

THE LABOR MARKET SIDE OF DISABILITY-BENEFITS POLICY AND LAW

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I. INTRODUCTION

The popular conception of “disability” under the Social Security Administration’s (SSA or “the Agency”) benefit programs¹ is that it derives from a standard based on objective medical facts demonstrated through scientific and clinical processes.² In truth, however, social security disability “embraces a specific context and frame of reference—disability from work.”³ Under the Social Security Act, claimants are

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¹ The SSA administers two primary disability benefit programs: the Disability Insurance (DI) component of the Old Age Survivors and Disability Insurance (OASDI) program and the Supplemental Security Income (SSI) disability program. *See infra* notes 24–31 and accompanying text (describing and analyzing the difference between social insurance and public assistance programs and the history of the different disability benefits programs). Under the Disability Insurance program, the “other jobs” labor-market work-adjustment inquiry is triggered by a determination that claimants cannot perform their past relevant work. Because SSI disability eligibility does require a work history, this SSI work-adjustment inquiry is triggered by a finding that claimants either cannot perform their past relevant work or do not possess past work. *See infra* note 100 and accompanying text.

² *See infra* Part II.

³ Jon C. Dubin, *Overcoming Gridlock: Campbell after a Quarter-Century and Bureaucratically Rational Gap-Filling in Mass Justice Adjudication in the Social Security*

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disabled if they are unable to perform “work which exists in significant numbers either in the region where [the claimant] lives or in several regions of the country.”⁴ Accordingly, the disability inquiry requires either a presumptive or more individualized determination of whether medically demonstrated conditions and limitations preclude meaningful participation in the labor market. This inquiry takes into account some vocational factors deemed relevant to making workplace adjustments, such as age, education, and prior work experience. The Act, however, provides no further elaboration on the meaning of “work which exists in significant numbers.”⁵

The Agency’s primary device for determining whether claimants can make labor-market adjustments to “work that exists in significant numbers” is a set of medical-vocational guidelines commonly referred to as the “grid.”⁶ In 1978, the Agency promulgated the grid by taking

Administration’s Disability Programs, 62 ADMIN. L. REV. 937 (2010) [hereinafter *Gridlock*]. The United States Institute of Medicine has supplied a more comprehensive and nuanced description of the meaning of disability as employed in the SSA’s programs:

Disability determination is a complex process, inescapably involving some interpretive judgment about capacity for work. At a minimum, making such decisions requires clinical determination of the extent of a claimant’s physical, mental, or sensory impairments; analysis of the degree to which such impairments limit the claimant’s functional capacity relevant to work roles; and consideration of the interaction of the claimant’s physical, mental, or sensory impairments with the person’s age, education, and work experience to provide an overall picture of the claimant’s future capacity for any sort of work. Finally the disability decision process requires a means for comparing those capacities with the capacities demanded by work roles in all jobs in the national economy that provide substantial gainful activity (SGA) earnings level.

U.S. INST. OF MED., *THE DYNAMICS OF DISABILITY: MEASURING AND MONITORING DISABILITY FOR SOCIAL SECURITY PROGRAMS* 113–14 (Googloo S. Wonderlich, Dorothy P. Rice & Nicole L. Amado eds. 2002) [hereinafter *DYNAMICS OF DISABILITY*] (citation omitted); *see also* *Bauer v. Astrue*, 532 F.3d 606, 609 (7th Cir. 2008) (Posner, J.) (“[T]he medical (disability) question and the economic (vocational) question are not readily separable. This is implicit in the concept of listed impairments-medical conditions that are deemed totally disabling without inquiry into labor-market conditions.”).

⁴ Social Security Act Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 821 (1967) (codified at 42 U.S.C. § 423(d)(2)(A) (2006)).

⁵ *Id.*

⁶ *Id.*; *see* 20 C.F.R. pt. 404, subpt. P, App. 2 (2011); *see also* *Hogan v. Schweiker*, 532 F. Supp. 639, 643 n.4 (D. Colo. 1982) (“Because parts are displayable as a simple chart or table, the medical vocational guidelines are commonly called ‘the grid’—a usage which, though technically limited to the tables themselves, commonly includes the attendant explanatory matter.”). The grid can be viewed as one grid with multiple parts or tables or in plural form as “grids.” For simplicity, this Article will use the singular term “grid” herein. As the Supreme Court described:

[The grid] consist[s] of a matrix of the four factors identified by Congress—physical

administrative notice of labor-market information and work-adjustment assumptions based on occupational characteristics and definitions established by the United States Department of Labor (DOL) in the 1965 edition of the Dictionary of Occupational Titles (DOT)⁷ and various DOL, Bureau of Census, and state- and local-agency labor-market surveys and materials that utilized DOT classifications.⁸

The Supreme Court and administrative law scholars have lauded the grid as an innovative and valuable administrative mechanism for advancing “mass justice consistency, efficiency, and uniformity in ‘the largest adjudicative agency in the [W]estern world.’”⁹ Additionally, “[t]he

ability, age, education, and work experience—and set[s] forth rules that identify whether jobs requiring specific combinations of these factors exist in significant numbers in the national economy.

Heckler v. Campbell, 461 U.S. 458, 461–62 (1983) (footnote omitted); *see infra* notes 109–158 and accompanying text. This article is a companion piece to the *Gridlock* article, *supra* note 3. Both articles utilize common or similar introductory and background material, but whereas *Gridlock* centers on administrative adjudication and federal court judicial review of labor market work adjustment assessments that fall between the grid’s gaps, this article focuses on the broader social welfare policy and empirical issues in the labor market side of disability benefit law, including those generated by the grid’s continued usage.

⁷ See U.S. DEP’T OF LABOR, DICTIONARY OF OCCUPATIONAL TITLES (DOT) (3d ed. 1965). The DOT is “a catalogue of the occupational titles used in the U.S. economy” and was intended to provide “reliable descriptions of the type of work performed in each occupation.” NAT’L RESEARCH COUNCIL, WORK, JOBS AND OCCUPATIONS: A CRITICAL REVIEW OF THE DICTIONARY OF OCCUPATIONAL TITLES 1 (1980) [hereinafter CRITICAL REVIEW]. It was created to assist employment offices and the U.S. Employment Service, which were established in the depression era of the 1930s, to properly classify and place job seekers. *Id.* Employment Service officials believed that a “dictionary was of great practical importance because getting qualified workers into appropriate jobs is a task that can be most adequately performed when the transition is based upon a thorough knowledge of both worker and job.” *Id.* at 1–2. The DOT’s first edition was published in 1939. *Id.* at 1. The DOL produced a fourth edition of the DOT in 1977 and a revised fourth edition in 1991. U.S. DEP’T OF LABOR, DICTIONARY OF OCCUPATIONAL TITLES (DOT): REVISED FOURTH EDITION (4th ed. 1991) [hereinafter DOT REVISED 4TH ED.]. It has not produced an update since 1991. The DOL has long produced a companion publication to the DOT “in response to the special needs of public and private organizations for more detailed data than that contained [in the DOT].” U.S. DEP’T OF LABOR, SELECTED CHARACTERISTICS OF OCCUPATIONS DEFINED IN THE REVISED DICTIONARY OF OCCUPATIONAL TITLES v (1993) [hereinafter SCODOT]. Earlier versions of the SCODOT, linked to earlier versions of the DOT, were published in 1966, 1968, and 1981. *See id.*

⁸ See 43 Fed. Reg. 9284–9302 (Mar. 7, 1978); 43 Fed. Reg. 55,349–55,362 (Nov. 28, 1978).

⁹ Dubin, *Gridlock*, *supra* note 3, at 939 (quoting *Heckler*, 461 U.S. 458, 460 n.2 (1983) (quoting JERRY L. MASHAW, CHARLES L. GOETZ, FRANK I. GOODMAN, WARREN F. SCHWARTZ, PAUL R. VERKUIL & MILTON M. CARROW, SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM xi (1978) [hereinafter MASHAW, HEARINGS])).

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grid standardized decisional outcomes and obviated the need for costly, time-consuming, and often inconsistent vocational expert testimony in a large volume of cases¹⁰ involving SSA labor-market work-adjustment determinations.¹¹

While the Supreme Court in 1983 sustained the grid against a variety of substantive and procedural challenges in *Heckler v. Campbell*,¹² the Court expressly declined to question, *sua sponte*, or review under the “arbitrary and capricious” standard, the grid’s empirical supportability or sufficiency of the SSA’s rulemaking record.¹³ Over time, the empirical issue has become considerably murkier. The grid continues to rely on woefully outdated assumptions drawn from a snapshot of the United States’ economy nearly a half-century ago. It has not been meaningfully updated to account for dramatic changes in today’s dynamic and fluid twenty-first-century economy and labor market.

Apart from empirical staleness, the National Research Council’s (NRC) Committee on Occupational Classification and Analysis has identified major deficiencies in both the source data used in, and the occupational characteristics created for, the fourth edition of the DOT, which was published in 1977.¹⁴ At least one major social security disability treatise has concluded that the DOT is not a methodologically reliable source for facilitating labor market assessments.¹⁵ This treatise also questions the SSA’s reliance on the 1965 DOT, which the agency used to support the grid’s 1978 rule promulgation without ever having determined that the DOT and related data and assumptions were accurate.¹⁶ Thus, despite the grid’s benefits, the accuracy and reliability of

¹⁰ Dubin, *Gridlock*, *supra* note 3, at 939.

¹¹ *See infra* Part II.

¹² *Heckler*, 461 U.S. at 458.

¹³ *See infra* notes 157–158 and accompanying text.

¹⁴ *See* CRITICAL REVIEW, *supra* note 7, at 191–94.

¹⁵ *See* DAVID F. TRAVER, SOCIAL SECURITY DISABILITY ADVOCATE’S HANDBOOK § 1403 (2009) (*citing* CRITICAL REVIEW, *supra* note 7, at numerous sections).

¹⁶ *See* TRAVER, *supra* note 15, § 1403.1.3. The treatise’s author, David Traver, is both a former vocational evaluator and a disability lawyer. The treatise is a practice manual focusing on the evaluation and litigation of vocational issues in disability benefits cases. It includes a scathing critique of the DOT. *See id.* §1403.1 (“The Social Security Administration figures the DOT and its related data are ‘better than nothing.’ But ‘better than nothing’ is not a reliable basis to award or deny life-sustaining benefits to the disabled and disadvantaged.”); *see id.* (noting the SSA’s continuing reliance on the DOT and related data that derives from a time “when the Beatles ruled the AM pop charts, and Elvis was still the king”). Traver also provides detailed analysis of methodological deficiencies in the secondary documentary sources, other

the SSA's labor-market work-adjustment methodology is presently vulnerable to serious empirical challenge.

There are a number of reasons why scholarly examination of this issue is important. Administrative law scholars have identified the SSA as the largest and most important social welfare agency—and the SSA's disability benefits programs as the largest income support programs for people unable to work—in the “Western world.”¹⁷ The SSA processes over five million disability benefit claims annually,¹⁸ and more than forty percent of all initial disability-insurance decisions involve labor-market work-adjustment assessments.¹⁹ Furthermore, the Agency acknowledges that cases involving full evaluation of vocational and labor-market work-adjustment issues are the “most difficult” to adjudicate.²⁰

The issue is also timely as the NRC recently issued a report recommending that the DOL and SSA renew interagency collaborative efforts to create an occupational taxonomy that could efficiently serve both the SSA's adjudicative needs in the manner of an updated DOT as well as the DOL's traditional objectives regarding employee placement, job counseling, and labor policy.²¹ While several scholars have identified

than the DOT, relied upon to supply empirical support for the grid. *Id.* at ch.15; see 20 C.F.R. pt. 404, app.2, § 200.00(b) (2011) (listing documentary sources of which the Agency took administrative notice to support labor-market work-adjustment rules in the grid).

¹⁷ See JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 18 (1983) [hereinafter MASHAW, BUREAUCRATIC JUSTICE]; Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 FLA. ST. U. L. REV. 199, 205 (1990); see also Richardson v. Perales, 402 U.S. 389, 399 (1971) (“The Social Security Act has been with us since 1935 . . . [and] [i]t affects nearly all of us.”); Paul R. Verkuil, *The Self Legitimizing Bureaucracy*, 93 YALE L.J. 780, 781 (1984) (“It is the Mt. Everest of bureaucratic structures: . . . One studies it because it is there.”).

¹⁸ The Agency processed over 2.3 million disability benefits applications and over 3.1 million SSI benefits applications in 2008. See SOC. SEC. ADMIN., ANNUAL STATISTICAL REPORT ON THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM, 2009, available at http://www.socialsecurity.gov/policy/docs/statcomps/di_ast/2009/index.html.

¹⁹ See SOC. SEC. ADVISORY BD., DISABILITY DECISIONMAKING AND DISABILITY INSURANCE ALLOWANCES: DATA AND MATERIALS 60–62 (2006) [hereinafter DATA AND MATERIALS], available at www.ssab.gov/documents/chartbook.pdf.

²⁰ See Rules for Adjudicating Disability Claims in Which Vocational Factors Must Be Considered, 43 Fed. Reg. 55,349 (Nov. 28, 1978) (codified at 20 C.F.R. pt. 404, subpt. P (2011)).

²¹ See COMM. ON NAT'L STATISTICS, NAT'L RESEARCH COUNCIL (NRC), A DATABASE FOR A CHANGING ECONOMY: REVIEW OF THE OCCUPATIONAL INFORMATION NETWORK (O*NET) 159–70 (Nancy T. Tippins & Margaret L. Hilton, eds. 2010) [hereinafter CHANGING ECONOMY], available at www.nap.edu/catalog/12814.html. After an inexplicably unsuccessful

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the socially constructed nature of disability reflected in the SSA's disability benefit programs and have highlighted the importance of medical considerations,²² the role of labor market factors in that construction has received far less contemporary scholarly attention.²³

attempt to collaborate with the DOL on a mutually workable occupational taxonomy earlier in the decade, *see id.*, the SSA went off on its own in 2009 and assembled an advisory committee to explore the creation of an independent additional occupational taxonomy to support the SSA's own disability adjudicative needs. *See* Meeting Notice, 74 Fed. Reg. 3666-03 (Jan. 21, 2009) (announcing SSA's convening of the first meeting of the Occupational Information Development Advisory Panel (OIDAP) that will "advise the Agency on creating an occupational information system tailored specifically for SSA's disability programs and adjudicative needs [and will provide] . . . recommendations . . . in the following areas: medical and vocational analysis of disability claims; occupational analysis, including definitions, ratings and capture of physical and mental/cognitive demands of work and other occupational information critical to SSA disability programs; data collection; use of occupational information in SSA's disability programs; and any other area(s) that would enable SSA to develop an occupational information system suited to its disability programs and improve the medical-vocational adjudication policies and processes"). Last year also marked the first time a Court of Appeals (albeit in an unpublished, non-precedential opinion) found the 1991 revised fourth edition of the DOT—the DOT's current version—potentially "obsolete" for labor market evidentiary purposes in disability adjudication. *See* *Cunningham v. Astrue*, 360 Fed. Appx. 606, 614–16 (6th Cir. 2010) ("[C]ommon sense dictates that when such [DOT] descriptions appear obsolete, a more recent source of information should be consulted . . . [W]e conclude that the VE's dependence on the DOT listings alone does not warrant a presumption of reliability."). *See also* *Abbott v. Astrue*, 391 Fed. Appx. 554, 559 (7th Cir. 2010) (referencing "the now-defunct DOT").

²² *E.g.*, Frank S. Bloch, *Medical Proof, Social Policy and Social Security's Medically Centered Definition of Disability*, 92 CORNELL L. REV. 189 (2007) [hereinafter Bloch, *Medical Proof*]; *see, e.g.*, JENNIFER L. ERKULWATER, *DISABILITY RIGHTS AND THE AMERICAN SOCIAL SAFETY NET* (2006); DEBORAH STONE, *THE DISABLED STATE* (1984); Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361 (1996) [hereinafter Diller, *Entitlement*]; Lance Liebman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates*, 89 HARV. L. REV. 833 (1976).

²³ *See* ANDREW F. POPPER, GWENDOLYN F. MCKEE, ANTHONY E. VARONA & PHILIP J. HARTER, *ADMINISTRATIVE LAW: A CONTEMPORARY APPROACH* 631 (2d ed. 2010) (comparing scholarship from the 1980s regarding disability benefits with contemporary scholarship on the same topic and noting that, "[m]ore recently, the [grid] process has not been front and center in the discourse regarding disability"). A few articles written in 1983, the year the Supreme Court sustained the grid against challenge in *Campbell*, predicted some of the problems and trends with the grid and the Agency's use of labor market considerations that have emerged since that time. *See, e.g.*, John J. Capowski, *Accuracy and Consistency in Categorical Decision-Making: A Study of Social Security's Medical-Vocational Guidelines—Two Birds With One Stone or Pigeon-Holing Claimants?*, 42 MD. L. REV. 329 (1983); Kathleen Pickering, Note, *Social Security Disability Determinations: The Use and Abuse of the Grid System*, 58 N.Y.U. L. REV. 575 (1983). Many of these issues are discussed and expanded upon with a contemporary focus herein and in *Gridlock*, the author's companion article to this writing. *See generally* Dubin, *Gridlock*, *supra* note 3. There is a growing body of scholarship on the labor, employment, and social-welfare policy implications and adjudicatory interactions of the SSA disability-benefits programs and the Americans with Disability Act disability discrimination protections. *See, e.g.*,

Thus, the massive volume of SSA decisions involving labor-market considerations, the potential staleness and inaccuracy of the empirical data and materials supporting those determinations, and the issue's timeliness merit greater academic exploration of this aspect of disability-benefits law and policy. In addition, both American disability policy and social welfare policy have undergone significant changes since the development of the SSA's labor-market work-adjustment methodology over thirty years ago. These changes further underscore the importance of evaluating the labor-market side of disability benefits policy and its empirical foundation through a contemporary lens.

Part I of this Article provides a summary of the history of the congressional, regulatory, and judicial development of the SSA's disability programs' eligibility standards, which have evolved to include some vocational and labor-market considerations while excluding others. Part II summarizes the SSA's present adjudication process and the five-step sequential-evaluation system that culminates in a labor-market work-adjustment assessment under the grid's legislative rules. Part III discusses deficiencies in the source data that supports the grid rules, particularly the data's staleness and the discontinuation of the original taxonomy upon which it is based. Part IV evaluates whether problems in the present system augur greater consideration of alternative approaches to the grid and the present labor-market work-adjustment methodology. Alternatives discussed include amendments to the Social Security Act to eliminate or alter the labor-market assessment. Other alternatives involve approaches promoted as more consistent with common perceptions of disability and social welfare policy after passage of the Americans with Disabilities Act of 1990 and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which utilize "welfare reform"-type incentives and active supervision of claimants to promote greater mandatory work participation instead of income supports.

Mark Weber, *Disability Rights, Disability Discrimination and Social Insurance*, 25 GA. ST. U. L. REV. 575 (2009); Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L. J. 1 (2004); Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921 (2003) [hereinafter Bagenstos, *ADA as Welfare Reform*]; Mark C. Weber, *Disability and the Law of Welfare: A Post-Integrationist Examination*, 2000 U. ILL. L. REV. 889 [hereinafter Weber, *Disability and the Law of Welfare*]; Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003 (1998) [hereinafter Diller, *Dissonant Disability Policies*]; Frank S. Ravitch, *Balancing Fundamental Disability Policies: The Relationship Between the Americans with Disability Act and Social Security Disability*, 1 GEO. J. ON FIGHTING POVERTY 240 (1994).

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This Article concludes that the SSA should utilize a “mend it, don’t end it” approach to the grid and the evaluation of labor-market considerations in disability benefit determinations. It argues that the suggested alternatives to the present system thus far are either fundamentally misguided or politically unpalatable. It urges acceptance of the NRC’s recommendation for the DOL and SSA to collaborate on completion of a current and methodologically appropriate labor-market taxonomy to support agency work-adjustment determinations and update the grid’s empirical bases. It further advocates for institutionalizing at least decennial revision of the underlying labor-market data and taxonomy to enhance the grid system’s temporal reliability on a continuing basis. Finally, it eschews usage of a grid-updating or grid-revision process as an opportunity to tighten or restrict benefit eligibility in light of the consequences of wrongful disability-benefit denial in a post-welfare-reform reality of substantially restricted safety net alternatives, and in a depressed and constricted economy for characteristically low-skilled disability benefits claimants.

