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## Waiting to Be Heard: Fairness, Legal Rights, and Injustices the Deaf Community Faces in Our Modern, Technological World

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# WAITING TO BE HEARD: FAIRNESS, LEGAL RIGHTS, AND INJUSTICES THE DEAF COMMUNITY FACES IN OUR MODERN, TECHNOLOGICAL WORLD

## I. INTRODUCTION

The denial of communication and language to the deaf and hard of hearing<sup>1</sup> has been compared to the denial of liberty, especially where public accommodations are concerned.<sup>2</sup> Throughout history the deaf community has navigated an uphill battle to be understood, convey thoughts and ideas, and most importantly, to communicate. The communication barrier remains prevalent in the employment, educational, and legal ecosystems, affecting civil and legal rights.<sup>3</sup>

While many technological developments<sup>4</sup> supporting instant, electronic communication have aided this community that relies on sight when communicating,<sup>5</sup> the benefits of Skype, text messaging, and social media are primarily social, and not focused on improving access to necessities such as legal assistance.<sup>6</sup> As emerging technologies reshape our everyday lives,

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1. Crucial to understanding the Deaf community is being cognizant of the differing labels within Deaf culture. The cultural distinctions between lowercase-d and capital-D deaf persons is further explained in note 45, *infra*. For the purposes of this endnote, the distinction is related to auditory capacity. The word “deaf” signifies a person’s complete inability to hear, while “hard of hearing” can be defined as mild to moderate hearing loss. Unless otherwise indicated, I will use “deaf” when discussing the inability to hear, “Deaf” when referencing the ideology associated with the Capital-D culture, and “DHH” (“deaf and hard of hearing,” for brevity); see *Community and Culture – Frequently Asked Questions*, NAT’L ASS’N OF THE DEAF, <https://www.nad.org/resources/american-sign-language/community-and-culture-frequently-asked-questions/> (last visited Feb. 5, 2017).

2. LAWRENCE M. SIEGEL, *THE HUMAN RIGHT TO LANGUAGE: COMMUNICATION ACCESS FOR DEAF CHILDREN XII* (2008).

3. See generally SY DUBBOW, SARAH GEER & KAREN PELTZ STRAUSS, *LEGAL RIGHTS: THE GUIDE FOR DEAF AND HARD OF HEARING PEOPLE*, Chapters 4, 10 (4th ed. 1992).

4. Collin Matthew Belt, *Connected: How New Technologies are Transforming Deaf Communication*, LIFEPRINT.COM, <http://www.lifepprint.com/asl101/topics/technology-deaf-communication.htm> (last visited Feb. 5, 2017).

5. See Laure J. Muir & Iain E. G. Richardson, *Perception of Sign Language and Its Application to Visual Communications for Deaf People*, 10 J. DEAF STUD. DEAF EDUC. 390, 391 (2005) for an observation into how crucial vision is for deaf people when signing or lip-reading, and how limits such as poor picture quality and connectivity still serve as barriers to communication.

6. Belt, *supra* note 4.

we must question whether the reliance on such measures have actually aided accessibility to public accommodations, how accessible said technology is for the DHH communities, and whether emerging technology has actually raised awareness about barriers that continue to exist.<sup>7</sup>

This note will examine the existing access to legal aid, employment, recourse, and education in various deaf cultures and societies. The goal is a comparative study into how the DHH communities are accepted, valued, and prioritized in different countries, and how that translates into legal infrastructure, in the form of governmentally-mandated statutes, regulations, public accommodations, and legal education. This will consist of a brief history into the recognition, labeling, and acceptance of deaf citizens in ancient and modern cultures, the path to a society's awareness and eventual recognition of deaf citizens, and how the various levels of awareness differ among regions and countries. The glimpse into varying cultures will also reveal the differences in legal systems, the effects those systems have on deaf culture, and how accessible those legal remedies are for deaf citizens. This note will focus on analyzing existing judicial infrastructures, potential barriers to justice, and the basic legal rights of a deaf person, in our modern, technological, and digital world.

Part II will begin with a historical background of particular countries and their initial recognition of rights for deaf persons, the development of those rights, and the existing rights and awareness in differing countries. The focus on awareness will be a recurring theme, as awareness leads to acceptance, which eventually leads to the application of legal remedies and assistance for the deaf community.

Part II will continue by detailing existing legal accommodations, regulations, and statutes for deaf and hard of hearing individuals. This will include particular insight into U.S., Portuguese, New Zealand, and U.K. regulations. The goal is to critically examine past and existing regulations, the impetus for their eventual implementation, and the prioritization of legal rights for the deaf. This is necessary to better understand how the deaf can rely on these laws for protection, and how this affects deaf citizens' relationship with legal systems. This note will elaborate on this by studying how educational and workplace environments normally serve as incubators for newly recognized rights.

This section will also delve into the classifications of the deaf community either as a legal minority or as disabled, and the implications that follow each distinction. This section will conclude by examining the

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7. See generally Michella Maiorana-Basas & Claudia M. Pagliaro, *Technology Use Among Adults Who Are Deaf and Hard of Hearing: A National Survey*, 19 J. DEAF STUD. DEAF EDUC. 400 (2014).

differing deaf experiences of the deaf within the criminal context, and the frequent negative consequences that accompany the resulting communication breakdown between deaf individuals and police officers, attorneys, and judges.

Part III will be a brief exploration into how technology has impacted methods of communication for the deaf, how it has translated into help and access to accommodations, and the potentially negative result of decreasing social awareness for the deaf.

Lastly, Part IV will survey existing problems and solutions within the legal industry, including public accommodations, law school attendance and experiences for the deaf, and unique issues deaf citizens face when retaining and communicating with counsel. This Note concludes with a discussion of ethical considerations that accompany representing a deaf client and proposes various solutions the legal community is uniquely suited to provide, namely requiring disabilities and communication-focused courses in either first-year law school curricula or required professional responsibility courses.

## II. RECOGNITION AND REALIZATION OF RIGHTS FOR DEAF CITIZENS

### A. *Historical Backdrop and the Plight of the Deaf Citizen*

Early recognition of deaf persons can be traced to ancient Greek legends,<sup>8</sup> and the first recorded writing identifying an individual as deaf can be traced to ancient Rome.<sup>9</sup> It is important to note that the legal system established in Rome serves as the model many countries discussed in this Note later adopted.<sup>10</sup> Early societies viewed a deaf person as incapable, similar in intelligence to a madman or an infant, in constant need of assistance, and therefore unable to participate in a legal transaction.<sup>11</sup> Most referred to the deaf as one large class,<sup>12</sup> failing to account for the many degrees of hearing loss.<sup>13</sup> This school of thought formed the early basis of

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8. *Timeline of Recorded Deaf History*, GALLAUDET UNIV. LIBR., <http://libguides.gallaudet.edu/content.php?pid=352126&sid=2881782>, (last visited Jan. 2, 2017).

9. *Id.*

10 Hessel E. Yntema, *Roman Law and Its Influence on Western Civilization*, 35 CORNELL L. REV. 77, 88 (1949).

11. ALBERT C. GAW, *THE LEGAL STATUS OF THE DEAF: THE DEVELOPMENT OF THE RIGHTS AND RESPONSIBILITIES OF DEAF-MUTES IN LAWS OF THE ROMAN EMPIRE, FRANCE, ENGLAND, AND AMERICA* 14 (1907).

12. *Id.* at 8.

