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Stability and Flexibility in the Law and Categorization*

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The United States Congress passed the Americans with Disabilities Act of 1990 ("ADA") in order to protect individuals who could not seek redress under other statutes, which had previously been enacted to prohibit discrimination based on race, color, national origin, sex, religion, or age.[1] One of the causes of action set forth by the ADA is discrimination by employers for not providing reasonable accommodations to employees or potential employees with disabilities. However, the standard of reasonable accommodation has been a source of dispute among courts as the definition of the standard is not easily attainable.

This article will regard the standard of reasonable accommodation as a category and use it to portray the tension in the American legal system between and within different players in constructing the category. It will be laid out that categorization of perhaps supposedly rigid legal standards and rules are in fact subject to constant restructuring by different parties. Another reason categories of legal standards and rules are at struggle is that legal decision makers strive to keep balance between the dual goals of structural stability and flexibility to adapt to new situations.

1. The ADA

Title I of the ADA prohibits employers from discriminating against a qualified

individual on the basis of disability in job application procedures, hiring, advancement, discharge of employees and other terms, conditions, and privileges of employment.[2] "Disability" means a physical or mental impairment that substantially limits one or more major life activities of an individual, a record of such an impairment, or being regarded as having such an impairment.[3] "Qualified individual" is defined as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[4] The ADA also provides that "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee" is discrimination, unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business" of such an employer.[5]

Since the enactment of the ADA, plaintiffs who brought suit under the statute were hindered by the first stage question of coverage: whether the plaintiffs had disabilities covered by the statute. This all changed with the enactment of the ADA Amendment Act of 2008 ("ADAAA"), which expressly rejected the Supreme Court's narrow views on what constituted covered disabilities[6] and directed courts to interpret the definition of disability broadly. Now that the burden of meeting the disability criteria is greatly reduced for many plaintiffs, the next focus for those with disabilities, who wish for their employers to make their working conditions and environment more reachable but have been denied such measures, is to prove that they were denied "reasonable accommodation" by their employers.[7]

However, the case law on the issue of discrimination based on denial of reasonable accommodations is far from being mature, precisely because many of the plaintiffs before the ADAAA could not go passed the question of whether they had the disabilities within the meaning of the act.[8] The following section will examine the language of the ADA provision in question and other law for illustration.

2. The Texts

The problems with the jurisprudence surrounding reasonable accommodation begin with the definition of reasonable accommodation, or the lack of it. Nowhere in the text of the ADA can one find a precise definition for "reasonable accommodation." To show the recurring problems with the term "reasonable," Black's Law Dictionary refers to writing by Patrick Devlin, a British judge: "In one sense the word [reasonable] describes the proper use of the reasoning power, and in another it is no more than a word of assessment. Reasoning does not help much in fixing a reasonable or fair price or a reasonable or moderate length of time, or in estimating the size of a doubt."[9] In the present case, the ADA's section that supposedly defines "reasonable accommodation" reads as follows:

> (9) Reasonable accommodation
> The term "reasonable accommodation" may include—
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
> (B) job restructuring, part-time or modified work schedule, reassignment to a vacant position, acquisition or modification 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. [10]

The Congress only lists some instances of what may be included as the meaning of the term "reasonable accommodation" without a definition as such or factors to be taken into account and how much weight should be given to the factors.[11] As a result of this framework, courts vary in their interpretations of what is "reasonable accommodation."

With respect to "undue hardship," a companion standard of "reasonable

accommodation," it is defined in the statute as "an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B)."[12] Subparagraph (B) in turn lays out that some factors being considered should include "the nature and cost of the accommodation," "the overall financial resources of the facility," "the number of persons employed at such facility," and some others.[13] While the definitional scheme of the "undue burden" still cannot escape a listing of examples with the use of the phrase "factors to be considered include," the Congress does provide some sort of definition of "undue burden" in subsection (A). Nonetheless, the definition is not detailed enough that courts have struggled, along with "reasonable accommodation," on the meaning and applications of "undue burden" to the facts before the courts.

Another illustration, though unrelated to the ADA, involves the Administrative Procedures Act of the United States ("APA").[14] "Agency" is defined as "each authority of the Government of the United States" which "does not include" the Congress, the courts of the United States, the government of the District of Columbia, and others. The statute does not define "authority," and uses the method of listing authorities that are not "agencies."[15] This is a case of listing non-members to help conceptualize a category. The language of the APA is comparable to the language of the ADA in that they both circumvent detailed definitions and instead resort to lists of instances, whether by listing specific instances that are included in the term or by listing instances that are excluded.

