

April 2020

The Blind Leading the Deaf: An Investigation of the Inconsistent Accommodations the Justice System Provides to People Who Are Deaf

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Repository Citation

Elizabeth Pindilli, *The Blind Leading the Deaf: An Investigation of the Inconsistent Accommodations the Justice System Provides to People Who Are Deaf*, 26 Wm. & Mary J. Race, Gender, & Soc. Just. 451 (2020), <https://scholarship.law.wm.edu/wmjowl/vol26/iss2/9>

THE BLIND LEADING THE DEAF: AN INVESTIGATION OF THE INCONSISTENT ACCOMMODATIONS THE JUSTICE SYSTEM PROVIDES TO PEOPLE WHO ARE DEAF

ABSTRACT

Historically, and to this day, people with disabilities have not been considered capable of determining their own needs. Instead, the general population has taken it upon themselves to dictate what accommodations they shall receive.¹ This becomes particularly problematic for the deaf community when interacting with the criminal justice system, where a lack of communication is synonymous with a lack of justice.² In this situation, the state should defer to the individual's understanding of their needs, or carry the burden of proving that another accommodation is equally effective.

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1. See, e.g., Arlette Abdallah, *Accommodations for the Hearing Impaired in the Florida State Court System*, 35 NOVA L. REV. 203, 210–11 (2010).

2. See Jamie McAlister, *Deaf and Hard-of-Hearing Criminal Defendants: How You Gonna Get Justice If You Can't Talk to the Judge?* 26 ARIZ. ST. L.J. 163, 163–64 (1994).

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INTRODUCTION

Ironically, the access inequality faced by members of the deaf community often goes unheard by hearing society. The lack of access to effective communication accommodations can create ramifications ranging from slight nuisance to serious endangerment of the rights and liberty of deaf individuals.³ Nowhere in our society is the possible peril more evident than in the criminal justice system.⁴ When the state fails to provide appropriate access to communication for deaf people interacting with the criminal justice system, the miscarriage of justice can be severe and devastating.⁵ While the nation has enacted statutory protections designed specifically to guard against these injustices, courts' exposition of the relevant standards are varied and sometimes incompatible with the purpose of the statute.⁶

In this Note, I will examine the different interpretations of the standard needed to receive compensatory damages under the American with Disabilities Act (ADA). The question of the proper standard was submitted for Supreme Court review, but was denied certiorari in late 2018.⁷ The petitioner claimed a plaintiff must show they were denied the accommodation as a result of animus because the alternative, deliberate indifference, was too small a hurdle for a plaintiff to overcome.⁸ This Note will expand on the different circuits' applications of the standards and eventually concur with the Ninth Circuit, both in its application of deliberate indifference and in its contention that, in practice, no circuit requires a showing of animus to receive compensatory damages.⁹ This Note will conclude by relating this analysis to the experience of people who are deaf in the criminal

3. See Kelly McAnnany & Aditi Kothekar Shah, *With Their Own Hands: A Community Lawyering Approach to Improving Law Enforcement Practices in the Deaf Community*, 45 VAL. U.L. REV. 875, 876 (2011).

4. See generally McAlister, *supra* note 2.

5. *Id.* at 164–65.

6. See, e.g., *Updike v. Multnomah Cty.*, 870 F.3d 939, 949 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 55 (2018).

7. See *id.*

8. *Id.* at 950.

9. *Id.* at 951.

justice system and determine that, specifically for the deaf community but also for all disabled Americans, the Ninth Circuit's understanding of the standard is the most congruous with the purpose of the ADA and ought to be applied uniformly across the country.¹⁰

Part I will provide some necessary background on the nature of the deaf community, their language, and their culture. Part II will then provide an overview of the ADA, its history, goals, and function in the criminal justice system. Part III will examine the breadth of deaf experience in the criminal justice system and how it differs from a hearing person's experience. This overview is essential to fully understand the need for a standard like the one proposed by the Ninth Circuit.¹¹ Part IV will examine the case, *Updike v. Multnomah County*, that was submitted for certiorari, and the perceived conflict between the deliberate indifference and animus standards.¹² Through an analysis of certain cases presented before all the circuits, Part IV will demonstrate that the petitioner's argument does not hold up and that there are truly no circuits applying an animus standard.¹³ However, it must be determined which circuit's application of the deliberate indifference standard is the proper interpretation. In Part V, this Note will argue that the intended purpose of the ADA requires the courts to apply the Ninth Circuit's analysis and in Part VI, consider why this standard has not been universally adopted.

I. WHO ARE THE MEMBERS OF THE DEAF COMMUNITY?

"Approximately twenty million people . . . or 8.6% of the [] United States population . . . are deaf or hard of hearing."¹⁴ Lower case 'd' deaf refers to the condition of deafness; many people identify only as deaf and do not choose to associate themselves with Deaf culture.¹⁵ Often people who identify as deaf became deaf late in life or communicate through something other than American Sign Language (ASL).¹⁶ People who identify as Deaf, with a capital 'D', view themselves as being a part of Deaf culture; they are Deaf and proud and often communicate through ASL, which they consider to be their

10. *Id.* at 949–50.

11. *See id.*

12. *Updike*, 870 F.3d at 949–50.

13. *See* Petition for Writ of Certiorari at 24–25, *Multnomah v. Updike*, 139 S. Ct. 55 (2018) (No. 17-1222); *Updike*, 870 F.3d 939. In denying certiorari, the Supreme Court implied that there was no split among the circuits to be resolved regarding the standard.

14. McAnnany & Shah, *supra* note 3, at 876.

15. CAROL PADDEN & TOM HUMPHRIES, *INSIDE DEAF CULTURE* 1 (2006).

16. *Community and Culture—Frequently Asked Questions*, NAT'L ASS'N OF THE DEAF, <https://www.nad.org/resources/american-sign-language/community-%20and-culture-frequently-asked-questions> [<https://perma.cc/3JKX-5WDK>].

“native language.”¹⁷ For the purpose of this Paper I will use “deaf” to refer to the entire community, and “Deaf” to refer to the portion of the larger community that consider themselves part of Deaf Culture.

America’s hearing and deaf communities exist in separate worlds.¹⁸ The deaf community is often invisible to members of the hearing community.¹⁹ When deafness is acknowledged, hearing society defines it pathologically, purely as an audiological malfunction.²⁰ A conflict arises because many Deaf people reject the sole basis of hearing people’s understanding of them: the classification as “disabled”.²¹ A large portion of the deaf community do not consider their deafness to be a disability, but instead interpret deafness as belonging in a culture and community.²²

Many people who are deaf do not feel like they are defined by their inability to hear, but rather choose to identify themselves as members of a “cultural and linguistic minority.”²³ Andrew Solomon, a scholar and author on cultural studies, explained that the notion of disability is often a result of pressure to conform to hearing society: “Those who learn forced English while being denied sign emerge semi-lingual rather than bilingual, and they are disabled people. But for the rest of us, it is no more a disability than being Japanese would be.”²⁴

While this argument might seem utterly shocking to a hearing person, it is important to understand that ‘disability’ is a label and limitation imposed by the dominant culture.²⁵ The societal barriers faced by a deaf person are the same obstacles a hearing person would encounter if they were encompassed in a world defined by deaf culture.²⁶ Throughout the later discussion of appropriate accommodations,²⁷ it is critical to remember that these same accommodations would be required by hearing people living in a world created for the deaf.

17. *Id.*; Andrew Solomon, *Defiantly Deaf*, N.Y. TIMES (Aug. 28, 1994), <https://www.nytimes.com/1994/08/28/magazine/defiantly-deaf.html> [<https://perma.cc/4JCG-J3CF>].

18. See Lydia Callis, *Deaf and Hearing Worlds: Bridging the Cultural Gap*, HUFFINGTON POST (Oct. 4, 2017, 11:15 AM), https://www.huffpost.com/entry/deaf-and-hearing-worlds-bridging-the-cultural-gap_b_59d4f4f3e4b02508a0a07b9b [<https://perma.cc/YGQ5-G7TY>].

19. See generally Stephen Wilbers, *Why American Needs Deaf Culture: Cultural Pluralism and the Liberal Arts Tradition*, 59 SIGN LANGUAGE STUD. 195 (1988).

