

20th Anniversary of the Americans with Disabilities Act

With Their Own Hands: A Community Lawyering Approach to Improving Law Enforcement Practices in the Deaf Community

Kelly McAnnany

Aditi Kotheekar Shah

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

Kelly McAnnany and Aditi Kotheekar Shah, *With Their Own Hands: A Community Lawyering Approach to Improving Law Enforcement Practices in the Deaf Community*, 45 Val. U. L. Rev. 875 (2011).

Available at: <https://scholar.valpo.edu/vulr/vol45/iss3/2>

This Article is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



Articles

WITH THEIR OWN HANDS: A COMMUNITY LAWYERING APPROACH TO IMPROVING LAW ENFORCEMENT PRACTICES IN THE DEAF COMMUNITY

Kelly McAnnany and Aditi Kotheekar Shah*

*Some deaf victims did not call 911 or want to make a complaint because they felt the police officers won't serve them right by providing interpreters. Most of the time deaf victims and police officers communicate with paper and pen. Many times the deaf victims waited a long time for an interpreter, then ended up without one. Some victims bring their friends to interpret. If there is no one interpreting and there is no effective communication, it can escalate the situation. It is dangerous for deaf victims and can cause isolation – most likely the victims will not ask for help next time. They feel helpless and re-victimized by the system. Deaf clients are less willing to report abuse because they won't be served as everyone else. Some hearing people can be insensitive and do not have (deaf) culture sensitivity. One time, a police officer from a precinct misunderstood and mistreated the deaf victim. Then this victim decided not to cooperate with a criminal case. She never came back.***

* Kelly McAnnany and Aditi Kotheekar Shah are attorneys in the Disability Law Center at New York Lawyers for the Public Interest, Inc. ("NYLPI") (www.nylpi.org). We thank our friends and community partners who inspired us to write this Article – those who embody the principles of community lawyering we seek to advance through this Article, and who have joined us in forming a coalition ("Coalition") (discussed further in Part VI.A) dedicated to improving the interactions between D/deaf individuals and the New York City Police Department ("NYPD"). We also thank everyone who helped in the development of this Article. Specifically, we thank Megan Cunningham, Darren Guild, Hayley Koteen, and Kate Richardson for their outstanding research and editing assistance; Nisha Agarwal, Ryan Borgen, Miranda Massie, Roshan Shah, and members of our Coalition for their valuable feedback on earlier drafts; the editors of the *Valparaiso University Law Review* for their helpful assistance in editing; and NYLPI for its support.

** These are the words of a Deaf advocate in New York City who works with D/deaf victims on a regular basis. This advocate is part of our Coalition, which we describe in this Article. We have printed this advocate's words here anonymously with her permission.

I. INTRODUCTION

Approximately twenty million people in the United States, or 8.6% of the total U.S. population three years of age and older, are deaf or hard of hearing.¹ Notwithstanding this significant number, police precincts nationwide continue to exhibit a significant lack of sensitivity towards D/deaf² individuals. D/deaf suspects and victims alike suffer great prejudice from their inability to effectively communicate with police officers. This prejudice ranges from an inability to report crimes to wrongful arrests based on police misperceptions of deafness.

Although lawyers have challenged these practices to some degree, their advocacy efforts to date have largely utilized traditional legal advocacy tools on behalf of individual clients, not larger impact litigation cases. By “traditional legal advocacy,” we mean advocacy funneled through established legal processes and claims, such as litigation or administrative complaints, in which lawyers speak for their clients and legal advocacy is unaccompanied by community organizing or goals of client empowerment. Although this type of advocacy benefits individual D/deaf plaintiffs or defendants, it is limited in its potential to effect widespread, lasting change for the Deaf community. Even traditional legal advocacy in the form of impact litigation may leave a community no more prepared to assert its rights in the next battle for justice. We argue that to eliminate injustice and make social progress, we, as lawyers, must strive to connect legal action to communities on the ground.

In contrast to traditional legal advocacy, “community lawyering” offers a multi-faceted approach to achieve comprehensive, sustainable

¹ Judith Holt, Sue Hotto & Kevin Cole, *Demographic Aspects of Hearing Impairment: Questions and Answers*, GALLAUDET RESEARCH INST. (1994), <http://research.gallaudet.edu/Demographics/factsheet.php#Q1>. More specifically:

About 2 to 4 of every 1,000 people in the United States are “functionally deaf,” though more than half became deaf relatively late in life; fewer than 1 out of every 1,000 people in the United States became deaf before 18 years of age.

However, if people with a severe hearing impairment are included with those who are deaf, then the number is 4 to 10 times higher. That is, anywhere from 9 to 22 out of every 1,000 people have a severe hearing impairment or are deaf.

Ross E. Mitchell, *Can You Tell Me How Many Deaf People There Are in the United States?*, GALLAUDET RESEARCH INST. (Feb. 15, 2005), <http://research.gallaudet.edu/Demographics/deaf-US.php>. “[F]unctionally deaf” describes “those [people] identified as either unable to hear normal conversation at all, even with the use of a hearing aid, or as deaf.” *Id.*

² For purposes of this Article, our references to “D/deaf” individuals encompass both deaf and hard of hearing individuals. “D/deaf” also includes both deaf individuals who associate with “Deaf culture,” as well as those who do not. *See infra* note 3.

reform at the direction of the stakeholders in the community. Although much has been written about community lawyering in the context of economic development and poverty lawyering, we propose that the community lawyering model also be applied to advocacy on behalf of the Deaf community,³ a group with a rich history of organizing against oppression.⁴ In particular, we argue that the community lawyering model is a natural fit for legal advocacy seeking to improve police practices towards D/deaf individuals. Our hope is for this Article to begin a dialogue between proponents of community lawyering and attorneys who advocate for the rights of D/deaf individuals.

In Part II of this Article, we describe the nature of the discrimination we seek to address—in particular, the barriers and maltreatment that D/deaf individuals, both suspects and victims of crime, face in their interactions with police. In Part III, we present an overview of the community lawyering model's origins, evolution, and basic tenets. In Part IV, we provide a brief overview of the statutes and regulations that govern police departments' interactions with D/deaf individuals. We also illustrate how prior legal advocacy in this area reflects the limitations that first compelled practitioners to develop the community lawyering model. In Part V, we detail why the community lawyering

³ Deaf spelled with a capital "D" refers to those individuals who are deaf and who also identify with the unique culture surrounding the use of American Sign Language ("ASL"). Those individuals who self-refer as "deaf" with a lower-case "d" do not associate with such a culture. Richard J. Senghas & Leila Monaghan, *Signs of Their Times: Deaf Communities and the Culture of Language*, 31 ANN. REV. ANTHROPOLOGY 69, 71-72 (2002). There is a significant distinction between Deaf and deaf:

Separating audiological issues (that is, measurable hearing levels—deaf and hearing) from those of socialization, acculturation, and identity (that is, Deaf as sociological or cultural reference) makes otherwise confusing issues far more understandable. Those who lose their hearing late in life, for example, might be considered deaf but not Deaf.

Id.

Significantly, the Deaf community has rejected the assertion that deafness is a disability:

To the surprise and bewilderment of outsiders, [the Deaf community's] message is utterly contrary to the wisdom of centuries: Deaf people, far from groaning under a heavy yoke, are not handicapped at all. Deafness is not a disability. Instead, many deaf people now proclaim, they are a subculture like any other. They are simply a linguistic minority (speaking American Sign Language) and are no more in need of a cure for their condition than are Haitians or Hispanics.

Edward Dolnick, *Deafness as a Culture*, ATLANTIC MONTHLY, Sept. 1993, at 37. See *infra* note 163 for a further discussion of the Deaf community's disassociation with the term "disability," along with the legal complexity this creates.

⁴ For a discussion of the "Deaf community" and its history of struggle against oppression, see *infra* Part V.

878 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 45

model is a particularly good model for advocacy with the Deaf community in light of its history and culture. Finally, in Part VI, we discuss our nascent use of the community lawyering model to address the barriers between the police and D/deaf individuals in New York City. Specifically, we describe the development of our Coalition and provide examples of how, even in its very early stages, the community lawyering model has succeeded.

II. D/DEAF INDIVIDUALS' INTERACTIONS WITH LAW ENFORCEMENT

*Every time I see the police, I get chills. If something happens to my mom, who do I call? I can't call the cops.*⁵

D/deaf suspects and victims of crime face significant barriers in their interactions with the police. These barriers can have a detrimental effect, not only on D/deaf individuals, but also on law enforcement efforts to prosecute cases.

A. *D/deaf Suspects: Arrest and Interrogation*

From the initial encounter with police through interrogation and detention, D/deaf suspects are at risk of suffering physical injury and constitutional violations due to the manner in which police officers often misperceive their actions or fail to ensure effective communication. When police officers fail to recognize that an individual is D/deaf, their response can trigger a chain of negative events. Police officers may mistreat D/deaf individuals because of their unfamiliarity with, or misconceptions about, deafness.⁶ For example, officers may mistake D/deaf individuals' actions or use of sign language for aggressive behavior⁷ or gang signs.⁸ In other situations, if a D/deaf individual tries

⁵ Julie Scharper, *Eroding a Wall Between Police, the Deaf*, BALT. SUN, Mar. 9, 2009, at 1A.

⁶ See Jordan Smith, *Tone Deaf: Deaf Austinites Say Police Can't Seem to Listen to Reason*, AUSTIN CHRON., Dec. 3, 2010, <http://www.austinchronicle.com/news/2010-12-03/tonedeaf/> (describing one recent encounter as well as discussing the national problem of poor police practices in arresting D/deaf individuals).

⁷ See, e.g., Scharper, *supra* note 5. In one instance, a deaf man who called the police to report that his mother's home had been burglarized ended up being arrested upon being "accused of punching a police officer in the chest. But a paramedic who was there wrote in a report that [the man], who is deaf and cannot speak clearly, simply pressed a note to the officer's chest and was then 'violently wrestled to the ground' by the officer." *Id.* The deaf man in this situation described how this incident left him with a fear of police: "Every time I see the police, I get chills. If something happens to my mom, who do I call? I can't call the cops." *Id.*

Notably, in emergency situations, "[a]s people grow more emotional, they sign with larger and more dramatic gestures." *Id.* However, this is not necessarily an indication of aggression, but rather is the equivalent to hearing people raising their voices when excited

to reach for a pen and paper to pass notes with a police officer,⁹ or a printed card documenting that he or she is deaf,¹⁰ officers are prone to assume the person is reaching for a weapon and respond accordingly.¹¹ Even when D/deaf individuals try to convey that they are deaf, police often do not understand or believe them, instead labeling them as uncooperative,¹² unintelligent,¹³ or mentally ill.¹⁴ The following case is illustrative:

or upset. *Id.*

⁸ Burt Herman, *Hearing Impaired Present Special Problems, Opportunities for Police*, MIAMI HERALD, Dec. 14, 1997, at 5B (“Ash, who is deaf, was scared and confused and couldn’t understand police when they arrived. And the officers, thinking Ash’s American Sign Language gestures were gang signs, at first considered him a suspect.”). Ironically, in this incident, once “an officer adept at sign language arrived . . . Ash became one of the best police witnesses in the shootings in which one person was killed and three were wounded. With the help of Ash and other deaf witnesses, an arrest was made seven months later.” *Id.*

⁹ Aviva Twersky-Glasner, *Miranda Warnings and Deaf Suspects: It is Not Just a Matter of Translation*, 42 CRIM. L. BULL. 593 (2006). For instance,

during a traffic stop in Lancaster, Pennsylvania, an officer, unaware the driver was deaf, started to talk as the driver reached toward the glove compartment for a pencil and paper to communicate he was deaf. The police officer thought the person was going for a gun, so he grabbed the person and pulled them [sic] from the car and pinned him down.

Id. at 601 (footnote omitted).

¹⁰ Herman, *supra* note 8 (describing how a deaf individual who “was reaching for a card that would have explained he was deaf” was fatally shot by police because police mistook his action as a threat of force).

¹¹ Notably, these actions taken by police officers are consistent with the training they receive regarding use of force, including deadly force. However, these examples illustrate the tension between police discretion in the use of force and the disadvantages many D/deaf individuals face in these high pressure situations because of communication barriers and police officers’ lack of awareness about deafness.

¹² Scharper, *supra* note 5 (describing how police officers have difficulty in recognizing deafness and in believing someone is truly deaf rather than uncooperative or unintelligent); Herman, *supra* note 8 (explaining how “[t]he biggest problem [deaf individuals] encounter is that a lot of officers don’t believe they are deaf” and how “[t]he police think ‘that they’re playing a game or think that they’re being uncooperative’”); *see also* McCray v. City of Dothan, 169 F. Supp. 2d 1260, 1276 (M.D. Ala. 2001) (presenting a situation in which the deaf plaintiff/arrestee, McCray, was assaulted by a police officer, Woodruff, because McCray was misperceived to have been refusing to cooperate). “McCray told Woodruff that he wanted an interpreter to assist him in answering questions. However, [Woodruff] perceived that McCray was refusing to cooperate with her efforts to obtain his name and address.” *Id.* Because of this misperception, “McCray was physically assaulted by the police defendants, forcibly removed from the restaurant, and arrested.” *Id.*

¹³ Scharper, *supra* note 5. As described by one deaf advocate,

When police see someone who is blind, they know he cannot see. When they see someone in a wheelchair, they know he cannot walk. But when they see someone who is deaf or hard of hearing, the assumption is that he is not trying hard enough to hear or that he’s unintelligent.

[T]he officers attempted to speak with Charles Lewis. Sneed and Leedy tried to explain to the officers that Charles was deaf and that the best way to communicate with him was to write down questions on a piece of paper. . . . None of the officers attempted to communicate with Charles Lewis on paper, even though at least one of the officers should have known that he was deaf. . . .

Upon entering the home, Defendants Truitt and McClure allegedly physically assaulted Charles Lewis. They pulled him to the floor by his hair, handcuffed him, placed him under arrest, and proceeded to kick and hit him. Charles suffered bruises, contusions, and severe internal injuries. This force was used on Charles even though Sneed and Leedy warned the officers repeatedly that Charles was deaf and could not hear their instructions. Defendant Truitt allegedly used abusive and inappropriate language to convey her belief that they were lying and that Charles really did know what she was saying.¹⁵

Notably, when officers use force in these circumstances, they may aggravate existing communication difficulties.¹⁶ Given the way in which D/deaf individuals rely on their bodies to communicate, even standard police procedures upon arrest can exacerbate communication barriers. For instance, when D/deaf individuals' hands are cuffed behind their backs, they are no longer able to use their hands for either of two primary ways of communicating—signing or writing.¹⁷ Although

Id.

¹⁴ Through our work with community advocates in New York City, we have learned of instances in which police officers mistook deafness as mental illness. Courts are similarly at risk of mistaking deafness for mental illness. See, e.g., 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, 164 (1994) ("A New Mexico deaf man, without a mental illness of any kind, was determined to be incompetent to stand trial because of his limited language skills and was banished to the state mental hospital until he was 'cured.'").

¹⁵ *Lewis v. Truitt*, 960 F. Supp. 175, 176 (S.D. Ind. 1997).

¹⁶ See Scharper, *supra* note 5 (quoting a deaf man who, after suffering violent police force when an officer disbelieved he was deaf, stated that "[w]hen the officer was pushing me, I couldn't breathe" and "I kept trying to mouth the word 'air, air, air' over and over again").

¹⁷ See Scott Sandlin, *APD, Jail Change Handling of Deaf*, ALBUQUERQUE J. (N.M.), Sept. 2, 1995, at A1 ("Officers, who thought he was a patron being ejected from a nearby restaurant for disturbing the peace, forced him to the ground and handcuffed him. That rendered him unable to communicate using American Sign Language, his primary means of communication, even though he tried to let the officers know he couldn't hear and etched

cuffing hands behind the back is a procedure grounded in legitimate safety concerns for the officers, its incidental effect is to cause a further breakdown in communication.

Beyond initial confrontation and arrest, the inability of D/deaf suspects to understand the *Miranda*¹⁸ warning or their conversations with police officers may lay the groundwork for constitutional defects in criminal cases. Police often rely on lip-reading when questioning D/deaf individuals or administering the *Miranda* warning.¹⁹ However, lip-reading can be highly ineffective for many D/deaf individuals.²⁰ According to several sources, the average D/deaf individual comprehends less than half of what he or she lip-reads.²¹ Exchanging written notes raises similar concerns about miscommunication, particularly between a police officer and a suspect. For instance, a written *Miranda* warning is frequently insufficient because in order to fully understand the written form, an individual must have at least a middle-school level of proficiency in English; approximately “60% of

the initials ADA into the dirt near his bus bench.”).

