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## Silent Struggle: Constitutional Violations Against the Hearing Impaired in New York State Prisons

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## Silent Struggle: Constitutional Violations Against the Hearing Impaired in New York State Prisons

### Acknowledgements

This piece is dedicated to each and every individual in prison: you do not leave your constitutional rights when you enter the prison doors. I am ever grateful to Maria Pagano and the Prisoners' Legal Services of New York family for the wonderful work they do. I am also thankful to Professor Tara Melish for the guidance and motivation in writing this piece. I'd like to also thank Gary Muldoon for his edits and endless help.

# A SILENT STRUGGLE: CONSTITUTIONAL VIOLATIONS AGAINST THE HEARING IMPAIRED IN NEW YORK STATE PRISONS

*Farina Mendelson*†

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## I. INTRODUCTION

Imagine sitting through a prison disciplinary proceeding for starting a small fire within the prison and disobeying a direct order a few days later. Imagine sitting through the proceeding and not being able to understand the proceeding around you because you are deaf. Not only can you not hear the officer during your disciplinary hearing, but you were not given a qualified sign language interpreter.

Now, imagine being sentenced to six months in the solitary housing unit as a result of that proceeding. You are forced to sit in an eight-by-ten-foot cell for twenty-three hours of the day, isolated from any human contact. You are unable to communicate with the prison therapist because they do not know how to sign. Qualified sign language interpreters occasionally come to the facility, but these visits are few and far between. As a result, you must communi-

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† J.D. Candidate, 2017, University at Buffalo School of Law. This piece is dedicated to each and every individual in prison: you do not leave your constitutional rights when you enter the prison doors. I am ever grateful to Maria Pagano and the Prisoners' Legal Services of New York family for the wonderful work they do. I am also thankful to Professor Tara Melish for the guidance and motivation in writing this piece. I'd like to also thank Gary Muldoon for his edits and endless help.

cate with staff by writing your needs on a sheet of paper and exchanging notes.

This reflects the experiences of many prisoners incarcerated in New York because State Department of Corrections and Community Supervision (“DOCCS”) regulations omit the necessary safeguards needed to protect deaf individuals incarcerated in New York State prisons. Specifically, the regulations fail to comply with the prison’s constitutional obligations to provide inmates with due process protections before further restricting their liberty, thereby contributing to inhumane conditions which otherwise constitute cruel and unusual punishment.

This article addresses the human rights violations against deaf inmates in New York State prisons and proposes policies and procedures in hopes of better protecting inmates who are deaf and hard of hearing.<sup>1</sup> Part I discusses deaf inmates in the New York prison system, the internal disciplinary procedures of DOCCS, and the rights of deaf inmates. When an inmate is found guilty in a disciplinary hearing, the hearing officer issues a disposition that typically parallels the criminal procedure of state and federal court. One such punishment is placement in the Solitary Housing Unit (“SHU”). In fact, deaf individuals are some of the most likely to be placed in solitary confinement<sup>2</sup> and they are severely disadvantaged in disciplinary procedures because of their hearing impairment.<sup>3</sup> Human rights advocates have spoken out against solitary confinement as inhumane and have suggested that such punishment is far worse for a deaf inmate.<sup>4</sup>

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<sup>1</sup> As a clerk at Prisoners’ Legal Services, I often found myself researching this issue with an inability to cite to a particular source addressing it. Given the large number of people affected by the possible constitutional violations, there is a great need to document and expose the harm members of our society face, concealed in the shadows of our opaque prison disciplinary system.

<sup>2</sup> “According to the advocacy group HEARD, which maintains the only known national database of incarcerated individuals who are deaf, deaf individuals are among those most likely to be held in solitary, often as a ‘substitute for the provision of accommodations for and protection of deaf and disabled prisoners.’” REBECCA VALLAS, CTR. FOR AM. PROGRESS, *DISABLED BEHIND BARS: THE MASS INCARCERATION OF PEOPLE WITH DISABILITIES IN AMERICA’S JAILS AND PRISONS* 11 (2016), <https://cdn.americanprogress.org/wp-content/uploads/2016/07/15103130/CriminalJusticeDisability-report.pdf> [HTTPS://PERMA.CC/PG5C-KM3F].

<sup>3</sup> See JAMELIA MORGAN, AM. CIVIL LIBERTIES UNION, *CAGED IN: SOLITARY CONFINEMENT’S DEVASTATING HARM ON PRISONERS WITH PHYSICAL DISABILITIES* 35-36 (2017), <https://www.aclu.org/files/caged-in/010916-ACLU-SolitaryDisabilityReport-Accessible.pdf> [https://perma.cc/WYA4-VLGD].

<sup>4</sup> HEARD: HELPING EDUCATE TO ADVANCE THE RIGHTS OF THE DEAF, #DEAFIN-PRISON CAMPAIGN FACT SHEET 2 (2014) [hereinafter HEARD], <http://www.behearddc.org/images/pdf/deafinprison%20fact%20sheet%20.pdf> [https://perma.cc/WA9E-

However, before reaching a disciplinary proceeding or the punishment phase, an inmate is first accused of violating a prison rule.<sup>5</sup> Notably, a DOCCS directive provides that, “[n]o deaf or hard of hearing inmate shall be disciplined for failing to obey an [sic] verbal order or rule which has not been communicated alternatively in a manner which can be understood by the deaf or hard of hearing inmate.”<sup>6</sup> There is a history of the deaf being treated unjustly in prison, for example deaf inmates are often punished for violating noise regulations, despite a clear rule mandating accommodations: this will continue to happen if rules are not strengthened.<sup>7</sup>

In one case, a deaf inmate was charged for violating a prison noise regulation because he was calling out a guard at a level he could not physically gauge.<sup>8</sup> He wrote, “I didn’t making [sic] loud noise, I just called the porter for something. I’m ‘deaf mute’ I cannot hear but my voice is very loud noises [sic].”<sup>9</sup> Prisoners’ Legal Services regularly receives correspondence from inmates requesting help with disciplinary proceedings where similar violations of a direct order occur despite evidence on the record of the inmate not hearing the order in the first place.<sup>10</sup> DOCCS needs to take

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Y5SK]; MORGAN, *supra* note 3, at 36. Research shows that solitary confinement can have a severe impact, especially on those with disabilities. VALLAS, *supra* note 2, at 3. In one “tragic but all-too common case” that demonstrates the mental health effects of prolonged solitary confinement, Kalief Browder died by suicide after nearly two years in solitary confinement in Rikers Island on charges that he had stolen a backpack. *Id.* Those charges were later dismissed. *Id.* at 13.

<sup>5</sup> N.Y. DEP’T OF CORR. SERVS., STANDARDS OF INMATE BEHAVIOR: ALL INSTITUTIONS 3 (2006), [http://www.legal-aid.org/media/121933/standards-of-inmate-behavior%20\(2\).pdf](http://www.legal-aid.org/media/121933/standards-of-inmate-behavior%20(2).pdf) [<https://perma.cc/8AV7-STGK>].

<sup>6</sup> N.Y. DEP’T OF CORR. & CMTY. SUPERVISION, DIRECTIVE NO. 2612, INMATES WITH SENSORIAL DISABILITIES 10 (2015) [hereinafter DOCCS 2612], [www.doccs.ny.gov/Directives/2612.pdf](http://www.doccs.ny.gov/Directives/2612.pdf) [<https://perma.cc/6YCS-GF5B>].

<sup>7</sup> Armen H. Merjian, *Lonesome Agony: Heard v. the District of Columbia and the Struggle Against Disability Discrimination in the D.C. Penal System*, 47 AM. CRIM. L. REV. 1491, 1492 (2010); Bonnie P. Tucker, *Deaf Prison Inmates: Time to Be Heard*, 22 LOY. L.A. L. REV. 1, 10 n.34 (1988) (discussing the experience of a hard of hearing prisoner in Arizona who, in 1987, was placed in solitary confinement for failing to obey an order which he did not hear); *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1032-33 (S.D.N.Y. 1995) (finding that New York Department of Correctional Services violated Due Process and the Eighth Amendment when failing to accommodate inmates with deafness and hearing impairment).

<sup>8</sup> *Clarkson*, 898 F. Supp. at 1050.

<sup>9</sup> *Id.*

<sup>10</sup> Based on experience of the author as clerk at Prisoners’ Legal Services of New York. Other advocacy organizations also frequently see deaf inmates punished on these grounds. *See, e.g.*, HEARD, *supra* note 4, at 2-3, (“Deaf prisoners are frequently punished for failure to obey commands or follow rules that were communicated to them in inaccessible methods within audio-centric prison confines.”).

corrective action for all of the individuals currently deprived of their constitutional rights and this should include training and consequences for the correctional facility that fails to provide sufficient services. To remedy the harm deaf inmates could potentially face as a result of inadequate translation services, best practices urge capturing a deaf individual's statements through video recording.<sup>11</sup>

This article will argue that the safeguards in place to protect deaf inmates before solitary confinement is imposed are inadequate, leading to deaf inmates being unfairly placed in solitary confinement. Part II argues that current DOCCS regulations are insufficient to prevent harm to deaf prisoners and violate the Eighth and Fourteenth Amendments of the Constitution as applied to prisoners housed in New York State prisons. Part III proposes two sets of reforms using a rights-based framework focusing on the Due Process Clause and the Eighth Amendment's prohibition on Cruel and Unusual Punishment. The first set targets aspects of the prison disciplinary process that can be altered to result in a less disparity between hearing-disabled and hearing-enabled inmates in punishments. The second set calls for a ban on housing deaf inmates in the solitary housing unit. Both are necessary to ensure the constitutional rights of hearing-disabled individuals while serving in New York State prisons.

