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I. INTRODUCTION

The majority of deaf people in the United States utilizes American Sign Language (ASL) as their primary mode of communication.[1] ASL is a completely different language from English, that has its own grammar and syntax[2] and is based on the use of signs representing a limited number of primarily concrete terms. Because the average deaf high school graduate reads and writes at the fourth grade level,[3] many deaf Americans have limited knowledge of the rules of English grammar and do not use English grammar even when writing.[4] By way of example, a person signing or writing in ASL might state "[y]our true most need tell me must," while an English speaking person would state "[y]ou must tell me what you really need most;"[5] a person signing or writing in ASL might ask "[t]ouch San Francisco already you?", while an English speak-

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1. *See, e.g.*, H. SCHLESINGER & K. MEADOW, SOUND AND SIGN: CHILDHOOD DEAFNESS AND MENTAL HEALTH 4 (1972); J.K. KRESSE & P. KLEVEN, DEAF PEOPLE AND SIGN LANGUAGE INTERPRETERS IN COURT: A BOOKLET FOR BENCH AND BAR (1981) [hereinafter KRESSE & KLEVEN].

2. *See, e.g.*, R. BATTISON, LEXICAL BORROWING IN AMERICAN SIGN LANGUAGE 92 (1978) (American Sign Language is "a separate language with a separate historical tradition, and separate morphological and syntactic principles of organization"); KRESSE & KLEVEN, *supra* note 1, at 4 (American Sign Language is "a complete language which is separate and not dependent upon English for its meaning and bears no structural resemblance to English."). As one author has explained: For example, ASL qualifiers generally follow rather than precede the noun as in English; events are normally placed in chronological order; cause and effect relationships are generally stated in the form of rhetorical questions; and conditional phrases are usually placed last in a sentence. *Id.* at 11.

3. OFFICE OF DEMOGRAPHIC STUDIES, GALLAUDET COLLEGE, ACADEMIC ACHIEVEMENT TEST RESULTS OF A NATIONAL TESTING PROGRAM FOR HEARING IMPAIRED STUDENTS IN THE UNITED STATES (Spring 1981) (the average 18-year old deaf person reads at the fourth grade level); P.W. OGDEN AND S. LIPSETT, THE SILENT GARDEN: UNDERSTANDING THE HEARING-IMPAIRED CHILD 94 (1982) ("Most deaf high school graduates read at a fourth-grade level, even today.").

4. *See, e.g.*, KRESSE & KLEVEN, *supra* note 1, at 6-7.

5. *Id.* at 7.

ing person would ask "[h]ave you been to San Francisco?"[6]

Deaf people in America comprise "a distinctly separate subculture in our society - a culture with its own language, social hierarchy and values."[7] While the existence of a deaf subculture is based on a variety of factors, the most significant are that: (1) the majority of deaf people share a common, unique language; and (2) deaf people often attend segregated state (or private) schools for the deaf, where their separate cultural values and concepts are developed and passed from one generation to the next.[8] Deaf people frequently view themselves as "outsiders in a hearing world" and thus "often form tightly knit groups that are reluctant to interact with the hearing world except when necessary . . . ."[9]

Because of their linguistic and cultural differences, deaf people face problems in every area of their lives, including social situations, employment and education, that are unimaginable to members of the hearing world. The following stories about simple situations involving deaf people embroiled in our criminal justice system serve to illustrate the breadth of the problems confronting many deaf Americans:

1. A deaf man was sentenced to one year in jail. Four months prior to the time his term expired, the prisoner was sent written data informing him that he was eligible for parole and if he wished to avail himself of that opportunity he should request a hearing before the parole board. The deaf prisoner's primary language, however, was ASL. Because "there are no signs for many legal terms,"[10] and because of the abstract nature of the word "parole," the prisoner did not comprehend

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6. Shipley, *The Deaf Witness*, 14 *Litigation* 13 (1987).

7. KRESSE & KLEVEN, *supra* note 1, at 3. *See also* Shipley, *supra* note 6, at 13 ("[t]he Deaf community is a culturally distinct group with its own language, values, and sense of history. The Deaf community sees itself as a minority group. That is why Deaf people capitalize Deafness—it unabashedly marks them as an ethnic group").

8. There are numerous books and articles discussing the deaf sub-culture. For a good overview of the subject, see B. BENDERLY, DANCING WITHOUT MUSIC: DEAFNESS IN AMERICA (1980); P.W. OGDEN & S. LIPSETT, *supra* note 3.

Deaf people have their own newspapers, such as The Silent News, published in Buffalo, New York, which has over 72,000 readers, their own Deaf Olympics, and their own "Miss Deaf America" contest. The Bicultural Center was recently formed in Riverdale, Maryland for the purpose of "recognizing Deaf people as a social and linguistic minority that has been frequently abused, misunderstood, or ignored by the Hearing majority." The Silent News, February 1988, at 28, col. 1. There are many projects aimed at "[e]nhancing the Deaf [c]ulture [c]urricula for Deaf students." *See, e.g.*, The Silent News, February 1988, at 29, col. 1; *see also* Silver, *In And Out Of Culture: The Role and Meaning of Deaf History*, The Silent News, February 1988, at 27, col. 1. Washington, D.C. has, for fourteen years, given recognition to "Deaf Heritage Week," which was celebrated most recently during the week of December 6-12, 1987.

9. Shipley, *supra* note 6, at 13.

10. *Id.* at 14.

that word, and was generally unable to understand the language of the official documents. Because a qualified interpreter was not provided to explain to the prisoner the concept of parole, and to explain the prisoner's rights, the prisoner remained in jail for an additional four months until his one year sentence expired.[11]

2. A deaf driver was pulled over by the police for committing a minor traffic violation. As the police approached the back of the stopped vehicle they observed beer cans in the back of the car and thought they had probable cause to believe the driver might be intoxicated. While still standing behind the car the policemen ordered the driver to exit his vehicle with his arms over his head. Being unable to hear the policemen, the driver did not exit. The policemen, therefore, pulled the man out of the car and twisted his arms behind his back, dislocating one shoulder. After explaining to the policemen via gestures that he was deaf, the driver was taken to the police department for a breath test. He was handed the breathylizer equipment and told to "blow." He blew. Unfortunately, he did not blow "hard" enough and thus he was orally instructed to blow "harder." The deaf man, however, did not comprehend the abstract term "harder,"[12] and thus failed to follow instructions. Accordingly, the police reported that the deaf driver "refused to take a breath test," and pursuant to the applicable law[13] the deaf driver's license was revoked for six months.[14]

3. Late one evening two men were observed by a policeman to be fighting on the street in front of an apartment building. The policeman broke up the fight and attempted to question the two men. Because one of the men was deaf and communicated solely via ASL, the policeman was unable to communicate with that man. Based upon the hearing man's version of the fight, however, the policeman arrested the deaf man for assault and placed him in the local jail. After spending the night in jail the deaf man attended a preliminary hearing before the local magistrate, accompanied by a qualified sign language interpreter. After listen-

11. Reported by Helen Young, nationally certified interpreter for the deaf, Phoenix, Arizona.

12. The term "hard" represents something concrete, such as a rock. To the converse, the term "harder," as in "blow harder," represents an abstract concept. Such abstract concepts are often unfathomable to deaf persons who communicate in sign language, which is based on a limited number of signs representative of a relatively small number of concrete words.

13. ARIZ. REV. STAT. ANN. § 28-691(D).

14. Subsequently the deaf driver obtained the services of a qualified interpreter and took the matter to court. The hearing examiner, after listening to testimony from an expert in ASL explaining why the deaf man did not understand the meaning of the term "harder," vacated the suspension. Reported by Helen Young, nationally certified legal interpreter for the deaf, Phoenix, Arizona.

ing to the deaf man's story, as presented through the interpreter, the magistrate dismissed the charges and upbraided the policeman for improperly making a decision to arrest the deaf man based on only one side of the story.[15]

As commentators have noted, "even basic legal terms and concepts are likely to be beyond comprehension for the many deaf people possessed of minimal English skills. Sometimes the lack of communication can be even more basic: In at least one instance a [California] court issued a bench warrant for a deaf person who was present in the courtroom but did not know his case had been called."[16]

The language and cultural differences of most deaf Americans have particularly severe ramifications for deaf prison inmates. Consider the following hypothetical case, which is based on facts derived from actual cases:[17]

Two brothers, John and Fred Doe, agreed to rob a local bank. John entered the bank and pulled a gun on the teller who was "persuaded" to give approximately fifty thousand dollars to John. John then fled from the bank in a car driven by Fred. John and Fred were captured and convicted of armed robbery. Each was sentenced to ten years in prison. John can hear. Fred, however, is profoundly deaf, and communicates through the use of ASL. Nevertheless, both men followed identical pro-

15. Reported by Helen Young, nationally certified interpreter for the deaf, Phoenix, Arizona. A similar problem sometimes occurs when two drivers, one deaf and one hearing, are involved in a car accident. Frequently the police ticket the deaf driver based on the one-sided "facts" provided by the hearing driver, who is the only person able to communicate with the police. *Id.*

Comparable problems arise in civil cases. For example, a state Department of Economic Security (DES) held a custody hearing to determine whether two children should be placed in the custody of their mother or their father. The mother was deaf. During the case management hearing to determine placement of the children a qualified interpreter was not provided for the deaf mother. Rather, a DES staff person, who had limited knowledge of sign language, was asked to interpret. Due to the limited abilities of the "interpreter," the mother was unable to understand the proceedings. Accordingly, the mother became frustrated and agitated. The DES caseworker termed the mother uncooperative and custody of the children was awarded to the father.

In another case involving the DES, authorities went to interview a deaf child who was allegedly molested by one of the members of her foster family. The authorities did not provide the child with a qualified interpreter, but relied solely on the biased "interpretation" provided by the child's foster mother. *Id.*

16. KRESSE & KLEVIN, *supra* note 1, at 7. While an explanation of the full extent of the language and cultural difficulties facing deaf people is beyond the scope of this article, for those who are interested, a summary of an ongoing criminal case involving a deaf suspect, which graphically illustrates the scope of these difficulties, is contained in the Appendix.

17. This hypothetical, although based on true cases involving current prison conditions, is not meant to be strictly representative of any one case; it is merely intended to illustrate the enormous disparity in the nature of prison life endured by hearing and deaf inmates.

cedural steps through the criminal justice system, from interrogation and meetings with lawyers to temporary incarceration and trial. Once convicted, both men entered the doors of the same prison to serve the same amount of time under lock and key for having committed the same crime.

During the procedural stages of his arrest and conviction John was fully aware and informed of what was happening within the criminal justice system. Before being interrogated John was given standard *Miranda* warnings, which he clearly understood. Therefore, John refused to answer questions posed by the police and requested the assistance of an attorney. John developed a rapport with his lawyer, who kept him informed of the progress of his case.

Fred, however, had very little comprehension of what was happening within the criminal justice process. Fred was unable to converse with the police who arrested him and took him into custody, and was not provided with the services of an interpreter who understood his native language, ASL. He was unable to understand the *Miranda* warnings given him,[18] and lacked the familiarity of criminal justice procedures that hearing people commonly obtain from movies, television and books.[19] He was unable to find an attorney who understood sign language, and thus his communications with his attorney were very limited.[20] Unaware of the status of his case—and of what would happen to him—Fred was bewildered and frightened.[21] Due to limited financial resources, John and Fred were unable to pay the bail imposed by the court, and both were held in jail pending trial. John was placed among the general prison

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18. *See infra* text accompanying notes 23-30 (Appendix).

19. Letter from Beth A. Munson, a paralegal assisting an attorney in representing a deaf client in California courts, to the author (Nov. 25, 1987) at 2.

20. As stated by one commentator:

> How does a deaf person in a criminal situation locate an attorney who understands his particular difficulties? Does he have employment which gives him sufficient resources to afford the kind of attention he requires and is entitled to receive? Communication is much more time consuming and attorneys usually bill by the hour in criminal cases. Unless the attorney has a paralegal interpreter or a paralegal familiar with the use of a TDD, a deaf individual may have to pay three times as much to achieve the same results which are obtained in attorney-client communications with a hearing client. An interpreter will have to be obtained and utilized, not only in court, but in most attorney-client interviews. Will the attorney or the client be aware of what can be charged to the court for that service? Should the deaf client accept court appointed representation and be content with the time and effort over-worked and under-compensated court appointed counsel may be able to provide? A deaf client who cannot afford retained counsel is not likely to find an appointed attorney who will have the appropriate staff or resources, or be able to devote the amount of time necessary for adequate communication.

Munson letter, *supra* note 19, at 3.

21. *Id.* at 2.

population. Due to his deafness, however, Fred was held in "protective custody" for several weeks; prison officials did not want to risk the possibility that other inmates might harm Fred.[22] A sign was taped on his cell door labeling him as a "DEAF MUTE," and Fred felt as though he "was being treated like a zoo animal on display to passers-by."[23] While being held in "protective custody" Fred remained in total isolation. He ate his meals alone in his cell; he was prohibited from exercising with the other men; he could not see a clock or the movements of the other inmates in the day room; he could not watch television.[24] He "was taken to shower and shave based on the availability of the guards," and, when the guards were busy, sometimes days would pass between such trips.[25]

Once convicted, John and Fred were placed in separate wards of the prison. John immediately attempted to create a niche for himself in this hostile environment. He learned which of his fellow inmates he wished to spend time with or avoid. He learned which of the guards were and were not trusted by the prisoners. He developed friendships with a few inmates. It did not take John long to learn the prison ropes; to learn how to avoid trouble and how to take maximum advantage of the few positive aspects of prison life. Recognizing the probability of attack by some of the more aggressive and sociopathic prisoners, John was constantly on his guard. When he heard people approaching behind him he was careful to place himself in a relatively safe position. When he heard loud arguments or fights he moved as far away from the noise as possible so as to avoid being caught up in the fracas.

John applied to work in one of several of the prison industries in which prisoners are trained in a specialized trade and then given jobs practicing that trade within the prison. Those fortunate prisoners received the highest wages paid to prison employees. As a prerequisite to obtaining such a position, John was required to take the Scholastic Aptitude Test (SAT) and obtain a stated score. John successfully passed the exam and was enrolled in an automotive mechanics class; subsequently he was employed as a mechanic in the prison industries.

Because John has a history of alcohol abuse, he enrolled in an Alcoholics Anonymous (AA) program at the prison. John also enrolled in a "Dove" program, where prisoners who come from families where do-

22. *Id.* at 3.

23. *Id.* As explained by Ms. Munson, her deaf client subsequently "marked out the word 'MUTE,'. . . complain[ing] . . . that it was an insulting label equivalent in offensiveness to the word 'nigger' to a black person." *Id.*

24. *Id.*

25. *Id.*

mestic violence has been prevalent receive counseling. In addition, John attended occasional lectures and classes on various other subjects, and sometimes went to church services in the prison chapel.

During periods of free time John watched television in the prisoners' day room and chatted with fellow prisoners. When in his cell he listened to his personal radio via individual earphones. John had ready access to the telephone in the day room, although his calls were limited to a strict time period of 15 minutes each. Once a week he was allowed to see visitors, whose visits were limited to one hour each. While John found prison to be a pretty miserable place, he did what he could to make his living conditions bearable.

Fred, to the contrary, could do very little to make his living conditions bearable. Immediately following imposition of his sentence Fred learned that the hazards of being a deaf prisoner were not limited to pretrial incarceration. At the onset of their sentences Fred and John had been placed in a temporary "holding" facility where they were separately evaluated by a team of prison officials for purposes of determining their appropriate prison placement. Fred was not provided the assistance of an interpreter during the placement meetings, and was thus unable to offer any input at those meetings or to understand what was discussed or resolved therein. Immediately upon his arrival in the permanent prison unit to which he was assigned, Fred's hearing aid[26] was removed and was not returned for approximately two months.[27] Very soon after his hear-

26. Most hearing-impaired people wear hearing aids. While the aids do not allow profoundly deaf individuals to hear speech or most of the sounds that hearing people take for granted in their everyday lives, they do—to differing degrees—provide a certain amount of background noise for profoundly deaf people, which in turn fosters a feeling of being part of the environment, and assists profoundly deaf people in a limited degree to be aware of what is happening around them.

27. *See, e.g.*, Plaintiff's Complaint at 5, Melissa Meadows v. Sheriff Charles Foti, (No. 83-4941) (E.D. La. 1983) [hereinafter Meadow's Complaint] (despite objections, hearing aid of deaf inmate removed during the intake procedure in New Orleans Correctional Center and not returned until one week after the inmate was released from confinement). *See also* Letter from Richard L. Lancaster, an inmate in the Arizona State Prison Complex, Douglas, Arizona, to the author (Nov. 20, 1987) at 2 (severely hearing impaired prisoner who wears eye glasses with a built-in hearing aid required to surrender glasses/aid upon being booked in jail. The glasses/aid were subsequently returned damaged, and the prisoner's hearing aid mold was lost. The prisoner was without benefit of the aid for an extended period of time until he was transported in chains to a public clinic to be fitted for a new mold and until the aid was repaired).

Another difficulty involves the inability of deaf prisoners to *obtain* hearing aids. *See, e.g.*, letter from William Herndon, an inmate at the Arizona State Prison Complex, Florence, Arizona, to the author (Nov. 20, 1987) (hearing impaired prisoner has unsuccessfully attempted to obtain a hearing aid for four months); letter from John Head, an inmate at the Arizona State Prison Complex, Tucson, Arizona, to the author (Nov. 29, 1987) ("it took 5 [five] years for [the Department of Corrections] to get me [a] hearing aid").

ing aid was returned Fred developed problems with his ear mold, and required a new mold.[28] Because a new ear mold could not be obtained without a court order, it took several months before Fred obtained a new mold and was able to wear his returned hearing aid.[29]

Shortly after his admission to prison Fred was interviewed by the prison psychiatrist. Fred managed to communicate via gestures and notes that it was frightening to be unable to communicate in prison—and more particularly to be unable to communicate with the psychiatrist. Although Fred made it clear that he required the services of a sign language interpreter trained in his native language, ASL, to interpret the interview, Fred's request was denied. Due to his fear and frustration, Fred became very agitated; consequently, he was ordered placed in solitary confinement and medicated.[30] Two days later, after Fred's repeated requests for an interpreter were ignored, Fred was taken to his cell in the general prison population.

Fred was unable to create a niche for himself in prison. Because Fred is unable to speak or to hear his fellow inmates or the guards speak, he remained virtually isolated from everyone else in the prison. He was never able to develop friendships with other inmates. While a few prisoners would, on occasion, write notes back and forth with Fred, the process was so laborious that most of the time the prisoners would not bother. The situation was aggravated by the fact that Fred has little knowledge of English grammar and reads and writes at the fourth grade level.[31] Thus, his ability to communicate by writing and reading written notes is very limited. Because a sentence written in ASL may not appear literate to an English speaking person, and vice versa, Fred and his fellow inmates were often unable to understand each others' written communications.[32]

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28. Ear molds are specially fitted for each individual hearing aid user. They are usually made by an audiologist or an otorhinolaryngologist, who makes a wax impression of the ear canal and has the ear mold built from that impression (similar to the manner in which molds for dentures and dental bridges are made).

29. Telephone conversation between the author and Rita Spenser, mother of a deaf suspect in the Maricopa County Jail, Phoenix, Arizona; letter from Chris Gallino, an inmate at the Maricopa County Jail, Phoenix, Arizona, to the author (Nov. 1987).

30. *See, e.g.*, Meadow's Complaint, *supra* note 27, at 6-7 (deaf female prisoner, who was interviewed by a prison psychiatrist without an interpreter as repeatedly requested, stripped of all clothing and bedcovers, placed in solitary confinement, medicated against her will and observed by male and female prison employees).

31. *See supra* text accompanying note 3.

32. Following is an excerpt from a letter written by a deaf (adult) prisoner whose primary language is ASL. The letter is typical of the written communications of deaf high school graduates whose native language is ASL:

On Sept. 25, 1986 CPS Dan Moe and Tim Crowley was decision with me by TDD

Fred's days in prison were fraught with frustration and fear. He was not able to develop any real understanding of the prison ropes. He was often unable to prevent attacks against himself by other prisoners and, as an easy prey, was frequently the victim of such attacks.[33] He was routinely taunted and tormented by many inmates and a few guards. Yet, when he defended himself, and was subsequently ordered before a disciplinary board, he was denied the right to an interpreter at the disci-

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and no way interpreter, that decision for move to minium at San Pedro. And I wait for a month later then they answer denies for minium. I not understand why denies. I found out reason why they denies me for minium due to problem on yard and give me high score is 4/0 on Sept. 1986, I found out that without interview with me decision about score is 4/0 I had no know about interview until later in Feb. 1987.

On March 13, 1987 [i]nterview with ICC by John Morrow and other CPO decision with me TDD . . . John Morrow know in law say must be interpreter to come with me on decision and John information with Jim McLaughlin to make application to someone but no show up come on time and keep continue talk with me by TDD. I not complain against John Morrow, I understand what he know and tries to provided an interpreter.

Letter from Nicki Bonner, a deaf inmate at Perryville Prison, Arizona, to the author (Aug. 26, 1987).

33. One prisoner attested, under oath, when discussing a co-prisoner who is deaf and suffers from tunnel vision:

> People here in prison steal things right out from under him; [t]he guards . . . ignore [the deaf inmate] all the time to include when he is literally beaten up, when he is stolen from, when he shows them documents to prove his handicaps, and when he needs to make TDD phone calls . . . ; I have seen people take [the deaf inmate's] food right off his tray in the chow hall, and the guards laugh . . . .

Affidavit of Jay R. Sheats, an inmate at Perryville Prison, Arizona, May 18, 1987, attached to plaintiff's response to defendant's motion to dismiss or for summary judgement in *Bonner v. Lewis*, Phx. CLH (MS) (No. 86-1771) (1987).

As one deaf inmate has stated:

> [H]ow can you avoid an attack when you can't hear an exchange of heated words or [an attacker's] approach on foot? Deaf inmates do not have the ability to hear of any anticipated trouble or fight starting before it becomes full scale, unless our eyes perceive trouble ahead of us. Deaf inmates inadvertently get involved where life can become endangered. If only we could hear, we'd have simply avoided trouble.

Interview with Steven Alan Turner by Ann Silver, The Silent News, Mar. 1987, at 28, col. 4.

