

ACCOMMODATING INTEGRATION

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In response to Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839 (2008).

In *Integrating Accommodation*, Elizabeth Emens commendably scrutinizes what could be called the “positive externalities” of disability accommodation and sharpens the policy choices that their recognition should present.¹ With useful analytic tools, Emens effectively outlines emerging choices that pertain to 1) how much value should be given to the benefits to others from the accommodations; 2) what relative priority should be given to others compared with the initial disabled claimant; and 3) what specific changes in regulatory regimes can and should be pursued to enhance the positive externalities without raising too many costs, whether in terms of costs or competing values. I look forward to the scholarly and policy debates that *Integrating Accommodation* will launch, as well as empirical research about costs and benefits that it should stimulate.

This Response explores how an important source of Emens’ analysis also gives rise to a potential obstacle to its implementation. For here, as in her other work,² Emens sheds light on disability law by opening for examination the assumption that the “person with a disability” is the only one affected by it or by responses to it. The power of her analysis in *Integrating Accommodation* depends on what may be an obstacle to acting upon it. Emens shows how the typical legal preoccupation with each individual as distinctive, alone, and unique produces pervasive inattention to relational, iterative, and collective features of social experience. Increased attention to this conceptual issue may be necessary if the kinds of considerations Emens advocates are to appeal to judges, legislators, administrators, employers, school officials, journalists, and even law professors.

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¹ Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839 (2008).

² See, e.g., Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399 (2006) (discussing the “hedonic costs” created in others by the mentally ill and the subsequent influence those costs have on discrimination).

In order to “integrat[e] accommodation,”³ then, we also need to accommodate integration in the cognitive sense explained by psychologist Jean Piaget. Piaget distinguished moments of learning that proceed by assimilating the new object into an existing framework, or “schema,” from accommodation, or moments of learning that require changing the existing schema in light of the new object.⁴ People may not see the benefits of devising new solutions until presented with someone whose need is great,⁵ but the powerful hold of existing conventions may obscure from view benefits to others, including ourselves.

I. THE FOCUS ON INDIVIDUALS OBSCURES “POSITIVE EXTERNALITIES”

Accommodations for one individual with a disability can help other people. In workplaces and schools, on sidewalks and subways, the design of institutions and environments that takes into account the distinctive needs of a variety of persons can, in practice, turn out to assist many who have never identified themselves as having such needs. The classic example of a “curb cut” in the sidewalk is reiterated in Emens’ examples of air-filters, telecommuting, and better training for supervisors.⁶ Adopted initially as an accommodation for persons identified to have a disability, these changes, respectively, can also directly benefit those who use baby-strollers, those who do not like smoke, those who have personal reasons to prefer working away from the office, and anyone who risks dealing with an inflexible boss. Such accommodations can further indirectly assist others by promoting the social integration of persons with disabilities and reducing the stigma associated with disabilities, in no small part, by showing that “special needs” are actually similar to the needs everyone has (what Emens calls “attitudinal benefits”).⁷

Indeed, accommodations for individuals with disabilities can emphasize the ways individuals are similar to one another—for example, some people have the same or a similar disability; and many people

³ See Emens, *supra* note 1, at 839.

⁴ See JEAN PIAGET, SIX PSYCHOLOGICAL STUDIES 7-8, 18, 30, 64 (David Elkind ed., Anita Tenzer trans., Random House 1967).

⁵ See Emens, *supra* note 1, at 860-61.

⁶ *Id.* at 850-59.

⁷ *Id.* at 848.

who do not have a disability can nonetheless share with someone who does have a disability a sub-optimal experience with features of dominant institutions or environments. Disability law could additionally recognize the ways in which individuals who seem quite different from one another can nonetheless benefit from one another's presence. And disability law could still further acknowledge and extend the battle against stigma, both by facilitating social interactions among different kinds of people and by revealing the sometimes surprising commonalities and benefits that appear with at least some accommodations triggered by disability rights claims.