13. While this note will at times differentiate between deaf and hard of hearing, the focus will be on

opinion regarding a deaf person's intelligence, and legal assistance<sup>14</sup> was generally guaranteed to the deaf deemed unfit to make their own decisions. Eventually, a deaf person who could prove independence by intelligence could enter legal contracts and other acceptable transactions.<sup>15</sup>

A closer examination of legal rights for the deaf in France, the birthplace of standardized sign language,<sup>16</sup> is important to understand the ideological shift towards unique communication suited for the DHH community, in addition to the development of their legal rights.<sup>17</sup>

Perhaps most notable is the groundbreaking work The Abbé Charles Michel de l'Épée<sup>18</sup> forged towards developing and educating the deaf based on a system of signs, instead of focusing on speaking. While l'Épée's work had a massive impact on deaf culture, and deaf persons in France were not deprived of any legal rights or privileges, the French Code rigidly required the deaf to display a high level of reading, writing, and speaking. These requirements effectively erected a wall most deaf persons could not climb over.<sup>19</sup> For example, the deaf could not serve in an office of civil status, and while he or she could technically make a declaration as a witness before a tribunal, the tribunal retained the ultimate decision regarding the weight given to the declaration.<sup>20</sup>

The driving force behind recognizing deaf persons as competent for communication was the importance placed on consent.<sup>21</sup> Without the ability to consent, official legal documents such as basic contracts, donations, or marriages were off-limits to deaf citizens.<sup>22</sup> This effectively placed a premium on education<sup>23</sup> for a deaf individual, as reading, writing, and even some speech was required to be socially and legally acknowledged. Because of the ultimate barrier in communication, the educational level of DHH individuals played a larger role in their social standing than it did for a

the congenitally or quasi-congenitally deaf, who have face the toughest battle for civil and legal rights.  
*Id.*

14. *Id.* at 16. When discussing legal rights, responsibility, or recognition, I will be referring to a deaf person's individual ability to access the courts, to contract, or to engage in business the way a similarly situated hearing person could.

15. *Id.* 16.

16. Jules Paul Seigel, *The Enlightenment and the Evolution of a Language of Signs in France and England*, 30 J. OF THE HISTORY OF IDEAS 96, 106 (1969).

17. GAW, *supra* note 11, at 42.

18. See THE ABBÉ CHARLES MICHEL DE L'ÉPÉE, GALLAUDET UNIV., <http://giving.gallaudet.edu/HOF/pastinductees/the-abbe-charles-michel-de-lepee> (last visited Sept. 29, 2017).

19. GAW, *supra* note 11, at 42.

20. *Id.* at 43.

21. *Id.* at 44.

22. *Id.*

23. *Id.* at 42.

hearing person when determining the capacity of the individual.<sup>24</sup>

Thus, a DHH individual could be legally recognized as able to enter the workplace, agree to contract, and essentially be a “normal” individual in society, but he would be viewed through a different, usually negative lens. This lens often resulted in rights considered equal to a minor, usually requiring assistance from judicial counsel.<sup>25</sup>

Additionally, the form of communication available to DHH individuals was generally seen as invalid; this is displayed by the fact that donations of gifts made in sign-language were often not considered valid under the French Code due to the code requiring gifts be delivered via oral statements.<sup>26</sup> Regarding the testation of wills, a deaf person had to perform a holographic will while showing that the deaf person understood what he wrote in order for it to be considered enforceable by a court at law.<sup>27</sup> In the event of criminal investigations or involvement as a witness, a deaf person would need to show the ability to communicate in writing or with the successful aid of an interpreter for it to be considered acceptable.<sup>28</sup>

Under English law, a person born “deaf and dumb”<sup>29</sup> was presumed to be an idiot,<sup>30</sup> requiring the person to show a high level of intelligence to overcome this presumption.<sup>31</sup> The labeling as “deaf and dumb” or “deaf mute” proved to be injurious, offensive, and perpetuated the connection between a deaf person and dumbness throughout history.<sup>32</sup> While many of the same legal constraints on testation, donations, and consent mirrored those in France,<sup>33</sup> early educators of the deaf gradually began introducing the idea that deafness did not equal complete incapacity.<sup>34</sup>

The realization that deaf individuals could be educated initiated the slow

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24. *Id.* at 49: “Article 936 in the title on Donations Inter Vivos contains the only direct reference to the deaf and dumb that is found in the French Civil Code. This article has indirectly an important bearing on the question of the capacity of the deaf-mute. It reads as follows: ‘A deaf and dumb person, who knows how to write, can accept, either personally or by attorney-in-fact. If he does not know how to write, the acceptance must be made by a curator appointed for that purpose, in accordance with the rules set down in the title of Minority, of Guardianship, and of Emancipation.’”

25. *Id.*

26. *Id.* at 53.

27. *Id.*

28. *Id.* at 64-65.

29. For an insight into the effect of negative labeling attached to disabilities, *see generally* Jennifer Gossett, *Ableism and Language*, OREGON STATE UNIV. DISABILITY ACCESS SERV. BLOG (Jan. 31, 2012), <http://blogs.oregonstate.edu/dasblog/2012/01/31/ableism-and-language/>.

30. GAW, *supra* note 11, at 72.

31. *Id.*

32. *See generally* MATTHEW S. MOORE & LINDA LEVITAN, *FOR HEARING PEOPLE ONLY* 213 (2d ed. 1993).

33. *See* GAW, *supra* note 11, at 76.

34. *Id.* at 76.

shift towards allowing deaf individuals to exercise previously withheld rights.<sup>35</sup> While this can be considered a step forward for the deaf, the presumption that uneducated and poorly educated deaf individuals could not control their affairs combined with the fact that signing was not yet fully recognized by courts, continued to hinder their progress.<sup>36</sup>

Lastly, early American law mirrored the French Code's concerns about DDH individuals' ability to contract.<sup>37</sup> However, by the nineteenth century the presumption shifted towards presuming DDH individuals had the proper capacity to make contracts, execute deeds, and marry freely as any other person unless proven otherwise.<sup>38</sup>

A noticeable difference in English and American law compared to France and Rome is that deafness was not viewed as negatively affecting a deaf persons' testamentary capacity.<sup>39</sup> Regarding testifying as a witness, English law recognized the validity of a deaf person as early as 1786, and American law also presumed the validity of either written or signed testimony, with the assistance of an interpreter.<sup>40</sup>

It is worth noting that two things hindered the establishment of a workable educational system in these societies: the first was the inability to ensure adequate learning opportunities for the deaf, resulting in the lack of access to a "language-rich" environment.<sup>41</sup> Factors contributing to the problem are the varying degrees of deafness,<sup>42</sup> confusion over tailored instruction required for deaf students, and problems associated with state-mandated education for deaf children.<sup>43</sup> The second issue can be traced to the original schooling available for the deaf resembling charitable organizations that provided care for the criminal or the insane, resulting in negative public regard and bias towards deaf people.<sup>44</sup>

Noticeably shared characteristics in the aforementioned societies are (1) the ever-important initial recognition of the deaf person, (2) societal realizations that some sort of help (usually judicial) is required for the person to successfully integrate into the particular developing society, and (3) the underestimation of a deaf person's capacity and intelligence, formulated on the underlying notion that the person is inadequate because

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35. *Id.* at 78.

36. *Id.*

37. *Id.* at 82.

38. *Id.* at 83-84.

39. *Id.* at 85.

40. *Id.* at 88.

41. See SIEGEL, *supra* note 2, at 31-32. Siegel explains how the variety of inadequate school programs attended by deaf students leads to many being cut-off from language, and thus communication.

