

# *MONEY FOR NOTHING: FIVE SMALL STEPS TO BEGIN THE LONG JOURNEY OF RESTORING INTEGRITY TO THE SOCIAL SECURITY ADMINISTRATION'S DISABILITY PROGRAMS*

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## I. FROM THE BEGINNING<sup>1</sup>: AN INTRODUCTION

The population of the United States grew by 9.7% from the years 2000 to 2010.<sup>2</sup> During the same period, the number of disability applications filed with the Social Security Administration (the “Agency”) grew by 230%—over 25 times the growth of the country’s population.<sup>3</sup> Why? During those ten years there was Hurricane Katrina and other storms, tornados, and floods. Other decades, however, have also had severe weather that caused deaths, injuries, and losses. There were the terrorist attacks of September 11, 2001, and the wars in Afghanistan and Iraq in which our service members continue to courageously fight. There has not been, however, any pandemic or other

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1. EMERSON, LAKE & PALMER, *From the Beginning, on TRILOGY* (Atlantic Records 1972).

2. U.S. CENSUS BUREAU, POPULATION DISTRIBUTION AND CHANGE: 2000 TO 2010, at 2 tbl.1 (Mar. 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>. The population of the United States in the year 2000 was 281,421,906. As of 2010, the population of the United States was 308,745,538. *Id.*

3. In the year 2000, 1,364,323 disability applications were filed with the Agency. OFFICE OF RESEARCH, EVALUATION, & STATISTICS, SOC. SEC. ADMIN., PUB. NO. 13-11827, ANNUAL STATISTICAL REPORT ON THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM, 2010, at 142 tbl.59 (2011), available at [http://www.ssa.gov/policy/docs/statcomps/di\\_asr/2010/di\\_asr10.pdf](http://www.ssa.gov/policy/docs/statcomps/di_asr/2010/di_asr10.pdf). In 2010, 3,161,314 applications for disability benefits were filed. SOC. SEC. ADMIN., SUMMARY FISCAL YEAR 2010, at 3 (2011), available at <http://www.ssa.gov/pgm/FY2010SummaryOfPerformanceAndFinancialInformation-508Final.pdf>.

mass-disabling event affecting large portions of the United States' population.

A common explanation for the recent increase in Social Security disability applications has been the economy's unprecedented sustained unemployment—the worst since the Great Depression.<sup>4</sup> Unemployed workers have increasingly given up looking for jobs and instead have sought Social Security disability payments.<sup>5</sup> Since 2009, the number of people who have signed up for disability benefits is twice the number of people that have started new jobs.<sup>6</sup> The Congressional Budget Office attempted to explain this by stating, “[w]hen opportunities for employment are plentiful, some people who could qualify for [disability] benefits find working more attractive . . . when employment opportunities are scarce, some of these people participate in the [disability insurance] program instead.”<sup>7</sup>

Social Security disability programs, however, were never designed to be a safety net for the jobless or a substitute for unemployment insurance compensation.<sup>8</sup> Furthermore, there is an inherent inconsistency with the notion that a person can switch back and forth between working when the economy is good and collecting disability benefits when the

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4. See, e.g., *Disability Payments: The Elephant in the Waiting-room*, ECONOMIST, Mar. 10, 2011, at 36, 36 [hereinafter *Disability Payments*]; Damian Paletta, *Insolvency Looms as States Drain U.S. Disability Fund*, WALL. ST. J., Mar. 12, 2011, at A1 [hereinafter Paletta, *Insolvency Looms*]; Lisa Rein, *Increase in Claims for Social Security Clogged by Denials*, WASH. POST, Mar. 29, 2011, at B4; Press Release, Gilda Mehraba, Disability Grp., The SSA's New Methods for Improving the Disability Claim Backlog (Feb. 2, 2011), <http://www.prweb.com/pdfdownload/8104909.pdf>; Brian Faler, *New Use Draining Social Security Disability Fund*, BOSTON GLOBE, May 30, 2012, <http://www.bostonglobe.com/news/nation/2012/05/29/social-security-disability-insolvent-unless-congress-votes/wmG61sP4AUS0Ep28oKobJN/story.html>; Russell Grantham, *Some Gains Made on Social Security Backlog*, ATLANTA J.-CONST., Nov. 1, 2010, <http://www.ajc.com/news/business/some-gains-made-on-social-security-backlog/nQmZh/>; John Merline, *5.4 Million Join Disability Rolls Under Obama*, INVESTOR'S BUS. DAILY (Apr. 20, 2012, 8:02 AM), <http://news.investors.com/article/608418/201204200802/ssdi-disability-rolls-skyrocket-under-obama.htm> [hereinafter Merline, *5.4 Million Join Disability*]; John Merline, *Labor Force Shrinks As Jobless Swell Disability Ranks*, INVESTOR'S BUS. DAILY (May 4, 2012, 9:31 AM) <http://news.investors.com/article/610306/201205040931/labor-force-shrinks-as-disability-grows.htm> [hereinafter Merline, *Labor Force Shrinks*].

5. Merline, *5.4 Million Join Disability*, *supra* note 4.

6. *Id.*

7. *Id.*

8. See, e.g., *Disability Payments*, *supra* note 4, at 36; Paletta, *Insolvency Looms*, *supra* note 4, at A1; Rein, *supra* note 4, at B4; Mehraba, *supra* note 4; Grantham, *supra* note 4; Merline, *5.4 Million Join Disability*, *supra* note 4. Since the ultimate question in a Social Security disability decision is whether or not an individual can work, the fact that many of these individuals are applying for disability benefits because they had been working but lost their job due to the downturn in the economy, and not their disability, would seem to answer the question as to whether or not they can work.

economy is bad. Merely losing a job is not in itself a reason to file for disability benefits. The Social Security Act (the “Act”)<sup>9</sup> defines a disability as an “inability to engage in any substantial gainful activity [e.g., work] by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”<sup>10</sup>

The ultimate question in an adult Social Security disability case is whether an individual can work.<sup>11</sup> Unless the person loses his or her job due to a “medically determinable physical or mental impairment” or develops one subsequent to losing the job, there is no better proof he or she can work than the fact that they were working. In other words, if a person with back pain has been working for years and his or her place of employment closes due to the economy, absent the worsening of the back problem or a new medical issue, the very best evidence as to whether the person can work despite his or her back pain is the fact they had been working for years. With the huge influx of Social Security disability applications from people who were working and lost their jobs due to the economy, awards of disability benefits should have plummeted in the last several years. Instead, they have consistently risen.

Between 2007 and 2010, the number of Social Security disability benefits awarded has risen 28%.<sup>12</sup> The Social Security Administration claims the rise in the approval rate of disability claims arose from the hiring of more people to process applications, which in turn expedites the process.<sup>13</sup> While an increase in staff could explain more cases being paid, as more cases are being processed overall, it does not logically explain an increase in the *approval rate* or percentage of cases being awarded benefits. Increases in staff or improved efficiency should have no effect whatsoever on the *rate* at which disability cases are approved, but rather should merely result in more cases being processed overall. Clearly, there must be some other reason for the 28% rise in the approval rate of Social Security disability cases in just a few years. “More Americans receive disability benefits than 20 years ago though people are less likely to have physically demanding jobs, health care has improved, and the Americans with Disabilities Act bans discrimination

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9. Social Security Act, ch. 531, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301–1397mm (2006)).

10. 42 U.S.C. § 423(d)(1)(A).

11. Heckler v. Campbell, 461 U.S. 458, 460 (1983).

12. *Disability Payments*, *supra* note 4, at 36; Jeffrey S. Wolfe & Dale D. Glendening, *What We Should Do About Social Security Disability: A Response to Richard J. Pierce, Jr.*, REGULATION, Spring 2012, at 16, 16.

13. See Grantham, *supra* note 4.

against the handicapped.”<sup>14</sup> Something more than being unemployed is encouraging individuals to apply for Social Security disability benefits.

Working or not, disabled or not, people are increasingly seeing Social Security disability benefits as a relatively easy means of earning a lifetime of government payments, and a gateway to a host of other government entitlement programs.<sup>15</sup> Because of this, a variety of commentators have reached the conclusion that the Social Security Administration’s disability programs have become unsustainably generous.<sup>16</sup> In addition, over the years, Congress and the Social Security Administration “have gradually expanded the availability of entitlements to greater and greater numbers of persons.”<sup>17</sup> Critics charge that “[t]he Social Security Act itself and the outdated jurisprudence underlying the current hearings and appeals system are the problem.”<sup>18</sup> Furthermore, the Social Security Administration leadership, being most concerned about the ever-growing backlog of disability cases, has prioritized the speed of processing cases over accuracy.<sup>19</sup> It has become increasingly clear the Social Security disability programs, instead of only awarding benefits to adults who are unable to work, is granting benefits to those who can work—effectively giving away money for nothing.

These problems are not merely academic. In fiscal year 2011, the Social Security Administration paid over \$175 billion in disability benefits to approximately 15 million recipients.<sup>20</sup> The trust fund that pays for the Social Security disability programs will exhaust its money in 2016—only four years away.<sup>21</sup> This situation has led to calls for a massive overhaul of the Social Security disability programs, ranging

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14. Faler, *supra* note 4.