Yet these features are far from salient. Besides the greater emphasis on accommodation's costs than on its benefits well-described by Emens,⁸ American disability law shares the same preoccupation with distinct and autonomous individuals that underlies much of U.S. law. That preoccupation is present in the employment discrimination portion of the Americans with Disabilities Act (Title I) which puts the burden on individual job applicants and employees to raise individual complaints and seek individual accommodations.⁹ While the Equal Employment Opportunity Commission pursues enforcement of Title I against private employers and the Department of Justice is authorized to pursue enforcement against state and local governments, they typically do so only in relation to complaints by individuals.¹⁰ Title I is not framed to prompt class actions or other systemic challenges to employment practices.¹¹ Similarly, the individualized focus pervades the Individuals with Disabilities Education Act and is exemplified by its reliance on individualized education plans for particular students.¹²

⁸ *Id.* at 876-82.

⁹ 42 U.S.C. § 12117(a) (2000) (granting the power of enforcement of the ADA "to any person alleging discrimination on the basis of disability in violation of any provision of this chapter").

¹⁰ See U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, DISABILITY RIGHTS SECTION, ENFORCING THE ADA: LOOKING BACK ON A DECADE OF PROGRESS 8-9 (2000), <http://www.ada.gov/pubs/10thrpt.pdf> (describing individual cases in which the Department of Justice successfully sued to enforce the ADA).

¹¹ See, e.g., Chris Baker, *ADA Access: A New Practice Area for Employment Lawyers?*, CONSTRUCTION WEBLINKS, Mar. 1999, http://www.constructionweblinks.com/Resources/Industry_Reports_Newsletters/March_1999/march_1999.html (explaining how employment cases under the ADA are "rarely appropriate for class action resolution").

¹² See 20 U.S.C. § 1400(d)(1)(A) (2006) (listing one purpose of the Act as ensuring that children with disabilities have special education "designed to meet their unique needs"); 20 U.S.C. § 1414 (2006) (providing requirements for individual evaluations and individualized education programs for children with disabilities).

The individualized focus has much to commend it, both in terms of obtaining actual relief and in ensuring accommodation tailored to the particular needs of individuals with disabilities. Yet this individualized focus can seem quite distorting when an employer or a school needs to devise a system or program to achieve either the requisite or the optimal accommodation. In the school context, for example, individualized education plans specify educational goals and strategies for each student but do so against a backdrop of programs and personnel that the school is able to offer. Designing those programs and deploying the personnel to consider how to meet the needs of a variety of students, with and without disabilities, requires planning that looks across individual students and at the interactions among them—which may include both synergies and conflicts. A school might well be able to deploy a teacher with special training in interactions between those with learning disabilities and those with limited English competence if the school can assess and focus on the needs of student groups as well as individual students. A school might well be able to ensure quality education by including two, three, or four students with multiple disabilities in a mainstream classroom, but including more than a few students with such needs could overwhelm both the classroom and the teacher. Thus, the statutory requirement that education plans be individualized does not easily allow schools to take into account these larger dimensions of the situation.

Recognition of interests shared by persons with varied disabilities may be accompanied by a heightened separation of these individuals from others. This is vividly apparent in the accommodation of persons who are blind (or have other related disabilities) in the copyright law that permits the otherwise unlawful reproduction and distribution of copyrighted materials that are designed in “specialized formats,”¹³ such as “braille, audio, or digital text which is exclusively for use by blind or other persons with disabilities.”¹⁴ This narrow accommodation is understandable, given the context of an exemption from otherwise protected copyright interests, and yet the practical effect in the educational context is to sharply curb the ability of teachers to involve the child who has a disability in collaborative learning with other stu-

¹³ 17 U.S.C. § 121(c)(3) (2006).

¹⁴ 17 U.S.C. § 121(d)(4)(A) (2006). Section 121(d)(4)(B) further defines specialized formats to refer to instructional materials including large print formats “when such materials are distributed exclusively for use by blind or other persons with disabilities.” 17 U.S.C. § 121(d)(4)(B) (2006).

dents around shared instructional material.

Similarly, the individualized focus in the employment context contributes to the neglect of potential benefits to persons other than the complainant. As a result, the ergonomic consultant brought in to assist one employee offers an individualized solution when a broader redesign of work stations to include adjustable chairs and computer desks would assist many more employees. In the same way, an individual asserting a disability accommodation claim may obtain specialized technology, shifting of job functions, special meetings, and other unique adjustments,¹⁵ but nothing in the law identifies how economies of scale, productivity, and general employee satisfaction might increase by designing these accommodations with other employees in mind. For example, a deaf employee's need for specialized communication technology can be met either through telephone-typewriter or TTY technology dedicated for the use of the deaf, or through devices such as pagers, faxes, or instant-messaging using the Internet that are used by deaf and non-deaf people.¹⁶ The technologies that are widely used outside the deaf community hold greater promise for integrating the deaf employee, and these technologies also offer business solutions when used by any employee.¹⁷

¹⁵ Accommodations can include: “[j]ob restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.” 29 C.F.R. § 1630.2(o)(2)(ii) (2007).