¹⁸ See generally *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁹ McCay Vernon, Lawrence J. Raifman, & Sheldon F. Greenberg, *The Miranda Warnings and the Deaf Suspect*, 14 BEHAV. SCI. & L. 121, 123 (1996).

²⁰ *Id.* at 122–23; Dolnick, *supra* note 3, at 39.

²¹ DEP’T OF JUSTICE, CIVIL RIGHTS DIV., COMMUNICATING WITH PEOPLE WHO ARE DEAF OR HARD OF HEARING: ADA GUIDE FOR LAW ENFORCEMENT OFFICERS (2006), available at <http://www.ada.gov/lawenfcomm.htm> [hereinafter DEP’T OF JUSTICE, COMMUNICATING WITH PEOPLE] (“[O]nly about one third of spoken words can be understood by speech reading.”); Elizabeth Eckhardt & Jeane Anastas, *Research Methods with Disabled Populations*, J. SOC. WORK DISABILITY & REHABILITATION, April 2007, at 241 (“[O]n average, the deaf adult will not understand more than 26%–40% of one-to-one conversation through lip-reading.” (citation omitted)); Vernon et al., *supra* note 19, at 123 (“[T]he average deaf lipreader comprehends only about 5% of what is spoken, even when conditions such as lighting and distance from the speaker are ideal and both parties are facing each other.”). According to some sources, even the best lip-readers understand only about 25%. Dolnick, *supra* note 3; Vernon et al., *supra* note 19, at 123.

Other sources indicate the possibility of a higher level of comprehension, though a range of factors come into play here. See, e.g., Edward T. Auer Jr., *Investigating Speechreading and Deafness*, 21 J. AM. ACAD. AUDIOLOGY 163, 163 (2010) (“Individual speechreading ability . . . is known to vary between 0 and 90% words correct in sentences. At a coarse level of description, spoken language understanding entails the encoding of the physical stimulus, followed by word recognition, and finally decoding of the intended message. It is likely that variations in one or more of these component perceptual and cognitive processes underlie individual differences in speechreading ability.” (citations omitted)). Among the factors driving these variations are the visual similarity on the lips between many different letters and sounds, “the number of words perceptually similar to a given target word in the perceiver’s mental lexicon,” and an individual’s own vocabulary. *Id.* at 164–66. These factors differ among D/deaf individuals depending on variables such as when in life the individuals became D/deaf and their level and type of education, among others. *Id.* at 165–66.

882 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 45]

deaf individuals do not read well enough to comprehend the Miranda Warnings.”²² The average D/deaf sixteen-year-old reads at an eight-year-old level.²³ Even among D/deaf students who have finished schooling, three-fourths are unable to read a newspaper; English is like a foreign language to them.²⁴ For D/deaf individuals who sign, sign language is typically the most appropriate method to communicate the *Miranda* warning.²⁵ However, not just any interpreter or translation will suffice; the *Miranda* warning requires particular skill to interpret into sign language.²⁶ In fact, studies show that interpreters with beginner or average skills are unable to fully interpret the *Miranda* warning.²⁷

When police officers do not successfully convey the *Miranda* warning to, or otherwise effectively communicate with, D/deaf suspects, serious consequences may ensue.²⁸ For example, D/deaf suspects may be

²² Vernon et al., *supra* note 19, at 122–23 (noting the difference between deaf individuals and hearing individuals who read below a sixth-grade level but can understand the *Miranda* warning when it is read aloud; deaf defendants clearly do not have this option and must instead rely on sign language).

²³ Dolnick, *supra* note 3, at 40; see also *Literacy and Deaf Students*, GALLAUDET U. (Oct. 30, 2003), <http://research.gallaudet.edu/Literacy/#research> (Oct. 30, 2003) (“For the 17-year-olds and the 18-year-olds in the deaf and hard of hearing student norming sample, the median Reading Comprehension subtest score corresponds to about a 4.0 grade level for hearing students. That means that half of the deaf and hard of hearing students at that age scored above the typical hearing student at the beginning of fourth grade, and half scored below. The ‘median’ is the 50th percentile, and is one of the ways to express an average, or typical, score.”).

²⁴ Dolnick, *supra* note 3, at 40.

²⁵ Vernon et al., *supra* note 19, at 123.

²⁶ Twersky-Glasner, *supra* note 9, 598–99 (summarizing a study testing deaf individuals’ ability to understand the *Miranda* warning signed by various sign language interpreters with varying degrees of experience); Vernon et al., *supra* note 19, at 123–24 (explaining the reasons why the *Miranda* warning is so difficult to interpret into ASL, including the absence of a written form of ASL; the inability to directly convert many English words into signs; and the limitations of finger-spelling to convey such words to D/deaf individuals who are illiterate).

²⁷ Twersky-Glasner, *supra* note 9, at 598–99. Research on the performance of sign language interpreters in conveying the legal rights contained in the *Miranda* warnings . . . found that deaf subjects were able to understand only one-in-twenty words signed by beginning interpreters—those with a year of experience. Those who had completed an associate’s degree in interpreting did much better, but still conveyed little grammar—which left the meaning of *Miranda* muddied. Only interpreters with ten or more years of training were able to get across the nuances inherent in the *Miranda* warnings.

Id.

²⁸ Several states have enacted statutes addressing this concern. See, e.g., N.D. CENT. CODE § 28-33-02(2) (2006) (“Immediately after a deaf person is arrested for any alleged violation of criminal law and penalty may include imprisonment or a fine in excess of one hundred dollars, or both, an interpreter must be appointed. No attempt to interrogate or

detained for long periods of time without an interpreter, sometimes unaware of their rights.²⁹ Excessive detention might result from something as simple as a police officer's failure to provide a D/deaf suspect with the means for a phone call.³⁰ D/deaf individuals may also incur criminal penalties without any knowledge of their constitutional rights, as they might be subjected to interrogation and plea bargaining without the means to effectively communicate.³¹

Significantly, D/deaf suspects and defendants are not the only ones who suffer adverse results from ineffective communication. Police and prosecutors risk having evidence suppressed or convictions otherwise challenged on constitutional grounds if the D/deaf defendant did not actually understand a particular phase of the prosecution.³²

take a statement from such person may be permitted until a qualified interpreter is appointed for the deaf person and then only through the use of the interpreter."); OKLA. STAT. tit. 63, § 2410(A) (Supp. 2 2007) ("In the event a person who is deaf or hard-of-hearing is arrested and taken into custody for any alleged violation of a criminal law of this state or for civil contempt, a qualified legal interpreter shall be obtained . . . who meet[s] the qualifications . . . in order to communicate to the person that person's legal rights and to interview and interrogate properly. No statement taken from such deaf or hard-of-hearing person before a qualified legal interpreter is present shall be admissible in court. The individual who is deaf or hard-of-hearing shall determine which type of qualified legal interpreter best fits the needs of the individual."); TENN. CODE ANN. § 24-1-211(3) (Supp. 2010) (similar); ARIZ. REV. STAT. ANN. § 12-242(C) (2003) (similar).

²⁹ See, e.g., *McAlister*, *supra* note 14 ("A deaf man arrested for a misdemeanor, unaware of his right to counsel and his right to post bail, spent two days in an Oklahoma jail and was arraigned without being given an interpreter.").

³⁰ See *Hanson v. Sangamon Cnty. Sheriff's Dep't*, 991 F. Supp. 1059, 1061, 1063 (C.D. Ill. 1998) (denying police department's motion to dismiss in a case where the police department did not provide deaf arrestee with effective means to make a phone call, and finding that "[a]lthough the Sheriff's Department presented other arrestees with [the opportunity for a phone call], it denied [the deaf individual] the same opportunities even though he could have participated in them with the assistance of a TDD, a TDD directory, and/or a person qualified in sign language").

³¹ See *McAlister*, *supra* note 14, at 163–64. For example, "[a] prelingually deaf man with an English reading comprehension level of grade 2.8 was interrogated through notes written in English, without a sign language interpreter or advice of counsel, and convicted on the basis of a confession that was later ruled involuntary." *Id.* at 164 (footnotes omitted). In another instance, "[a]n Arizona deaf man with minimal language skills was permitted to enter a guilty plea when in fact the man had no understanding of his constitutional rights or of the consequences of his guilty plea." *Id.* (footnote omitted).

³² See *State v. Jenkins*, 81 S.W.3d 252, 265–68 (Tenn. Crim. App. 2002) (analyzing in detail the interpretation given to the deaf defendant of the *Miranda* warning; concluding that because it omitted several key components, it was insufficient to inform the defendant of his rights; and upholding granting of defendant's motion to suppress his statement to police); see also *State v. Mason*, 633 P.2d 820, 821 (Or. Ct. App. 1981) (upholding trial court's decision to suppress statement made by deaf defendant because "none of the interpreters used by the police was able to communicate accurately in defendant's own language the concepts contained in *Miranda* warnings and [the] defendant did not understand them");

B. *D/deaf Victims: Reporting Crimes*

D/deaf victims of crime who attempt to seek assistance from the police also suffer prejudice from police officers' failure to provide for effective communication. This prejudice ranges from inability to file police reports to wrongful arrest based on officers' misunderstanding, all of which ultimately influences D/deaf individuals' willingness to contact the police at all.

D/deaf victims of crime face great obstacles in filing police reports.³³ For example, D/deaf victims of physical or sexual abuse who go to police precincts are often forced to exchange written notes in order to file reports of domestic violence,³⁴ despite their need for a sign language interpreter.³⁵ D/deaf victims of crime also describe being mocked by police officers for their inability to fully articulate or speak when trying to report a crime.³⁶ In other situations, police inappropriately rely upon family members—including children or the perpetrator—to act as interpreters, despite their obvious lack of qualification or neutrality.³⁷

Vernon et al., *supra* note 19, at 125–27 (describing three separate cases in which ineffective communication with police significantly affected the prosecution's efforts).

³³ See, e.g., Press Release, Dep't. of Justice, Rochester Police Formalize Sign-Language Interpreter Policy: Settlement is the First of its Kind in the State of New York (Nov. 7, 1995), available at http://www.justice.gov/opa/pr/Pre_96/November95/571.txt.html (describing settlement between the Department of Justice and Rochester Police Department, resulting from a DOJ complaint in which a deaf woman who tried to "report an assault . . . claimed that she was unable to tell police about the incident without the services of a sign language interpreter, which the police department did not provide").

³⁴ Julie Rems-Smario, *Domestic Violence: We Can't Ignore It Anymore*, NAD MAG., Mar./Apr. 2007, at 17–18, available at <http://www.deaf-hope.org/information/DeafHope%20NAD%20article.pdf>. Rems-Smario explains the experience of a D/deaf survivor of domestic violence:

[D]omestic violence experienced by the deaf community is generally the same. What sets deaf survivors apart from the hearing domestic violence experience is the potential abuse of hearing privilege. Many survivors become frustrated communicating with police officers. Officers often don't bring interpreters for interviews. Instead they rely on writing notes or on the hearing batterers to understand deaf survivors. This is an all too common example of abuse of hearing privilege causing deaf survivors to fall through the cracks of our system.

Id.

³⁵ See *supra* notes 20–25 and accompanying text.

³⁶ Through our conversations with community organizations and advocates in New York City, we have learned of instances of police officers mocking D/deaf victims.

³⁷ Rems-Smario, *supra* note 34.

As a result of these barriers, D/deaf survivors of domestic violence³⁸ may be unable to obtain orders of protection and may be placed in further danger. Their inability to effectively communicate with a police officer is likely to result in an inaccurate statement and correspondingly inaccurate police report.³⁹ Given the reliance on police reports as the “objective” account of an incident, misunderstandings and inconsistencies can present fatal problems of credibility when it comes to seeking an order of protection or pressing charges against an abuser.⁴⁰ Therefore, the failure of a police department to promptly provide for effective communication can mean that the survivor of domestic violence must return to an abusive environment and risk further endangerment.⁴¹

In the absence of an interpreter, D/deaf individuals who try to report crimes may also be arrested because of police officers’ misunderstanding of the situation, particularly where police rely on the hearing attacker’s version of the story. For example, the following case describes a D/deaf survivor who tried to report domestic violence and was instead wrongfully arrested as the alleged abuser:

Payton [the deaf victim] said she twice called 911 with her TTY device to report what she described in her claim as a domestic assault by her husband.

. . . .

Her husband told the deputies Payton had attacked him, Payton said, and he showed them scratches on his body. Payton said she inflicted the scratches while trying to keep her husband from pulling her hair and hitting her.

Payton . . . said she asked for a certified interpreter, but none was provided. She was unable to write what had happened to her because deaf people use unique syntax and grammar that can’t be readily understood by others.

³⁸ We use the term “survivor of domestic violence” rather than “victim of domestic violence” in line with the movement towards emphasizing the strength of the survivor to overcome the domestic violence.

³⁹ We have learned of such obstacles from several advocates with whom we work in New York City, who assist D/deaf survivors of domestic violence seeking to press charges or obtain orders of protection. They describe not only the frustration of their clients, but also the obstacles they themselves face in their advocacy due to supposed inconsistencies between their clients’ stories and the stories recorded in the police report.

See supra notes 20–25 and accompanying text for a discussion of the common difficulty with English among D/deaf individuals.

⁴⁰ *See supra* note 39.

⁴¹ *See supra* note 39.

886 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 45]

Arrested and jailed for 10 hours, Payton was never charged. But her former husband also wasn't prosecuted.⁴²

Significantly, D/deaf men and women are statistically more likely to experience violence, including sexual abuse, than their hearing counterparts⁴³ and therefore are more likely to need the protective services of law enforcement. Frighteningly, however, if a police officer insufficiently responds to a D/deaf victim's attempt to report abuse, particularly by failing to ensure effective communication, the individual experiences another layer of victimization.⁴⁴ This double-victimization reduces the chances that the individual will come forward in the future to report abuse.⁴⁵

D/deaf individuals' unequal access to law enforcement protection calls for systemic change and social reform. Traditional legal advocacy⁴⁶ does not fully address the barriers that perpetuate this injustice. In contrast, the community lawyering model, largely developed as a response to social justice issues for which traditional legal advocacy methods proved inadequate, provides a viable option to create comprehensive, sustainable change.

⁴² Steve Miletich, *Deaf Women Allege Abuses: Police Didn't Follow Law, 5 Say*, SEATTLE POST-INTELLIGENCER, Jan. 15, 1997, at B1 (describing the circumstances giving rise to lawsuits filed by "five deaf and hearing-impaired women [who] alleged they were falsely arrested . . . for domestic abuse because local police officers didn't find interpreters for them"). In one case, a deaf woman was falsely arrested for domestic assault because of the police department's failure to provide an interpreter: "[She] spent six hours in custody. When she asked for an interpreter at the . . . County Jail, she said, a guard handed her a note that read, 'Ha, ha, ha, we'll have to do the best we can.' . . . The case against [this woman] was dismissed." *Id.*

⁴³ JENNIFER OBINNA ET AL., COUNCIL ON CRIME AND JUSTICE, UNDERSTANDING THE NEEDS OF THE VICTIMS OF SEXUAL ASSAULT IN THE DEAF COMMUNITY: A NEEDS ASSESSMENT AND AUDIT 11 (2005).

Deaf individuals may be more likely to have a history of childhood sexual abuse than their hearing counterparts. An often quoted 1987 study, one of the few of its type, indicated the level of sexual victimization prior to adulthood to be 50% of all Deaf individuals as compared to 25% of hearing females and 10% of hearing males.

Id. (citing P.M. Sullivan, M. Vernon & L. Scanlan, *Sexual Abuse of Deaf Youth*, 32 AM. ANNALS DEAF 256, 262 (1987)).

⁴⁴ *Id.* at 8.

⁴⁵ *Id.*; cf. Lewis Merkin & Marilyn J. Smith, *A Community Based Model Providing Services for Deaf and Deaf-Blind Victims of Sexual Assault and Domestic Violence*, 13 SEXUALITY & DISABILITY 97 (1995) (explaining the need for a sexual assault and domestic violence program specially designed to serve Deaf and Deaf-Blind victims, and describing the nature and success of one such Deaf-run program, Abused Deaf Women's Advocacy Services).