A legal professional, discussing the plight of her deaf client, noted that during "four months [spent] in [a prison] facility, [our client] has been beaten up, jumped from behind and attacked by a deranged inmate while sweeping a hall, teased and tormented, and he has been unable to establish even one on-going non-threatening relationship within the facility." Munson letter, *supra*, note 19, at 4.

As stated by program counselor Nelson Cintron at New York's Eastern Correctional Facility, a hearing or visually impaired inmate's biggest fear "is that he could be assaulted before he realizes that he is in danger." Bell, *N.Y. Prison Lends its Handicapped Inmates a Hand*, Los Angeles Times, March 24, 1985, at I2, col. 1 [hereinafter L.A. Times, March 24, 1985].

Indeed, the United States Department of Justice expressly recognized the physical dangers faced by handicapped prisoners. When promulgating regulations pursuant to section 504 of the Rehabilitation Act, the Department of Justice stated that prison officials "must be mindful of the vulnerability of some handicapped inmates to physical and other abuse by other inmates." 28 C.F.R. Part 42, Appendix B at 45 Fed. Reg. 37,630 (1980). *See infra* text accompanying notes 102-06.

plinary hearing.[34] He was labeled as "dummy" or as "deaf and dumb."[35] Some of his fellow inmates were suspicious of his deafness, believing it to be an act, a ploy for better treatment, or an attempt to be mysterious.[36] A couple of inmates repeatedly "tested" Fred's deafness by approaching him from behind, lighting papers on fire, and sticking them in his back pockets.[37] In his isolation Fred did not know how to stop the attacks without worsening his situation.[38] In desperation Fred attempted to teach one of the guards to finger spell.[39] He was called a "rat" by some prisoners and beaten for his purported "snitching."[40]

Like John, Fred applied to be trained in a specialized trade and to work in one of the prison industries paying higher salaries. Unlike John, however, Fred was unable to obtain the requisite SAT score to qualify. Although Fred and John have approximately equal intelligence, because of his limited knowledge of English, and because he only reads and writes at a fourth grade level, Fred has great difficulty with standard achievement tests.[41] Thus, Fred was obliged to work in the prison mess hall, where he did not learn a trade and where he received minimal wages.[42]

Like John, Fred has a history of alcohol abuse and comes from a family background involving domestic violence. Because the prison would not provide Fred with an interpreter, however, he was unable to

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34. *See, e.g.*, Affidavit, *supra* note 33. Hard of hearing prisoners face related problems. One hard of hearing prisoner wrote the author that during his term in prison "I got wrote up, locked down [and] put in the hole because I did not obey a direct order which I never hear[d]." Letter from John Head, an inmate at the Arizona State Prison Complex, Tucson, Arizona, to the author (Nov. 29, 1987).

35. *E.g.*, Turner, *supra* note 33, at 28, col. 4.

36. Munson letter, *supra* note 19, at 4.

37. *Id.*

38. *Id.*

39. Finger spelling involves a process whereby signs made by an individual's fingers represent the various letters of the alphabet. Persons using ASL, for example, generally use finger spelling to spell out proper names or words for which there are no generalized signs.

40. Turner, *supra* note 33, at 28; Munson letter, *supra* note 19, at 4.

41. Because most deaf people face this difficulty, deaf students are tested for achievement in basic skills areas via a "Special Edition for Hearing Impaired Students of the 1973 Stanford Achievement Test." Trybus & Karchmer, *School Achievement Scores of Hearing Impaired Children: National Data on Achievement Status and Growth Patterns*, AM. ANNALS OF THE DEAF 62-69 (1977); Wolk & Allen, *A 5-Year Follow-up of Reading Comprehension Achievement of Hearing-Impaired Students in Special Education Programs*, 18 J. OF SPEC. ED. 161 (1984).

42. *See, e.g.*, Turner, *supra* note 33, at 28, col. 3, where Mr. Turner states that due to their inability to obtain the requisite scores on the SAT and "[b]ecause the average deaf American finishes high school with an average of 3rd grade or below, there is no way for deaf inmates to do anything productive and beneficial in prison—to better themselves educationally and financially. This really puts a dent in deaf inmates' lives morally and mentally. They become 'double-handicapped.'" *Id.*

attend AA or Dove meetings. For the same reason Fred was prevented from attending church services, lectures or classes offered at the prison. Because the televison in the prisoners' rec room was not equipped with a decoder,[43] Fred was unable to watch TV. Obviously he was unable to listen to the radio. Thus, Fred's days were spent in total boredom and frustration.

During most of his term of imprisonment the prison in which Fred resided did not have a teletypewriter device (TDD),[44] and thus Fred was unable to use the telephone. During the end of Fred's term the prison did obtain a TDD, but it was kept under lock and key in an administrative office. Thus, Fred could only use the telephone when he was able to persuade a guard to take him to the TDD. When he wished to make a phone call, he was required to write a request stating his desire to use the TDD, the time at which he wanted to use it, the identity of the person he wished to call and the purpose of the call.[45] The guards were frequently too busy to take him to the TDD or simply refused to do so. When Fred finally did manage to persuade a guard to escort him to the TDD, he was still limited to the 15 minute time restriction, notwithstanding that his access to the phone was severely restricted and that it takes twice as long to type messages than to speak messages back and forth.[46]

Fred looked forward to visiting hours each week. When he had a visitor who was not fluent in ASL, however, he was forced to communicate with that visitor without the assistance of an interpreter. Occasionally a prison guard who knew how to finger spell would attempt to interpret; more often than not Fred and his visitor attempted to write notes to one another. Although both of these very primitive modes of communication take at least three times as long as spoken communication, Fred's visitors were usually obligated to abide by the one-hour visitation rule.[47]

At the prison to which John and Fred were sentenced, the prisoners' daily lives were regulated via announcements made over a central loudspeaker. At repeated intervals during the day announcements were made

43. A decoder is a device whereby closed captioned television shows are provided for hearing-impaired persons on "line 21" of the television screen expressly reserved for that purpose. In this manner a hearing-impaired person may read, rather than try to hear, the speech of the television actors.

44. A TDD is a teletypewriter device for deaf persons, whereby the telephone receiver is placed into two headset cups on a machine that resembles a typewriter with a video screen (and sometimes a paper printout). The deaf person types a message on the keyboard which is relayed to a party at the other end of the line who also has a TDD.

45. Munson letter, *supra* note 19, at 5.

46. *Id.*

47. *Id.*

over the loudspeaker instructing the prisoners what to do and when and how to do it. Fred did his best to follow his fellow inmates—to go where they went and do what they did. Often, however, for one reason or another Fred was not immediately aware of what the other prisoners were doing. Sometimes he did not know whom to follow.

Everyday prison procedures were difficult. For example, the metal doors on the prisoners' cells operated electronically. Prior to opening the cell doors and moving the prisoners out, such as for meals, exercise, or random searches, a guard announced over the loudspeaker that the doors would be opened in 30 seconds. The prisoners were then required to exit their cells within an additional 30 seconds. Fred tried to keep an eye on his cell door so that he would see when it opened, since he could never be certain when such an announcement was going to occur. When the doors opened while Fred was sleeping or engrossed in reading a magazine or letter, however, Fred was unaware that the cell door had opened and closed. As a result, Fred was constantly in trouble with the prison authorities.[48]

Once outside their cells, when moving from one area of the prison to another, prisoners were required to pass through turnstiles located at each entrance and exit of the various sections of the prison. A guard in a central tower viewed the prisoner at the turnstile through a TV screen, and a speaker was attached to the turnstile to allow communication between guard and prisoner. As a prisoner passed through a turnstile, he was required to inform the guard (via the speaker) of his reasons for entering or exiting that section of the prison and to answer any questions the guard might choose to ask. Fred was frequently stranded inside the turnstiles, causing him to incur both the guards' wrath and that of the prisoners waiting in line behind him.[49] Clearly, Fred's experiences and circumstances as a criminal suspect and defendant were drastically differ-

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48. *Id.* The letter stated:

> Our client has appeared to be uncooperative and has gotten into trouble with guards when they have failed to comprehend that his apparent disobedience was not a deliberate act, but the result of not being able to hear the announcements or being unable to observe the movements of other prisoners and the opening of his cell door.

Id.

49. As stated by one deaf prisoner:

> During my first two years [in prison], I had to face [the] humiliation and embarrassment of being stranded inside the turnstiles, which in turn force[d] other inmates to wait behind me. In order to get myself through, the waiting line behind me had to become long enough to warrant notice by other guards patrolling within the area; sometimes the inmates would chant to get the guard's attention. Once the guards arrived and realize[d] what the problem [was], they'd notify the guard at the plaza central tower via walkie-talkie and explain that my deafness [was] the cause of the needless standstill.

Turner, *supra* note 33, at 28.

ent, and much more harsh, from John's experiences and circumstances. Just as clearly, once the prison doors shut behind them, there was little similarity between the ten-year terms of punishment and rehabilitation served by John and Fred. While both John and Fred were being punished for the same crime, Fred's actual punishment was substantially more severe than John's. While John and Fred were both purportedly being "rehabilitated," Fred was precluded from taking part in any of the rehabilitative aspects of prison life, such as job training, counseling, or religious activities. It cannot be fairly debated that there is no legitimate basis in the criminal law for this distinction. Our criminal justice system is based on the concept of blameworthiness,[50] and Fred and John were equally blameworthy for having committed the same crime. It would not foster the deterrence or rehabilitation principles of criminal punishment[51] to punish Fred more severely than John; indeed, with respect to the latter principle Fred was probably in greater need of rehabilitation than John. But what is the solution?

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50. "Criminal law is framed in terms of imposing punishment for bad conduct, rather than of granting rewards for good conduct, [thus] the emphasis is more on the prevention of the undesirable than on the encouragement of the desirable." W. LA FAVE & A. SCOTT, JR., CRIMINAL LAW, § 1.5 (2d ed. 1986) (footnote omitted).

51. *See, e.g., id.* One commentator argues that the rationale of punishing for specific deterrence purposes—to reduce crime by changing the behavior of individual criminals—is not applicable to handicapped offenders. According to that commentator, most physically disabled offenders tend not to engage in careers of crime, and once convicted of a crime are unlikely to repeat the offense. Brenner, *The Parameters of Cruelty: Application of* Estelle v. Gamble *to Sentences Imposed upon the Physically Fragile Offender*, 12 AM. J. CRIM. LAW 279, 321-22 (1984).

Even if the rationale of specific deterrence does apply to handicapped offenders, however, the deterrent effect would probably not be increased by the heightened level of punishment experienced by deaf inmates. Principles of general deterrence—which aim to reduce crime by changing the behavior of the public at large—are equally inapplicable with respect to requiring enhanced punishment for handicapped prisoners. The general deterrence rationale is premised on the theory that when members of the general public are made aware of the punishment for a particular crime to be imposed upon *similarly situated individuals* they will be deterred from committing that crime. Handicapped individuals, however, are not "similarly situated" to non-handicapped individuals. Hearing people generally find it difficult, at best, to understand the problems of deaf people, and would not comprehend the additional severity of the punishment imposed upon deaf offenders. In any event, since the increased severity of the punishment imposed upon deaf offenders would not apply to non-handicapped individuals, even if the latter were aware of the differences, and since the number of deaf offenders is so small (*see infra* text accompanying note 236), general deterrence would not be fostered by the imposition of greater sentences for deaf offenders. Finally, since deaf inmates are generally unable to participate in the rehabilitative aspects of prison life the rehabilitative goals of punishment—which seek to teach prisoners new forms of behavior and thereby reduce crime—would not be fostered. Nor does punishing deaf offenders more severely than hearing offenders further the retributive purpose of punishment, which seeks to ensure that wrongdoers get their just desserts. Why do deaf offenders deserve greater punishment than hearing offenders?

Some advocates of "deaf rights" argue that, to accomplish the goal of punishing deaf criminals to the same extent as hearing criminals, convicted deaf criminals should be sentenced to shorter prison terms than hearing prisoners. One deaf prisoner has stated that he would like to see "the judicial system cut[] 20% to 40% off the sentencing terms for deaf convicts . . . because deaf prisoners actually pay their price [a] hundredfold."[52] A professional in the legal field has pursuasively argued that:

> I think it is possible that deafness might mitigate, to some extent, some conduct. Deaf individuals do not often have equal input regarding what conduct is "normal" and may not have the same opportunities to achieve acceptable standards of behavior. We accept other mitigating factors in the sentencing procedure, why not consider the impact of deafness on a person's character and behavior? A resolution to this dilemma might be found in the pioneer intensive probation programs being implemented in some jurisdictions.[53]

This article argues that the sentences received by deaf offenders should *not* differ in length or severity from the sentences received by hearing offenders. To the contrary, it is axiomatic that deaf individuals must be held to the same standards of conduct and accountability as all other members of our society. To implement any theory of punishment that holds or implies otherwise is unacceptable. First, such a compromise would not address the underlying problem. While shorter or less severe prison sentences might help to "equalize" the sentences to be served by deaf and hearing prisoners, as deaf prisoners would suffer much greater punishment for a shorter period of time, deaf criminals would become further ostracized from the mainstream of society as a result, as well as from other prisoners, who would not understand or appreciate the shorter sentences. Second, the cultural and linguistic voids that result in gaps in deaf persons' knowledge of acceptable, "normal" behavior must be addressed by our educational institutions, not by our correctional institutions. The ultimate solution to the problem, therefore, lies in equalizing—to the extent practicable—the conditions of confinement for deaf and hearing prisoners. This article will explore principles of law that bear on the rights of deaf prisoners to receive equal treatment, and suggest means of remedying the unjust treatment pres-

52. Turner, *supra* note 33, at 29.

53. Munson letter, *supra* note 19, at 5.

ently received by deaf prison inmates.[54]

II. ANTI-DISCRIMINATION AND EQUAL PROTECTION PRINCIPLES

To equalize the conditions of deaf and hearing prisoners we must look to principles of anti-discrimination and equal protection. For two reasons, however, traditional anti-discrimination and equal protection principles are inapplicable to cases involving handicapped persons:

First, the legal concepts of "anti-discrimination" and "equal protection" are premised on the principle that it is wrong to treat similarly situated individuals differently. These concepts have their roots in the struggle of blacks to obtain the same status and rights afforded to non-minority citizens of the United States.[55] Because race does not create any rational difference between individuals that relates to meaningful criteria such as ability or qualification to perform a job, the law recognizes that persons of different races may not be treated differently simply on the basis of race.[56] Therefore, where race is at issue, anti-discrimination and equal protection principles are fairly clear: because racial differences tell us nothing about a person's ability or qualifications, different treatment based on race is presumed to be a result of irrational prejudice or hostility. Accordingly, such differences cannot justify different treatment and any such treatment is impermissible.

When applying principles of anti-discrimination and equal protection to cases involving handicapped people, however, those principles must be applied in situations in which persons being treated differently are not always "similarly situated persons." For example, while an individual's race bears no relationship to his or her ability to perform a particular job, an individual's handicap will frequently affect his ability to

54. The term "deaf prison inmates" is used here to refer to both pre-trial detainees and convicted prisoners.

Although many of the principles discussed in this article may apply generally to all handicapped prisoners, this article will focus solely on the problems of deaf inmates for two reasons: (1) for the sake of concreteness, and (2) because deaf people, due to their linguistic and cultural differences, face different (and in some respects, more severe) problems, and require different accommodations, than other handicapped prisoners.

55. *See, e.g.*, Brest, *The Supreme Court 1975 Term Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Parmet, *AIDS and the Limits of Discrimination Law*, 15 J. LAW, MEDICINE AND HEALTH CARE 61, 62 (1987).

56. The landmark case establishing the basis for modern discrimination law is Brown v. Board of Education, 347 U.S. 483 (1954), in which the Supreme Court held that "separate but equal" educational facilities for black and white children are inherently unequal and thus violative of the Equal Protection Clause. *Id.* at 495. For a comprehensive review of the Supreme Court cases discussing racial discrimination see Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

perform a job, since many handicapped people suffer some impairment of function. In such cases, where persons are not similarly situated in all material respects, the legal parameters of anti-discrimination and equal protection principles are somewhat hazy.[57] Because differences based on handicap *do* frequently tell us something about a person's ability or classification, and thus may justify different treatment in many cases, it cannot be presumed that different treatment based on handicap is premised on irrational prejudice or hostility. Therefore, different treatment based on handicap may not always be impermissible. The dilemma, of course, is how much recognition should be given to such differences. As one commentator has noted, cases involving handicapped persons "raise perplexing issues about when the [Supreme] Court should permit public and private decisionmakers to make the difference of handicap matter."[58]

The second reason why traditional anti-discrimination and equal protection principles are inapplicable to cases involving handicapped persons is that discrimination against handicapped people has different roots than discrimination against members of other minority groups. As the Supreme Court noted in *Alexander v. Choate*,[59] Congress has recognized that discrimination against the handicapped is "most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect,"[60] and "[f]ederal agencies and commentators on the plight of the handicapped . . . have found that discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus."[61] Similarly, the Tenth Circuit noted in *Pushkin v.*

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57. As one commentator has noted:

> The application of the anti-discrimination principle to issues other than race discrimination . . . is fraught with difficulties. Great controversy has arisen, for example, over what the principle requires with respect to pregnancy, a condition unique to women. Do maternity leaves discriminate against men, who cannot obtain such leaves, or do they enable women to achieve the same employment opportunities as men have, thereby reducing discrimination against women? This problem of *difference*, or of how the anti-discrimination principle applies to groups that are differently situated, has plagued attempts to use [federal anti-discrimination laws].

Parmet, *supra* note 55, at 62.

58. Minow, *The Supreme Court 1986 Term, Forward: Justice Engendered*, 101 HARV. L. REV. 10, 30 (1987). The author also noted that:

> [t]he dilemma of difference appears unresolvable. The risk of non-neutrality — the risk of discrimination — accompanies efforts both to ignore and to recognize difference in equal treatment and special treatment . . . .

Id. at 31.

59. 469 U.S. 287 (1985).

60. *Id.* at 295.

61. *Id.* at 296. *See also* Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 GEO. L.J. 1435, 1439-40 (1986), which states:

> Despite the history and continuing vestiges of invidious discrimination against the handicapped, their situation clearly is not the same as that of victims of racial

Regents of the University of Colorado[62] that, unlike other forms of discrimination, discrimination against handicapped people rarely results from a hostile discriminatory purpose, but "usually results from more invidious causative elements and often occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to the limitations of handicapped persons."[63] Because the underlying causes of discrimination against handicapped people are different from the underlying causes of discrimination against other minorities, the means by which we deal with those underlying causes should also be different.

In sum, the traditional legal methods for dealing with discrimination are not directly applicable to cases involving discrimination against handicapped people. Traditional anti-discrimination and equal protection law is premised on the need to treat similarly situated people in a similar manner. Further, discrimination against the handicapped has different roots than other forms of discrimination. The importance of this caveat will become obvious in the following analysis of the legal rights of deaf prisoners.[64]

III. SECTION 504 OF THE REHABILITATION ACT

The only federal law that bears on the substantive rights of deaf prison inmates is section 504 of the Rehabilitation Act,[65] which prohibits discrimination against handicapped persons by recipients of federal financial assistance.[66] Section 504 provides, in pertinent part:

> discrimination. The very notion of "disability" or "handicap" implies inherent limitations which, in many situations, do justify differential treatment of a disabled person. In addition, some of the "stereotyping" that results in the exclusion of disabled individuals from jobs or activities they could adequately perform stems from noninvidious (but still sometimes erroneous) assumptions that limitations attributable to most people with a particular handicapping condition will apply to all individuals with that condition, or from a well-intentioned, though often misplaced, concern that certain activities would be detrimental to the particular disabled person. In short, in contrast with the brutal history of racism in America, the treatment of the disabled has reflected a complex mixture of stereotyping and sympathy, apprehension and accommodation.

Id. (footnotes omitted).

62. 658 F.2d 1372 (10th Cir. 1981).

63. *Id.* at 1385. Note, however, that "[t]o be sure, well-catalogued instances of invidious discrimination against the handicapped do exist." *Alexander*, 469 U.S. at 295 n.12 (citing United States Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities, Ch. 2 (1983); Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401, 403 n.2 (1984)).

64. *See, e.g., infra* notes 113-14 and 129-31 and accompanying text.

65. 29 U.S.C. § 794 (1982).

66. Federal laws and regulations that purport to relate specifically to prisons do not provide any substantive relief to deaf prison inmates. For example, the Civil Rights of Institution-

> No otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency [of the United States] . . . .[67]

In accord with this statute, therefore, whether a deaf prison inmate

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alized Persons' Act, 42 U.S.C. §§ 1997-1997j (1982), empowers the Attorney General of the United States to institute a civil action for equitable relief in a federal district court whenever he has:

> reasonable cause to believe that any state . . . is subjecting persons residing in or confined to an institution [defined in 42 U.S.C. § 1997(1)(B)(ii) as including a jail, prison or other correctional facility] . . . to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges or immunities . . . .

42 U.S.C. § 1997(a) (1982).

In addition, the Institutionalized Persons' Act allows the Attorney General to invervene on behalf of the United States whenever:

> an action has been commenced in any court of the United States seeking relief from egregious or flagrant conditions which deprive persons residing in institutions of any rights, privileges or immunities serviced or protected by the Constitution or laws of the United States causing them to suffer grievous harm and the Attorney General has reasonable cause to believe that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities . . . .

42 U.S.C. § 1997(C)(a)(1) (1982).

While this Act would provide deaf prisoners with a procedural remedy for a violation of substantive rights (assuming that the Attorney General could be persuaded to act on behalf of such deaf prisoners), the Act does not define any substantive rights of prisoners, whether handicapped or non-handicapped.

In addition, a regulation promulgated pursuant to the Civil Rights for Institutionalized Persons' Act requires correctional institutions to create inmate grievance procedures, and requires each institution to "ensure that the [grievance] procedure is accessible to impaired and handicapped inmates." Minimum Standards for Inmate Grievance Procedures, 28 C.F.R. § 40.4 (1987). Again, however, this regulation offers procedural protections to handicapped inmates, but does not define any substantive rights of such inmates.

One federal regulation does purport to provide handicapped inmates in *federal* correctional institutions with some substantive rights. Regulations promulgated by the Department of Justice with respect to the Bureau of Prisons provide that:

> Inmates may not be discriminated against on the basis of race, religion, nationality, sex, *handicap*, or political belief. Each Warden shall ensure that administrative decisions and work, housing, and program assignments are non-discriminatory.

