

Spring 6-2022

Assessing the Accessibility of the Judicial System's Arrest-to-Parole Timeline for People who are d/Deaf and Hard-of-Hearing

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<https://doi.org/10.15760/honors.1212>

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**Assessing the Accessibility of the Judicial System's Arrest-to-Parole Timeline
for People who are d/Deaf and Hard-of-Hearing**

By

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An undergraduate thesis submitted in partial fulfillment of the
requirements for the degree of Bachelor of Arts

in

University Honors

and

World Languages and Literature: Spanish

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2022

Abstract

The judicial system is inaccessible to many groups of people for a variety of reasons, one of those populations being the d/Deaf and Hard of Hearing community (DHH). This community faces prejudice and discrimination in many institutions because of their identity, but within the justice system, this prejudice is compounded and controlled by legislation and either the lack of, or barriers to, effective communication. At every point in the chronological timeline from getting arrested to achieving parole, individuals who are d/Deaf or Hard of Hearing may face discrimination and obstacles that their hearing counterparts do not. The discrimination can be both symbolically and physically violent and this paper will discuss examples of physical and emotional abuse/assault (including sexual assault) that have been documented in qualitative studies by discourse community members. The point of this paper is to dissect previous impactful works from the field, examine why there has been little progress in dismantling the systemic and systematic discrimination that has been researched and discussed, and compare suggestions for creating change within the judicial and prison systems such as rewriting legislation, giving more agency to those requesting accommodations, and promoting education of these issues in government settings.

Keywords: deaf, hard of hearing, accessibility, interpreter, discrimination, legislation, justice system

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Introduction

There is and has been a lack of accessibility to effective¹ means of communication for the d/Deaf² and Hard of Hearing³ (DHH) population within the justice system. There is often bias, prejudice, and oppression that precedes, occurs in, and continues after a trial toward defendants with a DHH identity. There are recorded instances of sentences and fines which have wrongfully been distributed on the basis of ignorance, negligence, and disinformation on the part of hearing individuals with agency in the system toward the d/Deaf and HOH (Brunson, 2008; Ridgeway, 2012; Oberheim, 2018). Furthermore, the legislation is not up to date, nor reflective of the accessibility needs due to variations among people who are d/Deaf or HOH. Practices for appointing interpreters or choosing means of accommodation differ from state to state, and court to court, regardless of, and as a result of, the legislation and Acts that exist. The most often discussed example (according to the field) of the disparity in agency between the court and the defendant is the terminology in the Americans with Disabilities Act: Title II, State and Local Government Activities⁴ (2011), which allows for a judicial official's discretion over the people who are in need of accommodations, specifically the term "reasonable accommodations". This disparity in agency has led to wrongful sentencing because the defendants were denied proper accommodations. There is not necessarily a lack of ways to communicate that are preferable to and most effective or reasonable for the person in need of an accommodation, but there are a number of documented times where preference/need for certain kinds of accommodations were denied or not considered (Al Jazeera, 2013; Lewis, 2014). A contributing factor is the lack of access to interpreters in all parts of the process from arrest to parole (Brunson 2008; Al Jazeera, 2013; Lewis, 2014; Oberheim 2018; Zidenberg et al., 2021). Both misinformation and disinformation about the d/Deaf community contribute to the lack of effective accessibility.

¹ Fitting, fair, representative

² Lowercase deaf refers to the condition of not hearing, uppercase Deaf refers to the community that shares a culture and uses ASL (American Sign Language)

³ HOH is the acronym for hard of hearing

⁴ When the acronym ADA in rest of this paper, it will be referring to this Title II document unless explicitly noted

People who are deaf or HOH are not a monolith; not all use American Sign Language (ASL) or are proficient in English. There are many different types of signed language and communication in the US: part standardized, part localized, and part individualized. Trials can become skewed with poor interpretation or misinterpretation that occurs for a variety of reasons, with the differing fluency in standardized languages being just one of them (Smith, 1994; LaVigne & Vernon, 2003; Oberheim, 2018).

The examples of cases of discrimination and wrongful sentencing referenced in this paper have been previously collected by prominent discourse community members during their own investigations into the issue of accessibility in the justice system for people who are d/Deaf and HOH. The testimonies and research, across the texts, ranges from the 1980s (though discusses history even further back), which shows not only how long this problem has persisted but, more importantly, that few changes have been made within that time. While the bigger Acts like the Court Interpreters Act of 1978 and the ADA (the original 1990 version and its subsequent amended versions) were very important to help the process of making institutions like the government accessible, discourse community members argue that they were not enough then, nor adequate now because there are still ways in which access to effective communication can be refused, put off, or ignored (Brunson, 2008; Oberheim, 2018; Chavez; 2018). Many of the articles referenced in this paper explain the issues and the history of legislation and discrimination that brought DHH to where they are today, and those authors have expressed their sentiments that the system must be changed, however, less than a handful of them gave concrete suggestions for how to proceed and reform. One reason for the lack of ideas about dismantling and redefining legislation for accommodations is that the issues defendants struggle against, prior to and during trial, are incredibly nuanced, and many are rooted in a combination of systemic and systematic oppression. The hearing-centered government institution both ignorantly and willfully avoids understanding what being d/Deaf or HOH means within interpersonal situations and, more importantly in this context, within legal proceedings. The

field finds fault with the ADA and other pieces of legislation because it paints a false narrative that every person who is d/Deaf or HOH has the same needs and experiences, and thus, perpetuates the avoidance of mainstreaming education about disabilities and what accessibility looks like for differing disabilities.

The point of this literature analysis is to examine the arguments that have been made within the field about the injustices that persist for d/Deaf and HOH individuals going through the judicial and prison systems, and compare suggestions for creating change within the judicial and prison systems.