II. THE EVOLUTION OF LABOR MARKET CONSIDERATIONS IN THE DISABILITY BENEFITS PROGRAMS

A. THE DISABILITY CATEGORY AND THE CONGRESSIONAL IDEAL

The American social welfare system is based on notions of categorical eligibility and moral worthiness, with its genesis in the Poor Laws of Elizabethan England.²⁴ The receipt of public benefits generally requires inclusion in a subgroup of persons deemed “worthy” of assistance due to some status or situation that provides a socially acceptable justification for poverty or government assistance.²⁵ The disability category has long been among such worthy categories.²⁶ Nevertheless, the United States’ most sweeping social welfare law, the Social Security Act of 1935, failed to include the disability category.²⁷ This obvious omission

²⁴ STONE, *supra* note 22, at 29–89; Diller, *Entitlement*, *supra* note 22, at 372.

²⁵ Diller, *Dissonant Disability Policies*, *supra* note 23, at 372–74.

²⁶ STONE, *supra* note 22, at 35–36 (tracing the origins of a category based on ability to work by which persons would be separated into primary and secondary distributive systems in the statute of 1388 in England).

²⁷ Bloch, *Medical Proof*, *supra* note 22, at 190; *see* Social Security Act, ch. 531, 49 Stat. 620 (1935) (codified as amended in various scattered sections of 42 U.S.C. and 26 U.S.C. (2006)).

was due to Congress's inability to determine whether disability benefits should be distributed in the form of "welfare"—i.e. as means-tested public assistance, as social insurance benefits, or as both.²⁸ The omission was also due to concerns that the definition of "disability" could not be sufficiently cabined to restrain program costs within manageable and predictable limits.²⁹

In the 1950s, Congress addressed this first concern by adding disability categories to both the joint federal-state public assistance (or "welfare") program, and then, a few years later, to the federal social insurance (or "social security") program.³⁰ Congress addressed its second concern regarding the elusive definition of disability by adopting what it believed to be an objectively limited, medically centered definition of disability for its Social Security Disability Insurance (SSDI) program, and later, for its federal Supplemental Security Income (SSI) program.³¹

²⁸ Bloch, *Medical Proof*, *supra* note 22, at 190; *see also id.* at 190 n.4 ("The core distinction between public assistance and social insurance is that eligibility for the latter is contingent on having contributed to the program through taxes paid on wages, while public assistance is a noncontributory program with eligibility contingent on financial need."). As a political matter, there are considerably less obstacles to the substantial restriction or even elimination of public assistance programs due to transient or evolving public sentiments of recipient worthiness. *See generally* R. KENT WEAVER, *ENDING WELFARE AS WE KNOW IT* (2000) (describing elimination of the AFDC welfare entitlement program through the Personal Responsibility and Work Opportunity Reconciliation Act of 1996). On the other hand, President Roosevelt sought to characterize the social security program as untouchable because benefits were earned in the sense that they were provided only in return for having paid for them. *See generally* Matthew H. Hawes, *So No Damn Politician Can Ever Scrap It: The Constitutional Protection of Social Security Benefits*, 65 U. PITT. L. REV. 865 (2004) (deriving title from President Roosevelt's quote regarding political implications of social security program's contributory design: "With those taxes in there, no damn politician can ever scrap my social security program").

²⁹ Bloch, *Medical Proof*, *supra* note 22, at 190.

³⁰ *See id.* In the Social Security Amendments of 1972, Congress created the SSI program for adults and children and transferred the responsibility for welfare benefits for aged, blind, and disabled persons from a joint state-federal scheme to the Federal Social Security Administration. Liebman, *supra* note 22, at 855–56. Congress used the same definition of disability for adults under the SSI program that it used under the Social Security Disability Insurance program. *Id.* Congress had added a disability category to the joint federal-state welfare program through amendments to the Social Security Act in 1950, which added the Aid to the Permanently and Totally Disabled (APTD) welfare program. *See* Social Security Act Amendments of 1950, ch. 809, pt. 351, §§ 1401–1405, 64 Stat. 477, 555–58. Under the APTD program, which SSI replaced, Congress simply defined benefits eligibility as available to "needy individuals eighteen years or older who are permanently and totally disabled." Bloch, *Medical Proof*, *supra* note 22, at 196–97. However, Congress left to the states the creation and implementation of more meaningful disability eligibility standards for APTD. *Id.*

³¹ The states' varying APTD eligibility standards were often less strict and more flexible

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The narrower, medically centered disability definition reflected a retreat from broader conceptions of disability pursued during earlier stages of the Social Security program. As initially proposed in 1941 by Arthur Altmeyer, the Chairman of the Social Security Board,³² a disability insurance component to the Social Security program was to be inclusive and was to address economic loss and inability to perform actual work, rather than strict medical definitions of impairment severity.³³ Altmeyer and his colleagues sought a disability definition that would take into account “personal, economic and social circumstances,”³⁴ “regional economic conditions,”³⁵ a claimant’s age and training, and even a claimant’s “sex, race, urban or rural residence, occupation and experience.”³⁶ Further, they rejected the idea of basing disability determinations solely on a fixed schedule of medical findings and impairments as in the workmen’s compensation program.³⁷ Altmeyer concluded that, while such a schedule might provide some useful guidance, disability methodology should include the broader range of individual circumstances.³⁸ Thus, vocational factors and labor market considerations would have played an explicit and substantial role under the early conceptions of the disability category. However, major

than the uniform Federal SSI standard. *See* Diller, *Entitlement*, *supra* note 22, at 428–33. Nevertheless, the SSI program has provided many advantages over the APTD program for low-income disabled persons. SSI utilizes the SSA’s procedures and processes developed for a more valued and privileged segment of society—disabled persons with significant work histories and “earned rights” from years of social security contributions. *See* Liebman, *supra* note 22, at 857–60. Thus, SSI recipients are relieved of the obligation regularly to demonstrate continuing moral worthiness for assistance in a closely supervised welfare agency context as is present in most state-run welfare programs. *See id.* SSI also removed much of the stigma associated with participation in a “welfare” program, as recipients would receive a check from the SSA like most retirees. *See id.* Finally, SSI benefits, unlike state welfare benefits, are subject to regular cost-of-living increases. *Id.*

³² The original Social Security Act of 1935 created a three-person Social Security Board to run the new program. In 1946, Congress replaced the Social Security Board with the Social Security Administration (SSA), with a single Commissioner as head of the SSA. Arthur J. Altmeyer, the incumbent Chairman of the Board, became the first Commissioner of Social Security. *See generally*, U.S. SOC. SEC. ADMIN., SSA ORGANIZATIONAL HISTORY, www.ssa.gov/history/orghist.html (last visited Feb. 26, 2011) (explaining the origins of the SSA and how it was originally the SSB).

³³ Diller, *Entitlement*, *supra* note 22, at 399-400.

³⁴ *Id.* at 400.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

opposition developed in Congress to this broader disability conception based on fears of inundation from an inability to distinguish disability from more general unemployment and the potential for disincentives to both rehabilitation and the social obligation to work.³⁹ The experience of insurance companies handling private disability insurance policies during the depression, when disability claims soared due to abysmal labor market conditions, bolstered this fear.⁴⁰ Many individuals who satisfied any medical definition of disability still managed to find and maintain employment. Yet, when the economy contracted, many with severe impairments lost their jobs and applied for—and were granted—private disability-insurance benefits.⁴¹ Further, because doctors would be required to distinguish disability from unemployment cases, the medical profession opposed a social security disability program, fearing it would mandate a government medical corps that would signal the first step toward socialized medicine.⁴²

Because of these concerns, proponents of the program retreated to a more medically-based disability conception when Congress adopted its first modest inclusion of disability in the social insurance program through the disability freeze program in 1954.⁴³ Indeed, even though the disability

³⁹ *Id.* at 402–03.

⁴⁰ *Id.*

⁴¹ *Id.* Indeed, the trend of significantly increasing applications for disability benefits in times of recession continues to this day. Social security disability benefit applications rose 17% in 2009 due to the severe financial crisis that commenced in September 2008, and were expected to rise further in 2010–11. See Jason White, *Job Losses Send Disability Claims Soaring*, MSNBC.COM, Dec. 17, 2009, http://www.msnbc.msn.com/id/34381782/ns/us_news-the_elkhart_project/; Richard Wolf, *Social Security Recipients Up by 19%*, USA TODAY, Oct. 1, http://www.usatoday.com/news/nation/2009-10-01-social-security_N.htm (same); see generally Diller, *Dissonant Disability Policies*, *supra* note 23, at 1078 (suggesting two causes for this trend: first, disabled persons are among the first to be laid off or terminated in times of recession; and second, they are more likely to apply for benefits as opposed to seeking to beat the odds and find appropriate, retainable employment during such economic downturns).

⁴² As Deborah Stone described,

[t]he party line of organized medicine was that a federal program of disability insurance would be the entering wedge of socialized medicine. If the program were to require medical certification, so the logic went, then the government would have to provide free medical examinations to applicants. The government would therefore use government-employed physicians, such as those working for the Veterans Administration and the Public Health Service, to conduct the examinations. More and more physicians would come to be employed by government; government employment meant socialized medicine.

STONE, *supra* note 22, at 88.

⁴³ See Social Security Act Amendments of 1954, Pub. L. No. 83-761, § 106(a), 68 Stat.

freeze program did not realize the goal of providing cash benefits to claimants based on disability, Congress still expressed significant fear of program expansion and uncertainty due to the malleable nature of the disability category.⁴⁴ This motivated the SSA to convene a panel of medical experts to develop administrative medical guidelines to implement the freeze program that would assess impairment severity.⁴⁵ These guidelines provided a catalogue of impairments and conditions with specified medical findings deemed sufficient to establish disability.⁴⁶

Thus, when Congress finally added a disability-insurance cash-benefits provision to the Social Security Act in 1956, by an essentially bare one-vote majority in the Senate,⁴⁷ proponents of the disability initiative were able to point to the medical panel's guidelines to support the claim that medical science could sufficiently circumscribe a statutory disability standard.⁴⁸ The standard enacted was also touted as a "strict" standard that denied coverage for temporary or partial disabilities and

1052, 1079-80. Congress defined disability under the disability freeze program as "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or be of long continued or indefinite duration . . ." *Id.* Under the disability freeze program, periods of time during which one is not working and deemed disabled—which would otherwise reflect zero earnings in retirement benefits calculations and produce reduced benefit payments—would be removed from these benefits calculations. Bloch, *Medical Proof*, *supra* note 22, at 97 n.52. Put another way, "individuals who became disabled were made eligible for retirement benefits at age 65 as if they had continued to work between the onset of disability and age 65." Liebman, *supra* note 22, at 840. Their eligibility for retirement benefits would thus be "frozen" in place from the onset of disability, although they would not receive cash benefits until retirement age.

⁴⁴ *Id.*

⁴⁵ Bloch, *Medical Proof*, *supra* note 22, at 197; Diller, *Entitlement*, *supra* note 22, at 416.

⁴⁶ See INST. OF MED., *IMPROVING THE SOCIAL SECURITY DISABILITY DECISION PROCESS* 71 (John D. Stobo, Michael McGeary & David K. Barnes eds., 2007). These guidelines are the precursors to the SSA's present-day listings of medical impairments, which provide a presumptive but not exclusive basis for demonstrating disability under the SSA's disability benefit programs at step three of the SSA's five-step sequential evaluation process. *Id.*; Diller, *Entitlement*, *supra* note 22, at 416; see *infra* notes 124–127 and accompanying text.

⁴⁷ See ERKULWATER, *supra* note 22, at 36. The disability insurance bill actually passed the Senate by a two-vote margin but since all assumed Vice President Nixon would vote against it and would have cast the decisive tie-breaking vote, one change in the vote would have doomed the legislation. See EDWARD D. BERKOWITZ, *ROBERT BALL AND THE POLITICS OF SOCIAL SECURITY* 99 (2003). Indeed, President Eisenhower opposed the legislation but declined to veto it in an election year. See ROBERT DALLEK, *LONE STAR RISING: LYNDON JOHNSON AND HIS TIMES 1908–1960*, at 95–96 (1991). Many attribute the bill's narrow success in the face of such significant opposition to the considerable legislative skill of Lyndon Johnson who, as Senate majority leader, managed to navigate the legislation to a positive vote on the Senate floor despite its defeat in committee. See *id.*

⁴⁸ Bloch, *Medical Proof*, *supra* note 22, at 197.

provided benefits only for “permanent and total” disabilities.⁴⁹ To effectuate a “permanent and total” disability requirement, Congress defined disability as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration.”⁵⁰ Congress further explained that “[a]n individual shall not be considered to be under a disability unless he furnishes such proof of the existence thereof as may be required.”⁵¹ The statute delegated to the SSA the difficult and controversial task of determining when a medical impairment would be deemed the cause of an individual’s inability to work under this disability definition.⁵²

⁴⁹ Diller, *Entitlement*, *supra* note 22, at 415–16.

⁵⁰ Amendments to Title II of the Social Security Act of 1956, Pub L. No. 84-880, § 103, 70 Stat. 807, 815 (1956) (codified at 42 U.S.C. § 423(c)(2)).

⁵¹ Social Security Amendments of 1954, Pub. L. No. 83-761, §216(b), 68 Stat. 1080 (codified at 42 U.S.C. § 416(i)(1)).

⁵² Diller, *Entitlement*, *supra* note 22, at 416. The Act contained a number of other provisions designed to ensure its passage and to support the assertion of the disability standard’s strictness. After Senator Walter George of Georgia withdrew his long-held opposition to the legislation, he became a strong supporter of the program and touted its strictness. See STONE, *supra* note 22, at 125. He did so by emphasizing other restrictive aspects of the legislation, along with the strict medically centered disability definition, as collectively imposing seven separate eligibility requirements. See STONE, *supra* note 22, at 125; see also EDWARD D. BERKOWITZ, *DISABLED POLICY: AMERICA’S PROGRAMS FOR THE HANDICAPPED: A TWENTIETH CENTURY FUND REPORT 75–76* (1989) [hereinafter BERKOWITZ, *DISABLED POLICY*]. The seven requirements included the following: “1) the test of work history and contributions to social security; 2) the ‘unable to engage in substantial gainful activity’ test; 3) the ‘medically determinable impairment’ test; 4) the 6 month waiting period; 5) the ‘age 50 or over’ requirement; 6) the ‘proof of existence’ test, wherein the applicant must furnish proof of his or her impairment; and 7) the willingness to accept rehabilitation test.” STONE, *supra* note 22, at 125.

In addition, to enhance the program’s political popularity, Congress delegated primary responsibility for disability determinations to state disability agencies acting under uniform federal criteria. See BERKOWITZ, *DISABLED POLICY*, *supra* note 52, at 77–78. Thus, initial and reconsidered determinations for benefits are handled by the state agencies, and administrative hearings and administrative appeals are handled by components of the SSA. See 42 U.S.C. § 421(a) (2006); see generally *Bowen v. New York*, 476 U.S. 467, 472 (1986) (describing the four-stage administrative process and the division of state and federal responsibility). Further, Congress developed a separate trust fund for disability insurance so as not to endanger the social security survivors’ and retirement trust fund through the new program. See BERKOWITZ, *DISABLED POLICY*, *supra* note 52, at 77–78. Between 1960 and 1965, Congress expanded the initial eligibility criteria by removing the age fifty or older requirement and by changing “the definition of ‘permanent disability’ from a condition with a ‘long, continued and indefinite duration’ to one ‘expected to continue for at least 12 months.’” STONE, *supra* note 22, at 78. Congress also eventually eliminated the mandatory-rehabilitation provisions and reduced the waiting period to five months. See FRANK S. BLOCH, *BLOCH ON SOCIAL SECURITY* § 1:4 (2010)

Perhaps ironically, in relying heavily on assertions that medical professionals could largely ascertain the parameters of permanent and total disability, Congress essentially ignored the overwhelming testimony of representatives from the medical community. Medical associations offered congressional testimony that medical science, while generally capable of objectively determining whether a person suffered from a medical impairment, was incapable of reliably extrapolating from an isolated impairment to the individual's functional capacity for ongoing work performance in the United States labor market.⁵³ As one physician from the American Academy of General Practice stated, the varying physical and mental requirements across jobs made concrete determinations of disability uncommonly difficult:

Unfortunately, medical science has not reached the point of being able to unerringly state whether or not a man is totally and permanently disabled Is the delivery boy who loses both legs totally and permanently disabled? Or is the certifying doctor supposed to point out that he can still run a drill press and probably make more money?⁵⁴

Other physicians stressed the elusive nature of various medical conditions that lack objectively or medically demonstrable symptomatology, such as backaches and other forms of physical pain, or a variety of psychiatric conditions, such as anxiety and neuroses.⁵⁵ Still other physicians pointed to the non-medical "social," "psychological," and even "philosophical" elements inherent in work-capacity determinations, including consideration of how much pain or medical risk one should be expected to endure in the workplace and the extent to which the availability of benefits might lessen a person's residual will to overcome medical handicaps and continue working.⁵⁶

Because the physician lobby had originally expressed strong opposition to disability-insurance legislation on economic grounds by calling it the first step toward socialized medicine,⁵⁷ Congress perceived

[hereinafter BLOCH, BLOCH ON SOCIAL SECURITY] (available at Westlaw in the database "BLOCHSS"). Congress has also tightened the disability standard and contracted eligibility in a variety of ways. *See infra* notes 92–95 and accompanying text.

⁵³ ERKULWATER, *supra* note 22, at 35.

⁵⁴ STONE, *supra* note 22, at 80 (citation omitted).

⁵⁵ *Id.* at 80–82. To underscore this point, one representative referenced a poll of cardiac specialists after President Eisenhower's heart attack in 1955 in which 114 specialists believed him capable of continuing to serve as President, while 92 believed he could not. *Id.* at 82.

⁵⁶ *See id.*

⁵⁷ *See id.*

these physicians' newfound professional modesty as insincere and self-interested, and dismissed their concerns.⁵⁸ For example, Senator Walter George of Georgia expressed his view that the medical community was quite capable of creating appropriate, definitive medical criteria for disability determinations:

Doctors have less confidence in themselves than I have I think more of the medical profession in this country than to believe that they cannot determine when a man or a woman worker has a permanent and total disability. That fact must be medically determined, for, if not medically determined, the worker cannot receive any benefit.⁵⁹

Despite an emphasis on strict medical standards and previously developed guidelines of objectively determinable and presumptively disabling impairments, Congress and the SSA did not fully abandon Chairman Altmeyer and the early disability insurance advocates' desire to provide for some consideration of individual circumstances and vocational and labor-market factors.⁶⁰ Indeed, some degree of labor market evaluation was inherent in the statutory definition of disability; the standard referenced an inability to perform "substantial gainful activity" (SGA), which was defined as work activity garnering remuneration above certain minimum earning levels.⁶¹ In addition, SSA representatives indicated to Congress during legislative debates that the statutory definition would require some evaluation of the reasonableness of labor-market work-adjustments in light of a claimant's age, education, and experience. Harvard labor economist and Associate Chairman of the Social Security Advisory Council,⁶² Sumner Slichter, noted that the

⁵⁸ ERKULWATER, *supra* note 22, at 35.

⁵⁹ 102 CONG. REC. 13,038 (1956) (statement of Sen. Walter George).

⁶⁰ See Diller, *Entitlement*, *supra* note 22, at 419.

⁶¹ See *Flemming v. Booker*, 283 F.2d 321, 324 (5th Cir. 1960) (citing internal SSA guidelines establishing presumption that earnings of \$1,200 per year amounted to substantial gainful activity (SGA) to conclude that earnings under \$1,000 per year for work performed between 1956 and 1960 was not SGA). Current Agency rules establish a presumption that work performed in 2011 that does not produce earnings of at least \$1,000 per month is not SGA. See *Substantial Gainful Activity*, SSA.GOV, www.ssa.gov/OACT/COLA/sga.html (last modified Oct. 29, 2010); see generally 20 C.F.R. §§ 404.1574, 416.974 (2011) (guidelines for evaluating employees).

