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# DEAFNESS: A DISABILITY OR A DIFFERENCE?

Erica R. Harvey\*

## I. Introduction

Depending on the source and time at which data is collected, between 28.6 million and 31.5 million people in the United States describe themselves as having “hearing difficulty.”<sup>1</sup> These hearing difficulties range from age-related hearing loss to profound deafness. A smaller group of people within the group of individuals who are profoundly hearing impaired or deaf considers themselves to belong to a social minority group or subculture known as “Deaf Culture” or the “Deaf Community.”

The Deaf Community takes the seemingly paradoxical position that society (and individuals) should not define deaf people as impaired or as having a disability.<sup>2</sup> The Deaf Community believes that, rather than having a disability, its members are merely “different.” Yet, at the same time, they want to receive the legal benefits and accommodations that persons who fit within the characterization of individuals with disabilities receive.<sup>3</sup> Thus, the Deaf Community desires to obtain the protections and benefits afforded to those with disabilities while rejecting the notion that members of the Deaf Community have a disability that gives rise to the legal protections and benefits that they seek to enjoy. This philosophy and other paradoxes that surround Deaf Culture lead to difficult issues, including the extent to which people who deny having a disability should be able to take advantage of laws designed to afford rights to persons with disabilities, and whether the government should modify or expand existing laws to accommodate the views of this minority group.

The Deaf Community should not be able to reject the views of individuals who do not subscribe to their belief system, create their own communities separate from the rest of society, and still expect society to willingly accommodate them on the same basis that it accommodates those persons who acknowledge having conditions generally considered to be disabilities. The Deaf Community’s rejection of the label of disability and rejection of deaf persons who do view themselves as having disabilities, while demanding the protections and special rights granted to persons with disabilities, raises a difficult question of whether disability is defined

by society or by the person who has a physical or mental condition. Federal legislation to date seems to opt for the former, while the Deaf Community advocates for the latter.

The approach taken by federal disability rights law is, on balance, the better approach. This approach avoids the potential abuse of individuals proclaiming themselves as having disabilities in cases where an individual has neither physical nor mental conditions that limit the ability to live and function in society, and where society as a whole does not view the individual as having a disability.<sup>4</sup> Also, since individuals with disabilities have historically suffered from discrimination in the general society, this approach links the rights afforded to the individual to the societal cause of the discrimination.<sup>5</sup> The Americans with Disabilities Act<sup>6</sup> (ADA), the landmark federal legislation in the field of U.S. disability rights law, adopts a three-pronged test which defines disability either as physical or mental conditions that interfere with an individual’s daily life, a record of impairment, or physical or mental conditions other individuals perceive as a disability.<sup>7</sup>

Like other people with disabilities, individuals with hearing impairments<sup>8</sup> find themselves at a disadvantage when attempting to live and function in a society that does not automatically accommodate their needs. This disadvantage begins at birth for those who are born deaf, or who become deaf very shortly after birth, since babies learn speech largely through aural input.<sup>9</sup> Children who are born deaf, or lose their hearing shortly after birth, do not receive this critical input. Much of the information people receive comes through auditory channels such as everyday conversation, radio, television and other entertainment media, and warning sounds such as horns and sirens. Individuals with hearing impairments have limited or no access to information that comes through these media without special accommodations. To obtain auditory information, either the deaf must accommodate themselves to the society in which they live, or society must make accommodations for them.

Yet many individuals with impaired hearing often are otherwise physically indistinguishable from those without disabilities, making their disability invisible. The inability to receive information through sound creates a group of people who appear the same as others, but who have additional needs because of their difference. This invisible difference creates a potential tension between physical appearance and actual needs.

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“The inability to receive information through sound creates a group of people who appear the same as others, but who have additional needs because of their difference. This invisible difference creates a potential tension between physical appearance and actual needs.”



Deaf people find themselves subjected to what has been termed “unintentional barriers,” meaning that the systematic design of features of modern life, such as the telephone, are inaccessible to the deaf without modification.<sup>10</sup>

Individuals who are deaf clearly fall within the definition of disability which entitles those individuals to the protections of U.S. disability rights laws, regardless of whether those individuals consider themselves as having a disability.<sup>11</sup> This makes the Deaf Community’s position that deafness is not a disability irrelevant in the determination of the legal rights of the deaf. However, it is neither wise nor appropriate to adopt legislation granting separate and special treatment to the deaf that would separate their treatment from that given to other individuals with disabilities.

## II. Background

### A. The Evolution of Models for Understanding Disability

Individuals with disabilities have been subject to discrimination and mistreatment throughout history.<sup>12</sup> Until recently, society dealt with persons with disabilities under what is commonly referred to as the medical model. The medical model is a paternalistic model which focuses on attempting to “cure” disabilities rather than protect individual human rights.<sup>13</sup> Under this model, government or society viewed individuals with disabilities as objects who were acted upon, rather than as equals who participated in determining their own needs and enforcing their own rights. The medical model also views individuals with disabilities as exhibiting a deviation from what is considered normal.<sup>14</sup> This deviation makes them appropriate subjects for medical intervention and cure.<sup>15</sup>

In contrast, the social, or human rights-based model of disability, views a person’s disability not as the individual’s problem, but as a problem with the way that the society perceives of and treats the person who has a condition that society considers to be a disability.<sup>16</sup> The individual with perceived disabilities is empowered to be an active participant in determining how he or she is treated by society.<sup>17</sup>

The “equal opportunity” or rights model emphasizes the willingness and ability of individuals to assert their rights and establish their place in society.<sup>18</sup> Under the rights model it is the government’s duty to assist individuals in asserting their rights and establishing their equal place in society.<sup>19</sup> However, the individual is empowered as a partner with the government to be an advocate for his or her own rights. This empowerment of the individual fits best if the individual subscribes to the societal view that he or she, in fact, has a disability.

At least in theory, under the medical model, if society views the individual as having a disability, the individual is an appropriate subject for “cure” regardless of his or her self-perception.<sup>20</sup> On the other hand, the situation is problematic if the individual does not believe that he or she has a disability. Generally, to gain the rights that legislation grants, an individual must openly accept society’s perception that he has a disability, regardless of his own personal beliefs about his condition. On the other hand, if the government or advocacy groups assert the rights for an individual who denies that he or she has a disability, society has regressed to the medical model where the individual is an object that is acted upon.

The ADA represents a departure from the medical model since it is premised on a social or human rights model of disability. The ADA attempts to bring individuals with disabilities on to a level playing field with individuals without disabilities.<sup>21</sup> The goal of the ADA is to permit individuals with disabilities to share in the same opportunities in society to the maximum extent possible and on the same basis as individuals without disabilities.<sup>22</sup> Thus, individuals with disabilities become participants in the process rather than objects of treatment.

The ADA has attempted to adopt the rights model by permitting individuals with disabilities to avail themselves of the benefits of the ADA regardless of their subjective view of their physical or mental condition. However, the concept of disability in the ADA, which is based on impairment or society’s view that the individual is impaired, still carries with it the medical model’s concept that disability is a variation from “normal.”<sup>23</sup>

## B. Existing Legislation Affording Rights to the Deaf

The United States is often viewed as one of the first countries to adopt national legislation dealing with the rights of persons with disabilities.<sup>24</sup> The U.S. approach to granting these rights is a civil rights model, which attempts to assure that persons with disabilities enjoy the same rights and opportunities as other persons, and that in employment and areas that are considered public accommodations, physical facilities or systems are available to permit persons with disabilities to effectively use those public accommodations.<sup>25</sup> However, disability rights legislation in the United States is general in nature, focusing on assuring rights and access to all persons with disabilities in a given context, such as public accommodations, employment, or education, or assuring access or opportunity in a specific context such as air transportation or voting, rather than addressing the particular challenges faced by individuals with a specific disability. While the approach dictating equal access and opportunity established a general framework for disability rights, it is up to the individual with disabilities, or the government or an advocacy group acting as that person's proxy, to apply the general principles of U.S. disability law to the specific person and situation.

There are at least ten separate federal laws that seek to grant rights or protection to individuals with disabilities.<sup>26</sup> Many of these laws focus on specific activities and attempt to assure that persons with disabilities have the ability to fully participate in the activities on which the laws choose to focus. These focused laws deal with everything from access to air transportation,<sup>27</sup> to assuring that persons with disabilities can vote.<sup>28</sup> However, the Rehabilitation Act and the ADA are the key pieces of legislation relating to the rights of individuals with hearing impairments because of their historical contexts and broad implications for everyday life. These federal laws seek to prevent discrimination against those with disabilities, including the deaf, and assure them access to society in a broad range of activities and locations, both private and public.