Methods

Initially, this literature review began as an analysis of the legislation that existed and how the lack of effective communication was a barrier to access for many people who are d/Deaf and HOH within the judicial system. Throughout the prominent texts in the field that explain the history of d/Deaf struggles for accessibility, a theme about wrongful sentencing and/or unjustified trials surfaced and redirected the focus of this analysis. The data from the field showed that not only was lack of [effective] access a barrier to a just trial, but also prejudice and malpractice. This paper primarily examines the discourse contributed by Alexandra Zidenberg (2021), Beau Shine (2020), Lauren Oberheim (2018), Justin Chavez (2018), Brandon Tuck (2010), Jeremy L. Brunson (2008), Talila A. Lewis (2014) through her organization HEARD (Helping Educate to Advance the Rights of the Deaf) which is a Deaf advocacy and support group, as well as a few others.

Systemic discrimination is a system of legislation, technology, and values that works against people who are d/Deaf and HOH based on society's hegemonic values that prioritize "able" bodies and capitalistic timelines. The barriers/problems this systemic discrimination and prejudice creates within the arrest-to-parole timeline are primarily connected to legislation, communication, and necessarily, criminal justice. This paper will briefly explain prejudice,

legislation, and communication issues that DHH face within the judicial system in relation to barriers to accessibility, and then all three will be discussed in conjunction through the timeline which starts at an individual's initial encounter with the law until they are released on parole. Throughout the paper, this process will be referred to as the arrest-to-prison timeline, with the disclaimer that initial encounters with the law are not mutually exclusive with the result of arrest, trial, or prison time. Furthermore, for those who do go to prison, parole is not a possibility for everyone. Finally, the few different suggestions from the authors about improving the accessibility and lessening the harm done by the system will be compared, contrasted, and critiqued.

It is important to mention that there is a debate within the Deaf community as to whether they claim or reject their deafness being seen as a disability. I, as a hearing author with no personal connection to Deaf Culture or the community, have no authority to comment on the debate myself. Therefore, this paper will refer to deafness as a disability solely because it is defined this way by the legislation concerning accommodations that determine the accessibility in the judicial and prison systems and subsequently by the discourse community members who are critiquing this legislation. However, to provide a little perspective to the situation, Brunson (2008) finds that some of his interviewees who grew up deaf did not classify themselves as disabled until their encounter with the judicial system where that “disabled” identity was a defining factor in determining their (in)ability to interact effectively with the system and people in it.

Literature Review

Prejudice

One of the central issues that affects people who are d/Deaf or hard of hearing is the prejudice and discrimination towards them. This is the reason that the other issues (barriers to access, wrongful sentencing, etc.) exist. Part of the problem is ignorance of d/Deaf and HOH

existence because, as a disability, it competes with many other disabilities, and specifically, with those that are visible. Sometimes, a person or institution's ignorance about how disabilities differ can produce a mistake such as providing the wrong accommodation. There are a number of examples in which a d/Deaf person was provided a useless/unhelpful accommodation. For example, a provision of a wheelchair being given in response to a request for a d/Deaf specific accommodation, as happened to the famous deaf model, Nyle DiMarco, at the airport (McNamara, 2018). The image of a wheelchair has been made the most synonymous with, and representative of, "disability", and because there is a structural issue of a lack of education and also misinformation about the vast variety of identities that encompass the term "disability", unintentional (and potentially harmful) mistakes, like providing useless accommodations, occur.

Within the judicial system, those same kinds of mistakes do still occur but it is more likely that a person who is deaf would be given hearing aids, or given pen and paper with which to write back and forth, when the individual may not be fully literate or comfortable with English, etc. Oberheim (2018) provides a statistic that, in general, "thirty percent of deaf students exit the school system 'functionally illiterate'," in English because of the language's reliance on sound to understand the stress, cadence, and inflections of the voice that cannot be seen externally (p. 170). Zidenberg et al. (2021) contribute to the statistics when discussing the literacy levels of d/Deaf and HOH inmates: "Almost two thirds (62.9%) of the Texas d/Deaf sexual offending sample were reported to be functionally illiterate with a reading level of grade 2.8 or below, while nearly a quarter (24.3%) had minimal language skills/linguistic deprivation" (p. 380). They follow up by explaining that 90% of inmates use some sort of signed language or gestures to communicate, the literacy having related to English, not sign language. However, it's the documentation of illiteracy in English for people who are d/Deaf or HOH that is extremely incongruent with the assumption that using English in a written format will be a universally

effective choice, that is the most problematic and demonstrates the lack of education hearing people have sought or received about accommodation and accessibility issues.

There are also examples of intentional discrimination, in which DHH are ignored when police were taking statements about a crime (Brunson, 2008, p. 83), handcuffed (Chavez, 2018, p. 552), and, when imprisoned, denied access to their devices, such as cochlear implants or hearing aids. Additionally, they may be forbidden to sign because their language was perceived by the officers as gang signs (Lewis, 2014).

The ADA Title II (2011) brings up a multitude of rules and regulations protecting people with disabilities from discrimination within the judicial and penal system, but despite all of these measures, they are not always followed due to ignorance or willful discrimination. Lewis (2014) discusses how violence against people with disabilities within prison is handled. Reporting an assault or not obeying orders, due to lack of accessibility and comprehension, can result in being housed in isolation as a punishment.

Some of the arguments Shine (2020) makes about how ableism and oppression towards DHH in the context of a trial affects both parties are, firstly, that the reputation of the justice system is affected negatively, and secondly, that it can be ethically and financially burdensome to not provide a DHH individual with equal rights as it will increase “expenses due to additional appeals and civil court costs, as well as costly financial settlements” (p. 147). If the process is stalled or delayed, the government is the one paying for continued use of court appointed attorneys and interpreters. Shine writes that one of the interviewees, “noted that trials involving deaf defendants take longer because of the additional time associated with interpreting”, listing factors that can contribute to this lengthy process as the waitlist for interpreters and the consistent problem that the court is not informed that the defendant is deaf until they make their first appearance in court (p. 157).