⁶² The Social Security Council is a "catch-all label for the six-decade succession of (mostly) citizen groups appointed by the secretary of HEW/[HHS], Senate Finance Committee, and, in one case, the president to deliberate questions of Social Security policy and recommend changes, often enacted into law." See James Edward Gibson III, *The Last Council: Social Security Policymaking as Coalitional Consensus and the 1994–1996 Advisory Council as*

legislation's disability definition required that the claimant "be disabled not only for the occupation which he ha[d] been pursuing but [for] any occupation which he might be reasonably expected, by reason of education, experience, general background, age, and so forth, to pursue."⁶³ This inquiry would inevitably entail at least some evaluation of the availability and characteristics of such occupations or jobs in the United States labor market.

Consideration of these non-medical vocational and labor-market factors had the potential to cut both ways in the disability evaluation process. Some claimants with relatively strong vocational profiles who met the presumptively disabled criteria under the medical schedule could conceivably be found not to be disabled based on their ability to make adjustments to other work in the labor market. Meanwhile, other claimants who did not meet the presumptive medical criteria could still be found disabled based on a determination that their relatively weak vocational profiles precluded the ability to make labor-market work-adjustments.⁶⁴ Thus, the Act's proponents could reasonably assert that consideration of these limited labor-market and vocational factors would more closely reflect a claimant's ability to perform meaningful work without necessarily loosening the strict disability standard. In short, although proponents of disability programs touted the objective medical aspects of the disability standard, notwithstanding overwhelming medical testimony to the contrary, proponents also plainly intended to include some vocational and labor-market considerations.

In 1961, in response to congressional calls for the Agency to address the application of non-medical factors in the disability program,⁶⁵ the SSA

Institutional Turning Point 2 (July 5, 2007) (unpublished Ph.D. dissertation, Virginia Polytechnic Institute and State University) (*available at*

http://scholar.lib.vt.edu/theses/available/etd-07122007-224609/unrestricted/Last_Council072207.pdf); *see also* Social Security Independence and Program Improvements Act of 1994, Pub L. No. 103-296, § 103, 108 Stat. 1464, 1467 (replacing the Council with the Social Security Advisory Board in 1994 when Congress established the SSA as an independent agency).

⁶³ *Old Age, Survivors, and Disability Insurance: Hearing on H.R. 2893 Before the H. Comm. on Ways and Means*, 81st Cong. 1560 (1949) (statement of Sumner H. Slichter, Professor of Economics, Harvard University).

⁶⁴ *See* Diller, *Entitlement*, *supra* note 22, at 417–19 & n.189.

⁶⁵ The first Congressional oversight committee report studying the disability insurance program acknowledged the complications involved in creating specific criteria for nonmedical factors, but insisted that such criteria were required:

The subcommittee recognizes the difficulty of developing and enunciating specific

promulgated regulations requiring consideration of the claimant's age, education, and work experience in determining his or her ability to make labor-market work-adjustments unless the claimant had only a "slight" medical impairment.⁶⁶ The 1961 regulations also generally exempted persons from making work-adjustments to less strenuous work if they had only a marginal education, had performed arduous physical labor for thirty-five years or more, and had become medically unable to perform such work.⁶⁷ Thus, in the SSA's disability-determination process, claimants who received benefits could be apportioned among three categories: (1) those who satisfied the precise medical criteria in the schedule of automatically disabling impairments; (2) those who fit into the unique category for persons with a marginal education who were unable to perform their previous arduous work of thirty-five years; and (3) those who were not in either of the first two categories but who could not perform their past work and possessed more than a slight impairment.⁶⁸ The focus of the Agency's labor-market work-adjustment determinations centered on claimants in this third category and their combinations of medical and vocational adversities.

B. THE JUDICIAL GLOSS

While the Agency's approach justified evaluation of certain labor-market work-adjustment considerations in the disability evaluation process, such as the impact of age, education, and work experience, it excluded others, such as job incidence or prevalence, actual employment openings, regional economic circumstances, and employers' hiring

criteria for the weight to be given nonmedical factors in the evaluation of disability and the extreme sensitivity of this area. But the subcommittee believes that the time has come, if it is not well overdue, to make a determined effort to develop and refine these criteria and make them available to the evaluators and to the public in the form of published regulations.

SUBCOMM. ON THE ADMIN. OF THE SOC. SEC. LAWS, 86TH CONG., 2D SESS., ADMIN. OF SOC. SEC. DISABILITY INS.: PRELIMINARY REP. TO THE HOUSE COMM. ON WAYS & MEANS 18 (Comm. Print 1960) (emphasis omitted).

⁶⁶ See 20 C.F.R. § 404.1502 (1961). Previous regulations promulgated in 1957 provided simply that, "[i]n determining whether an individual's impairment makes him unable to engage in [substantial gainful activity] . . . consideration is also given to such other factors as the individual's education, training and work experience." 20 C.F.R. § 404.1501(b) (1957).

⁶⁷ See 20 C.F.R. § 404.1502(c) (1961).

⁶⁸ ROBERT G. DIXON, JR., SOCIAL SECURITY DISABILITY AND MASS JUSTICE: A PROBLEM IN WELFARE ADJUDICATION 54-57 (1973) [hereinafter DIXON, SOCIAL SECURITY].

practices.⁶⁹ Even as to age, education, and work experience, the Agency did not consider evidence of the impact of these select vocational factors on the ability to make work adjustments; instead, the Agency used various presumptions drawn from non-promulgated agency guidelines, which militated heavily against finding disability.⁷⁰ Thus, despite these early administrative attempts to add some adjudicative guidance for the difficult questions entailed in determining when persons become medically disabled from work, the early 1960s was also a period when the courts felt compelled to address large, unanswered labor-market-adjustment questions stemming from the disability definition and the Agency's approach.

The most prominent of those court decisions was the Second Circuit's opinion in *Kerner v. Flemming*.⁷¹ In *Kerner*, the Agency had denied benefits to Kerner, a sixty-year-old self-employed furniture repairman, because it concluded he could make a work adjustment to less demanding and unspecified light or sedentary work.⁷² The Agency's hearing examiner had specifically rejected the suggestion that such work might not be "attainable" for a claimant with Kerner's profile—a sixty-year-old severe diabetic with an acute cardiac condition.⁷³ In setting aside the Agency's decision, Judge Friendly found two substantial deficiencies, one substantive and one procedural, in the SSA's approach to the evaluation of disability based on presumed labor-market adjustments.

First, Judge Friendly interpreted the substantive disability standard as requiring more than a "[m]ere theoretical opportunity to engage in substantial gainful activity . . . if no reasonable opportunity for this is available."⁷⁴ Rather, he found the "determination requires resolution of two issues—what can applicant do and what employment opportunities are there for a man who can do only what applicant can do?"⁷⁵ Second,

⁶⁹ See 20 C.F.R. § 404.1502(b) (1961).

⁷⁰ See DIXON, SOCIAL SECURITY, *supra* note 68, at 58–59; see also Robert G. Dixon, Jr., *The Welfare State and Mass Justice: A Warning From The Social Security Disability Program*, 1972 DUKE L.J. 681, 706–08 (1972) [hereinafter Dixon, *Welfare State*]; see also OASI Disability Insurance Letter No. III-3 (Sept. 20, 1963), reprinted in STAFF OF THE HOUSE COMM. ON WAYS & MEANS, 93D CONG., DISABILITY INSURANCE PROGRAM 51–54 (Comm. Print 1974) [hereinafter COMMITTEE STAFF REPORT].

⁷¹ *Kerner v. Flemming*, 283 F.2d 916 (2d Cir. 1960).

⁷² *Id.* at 918–19.

⁷³ See *id.*

⁷⁴ *Id.* at 921.

⁷⁵ *Id.*

Judge Friendly held that, while the ultimate statutory burden of persuasion remained with the claimant based on express provisions in both the Social Security Act and the Administrative Procedure Act,⁷⁶ where a claimant “has raised a serious question and the evidence affords no sufficient basis for the Secretary’s negative answer[,] . . . [T]he Secretary’s expertise should enable him readily to furnish information as to the employment opportunities . . . or the lack of them, for persons of [the claimant’s] skills and limitations.”⁷⁷

Even though *Kerner* and its progeny were not without both academic⁷⁸ and judicial⁷⁹ detractors, the courts largely embraced and extended both the substantive and procedural prongs of Judge Friendly’s

⁷⁶ *Id.* at 921–22 (citing §§ 216(i)(1), 223(c)(2) of the Social Security Act, 42 U.S.C. §§ 416(i), 423(c)(2) (2006), and § 7(c) of the Administrative Procedure Act, 5 U.S.C. § 1006 (2006)).

⁷⁷ *Id.* at 922.

⁷⁸ Landon H. Rowland, *Judicial Review of Disability Determinations*, 52 GEO. L.J. 42, 79, 84 (1963) (“[*Kerner*’s] interpretations plainly thwart congressional intent and fly in the face of statutory language Short of an ideal government program which recognizes a generalized interest in unemployment, disability, rehabilitation, job retraining and relocation, there must be a limit on the duty of the Secretary to produce [such] evidence.”); see also Note, *Social Security Disability Benefits: Three Current Problems*, 52 MINN. L. REV. 165, 179 (1967) [hereinafter *Three Current Problems*] (“The [Social Disability] Act’s legislative history provides support for several strong arguments against the shift in the burden of proof [onto the Secretary] and the imposition of the area availability requirement.”); see also Note, *Social Security Disability Determinations: the Burden of Proof on Appeal*, 63 MICH. L. REV. 1465, 1472 (1965) [hereinafter *Burden of Proof*] (stating that Post-*Kerner* shifting of burden to Secretary to prove actual employment opportunities to which claimant can make work adjustment is inconsistent with legislative history of the Act).

⁷⁹ See, e.g., *King v. Gardner*, 391 F.2d 401, 405–10, 409 n.7 (5th Cir. 1967) (Wisdom, J., dissenting) (suggesting that the emerging post-*Kerner* labor-market work-adjustment court decisions were improperly “converting the disability insurance provisions of the Social Security Act into an unemployment compensation law” and noting that Congress intended a “strict” or “conservative” disability definition and “thought a rational determination (of disability) was possible without such evidence of employment opportunities”). One judge construed *Kerner* narrowly, emphasizing the elusiveness of open-ended work adjustment assessments. He stated:

It seems to me that Judge Friendly did not intend straight-jacket formalism by the Referees in the formulation of their decisions. Under my ruling . . . there is no necessity to delve into the mysteries of employment opportunities. As a fact of life, employment is a matter of fortune. Surplus labor areas and types of available employment differ in most sections of the country. In this progressive and scientific age, government agencies alone or in combination may have the know-how to survey such situations with reasonable certainty of prediction. But to particularize that a certain human being with individualistic impairment and limitation may or may not have employment opportunity in a certain area, in my inexperienced judgment, may require an elite group of soothsayers superbly trained to probe the many intangibles.

Stoliaroff v. Ribicoff, 198 F. Supp. 587, 591 (N.D.N.Y. 1961).

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analysis. Courts extended *Kerner*'s substantive prong by setting aside non-disability work-adjustment findings that did not evaluate the availability of specific jobs in the labor market to which a claimant could adjust,⁸⁰ the actual existence of and openings for such jobs,⁸¹ the presence of such jobs in the claimant's community,⁸² the potentially preclusive hiring practices of employers in the region and the impact of those practices on the claimant's opportunity to secure a position,⁸³ or some combination of these considerations.⁸⁴ Moreover, "[c]ourts . . . []

⁸⁰ See, e.g., *Parfenuk v. Flemming*, 182 F. Supp. 532, 536 (D. Mass. 1960) (stating that there must be evidence of "other kinds of work which are available and for which the claimant is suited"); see also *Butler v. Flemming*, 288 F.2d 591, 595 (5th Cir. 1961) ("[I]f there was any work for which this claimant was able to perform, the record fails to disclose it.").

⁸¹ See, e.g., *Cyrus v. Celebreeze*, 341 F.2d 192, 196 (4th Cir. 1965) (setting aside SSA decisions despite vocational expert testimony that claimant could make adjustment to other jobs because there was "no proof of specific job openings or vacancies which would have been available to the claimant"); *Hodgson v. Celebreeze*, 312 F.2d 260, 263 (3d Cir. 1963) (reversing determination of non-disability based on agency finding that the claimant could make a work adjustment to elevator-operator work and finding that "there has been no attempt to show that this occupation is one in which jobs are open to someone like Hodgson").

⁸² See, e.g., *Massey v. Celebreeze*, 345 F.2d 146, 157–58 (6th Cir. 1965) ("[P]roof of available job opportunities must be supported by evidence that such job opportunities are available in the general area in which the applicant lives."); *Hall v. Celebreeze*, 314 F.2d 686, 689 (6th Cir. 1963) ("We cannot believe that the Secretary is suggesting that if employment opportunities for a disabled person are not available in the state where he has lived for practically all of his life that he should pull up stakes and move to some far off place where such opportunities might be better."). The local job market cases presented particular problems in the Appalachia regions of the Fourth and Sixth Circuits, where it was harder to disentangle depressed and limited labor market conditions from medical or other vocational bases to make work-adjustment determinations involving workers medically precluded from previous work in the coal industry. See James M. Haviland & Michael B. Glumb, *The Disability Insurance Benefits Program and Low Income Claimants in Appalachia*, 73 W. VA. L. REV. 109, 129–30 (1971); Robert M. Viles, *The Social Security Administration Versus The Lawyers . . . And Poor People Too, Part I*, 39 MISS. L.J. 371, 402–03 (1968).

⁸³ See, e.g., *Sayer v. Gardner*, 380 F.2d 940, 951–52 (6th Cir. 1967) ("[W]here the hiring practices of employers, based on health insurance, workmen's compensation premiums, and liability insurance, preclude the hiring of an employee because of his physical impairment, he must, under the statute, be considered disabled . . ."); *Kirby v. Gardner*, 369 F.2d 302, 305 (10th Cir. 1967) (same).

⁸⁴ See, e.g., *Boyd v. Gardner*, 377 F.2d 718, 722–25 & nn. 7, 9 (4th Cir. 1967) (noting impropriety of looking to four-state regional labor market to determine potential work adjustment for claimant in depressed Appalachian mountain county in Virginia, as well as failure to consider employment practices of employers there and "economic realities" for securing jobs for disabled persons in claimant's locality); *Cyrus*, 341 F.2d at 196 (setting aside SSA decision despite vocational expert testimony that claimant could make adjustment to jobs in shoe industry since there was "no proof of specific job openings or vacancies which would have been available to the claimant," and no indication of whether vocational expert checked whether the only shoe industry employers "in the vicinity of [claimant's] home" actually "employed

extended *Kerner*'s procedural holding by expressly shifting the burden of proof to the Agency, which must demonstrate the availability of other jobs to which claimants can make a work adjustment in all cases where claimants demonstrated an inability to perform their former work."⁸⁵ Thus, by the mid-1960s, to meet its new burden of proof in labor-market work-adjustment cases, the Agency was relying heavily upon vocational expert testimony to supply the requisite evidence in adjudicated hearings.⁸⁶

persons for those jobs" or whether these employers' hiring practices would support hiring persons with claimant's impairments).

⁸⁵ Dubin, *Gridlock*, *supra* note 3, at 949 (citing Viles, *supra* note 82, at 397–98 (collecting cases)). Even before *Kerner*, some courts had identified the injustice of imposing a burden on claimants to prove the broad negative proposition that they were unable to adjust to every conceivable job in the United States labor market. *See, e.g.*, *Scales v. Flemming*, 183 F. Supp. 710, 714 (D. Mass. 1959) ("Claimants were usually poor. Rarely did they have lawyers. Efforts to show the state of the labor market would be expensive.").

⁸⁶ As described in a comprehensive study of the SSA hearings and appeals process by the National Center on Administrative Justice and led by Yale Law Professor Jerry Mashaw,

The Secretary after failing to convince the Solicitor General to petition for certiorari in *Kerner*, moved promptly to comply. In 1962, a nationwide program of vocational experts was established to provide testimony at the hearing level; a year later *Kerner* was published as a Social Security Ruling implying the Administration's acquiescence; and interpretive materials related to vocational factors in disability were distributed to the state agencies.

MASHAW, HEARINGS, *supra* note 9, at 142; *see id.* at xv–xvii (noting that Mashaw served as project director for this study). While the courts are credited with a significant role in the expansion of the disability program's focus on labor-market and vocational factors, they, too, "occasionally bought into the myth" that disability from work could be largely ascertained solely through objective medical evidence. STONE, *supra* note 22, at 86, 210 n.189 (citing and quoting *Mathews v. Eldridge*, 424 U.S. 319, 343–44 (1976)). In *Eldridge*, the Court declared:

In short, a medical assessment of the worker's physical or mental condition is required. This is a more sharply focused and easily documented decision than the typical determination of welfare entitlement. In the latter, a wide variety of information may be deemed relevant, and issues of witness credibility and veracity are often critical to the decisionmaking process By contrast, the decision whether to discontinue disability benefits will turn, in most cases, upon routine, standard and unbiased medical records by physician specialists.

Id. Indeed, even Judge Friendly, the author of the *Kerner* decision that is largely credited with launching the Agency's obligation to supply labor market evidence that led to the vocational expert program, later suggested that the SSA eschew expert hearing testimony altogether. He recommended instead the use of an expert medical board to adjudicate all disability cases. *See* Henry J. Friendly, *Some Kind of Hearing*, 128 U. PA. L. REV. 1267, 1285 (1975) ("Why do we not have the good sense in such cases to use something like the English medical appeals tribunal, two of whose members are private physicians, and avoid the calling of experts altogether?").

C. THE CONGRESSIONAL RESPONSE

In this period of tension between the differing approaches of the Agency and the courts to labor-market-adjustment determinations,⁸⁷ Congress tried unsuccessfully to introduce legislation that would have expanded eligibility by providing an occupational definition of disability that extended benefits to claimants who could no longer “engage in the occupation or employment last performed on a regular basis before the onset of such impairment.”⁸⁸ These proposals would have avoided many of the complex issues of more open-ended potential labor-market work-adjustment determinations and would have broadened the program in a manner analogous to disability programs in other developed Western nations where a medical inability to return to one’s economic or social class or local position in the labor market is a more decisive factor.⁸⁹ It also would have brought the general work-adjustment standards of the

⁸⁷ Although the Agency acquiesced in the *Kerner* decision, it specifically non-acquiesced in some post-*Kerner* labor-market adjustment decisions. Compare Social Security Ruling (SSR) 63-11c (acquiescing in *Kerner*) with SSR 66-23 (non-acquiescing in *Cyrus* and *Massey*) and SSR 67-14c (non-acquiescing in *Hodgson*). These latter rulings were the SSA’s first non-acquiescence rulings. See Carolyn A. Kubitschek, *Social Security Administration Nonacquiescence: The Need for Legislative Curbs on Agency Discretion*, 50 U. PITT. L. REV. 399, 402 n.15 (1989).

⁸⁸ H.R. 805, 89th Cong., 1st Sess. (1965); accord H.R. 911, 89th Cong., 1st Sess. (1965); see generally *Burden of Proof*, supra note 78, at 1473 n.46 (describing these bills); see also H.R. 18008, 89th Cong., 2d Sess. (1966) (providing eligibility for claimants at least age fifty-five whose impairments prevent performance of substantial gainful activity “requiring skills or abilities comparable to those of any gainful activity in which [they have] previously engaged with some regularity and over a substantial period of time”); *Three Current Problems*, supra note 78, at 180–81 n.103 (describing H.R. 18008 and its failure to secure passage because it was “introduced too late in the session to get adequate consideration”).