42. MOORE, *supra* note 32, at 220.

43. GAW, *supra* note 11, at 93.

44. *Id.*

he or she cannot hear, speak, and thus communicate.

This brief historical study displays the pivotal role legal systems have played in the recognition and acceptance of deaf citizens, and how these systems were crucial to furthering progress for the deaf. It unfortunately also exposes how various legal systems struggled to accurately label, accept, and account for the intelligence of the deaf, while grappling with how to offer adequate accessibility and protections.

### *B. Disability and Defining the Deaf Community*

Crucial to recognition in a society is the label given to a group of people. The second major barrier deaf persons face is the tension between being labeled as disabled, and benefiting from accommodations associated with a disability, or being labeled as an ethnic group, where they can retain their unique characteristics without mandated public accommodations.<sup>45</sup>

Understanding the two competing ideologies within the deaf community is paramount to fully grasping the layers that constitute the deaf community and its unique culture. “Capital D” deaf citizens are especially proud of their deaf status, communicate solely through sign language, and would choose to remain deaf if given the opportunity to hear.<sup>46</sup> These Deaf individuals believe sign language to be “a symbol of social identity” that serves as a medium of social interaction, and a store of cultural knowledge.”<sup>47</sup> This community does not identify as disabled, resists hearing-based societal norms, and pushes back against assimilation into the hearing world.<sup>48</sup> Lastly, and perhaps most important to Deaf parents, is their joy when their own children are also born deaf, as they prioritize ensuring deaf culture and communication via sign language remains active.<sup>49</sup>

In contrast, “lowercase d” deaf persons are often willing to assimilate into the hearing world in an effort to fully integrate into society.<sup>50</sup> These deaf persons are often the children of hearing parents, and live in a world

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45. Harlan Lane, *Ethnicity, Ethics and the Deaf-World*, 10 J. DEAF STUD. DEAF EDUC. 291, 297 (2005).

46. Kelly McAnnany & Aditi Kothekar Shah, *With Their Own Hands: A Community Lawyering Approach to Improving Law Enforcement Practices in the Deaf Community*, 45 VAL. U. L. REV. 875, 912 (2011).

47. *Id.* 910.

48. Lane, *supra* note 45.

49. McAnnany & Shah, *supra* note 46, at 912.

50. Patrick Dehan, *How Technology Could Threaten Deaf Identity*, ATLANTIC (May 6, 2014), <https://www.theatlantic.com/health/archive/2014/05/how-technology-could-threaten-deaf-identity/361604/>.



that consists of both hearing and sign language.<sup>51</sup> A significant dividing line between the communities is drawn at the decision to use and accept, or completely resist cochlear implant technology.<sup>52</sup> This procedure can potentially restore hearing depending on the severity of the deafness in the individual, and the recipient's level of immersion in oral/aural communication.<sup>53</sup>

This distinction serves as valuable insight into a culture frequently misunderstood by the hearing community.<sup>54</sup> The two distinct ways of thinking could affect the D/deaf<sup>55</sup> individual's perception of the hearing world, and their trust of the judicial and law enforcement systems.<sup>56</sup> Communicating with proponents of each community, determining their goals, and listening to their collective concerns will provide the much-needed first step towards formulating a working solution aimed at better serving and integrating the entire deaf community on their terms.

### C. *Legally Sound, Morally Reprehensible: The Argument for Fundamental Rights to Education*

The right to free speech in various shapes and forms is a right available in most developed societies, and one most certainly viewed as fundamental in the United States.<sup>57</sup> The importance of speech is further displayed by the development and reliance on spoken communication to convey ideas throughout the world.<sup>58</sup> A result of our hearing-based culture placing a high premium on communication through speaking is the detriment of deaf students often unable to experience adequate educational growth.<sup>59</sup>

51. *Id.*

52. Alicia Ouellette, *Hearing the Deaf: Cochlear Implants, the Deaf Community, and Bioethical Analysis*, 45 VAL. U. L. REV. 1247, 1250 (2011).

53. *Id.*

54. See Matthew S. Compton, *Fulfilling Your Professional Responsibilities: Representing a Deaf Client in Texas*, 39 ST. MARY'S L.J. 819, 828–36 (2008) (explaining the difference between culturally hearing and culturally deaf). Compton details the differences between grammar in sign language and English, and common misconceptions that occur during interactions between DHH individuals and attorneys. *Id.* at 834–35. Compton argues that attorneys that communicate using strictly written English, or who refuse representation based on a client's deafness, are in violation of their professional responsibilities as well as the ADA. *Id.* at 851.

55. As mentioned, I will continue to refer to the deaf using the lowercase spelling unless necessary to distinguish between the communities.

56. See McAnnany & Shah, *supra* note 46, at 878 (introducing that the deaf face significant barriers in interactions with police).

57. U.S. CONST. amend. I; see also *Held Dear in U.S., Free Speech Perplexing Abroad*, NPR (Sept. 19, 2012, 5:11 PM), <http://www.npr.org/2012/09/19/161439562/held-dear-in-u-s-free-speech-perplexing-abroad> (interview by Robert Siegel with Noah Feldman, Professor of International Law at Harvard Law School).

58. SIEGEL, *supra* note 2, at 17.

59. See *id.* at 28 (“Language is the linchpin of everything we learn.”).

The access to institutional education crucial to maintaining equality for the deaf community is usually rooted in two important sources, the first being federal and state statutes that create legal obligations for educational institutions.<sup>60</sup> These laws usually provide for basic human rights for the disabled, which in turn require public accommodations at school or the workplace, usually in the form of interpreters.<sup>61</sup> National or state-mandated public accommodations for educational institutions usually face two problems: inadequate resources, and the creation of a negative stigma by labeling the deaf as disabled.<sup>62</sup>

The second source can be found in a country's constitution, where the right to free speech varies depending on the specific country. The argument for the right to speech within this context is that it is tantamount to the right to language and linguistic development, which could be enabled by mandating access to interpreters and other visual assistance.<sup>63</sup> The critical question presented is: where does a right to communication fit in to this discussion, and is it inherently buried somewhere in existing statutes or constitutions?

An example of this tension was highlighted by the U.S. Supreme Court's denial of the right to an interpreter in a public school classroom for then-six-year-old Amy Rowley.<sup>64</sup> Amy provided a unique example because she had the ability to hear lower frequencies, some speech reading (lip-reading) skills, and was born to two deaf parents.<sup>65</sup> Amy's access to education was governed by the Education for All Handicapped Children Act<sup>66</sup> (since

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60. See generally Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012); Rehabilitation Act of 1973, 29 U.S.C. §§ 701–794 (2012); Council Directive 2000/78, 2000 O.J. (L 303) 16 (EC); Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3.

61. See 28 CFR § 36.303 (2017); Convention on the Rights of Persons with Disabilities, *supra* note 60, art. 9(2)(e), which requires states to “provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public.” This includes “schools, housing, medical facilities and workplaces.” *Id.* art. 9(1)(a).

62. Many DHH individuals have fought for years to distance sign language from disability and the accompanying stigma. See Michael A. Schwartz, *America's Transformation: The Arc of Justice Bends Towards the Deaf Community*, 45 VAL. U. L. REV. 845, 849 (2011) (discussing the work of the National Theatre of the Deaf).

63. See Maya Sabatello, *Disability, Cultural Minorities, and International Law: Reconsidering the Case of the Deaf Community*, 26 WHITTIER L. REV. 1025, 1046 (2005) (discussing the benefits of a right to language).

