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Designing the Architecture for Integrating Accommodation: An Institutional Comment

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DESIGNING THE ARCHITECTURE FOR INTEGRATING
ACCOMMODATION: AN INSTITUTIONALIST
COMMENTARY

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

Integrating Accommodation, by Elizabeth F. Emens, reshapes the framework for evaluating workplace accommodations to assure consideration of their third-party benefits.¹ In an ingenious move, the article extends the contact hypothesis, which conventionally emphasizes the attitudinal benefits of integrating diverse groups,² to the impact of integrating the accommodations made so that disabled people can effectively participate in the workplace. The article shows how accommodations benefit third parties by improving their workplace conditions and thus have the potential to change attitudes toward disability, accommodation, and the Americans with Disabilities Act (ADA).

This analysis has obvious implications for theory, doctrine, and practice as it relates to accommodating disabilities. The article also makes several important conceptual moves with broader application to equality theory and practice. The integrative approach developed by Emens resonates with approaches that encourage institutional re-

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

² For a discussion of studies of multiracial teamwork that suggest that the opportunity to work as relative coequals in interdependent, cooperative teams may reduce bias, see Samuel L. Gaertner et al., *The Contact Hypothesis: The Role of a Common Ingroup Identity on Reducing Intergroup Bias*, 25 SMALL GROUP RES. 224, 225-26 (1994), and Samuel L. Gaertner et al., *How Does Cooperation Reduce Intergroup Bias?*, 59 J. PERSONALITY & SOC. PSYCHOL. 692 (1990). Similar studies have been conducted in schools. See, e.g., Elliot Aronson & Diane Bridgeman, *Jigsaw Groups and the Desegregated Classroom: In Pursuit of Common Goals*, 5 PERSONALITY & SOC. PSYCHOL. BULL. 438, 440 (1979) (reporting that the use of the “jigsaw technique,” which forces students to work together toward a shared goal, helps foster the “increase in self-esteem and performance and the decrease in prejudice” predicted by many proponents of school desegregation); David W. Johnson & Roger T. Johnson, *Effects of Cooperative, Competitive, and Individualistic Learning Experiences On Cross-Ethnic Interaction and Friendships*, 118 J. SOC. PSYCHOL. 47 (1982) (studying the use of “cooperative learning groups” and concluding that such groups promote increased positive interactions between students of different ethnic groups).

design as a strategy for achieving inclusion and full participation of marginalized groups. This Response will highlight those moves and place them in the context of recent developments in the field. It will also show that Emens has not fully operationalized the functional integration move she proposes and offer a way to more fully realize the aspiration to mainstream the benefits of disability accommodation.

I. INTEGRATING ACCOMMODATIONS AS AN EXEMPLAR OF INCLUSION THROUGH FUNCTIONAL INTEGRATION

Integrating Accommodation demonstrates that disability accommodations can be designed in ways that more or less attend to the impact on, and potential benefits to, third-party interests.³ Yet, the cost-benefit analysis used by administrative agencies and judges to evaluate disability accommodations has failed to consider their benefits for coemployees and the public, even when they have considered their costs.⁴ Emens's argument that third-party benefits should be included in the cost-benefit calculus rests upon two crucial conceptual moves with implications beyond the disability context. First, the argument signals to employers that there are choices to be made among different designs for accommodating disabled workers and encourages employers to make those choices by being mindful about the relationship between disabled workers' experiences and those of others who may be affected in similar ways by the limitations imposed by current workplace design. Second, it positions disability to serve as a signifier of more general patterns of dysfunction and potential innovation. Accommodation framed in this way shows how individualized inquiry can serve as an engine of inclusion and innovation by providing a cutting edge of inquiry about the adequacy of a systemic baseline.⁵

Emens calls for "careful attention to the design of accommodations," which "involves an inquiry into the value of existing baselines that may alter the workplace structure or practices for everyone."⁶ This move contributes to the emerging recognition of institutional design as a critical dimension of an effective strategy for advancing in-

³ See Emens, *supra* note 1, at 861-66.