## II. DEAF PRISONERS IN THE UNITED STATES

In 2014, the United States held an estimated 1.5 million prisoners in state and federal custody.<sup>12</sup> An estimated 35 to 40% of inmates suffer from some degree of hearing loss.<sup>13</sup> That compares to a mere 13% of the U.S. population as a whole that suffers from hearing loss.<sup>14</sup> This population is part of a class of people with disa-

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<sup>11</sup> KELLIE STEWART ET AL., NAT'L CONSORTIUM OF INTERPRETER EDUC. CTRS., BEST PRACTICES: AMERICAN SIGN LANGUAGE AND ENGLISH INTERPRETATION WITHIN COURT AND LEGAL SETTINGS 22 (2009), [http://www.interpretereducation.org/wp-content/uploads/2011/06/LegalBestPractices\\_NCIEC2009.pdf](http://www.interpretereducation.org/wp-content/uploads/2011/06/LegalBestPractices_NCIEC2009.pdf) [<https://perma.cc/N5NP-GHLL>] ("Using technology to visually record an ASL/English Interpretation is the only way to preserve an accurate video record of the interpretation a deaf person received in the course of making a statement. Recording the interpretation is essential for preserving any evidence or future need for analysis of the interpretation that might arise during a court or legal proceeding.")

<sup>12</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2014: SUMMARY (2015), [https://www.bjs.gov/content/pub/pdf/p14\\_Summary.pdf](https://www.bjs.gov/content/pub/pdf/p14_Summary.pdf) [<https://perma.cc/BVX2-N9T5>].

<sup>13</sup> Jessie L. Krienert et al., *Inmates with Physical Disabilities: Establishing a Knowledge Base*, 1 SW. J. CRIM. JUST. 13, 15 (2003); MORGAN, *supra* note 3, at 32.

<sup>14</sup> *Deaf Population of the U.S.*, GALLAUDET U. LIBR., <http://libguides.gallaudet.edu/>

bilities who are disproportionately incarcerated and likely disproportionately placed in solitary confinement.<sup>15</sup>

Indeed, deaf and hard of hearing inmates were more likely to be convicted of violent offenses than the average inmate in the general population.<sup>16</sup> In a Texas study, 64.6% of hearing-impaired inmates were convicted of violent offenses as opposed to 49.7% of the overall population.<sup>17</sup> This may be due, in part, to the likely association between deafness and other socio-economic factors linked with criminality, such as “educational underachievement, low social status, social isolation, and unemployment.”<sup>18</sup>

Once a deaf individual is in the prison system, they may experience disciplinary segregation in the SHU. Disciplinary segregation separates an inmate from the population and is used by DOCCS to enforce standards of behavior within the facility.<sup>19</sup> SHU security facilities were established to house the most “invidious and dangerous criminals in the nation’s prisons who pose such a threat to prison security that they can only be controlled by isolation.”<sup>20</sup> DOCCS maintains statistics on the number of Tier III<sup>21</sup> hearings resulting in a SHU sanction: from 2007 through 2011, about 64%

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content.php?pid=119476&sid=1029190 [https://perma.cc/8THM-LYXW] (last updated Feb. 2014).

<sup>15</sup> MORGAN, *supra* note 3, at 40-44.

<sup>16</sup> Katrina R. Miller et al., *Violent Offenders in a Deaf Prison Population*, 10 J. DEAF STUD. & DEAF EDUC. 417, 417, 419 (2005).

<sup>17</sup> *Id.* at 419.

<sup>18</sup> Bruce Harry & Park Elliott Dietz, *Offenders in a Silent World: Hearing Impairment and Deafness in Relation to Criminality, Incompetence, and Insanity*, 13 BULL. AM. ACAD. PSYCHIATRY & L. 85, 94 (1985), <http://www.jaapl.org/content/13/1/85.full.pdf> [https://perma.cc/MHQ6-JP22]. Although many studies have attempted to link deafness with an increased propensity for violence, they have been inconclusive. See Harry & Dietz, *supra*, at 93-94.

<sup>19</sup> N.Y. COMP. CODES R. & REGS. tit. 7 §§ 250.2, 251-1.7, 301.2 (1999). An inmate may be segregated from the rest of the prison population in either disciplinary segregation, which is what this article will discuss, or administrative segregation. *Id.* §§ 301.2 (disciplinary admission), 301.4 (administrative admission); Elli Marcus, Comment, *Toward a Standard of Meaningful Review: Examining the Actual Protections Afforded to Prisoners in Long-Term Solitary Confinement*, 163 U. PA. L. REV. 1159, 1161 (2015) (describing the difference between disciplinary and administrative segregation).

<sup>20</sup> Maximilienne Bishop, Note, *Supermax Prisons: Increasing Security or Permitting Persecution?*, 47 ARIZ. L. REV. 461, 461-62 (2005) (using the term “Supermaxes” synonymously with solitary confinement).

<sup>21</sup> Inter-prison disciplinary hearings are separated into three tiers by the degree of severity of punishment. N.Y. COMP. CODES R. & REGS. tit. 7, § 270.3 (1998). Tier I hearings impose the least intense punishment for offenses minor in nature and Tier III hearings permit punishments intended for the most serious offenses. N.Y. DEP’T OF CORR. SERVS., *supra* note 5, at 3.

of Tier III hearings resulted in SHU time.<sup>22</sup> That translates to the solitary confinement of more than 68,000 individuals between 2007 and 2011 for ticketed violations that include not moving in the correct order, any sort of disorderly conduct, or arguing with a direct order.<sup>23</sup>

Prisons already contain a vulnerable subclass of the population in relation to race, ethnicity, and social class.<sup>24</sup> A physical disability adds another layer of vulnerability.<sup>25</sup> Aware of this reality in the criminal setting, judges often consider offender vulnerability as a mitigating factor.<sup>26</sup> At times, mitigating factors permit judges to commit certain vulnerable individuals to mental health treatment instead of imprisonment.<sup>27</sup>

In the prison disciplinary system, once an individual is admitted into a DOCCS facility, the Department is responsible for identifying an inmate's hearing impairment.<sup>28</sup> An individual with a sensorial disability is defined as one that has a "hearing impairment that substantially limits one or more of the person's major life activities . . . ."<sup>29</sup>

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<sup>22</sup> NYS DEP'T OF CORR. SERVS., INMATE DISCIPLINARY SYSTEM: COUNT OF TIER 3 HEARINGS (2012), <http://www.boxedinny.org/wp-content/uploads/2012/09/Tier-III-Hearings-Resulting-in-SHU-Sentences-by-Categories-of-Rule-Infractions-2007-2011.pdf> [<https://perma.cc/48D8-EGVC>] (showing 68,063 of 105,555 hearings result in a SHU sanction in a report provided by DOCCS upon FOIL request by N.Y. Civil Liberties Union); *see also* SCARLET KIM ET AL., N.Y. CIVIL LIBERTIES UNION, BOXED IN: THE TRUE COST OF EXTREME ISOLATION IN NEW YORK'S PRISONS 21 (2012), [https://www.nyclu.org/sites/default/files/publications/nyclu\\_boxedin\\_FINAL.pdf](https://www.nyclu.org/sites/default/files/publications/nyclu_boxedin_FINAL.pdf) [<https://perma.cc/SUP8-TEWY>]; GARY MULDOON, HANDLING A CRIMINAL CASE IN NEW YORK § 23:107 (rev. ed. 2016).

<sup>23</sup> NYS DEP'T OF CORR. SERVS., *supra* note 22; N.Y. DEP'T OF CORR. SERVS., *supra* note 5, at 9, 14, 17 (2006). There are also Tier I and Tier II hearings for less serious infractions; however, these are not discussed in this article. *See* N.Y. COMP. CODES R. & REGS. tit. 7, § 270.3 (2017); N.Y. DEP'T OF CORR. SERVS., *supra* note 5, at 3.

<sup>24</sup> Krienert et al., *supra* note 13, at 13.

<sup>25</sup> *Id.*

<sup>26</sup> *See, e.g.*, *Lockett v. Ohio*, 438 U.S. 586 (1978) (holding that an individualized consideration of mitigating factors is required under the 8th and 14th Amendments during sentencing in death penalty cases).

<sup>27</sup> E. Lea Johnston, *Conditions of Confinement at Sentencing: The Case of Seriously Disordered Offenders*, 63 CATH. U. L. REV. 625, 627 (2014).

<sup>28</sup> DOCCS 2612, *supra* note 6, at 7-8 ("All inmates newly received into the custody of the Department . . . who wear hearing aids, or have a history of hearing loss or observable behavior indicating hearing loss . . . will be immediately transferred . . . for classification and assessment. . . . [N]otice of the rights of the inmates under the Americans with Disabilities Act, will be reviewed with deaf, hard of hearing, blind, and severely visually impaired inmates by appropriate staff during orientation at any new facility. . . . Upon completion of the reception program, inmates with hearing or vision disabilities who require adaptive equipment other than hearing aids or eye glasses will enter an evaluation period for assessment . . . ." (emphasis omitted)).

<sup>29</sup> *Id.* at 1.