Non-Discrimination Toward Inmates, 28 C.F.R. § 551.90 (1987) (emphasis added).

Although that regulation has been in effect since 1980, it does not appear to have been utilized in any case to protect the rights of handicapped prisoners. Moreover, by its express terms the regulation only protects the rights of inmates in federal prisons. *See* General Definitions, 28 C.F.R. § 500.1(c) (1987) ("As used in this chapter . . . '[i]nmate' means any person who is . . . placed in or designated to be placed in, a [federal] Bureau of Prisons institution.").

67. 29 U.S.C. at § 794.

will prevail on a claim that the applicable department of corrections violated section 504 by failing to make reasonable accommodations within a correctional facility for his deafness will involve a determination of four factors: (1) whether the prison is a recipient of federal financial assistance; (2) whether the deaf inmate is an "otherwise qualified individual;" (3) whether the general operations of the prison are classified as a "program or activity" within the meaning of section 504; and (4) whether the deaf inmate has been impermissibly discriminated against on the basis of his handicap. Even if all of these factors were satisfied, however, the "reasonable accommodation" standard under section 504 must be interpreted in such a manner as to require prison officials to provide deaf prisoners with meaningful relief.

A. Requirement That the Prison Be a Recipient of Federal Financial Assistance

Because section 504 only prohibits discrimination against handicapped persons by recipients of federal financial assistance, some prisons may fall outside the scope of the Act. While no question exists with respect to federal correctional institutions,[68] whether a state or county correctional facility will be viewed as a recipient of federal financial assistance will be largely determined by the facts of each case. State and local governments regularly receive federal grants, entitlement funds and other federal assistance[69] to be utilized within and among their correctional departments and facilities. In such cases, state or local prison fa-

68. Section 504 was amended in 1978 by the Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978 (codified as amended at 29 U.S.C. § 794 (1982)). Among other things, the Amendments extended the non-discrimination mandate of section 504 to programs and activities conducted by agencies of the federal government. Since the Federal Bureau of Prisons is an agency of the federal government, federal prisons are clearly subject to the mandate of section 504.

69. The regulations promulgated by the United States Department of Justice pursuant to section 504 define the term "Federal financial assistance" as including:

> [A]ny grant, cooperative agreement, loan, contract (other than a direct Federal procurement contract or a contract of insurance or guaranty), subgrant, contract under a grant or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:
> 1. Funds;
> 2. Services of Federal personnel;
> 3. Real and personal property or any interest in or use of such property, including:
> (i) Transfers or leases of such property for less than fair market value or for reduced consideration; and
> (ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.
> 4. Any other thing of value by way of grant, loan, contract or cooperative agreement.

Definitions, 28 C.F.R. § 42.540(f) (1987).

cilities receiving such assistance should usually, but will not always, qualify as recipients of federal financial assistance within the meaning of section 504.

In March, 1988, Congress passed the Civil Rights Restoration Act of 1987 (Restoration Act),[70] which will have the effect of subjecting most state prisons to the mandate of section 504. The Restoration Act was passed to overrule the Supreme Court's decision in *Grove City College v. Bell*,[71] which held that only the specific program within an institution that received federal funds, not the entire institution, was required to comply with the anti-discrimination mandate of section 504.[72] Prior to the recent passage of the Restoration Act, if a state or county Department of Corrections received federal funds, but did not specifically utilize those funds for the particular correctional institution at issue (or perhaps even for a particular program at issue within that correctional institution), that correctional facility was not required to comply with section 504.[73] Following the passage of the Restoration Act, however, this "program specificity" exemption created in *Grove City College* is no longer applicable. Under the Restoration Act, the fact that specific prisons or prison programs are not the actual recipients of federal financial assistance received by the applicable Department of Corrections should be irrelevant for purposes of determining whether prison officials are subject to the mandate of section 504.

One qualification, however, does remain. In order to qualify as a recipient of federal financial assistance, the individual facility in question would probably be required to be an actual or intended recipient of such assistance. In *United States Department of Transportation v. Paralyzed*

70. PUB. L. NO. 100-259, 102 STAT. 28 (1987).

71. 465 U.S. 555 (1984).

72. *Id.* at 569-70. *Grove City College* actually dealt with Title IX of the Education Amendments, 20 U.S.C. § 1681(a) (1982). *Id.* at 557. In Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 636 (1984), the Supreme Court held that the ruling of *Grove City College* should also apply to actions arising under section 504.

73. Grove City College enrolled a large number of students who received Federal Basic Educational Opportunity Grants. *Grove City College*, 465 U.S. at 559. The Court held that only the student financial aid office benefitted from that federal financial assistance, and thus only the financial aid program, but not the entire college, was required to comply with Title IX's proscription against sex discrimination. *Id.* at 571.

Under this reasoning, a prison director or director of a local or state Department of Corrections could have argued that the federal financial assistance received by the prison was not received by the particular "program" within the prison that was at issue with respect to the deaf prisoner's complaint. Prior to the Restoration Act, under certain factual circumstances, for example, it was possible to argue that a prison received federal financial assistance solely for its work furlough program, and that therefore only the work furlough program should be required to comply with section 504.

Veterans of America,[74] the Supreme Court held that only actual recipients of federal financial assistance, and not beneficiaries of such assistance, must comply with the anti-discrimination mandate of section 504.[75] An example of a situation in which this ruling would become applicable is a case in which neither the Department of Corrections nor the specific correctional facility at issue was an actual recipient of federal financial assistance, but the prison was merely the indirect beneficiary of such assistance provided at large to the state or to a state agency other than the state Department of Corrections. As a result of the recent passage of the Restoration Act, however, relatively few prison facilities should be held exempt from compliance with section 504 due to the lack of federal financial assistance.

B. Requirement that the Deaf Prisoner Be an Otherwise Qualified Handicapped Individual

It is indisputable that a deaf person is "handicapped" within the meaning of section 504.[76] It would also appear indisputable that any handicapped person who has been involuntarily placed in a corrections facility or prison, and who is required by law to remain in that facility or prison, is "otherwise qualified" to be a prisoner, and is thus entitled to be treated in a non-discriminatory manner. In *Brauner v. McConnell*,[77] however, the court apparently found that fact disputable.

In *Brauner*, a paraplegic who was sentenced to jail in Jefferson County, Kentucky filed an action claiming that the prison to which he was sentenced was inaccessible to paraplegics. This, he claimed, violated section 504. Mr. Brauner's complaint included allegations that: (1) due to the inaccessibility of facilities he was unable to use the toilet or shower facilities; and (2) while in maximum security he was deprived of his wheelchair and was confined to and unable to move from his bunk. As a result, he was required to lie in a supine position due to his inability to sit

74. 477 U.S. 597 (1986).

75. The Court held that commercial airline carriers are not recipients of federal financial assistance under section 504, even though the airports and the air traffic control systems utilized by airlines are recipients of such assistance. Rather, the airlines are simply indirect beneficiaries of the federal financial assistance provided to the airports and the air traffic control systems. *Id.* at 612.

76. The term "handicapped" is defined under section 504 as:

> Any person who (i) has a physical or mental impairment which substantially limits one or more of such persons' major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment.

29 U.S.C. § 706(7)(B) (1982).

77. No. C84-0652-L(B) (W.D. Ky. Mar. 25, 1986), *aff'd without opinion*, 815 F.2d 701 (6th Cir.), *cert. denied*, 108 S. Ct. 343 (1987).

up without a wheelchair or bars to support him. In rejecting Mr. Brauner's section 504 claim, the district court stated: "[We are not] willing to hold that a prisoner is an otherwise qualified handicapped individual. The question which immediately leaps to mind is: Otherwise qualified to do what?"[78] The district court's ruling was affirmed without opinion by the Sixth Circuit,[79] and the United States Supreme Court recently denied certiorari.[80] The basis of the district court's refusal in *Brauner* to find a handicapped prisoner "otherwise qualified" is unfathomable. To the extent that the court ruled that the handicapped prisoner in *Brauner* was not otherwise qualified to be *a prisoner*, that ruling is directly contradictory to law. In *Southeastern Community College v. Davis*,[81] the Supreme Court held that an otherwise qualified individual is one who is qualified for the activity at issue "in spite of" his handicap. If a handicapped person is *not* qualified to be a prisoner in spite of his handicap, clearly he should not be required to be in prison. Conversely, if a handicapped person *is* required to be in prison despite his handicap, it must be assumed that he is qualified to be a prisoner regardless of that handicap.[82]

C. The "Program or Activity" Requirement

The few courts that have considered the plight of handicapped prisoners within the context of section 504 have agreed that *specific* programs or activities within the prison, such as employment programs and vocational training, constitute "programs or activities" under that statute. In *Journey v. Vitek*,[83] the Eighth Circuit considered a handicapped prisoner's claim that he was discriminated against in violation of section 504 because he was denied access to rehabilitation or vocational services within the prison. Mr. Journey was a paraplegic serving a twenty-one to thirty-six year sentence in a Nebraska state prison. Journey claimed, inter alia, that the Nebraska Department of Corrections violated section

78. *Id.* at 3.

79. 815 F.2d 701 (6th Cir. 1987).

80. 108 S. Ct. 343 (1987).

81. 442 U.S. 397 (1979).

82. If the *Brauner* court did, in fact, hold that Mr. Brauner was not otherwise qualified to be a prisoner, the effect of that ruling would be to permit, under section 504, every manner of official discrimination against handicapped prisoners, including feeding such prisoners less food or requiring them to wear stigmatizing armbands. Clearly, such a ruling is erroneous, and should have little precedential value. Giving the *Brauner* court the benefit of the doubt, however, perhaps the court was confusing the "otherwise qualified" issue with the question of whether a program or activity was at issue, or with the question of whether Mr. Brauner was discriminated against on the basis of handicap.

83. 685 F.2d 239 (8th Cir. 1982).

504 by refusing to provide him with access to the second floor of the prison, where the prison infirmary was located and where certain prison activities were conducted. Because there were no ramps in the prison to allow him to travel to the second floor, Journey asserted that he was improperly deprived of participation in educational, rehabilitative, recreational and employment programs within the prison. The Nebraska federal district court allowed Journey's section 504 action to proceed, but held as a factual matter that section 504 had not been violated because "[f]or the most part . . . the prison personnel have afforded [Journey] access to the activities in which he had interest, nearly as often as he wanted to participate."[84] The Eighth Circuit concluded that the factual findings of the district court were not clearly erroneous and thus affirmed the decision below.[85]

The district court in *Journey* apparently assumed that if the defendants were recipients of federal financial assistance the educational, rehabilitative, recreational and employment programs within the prison constituted "programs or activities" within the meaning of section 504.[86] The court in *Sites v. McKenzie*[87] reached a similar conclusion. In *Sites*, a prisoner claimed that the West Virginia Department of Corrections' denial of vocational rehabilitation opportunities to allegedly mentally ill prisoners incarcerated in prison violated section 504. The court stated as follows:

> Plaintiff has a record of mental impairment and certainly has been regarded as having such. Furthermore, it has been admitted that the West Virginia Department of Corrections is a recipient of Federal financial assistance. Accordingly, any exclusion of Plaintiff from participation in a vocational rehabilitation program simply because of his handicap is forbidden by the Act.[88]

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84. *Id.* at 242.

85. *Id.*

86. The Eighth Circuit stated in *Journey*:

> [t]he district court did not decide whether the phrase "any program or activity receiving Federal financial assistance" in [section 504 of] the Rehabilitation Act of 1973 means the specific programs which were the subject of Journey's exclusion, discrimination or denial of benefits or *any* program or activity of the Department of Correctional Services. This issue we . . . need not decide, as the district court's finding assumes without deciding that if any Federal financial assistance went to the Nebraska Department of Correctional Services, whether or not to a program from which Journey has been excluded, denied benefits or been the subject of discrimination, that he has an action.

Id. at 242 (footnotes omitted) (emphasis in original).

87. 423 F. Supp. 1190 (W.D. W. Va. 1976).

88. *Id.* at 1197.

Journey and *Sites*, however, do not specifically address the question of whether the prison program *as a whole* (which includes general conditions of confinement) constitutes a program or activity within the meaning of section 504. In *Brauner v. McConnell* the district court answered that specific question in the negative. The court first noted that, "[t]he action is a novel one so far as our research has disclosed. The [c]ourt has found actions in which handicapped prisoners are denied access to rehabilitation or vocational services, *Journey v. Vitek*, but we find no case treating the precise issue before the [c]ourt."[89] The court then opined that "[t]hroughout all of the authorities [discussing section 504] the [c]ourt has reviewed there runs a common thread of rehabilitation or educational opportunities," and concluded that it would violate the legislative intent of section 504 "to expand it to include involuntary incarceration within the definition of 'program or activity.' "[90]

When deciding *Brauner*, District Court Judge Thomas Ballantine Jr. was apparently unaware of a case in the same Western District of Kentucky, *Kendrick v. Bland*,[91] in which District Court Judge Edward H. Johnstone required prison officials of the Kentucky State Penitentiary to submit a "study and plan." The purpose of this "study and plan" was to "correct any deficiency" with respect to the requirement that the "physical barriers to the handicapped at its institution [be] in compliance with the Rehabilitation Act of 1973."[92] By imposing the requirements of the Act, the court in *Kendrick* obviously recognized that the prison, as a whole, constituted a program or activity under section 504, and was thus required to be in compliance with section 504.[93] *Kendrick* is in contrast to the reasoning in *Brauner*. In *Brauner*, the court recognized that a specific program within a prison constitutes a "program or activity" covered by section 504.[94] At the same time, the *Brauner* court refused to recognize the overall prison program as such a program or activity. Such a finding defies logic.[95]

89. District Court's Order of March 25, 1986, *supra* note 77, at 3 (citation omitted).

90. *Id.*

91. 541 F. Supp. 21 (W.D. Ky. 1981).

92. *Id.* at 40.

93. *See supra* notes 71-76 and accompanying text.

94. *See supra* note 77.

95. In a recent case the Sixth Circuit again appeared to indicate confusion with respect to the question of what prison programs or activities constitute a "program or activity" covered by section 504. In *Baker v. Seabold*, 831 F.2d 293 (6th Cir. 1987), not recommended for full text publication, 6th Cir. Rule 24 (LEXIS, Genfed library, USApp file) (vacating and remanding the district court order), a deaf inmate at the Luther Luckett Correctional Complex in Kentucky "filed a civil rights complaint alleging that the failure to provide him with an interpreter and a red warning light in his cell deprived him of rehabilitation opportunities at the

Under the *Brauner* court's reasoning, a hospital run by a state that received federal financial assistance for the purpose of maintaining or operating the hospital would fail to qualify as a "program or activity" conducted by the state, while specific programs or activities conducted by the hospital would qualify as such programs or activities. In practical terms, this would mean that, under section 504, the hospital could discriminate with impunity among its patients with respect to its more general activities (such as providing patients with beds, bathroom facilities and food), but could not discriminate with respect to particular programs provided to the patients (such as occupational or physical therapy or alcohol abuse programs). Similarly, under section 504, a prison director could discriminate with impunity among prison inmates with respect to general activities (such as by providing handicapped prisoners with less food or inferior living conditions), but not with respect to specific activities (such as denying handicapped prisoners access to rehabilitation programs). Such hair splitting is nonsensical. The sole question with respect to the "program or activity" requirement is whether the hospital as a whole (or the prison as a whole) including the hospital's (or prison's) specific activities, is a program or activity within the meaning of section 504. That question should be answered in the affirmative.

Section 504 was based on and modeled after the Civil Rights laws prohibiting sex and race discrimination. It has been repeatedly termed the "declaration of civil rights for the handicapped,"[96] because "[i]ts terms purport to guarantee to handicapped individuals the same rights afforded other minority or disadvantaged peoples under similar antidiscrimination provisions."[97] Indeed, the wording of section 504 is virtually identical to that of Title VI of the Civil Rights Act, which prohibits recipients of federal financial assistance from discriminating on the basis of race or sex.[98] Would the *Brauner* court hold that a prison that received

institution." The trial court dismissed the complaint as frivolous. In remanding the case to the district court, the Sixth Circuit cited *Journey* in claiming that: "Because the case was dismissed without an answer having been filed to the complaint, it is unknown whether any program in which Baker may be a potential participant receives Federal financial assistance. He may have a justiciable claim if there is such a program." *Id.*

96. Comment, *Toward Equal Rights for Handicapped Individuals: Judicial Enforcement of Section 504 of the Rehabilitation Act of 1973*, 38 OHIO ST. L.J. 677 (1977).

97. *Id.* at 677. *See, e.g.*, Education Amendments of 1972, 20 U.S.C. § 1681 (1982) (relating to gender); Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, 2000c-1, 2000e-17 (1982) (relating to race, color and national origin).

98. Title VI of the Civil Rights Act, 42 U.S.C. § 2000d (1982) provides that: "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

federal financial assistance did not constitute a program or activity covered by Title VI, and that, therefore, under Title VI black prisoners could be discriminated against with respect to general prison conditions on the basis of race?

While there is a dearth of judicial precedent on this issue (other than the previously quoted statement from *Kendrick*), the ruling of *Brauner* contravenes the prevailing administrative interpretation of section 504, and is a voice in the wilderness. The congressional committee reports discussing section 504 state that "[s]ection 504 was enacted to prevent discrimination against all handicapped individuals, regardless of their need for, or ability to benefit from, vocational rehabilitation services, in relation to Federal assistance in employment, housing, transportation, education, health services, or *any other* Federally-aided programs."[99] That the term "any other Federally aided program" was intended to encompass prisons maintained by departments of correction receiving federal financial assistance was expressly recognized by the Department of Justice when it promulgated regulations implementing section 504 in 1981. The initial regulations promulgated by the Department of Justice contained an appendix analyzing the final rules that discussed, inter alia, "[p]hysical and [o]ther [a]ccessibility to *[p]rograms*."[100] Specific "Detention and Correctional Agencies and Facilities"[101] were among the *"programs"* whose responsibilities were discussed in that appendix. The section 504 responsibilities of correctional agencies and facilities were stated as applying to "jails, prisons, reformatories and training schools, work camps, reception and diagnostic centers, pre-release and work release facilities, and community-based facilities."[102]

According to the Department of Justice, the section 504 responsibilities of such jails, prisons, and other correctional facilities receiving federal financial assistance included: the provision of "structural modifications to accommodate detainees or prisoners in wheelchairs" in certain designated circumstances; the provision of accessible visitation areas; and the insurance of ready physical accessibility to "[f]acilities . . . such as classrooms, infirmary, laundry, dining areas, recreation areas, work areas and chapels . . . ."[103] The Department of Justice noted that,

99. Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516 (1974), U.S. CODE CONG. & ADMIN. NEWS 6373, 6388 (emphasis added).

100. 28 C.F.R. Part 42, Appendix B - Analysis of Final Rule, Subpart G (1980). *See* Nondiscrimination Programs, 45 Fed. Reg. 37,620, 37,627, 37,629 (1980) (to be codified at 28 C.F.R. Part 42) (emphasis added).

101. *Id.* at subpart C(2), 45 Fed. Reg. 37,630 (1980).

102. *Id.*

103. *Id.*

under section 504, "[c]orrectional officials should take into account any handicaps which inmates may have in classifying them. In making housing and program assignments, such officials must be mindful of the vulnerability of some handicapped inmates to physical and other abuse by other inmates."[104] Although the entire appendix B (which included an extensive section discussing the responsibilities of employers) was subsequently eliminated from the Department of Justice regulations,[105] the deletion was made for administrative purposes only, and the principles elucidated therein still reflect the Department of Justice's position.[106]

Further, much of the federal financial assistance provided to state and local governments is given under the Revenue Sharing Act.[107] Under that Act, state and local governments are allocated specified "entitlement funds" from the federal treasury.[108] Section 6716 of the Revenue Sharing Act provides that when "a state government or unit of general local government . . . receives a payment under [the Act]," the "prohibition against discrimination against an otherwise qualified handicapped

104. *Id.* The Department of Justice further stated that "[t]he existence of a handicap alone should not, however, be the basis for segregation of such inmates in institutions or any part thereof where other arrangements can be made to satisfy safety, security and other needs of the handicapped inmate." *Id.*

105. *See* 46 Fed. Reg. 52,339, 52,357 (1980) (to be codified at 28 C.F.R. Ch. 1) ("Appendix B, Analysis of Final Rule, Part 42 is removed").

106. The Federal Register states that: "Parts 0 through 60, Title 28 of the Code of Federal Regulations [were amended for the purpose of] reflect[ing] a reorganization of the Department of Justice." *Id.* at 52,339. In a telephone conversation of November 20, 1987, John Wodatch, Deputy of the Coordinating and Review Section, Civil Rights Division, United States Department of Justice, relayed the following information to this author: Appendix B was deleted from the regulations in part due to the expense of publishing such a lengthy appendix to the rules in the Code of Federal Regulations. While the Appendix was considered appropriate for the purposes of the initial regulations, which were intended to establish an historical and regulatory framework for section 504, it was not deemed necessary to continue to incur the expenditure of publishing that appendix in later codified versions of the regulations. The Department of Justice felt that it was sufficient that the appendix remained available in the Federal Register, and could be viewed therein and cited from that source. According to Mr. Wodatch, the appendix remains viable authority, and when making the decision not to publish the appendix in the Code of Federal Regulations the Department of Justice "had no intent to back away from any position taken" therein. Mr. Wodatch further stated that the Department of Justice intends that the appendix will continue to be relied on as authority for the position taken by the Department.

107. 31 U.S.C. §§ 6701-6724 (repealed 1986).