15. See Drew A. Swank, *Welfare, Income Detection, and the Shadow Economy*, 8 RUTGERS J.L. & PUB. POL’Y 614, 633 (2011) [hereinafter Swank, *Welfare*]; Drew A. Swank, *An Argument Against Administrative Acquiescence* 9-11 (unpublished manuscript) (on file with author) [hereinafter Swank, *Administrative Acquiescence*]; Merline, *5.4 Million Join Disability Rolls*, *supra* note 4.

16. See Richard J. Pierce, Jr., *What Should We Do About Social Security Disability Appeals?*, REGULATION, Fall 2011, at 34, 34; Wolfe & Glendening, *supra* note 12, at 22; see also Merline, *5.4 Million Join Disability*, *supra* note 4 (discussing the loosening of Social Security disability rules).

17. Wolfe & Glendening, *supra* note 12, at 22.

18. *Id.* at 16.

19. See Damian Paletta, *Disability-Benefits System Faces Review*, WALL ST. J., Dec. 15, 2011, at A8 (“[S]peeding cases through the system has allowed, and in some cases encouraged,” disability benefits to be awarded in cases with less scrutiny). For a discussion of the Social Security Administration’s backlog of cases, see Drew A. Swank, *The Social Security Administration’s Condoning of and Colluding with Attorney Misconduct*, 64 ADMIN. L. REV. 508, 517-19 (2012) [hereinafter Swank, *Condoning and Colluding*].

20. *Securing the Future of the Social Security Disability Insurance Program: Hearing Before the H. Comm. on Ways & Means*, 112th Cong. 1 (2012) [hereinafter *SSDI Program*] (statement of Michael J. Astrue, Comm’r, Social Security Administration).

21. Faler, *supra* note 4.

from eliminating entire aspects of the program to fundamentally changing how disability hearings are conducted.<sup>22</sup> Only by such a top-to-bottom review and revision of the Act and the Agency's disability programs, critics argue, can the integrity be restored to the process.<sup>23</sup>

These are intriguing arguments, worthy of further consideration. They have just one fundamental flaw: the Congress of the United States. Massive overhauls of government disability programs require massive amounts of legislation and Congress has not been able to pass a budget in years, let alone undertake comprehensive entitlement reform.<sup>24</sup> Furthermore, Social Security disability benefits are big business. Representing Social Security disability claimants is a multi-billion dollar industry.<sup>25</sup> Claimant representatives, who only get paid if their client is awarded disability benefits, have no incentive to change the system and kill the proverbial goose that lays the golden egg.<sup>26</sup> Likewise, individuals who are awarded benefits for which they do not qualify would not want any changes to the system that benefits them. Members of Congress, dependent upon campaign donations as much as on votes, are highly unlikely to advocate for disability program reform, as such efforts could label them as being against the "disabled."<sup>27</sup> Reform efforts, such as tightening eligibility rules for Social Security disability benefits, have failed before.<sup>28</sup>

That is why this Article is different. It does not call for a complete restructuring of the Social Security disability programs which Congress will not do. As each journey begins with a single step, this Article advocates five small steps to start the very long journey of restoring the legitimacy and integrity of the Social Security disability programs, and in the process, ultimately reducing the growing disability case backlog. Only one of the five small steps requires any legislative change to the Social Security Act; the rest merely require following existing regulations or slight modifications to the current regulations that can be made by the Social Security Administration. The goal of these five small

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22. Pierce, *supra* note 16, at 39 (recommending, *inter alia*, eliminating non-exertional impairments, such as mental illnesses, from being a basis for disability benefits to eliminating hearings before Social Security administrative law judges); Wolfe & Glendening, *supra* note 12, at 21 (advocating for an independent administrative law judge corps and formalized "rules of evidence" and "civil procedure" for use in hearings).

23. See generally Pierce, *supra* note 16.

24. *Where's the Budget? How the Dems Plan to Win*, UNION LEADER (Jan. 24, 2012, 7:39 PM), <http://www.unionleader.com/article/20120125/OPINION01/701259989/-1/opinion>.

25. Damian Paletta & Dionne Searcey, *Two Lawyers Strike Gold in U.S. Disability System*, WALL ST. J., Dec. 22, 2011, at A1.

26. See 20 C.F.R. § 404.1720(b)(4) (2012).

27. See Faler, *supra* note 4.

28. Merline, *5.4 Million Join Disability*, *supra* note 4.

steps is not to make it harder for individuals to get disability benefits, but rather to restore integrity to and confidence in the taxpayer-funded disability programs. Two of the suggested changes involve updating rules that are over 34 years old. Two of the other suggested changes advocate merely following existing rules and regulations, which Social Security Administration leadership has thus far been unwilling to do. The final suggestion is a regulatory change to remove one of the most glaring logical and legal inconsistencies of the Social Security disability programs. While taking these five small steps will not solve all of the problems with the Social Security disability programs, my solution demonstrates a willingness to restore at least part of the legitimacy of taxpayer-funded entitlement programs.

II. “WILL YOU STILL NEED ME, WILL YOU STILL FEED ME,  
WHEN I’M SIXTY-FOUR?”<sup>29</sup>: REALIGNING THE AGE CATEGORIES IN THE  
MEDICAL-VOCATIONAL GUIDELINES TO MATCH REALITY

In a Social Security adult disability case, the ultimate issue is determining whether or not an individual can work: either in their previous job or any other job.<sup>30</sup> Prior to 1978, the Agency exclusively used vocational experts to provide evidence of “suitable jobs in the national economy” which a person with certain physical and/or mental impairments could perform.<sup>31</sup> Due to inconsistencies in vocational expert testimony from claimant to claimant, the Social Security Administration implemented the medical-vocational guidelines in 1978 in an effort to improve both uniformity and efficiency.<sup>32</sup> The medical-vocational guidelines consist of a matrix of four factors—physical ability, age, education, and work experience—which are used to determine eligibility for disability benefits.<sup>33</sup> The age factor is further subdivided into four categories: younger individual (age 18 to 49), closely approaching advanced age (50 to 54), advanced age (55 to 60), and closely approaching retirement age (over 60).<sup>34</sup>

Things have changed, however, in the thirty-four years since the implementation of the medical-vocational guidelines. One change has been that the full retirement age for Social Security retirement benefits rose after the implementation of the medical-vocational guidelines from

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29. THE BEATLES, *When I’m Sixty-Four*, on SGT. PEPPER’S LONELY HEARTS CLUB BAND (Parlophone Records 1967).

30. *Heckler v. Campbell*, 461 U.S. 458, 460 (1983).

31. *Id.* at 461.

32. *Id.*; see also *SSDI Program*, *supra* note 20, at 9-10.

33. *Heckler*, 461 U.S. at 461-62.

34. 20 C.F.R. pt. 404, subpt. P, app. 2 §§ 201(f)-(h), 203(c) (2012).

65 years of age to age 67 for individuals born after 1959.<sup>35</sup> One of the reasons Congress cited for this change in the benefits retirement age is the increase in the average life expectancy.<sup>36</sup> In 1978, when the medical-vocational guidelines were implemented, the average life expectancy in the United States was 73.5 years of age.<sup>37</sup> By 2012, the average life expectancy in the United States had risen to 78.7—over five years more than the average in 1978.<sup>38</sup> Another change in addition to a higher full Social Security retirement age and longer life expectancy has been the fact that people have begun working longer into old age.<sup>39</sup> While individuals polled in 1996 expected to retire at age 60, by 2012 the expected retirement age of individuals polled had increased to age 67.<sup>40</sup>

One thing that has not changed, however, is the age categories of the medical-vocational guidelines despite the fact Americans live longer, work longer, and collect Social Security retirement benefits later. At the very least, the upper age in each category should be increased two years to match the increase in the retirement age for individuals born after 1960. More realistically, given the increase in life expectancy and the age at which individuals expect to retire, the age in each category for all individuals should be increased five years: younger individual (age 18 to 54), closely approaching advanced age (55 to 59), advanced age (60 to 64), and closely approaching retirement age (over 65). The medical-vocational guidelines were not written in stone; they need to evolve as lifespans change. The purpose of such a change is not to increase or decrease the likelihood of any one individual receiving disability benefits, but rather to have the medical-vocational guidelines reflect the reality of today, and not the reality of over three decades ago.

The age categories used in the medical-vocational guidelines are a construct of the Social Security Administration; they are not specified in the Social Security Act passed by Congress.<sup>41</sup> No legislation would be

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35. *Retirement Age Calculator*, SOC. SECURITY ADMIN., <http://www.ssa.gov/pubs/ageincrease.htm> (last updated June 6, 2012).

36. *Id.*

37. *Life Expectancy – United States*, DATA360, [http://www.data360.org/dsg.aspx?Data\\_Set\\_Group\\_Id=195](http://www.data360.org/dsg.aspx?Data_Set_Group_Id=195) (last visited Feb. 7, 2013).