⁴⁶ We use "traditional legal advocacy" as defined above. See *supra* Part I.

III. CONTOURS OF COMMUNITY LAWYERING

The literary landscape of community lawyering is flooded with examples of campaigns involving tenant, welfare, environmental, and worker rights, among others. Writing and discourse on the community lawyering model has historically focused on its use in the labor context or in geographically located “communities,”⁴⁷ in particular to combat poverty or foster economic development.⁴⁸ The application of the community lawyering model has evolved to include more identity-based advocacy, such as campaigns to further the right to language access services in immigrant communities.⁴⁹ Notwithstanding this trend, articles examining the application of community lawyering to the Deaf

⁴⁷ See, e.g., Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 *CLINICAL L. REV.* 333, 334 (2009); Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 *CLINICAL L. REV.* 147, 148–49 (2000); Karen Tokarz et al., *Conversations on “Community Lawyering”: The Newest (Oldest) Wave in Clinical Legal Education*, 28 *WASH. U. J.L. & POL’Y* 359, 363–65 (2008).

⁴⁸ See, e.g., Janine Sisak, *If the Shoe Doesn’t Fit . . . Reformulating Rebellious Lawyering to Encompass Community Group Representation*, 25 *FORDHAM URB. L.J.* 873, 880–81 (1998). To illustrate,

New York Lawyers for the Public Interest has used similar organizing activities to fight environmental injustice in the Red Hook part of Brooklyn. These lawyers build consensus and coalitions among diverse community groups, the culmination of which is a large lawsuit aimed at blocking the location of additional waste stations in that community.

Both [New York Lawyers for the Public Interest and the Workplace Project] seem to fit the vision of rebellious lawyering or collaborative practice. They formulate alternative strategies by combining litigation with community organizing. They involve lay advocates and community members in fueling their campaign. Their strength lies in activism, whether in the form of a rally to raise awareness or a strike to force a pay raise. Although litigation serves an important role, the litigation is focused on achieving community-determined, long-term goals rather than short-term victories for individuals. Thus, the impact litigation is empowering because it naturally evolves from community-determined priorities.

Id. See also Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 *UCLA L. REV.* 443, 516 (2001) (reviewing the evolution of the law and organizing movement and identifying contexts in which the law and organizing model has been successfully applied). “Specifically, in the areas of workers’ rights, environmental justice, and community development, the combination of organizing techniques with more traditional forms of legal advocacy has led to the development of strategies that have effectively redressed problems faced by low-income constituencies.” *Id.*

⁴⁹ See, e.g., Rose Cuison Villazor, *Community Lawyering: An Approach to Addressing Inequalities in Access to Health Care for Poor, of Color and Immigrant Communities*, 8 *N.Y.U. J. LEGIS. & PUB. POL’Y* 35 (2004).

888 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 45]

or disability communities are notably absent.⁵⁰ Disability rights practitioners' reliance on traditional legal advocacy—perhaps a product of strong anti-discrimination laws like the Americans with Disabilities Act (“ADA”)⁵¹—leaves the community lawyering framework ripe for exploration in the Deaf and disability communities. In this Article, we take the first step forward by proposing that the community lawyering model is an ideal approach for improving police interactions with D/deaf individuals.⁵²

In order to analyze the community lawyering model's application to the Deaf community, it is necessary to provide a brief overview of the model's evolution and what we believe are its basic principles. Our intention in this section is not to further the debate regarding the various strains and permutations of community lawyering—others have written entire articles exploring these nuances.⁵³ Rather, we seek to distill the

⁵⁰ In her article, *Disability, Equality and Identity*, Laura Rovner examines the failure of the disability rights movement to lay the social foundation for passage of the Americans with Disabilities Act. Laura L. Rovner, *Disability, Equality and Identity*, 55 ALA. L. REV. 1043 (2004). She argues that as a result, judges, as well as the public, have adopted an unsympathetic—mostly medical model—lens through which they view the legitimacy of the legal rights of people with disabilities. *Id.* at 1092. Rovner calls on disability rights lawyers to embrace a “collaborative approach” to lawyering in order to change the status quo and “develop a compelling moral vision (or visions) to overcome the perception of disability as pathology.” *Id.* at 1095.

⁵¹ 42 U.S.C. §§ 12101–12213 (2006 & Supp. II 2008). See *infra* Part IV.A for an overview of the relevant ADA protections regarding D/deaf individuals.

⁵² As discussed *infra* at Part V.A, the Deaf community does not identify as “disabled,” preferring instead to unify along lines of language and culture. Although beyond the scope of this Article, disability is another unifying characteristic that provides a ripe opportunity for community lawyering. See, e.g., JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT 128 (1998). Charlton discusses the concepts of self-help and self-determination:

Self-help and self-determination . . . are simple and clear-cut. They require people with disabilities to control all aspects of their collective experience. They simply mean: we are able to take responsibility for our own lives, and we do not need or want you to manage our affairs; we best understand what is best for us; we demand control of our own organizations and programs and influence over the government funding, public policy, and economic enterprises that directly affect us. . . . Self-help has been a crucial movement principle for twenty years. It recognizes not only the innate ability of people with disabilities to control their lives but also the innate inability of able-bodied people, regardless of fancy credentials and awards, to understand the disability experience.

Id.

⁵³ For a helpful bibliography of “law and organizing” literature, see Loretta Price & Melinda Davis, *Seeds of Change: A Bibliographic Introduction to Law and Organizing*, 26 N.Y.U. REV. L. & SOC. CHANGE 615 (2000–2001). For another list of numerous articles exploring the community lawyering model, see Marshall, *supra* note 47, at 147 n.3. See also E. Tammy

most fundamental elements of the model in order to apply them to the specific case of the Deaf community.

A. *Evolution of the Community Lawyering Model*

*The primary motor of social change is social struggle, not legal struggle.*⁵⁴

The community lawyering model—also known as “law and organizing,” “rebellious lawyering,” and “collaborative lawyering,” among other names—has been in a constant state of evolution since the middle of the twentieth century. A departure from the typical positioning of lawyers in the civil rights struggle, community lawyering began, and has continued for the last several decades, as a response to the limitations of traditional models of impact litigation and legal services. These limitations persist in the current field of public interest lawyering.

1. *Response to Early Civil Rights Impact Litigation*

In the 1950s and 1960s, progressive lawyers used large-scale class action lawsuits to challenge racist segregation laws.⁵⁵ The 1970s saw the use of systemic litigation to reform the welfare system⁵⁶ and oppose the warehousing of institutionalized populations in psychiatric institutions and prisons.⁵⁷ Litigation was the focal point of these efforts to combat injustice and effect social change.⁵⁸ Although this era of impact litigation had its successes,⁵⁹ critics of this model complained that the transformative potential of litigation-centered lawyering was inherently

Kim, *Lawyers as Resource Allies in Workers' Struggles for Social Change*, 13 N.Y. CITY L. REV. 213 (2009); Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007); Daniel S. Shah, *Lawyering for Empowerment: Community Development and Social Change*, 6 CLINICAL L. REV. 217 (1999).

⁵⁴ Eduardo R.C. Capulong, *Client Activism in Progressive Lawyering Theory*, 16 CLINICAL L. REV. 109, 115 n.15 (2009) (quoting Steve Bachmann, *Lawyers, Law, & Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1, 21 (1984–85)).

⁵⁵ Cummings & Eagly, *supra* note 48, at 444.

⁵⁶ Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 535–37 (1989) [hereinafter White, *Mobilization on the Margins*].

⁵⁷ Cummings & Eagly, *supra* note 48, at 444–45.

⁵⁸ *Id.* at 453.

⁵⁹ White, *Mobilization on the Margins*, *supra* note 56, at 535–38 (describing the success of impact litigation to achieve welfare reform in the 1960s and 1970s, but explaining that litigation is no longer such a sweeping tool).

890 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 45]

limited by institutional and political barriers, as well as litigation's tendency to supplant social mobilization.

First, critics argued that the legal system was limited by institutional boundaries that litigation could not overcome. Not only are judges generally bound by the circumstantial constraints of the cases at hand—answering precise legal questions based only on the facts before them—but they are also restricted by the limits on their power vis-à-vis other institutions: “When the structure of a bureaucracy or its discretionary, routine functioning is challenged . . . courts find it difficult to craft and implement effective relief.”⁶⁰ Hence, litigation is not always capable of generating the systemic reform it seeks to achieve.

Second, and closely related to the first criticism, critics argued that gambling on litigation as a tool for achieving justice was risky given that “all legal arguments are reducible to policy arguments, including both legal and normative-rights reasoning.”⁶¹ Given the “politicized nature of legal doctrine,”⁶² they believed that relying on the legal system to define and resolve social and economic disputes reinforced and legitimized the same political system that “manag[ed] and oppress[ed] poor people.”⁶³ For example, at any given point, the law recognizes only certain plaintiffs⁶⁴ and legal claims;⁶⁵ it thereby delegitimizes the plaintiffs and

⁶⁰ Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 756 [hereinafter White, *To Learn and Teach*]. White adds the following:

The “constitutional crises” often associated with institutional litigation show that judges have limited legitimacy to redistribute resources on the basis of broad statutory or constitutional mandates. The typical scenario is that the judge orders a remedy that requires the expenditure of public funds. The executive or legislature refuses to comply. In order to enforce the order, the judge must then find the defendants in contempt of court. When push comes to shove, few judges are willing to take this step.

Id. at 756–57 n.206 (citing *Wilson v. Superior Court*, 240 Cal. Rptr. 131 (Cal. Ct. App. 1987)). See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

⁶¹ Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879, 1904 (2007).

⁶² Cummings & Eagly, *supra* note 48, at 453.

⁶³ Ashar, *supra* note 61.

⁶⁴ For example, a client may be held not to qualify as a plaintiff under a specific statute. See, e.g., SAMUEL R. BAGENSTOS, *LAW AND CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* 34 (2009) (“The ADA, for example, protects individuals against discrimination only if they have a ‘disability’ as defined by the statute.” (emphasis added)). “Federal courts . . . have read the ADA’s disability definition quite narrowly. Accordingly, an enormous portion of ADA litigation has focused on the threshold question of whether the plaintiff is a member of the protected class rather than on whether the defendant engaged in improper discrimination.” *Id.* This point raises the issue of how the law functions to define people—in this situation, who is disabled and who is not. In light of concerns like

claims it fails to recognize and can reinforce oppression. Additionally, judges, who by no means are immune from political influence, have the power to erect procedural barriers – such as standing and limitations on remedies – to bringing civil rights actions in court.⁶⁶

Third, critics argued that social transformation was not possible through litigation given its propensity to discourage client initiative and “dispers[e] social conflict into individualized legal claims.”⁶⁷ Even successful lawsuits risked “remov[ing] an important organizing tool from the community, making it more difficult to build and sustain a lasting community power base.”⁶⁸ Conducted in isolation, litigation kept lawyers in the lead, with no accompanying community engagement or “organized, politicized mass activism from below.”⁶⁹ As a result, legal reform remained separate and distinct from social reform.⁷⁰

this one, Congress passed the Americans with Disabilities Amendments Act (“ADAAA”) in 2008, which, among other things, revised the definition of “disability” under the ADA. See *Americans with Disabilities Act of 1990, As Amended*, DEP’T. JUST., <http://www.ada.gov/pubs/adastatute08mark.htm#12102> (last visited Feb. 25, 2011) (highlighting the revised text in bold and old text in strikethrough).

⁶⁵ Even where the law recognizes discrimination, it may fail to provide a private right of action for a harmed individual to challenge the discrimination in court. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (holding that no private right of action exists to enforce claims of disparate impact discrimination under regulations promulgated through Title VI of the Civil Rights Act of 1964). By this omission, the law devalues the wrong the individual has suffered.

⁶⁶ For an ongoing analysis of the rollback on civil rights in the federal courts, see the work of the National Campaign to Restore Civil Rights available at <http://www.rollbackcampaign.org/>. See also ROSENBERG, *supra* note 60.

⁶⁷ Cummings & Eagly, *supra* note 48, at 455 (describing litigation as “potentially dangerous” because of its tendency to “reinforc[e] poor clients’ feelings of powerlessness” and “co-opt social mobilization.”).

⁶⁸ Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L.Q.* 619, 651 (1992) (quoting Gary Bellow as stating “[t]he worst thing a lawyer can do—from my perspective—is to take an issue that could be won by political organization and win it in the courts”).

⁶⁹ Capulong, *supra* note 54, at 114–15. Capulong explains as follows:

In contrast to liberal-legalist practice, progressive lawyering rests on the sound assumption that no fundamental social change—be it the eradication of racism, poverty, war, sexism, homophobia or other societal ills—can come about solely through legal reform. Only organized, politicized mass activism from below, aimed at constantly enhancing and enforcing that social change or revolutionizing the entire social and economic order can achieve and maintain such goals.

Id. (footnotes omitted).

⁷⁰ White, *Mobilization on the Margins*, *supra* note 56, at 544–45. In particular, White argues that

[the] educative dimension of welfare litigation—its potential to be a learning space where poor people and their allies can gain self-confidence, group solidarity, political skills, and theoretical insights—

2. Response to Individual Legal Services Model

Community lawyering also finds its origins in the backlash against early poverty law practice. Government-funded legal services programs, which first came into existence in the 1960s,⁷¹ were consistently overwhelmed by the vast number of individual clients seeking representation.⁷² A triage-like model was adopted to provide necessary and immediate relief, such as welfare benefits or protection against eviction.⁷³ Notwithstanding its laudable achievements, this model failed to promote deep institutional change⁷⁴ or community empowerment, largely due to the manner in which attorneys handled individual client cases—with the goal of attaining short-term victories through individualized advocacy.⁷⁵

has never been realized on a comprehensive scale in the day-to-day practice of welfare litigation. On the contrary, welfare litigation has often undermined rather than accomplished this goal. In spite of lawyers' theoretical commitment to the goal of client empowerment, they have rarely succeeded in linking their complex, technical lawsuits to their clients' own efforts to name and pursue their own interests.

Id. at 540 (citations omitted).

⁷¹ The Legal Services Corporation Act was passed in 1974, but legal aid programs, which provided legal services to the poor through private bar and volunteer lawyers have been in existence since the 1880s. Raymond H. Brescia, Robin Golden & Robert A. Solomon, *Who's in Charge, Anyway? A Proposal for Community-Based Legal Services*, 25 FORDHAM URB. L.J. 831, 832–33 (1997–98).

⁷² See Marshall, *supra* note 47, at 154–58.

⁷³ See Brescia et al., *supra* note 71, at 844; see also Marshall, *supra* note 47, at 155–156.

⁷⁴ See Gregory L. Volz, Keith W. Reeves & Erica Kaufman, *Higher Education and Community Lawyering: Common Ground, Consensus, and Collaboration for Economic Justice*, 2002 WIS. L. REV. 505, 517. One explanation for this failure is that

[a]lthough some talented and fortunate individuals will escape entrenched poverty by their own devices, the persistence of the problem and the embedded nature of the systemic and structural problems require a fresh analysis. Community solutions implemented in concerted action by involved, energized citizens and institutions have proven modestly successful in empowering communities. Such solutions require community mobilization, organization, and planning. Community lawyering can assist all of these activities.

The traditional attorney-client relationship is ill-suited to contribute to these kinds of community solutions. For example, individual case-by-case representation of clients who are being evicted from housing because they cannot afford rent may delay eviction. Such lawyering cannot forever forestall the inevitable, however. Oftentimes a client's eviction results from inadequate income. A lawyer, using a traditional approach, cannot increase the income of a client.

Id. (citations omitted).

⁷⁵ See Marshall, *supra* note 47, at 155–56.

Critics argued that this model of representation failed to account for the reality that the legal problems of poor clients were not isolated or short-term. These clients were enmeshed in an indefinite, ongoing relationship with government bureaucracies, and their day-to-day life required visits to “housing authorities, job training programs and social service agencies.”⁷⁶ Although many clients faced similar, recurring problems, attorneys narrowly construed their cases as individual matters.⁷⁷ Rather than joining together to garner their collective strength, these clients remained isolated from one another.⁷⁸ Ultimately, any positive results from this legal advocacy were not sustainable beyond the particular case at hand; oftentimes, even individual victories quickly faded as the same barriers subsequently reappeared.⁷⁹

Critics further argued that the traditional legal services model neglected the distinct, yet critical, goal of empowering clients and communities.⁸⁰ Clients were on unequal footing with the agencies and bureaucracies that had significant power over their livelihood and well-being. Typically, low-income clients also had a fundamentally different relationship with their attorneys than paying clients; class, education, and cultural differences created distance⁸¹ and made these clients less able to assert their power. Clients remained in the shadows because of their lawyers’ expertise in the legal process.⁸² The expertise of the client,⁸³ who experienced the violation and, in many respects, who best

⁷⁶ *Id.* at 157.