Title II of the Americans with Disabilities Act prohibits states from discriminating against individuals with disabilities.<sup>30</sup> To comply with state and federal rules, DOCCS enacted Directive 2612.<sup>31</sup> Directive 2612 grants a deaf or hard of hearing inmate sign language interpreter services “whenever necessary.”<sup>32</sup> However, any additional requests must be initiated by the individual either verbally or with the submission of a reasonable accommodations form.<sup>33</sup>

The particular difficulty in dealing with deaf inmates is both their varying communication needs and the varying skills a sign language interpreter may possess. These factors are consequential because American Sign Language (“ASL”) is a discrete language entirely separate from English.<sup>34</sup> Generally, three sign languages are used in the United States: 75% of prelingually deaf individuals use ASL; “others employ some form of Signed English; still others use Pidgin Signed English (‘PSE’). A substantial minority of deaf individuals are exclusively oral.”<sup>35</sup> Certified interpreters may be skilled in ASL, “others in PSE or some form of Signed English, and others in oral interpretation.”<sup>36</sup> A sign language interpreter must use the “context and meaning of the spoken word” during the conversation to understand what is said.<sup>37</sup> In a court proceeding, the interpreter may need to have additional training as a legal interpreter to be qualified,<sup>38</sup> and in addition, a qualified interpreter may not simply be a family member or other non-certified individual because they may lack legal training.<sup>39</sup>

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<sup>30</sup> *Id.*; Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12131-12213 (2009)).

<sup>31</sup> DOCCS 2612, *supra* note 6, at 1.

<sup>32</sup> *Id.* at 3.

<sup>33</sup> *Id.* at 12.

<sup>34</sup> Jamie McAlister, *Deaf and Hard-of-Hearing Criminal Defendants: How You Gonna Get Justice If You Can't Talk to the Judge?*, 26 ARIZ. ST. L.J. 163, 175 (1994).

<sup>35</sup> *Id.* at 167 (footnotes omitted).

<sup>36</sup> *Id.* at 168.

<sup>37</sup> *Id.* at 179 n.111.

<sup>38</sup> *Exam Information*, N.Y. STATE UNIFIED CT. SYS., <http://www.nycourts.gov/COURTINTERPRETER/ExamInformation.shtml> [<https://perma.cc/4R2J-ADE4>] (last updated Apr. 5, 2017) (“Although the Unified Court System does not test for proficiency in American Sign Language, the Chief Administrative Judge has established the Registry of Interpreters for the Deaf, Inc (RID) as a recognized credentialing authority.”).

<sup>39</sup> DOCCS 2612, *supra* note 6, at 2 (requiring that sign language interpreters be able to interpret “effectively, accurately, and impartially”); N.Y. JUD. LAW § 390 (McKinney 2015); N.Y. STATE UNIFIED COURT SYS., COURT INTERPRETING IN NEW YORK A PLAN OF ACTION: MOVING FORWARD 4 (2011), <https://www.nycourts.gov/publications/pdfs/ActionPlanCourtInterpretingUpdate-2011.pdf> [<https://perma.cc/4Q26-FSS>]; see also Randall T. Shepard, *Access to Justice for People Who Do Not Speak English*, 40

Lastly, a common misconception is that an inmate who possesses a hearing aid is less worthy of accommodation.<sup>40</sup> Hearing aids do not solve a deaf inmate's issue: they merely amplify, not clarify.<sup>41</sup> A hard-of-hearing inmate is not only susceptible to miscommunication with officers but also among other inmates as well. A deaf person cannot hear "the chatter among other inmates" and cannot be understood when crying out for help during an attack, or even a rape, because their words come out jumbled.<sup>42</sup> Thus, particular care must be taken to examine the role that vulnerability contributes not only to disproportionality in SHU sentencing, but also to harm in its totality.

### III. OVERCOMING CONSTITUTIONAL HURDLES

The current regulations that DOCCS has in place to comply with state and federal law are insufficient as they do not adequately provide deaf inmates with: (1) due process of the law and (2) protection from cruel and unusual punishment. This section argues that the Due Process Clause is violated when qualified sign language interpreters are not provided at prison disciplinary hearings and when those hearings are not videotaped. Oftentimes disciplinary hearings result in deaf inmates being sentenced to time in the SHU. This punishment, for a deaf inmate in particular, amounts to cruel and unusual punishment. The following section will show that the conditions of solitary confinement are more harmful for deaf individuals.

#### A. *Right to Due Process in Prison Disciplinary Hearings*

The failure of DOCCS to ensure a qualified sign language interpreter in prison disciplinary hearings—which may result in solitary confinement time—violates due process of the law. An

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IND. L. REV 643, 653 (2007) (describing barriers and responses to the need for interpreters based upon a survey of Indiana judges).

<sup>40</sup> See, e.g., Complaint for Declaratory Injunctive Relief at 17, Disability Rights Fla., Inc. v. Jones, 4:16-cv-00047-RH-CAS (N.D. Fla. Jan. 26, 2016) (describing plaintiff's difficulties obtaining a hearing aid while incarcerated). "The FDOC also operates under the false stereotype that once a prisoner is given a hearing aid, his or her hearing is restored to perfect levels . . ." *Id.* at 6.

<sup>41</sup> See David H. Kirkwood, *FDA Proposes Guidance to Clarify Differences Between Hearing Aids and PSAPs*, HEARING HEALTH & TECH. MATTERS (Nov. 13, 2013), <http://hearinghealthmatters.org/hearingnewswatch/2013/fda-proposes-guidance-clarify-differences-hearing-aids-psaps/> [<https://perma.cc/6867-Y3UB>].

<sup>42</sup> James Ridgeway, *The Secret World of Deaf Prisoners*, MOTHER JONES (Oct. 2, 2009, 1:59 PM), <http://www.motherjones.com/mojo/2009/10/secret-world-deaf-prisoners-0> [<https://perma.cc/TDZ8-88LD>].

individual is not stripped of all constitutional rights simply because he is incarcerated, and the right to due process is not an exception: certain standards must continue to be afforded. Specifically, in 1974, the United States Supreme Court in *Wolff v. McDonnell* held that, in prison disciplinary proceedings, due process requires that a written notice of the charges be given to the inmate, “that there must be a ‘written statement by the factfinders as to the evidence relied on and reasons’ for the disciplinary action,” and “that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals.”<sup>43</sup>

When an inmate is deprived of life, liberty, or property, they must still be afforded the due process of law.<sup>44</sup> The *Wolff* Court held that confinement in a solitary housing unit threatens a liberty interest protected by the Due Process Clause.<sup>45</sup> In 1995, in *Sandin v. Conner*, the Supreme Court narrowed the holding of *Wolff*.<sup>46</sup> The *Sandin* Court stated that, although an individual may have liberty interests,

these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes *atypical* and *significant* hardship on the inmate in relation to the ordinary incidents of prison life.<sup>47</sup>

This article proposes that the proper application of the Due Process Clause for deaf inmates requires that two procedures be afforded to them as a matter of right in prison disciplinary proceedings: (1) qualified sign language interpreters and (2) videotaping of proceedings to ensure a record for appeal. To determine whether a particular procedure is constitutionally required under the Due Process Clause, a two-step inquiry is pur-

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<sup>43</sup> *Wolff v. McDonnell*, 418 U.S. 539, 564, 566 (1974); *see also* 83 N.Y. JUR. *Penal and Correctional Institutions* § 151 (2d ed. 2017) (“[H]owever, due process does not require confrontation and cross-examination procedures and does not require that the inmates have the right to counsel.”).

<sup>44</sup> *Wolff*, 418 U.S. at 556 (citing *Haines v. Kerner*, 404 U.S. 519 (1972); *Wilwording v. Swenson*, 404 U.S. 249 (1971); *Screws v. United States*, 325 U.S. 91 (1945)).

<sup>45</sup> *Id.* at 556-58 (holding that lost good-time credit with a guilty verdict, which would otherwise merit an early release, raises the requirements of procedural due process).

<sup>46</sup> *Sandin v. Conner*, 515 U.S. 472, 483-84 (1995).

<sup>47</sup> *Id.* at 484 (emphasis added) (citations omitted).

sued.<sup>48</sup> Courts first determine whether a life, liberty, or property interest is at stake.<sup>49</sup> If so, courts apply a three-part test to determine what procedures are required to protect that interest. Application of this inquiry to inmate disciplinary hearings demonstrates that additional proceedings are necessary to protect the core constitutional rights of inmates.<sup>50</sup>

As in *Sandin*, courts first determine whether there is a life, liberty, or property interest at stake.<sup>51</sup> In the context of deaf inmates in disciplinary proceedings, the disciplinary procedure must subject those individuals to “atypical and significant hardship” on the inmate in “relation to the ordinary incidents of prison life” in order for there to be a protected interest at stake.<sup>52</sup> For example, the Second Circuit looks to the specific conditions and circumstances of the punishment such as: whether there is regular review of the punishment imposed on each inmate, whether it will ultimately have an impact on that inmate to be granted parole, the length of the sentence, and a comparison of the conditions in segregation with those in the prison’s general population.<sup>53</sup> In other words, the “touchstone of the inquiry into the existence of a protected, state-created liberty interest” is not whether the restrictive condition is a violation created by a state statute, but whether the conditions are different from “the ordinary incidents of prison life.”<sup>54</sup>

Thus, although *Sandin* restricted the ability of an inmate to implicate a liberty interest by requiring a restricted comparison to the ordinary incidents of prison life, it did not ban such claims altogether.<sup>55</sup> *Sandin* simply requires consideration of the length of confinement and the implications thereof.<sup>56</sup> Where a prolonged amount of time with no harm may not be found to implicate a

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<sup>48</sup> See, e.g., *Brown v. Plaut*, 131 F.3d 163, 169-72 (D.C. Cir. 1997).

<sup>49</sup> See, e.g., *Sandin*, 515 U.S. at 477-78.

<sup>50</sup> *Brown*, 131 F.3d at 169-72.

<sup>51</sup> See *Sandin*, 515 U.S. at 477-78; see also *Brown*, 131 F.3d at 169.