Finally, one might recall that the United States government is a government of enumerated powers. The authorities of the three branches of the ferderal government are listed in the first three articles of the Constitution.

As seen so far, the scheme of listing instances to help determine meanings of legal standards is not too rare with respect to the Constitution and legislations, which might be seen from the general public with an impression of precision with detailed definitions. Among the legal texts introduced, the following sections will concentrate on the provision of the ADA which requires employers to

provide "reasonable accommodation" for individuals with disabilities.

3. Reasonable Accommodation as a Category

The scheme of listing instances to describe a term may jog the memory of those who study categorization and cognition. Wittgenstein, in describing the structure of the category GAME, stressed that it could not be defined in terms of necessary and sufficient features, as was most important to the "classical" theory, but that one must learn it by way of similarities between individual examples. What linked the members of a category were criss-crossings of attributes, the relationships of which were phrased as family resemblances.[16]

The interest of linguists in categorization and language use has been capsulized by Labov at the outset: "If linguists can be said to be any one thing it is the study of categories: that is, the study of how language translates meaning into sound through the categorization of reality into discrete units and sets of units."[17] Living organisms use categorization to reduce infinite items in the world to manageable proportions.[18]

One of the most notable theories of categorization is the prototype theory. People are said to conceptualize things in terms of good examples, which work as cognitive reference points for the categorization of new members.[19] Moreover, the concept of family resemblance can help explain membership of peripheral examples which have only one or a few similarities with other examples.[20]

A note should be made about levels of categorization at this point. The category of REASONABLE ACCOMMODATION has the characteristics of superordinate categories. That is to say, when people categorize entities in the world, they make a choice between categories on different levels.[21] Superordinate categories such as FURNITURE and VEHICLE are not the most cognitively and linguistically salient, but they are considered to have mainly two advantages. One is that superordinate categories highlight the function or purpose of the category.[22] VEHICLE is a superordinate category compared to

CAR or BUS, and the category VEHICLE is useful in highlighting the function of moving people or things from one place to another.[23] REASONABLE ACCOMMODATION, though the precise definition is difficult to extract, can be considered to highlight the function of the provision that demands employers to react responsibly and affirmatively[24] to adapt to the differences employees bring to the workplace. Furthermore, another advantage of a superordinate category is that it can be extended flexibly.[25] A large number of categories can be assembled under one label "for easy handling." [26] "Part-time or modified work schedules" is an example in the text of the ADA and a category included in REASONABLE ACCOMMODATION. Instances of "part-time or modified work schedules" could be "working for six hours a day" or "working for ten hours in the office and ten hours telecommunicating in a week." Without rigid defining features, various instances can fall under one convenient label of REASONABLE ACCOMMODATION.

4. Stability and Flexibility

It has been shown that some legal standards can be said to be understood with reference to individual instances. However, it is not to say that defining legal standards and rules are unimportant. Legislators and judges are said to be called to draw boundaries of legal categories in order to give proper notice to the society. In the case of an attorney, one must find the location of the category boundary in order for her client to be categorized within a verdict of "not guilty," for example. However, in civil law rather than criminal law, general standards are purposefully adopted in some statutes "to cover a multitude of situations that cannot practicably be spelled out in detail or even foreseen." [27] It would be too inconvenient to draw up an amendment proposal, debate it in both houses of the Congress, send it to the president of the United States and finally enact a new amended law every time a new or unexpected situation arises. Benjamin

Cardozo, who later served on the Supreme Court of the United States, wrote about the dual goals of law while sitting on the New York Court of Appeals: "No doubt the ideal system, if it were attainable, would be a code at once *so flexible and so minute*, as to supply in advance for every conceivable situation the just and fitting rule." (Emphasis added).[28] Therefore, ideal law should be "both sufficiently flexible to accommodate new cases as they arise and sufficiently rigid to maintain its predictive power." [29] Interestingly, the two goals of law between the balance of which legal decision makers struggle are the same as the advantages of prototype categories laid out by a linguist: "(P)rototypical categories are eminently suited to fulfill the joint requirements of structural stability and flexible adaptability." [30]

In the case of the ADA provision in relation to categorization, it is very likely that the instances listed in the provision were meant to serve as reference points for relevant parties. In other words, the job of the Congress here was to consciously create good members of REASONABLE ACCOMMODATION, so that parties in interest can assimilate their own situations of accommodation to these members. Instances that have similarities with the good members could, in practice, lose their status of REASONABLE ACCOMMODATION due to the special circumstances of the employer, or its "undue hardship," as is suggested by the language '"reasonable accommodation" *may* include."' (Emphasis added).[31] However, this does not change the initial status of the instances provided in the provision as reference points for the parties in interest.

