Keepin' It "Real": Israel's Segregation of Transgender Prisoners and the Transgender/Cisgender Binary

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KEEPIN’ IT “REAL”: ISRAEL’S SEGREGATION OF TRANSGENDER PRISONERS AND THE TRANSGENDER/CISGENDER BINARY

LIHI YONA*

I. INTRODUCTION

In a society built on the assumption that sex equals gender, transgender people struggle to find their place. And in a prison system with a primary logic of a gender-based binary (male facilities and female facilities), transgender prisoners’ alienation and exclusion is intensified as they are constructed as the ultimate “other.” In Israel, as in many other countries, this struggle has resulted in a decision to segregate transgender prisoners from the rest of the prisoners with the aim of ensuring their safety. In this paper, I wish to examine this decision and offer some critical thoughts about this approach and its underlying assumptions regarding transgender identity and conceptualization.

Transgender folk are often described, or describe themselves, as located “in-between”: in-between genders, in-between identities, in-between privilege and oppression. Sonny Nordmarken describes himself, in a short autoethnography, with the following words: “I live in the in-betweenness of genders and in the borderlands of oppressions.” However as the transgender struggle for equality gains recognition, the legitimacy of transgender identity develops, and transgender people are slowly being acknowledged as part of an independent category. In the United States, for instance, courts and legislatures have begun to acknowledge trans identity

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1 Sonny Nordmarken, Becoming Ever More Monstrous: Feeling Transgender In-Betweenness, 20(1) QUALITATIVE INQUIRY 37, 38 (2013). As he elaborates: “As a transgender being, my gendered shifting moves me into more betweennesses. I am queerly between: I occupy multiple positions at once, and different positions at different times, depending on how people read me—in regard to age and ability as well as gender. I am socially subjugated as transgender, even as I am beginning to experience in a new way what White male privilege is. And the subjugations of femaleness still shape my life.”
as an independent category of discrimination, and recent developments in Israeli law have followed this path. Nevertheless, in recent years transgender thinkers have started to cast doubts regarding what they perceive as a process of rigidification that transgender identity has undergone, and to raise certain concerns about it.

In this Article, I explore these doubts, specifically with regard to the policy of segregating transgender prisoners in Israeli prisons, in light of a recent Israeli Supreme Court ruling on the subject. I ask to what extent a policy of protective isolation and transgender prisoner segregation may actually achieve its stated goals, and furthermore what are the risks inherent in such a policy? I answer these questions in two ways. First, I draw on American and international transgender scholarship in order to critique Israel's latest court decisions on this issue, through detailing the damaging effects isolation and segregation have on the prisoners it presumably aims to protect. Second, I examine to what extent a policy of segregating transgender prisoners is harmful, not only in the damaging effects of segregation itself but also given the underlying assumption that enables it. How do these acts of segregation or isolation affect the construction of trans identity more generally? How does it affect cisgender identity? And to what extent does segregation result in a strict binary between transgender and cisgender identities?

Part II of this Article provides the background necessary for my argument. Since almost no legal writing on transgender prisoners exists relating to the Israeli context, I will briefly lay out some basic definitions as

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3 In Roe v. Israel which will be discussed here in length, the Israeli Supreme Court recognizes transgender people's right to equality, see CrimA 5833/12 Roe v. Israel (Sep. 12, 2013) Nevo Legal Database (by subscription, in Hebrew) (Isr.).

4 Dean Spade, Resisting Medicine, Re/modeling Gender, 18 BERKELEY WOMEN'S L. J. 15 (2003).

5 Cisgender, as defined by the Oxford English means: “Sense of personal identity and gender corresponds with their birth sex; Compare with transgender”. See “Cisgender,” OXFORD DICTIONARIES, 2016 www.oxforddictionaries.com/us/definition/american_english/cisgender. I do not mean to use this word in a denoting way, but rather as a definition to non-trans individuals. In this Article I will use the words “cisgender” and “cis” interchangeably.
well as explore the different reasons for transgenders' over-representation in the criminal system and their unique vulnerability within prison walls. Part III takes a closer look at the brief Israeli experience with transgender prisoners. Here I present the legal mechanism upon which transgender prisoners' segregation policy is based and the lack of adequate judicial review over it. In Part IV I present my critique of this segregative policy both in regard to the direct harm it causes isolated prisoners and in regard to its more general effects on the understanding of trans identity, cis identity and the space in-between them.6

II. OVERVIEW: TRANS FOLK AND THE PRISON SYSTEM

The term transgender has a variety of meanings, and a debate regarding what is part of this definition in currently taking place within LGBTQI communities in Israel, the United States and elsewhere. It has a medical definition which is heavily linked to the conditions required in order to undergo a sex-change operation;7 under the medical definition, a transgender person is one who wishes to change their biological sex so that it be adapted to their gender. Another approach on transgenderism argues that the idea that there is some lack of congruence between a transgender person's gender and their biological sex first assumes that there is some

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6 I allow myself to draw from the American experience regarding segregation of transgender prisoners due to two reasons. First, the legal connection between Israel and the United Stated is close. Israeli courts use U.S. rulings as sources of inspiration and persuasion in many cases, and the legal scholarship often compares these two common-law countries. Further, in Israeli studies on Israeli prisoners, many insights and comparisons are commonly taken from the American context. See, e.g., Gila Chen & Tomer Einat, Kele Nashim: Ha'hatzer Ha'ahorit shel Ha'hevra Be'yisrael [Women's Prison: The backyard of Israeli Society] (2010) (Isr.). Second, I restricted my usage of the American context only to general policy arguments and critiques that are relevant to the Israeli context.