### i. The Rehabilitation Act

Although the Rehabilitation Act's primary focus is on discrimination in areas where federal funds are involved, its enactment was a significant step in the development of U.S. disability rights law.<sup>29</sup> Section 504 of the Rehabilitation Act prohibits discrimination against individuals with disabilities in activities and programs carried on by any federal executive agency, the Postal Service, or by any group or entity receiving federal financial support. Not only did the Rehabilitation

Act facilitate access to areas such as employment and education for people with disabilities, it also empowered people with disabilities to enforce the rights granted to them as independent actors in the judicial system.<sup>30</sup>

The Rehabilitation Act forbids discrimination based on disability in federal employment (including those businesses which are working under federal contract), in programs receiving federal funds, or in programs sponsored by federal agencies.<sup>31</sup> Section 504 of the Rehabilitation Act prohibits discrimination and encourages non-discrimination by conditioning the receipt of federal funds on compliance with the statute.<sup>32</sup> Section 503 of the Rehabilitation Act goes beyond merely prohibiting discrimination and requires affirmative action by government contractors and certain subcontractors to include persons with disabilities.<sup>33</sup>

The Rehabilitation Act established the definition of disability used in other federal laws, including the ADA. Both acts adopt a three-prong definition of disability. When originally enacted, the regulations used the term "handicap." This obsolete and prejudicial term has since been changed to "disability" in describing individuals who are under its coverage. Both the ADA and the regulations adopted under it use the functional definition of an individual with a disability as an individual who: "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment."<sup>34</sup>

The Rehabilitation Act was the first federal legislation that prohibited discrimination against persons with disabilities.<sup>35</sup> However, its scope was limited—it only prohibited discrimination by the Federal government and by other groups that either contracted with the Federal government or received federal funds.<sup>36</sup> Limiting the scope of the Rehabilitation Act to the Federal government and federally-connected groups excluded a large number of businesses and organizations from the Rehabilitation Act's coverage.<sup>37</sup> Despite this shortcoming, the Rehabilitation Act has had at least two further positive effects. First, Section 504 of the Rehabilitation Act is viewed as a model for drafting multiple employment policies dealing with the hiring and treatment of individuals with disabilities.<sup>38</sup> Section 504 of the Rehabilitation Act also created a private right of action under which individuals with disabilities are able to sue on their own behalf if they believe they were the subject of disability discrimination.<sup>39</sup>

While the Rehabilitation Act's focus on discrimination against people with disabilities in employment was a major step in eliminating discrimination in one aspect

Section 504 empowered individuals with disabilities to become advocates for their own rights, rather than having to sit passively and wait for the government to act on their behalf.



of the lives of persons with disabilities, the creation of a private right of action for individuals with disabilities was even more significant since it opened up a means to effectively enforce rights of persons with disabilities in a broad range of activities. Section 504 empowered individuals with disabilities to become advocates for their own rights, rather than having to sit passively and wait for the government to act on their behalf.

## ii. The Americans with Disabilities Act of 1990

The Rehabilitation Act served as the precursor to the ADA and provided a base from which the ADA expanded the rights it grants.<sup>40</sup> Although they were not always successful, individuals with disabilities used Section 504 of the Rehabilitation Act in an attempt to gain access to education<sup>41</sup> and to gain or retain employment.<sup>42</sup> Even after the Rehabilitation Act's enactment, persons with disabilities were subject to both conscious and inadvertent exclusion and discrimination, due to the limited applicability of the Rehabilitation Act and enforcement limitations within its sphere. As a result, people with disabilities and their advocates undertook a grass roots campaign and generated publicity to pass legislation that would assure broader application of the rights of individuals with disabilities.<sup>43</sup> The National Council on the Handicapped (now, the National Council on Disability) developed a draft law.<sup>44</sup> The proposed congressional bill was the subject of numerous hearings held in every state. Despite opposition from groups such as small business owners, insurance companies, and other special interest groups, Congress passed the ADA on July 26, 1990.<sup>45</sup>

The ADA purports to assure civil rights to individuals with disabilities.<sup>46</sup> It extends the prohibition on discriminating against individuals with disabilities into areas where no federal employment or funds are involved.<sup>47</sup> In addition to broadening the Rehabilitation Act's prohibition against discrimination, the ADA attempts to extend the obligation to accommodate those with disabilities in numerous public places where individuals with disabilities were otherwise excluded because of accessibility or other existing limitations.<sup>48</sup>

While the standards used in determining employment discrimination under Title I of the ADA are the same as those used under the Rehabilitation Act, Title I of the ADA prohibits discrimination on the basis of disability in employment by any covered entity or employer that regularly employs 15 or more employees.<sup>49</sup> Thus, the ADA broadened the prohibition against discrimination from only the Federal government and entities doing business with it to most medium-sized and large organizations. Title II of the ADA similarly extends the prohibitions on discrimination against those with disabilities to state and local governments and their instrumentalities and activities, as well as to certain forms of public transportation.<sup>50</sup> States and localities may adopt their own laws prohibiting discrimination against people with disabilities provided they are consistent with the ADA.<sup>51</sup> Title III of the ADA prohibits discrimination in public accommodations and certain commercial facilities.<sup>52</sup>

The ADA adopted its structure from Title VII of the Civil Rights Act of 1964.<sup>53</sup> It borrows provisions from and defines disability the same as it is defined under the Rehabilitation Act. Significantly, the ADA went one step further than previous laws, such as the Civil Rights Act of 1964, and extended coverage against discrimination in the private sector to prohibit not only discrimination, but to also affirmatively require accessibility in an effort to avoid indirect discrimination as a result of lack of physical access.<sup>54</sup>

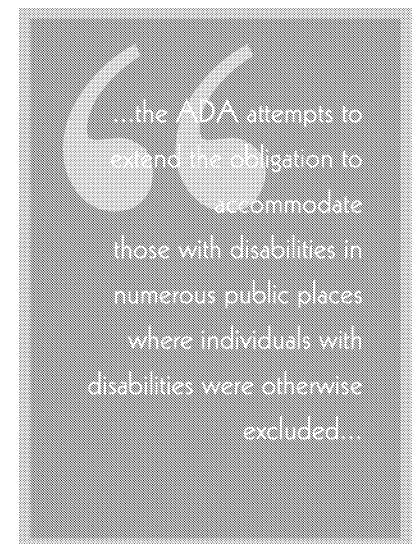
The ADA adopted the three-pronged approach described above to define a disability that invokes the ADA's protections.<sup>55</sup> This definition was adopted from Section 706 of the Disability Act and, by reference, Section 504 of the Rehabilitation Act.<sup>56</sup> Courts also adopted this definition in applying the acts.<sup>57</sup> Deafness fits within this definition of disability. However, the definition of disability is not universal. Groups such as transvestites,<sup>58</sup> users of illegal drugs (other than former drug users who have completed rehabilitation),<sup>59</sup> homosexuals and bisexuals, and people who suffer from certain other psychological disorders<sup>60</sup> are not considered to be individuals with disabilities and, thus, do not receive protection under the ADA.

The ADA also contains enforcement mechanisms that go far beyond anything contained in the Rehabilitation Act. Courts interpreted Section 504 narrowly in line with its scope, which applies to federal programs and organizations receiving federal aid. Congress intended broader protections for persons with disabilities and incorporated these protections into the ADA. The Act designates specific federal agencies that have enforcement powers and responsibility for implementing the Act.<sup>61</sup> Further, the ADA prohibits discrimination or retaliation against an individual who has alleged a violation of the Act and creates a private right of action under Titles I and II.<sup>62</sup>

The ADA also loosens the standard of when an action may be brought under the ADA. A person may bring a proceeding under Title II of the ADA when he or she has "reasonable grounds for believing" that he or she will be discriminated against because of new construction or modification to public accommodations.<sup>63</sup> Thus, a person with disabilities need not wait until a public accommodation is constructed and he or she faces actual discrimination before seeking a remedy. If an individual has a reasonable basis to believe that the design of a public accommodation will discriminate against him or her, the person may intervene before construction begins to require modification to the facility.<sup>64</sup> This right potentially makes persons with disabilities active participants in the design and planning of public accommodations.

## iii. Individuals with Disabilities Education Act (IDEA)

In order to ensure a "free appropriate public education" for all students with disabilities, Congress enacted the Individuals with Disabilities in Education Act (IDEA).<sup>65</sup> The IDEA requires public schools to provide children with disabilities appropriate learning environments and assistance to promote their education.<sup>66</sup> States, and more particularly school systems, are periodically required to work with students and their parents or guardians to develop an Individualized Education Program (IEP) for particular students with disabilities. The IEP is developed by a team of professionals, as well as the child's parents, the teacher, and where appropriate, the student with the disability. The IDEA provides a method by which parents of children



with disabilities and schools can address disagreements over the terms of the IEP and concerns about the student and the program.

The IDEA requires periodic re-evaluation, allowing for changes and using different approaches to find the best way to help the individual student.<sup>67</sup> In the case of deaf individuals, assistance for children with disabilities may include hearing aids or interpreters for the student in class, since otherwise the child may not be able to participate or learn from class lectures and discussion.

The IDEA requires that children with disabilities (including those in institutions or care facilities) be educated with children without disabilities, when possible, in the least restrictive environment reasonable.<sup>68</sup> The least restrictive environment for an individual is the environment most identical or similar to that in which children without disabilities are educated which still enables the child with a disability to flourish. The environment includes the physical location and facilities where the child is taught, as well as the means and approaches used to teach the child. Further, if possible, children are to be taught and participate with children without disabilities in as many class activities as is reasonable.

Implementation of the IDEA has led to numerous disputes between parents and school systems since the IDEA does not, and cannot, contain hard and fast rules or explicit guidance on how to meet the IDEA's aspirational criteria.<sup>69</sup> Naturally, parents want maximum assistance and benefits for their children, while school administrators may view the child's needs or situation differently and may also be constrained by available resources and funds. Whether "mainstreaming" is reasonable and how much, or what activities the child will participate in are determined on an individual basis.<sup>70</sup> Often the type of placement for a student will depend on the child's individual disability. There is a wide continuum of what may be considered the least restrictive environment for a particular child. This environment may range from full-time participation in general education classes with supplemental aids to education in special educational facilities or schools.<sup>71</sup>

The Deaf Community appears opposed to the least restrictive environment when it is applied to place a deaf student in general education classes. The Deaf Community has exhibited forceful opposition to educating deaf children in general education classrooms and prefers, or insists, that deaf children be segregated into special schools only for the deaf in order to surround them with Deaf Culture.<sup>72</sup>

The IDEA is a complement to the Rehabilitation Act and the ADA. It is consistent with the approach of the other two acts because it permits persons with disabilities access to a "free appropriate public education"<sup>73</sup> so that the child has a chance to achieve the maximum educational benefit that the child's disability will permit.<sup>74</sup> Like the ADA, the IDEA permits the individual with a disability, or at least their parents in the case of children, to be a partner in advancing the interest of the person with a disability.

