identified by staff as troublesome or violent social interaction and sensory stimulation.³⁵ However, lesbian, gay, bisexual, transgender, and queer individuals; and juveniles are at a heightened risk of being housed in solitary confinement around the United States due to housing policies.³⁶ According to a recent report regarding Correctional Systems on the Numbers of Prisoners in Restricted Housing from November 2016, in the 15 jurisdictions that had transgender prisoners in their restricted housing population, a total of 55 transgender prisoners are in restricted housing. In sum, of the 754 transgender prisoners reported by 33 jurisdictions, 55 (7.3%) were reported to be housed in restricted housing. The jurisdictions that reported transgender prisoners in restricted housing were: Arizona (5 prisoners), Colorado (1 prisoner), the District of Columbia (1 prisoner), Florida (1 prisoner), Kentucky (1 prisoner), Louisiana (2 prisoners), Maryland (1 prisoner), New Hampshire (1 prisoner), New Jersey (1 prisoner), New York (10 prisoners), Ohio (2 prisoners), Oregon (3 prisoners), Pennsylvania (5 prisoners), Texas (19 prisoners), and Washington (2 prisoners).³⁷

B. Constitutionality

Transgender prisoners particularly before having sex reassignment surgery or in case of lack of receiving hormones, cannot handle limited and inadequate conditions in segregated cells and commit suicide. Second issue is that transgender inmates are not always segregated from the general population as a punishment purpose, instead they are placed in order to secure them and prevent assaults against them. In these circumstances, the prison staffs allege that this placement has a penological interest and may exceed the 30 days limitation (According to the 28 CFR § 541.26 Review of placement in the SHU, the officer shall formally review the status of the prisoner who is in administrative detention or disciplinary segregation after every 30 calendar days at a hearing in which the prisoner has the right to attend.) However, the Court in *Hutto v. Finney* (1978) decided that living more than 30 days in punitive segregation may violate the Eighth Amendment when additionally considering the conditions in the cell taken as a whole.³⁸ The first interpretation of the totality of the conditions by considering the Eight Amendment was *Rhodes v. Chapman*³⁹ (1981) in which the Supreme Court concluded that double-celling may not be an ideal environment but “the Constitution does not mandate comfortable prisons.”⁴⁰

The supermax prison⁴¹, in which the visitation is rare and prisoners don’t have any access to any environmental or sensory stimuli and don’t usually have any human contact for an indefinite period⁴², is also an Eighth Amendment issue. Because as aforementioned, a punishment must be involved to be the basis of a constitutional claim and various forms of segregation may identify as a punishment in correctional law as long as it is comprised of four elements:

³⁵Chelsea van Aken, *Solitary By Any Other Name: Silence to Segregation in American Prisons*, (Master’s Theses, San Jose State University, 2016), 12.

³⁶*Id.*

³⁷Aiming to Reduce Time-In-Cell: Reports from Correctional Systems on the Numbers of Prisoners in Restricted Housing and on the Potential of Policy Changes to Bring About Reforms, November 21, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2874492 (last visited 27.12.2016).

³⁸Barbara Belbot & Craig Hemmes, *The Legal Rights of the Convicted*, 140 LFB Scholarly Publishing LLC, (2010).

³⁹*Rhodes v. Chapman*, 452 U.S. 2392 (1981).

⁴⁰Belbot & Hemmes, *supra* note 36, at 143.

⁴¹Supermax prisons are maximum-security facilities with highly restrictive conditions which are designed to segregate the most dangerous prisoners from the general prison population. See e.g. Chase Riveland, *Supermax Prisons: Overview and General Conditions*, U.S. Department of Justice, National Institute of Corrections, January 1999, available at <https://s3.amazonaws.com/static.nicic.gov/Library/014937.pdf>

⁴²John W.Palmer, *The Constitutional Rights of Prisoners* 113, 9th Edition, (2012).