7 The legal foundations for a sex change operation in Israel are detailed in Shmuel Shimoni, Hakara mishpatit be'shinui min [Legal recognition for sex change], 28 MEKHAREU MISHPAT [LAW STUDIES] 311 (2012) (Isr.). In Israel there is a committee which decides whether a sex change operation is authorized for an individual seeking one. It should be noted that the procedure for a sex change authorization is undergoing change these days, mostly thanks to transgender activists and organizations, such as Project Gila—a “movement for transgender empowerment in Israel” see www.gila-project.com/?page_id=224. In the United States the medical requirements for sex change operations are introduced, as well as criticized, in Dean Spade, supra note 4.
adequate connection between the two and that such an assumption, regarding a gender that "flows" naturally from a specific sex, is false.8

For the purpose of this paper, I use the term transgender to refer to those prisoners who are identified by prison authorities and/or other prisoners as transgenders, and are therefore isolated as such.9

Transgenders are traditionally divided into two main groups: M-to-F transgenders (biological males seeking female gender identity) and F-to-M transgenders (biological females seeking a male gender identity).10 As will also be evident from this paper, the first group (M-To-F) is usually discussed with greater attention.11 One of the main reasons for this phenomenon is the fact that biological females who adapt masculine dress code and behavior are usually less 'noticeable' as transgender in comparison to biological males who dress in women's clothes or act 'feminine.'12 I discuss both groups in this paper, but put greater emphasis on M-to-F transgender prisoners.

The social meaning of transgender existence, especially in a discussion on transgender prisoners, cannot be complete without understanding the process of criminalization that the lives of transgender folk undergo, and the other factors that contribute to the high representation

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8 See Andrew Gilden, Toward a More Transformative Approach: The Limits of Transgender Formal Equality, 23 BERKELEY J. GENDER L. & JUST. 83, 88 (2008) http://scholarship.law.berkeley.edu/bglj/vol23/iss1/3 (citing JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 33 (1990)). "In order for gender to be understood as a site for legal and political reform, it cannot be understood as flowing from one's inclusion in one of two biologically determined sexes. Gender is not merely the cultural manifestation of one's biological sex. Rather, it is a normative ideology that creates the appearance of a determinative biological self: 'Gender is the repeated stylization of the body, a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance, of a natural sort of being'."

9 Gabriel Arkles, argues in his article against prison segregation on the basis of gender, and discusses the group of “transgender, intersex, and gender nonconforming (TIGNC) people” Gabriel Arkles, Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 518 (2009). (hereinafter: “Arkles, safety and solidarity across gender lines”). Although this paper focuses only on the first group (transgender prisoners), I believe the arguments and its conclusion could be easily applied to these groups as well.


12 Id.
of transgender folk in the criminal system. Many factors contribute to the high percentage of transgenders being arrested and convicted for various crimes. I take the time to explore these factors, as they are key to demonstrating that the reality of transgenders in prisons is not coincidental but rather structured and permanent. This fact highlights the importance of providing an adequate solution for the problem presented in this paper.

The reasons for transgender folks’ over-representation in the criminal system can generally be divided into two categories. First, there are crimes conducted as a result of the link between transgender people and poverty and homelessness. Many transgender folks find themselves on the streets after being pushed out by their communities and families. In addition, many encounter discrimination in employment, housing and in acquiring health insurance. These factors “create a virtual pipeline to prison: economic hardship causes many transgender individuals to resort to illegal means to live, which results in arrest, conviction, and ultimately incarceration.”

Indeed, poverty and homelessness are traditionally linked to criminalization and criminality, and due to the fact that transgenders are at high risk of becoming poor and homeless, they are also at high risk of incarceration.

The second reason is inherently linked to the lives of transgender folks rich and poor. Due to the fact that Israeli society (much like American society) is still characterized by systemic transphobia, certain aspects of transgenders’ lives themselves are criminalized. Thus many of them are convicted for using the “wrong” bathroom or of sexual offenses based only on being in such a bathroom. Further, many transgender people are profiled or harassed by police officers, as well as wrongly assumed to be sex workers. Examples of this phenomenon can be found both in the U.S.

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16 Arkles, *supra* note 9, at 525-6.
17 *Id.*
and in Israel. Finally, given the risks of transphobia-based hate crimes, transgender folks are also at risk of being convicted for fighting back against their attackers.

From this review it appears that transgender people suffer greater risks of imprisonment, linked directly to their status as a marginalized and disadvantaged group. Two conclusions should be drawn from this fact, a descriptive and a normative: (1) the reality of transgender prisoners in the Israeli prison system is here to stay, and requires a comprehensive debate towards adequate policy; and (2) the amount of injustice and discriminatory factors tied to the imprisonment of so many transgender folks highlights the importance of designing a just solution for their accommodation in prison, one that does not further punish them while incarcerated. Segregation, I wish to argue in this paper, may prove to be just such further punishment, as it subjects transgender prisoners to more exclusion and oppression.

Finally, before any criticism can be made regarding the Israel Prison Service policy of isolation, it is crucial to explain its motivations. Given the lack of current information regarding violence against transgender prisoners in Israel, I will have to rely in this section mostly on American data; however it appears that the main argument regarding the need to protect transgender prisoners is similarly relevant in Israel, as I

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22 The only other papers focusing on transgender prisoners in Israel, written by Nora Grinberg, one of the leading figures in the Israeli transgender community, also relies solely on American data on this point. See Nora Grinberg, Mishpato shel adam bili nire'e: I hakara be 'zehuto shel avarian transgender ke'mehikat kiyumo [The trial of an invisible man: recognition in the identity of a transgender criminal as the erasure of his existence] 26 HAMISHPAT BARESHET (MIVZAKEI HEAROT PSIKA) 5 (2014) (Isr.). I can only hope that given the now emerging discussion about transgender prisoners, the research on this issue will grow, and the much needed data will become available in the future.
illustrate in the following section. From the American experience, it seems that transgender folks are subject to harsh conditions when in prison. Violence may come from both other prisoners and from prison guards. A 2007 study conducted in California showed that transgender inmates disproportionately suffer sexual violence. According to this study, 59 percent of transgender inmates reported experiencing sexual assault, as oppose to only 4.4 percent of the general inmate population.

