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Providing Effective Communication Access for Deaf People: An Insider's Perspective

Abstract: By way of narrative, the Author outlines decades of discrimination based on his deafness by providing his insider's perspective as a member of the Deaf community who experienced the lack of effective communication access in various settings. He proposes a number of concrete steps to combat disability-based discrimination, including the provision of funding for auxiliary aids and services.

Keywords: deafness, accessibility, effective communication access, disability-based discrimination, funding

Night fell at Kennedy Airport in New York. A full moon shone on the dark waters of the Atlantic Ocean, shimmering on the sea like a line of diamonds extending far into the darkness. An Eastern Airlines Whisperjet rolled onto the runway, turned, and stopped. "Eastern 233, cleared for takeoff," crackled a voice in the pilot's headset, and as the pilot eased the throttle forward, the engines growled to life. Lurching forward and picking up speed, the Whisperjet raced past the twinkling blue lights outlining the three-mile long runway at Kennedy. Engines humming at full power, the jet reached "V" speed – the takeoff speed – and gently coaxed by the pilot, the nose of the plane rose up. With a whispery sigh, the jet soared into the air, tucked in its wheels, and banked left over the moonlit sea.

This passage is a distillation of a story that played a critical role in my development as a deaf child in a "mainstream" environment.¹ Born profoundly deaf to two educated

1 This essay acknowledges my debt to African American women scholars who have asserted the primacy of narrative as a tool of analysis worthy of respect on an equal basis with more mainstream scholarly articles. CITE. By telling stories that underscore the points I wish to make about growing up deaf prior to the enactment of the Americans with Disabilities Act, 42 U.S.C. § 12.180 et seq., and the Individuals with Disabilities Education Act, CITE, I continue in that vein

white-collar professionals with typical hearing,² I graduated college in 1975, the year Congress passed the Education of All Handicapped Children's Act.³ Despite growing up without a law that mandated my inclusion, I was mainstreamed in public schools, and did not know sign language. The only deaf child in a classroom full of hearing children and adults with no access to visual language,⁴ communication in school from kindergarten to college was a challenge. I was forced to fend for myself. Around the fifth or sixth grade in an elementary school in New Rochelle, New York, I started to write a story of a plane taking off from an airport at night.⁵ Sitting in the back of the classroom, I rewrote draft after draft of the story. In this process, I embellished the details, indulging in a sweet fantasy that helped me cope with being deaf in an all-aural environment.⁶

I derived two benefits from this work. First, I imagine the teacher thought, "What a sweet student that little Mikey Schwartz is, he's taking notes." Writing kept her at bay.⁷ In fact, during my entire academic career, no teacher except one ever

of literary production. CITE. "Mainstream" was an old term for "inclusion" where the child with a disability was included in the classroom. Eastern Air Lines was a prominent air carrier during my childhood (https://en.wikipedia.org/wiki/Eastern_Air_Lines), and one of my first flights was on an Eastern Whisperjet Boeing 727 from New York's La Guardia Airport to Montreal, Canada. These early flights spurred my fascination with aviation.

2 90% of deaf children are born to parents with typical hearing who do not know sign language and are unfamiliar with deaf culture. CITE. I was in this cohort with 105 dB loss in one ear and 95 dB loss in the other ear. My father was a professor of group work at Columbia University School of Social Work, and my mother was a school social worker in the White Plains, NY, school district. Although they did not sign, they understood the importance of creating a sense of belonging, not just inclusion. This essay is dedicated to their memory.

3 Education of All Handicapped Children Act, CITE. Ultimately renamed Individuals with Disabilities in Education Act (IDEA), the mainstreaming law required school districts to educate children with disabilities along with children who were not disabled. CITE.

4 Today visual language is possible through CART, an acronym for computer-aided real-time transcription. CITE. A court reporter or stenographer uses shorthand software to convert spoken dialogue into real-time captioning projected on a laptop or wall screen. CITE. The latter is an example of universal design, a product available to all viewers, not just deaf ones. CITE. CART was non-existent during my youth, and as I did not sign, a sign language interpreter – a rarity in mid-20th century America – would have been useless.

5 My father traveled often as a consultant, and his departure airport was Idlewild, precursor of Kennedy International Airport. The sweet smell of jet fuel suffusing the air and the graceful four-engine Boeing 707s swooping in and out wove a magical world for me. It was the stuff of fantasy indulged in long class hours where I had no idea what the teacher and the children were saying.

6 This writing took place in pre-computer America where the pen and the pad ruled supreme. While communication access at school was problematic, I had access at home with my parents and my older brother completely accessible to me. We communicated through speech and lip-reading.

