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INTRODUCTION

Mistakes happen, and happen often, because we are all too human. Mistakes thus join company with death and taxes, those other two life certainties, but with an important difference: For death and taxes, rituals are prescribed and responses are predictable, but when mistakes happen, all bets are off about what judgment will follow. Will the mistake be forgiven, as Pope's "to forgive, divine" ending implies? Or will the actor's mistake be judged culpable to a degree, though mitigated by the mistake? Or will the mistake remit nothing, leaving the actor's culpability lessened not a whit?

—Norman J. Finkel & Jennifer L. Groscup[1]

Employment discrimination takes many more forms than the current models in our antidiscrimination laws explicitly recognize. As new forms of employment discrimination are identified, courts must decide whether or not to apply our existing statutes, which many continue to believe were narrowly constructed to focus primarily on conscious acts of prejudice. Litigants have had more success challenging that notion with respect to Title I of the Americans with Disabilities Act of 1990 (the "ADA"),[2] because Congress was relatively clearer about the multifaceted nature of disability discrimination. Legislators openly acknowledged that disability discrimination may result not only from invidious animus, but simply from "unthinking" conduct.[3] However, even under the ADA, courts repeatedly face new types of conduct that appear to be "discriminatory" in nature but that do not fit easily within the still rather limited concepts of discrimination that are formally described in the statute. Courts often frame these questions solely as an issue of liability. Judges either decide that an employer's conduct is "close enough" to a prototypic form of discrimination to be treated similarly, thereby triggering full liability, or they decide that the employer's conduct is "too far away" from prototypic discrimination

1. Norman J. Finkel & Jennifer L. Groscup, *When Mistakes Happen: Commonsense Rules of Culpability*, 3 PSYCHOL. PUB. POL'Y & L. 65, 66 (1997).

2. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12117 (1994)).

3. *See* 136 CONG. REC. H2599, H2622 (daily ed. May 22, 1990) (statement of Rep. Hoyer); 136 CONG. REC. H2421, H2440 (daily ed. May 17, 1990) (statement of Rep. Fish) (stating that disability discrimination often "is not the malicious, violent, ugly discrimination experienced on account of one's race, national origin or religion"); 134 CONG. REC. S5106, S5108 (daily ed. Apr. 28, 1988) (statement of Sen. Weicker) (stating that the proposed provisions encompass unintentional discrimination); *see also* Alexander v. Choate, 469 U.S. 287, 296 (1985) (explaining that "[f]ederal agencies and commentators on the plight of the handicapped similarly have found that discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus").

claims to be covered by the statute, thereby resulting in no liability at all.

Just as the statutory definitions of discrimination are often too narrow and rigid, so is this judicial liability-focused approach. Framing the issue solely in terms of a liability question is at once both overinclusive and underinclusive, imposing too great a punishment on some forms of discrimination, while leaving other forms completely unchecked. When courts identify discriminatory employment practices that do not fit the primary statutory models of "discrimination," courts should not limit themselves to an all-or-nothing decision. A more flexible approach would place greater emphasis on tailoring various remedies to fit the particular type of conduct. One way to achieve this shift in focus is to frame questions about nonprototypic employment discrimination in the language of tort law, which provides a more nuanced taxonomy of legal categories than is used in most discussions of antidiscrimination law. Rather than relying so heavily on an intentional tort model, it would be more useful to also discuss nonprototypic forms of employment discrimination in terms of strict liability or negligence models, which already have embedded a concept of tailored remedies. This approach would provide protection from a wider range of discriminatory practices than the current all-or-nothing choices, while recognizing that all forms of discrimination are not the same. This Article uses one particular aspect of disability discrimination law to help illustrate this "limited remedies" approach.[4]

This Article is about mistakes, their origins, and what their consequences should be. More specifically, it is about how the law should deal with an employer that takes a negative employment action against a nondisabled employee based on a mistaken belief that the employee is disabled. While misperceived but otherwise able-bodied[5] employees may not have been the primary concern of

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4. Another example of this theme is presented in a prior article. *See* Michelle A. Travis, *Leveling the Playing Field or Stacking the Deck? The "Unfair Advantage" Critique of Perceived Disability Claims*, 78 N.C. L. REV. 901, 902-07, 993-1011 (2000). That article analyzed a related issue involving the application of the ADA to a novel form of discrimination: whether the ADA should protect individuals who are "regarded as" disabled by their employer, when those individuals need "reasonable accommodations" to perform the "essential functions" of the job. *See id.* That analysis also illustrated the need for a shift in focus away from simply deciding whether or not to impose liability to an analysis of how properly to tailor the available remedies to establish a right that is consistent with the overarching goals of antidiscrimination law. *See id.* at 905-07, 993-1011.

5. Throughout this Article, I use "able-bodied" as a generic term to describe individuals who do not have any physical *or mental* impairments that rise to the level of an actual disability under the ADA.

antidiscrimination legislation, an employer's mistake does not make the consequences of discriminatory employment decisions any less real. "It is of little solace to a person denied employment to know that the employer's view of his or her condition is erroneous," one court has observed; "[t]o such a person, the perception of the employer is as important as reality."[6]

The ADA has already embraced this principle, at least in general terms. The ADA prohibits most employers from engaging in disability-based discrimination in the terms, conditions, or privileges of employment.[7] In taking this historic step, Congress recognized that the fears, prejudice, and animus toward individuals with disabilities are so pervasive that employment discrimination often reaches beyond the decisionmakers' intended targets.[8] Accordingly, the ADA not only protects individuals with substantially limiting physical or mental impairments, but also individuals *whose employer incorrectly regards them as disabled*, even when no disability exists.[9] This portion of the ADA's disability definition—known as the "regarded as" or "perceived disability" prong[10]—pushes antidiscrimination theory in a new direction: into the realm of mistakes.

Although a decade has passed since the ADA's enactment, courts are just beginning to explore the boundaries of this new frontier.[11] One question that courts currently are addressing is exactly what types of misperceptions should be covered by this unique statutory provision. Congress intended the perceived disability prong to be a "catch-all" for individuals who do not technically qualify as "disabled," but who nevertheless are subjected to an adverse disability-based employment action.[12] In this way, the perceived

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6. E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1097 (D. Haw. 1980); *see also* Sch. Bd. v. Arline, 480 U.S. 273, 283-84 (1987) (explaining that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment," and that impairments that do not have an impact on ability can "nevertheless substantially limit that person's ability to work as a result of the negative reactions of others").

7. *See* 42 U.S.C. § 12112(a) (1994). Since July 26, 1992, Title I of the ADA has applied to all private employers "engaged in an industry affecting commerce" and employing "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 12111(5)(A) (1994); 29 C.F.R. § 1630.2(e)(1) (2001).

8. *See, e.g.*, S. REP. NO. 101-116, at 7 (1989).

9. *See* 42 U.S.C. § 12102(2) (1994); 29 C.F.R. § 1630.2(g).

10. *See, e.g.*, Francis v. City of Meriden, 129 F.3d 281, 284-86 (2d Cir. 1997); Smaw v. Va. Dep't of State Police, 862 F. Supp. 1469, 1472 (E.D. Va. 1994).

11. *See* Travis, *supra* note 4, at 986-88 & nn.349-64 (describing the late development, but expected increase in, case law on perceived disability claims).

12. Arlene B. Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 609 (1997).

disability prong advances the social model of disability, in which disability is viewed as a product of forces in the individual's environment, not a product of inherently limiting personal traits.[13]

In describing this goal, legislators suggested that employers' misperceptions about nondisabled individuals may result from the same type of group-based and often purposeful discrimination that those with actual disabilities experience.[14] In other words, employers' negative views, fears, and misconceptions about disabilities are so strong that employers may incorrectly label some able-bodied workers with nondisabling conditions as "disabled," and treat those individuals differently from the rest of the able-bodied workforce. For example, a manager might reject all applicants with diabetes based on the misconception that people with diabetes are "inferior" in some way—perhaps believing that they are weak, undisciplined, or unable to work long hours or perform stressful or strenuous jobs. By viewing all individuals with the same diagnosis as an undifferentiated group, and by taking negative employment actions based on the assumption that all members of the group face similarly substantial limitations, the manager has erroneously treated the vast majority of fully capable, nondisabled diabetics as "disabled."

That type of group-based decisionmaking can result either from consciously held prejudiced beliefs or simply from the automatic activation of long-ingrained group stereotypes.[15] Such group-based responses certainly explain at least some of employers' mistakes about nondisabled employees, and there is no dispute that those types of errors may support an ADA perceived disability claim.[16] This is the case even if the manager's group-based decisionmaking is "rational" or "efficient" for the employer. Even if the

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13. *See* Anita Silvers, *Formal Justice, in* DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY 13, 75 (1998).

14. *See* 136 CONG. REC. E1972, E1913 (daily ed. June 13, 1990) (statement of Rep. Hoyer) (stating that the bill adopts the Supreme Court's analysis in *School Board v. Arline*, 480 U.S. 273, 283-84 (1987), which focused on the perception of disability based on myths and fears); 29 C.F.R. app. § 1630.2*(l)* (2001) (same); *see also* H.R. REP. NO. 101-485, pt. 3, at 29-31 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 452-54 (providing examples of perceived disability claims, all of which involved the application of group-based assumptions or conscious prejudice); *id.* pt. 2, at 53 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 335-36 (same); S. REP. NO. 101-116, at 24 (1989) (same).

15. *See* Laurie A. Rudman, *Measuring the Automatic Components of Prejudice: Flexibility and Generality of the Implicit Association Test*, 17 SOC. COGNITION 437, 437-38 (1999) (describing forms of unconscious, implicit prejudice and forms of conscious, explicit prejudice). *See generally* Patricia G. Devine, *Automatic and Controlled Processes in Prejudice: The Role of Stereotypes and Personal Beliefs, in* ATTITUDE STRUCTURE AND FUNCTION 181 (Anthony R. Pratkanis et al. eds., 1989) (describing both the controlled and the automatic processes involved in group-based prejudice).

16. *See infra* notes 73-84 and accompanying text.

manager is consciously treating all employees with a particular diagnosis as unemployable not out of animus, but because, on average, they tend to be more costly workers—i.e., even if the manager rejects all diabetics not out of fear or loathing, but because the employer has evidence that, on average, people with diabetes tend to take more sick days than people without—the perceived disability prong will still apply. Both the statute and the legislative history are clear that the perceived disability prong prohibits even "rational," statistical discrimination, by requiring employers to make *individual* employee assessments to determine accurately whether a particular employee's impairment is disabling or not.[17]

But what about mistakes that are not motivated by prejudice or group-based decisionmaking? How should the law treat what courts often refer to as "innocent mistakes," where there is no evidence that group-based assumptions or animus toward individuals with disabilities played any role in forming an employer's misperception about a nondisabled worker?[18] For example, what if the manager understood that diabetes is only disabling for some individuals, and therefore the manager attempted to assess a particular worker's diabetes on an individual basis, but the manager still incorrectly concluded that the worker's mild condition was serious enough to interfere with job performance? While this could occur if the employment decisionmaker simply had inaccurate information about the individual, the more troubling scenario is when the decisionmaker has accurate information, but nevertheless arrives at an erroneous assessment of the gravity of the employee's condition. The statute does not explicitly address employer misperceptions of nondisabling conditions that result from a proper individual assessment. Courts are therefore struggling to apply the perceived disability prong to these so-called "innocent mistakes."[19]

As is often the case with questions of statutory scope, courts have analyzed this problem as a liability issue, by simply deciding whether or not this type of "wrong" fits within a traditional ADA cause of action. Some courts have interpreted the ADA's language narrowly and denied liability altogether when there is no evidence that the employer's mistake was motivated by prejudice or group-based generalizations[20]—i.e., "the mistake [is] forgiven, as Pope's 'to

17. *See infra* notes 67-84, 471-73 and accompanying text.

18. *See* Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 182-83, 191 (3d Cir. 1999).

19. *See id.* at 182-83; Deane v. Pocono Med. Ctr., 142 F.3d 138, 143-44 n.4 (3d Cir. 1998) (en banc).

20. *See infra* notes 89-104 and accompanying text.

forgive, divine' ending implies."[21] In contrast, other courts have interpreted the ADA expansively and imposed liability to the same extent as for invidiously motivated mistakes or other forms of conscious, group-based decisionmaking[22]—i.e., "the mistake remit[s] nothing, leaving the actor's culpability lessened not a whit."[23] Rather than taking one of these all-or-nothing approaches, however, courts could choose an intermediate alternative. Instead of analyzing the question solely as a liability issue, courts could view it as a remedies problem, by allowing a claim for so-called "innocent mistakes," but circumscribing the remedies to reflect the less reprehensible nature of this particular type of wrong[24]—i.e., "the actor's mistake [is] judged culpable to a degree, though mitigated by the mistake."[25]

To assess the courts' current approaches properly—and to champion the intermediate alternative—requires more than just employing the traditional methods of statutory interpretation, which is as far as courts have gone. It also requires an understanding of the origin and consequences of employers' misperceptions. The source and impact of misperceptions is not, in the first instance, a legal question, but one of social cognition. Because the perceived disability prong deals solely with perceptual errors,[26] it makes sense to look to social cognition research for insight into the process by which perceptual errors occur and the harm that they impose.

Social cognition is the study of interpersonal perception: how the human mind processes information about social events.[27] If so-

21. Finkel & Groscup, *supra* note 1, at 66.

22. *See infra* notes 105-21 and accompanying text. The Supreme Court has not yet decided a nonmotivational mistake case under the ADA's perceived disability prong. In its most recent decision involving a perceived disability claim, the Court avoided the issue because the plaintiff affirmatively alleged that the employer's mistake was "based on myth and stereotype." *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 490 (1999). In describing the theory behind the perceived disability claim, the Court stated that employers' misperceptions "often 'resul[t] from stereotypic assumptions not truly indicative of . . . individual ability.' " *Id.* at 489 (quoting 42 U.S.C. § 12101(a)(7) (1994) (alterations in original)). The word "often" suggests that the Court might view conscious prejudice as only one of many potential sources of mistakes that could support a perceived disability claim. *See id.* However, it is difficult to read much into the Court's remark, because the only cases and regulations that the Court cited were ones that imply that innocent mistakes may not be cognizable under the ADA's perceived disability prong, based on the legislative purpose for that prong. *See id.* (citing Sch. Bd. v. Arline, 480 U.S. 273, 284 (1987); 29 C.F.R. app. § 1630.2*(l)* (2001)).

23. Finkel & Groscup, *supra* note 1, at 66.

24. *See Taylor*, 177 F.3d at 182-83.

25. Finkel & Groscup, *supra* note 1, at 66.

26. *See* McCollough v. Atlanta Beverage Co., 929 F. Supp. 1489, 1498 (N.D. Ga. 1996).

27. *See infra* notes 123, 126 and accompanying text.

cial scientists in this field have reached one common conclusion, it is that people are, by necessity, imperfect information processors. In our extraordinarily complex world, we constantly face the risk of becoming incapacitated by information overload.[28] So we all take a variety of cognitive "shortcuts" to process information more efficiently.[29] In so doing, we all end up making mistakes. These perceptual errors are not "motivational," in that they are not driven by conscious prejudice against or assumptions about a certain group of individuals.[30] Rather, these are "nonmotivational" mistakes that are the predictable byproduct of otherwise rational, efficient, and typically accurate cognitive processing mechanisms, which often work outside of our awareness.[31]

By systematically determining what types of processing errors people are likely to make and why, social cognition research can help determine whether or not perceived disabilities are likely to occur through mistakes that are not motivated by prejudice or group-based decisionmaking. Two branches of social cognition are particularly relevant to this endeavor: one explaining how we make mistakes in assessing others' behavior in the past, and one explaining how we make mistakes in predicting the behavior of others in the future. The first branch is the study of "causal attribution." Causal attribution theory attempts to explain the causes that we assign to social events or to another person's conduct or performance.[32] In addition, causal attribution theory attempts to explain the perceptual errors that we make during this attribution process.[33] To the extent that employers' mistaken perceptions of an able-bodied worker as "disabled" are the result of employers misassigning causes to workplace events or employee conduct, causal attribution theory can provide useful insights about the errors that result in ADA perceived disability claims. Causal attribution theory can help assess whether nonmotivational mistakes are possible, and what their impact might be. The second relevant branch of social cognition is the study of prediction errors. Social scientists have discovered that our predictions of future performance and behavior are efficiently—but imperfectly—based on cognitive shortcuts that rely too heavily on prior causal theories and that systematically

28. *See infra* note 127 and accompanying text.
29. *See infra* note 127 and accompanying text.
30. *See infra* notes 123-25 and accompanying text.
31. *See infra* notes 123-24 and accompanying text.
32. *See infra* note 130-33 and accompanying text.
33. *See infra* Part II.A (analyzing causal attribution errors).

bias predictions in identifiable ways.[34] To the extent that employers' mistaken perceptions of an able-bodied worker as "disabled" are the result of employers erroneously predicting the future impact of nondisabling impairments, this literature similarly can be useful in deconstructing the origin of perceived disability claims. Thus, combining this social science research with the more traditional methods of statutory interpretation should provide the best foundation for determining the proper scope of the ADA's perceived disability prong.

Using social cognition research to help analyze perceived disability claims is consistent with a broader trend in other areas of discrimination scholarship, particularly scholarship on various forms of "unconscious" race and sex discrimination. Relying heavily on social science evidence, scholars have shown that much of present-day race and sex discrimination stems not from consciously held prejudice against minority groups and women.[35] Rather, these scholars have demonstrated that stereotypes often work independently of invidious animus, by functioning as cognitive constructs, categories, or organizing principles, which are triggered automatically when someone perceives a social event. These cognitive processes can systematically bias one's perception, understanding, en-

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34. *See infra* Part II.B (analyzing prediction errors).

35. *See, e.g.*, JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 14, 72-77, 154-55 (1997) (using the "incontrovertible insights of modern psychology" to argue that "most racial discrimination today is not rooted in conscious animus," hut is the result of "unconscious mental reflexes"); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164, 1186-88, 1216-17 (1995) (relying on social cognition theory to argue that "a broad class of discriminatory employment decisions result not from discriminatory motivation, but from normal cognitive processes and strategies that tend to bias intergroup perception and judgment"); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323, 330-31, 336-39 (1987) (identifying "racism's primary source" as "a product of the unconscious," and describing cognitive psychologists' model for understanding the unconscious nature of race discrimination); Deborah J. Merritt & Barbara F. Reskin, *The Double Minority: Empirical Evidence of a Double Standard in Law School Hiring of Minority Women*, 65 S. CAL. L. REV. 2299, 2356-57 (1992) (citing social psychology research that demonstrates unconscious forms of sex discrimination to explain some of the inequality in law school faculty hiring and promotion); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 899-915 (1993) (noting recent studies demonstrating "that most discrimination is not the result of malice, hatred, ill will, or bigotry: it is the result of unintended and unconscious stereotyping"); Martha S. West, *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 TEMP. L. REV. 67, 96-97, 143-45 (1994) (arguing that Title VII antidiscrimination law "has not developed in ways that are able to address the problem or remedy the effects of subconscious, unintentional discrimination"); *see also* Judith Olans Brown et al., *Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L.J. 1487, 1491, 1493-97 (1997) (noting that "there is now a large body of scholarship showing the inevitability of bias: racism occurs through unconscious cognitive processes").

coding, retention, and recall of social events, in ways that predictably disadvantage racial minorities and women.[36]

Thus far, ADA scholars have tended to focus on more traditional types of barriers to equal employment opportunity for individuals with disabilities. Many commentators have addressed the significant structural, operational, social, and attitudinal barriers that directly or indirectly limit workplace access.[37] More recent scholarship has expanded this inquiry by encouraging broader interdisciplinary analyses of disability rights issues.[38] Thus far, how-

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36. *See* ARMOUR, *supra* note 35, at 40-42, 75, 130-39 (explaining that racial stereotypes result in discrimination by causing people to "unconsciously interpret[ ] experiences to be consistent with the underlying stereotype," to "selectively assimilat[e] facts that validate the stereotype while disregarding those that do not," and to be "primed to construe ambiguous behavior" consistent witb the stereotype); Brown et al., *supra* note 35, at 1493-97 (describing the stereotyping process as "a cognitive strategy that allows the mind to interpret information quickly" through the use of automatic categorization and other "cognitive shortcuts"); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1279, 1316, 1332 (1998) (arguing that much discrimination "occurs when an individual's group status subtly, even unconsciously, affects a decision makers' [sic] subjective perception of relevant traits," through "a variety of categorization-related cognitive biases" that affect the "interpretation, retention, and utilization of incoming mixed or ambiguous information"); Krieger, *supra* note 35, at 1165, 1198 (explaining social cognition research indicating "that normal cognitive processes can lead to the creation and maintenance of social stereotypes . . . [, which] represent simply one manifestation of generalized cognitive biases resulting from categorization, differential attention to salient events, and the search for meaning and coherence," and arguing that these cognitive processes are the basis for much racial discrimination in employment); Lawrence, *supra* note 35, at 336-39 (describing a cognitive approach to unconscious racism that stems from otherwise rational categorization processes); West, *supra* note 35, at 96-97, 143-45 (identifying forms of "subconscious, unintentional discrimination" that result "not from illegal intent in the minds of a few, but from deeply entrenched gender and race stereotypes in the minds of most of us").

37. *See generally* Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345 (1997) (describing attitudinal forms of disability discrimination); Harlan Hahn, *Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?*, 21 BERKELEY J. EMP. & LAB. L. 166, 174, 181 (2000) (using a sociopolitical perspective to identify employment barriers involving "[f]eatures of the buman-made environment that segregate disabled citizens," "prejudices derived from cultural meanings," and "paternalism"); Mayerson, *supra* note 12, at 587, 589 (identifying disability discrimination in the form of "outmoded, prejudicial and stereotypic mental or physical job criteria" and "arbitrary fears and stereotypes"); Susan Schwochau & Peter David Blanck, *The Economics of the Americans with Disabilities Act, Part III: Does the ADA Disable the Disabled?*, 21 BERKELEY J. EMP. & LAB. L. 271 (2000) (analyzing the three major economic theories of discrimination against individuals with disabilities in the labor market); Silvers, *supra* note 13, (discussing structural forms of disability discrimination); Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 273-74 (2000) (identifying unique social barriers to equal employment for those with psychiatric disabilities).

38. *See, e.g.*, Linda Hamilton Krieger, *Foreword—Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 12 (2000) (describing the goals of a recent symposium of disability rights scholars in law, sociology, psychology, political science, economics, history, and literature).

ever, the approach that scholars have taken in analyzing race- and sex-based discrimination in terms of cognitive processing biases has not been systematically undertaken in the context of disability discrimination law.[39] This Article takes an initial step in that direction.

This Article begins in Part I by describing the relevant statutory provisions and the various ways that courts have dealt with employer misperceptions under the ADA's perceived disability prong. Part II explains how social cognition research on cognitive bias can help identify the origins of some of the employer misperceptions underlying perceived disability claims. Specifically, Part II analyzes the work of causal attribution theorists and the social science literature on prediction errors to help explain why and when employers may erroneously label nondisabled employees as "disabled." This research indicates that at least some perceived disabilities are likely to result not from consciously held, group-based prejudices or generalizations, but from nonmotivational cognitive processing errors.

Part III combines the social science data with an analysis of more traditional methods of statutory interpretation to determine how the ADA should deal with these types of claims. This analysis concludes that in order to achieve all of Congress's objectives, courts *should* apply the ADA's perceived disability prong to claims involving nonmotivational mistakes, but such mistakes should not trigger the same extent of liability as mistakes that are invidiously motivated or otherwise the product of conscious, group-based decisionmaking. Rather than adopting the current "no liability" approach of some courts, or the "full liability" approach of others, this Article advocates a middle-ground alternative that focuses on tailoring remedies to fit the employer's conduct. In reaching this specific recommendation, this analysis illustrates the more general principle that line-drawing at the remedy stage can be a far more precise instrument for achieving the exact size and shape of a new

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39. Several disability scholars have begun this process by identifying unconscious processes as a potential source of disability discrimination and urging greater use of interdisciplinary research to understand the implications of these processes under the ADA. *See, e.g.*, Blanck & Marti, *supra* note 37, at 348-50 (noting that "[c]onscious and unconscious attitudes may lead to inaccurate perceptions and economically inefficient behavior by employers and others toward qualified persons with disabilities," and suggesting that "interdisciplinary research is needed"); *see also* Karen M. Kramer & Arlene B. Mayerson, *Obesity Discrimination in the Workplace: Protection Through a Perceived Disability Claim Under the Rehabilitation Act and the Americans with Disabilities Act*, 31 CAL. W. L. REV. 41, 64-72 (1994) (using literature and data from social science studies to identify the stigmatizing attitudes and stereotypes that prevent obese individuals from obtaining equal employment opportunity).

substantive right than the rather blunt tools available through decisionmaking solely at the liability stage.

1. CURRENT ADA LAW ON PERCEIVED DISABILITY CLAIMS AND EMPLOYERS' MISPERCEPTIONS

The employment provisions in Title I of the ADA are part of a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[40] The ADA extended disability-based antidiscrimination protection broadly into the private sector.[41] Under Title I, private employers with fifteen or more employees are prohibited from discriminating against any "qualified individual with a disability," with regard to hiring, training, compensation, promotion, termination, or any other terms and conditions of employment.[42] The ADA thus effectively added "disability" to the list of other statuses already protected by federal law, including race, color, religion, sex, national origin, and age.[43]

To state an employment discrimination claim under the ADA, an employee or job applicant[44] usually must demonstrate three things. First, the plaintiff must have a "disability."[45] Second, the plaintiff must be a "qualified individual," which means that the plaintiff can perform the "essential functions" of the job, "with or

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40. 42 U.S.C. § 12101(b)(1) (1994).

41. 42 U.S.C. § 12111(5)(A) (1994). The ADA was modeled after its predecessor, the Rehabilitation Act of 1973, which only prohibited disability discrimination by federal agencies, *see* 29 U.S.C. § 791(b) (1994), large federal contractors, *see* 29 U.S.C. § 793(a) (1994), and programs or activities receiving federal financial aid, *see* 29 U.S.C. § 794(a) (1994). Importing the Rehabilitation Act's definition of disability into the ADA has been described as a matter of political expediency, with potentially negative, unintended consequences. *See generally* Anita Silvers & Michael Ashley Stein, *Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Classification*, 35 U. MICH. J.L. REFORM (forthcoming 2002) (providing that, by relying on the Rehabilitation Act case law, courts are incorporating retrogressive social views of people with disabilities). Nevertheless, courts use case law under the Rehabilitation Act to help interpret analogous sections of the ADA, 29 C.F.R. app. § 1630.2(g) (2001), so this Article cites to Rehabilitation Act cases where helpful to analyze ADA issues.

42. § 12111(5)(A); 42 U.S.C. § 12112(a) (1994); 29 C.F.R. § 1630.4 (1999).

43. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2001) (governing employment discrimination on the basis of race, color, religion, sex, and national origin); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994) (governing employment discrimination on the basis of age).

44. The ADA protects both current employees and job applicants. *See* § 12112(a) (prohibiting discrimination in "hiring"). For convenience, I refer to both of these categories as "employees" throughout this Article.

45. 42 U.S.C. §§ 12102(2), 12112(a) (1994).

without reasonable accommodation."[46] And third, the employer must take an adverse employment action against the plaintiff "because of" the disability.[47] This Article focuses on the first of these three requirements: determining when an employee or job applicant is "disabled."

This threshold determination often distinguishes disability discrimination claims from employment discrimination claims based on race or sex.[48] Proving that an employee has a "disability" is usually an essential element of an ADA claim. In many situations, if an employee has a "disability," then the ADA applies, and if the employee does not have a "disability," then the ADA is inapplicable.[49] Thus, the ADA's status marker plays not only a prohibitory role, but also an exclusionary one. Disability identifies the characteristic upon which employers may not discriminate, and it often draws the line between those who are and are not protected in the first place. For race and sex, the statutory status marker plays only the former role. Title VII of the Civil Rights Act of 1964, the federal statute governing race and sex discrimination in the workplace, simply prohibits employers from considering race and sex when making employment decisions.[50] Although Title VII was concerned primarily with discrimination against minorities and women, Title VII protects all individuals from race-based or sex-based decision-making.[51] Because of the additional exclusionary role played by dis-

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46. §§ 12111(8), 12112(a).

47. § 12112(a)-(b).

48. *See* Fredregill v. Nationwide Agribusiness Ins. Co., 992 F. Supp. 1082, 1091 (S.D. Iowa 1997) ("[The ADA] is different from most other civil rights laws in that it is not always obvious whether a person is in the protected class.").

49. *See* Leslie Francis & Anita Silvers, *Introduction: Achieving the Right to Live in the World*, *in* AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS, at xiii, xxiii (Leslie Pickering Francis & Anita Silvers eds., 2000); Steven L. Willborn, *A Nested Model of Disability Discrimination*, at 3 (1999), *available at* http://www.people.virginia.edu/~dll2k/bottom.html. There are a few exceptions to this rule. For example, some courts hold that a nondisabled individual may state a claim against an employer for violating the ADA's prohibition against prehire medical inquiries. *See, e.g.*, Griffin v. Steeltek, Inc., 160 F.3d 591, 592-93, 595 (10th Cir. 1998). The ADA also protects all qualified employees against discrimination on the hasis of their "relationship or association" with someone who has a disability. *See* § 12112(b)(4); 29 C.F.R. app. § 1630.8 (2001).

50. *See* 42 U.S.C. § 2000e-2(a) (1994); Willborn, *supra* note 49, at 2.

51. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278-80 (1976); *see also* Michael D. Moberly, *Perception or Reality?: Some Reflections on the Interpretation of Disability Discrimination Statutes*, 13 HOFSTRA LAB. L.J. 345, 367 (1996) (quoting S. REP. NO. 93-1297 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6389-90); Willborn, *supra* note 49, at 2-3. The status markers of "color" and "national origin" are similar to race and sex in that all individuals are covered by the statute. In contrast, the status markers of "religion" and "age" play more analogous roles to the status marker of "disability" under the ADA. Because Title VII's ban on religious discrimination only protects those with sincerely held religious beliefs, *see* Shelton v.

ability status, the threshold determination of who is "disabled" is frequently the central and determinative issue in an ADA discrimination claim. This determination is complicated by the fact that, unlike race and sex, physical and mental impairment falls along a vast continuum. Accordingly, the ADA's drafters were forced to draw some very difficult lines.

Congress drew these lines by defining "disability" in three different ways. First, the ADA protects individuals with actual disabilities, which include any "physical or mental impairment that substantially limits one or more of the major life activities of such individual."[52] Second, the ADA protects individuals who have a "record of" an actual disability.[53] This prong covers people who do not currently have an actual disability, but who have had a substantially limiting impairment in the past.[54] And third, the ADA protects individuals who are mistakenly "regarded as" having an actual disability by their employer.[55] Under the third definition, the employee lacks a substantially limiting physical or mental impairment, but the employer's mistaken belief that the employee has such an impairment is enough to trigger statutory protection.[56] This Article addresses the scope of the third definition: the "regarded as" or "perceived disability" prong.

To establish a perceived disability, an employee must show that the employer mistakenly regarded the employee as having the type of impairment described in the ADA's actual disability prong.[57] In other words, the employer must mistakenly believe that the employee has a "physical or mental impairment that substantially limits a major life activity," when such an impairment does not exist. The Equal Employment Opportunity Commission ("EEOC") has issued implementing regulations identifying three categories that fit this definition:

Univ. of Med. & Dentistry, 223 F.3d 220, 224 (3d Cir. 2000) (citing 42 U.S.C. § 2000e(j) (1994)), "religion" plays both an exclusionary and a prohibitory role. Similarly, the Age Discrimination in Employment Act's ban on age discrimination only protects those who are forty years of age and older, 29 U.S.C. § 631(a) (1994), thereby using a particular age both to identify who obtains statutory protection and to define the characteristic that employers must ignore. Accordingly, courts must also make a threshold determination of whether the plaintiff falls within the protected category for employment discrimination claims based on religion and age.