In addition to the examples set forth in statutes, precedents serve as reference points for players in the legal system. An attorney, after studying the text of the statute, identifies the legal rules of one or more prior cases that interpreted the statute and decides whether they have facts similar to or different from her client's case. If the attorney decides that the facts are similar, then she concludes that the client's situation should have the same result as the precedents and presents the argument to the court.[32] The court examines the precedents and their un-

derlying policies as to whether the precedents are controlling. Thus, at the very core of legal reasoning is category extension by assimilation. The precedents serve as reference points for attorneys and judges as interpreters of statutes and case law. Reason by analogy allows categories of legal rules to extend flexibility to adapt to new situations.

In has been illustrated that in analogical reasoning, legal rules to be followed should be determined. In an assimilation process, lawyers use policy considerations, policies being promoted by legal rules,[33] in their construction of a category. Legal decision makers employ policy judgments in achieving "conceptual coherence" [34] and consequently stability within a category. Both policies and the similarities to the examples in the ADA and prior cases can be considered important to the realization of the stability and flexibility of the categorization of REASONABLE ACCOMMODATION.

5. Strategic Constructions of a Category

Whereas the starting point was the list of instances given by the Congress, the category of REASONABLE ACCOMMODATION turns out to have many phases. Depending on the positions of the language users to this category, and even in the head of a single person, the category's inner structure changes.[35] The Congress as the lawmaking body initially created the category of REASONABLE ACCOMMODATION with a daring policy of achieving equal opportunity for people with disabilities in the United States. It can be guessed that it made the choice of not having a definition in order to encourage membership to a wide variety of and unforeseen accommodations in the future. Having too much flexibility has a risk of not being a legal standard at all and hence a risk of instability, however. Therefore, the Congress used the list of instances to guide individuals with disabilities, their employers, and courts into identifying new instances surrounding them in furtherance of the policy.

Courts, faced with specific facts before them, look to the language of the statute and the legislative intent, or the legislative policy. Proper policy decisions bring about coherence and stability to the category. Coherence will help the predictability of law and avoid their decisions from being overturned by higher courts and consequently help become precedents, and therefore reference points, for future cases. As for plaintiffs and defendants, they have different ultimate goals in the formulation of the REASONABLE ACCOMMODATION category: plaintiffs to gain employment or continue to be employed while enjoying the proposed accommodations, and defendants to deny the accommodations. A plaintiff tries to assimilate or distinguish her situation with the facts of the precedent which is an example of REASONABLE ACCOMMODATION and insists on the same legal result if the precedent is favorable to her case. The defendant, on the other hand, finds the facts of the second case different from those of the prior case if the prior case had a consequence in favor of the plaintiff and insists that its rule should not be followed. As one can see, players in the legal system struggle amongst different goals and policies.

Language users in the legal system can be considered to reorganize categories so that policies and similarity to examples are employed as determinants of the categories. Without rigid definitions in statutes, courts will nonetheless conduct policy considerations while guided by the examples afforded by the Congress and by case law in order to bring about a stable and flexible system. Categories of legal standards and rules are subject to tension due to the pressures legal decision makers are placed under in order to realize law which is both stable and at the same time adaptable to changes. Moreover, different parties with different roles [36] construct categories varyingly. Whether judges, attorneys or lay persons, language users restructure categories strategically for the purpose of achieving their goals.

6. Locating the Category Boundary

As it has been shown above, the language of the ADA provides no definition for "reasonable accommodation," and it only lists examples of the category. However, courts and lawyers cannot just leave it at that. REASONABLE ACCOMMODATION is, after all, created by legislators with the determination that the U.S. government should assume a leading role in the fight against discrimination on individuals with disabilities.[37] In accordance with the intent of the legislation, a court must discern and adjudicate on, and a lawyer must prove, the elements of the cause of action, namely, discrimination against her client on the basis of denial of "reasonable accommodation." On the defense side, the attorney must put forward an effective defense to the charge, which is proving the existence of an "undue hardship," as discussed below. In other words, legal experts must find "the location(s) of boundar(ies)" [38] around the REASONABLE ACCOMMODATION and the UNDUE HARDSHIP categories.