The Rehabilitation Act, the ADA, and the IDEA are important not only because of the rights that they create for persons with disabilities. The acts also reflect an underlying shift in the view or model by which society and government understand the individual with a disability and that individual's relation to society.<sup>75</sup>

### C. The Emerging Movement of Deaf Culture Among the Deaf

The deaf do not have a uniform view of their condition. One deaf commentator has described the situation as, "[t]he world of deafness often seems Balkanized, with a warlord ruling every mountaintop."<sup>76</sup> At its simplest, the deaf fall into two basic groups characterized as the "deaf" and the "Deaf." The deaf view their condition as a physical or medical condition and as a disability or impairment.<sup>77</sup> The Deaf do not consider themselves to have a disability and view their condition as a label of a separate subculture to which they voluntarily subscribe as members.<sup>78</sup> They do not view themselves as medical cases and, instead of labeling themselves as individuals with disabilities, believe that the Deaf are "different."<sup>79</sup> Rather than finding this difference to be a negative factor, Deaf Culture aggressively asserts that the Deaf may be different but they are equal.<sup>80</sup> In its extreme form, this assertion leads to a desire to create a separate but equal classification for the Deaf. This clearly is at odds with the goal of current U.S. disability rights laws that seek to create equality for individuals with disabilities by integrating them into society.

Even within the group of individuals who classify themselves among the Deaf, there is a range of attitudes toward the deaf and the Deaf. The most extreme of the Deaf have been referred to as "absolutists" by I. King Jordan, the past President of Gallaudet College, the preeminent university for the deaf.<sup>81</sup> This group believes that a person either supports American Sign Language (ASL) or they are not Deaf.<sup>82</sup> This diversity in beliefs has led to friction within the Deaf Community. Recently, Jane K. Fernandes was ousted as President of Gallaudet College because of student and faculty opposition.<sup>83</sup> The opposition was based, in some quarters, on the fact

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that she was not “deaf enough,” having only learned ASL when she was in her twenties.<sup>84</sup> This controversy highlights the varying approaches to deafness within the deaf community.

Under the traditional medical model of disability, which views functional ability on a scale of normality, deafness was characterized as a disability.<sup>85</sup> Deafness was viewed as an individual shortcoming that needed to be corrected or cured. However, the Deaf Culture movement, or the Deaf Community, adopted the view of disability as a social construct.<sup>86</sup> Contrary to the medical model that mandates changing an individual or helping the individual to adapt, the Deaf Culture movement believes that mainstream society should modify social and environmental factors to allow the full participation of individuals with disabilities, including individuals with hearing impairments.<sup>87</sup> Yet, at the same time, it advocates self-segregation in educational facilities, such as Gallaudet College, and the avoidance of treatments or devices that may enable the deaf to regain some or all of their hearing.<sup>88</sup>

The Deaf Community goes one step further than the social model of disability. Deaf Culture rejects deafness as a disability in its entirety, viewing Deafness as a subculture existing within American culture. This Deaf subculture is entitled to exist as a recognized classification or minority similar to an ethnic or racial group. As a result, Deaf Culture is strictly opposed to “correctional” methods to improve hearing.<sup>89</sup> The Deaf Community views deafness as a characteristic that should be appreciated and valued,<sup>90</sup> and believe that deafness is only a different way of life.<sup>91</sup> Further, they believe that any effort to cure Deafness would be a repugnant attempt to eradicate a culture, with some individuals going so far as to consider it an attempt at genocide.<sup>92</sup>

Deaf Culture views discrimination against deafness, or audism, as a form of discrimination similar to racism, based not on perceived physical limitations of the individual, but rather based on the perceived difference in the characteristics of the individual.<sup>93</sup> While race is generally physically apparent, deafness is not necessarily visually apparent. Further, the Deaf differentiate themselves from individuals with other physical impairments such as blindness.<sup>94</sup> Advocates for the proposition that the Deaf are different from other individuals with disabilities assert that their Deafness makes them “ineradicably different” because of their inability to receive and process auditory signals and learn speech.<sup>95</sup>

This argument is weak, since the blind suffer from the same ineradicable difference since they cannot receive and process visual signals. The Deaf Community does not answer the question as to how auditory signals are different from or more important than visual signals, except by the implicit assumption that sound is more important than sight.<sup>96</sup> The only answer that the Deaf Community proposes to this argument is one that implies that a person must be Deaf to understand the difference. They point out that while an individual can simulate blindness, one cannot truly simulate deafness since a hearing person who simulates deafness still has the knowledge of what sound is.<sup>97</sup>

The language of Deaf Culture is sign language, and specifically American Sign Language (ASL) within the United States.<sup>98</sup> The Deaf Community views itself as a natural environment for not only deaf children, but all Deaf individuals. The Deaf Community not only welcomes those whose ability

to hear is impaired, but also any individuals accepting their cultural beliefs and norms and associate themselves with the Deaf Community.<sup>99</sup> Not all individuals who are unable to hear are considered Deaf or members of the Deaf Community. Those individuals who have taken steps to assimilate within mainstream hearing society are not considered to be a part of the separate Deaf Culture.<sup>100</sup> In the recent past there has even been talk by some members of the Deaf Community of creating a Deaf Town.<sup>101</sup> This separate town would replicate deaf enclaves that existed in the past and would provide a home for what the advocates see as the unique Deaf Culture.<sup>102</sup>

While society has made great steps and advances towards “curing” deafness, the Deaf Community is adamantly opposed to taking steps to “correct” hearing impairments. One such technological advance is the cochlear implant, an electronic device that is surgically implanted in the ear to create electronic stimulation of hearing nerve fibers. Cochlear implants allow sound to be transmitted to the brain.<sup>103</sup> The Deaf Community is ardently opposed to such devices, calling them “the ultimate invasion of the ear, the ultimate denial of deafness, the ultimate refusal to let deaf children be Deaf.”<sup>104</sup> The more extreme elements of Deaf Culture even oppose further research into cures for deafness.<sup>105</sup>

The Deaf do not believe that deafness is something that needs to be, or should be, cured.<sup>106</sup> Instead, they believe that deafness is a characteristic that should be embraced.<sup>107</sup> Deaf adults have the ability to make decisions for themselves as to whether they want treatments that may “cure” or lessen their deafness, such as cochlear implants. However, children who are born deaf, or become deaf, do not have this decision-making right. Parents generally make the decisions as to a child’s health care and treatment. Since the vast majority of deaf children are born to hearing parents,<sup>108</sup> in many of these cases, the decision as to whether to attempt to treat a child’s deafness will be made by parents who are not members of Deaf Culture. It is unlikely that courts will give standing to members of the Deaf Community who are not a child’s parents in determining a child’s medical treatment. Thus, the choice between being Deaf and deaf will be made for the individual.

## II. Analysis

### A. The Deaf Community’s Denial of Deafness as a Disability Raises Issues

Deafness is clearly defined as a disability under the ADA, as major life activities include hearing,<sup>109</sup> and hearing impairments are clearly specified as a physical or mental disability.<sup>110</sup> While this resolves the issue for most individuals and entities, the Deaf Community takes a different view. The Supreme Court has highlighted ambiguities in the definition of disability under the ADA and its implementing regulations.<sup>111</sup>

The Deaf Community and its supporters feel strongly that being deaf is not a disability. Yet, consistent with the other paradoxes that surround the Deaf Community, it has been a leader aligning itself with the disability movement in supporting the passage of the ADA.<sup>112</sup> Historically, both those living with other disabilities and those who are deaf experienced the same oppression. In the United States, persons living with physical and mental disabilities, including the deaf, have been institutionalized and segregated from the rest of mainstream society, and have even been faced with attempts to be wiped out of the future through the eugenics movement.<sup>113</sup>

Undeniably, there are commonalities between those who support the disability movement and those in the Deaf Community. Both groups attempt to change the perception of what it means to live with a disability, moving away from the idea of impairment or the idea that an individual must conform to society, and instead, toward a concept that individual variability is desirable and worthy of respect.<sup>114</sup> Further, both groups believe in the right to self-determination.<sup>115</sup>

The Deaf Community takes pains to separate itself from other disability advocates and points out the differences between itself and those accepting the concept of their disability. Unlike other people with mental or physical disabilities, the Deaf often point out that simulations of being deaf are not the same because temporary loss of hearing is not the same as everyday life without hearing.<sup>116</sup> While the disability movement believes that persons with disabilities should be indistinguishable from the rest of society, the Deaf Community thrives on its “differentness” and attempts to segregate itself and exist as a separate group or minority within society.<sup>117</sup>

The dichotomy between the disability movement’s efforts to integrate individuals with disabilities in society and the Deaf Community’s efforts at self-segregation are clearly seen in their diverging views on education. The Deaf Community has created segregated education facilities for the deaf, establishing their own schools to teach ASL and reject audism. At the same time, the disability movement is a strong proponent of inclusive education and accommodations to allow individuals to be accepted in society.<sup>118</sup> The Deaf Community’s goal of separate education goes far beyond deaf pride, since pride in deafness does not mandate that the deaf be separate from the general population.

The Deaf Community also has some striking similarities to groups that have faced past discrimination based on race or gender. Many ethnicities such as Hispanics and African-Americans have been in an inferior or minority position in American society. The Deaf Community compares itself to these groups. Like Hispanics, the Deaf Community identifies itself as a linguistic minority or subculture that ought to be honored.<sup>119</sup> Like characteristics of an individual’s race and gender, deafness is an uncontrollable characteristic.