¹⁶ See Proud Geek, *Do We Need TTYs Anymore?*, <http://blog.proud-geek.com/2007/03/10/do-we-need-ttys-anymore> (Mar. 10, 2007) (analyzing the evolution of communication technologies for the deaf and speculating that modern communications devices will eventually replace TTY). There still may be advantages in the use of TTYs for contacting government services in an emergency. See Jamie Berke, *Accessibility—TTYs Still a Useful Communications Tool*, ABOUT.COM, Dec. 8, 2007, <http://deafness.about.com/cs/accessibility/a/ttys.htm> (arguing that TTYs still have some advantages over modern communications like instant messaging, such as the fact that emergency services can more easily identify callers' locations through TTYs from land-line phones).

¹⁷ One such benefit is reduced interruptions. See R. Kelly Garrett & James N. Danziger, *IM = Interruption Management? Instant Messaging and Disruption in the Workplace*, 13 J. COMPUTER-MEDIATED COMM. (2007), <http://jcmc.indiana.edu/vol13/issue1/garrett.html> (finding that, contrary to the worry of certain scholars, instant messaging may help to reduce, rather than increase, interruptions in the workplace). Another potential benefit is enhanced communication, even in complex organizations. See Bonnie A. Nardi, Steve Whittaker & Erin Bradner, *Interaction and Outeraction: Instant Messaging in Action* 79-86 (2000), available at <http://portal.acm.org/citation.cfm?id=358975> (follow “Pdf” hyperlink) (discussing a study finding that instant messaging increases

In the language of microeconomics, the focus on individuals with disabilities obscures positive externalities from accommodations. Yet even this language betrays the preoccupation with individuals at the root of this problem.

II. THE RESILIENCE OF THE INDIVIDUALIZED FOCUS

The focus on the individual in American disability law reflects the long sought advance from charity to rights as the relevant framework.¹⁸ The focus on rights in the Western context typically emphasizes the separate and distinct individual as a rights-bearer rather than as an object of pity or even compassion. Achieving recognition as rights-bearers is indeed an historic accomplishment for persons with disabilities. The physical bodily fact of human distinctiveness and the unique constellation of strengths and vulnerabilities experienced by any individual may become especially salient when claims are framed in relation to disability. Individual distinctiveness also comes to the forefront when claims or requests pertain, or seem to pertain, to the use or consumption of limited resources or rivalrous goods. Perhaps this underlying sense of competition spills over to perceptions and discourse even with nonrivalrous goods or accommodations that benefit all.

Perceiving and discussing interactions, mutual benefits, relational gains, and interdependence are rendered difficult given the tradition of individualism in Western thought.¹⁹ Even Elizabeth Emens reflects

certain types of favorable informal workplace communication); Bonnie A. Nardi, *Steve Whittaker & Heinrich Schwarz, It's Not What You Know, It's Who You Know: Work in the Information Age*, 5 FIRST MONDAY (2000), http://www.firstmonday.org/issues/issue5_5/nardi/index.html (describing how new communication technologies are contributing to the replacement of formal corporate organization with more subtle personal networks).

¹⁸ See DORIS ZAMES FLEISCHER & FRIEDA ZAMES, *THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION* (2001) (documenting the historical development of the disability rights movement as a civil rights movement); JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* (1993) (same); Neta Ziv, *The Social Rights of People with Disabilities*, in *EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE* 369 (Daphne Barak-Erez & Aeyal M. Gross eds., 2008) (detailing the development of a social rights model of disability) [hereinafter "EXPLORING SOCIAL RIGHTS"]; University of California, Berkeley, *The Disability Rights and Independent Living Movement*, <http://bancroft.berkeley.edu/collections/drilm/> (last visited Sept. 19, 2008) (providing a collection of oral histories and personal papers documenting the history of the disability rights movement).