38. *Id.*

39. Alicia Munnell, *8 Reasons Older People Are Working Longer*, MSN MONEY (Aug. 12, 2011, 7:45 AM), <http://money.msn.com/retirement/article.aspx?post=11024ee3-c635-4d6d-9f2d-336f5b850247>; see also Andrea Orr, *Americans Work Longer*, ECON. POL'Y INST. (Apr. 27, 2012), [http://www.epi.org/publication/americans\\_work\\_longer](http://www.epi.org/publication/americans_work_longer).

40. Allison Linn, *Americans Expect to Work Longer, Retire Later*, NBC NEWS (Apr. 30, 2012), [http://lifeinc.today.com/\\_news/2012/04/30/11433757-americans-expect-to-work-longer-retire-later](http://lifeinc.today.com/_news/2012/04/30/11433757-americans-expect-to-work-longer-retire-later).

41. *Compare* 20 C.F.R. pt. 404, subpt. P, app. 2 § 200(a) (detailing the medical-vocational guidelines), *with* Social Security Act, ch. 531, 49 Stat. 620 (1935) (codified as amended at 42

required to change them beyond the Commissioner issuing a modification to the existing regulations.<sup>42</sup> Criticism of the medical-vocational guidelines age categories is not new; over a decade ago it was suggested the Agency extend the definition of “advanced age” to age 60.<sup>43</sup> Given the additional passage of time since that argument was made, modifying the various age categories in the medical-vocational guidelines is long overdue.

### III. “YOU DON’T UNDERSTAND ME”<sup>44</sup>: ELIMINATING ENGLISH LANGUAGE ABILITY AS A FACTOR OF THE MEDICAL-VOCATIONAL GUIDELINES

The age categories of the medical-vocational guidelines are not the only factor that is outdated. An individual’s ability to communicate in English is included in the medical-vocational guidelines as a vocational factor.<sup>45</sup> “Because English is the dominant language of the country, it may be difficult for someone who doesn’t speak and understand English to do a job, regardless of the amount of education the person may have in another language.”<sup>46</sup> Accordingly, the claimant’s ability to communicate in English is considered when determining what work, if any, he or she can do.<sup>47</sup> For example, an individual who knows enough English to communicate as a hotel maid may not be able to communicate in English for purposes of other jobs.<sup>48</sup> As stated in the Social Security regulations:

While illiteracy or the inability to communicate in English may significantly limit an individual’s vocational scope, the primary work functions in the bulk of the unskilled work relate to working with things (rather than data or people) and in these work functions at the unskilled level, literacy and ability to communicate in English has the least significance. Similarly the lack of relevant work experience

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U.S.C. §§ 301–1397mm (2006)) (making no mention of medical-vocational guidelines as part of the Social Security Act).

42. 42 U.S.C. § 902(a)(5).

43. Hon. John Marshall Meisburg, Jr., *Ten Ways to Improve the Social Security Disability Law and Save Billions of Dollars*, FED. LAW., May 2000, at 38, 40.

44. THE RACONTEURS, *You Don’t Understand Me*, on CONSOLERS OF THE LONELY (Third Man Records 2005).

45. 20 C.F.R. §§ 404.1564(b)(5), 416.964(b)(5) (2012); see Kathleen Pickering, Note, *Social Security Disability Determinations: The Use and Abuse of the Grid System*, 58 N.Y.U. L. REV. 575, 589 (1983).

46. 20 C.F.R. §§ 404.1564(b)(5), 416.964(b)(5); see Pickering, *supra* note 45, at 609.

47. 20 C.F.R. §§ 404.1564(b)(5), 416.964(b)(5).

48. Pickering, *supra* note 45, at 609 (citing *Minuto v. Sec’y of Health & Human Servs.*, 525 F. Supp. 261, 265-66 (S.D.N.Y. 1981)).

would have little significance since the bulk of unskilled jobs require no qualifying work experience. Thus, the functional capability for a full range of sedentary work represents sufficient numbers of jobs to indicate substantial vocational scope for those individuals age 18-44 even if they are illiterate or unable to communicate in English.<sup>49</sup>

What is interesting is that the Social Security Administration merely asks the individual if they are able to speak or understand English; there is no burden of proof placed on the individual to demonstrate an inability to communicate in English.<sup>50</sup> At least in certain circumstances, a claimant asserting an inability to communicate in English increases his or her likelihood to receive disability benefits under the medical-vocational guidelines circumstances as compared to an individual with the same impairments who can communicate in English.<sup>51</sup> At the sedentary exertion level of work,<sup>52</sup> the inability to communicate in English only benefits claimants who have either no work experience or merely unskilled work experience who are between the ages of 45 to 49.<sup>53</sup> At the light exertion level of work,<sup>54</sup> the inability to communicate in English only benefits claimants who have either no work experience or merely unskilled work experience who are under the age of 55.<sup>55</sup> At all other exertion levels and age categories, the ability to communicate in English is not an enumerated factor of the medical-vocational guidelines.

But is the issue of English language ability as relevant in contemporary America as when the medical-vocational guidelines were introduced? Just as people are living longer and retiring later, the demographics of the United States have undergone a dramatic transformation since 1978. From 1980 to 2007, the percentage of individuals in the United States predominantly speaking a language other than English has grown by 140%, while the nation's overall population

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49. 20 C.F.R. pt. 404 app. 2, § 201(h)(4)(i).

50. See, e.g., *GN 00203.011 Special Interviewing Situations: Limited English Proficiency (LEP) or Language Assistance Required*, SOC. SECURITY ADMIN., <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200203011> (last visited Feb. 7, 2013); *DI 11005.023 Completing the Disability Report Adult Form SSA-3368*, SOC. SECURITY ADMIN., <https://secure.ssa.gov/apps10/poms.nsf/lnx/0411005023> (last visited Feb. 7, 2013).

51. Pickering, *supra* note 45, at 609.

52. In the medical-vocational guidelines, sedentary work is defined as that work generally requiring lifting less than ten pounds and requires two hours or less of standing or walking and six hours or more of sitting. See 20 C.F.R. § 404.1567.

53. See 20 C.F.R. pt. 404, subpt. P, app. 2 tbl.1.

54. In the medical-vocational guidelines, light work is defined as that work generally requiring lifting up to twenty pounds occasionally and up to ten pounds frequently and requires six hours or more of standing or walking and two hours or less of sitting. See 20 C.F.R. § 404.1567.

55. See 20 C.F.R. pt. 404, subpt. P, app. 2 tbl.2.

only grew by 34%.<sup>56</sup> The number of people age 5 and older who speak a language other than English at home has more than doubled in the last three decades and grew at a pace four times greater than the nation's population growth—now totaling 20% of the population.<sup>57</sup> The use of Spanish as the predominant language in the home has risen the fastest in the United States; from 1980 to 2007 its use rose by 211%.<sup>58</sup> The longer a non-English speaker resides in the United States, the more likely they will communicate in English regularly, with 75% doing so after ten to fifteen years in the United States.<sup>59</sup>

While the age categories used in the medical-vocational guidelines are not mentioned in the Act, English language ability is specifically addressed in two different parts of the Act. The first reference, found at 42 U.S.C. § 423(f), relates to terminating Title II disability benefits.<sup>60</sup> The “lack of facility with the English language” is a factor the Agency must consider along with the physical, mental, and educational limitations of a claimant when terminating his or her disability benefits.<sup>61</sup> The second reference, found at 42 U.S.C. § 1383(c)(1)(A), relates to granting Title XVI disability benefits. That provision of the Act, just as with the Title II provision, states the Agency will take into account a claimant's “physical, mental, educational, or linguistic limitation of such individual (including any lack of facility with the English language) in determining” the award of disability benefits.<sup>62</sup> Because these references to English language competency are in the actual Social Security Act, legislation would be required to remove them. The purpose of the change, as with changing the age categories of the medical-vocational guidelines, is not to make it more or less likely that a claimant receive disability benefits, but rather to make the factors considered in the disability adjudication process reflect the America of today and how it has changed since 1978.

As a pragmatic matter, the inability to speak or understand English while trying to find a job could certainly make it more difficult. By the

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56. Press Release, U.S. Census Bureau, *New Census Bureau Report Analyzes Nation's Linguistic Diversity* (Apr. 27, 2010), [http://www.census.gov/newsroom/releases/archives/american\\_community\\_survery\\_acs/cb10-cn58.html](http://www.census.gov/newsroom/releases/archives/american_community_survery_acs/cb10-cn58.html).

57. *Id.*; see also U.S. CENSUS BUREAU, *LANGUAGE USE AND ENGLISH-SPEAKING ABILITY: 2000*, at 2 (Oct. 2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-29.pdf>.

58. Charlie Jolly, *Number of Non-English-Speaking Households Rises in the US*, K-INT'L (May 27, 2012), <http://www.k-international.com/blog/non-english-speakers-in-us>.

59. Stina Santiestevan, *Use of the Spanish Language in the United States: Trends, Challenges, and Opportunities*, ERIC DIGS. (May 1991), <http://www.ericdigests.org/pre-9221/spanish.htm>.

60. 42 U.S.C. § 423(f) (2006). For a discussion of the types of Social Security disability programs, see Swank, *Welfare*, *supra* note 15, at 618-19.

61. 42 U.S.C. § 423(f).