108. "Entitlement Funds" means the amount of revenue sharing payments to which a unit of local government is entitled as determined by the Director [of the Office of Revenue Sharing] pursuant to the allocation formula contained in the Act and as established by regulations under this part, including the interest earned on entitlement funds deposited in financial institutions prior to their use, obligation or appropriation." Money and Finance Treasury, 31 C.F.R. § 51.2(f) (1987).

individual under section 504" is specifically applicable.[109]

The Department of the Treasury has enacted regulations with respect to the section 504 obligations of the Office of Revenue Sharing (O.R.S.) that are similar to the Department of Justice regulations.[110] Further, in its "General Information" section of the O.R.S. regulations, when defining the "program[s] or activit[ies]" that are to receive federal financial assistance in the form of entitlement funds, the United States Department of the Treasury has included operations (i.e., prisons) of a corrections department. The Treasury Department regulations provide:

> "*Program or activity*" means the operations of the agency or organizational unit of a recipient government or the operations or organizational unit of a secondary recipient funded with entitlement funds (examples include, but are not limited to a police department, department of corrections, health department, or a division of a public or private corporation).[111]

In short, the Department of Justice, the Treasury Department and at least one court have recognized that a prison facility operated by a state or local department of corrections constitutes a program or activity within the meaning of section 504. Clearly section 504 governs with respect to all aspects of prison life, and prisons that are recipients of federal financial assistance may not discriminate with respect to conditions of confinement on the basis of handicap.

D. Discrimination Under Section 504

A recent Supreme Court decision, *Alexander v. Choate*,[112] sheds light on the nature of the discrimination prohibited by section 504. In that case, Medicaid recipients in Tennessee brought a class action claiming that a change in Medicaid policy, which reduced from twenty to fourteen the number of in-patient hospital days per fiscal year Tennessee Medicaid would pay hospitals on behalf of a Medicaid recipient, violated section 504. The Supreme Court rejected the claim that, because handicapped people generally require more hospitalization than nonhandicapped people, the regulation had an impermissible disparate impact on the handicapped. It rejected the claim on the ground that handicapped persons had meaningful and equal access to the benefit of obtaining fourteen days of hospital coverage.[113]

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109. 31 U.S.C. § 6716(2) (repealed 1986).
110. *See* 31 C.F.R. §§ 51.50-51.55 (1987).
111. 31 C.F.R. § 51.2(l) (1987).
112. 469 U.S. 287 (1985).
113. *Id.* at 302.

Nevertheless, the *Alexander* court recognized that discrimination against handicapped persons is usually the result of benign indifferences or paternalistic attitudes, rather than a result of a hostile animus. Therefore, the Court noted, "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent."[114] The Supreme Court held that it is not necessary to find discriminatory intent before a cause of action may lie under section 504;[115] rather, actions that are not intentional, but that have a disparate impact on handicapped people, may be impermissibly discriminatory under that Act. However, the Court failed to find such a disparate impact under the facts existing in *Alexander*.

The *Alexander* court also recognized that "[b]ecause the handicapped typically are not similarly situated to the nonhandicapped,"[116] *all* actions taken by recipients of federal financial assistance that have a disparate impact on handicapped persons are not necessarily discriminatory in violation of section 504. Rather, the Court held that to balance the countervailing considerations of giving effect to the statutory objectives of section 504 while at the same time keeping the Act within manageable bounds, section 504 should be interpreted as requiring an otherwise qualified handicapped individual to be provided with "meaningful access to the benefit that the grantee offers."[117] The Court noted, however, that the benefit itself, "cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, *reasonable accommodations in the grantee's program or benefit may have to be made.*"[118]

The factual situation involving deaf prison inmates is quite different from the factual situation at issue in *Alexander*. In *Alexander*, the Court found that by providing handicapped people with fourteen days of Medicaid-funded hospitalization the state would provide handicapped people with meaningful access to hospital care. In contrast, as our hypothetical case involving John and Fred graphically illustrates, absent the provision of reasonable accommodations, deaf prison inmates are *not*, under *any* definition of the term "meaningful," able to obtain meaningful access to the general prison program or any of its specific components. Accordingly, the failure to provide deaf prison inmates reasonable accommoda-

114. *Id.* at 296-97.
115. *Id.* at 298-99.
116. *Id.* at 298.
117. *Id.* at 301.
118. *Id.* (emphasis added).

tions to allow participation in programs for which they are qualified should be construed to be impermissibly discriminatory and violative of section 504.

E. Reasonable Accommodations

There appears to be a general fear or reluctance on the part of prisoners or their attorneys to assert the section 504 rights of handicapped prisoners. This reluctance may reflect, in part, an acknowledgement of the general sentiment that handicapped prisoners do "not deserve any special treatment to alleviate their unique forms of suffering because if they had not committed a crime, they would not be suffering in jail."[119] It may also reflect an acknowledgement of the reluctance of courts to invoke section 504 on behalf of handicapped prisoners, a reluctance clearly evidenced by the Sixth Circuit's affirmance of *Brauner v. McConnell* and the Supreme Court's refusal to hear the matter.[120]

Even where deaf prisoners are aware of their rights under section 504 and are willing to pursue those rights against prison officials, however, the rights of deaf prisoners under section 504 may be seriously limited by the "reasonable accommodation" standard. With respect to the latter requirement, under section 504 program administrators are not required to make *substantial* modifications or *fundamental* alterations in the nature of a program; rather, program administrators must merely make *reasonable* accommodations for the handicaps of program participants.[121] The concept of reasonableness cannot be considered in a vacuum, but must, of necessity, encompass the concept of cost; accommodations that are *excessively* costly would exceed the bounds of reasonableness.[122] For example, while it would be excessively costly, and thus unreasonable, to require the provision of a full time interpreter for a deaf prison inmate, it would certainly be reasonable to require that a qualified interpreter be provided to interpret for a deaf prisoner during a prison disciplinary hearing. Similarly, while it would be excessively costly, and thus unreasonable, to require that all deaf prison inmates be housed in a special prison facility manned by guards who utilize sign

119. Baum, *Handicapped Prisoners: An Ignored Minority?*, 18 COLUM. J.L. & SOC. PROBS. 349, 352 n.16 (1983). Presumably, under this rationale it must be assumed that deaf pre-trial detainees also did something wrong, else they would not be in prison awaiting trial.

120. *See supra* note 77.

121. Southeastern Community College v. Davis, 442 U.S. at 397, 407-12 (1979).

122. *Cf.* Alexander v. Choate, 469 U.S. 287, 303-08 (noting that excessive costs of expanding Medicaid services for handicapped people, in light of the fact that handicapped persons would receive meaningful access to Medicaid absent the expansion, served as an indicator that Medicaid's actions were not violative of section 504).

language, it would be considerably less costly, and presumably reasonable, to require that a qualified interpreter be provided, upon reasonable notification, to a deaf prisoner who wishes to attend a class, lecture, church service or counseling program within the prison.

Given the historical reluctance of courts to broadly define the rights of prisoners in general,[123] courts may attempt to narrowly define the "reasonable accommodations" that must be made to fulfill the needs of handicapped prisoners. Thus, it is not surprising that in *Journey v. Vitek* the Eighth Circuit refused to hold erroneous the district court's factual finding that the Nebraska Department of Corrections had not discriminated against a paraplegic prisoner, notwithstanding the circuit court's acknowledgement that the prisoner's access to some prison activities was limited since the prison did not have ramps allowing the prisoner to obtain access to the second floor of the prison.[124] The Eighth Circuit's affirmance of the district court's finding implies that, by providing handicapped prisoners with only limited access to prison activities, a department of corrections would satisfy the "reasonable accommodation" standard under section 504. That reasoning is questionable. To fulfill the letter and spirit of section 504, courts should interpret the "reasonable accommodation" test *fairly*, rather than in an overly restrictive and unduly narrow manner.

IV. CONSTITUTIONAL RIGHTS

Inequities suffered by deaf prison inmates should be held to violate the eighth amendment's proscription against cruel and unusual punishment[125] and the fourteenth amendment's proscription against the denial of equal protection of the law.[126] Under current case law, however, the

123. *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 347 (1981) ("restrictive and even harsh [prison conditions] are part of the penalty that criminal offenders pay for their offenses against society" and are thus not unconstitutional); Ruiz v. Estelle, 679 F.2d 1115, 1145 (5th Cir. 1982), *vacated in part on other grounds*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983) ("the Constitutional mandate against cruel and unusual punishment is not a warranty of pleasant prison conditions"); Wolfish v. Levy, 573 F.2d 118, 125 (2d Cir. 1978), *rev'd on other grounds sub nom.* Bell v. Wolfish, 441 U.S. 520 (1979) ("[t]he Constitution does not require that sentenced prisoners be provided with every amenity which one might find desirable").

124. *Journey*, 685 F.2d 239, 241-42 (8th Cir. 1982).

125. The eighth amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

126. The fourteenth amendment to the United States Constitution provides, in pertinent part, that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. In many cases deaf prisoners would also have a substantive due process

constitutional claims of deaf prison inmates would probably not pass muster, for two reasons. First, current case law focuses on traditional principles of anti-discrimination and equal protection which, as previously explained,[127] do not lend themselves well to cases involving discrimination against handicapped persons. Second, the courts have not yet embraced the concept of interpreting the Constitution in light of the evolving trend of recognizing the rights of handicapped people (in the same manner that courts finally began interpreting the Constitution in light of the trend of recognizing the rights of members of racial minorities).[128] The time has come, however, for deaf prison inmates to assert their right to be treated as equals under the Constitution—as human beings of equal dignity and worth—and to demand that society, and the courts, recognize that right.

A. Equal Protection

Following traditional principles of equal protection analysis, the Supreme Court has held that the equal protection clause of the fourteenth amendment prohibits only intentional discrimination.[129] Under traditional equal protection analysis, therefore, prison officials could circumvent an equal protection claim asserted by deaf inmates by taking the position that the inequitable conditions of confinement imposed upon deaf prisoners are not a result of intentional discrimination but are

claim under the fourteenth amendment. In one case, Pyles v. Kamka, 491 F. Supp. 204 (D. Md. 1980), a deaf prisoner complained that prison officials failed to provide him with interpreter services during prison disciplinary and other proceedings, in violation of his constitutional rights. *Id.* at 206. In recognition of the deaf prisoner's rights (including, apparently, the prisoner's eighth amendment rights), the defendants entered into a court-approved settlement of the case which required prison officials to provide the deaf inmate with interpreter services during parole and disciplinary hearings, *and* during certain prison activities, such as psychological counseling, medical care and on the job training, vocational or educational programs. *Id.* at 205-06. While the fourteenth amendment analysis herein focuses on the equal protection clause, the general principles discussed would apply in an analogous manner to an analysis under the substantive due process clause.

127. *See supra* notes 55-63 and accompanying text.

128. In 1954, in the landmark ruling of Brown v. Board of Education, 347 U.S. 483 (1954), the United States Supreme Court first gave official recognition to the rights of racial minorities when it held that "separate but equal" educational institutions for black and white children were unconstitutional. In the years following *Brown*, the Supreme Court gave recognition to the constitutional protections of members of racial minorities in other areas. *See, e.g.*, Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (segregated beaches unconstitutional); Gayle v. Browder, 352 U.S. 903 (1956) (segregated buses unconstitutional); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (segregated parks unconstitutional); Loving v. Virginia, 388 U.S. 1 (1967) (holding unconstitutional a state statute prohibiting marriages between persons solely on the basis of racial classifications).

129. *See, e.g.*, Village of Arlington Heights v. Metropolitan Housing Develop. Corp., 429 U.S. 252, 264-65 (1977); Washington v. Davis, 426 U.S. 229, 238-48 (1976).

merely the incidental result of rules promulgated in furtherance of the general management of prisons and prison inmates. As we have seen, however,[130] discrimination on the basis of handicap is rarely the result of intentional discrimination. One author has stated the problem concisely:

> [The] usual assumptions about intent do not work in the case of the handicapped. Discrimination law . . . generally assumes that overt classifications reflect invidious distinctions and that policies that affect protected classes disproportionately often reflect underlying discriminatory motives. Thus traditional discrimination theory, as applied in the racial context, has come to associate differential treatment, and sometimes differential impact, with malevolent intent. Those harmed by racial discrimination are its "victims"; those who engage in it are the "perpetrators." This division of the world makes it easy to distinguish cases: those in which the defendants intended to harm the plaintiffs are actionable; those in which the defendant meant no harm are usually not.
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> . . . .
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> The application of these assumptions to the case of the handicapped, however, is extraordinarily strained . . . .[131]

Because traditional assumptions about intentional discrimination are inapplicable to cases involving the handicapped, when analyzing the equal protection claims of handicapped persons the traditional "intent" requirement should be modified. Rather than phrasing the issue in terms of whether the unequal treatment itself resulted from an intent to discriminate and was thus impermissible under the appropriate standard of review, the issue should be phrased in terms of whether the refusal to take reasonable steps to remedy the unequal treatment constitutes impermissible discrimination. More specifically, the question should be whether, after notification of the inequitable conditions of confinement suffered by deaf prison inmates, the intentional refusal to make reasonable accommodations to equalize the conditions of deaf and hearing prisoners violates the equal protection clause. It is only by stating the question in this fashion that the equal protection clause can be meaningfully applied to handicapped persons.

Once the traditional intent requirement is appropriately modified, however, the question becomes whether the refusal to make reasonable accommodations to equalize the conditions of confinement for deaf pris-

130. *See supra* notes 55-63 and 114-115 and accompanying text.

131. PARMET, *supra* note 55, at 64 (footnote omitted).

oners violates the equal protection clause. The first step in answering this question is to determine the appropriate standard of review under which to evaluate that refusal.

In *City of Cleburne v. Cleburne Living Center*,[132] the Supreme Court held that mentally retarded people do not constitute a suspect or quasi-suspect class for the purpose of equal protection analysis, and thus the equal protection claims of mentally retarded people must be analyzed under the rational basis test. The ruling of *Cleburne* has been widely criticized as factually and legally unsound,[133] and this author agrees with those criticisms. Unfortunately, however, that ruling will presumably be held to apply to physically, as well as mentally, handicapped individuals,[134] and thus for purposes of this article the author will assume that the equal protection claims of deaf inmates will be analyzed under the rational basis test enunciated in *Cleburne*. The relevant question is, therefore, whether the unequal conditions of imprisonment suffered by deaf prison inmates would be held irrational under the standards enunciated in *Cleburne*.[135]

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132. 473 U.S. 456 (1985).

133. *See, e.g.*, Comment, *The Supreme Court - Leading Cases*, 99 HARV. L. REV. 120, 167-69 (1985). The author noted: 1) the Court's unprecedented rejection of the immutability of a group's defining characteristic as one indicator of suspectness; 2) the Court's unexplained decision "not to examine whether the retarded are a 'discrete and insular' minority"; and 3) the Court's unprecedented reliance on the fact that remedial legislation had been passed when answering the question of whether the retarded were politically powerless or subject to significant prejudice. The author also vehemently objects to the Court's failure to inquire fully into the historical questions of prejudice and fear shown the retarded when denying quasi-suspect classification in part for the reason that retardation is often relevant to the achievement of legitimate state ends. *See also*, Comment, *Equal Protection and the Mentally Retarded: A Denial of Quasi-Suspect Status in* City of Cleburne v. Cleburne Living Center, 72 IOWA L. REV. 241, 251 (1986) [hereinafter Comment, *Equal Protection*] (objecting to the Court's improper "conclusion that prejudice toward the mentally retarded no longer exists in light of the legislative responses to their difficulties"); Comment, *A Changing Equal Protection Standard? The Supreme Court's Application of a Heightened Rational Basis Test in* City of Cleburne v. Cleburne Living Center, 20 LOY. L.A.L. REV. 921, 948-56 (1987) [hereinafter Comment, *Changing Standard*].

134. *See, e.g.*, Baker v. Dep't of Environmental Conservation of the State of New York, 634 F. Supp. 1460, 1467-68 (N.D. N.Y. 1986) (following *Cleburne* in holding that physically disabled people, like mentally disabled people, do not constitute a quasi-suspect class).

135. Correctional officials may argue that because all inmates, whether deaf or hearing, are affirmatively treated the same, deaf inmates have no claim that they are subject to unequal treatment. This superficial argument ignores the fact that the failure to provide accommodations for the unequal results that flow from technically equal treatment may also violate the equal protection clause. In Lau v. Nichols, 414 U.S. 563 (1974), non-English speaking students alleged that the failure of a state school system to provide them with English language instruction violated the equal protection clause of the fourteenth amendment. The students argued that even though they were given the same course of instruction as all other school children they were denied education on equal terms with English speaking students because

Courts accord prison officials wide latitude in the administration of prison affairs, and are reluctant to interfere in such matters.[136] Thus, courts rarely uphold the equal protection claims asserted by prison inmates, and usually defer to the rationales set forth by prison administrators when holding that the unequal treatment at issue bears a rational relationship to a legitimate state interest. Generally, unequal treatment among prisoners is premised on the purported need to ensure prison security or safety, to prevent further crimes,[137] and to impose greater punishment where appropriate.[138] However, denying deaf inmates the assistance of interpreters and other requisite accommodations for their deafness is not usually (if ever) premised on the need to ensure prison security or safety, to prevent further crimes, or to impose greater punishment that is warranted by the greater culpability of the detainee or offender. Thus, the usual "rational" reasons for condoning unequal treatment among prisoners are inapplicable where deaf prisoners are at issue.

The only state interest at issue with respect to the unequal treatment of deaf prison inmates is, in most cases, that of avoiding the expense and any related administrative inconvenience that would be incurred as a re-

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they could not understand the language in which instruction was given. The *Lau* Court did not decide whether the equal protection clause had been violated, because it held that the school district's failure to provide English instruction violated the Civil Rights Act of 1964. The Court stated, however, that "equality of treatment" was *not* provided when non-English speaking students were furnished with identical facilities, textbooks, teachers and curriculum as English speaking students. *Id.* at 566. Just as equality of treatment is not provided by educating non-English speaking students in the same manner as English speaking students, equality of treatment is not provided by confining deaf inmates in the same manner as hearing inmates. In both cases the failure to provide assistance to render conditions equal in any *meaningful* fashion results in unequal treatment. Whether such unequal treatment violates the equal protection clause, however, must be determined by application of the appropriate constitutional test. The *Lau* Court did not reach that question.

136. The Supreme Court has repeatedly stated that the decisions of prison authorities should be given great weight. *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 351 ("[c]ourts must bear in mind that their inquiries [relating to conditions of confinement] spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility." (citing Bell v. Wolfish, 441 U.S. 520, 539(1979)); Bell v. Wolfish, 441 U.S. 520, 547 (1979) ("[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.").

137. *E.g.*, Gale v. Moore, 763 F.2d 341, 343-44 (8th Cir. 1985) (discretionary parole statute applied more harshly to sex offenders did not violate the equal protection clause because the goal of preventing sex crimes through rehabilitation and deterrence constituted a rational basis for the distinction).

138. *E.g.*, United States v. Garret, 680 F.2d 650 (9th Cir. 1982) (disparity between sentences given to several codefendants did not violate the equal protection clause, because some codefendants were more culpable than others and thus deserving of greater punishment).

sult of the provision of reasonable accommodations. In some instances, however, costs alone have been held to constitute a sufficiently legitimate state interest so as to warrant the imposition of unequal treatment. The Supreme Court has stated that "[i]n the area of economic and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect."[139] Thus, where states have determined that the expense of "equalizing" conditions between two sets of citizens is too high, some courts have recognized that such cost considerations constitute a rational basis for the unequal treatment. For example, in *Selph v. Council of City of Los Angeles*,[140] the court held that, where the cost of modifying all of a city's polling places to eliminate architectural barriers to handicapped people would require "an unfair expenditure of huge amounts of money in order to benefit a small segment of the total population," the equal protection clause was not violated even though some of the city's polling places were inaccessible to handicapped voters. In *Hammond v. Marx*,[141] the court held that where the administration of school readiness tests to all preschool children would be an unjustifiable expense in light of the high cost and questionable reliability of the tests, the failure to test children under six for readiness for school did not violate the equal protection clause.[142] The question is whether the costs of providing reasonable accommodations for the needs of deaf prisoners would be held, under *Cleburne*, to constitute a rational basis for the failure to provide such accommodations.

Although declining to label mentally retarded people a quasi-suspect class, the Court in *Cleburne* refused to allow application of a City of Cleburne zoning ordinance that required the operators of a group home for mentally retarded persons to obtain a special use permit. While claiming to apply the rational basis test, the Court held that there was no rational basis for the ordinance as applied to the proposed group home for the mentally retarded. As noted by Justice Marshall, concurring in part and dissenting in part to the majority's opinion in *Cleburne*, "[t]he Court [held] the ordinance invalid on rational basis grounds and disclaim[ed] that anything special, in the form of heightened scrutiny, [was] taking place. Yet Cleburne's ordinance surely would be valid under the traditional rational basis test applicable to economic and commercial

139. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

140. 390 F. Supp. 58 (C.D. Cal. 1975).

141. 406 F. Supp. 853 (N.D. Me. 1975).

142. *See also* Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 511 (1937) ("[a]dministrative convenience and expense in the collection or measurement of the tax are alone a sufficient justification for the difference between the treatment of small incomes or small tax payers and that meted out to others.").

regulation. . . ."[143]

In accord with Justice Marshall, commentators have uniformly recognized that the Court's review in *Cleburne* more closely resembles the heightened review provided in cases involving quasi-suspect classes than the traditional rational basis review.[144]

Similarly, in other recent cases the Court has gone beyond "traditional" rational basis review to more closely scrutinize regulatory legislation. Thus, in *Metropolitan Life Ins. Co. v. Ward*,[145] the Court applied the "rational basis" test in holding unconstitutional an Alabama statute that gave preferential tax treatment in the form of lower gross premium tax rates only to domestic insurers. The Court held that the State's purposes of encouraging the formation of new Alabama insurance companies and investment of capital by foreign insurance companies in Alabama assets and securities were not sufficiently "rational" to withstand challenge under the equal protection clause in light of the discriminatory effect that would result. In *Williams v. Vermont*,[146] the Court struck down a statute that gave preferential vehicle tax treatment to Vermont residents who were residents at the time of certain vehicle purchases. Despite the statute's presumably rational purposes of protect-

143. *Cleburne*, 473 U.S. at 456 (Marshall, J. concurring in part and dissenting in part; joined by Brennan, J. and Blackmun, J.).