¹⁹ Efforts to articulate relational understandings typically emerge in Western aca-

this difficulty as she uses the term “third-party benefits,”²⁰ which imagines distinct and dyadic relationships between each employer and each employee (as first and second parties) and then names other employees as third parties, outside the contractual relationship between the employer and employee. Yet, this set of terms obscures the common experiences of employees working for the same employer and the joint experiences of employers and employees. Indeed, as Emens and others have noted, it can become difficult or even arbitrary to sort out the benefits to the current employee with disabilities from benefits to other current or future employees.²¹

The resilience of the individualized focus is particularly ironic given the efforts of disability rights advocates to transform the focus on autonomous individualism. Drawing on an ethics of care, communitarian ideas, and an argument that the biggest problems facing persons with disabilities come from socially constructed practices and attitudes rather than the “disabilities” themselves, advocates have pressed for a social model of disability that criticizes the individualized focus of traditional legal rights.²² The durability of the individualized focus

demic and professional circles as critiques of dominant practices. See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 173-224 (1990) (arguing for a “social-relations approach” to rights analysis in various disciplines that focuses attention on relationships rather than individuals). Asian traditions offer a contrast. See David Y.F. Ho, *Interpersonal Relationships and Relationship Dominance: An Analysis Based on Methodological Relationism*, 1 *ASIAN J. SOC. PSYCHOL.* 1, 2 (1998), (developing a form of analysis of human thought and action “informed by Asian views reflecting the omnipresence of self-other relations in all social life”).

²⁰ See, e.g., Emens, *supra* note 1, at 845.

²¹ *Id.* at 849-50 (citing Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 *DUKE L.J.* 79, 106-07 (2003)). For a thoughtful treatment of the way that Title I of the ADA shifts employer incentives, see Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 *WM. & MARY L. REV.* 1197 (2003).

²² See MINOW, *supra* note 19, at 132-39 (discussing how the reform of institutional treatment for the mentally disabled may be affected by the assumptions underlying the societal framework of individual autonomy and rationality); Ziv, *supra* note 18, at 371-79; . Some advocates have attempted to develop a social model of disability that identifies the disabled as a minority group. See Harlan Hahn, *Adjudication or Empowerment: Contrasting Experiences with a Social Model of Disability*, in *DISABILITY, POLITICS AND THE STRUGGLE FOR CHANGE* 59 (Len Barton ed., 2001) (arguing for a “minority group” model of disability that focuses on empowerment, rather than adjudication); Harlan Hahn, *Toward a Politics of Disability: Definitions, Disciplines, and Policies*, 22 *SOC. SCI. J.* (Special Issue) 87, 93-101 (1985) (arguing for a socio-political perspective of disability that focuses upon a “minority-group” model); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 *U. PA. L. REV.* 579, 597-608 (2004) (arguing for a “social” or “minority” view of disability). Others have argued that the correct conception of disability should focus on the relationship between the

is also ironic more specifically in the context of conceptualizing accommodation, given the Piagetian notion of an accommodation as requiring change in the prevailing conceptual schema rather than assimilation to it.²³

III. ALTERNATIVE FRAMES

Alternative frames draw greater attention to the social features of isolation and integration and to the construction of institutions and practices that allocate the burdens and benefits that result from disabilities. The notion of universal design, drawn from architecture and elaborated in digital technology,²⁴ offers one framework for conceiving of the social construction of relationships in settings that can either accentuate or de-emphasize the significance of disabilities. While this framework informs the treatment of transportation and public accommodations in the Americans with Disability Act far more than the Act's treatment of employment, the idea of universal design could be mined for reimagining employment practices to appreciate how accommodations benefit employees other than the individual who is identified as disabled. Lotte Bailyn has adopted a similar strategy in examining potential new designs of work schedules to reflect workers' family obligations and shifting gender roles.²⁵ Bailyn uses case studies to show how the structure and culture of corporate life could be altered to allow employees to integrate work not only with family duties but also with their other obligations and interests, while at the same time helping their organizations become more effective. Drawing on

disabled and underlying environmental and social conditions, rather than just the disability. See NAT'L COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE: AN ASSESSMENT OF FEDERAL LAWS AND PROGRAMS AFFECTING PERSONS WITH DISABILITIES—WITH LEGISLATIVE RECOMMENDATIONS 13-14 (1986) (arguing that the obstacles facing the disabled arise not from disability itself but from social and environmental barriers); The Center for an Accessible Society, *The "New Paradigm" of Disability*, <http://www.accessiblesociety.org/topics/demographics-identity/newparadigm.htm> (last visited Sept. 12, 2008) (emphasizing a paradigm of disability that focuses upon the interaction between the individual and the environment).