⁷⁷ Brescia et al., *supra* note 71, at 840–42.

⁷⁸ Cole, *supra* note 68, at 651–52.

⁷⁹ Marshall, *supra* note 47, at 157.

⁸⁰ Not all legal services organizations or attorneys conducted advocacy in this narrow way. For a brief discussion of early poverty lawyering offices that utilized a client-empowerment model, see Cole, *supra* note 68, at 654–61.

⁸¹ Marshall, *supra* note 47, at 156–57.

⁸² White, *To Learn and Teach*, *supra* note 60, at 756.

Because the lawyer relies on the *court*, finally, to effect change, he must, first and foremost, be a good litigator. He must be creative at manipulating and extending accepted doctrine. He must assume a personal style that makes him credible to the judge. He must strive to have the other lawyers accept him as a person who plays to win, but whose ultimate loyalty is to the game itself.

In this image, the lawyer’s primary foci are the adversary, the judge, and the courtroom. The client must be sufficiently acculturated to that world to be a good witness when facts are at issue. But apart from the moments when facts are contested, the client is in the background.

Id. (footnotes omitted).

⁸³ See Volz et al., *supra* note 74, at 523–24 (“[T]he client’s voice is paramount, for only the client can explain the systemic and structural factors that need to be resolved, and only the client can help to build institutions to address the causes of poverty.”).

894 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 45]

understood the most desirable remedy, was devalued.⁸⁴ Expertise aside, clients were also prevented from crafting narratives in their own voice; litigation forced them to cram their problems into an existing legal framework,⁸⁵ even when doing so resulted in distorted representations of their situation and themselves.⁸⁶ Through this unfamiliar, formalized process, clients became alienated from their attorneys and from the proceedings.⁸⁷ Thus, even if the individual challenges these clients brought against these agencies were successful, they did not leave the clients any better off the next time they faced a similar obstacle. Rather than becoming empowered, these clients remained dependent not only on the agencies they wished to challenge, but also on their legal services lawyers.

⁸⁴ Capulong, *supra* note 54, at 111 (“[C]lient activism is not formally a province of traditional lawyering theory. Mainstream practice—individualist to begin with—contemplates a passive client reliant upon an attorney who acts, typically alone, on his or her behalf.”).

⁸⁵ White, *To Learn and Teach*, *supra* note 60, at 757. White explains:

[The lawyer] places great pressure on subordinate groups to formulate their interests in forms that the law can “process.”

In order to get into court, litigants must present their claims as similar to precedent claims that courts have already accepted. In order to get relief, litigants must propose remedies that are coextensive with these confined claims and that can be feasibly administered by the courts. . . . Through the process of voicing grievances in terms to which courts can respond, social groups risk stunting their own aspiration. Eventually, they may find themselves pleading for permission to conform to the *status quo*.

Id. (footnotes omitted).

⁸⁶ Cummings & Eagly, *supra* note 48, at 455.

⁸⁷ See White, *Mobilization on the Margins*, *supra* note 56, at 545 (“Not only do clients feel incapable of speaking and acting freely in the strange language and culture of the courtroom; in addition, their own lawsuits are often framed to render their perceptions and passions irrelevant to the legal claims.”). Also,

the majority of poor people perceive litigation as an alien or even hostile cultural setting. The talk and ritual of litigation constitute a discourse and a culture that are foreign to most poor people. Poor people obviously do not speak in the same dialect that lawyers, judges, and elite businesspeople use. Furthermore, their courtroom speech is routinely interrupted by lawyers and judges who use threatening tones in ordering them when not to talk and what not to say. Their stories are interpreted by black-robed authorities on the basis of rules that are rarely explained and norms that they seldom share.

. . . .

Not only do poor people feel intimidated by the strange culture of the courtroom, but the professional culture of legal training and practice leads advocates to compound the isolation and dependency that clients already feel.

Id. at 542–44 (citations omitted).

In response to these criticisms of traditional impact litigation and legal services representation,⁸⁸ community lawyering has evolved over the past several decades to advance methods that re-focus on “process-oriented client empowerment,” rather than the privileging of “results-oriented legal strategies.”⁸⁹ Such strategies have deemphasized litigation and decentralized the role of the lawyer, while adding grassroots mobilization to campaigns that challenge the structural causes of oppression and shift power to the community.⁹⁰

B. *Basic Tenets of Community Lawyering*

*[A] practice of lawyering that would continually cede to “clients” the power to speak for themselves. Such a practice would transform “lawyer” from a professional service that is imposed upon subordinated communities, to a political project in which the targets of the advocacy themselves take the lead.*⁹¹

Although the community lawyering model can hardly be characterized as monolithic, we believe that several basic principles distinguish it from traditional legal advocacy. At its core, the community lawyering model endeavors to promote community involvement; create systemic change; and empower a sustainable group of active community members. In this section, we highlight the features of community lawyering that advance these goals.

1. Valuing Stakeholder Voice, Experience, and Knowledge

Community lawyering provides space for affected individuals to formulate a response to injustice based on their expertise and in line with their own goals. The community lawyering model attempts to alter the traditional balance of power between attorney and client⁹² by

⁸⁸ The legal services model has evolved to include various community lawyering strategies, as well as impact litigation.

⁸⁹ Cummings & Eagly, *supra* note 48, at 460.

⁹⁰ *Id.* at 465–69.

⁹¹ Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 863–64 (1990) [hereinafter White, *Paradox of Lawyering*] (emphasis omitted).

⁹² See Gary Bellow, *Steady Work: A Practitioner’s Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 302 (1996) (“Particularly where those served are poor or otherwise vulnerable, the patterns of influence in the relationships formed can be asymmetrical and even exploitative. Power is always a heady experience, even, or especially, for those who serve the ‘greater good.’ Similarly, choice in any lawyer-client undertaking is never equally allocated. Choice often follows the power dynamics that frame and shape it.”); see also Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory*

896 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 45]

recognizing the value of knowledge drawn from a client's circumstances and experiences.⁹³ The lawyer does not always know best; in fact, meaningful solutions may evade an attorney who is not herself experiencing the discrimination at issue.⁹⁴ Community lawyering seeks to enhance the problem-solving stage of advocacy by ensuring that the stakeholders in the community—i.e., the people actually affected by the injustice at issue—are at the literal and figurative table developing solutions.⁹⁵ As described by Gerald P. López, a renowned pioneer of the community lawyering model,

lawyers must know how to work with (not just on behalf of) women, low-income people, people of color, gays and lesbians, the disabled, and the elderly. They must know how to collaborate with other professional and lay allies rather than ignoring the help that these other problem-solvers may provide in a given situation. They must understand how to educate those with whom they work, particularly about law and professional lawyering, and, at the same time, they must open themselves up to being educated by all those with whom they come in contact, particularly about the traditions and experiences of life on the bottom and at the margins.⁹⁶

Moreover, the community lawyering model recognizes the importance of uniting the community to express collectively its goals with respect to challenging unjust policies or practices.⁹⁷ When lawyers operate in isolation in efforts to effect change, they may unintentionally portray their clients or the community as needy, or simply fail to represent accurately or respectfully their interests or goals.⁹⁸ By

of *Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 691–93 (1987–88) [hereinafter Alfieri, *Antinomies of Poverty Law*].

⁹³ See Alfieri, *Antinomies of Poverty Law*, *supra* note 92, at 698 (describing “[p]ractical wisdom” as “reasoning that is principled and rooted in everyday experience” that “suggests considered judgment informed by the ordinary lessons of everyday life”); see also White, *Paradox of Lawyering*, *supra* note 91.

⁹⁴ See, e.g., Cole, *supra* note 68, at 649–50.

⁹⁵ Marshall, *supra* note 47, at 147.

⁹⁶ Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1085 (2007) (quoting GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 37 (1992)).

⁹⁷ See, e.g., Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67, 75 (2000).

⁹⁸ See, e.g., Alfieri, *Antinomies of Poverty Law*, *supra* note 92, at 692 (“The language of dominant poverty law traditions privileges the norms of lawyer domination and control.

prioritizing community involvement, lawyers can ensure that they correctly understand and advance the community's interests.

2. Fostering a Creative, Interdisciplinary, Systemic Approach

Community lawyering transcends the limited reach of traditional legal advocacy by promoting a more comprehensive and structural approach, where the goals of the community supplant the discrete needs of the individual.⁹⁹ The underlying premise of this approach is that more can be achieved both legally and politically when the community is the focus of efforts to create change.¹⁰⁰ Moreover, unlike the piecemeal nature of traditional legal advocacy, community lawyering involves a more sweeping survey of the root problems, which allows for more comprehensive remedies.¹⁰¹

To accomplish systemic reform, community lawyering offers a wide range of tools beyond litigation. Although community lawyers might not rely on litigation as the first and only method by which to advance justice, they may still use it as one of several instruments to create change.¹⁰² Media work, political pressure, legislative advocacy, and

These norms are closed rather than open to possibility, repressive rather than liberating in vision. . . . Within the attorney/client relation, therefore, the 'production of discourse' is controlled, selected, and organized by norms which exclude the client voice." (footnotes omitted)).

⁹⁹ Marshall, *supra* note 47, at 147; *see also, e.g.,* White, *Paradox of Lawyering*, *supra* note 91, at 861.

¹⁰⁰ *See generally* Michael J. Fox, *Some Rules for Community Lawyers*, 14 CLEARINGHOUSE REV. 1 (1980-81); Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1053 (1970).

¹⁰¹ Tokarz et al., *supra* note 47, at 364.

¹⁰² *See also* White, *Paradox of Lawyering*, *supra* note 91, at 871-72. White states that litigation or "rights-based" remedies should not be discredited:

What, then, is the lesson that advocates can draw from the ambiguous impact of the *Kelly* remedy? It is certainly not to debunk either litigation or "rights-based" remedies across the board. Rather, the lesson is more subtle. Legal remedies that are designed by lawyers to impose improved conditions upon the poor aren't likely to do much to challenge subordination in the long run. In many cases, lawyer-engineered remedies will not work as intended. Even in the rare cases when such remedies do work according to plan, they still do not challenge the lived experience of subordination—the experience, that is, of other people controlling the terms of one's life. Yet when legal remedies respond to strategic needs that emerge as poor people mobilize themselves, those remedies can, indeed, make a difference.

Id.; *see also* Volz et al., *supra* note 74, at 526-27 (providing examples of how litigation can "play a part in effective community lawyering"). *See generally* White, *Mobilization on the Margins*, *supra* note 56, at 538 (exploring "the potential of welfare litigation to become an occasion for the education and mobilization of poor people and their advocates"). In his

898 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 45]

community education are also available weapons in the community lawyer's arsenal.¹⁰³ In addition to varied strategies, community lawyering involves "collaborative, and frequently interdisciplinary, practice" where the community lawyer finds herself working "regularly with other professionals from disciplines that run the gamut from archeology to architecture to business to engineering to psychiatry to social work to urban planning."¹⁰⁴ Through the community lawyering model, lawyers can engage *all* relevant parties to ensure that remedies are practical and effective.

3. Consciousness-Raising, Educating, and Organizing Stakeholders

The community lawyering model also offers a means to create a shared space for community members to discuss problems, break down the walls of isolation, and become empowered.¹⁰⁵ When individuals experience oppression but remain disconnected from one another, it is more difficult to challenge the systems that foster inequality or discrimination.¹⁰⁶ In addition to uniting community members, and in order to close the gap between the law as it is written and the lived experience of individuals experiencing oppression, community lawyers seek to inform communities about their procedural and substantive rights. This requires education about the specific rights at stake, as well

discussion of the various and sometimes competing strains of community lawyering, Eduardo Capulong notes that

the critics of litigation have *never* argued that it not be used, but rather that it not be a default strategy and be used with greater reflection and caution. As Ascanio Piomelli puts it, the skepticism is of "*isolated* litigation conducted as a stand-alone approach to social change, *unconnected to and uninformed by collective public action.*" That is, even those who advocate prioritizing other, non-litigation, methods recognize that litigation remains an option.

Capulong, *supra* note 54, at 125 (emphasis added) (footnote omitted).

¹⁰³ Tokarz et al., *supra* note 47, at 362-63 ("Community lawyering clinicians also engage in multi-pronged and widely varying types of work, ranging from litigation to administrative practice, mediation and dispute resolution to community education and legislative advocacy to transactional work and community economic development." (footnotes omitted)).

¹⁰⁴ *Id.* at 363-64.

¹⁰⁵ Alfieri, *Antinomies of Poverty Law*, *supra* note 92, at 702 (encouraging lawyers to help a "client understand[] she is part of an oppressed *political* community, not simply an individual isolated and disconnected in her experience of oppression"). See, e.g., Marshall, *supra* note 47; White, *Paradox of Lawyering*, *supra* note 91, at 887 ("[W]e might look around us for spaces where poor people can talk among themselves about what they want to do. We might help to secure those spaces, doing what we can to make those spaces safer and more accessible. We might also try to listen to poor people's political conversations, not as expert advisors, but as learners and as friends.").

¹⁰⁶ Marshall, *supra* note 47, at 161-62.

as the development of stakeholder self-advocacy skills,¹⁰⁷ which leads to the training of “lay advocates”¹⁰⁸ to build strength within communities and prepare for future campaigns.

4. Cautionary Notes on the Community Lawyering Model

Notwithstanding its merits, lawyers must weigh important considerations when engaging in community lawyering.¹⁰⁹ For example, there is a dearth of ethical guidance to address the rich array of conflicts that arise when a lawyer advocates on behalf of a community group, as opposed to an individual.¹¹⁰ Additionally, most law schools do not include a course on organizing, which means that lawyers are often untrained in the methods and skills necessary to be effective organizers.¹¹¹ However, these and other challenges are not insurmountable; like any lawyering approach, the less traditional path of community lawyering demands vigilance regarding ethical and capacity-related concerns.

With this background in mind, we now return to the particular problem at hand—how to advocate for the rights of D/deaf individuals in their interactions with police departments.

IV. LEGAL LANDSCAPE OF POLICE INTERACTIONS WITH D/DEAF INDIVIDUALS

Many of the shortfalls and dynamics that inspired the need for community lawyering have arisen in the context of police interactions with D/deaf individuals. In this section, we provide an overview of applicable laws and discuss the advocacy conducted to date.

¹⁰⁷ *Id.* at 162.

¹⁰⁸ For a general discussion of “lay lawyering,” see LÓPEZ, *supra* note 96.

¹⁰⁹ See generally Cummings & Eagly, *supra* note 48.

¹¹⁰ See generally *id.*; Marshall, *supra* note 47.

¹¹¹ See Cummings & Eagly, *supra* note 48, at 501. Moreover, given the time and energy required to sustain the practice of law, a lawyer practically may have limited resources to devote to organizing strategies. *Id.* at 500–02. Cummings and Eagly also advise community lawyers to think carefully about how to leverage local organizing victories into more systemic change that offers “a coherent challenge to the larger institutional structures that produce poverty and inequality.” *Id.* at 485–86.

900 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 45]

A. Overview of Applicable Laws and Regulations

*The ADA affects virtually everything that [police] officers and
deputies do . . .*¹¹²

Under Title II of the ADA¹¹³ and Section 504 of the Rehabilitation Act (“Section 504”),¹¹⁴ law enforcement personnel are prohibited from discriminating against people with disabilities, including D/deaf individuals.¹¹⁵ Police departments are “public entit[ies]” under Title II of the ADA,¹¹⁶ and when they receive federal funding, they are subject to Section 504 as well.¹¹⁷ In order not to discriminate against a D/deaf individual,¹¹⁸ a police department must provide equal access to its services, including by ensuring “effective” communication where

¹¹² DEP’T OF JUSTICE, CIVIL RIGHTS DIV., COMMONLY ASKED QUESTIONS ABOUT THE AMERICANS WITH DISABILITIES ACT AND LAW ENFORCEMENT, http://www.usdoj.gov/crt/ada/q&a_law.htm (last visited Nov. 8, 2010) [hereinafter DEP’T OF JUSTICE, COMMONLY ASKED QUESTIONS].