- (i) action by an administrative body,
- (ii) which constitutes the imposition of a sanction,
- (iii) for the purpose of penalizing the affected person, and
- (iv) as the result of the commission of an offense.⁴³

These elements clearly explain that the solitary confinement or other punitive segregation forms are a punishment within the prison. After the 1960s the conditions in prison violating the Eighth Amendment while in punitive segregation were interpreted. The conditions of the solitary confinement⁴⁴ which are accompanied by a reduced diet and limited access to reading materials and other diversions are deemed to be subject to constitutional scrutiny.⁴⁵ As an evidence, the Court stated that confinement in an isolation cell constitutes a punishment, and therefore Eighth Amendment standards are applicable.⁴⁶

By contrast, administrative segregation's⁴⁷ validity was legitimized as depending upon the relative humaneness of the conditions of the segregated confinement and in individual cases upon the existence of a valid and subsisting reason or reasons for the segregation, such as protection of the segregated inmates from other inmates, protection of other inmates and prison personnel from the segregated inmates, prevention of escapes and similar reasons.⁴⁸ Another issue is that it does not satisfy the element of the purpose of penalizing the affected person. However transgenders name the administrative segregation as "prison," rather than a "punishment" since it is much more restricted.⁴⁹ A pre-operative transgendered woman filed a lawsuit indicating that she was rejected adequate "recreation, living space, educational and occupational rehabilitation opportunities, and associational rights for non-punitive reasons". However according to the officials the placement in administrative segregation was for protection.⁵⁰ The court urged that even though plaintiff's prolonged confinement in administrative segregation is not a violation of due process, cruel and unusual punishment as a violation of the Eighth Amendment may be subjected.⁵¹

On the other hand, the Courts have issued that solitary confinement isn't per se unconstitutional⁵² and confinement in maximum security facilities, as such, is not cruel or unusual treatment, punishment, or practice.⁵³ In this framework, despite the conditions of the solitary confinement as a segregation from the general population may violate under the Eight Amendment, the proof of the inadequate conditions shall be tough due to the fact that some conditions are interpreted as comfortable by the Court. Moreover the conditions in the administrative segregation might not violate the Eighth Amendment unless it is a prolonged confinement because the administrative segregation is inherently identified protective or disciplined segregation. But administrative segregation often constitutes a permanent placement⁵⁴ that transgender inmates may claim the violation of the Eighth Amendment.

⁴³*Id.* at 102.

⁴⁴Maria A.Lusie, *Solitary Confinement: Legal And Psychological Considerations*, 15 New Eng. J. on Crim. & Civ. Confinement 301, (1989). Solitary confinement is a disciplinary measure widely used in prison systems. Generally, this type of punitive action involves isolating the prisoner and taking away any prison privileges he may have. Such action is considered necessary in order to maintain control, protect prisoners, alter disobedience and prevent escapes.

⁴⁵*v. Finney*, 437 U.S. 678, 685 (1978).

⁴⁶*Id.*

⁴⁷The placement of a prisoner in less amenable and more restrictive quarters than those of the general prison population for non-punitive reasons, is well within the terms of confinement ordinarily contemplated by a prison sentence.

⁴⁸*Kelly v. Brewer*, 525 F.2d 394 (Eighth Cir. 1975).

⁴⁹Emily Alpert, *Transgender Prisoners Face Discrimination, Harassment, and Abuse Above and Beyond That of Traditional Male and Female Prison Population*, In The Fray, November 20, 2015, available at <http://inthefray.org/content/view/1381/39> (last visited July, 14, 2016),

⁵⁰*Meriwether v. Faulkner*, 821 F.2d 408, 416 (7th Cir. 1987).

⁵¹*Id.* at 415.

⁵²*Burns v. Swenson*, 430 F.2d 771 (8th Cir. 1970).

⁵³*Graham v. Willingham*, 384 F.2d 367 (10th Cir. 1967).