52. 42 U.S.C. § 12102(2)(A) (1994).

53. § 12102(2)(B).

54. *See* 29 C.F.R. app. § 1630.2(k) (2001).

55. 42 U.S.C. § 12102(2)(C).

56. *See* 29 C.F.R. app. § 1630.2*(l)*.

57. *See* § 12102(2); 29 C.F.R. app. § 1630.2*(l)*; Sutton v. United Air Lines, Inc., 527 U.S. 471, 489-90 (1999).

1) The individual may have an impairment which is not substantially limiting but is perceived by the employer . . . as constituting a substantially limiting impairment; [or]

2) The individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or

3) The individual may have no impairment at all but is regarded by the employer . . . as having a substantially limiting impairment.[58]

The EEOC regulations provide an example of each of these three categories.[59] The first category would cover an employee with controlled high blood pressure, if the employer erroneously exaggerates the gravity of the condition.[60] Even if the employee's high blood pressure does not constitute an actual disability because it does not substantially limit any major life activities, the employee is covered by the ADA if the employer incorrectly views the condition as substantially limiting.[61] If, for example, the employer reassigns the employee to less strenuous work based on unsubstantiated fears that people with high blood pressure are prone to heart attacks, the employee could state an ADA perceived disability claim.[62] The second category of perceived disabilities might cover an employee who has a prominent facial scar or disfigurement, or a condition that periodically causes an involuntary jerk of the head, none of which substantially limit any of the employee's major life activities.[63] If the employer believes that the employee is unable to work with customers because of their negative reactions to the employee's condition, then the employee could establish the second type of perceived disability discrimination claim.[64] The third category of perceived disabilities would protect a completely unimpaired employee whom the employer mistakenly believes has an actually disabling condition, such as when an employer believes an unfounded rumor that an employee is infected with the Human Immunodeficiency Virus ("HIV").[65]

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58. 29 C.F.R. app. § 1630.2*(l)*.
59. *See id.*
60. *See id.*
61. *See id.*
62. *See id. See generally* Anita Silvers & Michael Ashley Stein, *Protecting Genomics' Promise: An Equality Paradigm for Preventing Discrimination Based on Genetic Identity*, 9 VA. J. SOC. POL'Y & L. (forthcoming 2002) (analyzing whether the EEOC's statements could support a perceived disability claim by individuals who have been identified as having a genetic risk of becoming ill or bestowing illness on tbeir children).
63. *See* 29 C.F.R. app. § 1630.2*(l)*.
64. *See id.*
65. *See id.*

In reality, very few perceived disability discrimination claims involve the completely unimpaired employees hypothesized in the EEOC's third category.[66] The vast majority of claims involve the first two categories of perceived disabilities, which share one important commonality. Individuals in both of the first two categories do have some type of physical or mental "impairment." The impairment is just not "substantially limiting," and therefore does not qualify as an actual disability. The EEOC's first two categories protect these individuals when an employer mistakenly views their nondisabling impairments as worse than they actually are.

What causes employers to exaggerate the gravity of nondisabling impairments and to mistakenly regard them as "disabilities"? When Congress decided to include perceived disabilities in the ADA's disability definition, Congress recognized that these mistakes may be the product of the same type of prejudice or group-based assumptions that the ADA's general antidiscrimination mandate was designed to prevent.[67] Employers often hold generalized assumptions and fears about "the disabled" as an undifferentiated and uniform group. For example, prejudiced employers may choose not to associate with individuals with disabilities because of feelings of aversion, disdain, or pity. Or they may assume incorrectly that all individuals with disabilities are less productive, less safe, and have poorer attendance records, that all individuals with disabilities will be rejected by coworkers and customers, or that all individuals with disabilities impose higher insurance, liability, and workers' compensation costs.[68] By making these types of negative, group-based assumptions, employers discriminate against the extraordinary number of individuals with disabilities for whom these particular traits obviously do not apply.

But incorrectly assigning traits to all members of a group is not the only invidious effect of prejudice and group-based decisionmaking. Viewing individuals with disabilities as an undifferenti-

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66. *See* John M. Vande Walle, Note, *In the Eye of the Beholder: Issues of Distributive and Corrective Justice in the ADA's Employment Protection for Persons Regarded as Disabled*, 73 CHI.-KENT L. REV. 897, 904, 911 n.112 (1998).

67. *See* 136 CONG. REC. E1972, E1913 (daily ed. June 13, 1990) (statement of Rep. Hoyer) (stating that the bill adopts the Supreme Court's analysis in *School Board v. Arline*, 480 U.S. 273, 283-84 (1987), which focused on the perception of disability based on myths and fears); 29 C.F.R. app. § 1630.2*(l)* (same); *see also* H.R. REP. NO. 101-485, pt. 3, at 29-31 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 452-54 (providing examples of perceived disability claims, all of which involved the application of group-based assumptions or conscious prejudice); *id.* pt. 2, at 53, *reprinted in* 1990 U.S.C.C.A.N. 303, 335-36 (same); S. REP. NO. 101-116, at 24 (same).

68. *See* 29 C.F.R. app. § 1630.2*(l)*.

ated group not only causes employers to fail to distinguish between group members who do and do not possess particular traits, but it may also cause employers to fail to distinguish between similar employees who are and are not members of the group in the first place. In other words, an employer that views "the disabled" as an undifferentiated group (or, more likely, that views all individuals with a particular condition or diagnosis as an undifferentiated group) may fail to distinguish between individuals with similar impairments, some of whom are "substantially limited in a major life activity" and therefore fall within the ADA's actual disability category, and some of whom are not so limited and therefore fall outside of the protected group. For example, a manager who knows that asthma can be a disabling impairment and who views "people with asthma" as an undifferentiated group may categorize *all* asthma sufferers as "disabled," even though asthma is not a disabling condition for most individuals. Thus, prejudice against or generalizations about "the disabled" may not only cause an employer to assign traits incorrectly to members of the category who do not possess those traits, but it may also cause an employer to assign the category label incorrectly to individuals who are not members of the category at all.

In recognition of this second effect of disability-based decisionmaking, the ADA rejects the concept of "status-blind" assessment that underlies Title VII. While the antidiscrimination mandate in Title VII essentially orders the employer to ignore an employee's race, color, sex, or national origin, the ADA's antidiscrimination mandate requires the employer to think actively about an employee's disability.[69] In part, this is necessary because of the ADA's requirement that employers "reasonably accommodate" individuals with disabilities by providing appropriate workplace modifications to facilitate performance.[70] Because individuals with the same condition, impairment, or diagnosis will have a very wide range of capabilities, the ADA requires the employer to make an individual assessment of an employee's physical or mental impair-

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69. *See* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 2-3 (1996) (noting that "unlike Title VII, the ADA also requires employers to take some disabilities into account").

70. 42 U.S.C. § 12112(b)(5) (1994). Title VII contains a very limited version of an accommodation duty with respect to religious-based discrimination. *See* 42 U.S.C. § 2000e(j) (1994). However, because religion raises constitutional questions under the Establishment Clause that are not raised in the disability context, courts have interpreted Title VII's religious accommodations provision extremely narrowly. *See* Karlan & Rutherglen, *supra* note 69, at 6-7; *see also* H.R. REP. NO. 101-485, pt. 3, at 40 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 463 (distinguishing the ADA's "significant" accommodation duty from Title VII's "insignificant" duty to accommodate religious beliefs).

ments.[71] Congress theorized that group-based prejudices and assumptions could only be overcome by forcing employers to deal with employees on an individual basis.[72] The corollary expectation was that once employers assessed individual impairments individually, employers would stop making mistakes.

When Congress adopted the perceived disability prong, Congress clearly intended it to cover misperceptions and judgments that result from an employer's failure to make this required individual assessment.[73] For example, if an employer believes that all people with epilepsy pose safety risks in unsupervised positions, and the employer applies that group-based assumption to disqualify all job applicants with epilepsy, the perceived disability prong will protect all of the rejected applicants with epilepsy, including those who are not substantially limited by their condition and who are

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71. *See* 29 C.F.R. app. § 1630.9 (2001) (stating that the ADA "requires the individual assessment of . . . the specific physical or mental limitations of the particular individual"); 29 C.F.R. § 1630.2(o)(3) (2001) (describing the "interactive process" that employers may need to initiate with individual employees); *see also* Toyota Motor Mfg. v. Williams, 122 S. Ct. 681, 692 (2002) (holding that "Congress intended the existence of a disability to be determined in . . . a case-by-case manner," which requires "[a]n individualized assessment of the effect of an impairment"); Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1113-15 (9th Cir. 2000) (describing employers' obligations), *cert. granted in part*, 121 S. Ct. 1600 (2001).

72. *See* 136 CONG. REC. S9680, S9681 (daily ed. July 13, 1990) (statement of Sen. Kennedy) (explaining that the ADA's "fundamental premise" is that "disabled Americans should be judged on the basis of facts"); 136 CONG. REC. S9527, S9542 (daily ed. July 11, 1990) (statement of Sen. Dole) (stating that the ADA's goal was to ensure that employment decisions "must be made about individuals, not groups, and must be based on facts, not fears"); 136 CONG. REC. S7422, S7437 (daily ed. June 6, 1990) (statement of Sen. Harkin) ("The thesis of the Americans with Disabilities Act is simply this: That people with disabilities ought to be judged on the basis of their abilities; they should not be judged nor discriminated against based on unfounded fear, prejudice, ignorance, or mythologies; people ought to be judged based upon the relevant medical evidence and the abilities they have."); 136 CONG. REC. H2599, H2632 (daily ed. May 22, 1990) (statement of Rep. Owens) (stating that the ADA's goal is to prohibit the use of "averages and group-based predictions," by requiring employers to make employment decisions "based on facts, not on presumptions as to what a class of individuals with a particular disability can or cannot do"); 135 CONG. REC. S10765, S10798 (daily ed. Sept. 7, 1989) (statement of Sen. Simon) ("The ADA is designed to ensure that persons with disabilities are treated as individuals and that employment decisions are not made on the basis of stereotypes."); 135 CONG. REC. S4979, S4985 (daily ed. May 9, 1989) (statement of Sen. Harkin) ("The ADA sends a clear and unequivocal message to people with disabilities that they are . . . to be judged as individuals on the basis of their abilities and not on the basis of presumptions, generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, or pernicious mythologies.").

73. *See* 136 CONG. REC. E1972, E1913 (daily ed. June 13, 1990) (statement of Rep. Hoyer) (stating that the bill adopts the Supreme Court's analysis in *School Board v. Arline*, 480 U.S. 273, 283-84 (1987), which focused on the perception of disability based on myths and fears); 29 C.F.R. app. § 1630.2*(l)* (same); *see also* H.R. REP. NO. 101-485, pt. 3, at 29-31 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 452-54 (providing examples of perceived disability claims, all of which involved the application of group-based assumptions or conscious prejudice); *id.* pt. 2, at 53, *reprinted in* 1990 U.S.C.C.A.N. 303, 335-36 (same); S. REP. NO. 101-116, at 24 (same).

only "regarded as" disabled by the employer.[74] That type of mistake—a mistake based on the conscious application of generalizations about "the disabled" as a group, or about all those with a particular diagnosis—falls squarely within the intended scope of the perceived disability prong.[75]

Courts have had no trouble agreeing on this point. In *Cook v. Rhode Island*, for example, the court allowed a job applicant to bring a perceived disability discrimination claim when a medical facility rejected her application because of her morbid obesity.[76] Although morbid obesity is not an actual disability for many individuals because it does not substantially limit any major life activities, the employer "failed to make specific inquiries into [the applicant's] physical abilities and instead relied on generalizations regarding an obese person's capabilities."[77] By acting on negative, group-based assumptions, the employer mistakenly regarded the applicant's morbid obesity as a substantially limiting impairment, incorrectly believing that obesity is always an automatically disqualifying condition.[78] The court described the employer's conduct as the "strict inverse" of an individual inquiry and, therefore, a "graphic illustration" of impermissible discrimination.[79]

The court reached a similar conclusion in *Mendez v. Gearan*, when a job applicant sued the Peace Corps after it rejected her for an overseas position.[80] The job applicant had dysthymia, a chronic form of mild depression, which is not an actual disability for many individuals because it does not substantially limit any major life

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74. *See* Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 192-93, 193 n.8 (3d Cir. 1999) (explaining that the perceived disability prong would apply to "[a]n employer who regards a kind of impairment—epilepsy, for example—as disqualifying all people affected by the impairment for a wide range of johs," rather than "educat[ing] itself about the varying nature of impairments and [making] individualized determinations about affected employees"); *see also id.* at 193 (explaining that an employer will be held liable under the perceived disability prong if the employer acted on a group-based assumption that "anyone with bipolar disorder or HIV infection is substantially limited in a major life activity," because "[a]n employer with such a belief is failing to make an individualized determination").

75. *See id.* at 192-93, 193 n.8 ("[A]n employer who is informed that a particular individual has epilepsy might overestimate the limiting effects of that individual's epilepsy because of a general perception about the severity of epilepsy. If the employer mistakenly overestimates the degree of a person's impairment based on perceptions about the nature of the impairment, it is not basing its decision on an individualized evaluation.").

76. 10 F.3d 17, 20-21, 23, 27 (1st Cir. 1993) (applying the analogous language in the Rehabilitation Act of 1973).

77. *Id.* at 22, 27.

78. *See id.* at 26-28.

79. *Id.* at 27.

80. 956 F. Supp. 1520, 1522 (N.D. Cal. 1997) (applying the analogous language in the Rehabilitation Act of 1973).

activities.[81] Nevertheless, the Peace Corps failed to assess the applicant's condition on an individual basis.[82] Relying on group-based assumptions about individuals with mental impairments, the Peace Corps mistakenly assumed that the applicant's dysthymia was a substantially limiting impairment.[83] The court held that the Peace Corps regarded the applicant as disabled when it deemed her unable to perform any overseas assignments and automatically deferred her application for one full year.[84]

Until recently, courts and commentators have seemed to assume that perceived disabilities could only be the result of these types of conscious, motivational mistakes.[85] The assumption was that if employers engaged in the necessary individual assessment, they would stop acting on prejudice and group-based generalizations and, in turn, would determine accurately whether or not an employee had an actual disability. However, even if the first part of this assumption is correct—i.e., even if individual assessment *does* prevent employers from acting on consciously held prejudice and making group-based decisions—increasing evidence indicates that the second part of this assumption is not. As Professor Linda Hamilton Krieger has argued in the Title VII context, "the assumption that, absent discriminatory animus, employment decisionmakers are rational actors . . . [who] make even-handed decisions using optimal inferential strategies" is simply incorrect.[86]

Courts are now starting to identify cases in which the employment decisionmaker has mistakenly regarded a nondisabling impairment as a disability, even after conducting the individual assessment that Congress believed would prevent such mistakes. Courts have sometimes referred to these types of errors as "innocent mistakes," in that they are not motivated by the same group-

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81. *Id.* at 1522-24.

82. *Id.* at 1527-28.

83. *Id.* at 1525-29.

84. *Id.* at 1525-26.

85. *See, e.g.*, Kramer & Mayerson, *supra* note 39, at 49 (arguing that the EEOC guidelines "command an examination of whether societal prejudices associated with disability ha[ve] impermissibly played a role in an employer's decision"); Christine L. Kuss, Comment, *Absolving a Deadly Sin: A Medical and Legal Argument for Including Obesity as a Disability under the Americans with Disabilities Act*, 12 J. CONTEMP. HEALTH L. & POL'Y 563, 583 (1996) (stating that the perceived disability prong "is appropriate for a person who has experienced discrimination because of the 'myths, fears, and stereotypes' associated with a certain disability"); *see also* 29 C.F.R. app. § 1630.2*(l)* (2001) (stating that "if an individual can show that an employer . . . made an employment decision because of a perception of disability based on 'myth, fear or stereotype,' the individual will satisfy the 'regarded as' part of the definition of disability"); cases cited *supra* notes 76-84 and accompanying text.

86. Krieger, *supra* note 35, at 1167, 1181.

based animus or assumptions that caused the misperceptions described in the cases above.[87] Typically, courts have viewed these types of mistakes as far less serious than mistakes caused by group-based decisionmaking. In the words of one court: "[A] mistake about the extent of a particular employee's impairment made in the course of an individualized determination is further from the core of the ADA's concern . . . ."[88]

Viewing these types of mistakes as merely peripheral to the ADA's objectives, many courts have held that the perceived disability definition simply does not apply. These courts have decided that an employee is only protected under the perceived disability prong if there is evidence that disability-based prejudice or assumptions motivated the employer's mistaken belief. In reaching this conclusion, these courts essentially equate the "mistake" element with an element of intent.[89] They will not apply the perceived disability definition unless the employer's mistaken perception "raise[s] the specter of what appears to be the [ADA's] primary target": invidiously motivated discrimination.[90] Thus, these courts reject ADA liability altogether for nonmotivational mistakes that occur during an individual assessment. *Rondon v. Wal-Mart, Inc.* is an example of this approach.[91] In *Rondon*, the plaintiff's doctor advised him to avoid repetitive twisting and bending, lifting more than five pounds, and working for extended periods for three weeks after injuring his back at work.[92] Although the plaintiff's back injury was likely to be a nondisabling, temporary condition, the plaintiff's employer permanently discharged him from his pharmacist position

87. *See, e.g.*, Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 193 (3d Cir. 1999); Deane v. Pocono Med. Ctr., 142 F.3d 138, 143 n.4, 144 (3d Cir. 1998) (en banc).

88. *Taylor*, 177 F.3d at 193.

89. *See, e.g.*, Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 646 (2d Cir. 1998) (holding that "whether an individual is regarded as having a disability turns on the employer's perception of the employee and is therefore a question of intent"); Francis v. City of Meriden, 129 F.3d 281, 284 (2d Cir. 1997) (holding that the perceived disability definition "turns on the employer's perception of the employee, a question of intent"); Monroe v. Cortland County, 37 F. Supp. 2d 546, 555 (N.D.N.Y. 1999) (stating that the employee "bears the burden of showing the [employer] regarded him as being disabled," and that this question "focuses on the intent of the employer"); *see also* Johnson v. Boardman Petroleum, Inc., 923 F. Supp. 1563, 1569 (S.D. Ga. 1996) (rejecting an employee's perceived disability claim for failure to show "that her termination was motivated by [her employer's] discriminatory animus towards this disability").

90. *See* Milatz v. Frito-Lay, Inc., No. 95-6184, 1997 WL 12933, at *3 (10th Cir. Jan. 15, 1997) (affirming the dismissal of a perceived disability claim alleging that the employer mistakenly regarded the employee's nondisabling carpal tunnel syndrome as a disability, in part because the misperception did not reflect invidious intent).

91. No. C-97-0369 MMC, 1998 WL 730843, at *6 (N.D. Cal. Oct. 8, 1998).

92. *Id.* at *1.

shortly after learning of the impairment.[93] The *Rondon* court dismissed the plaintiff's claim that his employer mistakenly regarded his nondisabling lower back strain as a disability.[94] The court held that because "[b]ack strains are generally not the subject of 'myth, fear, or stereotype' resulting in a prejudicial overestimation of an employee's actual impairment," the employer's mistake was not covered by the perceived disability prong.[95]

Other courts have taken a similarly narrow view of the ADA's perceived disability definition and denied coverage whenever an employer undertakes an individual assessment, even if the assessment results in error.[96] In *Miller v. Airborne Express*, the employee's perceived disability claim was based on an employer's alleged mistaken perception that the employee's nondisabling knee injury was disabling.[97] The plaintiff had injured his knee on the job and was unable to kneel, squat, lift, climb, or stand for extended periods.[98] Although the plaintiff was not substantially limited in any major life activities, his employer refused to consider him for his prior position as a driver/dockworker, purportedly due to an erroneous view of the severity of the plaintiff's condition.[99] Because the court believed that individuals with knee injuries "do not typically suffer from societal prejudice and misconception," and there was no evidence that prejudice motivated the employer's mistake, the court held that the perceived disability prong did not apply.[100]

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93. *Id.*

94. *Id.* at *7.

95. *Id.* at *6 (quoting 29 C.F.R. app. § 1630.2*(l)* (2001)).

96. *See, e.g.*, Wooten v. Farmland Tools, 58 F.3d 382, 386 (8th Cir. 1995) (holding that an employer's misperception of an employee's abilities was not covered by the perceived disability definition because the mistake "was not based upon speculation, stereotype, or myth," but was based on information in a doctor's note provided by the employee); Collins v. Yellow Freight Sys., Inc., 942 F. Supp. 449, 453 (W.D. Mo. 1996) (dismissing employee's perceived disability claim where the employer's misperception about the employee's back injury was not based on "archaic attitudes, erroneous perceptions, and myths" about individuals with disabilities, but instead was based on a doctor's written evaluation); Schluter v. Indus. Coils, Inc., 928 F. Supp. 1437, 1450 (W.D. Wis. 1996) (dismissing employee's perceived disability claim because the employer's mistaken conclusion that the employee's nondisabling vision impairment was actually disabling "was based not on any invidious stereotype . . . , but on plaintiff's failure to respond to his inquiry about other work at the company and her expressed belief that she would be unable to perform any other job").

97. No. 3:98-CV-0217-R, 1999 WL 47242, at *6 (N.D. Tex. Jan. 22, 1999) (interpreting ADA case law and regulations in order to rule on a claim under an analogous state law disability discrimination provision).

98. *Id.* at *1, 4.

99. *Id.* at *1-2.

100. *Id.* at *6 (interpreting the purpose of the perceived disability prong narrowly as "protect[ing] individuals from myths, fears, or stereotypes associated witb certain physical conditions and disabilities"); *see also* Wright v. Ill. Dep't of Corr., 204 F.3d 727, 731 (7th Cir. 2000) (requir-

The discrimination claim in *Howard v. Navistar International Transportation Corp.* met with a similar fate.[101] The *Howard* court held that an employer's mistaken perception of an employee's nondisabling "tennis elbow" as a disability was also beyond the scope of the perceived disability prong.[102] "This provision of the ADA is designed to combat invidious stereotypes regarding disabled members of society," the court explained.[103] Because the employee "failed to produce any evidence of the existence of invidious stereotypes against individuals with tennis elbow," the court held the perceived disability definition to be inapplicable.[104]

While these courts may be correct that individual assessment errors are further from the ADA's "core," this fact is likely to be of little solace to the employees who still find themselves without a job, a raise, or a promotion because an employment decisionmaker acted on a mistaken belief. For that reason, other courts have taken the opposite approach to these nonmotivational misperceptions. These courts have interpreted the perceived disability definition broadly, applying it whenever the employer mistakenly regards a nondisabling impairment as a disability, regardless of the origin of the mistake.[105] For these courts, " 'even an innocent misperception

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ing an employer's mistaken perception of a nondisabling impairment to be "based on 'myth, fear or stereotype' " in order to satisfy the ADA's "regarded as" prong (quoting 29 C.F.R. app. § 1630.2*(l)*); McDowell v. Farmland Indus., Inc., No. 98-3100, 1999 WL 311477, at *2 (10th Cir. May 18, 1999) (same); Muller v. Auto. Club, 897 F. Supp. 1289, 1297 (S.D. Cal. 1995) (same). Although courts could interpret "myths" and "stereotypes" as unintentional forms of discrimination, they appear to equate those terms with conscious prejudice, which they then require as an essential element of a perceived disability claim.

101. 904 F. Supp. 922, 929-30 (E.D. Wis. 1995).

102. *Id.*

103. *Id.*

104. *Id.* at 930; *see also* Barber v. Pepsi-Cola Pers., 78 F. Supp. 2d 683, 691-92 (W.D. Mich. 1999) (holding that the perceived disability prong did not apply to an employer's mistaken perception of an employee's nondisabling shoulder injury because " 'a person with a shoulder injury does not suffer from perception of disability based on myth, fear, or stereotype' " (quoting Blair v. Prof. Corps. Mgmt. Co., No. 97-3593, 1999 WL 17648, at *2 (6th Cir. Jan. 4, 1999)) (citing 29 C.F.R. app. § 1630.2*(l)*)).

105. *See, e.g.*, Riemer v. Ill. Dep't of Transp., 148 F.3d 800, 806-08 (7th Cir. 1998) (sustaining a perceived disability claim even though the employer's misperception of an employee's nondisabling asthma as a disability was based on a doctor's report, not on myth, prejudice, or invidious stereotype); Deane v. Pocono Med. Ctr., 142 F.3d 138, 144 (3d Cir. 1998) (en banc) (finding a triable issue on a perceived disability claim by a registered nurse whose employer exaggerated the gravity of her condition, and holding that whether or not the employer was motivated by prejudice "is not determinative"); Johnson v. Am. Chamber of Commerce Publishers, Inc., 108 F.3d 818, 819 (7th Cir. 1997) ("If for no reason whatsoever an employer regards a person as disabled—if, for example, because of a blunder in reading medical records it imputes to him a heart condition he has never had—and takes adverse action, it has violated the statute unless some other portion of the law affords it a defense."); DiSante v. Henderson, No. CIV. A. 98-5703, 2000 WL 250225, at *1-2, 7, 10 (E.D. Pa. Mar. 2, 2000) (denying employer's summary judgment motion

based on nothing more than a simple mistake of fact as to the severity, or even the very existence, of an individual's impairment can be sufficient to satisfy the statutory definition of a perceived disability.' "[106] These courts do not equate the mistake element of the perceived disability definition with an element of intent; instead, they view the definition as imposing an absolute duty on the employer to get its assessment right.[107] Whether the employer's mistake was motivated by group-based assumptions or not, the employer is held fully liable under the ADA.

The court in *Taylor v. Pathmark Stores, Inc.* described this broad approach to the ADA's perceived disability prong.[108] In *Taylor*, the employer conducted the necessary individual assessment of an employee who had an injured ankle.[109] However, because of a variety of "miscommunications and misinterpretations," the employer mistakenly viewed the nondisabling condition as an actual disability that substantially limited the employee's ability to lift, walk, or stand.[110] While the court agreed with the employer that its mistake was not "infected with stereotypes or prejudice against the disabled," the court still denied the employer's summary judgment motion on the employee's perceived disability claim, holding that "an employer's innocent mistake (which may be a function of 'goofs' or miscommunications) is sufficient to subject it to liability under the ADA."[111] In reaching this conclusion, the court acknowledged

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on a perceived disability claim under the Rehabilitation Act where the employer misperceived the employee's nondisabling obsessive compulsive disorder as a disability, because the employee "need not prove animus on the part of [the] defendant; an innocent mistake may still support liability"); Bicknell v. Thomas Tile & Carpet, Inc., No. 98-C-3256, 1999 WL 261738, at *7 (N.D. Ill. Apr. 16, 1999) (denying employer's summary judgment motion on a perceived disability claim by a salesperson whose carpal tunnel syndrome was allegedly viewed as imposing significant and indefinite lifting restrictions, because " '[e]ven an innocent misperception based on nothing more than a simple mistake of fact' " is covered by the ADA's perceived disability prong (quoting Deane v. Pocono Med. Ctr., 142 F.3d 138, 144 (3d Cir. 1998) (en banc))); *see also* E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1097 (D. Haw. 1980) (noting in dicta that the perceived disability definition in the Rehabilitation Act applies to "those individuals who are perceived as having a handicap, whether an impairment exists or not, but who, because of attitudes *or for any other reason*, are regarded as handicapped by employers" (emphasis added)).

106. *Deane*, 142 F.3d at 144.

107. *See* Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 190-92 (3d Cir. 1999) (holding that an employee may bring a perceived disability claim even if the employer is "innocently wrong about the extent of his or her impairment," because the employer "has the initial responsibility to evaluate employees correctly"); *id.* at 191-92 ("An employer . . . has to be right when it decides that . . . restrictions are permanent and that they prevent the employee from performing a wide class of jobs . . . .").

108. *Id.* at 182-83, 190-92.

109. *Id.* at 183.

110. *Id.* at 188, 190.

111. *Id.* at 182-83, 190-92, 196.

that Congress was concerned with "eliminating society's myths, fears, stereotypes and prejudices with respect to the disabled."[112] But the court interpreted the "regarded as" language more broadly to bar *all* mistakes about employees' limitations, regardless of the origin of the employer's misperception.[113] Even though the employer was "innocently wrong" about the employee's nondisabling condition, the court still applied the perceived disability prong, holding that "prejudice is not required for a successful 'regarded as' claim. . . ."[114]

In reaching its conclusion, the *Taylor* court followed a prior decision in *Deane v. Pocono Medical Center*.[115] The perceived disability discrimination claim in *Deane* was based on a medical center's mistaken belief that a registered nurse's nondisabling wrist injury was a disabling impairment.[116] The Pocono Medical Center had conducted the necessary individual assessment and correctly determined that the employee's injury made her unable to lift more than fifteen to twenty pounds or to perform repetitive manual tasks.[117] However, the nurse alleged that the Pocono Medical Center had also viewed her limitations as "far worse than they actually were," by concluding incorrectly that she was "unable to lift more than ten pounds, push or pull anything, assist patients in emergency situations, [and] move or assist patients in the activities of daily living. . . ."[118] There was evidence that, despite undertaking an individual assessment, the employer "fundamentally misunderstood and exaggerated the limitations that the wrist injury imposed," and mistakenly believed that the nurse was unable to perform CPR, to use medical equipment, or to do any job involving patient care.[119] Even though there was no evidence that group-based

112. *Id.* at 191 (citing Deane v. Pocono Med. Ctr., 142 F.3d 138, 144 (3d Cir. 1998) (en banc)).

113. *Id.* at 182-83, 190-92.

114. *Id.* at 192. The court did make one distinction between perceived disability claims in which the employer's mistake is and is not based on prejudice. *Id.* at 182-83, 192-93. The court decided to recognize a "limitod defense" for employers when there is evidence that the employee was responsible for the employer's mistaken perception, but the defense was only allowed in the "innocent mistake" scenario. *Id.* The court explained that "[i]f an employer regards a plaintiff as disabled based on a mistake in an individualized determination of the employee's actual condition rather than on a belief about the effects of the kind of impairment the employer regarded the employee as having," then the employer will still be subject to a perceived disability claim, but "the employer will have a defense if the employee unreasonably failed to inform the employer of the actual situation." *Id.* at 193.

115. *Id.* at 182-83, 191, 194 (citing *Deane*, 142 F.3d at 144-45).

116. 142 F.3d at 141-46.

117. *Id.* at 141.

118. *Id.* at 142.

119. *Id.* at 142, 145.

assumptions played a role in the employer's misperceptions, the court held that lack of prejudice was "not determinative," and it allowed the employee to bring a perceived disability claim.[120] "Although the legislative history indicates that Congress was concerned about eliminating society's myths, fears, stereotypes, and prejudices with respect to the disabled," the court explained, "even an innocent misperception based on nothing more than a simple mistake of fact" may support an ADA claim.[121]

These two sets of cases illustrate the two extreme positions that most courts have taken on nonmotivational mistakes: either imposing full liability, or imposing no liability at all. On the surface, these two approaches appear to be based simply on differing interpretations of the ADA's statutory language and legislative intent. However, other assumptions appear to be at work below the surface. Although rarely made explicit, courts' views about employers' nonmotivational misperceptions seem to be driven by courts' divergent assumptions about whether these types of mistakes really occur, and if so, just how harmful they really are. Thus, this Article begins by exploring these underlying questions about the origins and consequences of mistakes. Is an employer's misperception of a nondisabling impairment as disabling likely to be caused by something other than animus against or conscious assumptions about "the disabled"? If so, what type of harm is likely to flow from such mistakes? These questions are largely ones about social perception and decisionmaking, which are the stomping grounds not of lawyers, but of cognitive social psychologists.