⁴ See, e.g., *id.* at 874-75 (criticizing the Supreme Court in *US Airways, Inc. v. Barnett*, 535 U.S. 391, 400-02 (2002), for considering potentially detrimental effects of an accommodation on third-party employees without considering potential benefits to the same employees).

⁵ See *id.* at 896.

⁶ *Id.* at 895.

clusion.⁷ Interventions aimed at institutional practice have traction to improve the conditions shaping individuals' experiences and to connect local experimentation to broader institutional change.⁸ Emens invites scholars, judges, policymakers, and employers to situate disability accommodation within a practice of what I have referred to elsewhere as "institutional mindfulness."⁹ Institutional mindfulness reduces bias and advances inclusion by building inquiry into workplace processes and routines, particularly those practices that ultimately determine whether workers with different identities and backgrounds will have the opportunity to thrive, succeed, and advance. Institutional analysis requires employers to address many questions: Where are the barriers to participation? Why do they exist? Are they signals of broader problems or issues? How can they be addressed? Where are the openings or pivot points that could increase participation and improve quality?

Emens's elaboration of the design choices inherent in individual accommodations highlights the potential role of individual conflict resolution as a trigger for institutional mindfulness and systemic improvement. If integrated into the overall governance of a workplace, the practice of designing accommodations can expand the employer's capacity for ongoing improvement of the workplace more generally. This approach resonates with my own recent scholarship linking individual negotiations and conflict resolution to systemic improvement.¹⁰ This work shows how the practice of problem solving triggered by in-

⁷ Recent scholarship has developed the importance of institutional design in shaping regulation and public policy. See, e.g., Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 446-67 (2006) (suggesting that regulation should be designed to counter the organizational tendencies to decouple information and action); Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 610-11 (2002) (discussing the potential of using institutional design informed by cognitive psychology to guide decision makers into making better policy decisions); Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equality in Higher Education*, 29 HARV. J. L. & GENDER 247 (2006) [hereinafter Sturm, *Architecture of Inclusion*] (developing institutional frameworks for increasing inclusiveness and an architecture to sustain a culture of inclusion in institutions). See generally LAW AND NEW GOVERNANCE IN THE EU AND THE US (Gráinne de Búrca & Joanne Scott eds., 2006) (documenting a shift toward new governance regulatory approaches in the United States and the European Union).

⁸ See Sturm, *Architecture of Inclusion*, *supra* note 7, at 249.

⁹ *Id.* at 257.

¹⁰ Susan Sturm, *Negotiation Workplace Equality: A Systemic Approach*, 1 NEGOTIATION & CONFLICT MGMT. J. (forthcoming Oct. 2008); Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1 [hereinafter Sturm & Gadlin, *Conflict Resolution*].

dividual conflicts or negotiations can trigger systemic changes that simultaneously address individual concerns and yield systemic improvements that benefit a broader group.

Emens's analysis also provides a powerful illustration of identity's potential as an engine of innovation and institutional transformation. It resonates with scholarship that treats group-based experience as a signifier of broader patterns in need of change, such as the work of Lani Guinier and Gerald Torres¹¹ and the scholarship of Martha Minow.¹² Indeed, this is an approach I have taken in my own work on addressing second-generation employment discrimination.¹³ This work employs an analogous "both/and" move, which conceptualizes problems *both* as particular to groups with shared experiences based on their identity *and* as visible indicators of issues applicable to others in the workplace. Disability, like race and gender in other contexts, thus exemplifies a dynamic category of identity. Emens makes an important new contribution to this field by showing that disability also contributes something particular to that idea of identity and change, through the legally inscribed requirement of "accommodation," which helps us both to hold on to the individual "static" idea of accommodation and also to use that inquiry to prompt a more "dynamic" accommodation approach of questioning the baseline.¹⁴