7 In a sense, the act of writing cloaked me like a Romulan Bird of Prey. See http://www.startrek.com/database_article/cloaking-device.

called on me.⁸ Even my law school professors did not call on me. They were as afraid of me, as I of them.

Second, the constant rewriting and editing of my story honed my English writing skills.⁹ The story offered many angles to explore: pilots engaged in radio chatter with the control tower; the dark cockpit illuminated by the glow of the instrument panel's colored lights; flight attendants battening down the hatches for take off; passengers in quiet anticipation of flight; ground crews, waving orange swizzle sticks and bustling around the planes like ants on the march; planes on the tarmac, red and blue strobe lights flashing rhythmically in the night. I learned to describe action, using active verbs, create images and dialogue, and add color, all in an effort to move the story forward.

Writing was my self-assigned reasonable accommodation.¹⁰ Since I had no effective access to communication in class, my writing created the conditions that rationalized my presence in the classroom. It enabled me to "pass" as a hearing member of the class – I knew where privilege lay.¹¹

The aural environment of my youth was not accessible. American television programs like *The Andy Griffith Show*, *The Many Loves of Dobie Gillis*, *Leave it to Beaver*, *Gilligan's Island*, *I Dream of Jeannie*, *Bewitched*, *The Beverly Hillbillies*, *The Ed Sullivan Show*, and my favorite, *Combat* – none of them were captioned for deaf and hard of hearing viewers.¹² Hollywood movies were no better – *Deliverance*, *Psycho*, *2001: A Space Odyssey*, *Bonnie and Clyde*, *A Clockwork Orange*, *The Graduate*, *Midnight Cowboy* – none were captioned.¹³ Access to live theater dialogue was non-existent. The telephone was of no use.¹⁴

8 Mr. Pahle, my "special education" teacher in second grade, was an exception.

9 Certainly, the story prefacing this essay reflects a maturity and sophistication I did not possess in sixth grade, but oddly enough, the process in creating this story as an adult replicated exactly the same process I used to create the story in my youth: slaving over every word, rewriting over and over until I was satisfied with the piece. Flaubert of *Madam Bovary* fame who would spend an entire day on one sentence would chuckle knowingly. CITE

10 CITE to the ADA.

11 See A.S. Wilensky, *Passing for Normal: A Memoir of Compulsion*, Broadway Books, NY (2000).

12 The American publication, *TV Guide*, provided network program listings where the brief description of the show's plot helped me follow the action. See <https://www.tvguide.com>.

13 It helped to read reviews of movies before deciding what to see. For instance, I read Anthony Burgess's 1962 novel, *A Clockwork Orange*, which helped me follow the movie without captions.

14 Ironically, Alexander Graham Bell obtained the first U.S. patent on a telephone in an effort to provide his deaf wife with a means of communication. <http://www.elon.edu/e-web/predictions/150/1870.xhtml>. It was not until the invention of the teletypewriter (TTY) in YEAR using old Western Union machines enabling deaf people to communicate with each other over the telephone lines. CITE. A national telephone relay system did not come into existence until the passage of Title IV of the Americans with Disabilities Act of 1990, mandating the establishment of a 24/7/365 system enabling deaf and hearing people to communicate with each other at any time during the week. CITE.

The lack of a communication accessible landscape in the Fifties and Sixties was not only physical. It was attitudinal. It was the era of ‘no thought’ given to disability, and when disability asserted itself in the form of a demand or request for accommodation, the response was one of shocked disdain at the effrontery of the disabled person to even politely ask for equality and inclusion.¹⁵ I recall applying for undergraduate admission to Harvard University in the early 1970s and being asked by an incredulous admissions interviewer, “Why do you think as a deaf person that you’ll do well at Harvard?” I can still see him looking at me quizzically, seemingly under the impression that a deaf person could not handle the rigors of a Harvard education.

The struggle against racial discrimination in America and the war in Vietnam during the Sixties and Seventies spurred the rise of the disability rights movement in the United States.¹⁶ Agitation for disability rights led to Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990.¹⁷ These laws promised radical change in the lives of people with disabilities in the United States, and undoubtedly Section 504 and the ADA have facilitated some progress toward a fairer and more inclusive America.¹⁸

However, when it comes to effective communication access in the various contexts of American life (*e.g.*, employment, justice, education, health care, market relations), significant gaps in stakeholder compliance with the law remain.¹⁹ From my perch as supervising attorney and director of the Disability Rights Clinic at Syracuse University College of Law and identifying as a full-fledged member of the Deaf community in the United States, I have seen widespread non-compliance with the ADA’s legal mandate to provide effective communication access.²⁰ Of particular

15 For greater insight into the struggles by people with disabilities to counter bigotry based on disability discrimination, see the work of Bill Peace. CITE.