144. One commentator has stated that the Court's unusual action in holding the ordinance at issue in *Cleburne* rational as applied "made the Court's minimum scrutiny take on the characteristics of intermediate review" generally followed in cases involving members of quasi-suspect classes. *The Supreme Court, 1984 Term* — Leading Cases, 99 HARV. L. REV. 120, 162 (1985). As that author noted, "what the Court in fact did by adopting an as-applied approach was to create an intrusive, case-by-case mode of reviewing legislative classifications under minimum scrutiny." *Id.* at 171. The author further recognized that "because of the Court's insistence that it was applying the same level of review it normally accords social and economic legislation, *Cleburne* stands as a precedent for the application of a form of heightened scrutiny to all legislative classifications." *Id.* at 167. *See also* Comment, *Equal Protection, supra* note 133, at 253 ("[a]lthough the Court purported to apply the rational basis test, its scrutiny more closely resembled a heightened review"); Merritt, *Communicable Disease and Constitutional Law: Controlling AIDS*, 61 N.Y.U. L. REV. 739, 784 (Nov. 1986) ("[t]he Court's decision in *Cleburne* does not persuasively rely upon application of the traditional rational basis test . . . . The fact that the city [of Cleburne] had chosen to address problems of overcrowding, flooding and fire hazards in homes for the mentally retarded but not in fraternities or apartment houses . . . would not have offended traditional rational basis review."); *Cf.*, Comment, *Justice Stevens' Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146, 1150 (1987) ("[t]he Court's equal protection opinions of the last decade evidence more frequent use of heightened scrutiny in cases in which the Court purports to apply only minimum 'rational basis' review"); Comment, *Changing Standard, supra* note 133, at 957 (the rational basis test applied in *Cleburne* "is more a 'rational justification' test that falls somewhere between the minimal rational basis test and the intermediate scrutiny applied to gender-based classifications").

145. 470 U.S. 869 (1985).

146. 472 U.S. 14 (1985).

ing the state against lost revenues from out-of-state automobile purchasers and requiring those who use Vermont's highways to contribute to their maintenance and improvement, the Court held that offering tax benefits to "old" as opposed to "new" Vermont residents was arbitrary and irrational. Similarly, in *Hooper v. Bernalillo*,[147] the Court held unconstitutional New Mexico's lifetime property tax exemption for Vietnam veterans who established residency before May 8, 1976. The Court rejected the state's argument that the statute was rationally related to the legitimate goal of showing appreciation to citizens who served in the military, holding that, in distinguishing between veterans who became residents before a certain date and those who became residents later, the law impermissibly "create[d] 'fixed, permanent distinctions between . . . classes of concededly bona fide residents,' " based on how long they have been in the state.[148]

In all of these cases, rather than applying traditional rational basis review—under which the state is presumed to have acted within its constitutional powers and the equal protection clause is held violated only if "the classification rests on grounds wholly irrelevant to the achievement of the State's objective"[149]—the Court balanced the legitimacy of the stated purpose(s) for the classification versus the severity of the discriminatory effect resulting therefrom. Thus, the Court struck down the statutes at issue in *Williams* and *Hooper* because they had the effect of discriminating unfairly against newer state residents; it struck down the statute at issue in *Metropolitan Life* because it discriminated heavily against foreign industry; it struck down the zoning regulation at issue in *Cleburne* as applied because it discriminated heavily against a group of mentally disabled persons.[150]

Lower courts have begun following the Supreme Court's lead in rejecting "traditional" rational basis analysis. When applying the rational basis test, these courts have begun to balance the legitimacy of the state's articulated purposes for the discriminatory action versus the severity of the discriminatory effect resulting from that action. For example, the court in *Coburn v. Agustin* examined a Kansas statute, which provided that damages recoverable by a plaintiff for personal injuries could be re-

147. 472 U.S. 612 (1985).

148. *Id.* at 617. The Court relied on its earlier decision in Zobel v. Williams, 457 U.S. 55 (1982), in which the Court struck down under the rational basis test Alaska's dividend distribution plan which favored established residents over new residents.

149. McGowan v. Maryland, 366 U.S. 420 (1961).

150. For an excellent analysis of the Court's "heightened review" in these four cases *see* Comment, *Still Newer Equal Protection: Impermissible Purpose Review in the 1984 Term*, 53 U. CHI. L. REV. 1455 (1986).

duced by the amount of payment or services received from sources other than the tortfeasor, under the rational basis test.[151] That court held that it "must balance the societal interests against the class interests served by the legislation and measure the benefits and burdens of the law." The court weighed the state's goal of lowering medical malpractice insurance against the interests of the victims of medical malpractice, and found the law unconstitutional. While declining to apply an intermediate standard of review, the court held that since "the statute significantly impinges upon the important rights of a class without the resources or capacity to protect itself," it was applying "a heightened form of rational basis scrutiny."[152] The court noted that in *Cleburne* and *Metropolitan Life*, the Supreme Court "altered" or "modified" the rational basis test, and concluded that "[i]n tandem, [those cases] convincingly demonstrate the Supreme Court's implementation of a more exacting rational basis test."[153] The court stated:

> The rational basis test is now being applied in a manner that is not outcome-determinative. Apparently, the Supreme Court is recognizing that not all cases involving economic and social welfare legislation can be made to fit into the traditional rational basis test and still comport with fundamental fairness under the equal protection clause.[154]

Similarly, in *Long Island Lighting Co. v. Cuomo*,[155] the Court held invalid under the rational basis test New York's Used and Useful Act, under which a nuclear power plant's costs would be excluded from the power company's rate base if the plant was not in operation by a specified date. The court also noted that in *Cleburne*, *Hooper* and *Williams* the Court applied a " 'means-oriented' model for judicial scrutiny" under the rational basis test.[156] Moreover, in *Cleburne* and *Hooper* "the [Supreme] Court, while conceding the legitimacy of most of the purposes the state claimed were furthered by the challenged ordinance, demanded some plausible connection between those ends and the burdens placed on those who were singled out by the ordinance."[157] Finally, in *Deibler v. City of*

151. 627 F. Supp. 983, 996 (D. Kan. 1985).

152. *Id.* at 997; *accord* Fretz v. Keltner, 109 F.R.D. 303, 307 (D. Kan. 1986). *Contra*, Ferguson v. Garmon, 643 F. Supp. 335, 339 (D. Kan. 1986) (refusing to apply the test applied in Coburn v. Augustin and Fretz v. Keltner).

153. *Coburn*, 627 F. Supp. at 989.

154. *Id.* at 990. The court recognized, however, that "it is true that the Supreme Court has not officially articulated a new test," and that "it is unclear whether the old rational basis test has been supplemented or supplanted. . . ." *Id.*

155. 666 F. Supp. 370 (N.D.N.Y. 1987).

156. *Id.* at 419-420.

157. *Id.* at 420.

Rehoboth Beach,[158] the court struck down as unconstitutional under the rational basis test a requirement that candidates for members of the city commission must be current in their city tax payments. The *Deibler* court noted that the rational basis test, while once "direct and objective," has, under *Cleburne* and *Hooper*, "become perhaps the most sophisticated and subjective of judicial tests" which "calls upon a judge's personal understanding of the needs of society."[159]

Under this newly applied (if not directly articulated by the Supreme Court) "heightened rationality test," courts should balance the benefits and burdens resulting from the refusal to make reasonable accommodations for the needs of deaf prisoners, a class of persons clearly without the resources or capacity to protect itself. Courts should further demand some rationale beyond mere cost savings to explain the connection between the refusal to accommodate and the placement of extreme burdens on deaf prisoners as a result of that refusal. The Court's unusual action in *Cleburne* in finding a municipality's economic and commercial zoning ordinance unconstitutional as applied to handicapped persons—under the rational basis test—is indicative of: (1) the Court's awareness of the growing public outrage against the unjust treatment traditionally meted out to the handicapped; and (2) the Court's initial receptiveness to the concept that handicapped people are entitled to enjoy the full panoply of Constitutional rights.

Similarly, courts should recognize that the "needs of society" now include the needs of handicapped people. Our society has come to recognize that it is morally and ethically abhorrent to treat our handicapped members as second class citizens.[160] It is time for the courts to interpret the Constitution in accord with the groundswell of public opinion that

158. 790 F.2d 328 (3rd Cir. 1986).

159. *Id.* at 334 n.1.

160. The handicapped rights movement began in the 1970s, when handicapped people began demanding civil rights protections similar to those established for racial minorities and women. Partly in response to that advocacy movement, and partly in response to some cases decided on constitutional principles (*e.g.*, Pennsylvania Association for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), and Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972)), in the 1970s Congress enacted a series of laws aimed at protecting handicapped people from discrimination and integrating handicapped people into the mainstream of American life. The most prominent laws enacted were Sections 501 through 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 790-796 (1973), and the Education for All Handicapped Children Act, 20 U.S.C. §§ 1401-1461 (1975). Although these laws were passed in the early 1970s, it was not until the late 1970s, in response to further outcry from handicapped people, that any real attempts were made to implement or enforce the laws. Since then, public outcry about the plight of our handicapped citizens has been widespread. Society has come to recognize the right of handicapped people to receive equal treatment and opportunities, and the courts have begun to enforce these laws in earnest.

demands equal rights for handicapped people, and to interpret the equal protection clause in a manner that gives fair recognition to the rights of our handicapped citizens.

Under the heightened rationality test applied in *Cleburne*, the cost saving rationale followed in *Selph* and *Hammond* should not be held to apply to the refusal to make reasonable accommodations for deaf prisoners. Rather, when balancing the legitimacy of a state's stated purpose of saving money versus the gross severity of the discriminatory effect upon a powerless class resulting therefrom, the equal protection clause should be interpreted as requiring that reasonable accommodations be made to assist in equalizing conditions of confinement between deaf and hearing prisoners. Where reasonable alternatives are feasible, under the more stringent rational basis test recently applied by the Supreme Court it should be held irrational for prison officials to refuse to implement such alternatives.[161]

B. The Eighth Amendment

Prior to discussing the rights of deaf prison inmates under the eighth amendment, it should be noted that the constitutional rights of deaf pretrial detainees are somewhat different from the constitutional rights of convicted deaf offenders. While the eighth amendment's prohibition

161. It is arguable that certain of the accommodations required by deaf prisoners, such as the provision of decoders to enable deaf prisoners to watch television, fall outside the protection of the equal protection clause, because the specific conditions at issue (i.e., the inability to watch television) are not of sufficient importance to warrant constitutional protection. This argument, of course, would not apply with respect to the bulk of the accommodations required by deaf prisoners, such as the need for qualified interpreters to interpret during prison proceedings and functions, the provision of TDD's to allow deaf prisoners to utilize the telephone, and the modification of employment tests to allow deaf persons to obtain employment within the prison for which they are otherwise qualified. But with respect to those few accommodations that would, if viewed singularly, fall outside the scope of constitutional protections, it is submitted that the focus should be on the *totality* of conditions for deaf prisoners.

To the extent that the total conditions of confinement suffered by deaf prisoners violate the equal protection clause, fine lines should not be drawn between the individual conditions at issue so that some conditions may be remedied and others may not. The solution to the generally inequitable conditions suffered by deaf prisoners lies in providing *reasonable* accommodations with respect to the overall prison conditions. It may be unreasonable, and unduly costly in some cases, to fully remedy a condition that *is* of sufficient importance to warrant constitutional protection, while it may be reasonable to remedy a condition that, standing alone, does not warrant constitutional protection. It would be unreasonable, for example, to provide a deaf prisoner with a full time interpreter during his employment at prison, notwithstanding that issues involving employment are worthy of constitutional protection. At the same time, it would be reasonable to provide a relatively inexpensive television decoder for a deaf prisoner (approximate cost $200) to ease the heavy burden of the prisoner's solitary confinement, notwithstanding that the denial of the ability to watch television does not, per se, warrant constitutional protection.

against cruel and unusual punishment applies to convicted deaf offenders, when evaluating the constitutionality of conditions of confinement pertaining to deaf pretrial detainees the "proper inquiry is whether those conditions amount to punishment of the detainee" absent an adjudication of guilt, in violation of the due process clause of the fourteenth amendment.[162]

1. Rights of convicted deaf prisoners

Although the rights of handicapped prisoners under the eighth amendment have been analyzed by several commentators,[163] those analyses focus in general on the Supreme Court's holding in *Estelle v. Gamble*.[164] In that case, the Supreme Court held that the eighth amendment prohibits prison officials from manifesting a "deliberate indifference to serious medical needs of prisoners . . . ."[165] While the problems confronting many handicapped prisoners may be medically related (even if they do not concern medical necessities), the problems confronting deaf prisoners are only rarely medically related.[166] Thus, *Estelle* is not directly applicable when determining the constitutional rights of deaf prisoners under the eighth amendment.

Nevertheless, *Estelle* is significant to this discussion. When prohibiting "deliberate indifference" to the serious medical needs of prisoners,

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162. Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979). The Court cited Ingraham v. Wright, 430 U.S. 651, 671-72, n.40 (1977), in stating:

> Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions . . . . [T]he state does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the state seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.

Id. at n.16 (citation omitted).

163. *See, e.g.*, Brenner, *The Parameters of Cruelty: Application of* Estelle v. Gamble *to Sentences Imposed upon the Physically Fragile Offender*, 12 AM. J. CRIM. LAW 280 (1984); Baum, *supra* note 119, at 359-79.

164. 429 U.S. 97 (1976).

165. *Id.* at 104.

166. It has been noted that the ruling of *Estelle v. Gamble* applies only in cases involving medical necessity, and that therefore *Estelle* might "not directly support a handicapped inmate's claim for special accommodations since the problems causing the inmate's suffering is not a medical necessity." Baum, *supra* note 119, at 362. The claims of many physically handicapped inmates are often medically related, however, in that they pertain to the need for accommodations relating to the performance of bodily functions, such as the use of toilets, sinks and shower facilities, or the need for accommodations relating to physical care, such as assistance to prevent the formation of bedsores. But the claims of deaf prisoners are only of a medical nature insofar as they relate to the need for the provision of hearing aids or hearing aid molds.

the Court implied that only *intentional* conduct on the part of prison officials will constitute a violation of the eighth amendment. The Court stated that "an inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind.' "[167] Rather, to state a claim under the eighth amendment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."[168]

Once again, to comport with the relevant precepts of the law as applied to the handicapped, the courts must analyze the intent requirement in terms of the deliberate refusal to make reasonable accommodations for deaf prisoners rather than in terms of the deliberate imposition of unjustly disproportionate prison conditions.[169] Indeed, that is exactly the "intent" analysis required in *Estelle*. The "deliberate indifference to serious medical needs" test focuses on the deliberate failure to provide "accommodations" (i.e., medical treatment) to alleviate problems caused by medical concerns. In the same manner, the "deliberate indifference to the needs of deaf prisoners" test would focus on the failure to provide accommodations to alleviate problems caused by deafness.

When looking at the proscription against cruel and unusual punishment in the context of the punishment suffered by deaf inmates, the first substantive inquiry focuses on the equal protection aspects of the eighth amendment. In *Furman v. Georgia*,[170] the Supreme Court held that the imposition of the death penalty violates the eighth amendment's prohibition against cruel and unusual punishment if the punishment discriminates against an offender "by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices."[171] The Court noted that "the basic theme of equal protection is implicit in 'cruel and unusual' punishments. 'A penalty . . . should be considered "unusually" imposed if it is administered arbitrarily or discriminatorily.' "[172] Accordingly, the Court held that laws which give a jury unfettered discretion to determine when to apply the death penalty violate the cruel and unusual punishment clause of the eighth amendment.

In *Furman*, the Court was concerned with the severity of the "type"

167. *Estelle*, 429 U.S. at 105-06.

168. *Id.* at 106.

169. *See supra* text accompanying notes 55-63 and 114-15.

170. 408 U.S. 238 (1972).

171. *Id.* at 242.

172. *Id.* at 249 (quoting Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790 (1970)) (footnotes omitted).

of punishment imposed upon one offender (the death penalty), as opposed to the "type" of punishment imposed upon another offender (life imprisonment). Because a deaf offender receives the same "type" of punishment as a hearing offender (i.e., imprisonment in both cases), and because this article is not concerned with the death penalty, as the *Furman* court was, the cases are somewhat inapposite. Nevertheless, *Furman* is significant to our discussion because of the Court's emphasis on the fact that the eighth amendment ban on cruel and unusual punishment encompasses "the idea of equal protection of the laws."[173] While every denial of equal protection can hardly be said to constitute cruel and unusual punishment, the failure to make reasonable accommodations to alleviate the cruel and unusual suffering incurred by deaf prisoners, which constitutes a denial of equal protection, should be held to violate the eighth amendment.

Justice Marshall, concurring in the *per curiam* opinion in *Furman*, specified "four distinct reasons" why a punishment may be deemed cruel and unusual.[174] Among the reasons cited by Justice Marshall for finding a penalty cruel and unusual is "because it is excessive and serves no valid legislative purpose."[175] As noted by Justice Marshall, "[t]he entire thrust of the Eighth Amendment is . . . against 'that which is excessive,' "[176] and thus "one of the primary functions of the cruel and unusual punishment clause is to prevent excessive or unnecessary penalties."[177] This prohibition against excessive punishments has two aspects: "First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime."[178]

The first prong of the test enunciated by Justice Marshall involves the prohibition against the unnecessary and wanton infliction of pain. The argument that the harsh prison conditions suffered by deaf prisoners are the necessary consequence of their deafness and their justifiable prison sentences ignores reality. Those disproportionate and discrimina-

173. *Id.*

174. *Id.* at 330-33 (Marshall, J., concurring).

175. *Id.* at 331 (Marshall, J., concurring). The remaining reasons cited by Justice Marshall for finding punishments cruel and unusual involve:
1) punishments that "inherently involve so much physical pain and suffering that civilized people cannot tolerate them" (*id.* at 330) (Marshall, J., concurring); 2) punishments that are so unusual as to be "previously unknown as [the penalty] for a given offence" (*id.* at 331) (Marshall, J., concurring); and 3) punishments that are abhorred by popular sentiment (*id.* at 332) (Marshall, J., concurring).

176. *Id.* at 332 (Marshall, J., concurring).

177. *Id.* at 331 (Marshall, J., concurring).

178. Gregg v. Georgia, 428 U.S. 153, 173 (1976) (citations omitted).

torily harsh conditions can easily be alleviated in many instances by the provision of qualified interpreters for deaf inmates in the conduct of prison proceedings and rehabilitative programs, by the provision of TDD's and decoders for deaf inmates, and by modifying some rules to accommodate the needs of deaf inmates. The only barrier to making such purportedly "necessary" treatment "unnecessary" is one of cost; it is axiomatic that "[h]umane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations. . . ."[179]

The second prong of the test enunciated by Justice Marshall involves the requirement of proportionality. The prohibition against excessiveness focuses on the *amount* of pain and suffering that constitutionally may be inflicted. Thus, in *Solem v. Helm*,[180] the Supreme Court focused on proportionality when assessing the excessiveness of the punishment imposed upon a convicted offender. In *Solem*, the defendant was convicted in South Dakota state court of uttering a "no account" check for $100. Because the defendant had previously been convicted of six felonies, he was sentenced to life imprisonment without possibility of parole under South Dakota's recidivist statute. When determining whether Solem's sentence constituted cruel and unusual punishment, the Court compared his sentence to sentences imposed on other offenders in South Dakota for similar and dissimilar crimes. It also compared the sentences imposed for commission of the same crime committed by defendants in other jurisdictions. The Court concluded that, because Solem was "treated more harshly than other criminals in the State who have committed more serious crimes" and because Solem was "treated more

179. Rhodes v. Chapman, 452 U.S. 337, 359 (1981) (Brennan, J., concurring) (citing Justice Blackmun's opinion in Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968)). *Accord*, Gates v. Collier, 423 F. Supp. 732, 743 (N.D. Miss. 1976) ("constitutional treatment of human beings confined to penal institutions is not dependent upon the willingness or the financial ability of the State to provide decent penitentiaries"), *aff'd*, 548 F.2d 1241 (5th Cir. 1977); Gates v. Collier, 501 F.2d 1291, 1319 (5th Cir. 1974) ("[w]here state institutions have been operating under unconstitutional conditions and practices, the defenses of fund shortage and the inability of the district court to order appropriations by the state legislature, have been rejected by the federal courts"); Ruiz v. Estelle, 679 F.2d 1115, 1146 ("Constitutional rights are not, of course, confined to those available at modest cost"), *vacated in part on other grounds*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983). *But cf.* Stickney v. List, 519 F. Supp. 617, 619 (D. Nev. 1981) (any analysis of prison conditions in the context of the eighth amendment "must consider the cost to determine if it would be unnecessarily expensive and whether or not it would impair prison security."). Cost is relevant, however, when weighing one remedy to right a constitutional violation versus another remedy. *See, e.g.*, *Ruiz*, 679 F.2d at 1146 ("[y]et in considering remedies for unconstitutional deprivation, the cost of one proposed remedy in comparison with the cost of others and the demonstrable need for the remedy should both be considered").

180. 463 U.S. 277 (1983).

harshly than he would have been in any other jurisdiction, with the possible exception of a single state," Solem's sentence was disproportionate to his crime and was thus prohibited by the eighth amendment.[181]

Applying the requisite proportionality analysis with respect to the punishment inflicted upon deaf offenders requires a shift in points of comparison. With respect to a deaf offender the appropriate question for proportionality purposes is whether the harshness of the penalty imposed upon the offender is seriously disproportionate to the penalty imposed upon a hearing offender in the same jurisdiction for the same offense. As our hypothetical case of John and Fred clearly illustrates,[182] the punishments inflicted upon deaf offenders are much more harsh than the punishments inflicted upon hearing offenders who commit the same crime in the same jurisdiction. The fact that the terms of imprisonment received by both offenders are of the same length should not be dispositive. Rather, the dispositive fact should be that deaf offenders are treated much more harshly than hearing offenders, in that the amount of pain and suffering inflicted upon the former is far greater than the amount of pain and suffering inflicted on the latter.

Alternatively, if we decline to compare the harshness of the penalty imposed upon a deaf offender (Fred) as compared to the penalty imposed upon a hearing offender (John) who has committed a similar crime, we reach the same result by comparing the severity of the deaf prisoner's sentence to the crime committed by that prisoner. The virtual isolation to which Fred is sentenced—the confinement for ten years without meaningful access to the rehabilitative, educational or social aspects of prison life and without any means of interacting with other human beings—appears to be out of line with the gravity of his offense. The disparate nature of the effective sentence to be served by John serves merely as an indication of this dissonance. Focusing the proportionality argument on either of these points of comparison should lead to the same result.