⁵⁴<http://solitarywatch.com/faq/> (last visited June 30, 2016)

III. Basic Human Needs in Segregation

Although the lack of reliable information, a census of state and federal prisoners conducted in 2005 by the Bureau of Justice Statistics –and cited by the Vera Institute of Justice– found more than 81,622 inmates placed in “restricted housing.”⁵⁵ However it doesn’t count prisoners who are in juvenile facilities, immigrant detention centers and/or local jails.⁵⁶ When bearing in mind this census, it is not difficult to figure out that so many transgender inmates- as vulnerable persons- are included in the said census.

In addition to being forced to live in isolation, inmates in segregation often have inadequate access to food, hygienic supplies- showers and recreational and outdoor activities as basic human needs.⁵⁷ The inability to have such human needs cause serious harms to transgender inmates especially considering the long-term segregations. Unfortunately the terms in solitary range from days to several decades;

- California Undersecretary of Operations Scott Kernan testified in August 2011 that the average term in solitary confinement in California is 6.8 years⁵⁸
- According to the American Friends Service Committee, the average time served in the supermax units in the Arizona prison system is 5 years.⁵⁹
- A 2003 report by the Correctional Association of New York found that the average sentence in disciplinary segregation was 5.3 months, while hundreds of inmates spent an average of three years in isolation.⁶⁰

As a result, providing the basic human needs to inmates may often be inadequate in the conceptions of the confinement and therefore the prison officials may violate the Eighth Amendment. Hence, with the study on the solitary confinement practices’ ill effects, advocacy organizations and research institutes became more outspoken with their policy recommendations to change solitary confinement practices. The VERA Institute of Justice made the following recommendations to improve the practice of solitary confinement: make segregation a last resort and a more productive form of confinement, and stop releasing people directly from segregation to the streets; end conditions of isolation to ensure that individuals in segregation still have regular and meaningful human contact; and protect mentally ill prisoners.⁶¹

A. Food and Diet

When the State imprisons persons, it must undertake responsibility for their well-being since incarceration in many terms prevents persons from caring themselves. Therefore the State must provide prisoners with the minimum necessities of life as the Supreme Court noted;

“When the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs- e.g. food, clothing, shelter- it transgresses... the Eighth Amendment...”⁶²

⁵⁵*Id.*

⁵⁶*Id.*

⁵⁷Stories from Solitary available at <http://www.aclu.org/prisoners-rights/joe-giarratano>; Sidney Rittenberg Sr., Solitary Torture, available at http://www.washingtonpost.com/opinions/solitary-confinement-is-a-torture-unworthy-of-us-prisons/2012/01/25/g1QA2VX6TQ_story.html; New York Civil Liberties Union, Submission to the UN Special Rapporteur Concerning New York State Prisoners Held in Solitary Confinement and Other Forms of Extreme Isolation by available at http://www.nyclu.org/files/releases/Extremelsolation_UNletter_2.5.13.pdf (last visited July, 15, 2016).

⁵⁸Solitary Watch, Solitary Confinement: FAQ, <http://solitarywatch.com/wp-content/uploads/2012/01/solitary-confinement-faq-short-version.pdf> (last visited 27.12.2016).

⁵⁹*Id.*

⁶⁰*Id.*

⁶¹Lesley Bob, *Complicated Confinement: Exploring Modifications to Solitary Confinement Practices in Adult Correctional Facilities*, (Master of Social Work Clinical Research Papers, St. Catherine University 2016), 16.

⁶²Michael B.Mushlin, *Rights of Prisoners* 265 (4th ed West 2009/2010), (quoting *Helling v. McKinney*, 509 U.S. 25,31,113 S.Ct. 2475, 125 L. Ed. 2d 22 (1993)).

Nevertheless, it was held that not preparing properly and serving nutritionally adequate food to prisoners is a violation of the Eighth Amendment.⁶³ According to the American Correctional Association, since the prisoners' health needs should be provided by the medical standards the human needs such as clothing, shelter, diet and food should be at least in the ratio of broadly accepted standards and the needs shouldn't be let go down below those standards. Thus, the Supreme Court has made clear that the prison conditions may be "restrictive and even harsh" but they may not deprive inmates of "the minimal civilized measure of life's necessities."⁶⁴ While the transgender inmates face very restricted and harsh conditions, it may be legitimated by alleging that the officials do their best and provide a generally accepted standards for life's necessities of prisoners.