The systemic discrimination works in tandem with the systematic process of the arrest-to-parole timeline. It needs mentioning that not all d/Deaf or HOH individuals are in

prison due to wrongful sentencing. While wrongful sentencing is a part of the issue that inaccessibility creates, Zidenberg et al. (2021) explain that there is also an overrepresentation of d/Deaf individuals in prison whether due to a wrongful conviction or a just conviction. For the latter, the data shows that the population of d/Deaf criminals had “communication and reading difficulties, low educational attainment, and elevated base rates of mental health and substance use diagnoses,” all as a linear issue of systemic discrimination. Because of the build up of those listed factors alongside oppression and inaccessibility within institutions, DHH–like many other people who are systematically targeted and discriminated against–have more emotional vulnerabilities which can result in activities and behaviors that law enforcement would consider worthy of pursuit and/or arrest. However, this paper is mostly focusing on the injustices occurring within the judicial and penal system, and not on the factors that may have caused their introduction to the arrest-to-parole timeline.

Legislation Issues

There are a few major issues with legislation and Acts regarding accessibility for the d/Deaf and HOH. The focus of the legislation discussion in this paper is how the legislation is not as relevant as it needs to be, and it is not well followed. The ADA Title II (2011) brings up a few key points to be followed to prevent discrimination, firstly that “A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.” (p. 56). Some of the people who have agency within the system do not abide by this. The discourse community has listed examples of cases where judicial officials intentionally, and/or ignorantly, neglected or refused the most accurate and effective form of communication for an individual using excuses such as time or lack of resources like qualified interpreters and captioners (Brunson, 2008; Al Jazeera, 2013; Lewis, 2014). These issues are existent everywhere for DHH,

but within the medical and judicial fields, the lack of accessibility can be extremely problematic, harmful, and life-threatening.

As an aside, many states have their own laws requiring interpreters which can promote inconsistency and the power imbalance between the court and the defendant. Additionally, Federal courts do not follow ADA regulations, but rather the Court Interpreters Act of 1978 which does not guarantee them an interpreter but puts an obligation on the court to do so and if their case is still deemed unworthy by the judicial officers of free accommodations, they turn to the Judicial Conference of the Administrative U.S. Courts to receive an interpreter (Tuck, 2010; Pravda, 2011; United States Courts, 2019). This paper will focus mostly on the cases in local and state courts that are required to follow the ADA in all contexts and for all disabilities.

The lack of attention to regulations in correctional facilities puts people who are d/Deaf and HOH at a higher vulnerability for prolonged mental health issues (Lewis, 2014). There are specific regulations for correctional facilities to follow. The ADA Title II (2011) states that public entities will not exclude, deny benefits to, or discriminate against people with disabilities even if a facility is inaccessible to them. That such inmates will be “housed in the most integrated setting appropriate to the needs of the individuals” and not in designated medical areas unless actively receiving treatment; nor in facilities that don’t offer programs they need if there are other facilities that do have these programs and can house them; nor “deprive inmates or detainees with disabilities of visitation with family members by placing them in distant facilities where they would not otherwise be housed” (p. 56). Across the field of research, there is a compilation of examples when those regulations are not followed (Al Jazeera, 2013; Ridgeway, 2012; Lewis, 2014).

When a person interacts with the justice system for reasons such as being suspected of/committing a crime, witnessing a crime, or being served/charged in some way, they must go through the process of dealing with attorneys and law enforcement officials before the trial even

starts⁵. Attorneys are required to be offered to everyone being charged by the US government, via the Miranda Warning⁶, which is based on the Sixth Amendment's right to counsel, but there is no requirement for appointing interpreters. Only in cases where the language difference is complicated with the label of disability must interpretation services be offered to the defendant because it is deemed essential to provide a fair trial. This paper will not go into the implications of accessibility hierarchy due to the lack of requirement to offer speakers of minority languages an interpreter. In "Knowledge Seminar: Court Interpreting Access to Justice" (United States Courts, 2019), a panel discussion and educational seminar about court interpretation in federal courts, an example of a trial was listed in which a Spanish speaker was put on trial where the rest of the court spoke English, so he could not comprehend anything about his case, and therefore, he was unable to defend himself. This case became a basis for the creation of The Court Interpreters Act of 1978. In the seminar, it is explained that the Act does not establish a new constitutional right for Federal courts to provide an interpreter for any non-english speaker, but only that it is an obligation for the courts to provide it where they see it is necessary. On the other hand, interpreters or other accommodations are required in State and Local Government Services and situations for d/Deaf or HOH because it is stipulated in the ADA. Accommodations are required not only pretrial and during the trial, but in prison as well, yet, there is still evidence that the legislation does not get followed for a variety of reasons including the poor system of keeping track of files on an individual, and the refusal to provide accommodations (Brunson, 2008; Al Jazeera, 2013; Ridgeway, 2012; Lewis, 2014).

⁵ For the purposes of not taking on too many variables in this paper, I will be mostly focusing on the d/Deaf defendant's perspective and not the other roles within the courtroom and justice system.

⁶ While the Miranda Warning doesn't have to be articulated exactly like this as long as the rights are stated clearly and unequivocally, the most common phrasing, especially in media (ex. The TV show Law and Order), is: "You have a right to an attorney. If you cannot afford an attorney, one will be appointed for you".

Communication

The issue of barriers to effective communication in the justice system is well known, not only for ASL users but for most minority languages. This issue was the reason I began researching this topic. There are 3 key struggles within this issue. Firstly, the system can be unaware of the hearing status of the defendant. Police may not know a person is DHH or may ignore them because they do not know how, nor want to try, to communicate with them (Brunson, 2008; Chavez, 2018). One’s hearing status may be omitted or left out of documentation about the defendant, and therefore, courts will be unaware that a defendant is d/Deaf or HOH until they arrive in court, which is inconvenient because, if interpretation is the accommodation they require, an interpreter will not have been prepared for them, and the interpreter’s schedule may delay the proceedings for an undefined amount of time (Shine, 2020). Alternatively, it will be decided by the judicial officials that any form of communication that relies on the defendant knowing English will be acceptable (ex. writing back and forth, using captions, or reading lips), even if, in reality, it is not accessible for the defendant. Brunson (2008) explains that “deaf people have little input in the type of accommodation they receive, they are made dependent on the courts and other legal institutions, which organize and pay for the accommodation.”