<sup>52</sup> *Sandin*, 515 U.S. at 484.

<sup>53</sup> See, e.g., *Brooks v. DiFasi*, 112 F.3d 46, 49 (2d Cir. 1997) (holding that regulations permitting lengthy administrative confinement compel the conclusion that extended disciplinary confinement is necessarily compatible with due process, simply because that was the point of comparison in the *Sandin* court).

<sup>54</sup> *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005) (internal quotations and citations omitted) (discussing conditions at Ohio State Penitentiary, which houses up to 504 persons in single-inmate cells).

<sup>55</sup> See *Sandin*, 515 U.S. 472; *Miller v. Selsky*, 111 F.3d 7, 9 (2d Cir. 1997).

<sup>56</sup> *Sandin*, 515 U.S. at 476, 486 (discussing the length of solitary confinement and the expunging of the prisoner’s disciplinary record as a factor to assess in determining whether treatment was atypical).

liberty interest,<sup>57</sup> one week in intensified conditions may arguably create a liberty interest.

In the context of solitary confinement of deaf and hard-of-hearing prisoners, such atypical and significant hardship is satisfied. “Confining someone in a segregation cell is not a minor punishment. Equally important, an inmate’s prison record may have a great effect on the future punishment he will receive and may even affect his chances for parole.”<sup>58</sup> Inmates placed in solitary housing face extreme isolation, deprived of environmental and “sensory stimuli and of almost all human contact.”<sup>59</sup> However, for deaf inmates in particular, the threat of solitary confinement does implicate a liberty interest, requiring the protection of the Due Process Clause as outlined by *Sandin*.

Once a protected right has been established, a three-part test is required to determine *what* procedures are required.<sup>60</sup> Under *Mathews v. Eldridge*, the following are considered: (1) the inmate’s private interest affected by the state; (2) the risk of erroneous deprivation through the current procedure employed by the state; and (3) the state’s interest.<sup>61</sup>

Under the first factor, the liberty deprived as a result of disciplinary proceedings must be considered in comparison with the baseline restriction of confinement. It must be evaluated “within the context of the prison system and its attendant curtailment of liberties,”<sup>62</sup> as opposed with regard to an individual’s circumstances free from the confines of a prison.

Next, under the risk of erroneous deprivation factor, efforts must be made to reduce the possibility of erroneous deprivation.<sup>63</sup> Such efforts may include offering the inmate to submit objections prior to the final level of review and multiple review stages before a ruling can be made.<sup>64</sup> By providing multiple levels of review as safeguards, with the power to overturn at each level, and a subsequent review within a period of placement in segregated confinement,

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<sup>57</sup> See *id.* at 486; see also *Colon v. Howard*, 215 F.3d 227, 230-34 (2d Cir. 2000) (discussing the merits of a bright-line rule at 180 days of solitary confinement).

<sup>58</sup> *Wilkinson v. Skinner*, 34 N.Y.2d 53, 58 (1974) (citing *Hudson v. Hardy*, 424 F.2d 854, 856 (D.C. Cir. 1970)).

<sup>59</sup> *Austin*, 545 U.S. at 214.

<sup>60</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>61</sup> *Id.*; see also Erwin Chemerinsky, *Procedural Due Process Claims*, 16 *TOURO L. REV.* 871, 888-89 (2000).

<sup>62</sup> *Austin*, 545 U.S. at 225.

<sup>63</sup> *Id.* at 225-26.

<sup>64</sup> *Id.* at 226.

the risk of erroneous deprivation is reduced.<sup>65</sup>

Finally, under the State interest factor, courts weigh the state's obligation to ensure the safety of guards and prison personnel, the public, and the prisoners themselves.<sup>66</sup> "[C]ourts must give substantial deference" to prison officials before requiring procedural safeguards for prisoners.<sup>67</sup> Scarce resources are another component of the State's interest, weighing against implementing additional procedures.<sup>68</sup>

### 1. Sign Language Interpreters May Satisfy the *Sandin* and *Mathews* Tests

Although "qualified [S]ign [L]anguage interpreter[s]" are mandated in disciplinary hearings, there is evidence that prisons may not take this requirement seriously.<sup>69</sup> DOCCS Directive 2612, outlining regulations for Inmates with Sensorial Disabilities, states:

Qualified Sign-Language Interpreting Services: A sign language interpreter certified by the National Registry of Interpreters for the Deaf or other National or New York State credentialing authority, or a sign-language interpreter who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary. The qualifications of an interpreter are determined by the actual ability of the interpreter in a particular interpreting context to facilitate effective communication. Except as otherwise indicated below, qualified interpreters may include inmates, correctional staff, including Correction Officers and volunteers, when their skills meet the above definition and factors such as emotional or personal involvement and considerations of confidentiality will not adversely affect their ability to interpret "effectively, accurately, and impartially" or jeopardize the safety and security of the inmate.<sup>70</sup>

This directive falls short because it does not require all interpreters to be qualified by the National Registry, which is consid-

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<sup>65</sup> *Id.* at 226-27.

<sup>66</sup> *Id.* at 227.

<sup>67</sup> *Id.* at 228.

<sup>68</sup> *Austin*, 545 U.S. at 228.

<sup>69</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 254.2 (McKinney 2017); *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1050 (S.D.N.Y. 1995) (holding that the liberty interest created by a parole-board hearing requires that deaf inmates be provided with a qualified interpreter); see also James C. McKinley Jr., *Judge Orders State to Provide Special Help to Deaf Prisoners*, N.Y. TIMES (June 20, 1995), <http://www.nytimes.com/1995/06/20/nyregion/judge-orders-state-to-provide-special-help-to-deaf-prisoners.html> [https://perma.cc/P9PY-RQUS].

<sup>70</sup> DOCCS 2612, *supra* note 6, at 2.

ered the most reliable means of ensuring the competence of an interpreter.<sup>71</sup> Specialized training is needed for those who are interpreting, or intend to interpret, in legal settings.<sup>72</sup> Those certified by the Registry are deemed qualified, however there is no explicit requirement in the regulation. “Interpreters who lack the preparation, skills, and qualification to practice, yet provide interpreting services in legal settings, increase the risk of inaccuracy.”<sup>73</sup>

Further, the directive permits Corrections Officers and volunteers to interpret when their skills meet the standard of accurate, effective, and impartial interpretation, instead of requiring an external, professional interpreter. An external interpreter, qualified by the National Registry is guaranteed to have the skills needed to interpret accurately and is not biased by the confines of prison. Further, this regulation fails to distinguish between different types of sign language: an individual who knows a different variation of a sign language, such as Signed English, is not a qualified interpreter for a prisoner with a hearing impairment who primarily communicates in ASL, and vice versa.<sup>74</sup> A prison guard with only basic sign language ability is not a qualified interpreter, and is not guaranteed to be impartial. Even with these shortcomings, there is no evidence that DOCCS is taking steps to ensure this policy is being followed.<sup>75</sup>

A qualified interpreter would likely satisfy the *Mathews* procedural requirements.<sup>76</sup> Deaf inmates must be afforded procedural protections because of the potential harm resulting from disciplinary hearings.<sup>77</sup> Under the *Mathews* private interest prong, in comparison with the baseline restrictions within a prison—as opposed to a criminal trial—a disciplinary hearing will not permit the same

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<sup>71</sup> Joint Comm. on Access to the Courts, *Improving the Access of Deaf and Hearing-Impaired Litigants to the Justice System*, 48 REC. ASS’N B. CITY N.Y. 834, 839 (1993).

<sup>72</sup> *Id.*

<sup>73</sup> Len Roberson et al., *American Sign Language/English Interpreting in Legal Settings: Current Practices in North America*, 21 J. INTERPRETATION 64, 66 (2011).

<sup>74</sup> *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1026-27 (1995) (stating that an interpreter who uses Signed English is not qualified to interpret for a prisoner who uses ASL); see also CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, ADA TITLE III TECHNICAL ASSISTANCE MANUAL III-4.6100 (1993), <http://www.ada.gov/taman3.html> [<https://perma.cc/XZ8A-8NEV>].

<sup>75</sup> See MORGAN, *supra* note 3, at 6 (“[P]rison authorities have failed to provide accommodations—such as sign language interpreters for deaf prisoners or text-to-audio devices for blind prisoners—in all prison programs, thus actively thwarting effective communications with these prisoners.”); see also *id.* at 44-46 (discussing deprivations of prisoners with disabilities in disciplinary hearings).

<sup>76</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>77</sup> See MORGAN, *supra* note 3, at 44.

amount of processes. In New York, for example, an individual has the right to a qualified interpreter in a criminal proceeding.<sup>78</sup> An individual has the right to understand the hearing officer and the procedure in a disciplinary hearing, which may deprive them of liberty.<sup>79</sup>

Second, the risk of erroneous deprivation with the current standard is high. Without a qualified interpreter, who is also certified by a recognized agency, a deaf individual may be paired with an interpreter who does not sign their language and there would be no way to alleviate this in an appeal because the record would simply reflect the output of the interpreter. Given the intricacies in the different types of sign languages that a deaf inmate may communicate in,<sup>80</sup> one interpreter may be sufficient for one inmate, that same interpreter may not qualify for another. For example, an inmate who converses in ASL must have a qualified ASL interpreter. Just as a Spanish interpreter would not be provided to an inmate who speaks French, an ASL interpreter should not be provided for an inmate who uses a sign language other than ASL. Another concern is whether the interpreter is qualified to interpret legal terms. A prison disciplinary hearing is filled with legal terms that are not common to ordinary sign language interpreters, who may not convey them appropriately.<sup>81</sup> This creates a high risk of deprivation, where an inmate may potentially go through an entire hearing without understanding the proceeding. Therefore, sign language interpreters should not only be qualified as DOCCS defines, but should also be trained in legal vocabulary and certified by a recognized organization.