62. *Id.* § 1383(c)(1)(A).

same token, having a felony conviction, being unattractive, or living in Detroit can all make it more difficult to find a job.<sup>63</sup> At least one commentator has even claimed the inability to communicate in English may itself be a non-exertional impairment—a disability.<sup>64</sup> The Social Security Act, however, defines a disability as an “inability to engage in any substantial gainful activity [e.g., work] by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”<sup>65</sup> Utilizing this definition, the test to determine if an individual qualifies for Social Security disability benefits is by deciding if the claimant’s:

physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), “work which exists in the national economy” means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.<sup>66</sup>

Furthermore, a “‘physical or mental impairment’ is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.”<sup>67</sup> The inability to communicate in English would not qualify under these definitions as a “disability” unless the individual had a mental or physical impairment that prevented communication in any language, and not just English. Twelve years ago the argument was raised to abolish the inability to communicate in English as a factor in awarding disability benefits.<sup>68</sup> Since then, the number of non-English speaking workers in the United States has

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63. See Jamie Barrand, *Felony Records Make Job Hunt Difficult*, J. REV. (Apr. 27, 2011, 1:15 AM), [http://www.journalreview.com/news/article\\_063933ae-706e-11e0-9750-001cc4c03286.html](http://www.journalreview.com/news/article_063933ae-706e-11e0-9750-001cc4c03286.html); Marty Nemko, *Working While Ugly: Career Advice for the Unattractive*, JEWISH WORLD REV. (May 25, 2006), <http://www.jewishworldreview.com/0506/nemko052506.php3>; John Zaphyr, *Worst Cities in the U.S. to Find a Job*, EHOW, [http://www.ehow.com/print/info\\_7931810\\_worst-cities-job.html](http://www.ehow.com/print/info_7931810_worst-cities-job.html) (last visited Feb. 7, 2013).

64. Pickering, *supra* note 45, at 609.

65. 42 U.S.C. § 423(d)(1)(A).

66. *Id.* § 423(d)(2)(A).

67. *Id.* § 423(d)(3).

68. Meisburg, *supra* note 43, at 42, 44.

dramatically increased. Just as with the arguments for realigning age categories in the medical-vocational guidelines, the argument for eliminating considerations of linguistic abilities from the adjudication of disability benefit awards is even stronger a decade later.

IV. “EVERY BREATH YOU TAKE, EVERY MOVE YOU MAKE, EVERY BOND YOU BREAK, EVERY STEP YOU TAKE, I’LL BE WATCHING YOU”<sup>69</sup>: THE FAILURE OF THE SOCIAL SECURITY ADMINISTRATION TO DO MANDATORY CONTINUING DISABILITY REVIEWS

The Act provides a mechanism to ensure that the approximately fifteen million current disability benefit recipients continue to be eligible to receive their benefits.<sup>70</sup> A Continuing Disability Review is “a review of continued eligibility for disability benefits previously awarded” by the Social Security Administration.<sup>71</sup> The Act requires Continuing Disability Reviews of all beneficiaries with nonpermanent impairments at least once every three years.<sup>72</sup> This three-year review requirement also applies to children receiving disability benefits whose impairments are likely to improve.<sup>73</sup> Additionally, if there are earnings reported for the individual above substantial-gainful activity levels, a Continuing Disability Review must be conducted.<sup>74</sup> For a small investment of administrative resources, Continuing Disability Reviews save billions of taxpayer dollars.<sup>75</sup> For each dollar spent on a Continuing Disability Review, an average of \$15 in improperly paid benefits is saved.<sup>76</sup>

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69. THE POLICE, *Every Breath You Take*, on SYNCHRONICITY (A & M Records 1983).

70. See *SSDI Program*, *supra* note 20, at 1.

71. *Social Security’s Payment Accuracy: Joint Hearing Before the Subcomm. on Oversight & Social Sec. of the H. Comm. on Ways & Means*, 112th Cong. 3 (2011) [hereinafter Statement of Ann P. Robert] (statement of Ann P. Robert, President Elect, National Council of Disability Determination Directors), available at <http://waysandmeans.house.gov/uploadedfiles/robert222.pdf>; see also OFFICE OF INSPECTOR GEN., SOC. SEC. ADMIN., SEMIANNUAL REPORT TO CONGRESS: OCTOBER 1, 2009–MARCH 31, 2010, at 22 (March 2010) [hereinafter SEMIANNUAL REPORT], available at [http://oig.ssa.gov/sites/default/files/semiannual/sar102009032010\\_0.pdf](http://oig.ssa.gov/sites/default/files/semiannual/sar102009032010_0.pdf).

72. Statement of Ann P. Robert, *supra* note 71, at 3 (citing sections 221(i) and 1614(a)(3) of the Social Security Act).

73. 42 U.S.C. § 1382c(a)(3)(H)(ii) (2006).

74. OFFICE OF INSPECTOR GEN., SOC. SEC. ADMIN., FOLLOW-UP ON DISABLED TITLE II BENEFICIARIES WITH EARNINGS REPORTED ON THE MASTER EARNING FILE 2 & n.10 (April 15, 2009) [hereinafter TITLE II BENEFICIARIES AUDIT] (citing 20 C.F.R. § 404.1590(b)(5) (2012)), available at <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-01-08-28075.pdf>.

75. *Hearing Before the S. Fin. Comm.*, 112th Cong. 11 (2012) [hereinafter *Hearing Before Fin. Comm.*] (statement of Michael J. Astrue, Comm’r, Social Security Administration), available at <http://www.finance.senate.gov/imo/media/doc/SSA-%20Testimony-%20Astrue-FINAL.pdf>.

76. TITLE II BENEFICIARIES AUDIT, *supra* note 74, at 7 & n.25.

Unfortunately, the Agency does not conduct Continuing Disability Reviews as required by the Act, despite, for example, the proven effectiveness of Childhood Continuing Disability compared with 163,768 in fiscal year 2002.<sup>77</sup> In a 2006 audit conducted by the Agency's Office of Inspector General, 39% of these Childhood Continuing Disability Reviews were not conducted in accordance with the requirements of the Act.<sup>78</sup> The failure to conduct the Childhood Continuing Disability Reviews resulted in \$194.7 million in disability payments to 205,900 individuals that should not have been paid.<sup>79</sup> Because of its failure to comply with the specific requirements of the Act, the Agency agreed to perform all Childhood Continuing Disability Reviews as mandated in the statute.<sup>80</sup>

Five years later, the Agency did not complete 78.5% of the required Childhood Continuing Disability Reviews as required by the Act—two times worse than in 2006.<sup>81</sup> The failure to conduct these Childhood Continuing Disability Reviews resulted in \$1.4 billion in disability payments—seven times the 2006 amount—to approximately 513,300 recipients who should not have been paid, and will continue to cost approximately \$462 million per year in improper disability payments until the reviews are conducted.<sup>82</sup> Even though five years earlier the Agency agreed to comply with the requirements of the Act and conduct appropriate Childhood Continuing Disability Reviews, the Agency in 2011 asserted that “budget constraints and other priority workloads” continue to be responsible for its failure to comply with the specific requirements imposed upon it by the statute, but that it hopes to comply “as its budget and other priority workloads will allow.”<sup>83</sup> There is, however, no provision in the Act that allows the Agency to ignore the specific requirement to conduct Childhood Continuing Disability Reviews because of “other priority workloads.”<sup>84</sup> Instead, the Agency seems to have determined when it will, and will not, comply with the specific requirements of the Act. Its legal basis for doing so is unknown.

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77. OFFICE OF INSPECTOR GEN., SOC. SEC. ADMIN., FOLLOW-UP: CHILDHOOD CONTINUING DISABILITY REVIEWS AND AGE 18 REDETERMINATIONS 7 tbl.5 (2011) [hereinafter CHILDHOOD CONTINUING DISABILITY AUDIT], available at [http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-01-11-11118\\_0.pdf](http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-01-11-11118_0.pdf).

78. *Id.* at 2.

79. *Id.*

80. *Id.*

81. *Id.* at 3 tbl.1. Of the 78.5% of the childhood continuing disability reviews not done in accordance with the Act, 93% were never done and 7% were late. *Id.* at 4.

82. *Id.* at 3.

83. *Id.* at 8.