64. Bd. of Educ. v. Rowley, 458 U.S. 176, 210 (1982).

65. SIEGEL, *supra* note 2, at 3.

66. The Act is now known as the Individuals with Disabilities Act (IDEA), 20 U.S.C. §§ 1400–1482 (2012). For an insightful discussion of the unexpected impact IDEA had on the deaf community, see generally Russell S. Rosen, *An Unintended Consequence of IDEA: American Sign Language, the Deaf Community, and Deaf Culture into Mainstream Education*, DISABILITIES STUD. Q., Spring 2006. Rosen traces the early efforts of advocates and researchers to integrate American Sign Language into

amended, and now rebranded as “IDEA”), which created mandates for public schools.<sup>67</sup> The intention of the law was to provide entitlements for children with disabilities, and specifically, the right to educational programs tailored to their specific needs.<sup>68</sup> So long as the state complied with the federal law, it received federally assisted funding to assist with the education for handicapped children.<sup>69</sup>

Amy’s parents decided to enroll her in a regular kindergarten class to determine what supplemental services would be required for her education.<sup>70</sup> After an initial trial period, it was decided that Amy would remain in the class, and be provided with an FM hearing aid which would help her hear words spoken into the aid during certain classroom activities.<sup>71</sup> Later, after Amy successfully completed kindergarten, an individualized educational program<sup>72</sup> was prepared to fit her needs as she headed to first grade. Amy’s parents agreed with parts of the IEP, but requested she be provided with a sign-language interpreter<sup>73</sup> in all her academic classes, instead of the school-recommended assistance.<sup>74</sup>

After the school administrators determined that Amy did not need an interpreter in the classroom, Amy’s parents demanded a hearing before an independent examiner, who ruled that since she was succeeding

public classrooms and discusses how IDEA served as the source of development, definition, and implementation of adequate communication needs for deaf and hard of hearing students.

67. SIEGEL, *supra* note 2, at 4.

68. *Id.* The relevant requirements under IDEA are provisions for an individualized program with adequate support services, in the least restrictive environment.

69. *Rowley*, 458 U.S. 176 at 179.

70. *Id.* at 184.

71. *Id.*

72. *Id.* The Individualized Educational Program (“IEP,” currently defined under IDEA), is the process by which the “free appropriate public education” required by the Act is tailored to students. It would be prepared at a meeting between a qualified representative of the local educational agency, the child’s teacher, the parents or guardians, and if appropriate, the child. The IEP consists of a written document detailing the educational level of the child, statement of annual goals, the extent to which the child would be able to participate in regular educational programs, the projected date for initiation and anticipated duration for the services, and an

appropriate objective criteria for eventuation procedures for determining whether the objectives are being achieved. *See* 20 U.S.C. § 1414(d) (2012).

73. For a statistical view of the effectiveness of interpreters, see Brenda Schick, Kevin Williams & Haggai Kupermintz, *Look Who’s Being Left Behind: Educational Interpreters and Access to Education for Deaf and Hard-of-Hearing Students*, J. DEAF STUD. & DEAF EDUC., Jan. 2006, at 3. The authors examine the inadequacies of interpreters in two aspects: first, classroom communication usually involves multiples speakers, which is often difficult to represent via sign language. Second, and perhaps most disconcerting, is the fact that more than half of the interpreters studied did not perform at the minimum standard on the Educational Interpreter Performance Assessment. The harsh reality is that deaf students are still learning at a lower level than hearing students, even with mandated and provided interpreters in the classroom.

74. *Rowley*, 458 U.S. 176, 184.

academically she did not need the interpreter.<sup>75</sup> With the right to judicial review allowed by the Act, the Rowleys filed suit in federal district court alleging that the administrator's denial of the sign language interpreter resulted in a denial of Amy's right to a "free appropriate education."<sup>76</sup> The district court noted that while Amy was a high-achieving student, she was unable to understand as much from the classroom as hearing students could, and held that her potential could be fully reached with the aid of an interpreter, and without one she was not receiving a "free appropriate public education."<sup>77</sup> On appeal, the United States Court of Appeals for the Second Circuit affirmed the district court's holding.<sup>78</sup>

Unfortunately, the Supreme Court went a different route, holding that under the Act Amy was not guaranteed a sign-language interpreter inside the classroom.<sup>79</sup> The Court held that the statute did not impose a requirement that the states maximize potential of handicapped children commensurate with other children.<sup>80</sup> Continuing further, the Court reasoned that since Amy was "receiving personalized instruction and related services calculated by the Furnace Woods school administrators to meet her educational needs the lower courts should not have concluded that the Act requires the provision of a sign-language interpreter."<sup>81</sup>

The implications of this ruling were troubling, particularly for the deaf community as an interpreter is often the only way to be included in the conversation, lesson, or environment.<sup>82</sup> This was the first case regarding the adequacy of IDEA before the Supreme Court, and the Court focused on whether the law provided the opportunity to maximize Amy's potential, instead of the fundamental issue—the flow of information inherent in the First Amendment, and ultimately, the right to communicate.<sup>83</sup> Lawrence Siegel posits that the Court's focus was misplaced, as the right to speech and communication is embedded in the First Amendment, while the right to

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75. *Id.* at 185.

76. *Id.*

77. *Id.* at 185–86. The court defined "free appropriate education" as "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children." *Id.*

78. *Rowley v. Bd. of Educ.*, 632 F.2d 945, 948 (2d Cir. 1980).

79. *Rowley*, 458 U.S. 176 at 203. When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Id.*

80. *Id.* at 198, 200.

81. *Id.* at 210.

82. See generally Schick et al., *supra* note 73.

83. SIEGEL, *supra* note 2, at 7.

equal education is embedded in the Fourteenth Amendment.<sup>84</sup>

Siegel contends that the classroom is a “language laboratory,” which forms the basis for emotional, intellectual, and educational growth that would be “unthinkable without the ability to communicate.”<sup>85</sup> Siegel further argues that the First Amendment is where the key to finding the fundamental right to communication exists, and that because the statute only requires that the IEP team consider the communication and language needs of the deaf, IDEA falls short of mandating the requirement for providing necessary assistance.<sup>86</sup>

During the reauthorization of IDEA in 1997, new language was added requiring an IEP team to consider a DHH student’s “communication needs.”<sup>87</sup> In 2004, Congress added sign-language interpreter to the list of specific related services a child may need to benefit his or her education under IDEA, but has yet to actually mandate any of the related services.<sup>88</sup> While an IEP team could decide that an interpreter is necessary in the classroom, the failure to make this a requirement leaves a gap in accessibility for deaf students in America. While IDEA is helpful for millions of students in need of educational assistance, its inadequacies regarding the deaf community displays one of the many barriers placed in front of the deaf community by our judicial system.

Correspondingly, deaf students have faced similar issues abroad. In 1994, the United Nations passed The Salamanca Statement,<sup>89</sup> a framework calling participating nations to action for improvements with inclusion for special needs education. This report is important for reaffirming that every child has a right to education,<sup>90</sup> for explicitly recognizing educational necessities unique to the deaf,<sup>91</sup> and for promoting a model of inclusivity.

The recognition of the distinctive needs of the deaf when determining educational placement raised awareness and placed responsibility on the

84. *Id.*

85. *Id.* at 28.

86. *Id.* at 56.

87. *Id.* at 7.