⁸⁹ See NAT’L ACAD. OF SCIENCES, INST. OF MED., PAIN AND DISABILITY: CLINICAL, BEHAVIORAL AND PUBLIC POLICY PERSPECTIVES 33 (Martin Osterweis ed. 1987) [hereinafter “PAIN AND DISABILITY”] (contrasting Germany’s disability program with the SSA’s programs and noting that the former “defines disability as an inability to earn a fixed amount of money (much higher than the American amount) by doing one’s previous job or any other job that corresponds to one’s education and capabilities and that does not entail a significant decline in social status”); *id.* at 33 (describing the Netherlands’ disability program as inability “to earn what similarly trained healthy people earn in the same community by working at the place where the person last worked or in a similar place”); see also STONE, supra note 22, at 58–66 (describing the German disability program’s history and the cultural influences behind its largely occupational disability approach); see generally Frank S. Bloch & Rienk Prins, *Work Incapacity and Reintegration: Theory and Design of a Cross-National Study*, 50 INT’L SOC. SEC. REV. 3, 10 (1997) (describing the stricter American SSA disability standard compared with disability programs in Sweden, Israel, and the Netherlands and noting that, in the latter, “eligibility is measured in relation to work normally done”).

disability program closer to the largely occupational standards used for two other socially constructed groups: older “legally blind” claimants⁹⁰ and claimants whom Robert Dixon has described as “worn-out manual laborers”—those in the previously discussed category comprised of marginally educated individuals who have performed arduous, unskilled work for thirty-five years or more.⁹¹ This Congressional effort was unsuccessful.

A few years later, the Agency sought and obtained from Congress an amendment to the Social Security Act that moved in the other direction and narrowed program eligibility by expanding the labor-market work-adjustment inquiry. The Social Security Amendments of 1967 provided, in relevant part, that

[a]n individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such a 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

⁹⁰ The Social Security Act’s separate standard for benefits based on blindness for claimants age fifty-five and older looks to whether a claimant’s condition precludes “substantial gainful activity requiring skills and abilities comparable to those of any gainful activity in which he has previously engaged with some regularity and over a substantial period of time.” 42 U.S.C. § 423(d)(1)(B) (2006); *see also* STONE, *supra* note 22, at 27, 173 (describing the social construction of the “legal blindness” category and the social reasons for preferential treatment over other disabilities in social policy “even though everyone knows that it is quite possible for blind people to work”); BLOCH, BLOCH ON SOCIAL SECURITY, *supra* note 52, § 2:2 (describing “significantly more liberal” SSA standards for blindness as opposed to other disabilities); Diller, *Entitlement*, *supra* note 22, at 373 n.28 (describing history and preferential treatment of aid to the blind over aid to the disabled in means-based social welfare system).

⁹¹ *See* DIXON, SOCIAL SECURITY, *supra* note 68, at 55–56, 139 (describing occupational standard for “‘worn out’ manual laborer syndrome”). The SSA has long employed a narrow occupational labor-market work-adjustment standard for the category of claimants with only marginal education who performed arduous, unskilled labor for thirty-five years or more. *See supra* notes 67–68 and accompanying text; *infra* note 105; 20 C.F.R. §§ 404.1565(a), 416.965(a) (2011). Although the original regulations provided that such claimants would be found disabled only if unable to perform light work, internal agency guidelines essentially provided for a disability finding even if claimants with this profile could perform a wide variety of other work. *See* DIXON, SOCIAL SECURITY, *supra* note 68, at 55–56, 139 (describing the administrative test derived from interpretation of the predecessor regulation, 20 C.F.R. § 404.1502(c) (1961), to this profile that is “designed to take account of the reality that such workers are not willing to go very far from their established homes or to accept retraining for sedentary jobs, even though theoretically they have sufficient residual capacity to perform some kind of gainful employment that exists in significant numbers”). In 1978, the SSA modified its regulations to more clearly provide for presumptive occupational disability for claimants with this profile. *See* 43 Fed. Reg. 55,352, 55,362 (Nov. 28, 1978).

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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 . . . “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.⁹²

⁹² Social Security Act Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 821 (codified at 42 U.S.C. § 423(d)(2)(A)); see S. REP. NO. 90-744, at 46–69 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2834, 2880-83. This provision’s legislative history reflects some congressional equivocation and unclear rationale. The Presidential Administration Bill made other changes to the program, such as inclusion of Medicare eligibility, but did not change the disability standard. Viles, *supra* note 82, at 400 n.88 (citing H.R. 5700). The House Ways and Means Committee then replaced that bill with its own bill, which introduced a redefinition of disability that expanded the work-adjustment inquiry to the national labor market. *Id.* (citing H.R.12080). This Bill was approved by the full House. *Id.* The prior definition was then restored through a Senate amendment by Senator Lee Metcalf of Montana, who pointed out that eight witnesses had testified against the new definition, including George Meaney, President of the AFL-CIO, while only one witness, Paul Henkel from the Council of State Chambers of Commerce, had testified in its favor. *Id.*; 113 CONG. REC. 33113 (Nov.17, 1967). Metcalf also chided the SSA for seeking a definitional amendment because “it lost a lawsuit.” *Id.* at 33,115. He pointed to the only specific case which the committee report had identified and condemned—*Leftwich v. Gardner*, 377 F.2d 287 (4th Cir. 1967)—a case in which the court awarded benefits even though the claimant was regularly working. *Id.* Senator Metcalf noted that the courts had rejected the Agency’s attempted redefinition, appearing in the House bill at the time, and had been guided by disability definitions employed in the veterans and workmen’s compensation programs. *Id.* The Senate adopted Metcalf’s amendment to the bill by a vote of thirty-four to twenty. *Id.* at 33,119. However, the conference committee restored the redefined disability standard to reconcile the house and senate versions. Viles, *supra* note 82, at 400 n.88; CONF. REP. NO. 1030, 90TH CONG., 1ST SESS., § 109 (1967), *reprinted in* 1967 U.S.C.C.A.N. 3179, 3197–98. The final version included a compromise that the phrase “work which exists in the national economy” would be explained to at least require the work-adjustment inquiry to focus on work either in the claimant’s immediate area or in several regions of the country. This would preclude a work-adjustment finding based on jobs in isolated or remote regions. *Id.*

The Congressional commentary on the need for the redefined standard first suggested that the House Ways and Means Committee “was forced to conclude” that “subtle changes” in the concept of “disabled worker” had produced program allowances in excess of predictions. However, the commentary then listed a series of circumstances, which had nothing to do with court decisions, that the committee deemed “in large part the reasons” behind the program expansion. Those reasons included: “(1) greater knowledge of the program to increasing numbers of qualified people; (2) improved methods of developing evidence of disability; and (3) more effective ways of assessing total impact of an individual’s impairment on his ability to work.” As Robert Viles pointed out, “what the Committee [on Ways and Means] may have been ‘forced to conclude’ about relationships between the Administrations’ estimates, the list of reasons for the errors, and the court decisions expanding the disability definition is left to conjecture.” Viles, *supra* note 82, at 401.

If a motivation behind the redefined standard was to correct court decisions awarding benefits to claimants who had been actually performing substantial gainful activity (as in *Leftwich*—the one case specifically referenced in congressional deliberations), a much simpler

The Amendment restricted *Kerner*'s substantive component by permitting more benefit denials based on a broader definition of work to which an impaired claimant might adjust than that recognized in *Kerner* and its progeny. However, the Amendment also provided express congressional ratification of vocational and labor-market considerations as unquestionable components of the Act's disability standard.⁹³ Furthermore, through the requirement in the 1967 Amendment that such other work "exist[] in significant numbers," Congress established, for the first time, a job-incidence or job-prevalence requirement for labor-market work-adjustment assessments.⁹⁴ While Congress has passed a number of amendments to the Social Security Act's disability benefit programs since 1967,⁹⁵ its disability definition has retained the labor-market work-adjustment standard adopted in the 1967 amendments.⁹⁶

fix would have been sufficient. The Committee's reason for seeking a broader amendment to the disability definition to reverse many of the post-*Kerner* work-adjustment cases appears to have been fear that, while these decisions were not major factors in the above-cited program growth, they might eventually lead to further program expansion. See H. REP. NO. 90-544, at 29 (Aug. 7, 1967). The Committee offered no analysis of those court decisions' merits but only the conclusory statement that "[i]t is and has been the intent of the statute to provide a disability definition which can be applied with uniformity throughout the nation, without regard to where a particular individual may reside, to local hiring practices of employer preferences or the state of the local or national economy." *Id.* at 30; Viles, *supra* note 82, at 402. This statement fails to recognize the many ways in which the disability definition will vary non-uniformly based on individualized factors that are affected by employer practices and the local economy and culture. For example, the definition mandates consideration of work experience and education in the work-adjustment inquiry and these factors are heavily influenced by the local economy and culture. See Viles, *supra* note 82, at 402. Moreover, the redefinition ultimately adopted still expressly incorporates some local variation since the work-adjustment inquiry looks to ability to adjust to jobs in either the unique labor market in the claimant's region or that of several regions.

⁹³ The Agency's first regulations implementing the 1967 Amendments incorporated this statutory language, as does the current version. Compare 20 C.F.R. § 404.1502(b) (1969) with 20 C.F.R. §§ 404.1566(a)-(c), 416.966(a)-(c) (2011).

⁹⁴ See *Gridlock*, *supra* note 3, at 948-49.

⁹⁵ The most significant substantive amendments to the SSA's disability benefits programs since 1967 (other than the previously discussed creation of the SSI disability program in 1974, see *supra* note 30) were the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 (codified at various subsections of 42 U.S.C. §§ 423, 1382 (2006)) (establishing a substantive medical improvement standard for evaluating whether to terminate benefits, requiring that the combined or cumulative effects of a claimant's impairments and limitations be considered throughout the disability evaluation process including in the determination of threshold medical severity, providing an interim standard for evaluation of pain and subjective symptomology, directing the SSA to rewrite its mental impairment criteria, and extending an administratively imposed moratorium on mental disability benefit terminations until the new criteria were in place); Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 105, 110 Stat. 847 (codified at 42 U.S.C. §§ 423(d)(2)(C), 1382c(a)(3)(J) (2006)) (precluding persons from receiving benefits "if alcoholism or drug addiction would . . .

D.LABOR-MARKET WORK-ADJUSTMENT DETERMINATIONS AND THE
SOCIAL SECURITY ADMINISTRATION’S ADJUDICATIVE PROCESS

The 1967 Amendment narrowed the substantive construction of the disability definition; however, it did not purport to alter the judicially-created limited shift in the burden of proof from the claimant to the SSA derived from *Kerner’s* procedural holding.⁹⁷ Courts interpreting the 1967

be a contributing factor material to the [SSA Commissioner’s] determination that the individual is disabled”); and the Personal Responsibility and Work Opportunity and Reconciliation Act of 1996, Pub. L. No. 104-193, § 402, 110 Stat. 2105 (1996) (codified at various subsections of 42 U.S.C. §§ 423(a)(1)(C), (d)(2)(A), 1382(e)(B), 1382(e)(4)(A) (2006)) (imposing sweeping restrictions on non-citizen eligibility; narrowing eligibility for children’s SSI disability; and removing from SSI eligibility persons fleeing prosecution, custody, or confinement for a felony); *see also* Social Security Protection Act of 2004, Pub. L. No. 108-203, §203, 118 Stat. 493 (2004) (extending fleeing felon prohibitions to the disability insurance program); *see generally* BLOCH, BLOCH ON SOCIAL SECURITY, *supra* note 52, §§ 1.8, 1.9 (describing statutory amendments affecting the disability programs from 1984 to present); L. Scott Muller, Brett O’Hara & John R. Kearney, *Trends in the Social Security and Supplemental Security Income Disability Programs*, SOC. SEC. ADMIN. 79–80 (Aug. 2006), *available at* www.ssa.gov/policy/docs/chartbooks/disability_trends/ (describing all amendments to the Act from 1970 to 2003).

⁹⁶ Within a few years of the restrictive 1967 labor-market work-adjustment amendment, the Social Security Advisory Council twice recommended, to no avail, that Congress further amend the Act to broaden eligibility by applying to older disability claimants the more liberal occupational labor-market work-adjustment standard used for older claimants in the blindness program. *See* Report of the 1971 Advisory Council on Social Security, H.R. DOC. NO. 92-80, at 29–30 (Apr. 5, 1971); Reports of the Quadrennial Advisory Council on Social Security, H.R. DOC. NO. 94-75, at 38–40 (Mar. 10, 1975). In 1981, the Reagan Administration proposed moving in the opposite direction and simplifying disability determinations through a far stricter disability standard based solely on medical considerations that did not include the 1967 Amendment’s limited vocational and labor-market factors. *See* SUBCOMM. ON SOC. SEC. OF HOUSE COMM. ON WAYS & MEANS, 97TH CONG., 1ST SESS., REAGAN ADMINISTRATION DISABILITY PROPOSALS 3–13 (Comm. Print 1981); *see* Capowski, *supra* note 23, at 373–74 and n.195 (describing the proposal). By 1983, the Administration had withdrawn this proposal. *See* Capowski, *supra* note 23, at 373 n.195.

⁹⁷ Although the judicial burden shifting to the SSA on the labor-market work-adjustment issue was mentioned in a report provided to Congress in 1967 about judicial interpretations on the disability standard (presumably those interpretations about which the Agency harbored disagreement), the amendatory provision did not propose language to overrule those cases. *See* H.R. REP. NO. 90-544, at 28–29 (1967). The 1967 amendment did include other language that could be interpreted as at least mitigating the Agency’s evidentiary-burden-allocation concerns by reemphasizing the claimant’s burden to supply medically acceptable evidence of an impairment. *Id.* at 30. The amendment also provides that

[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 An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require.

Amendment continued to expect the Agency to shoulder a burden of producing labor market evidence.⁹⁸ That burden was redefined based on the substantive provisions in the 1967 Amendment as a burden of producing evidence of “work which exists in significant numbers” either in the “local economy” or in “several regions of the country.”⁹⁹ This agency burden is triggered by the claimant’s demonstration of a “prima facie” case: showing an inability to perform “past relevant work,” or, for SSI claimants with no relevant work history, showing a lack of past relevant work.¹⁰⁰ Over time, every court of appeals¹⁰¹ and the Supreme Court¹⁰² adopted this burden-shifting process. Eventually, the Agency ceased its opposition to the burden-shifting formulation and created regulations and accompanying commentary that explained this process.¹⁰³

Before the grid’s adoption in 1978, the Agency attempted to meet its burden of proof in two ways: “(1) through the use of the official notice doctrine often coupled with notice of the DOT and other government job market publications; and (2) through the vocational expert [(VE)] program with a particular focus on the use of live vocational ‘expert’ testimony at

Social Security Act Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 821, § 158(b) (codified at 42 U.S.C. § 423(d)(4)–(5) (2006)).

⁹⁸ See, e.g., *Meneses v. Sec’y of Health, Educ. & Welfare*, 442 F.2d 803, 807 (D.C. Cir. 1971).

⁹⁹ *Id.* at 807–09 (“[T]he 1967 Amendments lighten the burden of what the Government must show, but claimant’s showing of inability to return to former work does shift to the government a burden of coming forward.”).

¹⁰⁰ See also *Johnson v. Heckler*, 769 F.2d 1202, 1210 (7th Cir. 1985), *vacated on other grounds sub nom.* *Bowen v. Johnson*, 482 U.S. 922 (1987); see also 20 C.F.R. § 416.920(g)(1) (2011) (describing how the work adjustment inquiry is triggered in SSI cases through demonstration of either the absence of past relevant work or an inability to perform past relevant work).

¹⁰¹ See *Johnson at id.* (collecting cases adopting this burden-shifting formulation from all twelve circuits).

¹⁰² See *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987).

¹⁰³ See 20 C.F.R. §§ 404.1512(g), 404.1560(c)(2), 416.912(g), 416.960(c)(2) (2011). The Agency further explained the burden shifting process in its commentary on the regulations:

This burden shifts to us because, once you establish that you are unable to do any past relevant work, it would be unreasonable to require you to produce vocational evidence showing that there are no jobs in the national economy that you can perform, given your RFC. However, as stated by the Supreme Court, “It is not unreasonable to require the claimant, who is in a better position to provide information about his own medical condition, to do so.” Thus, the only burden shift . . . is that we are required to prove that there is other work that you can do, given your RFC, age, education, and work experience . . .

68 Fed. Reg. 55,153, 55,155 (Aug. 23, 2003) (quoting *Yuckert*, 482 U.S. at 146 n.5).

administrative hearings.”¹⁰⁴ Thus, through either channel, the Agency relied heavily on the DOT.

However, the labor-market inquiry following the 1967 Amendment devolved into three distinct questions that are not answered by the DOT. These questions concern job performability, job adaptability, and job incidence. As I have described in a previous article,

[j]ob performability involves the question of the ability functionally to perform alternative occupations and jobs in light of the claimant’s medical limitations and statutory vocational limitations (education, training, and work experience to some degree). Is the claimant actually able to perform the specific job tasks demanded in the job(s) or occupation(s)?

Job adaptability is a somewhat less concrete inquiry that addresses the question of a claimant’s ability to adjust to a new work environment and job functions and to sustain employment in that environment on a competitive basis regardless of the medical, educational, or acquired-skill abilities to perform the specific tasks involved in the work. For example, the inclusion of age as a mandatory factor in the statutory criteria is presumed to affect only adaptability and not performability in any manner that is independent from one’s medical limitations Thus, fifty-five year-old high-school-educated workers, who have performed unskilled medium work throughout their careers but can no longer physically perform such tasks, may not be deemed sufficiently adaptable to adjust to unskilled light or sedentary work, even if medically and educationally capable of handling all of the tasks involved in a wide range of light and sedentary occupations and jobs¹⁰⁵

¹⁰⁴ Dubin, *Gridlock*, *supra* note 3, at 951. For extended analysis of the history, origin, and proper application of the official notice/administrative notice doctrine and vocational expert program in SSA disability cases, see Dubin, *Gridlock*, *supra* note 3, at Pts. IA, IB.

¹⁰⁵ Dubin, *Gridlock*, *supra* note 3, at 959–61 (citations omitted). Prior to the grid’s promulgation, the Agency lacked any published general guidance on the evaluation of adaptability and age. *Id.* at 961 n.96. While some social science literature supports recognition of greater limits on flexibility, new learning and general vocational adjustment by older workers, see *id.* at 960 n.95 (citing studies), Matthew Diller has suggested that the SSA’s use of adaptability assumptions based on age and the confluence of other adverse vocational factors reflect more of a socially constructed moral judgment that claimants “who are likely to have worked for a long time . . . should be rewarded” with an easier path to benefits than other claimants, rather than an empirically justified consideration relevant to adaptability. *Id.* at 950–61 and n.95 (quoting Diller, *Entitlement*, *supra* note 22, at 424); see also Dubin, *Gridlock*, *supra* note 3, at 962 n.98 (citing Diller, *Entitlement*, *supra* note 22, at 419 and n. 197 and noting Diller’s suggestion that the non-adaptability assumptions applicable to claimants with the adverse combination of a marginal education and thirty-five years experience in arduous labor that derive from the Agency’s 1961 vocational regulations also reflect a socially constructed

Finally, job incidence derives from the “significant numbers” clause and geographical labor-market parameters included in the 1967 Amendment. This third discrete labor market inquiry asks whether a “significant number” of jobs exist either in the “region” where the claimant lives or in “several regions of the country.”¹⁰⁶

Assuming that the DOT could be deemed empirically supportable and methodologically and temporally “reliable,” it would still fall short of satisfying the Agency’s burden of proof on the three separate work-adjustment inquiries. As I have also previously explained:

The DOT is merely a catalogue of jobs and occupations accompanied by basic descriptions and duties that take into account some of a claimant’s medical and vocational restrictions (i.e., residual functional capacity and certain educational and skill levels) First, the DOT does not particularize the job criteria to any given claimant’s combination of restrictions. Accordingly, if that precise mix of medical and vocational restrictions is not apparent from the job description, then a performability conclusion cannot properly be derived from the DOT. Second, the DOT provides no information whatsoever on adaptability and the relevance of work adjustment factors like age and the confluence of limited work history and education. Third, it also provides no information on job incidence, much less incidence that is particularized to the claimant’s region or to “several” specific regions.¹⁰⁷

Prior to the grid’s adoption in 1978, court decisions reviewing SSA work-adjustment adjudication often lacked meaningful rationale. There were few reported decisions specifically addressing the job incidence “significant numbers” inquiry. Most decisions sustained the Agency’s “significant numbers” findings without extended analysis of why a particular quantum of jobs was significant and without consideration of the impact of statutory vocational factors and adaptability considerations on the bottom-line numerical conclusions. Later cases have underscored the ad hoc, intuitive nature of the job incidence inquiry where the grid is not applicable, noting simply that the determination “should ultimately be left to the [adjudicator’s] common sense.”¹⁰⁸

moral judgment).