¹¹³ 42 U.S.C. § 12132 (2006) (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”). See generally 42 U.S.C. §§ 12131–34 (2006); 28 C.F.R. § 35.130 (2010) (outlining the “[g]eneral prohibitions against discrimination”).

¹¹⁴ 29 U.S.C. § 794(a) (2006) (“No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity . . .”).

¹¹⁵ Many D/deaf individuals do not consider themselves to have a disability. See *infra* note 163, for a further discussion of this perspective and the legal complexity it presents. However, legally speaking, deafness is included in the definition of “disability.” See 42 U.S.C. § 12102 (Supp. II 2008) (“The term ‘disability’ means, with respect to an individual – (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”).

¹¹⁶ See 42 U.S.C. § 12131(a).

¹¹⁷ 29 U.S.C. § 794(a); see also DEP’T OF JUSTICE, COMMONLY ASKED QUESTIONS, *supra* note 112. As explained by the Department of Justice, “[l]aw enforcement agencies are covered because they are programs of State or local governments, regardless of whether they receive Federal grants or other Federal funds.” *Id.*

Some courts have found that Title II does not apply to certain police activities. For a discussion of these cases, see *infra* notes 138, 141–44 and accompanying text.

¹¹⁸ See *Hargrave v. Vermont*, 340 F.3d 27, 34–35 (2d Cir. 2003) (listing the elements of a Title II claim). One must establish the following to prove a Title II violation: “(1) that he is a ‘qualified individual’ with a disability; (2) that he was excluded from participation in a public entity’s services, programs or activities or was otherwise discriminated against by a public entity; and (3) that such exclusion or discrimination was due to his disability.” *Id.*

necessary.¹¹⁹ Pursuant to the regulations implementing the ADA, public entities “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.”¹²⁰ The Department of Justice (“DOJ”), as the agency charged with enforcing the ADA,¹²¹ has published some guidance for police departments regarding their obligations under the law. Along with its general technical assistance materials regarding Title II of the ADA,¹²² the DOJ has published guidance that specifically addresses police interactions with D/deaf individuals and provides a basic explanation of police departments’ obligations.¹²³ In addition to publishing these materials, the DOJ is designated to receive complaints and bring enforcement

¹¹⁹ See generally 28 C.F.R. §§ 35.160-.164 (2010); Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56,164, 56,183-84 (Sept. 15, 2010) (to be codified at 28 C.F.R. pt. 35).

¹²⁰ Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. at 56,183.

¹²¹ See 42 U.S.C. § 12134(a).

¹²² DEP’T OF JUSTICE, ADA TITLE II TECHNICAL ASSISTANCE MANUAL COVERING STATE AND LOCAL GOVERNMENT PROGRAMS AND SERVICES (1993), available at <http://www.ada.gov/taman2.html> [hereinafter DEP’T OF JUSTICE, TECHNICAL ASSISTANCE MANUAL]; DEP’T OF JUSTICE, THE AMERICANS WITH DISABILITIES ACT TITLE II TECHNICAL ASSISTANCE MANUAL 1994 SUPPLEMENT, available at <http://www.ada.gov/taman2up.html>.

¹²³ DEP’T OF JUSTICE, COMMUNICATING WITH PEOPLE, *supra* note 21; DEP’T OF JUSTICE, COMMONLY ASKED QUESTIONS, *supra* note 112; DEP’T OF JUSTICE, CIVIL RIGHTS DIV., GUIDE FOR LAW ENFORCEMENT OFFICERS WHEN IN CONTACT WITH PEOPLE WHO ARE DEAF OR HARD OF HEARING, (Mar. 31, 2006), <http://www.ada.gov/PCALawEnfGuide.htm>; DEP’T OF JUSTICE, CIVIL RIGHTS DIV., ACCESS FOR 9-1-1 AND TELEPHONE EMERGENCY SERVICES, (July 15, 1998), <http://www.ada.gov/911ta.htm>; Video Series, *Police Response to People with Disabilities, Eight-Part Series*, ADA HOME PAGE (Dec. 1, 2008), <http://www.ada.gov/policeinfo.htm#Anchor-VIDEO-11481> (including a video focusing on how to respond to D/deaf individuals).

The DOJ’s materials are useful in highlighting for individual police officers some helpful tips regarding communication with D/deaf individuals and some examples of how to identify which auxiliary aids to use. However, these materials do not provide guidance for police departments on how to design effective systems. For example, in the DOJ’s “Model Policy for Law Enforcement on Communicating with People Who Are Deaf or Hard of Hearing,” the section entitled “Procedures for Obtaining Auxiliary Aids and Services” is conspicuously blank, setting aside space for each police department to design its own system with no guidance from the DOJ. See DEP’T OF JUSTICE, CIVIL RIGHTS DIV., MODEL POLICY FOR LAW ENFORCEMENT ON COMMUNICATING WITH PEOPLE WHO ARE DEAF OR HARD OF HEARING, (Jan. 2006), <http://www.ada.gov/lawenfmodpolicy.htm>. The manner in which a police department implements—or falls short of implementing—its system of accommodations is significant; for instance, it can determine whether an interpreter is available, qualified, and/or dispatched in a timely manner for a D/deaf victim of crime who tries to report abuse.

902 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 45]

actions against police departments and other public entities that violate the law.¹²⁴

A public entity must provide appropriate “[a]uxiliary aids and services”¹²⁵ where needed to achieve effective communication with a D/deaf individual, unless the public entity can show that the auxiliary aid or service would result in an undue burden or “fundamental alteration.”¹²⁶ Auxiliary aids and services comprise a wide variety of options, ranging from sign language interpreters to videophones to passing notes.¹²⁷ The choice of auxiliary aid depends on the circumstances of each individual situation, including, among other things, the nature and length of the conversation and the English proficiency of the D/deaf individual.¹²⁸ Significantly, “[i]n determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities.”¹²⁹

A D/deaf individual’s stated preference for one auxiliary aid over another is critical given the breadth of communication methods and English proficiency levels among D/deaf individuals. For example, not all D/deaf individuals who sign use the same sign language.¹³⁰ This variety depends, in part, on a D/deaf individual’s national origin. For example, American Sign Language (“ASL”) is different from British Sign Language or Nicaraguan Sign Language.¹³¹ As is the case with most languages, sign languages also vary based on dialect.¹³² The method by which a D/deaf individual acquired his or her sign language skills can further differentiate communication styles; those who learned in school may use a more mainstream form of sign language, whereas others who learned informally at home may use an idiosyncratic method of

¹²⁴ See *infra* note 147 for examples of the DOJ’s settlement agreements with various police departments.

¹²⁵ Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. at 56,177 (providing the definition of “auxiliary aids and services”).

¹²⁶ 28 C.F.R. § 35.164.

¹²⁷ Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. at 56,177.

¹²⁸ DEP’T OF JUSTICE, TECHNICAL ASSISTANCE MANUAL, *supra* note 122 (indicating that “[t]he type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with” several different factors, including methods of communication and the complexity of the communication).

¹²⁹ 28 C.F.R. § 35.160(b)(2).

¹³⁰ For a list and description of various sign languages used in the United States, see HARLAN LANE, ROBERT HOFFMEISTER & BEN BEHAN, A JOURNEY INTO THE DEAF-WORLD 270 (1996).

¹³¹ Senghas & Monaghan, *supra* note 3, at 74–75 (2002).

¹³² LANE ET AL., *supra* note 130, at 163 (discussing “[a] distinct Black dialect of ASL” that is “only partly intelligible to most white Deaf speakers of ASL”).

signing.¹³³ Yet another consideration is a D/deaf individual's proficiency in English, which affects his or her ability to write and read notes, and influences the type of sign language he or she uses.¹³⁴ Any of these factors may affect what kind of interpreter is appropriate for a given individual, and in some cases, a hearing interpreter alone is insufficient. In these situations, a Certified Deaf Interpreter ("CDI") may need to "team" with a hearing interpreter to simplify ASL into very basic signs and gestures.¹³⁵ The effect of these variations is more significant than simply a preference for one type of communication over another; in many cases, it will determine whether an individual truly is able to communicate effectively.

B. Overview of Advocacy Conducted Thus Far

*What the policemen should have done is beside the point,
unless [the deaf individual] can show that he was somehow
damaged by their failure to communicate.*¹³⁶

Notwithstanding the obvious limitations on what we can glean from a review of case law and publicly available settlement agreements, many of the limiting dynamics that generated the need for the community lawyering model¹³⁷ have appeared in the advocacy conducted thus far

¹³³ *Id.* at 51.

¹³⁴ Jo Anne Simon, *The Use of Interpreters for the Deaf and the Legal Community's Obligation to Comply with the A.D.A.*, 8 J.L. & HEALTH 155, 162, 164 (1994). Two variations of ASL are described below:

Pidgin Sign English (PSE) is a variant of ASL and English in that the signer communicates through signs in English word order, incorporating ASL for various idiomatic expressions common in English. . . . The more highly educated the deaf person, the more likely he will be able to use PSE or another variant, signed English.

. . . .

Manually Coded English (MCE) or Signed English is word for word English signed on the hands. This method is preferred in many professional settings by highly educated deaf people and by late deafened adults and hard of hearing people who have learned to sign.

Id.

¹³⁵ See REGISTRY OF INTERPRETERS FOR THE DEAF, INC., USE OF A CERTIFIED DEAF INTERPRETER 1 (1997), available at http://www.rid.org/UserFiles/File/pdfs/Standard_Practice_Papers/CDISPP.pdf ("A Certified Deaf Interpreter may be needed when the communication mode of a deaf consumer is so unique that it cannot be adequately accessed by interpreters who are hearing."). Some examples of individuals who require a CDI include, among others, those who "use idiosyncratic non-standard signs or gestures such as those commonly referred to as 'home signs' which are unique to a family," "use a foreign sign language," or "have minimal or limited communication skills." *Id.*

¹³⁶ *Rosen v. Montgomery Cnty. Md.*, 121 F.3d 154, 158 (4th Cir. 1997).

¹³⁷ See *supra* Part III.A.

on behalf of D/deaf individuals challenging police actions. Specifically, this advocacy has revealed the inherent limits of traditional legal advocacy in producing widespread social change.

1. Limited Reach in Creating Systemic Change

Like the circumstances that spawned the creation of the community lawyering model, institutional and procedural barriers, along with disconnectedness from the affected community, have limited the social impact of cases that have challenged poor police practices towards D/deaf individuals. This is particularly true given that these cases have largely been brought on behalf of individual plaintiffs.

First, with respect to institutional barriers, judges must operate within the confines of the decision-making boundaries of each case, which can limit their ability to order systemic change. One example of such limitation has arisen with the often-asserted defense of “exigent circumstances,” whereby police claim the emergency nature of their response excused their failure to provide an accommodation, either because their emergency actions fall beyond the scope of Title II¹³⁸ or because the requested accommodation is unreasonable in the context of the emergency.¹³⁹ In considering whether the exigency rendered the requested or provided accommodation reasonable, courts consider only what a police officer did in one circumstance and what resources the officer had available at the moment. Significantly, many of these cases arise from an unsympathetic set of facts, which affects a judge’s ability to find in favor of a D/deaf individual and to order a police department to improve its system of accommodations. In a different posture of

¹³⁸ See, e.g., *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000) (finding Title II of the ADA “does not apply to an officer’s on-the-street responses to reported disturbances or other similar incidents” because “[t]o require the officers to factor in whether their actions are going to comply with the ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents”). See *infra* notes 142–44 and accompanying text for further discussion of how some courts have carved out arrests from Title II’s reach.

¹³⁹ See, e.g., *Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1085 (11th Cir. 2007) (“The exigent circumstances presented by criminal activity and the already onerous tasks of police on the scene go . . . to the reasonableness of the requested ADA modification . . .”); *Loye v. County of Dakota*, 647 F. Supp. 2d 1081, 1088–89 (D. Minn. 2009), *aff’d* 625 F.3d 494 (8th Cir. 2010) (explaining that “exigent circumstances are a consideration when deciding whether reasonable modifications were in place” and finding that “exigent circumstances existed [where there] was an extreme environmental and personal health emergency occurring in real time”); see also *Waller v. City of Danville*, 556 F.3d 171, 174–75 (4th Cir. 2009) (“[E]xigency’ is not confined to split-second circumstances. Although the officers [in the instant case] did not face an immediate crisis, the situation was nonetheless unstable . . .” (citations omitted)).

advocacy, the problem of exigent circumstances could actually provide an opportunity for innovation in considering how police can better accommodate D/deaf individuals in future emergency situations, such as by expanding the police department's resources or modifying its protocol.¹⁴⁰ This way, if a similar situation arose in the future, the requested accommodation at issue might not be unreasonable, or the accommodation provided by the police might fall short. While we can conceive of a lawsuit that might present a judge with the opportunity to contemplate these kinds of ideas, perhaps in the context of a remedial order, the cases thus far have been void of such analysis.

Second, with respect to procedural barriers, some courts have erected statutory barriers that preclude D/deaf individuals from seeking legal redress under the ADA. For example, some courts have held that police arrests and interrogations do not constitute a "program, service or activity" under Title II,¹⁴¹ either through a narrow construction of "program, service or activity,"¹⁴² or by extending the exigent

¹⁴⁰ For instance, police departments could consider how they might use certain technologies to provide an interpreter during an emergency. For example, in a pilot program in Washington, D.C., the police department installed a video relay system in fifteen police cars and at each of its precincts so that deaf individuals can have quick access to a sign language interpreter through video, when an in-person interpreter is unavailable. See Nafeesa Syeed, *DC Police Install Software for the Deaf Community*, DEAF TIMES.COM (June 18, 2010), <http://deaf-times.com/south-east/washington-dc-dc-police-install-software-for-deaf-community/> ("The software connects an officer's laptop webcam to one of the company's 24-hour ASL interpreters, who then provide police with the translation. The service also allows deaf people to make phone calls from the scene.") A similar video relay system was installed in San Antonio, Texas. See San Antonio Police Dep't Victims Servs., *E.A.S.E. Interpretation for Deaf and Hard of Hearing*, SAN ANTONIO POLICE DEP'T, <http://www.sanantonio.gov/sapd/EASE.asp> (last visited Jan. 26, 2011).

¹⁴¹ 42 U.S.C. § 12132 (2006) ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the *services, programs, or activities* of a public entity, or be subjected to discrimination by any such entity." (emphasis added)).

¹⁴² See, e.g., *Rosen v. Montgomery Cnty. Md.*, 121 F.3d 154, 157 (4th Cir. 1997) ("[C]alling a drunk driving arrest a 'program or activity' of the County, the 'essential eligibility requirements' of which (in this case) are weaving in traffic and being intoxicated, strikes us as a stretch of the statutory language and of the underlying legislative intent."). This logic is flawed because it mischaracterizes what constitutes a "program or activity" under Title II. The Fourth Circuit misplaced its focus on the actions of the D/deaf suspect, rather than the police department's program and activities for law enforcement and public safety. It suggests that an individual must voluntarily partake in something for it to be a "program or activity" for Title II purposes. See *Thompson v. Davis*, 295 F.3d 890, 897 (9th Cir. 2002) ("[R]easoning that the statutory text implied voluntariness on the part of the individual, [the court in *Rosen*] held that an arrest was not a 'program or activity' of the defendant County. This reasoning has now been discredited by the Supreme Court." (citation omitted) (citing *Penn. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 211 (1998)). "[T]he weight of authority on the applicability of the ADA to arrests suggests that a state's substantive decision-making processes in the criminal law context are not immune from

906 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 45]

circumstances defense to carve certain police activity out of Title II coverage altogether.¹⁴³ Hence, these courts, in contrast to others, have ruled that effective communication under the ADA is not required during an arrest.¹⁴⁴ Notwithstanding the egregious consequences that can ensue from ineffective communication during arrest and interrogation,¹⁴⁵ D/deaf individuals in certain jurisdictions have been excluded from addressing their claims in court because of such statutory hurdles. This exclusion effectively delegitimizes their felt injustice and leaves the system of oppression unchallenged.¹⁴⁶

Third, traditional legal advocacy in this context has failed to bridge the gap between legal and social change. Even DOJ settlement agreements that seek to affect entire police departments¹⁴⁷ risk lying

the anti-discrimination guarantees of federal statutory law." *Id.* Note also that the DOJ guidance includes arrest as an activity covered by Title II. See DEP'T OF JUSTICE, COMMONLY ASKED QUESTIONS, *supra* note 112 ("The ADA affects virtually everything that officers and deputies do, for example . . . arresting, booking, and holding suspects.").