16 CITE.

17 CITE.

18 CITE.

19 CITE to numerous DOJ settlements regarding interpreters. DOJ enforcement doesn’t appear to be making a dent in America’s non-compliance with the law. An area for qualitative research. By social relations, I mean interpersonal interactions, and by market relations, I mean access to private businesses selling goods and services to the general public.

20 CITE Title III of the ADA. For more information about my work at the Disability Rights Clinic, see <http://law.syr.edu/academics/clinical-experiential/clinical-legal-education/disability-rights-clinic/>. As a Deaf director and supervising attorney of a disability law clinic, I grapple with the application of the law of effective communication access in these contexts. My clinic handles disability-based discrimination in employment (ADA Title I), access to government services like the courts and penal institutions (ADA Title II), and access to private businesses selling goods and services to the public (ADA Title III). The clinic also works with families whose children require special education services in the public schools under the Individuals with Disabilities Education Act (CITE). This work has enlightened me to the extent and depth of the lack of

note are law firms and courts whose compliance with the ADA leaves something to be desired.

Four stories illuminate the problem of non-compliance in the legal profession. In 1992, two years after the enactment of the ADA when the statute became effective, I applied to 135 law firms in New York City.²¹ My resume included my 1981 graduation from New York University School of Law and stints as a law clerk for District Judge Vincent L. Broderick of the United States District Court for the Southern District of New York; an Assistant District Attorney in the New York County District Attorney's Office; and a Trial Attorney in the Civil Rights Division of the United States Department of Justice in Washington, D.C.

One would think that record would have generated an interview. I did not get a single invitation, let alone an interview. Why? In the interest of transparency and honesty, I inserted in my cover letter the fact I was deaf.

My suspicion of disability-based discrimination by these firms was confirmed two years later when I applied to a private law firm in Greenwich Village, New York. This time I added to my resume a stint as an Assistant Attorney General in the Civil Rights Bureau of the New York State Department of Law and an LL.M. degree from Columbia University Law School. This time I did not mention my being deaf. I immediately received an invitation to interview for an opening in the firm.

I showed up at the firm's office, and when the senior partner came out to greet me, I told him I was deaf and read lips. He was clearly shocked, mouth agape. Without a word, he led me into his office, sat down at his desk, picked up the telephone, and turned around in his chair with his back to me. Whether he was receiving a telephone call or making one, I do not know. After twenty minutes of twiddling my fingers, I saw the partner hang up the phone and turn to me. What happened next was a punch to the gut: "I'm sorry, we have no openings." He got up, walked me to his door, and bid me goodbye.

Fast forward to the early 2000s. Now a law professor at Syracuse University, I had the opportunity to participate in the annual meetings of the Association of American Law Schools ("AALS").²² In order to participate in these meetings, I requested the provision of CART (computer-aided real-time transcription) and a team of two sign language interpreters.²³ CART enables me to read the dialogue

effective communication access for deaf people – despite the legal requirement to provide this access at no charge to the deaf person, compliance remains low.

21 Although President George H.W. Bush signed the ADA in 1990, key provisions of the law did not go into effect until 1992. CITE to the ADA. Of the 135 firms, one third were large firms, one third medium-sized, and one third smaller firms. I picked them for their work in areas of law that were of interest to me.

22 See <https://www.aals.org>.

23 When an interpreting assignment goes over one hour, custom requires two interpreters because one person's effectiveness decreases after one hour without relief from a second interpreter. See

on either a laptop screen or a wall mounted screen; the interpreters enable me to ask questions and make comments. However, when I arrived at the conference in San Diego, I ran into difficulties in obtaining effective communication access at the conference. One incident crystallized the AALS's attitude toward accessibility: it denied my interpreter's entry at a luncheon because her name was not on the list of invited guests. I pointed out that I could not participate in the conversation at my table if I didn't have an interpreter with me. After a few minutes of embarrassing argument with other law professors looking on, the AALS reluctantly agreed to let my interpreter sit at my table. My request for full coverage – not only official events but also non-official events like networking and meals – was rejected.²⁴

Even today the AALS maintains it will not cover networking and meals.²⁵ I told the AALS that the conference started when the attendees came downstairs at the start of the day for breakfast and ended when they went upstairs to their rooms in the evenings. In between “AALS-sponsored events” are the many interactions between law professors – an opportunity to network and develop professional relationships, which is a *raison d'être* of the AALS conferences. But the AALS will provide interpreters only at its sponsored events. This reading of the law is a restricted interpretation of the ADA. Do only what is minimally required.