This leads to the second point that there are myths about the needs of people requesting accommodations. The DHH community is not a monolith, and thus, people within the community have different skill sets. Not everyone knows how to read lips or speak. ASL is a complete natural language, so even though some English words may be used/fingerspelled, the grammar is different, and it is ignorant to assume that a person who knows ASL will know English. Furthermore, there are many different signed languages and types of sign within the US, including but not limited to Black American Sign Language (which is an ethnolect like Ebonics or Black English) and Pidgin Signed English (a combination of ASL and English typically used by HOH or deaf people who become DHH later in life). However, “even when deaf

people provided their expertise as to which accommodation should be used for their legal interaction, their suggestions were often ignored” because a specific accommodation was opportune neither in manners financially nor timely to the court (Brunson, 2008).

Lastly, courts may employ under-qualified interpreters or an interpreter that is not a good fit with the defendant. Unfortunately, as mentioned by LaVigne & Vernon (2003) and Tuck (2010), having a qualified certification to serve as a Certified Deaf Interpreter (CDI) from the Registry of Interpreters for the Deaf (RID) does not guarantee that the interpreter will be fully proficient in signing, know how to sign in a way that is more culturally significant and comprehensible for Deaf people (because they may still use some English grammar in sentence structure), or know how to sign in a fast-paced and wholly immersive environment such as a court proceeding. ASL is not a language that an interpreter can get a federal certification for, but RID can provide training for a person to become professionally qualified. The court can locate these qualified interpreters through the National Court Interpreter Database (NCID).

Occasionally, a certified interpreter will not be a good fit if the person requesting accommodations has a communication style that greatly varies from ASL or the other more identifiable signed languages (Black American Sign Language, Pidgin Signed English, Martha’s Vineyard Sign Language), or is semilingual or non lingual. In these cases, the court might try to bring in a CDI, a language-skilled interpreter who has a substantial knowledge of signing and has been rigorously tested to work specifically with people who have Minimal Linguistic Skills (MLS) (Tuck, 2010).

All three barriers in receiving effective and accurate communication accommodations have an effect on the fairness of the trial. As interpreters are needed from the initial arrest and interrogation through sentencing and then parole, if the defendant is sentenced to time in prison, this process allows for many opportunities for these issues to be perpetuated, and for this systematic oppression towards people who are d/Deaf and HOH to continue to occur.

Arrest-to-Parole Timeline

Arrest

There are many cases where effective interpretation, if any, has not been provided to the defendant at the beginning of the arrest to parole process. It is a barrier that hearing people are not fully aware of the needs and accommodations of people who are d/Deaf or Hard of Hearing, not solely because there is a lack of education and awareness of what deafness is as a identity and disability, but also because of varying languages, dialects, and forms of communication each DHH individual is accustomed to. It is important that people get access to accommodations as soon as possible in the initial stages of contact with law enforcement. Police do not have to provide interpreters unless they are reading the person their rights (Brunson, 2008). To complicate matters further, if the law enforcement officials do acquire an interpreter to read the individual their rights, “the Miranda warnings are not easily translated into American Sign Language (ASL), especially for those deaf people who have low ASL and English skills or who rely on a visual-gestural system of communication” (Smith, 1994, pp. 88-89). Tuck (2010) states that experts claim it can take up to six hours to interpret the Miranda warning, even to highly educated people who simply lack cultural and linguistic experience with hearing people/English. Police are not well-educated or trained on how to interact with people who are d/Deaf and the procedures of taking a person into custody are ableist in that they can perpetuate assumptions about d/Deaf individuals, written English and American Sign Language as universally effective communication mediums (Zidenberg et al., 2021). When apprehending an individual to bring them into custody, even if the person is understood to be d/Deaf or HOH, there is a typical procedure of “handcuffing and the placing of hands behind a person’s back,” which effectively silences a d/Deaf person (Chavez, 2018, p. 552).

Two examples of automobile accidents brought up by Brunson (2008) are explicative of the ways people who are d/Deaf or HOH can be discriminated against in the initial stages of the judicial process. A side note: these are not examples of arrests, but it is still applicable to include

them in this section because my usage of the concept of an arrest-to-parole process/timeline, works to simplify and narrow the conversation about the specific paths a person can take throughout the justice and correctional systems. This simplification is done because many of the examples within the qualitative studies done by the discourse community members stick to the path of arrest, trial, sentencing, prison, and parole, and yet it is important to note the variety of experiences in which people have faced discrimination during each of these steps in the arrest-to-parole timeline.

In Brunson's (2008) first example, a woman, Michelle, was involved in an automobile accident while driving with her hearing mother. When the police came to take statements, they ignored Michelle completely and only spoke to her mom. While Michelle wasn't too bothered by the situation, Brunson's article relates that in other cases, the police may not even try to communicate with the DHH individual at all or, alternatively, choose to ask any hearing person, even children, for a statement before taking a statement from a person who is d/Deaf or HOH.

Martha, in Brunson's second example, was completely ignored by law enforcement, and the police only took the statement of the other person involved in the accident. This turned out to be harmful because the other woman lied and said the accident was solely Martha's fault. When Martha tried to contact an attorney of her choice, she was referred to another, and believes the reason for this is due to the extra cost the attorney would have to pay for hiring an interpreter to be at their sessions. When she got an attorney to take her case, it took 2 years in court before Martha could prove she didn't cause the accident. What is more, after all of that, "Martha was not refunded the amount of the increased premium that she had paid during the previous 2 years," (p. 83).