By way of analogy, picture the following scenario: Congress enacts a law providing for the creation of a new federal prison that is to employ experimental punitive measures for the purpose of determining whether such measures serve as a significant deterrent to future criminal activity. While most federal offenders are required to serve their sentences in traditional (i.e., "normal") prisons, a small number of randomly selected offenders are placed in the experimental prison. The experimental prison contains no rehabilitative, social or church related programs; prisoners

181. *Id.* at 303.

182. *See supra* text accompanying notes 17-51.

are not allowed to socialize with one another or to use the telephone; the prison does not contain a television, radio or any other such electronic device. The guards at the experimental prison communicate in a complicated, unique "language," in which they have received extensive training, that involves the use of squeaks pitched beyond the range of human hearing. Prisoners who want to speak to the guards or to other prisoners for necessary matters must also speak in that strange language. It would certainly seem to be cruel and unusual to subject arbitrarily selected persons to such conditions. But how do we articulate our reason for reaching that decision? Is it because the conditions to which the randomly selected prisoners are subjected are so disproportionate to the conditions to which other prisoners are subjected that they stand out as glaringly "cruel and unusual?" Or is it because the conditions to which the randomly selected prisoners are subjected are inherently unfair and outrageous when compared to the crimes committed by the prisoners? In effect these two rationales are really one and the same. That is, whether phrased in terms of the disproportionality between penalties received by two persons who have committed similar crimes or in terms of the disproportionality between the crime and the penalty, the disproportionality test is simply a gut-wrenching test for cruelty—a test that the disporportionate conditions of confinement served by deaf prisoners seems clearly to satisfy.

Our final inquiry with respect to eighth amendment principles focuses on the concept of isolation or solitary confinement. A profoundly deaf offender who communicates solely via the use of sign language and is serving a term of imprisonment in a correctional institution where inmates and staff all hear and do not know sign language, and where no accommodations are made for the offender's deafness, is, for all practical purposes, required to serve his time in virtual isolation. It is appropriate, therefore, to examine the circumstances under which isolation or solitary confinement have been deemed not violative of the eighth amendment.

Segregated administrative detention does not, per se, violate the eighth amendment.[183] Nevertheless, there are constitutional limitations upon the extent to which prisoners may be isolated from humanity. Thus, isolation in prison becomes cruel and unusual when "it offends 'the

183. *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 686 (1978) ("[i]t is perfectly obvious that every decision to remove a particular inmate from the general prison population for an indeterminate period could not be characterized as cruel and unusual"). *Accord* Graham v. Willingham, 384 F.2d 367, 368 (10th Cir. 1967); Sostre v. McGinnis, 442 F.2d 178, 190 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972); Kelly v. Brewer, 525 F.2d 394, 399 (8th Cir. 1975); *see also*, Annotation, Prison Conditions as Amounting to Cruel and Unusual Punishment, 51 A.L.R.3d 111, 164-69 (1973) and 1987 Supp. 78-83.

evolving standards of decency that mark the progress of a maturing society.' "[184]

While courts have frequently upheld the constitutionality of solitary confinement imposed for disciplinary reasons,[185] even in that context the Supreme Court has cautioned that "the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards."[186] Federal courts of appeals have frequently noted that the length of time in isolation must be considered when reviewing the eighth amendment claims of prisoners confined in segregation, because prolonged solitary confinement can lead to serious physical and mental deterioration.[187]

Accordingly, even where solitary confinement is imposed as a "necessary tool of prison discipline, both to punish infractions and to control and perhaps protect inmates whose presence within the general population would create unmanageable risks,"[188] there are constitutional limitations upon isolated prison confinement. Where, as in the case of deaf inmates, there is no disciplinary basis for the enforced isolation, and the isolation will continue for the entire length of the prisoners' sentence (in Fred's case, for example, for ten years), such isolation should shock the conscience and offend the evolving standards of decency that mark the progress of a maturing society.[189] Thus, prison officials should be constitutionally required to "explore feasible alternative[s]"[190] to the unnecessarily enforced isolation of deaf prisoners, by making reasonable accommodations for their deafness.

In sum, the disproportionate and discriminatory punishments suffered by deaf offenders should be held violative of the eighth amendment's prohibition against cruel and unusual punishment. It has long been recognized that the eighth amendment is not static, and that in ac-

184. Gregory v. Wyse, 512 F.2d 378, 381 (10th Cir. 1975) (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)).

185. *See, e.g.*, Burmarner v. Bloodworth, 768 F.2d 297 (8th Cir. 1985); Jackson v. Meachum, 699 F.2d 578 (1st Cir. 1983); Pepperling v. Crist, 678 F.2d 787 (9th Cir. 1982); LaPlante v. Southworth, 484 F. Supp. 115 (D.R.I. 1980); Gregory v. Wyse, 512 F.2d 378 (10th Cir. 1975); O'Brien v. Moriarty, 489 F.2d 941 (1st Cir. 1974); United States *ex. rel.* Tyrrell v. Speaker, 471 F.2d 1197 (3d Cir. 1973).

186. *Hutto*, 437 U.S. at 686 n.10.

187. *See, e.g.*, Sheley v. Dugger, 833 F.2d 1420, 1429 (11th Cir. 1987); Meriwether v. Faulkner, 821 F.2d 408, 416-17 (7th Cir. 1987), *cert. denied*, 108 S.Ct. 311 (1987); *Jackson*, 699 F.2d at 584-85; *Pepperling*, 678 F.2d at 789; Bono v. Saxbe, 620 F.2d 609, 614 (7th Cir. 1980); Sweet v. South Carolina Dep't of Corrections, 529 F.2d 854, 861 (4th Cir. 1975) (en banc); *O'Brien*, 489 F.2d at 944.

188. *O'Brien*, 489 F.2d at 944.

189. Trop v. Dulles, 356 U.S. 86, 101 (1958).

190. *Jackson*, 699 F.2d at 585.

cord with " 'the evolving standards of decency that mark the progress of a maturing society' "[191] the words "cruel and unusual" must be interpreted " 'in a flexible and dynamic manner.' "[192] It has also long been recognized that punishment must accord with the " 'dignity of man,' which is the basic concept underlying the Eighth Amendment."[193] During the last ten years our society has come to recognize the terrible plight faced by many handicapped individuals and has taken giant steps in attempting to remedy that plight by allowing our handicapped citizens to enjoy the same opportunities to achieve the same quality of life as that enjoyed by our non-handicapped citizens.[194] Our society's evolving standards of decency have come to include the recognition that handicapped people must be treated with the dignity awarded non-handicapped people. It is time for deaf inmates to request that the courts interpret the eighth amendment in light of this evolving standard of decency.[195]

2. Due process rights of pretrial detainees

"Any act or practice which violates the Eighth Amendment's prohibition against cruel and unusual punishment also violates the due process rights of pretrial detainees under the Fifth and Fourteenth Amendments."[196] Thus, to the extent that denying deaf inmates the right to interpreters, TDD's, decoders and other necessary assistance to accommodate for their deafness violates the eighth amendment rights of con-

191. *E.g.*, *Gregg*, 428 U.S. at 173 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)).

192. *Rhodes*, 452 U.S. at 345 (citing Gregg v. Georgia, 428 U.S. 153, 171 (1976)).

193. *Gregg*, 428 U.S. at 173 (citing Trop v. Dulles, 356 U.S. 86, 100 (1958)).

194. *See supra* text accompanying note 160.

195. To date, the author is unaware of any reported case in which it has been argued that the harsher prison conditions imposed upon deaf inmates violates the eighth amendment. One reason for this may be that traditional eighth amendment analysis frequently involves the adequacy of prison shelter, sanitation, food, personal safety, adequate clothing and medical care. It has been held that " '[a]n institution's obligation under the eighth amendment is at end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal safety.' " Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982) (quoting Wolfish v. Levi, 573 F.2d 118, 125 (2d Cir. 1978)); *accord* Ramos v. Lamm, 639 F.2d 559, 567-68 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); Newman v. Alabama, 559 F.2d 283, 291 (5th Cir. 1977), *rev'd in part on other grounds sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978). This statement, however, ignores the proportionality and equal protection components of the eighth amendment, and addresses only one aspect of the ban against cruel and unusual punishment.

196. Matzker v. Herr, 748 F.2d 1142, 1146 (7th Cir. 1984) (citing Bell v. Wolfish, 441 U.S. 520, 545 (1979)); *cf.* Davis v. Smith, 638 F.2d 66, 68 (8th Cir. 1981) ("[t]he court's finding that the conditions of Davis' pretrial detention constituted punishment under the eighth amendment was clearly sufficient to establish a violation of Davis' due process rights under the fourteenth amendment").

victed deaf prisoners, such deprivation would also violate the due process rights of deaf pretrial detainees.

But the rights of pretrial detainees are broader than those of convicted offenders, because the due process clauses of the fifth and fourteenth amendments prohibit the imposition of any punishment before conviction. Consequently, "conditions of confinement which may be constitutional for sentenced inmates under the Eighth Amendment may be unconstitutional for pre-trial detainees under the Fourteenth Amendment."[197] In accord with this principle, in *Bell v. Wolfish* the Supreme Court held that unconvicted persons may not be subjected to conditions of confinement that are punitive in nature.[198] A pretrial detainee's right to be free from punishment goes to both the length of his pretrial detention and the right not to be subjected to conditions imposed for the purpose of punishment.[199] The proper inquiry with respect to the question of whether a deaf pretrial detainee's due process rights have been violated, therefore, is whether, in refusing to provide reasonable accommodations for the detainee's deafness, prison officials acted with intent to *punish* the detainee. In that regard, "if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees."[200]

While "maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees,"[201] a restraint that " 'appears excessive in relation to the alternative purpose assigned [to it]' " is improperly punitive in nature and violative of the due process rights of pretrial detainees.[202] If the restraint, however, is "an incident of a legitimate nonpunitive govern-

197. Monmouth County Correctional Institution Inmates v. Lanzaro, 595 F. Supp. 1417, 1428 (D.N.J. 1984), *cert. denied*, 108 S. Ct. 1731 (1988). *But see* Hamm v. DeKalb County, 774 F.2d 1567, 1574 (11th Cir. 1985), *cert. denied*, 475 U.S. 1096 (1986) ("in regard to providing pretrial detainees with such basic necessities as food, living space, and medical care the minimum standard allowed by the due process clause is the same as that allowed by the eighth amendment for convicted prisoners"); *accord* Boring v. Kozakiewicz, 833 F.2d 468 (3rd Cir. 1987), *cert. denied*, 108 S. Ct. 1298 (1988); Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986); Garcia v. Salt Lake County, 768 F.2d 303, 307 (10th Cir. 1985); Whisenant v. Yuam, 739 F.2d 160, 163 (4th Cir. 1984).

198. 441 U.S. 520, 536-37 (1979).

199. *Id.* at 535-43.

200. *Id.*

201. *Id.* at 546.

202. *Id.* at 538 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)).

mental objective," it is not violative of the due process clause.[203]

Applying this test, courts have sometimes held that restraints or conditions of confinement were impermissibly punitive and thus in contravention of the due process rights of prison detainees. Examples of such impermissibly punitive prison conditions include overcrowded prison conditions,[204] the failure of prison officials to exercise proper supervisory authority to remedy problems of violence,[205] and the failure of prison officials to allow pretrial detainees to have contact visits and regular access to outdoor recreation.[206] It has also been held that a cause of action under the due process clause is established when pretrial detainees assert that they have been denied sufficient visiting privileges with family and friends and sufficient telephone access in prison.[207] The courts have explicitly recognized that the "failure to provide a pretrial detainee with an environment that does not impair his mental and emotional health is punishment and violative of his Fourteenth Amendment rights."[208] In theory, at least, the restrictions and conditions placed on pretrial detainees may not be any more restrictive than necessary to assure their presence at trial or to preserve security.[209]

In accord with this reasoning, it may be argued that the deliberate refusal to provide deaf pretrial detainees with reasonable accommodations for their deafness, particularly the right to the assistance of qualified interpreters during all prison proceedings and activities, is punitive in nature.[210] First, to imprison deaf pretrial detainees absent such accom-

203. *Id.* at 539 n.20.

204. *E.g.*, Lareau v. Manson, 651 F.2d 96 (2d Cir. 1981); Campbell v. Cauthron, 623 F.2d 503 (8th Cir. 1980); Reece v. Gragg, 650 F. Supp. 1297 (D. Kan. 1986).

205. *E.g.*, Matzker v. Herr, 748 F.2d 1142 (7th Cir. 1984).

206. *E.g.*, Miller v. Carson, 563 F.2d 741 (5th Cir. 1977).

207. Duran v. Elrod, 542 F.2d 998, 1000 (7th Cir. 1976), *cert. denied sub nom.* Jones v. Thorne, 475 U.S. 1016 (1986).

208. McMurry v. Phelps, 533 F. Supp. 742, 762 (W.D. La. 1982) (citing Anderson v. Nosser, 456 F.2d 835 (5th Cir.) (en banc), *cert. denied*, 409 U.S. 848 (1972)); Adams v. Mathis, 458 F. Supp. 302 (M.D. Ala. 1978), *aff'd*, 614 F.2d 42 (5th Cir. 1979). *See also, Duran*, 542 F.2d at 1000. *But cf.* Thorne v. Jones, 765 F.2d 1270, 1272 n.6 (5th Cir. 1985) (en banc) (stating that McMurry v. Phelps was wrongly decided insofar as the *McMurry* court held that " 'basic visitation is a right protected by the First Amendment: freedom of association' ").

209. *E.g.*, Miller v. Carson, 563 F.2d at 750.

210. In Daniels v. Williams, 474 U.S. 327 (1986), the Supreme Court held that "the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty or property." *Id.* at 328. In Davidson v. Cannon, 474 U.S. 344 (1986), the Court held that, in accord with *Daniels*, "the protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials." *Id.* at 348. Under these rulings, it has been held that "[o]nly if the evidence suggests that [prison officials] knew of the jails' conditions, or intended to force the detainees to endure

modations is excessive in relation to the alternate purpose of reducing expense and consequential administrative inconvenience,[211] and certainly requires deaf pretrial detainees to be restrained in a manner that is more restrictive than necessary to assure their presence at trial or to preserve security. Second, imprisoning deaf pretrial detainees in facilities where they are unable to communicate with fellow prisoners or guards, where they are unable to understand what is happening at prison proceedings they are forced to attend, and where they are unable to participate in any of the rehabilitative, educational or recreational aspects of prison life, will clearly impair the mental and emotional health of such detainees. Accordingly, the failure to provide deaf pretrial detainees with interpreters and other reasonable accommodations should be held to be punitive and thus violative of the detainee's due process rights under the fourteenth amendment.[212]

C. *Summary*

The discriminatory and disproportionate prison conditions suffered by many deaf prison inmates should be held unconstitutional, as violative of the eighth and fourteenth amendments to the United States Constitution.[213] Unfortunately, however, to date the Supreme Court has not been

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such conditions" would the principles enunciated in *Bell v. Wolfish* apply. Ortega v. Rowe, 796 F.2d 765, 768 (5th Cir. 1986) (en banc), *cert. denied*, 107 S. Ct. 1887 (1987). Following the reasoning of *Ortega*, deaf pretrial detainees would only have a cause of action against prison officials under the fourteenth amendment if the officials were more than negligent; in other words, if the officials knowingly or deliberately refused to provide reasonable accommodations for deaf inmates.

211. The underlying rationale expressed by prison officials when refusing to provide deaf prisoners with interpreters and other accommodations is generally that such accommodations are expensive and no one has the time to bother with making appropriate arrangements to obtain the necessary accommodations.

212. Note, however, that the success of this argument will depend upon the willingness of the courts to interpret the Constitution in light of the changing climate with respect to handicapped persons. In Bell v. Wolfish, 441 U.S. at 562, the Court made it clear when discussing the fourteenth amendment rights of pretrial detainees that federal courts should not, "in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations." This statement is reflective of the general reluctance of the courts to find that prison officials have violated the constitutional rights of prisoners, whether pretrial detainees or convicted offenders. Deaf pretrial detainees, therefore, as well as convicted deaf offenders, will face a tough battle when claiming that their discriminatory and disproportionate prison conditions are unconstitutional.

213. In addition, the refusal to provide a deaf prison inmate with the assistance of a qualified interpreter at disciplinary hearings, grievance hearings (filed by or against the deaf inmate), or similar hearings, such as a "transfer" hearing to determine whether the prisoner should be removed from an "honor-dorm" for qualified prisoners, should be held violative of the procedural due process clause of the fourteenth amendment. Absent the opportunity to understand such proceedings, the deaf prison inmate is denied meaningful access to such pro-

sympathetic to the plight of handicapped people, but has narrowly interpreted the laws relating to handicapped rights, causing severe setbacks to the handicapped rights movement.[214] Thus the current success of the constitutional claims of deaf prison inmates is questionable, at best. It is time, however, for deaf inmates to begin raising these constitutional claims, if for no other reason than to make the courts—and the public—

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ceedings, and the effect is the same as if the deaf prison inmate is not permitted to be present at such hearings. While in Hewitt v. Helms, 459 U.S. 460 (1983), the Supreme Court held that hearings relating to the transfer of prisoners must only be conducted in a non-adversarial evidentiary manner, the Court noted that in a transfer hearing, even when it is claimed that an inmate represents a security threat and administrative segregation is at issue, the inmate must "receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation." *Id.* at 476. Similarly, in Toussaint v. McCarthy, 801 F.2d 1080, 1100 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 2462 (1987), the Ninth Circuit held that, even under the relaxed procedural standard enunciated in *Hewitt*, "prison officials must inform the prisoner of the charges against the prisoner or their reasons for considering segregation [and] allow the prisoner to present his views." Absent the provision of a qualified interpreter, a deaf prison inmate will not be able to fully understand the charges against him at a disciplinary or transfer hearing and will *not* be able to "present his views."

214. Listed below are a few of the more egregious examples of the Supreme Court's narrow reading of the handicapped rights laws:

In Atascadero State Hospital v. Scanlon, 473 U.S. 2342 (1985), despite the fact that section 504 was aimed at prohibiting recipients of federal financial assistance—usually the states—from discriminating against handicapped people, the Court held that the eleventh amendment prohibited a state from being subject to suit in federal court for alleged violations of section 504. To overturn the horrendous effect of this ruling, which would have effectively nullified section 504, in 1986 Congress passed the Rehabilitation Act Amendments of 1986, which provide that a state shall *not* be immune under the eleventh amendment from a suit brought in federal court for a violation of section 504. 42 U.S.C.A. § 2000d-7 (West Supp. 1988).

In Smith v. Robinson, 468 U.S. 992 (1984), the Court held that parents who prevailed in claiming that a school district had failed to provide their handicapped child with a free appropriate education as required by the Education For All Handicapped Children Act, 20 U.S.C. §§ 1400-14 (1978), and had thus violated 42 U.S.C. § 1983 and having unfairly discriminated on the basis of handicap in violation of section 504 of the Rehabilitation Act, could not obtain attorneys' fees under section 504 or under 42 U.S.C. § 1988, which provides for an award of attorneys' fees to the prevailing party in an action premised in part on constitutional claims. To overturn the effect of this ruling, which made it implausible if not impossible for handicapped children to assert their rights to an appropriate education, Congress passed the Handicapped Children's Protection Act of 1986, 20 U.S.C. § 1415 (1986), thus reversing *Smith*.

In United States Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597 (1986), the Court held that commercial airlines are not subject to the nondiscrimination mandate of section 504, because they are not technically recipients of federal financial assistance despite the fact that airports and air traffic controller systems are subsidized by federal funds and airlines cannot operate without airports and air traffic controllers. To assist in overturning the effect of this ruling, on August 15, 1986, Congress amended section 404(a)(c)(1) of the Federal Aviation Act to provide that "no air carrier may discriminate against any otherwise qualified handicapped individual, by reason of such handicap, in the provision of air transportation." 49 App. U.S.C.A. § 1374(c)(1).

aware of the inequities at issue and to serve as an impetus for a legislative solution to the problem.

V. BROADENING STATE INTERPRETER STATUTES: A PARTIAL SOLUTION

The most obvious legislative solution to the problem would be for each of the individual states to enact statutory provisions aimed at equalizing the conditions of confinement for deaf and hearing prison inmates. With respect to the most significantly required accommodation—that of providing qualified interpreters to deaf prisoners during all prison proceedings and organized activities and programs—the problem could be solved relatively simply by expanding current state interpreter laws.

In recognition of the communicative difficulties of deaf people, forty-five states have enacted statutes providing for the appointment of qualified interpreters for deaf persons involved in various aspects of our criminal justice system. The statutes are diverse, and vary widely in coverage. Some state statutes provide for the mandatory[215] or discretionary[216] appointment of interpreters for deaf defendants at trial. Some

215. ARIZ. REV. STAT. ANN. § 12-242(A) (1987 Supp.); ARK. STAT. ANN. § 42-2101.1(a) (1983 Supp.); CAL. EVID. CODE § 754(b) (1988 Supp.); COLO. REV. STAT. § 13-90-201 (1987); CONN. GEN. STAT. ANN. § 17-137K(b)(1) (1987 Supp.); DEL. CODE ANN. tit. 10, § 8907 (1986 Supp.); FLA. STAT. ANN. § 90.6063(2) (West 1987 Supp.); GA. CODE ANN. § 99-4004(a)(1) (1986 Supp.); ILL. ANN. STAT. ch. 110, para. 8-1402 (Smith-Hurd 1984); IOWA CODE ANN. § 622B.2 (West 1987 Supp.); IDAHO CRIM. RULE 28 (1987); KAN. STAT. ANN. § 75-4351(b) (1984); KY. REV. STAT. ANN. § 30 A.410(1) (Michie/Bobbs-Merrill 1985); LA. REV. STAT. ANN. § 270(A) (West 1981); ME. REV. STAT. ANN. tit. 5, § 48(2)(A) (1987 Supp.); MD. ANN. CODE art. 27, § 623A.(a) (1968); MASS. GEN. LAWS ANN. ch. 221, § 92 A (West 1988 Supp.); MICH. STAT. ANN. § 17.55(103)(1) (Callaghan 1987 Supp.); MINN. STAT. ANN. § 611.32(1) (West 1987); MISS. CODE ANN. § 13-1-303 (1987 Supp.); MO. REV. STAT. § 546.034.3 (1987); MONT. CODE ANN. § 49-4-503(3)(a) (1985); NEB. REV. STAT. § 25-2403 (1985); NEV. REV. STAT. § 50.051 (Michie 1986); N.H. REV. STAT. ANN. § 521-A:2 (1987 Supp.); N.M. STAT. ANN. § 38-9-3 (1987 Supp.); N.Y. JUD. LAW § 390 (1983); N.C. GEN. STAT. § 80-2(a) (1986); N.D. CENT. CODE § 28-33-02(1) (1987 Supp.); OHIO REV. CODE ANN. § 2311.14(A) (Anderson 1981); OKLA. STAT. ANN. tit. 22, 1278(a) (West 1986); S.C. CODE ANN, § 15-27-110 (Law. Co-op. 1976); OR. REV. STAT. § 183.418(1) (1987); 1987 S.D. LAWS § 19-3-10(2); TENN. CODE ANN. § 24-1-103(3)(b)(1) (1987 Supp.); TEX. CRIM. PROC. CODE ANN. art. 38.31(a) (Vernon 1988 Supp.); VA. CODE ANN. § 19.2-164.1 (1988 Supp.); WASH. REV. CODE § 2.42.030 (1988); W. Va. Code § 57-5-7(a) (1988 Supp.); WYO. STAT. § 5-1-109(a) (1987 Supp.).