II. USING SOCIAL COGNITION TO EXPLAIN THE SOURCE AND IMPACT OF EMPLOYERS' MISPERCEPTIONS

> *A man of genius makes no mistakes. His errors are volitional and are the portals of discovery.*
>
> —Ulysses[122]

Cognitive social psychology or "social cognition" studies how the human mind perceives, processes, understands, and responds to social and interpersonal events.[123] The growth of this field reflected

120. *Id.* at 144.

121. *Id.*

122. JOHN BARTLETT, THE SHORTER BARTLETT'S FAMILIAR QUOTATIONS 197 (1964).

123. *See* David L. Hamilton et al., *Social Cognition and Classic Issues in Social Psychology*, *in* SOCIAL COGNITION: IMPACT ON SOCIAL PSYCHOLOGY 1, 2-5 (Patricia G. Devine et al. eds., 1994); *see also* Brown et al., *supra* note 35, at 1493-94 (describing social cognition as the field of

a general shift away from motivation-based models of social psychology, which had focused on individual needs and desires as the source of attitudes and interpersonal behavior.[124] Social cognition theory takes a nonmotivational approach to interpersonal judgment and decisionmaking, by looking for explanations in the information-processing mechanisms of the human brain.[125] Social cognition theorists study the strategies that we use, often outside of our conscious awareness, to select, filter, organize, store, and recall information from our complex perceptual environment, and how we use that information to make social judgments and decisions.[126]

Cognitive social psychologists have discovered that we use a variety of cognitive "shortcuts" to simplify the otherwise overwhelming task of understanding our social world.[127] While these

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psychology that applies methodologies from cognitive psychology to issues in social psychology, by analyzing the "processes though which people perceive and order their social worlds," and by studying "how people interpret, analyze, remember, and use information that they perceive about the social world"); Krieger, *supra* note 36, at 1257 (defining social cognition theory as the sub-discipline of social psychology that studies patterns of human cognition that bias social perception).

124. *See* MILES HEWSTONE, CAUSAL ATTRIBUTION: FROM COGNITIVE PROCESSES TO COLLECTIVE BELIEFS 60 (1989); James L. Hilton, *Interaction Goals and Person Perception, in* ATTRIBUTION AND SOCIAL INTERACTION: THE LEGACY OF EDWARD E. JONES 127, 130-31 (John M. Darley & Joel Cooper eds., 1998).

125. DAVID O. SEARS ET AL., SOCIAL PSYCHOLOGY 142 (6th ed. 1988) (describing the difference between motivational biases that result from conscious needs and desires, and cognitive biases that result from the search for "a coherent, clear understanding of [the] environment[ ]"); Krieger, *supra* note 35, at 1164-65, 1187-88, 1216, 1239 (distinguishing between motivational biases that result from the "intent to discriminate," and cognitive biases that are "an unwelcome byproduct of otherwise adaptive cognitive processes," and arguing that race discrimination often results from the latter); *see also* ARMOUR, *supra* note 35, at 14, 75-76, 154-55 (distinguishing between racial discrimination that is "rooted in conscious animus" and discrimination that stems "from unconscious mental reflexes"); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1130 (1999) (noting that "[s]cholars addressing the problem of discrimination against socially disfavored groups have distinguished between two types of bias in a variety of social settings: 'conscious,' deliberate, or purposeful animus, and 'unconscious,' inadvertent, or automatic forms of bias").

126. *See supra* note 123.

127. *See* HEWSTONE, *supra* note 124, at 94 (explaining that because humans are "capacity-limited information-processors," the need to process large amounts of information requires people to use "heuristics," which are cognitive strategies to simplify complex tasks); Brown et al., *supra* note 35, at 1493-97 (1997) (explaining that the "basic premise of social cognition is 'information overload,' the theory that the normal human mind cannot possibly notice, let alone analyze and use, every bit of social information it encounters," and that people therefore adopt cognitive "shortcuts" to "process information as quickly and efficiently as possible"); *see also* RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 254-55, 269-70 (1980) (explaining a variety of efficient cognitive processing techniques); John S. Carroll & John W. Payne, *The Psychology of the Parole Decision Process: A Joint Application of Attribution Theory and Information Processing Psychology, in* COGNITION AND SOCIAL BEHAVIOR 13, 22 (John S. Carroll & John W. Payne eds., 1976) (describing studies demonstrating that

cognitive shortcuts are efficient and typically adaptive—in fact, even essential—researchers have discovered that they often lead to predictable perceptual errors or "cognitive biases."[128] We are imperfect information processors, and we all make mistakes in assessing social events. These perceptual mistakes are not motivational in origin. They are not caused by conscious needs or desires, in the way that group-based animus may cause a prejudiced employer to attribute traits mistakenly to every member of a disfavored group, or the way that even a "rational" statistical discriminator might use group-based generalizations as a proxy for relevant characteristics that are costly to assess on an individual basis. Rather, these errors are the unintentional result of normal but imperfect, and often automatic and unconscious, cognitive processing mechanisms.[129] These cognitive biases creep into two stages of the employment decisionmaking process: when the decisionmaker assesses an employee's past behavior, and when the decisionmaker makes judgments about what the employee's future performance is likely to be. Parts A through D below analyze two branches of social cognition that study these decisionmaking stages: the fields of causal attribution theory and prediction bias.

"humans often resort to heuristic procedures when faced with such tasks as probability estimation and prediction").

128. *See* HEWSTONE, *supra* note 124, at 94 (explaining that cognitive shortcuts or "heuristics" are effective because they allow people to simplify complex attribution tasks efficiently, but the outcomes are not always normatively correct); SEARS ET AL., *supra* note 125, at 134-41 (describing a variety of "cognitive biases" that result from our automatic cognitive simplification mechanisms); Brown et al., *supra* note 35, at 1493-97 (explaining how the efficiency of cognitive shortcuts, of which people are "generally unaware," comes at the price of "being less than fully logical, thorough, or accurate," and being prone to "exaggerations, oversimplifications, [and] generalizations"); Carroll & Payne, *supra* note 127, at 22 (explaining that while our cognitive heuristics are necessary to simplify social judgments and are often accurate, they also cause systematic mistakes); Krieger, *supra* note 36, at 1257 (explaining that social cognition theory has identified "how patterns of human cognition, while adaptive in many important respects, lead to systematic errors which bias social perception and judgment in a variety of predictable ways"); *cf.* Krieger, *supra* note 35, at 1216 (arguing that the primary sources of racial discrimination are cognitive biases tbat are "an unwelcome byproduct of otherwise adaptive cognitive processes"). *See generally* Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, *in* 10 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 173, 198-200 (Leonard Berowitz ed., 1977) (identifying and analyzing cognitive processing mistakes); Joshua Susskind et al., *Perceiving Individuals and Groups: Expectancies, Dispositional Inferences, and Causal Attributions*, 76 J. PERSONALITY & SOC. PSYCHOL. 181, 181-82 (1999) (analyzing the unique cognitive processing errors that occur when people are perceiving individuals rather than groups).

129. *See supra* note 125.

A. Errors in Assessing the Past

1. Causal Attribution Theory

Causal attribution theory, which is a branch of the broader field of social cognition, focuses on one type of cognitive processing mechanism: the process by which people arrive at explanations for social events.[130] When people observe others' actions or behavior, they ask themselves what the cause of that conduct might be.[131] Causal attribution is the cognitive process by which people answer that question and link an observed behavior or other social event to some causal antecedent.[132] The goal of causal attribution theory is to understand "how a person infers or attributes cause and what happens once he does."[133] According to causal attribution theorists, the attribution process is ubiquitous. We constantly make causal attributions about virtually every salient event in our social lives.[134] Causal attributions are usually rapid and automatic assessments, and we are often unaware that we are making a causal inference at all.[135] People make causal attributions of other people's behavior as a way to understand their social environment.[136] These attributions are highly adaptive because an understanding of past behavior allows people to predict future behavior and, in turn, to feel more in

130. *See* SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 57-95 (1991); HEWSTONE, *supra* note 124, at 37; SEARS ET AL., *supra* note 125, at 117; Carroll & Payne, *supra* note 127, at 18; Irene Hanson Frieze, *The Role of Information Processing of Making Causal Attributions for Success and Failure, in* COGNITION AND SOCIAL BEHAVIOR 95, 95 (John S. Carroll & John W. Payne eds., 1976); Gerald Metalsky & Lyn Y. Abramson, *Attributional Styles: Toward a Framework for Conceptualization and Assessment, in* ASSESSMENT STRATEGIES FOR COGNITIVE-BEHAVIORAL INTERVENTIONS 13, 26 (Philip C. Kendall & Steven D. Holan eds., 1981); Ross, *supra* note 128, at 174; Michael Ross & Garth J.O. Fletcher, *Attribution and Social Perception, in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 73 (3d ed. 1985).

131. *See* HEWSTONE, *supra* note 124, at 37.

132. *See id.*; Carroll & Payne, *supra* note 127, at 18; Frieze, *supra* note 130, at 95; Metalsky & Abramson, *supra* note 130, at 26; Ross, *supra* note 128, at 175; Ross & Fletcher, *supra* note 130, at 73.

133. Carroll & Payne, *supra* note 127, at 18.

134. *See* Frieze, *supra* note 130, at 95; Metalsky & Abramson, *supra* note 130, at 37; *see also* Reid Hastie, *Causes and Effects of Causal Attribution*, 46 J. PERSONALITY & SOC. PSYCHOL. 44, 44 (1984) ("When we perceive events we are almost irresistibly drawn to seek their sources or causes. This tendency is especially strong when the events are the actions of other people.").

135. *See* Metalsky & Ahramson, *supra* note 130, at 26, 37.

136. *See* HEWSTONE, *supra* note 124, at 61; SEARS ET AL., *supra* note 125, at 118; Frieze, *supra* note 130, at 95; Richard R. Lau & Dan Russell, *Attributions in the Sports Pages*, 39 J. PERSONALITY & SOC. PSYCHOL. 29, 29 (1980); Ross & Fletcher, *supra* note 130, at 73; Bernard Weiner, *A Theory of Motivation for Some Classroom Experiences*, 71 J. EDUC. PSYCHOL. 3, 3 (1979).

control of social interactions.[137] Thus, causal attributions are a very efficient way to help people interact and make social judgments and decisions.[138]

When employers are engaged in the ADA's required individual assessment of employees' impairments, causal attributions are very likely to occur. The more involved the observers are in the situation, the more likely they are to engage in causal inferences about other people's behavior.[139] Specifically, an observer is more likely to make causal attributions for another person's behavior if the observer expects to interact with the other person in the future,[140] if the observer is required to predict the other person's future behavior,[141] if the observer wants to control the other person's conduct,[142] or if the observer is in some way dependent on the other person's performance for achieving a desired goal.[143] All of these

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137. *See* HEWSTONE, *supra* note 124, at 61; SEARS ET AL., *supra* note 125, at 117-18; Carroll & Payne, *supra* note 127, at 18; Frieze, *supra* note 130, at 95; Harold H. Kelly, *Attribution in Social Interaction*, *in* ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR 1, 22 (Edward E. Jones et al. eds., 1972); Krieger, *supra* note 36, at 1281 (explaining that, "[r]ightly or wrongly, we assume that understanding why something has happened will improve our power to predict or even control what will happen in the future"); Lau & Russell, *supra* note 136, at 29; Metalsky & Abramson, *supra* note 130, at 17; Jerri P. Town & John H. Harvey, *Self-Disclosure, Attribution, and Social Interaction*, 44 SOC. PSYCHOL. Q. 291, 291 (1981); Oscar Ybarra & Walter G. Stephan, *Attributional Orientations and the Prediction of Behavior: The Attribution-Prediction Bias*, 76 J. PERSONALITY & SOC. PSYCHOL. 718, 718, 726 (1999). *See generally* Ross & Fletcher, *supra* note 130, at 104 (collecting social science studies that provide empirical support for the hypothesis that "people make attributions, in part, to enhance their control over the environment").

138. *See* Lau & Russell, *supra* note 136, at 29; *cf.* ARMOUR, *supra* note 35, at 36 (making a similar observation about the adaptive value of stereotypes, which "are merely statistical generalizations, probabilistic rules of thumb that, when accurate, help people make speedy and often difficult decisions in a world of imperfect information").

139. *See* John H. Harvey et al., *Unsolicited Interpretation and Recall of Interpersonal Events*, 38 J. PERSONALITY & SOC. PSYCHOL. 551, 552 (1980).

140. *See* HEWSTONE, *supra* note 124, at 45-46 (providing empirical support); *see, e.g.*, Harvey et al., *supra* note 139, at 559-62 (describing a study finding that subjects who described their thoughts and feelings after watching videotaped episodes of people engaging in various behaviors provided more causal attributions in their descriptions when they anticipated having a future interaction with one of the videotaped actors); Kerri Yarkin-Levin, *Anticipated Interaction, Attribution, and Social Interaction*, 46 SOC. PSYCHOL. Q. 302, 304-09 (1983) (describing a similar study with similar results).

141. *See* HEWSTONE, *supra* note 124, at 43 (providing empirical support); Ross & Fletcher, *supra* note 130, at 93 (same); *see, e.g.*, John S. Carroll & Richard L. Weiner, *Cognitive Social Psychology in Court and Beyond*, *in* COGNITIVE SOCIAL PSYCHOLOGY 213, 227-28 (Albert H. Hastorf & Alice M. Isen eds., 1982) (describing a study finding that parole decisionmakers who were required to predict inmates' risk of future criminal behavior were particularly likely to make causal attributions for the inmates' prior crimes).

142. *See* Ross & Fletcher, *supra* note 130, at 93 (providing empirical support).

143. *See* Hastie, *supra* note 134, at 45 (providing empirical support); Thomas A. Pyszczynski & Jeff Greenberg, *Role of Disconfirmed Expectancies in the Instigation of Attributional Processing*, 40 J. PERSONALITY & SOC. PSYCHOL. 31, 32 (1981) (summarizing research demonstrating

circumstances that tend to increase observers' causal attribution activity are present in an employer-employee interaction. The employer is highly involved in job-related decisions such as hiring, firing, and promotion. This involvement is heightened because the employer expects to have long-term interactions with employees who are hired or retained, and therefore the employer must predict what the employee's future performance is likely to be. Because the employer's business outcome relates to employee productivity, the employer wants to control employee performance, upon which the employer's bottom line ultimately depends. Thus, social science research predicts that an employer's decisionmaking process about employees is particularly likely to trigger the cognitive processes involved in causal attribution.

In addition to routine employee evaluations at times of hiring, firing, and promotion, employers also assess employees when performance or behavior raises a question about the employees' capabilities. Not surprisingly, cognitive social psychologists have demonstrated that observers make more causal attributions for another person's behavior when asked or required to provide an explanation,[144] which is typically the case when an employer must decide whether or not to respond to a particular instance of employee conduct.[145] In addition, observers engage in increased causal attribution activity after observing an unexpected behavior[146] or a

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"that the perceiver's outcome dependency on a target person may be another determinant of the onset of attrihutional processes").

144. *See* HEWSTONE, *supra* note 124, at 111; NISBETT & ROSS, *supra* note 127, at 183; Ross & Fletcher, *supra* note 130, at 93.

145. *See* Blanck & Marti, *supra* note 37, at 355-56 (describing one general category of perceived disability claims that "involve[ ] alleged employment discrimination . . . in circumstances where the appropriateness of an employee's workplace behavior is at issue . . . [but] the behavior at issue is not always related to an underlying disability recognized by the law").

146. *See* HEWSTONE, *supra* note 124, at 43-45 (1989) (providing empirical support); SEARS ET AL., *supra* note 125, at 121 (same); Hastie, *supra* note 134, at 44-45, 48, 50, 52-53 (same); Ross & Fletcher, *supra* note 130, at 93 (same); Weiner, *supra* note 136, at 4 (same); *see also* Bertram F. Malle & Joshua Knobe, *Which Behaviors Do People Explain? A Basic Actor-Observer Asymmetry*, 72 J. PERSONALITY & SOC. PSYCHOL. 288, 288-89 (1997) (explaining why unexpected events are so likely to elicit causal inferences).

For example, one early study found that unexpected outcomes of sporting events elicited more causal attributions in the newspaper sports pages than did sporting events with expected outcomes. *See* Lau & Russell, *supra* note 136, at 34-35. In another study, subjects observed various conduct by a confederate actor. *See* Pyszczynski & Greenberg, *supra* note 143, at 33-36. In some situations, the actor's conduct confirmed the observer's expectations: the actor either agreed to a request for a very small favor or refused a request for a very large favor. *See id.* In other situations, the actor's conduct disconfirmed the observer's expectations: the actor either refused a request for a very small favor or agreed to a request for a very large favor. *See id.* The study found that subjects sought out attribution-relevant information significantly more in the disconfirming than the confirming interactions. *See id.*

negative event,[147] particularly when the other person fails to obtain a desired goal.[148] Those are precisely the types of events that would prompt an employer to evaluate an employee's capabilities. Recall that most perceived disability discrimination claims involve employees who *do* possess some type of nondisabling physical or mental impairment, which the employer concludes is actually disabling.[149] In the typical case, the employer's evaluation process is triggered when a previously nonimpaired employee suffers an illness or injury that might impact the employee's performance, or when the employer otherwise recognizes that an impairment exists. The employer often must assess whether conduct is related to the impairment, determine the gravity of the impairment, and judge the likelihood that the impairment will impact performance in the future. That scenario contains all of the ingredients for increasing the likelihood that the employer will use causal attributions in the decisionmaking process.

The fact that an employer's evaluation of an employee's impairment is likely to involve causal attributions, however, does not by itself shed any particular light on the origins of perceived disabilities. To assess the origins of perceived disabilities, one needs to know not only that employment decisionmakers are using causal attributions, but also whether the causal attribution process is contributing to misperceptions. If the causal attribution process can explain why an employer might erroneously regard a nondisabling impairment as a disability, that would help answer the underlying question of whether perceived disabilities indeed may result from nonmotivational mistakes.

Causal attribution theorists can assist in this endeavor. These researchers have discovered that although the causal attribution process is typically effective and highly adaptive, its utility does not come without a price. While our rapid and often unconscious attribution process has the benefit of extraordinary efficiency, it yields imperfect results. Social scientists have demonstrated not only that people *will* make perceptual errors during the causal attribution process, but, more importantly, they have also

147. *See* HEWSTONE, *supra* note 124, at 46 (providing empirical support); Krieger, *supra* note 36, at 1267 (noting that "attributions are much more common following negative events than following positive events"); *see also* Malle & Knobe, *supra* note 146, at 288-89 (explaining why negative events are so likely to elicit causal inferences). *See generally* David L. Hamilton & Robert K. Gifford, *Illusory Correlation in Interpersonal Perception: A Cognitive Basis of Stereotypic Judgments*, 12 J. EXPERIMENTAL SOC. PSYCHOL. 392 (1976) (providing empirical support).

148. *See* HEWSTONE, *supra* note 124, at 44-45, 111 (providing empirical support).

149. *See supra* notes 58-63 and accompanying text.

identified the *specific types of errors* that people are likely to make. These researchers have characterized potential causes along three primary dimensions, which are described in Part II.A.2, and they have discovered predictable attribution biases along each dimension. More specifically, causal attribution theorists have demonstrated that we systematically tend to overattribute to certain types of causes, and we systematically tend to underattribute to others.[150] By mapping these known causal attribution biases onto the elements of an ADA perceived disability claim, the analysis in Part II.A.3 will show that we predictably err in ways that tend to *facilitate* misperceptions of nondisabling conditions as disabling. In other words, the social science evidence supports the view that perceived disabilities can have purely cognitive origins, independent from invidious prejudice or other forms of group-based decisionmaking, and that these types of errors may be a fairly common event.

2. The Causal Attribution Dimensions

When a person (the "observer") views the behavior or performance of another person (the "actor"), particularly under the conditions described above, the observer will rapidly assign a "cause" to the actor's conduct.[151] According to causal attribution theorists, observers attribute social events to causes that lie along three primary dimensions: (1) internal versus external; (2) stable versus variable; and (3) global versus specific.[152]

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150. *See* HEWSTONE, *supra* note 124, at 60 (explaining that people demonstrate clear biases by making rapid judgments from limited information); SEARS ET AL., *supra* note 125, at 134 (same); Lyn Y. Abramson et al., *Learned Helplessness in Humans: Critique and Reformulation*, 87 J. ABNORMAL PSYCHOL. 49, 59 (1978) (noting support for finding "systematic biases and errors in the formation of attributions").

151. *See* HEWSTONE, *supra* note 124, at 37; Metalsky & Abramson, *supra* note 130, at 26, 37.

152. *See* Metalsky & Abramson, *supra* note 130, at 45-46; Christopher Peterson et al., *The Attributional Style Questionnaire*, 6 COGNITIVE THERAPY & RES. 287, 288 (1982); Martin E.P. Seligman et al., *Depressive Attributional Style*, 88 J. ABNORMAL PSYCHOL. 242, 242-43 (1979).

Some social scientists have theorized the existence of a fourth causal attribution dimension that characterizes causes as either "volitional" or "nonvolitional," based on how much control the actor has over the outcome. *See, e.g.*, HEWSTONE, *supra* note 124, at 33; SEARS ET AL., *supra* note 125, at 120; Weiner, *supra* note 136, at 6. However, social scientists have not agreed uniformly that this dimension exists independent from the other dimensions. *See, e.g.*, HEWSTONE, *supra* note 124, at 68. In addition, ADA case law holds that the volitional nature of one's impairment is not legally relevant. *See* Cook v. Rhode Island, 10 F.3d 17, 24 (1st Cir. 1995) (rejecting an employer's argument that an employee's morbid obesity could not be covered by the ADA if it was a voluntary condition under the employee's control). Similarly, some recent research has criticized attribution scholarship for overemphasizing the internal/external dimension, arguing that an even more nuanced taxonomy would better explain naturally occurring inferential behavior. *See* Bertram F. Malle et al., *Conceptual Structure and Social Functions of Behavior Explanations: Beyond Person—Situation Attributions*, 79 J. PERSONALITY & SOC. PSYCHOL. 309, 309-18 (2000)

The first causal attribution dimension characterizes potential causes as either "internal" or "external" to the actor.[153] When the observer views the actor's behavior, the observer identifies either something about the actor, or something about the environment or situation, as the primary cause of the social event.[154] The former are internal attributions; the latter are external attributions.[155] If the observer concludes that the actor's behavior was caused by the actor's effort, friendliness, impatience, or intelligence, for example, the observer is making an internal attribution.[156] If the observer concludes that the actor's behavior was caused by the weather, the difficulty of the task, a looming deadline, or even luck, the observer is making an external attribution.[157] In other words, internal causal attributions involve "something about the person" who is being observed, while external causal attributions involve "something about the situation" in which the actor's behavior is taking place.[158]

The second causal attribution dimension characterizes potential causes as either "stable" or "variable."[159] Stable causes are

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(arguing that behavior explanations can also be distinguished as "reasons, causal histories of reasons, and enabling factors"). However, the three standard causal attribution dimensions still dominate attribution literature and research.

153. *See* HEWSTONE, *supra* note 124, at 30-31 (explaining the historical development of the internal/external dimension); SEARS ET AL., *supra* note 125, at 118 (identifying the internal/external dimension as the "central issue in most perceptions of causality"); Ross, *supra* note 128, at 184 (coining the term, "fundamental attribution error," to describe the tendency to overattribute others' behavior to internal rather than external causes). This dimension has also been referred to as the "person" versus "environment" dimension, or the "dispositional" versus "situational" dimension, but the internal versus external description is the most flexible concept to encompass these other taxonomies. *See* HEWSTONE, *supra* note 124, at 30-31; SEARS ET AL., *supra* note 125, at 119.

154. *See* HEWSTONE, *supra* note 124, at 30-31; SEARS ET AL., *supra* note 125, at 119; Ross, *supra* note 128, at 184.

155. *See* HEWSTONE, *supra* note 124, at 30-31; SEARS ET AL., *supra* note 125, at 119; Ross, *supra* note 128, at 184.

156. *See* HEWSTONE, *supra* note 124, at 30; SEARS ET AL., *supra* note 125, at 119; Weiner, *supra* note 136, at 6. Internal attributions include all causes internal to the actor to whose behavior the observer is trying to attach a causal antecedent, including moods, attitudes, personality traits, abilities, emotions, preferences, health, or physical or mental conditions. *See* HEWSTONE, *supra* note 124, at 30; SEARS ET AL., *supra* note 125, at 119; Weiner, *supra* note 136, at 6.

157. *See* HEWSTONE, *supra* note 124, at 30; SEARS ET AL., *supra* note 125, at 119; Weiner, *supra* note 136, at 6. External attributions include all causes external to the actor to whose behavior the observer is trying to attach a causal antecedent, including aspects of the environment or task, pressure from the situation or others, and rewards or punishments. *See* HEWSTONE, *supra* note 124, at 30; SEARS ET AL., *supra* note 125, at 119; Weiner, *supra* note 136, at 6.

158. Peterson et al., *supra* note 152, at 288; *see* Ross, *supra* note 128, at 184.

159. *See* HEWSTONE, *supra* note 124, at 33; SEARS ET AL., *supra* note 125, at 119; Weiner, *supra* note 136, at 6. Some researchers refer to this dimension as the "stable" versus "unstable" dimension. *See, e.g.*, Weiner, *supra* note 136, at 6.

relatively permanent features that are likely to produce the same outcome or behavior in the same situation at a different point in time.[160] In contrast, variable causes are relatively fleeting features that are likely to produce different outcomes or behavior in the same situation over time.[161] Stable attributions thus identify "non-transient" causes, while variable attributions identify causes that are "transient."[162] An observer who attributes an actor's performance to the actor's intelligence, for example, is making a stable attribution.[163] Because an actor's intelligence level typically remains constant over time, that causal antecedent suggests that the actor would perform similarly every time that the actor faces a particular task. On the other hand, an observer who attributes an actor's behavior to the actor's effort or to luck is making a variable attribution.[164] Because an actor's effort or the vagaries of "luck" are likely to fluctuate, those causal antecedents suggest that the actor may perform differently the next time that the actor is facing the same situation.

As these examples illustrate, the stable/variable dimension cuts across or is orthogonal to the internal/external dimension. Internal causes can be stable or variable, as can external causes.[165] For example, intelligence is an internal and stable causal attribution, whereas effort is an internal and variable causal attribu-

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160. *See* HEWSTONE, *supra* note 124, at 33; SEARS ET AL., *supra* note 125, at 119; Weiner, *supra* note 136, at 6-8; *see also* Ross & Fletcher, *supra* note 130, at 90 (explaining that when an observer attributes an actor's performance to a stable cause, it increases the observer's expectations that the actor will perform similarly on the same task in the future).

161. *See* HEWSTONE, *supra* note 124, at 33; SEARS ET AL., *supra* note 125, at 119; Weiner, *supra* note 136, at 6.

162. *See* Peterson et al., *supra* note 152, at 288; *see also* Abramson et al., *supra* note 150, at 56 ("Stable factors are thought of as long-lived or recurrent, whereas unstable factors are short-lived or intermittent."); Metalsky & Abramson, *supra* note 130, at 23 ("Stable factors are fixed and likely to persist over time whereas unstable factors are variable and unlikely to persist over time.").

163. *See, e.g.*, SEARS ET AL., *supra* note 125, at 119 (listing "intelligence" as an example of a stable causal attribution).

164. *See, e.g.*, SEARS ET AL., *supra* note 125, at 119 (listing "effort" as an example of a variable causal attribution); Weiner, *supra* note 136, at 5-6 (listing "luck" as an example of a variable causal attribution).

165. *See* HEWSTONE, *supra* note 124, at 33; SEARS ET AL., *supra* note 125, at 119; Weiner, *supra* note 136, at 6.

tion.[166] Task difficulty is an external and stable causal attribution, whereas luck is an external and variable causal attribution.[167]

The first two causal attribution dimensions also cut across or are orthogonal to the third dimension, which characterizes potential causes as either "global" or "specific."[168] Global causes can be internal or external and stable or variable, just as specific causes can be internal or external and stable or variable.[169] Whereas the stable/variable dimension captures the concept of "temporal generalization," meaning whether or not the same outcome will occur in the same situation at different times, the global/specific dimension captures the concept of "stimulus generalization," meaning whether or not the same outcome will occur with different situational stimuli.[170] Global causes are factors that are likely to produce the same outcome or behavior in different situations.[171] Specific causes are factors that are likely to produce different outcomes or behavior when the situation is changed.[172] For example, if the actor fails a math exam, an observer might attribute the failure to the actor's generalized intelligence (e.g., "the actor is dumb"), or the observer might attribute the failure to task-specific ability (e.g., "the actor has poor math skills").[173] The former is a global attribution because it suggests that the actor also will perform similarly in different situations (i.e., the actor also will fail an English exam).[174] The latter is a situation-specific attribution, which suggests that the actor might perform differently if the situation changed (i.e., the actor might pass an English exam).[175]

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166. *See, e.g.*, SEARS ET AL., *supra* note 125, at 119; *see also id.* at 117 (explaining that a personality trait is an internal and stable causal attribution, while a temporary illness, such as a stomach ache, is an internal and variable causal attribution); Weiner, *supra* note 136, at 4-7 (listing "ability" as an example of an internal and stable causal attribution, and "effort" as an example of an internal and variable causal attribution).

167. *See* Weiner, *supra* note 136, at 4, 6-7; *see also* Abramson et al., *supra* note 150, at 56.

168. *See* Abramson et al., *supra* note 150, at 56-57; Peterson et al., *supra* note 152, at 288.

169. *See* Abramson et al., *supra* note 150, at 57.

170. Weiner, *supra* note 136, at 7.

171. *See* Abramson et al., *supra* note 150, at 57 (explaining that "[g]lobal factors affect a wide variety of outcomes"); Peterson et al., *supra* note 152, at 288 (explaining that "causes present in a variety of situations" are considered global).

172. *See* Abramson et al., *supra* note 150, at 57 (explaining that "specific factors" do not "affect a variety of outcomes"); Peterson et al., *supra* note 152, at 288 (explaining that specific causes are not "present in a variety of situations," but are "more circumscribed").

173. *See* Weiner, *supra* note 136, at 7.

174. *See id.* (distinguishing between task-specific abilities and general traits).