88. *Id.*

89. World Conference on Special Needs Education Access and Quality, *The Salamanca Statement and Framework for Action on Special Needs Education*, U.N. Doc. ED-94/WS/18 (June 7-10, 1994) [hereinafter *Salamanca Statement*].

90. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

91. *Salamanca Statement*, *supra* note 89, at Part II, art. 21:

The importance of sign language as the medium of communication among the deaf, for example, should be recognized and provision made to ensure that all deaf persons have access to education in their national sign language. Owing to the particular communication needs of deaf and deaf/blind persons, their education may be more suitably provided in special schools or special classes and units in mainstream schools.

nations to take action.<sup>92</sup> Participating nations have since struggled with enacting new laws while attempting to reconcile competing ideologies regarding inclusion of deaf students into the mainstream classroom.<sup>93</sup> In response, Portugal passed a law based on inclusion, requiring a sign-bilingual environment focused on facilitating Portuguese Sign Language (PSL) development.<sup>94</sup> This is a significant step towards providing access to education based on the legal mandates, but faces barriers due to the lack of human resources and difficulties with blending the hearing-based curriculum with signing.<sup>95</sup>

The United Kingdom (a signatory to the Salamanca Statement) has also been shrouded in a debate over inclusion since it was passed.<sup>96</sup> Unlike Portugal, deaf students and parents in the U.K. have a large selection of methods of education,<sup>97</sup> and parents sometimes prefer a specialized school due to the dearth of evidence proving that mainstream schooling is more effective than specialized schools.<sup>98</sup>

The method employed to execute the inclusive model for deaf students has been the source of considerable controversy due to conflicting opinions about whether deaf students should be treated differently from hearing students in the first place.<sup>99</sup> Some argue that a specialized school focusing on signing will best serve an inclusive model, while the British Deaf Association (“BDA”)<sup>100</sup> expresses caution towards automatic mainstreaming because schools may not be equipped to properly incorporate deaf students.<sup>101</sup> In 2001, with the passage of the Special

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92. Sofia Freiere, *Creating Inclusive Learning Environments: Difficulties and Opportunities Within the New Political Ethos*, 14 J. DEAF STUD. DEAF EDUC. 131 (2007).

93. *Id.* Freiere outlines the controversy over implementing the inclusion model outlined by the Salamanca Statement. Those in opposition argue that the difficulty presented by the hearing barrier, the inability for deaf students to create a unique and positive connection to their deaf identity, and the dearth of fully trained bilingual teachers are reason enough to pull back on automatic inclusion. Those in favor argue for the educational system’s need to diversify instruction, strategy, and methods for learning.

94. *Id.* at 132.

95. *Id.* at 133-34.

96. Stephen Powers, *From Concepts to Practice in Deaf Education: A United Kingdom Perspective on Inclusion*, 7 J. DEAF STUD. DEAF EDUC. 230, 233 (2002).

97. *Id.* at 232.

98. *Id.*

99. *Id.*

100. The British Deaf Association is the largest deaf-advocacy group in the U.K., is run by deaf people, and lead the campaign for British Sign Language (“BSL”) to be recognized as a minority language. For insight into statistical use of BSL in the U.K., see *British Sign Language Statistics*, BRITISH DEAF ASSOCIATION, <https://www.bda.org.uk/bsl-statistics> (last visited Feb. 9, 2017).

101. *Id.* The British Deaf Association has outlined prerequisites for adequate bilingual education if employed in mainstream schooling, including access to a deaf peer group, and curriculum and assessment provided in the student’s preferred language, whether it be BSL or not.

Education Needs and Disability Act,<sup>102</sup> the British Government attempted to strike a balance between pushing for inclusivity and allowing parents to select special schooling they deem fit for their deaf children.<sup>103</sup> The statute was a large step forward for DHH students, striking the balance between inclusivity while outlining provisions for parents to seek alternative special schooling in the event that the mainstream school be deemed incompatible with a student's needs.<sup>104</sup>

These brief examples from a few countries display the striking similarities in issues surrounding the inarguable right to deaf education. While sign-languages and ideas for implementing adequate instruction may differ between countries, one thing remains the same: inclusivity is the key to continued progress.

#### *D. Legal Rights for the Deaf at Home and Abroad*

The pertinent sources of legal recognition for the deaf community in America can be found in in the Rehabilitation Act of 1973, the Americans with Disabilities Act (ADA), and the Individuals with Disabilities Act (IDEA).<sup>105</sup> While not specifically aimed at the deaf community, Section 504 of the Rehabilitation Act was the first piece of legislation to forbid discrimination against the handicapped by any entity that received federal financial assistance.<sup>106</sup> The Act's goal of encouraging handicapped persons to contribute to society by entering the workplace was a critical point in American history, as until then deaf persons were often segregated from the schooling and vocational positions of their choice.<sup>107</sup>

102. Special Educational Needs and Disability Act 2001 c.10, s. 316.

103. Powers, *supra* note 95, at 234. Powers posits that the statutory framework secured access to mainstream rights for deaf students, while also guarding civil rights for students requesting or requiring specialized education.

104. *Id.* at 233-34.

105. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §701 (1998); Americans with Disabilities Act, 42 U.S.C. § 12102 (2009), as amended; Individuals with Disabilities Act, 20 U.S.C. § 1400 (2010); *See supra* note 66 and accompanying text for further examination of IDEA and its impact; *see also* Cantor, *infra* note 114, for a discussion on the Americans with Disabilities Amendment Act of 2008 and its attempt to recapture the spirit of the "social model."

106. Bonnie Poitras Tucker, Comment, *Section 504 of the Vocational Rehabilitation Act of 1973 and the Postsecondary Education for the Deaf*, 50 U. COLO. L. REV. 341, 341-42 (1979).

107. *Id.* In 1974, the influential Section 504 was added to the statute, which stated that "no otherwise qualified handicapped individual in the United States shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." The statute originally defined a "handicapped individual" as "any individual who had a physical mental disability which for such individual constitutes results in a substantial handicap to employment." Section 504 updated the definition to include, "any person who has a physical impairment which substantially limits one or more of such person's major life activities, has a record of such impairment, or is regarded as having such an impairment." (emphasis added).

In 1990, the landmark ADA was passed, expanding civil rights for those with disabilities, including the deaf. Title III<sup>108</sup> of the Act is especially pertinent to the deaf, requiring public accommodations be accessible to disabled people.<sup>109</sup> This includes the requirement that lawyers provide auxiliary aids<sup>110</sup> or related services to DHH clients, unless doing so would constitute an “undue burden.”<sup>111</sup> The public accommodation is required when it is necessary to ensure effective communications with individuals with disabilities.<sup>112</sup> While Title III’s list of public accommodations is expansive in scope, and notable for including access to lawyers, its implementation has faced difficulties provided by the legal profession’s failure to realize its responsibilities.<sup>113</sup>

Relatedly, the ADA had major international impact, particularly in the United Kingdom, where disability rights advocates began pushing for similar legislation in the European Union (EU) shortly after the ADA was enacted.<sup>114</sup> In 2000, the Directive Establishing a Framework for Equal Treatment in Employment and Occupation (“Directive”) was passed in the EU.<sup>115</sup> While initially celebrated by disability-rights advocates, the reality of conflicting conceptualizations of disability,<sup>116</sup> combined with the

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108. See Susan K. Donius, *A Landmark Moment for Americans with Disabilities*, THE WHITE HOUSE (July 26, 2012, 9:00 AM), <https://obamawhitehouse.archives.gov/blog/2012/07/26/archives-landmark-moment-americans-disabilities>.