The final, and most relevant issue for the arrest-to-parole timeline is that after that initial encounter with law enforcement, there isn't consistent documentation of who is d/Deaf or HOH which means that people can get lost in the system which makes the trial process more

complicated, drawn out, and burdensome for both the defendant and the court, and additionally impedes on the defendant’s Sixth Amendment right to a speedy and fair trial (Lewis, 2014).

Pre and During Trial

During the time leading up to the trial and the trial itself, the main issue is getting access to the most effective means of communication for the specific defendant. As the ADA stipulates, the justice system must provide a reasonable accommodation. That wording of the Act doesn’t explicitly give the freedom of choice to the person requesting the accommodation, and consequently, the justice officials (traditionally hearing) can, and have taken, that agency. Therefore, “because deaf people have little input in the type of accommodation they receive, they are made dependent on the courts and other legal institutions, which organize and pay for the accommodation” (Brunson, 2008, p. 89). The selection of accommodations may consist of pen and paper, captions, an ASL interpreter, a RID certified interpreter⁷, TTY (TeleTYpe writer), TRS (telecommunication relay system), VRS (video relay services), and VRI (video remote interpreting). TRS is like a texting service. VRS is a telephone that has one way video in which the hearing person talks to the interpreter who signs over a video feed to the DHH individual and then back. VRI is a fully video interpreting service. In recent years, it has become practice to use services such as ZOOM, Google Video, FaceTime, Skype, etc. to communicate in any context, and this is a similar concept. “VRS and TRS are free programs regulated by the FCC and VRI is a fee-based service that satisfies the communication-related mandates of the ADA” (Effective Communication, 2020)

However, there are other problems with receiving accommodations. In more remote locations, interpreters (especially certified ones) may not be readily available, even for long-distance VRS or VRI communication. While this is not necessarily the direct fault of the courts as the demand for accommodations can be higher than the supply in certain locations, the

⁷ RID also provides specialized certification for legal interpreting requiring additional training in substantive and procedural legal issues (Smith, 1994)

lack of ready availability of accommodations can prevent a speedy and fair trial which is then a violation of the Sixth Amendment right. There are also assumptions about people who are d/Deaf or HOH that affect the types of accommodations they are offered. Firstly, not all are fully literate in English, so the common choice of pen and paper is not effective or ‘reasonable’ for everyone (Brunson, 2008). Next, not all DHH can successfully use cochlear implants or hearing aids. One example of this risk of ignorance is discussed by journalist Jim Ridgeway in a news segment from Al Jazeera America in 2013, wherein a deaf prisoner explained how he was given a hearing aid as his accommodation—a device that, for a deaf person, would simply produce unintelligible noise. The device also did not have batteries. When he complained, the judge told him to turn the volume up, and that was the end of the discussion. Therefore, “he was effectively unable to understand or participate in his trial” (Al Jazeera, 2013). His attorney tried to make the court aware that his client could not hear the proceedings, so was unable to help himself, and that this violated his Sixth Amendment right. The conclusion from the segment was that an interpreter definitely would have changed the results.

However, LaVigne & Vernon (2003) argue that appointing an interpreter does not guarantee that the issues of miscommunication will be overcome because, “[interpreters] can still mess up translation which can fall on the DHH individual for not understanding” (p. 919). The law is already difficult for a layperson to understand but adding on the complication of misinterpretation can lead to a decreased ability for the individual to represent themselves and their case accurately.

There are different kinds of interpreters used within a courtroom, such as a Proceedings Interpreter (PI) or a Table Interpreter (TI)/Interpreter for Counsel (IFC). PIs interpret everything that is being said in a courtroom and are considered to be an Officer of the Court, and thus, take oaths to be truthful and accurate like a witness does. TI/IFCs interpret at the defendant's table and have typically been part of the defendant's legal council meetings from the initial meeting; and, while the previous two may also be Certified Deaf Interpreters, for a person

who has very minimal knowledge of English, and a less standardized knowledge of ASL, for example, there is occasionally the use of a CDI as a relay interpreter where an ASL interpreter will interpret what is being said in the courtroom to the CDI who will then interpret that in a more stylized version that is culturally applicable and more relevant to the viewer/defendant.

Uncertified individuals are barred from translating in a legal proceeding due to The Court Interpreters Act, however, if and when there are no certified interpreters, the courts may use discretion to find an otherwise qualified interpreter (Oberheim, 2018). The courts admit to using uncertified interpreters mostly in cases for people who use lesser-known languages, such as some indigenous languages that they wouldn't reasonably be able to get a certified interpreter for. In some more extreme cases where the language is a dialect only known by a few people, family members may be called in, or they may try to use technological services to have an interpreter call in from across the country or world where the language is from (United States Courts, 2019).

Because d/Deaf and HOH people are not a monolith, not all of them know standardized ASL, and therefore, qualified interpreters that cannot interact with the person using a non standardized set of signs would not be an effective choice of interpreter. Home signs, slang, and varying dialects/languages exist within the U.S. There is Black American Sign Language (BASL), West coast vs East coast vs Southeast, Signed Exact English (SEE), Pidgin Sign English (PSE), and Martha's Vineyard Sign Language (MVSL). Not all interpreters are trained to know these signed languages/dialects but friends and family may not be allowed to interpret due to conflict of interest, despite the disparity between the defendant's language and ASL. Interpreters can't have a conflict of interest and must abide by strict rules, which have pros and cons (Goldberg, 1980; Brunson, 2008; Shine, 2020). They can't ask for clarification or repetition because they are seen only as a communication tool. While this is preferable because it allows the defendant to be the focus of their own case, it can simultaneously be harmful because they can make mistakes. Smith (1994) explains that on top of interpreters having to keep track of so many

different people across the room to interpret for their client, there could be interference, such as people speaking simultaneously or physically blocking the view of another person. Additionally, the jury can make assumptions about the defendant's comprehension of or reactions to the trial due to cultural differences between people who are hearing or DHH. One example is the nonverbal behaviors in ASL that have different meanings to hearing people i.e. “nodding does not necessarily indicate agreement or approval but rather that someone is paying attention” (p. 101). d/Deaf or HOH individuals may find themselves needing to feign understanding and contentment in order to make social interactions with [English-speaking] hearing people less uncomfortable. This masking can look like smiling and nodding or standing/sitting with an open posture. In a trial setting, this is particularly dangerous because the judge and jury (and even interpreter) can misconstrue this for comprehension and agreement with the proceedings. Faking comprehension isn't an uncommon practice for anyone, however, people who experience language and hearing barriers in conversations, learn to go with the flow and not ask clarifying questions or bring awareness to their lack of understanding because it's less socially acceptable.