175. *See id.*

A single cause may be characterized by its location on each of these three primary causal attribution dimensions.[176] For example, attributing an actor's poor performance to the actor's incompetence is an internal, stable, and global causal attribution. Incompetence is something about the actor, it is likely to be nontransient and produce similar performance for the actor on the same task in the future, and it probably will produce poor performance for the actor in other situations as well.[177] On the other hand, attributing the actor's poor performance to the difficulty of the task is an external, stable, and specific causal attribution. Task difficulty is something about the environment, it is likely to be nontransient and produce similar performance when the actor faces the same task at other times, but the actor may perform quite differently when the task is changed.[178] Thus, the three causal attribution dimensions form a two-by-two-by-two array of causal attribution categories—(internal/external) x (stable/variable) x (global/specific)—making eight different categories in all.[179]

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176. *See* Abramson et al., *supra* note 150, at 67 (discussing studies of causal attributions of depressed students). Some social scientists have criticized causal attribution theory because of the potential variations in the way experimenters can categorize the same explanation by subjects. *See, e.g.*, Peterson et al., *supra* note 152, at 289 ("[T]here is no guarantee that an attribution regarded by an attribution theorist as, for example, unstable is so regarded by all subjects; some may believe that low effort is a stable characteristic of the individual, while others may perceive it as unstable."); *see also* Malle et al., *supra* note 152, at 310 (arguing that attribution research is flawed because it focuses solely on the "linguistic surface" of subjects' responses, while ignoring the underlying conceptual structure of the responses). However, most cognitive attribution theorists believe that there is sufficient consistency in categorization to make the dimensions useful as a research construct. *See* Peterson et al., *supra* note 152, at 292 (describing experimental methods that undermine this criticism). One way that experimenters have addressed this criticism is by asking subjects in causal attribution studies not just to attribute a social event to a particular cause, but also to characterize the cause along the three dimensions. *See id.* For example, in a study that looked at the causal attributions that people make for failing to obtain a job, the experimenters' questionnaire asked the subject to identify what the subject believed was the major cause of the failure, and also to rank from one to seven whether that cause was "due to something about you or to something about other people or circumstances," whether that cause would "again be present" in the same situation in the future, and whether that cause would "also influence other areas of your life." *See id.* In that way, experimenters could be certain that their categorization of a particular cause along the three dimensions was similar to others' categorization of that same cause.

177. *See* Abramson et al., *supra* note 150, at 67.

178. *See id.*

179. *See* Seligman et al., *supra* note 151, at 242-43 (identifying the three causal attribution dimensions); *see also* Abramson et al., *supra* note 150, at 57 (same); Peterson et al., *supra* note 152, at 288 (same).

To illustrate the eight causal attribution categories, consider the following scenario: a student who is taking the GRE has just completed the math portion and, during the break before the English portion, the student tells a friend that she has performed very poorly on the math exam. *Cf.* Abramson et al., *supra* note 150, at 56-58, 57 tbl. 2 (using a similar example). The friend ponders whether the student will do poorly on the upcoming English portion of the exam,

3. Mapping the Causal Attribution Dimensions onto the Elements of an ADA Perceived Disability Claim

For a nondisabled employee to state a perceived disability discrimination claim, the employee must show that the employer mistakenly regarded the employee as having an actually disabling condition.[180] As explained above, the ADA defines an actual disability as a physical or mental "impairment" that "substantially limits" one or more "major life activities."[181] Thus, to meet the perceived disability definition, a nondisabled employee must show that the employer mistakenly regarded the employee as having a physical or mental impairment that substantially limits one of the employee's major life activities, when one or more of those elements actually do not exist. Because employers often arrive at their assessments by making attributions for an employee's behavior or performance, the elements of the perceived disability definition may be mapped onto the causal attribution dimensions defined above.

First, for an employer to regard an employee as having a physical or mental "impairment," the employer must make an internal rather than an external causal attribution. The ADA defines an impairment as:

> 1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

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and whether the student would do better by taking the math portion again the next time the GRE is given. During this thought process, the friend is likely to attribute the student's poor math performance to one of many potential causes, including: (1) that the student lacks intelligence, which is an internal, stable, and global cause; (2) that the student lacks math ability, which is an internal, stable, and specific cause; (3) that the student was exhausted or ill, which is an internal, variable, and global cause; (4) that the student got fed up with doing math problems, which is an internal, variable, and specific cause; (5) that the testing service gives unfair tests, which is an external, stable, and global cause; (6) that the testing service asks unfair math problems, which is an external, stable, and specific cause; (7) that this was an unlucky day for test-takers, which is an external, variable, and global cause; or (8) that the student was unlucky during the math portion of the test, which is an external, variable, and specific cause. *See id.* The friend is most likely to predict poor performance on the upcoming English portion of the exam and on a future GRE math exam if the friend makes an internal, stable, and global causal attribution for the student's poor performance on the prior math exam. *See id.* at 62.

180. 42 U.S.C. § 12102(2)(C) (1994); Sutton v. United Air Lines, Inc., 527 U.S. 471, 489-90 (1999); 29 C.F.R. app. § 1630.2*(l)* (2001).

181. § 12102(2)(A).

> 2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[182]

The regulations specifically exclude from this definition any condition that relates to the employee's external environment rather than to the employee's internal, physiological or psychological make-up.[183] According to the regulations, "environmental, cultural, and economic disadvantages are not impairments" for purposes of the ADA.[184] The regulations list poverty and lack of education as examples of such external conditions.[185]

This distinction means that an employer must make an internal causal attribution for a nondisabled employee's behavior in order for the perceived disability prong to protect that employee. If an employer observes an employee having difficulty reading, for example, the perceived disability prong will only apply if the employer attributes the difficulty to a cause that originates within the employee. As the regulations explain:

> [A]n individual who is unable to read because he or she was never taught to read would not be an individual with a disability because lack of education is not an impairment. However, an individual who is unable to read because of dyslexia would be an individual with a disability because dyslexia, a learning disability, is an impairment.[186]

Thus, if observers tend to err in the direction of making internal, rather than external, attributions for employee behavior, that type of cognitive bias would tend to facilitate the occurrence of perceived disabilities. In fact, that is exactly what social psychologists have found.

The first causal attribution bias that researchers have discovered is that when observers make attributions for other people's behavior, the observers tend to overattribute to internal causes and underattribute to causes that are external.[187] This cognitive bias is

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182. 29 C.F.R. § 1630.2(h) (2001).

183. *See id.*

184. 29 C.F.R. app. § 1630.2(j); *id.* § 1630.2(h) ("It is important to distinguish between conditions that are impairments and . . . environmental, cultural and economic characteristics that are not impairments.").

185. *See* 29 C.F.R. app. § 1630.2(h).

186. *Id.* § 1630.2(j).

187. *See* Ross, *supra* note 128, at 193-94. Most social scientists attribute the development of research on this attribution bias to a seminal study in 1967. *See, e.g.*, HEWSTONE, *supra* note 124, at 50-51 (citing Edward E. Jones & Victor A. Harris, *The Attribution of Attitudes*, 3 J. EXPERIMENTAL SOC. PSYCHOL. 1 (1967)); NISBETT & ROSS, *supra* note 127, at 121 (same); SEARS ET AL., *supra* note 125, at 124-26 (same). In that study, experimenters asked subjects to read another student's exam answer from a political science course. *See* Jones & Harris, *supra*, at 4. Some subjects were told that the exam question asked the student to criticize Fidel Castro's

so robust and pervasive that social scientists call it "the fundamental attribution error."[188] The fundamental attribution error refers to observers' consistent tendency to overestimate the role of an actor's internal, dispositional characteristics and to underestimate the power of the situation in controlling the actor's behavior.[189]

In one well-known experiment demonstrating this phenomenon, experimenters asked subjects to observe two actors participate in a general knowledge "quiz game."[190] The subjects watched as the experimenter randomly designated one actor to be the "questioner" and one actor to be the "contestant."[191] The experimenter told the subjects that the questioner's task was to write ten general knowledge questions that were difficult and esoteric and that would display the questioner's own particular expertise.[192] The subjects then watched the questioner pose the ten questions to the contestant.[193] Given the setup of the game, it was virtually inevitable that the

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Cuba; some subjects were told that the exam question asked the student to defend Fidel Castro's Cuba; and some subjects were told that the exam question asked the student to write either a defense or a criticism. *See id.* The subjects were then asked to predict the student's true attitudes. *See id.* Even when the exam question assigned the direction of the essay (an external cause), the subjects incorrectly attributed the essay to the personal beliefs of the student (an internal cause). *See id.* at 5-7. Follow-up studies consistently confirmed that "the average subject in these experiments attaches insufficient weight to the constraining force of authoritative directions to behave in a certain way." *Id.* at 8-11, 22.

More recent research has identified this bias as partially culturally determined, finding that non-European-American subjects use more situational attributions for others' behavior. *See, e.g.*, Leonard S. Newman, *Why Are Traits Inferred Spontaneously? A Developmental Approach*, 9 SOC. COGNITION 221, 247 (1991); E. Rhee et al., *Spontaneous Self-Description and Ethnic Identities in Individualistic and Collectivistic Cultures*, 69 J. PERSONALITY & SOC. PSYCHOL. 142, 142-52 (1995).

188. Ross, *supra* note 128, at 184, 193-94 (coining the term and stating that this attribution bias "has been noted by many theorists" and "disputed by few"); *see also* Yaacov Trope & Ruth Gaunt, *Processing Alternative Explanations of Behavior: Correction or Integration?*, 79 J. PERSONALITY & SOC. PSYCHOL. 344, 344 (2000) (concluding that "[f]orty years of social psychological research . . . have provided considerable empirical support" for this finding). Empirical support for the fundamental attribution error dates as far back as 1944. *See* HEWSTONE, *supra* note 124, at 13 (citing F. Heider, *Social Perception and Phenomenal Causality*, 51 PSYCHOL. REV. 358, 361 (1944) (finding that individuals have a tendency to perceive persons as origins of events and underestimate other factors that are responsible for the event)).

189. *See* HEWSTONE, *supra* note 124, at 50; NISBETT & ROSS, *supra* note 127, at 120-22; SEARS ET AL., *supra* note 125, at 136; Ross, *supra* note 127, at 184, 193-94; Lee D. Ross et al., *Social Roles, Social Control and Biases in Social-Perception Processes*, 35 J. PERSONALITY & SOC. PSYCHOL. 485, 492 (1977); *see also* Krieger, *supra* note 36, at 1329; Krieger, *supra* note 35, at 1204-05. For a review of the literature on this process of "spontaneous trait inference," see James S. Uleman et al., *People as Flexible Interpreters: Evidence and Issues from Spontaneous Trait Inference*, 28 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 211, 212-67 (1996).

190. *See* Ross et al., *supra* note 189, at 485, 490-91.

191. *See id.* at 485-87, 490-91.

192. *See id.* at 485-87.

193. *See id.* at 485-87, 490-91.

contestant would perform poorly. The contestant's poor performance was due to the extraordinarily strong role-conferred advantage of the questioner: if the experimenter had assigned the questioner to be the contestant, the questioner also would have performed poorly in that disadvantaged role.[194]

After the game was over, the experimenters asked the observers to rate the questioner's and the contestant's general knowledge.[195] The observers ignored the power of the situation and attributed the outcome to internal traits of the actors, rating the questioner as vastly more knowledgeable than the contestant.[196] In so doing, the observers "failed to recognize . . . that the questioners did not possess any superiority in general knowledge—they merely had exploited the opportunity to choose the particular topics and specific items that most favorably displayed their general knowledge."[197] This illustration of the fundamental attribution error is particularly striking given that the observers had complete and explicit information about the powerful situational constraints.[198] Outside the laboratory, people are unlikely to have such complete information and therefore may be even more prone to this attribution bias.

Another study that attempted to create a more "real world" attribution situation supports that prediction. In this study, experimenters arranged to have some subjects (the "observers") watch other subjects (the "actors") respond to an experimenter's request to volunteer additional time.[199] The observers were not aware that the event was part of the experiment until after the event took place, so the observers' reactions to the event presumably were unaffected by the laboratory setting.[200] The experimenters found that the amount of money that they offered the actors—an external cause—was the major determinant of whether or not the actors agreed to the request to volunteer time.[201] Actors who were offered a small amount of money generally declined, while actors who were offered a large amount of money generally accepted, regardless of the actors' per-

194. *See id.* at 485-88.

195. *See id.* at 491.

196. *See id.*

197. *Id.*

198. *See id.* at 485 ("[T]he role-conferred advantages and disadvantages in the self-presentation of general knowledge in the quiz game were neither subtle nor disguised.").

199. *See* Richard E. Nisbett et al., *Behavior as Seen by the Actor and as Seen by the Observer*, 27 J. PERSONALITY & SOC. PSYCHOL. 154, 155-58 (1973).

200. *See id.*

201. *See id.* at 156-57.

sonal traits.[202] However, when the experimenters later asked the observers about the event, the observers tended not to attribute the actors' responses to the amount of money offered, but rather to characteristics of the individual actors (e.g., the observers would conclude that an actor agreed to volunteer time because the actor was "generous").[203] By incorrectly assigning an internal cause to the actors' behavior, the observers exhibited the fundamental attribution error.[204] The actors themselves, however, were more likely to provide accurate situational attributions, demonstrating that the fundamental attribution error occurs when people are assessing the causes of other people's behavior rather than their own.[205] Social scientists have replicated this "actor-observer difference" in a wide variety of other situations.[206]

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202. *See id.*

203. *See id.*

204. *See id.* at 157.

205. *See id.*

206. *See, e.g.*, NISBETT & ROSS, *supra* note 127, at 123-25 (describing studies supporting this assertion); Nisbett et al., *supra* note 199, at 158-60 (describing a study in which subjects were asked to choose between various trait descriptions for themselves and others, finding that subjects were more likely to believe their own behavior "depends on the situation" and were more willing to assign nonsituation-specific traits to others); Dennis T. Regan & J. Totten, *Empathy and Attribution: Turning Observers into Actors*, 32 J. PERSONALITY & SOC. PSYCHOL. 850, 850 (1975) (demonstrating empirically the tendency to make more internal attributions for other people's behavior than for the same behavior by oneself); Michael R. Wolfson & Gerald R. Salancik, *Observer Orientation and Actor-Observer Differences in Attributions for Failure*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 441, 441 (1977) (listing studies demonstrating the "tendency for persons to attribute their own behaviors to external or situational factors but to attribute the behavior of others to internal or dispositional factors"); *see also* Krieger, *supra* note 35, at 1205 (citing studies that support this actor-observer difference); Malle & Knobe, *supra* note 146, at 288 (noting that "many studies have shown that . . . actors prefer[ ] situation causes and observers prefer[ ] person causes").

In one typical study, experimenters asked male college students to explain why they chose their own major and why their best friend chose his major. *See* Nisbett et al., *supra* note 199, at 158-60. The study found that subjects were much more likely to provide internal causal attributions for their best friend's behavior (i.e., saying that their best friend chose his major because of a personal characteristic of the best friend), while providing external causal attributions when describing their own behavior (i.e., saying that they chose their own major because of various characteristics of the major). *See id.*

One exception to this finding is that observers tend not to make the fundamental attribution error when observing members of a preferred ingroup. Observers typically attribute negative outcomes by members of a preferred ingroup to external and variable causes—i.e., treating them the same as they would themselves. *See generally* Thomas F. Pettigrew, *The Ultimate Attribution Error: Extending Allport's Cognitive Analysis of Prejudice*, 5 PERSONALITY & SOC. PSYCHOL. BULL. 461 (1979) (reviewing research and studies demonstrating that observers attribute behavior by preferred ingroups to situational contexts); Joseph G. Weber, *The Nature of Ethnocentric Attribution Bias: Ingroup Protection or Enhancement?*, 30 J. EXPERIMENTAL SOC. PSYCHOL. 482, 484-503 (1994) (providing empirical support for this proposition).

Social scientists have posited two primary explanations for the pervasiveness of the fundamental attribution error and the actor-observer difference. The first reason is perceptual[207] and is based on "salience," which is a measure of how much something attracts an observer's attention.[208] People simplify their cognitive processing by focusing on the most salient stimuli around them, and salience leads to the perception of causality, whether or not the most salient stimuli are actually the most causally influential.[209] When observers attribute a cause for an actor's behavior, the actor is more salient than the environment in which the actor is behaving, which tends to increase internal causal attributions.[210] In contrast, when observers attribute causes for their own behavior, the perceptual focus is reversed, making the environment more salient and increasing the level of external causal attributions.[211]

The second reason for the fundamental attribution error and the actor-observer difference is informational.[212] When observers attribute a cause for an actor's behavior, the observers often have insufficient data about the actor's different behavior in other situations, so the observers are unlikely to look to the situation as a cause.[213] In contrast, when observers attribute a cause for their own behavior, they have complete information about how their own be-

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207. *See* NISBETT & ROSS, *supra* note 127, at 123-25; Nisbett et al., *supra* note 199, at 154.

208. *See* John B. Pryor & Mitchell Kriss, *The Cognitive Dynamics of Salience in the Attribution Process*, 35 J. PERSONALITY & SOC. PSYCHOL. 49, 53 (1977).

209. *See* HEWSTONE, *supra* note 124, at 52-53; SEARS ET AL., *supra* note 125, at 134-36; Krieger, *supra* note 36, at 1267; Leslie Zebrowitz McArthur, *What Grabs You? The Role of Attention in Impression Formation and Causal Attribution*, *in* 1 SOCIAL COGNITION 201, 201-06 (E. Tory Higgins et al. eds., 1981); Shelley E. Taylor & Susan T. Fiske, *Salience, Attention, and Attribution: Top of the Head Phenomena*, *in* 11 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 249, 264-65 (Leonard Berkowitz ed., 1978).

210. *See* HEWSTONE, *supra* note 124, at 137-40; NISBETT & ROSS, *supra* note 127, at 122-25 (describing supporting studies); *see also* SEARS ET AL., *supra* note 125, at 136-40 (arguing that "[s]alience is the most likely explanation for this attributional bias" because the behavior of others is so salient that it engulfs an observer's perceptual field); Pryor & Kriss, *supra* note 208, at 53-54 (suggesting that the tendency to see actors as disproportionately causal in relation to their environment is because actors are more salient, attract more of the observer's attention, and are therefore more available for recall in memory); *see also* Trope & Gaunt, *supra* note 188, at 344 (describing research finding that because the "link between behavior and the person seems immediate and natural, whereas the link between behavior and the situation seems derived and remote," people anchor on internal, dispositional attributions, and then insufficiently adjust for situational information).

211. *See* HEWSTONE, *supra* note 124, at 54-57; NISBETT & ROSS, *supra* note 127, at 123-25; SEARS ET AL., *supra* note 125, at 137-40; Ross & Fletcher, *supra* note 130, at 100-03.

212. *See* NISBETT & ROSS, *supra* note 127, at 125-26; Wolfson & Salancik, *supra* note 206, at 441.

213. *See* Wolfson & Salancik, *supra* note 206, at 441.

havior has varied in different contexts, so they are more likely to look to a situational factor as a potential cause of their own acts.[214]

Several social scientists have suggested that the employment relationship is one in which the fundamental attribution error is particularly likely to occur.[215] People are particularly prone to underestimating the causal impact of situational constraints when those constraints derive from underlying social roles—like the roles of the questioners and contestants in the simulated quiz show experiment described above—which is what exists in highly role-differentiated employer-employee interactions.[216] This tendency to overattribute other people's behavior to internal causes is particularly likely to occur when the observer views the actor as a member of a different "group,"[217] when the actor's performance can be characterized as a failure,[218] or when the actor's conduct has consequences for the observer.[219] That suggests that the risk of the fundamental attribution error is heightened in the employment decisionmaking context, where a member of "management" is evaluating one of the "employees" because of some conduct that may impact performance on the job. Because observers disproportionately attribute out-group members' failures to internal characteristics of those individuals, rather than to situational constraints, employers are at high risk of unknowingly committing the fundamental attribution error when assessing employee performance.

The fundamental attribution error takes on particular significance in the context of ADA perceived disability claims. Because the social science research demonstrates a tendency to overattribute other people's behavior to *internal* causes, and the first element of a perceived disability claim requires that the employer "regard" the employee as having a limiting condition that originates from *within the employee*, the fundamental attribution error should facilitate the occurrence of perceived disabilities. Even when an employer is avoiding the use of group-based prejudice and assumptions and conducting the required individual assessment, the fundamental attribution error predicts that the employer still will tend to attribute some employee behavior mistakenly to an internal condition

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214. *See id.*

215. *See* Ross et al., *supra* note 189, at 494.

216. *See id.*

217. *See* Krieger, *supra* note 35, at 1191-92 n.136 (citing studies to support this finding).

218. *See id.* (citing studies to support this finding).

219. *See* Carroll & Payne, *supra* note 127, at 20 (noting research demonstrating that "the extent to which an act has consequences for the observer, its hedonic relevance, increases dispositional judgments of the causes of the act").

rather than to an external, situational constraint, thereby exaggerating the gravity of the condition.

An employer's failure to make an accurate external attribution for a particular incident on the job is illustrated by the facts in *Motto v. City of Union City*.[220] The plaintiff in that case was a truck driver who was morbidly obese, which was a nondisabling condition because it did not substantially limit any of the employee's major life activities.[221] While the plaintiff was removing some debris with a pay loader as part of the plaintiff's job, a cinder block wall fell over and damaged some personal property.[222] Evidence suggested that the cause of the event was external: that the supervisors did not train the plaintiff properly on how to use a pay loader, or that the vines in the debris were overgrown through the wall, causing the collapse when the debris was moved.[223] However, the employer attributed the incident to the employee's obesity—an internal cause—believing that the employee's physical condition made him incapable of driving a vehicle.[224] Based on the employer's misperception, the plaintiff was able to state a triable issue on his perceived disability discrimination claim.[225]

Not all internal conditions constitute "impairments," however, because the ADA's definition of impairment also contains a durational element. This second requirement of a perceived disability claim means that an employer must also make an attribution to a stable rather than a variable cause. The regulations explain that conditions that are "temporary," "non-chronic," or "of short duration, with little or no long term or permanent impact" do not constitute impairments under the ADA.[226] Transient conditions such as pregnancy, broken bones, sprained joints, concussions, appendicitis,

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220. No. CIV.A. 95-5678, 1997 WL 816509, at *1, 4 (D.N.J. Aug. 27, 1997).

221. *Id.* at *3-5.

222. *Id.* at *4.

223. *Id.*

224. *Id.* at *4-5.

225. *Id.* at *10. Note that because there was also direct evidence of conscious, group-based animus against individuals who are ohese, it was unclear whether the court would have applied the perceived disability prong to a truly "innocent mistake" scenario. *See id.* at *1, 5; *see also* Holihan v. Lucky Stores, Inc., 87 F.3d 362, 364, 366 (9th Cir. 1996) (denying employer's summary judgment motion on a perceived disability claim by a supermarket manager where there was a factual dispute over whether the employer mistakenly attributed complaints about the manager to a psychological disorder (an internal cause) or to aspects of the employee's job (an external cause)); Mundo v. Sanus Health Plan, 966 F. Supp. 171, 172-73 (E.D.N.Y. 1997) (noting that the employer erroneously attributed an employee's work backlog to her inability to tolerate stress (an internal cause), rather than to excess work, a poor computer system, and an inadequately defined job (external causes), but dismissing the employee's perceived disability claim for failure to meet a different element of the prima facie case).

226. 29 C.F.R. app. §1630.2(j) (2001).

or the typical flu are not considered impairments.[227] For an employer to regard an employee mistakenly as having a disability, the employer must regard the employee as having a long-term physiological or psychological condition[228]—i.e., the employer must make an attribution not only to an internal cause, but to a stable one as well. As one court explained, if an employer "perceives [a] plaintiff as having a minor, temporary condition, the plaintiff is not covered by the Act[,]" but if the employer "considers the impairment as significant, and potentially long-term, the Act's coverage is triggered."[229] Accordingly, if observers tend to err in the direction of making stable, rather than variable, attributions for employee behavior, that type of cognitive bias would also tend to facilitate the occurrence of perceived disabilities. Once again, the social science research supports that conclusion.

The second attribution bias that social scientists have identified is a tendency to overattribute to stable causes and underattribute to causes that are variable.[230] Social scientists believe that this attribution bias is driven by people's desire to feel like they understand and can predict and control their social world, a feeling that is enhanced "by referring transient and variable behavior and events to relatively unchanging underlying conditions."[231] As with the fundamental attribution error, there is an actor-observer difference in the tendency to overattribute to stable causes.[232] Observers make more stable attributions for other people's behavior than they do for their own.[233] In addition, the tendency to overattribute other people's behavior to stable causes is particularly strong when the observer is also making an internal attribution. Not only do observers tend to overestimate the role that an actor's internal characteristics play in determining the actor's behavior, but observers also

227. 29 C.F.R. app. § 1630.2(h), (j).

228. *See* Rondon v. Wal-Mart, Inc., No. C-97-0369 MMC, 1998 WL 730843, at *6 (N.D. Cal. Oct. 8, 1998) ("If a defendant perceives plaintiff as having a minor, temporary condition, the plaintiff is not covered by the Act." (internal quotation marks omitted) (quoting Mendez v. Gearan, 956 F. Supp. 1520, 1524 (N.D. Cal. 1997))).

229. Mendez v. Gearan, 956 F. Supp. 1520, 1525 (N.D. Cal. 1997) (internal citations omitted) (analyzing the analogous prong of the disability definition in the Rehabilitation Act).

230. *See* Ross & Fletcher, *supra* noto 130, at 74 ("People are inclined to attribute actions to stable or enduring causes, rather than te transitory or variable causes.").

231. *See id.*

232. *See* Regan & Totten, *supra* note 206, at 850.

233. *See id.*

tend to exaggerate the existence of characteristics that are "enduring and consistent."[234]

The study involving requests to volunteer time, described above, illustrates this compound attribution bias. As explained above, experimenters found that actors' responses to a request to volunteer time were determined by the amount of money that the experimenter offered—a cause that is both external and variable.[235] The observers, however, not only erred by attributing the actors' responses to characteristics of the individual actors, but also tended to select stable traits for their causal attributions.[236] Accordingly, the observers predicted that the actors would respond similarly to future requests to volunteer time, while the actors themselves predicted that their own behavior would show much more variability over time.[237]

This second attribution error also takes on particular significance in the context of ADA perceived disability claims. Because the social science research demonstrates a tendency to overattribute other people's behavior to *stable* causes, and the second element of a perceived disability claim requires that the employer "regard" the employee as having a *permanent or long-term* condition, the second causal attribution bias should work in the same direction as the first: facilitating the occurrence of perceived disabilities. Even if an employer is properly engaged in an individual employee assessment, free from disability-based animus, attribution research predicts that the employer still will tend to attribute employee conduct mistakenly to a stable condition rather than a variable factor that will change over time.

The facts in *EEOC v. Texas Bus Lines* illustrate an employer's failure to make an accurate variable attribution for conduct that the employer witnessed during the course of an individual assessment.[238] The plaintiff in that case was also morbidly obese, which again was a nondisabling condition.[239] The plaintiff applied for a job driving a passenger transport van between the airport and

234. NISBETT & ROSS, *supra* note 127, at 31; *see also* Ross et al., *supra* note 189, at 491 (explaining that people are too often "nativists" by overestimating the causal role of stable individual differences, rather than variable situational determinants). Another way of stating this is to describe the fundamental attribution error as having both an internal and a stable component. Attribution theorists refer to this tendency to attribute behaviors automatically to stable dispositional qualities as "spontaneous trait inference." *See* Krieger, *supra* note 36, at 1281-82.

235. *See* Nisbett et al., *supra* note 199, at 156-57.

236. *See id.* at 157.

237. *See id.*

238. *See* 923 F. Supp. 965, 967-68, 976-78 (S.D. Tex. 1996).

239. *Id.* at 967 n.1.

hotels, and the employer required an individual medical examination as part of the application process.[240] When the plaintiff was summoned from the waiting room for her exam, the evaluator saw her have difficulty getting out of her chair and "waddling" slowly to the exam room.[241] The employer attributed the plaintiff's behavior to her obesity and assumed that she would always be unable to stand up and walk rapidly, which would make her ineffective in emergency situations on the job.[242] When the employer refused to hire her, the plaintiff brought a perceived disability discrimination claim, and the court allowed the claim to proceed. The court explained that the evaluator "did nothing to rule out the possibility that [the plaintiff] had simply decided to walk slowly because she had grown tired of sitting in the waiting room, or because her foot had fallen asleep, or some other temporary, non-impairing reason."[243] Although the decisionmaker individually assessed the employee, the decisionmaker nevertheless erroneously regarded the plaintiff as disabled by making a stable rather than a variable causal attribution for one ambiguous observed behavior.[244]

While the combination of these first two attribution biases may explain why employers are likely to exaggerate the job-related impact of internal and stable employee characteristics, the ADA's

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240. *Id.* at 967.

241. *Id.* at 968.

242. *Id.* at 968, 976-78.

243. *Id.* at 978.

244. While the employer's mistake could have been solely cognitive in origin, the court found other evidence indicating that conscious prejudice played a role, and the employer "made the decision not to hire [the plaintiff] because of a perception of disability based on myth, fear or stereotype." *Id.* at 979 (internal quotation marks omitted). Therefore, the court did not have to decide whether the perceived disability prong would apply to solely cognitive mistakes.

There are several cases, however, in which employers have incorrectly made stable rather than variable attributions, and there was no evidence of conscious animus upon which to base the employee's perceived disability claim. *See, e.g.*, Dipol v. New York City Transit Auth., 999 F. Supp. 309, 311, 314 (E.D.N.Y. 1998) (permitting a perceived disability claim by an employee who temporarily failed to control his nondisabling diabetes and whose employer mistakenly regarded the resulting vision problems as permanent even after the symptoms had gone away); Colwell v. Suffolk County Police Dep't, 967 F. Supp. 1419, 1426 (E.D.N.Y. 1997) (permitting a perceived disability claim when a police department refused to let a police officer return from limited duty after he had recovered from a car accident and the employer mistakenly regarded the prior injury as permanent despite receiving individual information to the contrary); Muller v. Hotsy Corp., 917 F. Supp. 1389, 1398-1400, 1411-12 (N.D. Iowa 1996) (finding a triable issue on a perceived disability claim by a plant foreperson whose employer incorrectly viewed his temporary and nondisabling spinal injury as something from which the employee would never be able to recover from); Mendez v. Gearan, 956 F. Supp. 1520, 1522-26 (N.D. Cal. 1977) (permitting a perceived disability claim under the Rehabilitation Act when the Peace Corps conducted an individualized assessment of the plaintiff but incorrectly evaluated the "expected duration" of her nondisabling depression and refused to consider her for a job for at least a year).

definition of "impairment" also has a third and final requirement. For an internal and stable employee characteristic to be deemed an "impairment" and qualify for statutory protection, the ADA requires that the characteristic be unusual.[245] According to one court, "the very concept of an impairment implies a characteristic that is not commonplace."[246] The ADA's definition of impairment therefore excludes ordinary physical characteristics or conditions such as old age, eye or hair color, left-handedness, or height, weight, or muscle tone, if those characteristics are "within 'normal' range and are not the result of a physiological disorder."[247] Similarly, the definition excludes "common personality traits," such as a quick temper or poor judgment, unless the traits are symptoms of an underlying psychological disease.[248] Thus, for an employer to "regard" an employee as having an impairment, the employer must also make an attribution to a condition that lies outside of the "normal range." Social science research suggests that we are likely to err in that direction as well.

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245. *See* Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986) (explaining that an impairment must be "a characteristic that is not commonplace"); *see also* Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 185-86 (3d Cir. 1999) ("The purpose of the ADA would be undermined if protection could be claimed by those whose relative severity of impairment was widely shared."); Andrews v. Ohio, 104 F.3d 803, 808 (6th Cir. 1997) ("The definition of the term 'impairment' does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within 'normal' range and are not the result of a physiological disorder." (citing 29 C.F.R. § 1630.2(h) (App. 1995)).

246. *Forrisi*, 794 F.2d at 934; *see also* Sutton v. United Air Lines, Inc., 527 U.S. 471, 490 (1999) ("[A]n employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment—such as one's height, build, or singing voice—are preferable to others.").

247. 29 C.F.R. app. § 1630.2(h), (j) (2001); *see, e.g.*, Francis v. City of Meriden, 129 F.3d 281, 285 (2d Cir. 1997) (rejecting a firefighter's claim that his employer mistakenly regarded him as disabled when he failed to meet the employer's weight guidelines because being overweight is distinguishable from having "a physiological weight-related disorder," the former being a common "physical characteristic," and only the latter being a "physiological disorder" or "impairment").