109. Elana Nightingale Dawson, *Lawyers Responsibilities Under Title III of the ADA: Ensuring Communication Access for the Deaf and Hard of Hearing*, 45 VAL. U.L. REV. 1143, 1148 (2011). See also 42 U.S.C. § 12181(7)(A)-(F) (2012), which lists twelve categories of private entities considered public accommodations. This list explicitly includes the “office of a lawyer.” *Id.* at § 12181(F).

110. 28 C.F.R. § 36.303(b)(1) (2016) lists acceptable auxiliary aids and services, which includes qualified interpreters, note takers, computer-aided transaction services, and written materials.

111. Dawson, *supra* note 109, at 1149. 42 U.S.C. § 12182(b)(2)(A)(iii) (2012) states that discrimination includes

[A] failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.

Importantly, defining access to legal assistance as a public accommodation means that the costs of the accommodation cannot be shifted to the disabled client.

112. 28 C.F.R. § 36.303(c) (2016).

113. Dawson, *supra* note 109, at 1144.

114. Jared D. Cantor, Note, *Defining Disabled: Exporting the ADA to Europe and the Social Model of Disability*, 24 CONN. J. INT’L L. 399, 406. (2009).

115. Council Directive 2000/78, 2000 O.J. (L 303) 16 (EC). Resembling the ADA, the Directive prohibited discrimination based on “any ground of disability” *Id.* at art. 2(1).

116. Cantor, *supra* note 114, at 403-05. The dueling models of disability are the medical and social models. The medical model is based on the idea that the disability stems from a visible physical, mental, or sensory deviation caused by a health condition, and aims to resolve the issue through medical knowledge. The social model defines disability as the result of the interaction between a person’s mental or physical condition and a social environment deemed inaccessible. The key difference is the social



omission of any workable definition of disability, resulted in narrow, unfavorable judicial interpretation of the statute.<sup>117</sup>

On a more positive note, in 2003 the U.K. Government recognized BSL as an official minority language,<sup>118</sup> which increased funding for and awareness of the British DHH community. Additionally, the passing of the Equality Act of 2010<sup>119</sup> combined and replaced existing statutes (such as the Disability Discrimination Act), strengthening protections against discrimination based on nine categories directly affecting the DHH community.<sup>120</sup> Lastly, the milestone British Sign Language (Scotland) Act 2015<sup>121</sup> was recently passed into law. The Act implements a national plan enforced by the Scottish Government focused on raising awareness for BSL, improving access to services for individuals that use BSL,<sup>122</sup> and requiring local entities to outline and publish their own methods for compliance.

The global movement towards recognition for deaf rights now reaches as far as New Zealand with the passing of the New Zealand Sign Language Act in 2006, which recognized New Zealand Sign Language (“NZSL”) as

model posits that the issue is one of societal discrimination, best solved by eliminating attitudinal barriers. *Id.* at 405. Cantor strenuously argues for the benefits of the social model and highlights the negative effects of the medical model, the most glaring being the repercussions of judicial decisions struggling to pigeonhole claimants into categories of disabilities. *Id.* Indeed, the 2008 amendments to the ADA are viewed as a restoration of the ADA back to its social roots, with the focus on being on whether discrimination occurred instead of whether the claimant qualifies as disabled. *Id.*

117. See Cantor *supra* note 114, at 411. An illustration of the narrow judicial interpretation based on the Directive’s failure to include a workable definition of disability is provided by a case involving a Spanish woman named Sonia Chacon Navas. After being diagnosed as medically unfit to work, Navas’ employer terminated her without further explanation. *Id.* at 421. With no state law offering protection, she filed an appeal that was later referred to the European Court of Justice (ECJ). *Id.* at 422. In what is perceived as a letdown, the ECJ held that Navas was not protected as disabled because her diagnosed sickness was not a long-term condition. *Id.* at 4424.

118. *Legal Status for BSL*, BRITISH DEAF ASS’N, <https://www.bda.org.uk/legal-status-for-bsl-uk> (last visited Sept. 29, 2017). For a definition of “minority language,” and an argument for why sign languages are stronger than minority languages because sign languages provide rights to normal social and cognitive development, see generally Sara Trovato, *A Stronger Reason for the Right to Sign Languages*, 13 SIGN LANGUAGE STUD. 401 (2013).

119. Equality Act 2010, c. 15, § 4 (Eng.).

120. *Id.* § 4 Disability, which includes deaf and hard of hearing individuals, is defined as a person having a physical or mental impairment that has a substantial and long-term adverse effect on the person’s ability to carry out normal day-to-day activities. The Act further prohibits service providers and employers from discriminating or victimizing a disabled person by not providing necessary accommodations, such as auxiliary aides or additional help for deaf persons. *Id.* § 29. See generally *Disability Discrimination and the Law*, ACTION ON HEARING LOSS, <https://www.actiononhearingloss.org.uk/supporting-you/rights-and-benefits/disability-discrimination-and-the-law/what-is-the-equality-act.aspx> (last visited Sept. 29, 2017).

121. British Sign Language Act 2015, § 2 (Scot.).

122. *British Sign Language Legislation*, NATIONAL DEAF CHILDREN’S SOC’Y, [http://www.ndcs.org.uk/help\\_us/campaigns/our\\_current\\_campaigns/scotland/british\\_sign.html](http://www.ndcs.org.uk/help_us/campaigns/our_current_campaigns/scotland/british_sign.html) (last visited Sept. 29, 2017).

an official language.<sup>123</sup> The Act also mandates the integration of NZSL in legal proceedings, effectively opening the door for the use of sign language in the courtroom.<sup>124</sup>

It should be noted that this brief insight into existing legal rights is non-exhaustive, and many countries continue working towards promising strides for deaf citizens.<sup>125</sup> Even though many of these laws providing accommodations or recognizing sign languages should have been passed years ago, the noticeable trend towards more expansive rights and state-mandated responsibilities is reason to be optimistic.

#### *E. Criminal Context and Additional Constitutional Concern*

The right to an interpreter in the courtroom is recognized by state and federal statutes and is generally viewed as required for due process and proper access to courts.<sup>126</sup> Unfortunately, the legal system is an area distinctly reliant on the ability to hear, and simply hiring an interpreter does not solve every issue.<sup>127</sup> “The defendant may have to pay the extra costs of an interpreter, and the interpreter’s neutrality and qualifications are susceptible to being challenged,” potentially coloring the credibility of testimony.<sup>128</sup>

First, interpreters are often insufficient when civil rights are threatened, given the uncertainty around the defendant’s level of comprehension.<sup>129</sup> The confusion surrounding the DHH community as a whole perpetuates the misconception that interpreters remedy every situation.<sup>130</sup> The combination of a learning disability and deafness can lead to an inability to properly

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123. New Zealand Sign Language Act 2006, ss 6-7.

124. See generally Rachel Locker McKee, *Action Pending: Four Years on from the New Zealand Sign Language Act 2006*, 42 VICT. U. WELLINGTON L. REV. 277 (2011).

125. For an illuminating example involving the Supreme Court of Canada, see generally Dianne Pothier, *Elbridge v. British Columbia (Attorney General): How the Deaf Were Heard in the Supreme Court of Canada*, 9 NAT’L J. CONST. L. 263 (1998).

126. Michele LaVigne & McCay-Vernon, *An Interpreter Isn’t Enough: Deafness, Language, and Due Process*, 2003 WIS. L. REV. 843, 847 (2003).