One state, Rhode Island, provides for mandatory provision of a deaf party who is a *witness* at trial. R.I. GEN. LAWS § 8-5-8 (1985).

216. ALA. CODE § 12-21-131 (1986); HAWAII REV. STAT. § 606-9 (1976); UTAH CODE ANN. § 77-35-15(b) (1982); VERMONT RULES CRIM. PROC., Rule 28 (1983); WASH. REV. CODE ANN. § 2.42.030 (1988); W. VA. CODE § 57-5-7(a) (1988 Supp.); WIS. STAT. ANN. § 885.37(1)(b) (1987 Supp.).

Some states also provide for interpreters for deaf witnesses or complainants at trial. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-242(A) (1987 Supp.); CONN. GEN. STAT. ANN. § 17-

state statutes are broadly worded to provide for the appointment of interpreters upon arrest, to be utilized during custodial interrogations of suspects,[217] while still others require the appointment of a qualified interpreter when a grand jury questions a deaf suspect.[218] A few state statutes provide for the appointment of qualified interpreters to facilitate communications between deaf suspects and their attorneys.[219] Even the broadest of these state statutes, however, are not currently interpreted as requiring the appointment of qualified interpreters to assist incarcerated deaf persons during prison related proceedings, such as during intake evaluations, psychological testing or evaluations, disciplinary hearings,

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137K(b)(1) (1988); FLA. STAT. ANN. § 90.6063(2) (West 1988 Supp.); GA. CODE ANN. § 99-4004(a)(1) (1987 Supp.); Ill. Ann. Stat. ch. 110, para. 8-1402 (Smith-Hurd 1984); IOWA CODE ANN. § 622 B.2 (West 1987 Supp.); IDAHO CRIM. RULE 28 (1987); MICH. STAT. ANN. § 17.55(103)(1) (Callaghan 1988); MISS. CODE ANN. § 13-1-303(1) (1987 Supp.); MO. REV. STAT. § 546.034.2 (1987); MONT. CODE ANN. § 49-4-503(1) (1985); NEV. REV. STAT. § 50.051 (Michie 1985); N.M. STAT. ANN. § 38-9-8 (1987 Supp.); N.Y. JUD. LAW § 390 (McKinney 1983); N.C. GEN. STAT. § 80-2(a) (1986); OHIO REV. CODE ANN. § 2311.14(A) (1981); OKLA. STAT. ANN. tit. 63, § 2409(A) (West 1984); S.C. CODE ANN. § 15-27-110 (Law. Co-op. 1977); TENN. CODE ANN. § 24-1-103(3)(b)(1) (1984).

Still other states provide for interpreters for deaf witnesses but not deaf complainants. *E.g.*, ALA. CODE § 12-21-131 (1981); CAL. EVID. CODE § 754(b) (West 1988 Supp.); DEL. CODE ANN. tit. 10, § 8907 (1986 Supp.); KY. REV. STAT. ANN. § 30A.410(1) (Michie 1985); TEX. CODE CRIM. PROC. ANN. art. 38.30 (1988 Supp.); WIS. STAT. ANN. § 885.37(1)(b) (West 1987 Supp.).

A few state statutes provide for interpreters for deaf complainants but not witnesses. *E.g.*, OR. REV. STAT. § 183.418 (1987); WYO. STAT. § 5-1-109(a) (1987 Supp.).

217. ARIZ. REV. STAT. ANN. § 12-242(C) (1987 Supp.); CONN. GEN. STAT. ANN. § 17-137K(2) (1988 Supp.); GA. CODE ANN. §§ 99-4002, 99-4005 (Harrison 1987 Supp.); MASS. GEN. LAWS ANN. ch. 121, § 92 A (West 1986); MICH. STAT. ANN. § 17.55(105)(1) (Callaghan 1988 Supp.); MINN. STAT. ANN. § 611.32(2) (West 1987); MISS. CODE ANN. § 13-1-303(3) (1987 SUPP.); MO. REV. STAT. § 546.034.1 (1987); MONT. CODE ANN. § 49-4-503(3)(b) (1985); N.H. REV. STAT. ANN. § 521-A:3 (1987 Supp.); N.C. GEN. STAT. § 80-2(d) (1986); N.D. CENT. CODE § 28-33.02(2) (1987 Supp.); S.D. CODIFIED LAWS ANN. § 19-3-10(4) (1987); TENN. CODE ANN. § 24-1-103(3)(b)(3) (1987 Supp.); WYO. STAT. § 5-1-109(a) (1987 Supp).

218. ARIZ. REV. STAT. ANN. § 12-242(A) (1987 Supp.); COLO. REV. STAT. § 13-90-201(a) (1987); FLA. STAT. ANN. § 90.6063(2) (1987 Supp.); IOWA CODE ANN. § 622B.2 (1987 Supp.); KAN. STAT. ANN. § 75-4351(a) (1984); KY. REV. STAT. ANN. § 30A.410(1) (Michie 1985); MICH. STAT. ANN. § 17.55(103)(1) (Callaghan 1988); MINN. STAT. ANN. § 611.32(1) (West 1987); MISS. CODE ANN. § 13-1-303(1) (1987 Supp.); MONT. CODE ANN. § 49-4-503(3) (1985); NEV. REV. STAT. § 50.050(2) (Michie 1986) (not specifically referring to grand juries but to "all judicial proceedings in which a [deaf] person appears as a witness"); OKLA. STAT. ANN. tit. 63, § 2409(A) (West 1984); 1987 S.D. LAWS § 19-3-10(1); TENN. CODE ANN. § 24-1-103(3)(b)(1) (1987 Supp.); W. VA. CODE § 57-5-7(a) (1988 Supp.); WYO. STAT. § 5-1-109(a) (1987 Supp).

219. *E.g.*, ARIZ. REV. STAT. ANN. § 12-242(A) (1987 Supp.); GA. CODE ANN. § 99-4006 (Harrison 1987 Supp.); TEX. CODE CRIM. PROC. ANN. art. 38.31(b) (Vernon 1988 Supp.); ALA. CODE § 12-21-131 (1987); DEL. CODE ANN. tit. 10, § 8907 (1986 Supp.); KY. REV. STAT. ANN. § 30 A.410 (1) (Michie/Bobbs-Merrill 1984).

parole hearings or the like, and none of the statutes provide for the appointment of interpreters during specific prison programs (i.e., meetings, church services, lectures, group counseling sessions). Moreover, even the most broadly worded interpreter statutes lack adequate enforcement mechanisms, and as a result the applicable authorities frequently disregard the statutes.[220]

Arizona, for example, has enacted one of the more broadly written statutes in this area. Arizona Revised Statute section 12-242 provides for the appointment of qualified interpreters:

> in any civil or criminal case or grand jury proceeding in which a deaf person is party to such action, either as a witness, complainant, defendant or attorney . . . to interpret the proceedings to the deaf person, to interpret the deaf person's testimony or statements and to interpret preparations with the deaf person's attorney.

Further, the statute requires the provision of a qualified interpreter whenever a deaf person is taken into custody, to interpret while the deaf person is provided with *Miranda* warnings, during the deaf person's interrogation, and during the giving of any statement by the deaf person.[221]

Although section 12-242 has been on the books for over five years, the statute continues to be ignored or disregarded. For example, in the 1987 case involving a deaf defendant, Chris Gallino,[222] the police blatantly disregarded the mandate of section 12-242 that a qualified interpreter be provided to interpret "[w]arnings of [Gallino's] constitutional privilege against self-incrimination as it relates to custodial interrogation," the "interrogation of [Gallino]," and "Gallino's statements."[223] Rather, the officers attempted to rely on the "interpretation" provided by a fellow police officer, Detective Samuel Grimes, whose own knowledge of sign language is negligible and who was unable to meaningfully communicate with Gallino. Subsequently, Gallino moved to suppress his statement. For a period of several months, the parties engaged in lengthy and costly hearings, to elicit testimony from several expert witnesses throughout the country. As a result of the hearings, the court granted Gallino's motion to suppress.[224]

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220. One author has noted that "[e]ven in those states that require the police to make sign language interpreters available [to deaf suspects], police officers do not always locate interpreters after arresting deaf suspects." Comment, *Protecting Deaf Suspects' Right to Understand Criminal Proceedings* 75 J. of CRIM. L. & CRIMINOLOGY 166, 173-74.

221. ARIZ. REV. STAT. ANN. § 12-242 (1982).

222. *See infra* text accompanying notes 238-304

223. ARIZ. REV. STAT. ANN. § 12-242(C)(1)(2)(3)(1982).

224. Order of Sept. 11, 1987.

Despite the publicized *Gallino* fiasco, the Arizona police continued to improperly utilize the services of Detective Grimes as an "interpreter" for deaf people embroiled in Arizona's criminal justice system. In the case of *State v. Nordman*[225] a deaf woman, Ms. Simms, was a witness to a murder involving three co-defendants. The policemen responsible for investigating the homicide requested that Detective Grimes assist them in their investigation by interpreting for Ms. Simms while they questioned her about the events she witnessed.[226] Detective Grimes explained that he was not qualified to interpret for the witness and that litigation was currently ongoing based on allegations that under Arizona law he was not qualified to interpret for deaf persons embroiled in the criminal justice system (i.e., the *Gallino* hearings).[227] Detective Grimes was informed that the *Nordman* case differed from the *Gallino* case because Ms. Simms was not a suspect, but a witness.[228] Accordingly, Detective Grimes "interpreted" for Ms. Simms while she was interviewed by the police, and accompanied Ms. Simms to the police station and interpreted for her while she observed a line-up of suspects, identified each co-defendant, and explained the part that each co-defendant played in the murder.[229]

Subsequently, the State reinterviewed Ms. Simms with the aid of a qualified interpreter who was fluent in ASL (Ms. Simms' primary language). A qualified interpreter was also utilized when Ms. Simms testified at trial.[230] While the statements that Ms. Simms made at the second interview and at trial (via qualified interpreters) were consistent with one another, those statements were somewhat inconsistent with the statement that Detective Grimes had attributed to Ms. Simms during the first police interview.[231] The defendants in *Nordman* made an issue of inconsistencies, and the State attempted to suppress the statement made by Ms. Simms to Detective Grimes on the basis that Detective Grimes was unqualified to interpret sign language.[232] Despite the fact that Detective Grimes testified in court that he was not qualified to interpret Ms. Simms' statements, the court allowed the statements made by Ms. Simms

225. State v. Nordman, Arizona Superior Court, County of Maricopa (No. 87-02256). *See* letter from James Blake, Maricopa County Deputy County Attorney (prosecutor for the *Nordman* action) to the author (Nov. 24, 1987).

226. Letter from Helen Young, nationally certified interpreter for the deaf, to the author (Oct. 1, 1987) at 2.

227. *Id.*

228. *Id.*

229. *Id.*

230. Blake letter, *supra* note 225.

231. *Id.*; Young letter, *supra* note 226, at 2.

232. *Id.*

through Detective Grimes to be received into evidence.[233]

Notwithstanding that Arizona's statute requires the provision of qualified interpreters "in any proceeding before [a state] department, board, commission, agency or licensing authority in which a deaf person is a principal party of interest or witness,"[234] that statute has been consistently interpreted as having no application to prison administrative hearings conducted by the State Department of Corrections, such as intake hearings to determine appropriate placement (i.e., maximum or minimum security), psychological evaluations, disciplinary hearings, parole board hearings and other committee hearings that are routinely held within correctional facilities.[235] And the statute clearly does not require

233. *Id.*

234. ARIZ. REV. STAT. ANN. § 12-242(B).

235. Young letter, *supra* note 226, at 4-5; Letter from Scott Loos, Coordinator of Interpreting Services for the Maricopa County Court System, to the author (Dec. 9, 1987); Letter from Stuart Brackney, Director, Arizona Council for the Hearing Impaired, to the author (Dec. 4, 1987); Telephone conversation of December 3, 1987 between the author and Craig Phillips, Classification Manager, Arizona Department of Corrections.

According to Mr. Phillips, in situations involving deaf prisoners the prison authorities will see if a staff person or another inmate can be found who knows some sign language; if no such person is available the authorities will "have to make do somehow." Staff persons and other inmates who may know some sign language, however, are hardly qualified to interpret for a deaf prisoner; indeed, they are often less equipped to provide such services than someone like Detective Samuel Grimes. Moreover, deaf prisoners will often refuse to speak about private or confidential matters in the presence of staff and fellow inmates, and strongly object to the presence of such third persons at hearings where personal concerns are at issue. As for "making do" when no staff person or inmate is available to attempt to "interpret," presumably that "solution" involves writing notes, which, as previously explained (*see supra* text accompanying notes 3-6 and 31-33), is a totally ineffective means of communicating with most deaf prisoners.

Occasionally the courts will attempt to alleviate this problem by ordering prison officials to provide qualified interpreters for deaf inmates during certain prison proceedings. In Maricopa County, Arizona, for example, courts on at least two occasions ordered prison officials at Alhambra prison to provide interpreters for deaf inmates during intake assessment hearings. *See, e.g.*, Order of June 9, 1987 in State v. Cofield, Maricopa County, Ariz. Super. Ct. No. CR-156477 (ordering that a certified ASL interpreter be appointed to assist the defendant in all communications concerning evaluations for placement within the Arizona Department of Corrections). Unfortunately, Helen Young, a nationally certified interpreter for the deaf, in Phoenix, Arizona, reports that both of these orders were disregarded.

The problem is further compounded by the small number of interpreters who are certified as qualified to interpret during legal proceedings and the very high fees charged by interpreters. In Arizona, for example, there is only one certified "legal" interpreter for deaf persons and one interpreter awaiting legal certification, and the current going rate for legal interpreters is approximately $45.00 per hour. (Telephone conversation of December 3, 1987 between the author and Stuart Brackney, Executive Director of the Arizona Council for the Hearing Impaired; personal conversations during November and December 1987 between the author and Helen Young, certified interpreter for the deaf, Phoenix, Arizona.) One commentator has noted,

> Many interpreters hesitate before working in legal proceedings because the risks are high. They may be subject to malpractice suits if they err; the pay is low—payment is

the provision of interpreters for deaf persons seeking to take part in the rehabilitative aspects of prison life (such as counseling sessions, lectures, church services, and educational programs). It would be relatively simple, however, to amend Arizona's interpreter statute to: (1) require the provision of qualified interpreters during all prison related proceedings and organized activities (when such services are requested by a deaf inmate); and (2) provide for the promulgation of heavy sanctions against state agencies (including state departments of corrections) that refuse to follow the statute. Other states could enact similar statutory provisions. While the enactment of such statutes would not solve *all* of the inequities faced by deaf prison inmates, the statutes would alleviate a major portion of those inequities.

VI. CONCLUSION

Due largely in part to their complex communication and cultural differences, the conditions of confinement suffered by many deaf prison inmates are unconscionably disproportionate and discriminatory. Although the inequities suffered by deaf prisoners cannot practicably be totally eliminated, the unjust treatment inflicted upon deaf inmates can be greatly alleviated by the provision of reasonable accommodations that will assist in equalizing the conditions under which deaf prisoners are confined.

The real tragedies underlying the unjust manner in which our society treats its deaf criminals are that the system fails to make even a pretense of rehabilitating deaf prisoners, and that the system condones, perhaps even encourages, cruelty towards, and unjust treatment of, a segment of our population. Requiring deaf criminals to serve prison sentences under circumstances that are at best counter-productive, and at worst horrifying, is a self-defeating proposition. We should expect more from our criminal justice system. In Utopia we would confine all deaf prisoners together in separate wards that are not operated by guards talking through loudspeakers or via hidden cameras with speakers; where deaf prisoners are guarded by guards who are proficient in sign language; where full time interpreters are provided for all prison proceedings, counseling groups, classes, job training, and other activities; where special tests are given to determine capability for job training; where a decoder is placed in the unit TV and a TDD is placed in the deaf prisoners'

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usually either set by statute or determined at the court's discretion, and is often below the going rate; and the work is difficult since there are no signs for many legal terms.

Shipley, *supra* note 6, at 14.

day room; and where the time limits are extended for TDD calls and visits to deaf prisoners. This is not Utopia, however, and the relatively small number of deaf prisoners in a given jurisdiction make such a scheme impractical, at best.[236] But a practical solution is possible.

Deaf prisoners and their counsel should educate the public and the

236. Pursuant to this author's request, the United States Department of Justice compiled statistics regarding the number of deaf prisoners in federal prisons. According to that study, there are currently only two profoundly deaf prisoners within the forty-seven federal prisons (although there are numerous hearing-impaired prisoners within those prisons). Telephone conversation of February 16, 1988 between the author and G. Radford Clark of the United States Department of Justice, Federal Bureau of Prisons, Medical Services Division.

There are no statistics available concerning the number of deaf prisoners in state or local correctional facilities throughout the United States. To obtain a representative sample of the number of deaf prisoners in each state, the author requested information about the number of deaf prisoners under the jurisdiction of the departments of correction of the states of Arizona, California, Florida and New York, and of the District of Columbia. Following is a summary of the information obtained:

a. Arizona: As of November 16, 1987 there were nineteen hearing impaired inmates scattered throughout six correctional facilities in Arizona. Letter from Michael A. Arra, Arizona Department of Corrections Public Information Officer, to the author (Nov. 16, 1987). Almost all of these inmates, however, are hard-of-hearing, rather than profoundly deaf. The author has been made aware of only two profoundly deaf inmates among these nineteen individuals.

b. California: According to Michael Van Winkle, Information Officer of the California State Department of Corrections, California does not contain a "category in its classification procedures" for deaf inmates, and no information is available with respect to the number of deaf inmates scattered throughout California's sixteen prisons and thirty-four minimum security camps. Telephone conversation of November 9, 1987 between Mr. Van Winkle and the author's secretary, Carla Gard.

c. Florida: According to Emile Baudoind'Ajoux, Impaired Inmate Services for the Florida State Department of Corrections, as of November 9, 1987 there were five profoundly deaf inmates and fifty hearing-impaired inmates scattered throughout Florida's thirty-six prisons. Telephone conversation of November 9, 1987 between Mr. Baudoind'Ajoux and the author's secretary, Carla Gard.

d. New York: According to Ms. Nancy Hickey, Instructor, Seriously Disabled Unit, Eastern New York Correctional Facility, as of November 20, 1987 there were three profoundly deaf inmates and two hearing impaired inmates housed in the Eastern Correctional Facility (described below). Telephone conversation of November 20, 1987 between Ms. Hickey and the author's secretary, Carla Gard.

e. District of Columbia: According to Ms. Arlene Kelliebrew, Assistant to the Public Affairs Specialist of the District of Columbia Department of Corrections, as of December 7, 1987 there were two profoundly deaf inmates and three hearing impaired inmates scattered throughout the District of Columbia's nine prisons, one detention center and eight half-way houses. Telephone conversation of December 7, 1987 between Ms. Kelliebrew and the author's secretary, Carla Gard.

Despite these small numbers, one state does have special prison facilities for deaf prisoners. In 1985 the state of New York established a pioneer program for prisoners who are hearing or visually impaired in the basement of The Eastern Correctional Facility, a maximum security prison. One of the first prisoners to enter the special program, Patrick Fenton, expressed his relief at being able to converse in sign language with other prisoners, stating through sign language that during his six years in prison prior to "arriving at Eastern he had

courts about the inequities that currently exist between deaf and hearing prisoners, and should demand that prison officials provide reasonable accommodations to alleviate those inequities. A realistic approach to the reasonable accommodation standard as applied to deaf prisoners should yield the following results: deaf prisoners should not expect to be housed in units with other deaf prisoners, guarded by guards who know sign language, or provided with full time interpreting assistance, because such accommodations would require substantial or fundamental changes in the nature of the prison program. Deaf prisoners should, however, expect to have equal access to the telephone via TDD, access to a television set with a decoder, extended visiting hours where necessary, and the opportunity to participate in job training notwithstanding the inability to succeed on standardized achievement tests. Where the doors of the prisoners' cells are operated electronically after announcements, the cells of deaf prisoners should be equipped with a light that flashes when the cell doors are opening. Most importantly, however, deaf prisoners should expect to be provided with the services of qualified interpreters during *all* prison proceedings, such as during intake examinations, psychiatric interviews, disciplinary reviews or hearings, parole hearings and procedural hearings within the prison to determine whether a prisoner's "status" should be changed. Deaf prisoners should also be provided with interpreters during *all* rehabilitative aspects of the prison program (e.g., counseling, job training, self-help programs, lectures, classes, and church services).

When the prison is a recipient of federal financial assistance, section 504 of the Rehabilitation Act should be interpreted as requiring that such accommodations be made. When section 504 is not applicable, the eighth and fourteenth amendments to the Constitution should be interpreted in accord with the evolving moral climate of our society, which now gives due recognition to the equal rights of our handicapped citizens.

In addition, individual states should expand their current statutes relating to the provision of interpreters for deaf persons embroiled in our criminal justice system, to incorporate mandatory requirements for the provision of qualified interpreters to assist deaf prison inmates during all prison proceedings and programs.[237]

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no one to talk with because 'no one knows sign language.' " L.A. Times, March 24, 1985, *supra* note 33, at I2, col. 1.