People in the court do not just make assumptions about DHH defendants; they also make assumptions about the interpreter. If the interpreter is not slowing or breaking, that might be taken as a sign of skilled and accurate interpretation, but there is the real possibility that they may be making mistakes, and “most trial judges have no way of knowing whether an interpreter is communicating adequately with a deaf person or not,” (LaVigne & Vernon, 2003, p. 918).

Sentencing

One of the results of discrimination and prejudice, lack of access to accommodations, ineffective accommodations, and assumptions about the capabilities of both the DHH defendant and the effectiveness of any accommodation, is wrongful sentencing and conviction.

Additionally, a defendant who is d/Deaf or HOH may be sentenced for crimes they did not commit due to a different kind of accommodation interference. Interpreters gain some legal

experience when working within the judicial system for a while and have occasionally, with good intentions, illegally guided a defendant to make a decision based on their previous experience interpreting for similar cases. Brunson (2008) states that interpreters could influence the defendant to take a plea bargain, or discontinue the appeals process, etc. and that has the possibility of negatively impacting their future and their path in the judicial system/arrest-to-parole timeline. One interviewee recalls their experience; “I told them I was guilty [on the advice of his interpreter] so I could go home,” (Brunson, 2008, p. 89).

As referenced earlier in this paper, not all cases that are tried and result in conviction are wrongful sentences where the verdict was decided solely on the aforementioned accommodation and discrimination issues. There are also cases where a person is justly convicted for the crime that they committed, and that does not mean that there weren't accessibility issues or will continue to be accessibility issues in prison (if prison time is what their sentence dictates). Zidenberg et al. (2021) discuss the idea that there is very little data on DHH inmates due to a problem that Lewis (2014) also points out: there is a lack of documentation on inmate hearing status. However, in the two studies Zidenberg et al. found and analyzed, some important observations were made, one is that there seems to be an overrepresentation of DHH in the prison system which can be partially related to the wrongful sentencing but “32.8% of the Texas violent offending sample had a psychiatric diagnosis while 60.7% of the homicide offenders had a mental health diagnosis” (2021, p. 380). These statistics can correlate to their longer lists of infractions and crimes as well as the rates of conviction: “d/Deaf and HOH inmates were more likely to be convicted of violent offenses (64.6%) than the general inmate population (49.7%)” (p. 378). Both point towards systemic and systematic oppression as a reason for affecting mental health and then allowing inaccessibility to contribute to the verdict of the trial regardless of whether the crime was committed or not. If more studies were to be done on this topic, it would be enlightening to examine the differences in verdicts between people who are hearing and DHH

for the same crimes. Would there be a difference in monetary bail amounts, fines, length of prison sentences, etc.?

Prison

Once within the prison system, whether a person is there due to a wrongful sentence or a just conviction, life can be unsafe for people who are d/Deaf or HOH. This is true for anyone due to the nature of the defensive/offensive environment, however, people with disabilities, due in part to discrimination and to poor accessibility, are at a higher risk for assault and sexual abuse (Al Jazeera, 2013). Many are not allowed to have their hearing aids or cochlear implants due to fear swardens/guards have that DHH inmates could make a bomb or weapon with them. When they are allowed, batteries are not supplied as often as needed, if at all. DHH inmates also have to pay for pen and paper out of their own pocket, and usually do not get interpreters outside of mandated courses for parole and in conversations with authorities and attorneys. Visits with interpreters are much less likely and there is also a lengthy process to acquire telephone/TTY services (Lewis, 2014; Zidenberg et al., 2021; Otis, 2021). “As a result, deaf prisoners rarely have access to medical and mental health services and to educational and rehabilitative programs, which are critical steps to early release options” (Lewis, 2014, p. 2). In some cases, hearing prisoners who have a basic knowledge of sign are allowed to “interpret” for d/Deaf prisoners but as they are not certified nor even qualified, they have not been trained on neutrality and can have higher rates of misinterpretation, and thus, it is justified to state that this practice would violate federal disability rights laws (Lewis, 2014).

This uncertified interpretation is less frequent because people in correctional facilities are generally discouraged from making friends or acquaintances, for fear that alliances could lead to attempted overthrows or escapes. For people who are d/Deaf or HOH, this is isolating because they cannot understand or communicate with the people around them. Compounding matters, if guards do not know of or understand their hearing status, DHH inmates can be

punished for missing orders. Additionally, sign language can be incorrectly assumed as gang signs, and therefore, has been banned by many departments of correction, which further isolates d/Deaf and HOH inmates from each other (Lewis, 2014).

Isolation is dangerous because it means people who are d/Deaf or HOH are alone at their most vulnerable times, like showering or sleeping. Because they cannot hear attackers approach, DHH individuals are more likely to be assaulted and harmed in general, but they also face a disproportionately higher degree of danger in the shower or while sleeping when they lose another sense: sight. As of 2014, “the percentage of [d/Deaf people] that have been raped is well above 80%-- raped or abused in some manner,” (Al Jazeera, 2013). An updated figure from Lauren Oberheim’s 2018 article reports that, in general, d/Deaf or hard of hearing people are 1.5 times more likely to be a victim of rape. While The Prison Rape Elimination Act requires accessible responses to reports of sexual assault in prison, this is not consistently adhered to, especially in cases of sexual assault of deaf prisoners, and furthermore, “deaf prisoners cannot use TTYs to call STOP RAPE hotlines or any other toll-free numbers that are available to hearing prisoners who need support and assistance with abuse” (Lewis, 2014, p. 3).