Lastly, the state's interest in prison safety or the welfare of the prison would not be compromised. Qualified interpreters do not pose a safety threat, nor will there be a unique cost to hiring a qualified interpreter. DOCCS directives already require interpret-

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<sup>78</sup> N.Y. JUD. LAW § 390(1) (McKinney 2015) ("Whenever any deaf or hard of hearing person is a party to a legal proceeding of any nature, or a witness or juror or prospective juror therein, the court in all instances shall appoint a qualified interpreter . . . ."); *Chatoff v. Pub. Serv. Comm'n*, 60 A.D.2d 700, 700 (1977).

<sup>79</sup> *See* Joint Comm. on Access to the Courts, *supra* note 71, at 834-35.

<sup>80</sup> *See* McAlister, *supra* note 34, at 167-68, 175-76.

<sup>81</sup> *See About the Legal Interpreter*, NAT'L CONSORTIUM OF INTERPRETER EDUC. CENTERS, <http://www.interpretereducation.org/specialization/legal> [<https://perma.cc/Y3W5-SPBQ>] ("Typically, the knowledge and skills required of interpreters to work in this setting are acquired after completion of a solid academic foundation in interpreting, coupled with multiple years of practice, followed by specialized training in legal interpreting and supervised field experience.").



ers and the prison and state must accommodate for this cost when the prejudicial value is so high in this balancing test.

The rights of deaf individuals have been successfully litigated in a medical care case before the Supreme Court of Canada in *Eldridge v. British Columbia*.<sup>82</sup> There, the court recognized positive obligations on the government to allocate resources towards sign language interpretation where it was necessary for effective communication.<sup>83</sup> As a result of the decision, a new program was established that delegated interpreting services to a separate non-profit body that was composed of a board of primarily members who are deaf to delegate interpreting services when needed.<sup>84</sup> The remedy in this case may be one to draw from and implement in the prison disciplinary system, which would in turn create high quality interpreting services.<sup>85</sup>

## 2. Videotaping may Satisfy the *Sandin* and *Mathews* Tests

Absent from the regulations is the requirement of a meaningful review of the disciplinary hearing.<sup>86</sup> The only accommodation to a deaf inmate during the disciplinary hearing is the requirement to provide such an inmate with a qualified sign language interpreter at the hearing.<sup>87</sup> An inmate has the right to appeal a disciplinary ruling,<sup>88</sup> but deaf inmates are significantly disadvantaged at the appeal process as they will not have an adequate record on appeal when the possibility of ineffective sign language interpretive services is at bay. Likely, when statements are made by an inmate in a disciplinary proceeding and a sign language interpreter translates those statements, the only record that would remain on ap-

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<sup>82</sup> *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624 (Can.).

<sup>83</sup> *Id.* at 677.

<sup>84</sup> Bruce Porter, *Canada: Systemic Claims and Remedial Diversity*, in *SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE: MAKING IT STICK* 201, 218 (Malcolm Langford et al. eds., 2017).

<sup>85</sup> The dictum in *Eldridge* suggested that at issue is the complexity of the services at issue. It is arguable that the complexity of legal concepts at issue in a prison disciplinary hearing would rise to the level in *Eldridge* that would require a sign language interpreter. See *Eldridge*, 3 S.C.R. at 683 (stating that this analysis would “take into consideration such factors as the complexity and importance of the information to be communicated, the context in which the communications will take place and the number of people involved”).

<sup>86</sup> See DOCCS 2612, *supra* note 6.

<sup>87</sup> *Id.* at 8-9; N.Y. COMP. CODES R. & REGS. tit. 7, § 254.2 (1997) (also providing that hard of hearing inmates who have amplification devices as accommodations be able to use them in a Tier III hearing).

<sup>88</sup> COMP. CODES R. & REGS. tit. 7, § 254.8 (providing for an appeal within 30 days of the decision); see also Stuart M. Bernstein, *The Evolving Right of Due Process at Prison Disciplinary Hearings*, 42 *FORDHAM L. REV.* 878, 878 (1974).

peal is that of the sign language interpreter. Even with a qualified sign language interpreter who is able to adequately translate legal colloquia for the inmate, the potential risk does persist.<sup>89</sup> By failing to videotape, the original statement of the deaf inmate is lost and there is no evidence of any legal challenge that the inmate may make.

Additionally, videotaping a hearing would satisfy the *Mathews* procedural limitations.<sup>90</sup> Under the first private interest prong, a videotape of the disciplinary hearing would protect the interest of a deaf inmate that is already afforded to hearing-enabled inmates. A hearing inmate has the opportunity to dispute and appeal the disciplinary hearing within the prison at the state and federal level after exhausting administrative remedies.<sup>91</sup> Every statement made in the disciplinary hearing is transcribed and available to the inmate.<sup>92</sup> When a deaf individual is on the stand, their statements are completely lost because they are visual rather than verbal. Therefore, a deaf inmate's statements are not preserved in the record at all: all that is left in the record is the statements of the interpreter. However, if the interpreter does not sufficiently translate the deaf individual's statements, there is no way to dispute that on appeal.<sup>93</sup>

Under the second prong, the risk of erroneous deprivation as the current procedures stand is high. Without a video record, there is no way to appeal the adequacy of visual sign language translation. The record on appeal only contains the verbal statements made in the hearing. These verbal statements are those of the interpreter<sup>94</sup> and the hearing officer. The statements of the inmate,

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<sup>89</sup> STEWART, *supra* note 11, at 13-14.

<sup>90</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>91</sup> 42 U.S.C. § 1997e(a) (2013); 42 U.S.C. § 1983 (1996); N.Y. C.P.L.R. 7801 (McKinney 1962).

<sup>92</sup> N.Y. DEP'T OF CORRS. & CMTY. SUPERVISION, DIRECTIVE NO. 6910, CRIMINAL PROSECUTION OF INMATES 3 (2015), <http://www.doocs.ny.gov/Directives/6910.pdf> [<https://perma.cc/T4SX-J769>].

<sup>93</sup> For example, if a Spanish-speaking inmate has an interpreter at the disciplinary hearing and they dispute the adequacy of translation, a third party can review the hearing tapes, listen for the statements made by the inmate in Spanish, and compare the statements of the interpreter. While the sufficiency of a translation is a viable ground for appeal, without a video this ground is functionally foreclosed for deaf inmates as there is no way to independently compare the statements of the inmate with the translation performed. *People v. Rios*, 57 A.D.3d 501, 502 (2d Dep't 2008) (looking to the statements of the interpreter when analyzing a challenge to sign language translation services); *In re Lizotte v. Johnson*, 4 Misc. 3d 334, 337 (Sup. Ct. 2004) (challenging the adequacy of interpreter services).

<sup>94</sup> Paired with the argument made earlier, if the interpreter is not highly qualified, the risk of error is amplified when the interpreter can possibly make mistakes during the hearing. See *supra* Section A.1.

if visual, are left behind in the disciplinary hearing room.

Lastly, under the third prong, the state's cost of implementing video recordings of hearings for deaf inmates would increase. It is likely that the State will argue that if deaf prisoners are accorded video recording of their hearings, the same should be afforded to non-English speakers. However, deaf inmates pose a unique category of threatened individuals; in the case of a non-English speaker, on review of the already-offered audio tape of a disciplinary proceeding, the sufficiency of the translation may be challenged. A non-English speaker may subsequently have a qualified interpreter compare the original non-English audio with the "English" translation. A deaf inmate cannot do this. On review, a deaf inmate who communicates in any form of sign language cannot "hear" their original statements as they are visual. This would justify the added cost only for disciplinary proceedings involving deaf or hard-of-hearing inmates.

Statistics on the number of deaf inmates in the prison population range from 6.2% to an estimated 35%.<sup>95</sup> The State may argue that accommodating such a high number of prisoners would be expensive.<sup>96</sup> However, the expense does not rise to the level of precluding this procedure. The disciplinary proceeding as it stands is audio-recorded; enhancing this procedure would only require a video camera and television review system.<sup>97</sup> This would also only

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<sup>95</sup> JENNIFER BRONSON ET AL., U.S. DEP'T OF JUSTICE, DISABILITIES AMONG PRISON AND JAIL INMATES, 2011-12 3 (2015), <https://www.bjs.gov/content/pub/pdf/dpji1112.pdf> [<https://perma.cc/4VZK-XLLM>] (stating that 6.2% of people in state and federal prison identified as having a hearing disability, as compared with 2.6% of the general population); MORGAN, *supra* note 3, at 32 ("[B]etween 35 and 40 percent of all inmates experience some degree of hearing loss, including 13 to 20 percent with significant hearing loss." (internal quotations omitted)).

<sup>96</sup> As an example, as a result of a settlement, the South Carolina Department of Corrections upgraded its facilities for inmates with mental illness at the one-time cost of \$1.7 million for facility upgrades and \$7 million annually for staffing, phased over three years. John Monk, *Negligent SC Prison System Agrees to Reforms for the Mentally Ill*, STATE (June 1, 2016, 10:22 AM), <http://www.thestate.com/news/local/crime/article81081252.html> [<https://perma.cc/GYH6-JH34>].