¹⁰⁶ *Id.* at 962 (citations omitted).

¹⁰⁷ Dubin, *Gridlock*, *supra* note 3, at 962–63.

¹⁰⁸ Hall v. Bowen, 837 F.2d 272, 275 (6th Cir. 1988); *see generally* Dubin, *Gridlock*, *supra* note 3, at 970–71 (citing cases characterized as reflecting an ad hoc intuitive approach to non-grid work adjustment decisions that lack meaningful consideration of statutory vocational factors or adaptability considerations and vary widely in the quantum of jobs deemed

III. THE GRID REGULATIONS AND ADJUDICATIVE
FRAMEWORK

An influential study by the National Center for Administrative Justice, led by Professor Jerry Mashaw, criticized the varying use and widely inconsistent outcomes of SSA hearings on work-adjustment issues. After urging greater judicially supportable use of the official notice doctrine on a case-by-case basis,¹⁰⁹ the study then suggested more comprehensive solutions.¹¹⁰ The Agency “by regulation supported by appropriate administrative findings, . . . could specifically authorize the taking of official notice in designated cases.”¹¹¹ More significantly, the study suggested implementing “better decisional standards . . . that reduce individual ALJ [(Administrative Law Judge)] discretion by providing per se rules, presumptions, or the like.”¹¹² The House Ways and Means

“significant”). In pre-grid and grid exception cases, some courts also issued conflicting and confusing decisions on the extent to which the DOT could potentially support work adjustment assumptions. *Compare* *White v. Harris*, 605 F.2d 867, 869 (5th Cir. 1979) (suggesting without explanation that the DOT could be used for both job “detail” and job “availability” or incidence questions) *with* *Field v. Bowen*, 805 F.2d 1168, 1171 (5th Cir. 1986) (describing the limited nature of the DOT even as to job detail or job description inquiries and noting that DOT occupational classifications “fail to identify the unique requirements of the positions, such as pace at which one must work or the environment in which the work is performed.”); *see generally* TRAVER *supra* note 15, at 20-08 (criticizing court decision suggesting that the DOT supplies job numbers or incidence information).

¹⁰⁹ The study drew a distinction between official notice with “a documentary basis” and official notice without such a basis. *See* MASHAW, HEARINGS, *supra* note 9, at 80–82 (explaining and comparing the D.C. Circuit’s rejection of official notice in *Meneses v. Sec’y of Health, Educ. & Welfare*, 442 F.2d 803, 809 (D.C. Cir. 1971) and the Fourth Circuit’s acceptance of official notice in *McDaniels v. Celebreeze*, 331 F.2d 426, 428–30(4th Cir. 1964) on that basis). The study suggested that official notice without documentary support was the cause of restrictive court decisions on the doctrine’s use in work adjustment assessments. *Id.* It reasoned, therefore, that courts would provide greater latitude for official notice in lieu of vocational expert testimony on work adjustment issues if the notice were based on the DOT and similar publications rather than administrative law judge intuition. *See id.*

¹¹⁰ MASHAW, HEARINGS, *supra* note 9, at 25.

¹¹¹ MASHAW, HEARINGS, *supra* note 9, at 82. Presumably influenced by this study, the SSA promulgated a regulation in 1978 expressly authorizing Agency adjudicators to take administrative notice of “reliable job information” from the DOT and other government labor market publications. Rules for Adjudicating Disability Claims in Which Vocational Factors Must Be Considered, 43 Fed. Reg. 55,349, 55,365 (Nov. 28, 1978), 20 C.F.R. § 404.1509(c) (1979) (current version at 20 C.F.R. §§ 404.1566(d); 416.966(d) (2011)).

¹¹² MASHAW, HEARINGS, *supra* note 9, at 25. In an early case interpreting the grid, the Third Circuit summarized the Mashaw study’s conclusions about the importance of achieving greater consistency in work adjustment determinations, its evaluation of multiple alternatives to accomplish those ends, and the Agency’s selection of the study’s presumption and rule-based alternative that ultimately supported development of the grid system:

Committee had also urged the Agency to “explore the possibilities as to whether the definition of disability could be stated more specifically in the law or regulation[s], and whether more operational presumptions may be incorporated into its administration.”¹¹³ The Agency responded to these calls for greater standardization, consistency, efficiency, and fairness in work-adjustment determinations by promulgating the medical-vocational guidelines, or “grid” regulations.¹¹⁴ These regulations provide “broad, across-the-board legislative rules based on irrebuttable official or administrative notice of all three work adjustment inquiries for claimants

In order to achieve greater uniformity in disability claim determinations, the Mashaw study considered three possible reforms. One was rejected out of hand as politically unacceptable and administratively cumbersome: namely, that each ALJ be instructed to make a finding of disability in only a certain percentage of the cases he reviews. The reform preferred by the authors was that a panel system be deployed—i.e., three ALJs would consider the merits of each disability claim. As a purely statistical matter, the variance in outcomes between these panel decisions and the decisions presently rendered by ALJs sitting alone would be significantly less. Recognizing that such a three-judge approach might entail “quite staggering” administrative costs, the authors also recommended “the development and enforcement of better decisional standards . . . that reduce individual ALJ discretion by providing per se rules, presumptions, or the like.” . . . HHS, in developing the medical-vocational [grid] regulations, appears to have followed this last recommendation.

Santise v. Schweiker, 676 F.2d 925, 930 n.14 (3d Cir. 1982) (citing MASHAW, HEARINGS, *supra* note 9, at 24–27).

¹¹³ COMMITTEE STAFF REPORT, *supra* note 70, at 6. Shortly thereafter, the Agency concluded that it should promulgate regulations that would include the internal criteria that the state disability agencies had been instructed to apply. See SUBCOMM. ON SOC. SEC. OF THE HOUSE COMM. ON WAYS & MEANS, 94TH CONG., RECENT STUDIES RELEVANT TO THE DISABILITY HEARINGS AND APPEALS CRISIS 46 (1975) [hereinafter APPEALS CRISIS]; see also Edward Yourman, *Report on a Study of Social Security Beneficiary Hearings, Appeals and Judicial Review*, reprinted in APPEALS CRISIS, at 167 (The Agency “hope[s] to be able to meet the vocational evaluation problem by a regulatory provision that would describe the classes of residual functions which are commonly encountered in adjudication and indicating for each whether work ‘exists in significant numbers . . . in several regions of the country’ which an unskilled person in the class could perform”). On a few occasions, the Chairman of the Subcommittee on Social Security of the House Ways and Means Committee introduced legislation that would have required the Agency to promulgate medical-vocational regulations. See e.g., H.R. REP. NO. 94-1745 (1976) (Conf. Rep.); H.R. REP. NO. 95-8076 (1977). This legislation was not enacted because the Department promulgated the grid regulations. See SUBCOMM. ON SOC. SEC. OF THE HOUSE COMM. ON WAYS & MEANS, 95TH CONG., PROPOSED DISABILITY INSURANCE AMENDMENTS OF 1978 (1978) (recommending that no change be made in the Act’s disability definition pending a determination of the operation of the new [“grid”] regulations); see also Heckler v. Campbell, 461 U.S. 458, 466 n.10 (1983) (detailing congressional advocacy for more comprehensive SSA rulemaking on work-adjustment issues from 1954 to 1977).

¹¹⁴ See Rules for Adjudicating Disability Claims in Which Vocational Factors Must Be Considered, 43 Fed. Reg. 55,349 (Nov. 28, 1978) (to be codified at 20 C.F.R. § 404).

who fit into certain medical-vocational profiles,” thus satisfying the Agency’s burden of proof in such cases.¹¹⁵

The grid is utilized for disability determinations in the fifth step of the Agency’s five-step sequential evaluation process.¹¹⁶ The first step determines whether the claimant is currently performing significant work, defined as “substantial gainful activity” (SGA).¹¹⁷ If performing SGA, the claim is denied.¹¹⁸ If not engaged in SGA, the second step evaluates whether the claimant has a severe, medically determinable physical or mental impairment,¹¹⁹ which courts have interpreted as requiring more than a slight or *de minimis* impairment.¹²⁰

Step two helps to distinguish the construction of the disability-benefits programs from unemployment programs by denying benefits to persons whose unemployment is not at least partially attributable to a medical condition.¹²¹ Where a claimant’s medical conditions, evaluated individually and collectively,¹²² do not exceed step two’s threshold, the claim is denied on medical grounds alone.¹²³ Where the claimant’s condition exceeds step two’s threshold, the third step evaluates whether the claimant’s impairments are so severe that they are presumptively disabling and meet or equal the criteria of the Agency’s listings of impairments.¹²⁴ The Agency’s listings have their genesis in the administrative schedule or catalogue of presumptively disabling

¹¹⁵ Dubin, *Gridlock*, *supra* note 3, at 972. The Agency declared that the grid presumptions were supported by “long standing” internal administrative practices. See 43 Fed. Reg. 55,349 (Nov. 28, 1978); *cf.* Capowski, *supra* note 23, at 346–47 n.90 (questioning this declaration and opining that prior agency practices were “not written with the clarity that characterizes the [grid]” nor as clearly and consistently applied).

¹¹⁶ See 20 C.F.R. §§ 404.1520; 416.920 (2011) (describing each of the five steps in the process).

¹¹⁷ See 20 C.F.R. §§ 404.1571, 416.971 (2011).

¹¹⁸ See 20 C.F.R. §§ 404.1520(a)(4)(i); 416.920(a)(4)(i) (2011).

¹¹⁹ 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii) (2011).

¹²⁰ See, e.g., *Dixon v. Shalala*, 54 F.3d 1019, 1023–25 (2d Cir. 1995) (describing the *de minimis* “slightness” step-two standard, noting that five members of the Supreme Court in *Bowen v. Yuckert*, 482 U.S. 137 (1987), found that application of a greater-than-slightness standard would be unlawful, and sustaining invalidation of the SSA’s systematic application of a greater-than-slightness step-two threshold).

¹²¹ See *id.*

¹²² See *Bailey v. Sullivan*, 885 F.3d 52, 60 (3d Cir. 1989); SSR 85-28, 1985 WL 56856, at *3 (1985).

¹²³ See 20 C.F.R. §§ 404.1520(a)(4)(ii), (c); 416.920(a)(4)(ii), (c) (2011).

¹²⁴ See 20 C.F.R. §§ 404.1520(a)(4)(iii); 416.920(a)(4)(iii) (2011); 20 C.F.R. pt. 404, app.1 (2011).

conditions developed at the outset of the SSA's disability program in the 1950s.¹²⁵ Because this step authorizes a favorable decision on medical grounds alone where a claimant's condition meets or equals the listing,¹²⁶ listing-level impairment severity is set at a very high level.¹²⁷ If the claimant's condition does not satisfy the listing criteria, the fourth step requires a determination of whether the claimant can perform his or her past relevant work in light of his or her residual functional capacity.¹²⁸

Residual functional capacity (RFC)¹²⁹ measures a claimant's ability to perform work functions notwithstanding his or her medically-based limitations.¹³⁰ The Agency's exertional- or strength-related-RFC assessment corresponds to the DOT's classification of jobs by exertional requirements—sedentary, light, medium, heavy, and very heavy—and is based on limitations that restrict an individual's ability to do strength-related work activities: walking, standing, sitting, lifting, carrying, pushing, and pulling.”¹³¹

All restrictions that are not strength-related, such as mental, sensory, manipulative, postural, and environmental limitations, are classified as non-exertional restrictions.¹³² The Agency is also required to evaluate non-exertional restrictions in the RFC assessment; a claimant with an

¹²⁵ See DYNAMICS OF DISABILITY, *supra* note 3, at 68–72.; see *supra* notes 45–48 and accompanying text (describing the adoption of the original schedule of disabling impairments for the 1954 disability freeze program).

¹²⁶ See 20 C.F.R. §§ 404.1520(a)(4)(iii), (d); 416.920(a)(4)(iii), (d) (2011).

¹²⁷ See MASHAW, BUREAUCRATIC JUSTICE, *supra* note 17, at 165 (recounting SSA consulting physician's observation that the listings “are so strict live patients don't have those symptoms.”).

¹²⁸ See 20 C.F.R. §§ 404.1520(a)(4)(iv), (e), (f); 416.920(a)(4)(iv), (e) (f) (2011)

¹²⁹ *Id.*

¹³⁰ See 20 C.F.R. §§ 404.1545, 416.945 (2011).

¹³¹ Dubin, *Gridlock*, *supra* note 3, at 974–75; see 20 C.F.R. §§ 404.1567, 404.1569a(b), 416.967, 416.969a(b) (2011). For the same reasons discussed herein about medical science's inability to objectively link impairment findings with ability to work or with the degree of pain and subjective symptomatology, the RFC assessment is similarly vulnerable to critique. See *supra* notes 53–59 and accompanying text; *infra* note 209. In responding to questions about physicians' and adjudicators' abilities to determine claimants' abilities to function at “exertional levels,” SSA Commissioner Cardwell explained that while “considering the ‘state of the art,’ there is simply no satisfactory way to relate the effect of disease or injury to an individual's ability to work. However, since its inception, the [program], in making disability determinations, has included an assessment of an individual's residual functional capacity.” STONE, *supra* note 22, at 166. Deborah Stone characterized Cardwell's RFC response as saying it is “impossible to specify but we do it anyway.” *Id.*

¹³² 20 C.F.R. §§ 404.1569a(a), 416.969a(a) (2011).

exertional RFC for a wide range of heavy labor may still be found disabled as lacking the mental RFC for gainful employment.¹³³

A claimant's past work is "relevant" if it was performed within the last fifteen years, has lasted long enough to be learned, and constituted SGA.¹³⁴ A claimant is deemed capable of performing past relevant work (PRW) if he or she retains the RFC to perform either the actual functional demands and duties of a particular past relevant job, or the functional demands and job duties of the occupation as generally required by employers throughout the economy.¹³⁵

If the claimant can perform his or her PRW, the Agency will deny the claim; if not, the process continues to step five, the final step.¹³⁶ Only at step five does the process fully address the statutory medical-vocational disability standard and the labor-market work-adjustment inquiries. In step five, the SSA determines whether "work exists in significant numbers" in the economy to which the claimant can make a work adjustment, considering his or her age, education, work experience, and RFC.¹³⁷ If so, the claimant is not disabled; if not, the claimant is disabled and entitled to benefits.¹³⁸

¹³³ SSR 83-10, 1983 WL 31251 (1983).

¹³⁴ See 20 C.F.R. §§ 404.1565(a), 416.965(a) (2011).

¹³⁵ SSR 82-61, 1982 WL 31387 (1982). Because the DOT is often used at step four, particularly with respect to the second "generic" PRW prong, its limitations described herein are applicable to various step-four labor-market determinations as well.

¹³⁶ See 20 C.F.R. §§ 404.1520(a)(4)(iv),(v), (e)-(g) ; 416.920(a)(4)(iv),(v), (e)-(g) (2011).

¹³⁷ *Id.*

¹³⁸ See 20 C.F.R. §§ 404.1520(a)(4)(iv),(v), (e)-(g) ; 416.920(a)(4)(iv), (v), (e)-(g) (2011). A 1994 SSA proposal to change the substantive approach to the sequential evaluation process to simplify criteria and focus more broadly on functional capacity, and baseline occupational demands has stalled indefinitely. In part, this is due to the inability to identify an appropriate methodology to measure such capacities. The SSA's 1994 disability reengineering plan, while touted as a proposal to streamline the fragmented, multi-stage state agency/SSA adjudication processes, also included a proposal to alter the SSA's substantive eligibility criteria. See Gay Gellhorn, *Disability and Welfare Reform: Keep The Supplemental Security Income Program But Reengineer The Disability Determination Process*, 22 FORDHAM URB. L.J. 961, 992-95 (1995) (discussing disability advocates' frustration with the agency for disclaiming an intent to alter the substantive disability standard but then filtering substantive proposals through an ostensibly process-based project). The reengineering proposal while primarily drawing attention for its call to eliminate the reconsideration and appeals council stages in the administrative process, also recommended alterations of steps two through five in the substantive sequential evaluation process. See 59 Fed. Reg. 47,887 (Sept. 19, 1994). First, the step-two medical severity threshold would be replaced with a requirement of demonstrating a medically determinable impairment. *Id.* at 47911. Second, the step-three listings would be replaced with an index of medical conditions that would obviate the need for highly technical test results and would

The sequence uses the grid at step five.¹³⁹ The grid contains a series of matrices that provide decisional rules based on administrative notice of the availability of a significant number of jobs to which claimants can make work adjustments based solely on exertional RFCs.¹⁴⁰ The grid rules do not supply direct rules of decision in situations where claimants possess limitations not administratively noticed in the grid's promulgation, such as non-exertional limitations.¹⁴¹ It also applies only where a claimant's medical-vocational profile coincides precisely with a grid rule's criteria.¹⁴² The grid's work-adjustment rules are conclusive and may not be rebutted through contrary labor-market or vocational evidence.¹⁴³

“describe impairments so severely debilitating that [they] can be presumed to equal a loss of functional ability to perform [SGA] without assessing the individual's functional ability.” *Id.* Because functional equivalence is factored into the index, the present process for evaluating equivalence to a listing would be eliminated. *Id.* at 47,912. Finally, at the fourth and fifth steps of the current sequential process, the RFC determination would be replaced with an individual assessment of functional capacity that would also consider the claimant's education. *Id.* at 47,912. After such an assessment, “the individual's age will determine whether his or her functional ability is compared against the demands of the individual's previous work or against a ‘baseline’ of occupational demands.” *Id.* “The baseline will describe a range of work related functions that represents work that exists in significant numbers in the national economy that does not require prior skills or formal job training.” *Id.* Individuals nearing retirement age would be evaluated under an occupational approach to disability and would be found disabled if unable to perform the functional demands of prior work. *Id.* at 47,913. All other workers would be evaluated against the functional demands of the baseline work. *Id.*

To accomplish this task, the proposal called for the development of “functional assessment instruments [that] will be designed to measure, as objectively as possible, an individuals [sic] abilities to perform a baseline of occupational demands that includes the principal dimensions of work and task performance, including primary physical, psychological and cognitive processes.” *Id.* at 47,912. These instruments would also obviate the need for VE and medical expert testimony at disability hearings. See Daniel F. Solomon, *Vocational Testimony in Social Security Hearings*, 18 J. NAT'L ASS'N. ADMIN. L. JUDGES 197, 253 (1998) [hereinafter Solomon, *Vocational Testimony*]. A study undertaken to create these assessment instruments concluded that “no single instrument would fulfill SSA's vision.” Solomon, *Vocational Testimony*; see also Solomon, *Vocational Testimony* at n.88 (veteran ALJ suggests the proposal is based on “social science fiction.”). To date, the Agency has been urged to prioritize the reengineering proposal's presumably time-saving process proposals and has taken no further steps to pursue substantive sequential evaluation criteria changes. See U.S. GENERAL ACCOUNTING OFFICE, *SSA DISABILITY REDESIGN: FOCUS NEEDED ON INITIATIVES MOST CRUCIAL TO REDUCING COSTS AND TIME* (Dec. 20, 1996), <http://www.gao.gov/products/HEHS-97-20>.

¹³⁹ See 20 C.F.R. §§ 404.1560(c), 416.960(c) (2011).

¹⁴⁰ See 20 C.F.R. §§ 404.1569a(b), 416.9659a(b) (2011).

¹⁴¹ *Id.*; 20 C.F.R. pt. 404, app. 2, §§ 201.00(b), (e) (2011).

¹⁴² See 20 C.F.R. pt. 404, app. 2 §§ 201.00(b), (e) (2011).

¹⁴³ See SSR 83-5a, 1983 WL 31250, at *1–2 (1983).