However, in *City of Cleburne v. Cleburne Living Center*,<sup>120</sup> the United States Supreme Court distinguished the category of persons with disabilities from race and gender when it comes to analyzing governmental action under the Equal Protection Clause. While governmental actions based on classifications of race received the highest scrutiny and gender classifications receive intermediate scrutiny, in reviewing governmental actions relating to people with disabilities, the Supreme Court declared that these actions need only to be analyzed to determine whether the governmental action is a rational means to serve a legitimate end.<sup>121</sup> This is a very low standard of judicial scrutiny because as long as the government demonstrates a legitimate state interest and the classification or treatment is rationally related to this interest, the classification is constitutional and passes muster.<sup>122</sup> Interestingly, although the Supreme Court granted great deference to governmental actions and established a very low standard of judicial scrutiny, the Court in *Cleburne* nonetheless invalidated the City of Cleburne’s action denying the living center’s application.<sup>123</sup>

This low standard of scrutiny affords states “wide latitude” in social and

economic legislation.<sup>124</sup> It does not support affirmative action to level the playing field for deaf individuals or place them in a favored position to make up for past wrongs. While the *Cleburne* Court determined that persons with disabilities, namely individuals with intellectual impairment, had a “non-suspect” status, it acknowledged that physical disabilities often have a relation to an individual’s “ability to perform or contribute to society.”<sup>125</sup> The Court noted two factors that applied to the individuals with intellectual disabilities, but that are equally applicable to all individuals with physical or mental disabilities. The first factor is a “reduced ability to cope with and function in the everyday world.”<sup>126</sup> The second factor is the variability among individuals who have the same disability.<sup>127</sup> Although *Cleburne* dealt with intellectual disability, the general principles are equally applicable to the deaf.<sup>128</sup>

This distinction between disability and race and gender in applying equal protection criteria also emphasizes two additional pragmatic points. First, it highlights the need for a thoughtful analysis of the applicable general legal standards to various groups of individuals in determining their similarities and differences when it comes to applying equal protection concepts.<sup>129</sup> Second, it argues against the Deaf position that the Deaf are a separate subculture. Based on the *Cleburne* analysis, Deaf Culture’s claim to be a subculture or linguistic group becomes irrelevant. Courts are unlikely to grant any special consideration to Deaf Culture other than under the low standard of actions furthering a legitimate governmental interest.

Perhaps the Deaf Community is most similar to the homosexual community, in that deaf individuals, more often than not, do not share this distinct characteristic with their parents.<sup>130</sup> Therefore, both homosexuals and Deaf individuals may join their respective cultures later in life and do not learn the “ins and outs” of their community at home but rather at school or from others outside of their family.<sup>131</sup> Further, disability appears to receive similar judicial treatment to that given to the homosexual community. Classifications based on sexual orientation have only been given “rational basis” scrutiny and therefore, the treatment of homosexuals in courts has been very similar to that received by individuals with disabilities, including those individuals who are deaf.<sup>132</sup> But the ADA specifically excludes homosexuality as a disability that falls under the ADA’s protection.<sup>133</sup>

To a large extent, the argument as to whether deafness is a disability and whether Deaf Culture is a subculture or minority is irrelevant. Because both the Rehabilitation Act and the ADA provide that a person is defined as having a disability if that person is generally perceived by others as having a disability, people who are deaf are able to obtain the protection of both acts based on society’s perception of deafness as a disability independent of an individual’s willingness to admit that he or she has a “disability.”

Case law under the ADA validates the position that, if a person or organization covered by the ADA regards an individual as having an impairment, that belief, whether or not correct, is sufficient to bring the individual within the protection of the ADA.<sup>134</sup> The Equal Employment Opportunity Commission has interpreted this “regarded” test in its regulations to provide that impairment includes physical or mental conditions that do not substantially limit “major life activities” but are regarded as doing so by a covered entity. Impairments also include



conditions that limit major life activities only because of the attitudes of others, and conditions, outside of certain enumerated conditions under the regulations, that are treated by a covered entity as a “substantially limiting impairment.”<sup>135</sup> This approach to the “regarded” test focuses not on the individual’s self-perception, but on how others perceive the individual.

Under this analysis, the individual’s perception of his or her condition is a sociological issue rather than a legal issue. This approach also has the added benefit (along with the logical paradox) of permitting individuals to determine both how they perceive themselves and whether they will choose to seek the protections and benefits granted by disability laws regardless of that self-perception.

### **B. The Conflict Between Self-Segregation and Integration: The Puzzle of Education**

No area highlights the conflict between the goals of Deaf Culture and disability law better than education. The goal of the IDEA is to mainstream children with disabilities to the maximum extent consistent with their abilities and educational needs.<sup>136</sup> This reflects an underlying desire to provide both equality of opportunity and integration of children into society to the maximum extent feasible.<sup>137</sup> The prevalent theory is that children with disabilities placed in integrated classrooms will not only personally benefit, but children who do not have disabilities will also benefit by seeing human diversity and learning tolerance.<sup>138</sup> In this sense, mainstreaming under the IDEA is analogous to racial integration of schools.

Deaf Culture opposes this integration, however, it also wants to coexist within society as a separate subculture. In a movement that can be compared to resegregation, Deaf Culture advocates separate education for the deaf and exclusive reliance on ASL.<sup>139</sup> Members of the Deaf Community want their children to be like them. The Deaf Community seeks to liberate the Deaf from what it sees as oppression by setting up an alternative community and alternative education. It vigorously asserts the positive attributes of being deaf while largely denying the negative drawbacks. These values of the Deaf Culture are best preserved and passed on to future generations by teaching them to deaf children in an educational setting that is separate from the general population.<sup>140</sup> Rather than focusing on the problems that come from deafness in a hearing society, they often feel that since they have had the experience of being deaf, they will be able to assist their children.<sup>141</sup> The Deaf see separate, residential education as a way of preserving Deaf Culture.<sup>142</sup> They downplay the costs of separate schools, where it is dramatically more expensive to

educate a child than it is to educate the same child in a mainstreamed environment.<sup>143</sup> Since funding for public education is limited, establishing separate schools and universities for the deaf reduces the funding available for all other children, whether or not those children are living with a disability.<sup>144</sup>

Parents make the educational decisions for their minor children.<sup>145</sup> The model under the IDEA is that, to the maximum extent feasible, children who are deaf will be given special assistance and mainstreamed with hearing children.<sup>146</sup> However, mainstreaming runs directly contrary to the position of Deaf Culture. Parents, educators, and specialists develop an IEP for the child. Unless the parents and the educators determine that segregated education in a special facility is in the best interests of the child, the Deaf Community’s goal of separate education is unlikely to be achieved. In fact, the position of the Deaf Community likely will not be heard or considered in developing an IEP for the deaf child unless the parents subscribe to Deaf Culture. This is consistent with the general approach that parents have the right and power to make decisions for their minor children.

### **C. Evaluating Existing Disability Laws**

Regardless of whether Deaf Culture chooses to view the Deaf as having a disability, a system of laws is in place that prohibits discrimination and requires a broad range of public and private parties to make reasonable accommodations for individuals with disabilities. Even if the Deaf choose to reject the position that the deaf suffer from a disability, they nonetheless seek the benefits of laws protecting persons with disabilities. Laws that prohibit discrimination against individuals with disabilities and that assure them rights to the facilities enjoyed by society as a whole also protect those who are deaf but who do not accept the positions taken by the Deaf Community. The key issue is whether the existing provisions of the ADA are sufficient to protect the deaf or whether further legislation is advisable.

Importantly, it is possible and feasible to enact federal and state legislation that requires or prohibits particular conduct. The ADA is a clear example of such legislation. The ADA both prohibits discrimination against persons with disabilities and requires broad classes of governmental bodies and private interests to make reasonable accommodations for people with disabilities, including individuals who are deaf. However, the modification of attitudes is a more gradual process, but by mandating conduct, legislation can modify attitudes over time. The Civil Rights Act of 1964<sup>147</sup> and subsequent civil rights legislation have generally modified societal attitudes. Similarly, the ADA

The ADA both prohibits discrimination against persons with disabilities and requires broad classes of governmental bodies and private interests to make reasonable accommodations for people with disabilities, including individuals who are deaf . . . the modification of attitudes is a more gradual process . . .

has created societal changes that do not automatically create acceptance of persons with disabilities but that do facilitate the integration of those individuals with disabilities who do want to participate in society.<sup>148</sup> While these laws do not require participation, by requiring reasonable accommodations for people with disabilities and prohibiting discrimination based on disability, they facilitate participation in society.<sup>149</sup>

Evaluating the status of individuals who are deaf and determining whether they receive adequate protection under existing disability laws involves issues of both law and sociology. Disability laws focus on the ability of individuals to function within society on a basis that is equal with people without disabilities.<sup>150</sup> Further, American disability law adopts the rights model so as to empower individuals with disabilities to assert the legislative rights granted to them.<sup>151</sup> Deaf Culture takes the approach that the Deaf are a separate subculture and a minority group. The implication of this approach is that Deaf Culture is a group that is protected not just by the ADA but also by civil rights legislation. The initial determination is whether Deaf Culture is really a culture. The secondary determination is whether it is possible or desirable to treat the Deaf as a minority.

Regardless of whether Deaf Culture is a subculture or minority, existing disability laws provide certain protections for persons with disabilities. It is appropriate to evaluate whether existing provisions of these laws achieve the goals of preventing discrimination against the deaf because of their condition and facilitating their ability to function on equal footing with persons without disabilities. If existing disability law is not adequate to achieve these goals, it is appropriate to determine what legislative provisions would be necessary to do so. Finally, as a policy matter it is appropriate to ask whether adopting special laws or treating Deaf Culture as a culture is a regressive step toward the discredited doctrine of separate but equal.

#### **D. Determining Whether Deaf Culture is a Subculture May Be Sociologically Useful, But is Legally Irrelevant**

Deaf Culture is often seen as a response to society's "rejection" of deaf individuals, which leads these deaf individuals to establish their own unique subculture.<sup>152</sup> The Deaf Community believes that they are entitled to legal and social recognition as a minority linguistic culture based on their use of ASL.<sup>153</sup> The Deaf view their minority group as disadvantaged only relative to the rest of hearing society due to the construction and structure of majority society around the needs and abilities of people who are able to hear.<sup>154</sup>

Critics have disputed this identification of the Deaf Community as a subculture. These critics view Deaf Culture as a lifestyle choice that is adopted by the Deaf.<sup>155</sup> Therefore, these critics do not view the Deaf as a separate ethnic, religious, or racial group.<sup>156</sup> Deafness affects members of all ethnic, religious, and racial groups. Further, if the deaf are a minority linguistic group, there is ample precedent for meeting their needs. Spanish-speakers also comprise a linguistic minority that has been accommodated in the United States. Many of the materials that are supplied by the federal and state governments are made available in Spanish and other languages as an alternative to English. The same accommodations are made available to the deaf through the availability of facilities such as teletype, relay, assistive devices, and ASL interpreters.