Not surprisingly, courts' attempts to determine the definition of REASONABLE ACCOMMODATION have not been uniform, particularly because *US Airways, Inc. v. Barnett* ("*US Airways*"),[39] the Supreme Court case that decided on the merits of the issue of reasonable accommodation, ended up leaving little guidance for lower courts. In that case, Barnett suffered from a back injury and resorted to his seniority rights for an assignment of a mailroom position, which was physically less demanding. The plaintiff's request was denied. As cited earlier, ADA forbids not making reasonable accommodation for an otherwise qualified individual with a disability, unless the covered entity can show that the accommodation would inflict "an undue hardship on the operation of the business." [40] At the center of the confusion lies the existence of dual categories REASONABLE ACCOMMODATION and UNDUE HARDSHIP.

The analyses of the categories REASONABLE ACCOMMODATION and UNDUE HARDSHIP are such that the differences are not easily drawn. The

Supreme Court in *U.S. Airways* rejected a simple reading of "reasonable accommodation" that it only concerned the effectiveness of the accommodation in achieving the individual's participation in the workforce.[41] The rejected reading was the same as the position taken by the plaintiff in *U.S. Airways*.[42] In other words, to this plaintiff, reasonable accommodations only concerned the benefits to the employee and not the costs borne by the employer. Otherwise, the plaintiff argued, the terms "reasonable accommodation" and "undue hardship" become "virtual mirror images," if they both involved an inquiry into the costs assumed by the employer.[43] If the employee had to consider the costs borne by the employer in accommodating the employee's disability, that would, in effect, make the employee prove an absence of hardship.[44] The plaintiff made his utmost effort trying to convince the Court about the location of the category boundaries of the two concepts and that the accommodation he sought was within the REASONABLE ACCOMMODATION boundary. The plaintiff argued that the accommodation was "inside" the category, and the defendant insisted that it was "outside."[45] They both advanced their theories of policy to support their respective goals.

To the plaintiff's avail, the Supreme Court opinionated that the terms were not in fact mirror images. The Court also rejected the defendant's theory, though what rule the Court adopted is not apparent from the text of the opinion: "(A) demand for an effective accommodation could prove unreasonable because of its *impact*, *not on business operations*, *but on fellow employees*—say because it will lead to dismissals, relocations, or modification of employee benefits."(Emphasis added).[46] This seems to mean that "reasonable accommodation" includes considerations of costs inflicted on other fellow employees, although a question remains as to the considerations of the costs which employers must bear. The Supreme Court is also unclear as to the analysis of "undue burden."[47]

The Supreme Court, without clearly defining "reasonable accommodation" and "undue burden," camouflages the problem with the issue of who bears the

burden of proof, which, nonetheless, is equally important. Without deciding on the contents of "reasonable accommodation" and "undue burden," the Court held that a plaintiff must prove an accommodation is reasonable "ordinarily or in the run of cases."[48] The burden that the plaintiff is required to bear is a burden of production,[49] upon satisfaction of which the burden shifts to the defense. The employer then must satisfy the burden of persuasion as to its "undue hardship" in the particular circumstances.[50] However, without clarifying what analyses are necessary to prove "reasonable accommodation" and "undue burden," the decision on the issue of the burden of proof only solves part of the problem.

On the other hand, the U.S. Court of Appeals for the Second Circuit, in the case cited by the Supreme Court, may seem to have given up on distinguishing the locations of the boundaries of the two categories. The court in *Borkowski v. Valley Central School District* ("*Borkowski*") has held, "the defendant's burden of persuading the factfinder that the plaintiff's proposed accommodation is unreasonable *merges*, in effect, with its burden of showing, as an affirmative defense that the proposed accommodation would cause it to suffer an undue hardship." (Emphasis added).[51] Faced with two seemingly similar analyses, the difficulty in locating sharp boundaries around REASONABLE ACCOMMODATION and UNDUE HARDSHIP has been a continued problem for judges hearing the ADA reasonable accommodation cases.[52] Even prominent judges struggle with determining the locations of boundaries and with the risk of not being able to do it well.

7. Conclusion

The ADA provides legal recourse for many Americans with disabilities, and the legal rule of reasonable accommodations is ever more important now that some other issues of the ADA have been largely solved. However, courts have varied in their precise rules to be applied to individual facts before them, due to

the difficulty in constructing REASONABLE ACCOMMODATION based on defining features. The Congress and courts struggle with determining the most desirable standards and rules in realization of law which is stable and at the same time flexible in society. As a result of the struggle, variance occurs from one legal decision making institution to another and even within the same institution. Furthermore, the variance in the structures of the category can also be attributed to the fact that different parties play different roles in the legal system. The seemingly same category is restructured by different players in the U.S. legal system as language users. Legal categories with supposedly concrete definitions, after all, are constantly subject to restructuring.

