

Basic Human Needs of Transgender Inmates in Segregation: An Analysis of the Eight Amendment of the U.S.A

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Abstract

Incarceration places people in inadequate conditions. Especially for transgender inmates, these conditions get worse since transgenders face discrimination and humiliation in prison. One of the reasons causing the victimhood of transgenders is placing them in prison according to their perceived genital rather than their self-expressed gender identity. This means that transwomen and trans-men are held in women's facilities are often held in men's facilities and transgender prisoners 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 needs, health and sanitary care and to use the facility's opportunities. Therefore, in this paper the cruel and unusual punishment shall be defined and whether or not the segregation shall violate the Eighth Amendment of the U.S.A by referring to the Court decisions. Afterwards, how the Courts clarifies the basic human needs in segregation shall be explained. Consequently, the question of whether the segregation of transgender inmates from the general population is the best and proper solution rather than addressing the underlying issues of transphobia in prison or rethinking existing policies around sex-segregation shall be discussed.

Keywords: Human rights, Prison, LGBTI, Incarceration.

Introduction

Several courts have recognized the vulnerability in prison of people who do not conform to traditional gender norms.¹ Even though the data on the experiences of transgenders in prison and jail is limited, the National Center for Transgender Equality and the National Gay and Lesbian Task Force undertook a study called Injustice at Every Turn to bring the full extent of discrimination against transgenders and gender non-conforming people.² This recent data from the report Injustice at Every Turn found that the incarceration of transgenders at higher rates than the general population is clear.³ As a consequence of incarceration, transgenders might be mistreated and discriminated hence, the prison officials sometimes put them in segregation on the grounds of 'security', 'protective custody' or 'punishment'. Most people assume that transgender inmates are voluntarily placed in segregation due to the dangerousness of general population. However, the number of transgender prisoners placing in some form of segregation against their will and seeking assistance to get out of it is significant.⁴ A recent study from 2005 of the 44 inmates who committed suicide in the California prison system showed that 70% were housed in solitary confinement.⁵ Thusly, the segregation causing the psychological stress

¹See e.g. U.S. v. Gonzalez, 945 F.2d 525, 526-27 (1991), Young v. Quinlan, 960 F.2d. 351, 362 (1992).

²Grant, 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 available at http://transequality.org/PDFs/NTDS_Report.pdf (last visited March 11,2015).

³Testimony 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_sjsccrhr_20120619_solitary-confinement.pdf (last visited March 13,2015).

⁴Gabriel Arkles, Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention 12, 18 Temp. Pol. & Civ. Rts. L.Rev. 515 (2009).

⁵Don Thompson, *Convict Suicides in State Prison Hit Record High*, Associated Press, (2006).

on the transgender inmates while violating their access to basic needs, health and sanitary care and to use the facility's opportunities such as outside activities led the way of this research. In this sense, the basic human needs in segregation of transgenders shall be the subject after the Eighth Amendment and the concept of the cruel and unusual punishment shall be explained.

The Eighth Amendment⁶ and Segregation

Although placement in segregation where an abusive staff member does not work or a dangerous prisoner does not stay reduces certain forms of violence in some cases, the said placements are worse than general population.⁷ The lack of the rights of recreational activities, healthcare/hygienic supplies and diet are included in the main reasons caused worse conditions. These lacks shall be a matter of the Eighth Amendment due to the fact that it apparently refers to cruelty and unusualness. However, the Eighth Amendment does not actually outlaw the cruel and unusual conditions, but its outlaws cruel and unusual punishments⁸ and this issue is subject to an extensive litigation especially on prison conditions.

Initially the question of which punishment might be raised in order to clarify the Eighth Amendment violations in the prison should be pointed out. An official's treatment of a convicted offender constitutes a punishment so long as it is inflicted in the course of administering a penalty pronounced by a duly authorized sentencing court⁹ and in this sense, the prison official treats as a pion of the State. Then a punishment must be deemed as cruel and unusual; albeit it is also problematic. Therefore, instead of giving an exact definition, the Supreme Court preferred to implement standards for whether the punishment can be upheld under the meaning of the Eighth Amendment.