Why is this happening? One of the main reasons that transgender prisoners are subject to higher risk is due to prison hierarchies based on gender and masculinity, especially in male facilities. In such a masculine environment, when prisoners are rewarded for being tough and aggressive (both characteristics that are traditionally associated with masculinity), the transgender prisoner appears to be feminine and weak, and as such becomes the subject of attacks. In many facilities, transgender inmates are considered "queens," meaning that they are responsible for laundry, cleaning, cooking etc. However, the mere fact of being responsible for "feminine" chores in prison is hardly the problem, of course. This culture and systemic power structure creates an assumption that non-trans men have the right to "to access bodies perceived as female and/or feminine." This theory accords

23 I will elaborate on the Israeli treatment in the following section; see page 9 onwards, and especially page 10.
25 Id.
26 Sharin Dolovich, Strategic Segregation in the Modern Prison, 48 AM. CRIM. L. REV. 1, 14 (hereinafter: “Dolovich, Strategic segregation”): “To outside observers, prison life can seem like a dog-eat-dog state of nature. Yet the sexual victimization of weaker prisoners by more powerful ones in fact takes place within a highly organized social system, in which power is allocated and exercised along surprisingly conventional lines. As with intimate relationships in society in general, the defining scripts are gendered: in men’s prisons, as in the free world, men dominate women.”
29 Arkles, supra note 9, at 526.
with the fact that many gay or effeminate men are also subject to harassment, rape, and other forms of sexual violence.\textsuperscript{30} 

I would like to offer one additional explanation for the sexual violence directed at transgender prisoners. In \textit{The Lords of Rikers}, a New York Magazine article on the inner system dictating life inside the Robert N. Davoren Center (RNDC) juvenile detention building, Geoffrey Gray describes a facility characterized by a rigid power structure established by the inmates that divides them into rival groups and castes. Every new prisoner is required to associate himself with one of the rival groups in order to survive:

‘Are you wit’ it?’ is the way it begins. At RNDC, what it means is, have you accepted the power structure as it exists... if you answer no, you get ‘spanked,’ that is, beaten savagely\textsuperscript{31} 

In other words, non-compliance with the existing dynamic and power structure is by itself a reason for harassment. I argue that we should look at transgender inmates as the young inmate answering “no” to the question, “are you wit’ it?” The only difference is that the structure these transgender inmates are refusing to adhere to is the gender binary and the hierarchies of masculinity that dictate most prisons, and male facilities in particular.

The problems transgender prisoners face behind bars are grave. Not only do most of them arrive at the prison gate after likely having been subjected to disadvantage, violence, and harassment, they are further likely to be subjected to harsher conditions in prison as a result of their vulnerable state. As mentioned above, the authorities’ response to this problem, in Israel and in many sites in the United States, has been to isolate transgender inmates in order to protect them. In the next section, I briefly present the Israeli isolation policy of transgender prisoners, as well as the judicial responses to it. I then arrive at the core of my argument, where I present the concept of isolation and its implications on prisoners’ lives, offering a critical look into its underlying assumptions.

\section*{III. TRANSGENDER PRISONERS IN ISRAEL}

Up until recently, the Israel judicial system did not directly deal with the subject of transgender prisoners. However, it received sudden

\footnotesize{\textsuperscript{30} Dolovich, \textit{supra} note 26, at 2. 
public attention with a first-of-its-kind ruling the Israeli Supreme Court issued on September 12th, 2013, in the case of a transgender prisoner who appealed his sentence.

The Israeli Prison Ordinance is the law governing conditions within the Israeli prison system. Article 10(a) of the ordinance states that male prisoners and female prisoners must be incarcerated in different parts of the prison in a manner that prevents them from seeing, talking, or coming into contact with one another.32 With this section, the prison systems’ gender binary was established. Article 19(b)(3) further states that it is legal to hold a prisoner in protective segregation if they require such protection.33

In addition to the broad terminology of the order, which allows prison authorities to hold transgender prisoners in protective segregation at their discretion, a regulation issued by Israeli police applying to Israel Prison Service made a direct connection between transgender prisoners and protective confinement.34 According to a 1993 regulation, due to their vulnerable status, certain types of prisoners will be kept in separated cells. Included among these types are mentally ill prisoners, “trannies,”35 homosexuals, sex offenders and other groups designated by officials. With this regulation, the segregation of transgender prisoners has been established.

“Segregation” here should be understood as nothing other than isolation: according to the order, segregation is to be achieved through prisoners’ isolation in an individual cell or a cell shared with one additional prisoner. As of 2010, two-thirds of the prisoners held in segregation were kept in a cell by themselves.36 A 2015 report by the Israeli Office of the Public Defender states that two transgender prisoners are held in isolation in the Neve Tirtza women’s prison, one for a period of four-and-a-half

32 Israel Prison Order [New Form] 5732-1971, Article 10(a) 21, LSI 459 1971 (lsr.).
33 Id, at Article 19(b)(3).
34 The regulation technically pertains to detention and not incarceration, however I believe it reflects authorities' modus operandi in these and similar situations. However I also base my understanding regarding transgender isolation on information revealed by prison authorities in the cases that I mention below.
35 I am translating the Hebrew term koksinelim, which is a derogatory term in the original, hence the use of a derogatory term in the English (the exact and fascinating etymology of the Hebrew-French term koksinel will have to be dealt with in a separate paper, and I thank Ishai Mishory for this point). See General Headquarters’ Order No. 12.3.01 (Treating Inmates in Detention) (Dec. 15, 1993) (Isr.).
36 Physicians for Human Rights, Adalah – Center for Arab Minority Rights & Al-Mezan Center for Human Rights, bidud asirin ve’atzirim bebatey hakele be’yisrael [Segregation of prisoners and detainees in Israeli prisons], 3 (2011) (Isr.).
According to the report, both were kept in individual cells with no connection to other prisoners, and one expressed a marked deterioration in her psychological state.

Although this policy has never been challenged in the court system, there were three occasions where the manner in which transgender prisoners served their time was discussed in the court’s decisions. I will present them briefly, as they illustrate how this policy, and transgender prisoners’ conditions, are accepted with no judicial review.