¹⁴³ See, e.g., *Hainze*, 207 F.3d at 801; *Patrice v. Murphy*, 43 F. Supp. 2d 1156, 1160 (W.D. Wash. 1999) (finding that Title II does not apply to arrests because "[t]he decisions we ask our officers to make under already stressful, and sometimes dangerous, circumstances should not be subjected to second guessing by comparing their in-the-field actions to the requirements of the ADA").

¹⁴⁴ See, e.g., *Patrice*, 43 F. Supp. 2d at 1160 ("[A]n arrest is not the type of service, program, or activity from which a disabled person could be excluded or denied the benefits, although an ADA claim may exist where the claimant asserts that he has been arrested because of his disability.").

¹⁴⁵ See *supra* Part II.A.

¹⁴⁶ See *supra* Part III.A.1.

¹⁴⁷ For examples of DOJ's various settlement agreements, see generally Dep't of Justice, *ADA Settlements and Consent Agreements*, ADA HOME PAGE, <http://www.ada.gov/settlemt.htm> (last visited Jan. 26, 2011); see also, e.g., Settlement Agreement Between the United States of America, Rashad Gordon, Michael Edwards, and the City of Houston, Texas, Dep't of Justice Complaint No. 204-74-102, No. H-98-1369 (S.D. Tex.), available at <http://www.ada.gov/houston.htm> (last visited Jan. 26, 2011); Settlement Agreement in U.S. Dep't of Justice ADA Complaint No. 204-39-139 (Oct. 3, 2008), available at http://www.ada.gov/dakota_co.htm (last visited Jan. 3, 2011); Settlement Agreement Between the Elk Grove Village Police Dep't and the United States of America (Oct. 22, 2008), available at http://www.ada.gov/elk_grove.htm (last visited Jan. 3, 2011); Settlement Agreement Between the United States of America and Consolidated City of Jacksonville, FL, Dep't of Justice Complaint Nos. 204-17M-279, -290, -295, -346, -361, -400, & -401, available at <http://www.ada.gov/jacksonvillefla.htm> (last visited Jan. 3, 2011); Settlement Agreement Between the United States of America and the North Kingstown Police Dep't and North Kingstown, Rhode Island, Dep't of Justice Complaint No. 204-66-34, available at <http://www.ada.gov/kingsett.htm> (last visited Jan. 3, 2011); Settlement Agreement Between the United States of America and the County of Alameda Sheriff's Office, Dep't of Justice Complaint No. 204-11-290 (Feb. 2, 2010), available at <http://www.ada.gov/bonner.htm> (last visited Jan. 3, 2011); Settlement Agreement Between the United States of America and the New York City Police Department (Nov. 18, 2009) [hereinafter NYPD Settlement Agreement], available at <http://www.ada.gov/nypd.htm>.

disconnected from on-the-ground implementation. Unaccompanied by grassroots action or community education, the DOJ process alone is ill-equipped to ensure that the rights contained in a settlement agreement are communicated to those whom it protects. Moreover, the DOJ process is not structured in a way that provides the community with a seat at the table when negotiating a settlement agreement or prosecuting a lawsuit in court.¹⁴⁸ As a result, the affected community may not only be unable to reap the benefits of whatever enforcement action the DOJ has taken, but they may also be unable to influence the development of workable solutions in the first instance.

2. Individualized Nature of Challenges

The individualized nature of legal advocacy challenging discriminatory police practices towards D/deaf individuals is reminiscent of the kind that inspired the community lawyering model. This form of traditional legal advocacy has failed to create space for the Deaf community to unite to implement systemic, sustainable change.¹⁴⁹

As an initial matter, cases regarding D/deaf individuals' communications with police arise most frequently when a D/deaf arrestee challenges police procedures during the course of arrest or interrogation.¹⁵⁰ Notably, cases involving communication barriers that impede D/deaf victims' attempts to report crimes¹⁵¹ are conspicuously rare.¹⁵² This relative void likely exists because the affected individuals

¹⁴⁸ As a general matter, the DOJ brings enforcement actions on behalf of the public and stands in as a plaintiff. Although a complaint filed by an individual can prompt the DOJ to initiate an investigation or a lawsuit, the complainant is not treated as a plaintiff or client. Although the community may be invited to testify regarding what discrimination has occurred, it is unable to directly influence the deliberations or negotiation processes.

¹⁴⁹ See *supra* Part III.A.2.

¹⁵⁰ See, e.g., *Delano-Pyle v. Victoria Cnty. Tex.*, 302 F.3d 567, 571 (5th Cir. 2002) (deaf plaintiff challenged arrest and interrogation); *Rosen v. Montgomery County*, 121 F.3d 154, 156 (4th Cir. 1997) (deaf plaintiff challenged arrest); *Gallo v. Hamilton Twp. Police Dep't*, 2006 WL 2000135, Civ. Action No. 06-1549, at *2 (D.N.J. 2006) (deaf plaintiff challenged arrest and interrogation); *McCray v. City of Dothan*, 169 F. Supp. 2d 1260, 1266 (M.D. Ala. 2001) (deaf plaintiff challenged arrest); *Lewis v. Truitt*, 960 F. Supp. 175, 177 (S.D. Ind. 1997) (deaf plaintiff challenged arrest).

¹⁵¹ See *supra* Part II.B.

¹⁵² Very few lawsuits have been brought by non-arrestees to challenge ineffective communication by police. See *Ferguson v. City of Phoenix*, 157 F.3d 668, 670 (9th Cir. 1998) (describing “[t]hree separate lawsuits, later consolidated, seeking declaratory, injunctive and damages relief . . . against the City of Phoenix [which allegedly] operated its 9-1-1 emergency service in a way which discriminated against [D/deaf] individuals”); *Salinas v. City of New Braunfels*, 557 F. Supp. 2d 771, 773, 777 (W.D. Tex. 2006) (denying city’s motion for summary judgment in case where plaintiff had called police for assistance, police knew from 9-1-1 call that plaintiff needed an interpreter, police failed to provide an

often are deterred from contacting the police due to communication barriers, fear, feelings of helplessness, or lack of information.¹⁵³ Even those individuals who try to report crimes may not know how to complain after they have experienced ineffective communication with the police. Whatever the reasons, this subgroup of crime victims has not found the space in which to express its concerns and assert its rights through traditional legal advocacy.

Second, the largely individual focus of the cases that have been brought—typically, an individual claiming that the police violated his or her rights during a specific incident—has resulted in highly particularized results.¹⁵⁴ This is especially true given the type of legal analysis these cases require regarding the issue of whether effective communication took place.¹⁵⁵ These individual cases are seldom

interpreter, and “[a]s a consequence, none of the responding officers were able to communicate effectively with Plaintiff”); *Center v. City of West Carrollton*, 227 F. Supp. 2d 863, 869–70 (S.D. Ohio 2002) (similar); *Miller v. District of Columbia*, 983 F. Supp. 205, 205 (D.D.C. 1997) (finding that city’s failure to provide 9-1-1 services to deaf or hard of hearing individuals violated Title II and Section 504); *Civic Ass’n of Deaf of N.Y. City Inc. v. Giuliani*, 915 F. Supp. 622, 637–38 (S.D.N.Y. 1996) (holding that the city’s removal of accessible public emergency alarm boxes violated Title II and Section 504 in challenge by class of deaf and hard of hearing plaintiffs). Other types of actions, such as administrative complaints or settlements, may exist regarding D/deaf victims of crime; however, we are unable to access these documents because they are not publicly available.

¹⁵³ OBINNA ET AL., *supra* note 43, at 20–21, 59, 62–63. A service provider gave the following account of a deaf individual’s interaction with police:

Well, for example my client that I’m working with right now she’s Deaf blind. When she contacted the police . . . the police told her to come today to the police department and we will do an interview using a computer. Well, she’s Deaf and blind. So she thought, is that hardly even worth it?

Id. at 59; *see also id.* at 62–63 (“Police are almost always thought of as a place to call for help and yet, many discuss experiences in which contact with the police as [sic] frustrating. Few survivors called the police after their experience with sexual abuse.”). We have learned of such dynamics also directly through our work with advocates, community groups, and social services agencies serving D/deaf individuals in New York City. Known communication barriers and fear of police have been among the top reasons provided as to why D/deaf victims of crime do not step forward to file a police report.

¹⁵⁴ For example, in the criminal context, these cases often focus on issues such as whether to suppress evidence allegedly extracted through ineffective communication. *See, e.g., Nathan v. Municipality of Anchorage*, 955 P.2d 528, 531–32 (Alaska Ct. App. 1998) (concerning a challenge to a blood test on the ground that defendant did not understand right to an independent test); *Lawson v. State*, 47 S.W.3d 294, 300 (Ark. Ct. App. 2001) (concerning a motion to suppress statement on ground that police did not provide interpreter). In the civil context, the plaintiff often files suit seeking damages to remedy the harm that was suffered from the incident. *See, e.g., Center*, 227 F. Supp. 2d at 870–71 (seeking punitive damages for ineffective communication).

¹⁵⁵ *See, e.g., Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1087 (11th Cir. 2007) (listing various factors to consider in determining whether police department provided for

instructive for future police conduct, and their precedents may have the counterproductive effect of incentivizing police departments to focus on the minimum requirements for communication access. Significantly, individual plaintiffs in these actions may be limited to seeking compensatory damages because they lack the standing to seek injunctive relief,¹⁵⁶ and settlement agreements that provide only a remedy for that one individual are common. Given these various dynamics, the affected community as a whole does not benefit from these individual cases, as they have no lasting effect.

In light of these shortfalls, we turn now to the examination of why the community lawyering model should be applied to the Deaf community.

effective communication in a DUI arrest and interrogation). The factors the court listed include the following:

What steps are reasonably necessary to establish effective communication with a hearing-impaired person after a DUI arrest and at a police station will depend on all the factual circumstances of the case, including, but not limited to:

- (1) the abilities of, and the usual and preferred method of communication used by, the hearing-impaired arrestee;
- (2) the nature of the criminal activity involved and the importance, complexity, context, and duration of the police communication at issue;
- (3) the location of the communication and whether it is a one-on-one communication; and
- (4) whether the arrestee's requested method of communication imposes an undue burden or fundamental change and whether another effective, but non-burdensome, method of communication exists.

See id.; *see also, e.g., Delano-Pyle*, 302 F.3d at 576 (performing detailed factual analysis in upholding district court's decision that plaintiff, a deaf individual, had presented enough evidence to support a claim under the ADA and RA). The court's reasoning was as follows:

It is clear from the videotape of the accident that no matter how many times Daniel [the police officer] repeated himself and no matter how loudly he spoke, Pyle [the deaf individual] could not understand most of what he was saying. For example, while Daniel was demonstrating the sobriety tests, he told Pyle several times not to start the test until after he was finished demonstrating. Nonetheless, each time, Pyle started to perform the task while observing Daniel. . . .

In addition, during trial, Pyle's counsel asked Daniel if he was speaking quickly when informing Pyle of his legal rights. Daniel responded "[y]es, probably so, yes."

Id. at 575; *see also Ryan v. Vt. State Police*, 667 F. Supp. 2d 378, 398–90 (D. Vt. 2009) (performing similarly detailed factual analysis of whether effective communication took place).

¹⁵⁶ *See, e.g., Bahl v. County of Ramsey*, 597 F. Supp. 2d 981, 983–84 (D. Minn. 2009) ("[P]laintiffs lack standing to pursue injunctive and declaratory relief because they cannot show 'a likelihood of future injury.'").

V. COMMUNITY LAWYERING AND THE DEAF COMMUNITY

Community lawyering can benefit the Deaf community for the same reasons it has benefitted the anti-poverty and workers' rights movements—community-led struggle can produce more lasting, systemic change. The community lawyering model has great potential for success in the Deaf community given its history of struggle against oppression and its strong organizing tradition.

A. *The Capital "D" Deaf Community*

*The essence of deafness . . . is not the lack of hearing but the community and culture based on ASL. Deaf culture represents not a denial but an affirmation.*¹⁵⁷

The "Deaf community" is a unified group of Deaf—with a capital "D"¹⁵⁸—individuals who proudly share a unique culture¹⁵⁹ centered on a common language.¹⁶⁰ To Deaf individuals, ASL is "a symbol of social identity, a medium of social interaction, and a store of cultural knowledge."¹⁶¹ Many Deaf individuals consider themselves to be part of a *linguistic minority* community¹⁶² and do not identify as "disabled."¹⁶³

¹⁵⁷ Dolnick, *supra* note 3, at 43.

¹⁵⁸ See *supra* note 3 for more information regarding the significance of "Deaf" spelled with a capital "D."

¹⁵⁹ See generally LANE ET AL., *supra* note 130, at 124–73 (discussing Deaf culture).

¹⁶⁰ *Id.* at 42 ("Nothing is more central to [Deaf] culture and dearer to the hearts of Deaf people than their language."). See generally *id.* at 67–77 (discussing the prominent role of ASL in the Deaf culture). Note generally that

[t]he definition of community itself is problematic Constant attention must be given as to whether the term denotes any one or a combination of group, linguistic (speech) community, social network, imagined community, ethnic group, or even simply a population of deaf individuals (with little indication of any actual social relationships among them) in a given geographic area.

Senghas & Monaghan, *supra* note 3, at 76 (citations omitted).

¹⁶¹ LANE ET AL., *supra* note 130, at 67.

¹⁶² Senghas & Monaghan, *supra* note 3, at 81 ("Simply put, *linguistic communities* are people who can and do communicate with each other using language."); Lennard J. Davis, *Deafness and the Riddle of Identity*, CHRON. HIGHER EDUC., Jan. 12, 2007, at B6, available at <http://www.lennarddavis.com/downloads/deafnessandtheriddle.pdf> (describing the origins and development of the notion of deafness as a culture). Davis states:

[i]mportant scholarship formed the foundation for this new construction of deafness as a sociological phenomenon rather than a physical impairment. That view of deafness became possible only after linguists like William C. Stokoe Jr. established ASL as a genuine language (in the late 50s and early 60s), not just a set of gestures or pantomime, as had been thought. Later, in 1993, Harlan Lane . . . suggest[ed] that the deaf were like a colonized people. Lane

They do not feel they need to be “cured”; rather, they feel the limitations they face result largely from the imposition of societal norms.¹⁶⁴ In fact,

was instrumental in defining deaf identity based on the notion that deaf people were a linguistic and even an ethnic minority, since they not only shared a common language (ASL) and, by this time, a common culture, but also were seen by others as a separate group. Other deaf-studies scholars . . . solidified the concept of the deaf as a minority group.

Id.; see also Maya Sabatello, *Disability, Cultural Minorities, and International Law: Reconsidering the Case of the Deaf Community*, 26 WHITTIER L. REV. 1025, 1027–28 (2005) (describing the nature of Deaf individuals’ identification as members of a social and linguistic culture).

However, defining the Deaf community as a linguistic minority is far from straightforward:

The central problem with defining deaf people as a linguistic group is that to do so, you have to patrol the fire wall between the deaf and nondeaf in very rigid ways. If deaf people are defined as only those who are native users of ASL, you have to define all nonusers of ASL as “other.” . . . The other flaw in the model is that it defines hearing, signing children of deaf adults (CODA’s) as deaf, since they are native sign-language speakers. One could argue that CODA’s aren’t discriminated against by the hearing world, but if one takes that tack, then one has to abandon the idea that language is the key defining term. And that brings us back to some notion of deafness as a biological impairment.

....

And is a deaf person excluded from his ethnic identity of deafness if he or she chooses not to act deaf?

Davis, *supra*. See also LANE ET AL., *supra* note 130, at 214 (explaining the tension between the hearing world’s perception of Deaf people as disabled and the Deaf community’s self-identification as a linguistic minority).

¹⁶³ The Deaf community has rejected the assertion that deafness is a disability:

To the surprise and bewilderment of outsiders, [the Deaf community’s] message is utterly contrary to the wisdom of centuries: Deaf people, far from groaning under a heavy yoke, are not handicapped at all. Deafness is not a disability. Instead, many deaf people now proclaim, they are a subculture like any other. They are simply a linguistic minority (speaking American Sign Language) and are no more in need of a cure for their condition than are Haitians or Hispanics.