²³ See *supra* note 4 and accompanying text.

²⁴ See, e.g., WOLFGANG F.E. PREISER AND ELAINE OSTROFF, UNIVERSAL DESIGN HANDBOOK (2001); The Center for Universal Design, Universal Design Principles, http://www.design.ncsu.edu/cud/about_ud/udprincipleshtmlformat.html (last visited Sept. 12, 2008).

²⁵ LOTTE BAILYN, BREAKING THE MOLD: REDESIGNING WORK FOR PRODUCTIVE AND SATISFYING LIVES (2006).

international comparisons, as well as many years of working with organizations of various kinds, Bailyn articulates ideas for redesigning the work day, allocating tasks, and shifting the relationships between public and private lives.²⁶

The capabilities approach, pioneered by Amartya Sen and Martha Nussbaum,²⁷ and extended, with modifications, to the legal treatment of disability by Michael Stein,²⁸ offers yet another framework that shifts from according rights only to discrete and formed individuals.²⁹ Analyses of cooperation and interdependence by Western scholars of economics and philosophy offer resources for letting go of the preoccupation with individuals prevailing in much of American disability law.³⁰ Conceptual resources from other legal traditions are also available to preserve the promise of—and also move beyond the limitations of—the individualized focus of American disability law.³¹

Especially as nations across the world ratify the Convention on the Rights of Persons with Disabilities,³² the opportunity to use law to ad-

²⁶ *Id.* at 69-85. For an even broader claim that employers should create workplaces guided by an ethic of care, see RUTH O'BRIEN, *BODIES IN REVOLT: GENDER, DISABILITY, AND A WORKPLACE ETHIC OF CARE* (2005).

²⁷ See MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* 155-223 (2006); MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999).

²⁸ See Michael Stein, *Disability Human Rights*, 95 CAL. L. REV. 75 (2007).

²⁹ Work reconceptualizing dependency is also helpful here. See EVA FEDER KITTAY, *LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* 49-73 (1999) (approaching issues of equality from the premise that individuals exhibit varying degrees of dependency in different relationships).

³⁰ See, e.g., LELAND B. YEAGER, *ETHICS AS SOCIAL SCIENCE: THE MORAL PHILOSOPHY OF SOCIAL COOPERATION* 1-15 (2001) (viewing ethics as a social science based in cooperation and agreed upon societal values).

³¹ See Daphne Barak-Erez & Aeyal M. Gross, *Introduction: Do We Need Social Rights? Questions in the Era of Globalization, Privatisation, and the Diminished Welfare State*, in *EXPLORING SOCIAL RIGHTS*, *supra* note 18, at 1 (exploring various theoretical and international alternatives to the focus of American law on individual rights).

³² Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 13, 2006); see also United Nations, *UN Enable—Promoting the Rights of Persons with Disabilities*, <http://www.un.org/disabilities/> (last visited Sept. 19, 2008) (tracking the progress of the Convention's ratification). This international development both depends upon and will influence domestic norms and practices. See Gerard Quinn, *The UN Convention on the Rights of Persons with Disabilities. National Institutions as Key Catalysts of Change*, in COMISIÓN NACIONAL DE LOS DERECHOS HUMANOS, *NATIONAL MONITORING MECHANISMS OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES* 123, 124-25 (2008) (viewing the Convention as a driver for change in domestic law); Michael Ashley Stein & Janet E. Lord, *The United Nations Convention on the Rights of Persons with Disabilities as a Vehicle for Social Transformation*, in

vance the dignity and integration of persons with disabilities could include conceptualizing inclusive human settings in ways that benefit everyone. That opportunity means accommodating integration—adjusting our conceptualization to make integration a challenge to the prevailing individualistic focus of law—as well as integrating accommodation.

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COMISIÓN NACIONAL DE LOS DERECHOS HUMANOS, NATIONAL MONITORING MECHANISMS OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES 109, 113-15 (2008) (detailing the ways in which the Convention is most likely to affect change for the disabled).