Determining whether Deaf Culture is a culture or subculture or minority group starts with determining exactly what comprises a culture or subculture. Culture is a concept which mixes both legal and sociological concepts and has many definitions.<sup>157</sup> The sociological concept of culture may be useful as a starting point for developing a legal definition of a culture or subculture since it provides a framework for applying the concepts of what a culture is to the facts that relate to a specific group, such as the deaf. However, based on cases such as *Cleburne*, although the concept of culture may have some relevance in criminal law, it seems to have little value in the field of disability rights law.<sup>158</sup>

While the deaf share tendencies toward certain behaviors, deafness does not occur based on any one characteristic.<sup>159</sup> Clearly, deaf persons must rely more heavily on visual input than hearing persons do. To the extent that they cannot receive auditory signals, they must compensate through the use of sight. ASL also can provide a common characteristic.<sup>160</sup> Putting aside the opposition of Deaf Culture to their use, the availability of cochlear implants permits many people who otherwise would remain deaf to gain some form of hearing. Deaf persons also tend to marry other deaf individuals more frequently than they marry hearing individuals.<sup>161</sup> The current estimate is that 90 percent of deaf people marry other deaf people.<sup>162</sup>

Deafness occurs throughout all nations and cultures and is found in all races and religions and among both men and women.<sup>163</sup> Ninety percent of deaf children are born to hearing parents and 90 percent of deaf parents have hearing children.<sup>164</sup> Many deaf persons suffer from other societally-imposed disabilities that can subject them to multiple discriminations. Like other members of the racial group to which they

belong, members of minority racial groups may suffer from both audism and racial discrimination.<sup>165</sup> An African-American woman who is deaf may suffer from three forms of discrimination: racism, sexism, and audism.

One author has commented on the similarities between the negative stereotypic terms that the Belgians used to describe the Africans that they colonized and the stereotypic terms used to describe the deaf when training teachers, doctors and social workers to work with the deaf.<sup>166</sup> But negative stereotypes and discrimination do not create a culture or a subculture. They may be evidence of a suspect classification upon which legal protections are based, but not evidence of a distinct culture or subculture.

Despite the similarities shared by the deaf and the differences among them, the key question is whether a group of people “manufacture” a subculture by their conduct. An individual cannot elect to become African-American, Hispanic, or Italian-American. An individual acquires this racial or cultural status by birth. While the deaf may be born deaf or become deaf, this should not be seen as creating a subculture. While a person cannot change races, a person can either embrace or reject their cultural heritage. In the same manner, people may be born into a religious group but either choose to remain in that faith or leave it of their own volition. And while it is possible to embrace a culture even if an individual is not born into it, doing so does not create a new ethnic identity.

#### E. Deaf Culture Attempts to Create a New Subculture.

While it may be a cultural movement, Deaf Culture should not be considered a culture or subculture.<sup>167</sup> Deaf Culture clearly is a minority group within American society. Its members express a sense of solidarity, at least within a range of general attitudes. Deaf Culture embraces ASL as a medium of communication and rejects “curing” deafness by means such as cochlear implants.<sup>168</sup> It is difficult to consider ASL as a separate language instead of a means of communication based on American-English. Nor have the deaf universally adopted ASL as a means of communications.<sup>169</sup> Unlike other cultural or racial groups, the members of the Deaf Community do not share “communal characteristics” like race, national origin, or other commonly recognized cultural characteristics.<sup>170</sup> The Deaf may be subject to multiple characteristics that may potentially lead to discrimination, such as race, gender, or other physical or mental disabilities. Any one of these traits may be a basis for discrimination, but not all of these traits are communal characteristics. Physical impairment

is fundamentally different from race or gender. The only universal trait that the deaf share is their deafness. Except for this one common trait, the deaf represent a cross-section of society as a whole. Acknowledging Deaf Culture as a culture is, in essence, acknowledging that any group of like-minded people can create a subculture.

However, Deaf Culture may be a movement within a larger group that is gaining recognition – disability culture. Persons with disabilities have been subjected to discrimination and, in some cases, persecution for all of recorded history.<sup>171</sup> Disability culture is difficult to define precisely, but one commentator has noted that it is a group identity that is based on a common history of oppression and common toughness that allows for the formation of cultural artifacts such as art, music, and literature which allow individuals with disabilities to express their life experiences.<sup>172</sup> This approach is sociological. Disability culture can also be viewed as a psychological phenomenon, because it is a psychological response by a minority population to the majority’s treatment of that minority group manifested in attitudes and responses.<sup>173</sup>

Classifying Deaf Culture or even disability culture as a subculture or culture is sociologically and psychologically relevant, but not necessary to assure that the deaf are afforded the protection of disability laws. The deaf fall within the definition of disability in the ADA. An individual has a disability when he or she have “a physical . . . impairment that substantially limits one or more major life activities . . .”<sup>174</sup> Paradoxically, Deaf Culture rejects the notion that the Deaf have a disability because of their deafness, while they also want protection of disability laws so they have both protection from discrimination and accommodations for their condition.<sup>175</sup> Despite this logical inconsistency, Deaf Culture does have a legal basis for this position. The ADA definition of disability does not require that an individual acknowledges his or her disability. The ADA definition of disability includes individuals who are “regarded as having such impairment [that substantially limits one or more major life activities].”<sup>176</sup> Under the ADA definition of disability, the test is a dual-pronged one. An individual can have an objectively observed physical or mental condition that interferes with major life activities, or he or she can be perceived by others as having an impairment.<sup>177</sup> Deaf Culture does not argue that the non-deaf world does not perceive the Deaf as having a disability. Members contend that the Deaf do not perceive themselves as having a disability.

The other possible field in which the treatment of Deaf Culture as a culture or subculture may have relevance

“Classifying Deaf Culture or even disability culture as a subculture or culture is sociologically and psychologically relevant, but not necessary to assure that the deaf are afforded the protection of disability laws.”



is in international human rights law. If Deaf Culture could convince the international community that the use of devices such as cochlear implants and mainstreaming children into schools with hearing children amounts to eugenics, then they could make the argument that Deaf Culture is in danger of being eliminated and is being subjected to the same treatment as other repressed minorities.<sup>178</sup> This argument overlooks the fact that in most other situations, the repressed minority is distinguished by factors such as race, ethnicity, or religion.

Further, the United States historically has not ratified international human rights treaties.<sup>179</sup> Notably, the United States has announced that it will not adopt the pending U.N. Convention on the Rights of Persons with Disabilities.<sup>180</sup> This Convention would be most relevant to the rights of individuals with disabilities. However, given the U.S. position that it will not join in such international agreements, should Deaf Culture succeed in convincing even part of the international community of its position, international comment alone will not likely change to position of the U.S. Government.

Based on the current state of disability laws in the United States and the U.S. position on international human rights law, the concept of Deaf Culture is a legal irrelevance. Based on the Supreme Court's ruling in *Cleburne*, Deaf Culture will likely not receive special protection under civil rights law or an equal protection argument.<sup>181</sup> While the concept of Deaf Culture may have sociological relevance, it does not provide the basis for expanding the rights or protections of the deaf. Further, the position of the Deaf that they are different and not living with a disability, and the drive of some in the Deaf Culture for resegregation, does little to advance their political goals.

#### F. Additional Laws Applying to the Deaf Community are Not Necessary

Existing disability rights laws are not perfect, nor are they universally applicable. The ADA requires that public accommodations include reasonable accommodations for individuals with disabilities.<sup>182</sup> However, every location and facility is not a place of public accommodation, nor can all accommodations be considered reasonable.<sup>183</sup> Economics enters into the analysis of what is a reasonable accommodation.<sup>184</sup> Determining reasonable accommodation involves a complex analysis of the cost of modifications or an analysis of the financial ability of a small employer to provide such facilities. Nor does the ADA require that employers hire individuals with disabilities for jobs for which they are not qualified.<sup>185</sup>

There also may be a range of technological solutions to afford reasonable accommodation that are viable but which may be more or less attractive to owners and individuals with disabilities. For example, to

permit deaf individuals to understand the audio portion of motion pictures, it is possible either to use open captioning (i.e. subtitles) or a rear-window captioning system.<sup>186</sup> However, some hearing moviegoers object to open captioning because they find it intrusive.

These sorts of issues illustrate that laws such as the ADA are imperfect. Accommodating persons with disabilities, including individuals who are deaf, involves compromises that respect the rights of individuals without disabilities, commercial and social interests, and individuals with disabilities. Also, individuals with disabilities, including the deaf, are not monolithic. They have individual needs and varying situations. The rights of the majority must also be considered when considering the rights of individuals with disabilities.

Despite the imperfections in laws such as the ADA, it is not advisable to adopt disability laws targeting people with specific disabilities unless there is a compelling reason to do so. Targeted disability laws create several risks. First, they will create even more regulations, litigation, and conflicting requirements than generic disability laws such as the ADA. Lawmakers must consider the interests of employers and owners along with the interests of people with disabilities. Multiple sets of requirements impose additional burdens on employers and owners. Second, singling out people with a specific disability creates the possibility that one group of people with disabilities will be pitted against another. Creating separate classes can only weaken the chances of unified action to further the rights of persons with disabilities. Advocates for the deaf were early supporters of the ADA and played a major role in obtaining its passage.<sup>187</sup>

In contrast, it is equally dangerous to adopt legislation that would codify the positions taken by Deaf Culture. The Deaf Community is a subgroup among the deaf and does not represent the positions of all deaf persons.<sup>188</sup> Adopting legislation that satisfies the desires of the Deaf Community would both undo federal disability law and create further fragmentation of the deaf. Requiring or encouraging separate deaf-only education and mandating use of ASL would go against the goals of the IDEA, which is intended to permit students with disabilities to participate in regular educational settings to the extent that they can benefit from being mainstreamed, even when this requires extra accommodations and cost. Giving representatives of Deaf Culture a role in the medical treatment and development of IEPs of deaf children other than their own would run against the existing general rights of parents to determine the health care and education of their children.