<sup>97</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 254.6(a)(2) (McKinney 2015). In contrast, the SHU is videotaped. "A trend less known to people outside the criminal justice community is the proliferation of ultra-maximum-security 'lockdown' units, highly secure prisons within prisons in which inmates are confined 23 hours a day. In these stark facilities, all movement is monitored by video surveillance and assisted by electronic door systems. Special alarms, cameras and security devices are everywhere. Living conditions include either solitary confinement or double-celling, where two men are forced to share limited living space around the clock." JENNIFER R. WYNN ET AL., CORR. ASS'N OF N.Y., LOCKDOWN NEW YORK: DISCIPLINARY CONFINEMENT IN NEW YORK STATE PRISONS 7 (2003), <https://www.prisonpolicy.org/scans/lockdown-new-york-1.pdf> [<https://perma.cc/39BM-XSE3>]. Further, a decade ago DOCCS reported spend-

be implemented when there is a hearing-impaired inmate. Thus, to afford deaf inmates due process of the law, DOCCS must provide said inmates with a qualified sign language interpreter and must video tape the prison disciplinary hearings because such hearings may result in the loss of a protected liberty interest.

*B. Solitary Confinement of Deaf Inmates Violates the Eighth Amendment*

New York State prisons are exposing hearing-impaired prisoners to cruel and unusual punishment by sentencing them to the SHU. The Eighth Amendment imposes an obligation on prisons to provide for the basic needs of inmates.<sup>98</sup> Although “the Constitution does not mandate comfortable prisons,” it does not permit inhumane ones.<sup>99</sup> In addition to imposing restrictions on the use of physical force, the Eighth Amendment “also imposes duties on [prison] officials, who must provide humane conditions of confinement; . . . must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates . . . .”<sup>100</sup>

The Eighth Amendment prohibits punishments which, although not physically barbarous, “involve the unnecessary and wanton infliction of pain,”<sup>101</sup> or are “grossly disproportionate to the severity of the crime . . . .”<sup>102</sup> There is no bright-line rule that determines when conditions are cruel and unusual, and the Eighth Amendment draws meaning from the “evolving standards of decency that mark the progress of a maturing society.”<sup>103</sup> These principles will be used when the conditions of confinement are in question, rather than the state of the prison itself, as a prison may not necessarily be up-to-date to the evolving standards of decency, as we will see here.<sup>104</sup>

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ing more than \$35 million on cameras and custody within the prison for the purpose of surveillance. N.Y. DEP’T OF CORR. SERVS., PRISON SAFETY IN NEW YORK 33 (2006), <http://www.doocs.ny.gov/PressRel/06commissionerrpt/06prisonsafetyrpt.pdf> [<https://perma.cc/9VJ6-9Z3T>].

<sup>98</sup> U.S. CONST. amend. VIII; see *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

<sup>99</sup> *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981).

<sup>100</sup> *Farmer*, 511 U.S. at 832 (internal quotations and citations omitted).

<sup>101</sup> *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

<sup>102</sup> *Rhodes*, 452 U.S. at 346.

<sup>103</sup> *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

<sup>104</sup> *Id.* at 347. Traditionally, the inquiry into whether an inmate’s Eighth Amendment right to be free from Cruel and Unusual Punishment has been violated requires proof of two prongs: the objective and the subjective prong. Because this Article is not challenging a specific instance of a violation of a particular inmate’s rights—as one would in a § 1983 claim, for example—the mental state of one particular agent of the

To qualify as a deprivation of the right against cruel and unusual punishment, the alleged deprivation must be objectively “sufficiently serious” and must result in denial of “the minimal civilized measure of life’s necessities . . . .”<sup>105</sup> Under this test, the court will look at whether the condition or conditions being challenged could seriously affect an inmate’s health or safety and the minimal civilized measure of life’s necessities.<sup>106</sup> Courts evaluate whether inmates are deprived of the “civilized measures of life’s necessities” by considering the length of time in solitary confinement and possible harm in the future.<sup>107</sup>

At the base level, deaf inmates are treated like hearing-enabled inmates despite their inability to hear. They are only afforded “reasonable accommodations” at the discretion of the superintendent.<sup>108</sup> DOCCS regulations define “reasonable accommodation” as:

Any change in the environment or the manner in which tasks are completed that enables a qualified individual with a disability to participate in a program or service. Such accommodation should not impose any undue hardship on the Department. Reasonable accommodations *might* include the following: making existing facilities readily accessible to meet a particular individual’s needs[;] providing readers, interpreters, note takers, sighted guides, daily living skill aides[;] acquisition or modification of equipment or devices.<sup>109</sup>

Although additional accommodations may be granted at the request of a deaf inmate, the baseline accommodations are insuffi-

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Department of Corrections cannot be challenged, as would be required for an inmate to succeed on such a claim, and will not be addressed here.

<sup>105</sup> *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (quoting *Rhodes*, 452 U.S. at 347).

<sup>106</sup> *Barney v. Pulsipher*, 143 F.3d 1299, 1310 (10th Cir. 1998).

<sup>107</sup> The brief nature of unsavory conditions may be seen as a roadblock to recovery, however it is not dispositive. *See, e.g.*, *Whitnack v. Douglas County*, 16 F.3d 954, 958 (8th Cir. 1994) (holding deplorably filthy and “patently offensive” cell with excrement and vomit not unconstitutional because conditions lasted only for 24 hours); *White v. Nix*, 7 F.3d 120, 121 (8th Cir. 1993) (holding an 11-day stay in unsanitary cell not unconstitutional because of relative brevity of stay and availability of cleaning supplies); *Harris v. Fleming*, 839 F.2d 1232, 1234-36 (7th Cir. 1988) (holding five day stay in “filthy, roach-infested cell” not unconstitutional).

<sup>108</sup> DOCCS 2612, *supra* note 6, at 12-13 (outlining the request procedure). *See also id.* at 8 (“Facilities designated in Section III shall make available to deaf and hard of hearing inmates the auxiliary aids, services, and assistive devices as approved through the reasonable accommodation process which are necessary to facilitate full and effective participation in prison programs, activities, and services.”). *See also id.* at 12 (“All requests for accommodations shall be forwarded to the Deputy Superintendent for Program Services or designee within the facility and all time frames within this Section shall apply.”).

<sup>109</sup> DOCCS 2612, *supra* note 6, at 2 (emphasis added).

cient to meet the needs of hearing-impaired prisoners, especially those housed in the solitary housing unit.

It is well-established that solitary conditions are particularly harsh for inmates with physical disabilities.<sup>110</sup> The conditions of the solitary units have been described as follows:

[Secure housing] units are usually about eight feet by six feet in size . . . . [T]here is generally a stainless steel sink and toilet, as well as some type of desk and bed. The walls of the cell are bare and white with no windows. Usually the only light is a bare light bulb, which hangs from the ceiling and remains on twenty-four hours a day. Inmates are unable to control the brightness of their cells and are unable to tell what time of day it is. . . . [The doors] are made of solid steel, interrupted only by a small approximately eye-level clear window and a waist-level food slot. . . . Moreover, the door is usually outfitted with strips on each side so as to muffle any possible conversations between inmates in adjacent cells. . . . The doors also have the effect of cutting off ventilation in the units, so that the air becomes heavy and dank.<sup>111</sup>

The detrimental psychological and physiological effects of segregation are well-documented.<sup>112</sup> The United Nations reported that solitary confinement in excess of fifteen days can amount to torture or cruel, inhuman, or degrading treatment or punishment.<sup>113</sup> Similarly, the First Circuit stated in dictum that “even the

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<sup>110</sup> See, e.g., *Scarver v. Litscher*, 434 F.3d 972, 976-77 (7th Cir. 2006). The American Civil Liberties Union summarizes the harm to inmates with sensory disabilities as such: “In solitary confinement there is often little to no access to natural light. Some solitary confinement cells have no windows. Artificial lights can be kept on for 24 hours a day. Most cells have a solid steel door with a narrow viewing window and small slot. Communication is highly curtailed, mainly occurring through these small slots designed for food trays, passing mail or medications, or cuffing prisoners prior to their exiting their cells. These harsh and isolating conditions are especially harmful for prisoners with sensory disabilities who experience profound and heightened isolation due not only to the sensory and social deprivation experienced by all prisoners subjected to solitary, but also because they face huge barriers to meaningful communication in correctional environments.” MORGAN, *supra* note 3, at 32.

<sup>111</sup> Kathryn D. DeMarco, Note, *Disabled by Solitude: The Convention on the Rights of Persons with Disabilities and Its Impact on the Use of Supermax Solitary Confinement*, 66 U. MIAMI L. REV. 523, 537-38 (2012) (quotations and footnotes omitted).

<sup>112</sup> Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 478 (1997).

<sup>113</sup> Juan E. Méndez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Interim Rep. of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 88, U.N. Doc. A/66/268 (Aug. 5, 2011) (“It is clear that short-term solitary confinement can amount to torture or cruel, inhuman or degrading treatment or punishment; it can, however, be a legitimate device in other circumstances,

permissible forms of solitary confinement might violate the Eighth Amendment if imposed inappropriately, or for too long a period . . . .”<sup>114</sup> The constitutional harm dictates the need for “systematic, periodic review of the prisoner’s condition, his ability to reenter the general population,” and feasible alternatives to segregated confinement.<sup>115</sup> The length of isolation has repeatedly been urged as an important factor to consider in a cruel and unusual analysis.<sup>116</sup>

A punishment has been deemed cruel and unusual when it is excessive and serves no valid legislative purpose.<sup>117</sup> The excessiveness prong involves the requirement of proportionality to the crime charged, the focus being on the amount of pain and suffering that may be constitutionally inflicted.<sup>118</sup> With deaf offenders, the proportionality analysis must shift the points of comparison. The question remaining is whether the harshness of the penalty imposed is disproportionate to the penalty imposed upon a hearing offender.