According to *Barnes v. Government of Virgin Islands*, every inmate is entitled to three wholesome and nutritious meals per day and food must be handled and prepared under conditions which meet the minimum public health standards.⁶⁵ Additionally, the Constitution required that prisoners must be provided "reasonably adequate food"⁶⁶ and "a well-balanced meal, containing sufficient nutritional value to preserve health."⁶⁷ But if the food occasionally contains foreign objects or sometimes is served cold, while unpleasant, it must not be amounted to a constitutional deprivation.⁶⁸

A lower Court have held that the prisoners can be deprived of food for limited periods by the prison officials as a punishment. In *Johnson*⁶⁹, Johnathan Johnson alleged that punishing him with a restricted diet consisting of a "food loaf" for seven days violated his Eighth Amendment rights. However, the 2nd Circuit dismissed the Eighth Amendment claim on the grounds that Johnson's allegations failed to demonstrate either that the restricted diet posed a threat to Johnson's health or well-being or that the defendants acted with sufficiently culpable states of mind.⁷⁰ Additionally, the Court upheld the prison regulation that requires serving the food in the cells by getting prisoners on their knees, backing the hands behind and facing them to the wall is legitimated because it is "reasonably related to legitimate penological interests."⁷¹ The American Correctional Association, "precludes the use of food as a disciplinary measure" in its standards.⁷² However the rule in the standards regarding food is not obligatory and unfortunately New York's prisons are currently using a restricted diet. According to the Report by the New York Civil Liberties Union;

"Correction officers (COs) also use food to punish Adrian informally. His meals have arrived covered with hair or spoiled. Sometimes meals don't come at all, an occurrence that happens so often that prisoners have a name for it: a "drive-by." COs "drive-by" Adrian's cell without delivering his meal, or leave a covered tray with no food beneath the cover. Adrian has quickly learned that in the Box, little can be taken for granted."⁷³

⁶³Adams v. Mathis, 458 F.Supp. 302 (1978).

⁶⁴Mushlin, *supra* note 63, at 299 (citing Rhodes v. Chapman, 452 U.S. 337, 347,101 S.Ct. 2392 69 L.Ed. 2d 59 (1981)).

⁶⁵Barnes v. Government of the Virgin Islands, 415 F.Supp 1234. 1218 (1976).

⁶⁶Jones, 636 F.2d at 1378; Newman, 559 F.2d at 286.

⁶⁷Smith v. Sullivan, 553 F.2d 373, 380 (5th Cir.1977).

⁶⁸Hoitt v. Vitek, 497 F.2d 598, 601 (1st Cir.1974); Sinclair v. Henderson, 331 F.Supp. 1123, 1126 (D.La.1971), quoted in Freeman v. Trudell, 497 F.Supp. 481, 482 (E.D.Mich.1980).

⁶⁹Johnson v. Gummerson, 198 F.3d 233 (2d Cir. 1999).

⁷⁰*Id.*

⁷¹Talib v. Gilley, 138 F.3d 211, 213 n3 (5th Cir. 1998).

⁷²Matthew Purdy, *What's Worse Than Solitary Confinement? Just Taste This*, N.Y. Times, August 4, 2002, available at <http://www.fedcrimlaw.com/visitors/PrisonLore/TheLoaf.html>, (last visited July, 16, 2016).

⁷³Box in The True Cost of Extreme Isolation in New York's Prisons, A Report by the New York Civil Liberties Union, available at http://www.nyclu.org/files/publications/nyclu_boxedin_FINAL.pdf, (last visited July, 15, 2016).

Furthermore, one of stories from solitary comes from Joe Giarratano who told to the ACLU;

“Twice a day a bag meal would be tossed into the cell through a food hatch that would slam shut behind it. The mice had a field day.”⁷⁴ These samples are just the stories that we know so far. However there are probably much more when considering that transgender people are less able to make their voice hear.