20. TARA POTTERVELD, LAW ENFORCEMENT INTERPRETING FOR DEAF PERSONS ix (2012).

21. See Mary Ellen Aldrich, *Being Deaf Is Not A Disability*, 48 FREE PRESS, 11 (Apr. 2017).

22. See *id.*

23. POTTERVELD, *supra* note 20, at ix.

24. Solomon, *supra* note 17.

25. See *id.*

26. See *id.*

27. See *infra* text accompanying notes 90–104.

Deaf culture is not based on the medical understanding of deafness as a disability, but on a strong sense of community, growing from Deaf pride.²⁸ Deaf pride is powerful. So powerful in fact, that many Deaf people say they would not want to be hearing if they had the choice.²⁹ Deaf culture is rich with its own distinct norms, traditions, and art.³⁰

A. Variations of Sign Language as a Means of Communication for Deaf Individuals

ASL is one of the bastions of Deaf culture and powerfully connects members of the Deaf community to one another.³¹ ASL is held in such high regard because it was a right not easily won.³² Until the 1980s, use of ASL was severely repressed by hearing educators in favor of oralism, which forces speech and lip-reading and forbids sign language.³³ Eventually however, ASL was recognized as “a distinct language from English with its own grammar and linguistic rules.”³⁴

ASL is not used universally within the deaf community and is not the only method of signed communication available; some people who are deaf communicate through Signed Exact English (SEE), which retains the grammatical order of English.³⁵ Pidgin Signed English (PSE) is another means of visual communication, which combines ASL and SEE.³⁶ A person fluent in SEE or PSE would need a certified interpreter who understands the difference between the different signed languages in order to be able to fully and effectively communicate.³⁷ Unfortunately, hearing society’s minimal understanding of signed language means that the people tasked with providing the necessary accommodations might not know enough to ensure the correct interpreter is present.³⁸

28. See Solomon, *supra* note 17.

29. See *id.*

30. See PADDEN & HUMPHRIES, *supra* note 15, at 150.

31. See Aldrich, *supra* note 21.

32. See Solomon, *supra* note 17.

33. See *id.* The use of sign language was banned by a gathering of international deaf educators at the 1880 Milan Conference. This forced many deaf students to sign in secret or risk punishment by their teachers.

34. POTTERVELD, *supra* note 20, at x. In 1960 William Stokoe, a Professor at Gallaudet University, Americans only deaf college, published his findings establishing ASL as a legitimate language. In 1964 Congress issued the Babbidge Report concluding oral education of the deaf was a failure. *Deaf Culture Timeline*, SIGN LANGUAGE INTERPRETERS (Mar. 2013), <https://signlanguageco.com/deaf-culture-timeline> [<https://perma.cc/RK3L-2G3V>].

35. See Abdallah, *supra* note 1, at 207–09.

36. See *id.*

37. See Laurent Clerc National Deaf Education Center, *Working with Interpreters*, GALLAUDET U. (2015), <https://www3.gallaudet.edu/clerc-center/info-to-go/interpreting/working-with-interpreters.html> [<https://perma.cc/N6EN-GY5X>].

38. See Abdallah, *supra* note 1, at 210–11.

A minority of the deaf community communicates orally and relies on lip-reading.³⁹ Ninety percent of deaf children are born to hearing parents and are often not exposed to ASL from birth—these people often discover Deaf culture, pride, and ASL later in life.⁴⁰ Hearing parents often reject ASL and instead insist on speech training and lip-reading in hopes of communicating orally with their child.⁴¹ However, it is a “[s]ocietal myth [] that lip-reading will surmount any and all communication difficulties that arise between deaf and nondeaf persons. This simply is not true. . . . only about thirty percent of language sounds are visible on the lips.”⁴² That means, only about thirty percent of words can be understood by a skilled lip-reader.⁴³ Generally in “someone deafened postlingually [lip-reading] can be developed, but for someone with limited English, it is an excruciating endeavor.”⁴⁴

Hard of hearing typically refers to people who have mild-to-moderate hearing loss.⁴⁵ Hard of hearing individuals may better be able to rely on hearing aids due to their lesser amount of hearing loss.⁴⁶ Hearing aids amplify sound but do not clarify it, therefore a hearing aid must often be paired with lip-reading and the appropriate conditions, to make speech intelligible.⁴⁷ Furthermore, there is another portion of the deaf community that is not fluent in any signed or spoken language.⁴⁸

While no two people with any disability are the same, the extreme variation in methods of communication makes the deaf community particularly heterogeneous.⁴⁹ This is critical when providing guidelines for communication accommodations, as not all deaf people will require the same tools or services;⁵⁰ some people who are deaf might feel comfortable passing written notes while others would require a certified ASL interpreter. In any particular instance it is very likely that two deaf people would require very different accommodations. This means a deaf person is often the only person

39. *See id.* at 207.

40. POTTERVELD, *supra* note 20, at x.

41. *See* Cassandra Shaw & Rhonda Buie, *Why Parents of Deaf Children Don't Learn Sign Language*, <http://deafed.net/PublishedDocs/sub/970415y.htm> [<https://perma.cc/54XC-9Z75>].

42. McAlister, *supra* note 2, at 171–72.

43. *Id.* To demonstrate this point, say the words ‘pan’ and ‘ban’ and consider how impossible it would be to visually distinguish between those words, especially if you had no past exposure to how words sound.

44. Solomon, *supra* note 17.

45. *See* NAT'L ASS'N OF THE DEAF, *supra* note 16.

46. *See Deafness and Hearing Loss*, WHO (Mar. 2019), <https://www.who.int/news-room/fact-sheets/detail/deafness-and-hearing-loss> [<https://perma.cc/3BBF-29GZ>].

47. *See* Abdallah, *supra* note 1, at 207.

48. *See id.*

49. *Id.*

50. *Id.* at 206–07.

who knows what they truly need to effectively communicate.⁵¹ Serious investigation on the part of the official could result in effective communication, but it is typically the best practice to defer to the request of the person who is deaf.

II. THE AMERICANS WITH DISABILITIES ACT

Regardless of the Deaf community's resistance to the label "disabled", the world is designed for hearing people, which makes functioning in that world more difficult for people who are deaf.⁵² "[I]t is hearing people's gaze that determines reality. Within this reality deaf people are disabled."⁵³ Therefore, without a change to society's conception of normalcy, the deaf community will continue to be considered disabled and will be entitled to the protections and accommodations which that classification affords.⁵⁴

In 1990, Congress passed the Americans with Disabilities Act (ADA), a comprehensive law designed to provide stronger antidiscrimination protections for the disabled population.⁵⁵ The ADA was not a general prohibition of discrimination but provided tangible and specific legal rights; therefore, it is considered one of the most powerful pieces of civil rights legislation since the 1960s.⁵⁶

More broadly, "[t]he ADA prohibits discrimination on the basis of disability in employment, the provision of state and local government services, places of public accommodations, commercial facilities, transportation, and telecommunications."⁵⁷ For the purposes of this Note, I will be focusing on Title II of the ADA, which requires state and federal governments to ensure that disabled people have the equal opportunity to benefit from all activities, programs, and services offered by the government.⁵⁸

The aim of Title II is to ensure that public officials and entities prevent discrimination and provide appropriate accommodations to people with disabilities.⁵⁹ "Title II states that 'no qualified individual

51. See McAlister, *supra* note 2, at 196.

52. Mary Ellen Maatman, *Listening to Deaf Culture: A Reconceptualization of Difference Analysis under Title VII*, 13 HOFSTRA LAB. L.J. 269, 326 (1996).

53. *Id.* (quoting Leah H. Cohen, *Train Go Sorry* 208 (1994) (internal quotation marks omitted)).

54. See *id.* at 326.

55. See Sande Buhai & Nina Golden, *Adding Insult to Injury: Discriminatory Intent as a Prerequisite to Damages Under the ADA*, 52 RUTGERS L. REV. 1121, 1122–23 (2000).

56. *Id.* at 1122.

57. Michael A. Schwartz, *America's Transformation: The Arc of Justice Bends Toward the Deaf Community*, 45 VAL. U.L. REV. 845, 852 (2011).

58. *Id.* at 853.

59. Andrew J. Lohmann, *Arrests and Title II of The ADA: Framework of Claims for Monetary Damages*, 56 WASHBURN L.J. 559, 562–63 (2017).

with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.’”⁶⁰ This Note will focus specifically on how the ADA is intended to function in the criminal justice system, and the many instances where the system fails to meet the standard set by the ADA mandate with regard to the deaf population.⁶¹

Courts and police officers are both bound by the requirements of Title II of the ADA, and therefore must ensure that their interactions with people who are disabled are the same as their communications with the nondisabled population.⁶² It is in the legal system, where clear communication is tantamount to justice, that the failures to appropriately accommodate have the harshest repercussions.⁶³

III. WHAT IS THE DEAF EXPERIENCE IN THE CRIMINAL JUSTICE SYSTEM LIKE?

From the first interaction with the police through the trial process, and even through their time incarcerated, there are many instances where a deaf person is denied accommodations and therefore denied equal access to the justice system.⁶⁴ This communication barrier and unequal access leads to an increased number of people who are deaf being denied a fair trial,⁶⁵ falsely convicted, and falsely imprisoned.⁶⁶ “[E]ffective communication access to law enforcement has been problematic for members of the Deaf community—victims, witnesses, and suspects have trouble communicating with the police—and traditional legal advocacy such as litigation has failed to effectuate change beyond the specific parties involved in the criminal justice system.”⁶⁷

Consistently ineffective communication with the police means members of the deaf community are less likely to report crimes and are more likely to be falsely arrested and face police brutality.⁶⁸

60. *Id.*

61. *See infra* Part IV.