The first time the issue of transgender prisoners came up in a legal decision was in 2010, in *Israel v. Shani Mensi*. Upon releasing two prisoners who had appealed the continuance of their arrest, the judge mentions the circumstances weighing in their favor: "the suspects suffered harsh treatment from other male prisoners when detained because they are transgendered, and these things are unfortunately obvious." This short sentence raises several questions and insights. First, it is impossible to discern whether both suspects were born male or identify as women—or the other way round. Second, it is further unclear whether both were held in isolation, and if so, whether the harsh treatment they received from other male prisoners occurred despite this isolation. Third, it indicates that despite both prisoners being presented as women—and regarded as such—they were held in an all-male facility. Finally, and perhaps most interestingly, it seems that the harsh conditions these prisoners were subjected to were “obvious” to the judge: though this was the first time the topic of transgender imprisonment was ever explicitly mentioned in a court decision, the judge nevertheless treats this fact as if it were long an understood given. The way these conditions are presented, along with the lack of any concurrent critique, helps in creating the assumption that the harsh treatment suffered by transgender prisoners is almost an inherent and inevitable part of prison reality, known and unfortunate but nevertheless unchangeable.

The second time the issue comes up in a judicial ruling is in *Plonit (Roe) v. Israel*, an appeal of the sentence severity handed to three prisoners convicted of armed robbery. One of the criminals, a “Jane Roe” according

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38 Translation is mine. See CrimA(TA), 10-09-20413 Israel v. Shani Mensi, PM (2010) (Isr.).

39 CrimA 5833/12 Roe v. Israel (Sep. 12, 2013) Nevo Legal Database (by subscription, in Hebrew) (Isr.)
to the court, was born female but identifies as male, and underwent a series of sex-change operations. In the trial, Israel Prison Service presented its position that "Roe" should be held in isolation from other inmates in order to protect "her." Given the prison service's position, the Supreme Court ruled that there was justification to shorten Roe's sentence in comparison to those of his accomplices, reducing it from 15 months to ten.

The Justices held that isolation constituted an aggravation of punishment, justifying reducing the term of imprisonment to reach equal sentencing between Roe and his accomplices. Justice Neal Hendel, who authored the court's opinion, as well as Justice Salim Joubran who wrote a concurring opinion, both criticized Israel Prison Service's isolation policy; however both aimed their criticism at the sentence reduction, leaving the policy intact.40

Five months later, a similar case was brought before Tel Aviv District Court. In Israel v. Shiran Ozen, which dealt with a transgender man (F-to-M) convicted of theft and assault,41 the judge mentions Roe v. Israel and Israel Prison Service's isolation policy as justification for sentencing the defendant to a lower sentence. However, this judge similarly does not question the policy itself.

Roe v. Israel, as well as Israel v. Ozen, I would argue, created a de facto judicial approval of the isolation of transgender prisoners. I would further argue that the fact that Roe v. Israel entails a recognition of transgender identity and transgender prisoners' right to equality in sentencing has framed this case as an achievement for the transgender community. Indeed several statements made by the Supreme Court justices in Roe v. Israel constitute a significant contribution to transgender justice, as already eloquently noted by Aeyal Gross and Ido Katri.42 However, I continue and argue that the almost absolute lack of a needed critique of transgender prisoner isolation policy has advanced the assumption that such

40 It should be noted that this was partly a result of a problematic litigation strategy on the defendant's lawyers, as Nora Grinberg also notes. See Grinberg, supra note 22.
42 See Aeyal Gross, Israel Should Drop Binary View of Gender, HAARETZ (Sept. 16, 2013) (claiming that "[t]his opinion, together with Joubran's ruling, are the first signs of judicial recognition of a right to equality for transgender people, who suffer from workplace discrimination and face unreasonable barriers to changing their gender from the health and interior ministries."); See also Ido Katri, Shonut migdarit bepsak hadin Ploni(t) –bein shamranut le'hadshanut [Gender Otherness in the Case of D/Roe: Between Conservative and Innovative Approach], 26 HAMISHPAT BARESHET (MIVZAKEI HEAROT PSIKA) 5 (2014) (Isr.).
isolation—not unlike harassment by other prisoners—may be unfortunate, but is nevertheless inevitable.\footnote{There are only two statements I could trace objecting to the isolation of transgender prisoners, both by Nora Grinberg. See Grinberg, \textit{supra} note 22, and in a blog dealing with LGBT issues. The blog contains a quote by Grinberg, stating that “they put them [transgender prisoners] in isolation to protect them, but, in fact, the isolation is an additional punishment.” See Yaniv Halperin, \textit{Koksinelim vehomomim: kluim ye'unei hagana} [\textit{Trannies and Gays—Vulnerable Inmates}] GoGAY (July 26, 2005), http://gogay.co.il/item.php?id=5108.}

This is, of course, surprising. International as well as Israeli experience on isolation and the problems associated with it is extensive and well-documented. And critical writing about isolation, whether for punitive reasons or as a protective measure, is also plentiful. In the section below I seek to map the current critique on prisoner isolation and to detail my own dilemmas vis-à-vis this policy.

\textbf{IV. A CRITICAL LOOK AT PROTECTIVE ISOLATION}

The critique I present regarding Israel Prison Service’s segregation policy will be divided into two main categories: direct harm to transgender prisoners caused by segregation and isolation and the problematic ways this policy assumes—as well as enforces—rigid definitions of transgender and cisgender identities.

\textit{A. Direct implication of isolation on transgender prisoners}

As elaborated above, Israeli law permits holding prisoners in segregation for extended periods. According to a 2012 report by the Israeli Office of the Public Defender, a prisoner in isolation remains in their cell for 23 hours a day.\footnote{2012 Public Defender’s Report, \textit{supra} note 37, at 10.} Further, the report documented extremely harsh conditions in the isolation cells, including severe heat, lack of airflow in summer and severe cold in winter, poor sanitation conditions, insufficient lighting, and an infrastructure that fails to ensure prisoners’ privacy.\footnote{\textit{Id}, at 11-16.} A follow-up report published in 2015 states that most of the problems stated in the original report were not addressed, and recommends that the isolation unit at Neve Tirtza should be closed immediately.\footnote{\textit{Id} at 8-9.}

The isolation policy has a direct effect on prisoners who are subjected to it, even when implemented due to protective motivations. In a 1996 report issued by the Prison Service and the Ministry of Public Security regarding the effects of segregation on prisoners, it was found that...
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segregation of inmates results in deep psychotic reactions and that prisoners held for extended periods in segregation suffer long-term detrimental effects. The conclusions the report reaches match international findings on prisoner isolation and segregation. Isolation, it has been proven by many scholars, is indeed psychologically damaging. In the United States, the Supreme Court’s criticism of this policy dates back to 1890, when the court stated that

[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.