237. As this article went to print, the Ninth Circuit Court of Appeals entered an opinion in *Bonner v. Lewis*, No. 87-2663, slip op. (9th Cir. Sept. 13, 1988), holding, *inter alia*, as follows:

(1) A deaf prison inmate who alleged that the prison's failure to provide him with interpreter services during disciplinary and administrative hearings and while receiving counseling and medical services (a) was an "otherwise qualified" individual under section 504, and (b) could assert a claim under section 504 against the prison because the prison constituted a "program or activity" under section 504. *Id.* at 11220-21.

(2) The prison's failure to provide a deaf prison inmate with interpreter services did not violate the prisoner's right to equal protection, because the failure to do so based on cost considerations would be reasonable under the rational relation test. *Id.* at 11226.

(3) The prison's refusal to provide a deaf prison inmate with a qualified interpreter did not constitute cruel and unusual punishment under the eighth amendment. *Id.*

Accordingly, the Ninth Circuit affirmed the district court's grant of summary judgment in favor of the prison based on the prisoner's constitutional claims, and reversed the district court's grant of summary judgment in favor of the prison based on the prisoner's section 504 claim. The case was remanded to the district court for consideration of the factual questions relating to the issue of whether the prison official's refusal to provide the deaf inmate with qualified interpreter services impermissibly discriminated against the inmate in violation of section 504.

APPENDIX

The immense complexity of the language difficulties facing deaf people in our criminal justice system, and the need for deaf people embroiled in our criminal justice system to be provided with the services of a *qualified* interpreter, can best be explained by examining a sample case. In *State v. Gallino*,[238] the alleged confession of an intelligent,[239] deaf high school graduate charged with murder was suppressed because the suspect was not provided with the assistance of a qualified sign language interpreter when given the required warnings under the Supreme Court's decision in *Miranda v. Arizona*.[240] The relevant facts and evidence are as follows:

On January 2, 1986 two police officers investigating the death of an unidentified young man visited Chris Gallino, a twenty year-old profoundly deaf man, at his place of employment to determine the victim's identity.[241] Subsequently, after learning that the victim was Martin Lewis Eslinger and that Mr. Eslinger purportedly had left home to purchase a car from his friend, Chris, two policemen again visited Mr. Gallino on January 3, at his home to talk more about Mr. Eslinger and Chris Gallino.[242] The policemen requested that another policeman, Detective Samuel Grimes, accompany them to visit Gallino because

238. No. CR-154416 (Supreme Court of the State of Arizona, County of Maricopa, Order of September 11, 1987).

239. *See, e.g.*, Transcript of the March 20, 1987 hearing before the Hon. Daniel E. Nastro, Judge of the Superior Court of the State of Arizona, County of Maricopa (No. CR-154416), testimony of Theresa Smith, at 71 [hereinafter Smith Testimony]; Transcript of July 24, 1987 hearing in the same matter, testimony of Dr. McKay Vernon, at 17-21 [hereinafter Vernon Testimony] (Dr. Vernon administered several intelligence tests to Mr. Gallino and determined that Mr. Gallino is "in the upper 20 to 30 percent of the population relative to intelligence.") *Id.* at 21.

240. 384 U.S. 436 (1966). Under the *Miranda* rule officers interrogating a suspect after he has been taken into custody must inform the suspect that: 1) "he has a right to remain silent;" 2) "any statement he does make may be used as evidence against him;" 3) "he has the right to the presence of an attorney;" and 4) "if he cannot afford an attorney he is entitled to the assistance of a court appointed attorney." *Id.* at 444. Throughout its opinion, the Court made it clear that the warnings provided to a suspect must be complete and effective. *Id.* at 444, 479.

The requirement that deaf suspects be provided *Miranda* warnings in a manner that ensures their understanding of such warnings has been comprehensively discussed by other authors and will not be discussed herein. *See, e.g.*, Comment, *supra* note 220, at 171-77. The *Gallino* case involving the effectiveness of *Miranda* warnings given to a deaf suspect is described herein solely because it serves to illuminate the enormity of the language barriers confronting most deaf prisoners and suspects.

241. Transcript of January 30, 1987 proceedings before the Hon. Daniel E. Nastro, Judge of the Superior Court of the State of Arizona, County of Maricopa, (No. CR-154416), testimony of Detective Russell P. Kimball of the Maricopa County Sheriff's Office, at 12-13 [hereinafter Kimball testimony].

242. *Id.* at 18, 19.

Detective Grimes' parents were deaf and he knew some sign language.[243] The policemen arrived at Gallino's home and, with the assistance of Detective Grimes, told Gallino that they wanted to talk to him about the Eslinger homicide.[244] Gallino then accompanied the officers to the Sheriff's Department, where they arrived at approximately 6:45 p.m.[245]

Police Detective Russell Kimball began asking Gallino questions, which Detective Grimes attempted to translate into some form of sign language. Gallino would then "respond verbally when he could but in sign to Detective Grimes who would usually repeat the answers."[246] After much question and answer, during which Gallino described what he had done on the nights of December 30 and 31 and discussed conversations with Eslinger involving the latter's possible purchase of Gallino's car, according to Detective Kimball the detectives "asked if [Gallino] knew who killed Marty [Eslinger] and he said he didn't. We asked him again if he killed Marty and he said no, and we asked him again if he killed Marty and he said I guess."[247] After Gallino's statement of "I guess," the detectives "asked him why, and his words were, 'I fucked up.' "[248] The detectives then "asked him how, and he said with a gun."[249]

At that point Detective Grimes "advised [Gallino] of his right to remain silent from a standard Miranda warning card."[250] Detective Grimes also "went through a little explanation period" when he "verbally and in sign" informed Gallino of his rights and asked Gallino if he would voluntarily talk with the police.[251] The detectives then gave Gallino a voluntary statement form, which included the *Miranda* warnings, and obtained a written statement from Gallino.[252] Gallino initialed the statement in three places next to the printed *Miranda* warnings and signed the statement.[253] Subsequently, Gallino and the officers drove to the approximate location where the death occurred; Gallino pointed out a "portion of the roadway along which he said . . . he threw the gun and the wallet out."[254] Gallino was then booked in the Maricopa County jail

243. *Id.* at 19.
244. *Id.* at 21.
245. *Id.* at 21-22.
246. *Id.* at 22.
247. *Id.* at 23.
248. *Id.* at 24.
249. *Id.*
250. *Id.* at 23, 24.
251. *Id.* at 26.
252. *Id.* at 32.
253. *Id.* at 33-35.
254. *Id.* at 35.

and charged with first degree murder and armed robbery.[255]

A tape recording was made of the interrogation of Chris Gallino conducted by Detectives Kimball and Grimes on the third of January. As evidenced by the tape, at one point during the questioning (after Gallino had been provided his *Miranda* warnings) Gallino stated that he wanted an attorney, but could not afford one. Detective Grimes, serving in his capacity as an interpreter, then informed Detective Kimball that "he wants an attorney" but that Gallino had stated he could not afford an attorney.[256] Based on the entirety of Gallino's testimony, however, Detective Kimball interpreted those statements as meaning that Gallino did not want an attorney at the moment, but would want an attorney eventually, at which point he would not be able to afford an attorney.[257]

Detective Grimes testified that as the son of deaf parents he had learned some sign language from his parents, but "for the most part except for some . . . more familiar signs, when [Grimes] would speak to [his] folks or speak for them [Grimes] would finger spell."[258] In short, Detective Grimes was "basically a finger speller,"[259] who "didn't under-

255. *Id.* at 36.

256. Transcript of March 6, 1987 hearing before the Hon. Daniel E. Nastro, Judge of the Superior Court of the State of Arizona, County of Maricopa (No. CR-154416), testimony of Detective Russell P. Kimball, at 26-28 [hereinafter Kimball Testimony II]; Transcript of March 6, 1987 hearing in the same matter, testimony of Detective Samuel Grimes, pp. 97-100 [hereinafter Grimes Testimony].

257. Kimball Testimony II, *supra* note 256, at 20-36. Subsequently, when giving Gallino his *Miranda* warnings prior to attempting to obtain his assistance in gathering evidence, the police disregarded acknowledged confusion about whether Gallino felt threatened. Deputy Sheriff John Coppock of the Maricopa County Sheriff's office testified that on January 4, 1987 he contacted Gallino at the Maricopa County Jail for the purpose of asking "Chris if he would take us back into the field and show us where the gun and wallet were located. . . ." Transcript of March 20, 1987 hearing before the Hon. Daniel Nastro, Judge of the Superior Court of Arizona, County of Maricopa (No. CR-154416); testimony of Deputy Sheriff John Coppock, at 26. Sheriff Coppock testified that when writing notes back and forth with Gallino, the questions and answers went as follows:

> I wrote, '[Chris], it's really important to us that we're sure —' sure is underlined — 'that you understand your rights and that you do not have to go with us to help us find the pistol and wallet. Are you sure you understand your rights?' He responded with 'Yes.' 'Has anyone promised you anything if you cooperate?' 'He put down No.' 'Has anybody threatened you in any way?' He put down 'Yes.' 'Are you afraid of us in any way?' He said, 'A little bit.'

Id. at 30. Shortly thereafter Sheriff Coppock requested that Detective Grimes "assist [Coppock] in clarification of whether or not [Gallino] had, in fact, been threatened." *Id.* at 31. When asked how that issue was clarified, Sheriff Coppock responded "I asked [Detective Grimes] what [Gallino] meant by the fact he had been threatened, and [Detective Grimes] stated that there was some confusion on that, that he couldn't determine that he had been threatened." *Id.*

258. Grimes Testimony, *supra* note 256, at 71-74.

259. *Id.* at 45.

stand a lot of signs."[260] As noted by Detective Grimes, finger spelling involves making alphabet signs with the hands, and spelling each word as it is stated.[261] One who is "finger spelling in English words or a sentence . . . [is] speaking the English language . . . by signing each individual letter of each individual word . . . ."[262] As previously explained, however, the various forms of sign language are different languages than English.[263] In general, when sign language is used words are not spelled letter by letter, but are signed by a symbol representing an entire word or an entire phrase.[264]

Detective Grimes was not conversant in American Sign Language or Pidgin Sign Language (PSE),[265] the primary languages spoken by Chris Gallino, and thus had problems understanding what Mr. Gallino was signing to him.[266] Detective Grimes also had no knowledge of Mr. Gallino's reading level of the English language.[267] Despite those factors, and despite the fact that Detective Grimes was not an impartial person serving as an interpreter for Mr. Gallino, but was serving in the dual (and conflicting) roles of interpreter and police interrogator, it was Detective Grimes that "interpreted" the *Miranda* warnings for Mr. Gallino.

At the hearing conducted as a result of defendant's motion to suppress Gallino's confession as being obtained absent proper *Miranda* warnings, the defense introduced the testimony of three expert witnesses. The first expert, Theresa Smith, a certified interpreter for the deaf and college professor of interpreting principles, reviewed Chris Gallino's

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260. *Id.* at 74.

261. *Id.* at 45.

262. Smith Testimony, *supra* note 239, at 52-54.

263. *See* KREESE & KLEVEN, *supra* note 1.

264. It has been stated that:

> Fluent practitioners of ASL can convey "all the range and diversity of expression possible in any language." ASL uses signals, hand gestures, facial expressions and body movements to convey a rich variety of messages.
>
> ASL's grammar is in the movement of signs. For example, a particular repetitive movement of some signs will change them from verbs to nouns; other repetitive movements of these same signs will signify the use of adverbs with meanings such as regularly, frequently or continually. As in languages such as Latin, Navajo and Russian, ASL relies heavily on inflection to convey a great variety of information by varying a root sign.

KRESSE & KLEVIN, *supra* note 1, at 4.

265. During the continuation of the March 6, 1987 hearing on March 20, 1987, an expert witness, a sign language interpreter, was requested to sign some sentences to Detective Grimes in ASL and PSE. Detective Grimes was unable to understand what the expert was trying to state. Transcript of March 20, 1987 hearing, testimony of Detective Samuel Grimes, at 13-15, 19-20 [hereinafter Grimes Testimony II].

266. *Id.* at 78.

267. Grimes Testimony II, *supra* note 265, at 5-7.

school file (including the results of standard achievement tests and teachers' notes) and police reports of the events relating to Gallino's confession. Professer Smith also interviewed Gallino for the purpose of determining his proficiency in sign language and his understanding of general topics of common knowledge that would evidence his general ability to understand his constitutional rights.[268] When Ms. Smith asked Gallino what the government is, what a legislature is and how a legislature gets elected, Gallino responded that the government "pay[s] for things"[269] and that the purpose of a legislature was to "help all people."[270] When asked what senators were, Gallino responded that "they have meetings."[271] When Ms. Smith asked, "If I wanted to be a senator, how would I do that?," Gallino responded, "Well, if you're good you know how."[272] In response to Ms. Smith's query "how would I get the job? Where would I go to apply for the job . . . as a senator?," Gallino replied: "Well, they have groups. They go together in meetings and they vote."[273] Gallino was apparently not aware of the concept of constitutional rights prior to being placed in jail.[274] Gallino had not heard about "the Iran problem with Reagan," and although he "was aware of the Challenger . . . he was not aware of any of the involvement of NASA."[275]

Ms. Smith testified that Gallino's English vocabulary skills were at the third grade level.[276] Ms. Smith further testified that Gallino is not fluent in ASL, but that based upon the Foreign Service five-point scale for evaluating an individual's command of language, Gallino's command of ASL is only at level two.[277] According to Ms. Smith, although Gal-

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268. Smith Testimony, *supra* note 239, at 65-67.

269. *Id.* at 68-69. As explained by Ms. Smith, this view of government as an organization that "pay[s] for things" is "consistent with how deaf people generally view what government does" because of the "numerous social service agencies that are set up to serve deaf people" with respect to education and employment. *Id.*

270. *Id.* at 69.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 69-70.

275. *Id.* at 68.

276. *Id.* at 71. As explained by Ms. Smith, however:

> that is the reading vocabulary of an eight-year old. So that if I were to write something out for my eight-year old, and if she could read it, that would be roughly the vocabularly level that Chris would have. That does not mean if I said it to my eight-year old and she understood that, that he would be able to understand it, because my eight-year old child—hearing child—would be able to understand much more orally or verbally than he would be able to read in terms of vocabulary.

Id. at 72-73.

277. *Id.* at 76-78. The five points of the foreign service scale are as follows: level one includes survival level communication skills (i.e., where is the bathroom?); level two includes the ability to carry on ordinary conversation (i.e., how was your weekend?); level three includes

lino is somewhat more comfortable with PSE, he is no more fluent in PSE than in ASL.[278] Based on the above information, Ms. Smith concluded that before Gallino could understand the *Miranda* warnings an interpreter would have to take a great deal of time to explain the basic concepts involved via the use of elementary ASL or PSE.[279]

Ms. Smith explained, for example, that the concept of the "right to remain silent" would be particularly difficult for Gallino to comprehend.[280] The complexity of explaining via PSE and ASL that the right to remain silent encompasses not only the right to refrain to volunteer information, but the right to refuse to answer questions—not only for this instance, but for "the duration"—is compounded by the fact that deaf people are generally "accommodating to people who are able to hear and speak."[281] Ms. Smith opined that Gallino's repeated "yes" responses to the detectives' questions about Gallino's understanding of the *Miranda* warnings were representative of a common strategy employed by deaf people of "just saying yes to everything" they are asked by hearing people in positions of power and authority.[282]

The second witness testifying on behalf of Gallino was Dr. Robert Johnson, Chairperson of the Linguistics and Interpreting Department of Gallaudet College.[283] After reviewing audio and video tapes of Detective Grimes' interpretation of the *Miranda* warnings to Gallino, Dr. Johnson concluded that the interpretation provided by Detective Grimes was inadequate in several ways.

Initially, Dr. Johnson noted that Detective Grimes' interpretation was ethically inadequate. An interpreter is bound by ethical constraints to: (1) stop the proceedings if there is a breakdown in communication;

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the ability to communicate within your working environment (which includes any special vocabularly terms used in your work place); level four includes the ability to converse as an average native speaker (i.e., to talk about sports or the Challenger); level five involves the ability to converse as an educated native speaker. *Id.*

278. *Id.* at 53, 78.

279. *Id.* at 82-86.

280. *Id.* at 84.

281. *Id.*

282. *Id.* at 84-86.

283. Transcript of June 18, 1987 hearing before the Hon. Daniel E. Nastro, Judge of the Superior Court of the State of Arizona, County of Maricopa (No. CR-154416), testimony of Dr. Robert Johnson, at 9-11.

Gallaudet College is a college for deaf people, and has 2,000 deaf students. The Linguistics and Interpreting Department offers a masters' degree program that focuses on the study of the structure of ASL and other sign languages, and a bachelor of arts program in interpreting. The Department also provides all the interpreting services for Gallaudet University students, and thus Dr. Johnson supervises 150 interpreters who provide approximately 26,000 hours of interpreting a year.

(2) make *all* communications accessible to both parties; (3) refrain from participating in discussions about what is happening (i.e., remain neutral); (4) avoid being in a position of authority which might intimidate the deaf person (to avoid the "acquiescence to authority figure" syndrome); and (5) refrain from speaking for one of the parties to the communication.[284] Dr. Johnson explained that Detective Grimes violated all of these ethical precepts.

First, although Detective Grimes noticed several times that communication between he and Gallino had broken down, he did not withdraw as an interpreter.[285] Second, Detective Grimes often had "side discussions" with the other police officers interrogating Mr. Gallino about the direction they should take in continuing the interrogation; communications that were "secret" in that they were not translated to Gallino.[286] In this regard, Detective Grimes was "deciding on the direction of the proceedings rather than just communicating . . . or translating them."[287] Third, Detective Grimes took a substantive role in the interrogation rather than remaining in the neutral role of an interpreter. His goal was to *obtain* information on behalf of the police rather than to simply *transmit* information.[288] Fourth, Detective Grimes was a frightening authority figure to Gallino, who participated in Gallino's interrogation. Fifth, Detective Grimes improperly spoke for Gallino, answering questions posed by the police officers such as "what is Gallino thinking about?"[289]

The second manner in which Dr. Johnson deemed Detective Grimes' interpretation inadequate has its roots in the fact that Gallino lacked both a cultural and linguistic understanding of the information presented to him and Detective Grimes did nothing to alleviate that problem. In order to comprehend the concept of "rights," for example, one must have a cultural understanding of how our legal system works and how the concept of constitutional rights fits within that legal system.[290] Dr. Johnson noted that a "yes" answer from Gallino to the question "do you understand these rights?" might mean "yes I understand

284. *Id.* at 27-31.

285. Several times Detective Grimes said "I'm lost on this;" "I'm lost here;" "I can't quite figure out what he's trying to tell me;" "I don't quite understand what he's trying to tell me;" "I'm having trouble understanding what he's trying to tell me;" "I'm not that proficient at it." *Id.* at 33-34.

286. *Id.*

287. *Id.* at 33.

288. Detective Grimes asked Mr. Gallino: "Are you afraid of us? We won't hurt you." In other words, Detective Grimes "represent[ed] himself as one of the people who was controlling the situation." *Id.* at 34.

289. *Id.* at 31-36.

290. *Id.* at 39.

what you said," but that due to Gallino's cultural background he would not understand the concept of "rights" and would not understand what it means to give up his rights. In other words, Gallino could not know that replying "yes" to that question might imply that he was giving up his rights.[291] Dr. Johnson opined that Gallino lacked both the necessary cultural and linguistical background to understand the *Miranda* warnings. When testing Gallino's linguistic comprehension of words used in the *Miranda* warnings Dr. Johnson determined that Gallino did not have any knowledge or understanding of the words "manner," "offense," "herein," "advised," or "leniency."[292] Dr. Johnson noted that the statements made to Gallino consisted of "extremely long and convoluted sentences" which would be "virtually impossible" for Gallino to comprehend.[293]

The third major problem identified by Dr. Johnson with respect to Detective Grimes' interpretation involved the Detective's inability to select the most effective means of communicating the *Miranda* warnings to Gallino given the latter's language skills and cultural and linguistic background.[294] Not only did Detective Grimes lack the training or background to determine which variety of language would prove most effective in overcoming Gallino's language barrier, but Detective Grimes himself was only capable of "translat[ing] English into English" by the use of finger spelling and a few signs.[295] Indeed, Dr. Johnson observed significant errors in Detective Grimes' finger spelling and signing.[296] Rather than signing "I am required by law," for example, Detective Grimes actually signed "I am required by illegal."[297] Many words were finger-spelled incorrectly.[298]

The final expert witness testifying on behalf of the defense was Dr. McKay Vernon, a college professor of psychology and a private psychologist specializing in working with deaf patients.[299] Dr. Vernon adminis-

291. *Id.* at 57.
292. *Id.* at 46.
293. *Id.* at 45.
294. *Id.* at 58.
295. *Id.*
296. *Id.* at 51-52.
297. *Id.*
298. The word "assist" was spelled "assisslt." The word "cannot" was spelled "cannolt." The word "attorney" was spelled once as "atteorney" and once as "attoreney." The word "appointed" was spelled "appeinted." The word "prior" was spelled "preor." The word "these" was spelled "taes." *Id.* at 51, 56.
299. Dr. Vernon teaches, *inter alia*, a course entitled Psychology of Deafness and a course on psychological testing at Western Maryland College, where professionals are trained to work in the field of deafness. Vernon Testimony, *supra* note 239, at 7.

tered several psychological and intelligence tests to Gallino, and interviewed Gallino for two and a half to three hours.[300] According to Dr. Vernon, it is "just . . . impossible" that Gallino could have understood the *Miranda* warnings given him; Dr. Vernon remained "totally convinced" that Gallino was not able to understand the *Miranda* warnings interpreted to him by Detective Grimes.[301] Despite Gallino's high intelligence, his cultural and linguistic difficulties led Dr. Vernon to conclude that it would take an expertly trained interpreter such as Theresa Smith five to six hours to communicate to Gallino his *Miranda* rights.[302] Dr. Vernon analogized Gallino to a million dollar computer without an adequate program, in that Gallino has an excellent mind but a very poor understanding of English and the abstract concepts involved.[303]

Based on the above testimony, the court in *Gallino* suppressed the alleged confession.[304]

300. *Id.* at 23.
301. *Id.* at 25.
302. *Id.* at 27.
303. *Id.* at 28-29.
304. Order of Sept. 11, 1987.