248. 29 C.F.R. app. § 1630.2(h); *see, e.g.*, Daley v. Koch, 892 F.2d 212, 214-15 (2d Cir. 1989) (rejecting a police applicant's perceived disability claim where the employer regarded him as having only "commonplace" personality traits, including "poor judgment, irresponsible behavior and poor impulse control," and the employer did not attribute those characteristics to "any particular psychological disease or disorder"); Mundo v. Sanus Health Plan, 966 F. Supp. 171, 173 (E.D.N.Y. 1997) (dismissing a supervisor's claim that her employer mistakenly perceived her low tolerance for stress as a disability because "common personality traits" are not impairments under the ADA); Greenberg v. N.Y., 919 F. Supp. 637, 642-43 (E.D.N.Y. 1996) (rejecting a perceived disability claim against an employer that denied the plaintiff a position as a corrections officer because, even though the employer relied on a psychologist's view that the plaintiff's poor judgment made him psychologically unfit for the job, the employer did not attribute that common characteristic to "a particular psychological disease or disorder").

In selecting a single cause for a social event, observers tend to overattribute to uncommon or unusual causes, rather than to causes that are common, ordinary, and far more likely to be influential.[249] This error is a result of the confluence of several different cognitive processing biases. The first is what social scientists refer to as the "representativeness heuristic." Heuristics are efficient cognitive shortcuts or rules of thumb used to simplify complex social judgments.[250] The representativeness heuristic is the tendency to assign items or social events to one conceptual category rather than another because the main features of the item or event "represent" or resemble the category.[251]

The strength of the representativeness heuristic frequently causes people to ignore the base rate or prior probability of categories or events and to rely solely on a resemblance criterion.[252] When a judgment requires an estimate of the likelihood that some event is an instance of a particular category or class, people pick a category that resembles the instance in some way, and they fail to consider whether the category is a common or uncommon one, which should be highly relevant to the observer's judgment.[253] People are particularly likely to ignore very low base rates, thereby overestimating or overattributing to very unlikely causes, characteristics, or events.[254]

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249. *See* Nira Liberman et al., *Promotion and Prevention Focus on Alternative Hypotheses: Implications for Attributional Functions*, 80 J. PERSONALITY & SOC. PSYCHOL. 5, 7 (2001) (citing studies finding that "causes that constitute abnormal conditions are perceived as better explanations than . . . normal conditions").

250. *See* HEWSTONE, *supra* note 124, at 94; NISBETT & ROSS, *supra* note 127, at 24-25; *see also* Carroll & Payne, *supra* note 127, at 22 (explaining that although the representativeness heuristic "often leads to correct judgments, it can lead to large and consistent biases").

251. *See* HEWSTONE, *supra* note 124, at 95; NISBETT & ROSS, *supra* note 127, at 24-25; *see also* Carroll & Payne, *supra* note 127, at 22 (describing the representativeness heuristic as the tendency to "predict the outcome that appears most representative of the evidence").

252. *See* NISBETT & ROSS, *supra* note 127, at 25-26, 141-50; Ross, *supra* note 128, at 199; *see also* Carroll & Payne, *supra* note 127, at 22 (describing studies finding that people show "relatively little regard for prior probabilities or base rate").

253. *See* NISBETT & ROSS, *supra* note 127, at 25-26, 141-50; Carroll & Payne, *supra* note 127, at 22-24; *see also* Ross, *supra* note 128, at 200 (noting that "behavioral predictions, like category predictions, may be relatively impervious to consensus or baseline information," and describing an experiment in which subjects failed to use relevant baseline information in making causal attributions to an unlikely cause).

254. In one study illustrating this cognitive bias, an experimenter asked subjects to judge whether an individual was an engineer or a lawyer. Metalsky & Abramson, *supra* note 130, at 20. The experimenter told the subjects only that the individual enjoys math puzzles and shows no political interest. *Id.* In some situations, the experimenter told the subjects that the individual came from a sample including seventy percent lawyers and thirty percent engineers, and in some situations, the percentages were reversed. *Id.* The study found that subjects were much more likely to judge the individual as an engineer, and they were just as likely to do so when told

When causal attributions are involved, the representativeness heuristic means that people tend to assume that the cause bears some similarity to its effects—we "demand[ ] that cause and effect resemble one another in their outward features."[255] This assumption is efficient because it allows rapid categorization and it often leads to accurate causal attributions.[256] However, it also leads people to overattribute to or exaggerate the likelihood of uncommon causes, either because observers assume that an unusual behavior generally must have an unusual cause or, more specifically, because observers rely on an outward resemblance between a behavior and a cause, regardless of the prior probability of a particular causal antecedent. For example, an insomniac who suffers emotional distress from lack of sleep may assume that the cause of the insomnia must resemble the emotional effect.[257] Accordingly, the insomniac may believe that "emotional problems" are the cause, rather than an overheated room or smoking, which are far more common causes of insomnia, but which resemble the emotional effects to a lesser degree.[258] This cognitive bias occurs consistently in the laboratory even when experimenters provide people with perfect base rate information, so it is likely to occur even more frequently in the "real world," which rarely graces us with such complete and accurate data.[259]

The representativeness heuristic would typically work in the same direction as the first two causal attribution biases: to facilitate employers' misperceptions of a nondisabled employee as disabled. When an employer is trying to decide whether to attribute an employee's performance problem to a common personality trait or to an uncommon psychological disorder, for example, the employer is likely to make the latter attribution more often than is warranted

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that there was a thirty percent or a seventy percent base rate of engineers in the population. *Id.* In other words, subjects relied solely on a resemblance criterion—that a few individual traits seemed to resemble those of a prototypic engineer—at the expense of highly relevant base rate information. *See id.*; *see also* Carroll & Payne, *supra* note 127, at 22 (describing a similar study finding that although "the likelihood that any particular description belongs to an engineer rather than a lawyer should be strongly influenced by the prior base-rate information," subjects "largely ignored" information on prior probabilities). Thus, the representativeness heuristic was responsible for overestimates in the low base rate scenario.

255. HEWSTONE, *supra* note 124, at 95; *see also* NISBETT & ROSS, *supra* note 127, at 26-27, 115-18, 120.

256. See NISBETT & ROSS, *supra* note 127, at 26-27, 115-18, 120; *see also* Carroll & Payne, *supra* note 127, at 22 (explaining that although the representativeness heuristic "often leads to correct judgments, it can lead to large and consistent biases").

257. *See* NISBETT & ROSS, *supra* note 127, at 120.

258. *See id.*

259. *See* Ross, *supra* note 128, at 187.

by its much lower base rate. Social scientists would expect that an employer sometimes would err in the direction of believing that an employee has an unusual, disabling illness or injury, rather than a more common, nondisabling condition.

The facts in *Schnake v. Johnson County Community College* illustrate this type of mistake.[260] After three years of satisfactory performance as an administrative secretary, the plaintiff began exhibiting "erratic behavior" immediately after her mother died.[261] Rather than attributing the plaintiff's behavior to the temporary stress of her mother's death, the employer concluded that she had an altered perception of reality that might be the result of multiple personalities, and the employee was suspended.[262] Shortly thereafter, the employee again received outstanding performance reviews at another job.[263] Based on the original employer's erroneous attribution for her prior behavior, the employee was able to state an ADA perceived disability claim.[264]

The second and perhaps more important cognitive shortcut that can contribute to the tendency to overattribute to uncommon causes is the "availability heuristic." Like the representativeness heuristic, the availability heuristic is an efficient rule of thumb that people use to cope with complex attribution tasks. "Availability" is the ease at which something can be recalled in memory, and the "availability heuristic" is the tendency to judge the causal impact of a particular factor by how "available" it is.[265] The more easily an observer can recall or bring to mind a particular antecedent, the greater causal significance the observer will assign to it.[266] While availability of a particular item in memory is often correlated with the commonness of that item, that is not always the case. Sometimes very uncommon events become highly available in memory, and the availability heuristic therefore results in overattribution to unlikely causes.[267]

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260. *See* 961 F. Supp. 1478, 1479-80, 1482 (D. Kan. 1997).

261. *Id.* at 1479.

262. *Id.* at 1479, 1482.

263. *Id.* at 1480.

264. *Id.* at 1482.

265. *See* HEWSTONE, *supra* note 124, at 96; NISBETT & ROSS, *supra* note 127, at 122; Pryor & Kriss, *supra* note 208, at 49; Ross, *supra* note 128, at 198.

266. *See* HEWSTONE, *supra* note 124, at 96; NISBETT & ROSS, *supra* note 127, at 122; David M. Sanbonmatsu et al., *Overestimating Causality: Attributional Effects of Confirmatory Processing*, 65 J. PERSONALITY & SOC. PSYCHOL. 892, 900-01 (1993).

267. *See* NISBETT & ROSS, *supra* note 127, at 122 ("[T]he causal significance of highly available antecedents is overestimated."); *see also* Ross, *supra* note 128, at 198 (explaining that the availability heuristic causes people's "estimates of the frequency or probability of events to re-

This error takes place because salience, or the attention-grabbing nature of the item or event, has a profound influence on availability.[268] Experimenters in one study gave subjects a series of statements about an actor and an object, and the experimenters systematically manipulated the salience of each item.[269] In some statements the experimenters made the actor salient (e.g., "John likes the car"), and in some statements the experimenters made the object salient (e.g., "the restaurant was liked by Sue").[270] The study found that subjects had better recall of the salient items—i.e., that salience was directly correlated with availability—and that the more available the items were in recall, the more causal influence the subjects attributed to them.[271] Because unusual or uncommon characteristics often have disproportionate salience, the availability heuristic can contribute to the tendency to overattribute to potential causes that are unlikely to be the actual cause of the event.[272] This tendency to ignore potentially relevant causes is exacerbated by another cognitive simplification mechanism known as the "hydraulic" model of causation: the assumption that each event has one and only one cause.[273] Moreover, people tend to stop searching for potential causes at the first plausible explanation they identify,[274] which is typically the one most salient.

In the employment setting, the availability heuristic could explain why employers would exaggerate the causal significance of known or visibly obvious nondisabling conditions of their employ-

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flect the ease of imagining or remembering those events," and that because "availability is often poorly correlated with frequency or probability, systematic errors and biases in judgment inevitably result"); Sanbonmatsu et al., *supra* note 266, at 900-01 (arguing that observers may overestimate the causal significance of "novel and distinct" causes because of their salience).

268. *See* Pryor & Kriss, *supra* note 208, at 51-53.

269. *See id.* at 51.

270. *See id.*

271. *See id.* at 50, 52-53.

272. *See* HEWSTONE, *supra* note 124, at 97; *see also* SEARS ET AL., *supra* note 125, at 134-36 ("Bias arises because the most perceptually salient stimuli often dominate causal explanations even when they are not actually the most powerful causes."); Harold H. Kelley, *Causal Schemata and the Attribution Process*, *in* ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR 151, 170 (Edward E. Jones et al. eds., 1972) (noting that "not all plausible causes for a given effect may be salient to the attributor at any given time," and therefore, "[n]ot surprisingly, he may simply overlook some of the possibly relevant causes").

273. *See* NISBETT & ROSS, *supra* note 127, at 127-28; Krieger, *supra* note 35, at 1223; Sanbonmatsu et al., *supra* note 266, at 893, 895.

274. *See* NISBETT & ROSS, *supra* note 127, at 119-20, 127-30; *see also* John McClure, *Discounting Causes of Behavior: Are Two Reasons Better than One?*, 74 J. PERSONALITY & SOC. PSYCHOL. 7, 14 (1998) (explaining that "[p]eople anchor on the first cause and give insufficient weight to evidence implicating other causes"); Sanbonmatsu et al., *supra* note 266, at 893, 895 (explaining that "the search for evidence is typically truncated following the identification of a likely cause").

ees. Many perceived disability discrimination claims arise when a previously unimpaired employee becomes ill or injured and the employer must decide if the condition will affect job performance, or when the employer is otherwise aware of an employee's nondisabling physical characteristic, such as an employee who is obese, has a cosmetic disfigurement, or is known to take medication, wear glasses, or otherwise use mitigating measures for a nondisabling illness or disease.[275] It is the rare case indeed in which an ADA perceived disability claim stems from an employer's mistaken belief that the employee has a condition that the employee lacks altogether; claims almost always arise when an employer exaggerates the gravity of a real but nondisabling condition.[276] Because these known and often visibly salient impairments are likely to be highly "available" in an employment decisionmaker's mind when assessing the employee, there is an increased chance that the employer will assign those characteristics a disproportionately causal role. The availability heuristic suggests that an employer simply cannot help but think about the employee's condition when observing the employee on the job.

Although the causal attribution literature has not focused directly on the problem of misperceived disabilities in nondisabled individuals, there has been some research involving individuals with actual disabilities that supports this thesis. This research has found that known disabilities take on exaggerated causal significance for observers.[277] When an observer knows about an actor's actual disability, the observer mistakenly views the disability as the cause of a wide range of ordinary and unrelated behaviors and events.[278] For example, when an individual with mental retardation has a performance problem, observers are too prone to attribute the problem to the disability, even if the problem also commonly occurs among the nondisabled.[279] Individuals with histories of mental illness are acutely aware of this "putative deviance" phenomenon.[280] They report that they are often afraid to engage in vigorous arguments with coworkers or employers because any display of strong

275. *See* Vande Walle, *supra* note 66, at 904, 911 n.112.

276. *See id.*

277. *See* Ross & Fletcher, *supra* note 130, at 780 (citing ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 15 (1963)).

278. *See id.*; *see also* Blanck & Marti, *supra* note 37, at 374 (explaining that the "[s]tudy of attitudes and behavior about known hidden disabilities may reveal the meanings ascribed by employers, coworkers or others to the behavior of qualified persons with disabilities").

279. *See* Ross & Fletcher, *supra* note 130, at 780 (citing GOFFMAN, *supra* note 277, at 15).

280. *See id.*

emotion is likely to be misattributed to their prior mental illness.[281] This phenomenon occurs because observers overattribute to the most salient potential cause: the actor's internal, stable, and uncommon physical or mental disability. While these studies focused on attribution errors involving conditions that typically would meet the ADA's definition of an actual disability, the results are likely to be the same with salient nondisabling impairments, which are possessed by most individuals who bring claims under the ADA's perceived disability prong.

While all of this research on cognitive biases thus predicts that mistaken perceptions of physical or mental "impairments" are likely to occur, not all impairments constitute statutory "disabilities." For an employer to regard a nondisabled employee mistakenly as having a disability, the employer must not only believe that the employee has an impairment, but also that the impairment "substantially limits" one of the employee's "major life activities."[282] Major life activities are basic functions such as walking, sitting, standing, lifting, reaching, seeing, hearing, speaking, breathing, learning, or caring for oneself.[283] In addition, the regulations list "working" as a major life activity.[284] The regulations suggest that "working" should be used as a major life activity only as a last resort, when the employee is unable to show substantial limitations in any of the other enumerated tasks.[285] Nevertheless, working is still the most common major life activity relied on in ADA perceived disability claims.[286] The definition of a perceived disability is based solely

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281. *See id.*

282. 42 U.S.C. § 12102(2)(C) (1994); Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 192 (3d Cir. 1999) ("Liability attaches only to a mistake that causes the employer to perceive the employee as disabled within the meaning of the ADA, i.e., a mistake that leads the employer to think that the employee is substantially limited in a major life activity.").

283. 29 C.F.R. § 1630.2(i) (2001); 29 C.F.R. app. § 1630.2(i) (2001).

284. 29 C.F.R. § 1630.2(i).

285. *See id.* In addition, the Supreme Court has questioned whether "working" should count as a major life activity at all. *See* Toyota Motor Mfg. v. Williams, 122 S. Ct. 681, 692 (2002) (explaining in dicta that "[b]ecause of the conceptual difficulties inherent in the argument that working could be a major life activity, we have been hesitant to hold as much," but concluding that the Court "need not decide this difficult question today"); Sutton v. United Air Lines, Inc., 527 U.S. 471, 492 (1999) (noting in dicta "that there may be some conceptual difficulty in defining major life activities to include work," but "[a]ssuming without deciding that working is a major life activity" for purposes of deciding the case (internal quotation marks omitted)).

286. *See* Rondal I. Goldstein, Note, *Mental Illness in the Workplace after* Sutton v. United Airlines, 86 CORNELL L. REV. 927, 966 (2001) (stating that "most perceived disability claims by mentally ill individuals concern the major life activity of working"); *see also Sutton*, 527 U.S. at 490 (highlighting the fact that in the first major perceived disability case to reach the Supreme Court, the severely myopic plaintiffs "do not make the obvious argument that they are regarded due to their impairments as substantially limited in the major life activity of seeing," but in-

on the employer's perception of the employee, not on the employee's actual condition. It is typically easier to infer an employer's perceptions about the employee's ability to work than it is to infer an employer's perceptions about any of the other activities on the regulatory list.

In general, an employee is "substantially limited" in a major life activity if the employee is:

> i. Unable to perform a major life activity that the average person in the general population can perform; or
>
> ii. Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.[287]

When the major life activity is "working," the regulations provide more specific guidance. An impairment "substantially limits" the major life activity of working only if the employee is "significantly restricted in the ability to perform *either a class of jobs or a broad range of jobs in various classes* as compared to the average person having comparable training, skills and abilities."[288] According to the regulations, "the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."[289]

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stead, "[t]hey contend only that respondent mistakenly believes their physical impairments substantially limit them in the major life activity of working").

287. 29 C.F.R. § 1630.2(j)(1). The regulations list three factors to consider when determining if an impairment is substantially limiting: "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." *Id.* § 1630.2(j)(2); *see also* 29 C.F.R. app. § 1630.2(j) (explaining that duration "refers to the length of time an impairment persists," and impact "refers to the residual effects of an impairment").

288. 29 C.F.R. § 1630.2(j)(3) (emphasis added).

289. *Id.* The regulations list three main factors to determine if an employee is unable to perform "either a class of jobs or a broad range of jobs in various classes":

> (A) The geographical area to which the individual has reasonable access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Id.; *see also* 29 C.F.R. app. § 1630.2(j) (listing examples of limitations that affect a class of jobs or a broad range of jobs in various classes (citing Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986);

When an employee is alleging a perceived rather than an actual disability, the employer must mistakenly *believe* that the employee is unable to perform either a class of jobs or a broad range of jobs in various classes. A court must find that the employer's misperception goes beyond just the employee's ability to perform the specific job at issue in the case.[290] "[C]ourts have differentiated between an employer's rejection of an employee or potential employee due to a perception that the individual is unable to perform the duties of *that job*, and denial because the employer believes the individual is inherently incapable of working at *any of a number of jobs*."[291] The former is a "job-specific perception" and does not meet the "substantially limiting" requirement, while the latter is a "more generalized perception that the applicant is impaired in such a way as would bar her from a large class of jobs," which is necessary to establish the "substantial limitation" element of an ADA perceived disability claim.[292]

This distinction between a "generalized perception" about an employee's ability to work and a "job-specific perception" about an employee's ability to perform the employer's particular job is an example of the final causal attribution dimension: global versus specific. For an employee to state an ADA perceived disability claim, the employer must make a global causal attribution, rather than a specific causal attribution. The employer must believe that the employee's characteristics will produce the same outcome in many different situations: that the employee will be unable to perform in a "class of jobs or a broad range of jobs in various classes."[293] If the employer believes that the employee's characteristics will impact

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Jasany v. United States Postal Serv., 755 F.2d 1244 (6th Cir. 1985); E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Haw. 1980))).

290. Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 523 (1999) (explaining that the employee "must be regarded as precluded from more than a particular job" in order to state a perceived disability claim using "working" as the relevant major life activity).

291. Shaw v. Commonwealth of Va. Dep't of State Police, 862 F. Supp. 1469, 1474 (E.D. Va. 1994) (emphasis added) (interpreting the parallel definition in the Rehabilitation Act and concluding that "the latter may qualify as handicapped under the statute, while the former cannot").

292. Joyce v. Suffolk County, 911 F. Supp. 92, 97 (E.D.N.Y. 1996); *see also* Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 806 (5th Cir. 1997):

> An employer does not necessarily regard an employee as having a substantially limiting impairment simply because it believes that she is incapable of performing a particular job; the statutory reference to a substantial limitation indicates instead that an employer regards an employee as substantially limited in his or her ability to work by finding the employee's impairment to foreclose generally the type of employment involved.[;]

Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986) (making the same distinction for the parallel language in the Rehabilitation Act).

293. 29 C.F.R. § 1630.2(j)(3); *see Murphy*, 527 U.S. at 523.

only the specific job that the employer is offering, the employee has not been "regarded as" disabled.

Once again, social science research suggests that when we make mistakes, we are likely to do so in a direction that would facilitate the occurrence of perceived disabilities: we overattribute to global causes and we underattribute to specific causes.[294] In other words, people tend to overestimate the level of cross-situational consistency in other people's behavior.[295] Although "slight differences in situations often produce large differences in the behavior of most people in those situations," observers erroneously believe that an actor will behave similarly in many different contexts.[296] There is also an actor-observer difference on this variable, with observers believing that other people's behavior will demonstrate much more cross-situational consistency than their own.[297]

In one illustrative study, experimenters asked subjects to describe their own behavior in many different potentially anxiety-arousing situations (such as taking an exam or giving a speech), and in many different potentially hostility-arousing situations (such as getting blamed for someone else's error or having someone open one's personal mail).[298] Each subject then had a close friend and an acquaintance (the "observers") predict the subject's behavior in the same array of situations.[299] The experimenters found that the observers consistently predicted more cross-situational consistency in the subjects' behavior than did the subjects themselves, which indicates that the observers were basing their judgments on global rather than specific causal attributions.[300]

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294. *See* Ross, *supra* note 128, at 184-85, 193-94 (explaining that people "too readily . . . expect[ ] consistency in behavior or outcomes across widely disparate situations and contexts").

295. *See* NISBETT & ROSS, *supra* note 127, at 120; Ross et al., *supra* note 189, at 491; *see also* Dennis T. Regan et al., *Liking and the Attribution Process*, 10 J. EXPERIMENTAL SOC. PSYCHOL. 385, 397 (1974) (stating that "observers tend consistently to overemphasize individual differences at the trait level despite scant evidence for . . . cross-situational consistency in behavior").

This attribution bias is exacerbated by the "correlation error," which is the tendency to overestimate the strength of the relationship among observable characteristics and behaviors. *See* Ross, *supra* note 128, at 202. By overestimating the degree of relationship between variables that are present in a social situation, observers end up "consistently overestimat[ing] the degree of cross-situational consistency existing in the relevant behavioral measures and outcomes." *Id.*

296. NISBETT & ROSS, *supra* note 127, at 120.

297. *See* Clarry Lay et al., *The Perception of Situational Consistency in Behaviour: Assessing the Actor-Observer Bias*, 6 CANADIAN J. BEHAV. SCI. 376, 377-83 (1974) (describing two studies finding that people overattribute other people's conduct to global causes, by assuming more cross-situational consistency in other people's behavior than in their own behavior).

298. *See id.* at 379.

299. *See id.*

300. *See id.* at 379-80.

Our attribution bias on the global/specific dimension works in the same direction as our other attributional biases. Even during an individual employee assessment that avoids group-based assumptions about "the disabled," social science research predicts that employers will err by assuming too much cross-situational consistency for employees' behavior. Employers predictably will assume that more employees are substantially limited in the major life activity of working than is actually the case. Although psychologists have not studied this phenomenon specifically in the context of perceived disabilities, some research on actual disabilities supports this view. In one study, an individual who was blind asked various social agencies for a specific, limited service, such as a housekeeper or a reader.[301] The study found that agency workers viewed the individual's blindness as a global rather than a specific cause, and incorrectly assumed that the individual would require extensive and wide-ranging services to perform a variety of other tasks.[302]

The facts in *Deane v. Pocono Medical Center* illustrate a similar failure to make an accurate specific attribution for an employee's nondisabling wrist injury.[303] In *Deane*, the employer learned that a registered nurse on the medical/surgical ward was unable to lift more than fifteen to twenty pounds or to perform repetitive manual tasks.[304] Although the employer properly conducted an individual assessment, the employer mistakenly regarded the employee's limitations as "far worse than they actually were," and "fundamentally misunderstood and exaggerated the limitations that the wrist injury imposed."[305] The employer mistakenly believed that because of the nondisabling impairment, the plaintiff was unable to perform not only specific, limited tasks such as typing, but also a wide range of other job duties. The plaintiff's employer viewed her as unable to "push or pull anything, assist patients in emergency situations, [or] move or assist patients in the activities of daily living," and incorrectly believed that she could not "perform CPR, use the rest of her body to assist patients, work with psychiatric patients, or use medical equipment."[306] Accordingly, the plaintiff's employer regarded her as unable to perform any patient care

301. *See* Ross & Fletcher, *supra* note 130, at 784 (citing R.A. SCOTT, THE MAKING OF BLIND MEN: A STUDY OF ADULT SOCIALIZATION 180 (1969)).

302. *See id.*

303. *See* 142 F.3d 138, 141 (3d Cir. 1998) (en banc).

304. *Id.*

305. *Id.* at 142, 145.

306. *Id.* at 142.

job, either at the employer's medical center or at any other hospital.[307] In reality, the plaintiff's nondisabling condition allegedly did not prevent her from working in many patient care jobs, including jobs in pediatrics and oncology wards.[308] Despite the fact that the employer acted without prejudice or group-based assumptions, the employer nevertheless regarded the plaintiff as disabled by erroneously making a global rather than a specific causal attribution.[309]

Thus, our predictable attribution biases of overattributing to internal, stable, uncommon, and global causes are all the same types of errors that are needed for an employer to perceive a nondisabled employee mistakenly as disabled.[310] For an employer's

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307. *Id.*; *see also id.* at 145 (noting expert testimony concluding that Deane would have been precluded from a wide ranges of jobs if she had been impaired to the extent perceived by the employer).

308. *Id.* at 142, 145.

309. *See id.*; *see also* Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 190 (3d Cir. 1999) (permitting a perceived disability claim against an employer whose individual assessment of an employee's nondisabling ankle injury was "dominated by miscommunications and misinterpretations," causing the employer to conclude erroneously that the employee was "incapable of performing a wide range of jobs"); Jimeno v. Mobil Oil Corp., 66 F.3d 1514, 1521-22 (9th Cir. 1995) (permitting a perceived disability claim under the state's analogous antidiscrimination statute when an employer conducted an individual assessment of a mechanic's nondisabling spinal impairment but erroneously concluded that the impairment "foreclosed generally the possibility of employment as a truck mechanic" and "affect[ed] his ability to find employment anywhere in his chosen profession"); Dipol v. New York City Transit Auth., 999 F. Supp. 309, 311, 314 (E.D.N.Y. 1998) (holding that an employee stated a perceived disability claim against an employer that conducted an individual assessment but incorrectly regarded the employee's nondisabling diabetes as precluding the employee from working in a broad range of jobs involving heights, hazardous conditions, or the operation of any vehicle or equipment); Coleman v. Keebler Co., 997 F. Supp. 1102, 1108, 1114 (N.D. Ind. 1998) (allowing a perceived disability claim against an employer that erroneously perceived an employee's nondisabling arthritis as precluding her from thirteen different job classifications); McAlpin v. Nat'l Semiconductor Corp., 921 F. Supp. 1518, 1520, 1523 (N.D. Tex. 1996) (finding a triable issue on an employee's perceived disability claim where the employer individually assessed the employee's nondisabling sarcoidosis but erroneously viewed her as unable to work at any job in the company, rather than being precluded only from jobs involving direct exposure to chemicals); EEOC v. Chrysler Corp., 917 F. Supp. 1164, 1166, 1169 (E.D. Mich. 1996) (holding that an employee stated a perceived disability claim against an employer that individually assessed the employee's nondisabling high blood pressure but incorrectly regarded the employee as unable to work as an electrician or in "a wide range of other jobs").

310. As noted above, some social scientists have periodically identified a fourth causal attribution dimension—volitional versus nonvolitional—which has received limited support. *See supra* note 152. The ADA and its legislative history arguably indicate that a condition must be nonvolitional to constitute a "disability." *See, e.g.*, 42 U.S.C. § 12101(a)(7) (1994) (describing "individuals with disabilities" as a discrete and insular minority who have been discriminated against "based on characteristics that are beyond the control of such individuals"); 135 CONG. REC. S10765, S10796 (daily ed. Sept. 7, 1989) (statement of Sen. Rudman) (arguing that the ADA's definition of mental disabilities should not cover illegal drug users in part because drug use involves behavior "which individuals are engaging in of their own volition"); 135 CONG. REC. H5064, H5065 (daily ed. Aug. 3, 1989) (statement of Rep. Hoyer) (suggesting that the ADA

misperception to trigger the ADA's perceived disability prong, the misperception must involve an attribution to the exact types of causes to which we are most likely to assign too great a causal role.

Of course, because our attributional errors are only tendencies, it is difficult to conclude with any certainty that they will be outcome determinative or result in any particular number of perceived disabilities. However, the potential for such nonmotivational misperceptions appears to be fairly significant. As explained above, the employment setting is one in which causal attribution activity is particularly likely to occur. Moreover, attribution errors occur with notable frequency even under the "pristine conditions" of a laboratory, where experimenters often provide subjects with completely relevant, sufficient, and accurate data for their decisionmaking tasks.[311] Employers are likely to be at higher risk of making attribution errors because they often lack the complete information or sufficient time to maximize the accuracy of their social judgments and decisions. Thus, causal attribution research at least lends serious plausibility to the view that so-called "innocent mistakes" may occur with some frequency. Even during an individual employee assessment free from invidious, group-based animus, the predictable errors from employers' automatic cognitive processes suggest that sometimes employers will still mistakenly perceive a nonexistent disability, particularly by exaggerating the role of salient nondisabling conditions.[312]

This explanation is even more plausible given that not all of the attributional biases need to be in play for an employer's misperception to meet the definition of a perceived disability. For an em-

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should only protect individuals who have disabilities "through no fault of their own"); 134 CONG. REC. S5106, S5114 (daily ed. Apr. 28, 1988) (statement of Sen. Harkin) (explaining that "persons with disabilities" have been "subjected to a history of purposeful unequal treatment . . . based on characteristics that are beyond the control of such persons").

However, courts have rejected this suggestion and applied the ADA's disability definition even to individuals whose impairments were caused in whole or in part by the individual's own behavior. *See, e.g.*, Cook v. Rhode Island, 10 F.3d 17, 24 (1st Cir. 1993) (holding that the ADA "indisputably applies to numerous conditions that may be caused or exacerbated by voluntary conduct"). The volitional nature of the employee's conduct should be particularly irrelevant for perceived disability claims, which focus entirely on the employer's perception of the employee's condition, rather than on the condition itself. *See id.* at 24 (allowing a perceived disability claim based on an employer's misperception of an employee's obesity, regardless of whether the obesity was within the employee's control). Thus, even if there is a fourth causal attribution dimension categorizing causes as either volitional or nonvolitional, that dimension is not relevant in predicting the occurrence of perceived disabilities.

311. *See* NISBETT & ROSS, *supra* note 127, at 114.