127. *Id.* at 849.

128. Michele-Lee Berko, Comment, *Preserving the Sixth Amendment Rights of the Deaf Criminal Defendant*, 97 DICK. L. REV. 101,103-04 (1992).

129. LaVigne & McCay-Vernon, *supra* note 126, at 844-48. The authors detail the tribulations endured by two deaf defendants with varying levels of mental capabilities and language comprehension. The description showcases the additional problems that arise when deaf person’s competency is affected by additional factors combined with a language barrier. LaVigne & McCay-Vernon argue that the key to helping people with semi-lingual or minimal language skills is first acknowledging that these problems exist, and second, utilizing emerging technology to ensure adequate communication. *Id.* at 936.

130. *Id.* at 868.

communicate with either deaf or hearing person, proving especially problematic in the judicial setting.<sup>131</sup> Another example of a difficulty is when a DHH defendant is semi-lingual, neither fully able to speak sign language or adequately communicate in spoken English.<sup>132</sup>

As a result, the actual inability to redress<sup>133</sup> an individual's needs combined with the tendency to quickly solve cases for the sake of judicial economy leaves DHH defendants without much faith in the judiciary. Because access to adequate representation, a fair trial, and a fair ruling are in question when the attorney, judge, and interpreter are unable to help, the criminal context provides many constitutional concerns.<sup>134</sup>

Outside the courtroom, many legal and civil rights violations not anticipated by the hearing community also negatively impact the deaf. A disheartening example occurs during a typical arrest, where deaf citizens often face harsh, unwelcome, and confusing experiences because of their need to communicate with their hands.<sup>135</sup> From beginning to end, these encounters can be complete misunderstandings, rife with confusion, and a portrait of inherent failures in our hearing-based systems.<sup>136</sup> Further, the requirement for hand movements during communication usually causes more confusion to hearing police officers, who often misconstrue this either as erratic, or as a failure to comply with instructions.<sup>137</sup> Most saddening is the procedure requiring handcuffing and the placing of hands behind a person's back, effectively silencing a deaf person.<sup>138</sup>

Issues with Miranda warnings<sup>139</sup> also frequently arise during these incidents, potentially leading to an unlawful and lengthy detention based on a DHH individual's inability to communicate with officers.<sup>140</sup> Perhaps most disconcerting is the deterrent effect these experiences can have on crime-reporting in DHH citizens who are hesitant to seek assistance because of the inherent communication barriers common to investigative procedures

131. *Id.* at 844.

132. *Id.* at 846.

133. *Id.* at 848.

134. *See id.* at 849.

135. 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 way 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. McAnnany & Shah, *supra* note 46, at 878.

136. *See* State v. Mason, 633 P.2d 820, 7827 (Or. Ct. App. 1981) (affirming the lower court's decision to suppress statement made by deaf defendant when interpreters employed by police were unable to adequately convey the rights included in the Miranda warning).

137. McAnnany & Shah, *supra* note 46, at 878.

138. *Id.* at 880-81.

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

140. McAnnany & Shah, *supra* note 46, at 881.

conducted by authorities not trained to encounter or understand sign language.<sup>141</sup>

The difficult issue presented requires determining what protocol can remedy this problem. Requiring law enforcement to be familiar with, or learn sign language beyond conceivable, so what can be done to properly address these interactions? Unanswered questions like this one sadly demonstrate one of many frustrations that pervade the life of a deaf citizen.

### III. TECHNOLOGY, COMMUNICATION, AND THE DEAF: WHAT YOU SEE IS WHAT YOU GET

#### A. *From TTY to Texting*

To say that technology has forever revolutionized the means in which we communicate would be a severe understatement, yet throughout history new communication-related innovations for the deaf can perhaps be characterized as, “one step forward, two steps back.”<sup>142</sup> For example, the purpose behind the invention of the telephone was for improving communication for the deaf, yet it ultimately transformed communication for the hearing while alienating the DHH community.<sup>143</sup> The invention and subsequent dependence of communication via teletypewriter (“TTY”)<sup>144</sup> also surprisingly reveals a form of technology helping, yet ultimately alienating the deaf.<sup>145</sup> Because communication via TTY depended on each party to the communication having a TTY device, the long-distance

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141. *Id.* at 884. The failure to prepare for and ensure adequate communication is possible can lead to credibility concerns due to police officers failing to produce accurate transcripts of the incident reports, wrongful arrests, or officers incorrectly relying on family members or the perpetrator to serve as impromptu interpreters.

142. Michella Maiorana-Basas & Claudia M. Pagliaro, *Technology Use Among Adults Who Are Deaf and Hard of Hearing: A National Survey*, 19 J. DEAF STUD. DEAF EDUC. 400, 400 (2014). For a contemporaneous example of technology alienating the deaf via inadequate or non-existent closed captions on Netflix, see Jon Christian, *How Netflix Alienated and Insulted Its Deaf Subscribers*, THE WEEK (Jan. 30, 2014), <http://theweek.com/articles/452181/how-netflix-alienated-insulted-deaf-subscribers>. For an argument against movie and television producers using a copyright defense to avoid captioning song lyrics, see generally John F. Stanton, *[Song Ends]—Why Movie and Television Producers Should Stop Using Copyright as an Excuse Not to Caption Song Lyrics*, 22 UCLA ENT. L. REV. 157 (2015).

143. Maiorana-Basas & Pagliaro, *supra* note 142, at 400.

144. The term TTY is also used interchangeably with “TDD” when referring to devices used to transmit messages with a keyboard over phone lines. TTY devices are still in use, although not as frequently, and are also sometimes employed by hearing people. See *What’s a TTY? What’s a TDD? What’s a Relay System?*, GALLAUDET UNIV., <http://www.gallaudet.edu/about/history-and-traditions/tty-relays-and-closed-captions> (last visited Nov. 13, 2017).

145. Maiorana-Basas & Claudia M. Pagliaro, *supra* note 142.

communication was effectively limited to those possessing the devices.<sup>146</sup>

Conversely, the recent transformation of and universal access to technology allowing instant communication has arguably “leveled the playing field”<sup>147</sup> between deaf and hearing individuals. SMS, e-mail, instant messaging, and social media networks have allowed greater independence, less isolation, and a sense of empowerment for the DHH, particularly among adolescents.<sup>148</sup> However, barriers continue to exist in the presentation of websites, leading to calls for reform for greater accessibility to the internet in the form of required close captioning.<sup>149</sup> Because disability-rights statutes such as the ADA are silent on online audio and video content, no requirement to provide captions exists due to the internet not qualifying as a “public accommodation.”<sup>150</sup>

### B. *Technology and The Law*

Title III of the ADA is especially pertinent to the legal profession with respect to emerging technologies. The requirement for interpreters affects law students and practitioners alike, opening doors to education, and reigniting careers for lawyers that experienced hearing loss later in life.<sup>151</sup> Law firms are slowly starting to use technology to assist with deaf attorneys, leading to increased employment opportunities for the deaf.<sup>152</sup>

Also important are the accommodations required in courtrooms, which previously alienated deaf persons from entering the legal profession, due in part to hostile judges and an unenlightened profession.<sup>153</sup> The days of discouraging aspiring deaf attorneys are for the most part over, due to an attitudinal shift, the ADA, and incorporation of technology such as CART. While these are clear signs of progress, more work is needed to continue raising awareness,<sup>154</sup> and ensuring existing technologies are not only

146. *Id.*

147. *Id.* at 401.