In *Estelle v. Gamble*,¹⁰ the Court established two doctrinal components having to be satisfied the Eight Amendment. 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 incarcerated.¹¹ These serious harms may be serious medical needs¹² and identifiable human needs such as food, warmth or exercise.¹³ The harms mentioned might be "grossly disproportionate" to the crime¹⁴ as a punishment that "involve the unnecessary and wanton infliction of pain"¹⁵ and that are inconsistent with "evolving standards of decency".¹⁶ Second standard is the subjective standard requiring "official acted with a sufficiently culpable state of mind".¹⁷ In *Estelle*¹⁸ while the Supreme Court acknowledged that the Eighth Amendment could be applied to some deprivations that were not specifically part of the sentence but were suffered during imprisonment, it rejected that prison doctors had inflicted cruel and unusual punishment because the plaintiff had failed to establish that the doctors possessed a sufficiently culpable state of mind. It was also underlined that the punishment received from the prison official or doctor did not include a deliberate act intended to chastise or deter.¹⁹

On the one hand, it appears that the Supreme Court avoided articulating a definition of deliberate indifference until he urged that prison officials cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement, unless the officials know of and disregard an

⁶U.S. Const. Amend. XIII.

⁷See supra note 6.

⁸*Farmer 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).

⁹Sharon Dolovich, Cruelty, Prison Conditions, and the Eighth Amendment, *New York University Law Review* 898, 881-979 (2009).

¹⁰*Estelle 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).

¹¹*Helling v. McKinney*, 509 U.S. 25, at 35 (1993).

¹²*Estelle*, supra note 12, at 104.

¹³*Id.*, at 304

¹⁴*Coker v. Georgia*, 433 U.S. 584, 592 (1977).

¹⁵*Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

¹⁶*Id.* at. 173.

¹⁷*Estelle*, supra note 12, at 298.

¹⁸*Id.*

¹⁹*Wilson v. Seiter*, 501 U.S. 300 (1991).

excessive risk to inmate health and safety. The officials must both be aware of the facts from which inference could be drawn that substantial risk of serious harm exists, and they must also draw that inference.²⁰

In this framework, the two standards above may fall to satisfy in some circumstances. A staff providing inadequate nutrition to a prisoner might act without deliberate indifference. It means that the conditions cannot be defined as cruel when prison officials fail to notice any risks. Especially, recklessness of staffs is a usual issue in the cases of transgender prisoners since staffs are more careless and blinder to transgenders' needs. Moreover, the term of substantial risk of harm and serious harm seems unclear. The harm actually depends on the person and on the conditions hence establishment of a physical harm or a pain degree particularly might not be characterized enough. The harms persuading the Court should also include physiological harms due to the fact that transgenders suffer from ill treatment and humiliation in the prison. Thus, two standards above mentioned should be interpreted in a larger concept and the issue of harm should be held a case by case.

In accordance with the Eighth Amendment, punishment and the segregation, the Courts have held whereof solitary confinement is not per se unconstitutional,²¹ and confinement in maximum security facilities, as such, is not cruel or unusual treatment, punishment, or practice.²² However, the conditions of the solitary confinement which are accompanied by a reduced diet and limited access to reading materials and other diversions are deemed to be subject to constitutional scrutiny²³ and confinement in an isolation cell is a type of punishment, and therefore Eighth Amendment standards must be applicable.²⁴ Furthermore, the supermax prison²⁵ in which the visitation is rare and prisoners are deprived of any environmental or sensory stimuli and of almost all human contact for an indefinite period,²⁶ is a violation of the Eighth Amendment.

The first interpretation of the totality of the conditions was occurred in *Rhodes v. Chapman*²⁷ that double-celling may not be an ideal environment but “the Constitution does not mandate comfortable prisons”.²⁸ Administrative segregation’s validity was also 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 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.²⁹ Therefore, it is argued that it does not satisfy the element of the purpose of penalizing the affected person. However transgender inmates refer administrative segregation as “prison,” viewing it as “punishment” because it is more restrictive.³⁰ A pre-operative transgendered woman complained that she was denied adequate “recreation, living space, educational and occupational rehabilitation opportunities for non-punitive reasons,” because she was placed in administrative segregation for her own protection.³¹ However, the proof of the inadequate conditions shall be tough since several conditions are interpreted as comfortable by the Court. On the other side, the conditions in the administrative segregation might not be a subject of the Eighth Amendment unless it is a prolonged confinement because the administrative segregation is inherently identified protective or disciplined segregation. However, the permanentness of segregation shall not be discussed in this paper since it is another issue.

²⁰*Id.* at 837.