Although these statements were not made with regard to Israel specifically, and therefore should be applied carefully to the Israeli context, they nevertheless provide some indication of the effects of isolation on human beings.

Several additional studies examined the specific implications of long periods of isolation and segregation of prisoners. In a 1992 study, which was based on hundreds of in-depth interviews with prisoners subjected to isolation in New York facilities, researcher Hans Toch found that “isolation panic” is a significant problem suffered by prisoners in solitary confinement: among its symptoms are “rage, panic, loss of control, breakdowns, psychological regression, and a build-up of physiological and

48 Arkles, supra note 9, at 538.
50 I can further argue that given the nature of isolation - the detachment from society and the experience of the self as an isolated human being with no exterior stimuli whatsoever - the studies into the effects of isolation are in fact studies of the human condition that is transcendent of cultural and societal differences. No doubt, the perception of “self” differs from society to society in ways that can influence the experience of such “self.” However, it still seems that this experience captures a unique state of affairs with regard to the human condition, which allows me to apply these studies to the situation in Israel.
psychic tension that led to incidents of self-mutilation.\textsuperscript{51} Prisoners reported a distinct difference between prison, which they described as tolerable, and segregation, which was not.\textsuperscript{52}

Specific studies were also conducted regarding prisoners in protective custody. There, too, high levels of anger, depression, and physical symptoms were reported.\textsuperscript{53} Multiple studies conducted in more recent times, as well as in different countries, support these conclusions.\textsuperscript{54} In fact, due to these findings, the United Nations General Assembly declared in 1990, in a session on Basic Principles for the Treatment of Prisoners, that the use of solitary confinement should be abolished or, at the very least, highly restricted.\textsuperscript{55}

The implications of isolating a prisoner, then, are very grave indeed. As many scholars have noted, isolation should be viewed as a form of psychological violence, as well as a sort of “double” punishment to the prisoner.\textsuperscript{56} Moreover, not only does isolation causes severe psychological damages to prisoners, it has been also found that it achieves none of its declared protective goals.

Traditionally, the harmful effects of segregation have been justified by its protective goals—the end justifies the means. However, the assumption underlying these goals is also questionable. In an article recently published by Gabriel Arkles, a transgender prisoners’ attorney, he mentions several facts gleaned from clients.\textsuperscript{57} Arkles argues that protective confinement actually works against transgender prisoners’ safety for two major reasons. First, the social connections prisoners create with fellow prisoners are crucial, both for moral and mental support and for survival and protection. Among the examples he provides is the story of Victoria Arrellano, a 23-year-old transgender woman (M-to-F) who was HIV

\textsuperscript{52} Id. at 54
\textsuperscript{56} Arkles argues that “[t]his type of segregation itself is a form of psychological violence and can lead to prisoners violently harming or killing themselves.” See Arkles, supra note 9, at 538-39. For a similar argument, regarding isolation as punishment, see Barnes, supra note 10, at 644.
\textsuperscript{57} Arkles, supra note 9, at 518.
positive and was placed in the general population of a male facility. She had no access to medication, and her situation began to deteriorate:

She grew gravely ill, such that she screamed in pain any time anyone moved her, vomited blood, and experienced diarrhea, fever and other symptoms. The men who were detained with Victoria cared for her, administering cold compresses to bring down her fever, cleaning up her blood and vomit, and helping her get to the bathroom. They made requests for the infirmary to treat her. They created a petition for her demanding medical care, which seventy of them signed. Finally, eighty of them organized and refused to line up for count, chanting ‘Hospital’ again and again until at last the facility complied and removed Victoria to the hospital.58

The second reason Arkles provides is based on the understanding that risks to inmates may be derived not only from other prisoners but also from prison guards. A 2014 Israeli example comes to mind, highlighting the potential harm trans folk face from men in uniform: eleven off-duty Border Policemen attacked a transgendered woman with pepper spray and a stun gun after leaving a nightclub in southern Tel Aviv—and police later said the crime (which they termed a "prank") was mainly motivated by boredom.59

Given that guard violence is sometimes the reality in prison, many transgender prisoners fear they are an easier target for such violence when isolated.60 The risks and harms associated with segregative confinement make it clear why some see it as a form of punishment.61 Within the framework that acknowledges the penal aspects of protective segregation, additional problems for transgender prisoners become clear, and they stem from the conceptual punishment of transgenderism. First, when transgender prisoners are placed in isolation as a result of threats to their safety, the

60 Arkles, supra note 9, at 540.
61 See Branes, supra note 10, at 644. She argues that isolation of transgenders is a punishment of their status instead of their actions, and as such should be held illegal, in the same way isolation on the basis of disability or substance addiction are prohibited. Id.
message sent to the rest of the prison population is that the problem is transgender prisoners—who therefore need to be isolated—rather than the prisoners threatening them. Such a message is harmful to transgender prisoners because it can be understood as legitimizing the violence they suffer. In addition, it may deter other victims of sexual-based violence from reporting incidents to the prison officials for fear of being placed in protective isolation. Finally, under harsh prison norms, when a prisoner is associated with weakness and vulnerability that can place him or her in danger. Weak prisoners fall prey to others trying to climb a prison’s hierarchical ladder. When transgender prisoners are put in protective custody, they may be perceived as ‘victims,’ and therefore ‘weak,’ which in turn makes them potential targets for future violence.

It appears, then, that segregation not only causes harsh psychological harm to prisoners but also fails to achieve its stated goal as it does not necessarily contribute to vulnerable prisoners’ safety in prison and can sometimes even harm it.

Other than these well-documented problems associated with protective segregation and isolation, segregative measures have additional harmful effects relating to the way they maintain and reinforce questionable gender binaries. I explore these problems, which form the core of my argument in this Article, in the following section.