DHH might find themselves intentionally and physically unable to sleep because they are in a constant state of stress. Some interviewees talked about having to keep against the wall in order to feel vibrations of movement around them when it’s dark, or not turning their back when in the shower (Al Jazeera, 2013). Prison guard officers sometimes come up with their own solutions: “many deaf prisoners are housed in solitary confinement simply because they are deaf, where they are treated as those who are in solitary confinement for disciplinary infractions (i.e., limited/no mail, telephone, or commissary privileges, etc.)” (Lewis, 2014, p. 2). However, being sent to solitary is not always done as a solution– it can also be in retaliation to reporting discrimination or abuse from others in general housing (guards or prisoners). Either way, within both solitary confinement and housing in the general population, isolation contributes to mental

health issues from the prolonged communication and sensory deprivation which can have future impacts on their ability to socialize with anyone in any language (Lewis, 2014).

The same issue of lack of documentation about their hearing status, that prevented them from getting a speedy and fair trial, is also harmful in that they can easily get lost within the system and not be able to be located by their friends and family. They may never get it written in their records that they are deaf or HOH, and therefore, they may continually face struggles because they do not get access to the resources they need. This is especially an issue if they are moved between facilities.

Parole

The lack of access to interpreters or effective means of communication within correctional facilities is not only important to attend to because of the safety concerns for DHH, but also in terms of cost effectiveness in the US economic system. Being accessible to people who need accommodations is actually cheaper. Prisoners take classes when trying to get released on parole, so for people who are d/Deaf or HOH, the delay in providing an interpreter for that purpose is actually cost-prohibitive because prisons may not have the space, and the state has to pay more to keep them incarcerated for a longer time, while waiting to take the classes, than it would be if they were to provide interpretation services as a matter of course, and then release them on time (Al Jazeera, 2013). An example of this delay in access and how it affects both the prisoner and the state is in a news segment from Al Jazeera, wherein they highlight a story about a deaf woman who keeps getting her request for an interpreter stalled, so she has been in jail longer than her sentence requires her to be there. “It would actually save the state money to get her out of jail sooner. Having a sign language interpreter provided for her would be a good investment” (Al Jazeera, 2013). The follow up problem to achieving parole is that when they return to their communities with the label “returning citizens”, despite federal disability rights laws that stipulate equality in accessibility, they don’t often get access to accommodations with

their parole officers nor at reentry facilities. Because of that lack of accommodations, “many deaf returning citizens do not understand the terms of their release, which increases the likelihood of their being sent back to prison” (Lewis, 2014, p. 4).

Proposed Recommendations

The aforementioned problems, while pervasive, systemic, and wholly problematic, aren’t completely impervious to change. Some of the discourse community’s authors have offered ideas for systematic changes that could be made to alleviate some of these issues, or at least, make them more situational. The concern repeatedly mentioned throughout the field is the need to give more agency to the d/Deaf or HOH defendants in need of accommodations. To address the myth that DHH are a monolith, changes could be made through legislation to acknowledge and dismantle that stereotype. Additional interpreters could be supplied in cases where sign language interpretation is the most effective form of communication to better guarantee accuracy in interpretation and prevent wrongful sentencing. Proposals for DHH safety in correctional facilities could be created, as well as making plans to ensure enforcement officials’ general adherence to the protocols that are currently in place. The first three are primarily concerned with lessening the threat of wrongful sentencing that people who are d/Deaf or HOH face due to the poor quality or lack of effective communication/interpretation. The last is focused on how to protect people in prison whom the system has failed, which includes but is not limited to the many ways DHH are treated in correctional facilities, such as being simultaneously [systematically] forgotten about (e.g. their needs and rights to accommodations as well as their physical location within the correctional system) and targeted with discrimination and abuse.

In response to the first matter, that the power currently in the hands of judicial officials who can and have decided that certain methods of communication will be used whether they are fully functional and effective accommodations for the recipient or not, it has been suggested that

legislation be updated to more clearly state that DHH defendants, at least in certain instances such as cases of violent crimes, can choose their preferred method of communication (Oberheim, 2018; Brunson, 2008). This is not a wholly different or new procedure, and it still leaves room for discourse between the court officials and the individuals, if the preferred method of communication is not reasonable. If there is a clear, more balanced distribution of agency between judicial officers and the defendants, it should follow that requests for accommodations will be considered together. However, this does not ensure that people's requests will not be deemed unreasonable by the court. This paper does not mean to say that no requests are unreasonable but that the data from the field shows that requests can and have been disregarded, denied, or overridden even if they are reasonable and able to be complied with. This agency imbalance may continue even if there is more clearly established legislation, in the same way that clear legislation about correctional facilities procedures, accommodations, and housing may be ignored.

A related qualm that some find with providing an option to choose one's preferred method of communication is the ethics of allowing family members or friends to interpret for the defendant. Oberheim (2018) argues that it could be extremely vital to let a relative interpret if the defendant does not know standardized ASL or English because then the people who interact most with the defendant would be able to best understand their particular means of communication, and therefore, would be the most reliable interpreter. Brunson (2008), while in agreement with allowing defendants to choose their preferred method of communication, lists an example of how one defendant was able to have his friend interpret for him, but later took himself off the case because he had added extra context while interpreting, and generally showed a conflict of interest. Shine (2020) adamantly argues that family and friends should not be allowed to interpret because they are not familiar with legal jargon, and pose not only an ethical risk because of the potential conflict of interest, but also a logistical risk even if their family can communicate with them more effectively than a qualified interpreter. Interpreting

during trials is understood to be complex and exhausting. Interpreters, when interpreting for one person, can only interpret for 30 minutes without making mistakes that can affect the meaning (Tuck, 2010). When interpreting for multiple people (the judge, lawyers, and witnesses in the court and the defendant), this can be even more complicated and draining. For a person who has no experience interpreting in legal situations, even if they have some experience interpreting for their friend or family member that is on trial, the new context, setting, and rules can be a factor in distracting the interpreter from their task. This might also mean that there would only be one interpreter for the defendant, as opposed to a few that can switch off, and thus, which puts more stress on the sole interpreter and draws out the timeline of the trial.