312. *Cf.* Krieger, *supra* note 35, at 1200 (arguing that other aspects of "cognitive efficiency" cause "systematic biases [that] may in turn lead to predictable types of error in social judgment," and that those errors explain much of current intergroup race and sex discrimination).

ployer to regard a nondisabled employee as disabled, the employer must perceive the employee as having a physical or mental impairment that substantially limits a major life activity, but only one element of that definition needs to be a mistake. For example, as noted above, the vast majority of perceived disability claimants *do* have some type of nondisabling physical or mental "impairment," which just does not rise to the level of an actually disabling condition. Often employers *correctly* attribute various behaviors, performance, or limitations to the individual's nondisabling impairment. If, however, the employer mistakenly believes that the nondisabling impairment substantially limits the employee's ability to work (i.e., the employer's only *mistake* is on the global/specific dimension), the employer has regarded the employee as disabled under the perceived disability prong. The bottom line: "[A] little causal analysis is a dangerous thing."[313]

B. Errors in Predicting the Future

While some employment decisions about individuals with nondisabling conditions are made solely on the basis of attributions for the employee's prior conduct, some involve predictions about the employee's future conduct as well. Causal attributions for past behavior play a central role in predictions of future performance. In fact, social scientists believe that predicting others' behavior is a primary reason that we make causal attributions in the first place.[314]

Thus, the consequences of biased causal attributions are often magnified as they are translated into biased predictions. The *Texas Bus Lines* case, described above, illustrates this phenomenon.[315] The plaintiff in that case, who was nondisabled but morbidly obese, was rejected for a job driving a passenger transport van.[316]

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313. *See* NISBETT & ROSS, *supra* note 127, at 185.

314. *See* HEWSTONE, *supra* note 124, at 61; SEARS ET AL., *supra* note 125, at 117-18; Carroll & Payne, *supra* note 127, at 18; Frieze, *supra* note 130, at 95; Kelly, *supra* note 137, at 22; Krieger, *supra* note 36, at 1281 (explaining that, "[r]ightly or wrongly, we assume that understanding why something has happened will improve our power to predict or even control what will happen in the future"); Lau & Russell, *supra* note 136, at 29; Liberman et al., *supra* note 249, at 7 (describing this position as part of "classic attribution theories"); Metalsky & Abramson, *supra* note 130, at 17; Town & Harvey, *supra* note 137, at 291; Ybarra & Stephan, *supra* note 137, at 718, 726. *See generally* Ross & Fletcher, *supra* note 130, at 104 (collecting social science studies that provide empirical support for the hypothesis that "people make attributions, in part, to enhance their control over the environment").

315. 923 F. Supp. 965 (S.D. Tex. 1996).

316. *Id.* at 967.

During the application process, the evaluator saw the plaintiff having difficulty getting out of her chair and "waddling" out of the waiting room.[317] In deciding not to hire the plaintiff, the decisionmaker first assessed the cause of that past behavior—by allegedly attributing it to the plaintiff's obesity, rather than to a temporary, nonimpairing condition like fatigue or a foot that had fallen asleep.[318] The decisionmaker then relied on that internal, stable, and global attribution to predict how the plaintiff would perform in the future—by allegedly concluding that the plaintiff would always be unable to stand up and walk rapidly, making her ineffective in potential emergencies on the job.[319] As a combination of both of these biased judgments, the employer exaggerated the gravity of the plaintiff's nondisabling condition, and the plaintiff was able to state a perceived disability claim.

Social scientists have discovered that this connection between backward-looking assessments and forward-looking predictions is extraordinarily strong, as causal attributions directly affect our future expectations.[320] This problem is most severe when the employer's attribution is to an internal, stable, and global cause, which consistently triggers overgeneralization in predictions about future events.[321] A decisionmaker who makes a stable, dispositional attribution for an actor's past failure, for example, will expect similar failures on the same task in the future.[322] Observers are most likely to translate their causal attributions into predictions about the target's future behavior when they are making judgments to

317. *Id.* at 968.

318. *See id.* at 978-79.

319. *See id.* at 968, 976-78.

320. *See* SEARS ET AL., *supra* note 125, at 117; *see also* Krieger, *supra* note 35, at 1204 ("[C]ausal attribution substantially affects how past events inform our predictions about the future."); Ross, *supra* note 128, at 175 (explaining that people make attributions to help "form expectations and make predictions about future actions and outcomes"). *See generally* Ybarra & Stephan, *supra* note 137, at 718 (analyzing "how the prediction of another person's behavior is affected by prior attributions").

321. *See* Abramson et al., *supra* note 150, at 68 (explaining how attributions to internal, stable, and global causes create expectations of an unchanging future).

322. *See* Frieze, *supra* note 130, at 98; Liberman et al., *supra* note 249, at 7 (explaining that "dispositional attributions enable one to predict how the target will behave in future situations"); Ross & Fletcher, *supra* note 130, at 90; Weiner, *supra* note 136, at 7-8; *see also* Carroll & Payne, *supra* note 127, at 19 (citing research showing that "[e]xpectancies for future performance . . . are dependent on judgments of stability"). *See generally* Ybarra & Stephan, *supra* note 137, at 718 (providing empirical support for an "attribution-prediction bias," meaning that observers who attribute an actor's past behavior to internal, dispositional causes expect the actor to engage in more negative behavior in the future than observers who attribute the actor's past behavior to situational constraints).

fulfill duties or obligations,[323] which occurs in the employment decisionmaking context. This means that an employer that incorrectly attributes a single episode of poor performance to a physical or mental impairment may decide to fire, refuse to promote, or limit compensation based on the erroneous assumption that the poor performance will continue over time.

People's expectations about another person's future behavior will, in turn, influence the way they behave toward that individual.[324] Causal attributions work as "mediators" between one's observations and reactions towards others.[325] For example, when another person makes a negative remark, an observer might attribute the remark to an intense job deadline causing temporary stress (an external and variable cause), or to a vindictive personality (an internal and stable cause).[326] In the first situation, the observer likely would predict the person to be friendlier in the future, and the observer would therefore be forgiving and decide to avoid the individual for just a short period of time.[327] In the latter situation, the observer likely would predict the person to remain unfriendly, and the observer would therefore be angry and decide to avoid the individ-

323. *See* Liberman et al., *supra* note 249, at 5, 7, 14-15.

324. *See* NISBETT & ROSS, *supra* note 127, at 30 (explaining that people's theories of the causes of human behavior "determine the meaning we extract from social interaction, and, in large measure, they determine the way we behave in response to the actions of our fellows"); *see also* HEWSTONE, *supra* note 124, at 63 (same); SEARS ET AL., *supra* note 125, at 117 (same); Carroll & Payne, *supra* note 127, at 18 (explaining that attribution theory studies how people make judgments about the causes of events, "and how these judgments are used and so affect the person's behavior"); Robert S. Wyer Jr. & Alan J. Lambert, *The Role of Trait Constructs in Person Perception: An Historical Perspective*, *in* SOCIAL COGNITION: IMPACT ON SOCIAL PSYCHOLOGY 109, 129 (Patricia G. Devine et al. eds., 1994) (explaining that "people's social behavior is guided in part by their expectations of how others will respond, and these expectations, in turn, are often determined by perceptions of the others' general traits").

325. SEARS ET AL., *supra* note 125, at 118 (explaining that "[o]ur reactions to other people—liking, aggression, helping, conformity, and so on—frequently depend on our interpretation of their behavior"); *see also* John S. Carroll et al., *Sentencing Goals, Causal Attributions, Ideology, and Personality*, 52 J. PERSONALITY & SOC. PSYCHOL. 107, 110-17 (1987) (describing two studies finding that people who attribute crime to internal and stable traits of offenders are more likely to believe in punishment, while people who attribute crime to external causes are more likely to believe in welfare and rehabilitation); Stanley Feldman, *Economic Individualism and American Public Opinion*, 11 AM. POL. Q. 3, 10-25 (1983) (describing a study showing that people who attribute the poverty level of blacks in America to discrimination and other environmental failures are more likely to support government aid, while people who attribute the poverty level to individual laziness and unwillingness to get job training are more likely to oppose government aid).

326. *See* SEARS ET AL., *supra* note 125, at 117.

327. *See id.*

ual permanently.[328] Attribution errors thus can have very significant practical consequences for the attribution target.

This mediating role of causal attributions takes on particular importance in contexts where one party is evaluating and determining outcomes for another. Most research in this area has involved criminal punishment and parole decisions. In one study, experimenters asked subjects to recommend the punishment level for offenders with varied backgrounds and criminal records.[329] The study found that subjects recommended the most severe sentences when they attributed an offender's past crime to an internal and stable cause rather than to an external or variable cause.[330] Experimenters have found similar results in parole decisions.[331] When parole decisionmakers attributed an inmate's past crime to an internal and stable cause, they viewed the inmate not only as more worthy of punishment, but also more likely to recidivate, and the inmate was therefore the least likely to be granted parole.[332]

In the employment context, this means that causal attributions mediate between an employer's evaluations of an employee's past behavior, predictions of the employee's future performance, and decisions about the employee's job.[333] In one experiment, researchers found that when observers attributed an incident of undesirable job-related behavior to an internal and stable characteristic of the employee, they were more likely to suggest greater job-related sanctions than for another employee who acted in exactly the same way.[334] Thus, an employer's mistaken perception of a nondisabled employee as having an internal and stable impairment is likely to have very real consequences for the employee's job. As Professor Linda Hamilton Krieger has explained, "The causal attribution of success and failure plays a critical role in performance evaluation, promotion, compensation, and discharge decisions."[335]

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328. *See id.*

329. *See* John S. Carroll & John W. Payne, *Crime Seriousness, Recidivism Risk, and Causal Attributions in Judgments of Prison Term by Students and Experts*, 62 J. APPLIED PSYCHOL. 595, 596-600 (1977).

330. *See id.*

331. *See* Weiner, *supra* note 136, at 20-21.

332. *See id.*

333. *See* Krieger, *supra* note 35, at 1207 ("The causal attribution of success and failure plays a critical role in performance evaluation, promotion, compensation, and discharge decisions."); Kerry L. Yarkin et al., *Cognitive Sets, Attribution, and Social Interaction*, 41 J. PERSONALITY & SOC. PSYCHOL. 243, 243 (1981) (explaining that observers select between alternative courses of action based on causal attributions of other people's behavior).

334. *See* Krieger, *supra* note 35, at 1205-07 (describing a study by Bodenhausen and Wyer).

335. *Id.* at 1207.

These effects of mistaken attributions are lasting ones, in part because causal attributions tend to increase belief perseverance. Once an observer has organized social information and established social beliefs based on erroneous attributions, those beliefs will remain even after the observer learns that the original attributions were incorrect.[336] Ability-related attributions are particularly resistant to change. In one set of studies, observers evaluated two different actors in a series of tasks. One actor started out performing well, followed by steadily decreasing levels of success, while the other actor performed with the opposite pattern.[337] The observers judged the former actor as more intelligent and they had higher expectations for the former actor's future performance.[338] Thus, the initial attributions rapidly entrenched an estimate of future ability, and those estimates were resistant to change, even in the face of new and discrepant information.[339]

This attribution perseverance occurs even when the observer's original data is fully and completely discredited. Experimenters in another study asked subjects to observe actors try to distinguish authentic from fictitious suicide notes while the experimenters provided completely fabricated feedback about the actors' accuracy on each note.[340] The observers made causal attributions and formed impressions of each actor as they watched the false-feedback manipulation.[341] The experimenters then told the observers that the feedback was fabricated, and the experimenters asked the observers to make their own assessment of the actors' past performance and general abilities, and to provide their own predictions about the actors' future performance on the same or re-

336. *See* HEWSTONE, *supra* note 124, at 64; NISBETT & ROSS, *supra* note 127, at 184-85 (explaining that causal attributions can play a role "in reinforcing and maintaining more abstract and general theories," and identifying studies finding that people believe that their causal attributions are plausible even in the face of later evidence that the connection is nonexistent); Krieger, *supra* note 36, at 1290-91 (describing studies demonstrating that "even after a belief is discredited, the causal explanations generated to support it persist, giving the discredited belief a kind of cognitive life after death"); Ross, *supra* note 127, at 205 (describing studies demonstrating that "errors in . . . social judgments are difficult to reverse and may survive even the complete negation of their original evidential basis"); Vincent Yzerbyt et al., *Stereotypes as Explanations: A Subjective Essentialistic View of Group Perception*, *in* THE SOCIAL PSYCHOLOGY OF STEREOTYPING AND GROUP LIFE 20, 28 (Russell Spears et al. eds., 1997) (compiling studies demonstrating "the impressive ability of theories to self-perpetuate if they are adequately backed up by an explanatory framework").

337. *See* Ross & Fletcher, *supra* note 130, at 90.

338. *See id.*

339. *See id.*

340. *See* Ross, *supra* note 128, at 205.

341. *See id.*

lated tasks.[342] The study found that "[t]he totally discredited initial outcome manipulation produced significant 'residual' effects" on the observers' assessments.[343] The observers evaluated the actors consistent with their original ability-related attributions, even though the observers knew that their original attributions were completely baseless.[344] The fact that people are overly confident in the accuracy of their causal attributions exacerbates this phenomenon.[345] And this extraordinary resistance to reattributing impression-relevant data is likely to be even stronger outside the laboratory, where employers rarely obtain such immediate, complete, or incontrovertible new data regarding their erroneous perceptions about a nondisabled employee.[346]

This belief perseverance is further facilitated because prior expectations actually distort the way that observers view and interpret new events.[347] Once an observer has formed expectations about a person's future behavior based on causal attributions for past behavior, the observer typically will selectively seek and recall new data only if it confirms the observer's prior causal theory.[348] Data from new observations of the actor are thus " 'selectively'

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342. *See id.*

343. *Id.*

344. *See id.* at 206-07. In another study demonstrating this phenomenon, experimenters gave subjects several case studies of individual firefighters and asked the subjects to hypothesize the relationship between firefighters' risk preference as trainees and their later success on the job. *See* NISBETT & ROSS, *supra* note 127, at 185 (describing 1979 study on theory perseverance). The subjects then provided causal attributions for the hypothesized relationship. *See id.* Experimenters then told the subjects that the underlying data was completely fictitious and there was no relationship whatsoever between a firefighter's prior risk preference and later job performance. *See id.* Nevertheless, the subjects persevered in their original causal attributions, still believing their own underlying explanations. *See id.* at 185-86 (explaining that "[p]eople's facility in forming causal explanations is so great that they usually will be able to explain most events and relationships they observe," and that "[t]hese explanations may often prove so convincing that they survive even the total discrediting of the 'evidence' that prompted their invention in the first place").

345. *See* NISBETT & ROSS, *supra* note 127, at 119-20; *see also* Susan E. Brodt & Lee D. Ross, *The Role of Stereotyping in Overconfident Social Prediction*, 16 SOC. COGNITION 225, 225-26 (1998) (collecting studies demonstrating "that people tend to make social predictions with greater subjective certainty or confidence than can be justified by their objective accuracy").

346. *See* NISBETT & ROSS, *supra* note 127, at 251.

347. *See* Ross, *supra* note 128, at 206 ("The capacity of existing impressions and expectations to bias interpretations of social data is, of course, a well-replicated phenomenon in social psychology.").

348. *See* HEWSTONE, *supra* note 124, at 64 & ch. 6; NISBETT & ROSS, *supra* note 127, at 186-88; Ross, *supra* note 128, at 210; Sanbonmatsu et al., *supra* note 266, at 892-93. *But see* Krieger, *supra* note 36, at 1268-69 (describing research showing that observers actually recall disconfirming evidence more readily than confirming evidence, but explaining that the result was because the observers used increased cognitive processing efforts to attribute the expectancy-inconsistent information in a way that would insulate the observer's original theory from modification).

coded in accord with one's biased prior impressions."[349] For example, if the observer has already made an internal and stable attribution for a person's past behavior, the observer will selectively continue to make that attribution for future behavior that confirms the observer's original hypothesis, but will make external and/or variable attributions for future disconfirming behavior, rather than using the new data to reevaluate and modify the initial causal explanation.[350] This process of selective encoding is so strong that "virtually any random sample of newly considered evidence . . . will seemingly support the existing belief or theory."[351] Many researchers are already convinced that these cognitive processes can play an important role in maintaining racial stereotypes,[352] and the effect is likely to be the same with perceived disabilities. An employer's initial misperception of a nondisabled employee as disabled is likely to stick, regardless of what the employee does to try to change that impression.

Moreover, mistaken causal attributions of an actor by an observer can actually affect the way that the actor will later behave. The mere act of making a causal attribution for another person's behavior tends to polarize the observer's responses toward that individual, making the responses either more positive or more negative than they would have been if no causal attribution had occurred at all.[353] Actors then tend to respond in ways suggested by

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349. Ross, *supra* note 128, at 210.

350. *See* HEWSTONE, *supra* note 124, at 64 & ch. 6; Ross, *supra* note 128, at 210.

351. Ross, *supra* note 128, at 210. Selective encoding is another example of a typically rational cognitive processing strategy, which trades off some predictable mistakes for the benefit of great efficiency. *See id.*; *see also* Krieger, *supra* note 36, at 1268-69 (describing research on the "expectancy-confirming attribution bias").

352. *See, e.g.*, NISBETT & ROSS, *supra* note 127, at 238-41; Brown et al., *supra* note 35, at 1495 (citing research demonstrating that once observers have assigned someone to a specific social group, "their reactions may be dominated by this single characteristic; and they may fail to notice other important facts about the person"); Krieger, *supra* note 36, at 1265-70 (citing evidence that "biases in the attribution of causation frequently result in discrimination against members of stereotyped outgroups"); Krieger, *supra* note 35, at 1198 (arguing that social cognition research "indicates that normal cognitive processes can lead to the creation and maintenance of social stereotypes," and that current Title VII jurisprudence does not account for such nonmotivational sources of discrimination).

353. *See* Yarkin et al., *supra* note 333, at 245-51 (studying the behavioral responses of subjects who did and did not make causal attributions for an actor's behavior and finding that "subjects in the attribution measure conditions generally exhibited more pronounced behavioral responses relative to subjects in the no-attribution measure conditions"); Yarkin-Levin, *supra* note 140, at 304-09 (describing the results of a study finding that the act of making causal attributions makes people's behavior towards the individual—whether positive or negative behavior—more extreme in later interactions than the behavior of people who did not engage in causal attribution); *see also* Town & Harvey, *supra* note 137, at 293-98.

the observer's original hypothesis, through the well-documented phenomenon of the "self-fulfilling prophecy."[354] Thus, employers with mistaken perceptions about an employee will not only continue to see nonexistent evidence to support their perception, they will also create confirming evidence in response to their own polarized behavior. What all of this research suggests is that once an employer mistakenly perceives a nondisabled employee as disabled, that mistake is likely to last: "[T]he perception of a disability, socially constructed and reinforced, is difficult to destroy."[355]

III. RECOMMENDATIONS

As explained above, most courts that have addressed nonmotivational misperceptions either have held that the ADA's perceived disability prong does not apply at all—the "no liability" approach—or they have applied the perceived disability prong identically to both nonmotivational and motivational mistakes—the "full liability" approach. In contrast, at least one court has suggested an intermediate alternative.[356] Rather than excluding nonmotivational mistakes from the perceived disability definition altogether, or treating nonmotivational mistakes exactly the same as mistakes that are invidiously motivated, courts could apply a form of "limited liability." Courts could apply the perceived disability prong to nonmotivational mistakes, but treat the employer's lack of animus or the absence of group-based decisionmaking as a mitigating factor that limits the available remedies to fit this particular type of harm. Rather than equating the mistake requirement with one of intent when assessing liability, courts could address the intent issue when determining what the appropriate remedy should be. This section argues that this intermediate approach is the most appropriate. Tailoring remedies is a more precise way to achieve the desired substantive outcome than the rather loose fit that can be obtained solely by line-drawing at the liability stage.

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354. *See* NISBETT & ROSS, *supra* note 127, at 187-88; *see also* Wyer & Lambert, *supra* note 324, at 129-30 (explaining that observers who believed that another person possessed a particular trait "interacted with the other in a way that actually elicited the type of behavior they expected, thereby confirming their predictions").

355. Deane v. Pocono Med. Ctr., 142 F.3d 138, 148 n.12 (3d Cir. 1998) (en banc); *see* Travis, *supra* note 4, at 997-98 (explaining how an employer's misperception of a nondisabled individual as disabled can have lasting discriminatory effects even after the employer is disabused of its misperception).

356. *See* Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 182-83 (3d Cir. 1999) (noting in dicta that while "an employer's innocent mistake . . . is sufficient to subject it to liahility under the ADA, . . . the employer's state of mind is clearly relevant to the appropriate remedies").

A. What's Wrong with the "No Liability" Approach

Courts that have adopted the "no liability" approach for nonmotivational mistakes tend to view the ADA narrowly as a weapon aimed at combating purposeful discrimination.[357] While purposeful discrimination is a central concern of the ADA,[358] it is by no means the exclusive one, and it should not be used as a rationale for limiting the scope of perceived disability claims.

Courts that have taken the "no liability" approach have done so in part because of imprecision in the EEOC's historic account of the perceived disability prong. In 1987, in *School Board of Nassau County v. Arline*, the U.S. Supreme Court first interpreted the "regarded as" language in the ADA's predecessor statute, the Rehabilitation Act.[359] According to the Supreme Court, the perceived disability prong reflected congressional acknowledgement "that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."[360] When drafting the ADA to extend protection into the private sector, Congress adopted the Rehabilitation Act's definitions and cited the *Arline* opinion to justify retaining the "regarded as" language in the ADA.[361] The EEOC's implementing regulations for the ADA therefore correctly cited *Arline* as evidence of congressional intent. But the EEOC did so in a way that may have proved too much.

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357. *See supra* notes 89-104 and accompanying text.

358. *See, e.g.*, 42 U.S.C. § 12101(a)(7) (1994) (stating in the preamble that the ADA is based on Congress's finding that individuals with disabilities have been "subjected to a history of purposeful unequal treatment"); 136 CONG. REC. S9680, S9680 (daily ed. July 13, 1990) (statement of Sen. Kennedy) (emphasizing discrimination based on "ignorance," "fear," and "prejudice"); 136 CONG. REC. S7422, S7441 (daily ed. June 6, 1990) (statement of Sen. Harkin) (stating that "the spirit of the ADA is to end discrimination based on ignorance and prejudice").

The ADA's predecessor statute, the Rehabilitation Act of 1973, originally covered only actually disabling impairments, until Congress amended the Act in 1974 to add the "regarded as" prong. *See* Amendments to the Rehabilitation Act of 1973, Pub. L. No. 93-516, § 111(a), 88 Stat. 1617, 1619 (1974) (codified as amended at 29 U.S.C. § 705(20)(B)(i)-(iii) (Supp. V 1999)). Congress justified the amendment in part based on the belief that nondisabled individuals who are mistakenly "regarded as" disabled are subject to the same type of purposeful discrimination as those with actual disabilities. *See* S. REP. NO. 93-1297 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6389-90.

359. 480 U.S. 273, 283-84 (1987).

360. *Id.* at 284.

361. *See, e.g.*, 136 CONG. REC. E1913, E1913 (daily ed. June 13, 1990) (statement of Rep. Hoyer) (defining the ADA's "regarded as" prong as the *Arline* Court had interpreted the same language in the Rehabilitation Act).

While the *Arline* Court had merely described the effect of motivational mistakes as one potential rationale for the perceived disability prong, the EEOC arguably seemed to equate that description with a *requirement* that the mistakes be motivational in origin. Citing *Arline*, the EEOC states: "[I]f an individual can show that an employer . . . made an employment decision because of a perception of disability *based on* myth, fear or stereotype, the individual will satisfy the regarded as part of the definition of disability."[362] Although the reference to myth and stereotype could be interpreted to encompass a variety of unintentional forms of discrimination,[363] many courts have viewed those terms narrowly to include only group-based misperceptions or intentionally discriminatory acts.[364] Similarly, while the EEOC's statement does not necessarily preclude liability when the perception of disability is "based on" something *other than* myth, fear, or stereotype, these courts have used this regulation as a basis for denying liability for nonmotivational mistakes when an employer regards a nondisabled employee as disabled during the course of an individual evaluation.

That interpretation of the EEOC's regulations ignores the underlying rationale for the perceived disability prong articulated by both Congress and the Supreme Court. Simply put, the rationale is that individuals who are treated as disabled will be disadvantaged in employment whether they are actually disabled or not.[365]

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362. 29 C.F.R. app. § 1630.2*(l)* (2001) (emphasis added) (internal quotation marks omitted).

363. Arguably, the use of the word, "stereotype," by itself indicates that the ADA covers cognitive mistakes. Professor Jody David Armour has described stereotypes as "well-learned sets of associations among groups and traits established in children's memories at an early age." ARMOUR, *supra* note 35, at 121. He distinguishes those cognitive constructs from "prejudiced personal beliefs," which he describes as "the endorsement or acceptance of a negative cultural stereotype." *Id.* While prejudice is conscious and motivational, stereotypes often work at an unconscious level outside of one's own awareness. *See id.* at 121-22. It is unclear if the EEOC's use of the term "stereotype" was intended to include this cognitive view of the stereotyping process, or whether it was intended to describe the conscious and motivational use of group-based generalizations to determine the fate of individuals within the group. To the extent that the EEOC's wording can be viewed as a recognition of cognitive sources of discrimination, that provides an even more direct basis for arguing that the perceived disability prong should cover nonmotivational mistakes.

364. *See, e.g.*, Wright v. Ill. Dep't of Corr., 204 F.3d 727, 731 (7th Cir. 2000) (citing 29 C.F.R. app. § 1630.2*(l)* (2000) to support the conclusion that the perceived disability prong requires that the employer's mistake be based on conscious forms of prejudice); McDowell v. Farmland Indus., Inc., No. 98-3100, 1999 WL 311477, at *2 (10th Cir. May 18, 1999) (same); Miller v. Airborne Express, No. 3:98-CV-0217-R, 1999 WL 47242, at *6 (N.D. Tex. Jan. 22, 1999) (same); Rondon v. Wal-Mart, Inc., No. C-97-0369 MMC, 1998 WL 730843, at *5 (N.D. Cal. Oct. 8, 1998) (same).

365. *See Arline*, 480 U.S. at 283-84 (explaining that a nondisabling impairment that is regarded as a disability "might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment"); *see also* 29 C.F.R. app. § 1630.2*(l)*.

That rationale applies to all types of perceived disabilities, whether the employer's misperception of a nondisabled individual originates cognitively or from conscious and invidious motivations. As one court has explained, "[T]he perception of the employer is as important as reality."[366] Because an employer's misperception causes negative consequences whether or not the mistake is motivationally or cognitively based, the ADA's perceived disability prong should apply to both.[367] Moreover, because an employer's initial misperception of a nondisabled employee as disabled is likely to persevere, regardless of what the employee does to try to change that impression, employees are unlikely to be the "cheapest cost avoiders," which undermines one potential economic argument for a "no liability" approach.[368]

As has been demonstrated with other forms of employment discrimination, the market alone is unlikely to eliminate these employer misperceptions. If firms with managers who consistently exaggerate the gravity of nondisabling impairments faced real competition relative to firms with managers who made accurate attributions, then arguably there would be no need for legal liability in addition to market penalties, and the "no liability" approach would make sense. But there are several reasons to believe that the market will not sufficiently discipline these types of discriminators. First, although people predictably err in their causal attributions in a way that is likely to harm certain individuals disproportionately, the causal attribution process overall is more often accurate than not, and it is an extremely rapid way to organize social information

366. E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1097 (D. Haw. 1980); *see also* Moberly, *supra* note 51, at 363 (explaining the view that "individuals with perceived disabilities and those with actual disabilities may be equally deserving of statutory protection" because "an individual who is incorrectly perceived to have a disability may be as aggrieved by discriminatory treatment as a person who actually has a disability").

367. Professor David Oppenheimer has made a similar point in arguing that Title VII should apply to forms of unconscious racism:

> [T]he victims of unconscious discrimination have suffered the same economic damages, and often the same emotional damages, as the victims of knowing bigotry. The nature of the wrong committed by the employer who decides not to hire African Americans, or women, or members of ethnic or religious minority groups, because of a self-acknowledged prejudice, may be greater than that of the employer who is merely unaware of his own propensities, but the harm caused by the unconscious discrimination is largely the same.

Oppenheimer, *supra* note 35, at 916; *see also* Lawrence, *supra* note 35, at 322-23 (arguing that "equal protection doctrine must find a way to come to grips with unconscious racism").

368. *See, e.g.*, Wax, *supra* note 125, at 1199-1206 (viewing the victims of race-based employment discrimination as the "cheapest cost avoiders," and suggesting that "it could well make sense to let the costs of unconscious [racial] bias remain where they fall" because "employees might be able to control that risk more efficiently than employers").

and make useful predictions about future behavior. Because nonmotivational perceived disabilities are the result of typically effective cognitive processes rather than the consistent application of irrational prejudice, the market may not penalize these types of mistakes sufficiently.

In fact, there may even be some rewards for this type of discrimination, making the net market penalty zero, or even providing employers with a net positive result. In addition to the standard arguments about reducing internal governance costs by increasing workforce homogeneity,[369] causal attribution biases may also be working in some ways like a form of statistical discrimination,[370] even if not knowingly done so. If individuals with nondisabling impairments are, on average, more likely to become costly employees than are fully able-bodied workers (for example, by being more likely, on average, to later become actually disabled and entitled to workplace accommodations, or to take sick days, or to draw workers' compensation, etc.), then acting on attribution biases may end up being economically efficient for an individual employer. By systematically basing employment decisions on exaggerated assessments of nondisabling impairments, employers may actually be profit maximizing, if it is costly to make more accurate assessments. Thus, misperceptions that function as a form of statistical discrimination may remain stable even in a competitive market.[371] But even if statistical discrimination is profit maximizing for the individual firm, it can be "inefficient for society as a whole."[372] Statistical discrimination may, for example, distort the incentives for investment in human capital by divorcing individual productivity from wages.[373] If so, ADA liability is needed to address this form of discrimination.

Even if the market is unlikely to eliminate perceived disability discrimination on its own, advocates of the "no liability" approach may still argue that the ADA should not apply to cognitively based misperceptions. While the social science literature indicates that there can be very real job-related consequences for nondisabled

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369. *See generally* RICHARD A. EPSTEIN, THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAW (1992).

370. *Cf.* John J. Donohue III, *Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner*, 136 U. PA. L. REV. 523, 531-33 (1987) (describing "statistical discrimination" in the context of Title VII and race discrimination).

371. *Cf. id.* at 532 (making this point in the context of Title VII and race discrimination, stating that "[s]ince statistical discrimination can be profit-maximizing, it tends to be stable while [animus-based] discrimination tends to be eroded by competitive markets").

372. *Id.*

373. *See id.* at 532-33.

employees who are subject to cognitively based misperceptions by their employers, it does not necessarily indicate that the consequences are identical to nondisabled employees who are subject to motivational mistakes. Advocates of the "no liability" approach could point to at least two potential differences between the harm faced by nondisabled employees who are misperceived during an individual evaluation and those who are misperceived due to invidious prejudice or group-based decisionmaking.

First, proponents of the "no liability" approach may argue that nondisabled employees who face motivational misperceptions are subjected to a more widespread form of employment discrimination. Some commentators believe that "a particular employer's mistaken perception will seldom limit an individual's general ability to secure employment elsewhere."[374] Nondisabled employees will face systemic exclusion only if they possess some characteristic "about which other employers might form a similar (albeit mistaken) impression."[375] Some may argue that such shared misperceptions will occur more often with mistakes based on group-based prejudice than with mistakes based on cognitive processing errors. Motivational prejudice, which is "socially created and social-norm enforced,"[376] may be shared by many employers and triggered by similar employee characteristics, while mistakes that arise during an individual employee assessment may be less likely to be duplicated by others. If so, nondisabled employees who are victims of an employer's nonmotivational misperception may not face the same type of systemic workplace exclusion as those who are victims of conscious prejudice. This is relevant because the heart of the disability rights movement was focused on independence, self-sufficiency, mainstreaming, and integration for those who had been systematically excluded from workforce participation.[377] Imposing liability

374. Moberly, *supra* note 51, at 363 (citations omitted).

375. *Id.* (citations omitted).