B. Shower and Hygienic Supplies

Transgender inmates may be entitled to have less shower or hygienic supplies or may particularly be denied to have adequate shower as Tate and Espinoza experienced in the Sacramento Main Jail.⁷⁵ According to the unrefuted testimony Tate, Espinoza and other transgender inmates are permitted to have shower less often than other inmates⁷⁶ and it was required transgender inmates to file a grievance each time they need a shower.⁷⁷

In an earlier case, only one shower per week was held to violate of the Eighth Amendment since it promotes deterioration of inmates physically.⁷⁸ The exact number of showers per week has been settled, instead the Seventh Circuit denied the entitlement to three showers per week of an inmate in segregation by relying on the physical deterioration.⁷⁹ However Judge Cudahy observed in his dissent that in order to prevent ill effects on the physical and mental health of prisoners, at least three showers per week should be provided.⁸⁰

The rationale behind the limitation of showers per week seems as because prisons are places for serving sentence and therefore they do not have to be comfortable places. This approach finds a voice in *Rhodes*, that the providing comfortability by the prisons is not a requirement in the Constitution however a violation is subjected in case of “deprive inmates of the minimal civilized measure of life’s necessities”.⁸¹

However despite the discussions before the Court, it was held in one of the case regarding transgender inmate in segregation that transgendered inmates must have adequate possibilities to access to the shower in addition to being provided cleaning supplies; otherwise it may result that the transgender inmates are subject to harsh conditions by being deprived of basic human needs and privileges available to all other inmates.⁸² Therefore the Court also ordered that two transgender inmates’ cells should be cleaned at least as often as those of other inmates in the same pod in the Sacramento County Jail after the Court found that the cells of transgender inmates are cleaned far less often than the cells of other inmates.⁸³ Besides, if other inmates are provided cleaning supplies, transgender inmates should be similarly treated.⁸⁴ The most impressive order is that if, for safety reasons, the cells of transgender inmates must be cleaned by a Jail employee or by a trustee with a guard present, then transgender inmates must see that it is done.⁸⁵ These above orders clearly show that transgender inmates must be entitled to have same opportunities and be treated with the same respect as other prisoners.

⁷⁴<http://www.aclu.org/prisoners-rights/joe-giarratano>, (last visited June 30, 2016).

⁷⁵Tate v. Blanas, 2003 WL (E.D. Cal. Mar.11, 2003).

⁷⁶*Id.*

⁷⁷*Id.*

⁷⁸Mushlin, *supra* note 63, at 320 (citing Lightfoot v. Walker, 486 F. Supp. 504, 511 (S.D. Ill 1980)).

⁷⁹Davenport v. DeRobertis, 844 F.2d 1310 (7th Cir. 1988).

⁸⁰844 F.2d 1317 (Cudahy, C.J., dissenting).

⁸¹Rhodes, 452 U.S. at 347, 101 S.Ct. 2392.

⁸²Tate, *supra* note 76, at 8.

⁸³*Id.*

⁸⁴*Id.*

⁸⁵*Id.*

C. Recreational and Outdoors Activities

Clearly, the rights to outdoor exercise and recreation are also human needs since they are required for health, especially as a matter of isolated segregation. Initially, out-of-cell exercise is not required by the Constitution. Nonetheless, the failure of providing exercise opportunity as a near-total deprivation may violate the Eighth Amendment if it is not related to a legitimate penological purpose.⁸⁶ In the Platt case⁸⁷ the plaintiff alleged that he experienced and suffered depression and anxiety due to the his placement in punitive segregation and the lack of exercise. As he stated, he was allowed to exercise only twice per month for one hour. However, due to the fact that he wasn't able to demonstrate sufficiently serious harm because of the restricted exercise opportunity, and that out of wanton disregard was imposed by the prison staffs, Platt could not prove his Eighth Amendment claim.