84. See 42 U.S.C. § 1382c(a)(3)(H)(ii) (2006); CHILDHOOD CONTINUING DISABILITY AUDIT, *supra* note 77, at 8.

The “budgetary constraints” excuse of the Agency is particularly interesting. Since fiscal year 2009, the Agency has requested and received from Congress special additional funding solely for the purpose of conducting Continuing Disability Reviews.<sup>85</sup> Despite the Agency receiving over 1.2 billion additional dollars for this purpose since 2009, the current number of Continuing Disability Reviews is nowhere near the level in fiscal year 2003 when the Agency received no additional funding.<sup>86</sup> In fiscal year 2010, with the additional funding, the Agency conducted almost eight times fewer Childhood Continuing Disability Reviews as compared to the number conducted in fiscal year 2003—when there was no additional funding.<sup>87</sup> With over a billion more dollars given to the Agency specifically to do Continuing Disability Reviews, it conducted 87% fewer Childhood Continuing Disability Reviews than when it was not given any additional money. Childhood Continuing Disability Reviews are not the only types of reviews that have decreased with the additional funding; the number of adult medical Continuing Disability Reviews for both Title II and adult Title XVI recipients in fiscal year 2010 was only 47% of the number completed in fiscal year 2004—when there was no additional funding.<sup>88</sup> Had these reviews been performed as required by the Social Security Act, between \$1.3 billion and \$2.6 billion in improper payments could have been saved.<sup>89</sup>

Given the inverse results, “budgetary constraints” does not seem to be the real reason for the Agency’s failure to abide by the Act and conduct the required Continuing Disability Reviews. If the Agency is not doing Continuing Disability Reviews due to “budgetary constraints,” then the sole remaining reason is its emphasis on “other priority workloads.”<sup>90</sup> According to the Commissioner of the Social Security Administration, eliminating the backlog of disability cases awaiting a hearing is the Agency’s top priority.<sup>91</sup> In fiscal year 2011, the Social Security Administration received approximately 877,000 hearing

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85. CHILDHOOD CONTINUING DISABILITY AUDIT, *supra* note 77, at 6 & tbl.4.

86. *Id.* at 6 & tbl.4, 7 tbl.5.

87. *Id.* at 7 tbl.5. In fiscal year 2010, the Agency conducted 16,677 Childhood Disability Reviews. In fiscal year 2003, it had conducted 127,444. *Id.*

88. See *Hearing Before Fin. Comm.*, *supra* note 75, at 12 tbl.1.

89. SEMIANNUAL REPORT, *supra* note 71, at 22.

90. CHILDHOOD CONTINUING DISABILITY AUDIT, *supra* note 77, at 5.

91. *Hearing Before Fin. Comm.*, *supra* note 75, at 3; *SSDI Program*, *supra* note 20, at 18; see, e.g., Damian Paletta, *Disability-Claim Judge Has Trouble Saying “No”: Near-Perfect Approval Record; Social-Security Program Strained*, WALL ST. J., MAY 19, 2011, at A1 [hereinafter Paletta, *Disability-Claim Judge*]; Amy Reifenrath, *Cheaters Cost Social Security Billions*, OREGONIAN (Dec. 6, 2008, 8:36 PM), [http://www.oregonlive.com/news/index.ssf/2008/12/disability\\_fraud\\_saps\\_social\\_s.html](http://www.oregonlive.com/news/index.ssf/2008/12/disability_fraud_saps_social_s.html).

requests, about 22% more than it received in fiscal year 2010.<sup>92</sup> Congress has consistently investigated, criticized, and publicly chastised the Agency for this backlog.<sup>93</sup> In response to this criticism, the Agency has repeatedly stated the elimination of the backlog—and the source of public and congressional disapproval—is its top priority.<sup>94</sup>

The fact the Social Security Administration does not want anything to impede the quick processing of the backlogged cases has previously been exposed to both Congress and the media.<sup>95</sup> Conducting Continuing Disability Reviews, irrespective of their requirement in the Act, takes administrative, personnel, and monetary resources away from the foremost goal of eliminating the hearing backlog. Even worse, conducting Continuing Disability Reviews actually makes the hearing backlog grow. If claimants' benefits are terminated due to a Continuing Disability Review, they can always file a new application for benefits. The new application for disability benefits will need to be processed and decided like any other disability case, and if it goes to a hearing, it adds to the backlog. As there is no limit to how many applications a person may file and there is no cost to the person to do so, there is no reason why a person whose benefits have been terminated due to a Continuing Disability Review would not file a new application.<sup>96</sup> With each new application for disability benefits that is filed, whether resulting from a Continuing Disability Review or not, the backlog grows. Of course, if no Continuing Disability Review is ever conducted, more taxpayer money will continue to be improperly spent.<sup>97</sup>

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92. *Hearing Before Fin. Comm.*, *supra* note 75, at 5; Rein, *supra* note 4, at B4.

93. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-667T, SOCIAL SECURITY DISABILITY: MANAGEMENT OF DISABILITY CLAIMS WORKLOAD WILL REQUIRE COMPREHENSIVE PLANNING 4 (2010) (statement of Daniel Bertoni, Director of Education, Workforce, and Income Security); Ed Madrid, *Benefits Backlog Swells as Social Security Slims*, OREGONIAN (Aug. 4, 2008, 3:35 PM), [http://www.oregonlive.com/special/index.ssf/2008/08/benefits\\_backlog\\_swells\\_as\\_soc.html](http://www.oregonlive.com/special/index.ssf/2008/08/benefits_backlog_swells_as_soc.html).

94. *See, e.g.*, *Funding Social Security's Administrative Costs: Will the Budget Meet the Mission: Hearing Before the S. Fin. Comm.*, 110th Cong. 3 (2007) (statement of Michael J. Astrue, Comm'r of Social Security Administration); Press Release, Soc. Sec. Admin., Social Security Administration Attacks Disability Backlog (Oct. 9, 2007), <http://www.ssa.gov/pressoffice/pr/disability-backlog-pr.htm>.

95. Paletta, *Disability-Claim Judge*, *supra* note 91. "Critics blame the Social Security Administration, which oversees the disability program, charging that it is more interested in clearing the giant backlog than ensuring deserving candidates get benefits." *Id.*

96. Beginning July 28, 2011, a claimant who has a claim pending in the Agency's administrative review process may not file a new claim of the same benefit type until the previous claim is adjudicated. There is no prohibition on filing a different type of claim (for instance, filing a Title XVI claim if there is already a Title II claim) nor any limit on the total number of claims that may be filed during a person's lifetime. Titles II and XVI: Procedures for Handling Requests to File Subsequent Applications for Disability Benefits, 76 Fed. Reg. 45309 (July 28, 2011).

97. As opposed to a private insurer, because someone else pays the bills (e.g., the taxpayer),

Unlike the other four suggestions in this Article to restore the integrity to the Social Security disability process, conducting Continuing Disability Reviews requires no statutory or regulatory changes. The Act already requires the Agency to conduct a variety of Continuing Disability Reviews. All that is needed is for the Agency to do what it is required to do, what it has stated it must do, and what it has been given extra money to do. Unfortunately, because these reviews do not reduce the backlog, the Social Security Administration is unlikely to ever conduct Continuing Disability Reviews as required.

V. “TELL ME EVERYTHING”<sup>98</sup>: INTENTIONALLY CONCEALING ADVERSE MEDICAL AND VOCATIONAL INFORMATION AND FRAUD

The Social Security Administration’s disability hearings are non-adversarial in which the government is not represented.<sup>99</sup> There is no opposing party at the hearing to introduce evidence contrary to the application for disability benefits. The Agency relies on the claimant and his or her representative for information on which health care providers the claimant has seen.<sup>100</sup> This disparity of knowledge creates a huge potential problem, as the claimant, and/or his or her representative, can be selective as to what medical or vocational evidence is submitted at the hearing.<sup>101</sup> As the average claimant’s lifetime award is over \$300,000 and the representative being paid either 25% of the back benefits (or \$6000, whichever is less) only if the claimant is awarded benefits, there is a strong incentive for both the representative and the claimant to not disclose adverse vocational or medical information to the Agency.<sup>102</sup>

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there is no incentive for the Social Security Administration to keep the number of cases paid low. See Paletta, *Insolvency Looms*, *supra* note 4, at A16 (discussing the common belief of claimants’ that “big, rich Uncle Sam’s money” pays for their Social Security disability benefits where in reality it is the American taxpayer).

98. CHEAP TRICK, *Tell Me Everything*, on *WOKE UP WITH A MONSTER* (Warner Bros. Records 1994).

99. See Robert E. Rains, *Professional Responsibility and Social Security Representation: The Myth of the State-Bar Bar to Compliance with Federal Rules on Production of Adverse Evidence*, 92 CORNELL L. REV. 363, 364 (2007); Swank, *Administrative Acquiescence*, *supra* note 15, at 12-13.

100. *DI 2250.006 Requesting Evidence – General*, SOC. SECURITY ADMIN., <https://secure.ssa.gov/poms.nsf/lnx/0422505006> (last visited Feb. 7, 2013) (discussing how that the Social Security Administration employees should develop the evidence in the case file from all sources identified by the claimant or that can be discovered from the records of the health care providers identified by the claimant).

101. Rains, *supra* note 99, at 364.

102. Paletta, *Insolvency Looms*, *supra* note 4, at A16. The \$300,000 amount is merely for the average of Social Security disability benefits, and not the total amount, which could include additional government benefits that can become available—such as Medicaid—with a grant of Social Security benefits. See Maximum Dollar Limit in the Fee Agreement Process, 74 Fed. Reg. 6080, 6080 (Feb. 4, 2009); Paletta & Searcey, *supra* note 25, at A16.