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The grid's format includes tables with decisional columns based on various combinations of RFC, age, education, and work experience.¹⁴⁴ Each table is based on an RFC category with tables for sedentary-, light-, and medium-work RFCs, respectively.¹⁴⁵ Age is divided into four categories ranging from "closely approaching retirement age" to younger individuals.¹⁴⁶ Education is also separated into four categories, ranging from high school or above to illiterate or unable to communicate in English.¹⁴⁷ Finally, work experience ranges from skilled to none.¹⁴⁸ Claimants with skilled or semi-skilled work experience are presumed to possess greater work-adjustment potential if their skills are deemed transferable to other work.¹⁴⁹ Where a claimant's RFC, age, education, and work experience fit the precise profile in a grid rule, the rule directs the decision.¹⁵⁰

¹⁴⁴ See 20 C.F.R. pt. 404, app. 2 §§ 201.00(b), (e) (2011). A claimant capable of one RFC is deemed able to perform all less strenuous RFCs. See 20 C.F.R. pt. 404, app. 2, § 204.00 (2011). Thus, there are no grid tables based on RFCs for heavy or very heavy work as the ability to make a work adjustments to the wide, combined occupational base represented in the ability to perform all sedentary, light, medium and heavy jobs is presumed, even for claimants with the most vocationally adverse combinations of age, education, and work experience.

¹⁴⁵ 20 C.F.R. pt. 404, app. 2, tpls I, II, and III (2011).

¹⁴⁶ See 20 C.F.R. §§ 404.1563, 416.963 (2011). In 2005, in an effort to tighten eligibility standards for older claimants, the Agency commenced a rulemaking to increase the chronological age cutoffs in the grid at which non-adaptability presumptions are conclusive. See 70 Fed. Reg. 67,101 (Nov. 4, 2005). However, more recently the Agency has withdrawn the proposed rule. See 74 Fed. Reg. 21,563 (May 8, 2009).

¹⁴⁷ See 20 C.F.R. § 404.1564; 416.964 (2011). One Court of Appeals has interpreted the regulations' reference to a grid category for those illiterate *or* unable to communicate in English as a disjunctive requirement in this last education category, and has thus concluded that the grid may not be utilized to direct a non-disability work-adjustment decision for claimants further limited, vocationally, by a conjunction of these deficits (both illiterate *and* unable to communicate in English). See, e.g., *Martinez v. Heckler*, 735 F.2d 795, 796 (5th Cir. 1984); SSAR 86-3(5), 1983-1991 Soc. Sec. Rep. Serv. 855 (West 1986) (announcing the Agency's "acquiescence" in the *Martinez* decision). The Agency has commenced but apparently abandoned a rulemaking scheme to apply this disjunction in the grid regulations to claimants fitting the conjunctive (both illiterate and unable to communicate in English) profile in order to supersede *Martinez*. See 68 Fed. Reg. 40,213, 40,216 (July 7, 2003); 70 Fed. Reg. 65,488, 65,489 (Oct. 31, 2005) (listing a final action date of October 2005 but not finalizing the regulation).

¹⁴⁸ See 20 C.F.R. §§404.1565, 416.965 (2011).

¹⁴⁹ *Id.* In 2000, the Agency promulgated regulations restricting eligibility for claimants approaching retirement age by deleting reference to a "highly marketable skills" requirement for finding that such older workers possess transferable skills that permit a work adjustment under the grid. See 65 Fed. Reg. 17,994, 17,995 (Apr. 6, 2000).

¹⁵⁰ SSR 83-11, 1983 WL 31252 (1983); see 20 C.F.R. pt. 404, app. 2, § 200.00 (2011).

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The grid regulations and methodology also concretely resolve “both the somewhat elusive adaptability and job incidence, or statutory ‘substantial numbers,’ inquiries that have vexed the courts and commentators”¹⁵¹ The Agency has issued a Social Security Ruling that summarizes and further explains how the grid resolves these issues:

When the medical-vocational rules were promulgated, administrative notice was taken of the fact that it was possible to identify, at the unskilled level, approximately 200 sedentary occupations; approximately 1,600 sedentary and light occupations; and approximately 2,500 sedentary, light and medium occupations, each representing numerous jobs in the national economy Thus, as related to RFC, the occupational base considered in each rule consists of those unskilled occupations identified at the exertional level in question

The Issue of Work Adjustment

In the situations considered in the numbered table rules (those indicating decisions of “Disabled” as well as “Not disabled”), an individual has the RFC to perform a full range of the unskilled occupations relevant to the table. Each of these occupations represents numerous jobs in the national economy. *However, the individual may not be able to adjust to those jobs because of adverse vocational factors.*

The issue of whether a work adjustment is possible involves determining whether the jobs whose requirements can be met provide an opportunity for adjusting to substantial and gainful work other than that previously performed. Accordingly, *the issue of work adjustment is determined based on the interaction of the work capability represented by RFC (the remaining occupational base) with the other factors affecting capability for adjustment—age, education, and work experience.* Each numbered rule in Appendix 2 includes an administrative evaluation which determines whether a work adjustment should be possible.¹⁵²

In *Heckler v. Campbell*, the Supreme Court rejected a variety of challenges to the grid’s validity. First, the Court clarified that properly empowered agencies may promulgate rules to resolve a class of factual issues in advance of individual adjudications.¹⁵³ Therefore, the grid rules

¹⁵¹ Dubin, *Gridlock*, *supra* note 3, at 978.

¹⁵² SSR 83-10, 1983 WL 31251 (1983) (emphases added).

¹⁵³ As the Court explained,

It is true that the statutory scheme contemplates that disability hearings will be individualized determinations based on evidence adduced at a hearing. But this does not bar the Secretary from relying on rulemaking to resolve certain classes of issues.

conflict with neither the Social Security Act's requirement for individualized consideration of each claimant's case, contained in 42 U.S.C. § 423(d)(2)(A), nor the requirement that hearing decisions be based on evidence adduced at the hearing, contained in 42 U.S.C. § 405(b).¹⁵⁴ Next, the Court found that the Agency's rulemaking proceedings provided sufficient procedural protection to test the facts upon which the grid was based, and thus rejected assertions that the grid denied claimants the due process and statutory right to notice and the opportunity to rebut administratively noticed facts.¹⁵⁵ Finally, the Court also observed that the Plaintiff in *Campbell* did not challenge the grid's rulemaking proceeding itself or the sufficiency of the rulemaking record supporting the grid's work-adjustment rules,¹⁵⁶ and the Court concluded that the record did not establish that the rule was arbitrary and capricious.¹⁵⁷

IV. THE GRID'S FOUNDATION: TRUE GRID?

As introduced above, the grid was predicated on a 1960s-era version of the DOT and related publications when promulgated.¹⁵⁸ It has not been meaningfully updated to reflect any of the fundamental structural changes in the United States economy in the last half-century.

When the SSA promulgated the grid in 1978, the Agency acknowledged that it had relied at least partially on the 1965 DOT third edition, which had been superseded by the fourth edition of the DOT in

The Court has recognized that even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration. A contrary holding would require the agency continually to re-litigate issues that may be established fairly and efficiently in a single rulemaking proceeding.

Heckler v. Campbell, 461 U.S. 458, 467 (1983) (citations omitted).

¹⁵⁴ *Id.* at 467–68. Moreover, the Court reasoned that claimants could still introduce evidence at their individual hearings to demonstrate that their circumstances did not fit into an unfavorable grid category. *Id.*

¹⁵⁵ *Id.* at 468–70.

¹⁵⁶ *Id.* at 470 n.14.

¹⁵⁷ *Id.* at 468. To the extent the majority's reference to the "record" and its relationship to the grid's substantive validity under the arbitrary and capricious standard implied a focus on the sufficiency of the grid's rule-making record and underlying labor market data, that issue was not raised at any point in the litigation or discussed or analyzed in any of the lower court opinions. See Brief for Petitioner Richard S. Schweiker at 12, *Heckler v. Campbell*, 461 U.S. 458 (1983) (No. 81-1983) ("Neither the Court of Appeals nor respondent has challenged the accuracy of the job data underlying the regulations and tables.").

¹⁵⁸ See *supra* notes 7–13 and accompanying text.

1977, even though the Agency knew the 1965 data was no longer accurate in at least some areas.¹⁵⁹ The Agency's reasons for not incorporating material from the 1977 DOT were somewhat contradictory. The Agency stated that the differences in "content and substance" between the 1965 and 1977 editions were so significant that they precluded "detailed analysis in the immediate future," or at least in time for the grid's promulgation.¹⁶⁰ At the same time, the agency declared that it "did not anticipate any major changes in job incidence or other occupational data."¹⁶¹

However, the 1977 DOT reflected some significant changes from the 1965 third edition. For example, the sedentary occupational base had diminished from 200 occupations in 1965 to 137 occupations in 1977.¹⁶² Also, while the grid still claims that 85% of the unskilled sedentary occupations are in the machine trades and benchwork categories,¹⁶³ the 1977 edition of the DOT noted "rapid changes in industrial technology." With the advent of automation and computerization, the labor market landscape saw significant changes: "the electronic computer came of age during this period with effects that were visible in virtually every sector of the economy."¹⁶⁴ Around this time the United States labor force also experienced a substantial shift from manufacturing to service industries.¹⁶⁵ That the U.S. Department of Labor's 1977 edition of the DOT recognized these changes suggests that, by as early as 1977, the Administration was

¹⁵⁹ See 42 Fed. Reg. 55,349, 55,351–54, 55,360–61 (Nov. 28, 1978). The Agency administratively noticed other publications to support its conclusions in the grid, such as Census Reports and County Business Patterns published by the Bureau of the Census, and the Occupational Outlook Handbook published by the Bureau of Labor Statistics. *Id.* at 55,351. However, the only comprehensive occupational classification system noticed was the DOT, and thus the Agency and all commentators properly recognized the DOT as the agency's primary source for the grid's occupation-based rules.

¹⁶⁰ *Id.* at 55,360–61.

¹⁶¹ *Id.*

¹⁶² The grid regulation's assumption of 200 (as opposed to 137) sedentary occupations was called into question even before the grid became effective in 1979. See *supra* notes 159–161 and accompanying text. The grid regulations have always acknowledged that "sedentary work represents a significantly restricted range of work." 20 C.F.R. pt. 404, app. 2, § 201.00(b) (2011); cf. TRAVER, *supra* note 15, § 1200.3.5 ("The occupational base for unskilled sedentary work is likely non-existent and certainly fragile."). The DOT still includes questionable sedentary occupations such as "dowel inspector" (DOT # 669.687-014) and "vamp strap ironer" (DOT #788.687-158) in its occupations' list. See DOT REVISED 4TH ED., *supra* note 7.

¹⁶³ See 20 C.F.R. pt. 404, subpt. P, app. 2 (2011).

¹⁶⁴ DOT REVISED 4TH ED., *supra* note 7, at v.

¹⁶⁵ *Id.*

aware that many of the machine trade and benchwork occupations administratively noticed in the grid were lost or altered due to these labor market trends.

Nevertheless, the Agency vigorously defended its use of 1960s-era DOT data in the grid. Based on conversations with officials from the North Carolina Occupational Analysis Field Center—an organization that compiles data for the DOL’s publications—the SSA confirmed that there is “no precise updated data but that the regulatory estimate of approximately 200 sedentary unskilled occupations is still valid, because some of the 137 occupations in the [fourth] edition of the DOT comprise more than one of the separate occupations of which we take administrative notice.”¹⁶⁶ In a 1982 decision authored by Judge (now Justice) Breyer, the First Circuit sustained the grid against claims that it was substantively invalid on account of its reliance on the 1965 DOT instead of the 1977 edition.¹⁶⁷ While observing that “the numbers ha[d] declined from the [1965] to the [1977] edition,” the First Circuit still concluded that “it ha[d] not been shown that the decline was so great that a rule premised on the earlier figures [wa]s now without foundation and that a failure to reconsider the rule [wa]s ‘arbitrary.’”¹⁶⁸ Although not directly relating the issue to the grid’s underlying data, the Second and Fourth Circuits have since invalidated the use of the 1965 DOT to support work-adjustment assessments in grid exception cases.¹⁶⁹ Expressly labeling the 1965 edition “outdated,” these courts explained that there are “substantial” differences between the two editions; the “[1977] Edition requires a much higher level of mathematical and verbal skills for most of the jobs at issue than d[oes] the [1965] Edition.”¹⁷⁰

Even so, the 1977 edition has also been questioned. As far back as 1980, the National Research Council raised questions about the accuracy

¹⁶⁶ SSR 96-9p, 1996 WL 374185, at n.5 (July 2, 1996); *see also* 57 Fed. Reg. 43,005 (Sept. 17, 1992) (“The range of work (of which the medical-vocational rules take administrative notice) continues to represent more occupations than would be required to represent significant numbers [W]e have received no significant data or other evidence to indicate that . . . the unskilled occupational base . . . has changed substantially.”); 53 Fed. Reg. 51,097 (Dec. 20, 1988) (same).

¹⁶⁷ *See* *Sherwin v. Sec’y of Health & Human Servs.*, 685 F.2d 1, 6–7 (1st Cir. 1982).

¹⁶⁸ *Id.*

¹⁶⁹ *See* *English v. Shalala*, 10 F.3d 1080, 1084–85 & n.3 (4th Cir. 1993); *Townley v. Heckler*, 748 F.2d 109, 113–14 (2d Cir. 1984).

¹⁷⁰ *Townley*, 748 F.2d at 113–14; *English*, 10 F.3d at 1084–85 (quoting *Townley*, 748 F.2d at 113–14).

of the data and methodology underlying the 1977 DOT.¹⁷¹ The NRC identified major deficiencies in the 1977 edition's source data and the occupational characteristics it created.¹⁷² The NRC nevertheless concluded that, "[d]espite deficiencies" in several functions, the 1977 edition remained "the most comprehensive set of occupational characteristics currently available" and encouraged its continued use.¹⁷³

By 1986, however, a Chicago-area study had obtained findings challenging the SSA's assumption of a significant unskilled sedentary occupational base.¹⁷⁴ The study found that only 2.4% of employers "reported having jobs that were sedentary, unskilled, and self-contained."¹⁷⁵ The study suggested that the discrepancy between the unskilled sedentary occupations identified in the grid and those found in the actual labor market was attributable to increasingly outdated source data; significant transformations in the labor market due to decreases in the United States' manufacturing base due to international competition or otherwise; and an increase in automation with a corresponding increase in the need for some particular skills in "almost all" of the clerical, technical, and professional occupations that comprise the core of the "sit down" sedentary base.¹⁷⁶ The study concluded "that the existence and numbers of occupations claimed by the [SSA] [are] insignificant in the standard metropolitan statistical area of Chicago."¹⁷⁷ Although the study suggested that, based on the size and diversity of Chicago's business community, a similar inference could be drawn for the national economy, the study recommended that a comparable study be undertaken to analyze labor-market conditions nationally.¹⁷⁸

In 1991, the Department of Labor updated and revised the DOT, and in 1998, it replaced the DOT with a new occupational classification system known as the Occupational Information Network (the

¹⁷¹ See CRITICAL REVIEW, *supra* note 7.

¹⁷² See *id.* at 145–47, 191–94.

¹⁷³ *Id.* at 195.

¹⁷⁴ Julie L. Bose et al., *Misuse of Occupational Information in Social Security Disability Cases*, 30 REHAB. COUNSELING BULL. 83 (1986).

¹⁷⁵ *Id.* at 88–89. A "self-contained," unskilled, sedentary job is one in which there are no tasks involved in the job that involve either exertional requirements more strenuous than sedentary or the use of any skills. See *id.* at 89.

¹⁷⁶ *Id.* at 90–91.

¹⁷⁷ *Id.* at 89.

¹⁷⁸ *Id.* at 91–92.

“O*NET”).¹⁷⁹ An advisory panel to the DOL in 1993 provided the impetus for the O*NET by recommending the creation of a more accessible and flexible occupational taxonomy for meeting the DOL’s primary goals of promoting “effective education, training, counseling and employment of the American workforce.”¹⁸⁰ The O*NET was first released to the general public in December 1998,¹⁸¹ and while it did meet the DOL’s employment and policy concerns, the O*NET failed to meet the SSA’s adjudicative requirements for work-adjustment disability decisions.¹⁸² The O*NET’s most specific shortcoming as an SSA work-adjustment tool was that it did not categorize jobs by exertional RFC.¹⁸³ The O*NET also utilized a different, more layered system for classifying skills and the required vocational preparation for various jobs than was contemplated in the SSA’s transferable-skills rules.¹⁸⁴ In the most recent version of the O*NET, the DOL aggregated the DOT’s approximately 13,000 total occupations into only 812 occupations,¹⁸⁵ thus further obscuring the DOT’s and the grid’s occupational groupings and bases.¹⁸⁶ Although officials from the DOL have conceded that even the 1991 DOT is now “obsolete,”¹⁸⁷ the SSA continues to use the DOT and DOT-based

¹⁷⁹ See Angela M. Heitzman et al., *A Call to Update the DOT: Findings of the LARP Occupational Database Committee*, 17 REHAB. PROF. 63, 64 (2009) (explaining that the DOL convened an Advisory Panel for the Dictionary of Occupational Titles (APDOT), which recommended in 1993 that the DOT be replaced).

¹⁸⁰ *Id.* at 77; see also *id.* at 71 (“The Structure of the DOT doesn’t work well with career planning . . .”); see generally U.S. DEP’T OF LABOR, ADVISORY PANEL FOR THE DICTIONARY OF OCCUPATIONAL TITLES (APDOT) A NEW DOT: A DATABASE OF OCCUPATIONAL TITLES FOR THE TWENTY-FIRST CENTURY (1993) [hereinafter A NEW DOT] (APDOT’s recommendations).

¹⁸¹ *Id.* at 71. Instead of the nine levels of specific vocational preparation utilized in the DOT, which focus on the time required to learn and perform job tasks, the O*NET has five job “zones,” which “are more abstract and include: little or no preparation needed; some preparation needed; medium needed; considerable preparation needed; and extensive preparation needed.” *Id.* at 72.

¹⁸² *Id.* at 72.

¹⁸³ See CHANGING ECONOMY, *supra* note 21, at 164–65 (describing the O*NET’s use of the concept of static strength as opposed to RFC); Heitzman, *supra* note 179, at 72 (noting that in “O*NET the occupational unit may include jobs that are sedentary all the way up to heavy in the same grouping”).

¹⁸⁴ Heitzman, *supra* note 179, at 72.

¹⁸⁵ *Id.*

¹⁸⁶ See *supra* note 152 and accompanying text.

¹⁸⁷ An assistant Commissioner from DOL’s Bureau of Labor Statistics (BLS) has noted that the BLS regards the DOT as “obsolete since much of the information contained in the most recent version is based on research conducted at least two decades ago.” Letter from Dixie

adjudicative tools out of necessity because the O*NET is an inadequate alternative.¹⁸⁸

The reliance on seriously outdated labor market information means that the DOT, and ultimately the grid, is presently based on outdated assumptions that have not been established as relevant to the contemporary and dramatically different United States economy and labor market. The United States General Accounting Office (GAO) recently noted that, while certain advances in technology have made it easier for disabled individuals to participate in the labor force, the fast-paced nature of the United States' service-based economy has increased the physical and mental demands of many entry-level jobs:

[T]he nature of work has changed in recent decades as the national economy has moved away from manufacturing-based jobs to service- and knowledge-based employment . . . Although certain jobs in the service economy continue to be physically demanding—a cashier in a fast food restaurant might be expected to stand for most of his or her shift—other service- and knowledge-based jobs can allow greater participation for persons with physical limitations. In addition, telecommuting and part-time work provide other options for persons

Somers, Assistant Commissioner, U.S. Department of Labor, Office of Occupational Statistics, to David Lowery (Nov. 26, 2007) (on file with author). Indeed, since it has been twenty years since the last DOT revision, the SSA's regulations on past relevant work suggest that the information supplied has become outdated for the SSA's purposes too. See 20 C.F.R. §§ 404.1565(a), 416.965(a) (2011) (Jobs performed more than fifteen years from the onset of disability are no longer "relevant" because "[a] gradual change occurs in most jobs so that after 15 years it is no longer realistic to expect that skills and abilities acquired in a job done then continue to apply."). It follows, *a fortiori*, that the grid's foundation based on the 1965 DOT is obsolete.