62. Laurence Paradis, *Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act: Making Programs, Services, and Activities Accessible to All*, 14 STAN. L. & POL’Y REV. 389, 395 (2003).

63. *See* McAlister, *supra* note 2, at 163–64.

64. Joint Committee on Access to the Courts, *Improving the Access of Deaf and Hearing-Impaired Litigants to the Justice System*, 48 REC. ASS’N B. CITY N.Y. 834, 834 (1993).

65. *See generally* Kenneth S. Resnick & Eleanor M. Stromberg, *The Rights of a Hearing-Impaired Litigant*, 8 OHIO LAW. 12 (1994).

66. *See* HEARD—HELPING EDUCATE TO ADVANCE THE RIGHTS OF DEAF COMMUNITIES, <https://behearddc.org> [<https://perma.cc/56SU-NWMB>] [hereinafter HEARD].

67. Schwartz, *supra* note 57, at 853.

68. *See* McAnnany & Shah, *supra* note 3, at 876.

While the ADA requires reasonable accommodations during judicial proceedings, this does not always guarantee an interpreter.⁶⁹ Many law enforcement officers have likely never met a deaf person.⁷⁰ In “the bible of police interrogations,” there is no information on interviewing people who are deaf.⁷¹ This means a deaf individual could, and often does, spend their entire time in police custody without the ability to understand what is happening and communicate their wants and needs.⁷²

False arrest is a common occurrence in the deaf community.⁷³ Officers often perceive “a [deaf] person’s actions as suspicious, illegal, or uncooperative.”⁷⁴ For example, a deaf person’s speech patterns might “sound slurred or unintelligible” and they might “have [a] balanc[ing] problem . . . due to [an] inner ear condition[]”; this might lead an officer to believe they are intoxicated.⁷⁵ Alternatively, an officer might believe a deaf person is ignoring their instructions or resisting arrest.⁷⁶

Police officers have a duty, under Title II, to ensure that their communications with people who are deaf are as effective as communications with others.⁷⁷ Interpreters are not required for traffic stops, arrests with probable cause, or stop-and-frisks; they are required if the officer reads the *Miranda* rights or conducts an interview.⁷⁸ The *Miranda* rights are a prime example of how a practice, neutrally applied, can prejudicially effect a deaf person’s interaction with the criminal justice system.

A. *The Miranda Interpretation Problem*

The decision in *Miranda v. Arizona*⁷⁹ affirmed “the simple truth that effective access to information regarding constitutional rights is the absolute prerequisite to exercising those rights.”⁸⁰ The *Miranda* rights—familiar to all hearing people from their constant reiteration in mainstream media—inform an individual of the right to remain

69. See Katrina R. Miller, *Access to Sign Language Interpreters in the Criminal Justice System*, 146 AM. ANNALS DEAF 328, 329 (2001).

70. See POTTERVELD, *supra* note 20, at 15.

71. *Id.*

72. See Miller, *supra* note 69, at 329.

73. See HEARD, *supra* note 66.

74. POTTERVELD, *supra* note 20, at 16.

75. *Id.*

76. See *id.*

77. See *id.* at 20.

78. See *id.* at 18–23.

79. *Arizona v. Miranda*, 384 U.S. 436, 445 (1966).

80. McAlister, *supra* note 2, at 165.

silent and the right to consult an attorney.⁸¹ *Miranda* warnings can range from a fifth- to eleventh-grade reading level.⁸² A study of deaf people educated until or beyond age 18 found 10% read at a tenth-grade level, 60% read at a third- to fourth-grade level, and 33% read at a 2.8-grade level.⁸³

Many deaf people struggle to understand their *Miranda* rights either written or even interpreted in ASL.⁸⁴ “ASL is a visual language” without a written equivalent, meaning a person who is deaf might struggle to parse and understand the different grammatical structure of written English, because their language has no functional equivalent.⁸⁵ The meaning of this critical passage can be difficult to convey even in ASL; for example, ASL has no sign for the word ‘right’ as it is used in the warning.⁸⁶ While a certified interpreter could attempt to convey the meaning through different words, there is a significant risk that this warning, written for hearing people, will not clearly translate into ASL.⁸⁷

This exemplifies another barrier faced by deaf people in the criminal justice system. Most of hearing society could recite the *Miranda* warnings solely from how often they have heard them said on TV, but “many [d]eaf people have never encountered [them].”⁸⁸ Deaf people do not have the same access to incidental learning as hearing people.⁸⁹ Lack of exposure to media, conversations, and discussions with hearing people create a gap in their supplemental understanding of concepts that hearing society deems banal.⁹⁰ This is especially true of the criminal justice system, which all hearing people have at least a passing comprehension of from TV alone.⁹¹ Most hearing people would know, from their cultural background, that they have the right to an attorney when being interviewed by the police.⁹² Deaf people, lacking that same exposure, might not know they have that basic right. Even if they do, they likely will not be given the tools necessary to assert the right.

81. *Miranda*, 384 U.S. at 445.

82. See POTTERVELD, *supra* note 20, at 39.

83. *Id.* at 43.

84. See McAnnany & Shah, *supra* note 3, at 881–82.

85. POTTERVELD, *supra* note 20, at 55.

86. *Id.* at 43.

87. *Id.* at 55–56.

88. *Id.* at 50.

89. See, e.g., *id.* at 54–55. Hearing the *Miranda* rights repeated on every police or lawyer TV show is an example of the kind of incidental learning that people who are deaf are not exposed to.

90. *Id.* at 55.

91. POTTERVELD, *supra* note 20, at 50.

92. *Id.* at 49–50.

B. Interpreting

In *Updike v. Multnomah County*,⁹³ the specific case before the Court, it is being asserted that written notes were as effective as an interpreter would have been, yet the nature of sign language makes that untrue.⁹⁴ The meaning of words in sign language can depend exclusively on the facial expression of the signer, and incredible emphasis can be conveyed through sign that cannot be communicated through written words.⁹⁵ This means that ASL or another signed method of communication is often the preferred method of communication for people who are deaf, even if they are able to read and write.⁹⁶

Often, interpreting in a legal setting requires expansion of the language to ensure accurate understanding.⁹⁷ Interpreters have a duty to ensure that a deaf suspect understands their constitutional rights before allowing the suspect to waive those rights in a police interview.⁹⁸ Interpreters have the authority to “use linguistic expansion to ‘make meaning explicit from something inherently implicit.’”⁹⁹ This requires an understanding of Deaf Culture and the background of the individual. For this reason, a CODA (Child of Deaf Adult¹⁰⁰) often makes the best interpreter of both language and culture.¹⁰¹ However, an interpreter is required to convey information impartially, which a family member often finds impossible to do.¹⁰² Family members also lack the legal training needed to interpret these specialized legal concepts in an effective matter.¹⁰³ Therefore, courts are required to maintain a list of certified interpreters, although the decision to supply an interpreter remains solely at the discretion of the judge and his understanding of the needs of the deaf person.¹⁰⁴

93. See *Updike v. Multnomah Cty.*, 870 F.3d 939, 949, 944, 955 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 55 (2018).

94. See Abdallah, *supra* note 1, at 207–08.

95. See Arika Okrent, *Why Great Sign Language Interpreters Are So Animated*, ATLANTIC (Nov. 2, 2012), <https://www.theatlantic.com/health/archive/2012/11/why-great-sign-language-interpreters-are-so-animated/264459> [<https://perma.cc/PAZ7-A3GZ>].

96. See Solomon, *supra* note 17.

97. See POTTERVELD, *supra* note 20, at 55.

98. See *id.* at 50–51.

99. *Id.*

100. *Children of Deaf Adults (CODA)*, DEAF WEBSITES, <http://www.deafwebsites.com/children/children-of-deaf-adults.html> [<https://perma.cc/SFN9-2FJC>]. CODAs have not only been interpreting for their parents for most of their lives, but because they grew up surrounded by both hearing and Deaf Culture, they can better interpret concepts that do not clearly translate from hearing to Deaf culture.