Companies that specialize in representing Social Security disability applicants have allegedly even institutionalized the process of withholding any information that might make it more difficult for their client—and their firm—to be paid.<sup>103</sup>

The purpose of a Social Security Act, however, is to provide assistance for those who cannot work due to a medically determinable impairment.<sup>104</sup> Just as with any other welfare program, the goal is to determine eligibility for benefits.<sup>105</sup> The only way to do this is to consider all of the medical and vocational information, not just the favorable information. The goal of the Social Security disability programs should not be to reward those who cheat or hide evidence the most successfully.<sup>106</sup> At least one commentator has concluded that Social Security representatives have a duty to disclose adverse information. In *Professional Responsibility and Social Security Representation: The Myth of the State-Bar Bar to Compliance with Federal Rules on Production of Evidence*,<sup>107</sup> Professor Robert Rains examines and ultimately rejects the arguments against disclosure of all evidence by Social Security claimant representatives.<sup>108</sup> Tracing a series of federal statutes, he concludes that the Social Security Protection Act of 2004 (the “Protection Act”)<sup>109</sup> mandates full disclosure of all evidence—good and bad—by claimant’s representatives and trumps any state bar ethics rules.<sup>110</sup> The provisions of the Protection Act have been incorporated into the Social Security Act, and provide for a five-year felony sentence for making or causing to be made “any false statement or representation of a material fact in any application for any payment” for disability benefits.<sup>111</sup> Furthermore, the Protection Act permits the Social Security Administration to impose monetary penalties for failing to disclose material facts relevant to the determination to grant disability benefits.<sup>112</sup>

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103. Paletta & Searcey, *supra* note 25, at A16. In 2011, one company that supposedly withholds medical information from the Social Security Administration received \$88 million in fees, more than any other disability representative company. *Id.*

104. Heckler v. Campbell, 461 U.S. 458, 460 (1983).

105. See generally Swank, *Welfare*, *supra* note 15.

106. See *id.* at 639.

107. Rains, *supra* note 99.

108. *Id.* at 390-91.

109. Social Security Protection Act of 2004, Pub. L. No. 108-203, 118 Stat. 493, 493-541 (2004) (codified as amended in scattered sections of 26 & 42 U.S.C.).

110. Rains, *supra* note 99, at 391-94.

111. 42 U.S.C. § 408(a) (2006); see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-849, SUPPLEMENTAL SECURITY INCOME: PROGRESS MADE IN DETECTING AND RECOVERING OVERPAYMENTS, BUT MANAGEMENT ATTENTION SHOULD CONTINUE 13 (2002), available at <http://www.gao.gov/assets/240/235391.pdf>.

112. Rains, *supra* note 99, at 377.

The Commissioner of the Social Security Administration delegated this sanction power to the Agency's Office of the Inspector General.<sup>113</sup>

The Social Security Act also allows for the Commissioner to suspend or disqualify a claimant representative who refuses to comply with the Agency's rules and regulations.<sup>114</sup> The Code of Federal Regulations, mirroring the Act, forbids making or participating in the making of false or misleading statements, assertions, or representations regarding a material fact or law, with claimant representatives who do so liable to suspension or disqualification from serving as a representative.<sup>115</sup> Additionally, both the Social Security Administration's hearing manual and policy manual reiterate these same requirements and likewise provide for the suspension or disqualification of representatives who violate "the affirmative duties of a representative or engaged in actions prohibited by the Commissioner's rules and regulations."<sup>116</sup> The Agency's Office of General Counsel is responsible for issues of representative suspension or disqualification.<sup>117</sup> However, Social Security administrative law judges, attorneys, and staff are prohibited by Agency policy from reporting representative misconduct to anyone other than agency management—a ban which includes reporting the suspected misconduct to the representative's state bar or the Agency's own Office of the Inspector General or Office of General Counsel.<sup>118</sup> If any action is to be taken, it is up to management to forward it to the Office of General Counsel for investigation.<sup>119</sup>

Unfortunately, the Agency has a very poor record of sanctioning representative misconduct.<sup>120</sup> On average, each year 5.56 of the estimated total 31,000 attorney and non-attorney representatives—or

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113. *Id.* at 378.

114. 42 U.S.C. § 406(a)(1).

115. 20 C.F.R. §§ 404.1740(c)(3), 404.1745, 416.1540(c)(3), 416.1545 (2012).

116. See OFFICE OF DISABILITY ADJUDICATION & REVIEW, SOC. SECURITY ADMIN., HALLEX: HEARINGS, APPEALS AND LITIGATION LAW MANUAL § I-1-1-40 (2011), available at [http://ssa.gov/OP\\_Home/hallex/I-01/I-1-1-40.html](http://ssa.gov/OP_Home/hallex/I-01/I-1-1-40.html); GN 03970.010 *Rules of Conduct and Standards of Responsibility for Representatives*, SOC. SEC. ADMIN., <https://secure.ssa.gov/apps10/poms.nsf/lnx/0203970010> (last visited Feb. 7, 2013).

117. OFFICE OF DISABILITY ADJUDICATION & REVIEW, SOC. SEC. ADMIN., HALLEX: HEARINGS, APPEALS AND LITIGATION LAW MANUAL § I-1-1-50(B) (2011), available at [http://ssa.gov/OP\\_Home/hallex/I-01/I-1-1-50.html](http://ssa.gov/OP_Home/hallex/I-01/I-1-1-50.html).

118. *Id.* § I-1-1-50(A) (requiring any staff person who observed or detected suspected violations of the rules pertaining to a representative's conduct to provide that information to their office management).

119. *Id.* § I-1-1-50(A)(4).

120. Swank, *Conditioning and Colluding*, *supra* note 19, at 519; Drew A. Swank, *Non-Attorney Social Security Disability Representatives and the Unauthorized Practice of Law*, 36 S. ILL. U. L.J. 223, 242 (2012).

.018%—are suspended or disqualified by the Agency.<sup>121</sup> “The average number of attorneys (as opposed to non-attorneys) suspended or disqualified each year by the Agency is 2.4, or .009% of the estimated total number of attorney representatives.”<sup>122</sup> This percentage of suspended or disqualified attorneys is sixteen times less than the number of attorneys disbarred in an average year in either Georgia or Maryland.<sup>123</sup> Considering that disbarment or other punishment by a state bar has been historically very rare, the fact that the Agency does the equivalent sixteen times fewer than state bars is incredible.<sup>124</sup> Furthermore, the few attorneys the Agency suspends or disqualifies each year have normally already been disbarred—and in some cases convicted of a crime and even incarcerated—prior to the Agency taking any action.<sup>125</sup> Because of management’s refusal to take misconduct seriously, the laws intended to prohibit concealing or misrepresenting adverse material facts are rendered meaningless.

Accordingly, the commissioner of the Social Security Administration should modify the regulations and additionally delegate to the administrative law judges who preside over the disability hearings

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121. OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., CLAIMANT REPRESENTATIVES BARRED FROM PRACTICING BEFORE THE SOCIAL SECURITY ADMINISTRATION 1 n.3 (Sept. 28, 2007), available at <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-07-17057.pdf>; Swank, *Condoning and Colluding*, supra note 19, at 519-20. Attorneys represent 63% of Social Security disability claimants, 11% are represented by non-attorneys, and the remaining 26% of claimants are *pro se*. OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., DEMONSTRATION PROJECT FOR NON-ATTORNEY REPRESENTATIVES 3 (June 5, 2006), available at <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-06-16013.pdf>; Swank, *Condoning and Colluding*, supra note 19, at 519-20; see also Rains, supra note 99, at 370.

122. Swank, *Condoning and Colluding*, supra note 19, at 520.

123. See, e.g., THE ATTORNEY GRIEVANCE COMM’N OF MD., 33RD ANNUAL REPORT: JULY 1, 2007 THRU JUNE 30, 2008, at 4-13, available at <http://www.courts.state.md.us/attygrievance/pdfs/annualreport.pdf> (demonstrating that in Maryland in fiscal year 2008, 45 of the approximately 33,400 attorneys in the state were disbarred or suspended, or 0.13%); BD. OF GOVERNORS, STATE BAR OF GA., 2010 REPORT OF THE OFFICE OF THE GENERAL COUNSEL 9 (2010), available at [http://www.gabar.org/barrules/ethicsandprofessionalism/upload/OGC\\_Report\\_09\\_10.pdf](http://www.gabar.org/barrules/ethicsandprofessionalism/upload/OGC_Report_09_10.pdf). Fifty-nine attorneys were either disbarred or suspended out of a total of 36,500 (or 0.16%). BD. OF GOVERNORS, supra; Swank, *Condoning and Colluding*, supra note 19, at 520 & n.74.

124. Derek A. Denckla, *Responses to the Conference: Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2594 (1999) (suggesting that studies of the lawyer discipline system demonstrate that lawyers rarely suffer any consequences for incompetence or other failings); see also *National Affairs: Disbarred*, TIME, Nov. 27, 1939, at 15 (demonstrating that this observation had been previously made over seventy years ago).