Despite some judicial fact-specific decisions establish a five-hour minimum per week for exercise on prisoners' exercise rights⁸⁸, the federal courts didn't have any attempt in order to rule a detailed guidelines for the administration of state prisons.⁸⁹ On the other hand a restriction to one 45- minute period a week of outdoor recreation for protective custody inmates was not upheld as unconstitutional. In considering an alleged deprivation of adequate exercise, the Eighth Circuit stated that the Court must consider several factors including: "(1) the opportunity to be out of the cell; (2) the availability of recreation within the cell; (3) the size of the cell; and (4) the duration of confinement unless lack of exercise may be a constitutional violation if one's muscles are allowed to atrophy or if an inmate's health is threatened."⁹⁰ Prison records indicate that an inmate called *Wishon* had not used all the recreation time available to him and that he had the opportunity to exercise within his cell. In addition, *Wishon* was assigned to protective segregation for his own safety and the limitations on out-of-cell time were necessary to ensure his safety and security. Hence his claim of violation of the Eighth Amendment was rejected. One of the major justifications to reject the Eighth Amendment claim was that *Wishon* did not suffer any injury or decline in health resulting from his limited out-of-cell exercise time and having the opportunity to be out of his cell for personal telephone calls and visitation.⁹¹ Consequently, it demonstrates the Court's consideration and belief that decision making regarding the outdoor exercise and recreation rights depends on the facts of each case and inmate. Furthermore, prisoners placed in solitary confinement in Florida state prisons experience tremendously restricted conditions such as detaining almost in a complete isolation, leaving the cell three times per week for taking a shower, and exercising an additional three hours per week after completing a thirty day period.⁹²

Still, the transgender inmates carry unique concerns for prison officials that cannot mistreat them or reject them the benefits had by all other prisoners. Due to bias against them, transgender inmates suffer more when they do their outdoor exercises and recreational activities rights. As the Seventh Circuit Court of Appeals observed, "where movement is denied and muscles are allowed to atrophy, the health of the individual is threatened."⁹³ From the beginning of prison history, one of the aims of the establishment of prisons and correctional facilities was to rehabilitate the prisoners and to reduce the incidence of crime. Therefore, the prisoners are encouraged to participate in prison programs including jobs, education and psychological programs. The American Correctional Association has stated that "prison serves most

⁸⁶Mitchell v. Rice, 954 F.2d 187, 191-192 (4th Cir.1992).

⁸⁷Platt v. Brockenborough, 476 F.Supp. 2d 467 (E.D. Pa. 2007).

⁸⁸Delaney v. DeTella, 256 F.3d 679 (2001).

⁸⁹Davenport v. DeRobertis, 844 F. 2d 1310 (7th Cir. 1988) (citing Harris v. Fleming, 839 F.2d 1232, 1236-37 (7th Cir.1988), and Shelby County Jail Inmates v. Westlake, supra, 798 F.2d at 1089).

⁹⁰Wishon v. Gammon, 978 F. 2d 446, (8th Cir. 1992).

⁹¹978 F.2d at 446.

⁹²Available at <http://www.aclu.org/blog/prisoners-rights-human-rights/sad-state-solitary-florida-there-hope-human-rights-violation>, (last visited June 30, 2016).

⁹³Mushlin, supra note 63, at 282, (2009) (citing French v. Owens, 777 F.2d 1250, 1255 (7th Cir. 1985)).

effectively for the protection of society against crime when its major emphasis is on rehabilitation and recreation should be recognized as a wholesome element of normal life.”⁹⁴ Hence, the lack of the outdoor exercise and recreation may cause serious psychological and physical problems. While the lack and denial of exercise in some cases are justified by a legitimate penological reasons, it is not always presented. For instance, the state defendants failed to and didn’t argue any legitimate penological reason about the length of this exercise restriction and the denial of outside exercise.⁹⁵