101. See *id.*

102. See Abdallah, *supra* note 1, at 208.

103. See *id.*

104. See *id.* at 210–11.

C. A Review of the Deaf Experience

To summarize, for a large portion of the deaf population, deafness is not defined only as an audiological malfunction or a disability, but as a basis for membership in a rich and unique culture and community.¹⁰⁵ Deaf people are not homogeneous; their experiences and their preferred methods of communication vary, some speak English while others use ASL, some are comfortable communicating with written English while others are not.¹⁰⁶ Therefore, the appropriate accommodation for one person who is deaf is oftentimes not the correct accommodation for another person who is deaf.¹⁰⁷ Regardless of their preferred method of accommodation, people who are deaf should be the ones tasked with determining what accommodation is best for them, be it a live interpreter or a pen and paper. Their preferred accommodation is of the utmost importance when interacting with the criminal justice system. Often the police officer or judge is not only unfamiliar with the experience of the individual before them, but likely has never met a deaf person before.¹⁰⁸ Clearly, they should not be tasked with deciding what accommodation should be provided; this was the issue presented in the case submitted to the United States Supreme Court.¹⁰⁹

IV. UPDIKE V. MULTNOMAH COUNTY

The case submitted to the United States Supreme Court, *Updike v. Multnomah County*, arose out of the Ninth Circuit.¹¹⁰ The plaintiff, David Updike, was born deaf, and his primary language is ASL; he does not consider himself to be bilingual in English.¹¹¹ His claim against the County arose from a three-day stay in the County detention center and jail in response to an alleged domestic disturbance.¹¹²

Although the arresting officer knew the reported disturbance involved deaf individuals, an ASL interpreter was not present during the arrest.¹¹³ Despite the fact that the detention center had a

105. See Solomon, *supra* note 17.

106. See Abdallah, *supra* note 1, at 207.

107. See *id.* at 206–07.

108. See Amiel Fields-Meyer, *When Police Officers Don't Know About the ADA*, ATLANTIC (Sept. 26, 2017), <https://www.theatlantic.com/politics/archive/2017/09/the-steadily-problematic-interactions-between-deaf-americans-and-police/541083> [https://perma.cc/L4NT-GFQ2].

109. See *Updike v. Multnomah Cty.*, 870 F.3d 939, 951, 954–55, 958 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 55 (2018).

110. *Id.* at 939.

111. *Id.* at 943.

112. *Id.* at 943–45.

113. *Id.* at 943.

telecommunications device for the deaf (TDD) and a contract with an interpreting service, Updike's requests for each of these accommodations during booking were denied, and he was forced to attempt to read the officer's lips.¹¹⁴ Updike was presented with written witness statements and told to write down his version of events.¹¹⁵

Twice while in holding, Updike requested a teletypewriter (TTY) to call his mother and attorney; he also requested an interpreter, and a piece of paper.¹¹⁶ None of these requests were accommodated.¹¹⁷ Updike had a meeting with the nurse, and once again requested an interpreter, as he was hoping to explain to the nurse that the officers had hurt his neck and back during the arrest.¹¹⁸ The nurse did not solicit an interpreter, despite his request.¹¹⁹ As a result, Updike was unable to communicate the pain in his neck and back to the nurse, and she did not examine those areas.¹²⁰

Before being transferred to the jail, Updike asked two other officers for a TTY and an interpreter, to no avail.¹²¹ During his next two days in jail, all of Updike's requests for a TTY were denied.¹²² His arraignment was delayed a day because an interpreter was not present.¹²³ This was a costly mistake, as he spent another night in jail.¹²⁴ Only during the arraignment was Updike accommodated with an interpreter, and only after being released was he allowed access to a TTY to call his daughter to pick him up.¹²⁵

A. The Appellate Court's Decision

The appellate court affirmed the district court's determination that the failure to have an interpreter at the first arraignment was

114. *Id.* at 943–44.

115. *Updike*, 870 F.3d at 944.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Updike*, 870 F.3d at 944–45.

122. *Id.* at 945. Nowhere in the record did the court explain any administrative or financial reasons for why these accommodations were denied. This leads to the assumption that the actions were discriminatory in nature. Unfortunately, this is not an anomaly. In a study of 22 criminal justice proceedings including deaf defendants a researcher found that in 40.9% of arrests law enforcement officials used only spoken English and provided no accommodation at all. 22.7% of deaf suspects had to communicate through a family member, friend, or law enforcement employee. 13.6% were interrogated through written notes, and only 13.6% were provided professional interpreters. Miller, *supra* note 69, at 329.

123. *Updike*, 870 F.3d at 945.

124. *Id.*

125. *Id.*

negligent, not deliberate.¹²⁶ They cite another Ninth Circuit case, *Duvall v. County of Kitsap*, to solidify this rule: “a failure to act must be a result of conduct that is more than negligent, and involves an element of deliberateness.”¹²⁷ The appellate court did not concur with the district court’s dismissal of the requests Updike made during processing and while in jail.¹²⁸

The Ninth Circuit reasoned that the County’s notice of his need for an accommodation and their deliberate denial of that accommodation, could lead a trier of fact to conclude that the County acted with deliberate indifference, and that those requested accommodations were “necessary for effective communication.”¹²⁹ The same issue of fact was present in his interaction with the nurse and the other officers.¹³⁰ Because of these questions of facts, the appellate court reversed summary judgement on Updike’s claim for damages, thus sending the case to trial, where the factual contentions could be fully explored and litigated.¹³¹

A determinative fact in the court’s decision was the failure of the County to investigate what accommodations might be appropriate for Updike: “the County introduced no evidence that it ascertained what accommodations might be needed, and instead relie[d] on self-serving observations that its employees believed they were effectively communicating with Updike.”¹³² As it follows, one of the main disputes in this case is who shall make the determination of what accommodations are appropriate: the person requesting the accommodation or the person supplying it.¹³³ The Ninth Circuit determined that “[i]f the public entity does not defer to the deaf individual’s request, then the burden is on the entity to demonstrate that another effective means of communication exists or that the requested auxiliary aid would otherwise not be required.”¹³⁴

B. The Debate over the Correct Standard

In the Petition for Writ of Certiorari, the petitioner argued that the Ninth Circuit’s two-pronged test, requiring notice and a deliberate failure to act, is too low a standard.¹³⁵ They believed this test was not a substantial enough hurdle and would require the government

126. *Id.* at 952.

127. *Id.* at 951–52.

128. *Updike*, 870 F.3d at 955.

129. *Id.*

130. *Id.* at 956.

131. *Id.* at 958.

132. *Id.* at 956.

133. *Updike*, 870 F.3d at 951, 954–55, 958.

134. *Id.* at 958.

135. Petition for Writ of Certiorari, *supra* note 13, at 24–25.

to grant a person's first-choice accommodation regardless of the cost.¹³⁶ Admittedly, the first prong of the standard is easily satisfied:

When the plaintiff has alerted the public entity to his need for accommodation (or where the need for accommodation is obvious, or required by statute or regulation), the public entity is on notice that an accommodation is required, and the plaintiff has satisfied the first element of the deliberate indifference test.¹³⁷

Petitioner claims the second prong is satisfied in any instance when a plaintiff is not granted their first-choice accommodation; “[i]f the entity does not provide the plaintiff’s first-choice accommodation—a fact common to every lawsuit challenging a public entity’s provision of reasonable accommodation—it has made a deliberate choice, satisfying the second prong of deliberate indifference.”¹³⁸

Although the standard used by the Ninth Circuit is not used universally, all circuits agree that in order to recover compensatory damages under the ADA, a plaintiff must prove some level of discriminatory intent.¹³⁹ This requirement exists because the remedial scheme of the ADA was derived from Section 504 of the Rehabilitation Act, which was derived from Title VI,¹⁴⁰ which was enacted through Congress’s Spending Power.¹⁴¹ Because of the structure of this law, in order for a government defendant to be liable for monetary damages under Title II, the plaintiff must prove the defendants were on notice that they were violating the law.¹⁴² Discriminatory intent satisfies the notice requirement, and without a showing of discriminatory intent, a plaintiff cannot recover compensatory damages.¹⁴³

C. Petitioner’s Position

The petitioner argued that the existence of two different standards for intentional discrimination warranted the Court’s review.¹⁴⁴ Arguably, three circuits—the First,¹⁴⁵ Fifth¹⁴⁶ and Sixth¹⁴⁷—believe

136. *Id.* at 25.

137. *Updike*, 870 F.3d at 950–51.

138. Petition for Writ of Certiorari, *supra* note 13, at 19.

139. *Id.* at 6.

140. See Nina Golden, *Compounding the Error: “Deliberate Indifference” vs. “Discriminatory Animus” Under Title II of the ADA*, 23 N. ILL. U.L. REV. 227, 230 (2003).

141. *Id.* at 233.

142. Petition for Writ of Certiorari, *supra* note 13, at 14.

143. *Id.* at 6.

144. *Id.* at i, 1–2.