In contrast with Shine (2020), Oberheim (2018) proposes a middle ground by examining an old case that set a precedent for family/friend interpreters. In the case, *United States vs. Bell*, a d/Deaf defendant's sister was allowed to interpret for him, and while there was contestation about the bias, the statements were admitted because "(1) the victim's 'unique method' of communication; (2) 'the lack of other options'; and (3) the appellant's ability to cross-examine and 'attack the testimony and interpretation'," (Oberheim, 2018, p. 184). This case shows the importance of access to interpretation that is effective. With this example, Oberheim is effectively stating that, for unique circumstances (e.g. rape victims who have minimal language skills, and situations similarly complex and delicate) utilizing friends/family members as interpreters, even if they are not qualified, can be successful, and courts should not have to go against legal precedent (Court Interpreters Act) to make sure accommodations can be readily complied with and provided because it furthers the barrier when courts make decisions based on agency over accessibility. In these cases, it would be a given that, as stipulated by 28 U.S. Code § 1827, interpreters would not act casually or familiar with the person for whom they are interpreting or any of the court participants. Additionally, because they are not bound to the same code of ethics as a certified RID interpreter, they, as any witness or key participant of the

court would, be required to take an oath, whereby if disregarded, they can be charged with perjury.

The following solution has been used in some cases where there are multiple languages in need of translation, and is also a fail-safe for any individual who is d/Deaf or HOH with minimal language skills (MLS). Certified deaf interpreters, CDIs, can occasionally be paired with a language skilled ASL interpreter to help translate because hearing interpreters may not have the history or knowledge of the range of Deaf culture, references, and variations in signs and slang that a CDI would. An example of this dual interpretation can be seen outside the courtroom when a government official is doing a press conference. The hearing ASL interpreter will listen to the speaker from a seat in the front row of the audience and interpret what is being heard into ASL to the CDI (standing in front of the camera) who receives that interpretation and translates it so that a viewer/audience member who is Deaf will understand better. A CDI knows how to interpret, translate, and transliterate. They have a well-rounded knowledge in variations of signs and American Sign Language and other visual and tactical forms of communication that d/Deaf, HOH, and Deaf-Blind use. Having a CDI doesn't guarantee that the d/Deaf person will communicate and understand better but "whether the person is eventually determined to be linguistically incompetent does not affect the rationale for providing all necessary accommodations because it is this provision that helps, in part, to inform the court about the degree of incompetence," (Tuck, 2010, pp. 931-2). This solution may never be 100% effective, however, bridging the gap and making sure that both parties are understanding each other well enough so that no unnecessary harm is done in the trial, will decrease the likelihood of wrongful sentencing.

Finally, in regards to proposals for improving accessibility and quality of life within the prison system, Lewis (2014) gives a few different suggestions as to how individuals can start change in the system. People who are d/Deaf or HOH can easily get metaphorically lost within the system if their hearing status is missing or omitted from their records, and thus, they would

not be locatable by their friends and family. It is proposed that an emphasis be put on gathering important data, such as hearing status, at the time of the arrest and shared with courts, prisons, and parole offices prior to their arrival. As a side note, Shine (2020) explains that courts do not usually know a defendant is deaf until their first court appearance, and therefore, must plan to arrange accommodations after the fact. Proceedings that require interpretation naturally take longer so this lack of preparedness elongates the already time-consuming process of waiting for a certified interpreter (demand is usually higher than supply and the person requesting accommodations, as well as the court, can be reliant on the interpreter's schedule). Lewis (2014) also suggests that civilians reach out to their congress members and ask that they request a congressional hearing about incarcerated people who are DHH, and to contact the local correctional facilities to ask what the conditions of confinement are (ex. if their building/cells meet 2010 ADA requirements at the bare minimum). This means that not only would interpreters, accessible technology, housing, and such be available for people who are disabled/people who are deaf, but that law enforcement needs to be educated and trained to be culturally competent. Lewis (2014) finishes those suggestions by emphasizing the importance of not placing d/Deaf prisoners in solitary confinement.

Conclusion

Most of the discourse community members' research overlapped and shared a lot of similar knowledge, history, and arguments. While some disagreed about the ways accessibility should move forward in the immediate future, putting more emphasis on different specific barriers within the arrest-to-parole timeline, they did encourage progress to be made because the past and current systems have had a proclivity to fail DHH defendants.

The strong divide in opinions about how to proceed and provide better accessibility for people who are d/Deaf or HOH in the judicial system could be one of the reasons there hasn't been much progress. Individual advocating for timely accommodations, effective

accommodations, and individual-tracking within the correctional system are the suggestions that seem to be the least controversial and most plausible, tangible next steps according to the field members.

My conclusion here is not in contrast with the specific solutions proposed but rather in friction because it is a dialectic. In order to truly resolve this issue, all factors of inhumane treatment and oppression must be considered. If we target problems individually, for example, solely focusing on the interpretation issues during trial proceedings, we are perpetuating the hierarchy of oppressions by selecting which is more important to address first, and we are not solving the entire issue, which is the systemic and systematic oppression that leads people into and through the judicial system. However, it is necessary to start somewhere, so, as Talila Lewis (Lewis, 2014) suggests, we need increased education and awareness on the topic in order and to effectively hold our representatives, courts, and prisons accountable to the legislation that already exists before we can realistically think about creating new legislation.

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