Dolnick, *supra* note 3, at 37. The Deaf community’s rejection of the term “disability” presents legal complexity, particularly for civil rights attorneys representing Deaf individuals. While seeking the protection of anti-discrimination laws and advocating for the legal right to effective communication, Deaf individuals reject the label of “disability,” even though establishing oneself as having a disability is the threshold inquiry under the ADA, as well as under comparable state and local laws that prohibit discrimination on the basis of disability. See *Americans with Disabilities Act of 1990*, 42 U.S.C. § 12102 (Supp. II 2008); see also, e.g., *Hargrave v. Vermont*, 340 F.3d 27, 34–35 (2d Cir. 2003).

¹⁶⁴ The disability rights community has similarly advocated for a shift to a social perspective, rather than a medical model of disability. See Rovner, *supra* note 50; see also CHARLTON, *supra* note 52, at 68 (discussing the way in which cultures and languages have historically equated disability with disease and sickness, and specifically noting that “the

912 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 45

many Deaf individuals state that even if given the opportunity to hear, they would choose to remain deaf.¹⁶⁵ Deaf parents are often joyful when they discover their baby is deaf.¹⁶⁶

The solidarity among Deaf community members is the source of much of its activism and political will that is directed against society's norms. Deaf identity works to unify individuals in the Deaf community, and it overcomes the variances in age, ethnicity, and other characteristics that are much more pronounced in the hearing community.¹⁶⁷ In ASL, Deaf individuals use the sign for "Deaf-World" to represent their community; this "world" refers not to a single location, but rather to the whole "social network" within the Deaf community.¹⁶⁸ Deaf community members feel they must unite and "emphasize their distinctiveness in order to fight discrimination."¹⁶⁹ Collectivism is a primary value in Deaf culture, as Deaf individuals rely on each other for information, given the communication barriers with hearing people.¹⁷⁰ Similarly, Deaf

language used to describe people with disabilities will change because it is now being actively contested by those it describes"); Sabatello, *supra* note 162, at 1027. Sabatello explains the socially based model:

Grounded in assumptions of societal influences and powers, this approach draws attention to the societal environment accounts in order to understand the construction of disability. It stresses that disability is a social construct, an ancillary of the domination of the abled-bodied and the subordination of persons with disabilities. Thus, rather than [sic] modifying the individuals, the approach calls for modifications of the social and environmental factors that create barriers to the full participation of persons with disability.

Id. (footnotes omitted).

¹⁶⁵ Dolnick, *supra* note 3, at 38; see also *id.* at 43 (explaining the fierce controversy surrounding cochlear implants for deaf individuals, stemming from the Deaf community's pride in being Deaf). See generally Alicia Ouellette, *Hearing the Deaf: Cochlear Implants, the Deaf Community, and Bioethical Analysis*, 45 VAL. U. L. REV. 1247 (2011) (discussing cochlear implants and the Deaf community).

¹⁶⁶ Dolnick, *supra* note 3, at 38. Also significant is that "90 percent of deaf people who marry take deaf spouses." *Id.* at 43; see also LANE ET AL., *supra* note 130, at 24-30 (describing the dynamics of a Deaf child being born to Deaf parents).

¹⁶⁷ LANE ET AL., *supra* note 130, at 70.

¹⁶⁸ *Id.* at 5.

¹⁶⁹ Petra Rose & Gary Kiger, *Intergroup Relations: Political Action and Identity in the Deaf Community*, 10 DISABILITY & SOC'Y 521, 524 (1995) (UK).

¹⁷⁰ See LANE ET AL., *supra* note 130, at 69 ("Much of Deaf people's knowledge of life and the world has been communicated to them by other Deaf people speaking their signed language. . . . [N]early all their knowledge of the world has come to them through signed language."). This is largely because of Deaf individuals' isolation from the hearing world. See OBINNA ET AL., *supra* note 43, at 11 ("As with other disability groups, the Deaf community experiences significant barriers in communication with the general hearing population and has limited access to media information that hearing people take for granted." (citation omitted)).

individuals value “group decision-making” and “mutual aid.”¹⁷¹ Building on their language, culture, and relationships, Deaf individuals organize in this manner to address injustices affecting the entire Deaf community.

B. *Struggle and Organizing in the Deaf Community*

The Deaf community has a rich history of organizing and agitation. In the face of oppression, the Deaf community has united to defend and preserve its identity and language. Two of the most well-known organizing movements in the community’s history are the century-long pushback against oralism¹⁷² and the Deaf President Now protest.

1. Pushback Against Oralism

*[P]ure oralism promoted a negative view of Deaf people. At bottom, oralism altered the character of the schools by vilifying sign language and promoting the image of nonvoicing Deaf people as “oral failures,” somehow defective, deviant, even un-American.*¹⁷³

The Deaf community’s struggle against oralism exemplifies the geographically disconnected Deaf community’s organizing capacity and strength. Like many oppressed groups, the Deaf community has struggled to speak with its own “voice” in society.¹⁷⁴ Ironically,

¹⁷¹ LANE ET AL., *supra* note 130, at 70.

¹⁷² See PADDY LADD, UNDERSTANDING DEAF CULTURE: IN SEARCH OF DEAFHOOD xviii (2003). Ladd explains that

[o]ralism can be defined as the educational system imposed on Deaf communities worldwide during the last 120 years which removed Deaf educators, Deaf communities and their sign languages from the Deaf education system. By replacing it with an exclusively Hearing-led system promoting the use of speech, lipreading and hearing aids only, and advocating no fraternisation [sic] between Deaf children and Deaf adults, they hoped to remove the ‘need for’ Deaf communities to exist at all.

Id.

¹⁷³ Susan Burch, *Reading Between the Signs: Defending Deaf Culture in Early Twentieth-Century America*, in THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES 214, 224 (Paul K. Longmore & Lauri Umansky eds., 2001).

¹⁷⁴ For example, non-disabled individuals frequently speak for people with disabilities—this phenomenon is unremarkable in the legal world. Attorneys are asked to formulate the narrative for a client, which will be relayed to the decision-maker, oftentimes with little input from the client. See generally Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769, 773–74 (1992). Alfieri adds the following:

Juridical roles and relationships mediate the interpretation of disability. Mediation occurs in the contexts of administration,

however, Deaf individuals historically have been silenced by virtue of being forced to speak. The Deaf community's fight against the oralist movement in the nineteenth and twentieth centuries was a struggle against forced assimilation into the hearing world.¹⁷⁵ The oralist movement came to the United States in the 1860s, led by hearing educators spreading the oral method—an ideology which regarded ASL as inferior and forced D/deaf people to communicate solely through lipreading and speech.¹⁷⁶ Deaf students were segregated from one another and were vigorously prohibited from using ASL or any sort of signed communication.¹⁷⁷ Control over instruction and administration of deaf schools was given to hearing people with no experience in or appreciation for the Deaf community.¹⁷⁸ In just twenty years, the percentage of Deaf teachers at schools for the deaf dropped from roughly forty-two percent to seventeen percent.¹⁷⁹ The oralism movement also spread a form of eugenics, discouraging deaf individuals from intermarrying and reproducing, and in some cases, pressuring deaf individuals to be sterilized.¹⁸⁰ The oralism movement ultimately “hoped to remove the ‘need for’ Deaf communities to exist at all.”¹⁸¹

Uniting around the common cause of preserving sign language, Deaf individuals fought against the hearing world's imposition of oralism throughout the twentieth century: “Deaf people not only resisted pure oralism . . . they broadened their strategies to defend their culture,

adjudication, and advocacy. Here, the roles of administrator, adjudicator, and advocate filter competing images of disability. Moreover, the relations dictated by these roles provide an added screen, obscuring the lived reality falsely designated “disability.” The mediation process aligns competing interpretations in hierarchical order, assembling dominant-subordinate groupings of ideals and discourses. Alignments that elevate ideals and discourses on necessitarian grounds are of limited virtue. Though adept at prosaic description and instrumental explanation, necessitarian analysis accommodates only the dominant juridical vision of a sociolegal artifact. This accommodation excludes opposing visions, negating alternative sets of ideals and discourses. The upshot of this exclusion is silence, in the instant case the silencing of impoverished people with disabilities.

Id.; see also CHARLTON, *supra* note 52, at 127–28.

¹⁷⁵ See LANE ET AL., *supra* note 130, at 62–63 (describing oralist assimilation practices in the nineteenth and early twentieth centuries in Europe and America).

¹⁷⁶ *Id.* at 60–61.

¹⁷⁷ *Id.* at 62; see also LADD, *supra* note 172.

¹⁷⁸ LANE ET AL., *supra* note 130, at 62.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 380–82.

¹⁸¹ LADD, *supra* note 172, at xviii.

fostered greater unity within the Deaf community, and maintained a separate communal identity.”¹⁸²

2. The Deaf President Now Protest

*To be deaf, the friends agreed, was to struggle constantly against the low expectations of the hearing world. What an insult, then, that the world's premier school for the deaf should buy into this underestimation.*¹⁸³

Perhaps one of the most poignant examples of the Deaf community's organizing capacity and political activism was the Deaf President Now protest¹⁸⁴ at Gallaudet University in 1988.¹⁸⁵ In August of 1987, the hearing president of Gallaudet announced his intent to resign.¹⁸⁶ A group of Gallaudet alumni, agitated by the fact that Gallaudet had never had a Deaf president, began organizing around this cause in February of

¹⁸² Burch, *supra* note 173, at 215. Burch explains more fully:

Historians have commonly assumed that oralism triumphed in early twentieth-century deaf education. In fact, Deaf people demonstrated consistent agency in their fight to maintain a role in Deaf education. . . . The oralists . . . never succeeded as completely as their propaganda might suggest. Deaf people not only resisted pure oralism; they managed to participate in teacher qualification programs, influence faculty and administrators, increase the use of sign language in schools by the 1940s, and transmit positive cultural views of Deafness within the schools. In doing so, they broadened their strategies to defend their culture, fostered greater unity within the Deaf community, and maintained a separate communal identity.

Id. at 214–15.

¹⁸³ JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 75 (1993).

¹⁸⁴ *See id.* at 74–83 (discussing the “Deaf President Now” protest at Gallaudet University). Indeed, this demonstration is regarded as one of the most publicized efforts to raise awareness of disability rights in America:

The Americans with Disabilities Act was introduced two months after the Gallaudet protest and, for a law with such sweep and so many potential enemies, took a rocket course toward passage. Argues Lex Frieden, then of the National Council on the Handicapped, “It would not have happened without Gallaudet raising people's consciousness.”

Id. at 75. *See also* BAGENSTOS, *supra* note 64, at 18 (“That high-profile recognition of discrimination against deaf people was a key moment in the efforts to obtain comprehensive antidiscrimination legislation.”).

¹⁸⁵ *See generally* *Deaf President Now Protest*, GALLAUDET U., http://aaweb.gallaudet.edu/About_Gallaudet/History_of_the_University/DPN_Home.html (last visited Jan. 28, 2011) (providing information and resources regarding the momentous Deaf President Now protest and its lasting impact).

¹⁸⁶ SHAPIRO, *supra* note 183, at 75.

916 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 45

1988.¹⁸⁷ After planning and organizing for several weeks, the students at Gallaudet were united and ready for their rally by March.¹⁸⁸ “[C]rystalliz[ing] the presidential selection as a civil rights battle,” the organizers of the rally sought to unite all the diverse cliques within the student body.¹⁸⁹ As a result of this effort, approximately 1500 students joined together on campus to push for the appointment of a Deaf president.¹⁹⁰ When, instead, a hearing president was appointed, the students protested, thereby effectively shutting down the school.¹⁹¹ The protest lasted nearly a week,¹⁹² during which time the students also appealed to members of Congress, who quickly allied with them.¹⁹³ Ultimately, the Gallaudet students prevailed in their efforts, pressuring the newly appointed hearing president to step down to make way for a Deaf president.¹⁹⁴ The new Deaf president, I. King Jordan, captured the sentiment of the protest upon acceptance of his new appointment:

This is a historic moment for deaf people around the world In this week we can truly say that we, together and united, have overcome our own reluctance to stand for our rights and our full representation. The world has watched the deaf community come of age. We can no longer accept limits on what we can achieve.¹⁹⁵

The solidarity and collective vision exemplified in the history of the Deaf community lends itself naturally to the community lawyering

¹⁸⁷ *Id.*; *DPN: The Issues*, GALLAUDET U., http://www.gallaudet.edu/About_Gallaudet/History_of_the_University/DPN_Home/Issues.html (last visited Mar. 15, 2011).

¹⁸⁸ SHAPIRO, *supra* note 183, at 75.

¹⁸⁹ *See id.* at 76 (“Gallaudet’s student body was made up not just of those with total hearing loss . . . but those with profound and severe hearing loss who could be helped with a hearing aid. The different groups often formed cliques, and those who used hearing aids felt more sanguine about integrating into the hearing world. The task for the rally’s sponsors was to crystallize the presidential selection as a civil rights battle.”).

¹⁹⁰ *Id.* at 77.

¹⁹¹ *Id.* at 78–79.

¹⁹² *See The Week of DPN . . .*, GALLAUDET U., http://www.gallaudet.edu/About_Gallaudet/History_of_the_University/DPN_Home/Issues/Week_of_DPN.html, (last visited Mar. 15, 2011) (providing a day-by-day account of the week-long protest).

¹⁹³ SHAPIRO, *supra* note 183, at 81–82.

¹⁹⁴ *Id.* at 82–83.

¹⁹⁵ *Id.* at 83; *see also DPN: The Impact*, GALLAUDET U., http://www.gallaudet.edu/About_Gallaudet/History_of_the_University/DPN_Home/Impact.html (last visited Mar. 15, 2011) (explaining the widespread and lasting impact of the Deaf President Now protest).

model. The next section will document our early attempts to put this model into practice with the Deaf community in New York City.

VI. APPLICATION OF THE COMMUNITY LAWYERING MODEL TO THE DEAF COMMUNITY: IMPROVING POLICE PRACTICES

New York Lawyers for the Public Interest (“NYLPI”) has embarked on a campaign that centralizes the role of the Deaf community in efforts to reform police practices towards D/deaf individuals. The campaign is still in its infancy, which limits our ability to analyze the successes and failures of the community lawyering model in this context. However, we can already identify the ways in which this approach has jumpstarted what we hope will become a lasting and comprehensive movement to reform poor policing practices toward D/deaf individuals in New York City.

A. *Early Development of the Coalition*

One of the primary elements of the community lawyering model is that lawyers listen to what the community identifies as its top needs and priorities.¹⁹⁶ As a legal organization dedicated to advocating on behalf of people with disabilities and D/deaf people in New York City,¹⁹⁷ NYLPI regularly conducts outreach to independent living centers¹⁹⁸ and other organizations that work with D/deaf individuals to identify problems and prioritize legal advocacy. Time and again over the past several years, community advocates raised concerns about the negative experiences D/deaf individuals were having with the police, particularly from poor neighborhoods and communities of color in New York City.¹⁹⁹

¹⁹⁶ This, of course, begs the question of “who is the community?” In this Article, we have chosen to focus on the “Deaf community.”

¹⁹⁷ NYLPI is the designated “Protection and Advocacy” agency for New York City, which means it receives federal funding and has a corresponding mandate to advocate on behalf of people with disabilities and people who are D/deaf. For more information about the Protection and Advocacy System, see NAT’L DISABILITY RTS. NETWORK: PROTECTION & ADVOC. FOR INDIVIDUALS WITH DISABILITIES, <http://www.napas.org/> (last visited Mar. 15, 2011).

¹⁹⁸ For a history of the Independent Living Movement, see CHARLTON, *supra* note 52, at 130–49.

¹⁹⁹ The over-policing of poor neighborhoods and communities of color is well-documented. See Ray Rivera, Al Baker & Janet Roberts, *A Few Blocks, 4 Years, 52,000 Police Stops*, N.Y. TIMES, July 12, 2010, at A1, available at <http://www.nytimes.com/2010/07/12/nyregion/12frisk.html?pagewanted=1>; Naima Ramos-Chapman, *Voices from Brooklyn: Racial Profiling’s Part of Everyday Life Here*, COLORLINES (Aug. 2, 2010, 1:00 PM) http://colorlines.com/archives/2010/08/voices_from_brooklyn_racial_profiling_part_of_everyday_life_here.html#.