For example, similar protections from solitary confinement are recommended for women and individuals who suffer from mental illness. “Women face many physical, medical, psychological, and socio-cultural challenges in prison. A higher percentage of women than men find themselves in prison for non-violent offenses.”<sup>119</sup> Although confined in female-only prisons, “[w]omen in custody are frequently guarded during their most private moments by men without a female guard present, despite the potential for

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provided that adequate safeguards are in place. In the opinion of the Special Rapporteur, prolonged solitary confinement, in excess of 15 days, should be subject to an absolute prohibition.”).

<sup>114</sup> *Jackson v. Meachum*, 699 F.2d 578, 582 (1st Cir. 1983) (internal quotations omitted) (citing *O’Brien v. Moriarty*, 489 F.2d 941, 944 (1st Cir. 1974)).

<sup>115</sup> *Id.* at 584.

<sup>116</sup> *Id.* at 584 (citing *Hutto v. Finney*, 437 U.S. 678, 686 (1978)).

<sup>117</sup> *Furman v. Georgia*, 408 U.S. 238, 332 (1972) (Marshall, J., concurring) (“[W]here a punishment is not excessive and serves a valid legislative purpose, it still may be invalid if popular sentiment abhors it.”).

<sup>118</sup> *Id.* at 271 (Brennan, J., concurring) (“The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings. Pain, certainly, may be a factor in the judgment. The infliction of an extremely severe punishment will often entail physical suffering.”). *Id.* at 279-80 (“(The Clause) is directed, not only against punishments of the character mentioned (torturous punishments), but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.” (alteration in original) (internal quotations and citation omitted)).

<sup>119</sup> AM. CIVIL LIBERTIES UNION, *WORSE THAN SECOND-CLASS: SOLITARY CONFINEMENT OF WOMEN IN THE UNITED STATES 2* (2014), <https://www.aclu.org/report/worse-second-class-solitary-confinement-women-united-states> [<https://perma.cc/XP5S-AYN4>].

abuse and degradation.”<sup>120</sup> Human Rights Watch has spoken out against the potential for abuse and degradation in the prison context when female prisoners are in their most intimate moments, such as dressing, showering, or using the toilet, instances which are guarded most prevalently in solitary confinement.<sup>121</sup> A woman’s vulnerability may increase her chance of harm if she has been a victim of past sexual abuse, and the isolation and absence of stimulation can contribute to further deterioration in an already-vulnerable individual.<sup>122</sup>

There is further harm when women who are mothers are placed in solitary confinement. The collateral consequences on their families is especially damaging because a mother’s relationship with her child deteriorates when she is unable to physically comfort her child.<sup>123</sup> The psychological bond between a mother and child must be considered when placing women in isolation.<sup>124</sup> Lastly, a harm that is specific to women is the risk associated with placing pregnant women in solitary. To correct this harm, the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders—known as the Bangkok Rules—prohibit the placement of pregnant or nursing women in solitary confinement.<sup>125</sup> These protections, however, are

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<sup>120</sup> *Id.* at 3.

<sup>121</sup> See generally HUMAN RIGHTS WATCH, NOWHERE TO HIDE: RETALIATION AGAINST WOMEN IN MICHIGAN STATE PRISONS (1998), <http://www.hrw.org/reports98/women/Mich.htm> [<https://perma.cc/Z8YZ-924D>] (calling upon corrections departments to limit male guards’ access to community showers, toilets, and dormitories during changing times).

<sup>122</sup> See Cassandra Shaylor, “*It’s Like Living in a Black Hole*”: Women of Color and Solitary Confinement in the Prison Industrial Complex, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 385, 390-92 (1998) (describing the vulnerability to sexual harassment and abuse caused by constant surveillance by men and the possibility of re-traumatization for women with a history of abuse).

<sup>123</sup> SUSAN D. PHILLIPS, THE SENTENCING PROJECT, VIDEO VISITS FOR CHILDREN WHOSE PARENTS ARE INCARCERATED: IN WHOSE BEST INTEREST? 1-2 (2012), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Video-Visitation-for-Children-In-Whose-Best-Interest.pdf> [<https://perma.cc/26SK-KVU4>] (describing the importance of and barriers to visitation of incarcerated parents).

<sup>124</sup> AM. CIVIL LIBERTIES UNION, *supra* note 119, at 7.

<sup>125</sup> G.A. Res. 65/229, United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), r. 22 (Dec. 21, 2010) (“Punishment by close confinement or disciplinary segregation shall not be applied to pregnant women, women with infants and breastfeeding mothers in prison.”); see also Juan E. Méndez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 61, U.N. Doc. A/68/295 (Aug. 9, 2013); U.N. OFFICE ON DRUGS & CRIME, HANDBOOK FOR PRISON MANAGERS AND POLICYMAKERS ON WOMEN AND IMPRISONMENT, at 41, U.N. Sales



not reflected in U.S. law. The American Civil Liberties Union (“ACLU”) argues that solitary confinement does not take into account the unique medical needs of pregnant women when in solitary.<sup>126</sup> The ACLU recommends solitary confinement “only when [female] prisoners pose a current, continuing, and serious threat” to safety, because of how “harsh and damaging” it is.<sup>127</sup> The instances where female prisoners meet these categories should be very rare because prisons “can physically separate” inmates “without resorting to solitary confinement.”<sup>128</sup>

Similarly high levels of vulnerability have been recognized in prisoners with mental disabilities.<sup>129</sup> In solitary, inmates with mental illnesses suffer from psychiatric deterioration that may result in attempted or actual suicide.<sup>130</sup> Many prisoners in need of mental treatment were being placed in isolated confinement instead of being treated in New York State prisons.<sup>131</sup> After a settlement agreement with Disability Advocates, Inc., the state created a unique resident mental health wing intended for inmates classified with serious mental illness sentenced to more than thirty days of SHU time. These units would permit inmates four hours of mental health treatment per day and an additional hour of recreation each day.<sup>132</sup> The settlement also required regular reviews of the

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No. E.08.IV.4 (2008), <https://www.unodc.org/documents/justice-and-prison-reform/women-and-imprisonment.pdf> [<https://perma.cc/MZR9-UL36>].

<sup>126</sup> AM. CIVIL LIBERTIES UNION, *supra* note 119, at 9.

<sup>127</sup> *Id.* at 10.

<sup>128</sup> *Id.*

<sup>129</sup> New York State Office of Mental Health (“OMH”) and DOCCS entered into a settlement agreement with Disability Advocates, Inc. (“DAI”) in 2007 for major improvements in psychiatric treatment for New York State prisoners with mental illness. *See* Disability Advocates v. N.Y. State Office of Mental Health, No. 02 Civ. 4002 (S.D.N.Y. Apr. 27, 2007), <http://www.op.nysed.gov/surveys/mhpsw/doccs-att3.pdf> [<https://perma.cc/7G2L-K5ZL>].

<sup>130</sup> ANNA GUY, AVID PRISON PROJECT, LOCKED UP AND LOCKED DOWN: SEGREGATION OF INMATES WITH MENTAL ILLNESS 5-6 (2016), <http://avidprisonproject.org/assets/locked-up-and-locked-down—avid-prison-project.pdf> [<https://perma.cc/G4EW-ZMJ9>] (“Even the president of the United States has recognized that a person’s mental illness can worsen in segregation, and inmates with mental illness are more likely to commit suicide.”); E. FULLER TORREY ET AL., TREATMENT ADVOCACY CTR. & NAT’L SHERIFF’S ASS’N, MORE MENTALLY ILL PERSONS ARE IN JAIL AND PRISONS THAN HOSPITALS: A SURVEY OF THE STATES 10 (2010), [http://www.treatmentadvocacycenter.org/storage/documents/final\\_jails\\_v\\_hospitals\\_study.pdf](http://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf) [<https://perma.cc/N63F-USGL>].

<sup>131</sup> FAQ, SOLITARY WATCH, <http://solitarywatch.com/facts/faq> [<https://perma.cc/M8PL-LX9S>].

<sup>132</sup> N.Y. DEP’T OF CORR. SERVS., DOCS FACT SHEET: DAI SETTLEMENT (2007), <http://www.doccs.ny.gov/FactSheets/PDF/daisettlement.pdf> [<https://perma.cc/9A7A-RBAR>]. “As a result of the DAI settlement agreement, OMH and DOCS developed a 100-bed RMHU. The target population for the RMHU is people who meet the criteria

amount of time spent in SHU; improved treatment programs and suicide prevention assessments; limits on the use of observation cells;<sup>133</sup> limiting the use of restricted diets; and a limitation on solitary confinement punishments for prisoners with serious mental illnesses.<sup>134</sup> These improvements were funded with a State budget of approximately \$50 million dollars.<sup>135</sup> These policies need to be adopted throughout the New York state prison system, as society's evolving standards of decency now require similar accommodations across vulnerable populations.

The vulnerabilities detailed above are comparable to those of deaf inmates in solitary confinement. In the Special Housing Unit ("SHU") at Massachusetts Correctional Institution in Walpole, Massachusetts, the restricted environment and social isolation of solitary confinement is "toxic to brain functioning" at the level of cognitive impairment.<sup>136</sup> Inmates developed florid delirium, which was defined as a psychosis paired with "intense agitation, fearfulness, and disorganization."<sup>137</sup> The harm can result in a "prolonged or permanent psychiatric disability," which may have reduced the inmate's chance of successful reentry to both the general prison population and the broader society as a whole out of prison.<sup>138</sup> These prisoners pose a danger to those around them, especially because this kind of trauma is experienced by a population of individuals already known to be "volatile, impulse-ridden, and inter-

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for Serious Mental Illness and have a sentence of more than 30 days of SHU time or 60 days of Keeplock." ALEXANDRA H. SMITH & JENNIFER J. PARISH, URBAN JUSTICE CTR. MENTAL HEALTH PROJECT, WHEN A PERSON WITH MENTAL ILLNESS GOES TO PRISON: HOW TO HELP 8 (2010), <http://il.nami.org/when%20a%20person%20with%20mental%20illness%20goes%20to%20prison.pdf> [<https://perma.cc/54WZ-4YNJ>].