¹⁸⁸ See Jeffrey A. Truthan & Sylvia E. Karman, *Transferable Skills Analysis and Vocational Information During a Time of Transition*, 6 J. FORENSIC VOCATIONAL ANALYSIS 17, 20 (2003) (noting that until a new occupational information instrument is developed, "the DOT cannot be retired or written off for rehabilitation, forensic, and disability adjudication [purposes]"); see also U.S. GEN. ACCOUNTING OFFICE (GAO), SSA & VA DISABILITY PROGRAMS: RE-EXAMINATION OF DISABILITY CRITERIA NEEDED TO HELP ENSURE PROGRAM INTEGRITY 14 (Aug. 2002) [hereinafter RE-EXAMINATION NEEDED], available at <http://www.gao.gov/products/GAO-02-597> ("The agencies have discussed ways that O*NET might be modified or supplemental information collected [sic] to meet SSA's needs, but no definitive solution has been identified. SSA officials have indicated that an entirely new occupational database could be needed to meet SSA's needs, but such an effort could take many years to develop, validate, and implement."); DISABILITY RESEARCH INST., SOCIAL SECURITY JOB DEMANDS PROJECT METHODOLOGY TO IDENTIFY AND VALIDATE CRITICAL JOB FACTORS 5, 11 (Nov. 2002), available at www.paq.com/PDF/DRIRreportSocialSecurity.pdf (explaining that DOL's abandonment of the DOT and use of the O*NET creates a "dilemma for the SSA[;] O*NET does not adequately describe job demands to meet SSA's current program requirements").

with disabilities. However, some labor market trends—such as an increasing pace of change in office environments and the need for adaptability—can pose particular challenges for some persons, such as those with severe mental illness and learning disabilities. Moreover, other trends—such as downsizing and the growth in contingent workers—can limit job security and benefits, like health insurance, that most persons with disabilities require for participation in the labor force. Whether these changes make it easier or more difficult for a person with a disability to work appears to depend very much on the individual’s impairment and other characteristics, according to experts.¹⁸⁹

After assessing the dramatic changes in the United States labor market and the concomitant adjustment in the skills required of disabled workers, the GAO concluded that the SSA’s disability standards are out of touch with contemporary conditions:

The disability criteria used by [federal government benefit] programs for determining who is disabled have not incorporated labor market changes. In determining the effect that impairments have on individuals’ earning capacity, programs continue to use outdated information about the types and demands of jobs in the economy. Given the nature of today’s economy, which offers varied opportunities for work, agencies’ use of outdated information raises questions about the validity of disability decisions SSA relies upon the Department of Labor’s Dictionary of Occupational Titles (DOT) as its primary database to make this determination; however, Labor has not updated DOT since 1991 and does not plan to do so Meanwhile, as new jobs and job requirements evolve in the national economy, SSA’s reliance upon an outdated database further distances the agency from the current market place.¹⁹⁰

An Inter-Organizational Task Force (IOTF) that included the SSA and the DOL set out to create a coordinated remedy for the ailing system. From 2000 to 2004, the IOTF worked “to establish a common, objective, measurable, and reliable framework that c[ould] best describe the

¹⁸⁹ RE-EXAMINATION NEEDED, *supra* note 188, at 13; *see also* VIRGINIA RENO, NATIONAL ACADEMY OF SOCIAL INSURANCE, SOCIAL SECURITY AS PART OF AN INTEGRATED NATIONAL DISABILITY POLICY: IS THE SOCIAL SECURITY DEFINITION OUT OF SYNC? 15 (Apr. 14, 2004) [hereinafter RENO, OUT OF SYNC], *available at* www.ssab.gov/DisabilityForum/Reno%20paper.pdf (noting that the current labor market is harder on persons with mental limitations because it requires that employees be “highly flexible”—one employee may be expected to perform and shift between the varied activities previously performed by two or three workers—and perform with an enhanced emphasis on speed and productivity).

¹⁹⁰ RE-EXAMINATION NEEDED, *supra* note 188, at 23.

physical, mental, cognitive, training and environmental demands associated with occupations.”¹⁹¹ Early efforts were promising: the IOTF explored both updating the DOT and revising the O*NET to make it suitable for disability adjudication purposes.¹⁹² According to the NRC, a pilot study funded by the DOL and based on the IOTF’s work showed promise in creating O*NET–D, a version of the O*NET specifically designed for disability purposes.¹⁹³ However, while the SSA staff initially agreed with the O*NET–D approach, the Agency later withdrew its support.¹⁹⁴ The IOTF ultimately reached no agreement on a collaborative interagency approach to the problem.¹⁹⁵ As the NRC observed, “communication and collaboration between DOL and SSA regarding a common occupational database now appears quite limited.”¹⁹⁶ In 2009, the SSA’s own advisory panel commenced work to evaluate and make recommendations on the creation of a new labor-market taxonomy designed solely for the SSA’s disability adjudication process.¹⁹⁷ The SSA panel responsible for developing the new approach, the Occupational Information Development Advisory Panel (OIDAP), does not include any representatives from the DOL or any DOL divisions, such as the Bureau of Labor Statistics, and will thus be making recommendations without directly drawing on the DOL’s labor market expertise and data, or its insights into the contemporary United States labor market.¹⁹⁸

Perhaps foreseeing the potential shortcomings of the SSA’s independent project, a recently issued NRC report recommended renewed collaboration between the SSA and the DOL as the most efficient, cost-effective, and sensible approach to this problem.¹⁹⁹ The NRC report stated:

¹⁹¹ Heitzman, *supra* note 179, at 63.

¹⁹² *Id.*

¹⁹³ CHANGING ECONOMY, *supra* note 21, at 162.

¹⁹⁴ *See id.* at 103.

¹⁹⁵ *Id.* The NRC observed a marked decline in “communication and collaboration between DOL and SSA regarding a common occupational database.” *Id.*

¹⁹⁶ *Id.* at 163.

¹⁹⁷ *See supra* note 21.

¹⁹⁸ *See* CHANGING ECONOMY, *supra* note 21, at 161, 163.

¹⁹⁹ *See id.* at 168. There may be political obstacles to agency collaboration on a project, which could significantly alter the nature and scope of millions of disability determinations in an enormous social welfare program. The political context surrounding the recently enacted health care legislation reflects unprecedented polarization between the political parties on health and social policy. *See* William A. Galston, *Party Polarization in the Health Care Debate*,

Given public demand for budgetary restraint and efficient government, which acquire additional importance in times of economic recession and slow economic growth, duplication in government should be prevented. Therefore the development of parallel, possibly redundant, occupational information systems, one for general purposes termed O*NET and the other tailored to the needs of [the] SSA, is of concern to taxpayers. In addition dual data collection processes would seem unnecessarily expensive . . . There are also some potential economies of scale to be derived from the development of a single occupational information system to be used by both agencies which may allow cost-sharing of resources in such functions as data collection and system maintenance.²⁰⁰

The NRC specifically recommended that the SSA and the DOL reconvene a joint task force to conduct “(1) an in-depth needs analysis of the occupational information required by the current disability determination process and (2) an interagency cost-benefit analysis and cost-sharing analysis of the additional resources that would be needed to make the O*NET suitable to the disability determination.”²⁰¹ Whether it updates the DOT, expands and modifies the O*NET,²⁰² or creates an

BROOKINGS INSTITUTION (Sept. 22, 2009) *available at* http://www.brookings.edu/opinions/2009/0922_polarization_galston.aspx (“[T]he ideological gap in Congress between Democrats and Republicans[] is at its highest level in more than a century.”). The SSA is an independent agency with a single commissioner removable only for cause. It is headed by Michael Astrue, a Republican appointee who served in the Reagan and George H.W. Bush administrations before appointment by President George W. Bush to a six-year term ending in 2013. *See* Soc. Sec. Admin., Press Office: Michael J. Astrue, AM. FED. OF GOV. EMPS. (last visited Feb. 27, 2011), <http://www.afge.org/Index.cfm?page=SocialSecurity>. The DOL is an executive cabinet-level department, headed by a Secretary who serves at the pleasure of President Obama. The Cabinet, WHITEHOUSE.GOV (last visited Oct. 10, 2010) <http://www.whitehouse.gov/administration/cabinet>. There is thus no inherent structural mechanism for facilitating effective collaboration between the SSA and executive departments. Indeed, in 1994, when Congress removed the SSA from the cabinet as a component of the Department of Health and Human Services and established it as an independent agency with only a single commissioner who could be removed only for cause, President Clinton questioned the Act’s constitutionality and, presumably, its consistency with the Article II executive power. *See* The American Presidency Project, William J. Clinton: Remarks on Signing the Social Security Independence and Program Improvements Act of 1994 (Aug. 15, 1994), <http://www.presidency.ucsb.edu/ws/index.php?pid=48980&st=&st1=#axzz1Jjj9dgEu>. The new scheme creates the potential for unusually minimal presidential involvement and direction in the policy and operation of the largest agency in the federal government.

²⁰⁰ CHANGING ECONOMY, *supra* note 21, at 161.

²⁰¹ *Id.* at 168.

²⁰² For discussion of potential methodological concerns with the O*NET, compare Robert J. Harvey, *The O*NET: Do Too-Abstract Titles + Unverifiable Holistic Ratings + Questionable Raters + Low Agreement + Inadequate Sampling + Aggregation Bias = (a) Validity, (b) Reliability, (c) Utility, or (d) None of the Above?* (2009),

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entirely new occupational taxonomy, it is clear that the SSA must take action to restore functionality to—and faith in—its disability determination system. As the Institute of Medicine presciently observed nine years ago, “barring some resolution, SSA will be left with no objective basis upon which to justify decisions concerning an individual’s capacity to do jobs in the national economy.”²⁰³

V. ALTERNATIVES TO THE CURRENT SYSTEM

In light of the deficiencies in the grid system; the complexity of some work-adjustment issues; and the conflicts, inconsistencies, and confusion within the Agency and among the courts, a case could be made for exploring alternatives to the present approach. While extended exploration of all of the legal and policy alternatives to the present manifestation of the disability standard is beyond the scope of this article, a series of alternatives that legislators and commentators have suggested are analyzed below.

A. AMENDMENTS TO THE ACT THAT ELIMINATE OR ALTER THE
WORK-ADJUSTMENT ASSESSMENT

As discussed above, the statutory disability definition does not create a precise, objective standard, but one that is socially constructed. Despite many of the program’s congressional framers’ best efforts, medical science has never been able to provide a reliable means to demonstrate the inability to function sufficiently and consistently in a work environment. The program more realistically embodies the recognition that there are circumstances in which individuals should be excused from the social obligation of work.²⁰⁴ Thus, the disability definition is a product of

<http://harvey.psyc.vt.edu/Documents/jobanalysis/2009.04.12.FINAL.RJHarvey.NASpaper1.pdf>
with Suzanne Tsacoumis, *Responses to Harvey’s Criticisms of HumRRO’s Analysis of the*
*O*NET Analysts’ Ratings* (2009),

<http://www7.nationalacademies.org/cfe/Response%20to%20RJ%20Harvey%20Criticism.pdf>.

²⁰³ DYNAMICS OF DISABILITY, *supra* note 3, at 9; *see, e.g.*, *Cunningham v. Astrue*, 360 Fed. Appx. 606, 614–16 (6th Cir. 2010) (stating that the 1991 DOT revised fourth edition’s “descriptions appear obsolete” and have been superseded by the O*NET; VE testimony based thereon does not amount to substantial evidence to support benefits denial).

²⁰⁴ *See* Jerry Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Value*, 44 U. CHI. L. REV. 28, 45 (1976) (“SSA disability adjudications should perhaps be viewed as really concerned with difficult value judgments—individualized exemptions from the moral, social and economic

political compromise and reflects a degree of social consensus.²⁰⁵ It includes some non-medical factors that are relevant to the ability to obtain, perform, and retain employment in the labor market, but it also excludes other potentially relevant factors. For example, the disability definition accounts for a claimant's age, education, and work experience, and the incidence of jobs to which claimants might make a work adjustment in the relevant labor markets. However, it excludes factors such as employer hiring practices and biases, local economic conditions, and the presence of actual job openings. The compromise inherent in the current system has stirred debates over whether its calculus of medical, vocational, and labor-market factors reflects the appropriate balance of considerations for determining disability from work in a manner that is consistent with American social values and norms.

As described above, in the 1980s, the Reagan administration introduced legislation that would have made the Act much stricter by eliminating consideration of all labor-market and vocational factors, and thus, the entire work-adjustment determination.²⁰⁶ Under such a system, claimants would presumably either satisfy step three of the current five-

constraints of the work ethic, determined by a complex of medical, vocational and environmental factors as they impinge on particular individuals.”). Thus, the notion that a person might be quite disabled, but still capable of doing some things for which others will pay, is not inconsistent with the Act's conception or recognition of a normative justification for an exemption from the social obligation of work. See Liebman, *supra* note 22, at 852 (“[V]irtually every disabled person can do something for which another person will pay. He is ‘totally’ disabled because the market value of his labor, given such alternatives as machines and healthy persons, is so low.”); see also Diller, *Dissonant Disability Policies*, *supra* note 23, at 1009 (disability benefit recipients “may be capable of working if they exceed social expectations”); BERKOWITZ, *DISABLED POLICY*, *supra* note 52, at 100 (noting that, while a person who suffered “loss of his arms and legs, his eye and his hearing[,] might have his trunk conveyed to a busy street corner and make a little money by selling such small objects as post cards, candy or cigars,” Congress would not require as much under the SSA's disability standard); Smith v. Califano, 637 F.2d 968, 971 (3d Cir. 1981) (“[S]tatutory disability does not mean that a claimant must be a quadriplegic or an amputee. Similarly, shopping for the necessities of life is not a negation of disability and even two sporadic occurrences such as hunting might indicate merely that the claimant was partially functional on two days. Disability does not mean that a claimant must vegetate in a dark room excluded from all forms of human and social activity.”); Butler v. Flemming, 288 F.2d 591, 594 (5th Cir. 1961) (“I do not interpret the Act to apply only to the totally helpless and bedridden nor to those at death's door.”).

²⁰⁵ See Capowski, *supra* note 23, at 374–75; Liebman, *supra* note 22, at 852–53.

²⁰⁶ See SUBCOMM. ON SOC. SEC. OF HOUSE COMM. ON WAYS & MEANS, 97TH CONG., 1ST SESS., REAGAN ADMINISTRATION DISABILITY PROPOSALS 3–13 (Comm. Print 1981). For a contemporary call to consider reviving this proposal, see David H. Autor & Mark G. Duggan, *The Growth in the Social Security Disability Rolls: A Fiscal Crisis Unfolding*, 20 J. ECON. PERSP. 71, 92–93 (2006) [hereinafter Autor & Duggan, *Growth in Social Security*].

step process or be denied benefits. As also discussed, in the 1960s, legislators introduced bills to make the Act more inclusive by eliminating the work-adjustment assessment and employing an occupational standard of disability.²⁰⁷ Under such a standard, claimants who could prove an inability to perform past relevant work at step four of the process would be determined disabled. Each of these ideas has serious flaws or obstacles.

1. Amendments to Simplify Work-Adjustment Assessments by Restricting Eligibility

First, the Reagan administration's proposal in the 1980s would have imposed a non-individualized "average person" concept on the program, which Congress and the Agency eschewed from its inception.²⁰⁸ It would have relied entirely on presumed employment-related reactions to various medical-impairment findings regardless of substantial employment-related differences in vocational factors such as age, education, and work experience, as well as any relevant labor-market realities. In addition, it would have failed to evaluate medical differences in physical and mental RFC, and would not have considered pain, fatigue, and other potentially debilitating subjective symptoms that cannot be as effectively measured through objective tests and exams, except to the extent such symptoms were part of a listing.²⁰⁹ On a more basic level, it would have moved the

²⁰⁷ See *supra* note 88.

²⁰⁸ See STAFF OF THE HOUSE SUBCOMM. ON ADMIN. OF THE SOC. SEC. LAWS, 86TH CONG., DISABILITY INSURANCE FACT BOOK 23 (1959) ("The law does not authorize the use of a rating schedule or the adoption of an 'average man' concept of total disability. The question in every case is whether the individual in spite of his impairment has sufficient capacity to function so that considering his age, education and experience, he is able to engage in any substantial gainful activity." (quoting DEP'T OF HEALTH, EDUC. & WELFARE, DISABILITY AND SOCIAL SECURITY (1958))); *supra* notes 60–68 and accompanying text; see also MASHAW, BUREAUCRATIC JUSTICE, *supra* note 17, at 75 (explaining inapplicability of "average person" concept to SSA disability program).

²⁰⁹ See *supra* notes 53–59 and accompanying text; *supra* note 131; see also PAIN AND DISABILITY, *supra* note 89, at 11 ("Pain is inherently subjective; there are no thoroughly reliable ways to measure it; and the correlation between the severity of pain and the level of dysfunction is imperfect."). The courts have recognized that at a certain, albeit difficult to quantify, point it is reasonable for society to excuse workers from enduring further pain, suffering or substantial discomfort in the job market. In a series of early cases shortly after the Act's passage, courts rejected Judge Learned Hand's "now famous aphorism" in a case under the War Risk Insurance Act, that "[a] man may have to endure discomfort or pain and not be totally disabled; much of the best work of life goes on under such disabilities." *Page v. Celebrezze*, 311 F.2d 757, 762 (5th Cir. 1963) (quoting *Theberge v. United States*, 87 F.2d 697, 698 (2d Cir. 1937)). In *Page*, the Fifth Circuit observed that

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program even “further away from a concept of disability geared towards differentiating between those who can or cannot work.”²¹⁰

Second, this proposal would have had negative distributive consequences on the most economically vulnerable segments of the disabled population: older, less-educated, and less-skilled claimants.²¹¹ Lower-income claimants would have also been disproportionately disadvantaged based on their inclusion in the above groups and due to disparate access to the healthcare resources necessary to establish listing-level severity from required medical procedures and testing or the requisite documented treatment histories.²¹² Some racial minority groups and female claimants, who already confront inexplicably disparate outcomes in the adjudicative process,²¹³ would have suffered additional

the notion that pain must be endured, that pain, no matter how severe or overpowering, is not disabling unless it will “substantially aggravate” a condition, is “contrary to the standard announced in” cases from this and other Circuits since “the purpose of much social security legislation” including this Act, “is to ameliorate some of these rigors that life imposes.”

Id.; see generally Jon C. Dubin, *Poverty, Pain and Precedent: The Fifth Circuit’s Social Security Jurisprudence*, 25 ST. MARY’S L.J. 81, 112–16 (1993) (analyzing judicial and regulatory history and treatment of pain in SSA disability programs).

²¹⁰ Capowski, *supra* note 23, at 374.

²¹¹ See *id.* at 374 n.201.

²¹² See Peter V. Lee, Sheri Porath & Joan E. Schaffner, *Engendering Social Security Determinations: The Path of A Woman Claimant*, 68 TUL. L. REV. 1477, 1521 (1994) (“Poor claimants, as well as increasingly many working-class claimants, are not likely to have the financial resources to establish an ongoing relationship with a physician of the type envisioned by the SSA regulations. Often they can only afford to go to a public clinic where physicians are not likely to have the same detailed knowledge of the patient’s condition that would be expected of a private doctor. The clinic physician who sees a claimant once may not, for example, be able to describe adequately how a particular medical ailment uniquely affects the claimant’s ability to function. Doctors who are unfamiliar with a patient’s medical history may be less likely to perform diagnostic tests, which can be important to the claimant seeking to build a record of objective medical evidence of her impairment. Additionally, when there is no long-term relationship between a claimant and a physician, the testimony or reports of the physician can be more easily discredited by decisionmakers in the disability determination process.” (citations omitted)).