376. Mark Kelman, *Does Disability Status Matter?*, *in* AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 91, 94 (Leslie Pickering Francis & Anita Silvers eds., 2000) (explaining why prejudice against historically subordinated group members is less likely to be corrected by market competition than irrational treatment of a member of a socially advantaged group).

377. *See* JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 52, 144 (1993); *see also* S. REP. NO. 101-116, at 10 (1989) (describing the ADA's "critical goal" of "allow[ing] individuals with disabilities to be part of the economic mainstream of our society"); 135 CONG. REC. 19,892 (1989) (statement of Sen. Biden) (emphasizing the goals of participation, integration, independence, self-determination, and self-sufficiency); *cf.* Moberly, *supra* note 51, at 363 (explaining that one argument for not covering perceived disabilities at all is that "the primary purpose of laws prohibiting disability discrimination is to insure

only in the face of systemic exclusion may be a logical way to differentiate truly discriminatory employment decisions from mere "idiosyncratic irrationality" (such as when a manager mistakenly underestimates an employee's capabilities because the employee reminds the manager of a lazy relative), which is likely to have few lasting consequences given the presence of other employment opportunities.[378]

While this argument has some appeal, the social science literature suggests that perceived disabilities from cognitive processing biases are likely to be neither unusual nor idiosyncratic. Causal attribution biases work in predictable directions, and they are particularly likely to occur during employment decisionmaking about an individual with a nondisabling but salient impairment. Moreover, even if the pervasiveness of the harm is a distinguishing feature in fact, it is not a distinguishing feature in law. The ADA's statutory language covers single, even anomalous, instances of disability-based discrimination.[379] The EEOC and courts agree that one employer's misperception is enough to trigger the ADA's perceived disability prong, whether or not that misperception is shared by any other employer.[380]

In addition, Congress recognized that there are many different types of discrimination when disabilities are involved.[381] Although the legislative history does not explicitly acknowledge discrimination from the types of cognitive processing errors discussed above, Congress articulated a multifaceted view of disability discrimination. Although purposeful discrimination was a central con-

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that the 'truly disabled' are free from discrimination based on unfair stereotypes or prejudice," so disability protection should only apply to those who "suffer from impairments that 'significantly decrease [their] *general ability* to obtain satisfactory employment elsewhere' " (footnotes omitted) (alteration in original)).

378. *See* Kelman, *supra* note 376, at 94 (explaining that one reason the law might not protect a straight, white, able-bodied male who was the victim of irrational treatment by a particular employer whom he reminded of a loathed stepfather, for example, is because that type of irrationality "is likely to be corrected by market competition rather than state action," while irrational treatment of members of historically subordinated social groups is likely to result in persistent disadvantage); *see also id.* at 97 ("Markets presumably fail to eliminate irrational treatment where irrationalities are widespread rather than idiosyncratic.").

379. 42 U.S.C. § 12112(a), (b) (1994) (defining term discriminate).

380. *See, e.g.*, EEOC v. Texas Bus Lines, 923 F. Supp. 965, 975 (S.D. Tex. 1996) (citing 29 C.F.R. § 1630.2*(l)*); *see* 29 C.F.R. § 1630.2*(l)* (2001) (stating that the perceived disability prong applies "if an individual can show that *an* employer . . . made an employment decision because of a perception of disability" (emphasis added)).

381. *See* 135 CONG. REC. S4979, S4986 (daily ed. May 9, 1989) (statement of Sen. Harkin) ("Discrimination includes harms affecting individuals with disabilities . . . that are based on false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies.").

cern, Congress noted that disability discrimination could be both intentional and unintentional, and even perpetrated in good faith.[382] More specifically, some members of Congress endorsed the view that the ADA should cover "both conscious and unconscious, unthinking discrimination."[383] That statement is broad enough to encompass discrimination that results from unconscious causal attribution biases and other nonmotivational mistakes.[384]

The second potential difference between the type of harm suffered by nondisabled individuals who are misperceived because of motivational mistakes and those who are misperceived because of cognitive processing errors is that the former may face a form of dignitary injury not felt by the latter. Employers' misperceptions may only warrant a legal remedy when they stem from an individual's membership in an historically subordinated group, because the error conveys a unique form of stigma to the individual victim

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382. *See* 136 CONG. REC. H2599, H2618 (daily ed. May 22, 1990) (statement of Rep. Fawell) (noting that "there are going to be countless violations of this act made unintentionally and in good faith"); 136 CONG. REC. H2421, H2434 (daily ed. May 17, 1990) (statement of Rep. Unsoeld) (stating that disability discrimination "has the same impact" whether it is "unintentional or deliberate"); 135 CONG. REC. S10765, S10795 (daily ed. Sept. 7, 1989) (statement of Sen. Lieberman) (describing both "intentional and unintentional" forms of disability discrimination); 134 CONG. REC. S5106, S5108 (daily ed. Apr. 28, 1988) (statement of Sen. Weicker) (explaining that the ADA's provisions "encompass both intentional and unintentional acts of discrimination").

Congress agreed with the Supreme Court's assessment that discrimination against individuals with disabilities was "most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect." *See* Alexander v. Choate, 469 U.S. 287, 295 (1985) (deciding a case under the Rehabilitation Act and explaining that "[f]ederal agencies and commentators on the plight of the handicapped similarly have found that discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus"); 136 CONG. REC. H2421, H2440 (daily ed. May 17, 1990) (statement of Rep. Fish) (quoting *Alexander* and arguing that much of disability discrimination "is not the malicious, violent, ugly discrimination experienced on account of one's race, national origin or religion"); 134 CONG. REC. S5106, S5108 (daily ed. Apr. 28, 1988) (statement of Sen. Weicker) (citing *Alexander* favorably).

383. 136 CONG. REC. H2599, H2622 (daily ed. May 22, 1990) (statement of Rep. Hoyer); *see also* 135 CONG. REC. S10765, S10802 (daily ed. Sept. 7, 1989) (statement of Sen. Heinz) (explaining that the ADA was intended to address "institutional, structural, and psychological barriers").

384. *See* Mayerson, *supra* note 12, at 602 (documenting the ways in which the ADA's legislative history "emphasizes the need for broad [perceived disability prong] coverage"); *see also* Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (referring to "the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes"); *cf.* ARMOUR, *supra* note 35, at 79-80 (arguing that the correct legal approach regarding race discrimination should be a broad one "that refuses to give the state's imprimatur to . . . bias—whether conscious or unconscious, voluntary or involuntary"); Oppenheimer, *supra* note 35, at 899, 935-36 (using legislative history to make a similar argument with respect to Title VII on the basis that "[u]nderlying the Congressional focus on the consequences of discrimination, as opposed to discriminatory intent, may be an implicit recognition of the existence of unconscious discrimination, and its importance in the analysis of Title VII cases").

and indirectly victimizes other members of the group as well.[385] Proponents of the "no liability" approach may argue that those broader injuries may occur when an employer misperceives a nondisabled individual as disabled because of group-based assumptions about "the disabled," but may not occur when the mistake is a cognitive evaluation error during the course of an individual assessment. Arguably, the latter situation does not reflect the same expression of social dominance, disrespect, neglect, and devaluation as the former.[386]

There is evidence, however, that stigmatic injury is based on cultural context and that it may attach even without invidious intent or animus.[387] Cognitively based misperceptions are not "accidents," in that they are not evenly distributed, random events. Moreover, these employees are experiencing job-related consequences because they are perceived to be members of a class that undisputedly has been subjected to historic subordination and exclusion: a class that is likely to experience stigma even from unintentional forms of discrimination. In any event, even assuming that dignitary harm can distinguish between the consequences of motivational and cognitive mistakes, that does not necessarily preclude a broad application of the perceived disability prong. To the extent that the type of harm is different when motivational and nonmotivational mistakes are involved, that difference should be reflected by awarding different types of remedies, rather than holding the employer liable for one form of error but not the other.

Some might argue, however, that even a "limited remedies" approach has the potential to cause undesirable substitution effects by employers. If employers are likely to respond to the threat of ADA liability by deciding not to hire anyone with a nondisabling impairment in the first place, those individuals conceivably could end up worse off with ADA protection than without it. Although the ADA also prohibits discriminatory hiring decisions, discriminatory

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385. *See* Lawrence, *supra* note 35, at 350-52 (describing the unique harms from stigmatizing actions); *see also* Kelman, *supra* note 376, at 94-95 (explaining that one reason antidiscrimination laws may only protect against irrational employment decisionmaking against members of historically subordinated groups is because only those irrational decisions "express the social power of one group over another, or demean the victim"); *id.* at 97 ("Arguably, we invoke antidiscrimination law only for those who legitimately experience such treatment as stigmatizing.").

386. *See* David Wasserman, *Distributive Justice*, *in* DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY 147, 175 (Anita Silvers ed., 1998) (using these concepts to help draw other difficult lines in discrimination law).

387. *See* Lawrence, *supra* note 35, at 352-55 (stating that "stigma often occurs regardless of the intent of those who have engaged in the stigmatizing action . . . [and that] . . . evil intent . . . , while perhaps sufficient, is not necessary").

hiring may be the most difficult to detect and litigate successfully, which would make it rational for an employer to hire fewer individuals in the protected class.[388] With a limited remedies proposal, this risk presumably would exist only for the jurisdictions currently taking a "no liability" approach, where the scope of the ADA would be expanded, but not for jurisdictions currently taking a "full liability" approach, where potential ADA damages would actually be reduced. Even in the "no liability" jurisdictions, this substitution effect is likely to be smaller under a limited remedies proposal than under a full liability regime.[389]

Refusal to hire as a negative substitution effect is also likely to be smaller in the perceived disability context than with respect to race or sex, for example. Unlike an employee's race and sex, an employee's nondisabling impairments are more often unknown to an employer prior to hiring. The ADA prohibits prehire medical examinations,[390] which means that at the time of hiring, employers will only be aware of visibly obvious nondisabling impairments, such as cosmetic disfigurements. In addition, many nondisabling impairments do not exist until after the employee is hired. Perceived disability cases often arise when a current employee suffers from an illness or injury, prompting any nondisabling residual impairments to come to the employer's attention and become salient after the hiring decision has already taken place. Accordingly, refusing to hire is unlikely to be a widespread option for employers in response to a legal approach that applies the ADA's perceived disability prong to cognitively based mistakes. Thus, the anticipated

388. *Cf.* Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513, 517 (1987) (arguing that Title VII's prohibition on race discrimination will give employers "an economic incentive to employ fewer blacks" because even though the law also forbids making race-based hiring decisions, that part of the law is "very difficult to enforce"). *See generally* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991) (documenting the dramatic shift from hiring-based to firing-based employment discrimination litigation under Title VII).

389. Recent empirical work by Paul Oyer and Scott Schaefer is arguably consistent with this prediction. Paul Oyer & Scott Schaefer, *Sorting, Quotas, and the Civil Rights Act of 1991: Who Hires When It's Hard to Fire?* (Apr. 2001), *at* http://papers.ssrn.com/paper.taf?abstract_id=265509. Oyer and Schaefer have found that after Title VII was enacted to prohibit race and gender discrimination, the employment shares for African-Americans and women in industries with medium and low representation increased. *See id.* However, after the Civil Rights Act of 1991 made compensatory and punitive damages available for Title VII suits, the employment shares for African-Americans and women decreased in those same industries. *See id.* This suggests that employers may respond to antidiscrimination laws by hiring fewer individuals in the protected class primarily when there is a risk of large compensatory and punitive damage awards.

390. *See* 42 U.S.C. § 12112(d) (1994).

benefits of applying the ADA to these types of misperceptions are likely to outweigh the potential costs.

B. What's Wrong with the "Full Liability" Approach

While some courts have refused to apply the ADA's perceived disability prong to cognitively based misperceptions, other courts have taken a position on the opposite extreme. These courts have applied the perceived disability prong to cognitive errors in exactly the same way as to errors that result from disability-based animus or conscious, group-based decisionmaking. While the "no liability" approach falls short of the ADA's objectives, this "full liability" alternative goes too far.

First, misperceiving a nondisabled employee as disabled because of an overbroad application of consciously held prejudice or the deliberate application of group-based generalizations is arguably normatively worse than unconsciously overestimating the impact of a nondisabling condition during the course of an individual assessment.[391] The former misperception more clearly represents a knowing choice and invidious intent, and it may cause a more widespread and stigmatic form of injury, as explained above. Cognitively motivated mistakes, in contrast, represent at least an attempt to avoid the use of group-based assumptions. This "lack of moral blameworthiness," however, "does not translate into a lack of legal responsibility."[392] While nonmotivational mistakes may be less reprehensible than those based on conscious prejudice, that difference should only be considered when evaluating the appropriate remedy for the resulting harm.[393]

Second, imposing the full array of remedies against an employer for both motivational and cognitive errors could actually decrease voluntary efforts at compliance. If all perceived disabilities result in the same liability, employers will be even more unwilling

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391. *Cf.* Oppenheimer, *supra* note 35, at 916 (noting in the Title VII context that "[t]he nature of the wrong committed by the employer who decides not to hire African Americans, or women, or members of ethnic or religious minority groups, because of a self-acknowledged prejudice, may be greater than that of the employer who is merely unaware of his own propensities"); *see also* Wax, *supra* note 125, at 1220 (stating that "[i]nadvertent discrimination would understandably be regarded as less morally blameworthy than animus-based bias" by triers of fact).

392. Oppenheimer, *supra* note 35, at 971 (arguing that unconscious forms of race discrimination should be covered under Title VII).

393. *Cf. id.* at 916 (arguing that Title VII should cover unconscious race discrimination because it causes the same harm as knowing bigotry, but "[i]ntentional, bigoted decisions may be appropriately the subject not only of compensatory but of punitive damages as well, and thus properly distinguished").

to acknowledge their cognitive biases, which will reduce voluntary efforts to fix the problem.[394] If courts explicitly recognize that some employer misperceptions are not the result of conscious thought or invidious animus, and courts limit the scope of liability for such cognitive mistakes in a meaningful way, employers would not face the same type of moral opprobrium by acknowledging when such errors occur.[395]

Professor Linda Hamilton Krieger has made this point persuasively in the context of Title VII race discrimination claims. Professor Krieger argues that by failing to explicitly distinguish between cognitive and motivational forms of discrimination, Title VII jurisprudence exacerbates intergroup tensions by either failing to identify some forms of biased decisionmaking, or by wrongfully attributing a discriminatory motive to well-intentioned, but erroneous, decisionmakers.[396] By forcing all forms of individual discrimination to be litigated under a motivational, intentional tort model,

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394. *Cf.* Jessie Allen, Note, *A Possible Remedy for Unthinking Discrimination*, 61 BROOK. L. REV. 1299, 1317 (1995) (arguing that the failure to cover nonmotivational forms of discrimination under Title VII "may actually discourage employers . . . from acknowledging, let alone actively investigating, the risks of their own unconscious racism," because "[t]hey receive no credit for doing so and may subject themselves to greater potential liability").

In another context, the U.S. Supreme Court recently acknowledged the risk that applying punitive damages too broadly for Title VII violations could actually "reduce the incentive for employers to implement anti-discrimination programs." Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 544 (1999). Under current law, punitive damages are possible when a decisionmaker intentionally discriminates in the face of a perceived risk that the conduct violates federal law. *Id.* at 536. Accordingly, the Court rejected a lenient "scope of employment" standard for imposing vicarious liability for punitive damages on the employer. *Id.* at 544-45. The Court wanted to avoid an interpretation of the punitive damage provision that would "exacerbate concerns among employers" that the law "penalizes those employers who educate themselves and their employees on Title VII's prohibitions." *Id.* at 544. "Dissuading employers from implementing programs or policies to prevent discrimination in the workplace," the Court explained, "is directly contrary to the purposes underlying Title VII." *Id.* at 545.

395. *See* Allen, *supra* note 394, at 1318 ("In theory, anyway, the moral stigma of a finding of intentional discrimination should not attach to negligent discrimination, because acting negligently is simply not considered as blameworthy as causing intentional harm."); Krieger, *supra* note 35, at 1243-44 (arguing that Title VII should treat cognitively based discrimination different from motivational forms of discrimination by prohibiting compensatory and punitive damages in the former category, because "[a]ttaching moral opprobrium or the risk of substantial financial liability to cognitive intergroup judgment errors can only serve to heighten intergroup anxieties and . . . exacerbate categorical responding"); Lawrence, *supra* note 35, at 325-26 (arguing that if equal protection doctrine acknowledged liability for "unconscious" discrimination, it would "obviate[ ] the need for fault, as traditionally conceived, without denying our collective responsibility for racism's eradication," and, as a result, "our resistance to accepting the need and responsibility for remedy will be lessened"); *cf.* Allen, *supra* note 394, at 1317-19 (predicting that a negligence theory for race discrimination claims would "assign responsibility for discriminatory actions without demonizing and isolating the person who negligently discriminates").

396. *See* Krieger, *supra* note 35, at 1217.

Title VII law discourages voluntary settlement, increases litigation costs, and decreases the validity of employment discrimination adjudications.[397] Professor David Oppenheimer similarly has proposed the creation of a negligence model for unconscious forms of race discrimination under Title VII.[398] He suggests that Title VII should cover nonmotivational bias, including discrimination from cognitive processing errors, but punitive damages should be prohibited to avoid the moral stigma associated with intentional discrimination.[399] These arguments should apply equally in the disability context with regard to cognitively based perceived disability claims.

The third reason for providing different remedies is that the ADA's goal of eliminating misperceptions[400] may not be achieved in the same way for motivational and cognitive mistakes. When mistaken perceptions are the result of consciously held, group-based prejudice or assumptions, then increasing monetary sanctions sufficiently should cause employers to ferret out and eliminate their misperceptions, or at least to stop acting on them. In contrast, errors that result from typically unconscious, automatic, and largely adaptive cognitive processes are unlikely to be cured simply by the threat of a large monetary sanction.[401] In fact, social scientists have

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397. *See id.*

398. *See* Oppenheimer, *supra* note 35, at 916 (arguing that unconscious race discrimination should be redressed by Title VII, but that only knowing, intentional discrimination should subject the employer to punitive damages).

399. *See id.* at 970-72 (arguing that one social benefit that would result from recognizing negligent discrimination under Title VII "stems from the recognition that a finding of liability should not be equated with a determination of moral wrongfulness," and that "negligent discrimination need not and ought not to be viewed as morally reprehensible conduct").

400. *See, e.g.*, 136 CONG. REC. H4614, H4625 (daily ed. July 12, 1990) (statement of Rep. Edwards) (stating that the ADA will "go a long way" toward having individuals "judged by their abilities"); 136 CONG. REC. H4614, H4627 (July 12, 1990) (statement of Rep. Oberstar) (explaining the ADA's goal of "eliminating . . . misconceptions"); 136 CONG. REC. S9527, S9542 (daily ed. July 11, 1990) (statement of Sen. Dole) (stating that the ADA "is all about . . . replacing misunderstanding with understanding"); 136 CONG. REC. H2421, H2430 (daily ed. May 17, 1990) (statement of Rep. Bartlett) (explaining that one goal of the ADA is to "reshape attitudes toward disability"); 135 CONG. REC. S10765, S10791 (daily ed. Sept. 7, 1989) (statement of Sen. Riegle) (stating that the purpose of the ADA is to "eradicate" misconceptions); 135 CONG. REC. S4984, S4985 (daily ed. May 9, 1989) (statement of Sen. Harkin) (describing the ADA's purpose of eliminating decisionmaking "on the basis of presumptions, generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, or pernicious mythologies").

401. *See* Brown et al., *supra* note 35, at 1497, 1512 (noting that "cognitive shortcuts often will override even volitional good will" and that unconscious cognitive processes are difficult to prevent); Lawrence, *supra* note 35, at 349 (noting that "unconscious prejudice presents an additional problem in that it is not subject to self-correction" through normal processes of reason or moral persuasion).

found that monetary incentives for accuracy produce no systematic improvement in subjects' cognitive processing biases.[402]

Because of this additional challenge with cognitive errors, Professor Amy Wax has argued in the Title VII context that antidiscrimination statutes should not cover unconscious disparate treatment at all.[403] Professor Wax has argued that there is currently no known way to control unconscious bias effectively,[404] and thus she concludes that imposing liability under Title VII will have no deterrent effect[405] and will cause employers to overinvest in ineffective precautionary measures.[406]

While unconscious bias is indeed more difficult to control and deter, deterrence is not the only purpose of the ADA. Compensating employees is an independent objective that may be served by providing certain forms of "make whole" relief. Accordingly, while the limitations on deterring unconscious forms of bias provide a persuasive reason for not allowing deterrence-focused remedies, such as punitive damages, they do not necessarily support a "no liability" approach.[407]

In addition, while monetary incentives do not appear to systematically improve observers' perceptual accuracy, social scientists are continuing to discover other methods that may be more effective. These methods, which are described below, involve procedural manipulations in an observer's evaluation and decisionmaking strategies.[408] While this research is admittedly far from complete

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402. *See* NISBETT & ROSS, *supra* note 127, at 253.

403. *See* Wax, *supra* note 125, at 1332-33 (arguing that antidiscrimination statutes should not cover unconscious disparate treatment in the workplace because "employers have little effective control over unconscious bias").

404. *See id.* at 1133 (arguing that "there are no known methods for effectively controlling unconscious bias in the workplace").

405. *See id.* at 1175 ("Because employers do not know how to respond constructively to such incentives, there is no reason to believe that the risk of unconscious discrimination will be reduced by encouraging employers to take steps against decisionmaking bias. Put bluntly, liability for unconscious discrimination will not deter unconscious discrimination.").

406. *See id.* at 1184 (arguing that liability for unconscious bias would cause employers to overinvest in precautions that will reduce liability potential "without effectively reducing the influence of unconscious bias on its decisionmaking processes").

407. *See* Lawrence, *supra* note 35, at 344 (countering arguments "that the law should govern only consciously motivated actions").

408. *See infra* notes 437-70; *see also* Brown et al., *supra* note 35, at 1512 (citing cognitive theory and empirical studies providing reasons to be "guardedly optimistic" that people can override their automatic cognitive processing errors when sufficiently motivated to do so); Krieger, *supra* note 36, at 1332 (arguing that cognitive sources of intergroup discrimination can be corrected, but correction requires "further deliberate mental effort"); Lee Ross, *Comment on Gilbert*, *in* ATTRIBUTION AND SOCIAL INTERACTION: THE LEGACY OF EDWARD E. JONES 53, 56 (John M. Darley & Joel Cooper eds., 1998) (noting that the fundamental attribution error "could be at-

and may not yet give employers adequate direction about how to avoid causal attribution and prediction biases, this research at least suggests that proper incentives may lead employers to find ways to improve their assessments of employees' physical and mental conditions. Given the legislative interest in protecting employees from "both conscious and unconscious, unthinking, discrimination,"[409] and the legislative desire to get employers to make decisions "based on facts,"[410] any risk of overinvestment in precautionary measures appears to be one that Congress was willing to take with respect to the ADA.

If eliminating misperceptions is one goal of antidiscrimination laws, Professor Wax's argument that large monetary sanctions are unlikely to achieve that goal in the Title VII context probably applies with equal force to the ADA. Nonetheless, that should not relieve employers of responsibility for the very real consequences of their cognitive mistakes. Instead, the unique challenge of eliminating individual, cognitively based misperceptions provides additional support for carefully tailoring the types of remedies available, rather than abandoning liability altogether.

C. The "Limited Remedies" Approach

The ADA incorporates by reference the remedies provided under Title VII, which governs employment discrimination on the basis of race, color, sex, national origin, and religion.[411] For "intentional" discrimination, Title VII remedies may include declaratory judgments, injunctions, attorney's fees and costs, hiring or reinstatement, back pay, front pay, "or any other equitable relief as the court deems appropriate."[412] The Civil Rights Act of 1991 expanded the remedies for intentional discrimination for both Title VII and the ADA. Since 1991, plaintiffs alleging intentional discrimination

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tenuated or reversed" by manipulating a variety of perceptual underpinnings in the laboratory); Yaacov Trope, *Dispositional Bias, in Person Perception: A Hypothesis-Testing Perspective, in* ATTRIBUTION AND SOCIAL INTERACTION: THE LEGACY OF EDWARD E. JONES 67, 93 (John M. Darley & Joel Cooper eds., 1998) (arguing that "with sufficient motivation to be accurate and adequate processing resources, perceivers may adopt careful, diagnostic inference rules, rather than pseudodiagnostic heuristics, and thus avoid drawing overconfident dispositional inferences from behavior"); Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 130-35 (1994) (discussing preconditions and potential techniques for correcting "mental contamination").

409. 136 CONG. REC. H2599, H2622 (daily ed. May 22, 1990) (statement of Rep. Hoyer).

410. 136 CONG. REC. H2599, H2632 (daily ed. May 22, 1990) (statement of Rep. Owens).

411. *See* 42 U.S.C. § 12117(a) (1994) (incorporating the remedies available under Title VII, 42 U.S.C. § 2000e-5 (1994)).

412. § 2000e-5(g), (k).

may also seek compensatory damages (e.g., emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses) and punitive damages, up to specific statutory caps.[413]

Title VII also recognizes claims of "unintentional" discrimination against protected groups, under the systemic "disparate impact" model.[414] For disparate impact claims, Title VII imposes liability on the employer, but does not allow the newly added compensatory or punitive damage awards, in recognition of the unintentional nature of the employer's act.[415] But the disparate impact model does not apply to the types of unintentional discrimination identified in this Article. The disparate impact model only applies when an employer uses a particular, neutral employment practice that produces a statistically significant disparity in outcomes for members of one *group* as compared to members of another *group*, thereby placing one group at a collective disadvantage.[416] While disparate impact claims need not be class actions, the success of an individual employee's claim depends upon a showing of group-based harm. A group-based model of unintentional discrimination is ill-suited to address the unintentional cognitive processing biases that are at work during individual employee assessments. As Professor Krieger has explained in the Title VII context, the disparate impact model was developed to address "ostensibly empirical selection tools on their own empirical terms," not to address the cognitive biases involved in "subjective, individualized interpersonal decisionmaking."[417] Because the ADA tracks Title VII, the ADA similarly lacks a general model for redressing unintentional forms of individual discrimination, absent a showing of group-based harm.

However, the ADA does include one specific remedial caveat, which effectively recognizes at least one form of individual, but unintentional, harm. Moreover, this caveat treats the employer's lack of intent as a basis for remedial mitigation, rather than as a ticket

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413. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072-73, codified at 42 U.S.C. § 1981a(a), (b) (1994).

414. *See* 42 U.S.C. § 2000e-2(k).

415. *See* Civil Rights Act of 1991, § 102.

416. *See* § 2000e-2(k); Connecticut v. Teal, 457 U.S. 440, 457-59 (1982) (Powell, J., dissenting) (explaining that the disparate impact model, by definition, "invites the plaintiff to prove discrimination by reference to the group rather than to the allegedly affected individual," and that a disparate impact claim will fail "in the absence of disparate impact on a *group*"); *see also* Krieger, *supra* note 35, at 1228, 1231.

417. Krieger, *supra* note 35, at 1237; *see also id.* at 1227-37 (explaining why the disparate impact paradigm "is an inappropriate analytical tool" to address cognitive forms of discrimination under Title VII).

out of liability. The ADA defines the term "discriminate" to include seven different types of conduct, six of which mirror the forms of prohibited discrimination under Title VII.[418] The additional way that an employer may violate the ADA is by "not making reasonable accommodations" for an individual with a disability.[419] When the Civil Rights Act of 1991 expanded the remedies for intentional discrimination under Title VII and the ADA, Congress also added the following provision:

> Reasonable accommodation and good faith effort. In cases where a discriminatory practice involves the provision of a reasonable accommodation . . . , [compensatory and punitive] damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation . . . .[420]

By adding this provision, Congress acknowledged that some forms of disability discrimination are unique. Unlike the antidiscrimination mandate in Title VII, the ADA's reasonable accommodation provision requires employers to take specific affirmative steps. As the EEOC regulations explain:

> This process requires the individual assessment of both the particular job at issue, and the specific physical or mental limitations of the particular individual in need of reasonable accommodation. With regard to assessment of the job, "individual assessment" means analyzing the actual job duties and determining the true purpose or object of the job. . . . After assessing the relevant job, the employer, in consultation with the individual requesting the accommodation, should make an assessment of the specific limitations imposed by the disability on the individual's performance of the job's essential functions.[421]

The remedial caveat added by the Civil Rights Act of 1991 applies when an employer makes a good faith effort to carry out this individual assessment procedure, but nevertheless makes an error and fails to provide the accommodations that the ADA requires. In that situation, the statute will still hold the employer liable for discrimination, but the employee will not be eligible for all of the statutory remedies. The statute will only permit declaratory relief, injunctions, attorney's fees and costs, back pay, and front pay, but will not provide the compensatory or punitive damages added by the 1991 Act. Thus, the statute explicitly acknowledges at

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418. *See* Karlan & Rutberglen, *supra* note 69, at 5-6 nn.18-21 (explaining in detail the parallel discrimination provisions in the ADA and Title VII). *Compare* § 2000e-2(a) (describing unlawful discriminatory employment practices), *with* 42 U.S.C. § 12112(b)(1)(7) (1994) (defining the scope of the term "discriminate").

419. 42 U.S.C. § 12112(b)(5).

420. Civil Rights Act of 1991, § 102.

421. 29 C.F.R. app. § 1630.9 (2001).

least one form of unintentional individual disparate treatment, and while the employer's lack of intent is calculated into the remedy analysis, it is deemed irrelevant at the liability stage.

That approach is one way that individual, cognitively based misperceptions could be treated under the ADA's perceived disability prong. When an employer attempts to individually assess an employee's capabilities but unintentionally views a nondisabling impairment as a disability, the court could hold the employer liable for a perceived disability claim but find the employee ineligible for the forms of compensatory damage or the punitive damages that were added by the 1991 Act (similar to a disparate impact claim).[422] Excluding these two types of remedies would appropriately balance the concerns raised by the proponents of both the "no liability" and the "full liability" approaches. Imposing liability would recognize the economic reality that misperceived but nondisabled individuals are indeed disadvantaged by the employer's misperception. On the other hand, excluding the forms of compensatory damage covered by the 1991 Act would acknowledge that individuals who are subject to intentional discrimination, prejudice, and invidious animus may suffer unique and additional forms of dignitary and emotional harm. In addition, prohibiting punitive damages would reflect the unintentional nature of the employer's act and the presently unknown potential for deterrence.

This particular approach for applying the ADA's perceived disability prong to individual, cognitively based mistakes would not require any change in the statutory language. Courts would only need to construe the individual assessment requirement not merely as a procedural obligation, but also as a substantive one. Although Congress and the EEOC describe the purpose of the individual assessment as preventing the use of group-based generalizations,[423] an employer should not be deemed to have satisfied that requirement simply by avoiding the use of conscious prejudice. To effectively address all of the types of discrimination—intentional and unintentional, conscious and unconscious—that are recognized in the ADA's legislative history, courts should view the individual as-

422. *Cf.* Krieger, *supra* note 35, at 1243 (arguing that courts "should differentiate more clearly between intentional and unintentional forms of disparate treatment discrimination").

423. *See* 29 C.F.R. app. § 1630.5 (2001); *see also* 135 CONG. REC. S10765, S10779 (daily ed. Sept. 7, 1989) (statement of Sen. Domenici) (explaining that one reason for the individualized assessment rule is to ensure that people diagnosed with mental disorders are not "automatically discriminated against . . . because of some of the niches that they are put in," but instead receive "an unbiased evaluation of their capability").

sessment requirement independent from an employer's motivation. In other words, the ADA should be read not only to impose a proscriptive duty not to act with prejudice, but also a prescriptive duty to assess employees' physical and mental impairments accurately.[424] Employers must not only adopt the right type of individualized evaluation procedure, but the evaluation must also be substantively correct.