<sup>133</sup> "If a person in DOCS' custody has a psychiatric crisis (for example, becomes suicidal or psychotic), s/he will generally be transferred to an OMH Satellite Mental Health Unit Residential Crisis Treatment Program (RCTP) inside a prison. . . . The RCTPs are operated by OMH and consist of observation cells and dormitory beds. The cells are under 24-hour observation. People in psychiatric crisis in an observation cell are alone in the cell without any property, including their own clothes." SMITH & PARISH, *supra* note 132, at 5.

<sup>134</sup> N.Y. DEP'T OF CORR. SERVS., *supra* note 132.

<sup>135</sup> *Prisoner Mental Health*, LEGAL AID SOC'Y, <http://www.legal-aid.org/en/lawreform/lawreform/prisonersrightsproject/prisonermentalhealth.aspx> [<https://perma.cc/VWV8-TSRC>].

<sup>136</sup> Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 349 (2006) (discussing a practitioner's observations made during his involvement in a class action lawsuit).

<sup>137</sup> *Id.* at 354.

<sup>138</sup> *Id.*; International Psychological Trauma Symposium, *Istanbul Statement on the Use and Effects of Solitary Confinement* (Dec. 9, 2007), [http://solitaryconfinement.org/uploads/Istanbul\\_expert\\_statement\\_on\\_sc.pdf](http://solitaryconfinement.org/uploads/Istanbul_expert_statement_on_sc.pdf) [<https://perma.cc/593C-358H>].

nally disorganized.”<sup>139</sup>

The restricted environmental stimulation harms the hearing impaired even more so than the hearing-abled. Studies have shown that deaf individuals exhibit significantly higher rates of paranoia, which affects hearing-impaired individuals at multiple levels of deafness.<sup>140</sup> Thus, those with preexisting vulnerabilities, such as deaf or hearing-impaired individuals, may suffer more psychological pain and may be at greater risk of permanent damage than the average person.<sup>141</sup> “[H]ealthy people tend to be resilient in their responses to stressor events” like solitary confinement, but “[t]hose with preexisting psychological disorders may therefore suffer more psychic pain and be at greater risk for permanent damage” such as PTSD.<sup>142</sup> Further research done with torture survivors on the psychological effects of solitary confinement corroborate its harmful effects.<sup>143</sup> “The fact that solitary confinement is among the most frequently used psychological torture techniques seems to underscore its aversive nature and destructive potential.”<sup>144</sup>

One study showed “extraordinarily high rates of symptoms of psychological trauma among prisoners” in solitary confinement, including

anxiety and nervousness, headaches, troubled sleep, and lethargy or chronic tiredness, . . . nightmares, . . . . confused thought processes, an over-sensitivity to stimuli, irrational anger, . . . social withdrawal[,] . . . . violent fantasies, emotional flatness, mood swings, chronic depression, . . . feelings of overall deterioration, . . . hallucinations and perceptual distortions, and . . . suicidal ideation.<sup>145</sup>

All studies of solitary confinement lasting longer than ten days have shown negative psychological effects.<sup>146</sup> Thus, inmates who have been deprived of such fundamental sensory functions “cannot adjust to a sudden release into a free society because [their] mental and emotional mechanisms are adjusted to the deprivation

<sup>139</sup> Grassian, *supra* note 136, at 354.

<sup>140</sup> *Id.* at 364-65.

<sup>141</sup> See MORGAN, *supra* note 3, at 32-33.

<sup>142</sup> Haney & Lynch, *supra* note 112, at 534.

<sup>143</sup> See, e.g., Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. 124, 130 (2003) (“[T]he harmful psychological consequences of solitary and supermax-type confinement are extremely well documented.”).

<sup>144</sup> Haney & Lynch, *supra* note 112, at 508.

<sup>145</sup> *Id.* at 524.

<sup>146</sup> *Id.* at 531.

circumstances” and cannot tolerate “normal environments.”<sup>147</sup> These psychological effects paired with the vulnerability of deaf inmates rises to the level of “sufficiently serious” deprivation.

New York State prisons should prohibit placing deaf inmates in solitary confinement. This conclusion is supported by parallel reasoning against placing pregnant or nursing women and those with mental illnesses in solitary confinement. Because confining deaf and hard of hearing inmates to solitary confinement rises to the level of cruel and unusual punishment, such conduct should be proscribed.

At the international level, the United Nations requires all Member States to promote the human rights of all individuals, including those with disabilities.<sup>148</sup> Although the United States has yet to ratify the United Nations Convention on the Rights of Persons with Disabilities, President Obama signed the Convention in 2009, indicating an intention to take steps to be bound by the treaty at a later date.<sup>149</sup> President Obama has created an obligation, in the period between signing and ratification, to refrain from acts that would defeat the object and purpose of the treaty.<sup>150</sup>

The Convention identifies discrimination against any person on the basis of a disability as being a “violation of the inherent dignity and worth of the human person” and promotes an environment that protects those human rights.<sup>151</sup> The purpose of the Convention is to promote such human rights by ensuring the equal and full enjoyment of all human rights and fundamental free-

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<sup>147</sup> *Id.* at 515 (alteration in original) (internal citations and quotations omitted).

<sup>148</sup> United Nations Convention on the Rights of Persons with Disabilities, 2515 U.N.T.S. 3 (Dec. 13, 2006) [hereinafter CRPD]; *see also* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 2 (Dec. 10, 1948).

<sup>149</sup> *Convention on the Rights of Persons with Disabilities*, U.S. INT’L COUNCIL ON DISABILITIES, <http://uscd.org/index.cfm/crpd> [<https://perma.cc/E32Z-FGGM>] (“The United States signed the CRPD in 2009. On December 4, 2012 the United States Senate considered the ratification of the CRPD but fell 5 votes short of the super-majority vote required . . . .”); *Convention on the Rights of Persons with Disabilities*, U.N. TREATY COLLECTION [hereinafter U.N. TREATY COLLECTION], [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en) [<https://perma.cc/V47F-DRV1>] (indicating that the U.S. has signed, but not yet ratified, this treaty).

<sup>150</sup> Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> [<https://perma.cc/H9GS-BD5Q>]; Office of the U.N. High Comm’r for Human Rights, *The United Nations Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies*, at 50, <http://www.ohchr.org/Documents/Publications/FactSheet30en.pdf> [<https://perma.cc/TU76-GJV8>].

<sup>151</sup> CRPD, *supra* note 148, at Preamble (h).

doms.<sup>152</sup> Because a disability may present a barrier that hinders full and effective participation in society on an equal basis with others, member states have a responsibility to accommodate and respect, protect, and fulfill the human rights of persons with disabilities.<sup>153</sup> In particular, the United Nations intended these mandates to encompass prisons as shown in Article 13 of the Convention, which mandates prison staff to be appropriately trained to help ensure effective access to justice.<sup>154</sup> The United States has expressed intent to be bound by the Convention on the Rights of Persons with Disabilities; thus, the evolving standards of decency required by the 8th Amendment to the U.S. Constitution should be extracted from the Convention.<sup>155</sup>

Segregated confinement on its own has not been found to constitute cruel and unusual punishment unless the situation is intolerable.<sup>156</sup> Solitary confinement for the deaf, however, constitutes an intolerable scenario, and as it stands, the framework for accommodating the deaf is in violation of the United States Constitution.

#### IV. CONCLUSION

Deafness imposes a general liability on a prison, requiring greater protections given the audio-centric structures of our prison system.<sup>157</sup> Sentencing deaf inmates to solitary confinement fails to serve any legitimate penal interest when there are alternative solutions that will not subject deaf inmates to such cognizable harms. The cost and burden of implementing greater protections must be considered, but the balance of interests tips in favor of protecting those most vulnerable. New York State must accommodate the needs of its deaf inmates because placing them in solitary confinement tips the scale of harm far beyond constitutional purview.

The disproportionate number of individuals who are hearing-impaired in prisons requires an inquiry into the possibility of harm in New York State prisons. Not only is the prison disciplinary system skewed against them but the punishment that results harms

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<sup>152</sup> *Id.* art. 1.

<sup>153</sup> *Id.* art. 4.

<sup>154</sup> *Id.* art. 13(2).

<sup>155</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (“The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”); U.N. TREATY COLLECTION, *supra* note 149; *see also* Vienna Convention on the Law of Treaties, *supra* note 150, art. 18.

<sup>156</sup> *See, e.g., Rifkin v. Goord*, 273 A.D.2d 878, 879 (4th Dep’t 2000).

<sup>157</sup> *About*, PRISONERS’ LEGAL SERVICES N.Y., <http://plsny.org/about/> [<https://perma.cc/MX5S-5AM3>].

deaf inmates more than hearing-enabled prisoners. A person does not leave their human rights behind when they enter prison. The prison disciplinary process must be altered to accommodate deaf inmates by: (1) ensuring a qualified sign-language interpreter at each disciplinary hearing and (2) videotaping all disciplinary hearings to preserve issues for appeal. Furthermore, evolving standards of decency require adoption of a complete ban on housing deaf inmates in the Solitary Housing Unit. Only once these protections are implemented will deaf individuals incarcerated in New York State prisons begin to be treated equally.