145. See, e.g., *Schultz v. YMCA of the United States*, 139 F.3d 286, 291 (1st Cir. 1998).

146. See, e.g., *Delano-Pyle v. Victoria Cty.*, 302 F.3d 567, 575–76 (5th Cir. 2002).

147. See, e.g., *Anderson v. City of Blue Ash*, 798 F.3d 338, 356–57 (6th Cir. 2015).

the discriminatory intent standard should be animus, and five circuits—the Eighth,¹⁴⁸ Eleventh,¹⁴⁹ Tenth,¹⁵⁰ Ninth,¹⁵¹ and Third¹⁵²—believe the appropriate standard is deliberate indifference.¹⁵³ Petitioner further claims the interpretation of deliberate indifference varies circuit to circuit.¹⁵⁴ The petitioner lays out their understanding of the three circuits’ applications of what they define as the animus standard.¹⁵⁵

1. *The First Circuit*

The petitioner contends that the First Circuit requires a showing of animus in order to recover for emotional distress.¹⁵⁶ The petitioner points to *Schultz v. YMCA of the United States*¹⁵⁷ where a deaf lifeguard’s YMCA certification was revoked because of his refusal to wear a hearing aid at all times.¹⁵⁸ The court refused to grant damages and claimed that “an award of damages for emotional distress, in a debatable case on the merits with no animus or other concrete impact, strikes us as a distortion of remedial relief.”¹⁵⁹

This is both narrow and vague; the court elaborates on its understanding of the standard in *Carmona-Rivera v. Puerto Rico*.¹⁶⁰ Petitioner claims that this case made a showing of animus a requirement to recover for emotional distress.¹⁶¹ The respondent contends that this is an overstatement of the case’s holding, which stated a plaintiff could recover non-economic damages by showing animus *or* economic harm.¹⁶² The plaintiff in the case, and in *Schultz*—where the animus standard was first proposed—was only unable to recover because they were not seeking economic damages, and therefore had to make a showing of animus.¹⁶³ This is not the situation in *Updike v.*

148. *See, e.g.*, *Meagley v. City of Little Rock*, 639 F.3d 384, 389–90 (8th Cir. 2011).

149. *See, e.g.*, *Liese v. Indian River Cty. Hosp. Dist.*, 701 F.3d 334, 345 (11th Cir. 2012).

150. *See, e.g.*, *Barber v. Colorado*, 562 F.3d 1222, 1228–29 (10th Cir. 2009).

151. *See, e.g.*, *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001).

152. *See, e.g.*, *Chisolm v. McManimon*, 275 F.3d 315, 318, 327–28 (3d Cir. 2001) (reversing District Court’s grant of summary judgment to a detention center that denied a deaf inmate’s request for accommodations because there was a genuine issue of material fact regarding the effectiveness of alternative aids provided).

153. Petition for Writ of Certiorari, *supra* note 13, at 10–11.

154. *Id.* at 10–13.

155. *Id.* at 11–12.

156. *Id.* at 11.

157. *Id.*

158. *Schultz v. YMCA of the United States*, 139 F.3d 286, 288 (1st Cir. 1998).

159. *Id.* at 287–88, 291.

160. *Carmona-Rivera v. Puerto Rico*, 464 F.3d 14, 17 (1st Cir. 2006).

161. Petition for Writ of Certiorari, *supra* note 13, at 11.

162. Brief in Opposition at 15, *Multnomah v. Updike*, 139 S. Ct. 55 (2018) (No. 17-1222).

163. *Id.* at 15–16.

Multnomah County, where the plaintiff “sought compensatory damages, injunctive relief, and attorneys’ fees and costs.”¹⁶⁴

2. *The Fifth Circuit*

Petitioner claims deliberate indifference was deemed insufficient in the Fifth Circuit’s case *Delano-Pyle v. Victoria County*.¹⁶⁵ In this case, a deaf individual was instructed by a police officer to do three sobriety tests, even though the police officer knew the plaintiff was deaf and could not hear the commands.¹⁶⁶ When the plaintiff failed to perform the tests as instructed, he was arrested.¹⁶⁷ The police officer testified he did not know if the plaintiff had understood the instructions for the tests or his *Miranda* warnings.¹⁶⁸ The plaintiff was then interrogated and verbally asked six times until he agreed to consent to a blood test.¹⁶⁹

Respondent argues that the court did not apply an animus standard or reject deliberate indifference in this case.¹⁷⁰ It did not articulate a standard at all; instead, the Court only recognized that a showing of intentional discrimination was required.¹⁷¹ In this case, with facts very similar to those in *Updike*, the court found that the police intentionally discriminated against the plaintiff, without requiring any evidence of animus.¹⁷²

In a subsequent case, proffered by the petitioner, the court declined to find a college’s denial of a student’s request to take tests two weeks after the other students to be intentionally discriminatory.¹⁷³ “When the record is ‘devoid of evidence of malice, ill-will, or efforts . . . to impede’ a disabled student’s progress, summary judgment must be granted in favor of the university.”¹⁷⁴ Again, the respondent reads this conclusion narrowly, arguing here that the court only looks for malice in the specific instance of a university’s decision not to alter a program and is not generally defining the intent standard for intentional discrimination.¹⁷⁵

164. *Updike v. Multnomah Cty.*, 870 F.3d 939, 946 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 55 (2018).

165. Petition for Writ of Certiorari, *supra* note 13, at 12.

166. *Delano-Pyle v. Victoria Cty.*, 302 F.3d 567, 570 (5th Cir. 2002).

167. *Id.* at 570–71.

168. *Id.* at 571.

169. *Id.*

170. Brief in Opposition, *supra* note 162, at 11.

171. *Delano-Pyle*, 302 F.3d at 575.

172. Brief in Opposition, *supra* note 162, at 12.

173. *Campbell v. Lamar Inst. of Tech.*, 842 F.3d 375, 377 (5th Cir. 2016).

174. *Id.* at 380.

175. Brief in Opposition, *supra* note 162, at 13.

3. *The Sixth Circuit*

The respondent asserts that the petitioner's conclusion that the Sixth Circuit applies an animus standard is similarly misguided.¹⁷⁶ In *Anderson v. City of Blue Ash*, the court found that evidence of animus against a protected group is necessary to prevail under a disparate treatment claim; a lack of animus did not prevent recovery on a failure to accommodate claim.¹⁷⁷ Therefore, a plaintiff in this circuit can recover compensatory damages under Title II without a showing of animus.¹⁷⁸

D. *Respondent's Argument*

Respondent rejects petitioner's assertion that there is a split in the understanding and application of the intentional discrimination requirement.¹⁷⁹ The Supreme Court's denial of certiorari implies they too believe there is no split in the standard that needs to be rectified.¹⁸⁰ Respondent claims that even if each circuit has not expressly adopted the deliberate indifference standard, no circuit requires evidence of animus to recover compensatory damages.¹⁸¹ The following circuits have affirmatively adopted deliberate indifference as the appropriate standard.¹⁸² These circuits look for a "defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights."¹⁸³

1. *The Eighth Circuit*

In the Eighth Circuit case, *Meagley v. City of Little Rock*, the plaintiff was injured when her motorized scooter tipped over while attempting to cross a footbridge at the zoo.¹⁸⁴ After the accident, the zoo discovered the slopes of the footbridges exceeded the limit stated

176. *Id.* at 13–14.

177. Brief in Opposition, *supra* note 162, at 13–14 (citing *Anderson v. City of Blue Ash*, 798 F.3d 338, 356–57 (6th Cir. 2015)).

178. *Id.*

179. Brief in Opposition, *supra* note 162, at 11.

180. *Updike v. Multnomah Cty.*, 870 F.3d 939 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 55 (2018).

181. Brief in Opposition, *supra* note 162, at 11.

182. *See, e.g., Liese v. Indian River Cty. Hosp. Dist.*, 701 F.3d 334, 345 (11th Cir. 2012); *Meagley v. City of Little Rock*, 639 F.3d 384, 389–90 (8th Cir. 2011); *Barber v. Colorado*, 562 F.3d 1222, 1228–29 (10th Cir. 2009); *Duvall v. Cty. Of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001).

183. Petition for Writ of Certiorari, *supra* note 13, at 13 (citing *Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011)).

184. *Meagley*, 639 at 386–87.

in the ADA guidelines.¹⁸⁵ However, the plaintiff did not succeed in establishing deliberate indifference, because the zoo was not on notice that its bridges were not in compliance with the ADA.¹⁸⁶ When a plaintiff fails to establish notice, an inquiry in the deliberateness of the action or inaction is not required.¹⁸⁷ This case rebuts petitioner's contention that the deliberate indifference standard is too low.¹⁸⁸ A plaintiff still must show the defendant was on notice, and without notice they will not prevail.¹⁸⁹

2. *The Eleventh Circuit*

In *Liese v. Indian River County Hospital District*, the Eleventh Circuit adopted deliberate indifference as the proper standard for proving intentional discrimination.¹⁹⁰ The case arose when two deaf individuals were unable to effectively communicate at an emergency room.¹⁹¹ They filed a claim for compensatory damages, claiming the hospital's repeated denial of an ASL interpreter entitled them to damages under Section 504 of the Rehabilitation Act.¹⁹² The patient was examined and received emergency surgery without access to an interpreter; all communication was through lip-reading and written notes.¹⁹³ The court found these accommodations to be insufficient, relying mostly on the plaintiff's assertion that she had very little understanding of what was happening to her.¹⁹⁴

The court determined that a reasonable jury could find that the doctors were on notice of plaintiff's need for an interpreter, had the authority to get her one, and failed to do so with deliberate indifference.¹⁹⁵ "His apparent knowledge that Liese required an additional interpretive aid to effectively communicate with him and his deliberate refusal to provide that aid satisfies the deliberate indifference standard."¹⁹⁶

185. *Id.* at 387.

186. *Id.* at 389.

187. *Id.*

188. Petition for Writ of Certiorari, *supra* note 13, at 24–25.

189. *Id.* at 6.