### III. Conclusion

Whether deaf individuals consider themselves to be living with a disability or merely view themselves as being “different,” as Deaf Culture advocates, these individuals still fit within the definition of having a disability under existing disability rights laws such as the Rehabilitation Act, the ADA, and the IDEA. Thus, they are entitled to the protections and benefits of these laws, if only because they are regarded by others as having a disability. While the question of whether Deaf Culture is a linguistic minority or a subculture raises debatable sociological issues, the answer to this question does not create any unique rights for the Deaf Community that set it apart from other individuals with disabilities. Based on present law, it is not advisable to adopt additional legislation granting different treatment or special rights to individuals who are deaf in addition to the rights and accommodations the law gives to all other people with disabilities.

1 U.S. Equal Employment Opportunity Comm’n., *Questions and Answers about Deafness and Hearing Impairments in the Workplace and the Americans with Disabilities Act*, <http://www.eeoc.gov/facts/deafness.html> (last visited March 26, 2007).

2 Bonnie P. Tucker, *The Americans with Disabilities Act: Social Contract or Special Privilege?: The ADA and Deaf Culture: Contrasting Precepts, Conflicting Results*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 25 (1997) [hereinafter Tucker, *Social*]; see also Shelly Lane, *Deafness Shouldn’t be Called Handicap*, DALLAS MORNING NEWS, Mar. 5, 1995, at 6J (reporting that many deaf people say “‘handicapped’ doesn’t apply to their cultural group”).

3 See Tucker, *Social*, *supra* note 2, at 25.

4 See *infra* notes 174-177 and accompanying text (discussing the definition of “disability,” particularly in the Americans with Disabilities Act of 1990); cf. Mary Ellen Maatman, *Listening to Deaf Culture: A Reconceptualization of Difference Analysis under Title VII*, 13 HOFSTRA LAB. L.J. 269, 271 (commenting that “courts’ norm-centered perspective prompt them to regard differences as unreasonable privilege-seeking”).

5 See Tucker, *Social*, *supra* note 2, at 25 (“People with disabilities confronted virtually insurmountable discrimination . . . preclud[ing] their full participation in mainstream society”).

6 The Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2000).

7 42 U.S.C. § 12102(2) (2000).

8 See generally NAT’L ASS’N OF THE DEAF, *Info & FAQs: What is Wrong with the Use of these Terms: “Deaf-mute”, “Deaf and dumb”, or “Hearing-impaired”?*, available at <http://www.nad.org/site/pp.asp?c=foINKQMBF&b=103786> (last visited March 26, 2007) (explaining that many deaf people object to the term “hearing impaired” as they feel that it has a negative connotation, rather preferring to be called “deaf” or “hard of hearing”).

9 See Edward Dolnick, *Deafness as Culture*, THE ATLANTIC, Sept. 1993, at 37 (describing the difficulties deaf children have when learning to speak because they are unable to hear and mimic sounds).

10 See Tucker, *Social*, *supra* note 2, at 26 (explaining also that emergency broadcast warnings and televisions are other technologies unintentionally inaccessible to the deaf).

11 See EEOC Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(i) (defining major life activities, which must be limited to qualify as a disability, including “functions such as . . . hearing”). (emphasis added)

12 See Barbara J. McKee, *Disability Culture Timeline*, <http://www.chairgrl.com/Disability/Timeline/index.htm>, available at (last visited May 8, 2007); see also CAROL PADDEN & TOM HUMPHRIES, *INSIDE DEAF CULTURE*, 18 (Harvard University Press) (2005) (explaining how the increase in urbanization and socio-economic problems in the late 1800’s led to the separation and institutionalization of citizens whom were deaf, blind, criminal, sick, or insane under the guise of “rehabilitation and education”).

13 See NAT’L COUNCIL ON DISABILITY, A WHITE PAPER: UNDERSTANDING THE ROLE OF AN INTERNATIONAL CONVENTION ON THE HUMAN RIGHTS OF PEOPLE WITH DISABILITIES 6 (June 12, 2002) [hereinafter NCD WHITE PAPER]; see also

Aaron A. Dhir, *Human Rights Treaty Drafting through the Lens of Mental Disability: The Proposed International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, 41 STAN. J. INT’L L. 181, 191-92 (2005) (explaining that the medical model holds that individuals with disabilities show a deviation from the norm, making them appropriate subjects for medical intervention and cure).

14 Dhir, *supra* note 13, at 191.

15 *Id.* at 191-192; Gerard Quinn & Theresia Degener, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* at 14, U.N. Doc. HR/PUB/02/1, U.N. Sales No. 02.XIV.6 (U.N. Off. High Comm’r of Hum. Rts.) (2002); MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW*, 107 (Cornell University Press) (1990) (discussing what Minow terms the ‘Rights Analysis Approach’).

16 Quinn & Degener, *supra* note 15, at 27-28; see also NCD WHITE PAPER, *supra* note 13, at 28 (stating that, under this model, disability is a “social construction according to which society, not the person with a disability, requires adaptation.”) (emphasis in original).

17 Quinn & Degener, *supra* note 15, at 27-28.

18 *Id.*

19 *Id.*

20 See Dhir, *supra* note 13, at 191-92 (explaining that under the medical model, individuals with disabilities deviate from normal and are appropriate subjects for cure).

21 See Sally Chaffin, *Challenging the United States Position on a United Nations Convention on Disability*, 15 TEMP. POL. & CIV. RTS. L. REV. 121, 141 (2005) (remarking that the ADA is often viewed as “the most comprehensive civil rights law for people with disabilities that has ever been enacted by the United States [and] among the most protective in the world,” and often serves as a model for legislation in other countries because of concepts such as “reasonable accommodation”).

22 *Id.*

23 See 42 U.S.C. § 12102(2) (2000) (recalling that the ADA requires that in order for an individual to be eligible for assistance, or the difference or impairment must “substantially limit” the individual in at least one major life activity, which requires a comparison with other citizens considered to function “normally”).

24 See Arlene S. Kanter, *The Globalization of Disability Rights Law*, 30 SYRACUSE J. INT’L L. & COM. 241, 249 (2003) (describing the history of national anti-discrimination laws focused on people with disabilities and identifying the United States as among the first countries to adopt such laws).

25 See generally 42 U.S.C. § 12101(b) (describing the purpose of the ADA as “to provide a clear and comprehensive national mandate for elimination of discrimination against individuals with disabilities.”).

26 See U.S. DEP’T OF JUST., A GUIDE TO DISABILITY RIGHTS LAWS (2005), available at <http://www.usdoj.gov/crt/ada/cguide.pdf> (listing and generally describing existing federal laws dealing with the rights of persons with disabilities) [hereinafter DOJ, GUIDE TO DISABILITY RIGHTS LAW].

27 Air Carrier Access Act of 1986, 49 U.S.C. § 41705 (2000).

28 National Voter Registration Act of 1993, 42 U.S.C. §§ 1973(gg) (2000).

29 29 U.S.C. §§ 791-794 (2000).

30 See 29 U.S.C. § 701(b) (stating the purpose of the Rehabilitation Act as “to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society.”).

31 29 U.S.C. § 794(a) (2000).

32 29 U.S.C. § 794(a) (“No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.”).

33 29 U.S.C. § 793 (2000).

34 42 U.S.C. § 12102(2) (2000); see also 29 C.F.R. § 1614.203 (2001).

35 See Bonnie P. Tucker, *The ADA’s Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 341 (2001) [hereinafter Tucker, *The ADA*].

36 Center for Psychiatric Rehabilitation, Boston University, Reasonable Accommodations: The Rehabilitation Act of 1973 (1997), <http://www.bu.edu/cpr/reasaccom/whatlaws-rehaba.html> (last visited Mar. 26, 2007).