Instead, the placement of the transgender prisoners in segregation may prevent the aim of rehabilitation, as happened to Jackie Tates⁹⁶ who was a pre-operative transgender male to female classified as T-Sep.⁹⁷ The Court stated that transgender inmates must be allowed reasonable use of the dayroom, outdoor recreational facilities and telephones during normal hours, not just very late at night, after considering that Tate was forbidden to participate in recreational activities with other inmates or to exercise or interact with them and was repeatedly denied permission to use the dayroom with other transgender inmates.⁹⁸ In *Tates*, it was not decided whether there is a violation of the Eighth Amendment. Instead, Judge Panner directed defendants to file a proposed plan for correcting the deficiencies noted and the defendants’ proposed plan⁹⁹ was adopted on May 19, 2003.¹⁰⁰

Transgender inmates experience restricted conditions in solitary confinement in a grand rate since they and their identities are not widely accepted in the prisons. For instance, prison officials let them out of their cell for exercise at most an hour per day. Nevertheless, some of them have limited access to outside such as only five to ten minutes per day.¹⁰¹

As another damage causing from segregation, a transgender detainee named Mayra Soto declared in her testimony at the National Prison Rape Elimination Commission: “Because of my gender identity, I was placed in an administrative segregation cell with 10 to 12 other transgender women. The cell was overcrowded and we were denied the basic rights that other (non-transgender) detainees exercised. We were locked up for 23 hours a day and spent much of that time shackled and humiliated.”¹⁰² Even though long-term placement in administrative segregation can also cause psychological damage¹⁰³, the Prison Litigation Reform Act requires proof of physical harm, not just psychological harm, in order to recover the segregation damages.

However, as abovementioned, the lack and denial of outdoor and recreational exercises are discussed on the basis of physical harms before the Courts. The psychological harms experienced by prisoners are not on the table although solitary confinement develops psychopathologies in a high rate at 28% than the general population rate at 15% considering the rate of engagement in self-mutilation in solitary confinement is higher than general population. The data from *Injustice at Every Turn* also represents that transgender people had attempted suicide than the general population.¹⁰⁴

⁹⁴Palmer, *supra* note 43, at 221.

⁹⁵Delaney v. DeTella, 256 F.3d 679 (7th Cir. 2001) (Glen Delaney brought action against warden and other prison officials alleging that denial of exercise opportunities during six-month lockdown violated his Eighth Amendment rights to be free of cruel and unusual punishment).

⁹⁶See *supra* note 76.

⁹⁷Total Separation/Total confinement which is not a disciplinary classification and Total Separation inmates are separated from other inmates at all times and are housed in a separate unit for their own protection. See e.g. 42 Pa. Code § 9756., 2010.

⁹⁸See *supra* note 76.

⁹⁹Medina-Tejada v. Sacramento County, 2006 WL 463158 (E.D. Cal. Feb. 27, 2006).

¹⁰⁰*Id.*

¹⁰¹Ally Windsor Howell, *A Comparison of the Treatment of Transgender Persons in the Criminal Justice Systems of Ontario, Canada, New York, and California*, 28 Buff. Pub. Int. L.J. 133, 191-92 (2010).

¹⁰²Available at http://www.newyorker.com/reporting/2009/03/30/090330fa_fact_gawande, (last visited July, 16, 2016).

¹⁰³Davenport v. DeRobertis, 844 F.2d 1310, 1313 (7th Cir. 1988).

¹⁰⁴See *supra* note 7.

Finally in 1889 the U.S. Supreme Court commented on the impact of isolation on prisoners:

“A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane, others, still, committed suicide, while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.”¹⁰⁵

IV. Conclusion

As earlier mentioned, transgender people are vulnerable in society because of their gender identity and therefore face discrimination in many areas of casual life. Moreover once incarcerated, the transgender prisoners unfortunately become the targeted objects for the prison staff and other prisoners in the terms of violence and maltreatment and segregation from the general population puts them in a sort situation of ‘prison within the prison’. Although the automatically classification of transgender inmates as T-Sep is an errant classification by the administration in the Jail, segregation of transgender inmates should not always be required, as a usual implementation. Because as looking at the bright side while the placement of a transgender inmate in administrative segregation provides a great protection, on the other side an exclusion from human needs in the terms of harsh conditions of segregation may be a violation of the constitutional rights.