190. *Liese v. Indian River Cty. Hosp. Dist.*, 701 F.3d 334, 345 (11th Cir. 2012).

191. *Id.* at 336.

192. *Id.* The Rehabilitation Act has the same remedial scheme as the ADA, they are governed by the same legal standard. "The ADA enlarges the scope of the Rehabilitation Act to cover private employers, but the legislative history of the ADA indicates that Congress intended judicial interpretation of the Rehabilitation Act to be incorporated by reference when interpreting the ADA." *Nielsen v. Moroni Feed Co.*, 162 F.3d 604, 608 n.7 (10th Cir. 1998).

193. *Liese*, 701 F.3d at 343.

194. *Id.* at 344.

195. *Id.* at 351.

196. *Id.*

This case can be contrasted with *Martin v. Halifax Healthcare System*, where plaintiffs' claims of insufficient accommodations in a hospital setting did not overcome the deliberate indifference standard.¹⁹⁷ In this case, three separate plaintiffs argued that the failure of the hospital to provide "continuous live interpreting services" for the duration of their stay entitled them to compensatory damages.¹⁹⁸

The court found that in order to recover, the plaintiffs would need to demonstrate that "hospital staff knew there was a substantial likelihood that they would be unable to communicate effectively absent an interpreter, but still made a 'deliberate choice' not to provide one."¹⁹⁹ However, before a showing of deliberate indifference was required, a plaintiff would need to offer evidence that the defendants failed to provide appropriate accommodations.²⁰⁰

The court concluded, under the facts presented, that each plaintiff was provided appropriate aids to facilitate communication during their emergency situations.²⁰¹ These ranged from live interpreters, remote interpreting, family interpreting, written notes and gestures.²⁰² They emphasize that one of the plaintiffs never claimed he was unable to understand the written notes.²⁰³

3. The Tenth Circuit

The Tenth Circuit also applies the deliberate indifference standard.²⁰⁴ In *Barber v. Colorado*, the court found that the defendant's provision of a reasonable accommodation was not considered deliberately indifferent solely because the plaintiff had requested something else.²⁰⁵ The plaintiff was requesting an exception to a statute based on her disability.²⁰⁶ The statute at issue required a guardian with a valid license to supervise their child's driving until they turned sixteen.²⁰⁷ The plaintiff who is blind, and therefore cannot hold a valid license, requested an exception that would allow the child's grandfather to supervise her.²⁰⁸ The DMV's alternative accommodation involved the plaintiff's father becoming a guardian to the child, as this

197. *Martin v. Halifax Healthcare Sys.*, 621 Fed. App'x 594, 596, 604 (11th Cir. 2015).

198. *Id.* at 596, 599.

199. *Id.* at 604.

200. *Id.*

201. *Id.* at 603.

202. *Id.* at 598.

203. *Martin*, 621 Fed. App'x at 602.

204. *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999).

205. *Barber v. Colorado*, 562 F.3d 1222, 1232 (10th Cir. 2009).

206. *Id.* at 1226.

207. *Id.* at 1225.

208. *Id.*

would accommodate the request without requiring a change to the language of the statute.²⁰⁹

The Tenth Circuit found the DMV had not acted with indifference toward the plaintiff's disability and had offered an alternative accommodation which was all together reasonable.²¹⁰

To uphold the Barbers' claim for compensatory damages, we would necessarily need to hold that an institution's rejection of *any* requested accommodation, even when other reasonable options that are more acceptable to the institution are available, results per se in deliberate indifference. The mere fact that the DMV did not accept Marcia Barber's suggested resolution does not establish a deliberate indifference to her situation or her rights.²¹¹

This is starkly at odds with the conclusion the Ninth Circuit came to, yet the Tenth Circuit concedes this is an unusual case.²¹² The facts in most of the cases above are significantly different than the ones facing the Ninth Circuit.

4. *The Ninth Circuit*

The Ninth Circuit found deliberate indifference to be the correct standard in *Duvall v. County of Kitsap*.²¹³ In *Duvall*, the court explained its reasoning, asserting that the deliberate indifference standard "is better suited to the remedial goals of Title II of the ADA than is the discriminatory animus alternative."²¹⁴

The test applied by the Ninth Circuit demands a showing that the defendant was on notice that the accommodation is required and that the defendant's failure to supply that accommodation was not simply negligent, but involved "an element of deliberateness."²¹⁵ A defendant also has a duty to gather information from the person making the request and hire experts to help in their determination of what accommodations are necessary.²¹⁶

The Ninth Circuit expanded on its understanding of deliberate indifference in *Updike v. Multnomah County*.²¹⁷ Relying on the ADA

209. *Id.* at 1230.

210. *Id.*

211. Barber, 562 F.3d at 1232.

212. *Id.* at 1230.

213. *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001).

214. *Id.* at 1139.

215. *Id.* at 1138–40.

216. *Id.* at 1139.

217. Petition for Writ of Certiorari, *supra* note 13, at 8.

implementation regulations, the court concluded that a presumption of deliberate indifference is created when a plaintiff's first choice accommodation is denied.²¹⁸ The petitioner considers this to be too weak a rule and claims a reliance on the plaintiff's own understanding of his needs should not be sufficient.²¹⁹ Yet the Ninth Circuit justified this decision by quoting the language of the appendix of the ADA:

The public entity shall honor the choice [of the individual with a disability] unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under § 35.164. Deference to the request of the individual with a disability is desirable because of the range of disabilities, the variety of auxiliary aids and services, and different circumstances requiring effective communication.²²⁰

It seems well within the intended purpose of the ADA for a public entity to defer to a disabled individual's understanding of the appropriate accommodation.²²¹ If they choose not to honor that request, they carry the burden of showing that accommodation is not required and establishing that another accommodation is as effective.²²²

V. THE BEST STANDARD FOR THE DEAF COMMUNITY

The Ninth Circuit's justification²²³ fits perfectly when it comes to ensuring access to communication for members of the deaf community as they interact with the criminal justice system. In the analysis above, we have seen numerous instances when a police officer, a judge, or other powerful city official decided that their determination of the needs of a deaf person was the correct determination. That falls outside the mandate from the ADA, for which the intended purpose is:

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in

218. *Id.*

219. *Id.* at 9

220. *Updike v. Multnomah Cty.*, 870 F.3d 939, 950 (9th Cir. 2017) (quoting pt. 35, App. A (alteration in original)) (quoting 28 C.F.R. pt. 35, App. A (2009)).

221. *See id.*

222. *Updike*, 870 F.3d at 958.

223. *See Updike*, 870 F.3d at 950 (quoting pt. 35, App. A (alteration in original)) (quoting 28 C.F.R. pt. 35, App. A (2009)).

enforcing the standards established in this Act on behalf of individuals with disabilities²²⁴

These officials are charged with the task of providing the best available accommodation; it seems contrary to that purpose to refuse the first-choice accommodation of the person whose disability is meant to be fairly accommodated. This denial is even more egregious in cases where the required accommodation—an interpreter, a TDD, or even a piece of paper—is readily available, yet is still being denied. That is clearly discriminatory and cannot be the accurate function of this protective statute.

The Ninth Circuit correctly interpreted the proper standard that should be applied uniformly in all cases of denied accommodation. When a person's first choice accommodation is denied, the burden falls on the shoulders of the government, and a denial of a request without a subsequent investigation into the proper method of accommodation is enough to survive summary judgment.²²⁵ This does not mean that every deaf person will be entitled to an ASL interpreter for every moment of their interaction with the criminal justice system. What it means is this: if the government chooses to deny the person's first choice an accommodation, it will be required to do the necessary investigation into what would be a reasonable alternative accommodation.²²⁶

This process is beneficial not only because it takes into account the vast differences in deaf communication, but also because it forces the government, if it chooses not to defer to the requested accommodation, to become familiar with the different methods of communication and the experiences of the person in its custody.²²⁷ If there is a truly equal alternative, the government is free to choose it.²²⁸ However, often the burden on the government will be lessened, and the outcome for the individual will be improved, by deferring to the individual's understanding of their own needs.²²⁹ By being given the duty to educate itself on the circumstances and abilities of the people who are disabled that the government encounters, over time this interpretation might create a more informed and unbiased system that can better serve the needs of all members of our diverse society, thus meeting the objective of the ADA.²³⁰

224. 42 U.S.C. § 12101(b)(1)–(3) (2009).

225. *Updike*, 870 F.3d at 954.

226. *Id.* at 958.

227. *See id.*

228. *See id.*

229. *See id.* at 958.