- 37 See Tucker, *Social*, *supra* note 2, at 25 (noting that a majority of employers and others were not covered by the Rehabilitation Act).
- 38 *Id.*
- 39 *Id.*
- 40 Tucker, *The ADA*, *supra* note 35, at 341.
- 41 See *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397 (1979) (rejecting the claim of discrimination under Section 504 made by a hearing impaired woman who was denied admission to nursing education where accommodations would not be effective and her disability might prevent her from effectively performing nursing duties).
- 42 See *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987) (denying a claim under Section 504 by a teacher who had repeated relapses of tuberculosis because of the potential danger to students).
- 43 Lennard J. Davis, *Crips Strike Back: The Rise of Disability Studies*, 11 AM. LITER. HIST. 500, 507 (1999), available at <http://alh.oxfordjournals.org/cgi/reprint/11/3/500.pdf>.
- 44 NAT'L COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT xvii (1997), <http://www.ncd.gov/newsroom/publications/1997/pdf/equality.pdf> [hereinafter NCD, EQUALITY OF OPPORTUNITY].
- 45 See Tucker, *Social*, *supra* note 2, at 25-26 (describing steps leading to the proposal and the passage of the ADA).
- 46 See Tucker, *The ADA*, *supra* note 35, at 340.
- 47 See, e.g., 42 U.S.C. §§ 12111(2), (5) (2000) (prohibiting employment discrimination by an employer with more than 15 full time employees, an employment agency, a labor organization, or a joint labor-management committee, and subjecting them to very narrow exceptions).
- 48 See 42 U.S.C. §12182 (2000) (forbidding discrimination against people with disabilities from benefiting through goods, services, facilities, privileges, advantages or accommodations, and requiring modification of policies, practices and procedures, removing barriers, and providing auxiliary aids and services).
- 49 42 U.S.C. § 12111 (2000). *But see* 42 U.S.C. §12209 (2000) (showing that although Congress chose to apply the ADA to "instrumentalities of Congress", i.e., the General Accounting Office, the Government Printing Office, and the Library of Congress, it did not choose to apply the ADA to itself).
- 50 42 U.S.C. §§ 12131 (2000).
- 51 Cornell Law School, Legal Information Institute, *Disability Law -- Wex*, [http://www.law.cornell.edu/wex/index.php/Disability\\_law](http://www.law.cornell.edu/wex/index.php/Disability_law) (last visited March 26, 2006).
- 52 42 U.S.C. § 12181 (2000).
- 53 42 U.S.C. § 2000d (2000).
- 54 Tucker, *The ADA*, *supra* note 35, at 342.
- 55 See 42 U.S.C., *supra* note 34 and accompanying text.
- 56 29 U.S.C. § 794 (2000).
- 57 See *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).
- 58 42 U.S.C. § 12208 (2000).
- 59 42 U.S.C. § 12210 (2000).
- 60 42 U.S.C. § 12211 (2000).
- 61 See 42 U.S.C. §12206 (2000) (naming specifically the Attorney General, the Equal Employment Opportunity Commission, the Secretary of Transportation, the Architectural and Transportation Barriers Compliance Board, and the Federal Communications Commission to develop a plan to assist with understanding the responsibility of entities and agencies covered by the Act).
- 62 see 42 U.S.C. § 12203 (2000) ("No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act").
- 63 42 U.S.C. § 12188(a)(1) (2000).
- 64 See 42 U.S.C. §§ 12183(a), 12188(a) (granting individuals a right to injunctive relief in certain cases where new facilities or renovations of existing facilities will discriminate against people with disabilities).
- 65 20 U.S.C. § 1400.
- 66 See *id.* (stating that this may include supplying necessary learning aids, testing modifications, and other educational accommodations).
- 67 See *Reevaluation Regulations for IDEA*, 34 C.F.R. 300.536 (2004) (mandating that each child will be re-evaluated at least once every three years).
- 68 DOJ, GUIDE TO DISABILITY RIGHTS LAW, *supra* note 26, at 15.
- 69 See NAT'L COUNCIL ON DISABILITY, INDIVIDUALS WITH DISABILITIES EDUCATION ACT BURDEN OF PROOF: ON PARENTS OR SCHOOLS? POSITION STATEMENT I (Aug. 9, 2005), <http://www.ncd.gov/newsroom/publications/2005/pdf/burdenofproof.pdf>.
- 70 DOJ, GUIDE TO DISABILITY RIGHTS LAW, *supra* note 26, at 15.
- 71 *Id.*
- 72 Tucker, *Social*, *supra* note 2, at 33; PADDEN & HUMPHRIES, *supra* note 12, at 12 (citing that in 2002 only 27 percent of deaf children were enrolled in special schools centers).
- 73 20 U.S.C. § 1401(a)(9) (2000) (defining a FAPE as the "special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program.").
- 74 See *Board of Education v. Rowley*, 458 U.S. 176, 209-10 (1982) (holding that the Education of the Handicapped Act did not require states to maximize the potential of each child proportionate to the opportunity provided children without disabilities and that, insofar as a school was required to provide a FAPE, the school would provide personalized instruction with sufficient support services to allow the child to receive some educational benefit).
- 75 See *supra* notes 61-68 and accompanying text.
- 76 Dolnick, *supra* note 9 (quoting Henry Kisor).
- 77 See *id.*
- 78 *Id.*; Bonnie P. Tucker, *Deafness – Disability or Subculture: The Emerging Conflict*, 3 CORNELL J.L. & PUB. POL'Y. 265, 270 (1993-1994) [hereinafter Tucker, *Deafness*].
- 79 Tucker, *Deafness*, *supra* note 78, at 270-74.
- 80 *Id.*
- 81 I. King Jordan, *Deaf Culture and Gallaudet*, WASH. POST, Jan. 22, 2007, at A19.
- 82 *Id.*
- 83 Susan Kinzie, Nelson Hernandez & David A. Fahrenthold, *Gallaudet Board Ousts Fernandes; As Protesters Cheer, Trustees Say Law-Breakers 'Will Be Held Accountable'*, WASH. POST, Oct. 30, 2006 at A01.
- 84 Susan Kinzie & Michael E. Ruane, *Gallaudet's Next President Won't Bow Out*, WASH. POST, May 5, 2006, at A01.
- 85 Maya Sabatello, *International Law Weekend: Panel Presentation – Disability, Cultural Minorities, and International Law: Reconsidering the Case of the Deaf Community*, 26 WHITTIER L. REV. 1025, 1027 (2005).
- 86 See Dolnick, *supra* note 9 (describing how the Deaf now proclaim themselves as a subculture).
- 87 Sabatello, *supra* note 85, at 1028.
- 88 See Dolnick, *supra* note 9, at 43 (describing how the Deaf Culture views treatments for deafness, such as cochlear implants, as child abuse or even genocide); Tucker, *Deafness*, *supra* note 78, at 271 (quoting Roz Rosen: "Since '[h]earing is not a life or death matter . . . [it is] consequently not worth the medical, moral and ethical risk of altering a child.'").
- 89 Sabatello, *supra* note 85, at 1028-29 ("Members of the Deaf community rebuff technological advances such as hearing aids as medical attempts to 'cure' deafness").
- 90 See Tucker, *Deafness*, *supra* note 78, at 271 (indicating that supporters of Deaf Culture are proud of being deaf and claiming it is their own cultural right that should "be cherished rather than fixed and erased"); Sabatello, *supra* note 85, at 1028 ("'Deafness' is . . . a quality to cherish").
- 91 *Id.*
- 92 See *supra* notes 88-90.
- 93 See Jane K. Fernandes, Editorial, *Many Ways of Being Deaf*, WASH. POST, October 14, 2006, at A21 (discussing diversity among the Deaf Community and discrimination against the Deaf).
- 94 See Dolnick, *supra* note 9, at 39 (reporting that the Deaf view deafness as similar to ethnicity and distinguishing deafness from other disabilities such as blindness).
- 95 *Id.*
- 96 See Shelley Lane, *supra* note 2.
- 97 Dolnick, *supra* note 9, at 39.
- 98 Dolnick, *supra* note 9, at 37; PADDEN & HUMPHRIES, *supra* note 12, at 2-4.

99 See Monica Davey, *As Town for Deaf Takes Shape, Debate on Isolation Re-emerges*, N.Y. TIMES, March 21, 2005, at A1, available at <http://www.nytimes.com/2005/03/21/national/21deaf.html> (last visited May 7, 2007) (describing the plan for a town for sign language users in South Dakota that would welcome anyone who has “a commitment to live in a visually centered environment that supports manual as opposed to spoken language” often including the hearing relatives of deaf individuals).

100 Tucker, *Social*, *supra* note 2, at 31.

101 Davey, *supra* note 99.

102 *Id.*

103 U.S. Food and Drug Admin., Ctr. for Devices and Radiological Health, *Cochlear Implants – What is a Cochlear Implant?*, (Oct. 26, 2004) <http://www.fda.gov/cdrh/cochlear/WhatAre.html>.

104 Tucker, *Social*, *supra* note 2, at 33 (quoting Dolnick, *supra* note 9, at 43).

105 Tucker, *Deafness*, *supra* note 78, at 270-71 (“Supporters of this view do not want researchers to find a cure for deafness.”) (emphasis in original).

106 *Id.*; Dolnick, *supra* note 9.

107 Dolnick, *supra* note 9, at 37-38 (comparing “Deafness” to ethnicities such as Haitian, Hispanic and Italian-Americans).

108 See Nat’l Inst. of Health, Nat’l Inst. on Deafness and Other Communication Disorders, *Statistics about Hearing Disorders, Ear Infections, and Deafness*, available at <http://www.nidcd.nih.gov/health/statistics/hearing.asp#1> (last visited May 7, 2007) (reporting that in the United States, 9 out of every 10 children who are born deaf are born to hearing parents)[hereinafter NIDCD].

109 28 C.F.R. § 36.104 (1991) (defining “major life activities” under the *Disability* definition part (iv)(2)).

110 28 C.F.R. § 36.104 (1991) (defining “physical or mental impairment” under the *Disability* definition part (iii)).

111 See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999) (dismissing a claim of hiring discrimination based on the determination that whether an individual has a disability that substantially limits a major life activity must take into account measures that the individual is taking to alleviate the impairment).

112 See Tucker, *Deafness*, *supra* note 78, at 271 (“[T]he the Deaf community, however, are among the strongest advocates for laws and special programs to protect and assist people with hearing impairments.”).

113 PADDEN & HUMPHRIES, *supra* note 12, at 174-76 (discussing the eugenics movement, specifically in relation to movements to prevent procreation among deaf individuals).

114 MAIRIAN CORKER, DEAF AND DISABLED OR DEAFNESS DISABLED? TOWARDS A HUMAN RIGHTS PERSPECTIVE 31 (1998).

115 *Id.*

116 See Dolnick, *supra* note 9 (describing the differences between simulating deafness and blindness); Lane, *supra* note 2; see also *supra* notes 94-97 and accompanying text (describing the Deaf community’s effort to distinguish themselves from other disabilities such as blindness).

117 See CORKER, *supra* note 114, at 31 (embracing the notion of minority group status, based on the strong believing in segregated education, the right to coexist as a separate subculture of society, and seeking liberation by creating alternative communities).

118 *Id.*

119 See Sabatello, *supra* note 85, at 1035-38 (comparing how both the Deaf Community and linguistic minorities

experience “distinctive ‘shared history, culture, and tradition’”); see Dolnick, *supra* note 9, at 37-38.

120 473 U.S. 432 (1985).

121 *Id.* at 440-42.

122 See *id.* at 442-43 (declaring that individuals with disabilities was a group too undefined and amorphous to allow intermediate or heightened scrutiny).

123 *Id.* at 448 (holding that the record failed to provide any evidence that the home for individuals with intellectual impairments posed a special threat to the City of Cleburne’s legitimate interest, and therefore the ordinance involved was invalid).

124 *Id.* at 440 (“When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude.”).

125 *Id.* at 440-41.

126 *Id.* at 442.