Therefore housing the transgender prisoners with whom do not pose a violence risk, seems more proper. However according to the reports of ACLU, there still are not sufficient safeguards preventing vulnerable people from being sent to solitary.¹⁰⁶

Unfortunately since recklessness of the prison officials does not satisfy the subjective component of violation of the Eighth Amendment, the cruel and unusual punishment cannot be proved before the Courts. In case of determination of minimal human necessities, it seems also important to compare the treatment to the general population because cruel and unusual punishment may be imposed simply by treating transgender inmates differently.

In addition, the perception of the prison and incarceration of people unfortunately is a very negative aspect according to the society. The reflection of this perception may be observed in some of the Court decisions as they clearly state that the prison does not have to provide comfortable conditions to the inmates. In one sense it might be true since people in incarceration is punished; however it is also possible to use this perception in order to justify the inadequate conditions in the prison. Nowadays, in order to justify the inadequate conditions of transgender inmates, transgender prisoners have filed lawsuits in Florida, Delaware, Missouri and Nebraska since August and they argue the state is exerting cruel and unusual punishment by denying transgenders prisoners’ needs particularly regarding medical and hygienic care. As a recent and compelling lawsuit that alleges the harming a transgender inmate by denying essential medical care and exposing her to harassment has been filed in October, 2016 by Michale Wright against the Oregon Department of Corrections.¹⁰⁷ Besides, last year in Georgia Ashley Diamond filed a lawsuit alleging that the Georgia Department of Corrections violated the Eighth Amendment by withholding treatment for Ms. Diamond’s gender dysphoria against the advice and recommendations of her treating clinician.¹⁰⁸

¹⁰⁵Arkles, *supra* note 2, at 515 (citing *In re Medley*, 134 U.S. 160, 168 (1889)).

¹⁰⁶ Available at <http://www.aclu.org/blog/prisoners-rights-human-rights/new-york-subjects-prisoners-solitary-disciplinary-tool-first>, (last visited June 30, 2016).

¹⁰⁷For more information, see the Complaint *Wright v. Peters* Case 6:16-cv-01998-KI Document 1 Filed 10/17/16, available at <http://media.oregonlive.com/pacific-northwest-news/other/Wright%20v%20Peters%20-%20Complaint.pdf> (last visited 27.11.2016).

¹⁰⁸See *Ashley Diamond v. Brian Owens, et al* Case 5:15-cv-00050-MTT Document 29 Filed 04/03/15, available at https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/03/diamond_statement_of_interest.pdf (last visited 27.12.2016).

Consequently, considering the dilemma between segregating transgender inmates from general population for security and inadequacy brings us the necessity of finding new and better policies for transgender inmates. The abovementioned filled lawsuits may make a change in regard to understand the violation of the Eighth Amendment by having more court decisions about transgender inmates. In so far as the transphobia in every stage of our lives, the training and educating the guards and officials may be an initial solution. Then, some alternatives such as changing the cell of a perpetrator of abuse, providing greater supervision or placing in a single cell so long as being in general population may be presented. Providing transgender inmates the opportunities of being transferred from a women's to a men's facility or vice versa and being placed in a special prison facility for LGBT people such as K6G at the Los Angeles County Jail¹⁰⁹ might be an alternative. On the other hand as a new improvement, a new detention facility in Alvarado, Texas having a unit created particularly for transgenders shall be opened in November by the U.S. immigration officials. The officials states that each detainee will have an individualized detention plan "covering items such as searches, clothing options, hygiene practices, medical care, and housing assignments."¹¹⁰ It seems as a progress in the sense of the conditions provided to the transgenders, it still is discussable since the facility shall be established in a conservative place which is difficult for lawyers to gain access to the transgender inmates in such a rural area.

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