Combining these two moves—disability as catalyst for institutional-change analysis through mindfulness about remedial design—provides an illustration of a more general strategy for achieving full participation of previously marginalized groups, a strategy I have referred to as "functional integration."¹⁵ Functional integration is a process of internalizing values of inclusion into the norms, routines, and decisions that actually determine access, opportunity, and partici-

¹¹ See LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 116-19 (2002) (arguing that racial underrepresentation serves as a signifier of institutional injustice and dysfunction affecting a much larger group), *cited in* Emens, *supra* note 1, at 889 n.159.

¹² See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 84-86 (1990) (introducing the importance of baselines in determining how difference is experienced), *cited in* Emens, *supra* note 1, at 850 n.17.

¹³ See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) [hereinafter Sturm, *Second Generation Employment Discrimination*] (offering a regulatory framework to combat subtle "second generation" forms of workplace discrimination).

¹⁴ Emens, *supra* note 1, at 893-97.

¹⁵ Susan Sturm, *Gender Equity Regimes and the Architecture of Learning*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US*, *supra* note 7, at 323, 349-54 [hereinafter Sturm, *Gender Equity Regimes*].

pation. It has emerged in innovative programs like the National Science Foundation's ADVANCE initiative to increase the participation of women in science. This initiative employs deliberation and problem solving about gender and racial inclusion to prompt improvements in baseline norms, policies, and practices:

The ADVANCE initiatives connect gender equity problematics and goals to core institutional concerns, and at the same time preserve gender as a distinct analytical and normative category. NSF explicitly links its gender equity goals to the broader normative frame of advancing scientific inquiry and achievement. It encourages applicants and grantees to explore how women's advancement could improve the quality and dynamism of the overall academic enterprise. Local empirical analysis of gender inequality's causes and solutions also operates to connect gender to underlying institutional dysfunction preventing full, inclusive and productive faculty participation in academic science.¹⁶

Emens rests her argument for integrating accommodations primarily on third-party benefits' potential to "improve attitudes toward disability and toward the ADA"¹⁷ and thus to further the ADA's key purpose—"to integrate people with disabilities into the workplace and the broader community."¹⁸ This is an important insight and one that gestures toward arguments made for the functional-integration approach to advance inclusion in other arenas. For example, in the context of integrating women into science, functional integration has helped considerably in minimizing potential backlash against efforts to diversify faculties. By linking gender diversity to institutional mission and institutional improvement, diversity initiatives convey that "creating conditions more conducive to gender participation will also redound to the benefit of others affected by the same dynamics."¹⁹ This potential resonance among accommodation of disabilities and institutional-diversity initiatives offers Emens an additional justification for connecting diversity initiatives with the work of disability offices and advocates within universities.

Emens's reliance solely on improving attitudes about disability does not, however, fully mine the functional-integrationist insight she offers. At least under some circumstances, previously excluded groups cannot fully participate in the workplace without exploring the connection between their particular situation and the general experience. If, for example, a particular workplace fails to provide construc-

¹⁶ *Id.* at 350 (internal footnote omitted).

¹⁷ Emens, *supra* note 1, at 884.

¹⁸ *Id.* at 883.

¹⁹ Sturm, *Gender Equity Regimes*, *supra* note 15, at 350.

tive feedback or accountability to anyone, a worker who requires “accommodation” in the form of regular, structured evaluations is unlikely to receive successful accommodation. And, if a workplace lacks the systems and values for treating workers respectfully and valuing their development, an accommodation requiring sensitivity to particular needs may prove difficult to achieve. Moreover, if an accommodation is inconsistent with the overarching values and norms of a workplace, the accommodated worker may well find it difficult to advance. Emens recognizes these benefits, but does not include them in her normative arguments for integrating accommodation, which currently rest primarily on the attitudinal benefits and usage benefits for third parties.²⁰ I would encourage Emens to add a usage-based normative argument for integrating accommodation, which is important both for its attitudinal benefits and its direct impact on the capacity of disabled workers to participate fully in the workplace.