**B. Segregation as binary: transgenders, cisgenders and everything in between**

As noted in the previous section, the segregation of transgender prisoners has immediate harmful effects on their psychological state and safety inside prison. However, this policy also has additional indirect effects on transgender prisoners, as well as on the general prison population.

Any act of segregation assumes inherent difference, as well as a binary, between the two segregated groups. This inherent difference is what enables segregation. The segregation of transgender prisoners purports to draw a strict and rigid line between transgender and non-transgender (cisgendered) prisoners. A hint of this approach, which sees inherent difference between transgender and non-transgender prisoners, can be gleaned in the Israeli Supreme Court ruling in *Roe v. Israel*, written by Justice Hendel:

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63 Okamura, *supra* note 14, at 121.
It has been argued that there are prisoners that are isolated due to fear for their safety and not only because of their bad behavior. As a general rule this argument makes sense, but its weight decreases somewhat in the present instance as the circumstances warranting the appellant’s isolation have to do with inherently internal reasons, as opposed to other prisoners who warrant isolation. The hardship in the appellant’s placement... [is linked] to the circumstances of the core of their internal world. [Emphases added]

Transgendered individuals are described here as having an inherently different internal core, a pre-discursive “inner truth,” a way of being that is at odds with and opposed to a non-transgender way of being. Accordingly, Hendel based his ruling on traditional medical understanding of transgender people: the fact that the appellant had already begun the medical procedure of a sex change informed Hendel’s recognition of his rights.

This understanding of transgendered people as inherently different from cisgendered people, and the idea that a clear distinction can be drawn between them, shapes and constitutes the subjects on both sides of the line. In other words, this divide defines both “insider” and “outsider” and how they should behave. This technique dividing different prisoners into two distinctive groups—those who are vulnerable due to non-normative gender behavior and those who are not—echoes Judith Butler’s argument regarding the ways in which gender is produced “through certain exclusionary practices.” Butler argues that the division of gender, as well as sex, into two distinct categories and the resulting categories of this division (male/female; man/woman) are the product of judicial and discursive power rather than a natural, biological truth. Moreover, Butler adds, this distinction constitutes and fixes each of these categories: “[t]he act of differentiating the two oppositional moments of the binary results in a consolidation of each term, the respective internal coherence of sex, gender, and desire.”

65 See Butler for the objection of an inner truth of sex, BUTLER, GENDER TROUBLE, supra note 8, at 134-37.  
66 See on this point Katri, supra note 42  
67 BUTLER, GENDER TROUBLE, supra note 8, at 2.  
68 Id. at 23.  
69 Id. at 22-23. See also on page 4: “These domains of exclusion reveal the coercive and regulatory consequences of that construction, even when the construction has been elaborated for emancipatory purposes.”
I wish to apply Butler’s argument and framework into the transgender/cisgender binary inside prisons: the rigid, binary distinction between transgendered and non-transgendered prisoners is upheld in the same way that a rigid, binary distinction between men and women is, namely sex stereotypes and cultural norms, when in fact both categories belong on a continuum.

Given that gender norms and the alleged clear distinction between a normative and a non-normative gender performance are incoherent social constructs, I argue that the act of conforming or non-conforming to these same gender expectations and norms is a similarly unstable product of judicial and discursive power. Here specifically, judicial power is manifest in article 19(b)(3) of the Israeli Prison Ordinance combined with the 1993 regulation that dictates the transgender/cisgender binary in prison and in relevant court opinions.

Although traditionally transgender prisoners have sought to fully identify at one end of the gender scale, many have not, seeking rather a less-defined gender identity situated somewhere along the spectrum. Any attempt to create a fixed definition of what trans people are or ought to be in order to be considered “real” tends to further police the already-policed bodies of transgender people in general, and transgender prisoners in particular.

An example of the harms caused to transgender folks by a policy based on fixed notions of transgenderism is provided by lawyer and scholar Dean Spade, with regard to the medical institutions. Spade argues against the medical criteria for sex-change operations which have to do with a definition of “real” transgender people. He argues that this definition, a gatekeeper for resources and personal freedom, polices transgender people’s ability to explore and describe different narratives of inhabiting/doing transgender identity. Further, Spade challenges the understanding of transgenderism as a stable category with the ability to classify or limit it to certain performances: “[f]rom what I’ve gathered in my various counseling sessions, in order to be deemed real I need to want to pass as male all the time, and not feel ambivalent about this.”

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70 Israel Prison Order, supra note 32, and the General Headquarters’ Order, supra note 34.
71 Recall the discussion early in this paper regarding the umbrella term of transgenderism, see supra page 3-4.
72 SPADE, supra note 4, at 24.
73 Id. at 21. Spade further elaborates: “Here's what I'm after: a surgically constructed male-appearing chest, no hormones (for now, maybe forever), no first-name change, any pronouns (except "it") are okay, although when it comes to gendered generics I happen to really like "Uncle" better than "Aunt," and definitely "Mr. Spade. "... I've quickly learned that the converse is also true: in order to
Similarly, Rachel Pollack also challenges the discourse around “true” transsexualism, also seeking to undermine the stable understanding of transgender identity:

What sense does it make to label some people as true transsexuals, and others as secondary, or confused, or imitation? Whom does such an attitude serve? I can think of no one but the gatekeepers, those who would seize the power of life and death by demanding that transsexuals satisfy an arbitrary standard. To accept such standards, to rank ourselves and others according to a hierarchy of true transsexuality, to try to recast our own histories to make sure they fit the approved model, can only tear us down, all of us, even the ones lucky enough to match that model.

I read these writers as doing more than expanding the definition of what transgenderism is or ought to be; rather the challenge they pose to a strict definition of transgenderism has the potential to contest the purported binary between trans and cis people. As Spade further mentions, much like the man/women binary the trans/cis binary must also rest on stereotypical notions of gender in order to exist. Thus, a transgender girl is acknowledged by the medical system as a “real” transgender only if she plays with dolls and love princesses from an early age, while transgender boys are recognized as such by the DSM if they prefer short hair, show interest in sports and “rough-and-tumble play.”