Finally, but not least, was my treatment in the Civil Court of the City of New York. While living in Rochester, New York, I attended a performance of *Stomp* in the East Village, Manhattan, where a performer swept debris and dust from the stage in my face. I filed suit for assault in the New York City Civil Court since that court had jurisdiction over the theater company that staged the show. But every time I traveled from Rochester to Manhattan for the legal proceedings, the judge failed to arrange sign language interpreters, necessitating another postponement. The court's non-compliance with the ADA constituted a drain on my financial resources, and I was forced to drop the lawsuit.

I am not alone. The deaf clients of the Disability Rights Clinic tell stories of being denied effective communication access in the workplace, the courtroom, the stationhouse, the classroom, lawyers' offices, physicians' practices, and financial institutions like banks and insurance companies. A common refrain is, “We don't provide sign language interpreters. Bring your own.”²⁶

The problem of denial is compounded by the strenuous effort a Deaf plaintiff must invest in seeking justice. Even if a Deaf person understood their legal right

www.rid.org.

24 Clearly the AALS was worried about the cost of providing disability-related accommodation. Instead of seeing me as an opportunity to develop a progressive, pro-active system for accommodation, they pinched pennies in a cost-benefit analysis.

25 See <https://www.aals.org/clinical2018/accessibility/>. Here, the AALS states that sign language interpreters are available for “AALS-sponsored events only.”

26 CITE the ADA Titles I through III. Explain what each title stands for.

to a remedy for an ADA violation, obtaining counsel to pursue the grievance is a challenge in of itself because many lawyers are reluctant to provide interpreters in their private offices.²⁷

The collective experience of the Deaf community of which I am a part suggests a pattern of non-compliance that violates the spirit and the letter of the ADA. The problem of access to justice in the United States merits closer examination.

What should we do?

First is to recognize the motivation behind the reluctance to pay for sign language interpreters and CART is financial. It belies an attitude that devalues disability. "But for the grace of God go I." "Better dead than disabled." When something is devalued, people don't want to spend money on it.

Second is to conceptualize and execute a qualitative research project designed to develop a nuanced and complex picture of the problem of effective communication access for the Deaf community. The narratives of Deaf people who have been denied a sign language interpreter or CART justify taking the problem seriously and enacting significant law reform to address it.

Third is to think about Congressional legislation that would address the problem. One approach might mimic the Internal Revenue Service's requirement that we all file an income tax return. Likewise every entity covered by the ADA – from employers to local/state government services to private businesses – would be required to file a statement certifying effective compliance with the law, including an outline of specific steps the entity has taken, or will be taking, to ensure compliance. If a person with disability files a grievance alleging non-compliance, the entity would need to demonstrate compliance and failing that, to adopt policies and practices that promote inclusion and pay a fine commensurate with the degree of the offense. The advantage of this scheme is two-fold. One, it shifts the burden of proving non-compliance from the person with a disability to the entity. Given the rate of poverty in the community of people with disabilities, the burden is best placed on those who can afford to contest the allegation of noncompliance.²⁸ Two, the fines can be used to provide effective communication access, including sign language interpreters and CART.

Congress could also create a funding model akin to Title IV of the ADA where the federal government through the Federal Communications Commission collects a tiny fee from every person's telephone bill for the purpose of establishing a national telephone relay system enabling deaf and hard of hearing callers to communicate with people with typical hearing.²⁹ A dollar from everyone's tax return could establish

27 See <https://www.ada.gov/tirone.htm>.

28 CITE to statistics showing the poverty rate for people with disabilities.

29 CITE to Title IV of the ADA.

a fund supporting compliance with the law. Entities that need to provide appropriate auxiliary aids and services can apply for some financial relief.

While law cannot guarantee what a culture is not willing to give,³⁰ law can regulate human behavior by removing the financial incentive to deny Deaf people access to sign language interpreters and CART because of the cost of the accommodations. A counter-incentive is an ironclad funding stream to reduce or eliminate the desire to avoid spending money on accommodating Deaf people. Thus, Congress needs to pass legislation based on one of the above models or a hybrid where the burden of compliance is shifted from the Deaf person to the provider of communication access and simultaneously provides funding.

America's track record in providing effective communication access for the Deaf community needs improvement. Congress clearly needs to act.

By the way, today I no longer rewrite and edit a story about a plane taking off from an airport at night. I don't need to do so. I have my pilot's license earned in the cockpit of a Cessna 172 where I "have slipped the surly bonds of earth and danced the skies on laughter-silvered wings."³¹

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30 CITE to the intro quote to Mary Johnson's book, *Make Them Go Away*.

31 CITE to John Magee's poem, "High Flight" Magee was a pilot for the Royal Air Force of the United Kingdom who was killed in an accident during World War II. CITE.