127 *Id.*

128 See generally H.R. 6258, 109th Cong. (2006) (responding to *Cleburne*, Rep. James Sensenbrenner introduced H.R. 6258, The Americans with Disabilities Restoration Act, in the 109<sup>th</sup> Congress in 2006. The Act was intended to “restore the intent of the Americans with Disabilities Act of 1990 to more fully remove the barriers that confront disabled Americans.” However, while the Bill was referred to four committees and two of their subcommittees, it went no further.).

129 See SARAH S. GEER, *When “Equal” Means “Unequal” – And Other Legal Conundrums for the Deaf Community*, in *SOCIOLINGUISTICS IN DEAF COMMUNITIES*, 114-18 (Ceil Lucas ed., Gallaudet University Press) (2003) (discussing application of equal protection and suspect classifications to the deaf).

130 See Dolnick, *supra* note 9 (communicating that 90 percent of deaf children are born to parents who can hear and vice versa; Dolnick goes on to point out the similarity between deaf and homosexual children and their hearing or heterosexual parents by not sharing their cultural identity and instead acquiring cultural identity from peers). Compare HARLAN LANE, *THE MASK OF BENEVOLENCE: DISABLING THE DEAF COMMUNITY*, 21 (Vintage Books 1993) (1992) (noting that it is impossible for a child, homosexual, or heterosexual to procreate without the egg of a female and the sperm of a male (in other words, a heterosexual couple) and that the grouping of the deaf and homosexual communities is voluntary and the segregation or inability to participate with society is involuntary) with Tucker, *Social*, *supra* note 2, at 33 (explaining that, unlike the homosexual community, in many instances such as in education, the Deaf desire a segregated existence from mainstream society).

131 See LANE, *supra* note 130, at 21.

132 See *Romer v. Evans*, 517 U.S. 620, 631 (1996) (applying rational basis scrutiny to a State Amendment repealing all protections for homosexuals and finding it not rationally related to a legitimate government interest).

133 See ROBERT P. O’QUINN, *THE AMERICANS WITH DISABILITIES ACT: TIME FOR AMENDMENTS*, Cato Policy Analysis No. 158 (Cato Inst.) (Aug. 9, 1991), available at <http://www.cato.org/pubs/pas/pa-158.html> (explaining that the U.S. Senate amended Section 511 of the ADA to specifically exclude not only homosexuals, but also bisexuality, transvestites, transsexuals, pedophiles, individuals with gender identity disorders that are not the result of physical impairments, other sexual behavior disorders, compulsive gambling, kleptomaniacs, pyromaniacs, and disorders resulting from the current illegal use of drugs, in 1989).

134 *Murphy v. United Parcel Serv.*, 527 U.S. 516 (1999) (“To be regarded as substantially limited in the major

life activity of working, one must be regarded as precluded from more than a particular job. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working one must be regarded as precluded from more than a particular job.”); 29 C.F.R. § 1630(j)(3)(i).

135 29 C.F.R. § 1630(1)(2).

136 See *supra* notes 65-75 and accompanying text.

137 See generally *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994) (illustrating how the conflicting goals of Deaf Culture and disability laws can create complex legal tests, such as the Ninth Circuit’s four-factor test that requires balancing (i) the educational benefits of mainstreaming, (ii) the non-educational benefits of mainstreaming, (iii) the effect of the disabled child on the other children and the teacher in the class in which the child with a disability is placed, and (iv) the costs of mainstreaming.)

138 See LANE, *supra* note 130, at 237-238.

139 See Sabatello, *supra* note 85, at 1029 (explaining the Deaf Communities demand for an active role in the education of deaf children); see also *id.* at 1026 (explaining that the Deaf Communities point to the likelihood of hearing parents choosing an oral education and cochlear implants for pre-lingual deaf children and claim that these decisions impact the numbers of individuals associating with Deaf Culture and rather encourage deaf children to assimilate into the mainstream hearing culture).

140 See *NPR Talk of the Nation: As Deaf Culture Changes, So Do the Questions* (NPR radio broadcast Oct. 12, 2006) (transcript available at <http://www.npr.org/templates/story/story.php?storyId=6189253>) (describing need for schools like Gallaudet College as a place of deaf culture and the need to get to “folks younger”).

141 LANE, *supra* note 130, at 20.

142 Tucker, *Social*, *supra* note 2, at 31 (advocating removal of deaf babies from their homes in order to immerse or raise these children in Deaf Culture and Communities).

143 See *id.* at 33-34 (giving facts about the costs of educating deaf children in segregated schools and regular classrooms).

144 Therese Caraparo, *Remembering the “Individuals” of the Individuals with Disabilities Education Act*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y. 467, 494-95 (2003).

145 See Sabatello, *supra* note 85, at 1025-26.

146 Marjorie L. Baldwin, *The Americans with Disabilities Act: Social Contract or Special Privilege? Can the ADA Achieve Its Employment Goals?*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 37, 40 (1997).

147 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

148 Baldwin, *supra* note 146, at 40.

149 *Id.*

150 Quinn & Degener, *supra* note 15, at 27-28.

151 See Arlene S. Kanter, *The Globalization of Disability Rights Law*, 30 SYRACUSE J. INT’L L. & COM. 241, 249 (2003).

152 Carol J. Gill, *A Psychological View of Disability Culture*, DISABILITY STUD. Q. (Fall 1995), available at <http://www.independentliving.org/docs3/gill1995.html> (last visited May 8, 2007).

153 Sabatello, *supra* note 85, at 1028

154 See Tucker, *Deafness*, *supra* note 78, at 270-71; Anna-Miria Muhlke, *The Right to Language and Linguistic Development: Deafness from a Human Rights Perspective*, 40 VA. J. INT’L L. 705, 722-23 (2000).

155 Sabatello, *supra* note 85, at 1039-40.

156 See Tucker, *Deafness*, *supra* note 78, at 273 (“deaf people do not comprise a cultural race in the same manner as Native Americans, Blacks, Haitians, or Hispanics . . . these cultural races . . . do not lack one of five critical sense necessary to function in society”); see also Muhlke, *supra* note 154, at 738 (detailing how it is difficult to include the deaf into the definition of an ethnic minority which usually not only share biological and genetic features but also residence in a certain area, name, origin, use of a minority language, and cultural custom).

157 See Kenneth B. Nunn, Foreword, *New Explorations in Culture and Crime: Definitions, Theory, Method*, 17 U. FLA. J.L. & PUB. POL’Y. vii, viii-ix (2006) (“Culture can be defined as the structure of social organization found in a distant society or unfamiliar ethnic group . . . [or it] can also be defined as familiarity with a system of social etiquette. Culture may mean the state of

artistic production in a given place or time . . . According to Stuart Hall, one of cultural studies’ leading figures, culture is ‘the production and exchange of meanings . . . between members of a society or group.’ Likewise, Naomi Mezey defines culture as ‘any set of shared signifying practices-practices by which meaning is produced, performed, contested, or transformed.’”)

158 *Id.* at vii-ix

159 *Documentary: Through Deaf Eyes* (PBS television broadcast Mar. 26, 2007) <http://www.pbs.org/weta/throughdeafeyes/about/transcript.pdf> [hereinafter *Through Deaf Eyes*].

160 See Dolnick, *supra* note 9, at 40 (estimating that 500,000 people use ASL).

161 See LANE, *supra* note 130, at 16-17 (noting that ASL is the common language among members of the Deaf Community and that it plays a significant role in passing Deaf Culture between generations).

162 See *id.* at 17; Dolnick, *supra* note 9.

163 *Through Deaf Eyes*, *supra* note 159.

164 See NIDCD, *supra* note 108.

165 Fernandes, *supra* note 93.

166 LANE, *supra* note 130, at 34-36.

167 Dolnick, *supra* note 9.

168 *Id.*

169 *Id.* (estimating that approximately 500,000 people use ASL, and groups of deaf individuals have different forms of sign language in different countries, such as French Sign Language and Canadian Sign Language).

170 Sabatello, *supra* note 85, at 1038.

171 McKee, *supra* note 12.

172 Steven E. Brown, Editorial, *What is Disability Culture*, DISABILITY CULTURE – INDEP. LIVING INST. NEWSL. 2001-12, available at <http://www.independentliving.org/newletter/12-01.html> (last visited May 8, 2007).

173 Gill, *supra* note 152.

174 42 U.S.C. § 12102(2)(A) (2002).

175 Tucker, *Deafness*, *supra* note 78, at 270-72.

176 42 U.S.C. § 12102(2)(C) (2002).

177 *Id.*

178 Tucker, *Social*, *supra* note 2, at 25.

179 See Chaffin, *supra* note 21, at 130 (noting that the United States has ratified only three of twenty-six international human rights treaties).

180 See Chaffin, *supra* note 21, at 121 (reporting a 2003 comment by Ralph Boyd, former U.S. Assistant Attorney General for Civil Rights to the Ad Hoc Committee drafting the U.N. Convention, that the United States would not join in the convention). See generally The Secretary-General, *Final Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, U.N. Doc. A/61/611 (Dec. 6, 2006) [hereinafter *Convention*] (adopted by U.N. General Assembly Dec. 1, 2006, opening for signing by member nation states March 30, 2007).

181 See *supra* notes 119-126 and accompanying text.

182 42 U.S.C. § 12182 (2000).

183 See 42 U.S.C. §§ 12111(9)-(10) (2000) (defining reasonable accommodation and undue hardship).

184 See 42 U.S.C. § 12111(10) (2000) (defining undue hardship).

185 See 42 U.S.C. § 12112(a) (2000) (prohibiting discrimination in employment against *qualified* individuals with disabilities).

186 See MoPix Motion Picture Access, *Frequently Asked Questions*, <http://ncam.wgbh.org/mopix/faq.html> (last visited May 3, 2007).

187 See Tucker, *Social*, *supra* note 2, at 25; see also Tucker, *Deafness*, *supra* note 78, at 271.

188 See Dolnick, *supra* note 76 and accompanying text (describing the deaf as “Balkanized”).