230. *See id.*

VI. CONCERNS OVER ADOPTING THIS STANDARD

It is clear that in order to serve the intended purpose of the ADA, a person's accommodation preference should be the default, especially when interacting with the criminal justice system. Why, then, has this standard not been adopted throughout the country? The reasons range from a lack of political will to a deep-seated and stealthy prejudice in the nation's perception of the differently abled.²³¹ While these two obstacles have prevented forward movement, and even jeopardized existing protections, disability advocates have banded together to defend their right to individual autonomy and protection under the law.²³² With new invigoration motivated by these real and substantial threats to their existence, a new movement is forming and resisting in significant and visible ways.²³³

A. *Current Political Climate*

It is evident that the current political landscape does not lend itself to broadening protections and rights afforded to the disabled population.²³⁴ President Trump has not only openly mocked Americans with disabilities, but plans to re-erect the wall that the ADA tore down—a wall separating people with disabilities from true and equal access.²³⁵ It is hard to imagine any substantive achievements for the disabled community under the leadership of a president who openly ridiculed them, calling Paralympic athletes “a little tough to watch” and mockingly imitating a physically disabled reporter.²³⁶ His ignorance and bigotry have a powerful impact; not only do these instances

231. See Leadership Conference, *There's a Disability Rights Treaty. The United States Still Hasn't Ratified it*, MEDIUM (Mar. 30, 2017), <https://medium.com/@civilrightsorg/theres-a-disability-rights-treaty-the-united-states-still-hasn-t-ratified-it-370750457d72> [<https://perma.cc/TX7L-XEBF>].

232. ADAPT, *Disability Organizing 101 and Beyond*, <http://freeourpeople.net/disability-organizing101andbeyond/> [<https://perma.cc/NAK2-R7BT>]; National Association of the Deaf, *Law and Advocacy Center*, <https://www.nad.org/about-us/law-advocacy-center> [<https://perma.cc/MPS5-828T>].

233. See Abigail Abrams, ‘Our Lives Are at Stake.’ How Donald Trump Inadvertently Sparked a New Disability Rights Movement, TIME (Feb. 26, 2018), <https://time.com/5168472/disability-activism-%20trump> [<https://perma.cc/9AY5-3V2J>].

234. See Elena Hung & Katherine Perez, *Trump's New Wall to Keep Out the Disabled*, N.Y. TIMES (Nov. 29, 2018), <https://www.nytimes.com/2018/11/29/opinion/trumps-disability-public-charge.html> [<https://perma.cc/5L2Z-W85H>].

235. See *id.*

236. David Cross, *Take It from a Lawyer with a Disability: Trump's Paralympics Comments Were Offensive*, USA TODAY (May 11, 2018, 9:20 AM), <https://www.usatoday.com/story/opinion/2018/05/11/donald-trump-paralympics-disabled-tough-watch-column/599142002> [<https://perma.cc/N5WB-XVST>].

normalize and propagate such outrageous conduct, but they further ostracize the general public from this stigmatized community.²³⁷

The President's behavior is not his only method of endangering this portion of the population; the administration has been actively diminishing the progress made in disability rights and threatening the lives of disabled people across the country.²³⁸ By repealing the Individual Mandate in the Affordable Care Act (ACA), the current administration has left millions of disabled Americans without healthcare, making this issue truly one of life or death.²³⁹ Efforts to undermine Medicaid similarly, negatively, and disproportionately affected America's disabled community, as "Medicaid is the primary health insurer" for people with disabilities.²⁴⁰ These consistently proposed cuts could bring an end to Medicaid-funded personal-care attendants and in-home services, which would effectively strip people with disabilities of their autonomy and even force them into institutions, thus "condemning them to a life of limited freedom."²⁴¹

The administration is also attempting to undercut the protection provided by the ADA.²⁴² House Resolution 620, the ADA Education and Reform Act of 2017," would force a disabled person to first file a notice that usually requires counsel, wait 60 days for a response and wait 120 more days to see if progress is made on remedying a violation of the law before the issue can be brought to the courts."²⁴³ This Act will impose even more barriers to justice for people with disabilities.²⁴⁴ Sara Novic, a Deaf author, explained the fear this bill incited in her:

Under H.R. 620, a business could legally wait a minimum of six months as they "make progress" toward hiring an interpreter, captioning content or installing visual alarm systems—essentially rendering Deaf people like me powerless in the interim. And this is just one of the many far-reaching implications of the bill.²⁴⁵

237. *See id.*

238. *See* Hung & Perez, *supra* note 234.

239. *See* Vijay Das, *Trump Is Waging War on People with Disabilities*, AL JAZEERA (Nov. 3, 2018), <https://www.aljazeera.com/indepth/opinion/trump-waging-war-people-disabilities-181101112838539.html> [<https://perma.cc/SWA7-LVNL>].

240. Robyn Powell, *For People With Disabilities, Trump's First Year Has Threatened Nearly Every Facet of Life*, REWIRE NEWS (Jan. 19, 2018, 11:21 AM), <https://rewire.news/article/2018/01/19/people-disabilities-trumps-first-year-threatened-nearly-every-facet-life> [<https://perma.cc/5LVW-XZ8L>].

241. Das, *supra* note 239.

242. *See id.*

243. *Id.*

244. Powell, *supra* note 240.

245. Sara Novic, *The GOP's H.R. 620 Will Gut the Americans With Disabilities Act, Pushing Disability Rights Back to 1989*, NBC THINK (Feb. 22, 2018), <https://www.nbcnews.com/think/opinion/gop-%20s-h-r-620-will-gut-americans-disabilities-act-ncna850261> [<https://perma.cc/9KGG-PT3C>].

The proffered purpose of the bill is to protect businesses from frivolous lawsuits, but because there are no monetary damages awarded under these Title III lawsuits, it seems the framers' true agenda is not to prevent lawsuits but to delay them and deny people the opportunity to vindicate their rights.²⁴⁶ It is unsurprising that this bill has gained such quick support in the current Congress,²⁴⁷ and with a president whose personal businesses have been sued eight times for violations of the ADA.²⁴⁸

Similar attempts to cripple the ADA have been orchestrated by the Department of Justice, the very agency responsible for its enforcement.²⁴⁹ Former Attorney General Jeff Sessions withdrew guidance documents requiring states to promote employment opportunities for people with disabilities and pending documents relating to how the ADA applies to websites, something disability advocates had been pushing to be passed for years.²⁵⁰ These revocations generate confusion on the application of the law, which can result in diminished enforcement.²⁵¹

The human rights of people with disabilities are being attacked from all political sides, so it is imperative that we have the courts looking out for these attempts to subvert the advancements made in disability rights.²⁵² The Ninth Circuit—referred to by Rush Limbaugh as the “Ninth Circus”—is often considered a wild and liberal bastion that, according to Newt Gingrich, ought to be abolished.²⁵³ However, in reality it has been growing more conservative, thanks to Reagan and Bush appointments.²⁵⁴ Despite its reputation as an activist court, the Ninth Circuit is not, in fact, the most consistently overturned court on appeal and is often a force in progressive jurisprudence.²⁵⁵

B. American Normative Conception of Disability

Of course it is easy, but not accurate, to place the blame only on those in charge. Society has never been motivated to fight this specific

246. *See id.*

247. A Congress that is made up of people who are not representative of the lived experience of the disabled population. *See* Dóra Dénes & Republikon Institute, *Disabled Representation in Politics: Why Do We Still Need to Talk About It?*, 4LIBERTY (July 2019), <http://4liberty.eu/disabled-representation-in-politics> [<https://perma.cc/65QS-GWKU>].

248. *See* Novic, *supra* note 245.

249. *See id.*

250. *See id.*; Powell, *supra* note 240.

251. *See* Novic, *supra* note 245.

252. *See* Das, *supra* note 239.

253. Dylan Matthews, *How the 9th Circuit Became Conservatives' Least Favorite Court*, VOX (Jan. 10, 2018, 2:30 PM), <https://www.vox.com/policy-and-politics/2018/1/10/16873718/ninth-circuit-court-appeals-liberal-conservative-trump-tweet> [<https://perma.cc/6L7C-T9DP>].

254. *See id.*

255. *See id.*

fight.²⁵⁶ This is possibly due to the disabled community being less visible and more stigmatized than other marginalized groups.²⁵⁷ The growing grassroots movements often seek to erase the pity and stigma perceived by the general population as they campaign for equality.²⁵⁸

When President Bush signed the ADA, he celebrated the enactment, claiming the “passage has made the United States the international leader on this human rights issue.”²⁵⁹ While that might have been true at the time, the international community has taken strides that have left the United States in the dust.²⁶⁰ In 2012, the U.S. Congress refused to ratify The Convention on the Rights of People with Disabilities (CRPD), despite the fact that the United Nations (U.N.) had modeled it after the ADA.²⁶¹ While President Obama signed the treaty in 2009, it has been routinely rejected by a nervous Congress.²⁶² It seems illogical for the United States to refuse to ratify a treaty its high standards inspired, but the CPDR takes certain rights farther than the U.S. is comfortable with.²⁶³ Article 12 of the Convention is an example of an article that surpasses what our country is comfortable awarding its disabled citizens.²⁶⁴ This Article considers recognition of people with disabilities before the law stating: “Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”²⁶⁵ This contradicts America’s commitment to the paternal treatment of its disabled population.