²¹*Burns v. Swenson*, 430 F.2d 771 (8th Cir. 1970).

²²*Graham v. Willingham*, 384 F.2d 367 (10th Cir. 1967).

²³*Hutto v. Finney*, 437 U.S. 678, 685 (1978).

²⁴*Id.*

²⁵SupermaxPrisons are maximum-security facilities with highly restrictive conditions which are designed to segregate the most dangerous prisoners from the general prison population.

²⁶John W.Palmer, *The Constitutional Rights of Prisoners* 113, 9th Edition (2012).

²⁷*Rhodes v. Chapman*, 452 U.S. 2392 (1981).

²⁸Barbara Belbot& Craig Hemmes, *The Legal Rights of the Convicted*, 143, LFB Scholarly Publishing LLC (2010).

²⁹*Kelly v. Brewer*, 525 F.2d 394 (Eighth Cir. 1975).

³⁰BenishA.Shah, *Lost in Gender Maze: Placement for Transgender Inmates In the Prison System*, Journal of Race, Gender and Ethnicity Volume 5, Issue 1, 50, February 2010.

³¹*Meriwether v. Faulkner*, 821 F.2d 408, 416 (7th Cir. 1987).

Basic Human Needs in Segregation

The Supreme Court noted the State must provide prisoners with the minimum necessities of as;

“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...”³²

Besides, he clarified 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”.³³ In this sense, the failure to properly prepare and serve nutritionally adequate food to inmates who are unable to seek alternative sources of nutrition constitutes a violation of the inmates’ Eighth Amendment rights.³⁴ However interestingly, a lower Court have held that the prisoners can be deprived of food for limited periods by the prison officials as a punishment. Johnathan Johnson³⁵ alleged that punishing him with a restricted diet consisting of a “food loaf” for seven days violated his Eighth Amendment rights and 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.³⁶ The Report by the New York Civil Liberties Union shows us another sample of violation;

“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...”³⁷

However, it seems clear that each inmate should be 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.³⁸ The Constitution requires officers provide “reasonably adequate food”³⁹ and “a well-balanced meal, containing sufficient nutritional value to preserve health”.⁴⁰

The hygienic supplies and showers are another need of which inmates suffer. For instance, transgender inmates may be entitled to have less shower or may particularly denied to have adequate shower as *Tates* and *Espinoza* experienced in the Sacramento Main Jail.⁴¹ According to the unrefuted testimony *Tates*, *Espinoza* and other transgender inmates are permitted to have shower less often than other inmates⁴² in addition to the requirement of transgender inmates’ obligation to file a grievance each time they need a shower.⁴³ Further, the Court found that the cells of transgender inmates are cleaned far less often than the cells of other inmates therefore he decided 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.⁴⁴ Besides, if other inmates are provided cleaning supplies, transgender inmates should be similarly treated.⁴⁵ 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

³²Michael B. Mushlin, *Rights of Prisoners* 265, (2009) (quoting *Helling v. McKinney*, 509 U.S. 25,31,113S.Ct. 2475, 125 L. Ed. 2d 22 (1993)).

³³*Id.* at 299 (citing *Rhodes v. Chapman*, 452 U.S. 337, 347,101 S.Ct. 2392 69 L.Ed. 2d 59 (1981)).

³⁴*Adams v. Mathis*, 458 F.Supp. 302 (1978).

³⁵*Johnson v. Gummerson*, 198 F.3d 233 (2d Cir. 1999).

³⁶*Id.*

³⁷*Box 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 March 4,2015).

³⁸*Barnes v. Government of the Virgin Islands*, 415 F.Supp 1234. 1218 (1976).

³⁹*Jones*, 636 F.2d at 1378; *Newman*, 559 F.2d at 286.

⁴⁰*Smith v. Sullivan*, 553 F.2d 373, 380 (5th Cir.1977).

⁴¹*Tates v. Blanas*, 2003 WL (E.D. Cal. Mar.11, 2003).

⁴²*Id.*

⁴³*Id.*

⁴⁴*Id.*

⁴⁵*Id.*

that it is done.⁴⁶ 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.