125. Of those attorneys suspended or disqualified by the Social Security Administration, the majority were already sanctioned by their own state bar, and the Agency’s disciplinary action was merely to prohibit those individuals from representing claimants before it based on the action of their respective state bar, and not because the agency had pursued its own misconduct investigations regarding the conduct of those attorneys. *AALJ Education Conference: Labor Management Meeting*, NEWSL. & PRESIDENT’S REP. (Ass’n Admin. Law Judges), June 13, 2011, at 8-9.

the authority to ensure that all material evidence is submitted to the Agency.<sup>126</sup> Social Security administrative law judges are unusual in that they have no authority to sanction misconduct. Other federal agencies' administrative law judges are routinely allowed to sanction representative misconduct. For example, administrative law judges with the International Trade Commission are authorized to impose monetary penalties and non-monetary sanctions for representative misconduct.<sup>127</sup> Federal Trade Commission and Department of Labor administrative law judges can discharge representatives from cases for misconduct.<sup>128</sup> Federal Trade Commission, Department of Labor, and International Trade Commission administrative law judges are selected and appointed from the same pool as Social Security administrative law judges.<sup>129</sup> For some reason, while these agencies authorize their administrative law judges to sanction representatives who appear before them for misconduct, the Social Security administrative law judges are only allowed to report misconduct to Agency management.

Just as with actually performing the Continuing Disability Reviews, however, there is almost no likelihood the Agency will either enforce the requirement that all evidence be submitted to it or authorize its administrative law judges to sanction representatives' failure to do so, as neither would be perceived as means of reducing the backlog of disability hearings. As the requirement to submit adverse evidence is never enforced, there is no need for claimants' representatives to comply with the requirement. As the available evidence demonstrates that Social Security claimant representatives are no more ethical than any other type of attorney, and regardless of the requirement to produce adverse evidence, some Social Security disability claims will not be adjudicated on their merits, but will rather be decided by deceit and falsehood to the detriment of both the taxpayer and the truly disabled.<sup>130</sup>

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126. See 42 U.S.C. § 902(a)(5) (2006).

127. 19 C.F.R. § 210.4(d) (2012).

128. See, e.g., 16 C.F.R. § 3.42(d) (2012); 29 C.F.R. § 18.36(b) (2012).

129. See 5 U.S.C. § 3105 (2006).

130. Swank, *Condoning and Colluding*, *supra* note 19, at 520 & n.77; Swank, *Welfare*, *supra* note 15, at 638-41.

VI. “WELL I’VE BEEN LOOKIN’ REAL HARD, AND I’M TRYIN’ TO FIND A JOB, BUT IT JUST KEEPS GETTIN’ TOUGHER EVERY DAY”<sup>131</sup>.  
 THE INCONSISTENCY OF RECEIVING STATE UNEMPLOYMENT  
 INSURANCE COMPENSATION WHILE SEEKING SOCIAL SECURITY  
 DISABILITY BENEFITS

F. Scott Fitzgerald was quoted as saying, “[t]he test of a first-rate intelligence is the ability to hold two opposing ideas in mind at the same time and still retain the ability to function.”<sup>132</sup> Psychologists refer to this phenomenon of attempting to reconcile two conflicting ideas as cognitive dissonance.<sup>133</sup> Whether by genius or psychosis, many Social Security disability claimants applying for benefits due to an alleged inability to work are at the same time already collecting state unemployment compensation benefits by asserting they are able to work. Both assertions—one made to the federal government that the person is unable to work while at the very same time asserting to a state government that they can work—cannot be true.

When a person applies for Social Security disability benefits, he or she is asserting that due to “medically determinable physical or mental impairment[s],” he or she is unable to work for at least twelve months either in his or her past jobs or, considering his or her age, education, and work experience, any other jobs at substantial gainful activity levels.<sup>134</sup> This assertion is time specific; there is a specific alleged onset of disability date.<sup>135</sup> The problem arises when a person collects unemployment benefits for a period of time overlapping the alleged onset of disability date. In all fifty states, a person must certify they are able to work in order to collect unemployment benefits.<sup>136</sup> A few states,

131. STEVE MILLER BAND, *Rock’n Me*, on FLY LIKE AN EAGLE (Capitol Records 1976).

132. *F. Scott Fitzgerald Biography*, BIOGRAPHYBASE.COM, [http://www.biographybase.com/biography/Fitzgerald\\_F\\_Scott.html](http://www.biographybase.com/biography/Fitzgerald_F_Scott.html) (last visited Feb. 7, 2013).

133. Kendra Cherry, *What Is Cognitive Dissonance?*, ABOUT.COM, <http://psychology.about.com/od/cognitivepsychology/f/dissonance.htm> (last visited Feb. 7, 2013).

134. 42 U.S.C. § 423(d)(1)(A), (d)(2)(A) (2006).

135. *DI 25501.001 Onset of Disability and Blindness*, SOC. SECURITY ADMIN., <https://secure.ssa.gov/poms.NSF/0/d1e09a50c224cb678525754c0006ac5b> (last visited Feb. 7, 2013).

136. ALA. CODE § 25-4-77(a)(3) (2007); ALASKA STAT. § 23.20.378(a) (2010); ARIZ. REV. STAT. ANN. § 23-771(A) (2012); ARK. CODE ANN. § 11-10-507(3)(A) (2012); CAL. UNEMP. INS. CODE § 1253(b)–(c) (Deering 2012); COLO. REV. STAT. ANN. § 8-73-107(1)(c)(I) (West 2003); CONN. GEN. STAT. ANN. § 31-235(a)(2) (West 2011); DEL. CODE ANN. tit. 19, § 3315(3) (West 2012); FLA. STAT. ANN. § 443.091(1)(c)(1) (West 2012); GA. CODE ANN. § 34-8-195(a)(3)(A) (2008); HAW. REV. STAT. § 383-29(a)(3) (2007); IDAHO CODE ANN. § 72-1366(4)(a) (2012); 820 ILL. COMP. STAT. ANN. 405/500(C) (West 2011); IND. CODE ANN. § 22-4-14-3(b)(1) (West 2012); IOWA CODE § 96.40(5) (West 2010); KAN. STAT. ANN. § 44-705(c) (West 2011); KY. REV. STAT. ANN. § 341.350(4) (West 2011); LA. REV. STAT. ANN. § 23:1600(3)(a) (2011); ME. REV. STAT. ANN. tit. 26, § 1192(3) (2011); MD. CODE ANN., LABOR AND EMPLOYMENT § 8-903(a)(1) (West

such as Alabama, Arkansas, Connecticut, Indiana, Kentucky, and Rhode Island, go further and actually require the individual be “physically and mentally able to work” in order to be qualified to collect unemployment compensation.<sup>137</sup>

Receipt of unemployment compensation and any effect on a contemporaneous application for Social Security disability benefits is not mentioned in either the Act or the Code of Federal Regulations. Instead, the Agency has announced its position on receiving unemployment benefits while also seeking Social Security disability benefits in an “Adjudication Tip” issued by the Social Security Administration Office of Disability Adjudication and Review to which the Agency’s administrative law judges are assigned. Issued in April 2012, “Adjudication Tip #34 – Receipt of Unemployment Benefits” states:

How do you deal with a claimant who is applying for disability but is receiving unemployment? It is SSA’s position that individuals need not choose between applying for unemployment insurance and Social Security disability benefits.

The receipt of unemployment benefits is only one of many factors that must be considered in determining whether the claimant is disabled. See 20 CFR 404.1512(b) and 416.912(b). Therefore, when evaluating this issue, look at the underlying circumstances rather than the mere application for and receipt of benefits. Has the claimant looked for jobs with physical demands beyond his alleged limitations, during the alleged period of disability? Has the claimant performed various mental and physical activities in order to continue receiving

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2002); MASS. GEN. LAWS ANN. ch. 151A, § 24(b) (West 2004); MICH. COMP. LAWS ANN. § 421.28(1)(c) (West 2012); MINN. STAT. ANN. § 268.085-1(4) (West 2012); MISS. CODE ANN. § 71-5-511(c) (West 2009); MO. ANN. STAT. § 288.040-1(2) (West 2012); MONT. CODE ANN. § 39-51-2104(b) (2011); NEB. REV. STAT. ANN. § 48-627(3) (LexisNexis 2012); NEV. REV. STAT. ANN. § 612.375(1)(c) (West 2000); N.H. REV. STAT. ANN. § 282-A:31-c(I)(b) (2012); N.J. STAT. ANN. § 43:21-4(c)(1) (West 2012); N.M. STAT. ANN. § 51-1-5(A)(3) (West 2011); N.Y. LAB. LAW § 591(2) (McKinney 2011); N.C. GEN. STAT. ANN. § 96-13(a)(3) (2011); N.D. CENT. CODE § 52-06-01(3) (2011); OHIO REV. CODE ANN. § 4141.29(A)(4)(a)(i) (West 2011); OKLA. STAT. ANN. tit. 40, § 2-205A (West 2012); OR. REV. STAT. ANN. § 657.155(1)(c) (West 2012); 43 PA. CONS. STAT. ANN. § 801(d)(1) (West 2012); R.I. GEN. LAWS ANN. § 28-44-12 (West 2011); S.C. CODE ANN. § 41-35-110(3) (2011); S.D. CODIFIED LAWS § 61-6-2(3) (2009); TENN. CODE ANN. § 50-7-302(a)(4) (2012); TEX. LAB. CODE ANN. § 207.021(a)(3) (West 2008); UTAH CODE ANN. § 35A-4-403(1)(c) (LexisNexis 2012); VT. STAT. ANN. tit. 21 § 1457(2) (West 2007); VA. CODE ANN. § 60.2-612(7)(a) (2006); WASH. REV. CODE ANN. § 50.20.010(1)(c) (West 2012); W. VA. CODE ANN. § 21A-6-1(3) (West 2011); WIS. STAT. ANN. § 108.04(2)(a)(1) (West 2012); WYO. STAT. ANN. § 27-3-306(a)(iii) (2011).