II. AN ARCHITECTURAL APPROACH TO THE INTEGRATION OF ACCOMMODATIONS

In Part IV of her article, Emens offers three basic approaches to implementing the integration of accommodation.²¹ First, she provides a crucial correction of what courts have been doing when they do cost-benefit analyses of accommodations without even noticing third-party benefits and even when emphasizing third-party costs.²² Employers pay attention to courts’ analyses in structuring their accommodations processes, and so judicial recognition of third-party benefits might be helpful in signaling to employers the significance, and even the existence, of these benefits. Emens offers two additional legal and policy changes. One is to offer a framework differentiating usage benefits from attitudinal benefits.²³ The other is to propose a disclosure regime that encourages workers and employers to disclose particular accommodations in order to achieve the attitudinal benefits of integrating accommodations.²⁴ Both of these approaches assume that disclosure of individualized accommodations is necessary to achieve the attitudinal benefits of integrating accommodations and that an across-the-board disclosure policy (even one left to the employee’s

²⁰ Emens, *supra* note 1, at 848.

²¹ *Id.* at 897-15.

²² *Id.* at 908-912.

²³ *Id.* at 898-902.

²⁴ *Id.* at 903-08.

discretion) would work to achieve this goal. An institutionalist analysis reveals that this assumption should be rethought. I want to suggest the need to go beyond the conceptual taxonomies and top-down disclosure rules and take a more explicitly institutionalist approach if accommodations are to be effectively integrated at the level of the workplace. It is the process of individualization, and the capacity to learn about systems failure and innovation from individual accommodation, that will enable the integration of accommodation.

Emens's conceptual framework for designing interventions is too narrow an analytical frame because it does not directly value the participation (or usage) benefits to disabled people from integrating accommodations (although it does account for usage benefits to third parties). More importantly, Emens's approach uses an across-the-board, rule-based approach for a problem that is, as Emens acknowledges, contextual and complex. One-time disclosures do not generally have lasting effects, particularly in environments with high rates of turnover. Moreover, individualized disclosure of accommodations will not necessarily have the intended effect of improving attitudes toward disability if, for example, stereotypes about disability abound or if a workplace generally lacks the capacity to communicate effectively about the impact of particular policies. This limitation is a particular example of the limits of rule-based interventions as a way of remedying second-generation employment discrimination. As I have developed at greater length elsewhere,

[s]pecific commands will not neatly adapt to variable and fluid contexts. Inevitably, they will be underinclusive, overinclusive, or both. Moreover, the process of designing and implementing effective remedies for second generation bias is inseparably linked to that of defining the nature of the problem itself. Separating problem definition from its institutional context undermines the efficacy of the resulting legal norm as well as the remedy designed to achieve it.²⁵

I would like to suggest that integrating accommodations requires developing the capacity of workplaces to learn from the process of designing accommodations. This means designing policies that will shift the focus into the institution and up a level of analysis—from the individual case to the institutional capacity for learning about benefits to third parties (and for productivity, for that matter) from the process of accommodation. This approach would mean integrating the process of accommodating disability into a more general approach that

²⁵ Sturm, *Second Generation Employment Discrimination*, *supra* note 13, at 461.

enables learning from conflict and individual failure.²⁶ Interventions aimed at encouraging consideration of third-party benefits as part of the individual accommodations process would target the systems level, rather than only the level of each individual case.