148. *Id.* at 401-02. Studies performed on a wide-range of deaf citizens show preference for SMS and e-mail to TTY based on convenience, and ability to express emotions via emoticons. For an analysis of the primarily social use of communication technology among the deaf in Australia, see generally Mary R. Power, Des Power & Louise Horstmanshof, *Deaf People Communicating via SMS, TTY, Relay Service, Fax, and Computers in Australia*, 12 J. DEAF STUD. DEAF EDUC. 80 (2006).

149. Maiorana-Basas & Claudia M. Pagliaro, *supra* note 142, at 407.

150. *Id.* at 407-08. The authors argue that legal, educational, and humanitarian advocates must work with the deaf community to solve this existing “digital divide.”

151. See John F. Stanton, *Breaking the Sound Barriers: How the Americans with Disabilities Act and Technology Have Enabled Deaf Lawyers to Succeed*, 45 VAL. U. L. REV. 1185, 1186-87 (2011).

152. *Id.* at 1235-36. Examples include hiring interpreters that also serve as paralegals and incorporating Computer Assisted Real-Time (“CART,” which resembles captioning provided by a stenographer) to facilitate communication during litigation.

153. *Id.* at 1208-09.

154. See generally Manfred Hintermair & John A. Albertini, *Ethics, Deafness, and New Medical*

implemented, but remain accessible in an environment filled with constantly updating technology.<sup>155</sup>

#### IV. EQUALITY, AWARENESS, AND ETHICAL OBLIGATIONS FOR LAWYERS IN THE TWENTY-FIRST CENTURY

A unique yet typical insight into the plight of a DHH individual traversing the legal landscape is provided through the daily experiences of a deaf law student.<sup>156</sup> Alice McGill writes about her experiences at the Hastings College of Law, and explains the difficulty with an interpreter initially distracting her fellow students, while lamenting those that mistakenly believed she relied on the interpreter for legal analysis.<sup>157</sup> Alice elucidates the crucial misunderstanding of DHH individuals by noting the distinction between interpreter and interpretation; while the lecture and accompanying discussion are relayed to her via her interpreter, the preparation, comprehension, and legal interpretation is all her own.<sup>158</sup>

Alice also details the expenses a deaf student requires, such as the TTY, flashing lights for doors, and the cost of an interpreter, which is not always supplied by the educational institution.<sup>159</sup> While Alice shows she has the intellectual prowess and gumption to survive in a world where most hearing individuals never consider non-hearing realities, her experiences illustrate the institutional and cultural barriers unique to DHH individuals seeking a career in the legal field.

The institutional and cultural barriers exist outside the law school classroom, and continue beyond graduation, creating potential ethical issues for attorneys attempting to adequately represent deaf clients.<sup>160</sup> Mirroring many issues faced by the deaf, general unawareness about federal requirements the ADA places on lawyers results in deaf citizens absorbing the costs for necessary services.<sup>161</sup> Ensuring that a deaf person has access to legal recourse and representation can be solved only by educating the legal

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*Technologies*, 10(2) J. DEAF STUD. DEAF EDUC. 184 (2005). Hintermair & Albertini posit that technological advancements and media focus on deaf awareness has negatively impacted the deaf, as federal funding has increased for medical devices to correct deafness, as opposed to socially-oriented advances. The authors further argue that these consequences are caused by misplaced societal ideologies centered on “fixing” deafness.

155. Stanton, *supra* note 151, at 1244-5.

156. See generally Alice McGill, *Personal Experiences of a Deaf Law Student*, 1 HASTINGS WOMEN’S L.J. 117, 155 (2016).

157. *Id.* at 120.

158. *Id.*

159. *Id.* at 125.

160. Dawson, *supra* note 109, at 1171.

161. *Id.* at 1168.

community of its duties, lowering the cost of compliance, and increasing the threat of Title III enforcement.<sup>162</sup>

One proposal to solve the awareness issue is known as “community lawyering,”<sup>163</sup> which, “in contrast to traditional legal advocacy, offers a multi-faceted approach to achieve comprehensive, sustainable reform at the direction of the stakeholders in the community.”<sup>164</sup> McAnnany & Shah make a strong argument for using this well-known method to bring about larger positive awareness and change on behalf of the DHH community.<sup>165</sup> Ultimately, progress begins with the combination of individual awareness about realities faced by DHH citizens and understanding the ethical and legal responsibilities required to competently represent a deaf client.<sup>166</sup>

### CONCLUSION

The importance of accepting and recognizing the DHH community as fully integrated into society, and thus our legal system, is the first crucial step towards continuing to make progress with regards to rights and public accommodations. Fairness, equality, and justice are the basic pillars of a functioning legal system, and without the cognizance of current failures present in our institutions, the vibrant, intellectual DHH community will continue to exist on the periphery of our hearing-based world.

To properly prepare our legal system to effectively handle the challenges presented, dramatic reform must take place where it all begins: during the first year of law school. Because the legal profession is vast in scope, and responsibility for access to adequate judicial safeguards exists in many areas, there are many workable solutions to ensure law students can be taught to be aware of communication barriers. The first is offering relevant courses on the ADA, Rehabilitation Act, IDEA, and similar international statutes. This may require hiring professors or practitioners that specialize in these fields, or having professors that teach related courses (International

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162. *Id.* at 1170-77. Dawson argues for various kinds of reform, including: the American Bar Association implementing required courses on ADA compliance, Title III amendments providing damages in private actions, and the creation of state-based Communication Access Funds (“CAFs”) to lower accommodation costs; *see generally* Howard A. Rosenblum, *Communication Access Funds: Achieving the Unrealized Aims of the Americans with Disabilities Act*, 45 VAL. U. L. REV. 1061 (2011).

163. Community lawyering has many definitions, one being “a wide range of community-building and advocacy-related activities” where constituents provide their legal knowledge and support to achieve their goal. *See* Charles Elsesser, *Community Lawyering - The Role of Lawyers in the Social Justice Movement*, 14 LOY. J. PUB. INT. L. 375, 376 (2013).

164. McAnnany & Shah, *supra* note 46, at 876-78.

165. *Id.*

166. MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR. ASS’N 2006) (Competence): “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonable necessary for the representation.”)

Law, Employment Law, Constitutional law, etc.) focus part of their instruction on these important issues.

Required courses on professional responsibility and ethics can also be amended to not only teach the rules, but to understand the additional responsibilities attorneys have when communicating with and advising a deaf or hearing individual. Many schools have required legal research, negotiation, or intensive short classes on various topics; there is no reason why a similar required course on interacting with clients with disabilities cannot be offered.

Additionally, clinical programs providing opportunities to communicate with DHH clients would allow students to fully immerse themselves in these situations—something that is unequivocally important when interacting with deaf individuals. Once in place, this will initiate the sea change necessary to bring this issue from the periphery of our world into the main focus, leading to improvements in our legal system and education. Students should be aware of the reality of communication barriers and resultant difficulties presented when interacting with coworkers, clients, or opposing counsel. Law schools around the world can improve the judicial community by implementing these practices into their curricula so the next generation of lawyers will enter the legal profession ready, willing, and most importantly, able to communicate with and advise the DHH community.

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\*Editor-in-Chief, *Washington University Global Studies Law Review*; J.D. (2018), Washington University in St. Louis; B.A. (2013), The University of Texas at Austin. I would like to thank the diligent staff and executive editors of the *Washington University Global Studies Law Review* for their hard work throughout the year.