The near-total deprivation of the opportunity to exercise may also violate the Eighth Amendment, unless the restriction is related to a legitimate penological purpose.⁴⁷ The placement of the transgender prisoners in segregation may prevent the aim of rehabilitation. 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.⁴⁸ In *Tates*, it was not decided whether or not 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 plan⁴⁹ was adopted on May 19, 2003.⁵⁰ Not only Tate, moreover according to some inmates reporting, transgender inmates are allowed at most an hour outside of their cell per day as little as five to ten minutes each day.⁵¹ A transgender detainee 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”.⁵²

Even though the aim of prisons is the rehabilitation as the American Correctional Association has stated that “prison serves most 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”,⁵³ we are able to observe that the prisoners are not encouraged to participate in prison programs including jobs, education and etc. Besides several judicial decisions support five-hour minimum per week for exercise,⁵⁴ showing only a physical injury cannot satisfy an Eighth Amendment claim.⁵⁵ Therefore, the whole proves that physiological harms or the unsatisfied injuries do not provide to make a claim against the violations of the Eighth Amendment.

Conclusion

Although the classification of transgender inmates in segregated cells is an errant classification by the administration in the Jail and the segregation is not always required, ‘prison within the prison’ implementation is usual. Because on the one side, placing a transgender inmate in segregation may provide a greater protection than being housed in the general population, on the other side it is an unfortunate that such exclusion may violate the constitutional rights of prisoners. However, the subjective component of violation of the Eighth Amendment is not satisfied solely by the recklessness of the prison staffs and proving the cruel and unusual punishment in the segregation is usually tough issue before the Courts. In case of determination of minimal human necessities, it is also significant to compare the treatment to the general population because cruel and unusual punishment might be imposed simply by treating transgender inmates differently. Additionally, the perception of incarceration has a negative influence on the Courts that the prison does not have to provide comfortable

⁴⁶Id.

⁴⁷*Mitchell v. Rice*, 954 F.2d 187, 191-192 (4th Cir.1992).

⁴⁸See *supra* note 43.

⁴⁹*Medina-Tejada v. Sacramento County*, 2006 WL 463158 (E.D. Cal. Feb. 27, 2006).

⁵⁰Id.

⁵¹Ally 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).

⁵²Available at http://www.newyorker.com/reporting/2009/03/30/090330fa_fact_gawande, (last visited Marc 11, 2015).

⁵³Palmer, *supra* note 28, at 221.

⁵⁴*Delaney v. DeTella*, 256 F.3d 679 (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).

⁵⁵Id.

conditions to the inmates. Therefore, in some cases this perception justifies the inadequate conditions in the prison.

Consequently, considering the dilemma between segregating transgender inmates from general population for security and the conditions of segregation conducted us to find a better policy. In so far as the transphobia in every stage of our lives, the training and educating the guards and officials might be an initial solution. Secondly, housing the transgender inmates with whom do not pose a violence risk seems more proper. Then, alternatives might include relocating a perpetrator of abuse and providing heightened supervision or placement in a single occupancy cell within the general population by obtaining adequate opportunities. Providing transgender inmates, the opportunities of being transferred from a men's to a women's facility or vice versa and being placed in a special prison facility for LGBT people such as K6G at the Los Angeles County Jail⁵⁶ might be an alternative.

References

- Arkles G. Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention; 18 Temp. Pol. & Civ. Rts. L.Rev:515. 2009.
- Belbot B.,Hemmes C.The Legal Rights of the Convicted; 140, LFB Scholarly Publishing LLC. 2010.
- Dolovich S.Cruelty, Prison Conditions, and the Eighth Amendment; New York University Law Review 898:881-979. 2009.
- HowellA. Windsor. 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.
- Palmer W.John. The Constitutional Rights of Prisoners: 9th Edition. 2012.
- Rosenblum D. "Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism; 6 Mich. J. Gender & L. 499:523-24. 2000.
- ShahA.Benish. Lost in Gender Maze: Placement for Transgender Inmates In the Prison System, Journal of Race, Gender and Ethnicity; Vol.5 Issue 1:50. February 2010.
- Suto I. Inmates Who Attempted Suicide in Prison.A Qualitative Study; School of Professional Psychology; Paper 46. 2007.
- Thompson D. Convict Suicides in State Prison Hit Record High; Associated Press. 2006.

⁵⁶For more information see e.g. <http://www.centerforsexualjustice.org/2014/11/20/can-a-jail-be-fabulous-queer-responses-to-la-weeklys-article-on-k6g-gay-and-trans-inmate-classification-in-la-county-jails/> (last visited March 11,2014).