If an organization develops the capacity to analyze patterns and insights gleaned from individual cases, then individual-level disclosure of accommodations, with the attendant problems Emens judiciously notes,²⁷ may not be necessary to attain the attitudinal benefits from integrating accommodations. Attitudinal benefits can flow from understanding that the disability area in general is driving institutional learning, rather than necessarily making those connections always, or primarily, in the context of a specific accommodation. As Jill Anderson's recent work illustrates, attitudes about disability often stem from, or focus on, the general category of disability, rather than a particular type or functional aspect of a particular type of disability.²⁸ Instead of disclosing individual accommodations, an employer could instead communicate changes made in the aggregate as a result of analyzing a pool of disability-related accommodations. Also, an employer could be encouraged to disclose ways in which it has increased its capacity to learn from individual problems and to accommodate workers' needs generally as a result of its efforts to integrate the accommodation process for disabilities.

This systems approach has been used in a recent company-wide initiative undertaken at Deloitte & Touche USA LLP ("Deloitte"), inspired initially by a women's initiative.²⁹ Deloitte was concerned about high levels of attrition generally and specifically for women and people of color. After experimenting with more targeted accommodations and policies, Deloitte developed a talent development approach called Mass Career Customization, which creates individualized development plans for each employee and periodically offers each em-

²⁶ See generally Sturm & Gadlin, *Conflict Resolution*, *supra* note 10.

²⁷ See Emens, *supra* note 1, at 905-06 (discussing the "complicated calculus" involved in individual disclosure).

²⁸ Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans with Disabilities Act*, 117 YALE L.J. 992, 1000-01, 1042-52 (2008) (arguing for a broader definition of "disability" and other terms in the ADA).

²⁹ See CATHLEEN BENKO & ANNE WEISBERG, MASS CAREER CUSTOMIZATION: ALIGNING THE WORKPLACE WITH TODAY'S NONTRADITIONAL WORKFORCE 120-45 (2007). For a discussion of Deloitte's Mass Career Customization program as an example of a learning-and-integration approach to diversity, see Roberto Concepcion, Jr., Note, *Organizational Citizenship Through Talent Management: An Alternative Framework to Diversity in Private Practice*, 42 COLUM. J.L. & SOC. PROBS. (forthcoming 2008).

ployee the opportunity to ramp up or down in his or her level of responsibility and time commitment. The system also tracks both general and group-specific patterns of usage and creates a process for responding systemically to patterns emerging among different groups of employees. Deloitte has effectively integrated accommodation into the day-to-day practice of employee management and development. Preliminary data suggest that this process has been quite successful in increasing retention of women and of employees more generally and in improving productivity.³⁰

This institutional approach to intervention would require rethinking the structure currently in place in many companies for accommodating disability. In many offices, disability accommodations are handled by a specialized office, typically located within affirmative action or human resources, which is often decoupled from operational decision making.³¹ Much of the learning that could flow from analyzing third party benefits is never communicated beyond the individual case. So, policy interventions designed to encourage integration of the structure and process of accommodation into day-to-day governance could have a dramatic effect on both improving usage and attitudes toward disability.

CONCLUSION

Integrating Accommodation's rethinking of the cost-benefit analysis of disability accommodations moves beyond the difference dilemma and has profound implications for the design of accommodations. If taken seriously, it has the potential to shape how we understand and intervene to include people with disabilities in particular and people from marginalized groups more generally. The article provides a much-needed move to integrate disability scholarship into the general theoretical and policy literature on diversity, discrimination, and inclusion. My commentary encourages Emens to complete her proposed integration of accommodations as a matter of institutional practice.

³⁰ See DELOITTE, THE INITIATIVE FOR THE RETENTION AND ADVANCEMENT OF WOMEN: 2007 ANNUAL REPORT 11 (documenting a nine-percent increase, from twelve to twenty-one percent, in the percentage of women partners, principals, and directors from 1999-2007).

³¹ Cf. Bamberger, *supra* note 7, at 457-58 (recognizing the problem of departmental politics and the need for coordination in the organizational context); Sturm, *Architecture of Inclusion*, *supra* note 7, at 250-51 (arguing that new intermediary roles should be built into the architecture of organizations to serve as "organizational catalysts" to prevent subtle forms of discrimination).

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