While it might not have seemed critical for the U.S. to ratify this treaty in 2012, it seems much more crucial in our current political climate.²⁶⁶ Our reluctance to ratify this treaty is based in our reluctance as a nation to recognize the ability of those we classify as

256. The fact that the Civil Rights Act passed in 1960 but ADA did not come along until 1990 indicates our cultures lack of motivation to provide equal rights to this specific minority group. *See History of the ADA*, MID-ATLANTIC ADA CTR., <https://www.adainfo.org/content/history-ada> [<https://perma.cc/4NMX-PFVB>].

257. “Invisible disability in simple terms is a physical, mental or neurological condition that limits a person’s movements, senses, or activities that is invisible to the onlooker.” *How Do You Define Invisible Disability?*, INVISIBLE DISABILITIES ASS’N, <https://invisibledisabilities.org/what-is-an-invisible-%20disability> [<https://perma.cc/4WT8-H364>].

258. *See* Abrams, *supra* note 233.

259. Hung & Perez, *supra* note 234.

260. *See* Leadership Conference, *supra* note 231.

261. *See id.*

262. *See id.* The United States has historically been reluctant to grant equal rights to people with disabilities and even to acknowledge their capacity. As an example, consider the moniker “deaf and dumb” that shamed an entire portion of the population for generations.

263. *See* Convention on the Rights of People with Disabilities, art. 12, May 3, 2008, 2515 U.N.T.S. 3.

264. *Id.*

265. *Id.*

266. *See* Powell, *supra* note 240.

disabled.²⁶⁷ This stigma and notion of permanent helplessness undermines not only our perceptions of people with disabilities, but also our society's treatment of them.²⁶⁸ The theory of this Note is based on the understanding that a deaf person, and any disabled person, has the competence to discern their own needs. However, the most popular interpretation of the ADA gives the power to discern their needs to someone else.²⁶⁹ Our country will not be able to accept the Ninth Circuit's understanding of the ADA until we can join the world community in its recognition of the capacity of people with disabilities to determine their own needs. Our job, and the intention of the ADA, should not be to tell people with disabilities what they need, but to provide them what they need to have access equal to ours.

C. Current Momentum

While our political situation is disheartening, and the misconceptions about ability are deeply engrained, this cause is not without hope or promise. The fight on the political field is far from over; in fact, it has been reinvigorated.²⁷⁰ "What [Trump] doesn't seem to realize is that Americans with disabilities and our families are a powerful force that will fight back when he mocks or marginalizes."²⁷¹ While the current administration can work to undermine the rights of the disabled community, there are other methods to make substantial and necessary change.²⁷² Social activism in the disabled community has erupted as individuals and organizations grow increasingly conscious of their political identity and demand recognition.²⁷³

We have seen this in action in the fight to preserve the ACA.²⁷⁴ ADAPT, a grassroots disability civil rights organization, increased visibility and showed their resistance "by staging 'die-ins' in U.S. congressional offices."²⁷⁵ They averaged three protests per day in thirty states in an effort to retain the ACA—an issue that, for them, can mean life or death.²⁷⁶ Their tag line—"Piss on Pity"—acknowledges the capacity and power the disabled community possesses.²⁷⁷ These disability activists are coming together and refusing to be dismissed,

267. See Leadership Conference, *supra* note 231.

268. See *id.*

269. See Das, *supra* note 239.

270. See Hung & Perez, *supra* note 234.

271. *Id.*

272. See Abrams, *supra* note 233.

273. See *id.*

274. See Das, *supra* note 239.

275. *Id.*

276. Abrams, *supra* note 233.

277. ADAPT—Free Our People, *The Story of ADAPT Trailer*, <https://adapt.org/the-story-of-adapt-trailer> [<https://perma.cc/L9NR-ETC9>].

in some cases refusing to the extent that they are physically removed by the police.²⁷⁸ These mass actions attract attention and demonstrate the force of this historically disregarded group.²⁷⁹ This new visibility is critical; Trump's actions have not only ignited a new wave of disability activism but have also increased societal awareness of disability rights awareness that will be critical in achieving lasting equality.²⁸⁰

As the disability rights movement advances, it intersects with the fight of other marginalized groups.²⁸¹ 45,000 people with disabilities attended the Women's March on Washington; not only was this possibly the largest gathering of people with disabilities in our nation's history, but it marks a new level of intersection and visibility for the movement as they become part of this larger agenda.²⁸² This coalition, across multiple communities, is what will create the enlightened society that can ensure truly equal treatment of our country's largest minority.²⁸³

CONCLUSION

The deaf community faces many obstacles when traversing a world that was not designed to accommodate them.²⁸⁴ People who are deaf have their own language, culture, and community that thrives despite a lack of recognition and validation by hearing society.²⁸⁵ The United States has enacted statutory protections, like the ADA, to ensure people with disabilities have equal access.²⁸⁶ However, these protections can be misinterpreted by the courts, thus leading to a serious absence of necessary accommodations. This deficiency in accommodations can have the most detrimental effect when a person with a disability is interacting with the criminal justice system.

In the case submitted to the Supreme Court, *Updike v. Multnomah County*, a deaf man was denied his requested accommodations and was seeking compensatory damages.²⁸⁷ The perceived tension

278. See Powell, *supra* note 240.

279. See *id.*

280. See *id.*

281. See Abrams, *supra* note 233.

282. See *id.*

283. See *id.* Nearly 57 million Americans have a disability.

284. See, e.g., Maxine Bernstein, *Jury Awards \$125,000 in Damages to Former Multnomah County Inmate who is Deaf*, OREGONIAN (Sep. 26, 2019), <https://www.oregonlive.com/crime/2019/09/jury-awards-125000-in-damages-to-former-multnomah-county-inmate-who-is-deaf.html> [<https://perma.cc/67HX-4TK7>].

285. See Solomon, *supra* note 17.

286. See *What is the American with Disabilities Act (ADA)?*, ADA NAT'L NETWORK, <https://adata.org/learn-about-ada> [<https://perma.cc/G8BY-EZRZ>].

287. See *Updike v. Multnomah Cty.*, 870 F.3d 939, 946 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 55 (2018).

arose when deciding if a plaintiff, when claiming intentional discrimination, must prove they were denied an accommodation because of animus or because of deliberate indifference.²⁸⁸ Through an analysis of the different circuits' application of the law, it is clear that a true animus standard is not applied in order to recover compensatory damages under Title II of the ADA.²⁸⁹ The Supreme Court's denial of certiorari implies that they too do not consider there to be a split in the circuits.

While the application of deliberate indifference standard varies circuit to circuit, the Ninth Circuit's interpretation is most in line with the purpose and remedial goals of the ADA.²⁹⁰ The Ninth Circuit concluded that if a public entity does not defer to the individual's understanding of their required accommodation, the entity must show there was another effective accommodation or that the requested accommodation was not required.²⁹¹ The Ninth Circuit justified this standard by acknowledging the vast range of disabilities and the appropriate auxiliary aids and services required by each individual.²⁹²

This is especially true for the deaf community. Deaf individuals can range from bilingual in English and ASL to semilingual.²⁹³ Some people who are deaf can communicate through writing, but others cannot.²⁹⁴ Truly, the only person who should determine what accommodation is appropriate is the individual seeking the accommodation, not the police officer or judge who has just met them. Unfortunately, this contradicts the nation's understanding of the disabled community. The United States is reluctant to recognize the agency possessed by individuals with disabilities. The general public would rather look away and let officials make these critical determinations than to concede autonomy to this stigmatized and underestimated population.

The political climate is not currently conducive to expanding the rights of the disabled population; in fact, the situation for many disabled Americans is worsening.²⁹⁵ This anti-disability agenda manifests itself in restrictions of their freedom and threat to their existence.²⁹⁶ Fortunately, it has inspired a new, more visible, and more powerful disability rights movement that is actively fighting for equal access and treatment.²⁹⁷ Hopefully these movements can

288. *See id.*

289. *See supra* Part IV.

290. *See supra* Part IV.

291. *See Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001).

292. *Id.* at 1137.

293. *See Abdallah, supra* note 1, at 207–08.

294. *See id.* at 222.

295. *See Powell, supra* note 240.

296. *Id.*

297. *See Abrams, supra* note 233.

force the nation to finally take notice of the disabled community and recognize their capacity to determine their own needs.

A critical part of this movement is erasing the stigma attached to disability. The first deaf president of Gallaudet coined a maxim that encompasses Deaf pride: “deaf people can do anything hearing people can do, except hear.”²⁹⁸ This is the mindset the state should adopt when providing accommodations to the deaf community. Deaf people are just as capable as hearing people to discern what accommodations they require. By encouraging the state to promote this concept, we can push the general population past pity and toward embracing progress and true equality, legal and otherwise, for this marginalized community.

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298. I. King Jordan, *In His Own Words*, GALLAUDET U., <https://www.gallaudet.edu/about/history-and-traditions/deaf-president-now/profiles-and-viewpoints/i-king-jordan> [<https://perma.cc/FK7D-69JQ>].

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