Notes

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1 42 U.S.C.§12101(a) (4).

2 42 U.S.C.§12112(a).

3 42 U.S.C.§12102(1).

4 42 U.S.C.§12111(8).

5 42 U.S.C.§12112(b)(5)(A).

6 *Sutton v. United Air Lines, Inc*., 527 U.S. 471 (1999); *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

7 See George A. Rutherglen & John J. Donohue, III, *Employment Discrimination: Law and Theory*, 3d ed. 836 (Foundation Press 2012).

8 Michael J. Zimmer et al., *Cases and Materials on Employment Discrimination*, 8th ed. 537 (Aspen 2012).

9 *Black's Law Dictionary* 1456 (10th ed. 2014).

10 42 U.S.C.§12111(9).

11 This provision lists some examples of accommodations that may be reasonable, rather than a mandatory list of examples that must be considered reasonable. Mack A. Player, *Federal Law of Employment*

Discrimination, 7th ed. 329 (West 2013).

12 42 U.S.C.§12111(10)(A).

13 42 U.S.C.§12111(10)(B).

14 5 U.S.C.§551(1).

15 Linda D. Jellum, *Mastering Statutory Interpretation*, 2d ed. 252 (Carolina Academic Press 2013).

16 Ludwig Wittgenstein, *Philosophical Investigations* 31-32, translated by G. E. M. Anscombe (Basil Blackwell 1978).

17 William Labov, "The Boundaries of Words and Their Meaning," in Charles-James N. Bailey & Roger W. Shuy (eds.), *New Ways of Analyzing Variation in English* (Georgetown University Press 1973).

18 John R. Taylor, *Linguistic Categorization*, 3d ed. 51 (Oxford University Press 2003).

19 *Id*. at 45.

20 *See generally*, Friedrich Ungerer & Hans-Jorg Schmid, *An Introduction to Cognitive Linguistics* 75-76 (Longman 1996).

21 *Id*. at 60.

22 *Id*. at 78.

23 *Id*.

24 *See generally*, *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

25 *See generally*, Ungerer and Schmid, *supra* note 20, at 78.

26 *Id*. at 79.

27 Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 32-33 (West 2012).

28 Benjamin Cardozo, *The Nature of the Judicial Process* (Yale University 1928), cited in Lawrence M. Solan, *The Language of Judges* 13 (University of Chicago 1993).

29 Solan, *supra* note 28, at 12.

30 Dirk Geeraerts, "Cognitive Restrictions on the Structure of Semantic Change," in Jacek Fisiak (ed.), *Historical Semantics* 141 (Mouton de Gruyter 1985).

31 42 U.S.C.§12111(9).

32 *See* Kenneth J. Vendevelde, *Thinking Like a Lawyer: An Introduction to Legal Reasoning*, 2d ed. 116 (Westview Press 2011).

33 *Id*. at 119.

34 Gregory L. Murphy & Douglas L. Medin, "The Role of Theories in Conceptual Coherence," *Psychological Review* 92(3): 289-316.

35 William Croft & D. Alan Cruse, *Cognitive Linguistics* 92 (Cambridge University Press 2004). Croft and Cruse write that "Categories are inherently variable, and created on-line as and when needed," citing Linda B. Smith & Larissa K. Samuelson, "Perceiving and Remembering: Category Stability, Variability, and Development," in Koen Lamberts and David Shanks (eds.), *Knowledge, Concepts and Categories* 161-95 (Psychology Press 1997); and also citing Lawrence W. Barsalou, "*Ad- hoc Categories*," in *Memory & Cognition* 11 (3): 211-227.

36 Barsalou, *supra* note 35.

37 42 U.S.C.§12101(b)(3).

38 Croft and Cruise, *supra* note 35, at 91. Parentheses added.

39 *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

40 42 U.S.C. §12112(b)(5)(A).

41 *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

42 *Id.*

43 *Id.*

44 *Id.*

45 Croft and Cruse, *supra* note 35, at 95.

46 *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

47 *See id.*

48 *Id.*

49 *Id.*, citing *Borkowski v. Valley Central School District*, 63 F.3d 131 (2d Cir. 1995), which held that the plaintiff had to satisfy "'burden of production' by showing 'plausible accommodations.'"

50 *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

51 *Borkowski v. Valley Central School District*, 63 F.3d 131 (2d Cir. 1995).

52 Contrary to his admission perhaps of his failure to locate boundaries, Judge Guido Calabresi who wrote the opinion of *Borkowski* is more detailed and insightful than the Supreme Court in his analyses of "reasonable accommodation," "undue burden," and the burden of proof.

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