This approach could be conceptualized as a limited form of strict liability (where the employer is liable for a subset of remedies based on causation alone), rather than simply defaulting to "no liability" when cognitive errors cannot be shoehorned comfortably into a "full liability" intentional tort box. This narrow form of strict liability with limited remedies is arguably consistent with legislative intent. When Congress prohibited the use of group-based generalizations, it intended to substitute the use of accurate factual assessments. As one legislator explained, the ADA's goal is to prohibit the use of "averages and group-based predictions," by requiring employers to make employment decisions "*based on facts*, not on presumptions as to what a class of individuals with a particular disability can or cannot do."[425] Thus, the ADA was drafted to eliminate even forms of statistical discrimination.

The Third Circuit interpreted the ADA in this way in *Taylor v. Pathmark Stores, Inc.* In *Taylor*, the court explained that an em-

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424. *See* 29 C.F.R. app. § 1630.9 (stating that the ADA "requires the individual assessment of . . . the specific physical or mental limitations of the particular individual"); *cf.* Krieger, *supra* note 35, at 1166, 1245 (arguing with respect to discrimination under Title VII that "the nondiscrimination principle, currently interpreted as a proscriptive duty 'not to discriminate,' must evolve to encompass a prescriptive duty of care to identify and control for category-based judgment errors and other forms of cognitive bias in intergroup settings").

425. 136 CONG. REC. H2599, H2632 (daily ed. May 22, 1990) (statement of Rep. Owens) (emphasis added); *see also* 136 CONG. REC. S9680, S9681 (daily ed. July 13, 1990) (statement of Sen. Kennedy) (explaining that the ADA's "fundamental premise" is that "disabled Americans should be judged on the basis of facts and not fear"); 136 CONG. REC. S9527, S9542 (daily ed. July 11, 1990) (statement of Sen. Dole) (stating that the ADA's goal was to ensure that employment decisions "must be made about individuals, not groups, and must be based on facts, not fears"); 136 CONG. REC. S7422, S7437 (daily ed. June 6, 1990) (statement of Sen. Harkin) ("The thesis of the Americans With Disabilities Act is simply this: That people with disabilities ought to be judged on the basis of their abilities; they should not be judged nor discriminated against based on unfounded fear, prejudice, ignorance, or mythologies; people ought to be judged based upon the relevant medical evidence and the abilities they have."); 135 CONG. REC. S10765, S10798 (daily ed. Sept. 7, 1989) (statement of Sen. Simon) ("The ADA is designed to ensure that persons with disabilities are treated as individuals and that employment decisions are not made on the basis of stereotypes."); 135 CONG. REC. S4984, S4985 (daily ed. May 9, 1989) (statement of Sen. Harkin) ("The ADA sends a clear and unequivocal message to people with disabilities that they are . . . to be judged as individuals on the basis of their abilities and not on the basis of presumptions, generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, or pernicious mythologies.").

ployer "has the initial responsibility to evaluate employees correctly," and that, regardless of an employer's motivation, the employer "*has to be right* when it decides that . . . restrictions are permanent and that they prevent the employee from performing a wide class of jobs."[426] Under that interpretation, the Third Circuit correctly concluded that a nondisabled employee could bring a perceived disability discrimination claim even if the employer is "innocently wrong about the extent of his or her impairment."[427] In dicta, the court went on to note that while a nonmotivational mistake should be "sufficient to subject [an employer] to liability under the ADA, . . . the employer's state of mind is clearly relevant to the appropriate remedies."[428] Thus, by moving away from just a simple comparison to prototypic intentional discrimination claims (for which the full array of statutory remedies would be available), it becomes easier to reject the "no liability" approach.

Another way to achieve a "limited remedies" alternative would be to conceptualize individual, cognitively based misperceptions as a form of negligence. The primary differences between a negligence approach and a strict liability approach are that the negligence model would require the employee to prove that the employer breached a duty of reasonable care (rather than basing liability on causation alone), but, in turn, the employee would be entitled to the new compensatory damages (e.g., emotional distress) added by the 1991 Act. Under both models, punitive damages would be unavailable.

Professor Oppenheimer has made a similar suggestion in the Title VII context, arguing persuasively that Title VII should apply to unconscious forms of discrimination on the basis of race, color, sex, religion, and national origin.[429] Professor Oppenheimer has proposed that Title VII recognize not just "intentional" discrimination but also "negligent" discrimination, which would make the employee ineligible for a punitive damage award.[430] By explicitly recognizing a form of negligent discrimination for unconscious bias, the law would validate the harm from cognitive processing errors as worthy of compensation, but a negligence finding would "carry less

426. 177 F.3d 180, 190-92 (3d Cir. 1999) (emphasis added).
427. *See id.* at 191.
428. *See id.* at 182-83.
429. *See generally* Oppenheimer, *supra* note 35.
430. *See id.* at 967.

moral weight, and less stigma for the employer."[431] Professor Oppenheimer has argued that if Title VII covered unconscious forms of individual discrimination—but under a negligence theory rather than an intentional tort model—the law would properly focus "on the discrimination, not the motivation," and would correctly direct its attention "toward healing the wounded, rather than assessing blame."[432] A two-tiered remedy scheme should have similar benefits if applied to individual, cognitively based mistakes under the ADA's perceived disability prong.[433]

Under Professor Oppenheimer's proposal for unconscious discrimination under Title VII, negligence liability would attach

> [w]henever an employer fails to act to prevent discrimination which it knows, or should know, is occurring, which it expects to occur, or which it should expect to occur . . . . Liability should also be recognized when an employer breaches the statutorily established standard of care by making employment decisions which have a discriminatory effect, without first scrutinizing its processes, searching for

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431. *See id.* at 971-72 (arguing that negligence liability for racial discrimination under Title VII would benefit employees, "whose suffering is being recognized," and it would benefit employers, "who are no longer being accused of bigotry"); *see also* Lawrence, *supra* note 35, at 325-26 (making a similar argument with respect to discrimination law under the Equal Protection Clause).

432. Oppenheimer, *supra* note 35, at 970-72.

433. Note that the second tier of remedies for intentional claims could be triggered in several different ways. Recall that to state an ADA claim, the plaintiff typically must show three things: (1) the plaintiff has a "disability," by either having an actually disabling impairment, having a record of such an impairment, or being mistakenly regarded as having such an impairment, *see* 42 U.S.C. §§ 12102(2), 12112(a) (1994); (2) the plaintiff is a "qualified individual" who can perform the essential job functions with or without reasonable accommodation, *see* 42 U.S.C. §§ 12111(8), 12112(a) (1994), and (3) the employer took an adverse employment action because of the disability, *see* § 12112(a), (b). The analysis in this Article technically has dealt only with the first requirement in the plaintiff's case: whether the plaintiff has a "disability." One way to establish the "intent" for an intentional discrimination claim is through evidence submitted for the "disability" requirement of the plaintiff's case. When a plaintiff proves that he or she has a perceived disability because the employer made a motivational mistake, the "intent" needed for expanded remedies exists. In contrast, when a plaintiff proves that he or she has a perceived disability because the employer made a cognitive mistake, the evidence does not demonstrate the "intent" element required for the expanded remedies of an intentional discrimination claim.

In some cases involving nonmotivational mistakes, however, a court still could find intentional discrimination based on the evidence submitted for the *third* requirement of an ADA claim. To meet the third requirement, the plaintiff must show that the employer made an adverse employment decision because of the plaintiff's perceived disability, and that decision may itself be intentional or unintentional in nature. For example, if the employer innocently misperceived a nondisabled employee as disabled, but then deliberately required the employee to work the night shift because of concerns about customer reaction to someone with a disability, then the evidence submitted to prove the third element of the plaintiff's case would be sufficient to demonstrate "intent." In contrast, if an employer innocently misperceives a nondisabled employee as disabled, and then rationally determines that a person with the condition that the employee is believed to possess is not qualified to perform an essential job function, there would be no evidence of "intent" in any portion of the plaintiff's case to trigger the expanded remedies for intentional discrimination claims.

> less discriminatory alternatives, and examining its own motives for evidence of stereotyping. . . . [And liability should attach] [w]here an employer has created job screening procedures which fail to correct for unconscious discrimination, and such discrimination influences the process.[434]

This begins to define a workable definition of an employer's "duty," which would be necessary for a negligence model to work. However, some critics of Oppenheimer's negligence model—and even some proponents—have suggested that a more precise definition of the standard of care is needed to avoid uncertainty, large litigation costs, and resulting inefficiency, and that the state of social science knowledge is not yet up to that task.[435] While I am less concerned than some about the potential difficulties in defining negligent discrimination, and I agree with those who believe that negligence theory is one direction in which employment discrimination law should be moving, one benefit of a strict liability model is that it may be adopted more easily without statutory amendment. Although portions of the ADA, such as the reasonable accommodation mandate, arguably implicitly incorporate negligence concepts already,[436] it may be harder to find those concepts imbedded in the ADA's other antidiscrimination provisions.

Whether limited liability is imposed under a strict liability model or a negligence model, however, the result should be to encourage employers to implement job screening and employee evaluation procedures with self-conscious care.[437] This is exactly what is necessary to eliminate misperceptions that result from highly adaptive causal attributions.[438] A precondition to improving

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434. Oppenheimer, *supra* note 35, at 969-70.

435. *See, e.g.*, Krieger, *supra* note 35, at 1245 (arguing that Title VII should cover unconscious forms of discrimination, and "agree[ing] with David Oppenheimer's suggestions that a negligence approach . . . would further Title VII's purpose," but concluding that she is "not confident . . . that we know enough about how to reduce cognition-based judgment errors to enable us to translate such a duty into workable legal rules"); Wax, *supra* note 125, at 1153-54 (arguing that if Title VII applied to unconscious discrimination—to wbich she is opposed—a strict liability approach would be superior to a negligence approach that requires "fixing the standard of care," which is "likely to be quite complex, cumbersome, and error-prone"); Allen, *supra* note 394, at 1320, 1322-24 (arguing that Title VII should apply to unconscious racism, but not under a negligence model because "a standard of care for positive race consciousness is difficult to define in practical terms").

436. *See* Oppenheimer, *supra* note 35, at 943-44.

437. *Cf. id.* at 970 (arguing in the Title VII context that "[a]nother social benefit of negligent discrimination is its likely impact on employment policies," because "[i]mposing negligence liability should have the effect of encouraging greater care, and discouraging those who would look the other way and deny apparent discrimination").

438. *Cf.* Krieger, *supra* note 35, at 1239-40 (explaining why a simple admonition not to discriminate in the Title VII context will not end all racial disparate treatment because the cogni-

perceptual accuracy is persuading decisionmakers that they are prone to predictable and identifiable inferential errors.[439] Applying the perceived disability prong to nonmotivational mistakes would be the first step in getting employers to recognize this propensity. Once decisionmakers recognize that they make predictable causal attribution and prediction errors, they must take conscious, proactive steps to improve the accuracy of their inferential judgments.[440]

Social scientists have already studied ways to increase causal attribution accuracy outside of the employment context. Much of this research has been done in developing ways to treat clinical depression. Psychologists have discovered that some forms of depression are the result of particularly maladaptive causal attribution styles, in which patients show atypically strong biases in overattributing negative outcomes to external, stable, and global causes.[441] As a form of cognitive therapy, psychologists have experimented with various "attributional retraining" strategies and "reattribution techniques," which teach people to become aware of their causal inferences and modify their causal attributions.[442] This demonstrates that social scientists are able to develop processes for reducing causal attribution biases, and it provides optimism that more targeted research in the employment context would be worthwhile.

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tive processes that lead to some intergroup bias are not only "automatic and beyond ordinary conscious self-awareness, they are adaptive, indeed, essential to effective cognitive functioning").

439. *See* NISBETT & ROSS, *supra* note 127, at 280; Margo J. Monteith et al., *Prejudice and Prejudice Reduction: Classic Challenges, Contemporary Approaches, in* SOCIAL COGNITION: IMPACT ON SOCIAL PSYCHOLOGY 323, 336 (1994) (citing studies demonstrating that increasing peoples' awareness of subtle, prejudiced responses would motivate change); Wilson & Brekke, *supra* note 408, at 119; *cf.* Gordon B. Moskowitz et al., *Preconsciously Controlling Stereotyping: Implicitly Activated Egalitarian Goals Prevent the Activation of Stereotypes*, 18 SOC. COGNITION 151 (2000) (using empirical evidence to demonstrate that people who consciously adopt egalitarian goals will preconsciously control against the use of stereotypes because members of a stereotyped group will automatically trigger egalitarian cognitive constructs rather than implicit stereotypes).

440. *Cf.* ARMOUR, *supra* note 35, at 17, 124-26, 139-41, 145, 149-51, 158 (arguing that in order to combat unconscious forms of racial discrimination, people need to implement a "*proactive* strategy," by consciously and systematically "inhibiting their automatic negative responses to Blacks and replacing them with controlled, nonprejudiced ones"); Oppenheimer, *supra* note 35, at 970 (similarly arguing in the Title VII context that "[w]here unconscious motivations abound, self-conscious and cautious procedures are necessary"); *see also* Monteith et al., *supra* note 439, at 333-41 (citing supporting studies).

441. *See* HEWSTONE, *supra* note 124, at 65; Metalsky & Abramson, *supra* note 130, at 14-16; Seligman et al., *supra* note 152, at 242-43.

442. *See* HEWSTONE, *supra* note 124, at 65 (describing the use of "attributional retraining" as a therapeutic technique for depression, by inducing patients to make more variable and external attributions for their failures); Metalsky & Abramson, *supra* note 130, at 14-16 (same).

While such targeted research has not yet been undertaken, general research on improving causal attribution accuracy can provide a start. To begin with, social scientists believe that debiasing techniques can be implemented most effectively in judgments made in recurrent, institutional settings.[443] This is particularly true when evaluation criteria are identified specifically, decisions are based on an array of individual diagnostic information,[444] and individual decisionmakers know that they will be monitored by peers and held individually responsible for the accuracy of their results.[445] This means that employee selection and evaluation decisions are good candidates for procedural change.[446]

The most promising way that researchers have found to reduce the fundamental attribution error is to force the observer to take the actor's perspective. Recall that the tendency to overattribute to internal causes occurs when observers assign causes for other people's behavior, but not when they assign causes for behavior of their own.[447] Social scientists believe that this actor-observer difference occurs in part because people believe causal significance is related to salience.[448] When observers are identifying a cause for an actor's behavior, the actor is salient, thereby facilitating attributions to causes that are internal to the actor; when observers are identifying a cause for their own behavior, the situation is salient, causing more external causal attributions to occur.[449] Social scientists have discovered that if observers are forced to take the actor's perspective, the fundamental attribution error can be reversed.[450] If

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443. *See* NISBETT & ROSS, *supra* note 127, at 291.

444. *See* Veronica F. Nieva & Barbara A. Gutek, *Sex Effects on Evaluation*, 5 ACAD. MGMT. REV. 267, 271 (1980) (summarizing research in this area). *See generally* J. Scott Armstrong et al., *The Use of the Decomposition Principle in Making Judgments*, 14 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 257 (1975) (providing empirical support for the proposition that individuals make better judgments when they consider multiple factors).

445. *Cf.* Edward Donnerstein & Marcia Donnerstein, *Variables in Interracial Aggression: Potential Ingroup Censure*, 27 J. PERSONALITY & SOC. PSYCHOL. 143, 148-50 (1973) (finding that decisionmakers who are white tend to discriminate less against individuals who are non-white when allocating sanctions if the decisionmakers are aware that peers may monitor and censure their conduct); *see also* Gifford Weary et al., *Chronic and Temporarily Activated Causal Uncertainty Beliefs and Stereotype Usage*, 81 J. PERSONALITY & SOC. PSYCHOL. 206, 211-13 (2001) (finding that decisionmakers relied less on stereotypes when assessing others and doling out punishments if the decisionmakers were initially instructed that they would "be held accountable" for their judgment and would "have to be able to explain and justify" their assessments).

446. *See id.*

447. *See supra* notes 205-06 and accompanying text.

448. *See supra* notes 207-11 and accompanying text.

449. *See supra* notes 207-11 and accompanying text.

450. *See* HEWSTONE, *supra* note 124, at 55 (compiling studies); NISBETT & ROSS, *supra* note 127, at 123-25 (same); Fiona Lee & Mark Hallahan, *Do Situational Expectations Produce Situ-*

observers view the situation as the actor does, their causal attributions shift from internal to external and no longer diverge from the actor's causal attributions for his or her own conduct.

In the most influential study in this area, experimenters asked two subjects (the actors) to have a conversation in the presence of two observers.[451] Each observer could view one of the actors (who was seated across from that observer) but could not view the other actor (who was seated next to that observer).[452] The experimenters then asked the actors and the observers to provide causal attributions for the degree of nervousness, friendliness, talkativeness, and dominance displayed by the actor they were viewing during the conversation.[453] In the control condition, the attributions were made immediately after the conversation.[454] As expected, the observers committed the fundamental attribution error and attributed their target actor's behavior more to internal, dispositional qualities of the actor than did the actors themselves, who instead provided more external, situational explanations.[455]

In the experimental condition, the researchers changed the participants' perceptual focus. After the conversation, the observers viewed a videotape of the interaction before making their causal attributions.[456] For one observer, the videotape changed the perspective from which the observer had viewed the conversation live.[457] That observer watched a tape of the actor next to whom he or she had been sitting during the conversation and who had previously been hidden from view.[458] The study found that the observer who had his or her original perspective reversed by the videotape also reversed the causal attribution pattern seen in the control condition.[459] After the observer had viewed the actor from the actor's perspective on the videotape, the observer attributed the actor's behavior as much to situational factors as had the actor himself in

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ational Inferences? The Role of Future Expectations in Directing Inferential Goals, 80 J. PERSONALITY & SOC. PSYCHOL. 545, 545 (2001) (same); Ross & Fletcher, *supra* note 130, at 101-02 (same).

451. *See* M.D. Storms, *Videotape and the Attribution Process: Reversing Actors' and Observers' Point of View*, 27 J. PERSONALITY & SOC. PSYCHOL. 165, 166-67 (1973).

452. *See id.* at 167.

453. *See id.* at 168.

454. *See id.* at 167-68.

455. *See id.* at 168-69.

456. *See id.* at 167-68.

457. *See id.*

458. *See id.*

459. *See id.* at 169-71.

the original scenario.[460] Thus, when the observer was forced to take the perspective of the actor, the observer's attributions resembled those of the actor, demonstrating that the fundamental attribution error can indeed be undone.

While forcing observers to take the actor's *literal* perspective appears to be the best way to reduce observers' tendency to overattribute to internal causes, researchers have discovered that merely taking the actor's perspective *figuratively* can achieve similar results.[461] In the laboratory, observers were generally less likely to exhibit the fundamental attribution error if the experimenter told them to empathize with the actor and to try to see things the way the actor would.[462] Empathy instructions made observers more aware of situational constraints and more able to recall situational details, and the added salience of the situation resulted in increased external attributions for the actor's behavior.[463] Empathy instructions worked particularly well to mitigate the fundamental

460. *See id.*; *see also* Lee & Hallahan, *supra* note 450, at 545 (listing other studies that also found that "[o]bservers who took the target's visual perspective made more situational inferences for the target's behavior because the target's situation (rather than the target) was more visually salient").

461. *See* Lee & Hallahan, *supra* note 450, at 545 (summarizing research demonstrating that "observers emphasize situational inferences when they are instructed to take the target's perspective or when they are oriented to understand the situation").

462. *See* HEWSTONE, *supra* note 124, at 56; SEARS ET AL., *supra* note 125, at 140; Sharon S. Brehm & David Aderman, *On the Relationship Between Empathy and the Actor Versus Observer Hypothesis*, 11 J. RES. PERSONALITY 340, 340-44 (1977); Lee & Hallahan, *supra* note 450, at 545 (compiling studies); Regan & Totten, *supra* note 206, at 852-54. *But see* Lee & Hallahan, *supra* note 450, at 545-46 (noting some mixed results and citing some studies that found no relationship or the opposite relationship between perspective taking and social inferences); *id.* at 546-60 (describing studies that suggest that an observer will reduce the fundamental attribution error by taking the perspective of the target primarily when the observer expects to be in the same situation as the target in the future).

In one experiment, observers watched two actors get acquainted with one another. *See* Regan & Totten, *supra* note 206, at 852-54. Some of the observers were told to empathize with one of the actors, while some of the observers received no empathy instruction. *See id.* After watching the conversation, all of the observers gave attributions for the actors' behavior. *See id.* Observers who were not instructed to empathize demonstrated the fundamental attribution error by providing more internal attributions than the actors did for their own behavior. *See id.* Observers who were instructed to empathize did not demonstrate the fundamental attribution error, but instead provided external attributions similar to those provided by the actors themselves. *See id.*

463. *See* Regan & Totten, *supra* note 206, at 852-54 (describing the salience effect of empathy instructions); *see also* Harvey et al., *supra* note 139, at 553-57 (analyzing a study finding that observers who were told to empathize while watching a couple have a heated discussion about their relationship were later able to recall more situational information correctly than observers who were not told to empathize).

attribution error when the observer was making a causal attribution for an individual's failure, rather than success.[464]

Providing an empathy instruction is not the only technique that can mitigate the fundamental attribution error. Researchers have found that any technique that orients the observer to the situation or gets the observer to identify with the actor will have the same result: the observer provides more external attributions for the actor's behavior, thereby more closely matching the actor's self-attributions for his or her own acts.[465] For example, if the experimenter tells the observer that the observer will have to engage in the same task that the observer is watching the actor perform, the observer's attributions for the actor's performance shift from internal to external.[466] Requiring decisionmakers to summarize contrary evidence and make a case for the opposite decision than the one they intend to make also may reduce the biasing effect of prior, erroneous theories.[467] Making situational factors more salient, "priming" observers to think about situational effects, or obtaining specific situational information about the particular constraints under which the target was working, rather than just general information about the workplace itself, have all been shown to have similar results in decreasing the fundamental attribution bias.[468]

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464. *See* Brehm & Aderman, *supra* note 462, at 340-44 (describing a study finding that empathy instructions made observers shift from internal to external attributions for an actor's behavior, particularly when the actor's behavior resulted in a negative outcome); Robert Gould & Harold Sigall, *The Effects of Empathy and Outcome on Attribution: An Examination of the Divergent-Perspectives Hypothesis*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 480, 484-88 (1977) (describing a study finding that observers who were told to empathize with a male actor who failed to make a good impression on a female actor provided more external attributions for the negative result).

465. *See* SEARS ET AL., *supra* note 125, at 140; Lee & Hallahan, *supra* note 450, at 546; Wolfson & Salancik, *supra* note 206, at 444-49.

466. *See* Wolfson & Salancik, *supra* note 206, at 444-49. In one study, subjects watched an actor perform poorly in a task requiring the actor to maneuver a toy car on a model racing track. *See id.* When experimenters had informed observers that they would have to perform the same task themselves, the observers gave more external attributions for the actor's poor performance, just as the actor provided for his or her own behavior. *See id.* When the observers did not expect to have to perform the task later themselves, the observers demonstrated the fundamental attribution error and provided more internal attributions for the actor's poor performance than the actor did. *See id.*

467. *See* Krieger, *supra* note 36, at 1330; Donnerstein & Donnerstein, *supra* note 445, at 148-50; *see also* Sanbonmatsu et al., *supra* note 266, at 898-99 (concluding from empirical work that causal attribution accuracy increased when subjects were prompted to consider alternative causes for an outcome).

468. *See* Trope & Gaunt, *supra* note 188, at 346-51 (describing three recent experiments); *see also* Jack S. Croxton, *Attributional Activity in Explaining Disconfirmed Expectancies: The Search for Constraint*, 7 SOC. COGNITION 338, 340 (1989) (citing research finding that "the activation of situational cues prior to an attributional task increased the likelihood of situational attributions"); Eliot R. Smith, *Social Cognition Contributions to Attribution Theory and Research*, *in* SOCIAL COGNITION: IMPACT ON SOCIAL PSYCHOLOGY 77, 96-97 (1994) (citing research finding that

Overall, "active" or "involved" observers appear to provide more accurate judgments and predictions, while "passive" or "neutral" observers appear to be most at risk for causal attribution errors.[469]

While these results suggest that employment decisionmakers may be able to improve their attribution accuracy when assessing nondisabled employees, it is admittedly difficult to translate this research immediately into concrete employment practices or procedures. In general, when employers individually assess an employee's capabilities, the evaluator should try to use techniques self-consciously and systematically that force the evaluator to take the employee's perspective. In theory, by actively changing focus in this way during the evaluation, the evaluator should be less prone to make internal, stable, and global attributions, and therefore less likely to misperceive individuals with nondisabling conditions as disabled.[470] As a practical matter, however, this is likely to be far easier in the laboratory than in the workplace, where not all individual employment decisions can be turned into carefully controlled experiments.

Very recently, however, many courts have interpreted the ADA to require employers to engage in an "interactive process" with an employee who is suspected of having a disability, in order to identify the employee's precise limitations.[471] These recent decisions now obligate employers to meet with the employee, ask the employee questions, and "request information about the condition and what limitations the employee has."[472] In most jurisdictions, failure to engage in a meaningful interactive discussion with the employee is now considered an ADA violation in and of itself.[473] By involving the employee in the evaluation process, this new obligation is con-

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"priming" a causal factor or increasing its salience increases the likelihood that it will be cited by an observer as the cause of an event).

469. *See* Wolfson & Salancik, *supra* note 206, at 444-49.

470. In addition, when an employee *does* have an actually disabling condition, this process should help the employer view the employee's limitations more accurately as a product of structural or operational aspects of the workplace, rather than as a result of the employee's impairment, which should help in identifying appropriate accommodations.

471. *See, e.g.*, Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1113 (9th Cir. 2000) ("The interactive process is at the heart of the ADA's process and essential to accomplishing its goals."), *cert. granted in part*, 121 S. Ct. 1600 (2001).

472. Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 317 (3d Cir. 1999); *see also Barnett*, 228 F.3d at 1114-15 (explaining that employers must consult with the employee, "communicate directly," and "exchange essential information"); 29 C.F.R. app. § 1630.9 (2001) (describing the obligation as "a flexible, interactive process that involves both the employer and the [employee]").

473. *See Barnett*, 228 F.3d at 1111-14 (compiling cases from other jurisdictions) (citing H.R. REP. NO. 101-485, pt. 2, at 65 (1990); S. REP. NO. 101-116, at 34 (1989); 29 C.F.R. § 1630.2(o)(3) (2001); 29 C.F.R. app. § 1630.9 (2001)).

sistent with social cognition research on improving accuracy. In fact, the obligatory "interactive process" may provide the built-in laboratory that employers need to identify methods to avoid exaggerating the gravity of nondisabling conditions.

Thus, while the argument that imposing liability for unconscious bias will cause employers to overinvest in precautionary measures may be well taken in the Title VII context, it may not apply to the ADA. Unlike Title VII, the ADA already requires employers to take careful, time-consuming, and perhaps costly precautionary steps to evaluate employees believed to have a disability. Accordingly, imposing liability for individual, cognitively based mistakes as well as mistakes based on prejudice or group-based decisionmaking would not require as great a marginal investment as it would if liability were similarly extended under Title VII. The risk of overinvestment would also be reduced by eliminating the potential for the compensatory and punitive damage awards added by the Civil Rights Act of 1991.

CONCLUSION

The ADA's perceived disability prong is likely to play an increasingly significant role in ADA litigation. There has been a strong trend in the courts to narrow the ADA's definition of an actual disability, and therefore to circumscribe the reach of the ADA's actual disability prong.[474] This trend is exemplified by the U.S. Supreme Court's 1999 decision in *Sutton v. United Air Lines, Inc.*[475] Prior to *Sutton*, most circuit courts had followed the EEOC's regula-

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474. *See* Peter David Blanck & Michael Millender, *Before Disability Civil Rights: Civil War Pensions and the Politics of Disability in America*, 52 ALA. L. REV. 1, 2 (2000) (noting the "string of Supreme Court decisions that have rejected expansive readings" of the ADA); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 103-10 (1999) (same); Catherine J. Lanctot, *Ad Hoc Decision Making and Per Se Prejudice: How Individualizing the Determination of "Disability" Undermines the ADA*, 42 VILL. L. REV. 327, 328 (1997) (describing the detrimental effects of the "judicial narrowing of [the ADA's] provisions"); Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107, 108 (1997) (arguing that courts have raised the standards that disability discrimination plaintiffs must meet); Mayerson, *supra* note 12, at 587 (arguing that a "disturbing trend developing in case law is the narrowing construction of the definition of disability which thereby deprives qualified individuals of the opportunity to prove that they have been discriminated against"); Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321, 321 (2000) (arguing that a recent trilogy of Supreme Court cases "drastically curtailed" the number of people who can seek protection under the ADA's actual disability prong); *see also* Toyota Motor Mfg. v. Williams, 122 S. Ct. 681, 691 (2002) (holding that key terms in the ADA's definition of an actual disability "need to be interpreted strictly to create a demanding standard for qualifying as disabled").

475. 527 U.S. 471, 479-87 (1999).

tions and held that employers must determine if an employee is actually disabled based on the employee's capabilities without any corrective or assistive devices.[476] In *Sutton*, the Supreme Court rejected that view.[477] The Court held that actual disability status should be based on an employee's functioning *with* the use of any measures that the employee adopts to mitigate his or her impairment.[478] Accordingly, many high-functioning individuals with impairments that are substantially limiting in their untreated condition are no longer protected under the ADA's actual disability prong. These employees are the most at risk to be misperceived as disabled, because of their salient impairments. To protect these individuals fully, courts should apply the ADA's perceived disability prong in the expansive manner that Congress intended.

One step in that direction would be for courts to acknowledge that employers' misperceptions may be cognitive in origin. This recognition would be consistent with the rapidly growing research on cognitive bias and race discrimination, which is where legal scholars have made the most effective use of social cognition theory.[479] Experts in social cognition have long emphasized the "increasingly important goal" of not just identifying the information processing models that people use in their daily lives, but of understanding "the sources of systematic bias or distortion in judgment that lead the intuitive psychologist to misinterpret events and hence to behave in ways that are personally maladaptive [and] socially pernicious."[480]

One of the "socially pernicious" effects of cognitive bias is when an employer misperceives a nondisabled employee as disabled, and the employee suffers negative employment consequences as a result. To recognize the harm that results from such a mistake, the mistake should not "be forgiven, as Pope's 'to forgive, divine' ending implies."[481] Rather, employers should be held responsible for accurately assessing individual impairments. On the other hand, it would be inappropriate for the employer's mistake to "remit nothing, leaving the actor's culpability lessened not a whit,"[482] because individual, cognitive errors are qualitatively different from motiva-

476. *See id.*
477. *See id.*
478. *See id.*
479. *See supra* notes 35-36 and accompanying text.
480. Ross, *supra* note 128, at 181.
481. Finkel & Groscup, *supra* note 1, at 66.
482. *Id.*

tional or group-based errors, and they should be treated as such. Accordingly, this Article recommends a middle-ground approach, in which the employer's mistake is "judged culpable to a degree, though mitigated by the mistake."[483] Rather than ignoring the very real harm that results from cognitive mistakes, as do courts taking a "no liability" approach, or ignoring the very real distinctions between cognitive and motivational errors, as do courts taking a "full liability" approach, a tailored remedies approach should achieve the best balance between the competing interests at stake.

483. *Id.*

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