It was clearly an issue of great importance to the Deaf community. The community's concerns were wholly consistent with the barriers already discussed in this Article, such as the police department's failure to provide sign language interpreters or other auxiliary aids and services to D/deaf individuals who are arrested or attempt to report crimes.²⁰⁰ In particular, advocates repeatedly lamented that D/deaf survivors of domestic violence had difficulty reporting abuse or seeking protection on account of communication barriers, and that they experienced humiliating treatment by police officers at precincts.²⁰¹

As a legal organization, we could have responded to this injustice in many ways. We might have used traditional lawyering tools to immediately conduct a targeted plaintiff search and prepare for a lawsuit challenging these practices. Instead, last summer, NYLPI took the first step of bringing together key stakeholders to formulate a long-term, community-led campaign to improve police practices. NYLPI reached out to Deaf advocates, social service organizations, sign language interpreters, legal service organizations, and Deaf member-based advocacy organizations throughout New York City to form a coalition ("Coalition"). The Coalition continues to grow with each passing month; currently we have members who represent each category described above.²⁰² At the time of this Article, roughly half of the Coalition members are Deaf, and the remaining members are either interpreters for the D/deaf, or hearing advocates or attorneys who work with D/deaf individuals in some capacity. The Coalition meets monthly for two hours with the assistance of two or three sign language interpreters to reflect on its campaign and plan for future efforts. In an effort to enhance member participation and create as non-hierarchical a space for discussion as possible, we have implemented a rotating system in which Coalition members take turns facilitating each meeting.

Early on, the Coalition identified two overarching goals: (1) establish a network within the Deaf community that would bring together disparate groups to raise awareness about these issues and educate D/deaf individuals about their rights, and (2) improve police practices by helping to design training programs for police officers and create an effective system for providing interpreters and other legally

²⁰⁰ See *supra* Part II.

²⁰¹ Advocates have reported instances of distraught D/deaf women appearing at precincts attempting to file reports of abuse, only to be mocked and mimicked for their inability to voice fully or articulate what happened to them with words.

²⁰² The Coalition benefits from the participation of several Deaf advocates who lend critical reflections to the Coalition's advocacy, which stem from their first-hand experience assisting dozens of D/deaf female survivors of domestic violence who come into frequent contact with the NYPD.

required accommodations. In order to implement these goals, the Coalition is in the process of developing a city-wide survey of D/deaf individuals to gather information for a report identifying barriers and proposing solutions. In addition, the Coalition has filed a Freedom of Information Law²⁰³ (“FOIL”) request and has met with an NYPD officer to gather information about the NYPD’s current system for providing accommodations to D/deaf individuals. Through our work in the Coalition, we have already begun to reap the benefits of the community lawyering model.

B. Valuing Stakeholder Experience and Knowledge

Almost immediately, our collaborative efforts through the Coalition demonstrated the value of community input, with respect to both evaluating the feasibility of proposed remedies and identifying critical community goals that traditional legal strategies are at risk of overlooking.

One example to illustrate the importance of community input in evaluating the practical effects of a proposed remedy arose through the Coalition’s discussion of the DOJ’s advocacy efforts in this area. As noted above, the DOJ conducts much of the systemic legal advocacy challenging various police departments’ failures to meet the communication needs of D/deaf individuals.²⁰⁴ In part, meeting the communication needs of D/deaf individuals means providing notice of the right to an interpreter. When discussing the DOJ’s settlement with the NYPD at a Coalition meeting, we identified its requirement that the NYPD “provide notice of the availability of auxiliary aids and services for qualified individuals with hearing impairments through the distribution of pamphlets, posters or other appropriate means, including, but not limited to ‘The Americans with Disabilities Act What You Should Know.’”²⁰⁵ This last reference is to a one-page document that states that “[i]ndividuals who need auxiliary aids for effective communication in programs and services are invited to make their needs and preferences known to the ADA Compliance Coordinator.”²⁰⁶ As immediately identified by one of NYLPI’s Coalition partners, this document would otherwise be helpful but for one major flaw: many D/deaf individuals have a limited ability to read English and will not understand their rights through a written poster or pamphlet.²⁰⁷ Instead, the Coalition

²⁰³ N.Y. PUB. OFF. LAW § 87 (McKinney 2008).

²⁰⁴ See *supra* notes 147–48 and accompanying text.

²⁰⁵ NYPD Settlement Agreement, *supra* note 147.

²⁰⁶ *Id.*

²⁰⁷ See *supra* Part II.A.

920 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 45

member suggested the police department ought to include a picture of the ASL sign for “interpreter” on the poster and perhaps develop another more simplified way of communicating such a critical right to a D/deaf person with limited English proficiency.

Later, the importance of stakeholder input became clear when the Coalition discussed the possibility of obtaining information from the NYPD through a FOIL request.²⁰⁸ Many members of the Coalition were previously unaware of their right to access government records and they were happy to have discovered the FOIL process as a tool for gathering information. While discussing a draft of the FOIL request that we attorneys had prepared, a few Deaf advocates from the group expressed concern with our proposed use of the term “hearing impaired” as opposed to the preferred term “deaf or hard of hearing.” Although we had carefully avoided using this shunned term in other contexts, we explained our concern that government agencies tended to avoid responding to FOIL requests by claiming confusion about the information sought. As a result, we reasoned, it was important to mirror the term that the NYPD itself used in its documents so as to avoid any alleged lack of clarity. In other words, in our minds the one and only goal of the request was to get the information, regardless of the implications the wording might have on how the Deaf community would be represented. But our Coalition partners persisted: *Shouldn't we use language with which we feel comfortable and teach the NYPD how to properly refer to D/deaf individuals and the Deaf community? If we don't advocate for this kind of social progress, who will?* They were right—there were multiple goals at this stage, not just the need for information. The group felt that it was important to seek to educate the NYPD and maintain integrity while also gathering information. In the end, we found a way to craft the request to address all of these goals, and we learned something in the process.

C. *Fostering a Creative, Interdisciplinary, Systemic Approach*

Our work with the Coalition has also exposed the advantages of incorporating interdisciplinary expertise and the importance of bridging the gap between legal action and on-the-ground systemic reform.

The Coalition has already reaped the benefits of including members of a variety of backgrounds and disciplines in its efforts. Take, for instance, the role of sign language interpreters. Although interpreters

²⁰⁸ The Freedom of Information Law or “FOIL” is the New York State equivalent of the Federal Freedom of Information Act (“FOIA”), which grants public access to government records. See generally N.Y. PUB. OFF. LAW §§ 84–90 (McKinney 2008).

are not direct stakeholders, they are vital to the process of formulating a community response to improving interactions between D/deaf individuals and law enforcement because of their unique ability to raise tactical or practical considerations regarding interpretation.²⁰⁹ Despite this expertise, interpreters are generally neglected when the DOJ develops guidance for police departments on how to provide auxiliary aids and services. When demanding compliance with the ADA, both the DOJ and courts assume the availability of interpreters to provide for effective communication, despite evidence to the contrary. One member of our Coalition, a sign language interpreter with many years of experience, posed the following questions during a Coalition meeting: *What does it take to be a “qualified” interpreter for a D/deaf individual interacting with law enforcement – does an interpreter need additional training, such as how to handle an emergency situation? Are interpreters less inclined to accept a job if there are safety risks involved? How can we incentivize interpreters to accept these positions?*

The interpreter’s expertise revealed itself in another Coalition conversation regarding various methods of ensuring effective communication. When a member of the Coalition raised the possibility of administering the *Miranda* warning²¹⁰ to D/deaf suspects by pre-recorded video, the interpreter raised an important concern: how can a pre-taped *Miranda* warning be communicated effectively if each D/deaf individual has a different method of communicating? She rightly pointed out that some individuals use ASL, some use signed English, and still others understand no conventional signing and instead use home signs.²¹¹ Therefore, she explained, in order to ensure effective communication, it is critical that a sign language interpreter adapt the interpretation of the *Miranda* warning to the needs of each individual in any given situation. This interpreter further suggested videotaping the

²⁰⁹ Muneer Ahmad provides a detailed discussion of the oft-overlooked role that interpreters play in the lawyer-client relationship. Ahmad, *supra* note 96, at 1086. Ahmad provides the following breakdown of the role of an interpreter in the context of community lawyering:

While lawyering across language difference does not necessarily compel community lawyering, at the same time, effective lawyering across language difference demands an orientation to lawyering that draws upon and is consistent with community lawyering practices. The potential of robust collaboration between lawyer, client, and interpreter thus suggests a far grander vision of lawyer engagement not only in the cases of clients, but in the struggles of communities.

Id.

²¹⁰ See *supra* Part II.A for a discussion of the difficulties that may arise when communicating the *Miranda* warning to D/deaf individuals.

²¹¹ See *supra* Part IV.A for a discussion of the variety in signing styles and skills among D/deaf individuals.

922 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 45]

administration of the *Miranda* warning at the precinct to allow for a future review of whether communication was effective. It is difficult to imagine a way in which traditional legal advocacy could create space in which to share this expertise.

In addition to providing us the benefits of interdisciplinary expertise and community input, the community lawyering model has also informed our tactical and strategic approaches to advocacy. Through the Coalition, we have been reminded of the importance of striving for the long-term success of a community-led, systemic effort to change policing practices. To provide an example, the DOJ signed a settlement agreement with the NYPD in November of 2009, which addressed the NYPD's obligations to ensure effective communication with D/deaf individuals.²¹² We inadvertently discovered this agreement several months later through research on the DOJ's website and shared it with our Coalition partners at one of our first meetings. Despite the settlement agreement's obvious benefits to their D/deaf clients, in particular a provision outlining a grievance procedure when the police failed to provide communication services,²¹³ our Coalition partners were completely unaware that the agreement even existed. As far as the New York City Deaf community was concerned, no real change had taken place in the NYPD's approach or practices as a result of the DOJ's settlement agreement. At that moment, we understood that real change on the ground would require more than legal action alone—mobilizing and educating the stakeholders about their rights and how to enforce them would have to accompany any legal action.

D. Consciousness-Raising, Educating, and Organizing Stakeholders

Through the Coalition, we have prioritized the goal of creating an opportunity for D/deaf individuals in New York City to express their concerns, learn about their rights, and organize to fight against systemic oppression. Oralism's ugly legacy²¹⁴ increases the need to create a space in which D/deaf individuals can collectively take action through a shared, raised consciousness. Additionally, the reluctance of victims who have difficulty reporting crimes to step forward to challenge communication barriers²¹⁵—as reflected in Coalition members' experiences—also perfectly illustrates the need for a community lawyering approach to affirmatively and comprehensively identify existing barriers and develop advocacy accordingly.

²¹² See NYPD Settlement Agreement, *supra* note 147.

²¹³ *Id.*

²¹⁴ See *supra* Part V.B.1.

²¹⁵ See *supra* Part II.B.

Working in a Coalition that includes a substantial number of Deaf members has already proven invaluable in efforts to identify the range of barriers that can arise in law enforcement practices. The Coalition is in the process of developing a city-wide survey project aimed at collecting information about D/deaf individuals' experiences with the NYPD. Given the diffuse nature of the Deaf community—D/deaf individuals are not located primarily in one neighborhood or area—the task of identifying affected individuals can be more challenging than in a geographically concentrated community. Deaf individuals know where to find other Deaf individuals and are also a critical component to the interview and research process itself.²¹⁶ The method by which data is collected requires more attention given the nature of the communication barriers that can arise,²¹⁷ as well as the concern about lack of confidentiality, which is “a real problem for individuals who are deaf, in terms of both the risk to the individual and the individual’s reluctance to communicate during interviews conducted with interpreters where sensitive issues are explored.”²¹⁸ Therefore, surveying techniques must be implemented in a flexible way that includes members of the Deaf community at every stage from design to execution. Not only does the involvement of D/deaf individuals increase the accuracy of the information gathered, but it also provides space for consciousness-raising and empowerment.²¹⁹

With respect to the education of the Deaf community about their rights, Coalition members have expressed a sense of disconnectedness that they desire to bridge so that D/deaf individuals are better able to assert their rights. Therefore, in addition to surveying D/deaf individuals to identify barriers and develop solutions regarding police practices, we plan to create and disseminate accompanying materials that will educate D/deaf individuals about their rights.

²¹⁶ The Participatory Action Research (“PAR”) approach—the research community’s corollary to the community lawyering model—is a natural fit in the case of the Deaf community. See OBINNA ET AL., *supra* note 43, at 24 (“PAR is distinguished by 3 primary facets: 1) an iterative process for conducting research that includes reflection and action; 2) having community members and stakeholders involved with the research process; and 3) using findings to promote positive community change.”).

²¹⁷ See Eckhardt & Anastas, *supra* note 21, at 233–47 (discussing ways to detect and reduce bias and error in surveying the D/deaf and disability population).

²¹⁸ *Id.* at 241.

²¹⁹ The PAR model “seeks to join research, or systematic study, to the stimulation of change in the organization or social system, such as a community, being studied. Consciousness raising and the empowerment of research participants—of the groups and communities being studied—are often the hallmarks of such research.” Eckhardt & Anastas, *supra* note 21, at 236; see also OBINNA ET AL., *supra* note 43, at 22.

924 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 45]

Deaf Coalition members have articulated a need to inform D/deaf individuals not only about their legal rights when interacting with the police, but also about the nature of law enforcement services and actions. For example, the Deaf community has expressed outrage and frustration about the police department's practice of cuffing arrestees' hands behind their backs. As described above, to D/deaf individuals, handcuffing is a method of silencing, not just restraint and safety.²²⁰ Notwithstanding this sentiment among D/deaf individuals, the legitimate need for police officers to protect themselves and other citizens during an arrest may trump any competing concerns. D/deaf individuals need to better understand the reasons for such tactics in order to minimize the divisive effects such procedures can have on their relationship with the police.²²¹

In addition to procedural and substantive rights education, we plan to provide opportunities through the Coalition to develop the advocacy skills of individuals in the Deaf community, for example in media work or legislative advocacy. This type of skills development—in community lawyering terms, “lay lawyering”²²²—can help lay a stronger foundation for future campaigns in the Deaf community. In the case of D/deaf individuals, these campaigns may be large or small, individual or collective in nature. In fact, D/deaf individuals must ceaselessly engage in day-to-day advocacy in order to enforce their rights in a hearing-dominated world, whether at the doctor's office, the voting booth or in the courtroom.²²³

²²⁰ See *supra* Part II.A.

²²¹ See OBINNA ET AL., *supra* note 43, at 90–91. Obinna et al. provide an example of a forum created to address the issue of handcuffing in the Deaf community:

Different scenarios were role-played demonstrating actual instances of officers being killed or injured because they did not handcuff a suspect or they handcuffed them in the front. Deaf community members participated in these role plays along with Minneapolis Police officers. After the role plays were performed . . . [t]hey then provided an open forum for Deaf audience members to ask questions and share concerns.

At the conclusion of the workshop many Deaf people expressed that they still did not like the idea of being handcuffed behind their backs but said they now understood the reasons for this procedure. Police calls in the past have escalated because Deaf individuals had a different understanding about being handcuffed behind their back. These workshops not only help educate the Deaf or hard of hearing individual on police procedures but help officers have a better understanding of what cultural or miscommunication issues may potentially escalate calls.”

Id.

²²² For a discussion of “lay lawyering,” see LÓPEZ, *supra* note 96.

²²³ A full discussion of the myriad instances of discrimination that D/deaf individuals experience is outside the scope of this Article. However, the failure to remove

VII. CONCLUSION

The goal of this Article is to begin a dialogue about the virtue of using the community lawyering model to advance social justice for the Deaf community. The unique approach of community lawyering complements the Deaf community's strong cultural identity and vibrant history of organizing. We have already learned valuable lessons from our initial community lawyering efforts with the Deaf community in New York City, and we look forward to continuing to learn from our community partners as we fight to improve police practices in New York City. While this Article has highlighted the example of the Deaf community, we believe community lawyering has the potential to help dismantle injustice towards other oppressed communities, such as the disability community.

communication barriers in violation of the ADA and other relevant anti-discrimination laws is commonplace. See, e.g., Michael A. Schwartz, *Deaf Patients, Doctors, and the Law: Compelling a Conversation About Communication*, 35 FLA. ST. U. L. REV. 947 (2008).