The arguments these writers make demonstrate the ways a rigid definition of transgenderism that cringes from any risk of closeness to cisgender behavior actually harms transgender people and limits their range of legitimate existence narratives. And this discussion is uniquely relevant to obtain the medical intervention I am seeking, I need to prove my membership in the category "transsexual" to prove to the proper authorities that I have Gender Identity Disorder.

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75 Symptoms of GID in the Diagnostic and Statistical Manual (DSM-IV) describe at length the symptom of childhood participation in stereotypically gender inappropriate behavior. Boys with GID “particularly enjoy playing house, drawing pictures of beautiful girls and princesses, and watching television or videos of their favorite female characters.... They avoid rough-and-tumble play and competitive sports and have little interest in cars and trucks. Girls with GID do not want to wear dresses, "prefer boys' clothing and short hair," are interested in "contact sports, [and] rough-and-tumble play." See Dean Spade, Resisting medicine, supra note 4, at 24.
to the issue of transgender prisoners’ segregation: when the only method of protecting vulnerable, gender non-conforming people is segregation (which rests on one’s prior classification as “trans”), this inflicts harm not only because of segregation’s generally harmful effects but also due to the harmful effects that may stem from that very act of classification.

This policy, and the cis/trans binary at its core, risks forcing transgender prisoners into aligning themselves with the medical definition of transgenderism in order to even be considered for the relevant protection in prison. This is the case whenever the solution to violence against gender-nonconforming prisoners rests on the classification of these prisoners instead of on a holistic change of prison norms in a way that would make facilities suitable for transgender prisoners. Moreover, to continue my earlier assumption regarding the reasons of transgender prisoners’ special vulnerability as rooted their refusal to align themselves with the prison gender structure,76 I argue that in fact the continuation of the trans/cis binary inside prison perpetuates transgender prisoners’ vulnerability.

One could make a counter-argument at this point that true change to prisons’ structure, one that would make them more adaptable to gender-nonconforming prisoners, can only be achieved once the sex-binary logic that organizes prison geography is demolished. And I would agree. However given that the possibility of all-genders prisons (or, preferably, no prisons at all) currently seems out of reach, I would argue that there is still a reason to adhere to a solution seeking to break down the segregation and classification of transgender prisoners as such.

This, of course, still leaves the question of what facility should gender-nonconforming prisoners be assigned to: male or female. However, I am not arguing against any classification of transgender people as such. Acknowledging the unique situation of transgender and other gender-nonconforming people is crucial for them to achieve full access to resources and equality. But arguing that the trans/cis binary should not be relevant once the prisoners are behind prison walls does not require me to argue that it is never relevant—just as “seeing color” (i.e., the opposite of “color blindness”) may at times prove the right course for the achievement of racial equality while at others is the main hindrance to it.

As mentioned above, the problematic binary enforced by the segregation of transgender prisoners also influences those who are “inside,” i.e. those prisoners who remain in the general population. The idea that by removing the most vulnerable to a segregated area falsely assumes, as I have shown, that a clear divide exists between transgender and cisgender prisoners and that prison authorities simply have to enforce it. However,

76 I compared it to their alleged “no” answer to the question “are you wit’ it,” see supra page 8.
given the instability of gender norms—especially in prisons, where gender and sexuality are already under constant challenge and examination\textsuperscript{77}—the attempt to exclude the groups who do not conform to gender norms proves futile. The line has to be drawn and redrawn to exclude new vulnerable groups that fail to conform to new behavioral boundaries set after the exclusion of transgender prisoners.

Based on this understanding, similarities can be drawn between self-identified transgender prisoners and other prisoners who are "soft," "emotional," or act in other ways associated with femininity. These prisoners are also in danger of becoming targets once they become the most vulnerable gender-nonconforming prisoners in the system: as Sharon Dolovich argues, some prisoners will always have to be "designated as female."\textsuperscript{78} Therefore attempts to segregate these prisoners rather than correcting the cycle of violence itself will always result in both sacrificing some prisoners to sexual violence and in fostering an environment of violence dangerous to everyone.

An interesting example may be found in the Virginia Correctional Center for Women. The center has created a segregated wing designated for lesbian/bi prisoners in the hopes that it would "curb illegal sexual activity."\textsuperscript{79} This segregation policy, however, proved to be less clear-cut than was perhaps hoped for. Prisoners who did not act feminine enough soon found themselves segregated from the general population, with prisoners being transferred for wearing their hair short, wearing their uniforms loose, or not wearing makeup.\textsuperscript{80} I argue that this proves Butler’s argument regarding gender’s incoherence. True gender, she argues, is a fantasy.\textsuperscript{81} The idea that the general prison population can remain gender-conforming is somewhat of a fantasy, too.\textsuperscript{82}

This is especially dangerous in male facilities, where the segregation of transgender prisoners maintains and reinforces the prison as a masculine environment. The segregation and isolation of transgender prisoners simultaneously informs the rest of the prisoners that the general population “belongs” to prisoners acting in accordance with gender norms and expectations and transmits the message that the prison’s common areas

\textsuperscript{77} I thank Ido Katri for this point.
\textsuperscript{78} Dolovich, \textit{supra} note 26, at 14.
\textsuperscript{81} BUTLER, \textit{supra} note 8, at 136.
\textsuperscript{82} A similar idea may be found in Arkles, \textit{supra} note 9, at 546.
are unsafe for prisoners who challenge those norms. In an environment where the aggressive aspects of masculinity set the tone and ascribe the norms, men are encouraged to constantly prove their masculine worth. Such an environment is dangerous to every prisoner less successful in acting in accordance with such gender expectations, even if they do not identify as transgender. Breaking the trans/cis binary within prison walls has the potential therefore to not only allow for a more fluid transgender identity, but also to create a space for exploring cisgender identity and its limits. An interesting example for this point is provided by Arkles. He describes how the initial encounter of non-transgender prisoners with transgender prisoners, proved to have a liberating effect on non-transgender prisoners: “I have met both trans men and trans women who were first able to come out because of conversations and support from other people in detention.”

Taking into account the different problems associated with segregation that I have detailed thus far, I argue that any solution for the vulnerability of gender-nonconforming prisoners must be one that does not rely on the classification and segregation of identity-based groups. In the following section I detail several practical recommendations I believe should be taken into account when alternatives to the current policy are considered.