137. ALA. CODE § 25-4-77(a)(3); ARK. CODE ANN. § 11-10-507(3)(A); CONN. GEN. STAT. ANN. § 31-235(a)(2); IND. CODE § 22-4-14-3(b)(1); KY. REV. STAT. ANN. § 341.350(4); R.I. GEN. LAWS ANN. § 28-44-12 (specifying “physically” able to work).

unemployment benefits, such as going on interviews, filling out applications, etc.? These activities may also be relevant factors when evaluating the credibility of the claimant's allegations. 20 CFR 404.1529 and 416.929, and SSR 96-7p.<sup>138</sup>

While there is an inherent logical inconsistency of the two positions—saying to one government agency “I can work so I should receive money” while at the same time saying to another government agency “I cannot work so I should receive money”—from a legal standpoint, there is no bar to *applying* for both for the same time. The problem, from a legal perspective, arises upon the *receipt* of one or the other benefits. Known in the common law as the Doctrine of the Election of Remedies, it is “[a] claimant’s act of choosing between two or more concurrent but inconsistent remedies based on a single set of facts.”<sup>139</sup>

The beginning of the “Adjudication Tip” is therefore completely accurate; there is no inconsistency in *applying* for both state unemployment compensation and Social Security disability benefits; the inconsistency arises upon receipt of one and then continuing to pursue the other in violation of the Doctrine of the Election of Remedies. While the Social Security disability programs are clearly not governed by common-law doctrines, the logic of the doctrine is irrefutable.<sup>140</sup> Ultimately, an individual needs to choose his or her remedy for any given period of time. If the individual chooses to receive unemployment compensation, it should preclude him or her from collecting Social Security disability benefits for the same period of time.

As this policy is merely in the “Adjudication Tip,” all that would be needed to preclude collecting both state unemployment compensation and Social Security disability benefits at the same time would be for the Commissioner to issue a modification to the existing regulations as allowed by the Act.<sup>141</sup> With such a prohibition, individuals would be free to pursue both remedies, but limited to accepting only one. This prohibition would eliminate not only the logical inconsistency of collecting both state unemployment compensation and Social Security disability benefits but also the violation of the Doctrine of Election of Remedies.

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138. Social Security Administration, Office of Disability Adjudication and Review, *Adjudication Tip # 34 – Receipt of Unemployment Benefits* (April 2012) (on file with author).

139. BLACK’S LAW DICTIONARY 558 (8th ed. 2004).

140. See Swank, *Administrative Acquiescence*, *supra* note 15, at 13-15.

141. See 42 U.S.C. § 902(a)(5) (2006).

VII. “THIS IS THE END”<sup>142</sup>: CONCLUSION

What is the likelihood of the Social Security Administration taking just one of these five proposed steps? The leadership of the Social Security Administration would probably not want to institute any of the proposed changes, because none of them—in the short term at least—would reduce the backlog of pending disability hearings. In fact, actually conducting Continuing Disability Reviews, requiring all of the medical and vocational evidence to be submitted in an application for disability benefits, and updating age and language factors to represent the United States of today and not the 1970s, might result in more cases being denied, absolutely guaranteeing the Agency leadership would not want to institute any of the proposed changes. Denying disability applications only leads claimants to appeal or apply for benefits over and over again—both of which further add to the hearing backlog.

As long as the Agency’s goal is merely to process cases as quickly as possible, preferably awarding benefits so they do not come back as new applications or appeals, the backlog of disability cases will only continue to grow.<sup>143</sup> During the “height of the jobs crisis,” 117,000 Americans received both Social Security disability and unemployment benefits.<sup>144</sup> “Pay so they go away” has been an unsuccessful strategy in reducing the hearing backlog, and it will never work. For every individual improperly awarded disability benefits, there will be an incentive for others who likewise do not qualify to apply for them as well—adding to the backlog. As there is no cost to apply and no limit on the total number of times an individual can apply, there is no incentive not to apply even if the person is currently working, has no disability, or is able to work despite his or her disability.<sup>145</sup> As the average benefit amount of the disability payments alone is over \$300,000, and it serves as a gateway to additional benefits such as Medicaid or Medicare, what is lost by trying?<sup>146</sup> The odds of winning are astronomically higher than

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142. THE DOORS, *The End*, on THE DOORS (Elektra Entertainment Group 1967).

143. Paletta, *Disability-Claim Judge*, *supra* note 91, at A14.

144. Josh Boak, *117,000 Americans Get Jobless and Disability Benefits*, FISCAL TIMES (Sept. 12, 2012), <http://www.thefiscaltimes.com/Articles/2012/09/12/117000-Americans-Get-Jobless-and-Disability-Benefits.aspx>.

145. Beginning July 28, 2011, a claimant who has a claim pending in the Social Security Administration’s administrative review process may not file a new claim of the same benefit type until the previous claim is adjudicated. There is no prohibition on filing a different type of claim (for instance, filing a Title XVI claim if there is already a Title II claim) nor any limit on the total number of claims that may be filed during a person’s lifetime. Titles II and XVI: Procedures for Handling Requests to File Subsequent Applications for Disability Benefits, 76 Fed. Reg. 45,309, 45,309 (July 28, 2011).

146. See Paletta, *Insolvency Looms*, *supra* note 4, at A16.

any lottery, and it does not even cost a dollar to play. As long as eliminating the hearing backlog is the single, overriding concern of the Agency, Social Security disability programs will continue awarding money for nothing.

In the long run, however, the only way to actually reduce the backlog is to have a program that truly determines the issues of disability and ability to work on the merits, and does not merely try to process cases as quickly as possible so that they go away. A Social Security disability program that is run strictly according to its rules and regulations, whose goal is accuracy above speed, would deter unqualified individuals from applying. Why would a person bother applying if he or she either has no qualifying disability or is able to work despite a disability if such applicants are never awarded benefits? With changes making the system more accurate, the backlog would eventually be eliminated. The proposed five small steps are the first that can be taken to restore the integrity and legitimacy of our Social Security disability programs. The Social Security Administration's leadership will need to determine if they want to have a program that merely awards disability benefits very quickly, or one that actually does the job that the American taxpayer pays them to do.

“Ultimately, the taxpaying, voting public will only support need-based welfare programs if they believe that those actually in need of aid are the ones actually receiving the aid.”<sup>147</sup> The expectation of the taxpayers who fund the disability programs is that the decision to grant benefits will be correct, not just fast. Each disability case which is improperly paid has huge monetary consequences for the taxpayer: If merely 10% of all Social Security disability benefits are being improperly paid, that amounts to more than \$17 billion last year alone.<sup>148</sup> Even by government standards, that is real money. Furthermore, improperly paying disability benefits harms the economy as a whole. Once awarded disability benefits, individuals will “almost never return to the active workforce.”<sup>149</sup> Instead they will continue to receive disability benefits until death or when they become able to collect retirement benefits instead.<sup>150</sup> “This is straining already-stretched

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147. Swank, *Welfare*, *supra* note 15, at 639-40.

148. *See SSDI Program*, *supra* note 20, at 1.

149. Merline, *5.4 Million Join Disability*, *supra* note 4; Merline, *Labor Force Shrinks*, *supra* note 4.

150. Merline, *5.4 Million Join Disability*, *supra* note 4.

government finances while posing a long-term economic threat by creating an ever-growing pool of permanently dependent working-age Americans.”<sup>151</sup>

Beyond the monetary cost to the taxpayer, the improper payment of Social Security disability cases undermines the legitimacy and integrity of the entire system. Improperly paid disability claims stigmatize the people who properly receive disability benefits, as it calls into question the validity or degree of their own disability.<sup>152</sup> “[T]he fact that some people cheat the welfare system can lead to suspicion that anyone or even everyone receiving benefits is likewise cheating, which is clearly not true.”<sup>153</sup> Also harmed by improperly awarded disability benefits are those individuals whose attorneys did not cheat. “It is fundamentally unfair that individuals who intentionally cheat can get benefits, while those who follow the rules may not.”<sup>154</sup> The consequences of benefits being improperly paid are even more dire due to the financial insolvency of the Social Security disability program. In 2005, the Title II program began spending more money than it brought in through tax receipts.<sup>155</sup> The Title II trust fund that had been accruing for years is projected to expire in 2016.<sup>156</sup> By improperly paying benefits in the name of backlog reduction, the leadership of the Social Security Administration harms the very same people the Agency is supposed to be helping. By taking the five small steps advocated *supra*, the Agency leadership can begin the long journey of restoring the integrity of the Social Security disability program.

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151. *Id.*

152. Swank, *Welfare*, *supra* note 15, at 638; *see* Grantham, *supra* note 4.

153. Swank, *Welfare*, *supra* note 15, at 639.

154. *Id.*

155. Paletta, *Insolvency Looms*, *supra* note 4, at A16.

156. Faler, *supra* note 4.