V. PRACTICAL RECOMMENDATIONS

In light of the discussion presented above, several practical recommendations can be made with regard to transgender prisoners’ placement in Israeli prisons. I present them here briefly, as an invitation for deeper consideration of proper solutions and policies regarding transgender prisoners in Israeli prisons.

First, I would argue that the current policy of protective segregation of transgender prisoners should be reserved only for situations where those

\[83\] As Sharon Dolovich argues: “That in men’s prisons there are no ‘women’ as conventionally defined does not mean that there are no gendered relationships. It simply means that for purposes of this particular cultural model, some prisoners must be designated as female” and later: “In the prison, those men seeking to prove their masculinity vie for possession of weaker inmates—the “women” in this social system—whose utter subordination to them, known to include ongoing sexual access, stands as public proof of their masculine power. In this culture, the performance of rape—the sexual penetration of another inmate defined as female—is a way to shore up the rapist’s own claim to maleness and, thus, his status and power in the prison hierarchy.” See Dolovich, supra note 26, at 14-16.

\[84\] See Arkles, supra note 9, at 530-31.
prisoners seek it voluntarily. Second, involuntary segregation should be reserved for those who attack or abuse transgender prisoners. Doing so would send a message to the general prisoner population that transgender prisoners are no different than any other prisoner.

Third, although the question of specific detention facility types (male or female) was not discussed extensively in this paper, there are relevant insights that can be gleaned from following it. There are three dominant approaches used when assigning prisoners to specific prisons according to sex/gender: the biological sex approach, which favors placing prisoners in accordance to their biological sex; the current sex approach, which distinguishes between pre-operative transgenders and post-operative transgenders, allowing only the latter to be placed in accordance with their chosen sex/gender; and the gender identity approach, which ignores prisoners’ biological sex, placing them according to their gender identity as they perceive it.

As I have already noted, most of the discussion here was centered on one group of transgender folks—M-to-F transgender folks—due to their higher visibility and vulnerability. Given the assumption that M-to-F prisoners in male facilities are the most vulnerable sub-group, I believe they hold the strongest claim to the gender-identity-based approach of prisoner placement. Under such an argument, transgender women (born male) should be placed in Israeli women’s prisons as part of the general population. A sociological study recently conducted on the single female prison facility in Israel revealed that violent incidents are rare among them. It therefore seems that the placement of M-to-F prisoners in that prison would put them at lesser risk of violence. As far as the fear that these prisoners (especially non- or pre-op prisoners) would pose a threat to the general female prisoner population, such threats could be dealt with via

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85 Indeed, some prisoners prefer being segregated for safety reasons. See Arkles, supra note 8, at 537. For an example from the Israeli context, not necessarily with regard to transgender prisoners see 2012 PUBLIC DEFENDER’S REPORT, supra note 44.

86 I.e., transgender before or after a sex change operation, respectively.

87 Mann, supra note 28, at 104. (“In the United States there are two methods of housing transgender inmates within prison systems. The most prevalent type of placement used is genitalia-based placement, and the other type is identity-based placement”). For the current sex approach see Okamura, supra note 14, at 118 (“California prisons, however, base gender classification on present genital status”).

88 Obviously, this argument should not be read as delegitimizing the use of the gender-identity approach to placement for all prisoners. I merely argue that there is a correlation between the needs of the most vulnerable group of transgender prisoners and a solution which involves fewer risks.
traditional prison mechanisms. Further, when a transgender prisoner is the source of, rather than the target of, a threat, the legitimacy of placing that individual in punitive isolation would seem to rest on sounder justification. 89

VI. CONCLUSION

In some ways, the failure of solitary confinement to live up to its purported safety justifications mirrors the failure of incarceration itself... Mirroring the larger system of incarceration, the most marginalized and politically active groups within detention are also the most targeted for the extra incarceration of isolating segregation 90

The prison, and no doubt punishment in general, is not intended to eliminate offences, but rather to distinguish them, to distribute them, to use them 91

I chose to end with these two quotes because I believe they may illustrate the picture in its entirety. Indeed, the act of segregation and isolation inside prisons may be compared, both in in terms of justifications and consequences, with incarceration in general. In both situations, the system chooses to deal with individuals who clash with society by isolating them rather than by changing societal norms in a way that would allow them to integrate into society. In both cases, societal problems—whether they are strict gender binaries or factors that contributes to the criminality of certain groups in society—are solved by sweeping certain people under the rug, or behind bars. In that sense, transgender prisoners are an extreme version of prisoners as such; fittingly, they pay a double penal price because of larger structural problems—first as general prisoners, then as transgender prisoners.

However as Michel Foucault demonstrates, the parallel between transgender prisoners in isolation or segregation and the concept of prisons in general may be explained via another prism. He argues memorably that

89 Mann argues for the placement of all transgender prisoners in a female facility, regardless of their sex/gender. See Mann, supra note 28, at 133 (“Unless a significant security issue surfaces, prison administrations should place all preoperative transgender inmates in a female facility”).


the penal system is there to transform the "occasional offender into a habitual delinquent"92 and constitute the difference between legitimate and illegitimate illegalities, or in other words, the two sides of the criminal/non-criminal binary.93 I would argue, building on his insight, that transgender prisoners’ segregation and isolation is a mechanism for institutionally shaping and policing another binary, the one between transgender and cisgender identities.

I wish to conclude this article with one final remark. The case of Roe v. Israel, which I have discussed in this paper, includes a unique point on the philosophy of punishment. As mentioned above, The Israeli Supreme Court recognized the hardships a vulnerable prisoner faces, citing them as justification for reducing his sentence. The assumption that all prisoners suffer the same behind bars is part of a system that does not consider the convicts’ experiences once they leave the courtroom. Incorporating important insights from convicts’ incarceration experience when determining prisoners’ placement is a significant step towards more just sentencing. I can only hope this logic develops in theory and in practice beyond the case of transgender prisoners to include other situations in Israel, and hopefully in other countries as well.

92 Id.
93 Id. at 276-77.