²¹³ See Elaine Golin, Note, *Solving the Problem of Gender and Racial Bias in Administrative Adjudication*, 95 COLUM L. REV. 1532 (1995); U.S. GEN. ACCOUNTING OFFICE, SOCIAL SECURITY: RACIAL DIFFERENCE IN DISABILITY DECISIONS WARRANTS FURTHER INVESTIGATION 5 (1992), available at <http://archive.gao.gov/d32t10/146566.pdf> (“GAO recommends that the [SSA] Commissioner . . . investigate the reasons for the racial difference in allowance rates . . . and that the Commissioner act to correct and prevent any unwarranted disparities.”); see also U.S. GEN. ACCOUNTING OFFICE, SSA DISABILITY DECISION MAKING: ADDITIONAL MEASURES WOULD ENHANCE AGENCY’S ABILITY TO DETERMINE WHETHER RACIAL BIAS EXISTS (2002), available at <http://www.gao.gov/new.items/d02831.pdf> (finding that “[t]he steps SSA has taken over the last decade have not appreciably improved the agency’s

disparate ineligibility due to their greater inclusion in many of the categories above.²¹⁴

Finally, this proposal would have taken a standard touted for its unusual toughness and would have made it even more restrictive without responding to any documented or perceived excess in the system.²¹⁵ Indeed, the present SSA Commissioner recently underscored the discrepancy between the public and political perception of the disability standard's strictness, and the reality of the standard. As he explained, "it is a *very* tough standard; and you can argue about whether it should be the standard or not but I am stuck with it."²¹⁶ The degree of disability required under the Social Security Act has been characterized as "extreme in comparison to that required in disability insurance programs in other countries."²¹⁷ Furthermore, although the standard has been labeled as

understanding of whether . . . racial bias exists in its disability decision-making process"). For discussion of gender disparities, see Lee et al., *supra* note 212, at 1524 (concluding that the disability process "is based on male research models and . . . does not account for differences that may exist between men and women, leaving medical advisors with inadequate information about women's health issues"); THE EFFECTS OF GENDER IN THE FEDERAL COURTS: FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE (July 1993), *reprinted in* 67 S. CAL. L. REV. 857, 869–70 (1994) ("[T]he Advisory Committee concluded that many of the 'facially neutral' aspects of the SSA determinations may have gendered impacts—given current social expectations and roles of women and men, and moreover, that not all women are treated equally; race, class, and ethnicity may further disable women claimants.").

²¹⁴ See generally D. STANLEY EITZEN, MAXINE BACA ZINN & KELLY EITZEN SMITH, SOCIAL PROBLEMS 184–219 (11th ed. 2008) (describing disproportionate representation of racial minorities and women living in poverty, without access to adequate health care, and with less adequate educational opportunities); see also Capowski, *supra* note 23, at 374 n.201 (describing anticipated harm to African Americans from Reagan's proposal).

²¹⁵ One administrative law judge has argued that the statutory disability standard is too lenient because, among other grounds, it authorizes "a nonsequitur"—if a person can do sedentary work it should be impossible to find that he or she is disabled. See John M. Meisburg, Jr., *Ten Ways to Improve the Social Security Disability Law and Save Billions of Dollars*, 47 FED. LAWYER 38, 40 (2000). This position ignores that the Act incorporates adaptability considerations based on the confluence of age and other adverse statutory vocational factors as well as a job incidence requirement. See Robert E. Rains, *Debating Disability Design: A Response*, 47 FED. LAWYER 39, 43–45 (2000) (challenging Meisburg's assumptions and noting that Meisburg supplies no data, study or suggestion that the work adjustment and job incidence presumptions based on the mix of vocational factors in the sedentary grid rules are too generous).

²¹⁶ "Failing the Disabled," *Investigation: Disability Benefits System Harbors Culture of Denying Help to Even the Most Unfit to Work*, CBS NEWS (Jan. 15, 2008), http://www.cbsnews.com/stories/2008/01/15/cbsnews_investigates/main3718129.shtml (emphasis in original verbal statement).

²¹⁷ Weber, *Disability Rights*, *supra* note 23, at 601; see ERKULWATER, *supra* note 22, at 236–38; *supra* note 79; see generally RENO, OUT OF SYNC, *supra* note 189, at 9–10 (noting the

“strict” since its inception, virtually every congressional amendment to the substantive standard—from the 1967 amendments to the present, with the exception of the 1984 Disability Benefits Reform Act²¹⁸—has imposed

significantly greater expenditures of gross national product on disability benefit programs in European countries notwithstanding the presence of a much wider variety of expensive European safety net alternatives such as general assistance welfare benefits, more expansive unemployment benefits, and universal health care, all of which lessen the need for disability benefits).

²¹⁸ For analysis of the unique political circumstances that motivated the 1984 Disability Benefits Reform Act and the public outcry against the perceived excesses of the Reagan administration’s program to massively reduce the disability roles, see Schweiker v. Chilicky, 487 U.S. 412, 414–19 (1988); SUSAN G. MEZEY, *NO LONGER DISABLED: THE FEDERAL COURTS AND THE POLITICS OF SOCIAL SECURITY* (1988). Some recent studies attribute a rise in disability benefit awards over the past few decades to perceived substantial liberalization of the substantive standards for pain and mental impairments from the 1984 Reform Act. See, e.g., DAVID H. AUTOR & MARK DUGGAN, *SUPPORTING WORK: A PROPOSAL FOR MODERNIZING THE U.S. DISABILITY SYSTEM* 14–15 (Dec. 2010), available at www.brookings.edu/papers/2010/12_disability_insurance_autor.aspx; Perry Singleton, *The Effective Target of the Social Security Disability Benefits Reform Act of 1984* 1–2 (Ctr. for Policy Research, Working Paper No. 119, 2009), available at <http://ssrn.com/abstract=1521565>. While a fuller analysis of this assertion is beyond the scope of this article, this cause and effect suggestion appears questionable. For example, as to the pain standards, long before the 1984 Reform Act amendments, several U.S. Courts of Appeal had held that subjective pain could be disabling under the Act. See Dubin, *Poverty, Pain and Precedent*, *supra* note 209, at 114–15 & nn.160, 164 (collecting cases). The Reform Act’s pain standard clarified the connection between subjective pain symptoms and the requirements of objective medical proof by adopting an interim standard (now permanent) establishing that “pain or other symptoms shall not alone be conclusive evidence of disability . . . ; there must be medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of a medical impairment . . . which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all evidence required to be furnished . . . , would lead to a conclusion that the [claimant] is under a disability.” BLOCH, *BLOCH ON SOCIAL SECURITY*, *supra* note 52, § 1.8 (citation omitted). Both Congress and the Courts perceived the Reform Act’s pain standard as essentially codifying both agency pain regulations and case law prior to the 1984 Act. Bloch, *Medical Proof*, *supra* note 22, at 206 n.105 (citations omitted). The evaluation of mental disability is more complex. While the Act authorized disability based on mental impairments from its inception, the Agency, from 1978 to the early part of 1983, pursued an “illegal” “clandestine policy” to deny benefits to claimants whose mental impairments did not meet the mental listing criteria at step three of the five-step sequential evaluation process without considering whether claimants’ mental functional limitations precluded actual work performance at steps four and five. See *Bowen v. City of New York*, 476 U.S. 467, 474–75 (1986). It is true that Congress, through the 1984 Reform Act, imposed a temporary moratorium on mental disability terminations and a requirement that the agency promulgate updated mental listings and eligibility criteria in part in response to the Agency’s temporary illegal policy. See *Social Security Disability Reform Act of 1984*, Pub. L. No. 98-460, § 5(a), 98 Stat. 1805 (1984) (“The revised criteria . . . shall be designed to realistically evaluate the ability of a mentally impaired individual to engage in substantial gainful activity in a competitive workplace environment.”). However, it is not clear that the 1984 Act, coupled with the additional statutory and regulatory eligibility restrictions since 1984, have meaningfully

further limitations on eligibility.²¹⁹ The Agency has also further restricted disability eligibility through rulemaking and has specifically curtailed or proposed future restrictions on vocational and labor-market factors in a variety of ways in the past two decades.²²⁰

Thus, it is not surprising that a significant percentage of claimants who obtain benefits die within two years of receiving benefits.²²¹ In one study, almost half of the disability recipients either died or reached the retirement age of sixty-five by the end of the study's six-year period.²²² Even the vast majority of those who are found ineligible for disability

expanded mental disability standards beyond the *lawful* requirements in effect prior to 1984. There are a number of explanations for disability benefit program expansion and increased applications other than significant substantive eligibility liberalization. See NATIONAL ACADEMY OF SOCIAL INS., REPORT OF THE DISABILITY POLICY PANEL, BALANCING SECURITY AND OPPORTUNITY: THE CHALLENGE OF DISABILITY INCOME POLICY 6–7, 59–71 (Jerry L. Mashaw & Virginia P. Reno eds., 1996) (identifying causes of program growth, including the elimination or reduction of other benefit programs for the disabled and poor; declining access to quality ongoing and preventive health care for low-wage workers; transformations in the low wage economy; recurrent economic recessions; a rise in the eligible age and demographic populations; community-based alternatives to institutional care for mentally ill claimants; outreach efforts to disabled homeless persons; state and local requirements that persons medically disabled from state and local public benefit work requirements apply for federal disability benefits; and technological, scientific, medical and psychiatric diagnostic advances that more readily reveal impairments and their severity, among other reasons).

²¹⁹ See *supra* note 95. For a discussion of the ways the disability standard was expanded prior to 1967 in the period between 1960 and 1965, see *supra* note 52.

²²⁰ See, e.g., 68 Fed. Reg. 51,153, 51,159 (Aug. 26, 2003) (codified at 20 C.F.R. §§ 404.1560(b)(3), 416.960(b)(3) (2003)) (explaining that the SSA may deny claims based on ability to perform past relevant work even if such work no longer exists in the American labor market); *Barnhart v. Thomas*, 540 U.S. 20 (2003) (sustaining agency denial based on ability to return to job as elevator operator, even though the job no longer exists in significant numbers in the economy); 65 Fed. Reg. 42,772, 42,774, 42,780 (July 11, 2000) (codified at 20 C.F.R. §§ 404.1520(b), 404.1592(d)(2)(ii)–(iii) (2003)) (precluding eligibility for disability insurance claimants with disabling impairments who commence substantial gainful activity within twelve months of disability onset and preventing commencement of a trial work period within that first twelve month period); *supra* note 149 (deleting reference to a “highly marketable skills” requirement for finding transferable skills for older workers and thus restricting eligibility for such workers); see also *supra* note 146 (discussing SSA proposed regulation to raise the grid’s age cutoffs to restrict eligibility); *supra* note 147 (discussing SSA proposed regulation to restrict grid eligibility by expressly treating persons vocationally disadvantaged by both illiteracy and inability to communicate in English as if they were disadvantaged by only one such restriction).

²²¹ See Weber, *Disability and the Law of Welfare*, *supra* note 23, at 896 nn.45–46 (citing studies that show that one-eighth of claimants who obtained disability insurance in a twelve-month period died within two years and that “[t]he proportion of individuals dying within the first six months on [the program] is fourteen times that of persons in their first six months on the Social Security old-age insurance program”).

²²² See Diller, *Dissonant Disability Policies*, *supra* note 23, at 1071 n.310 (citation omitted).

benefits remain out of the workforce.²²³ Indeed, even commentators who have recently called for a reconsideration of the the 1980s era restricted medical disability concept to reduce disability benefit program growth acknowledge that it would harm “deserving claimants.”²²⁴

In light of the disability standard’s strictness, the SSA should also avoid less overt attempts to restrict the scope of labor-market and vocational factors through regulatory “reengineering” or other attempts to contract eligibility through altered work-adjustment assumptions. The 1994 “redesign” or “reengineering” proposal called for replacing the grid and the current fifth step’s work-adjustment approach with an assessment of a “baseline” of occupational demands that describes a range of work-related functions for claimants who have not reached “near retirement age.”²²⁵ The described functions would represent a claimant’s ability to perform work that does not require prior skill or formal job-training and that exists in significant numbers in the national economy.²²⁶ This proposal should be rejected because it would likely restrict eligibility of deserving, non-“near retirement age” claimants by substantially contracting consideration of age, education, and work experience.²²⁷

²²³ *Id.* at 1071 n.311 (citation omitted).

²²⁴ See Autor & Duggan, *Growth in Social Security*, *supra* note 206, at 92–93.

²²⁵ See *supra* note 138.

²²⁶ See *id.*

²²⁷ Matthew Diller has argued that the reengineering proposal would “essentially end consideration of vocational factors such as age, education, and work experience in the disability determination process.” Diller, *Dissonant Disability Policies*, *supra* note 23, at 1049–50 n.211; see also *id.* (“[I]t is difficult to see how any such baseline could be an accurate measurement of the ability of both older workers with few skills and little education and younger workers with significant skills or advanced education.”). Diller also argued against an earlier draft of the reengineering proposal that would have tied the proposed “baseline” to “any reasonable accommodations that employers are expected to make under the Americans with Disabilities Act [‘ADA’].” *Id.* at 1050. Diller pointed out the functional obstacles to any such ADA-predictive assessment. Because the reasonableness of any accommodation is employer-specific based on a determination of potential undue hardship from the accommodation, it cannot be determined outside of its specific context. See *id.* The Supreme Court, relying on present SSA policy as opposed to the yet unapproved reengineering proposal, has largely adopted Diller’s position. See *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 803 (1999) (“[T]he matter of ‘reasonable accommodation’ may turn on highly disputed workplace-specific matters; and an SSA misjudgment about that detailed, and often fact-specific matter would deprive a seriously disabled person of the critical financial support the statute seeks to provide.”).

2. Amendments to Simplify Work-Adjustment Assessments by Expanding Eligibility

The 1960s-era congressional bills that sought to add an occupational disability standard to the disability insurance program would have significantly expanded eligibility while simplifying the adjudicative process by eliminating the work-adjustment assessment.²²⁸ Under the 1960s-era proposals, claimants who demonstrated an inability to perform past relevant work would be deemed disabled.²²⁹ At present, this proposal would confront a series of functional, conceptual, and political obstacles. First, it is likely inconsistent with the American ethos on job mobility assumptions outside of one's social or economic class.²³⁰ With an occupational disability standard, persons unable to perform their past highly skilled, highly remunerative work would be excused from the social obligation of making adjustments to a wider range of less demanding, less esteemed, and less remunerative work than those whose past work was unskilled and generic.²³¹

Second, with the creation of the SSI program in 1974, claimants could establish entitlement to benefits without any past relevant work.²³² Thus, an occupational standard would either provide a much easier path to benefits for claimants without past work, or it would still require a work-adjustment process for this category. For example, a large number of impaired seventeen-year-old minors who have never worked, but who have been previously found eligible for SSI benefits as children, would be

²²⁸ See *supra* note 88 (describing House Reports 805 and 911 of the Eighty-Ninth Congress).

²²⁹ *Id.*

²³⁰ See PAIN AND DISABILITY, *supra* note 89, at 33 (comparing cultural conceptions of disability based on social status and prestige-focused occupational standards in Germany and the Netherlands with “[t]he very stringent [SSA disability] definition [that] expresses the dominant American ethos of the primacy of work”); STONE, *supra* note 22, at 61–68 (describing class and status-based cultural assumptions in Germany’s occupational disability standard).

²³¹ See *supra* note 135 (noting that claimants will be deemed capable of performing past relevant work if they can perform their prior work as it is generically performed in the economy, even though they are incapable of performing the specific tasks of their former jobs). Thus, in the SSA disability programs, a department store clerk who is fired because of a hip impairment, which precludes performance of the required task of climbing a ladder to post a window display, might be denied benefits. Such a claimant could still be deemed capable of performing past-relevant-department-store-sales-clerk work as that work is “generically” performed in the economy. On the other hand, an airline pilot with an inner ear impairment that precludes flying may be excused from the further obligation to work.

²³² See generally 20 C.F.R. § 416.920(g)(1)(2011).

presumptively eligible for adult benefits upon their eighteenth birthdays if their impairments remained severe and the SSI work-adjustment step were eliminated by an occupational standard.²³³ Such a proposal would undoubtedly confront significant political opposition.

Other proposals for loosening the strict eligibility standards or expanding benefits for other persons precluded from the workforce would also likely confront major political opposition. Lance Liebman has long called for a more inclusive disability standard based on worker expectations and a private insurance model.²³⁴ Under Liebman's approach, the standard "should cover all cases in which a medical cause leads to total unemployment, even if the claimant might be put to work by an ideal labor market."²³⁵

Mark Weber has called for providing benefits for partial or temporary disability in a manner similar to the disability-benefits programs in other countries and in other programs in the United States.²³⁶ Weber urges a particular focus on reducing the severity of the disability standard with respect to desperately low-income SSI applicants who can no longer obtain life-support benefits from the United States' safety net of residual welfare and general assistance programs, which have been discontinued or reduced over the past two decades.²³⁷ Matthew Diller has argued that social policy should recognize the reality that disability-benefits programs now serve a residual sustenance or life support function for society's most

²³³ See generally 20 C.F.R. § 416.987 (2011) (describing the process for the mandatory re-evaluation under adult criteria of persons receiving SSI benefits as children upon turning 18).

²³⁴ Liebman stated that,

[t]o visualize Social Security disability protection as a function of worker expectations is to see a way through the *Kerner* problem. If an individual bought private insurance against total medical disability and then became so sick that he could not do his former job, would he not expect to be paid—even if he could still perform some work but could not obtain a job? What point would insurance have, if not to pay when sickness leads to zero income? The insured might be less "needy" because of his theoretical capacity to work, but the point of the insurance would surely be income continuation if labor could not produce cash. We would be outraged if the small print in a Mutual of Omaha policy denied payments to Mr. Kerner. Because the United States, in its Social Security program, has tried to be Mutual of Omaha, judicial interpretation of the statutory ambiguity should mirror adjudication of a claim against a private insurer.

Liebman, *supra* note 22, at 854–55.

²³⁵ *Id.* at 855.

²³⁶ Weber, *Disability and the Law of Welfare*, *supra* note 23, at 943–51.

²³⁷ See *id.* at 950–55; see generally *Moore v. Ganim*, 660 A.2d 742, 755 n.39 (Conn. 1995) (noting that only 23 states still had general-assistance residual-welfare programs and many of those remaining programs had been significantly limited by the mid-1990s).

employment-challenged individuals; this is problematic, he argues, because not all of the most employment-challenged individuals have a medical disability as defined in the Act.²³⁸ Thus, according to Diller, the government should reconsider the universal guaranteed-income and negative-income tax proposals of the late 1960s and early 1970s, which would have provided a minimum subsistence benefit to all unemployed and low-income persons and would have obviated the need for a disability-benefit residual safety net.²³⁹

Without evaluating the merits of these proposals, only the Diller proposal would likely simplify the disability programs' work-adjustment adjudication process. As to Diller's call for a federal general-welfare program, however, it bears recognition that the creation of new or significantly expanded income-support programs in our present economic and political climate is unlikely in the extreme.²⁴⁰ It is telling that even before our social welfare choices became further compromised by the recent entrenched recession, Republicans and Democrats alike were celebrating the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 as the "end [of] welfare as we know it."²⁴¹

²³⁸ Diller, *Dissonant Disability Policies*, *supra* note 23, at 1075–80.

²³⁹ *See id.*; *see generally* BRIAN STEENSLAND, *THE FAILED WELFARE REVOLUTION: AMERICA'S STRUGGLES OVER GUARANTEED INCOME POLICY* (2007) (describing the guaranteed income proposals of the late 1960s to early 1970s and reasons for their legislative defeat).

²⁴⁰ Diller reached a similar conclusion about the unlikely political success of his own proposal over a decade ago. *See* Diller, *Dissonant Disability Policies*, *supra* note 23, at 1080 n.349. A proposal to convert disability benefits based on earnings to a system of general welfare benefits based on subsistence considerations would also engender significant political opposition from wage earners. *See supra* note 29.

²⁴¹ *See, e.g.*, Bill Clinton, *How We Ended Welfare, Together*, N.Y. TIMES, Aug. 22, 2006, at A23; Ron Haskins, *Welfare Reform, Success or Failure? It Worked*, BROOKINGS INSTITUTION (Mar. 15, 2006), available at <http://www.aphsa.org/publications/Doc/PP/0603ART1.pdf>. Among other provisions, PRWORA ended the Aid to Families with Dependent Children (AFDC) entitlement program and replaced it with the Temporary Assistance to Needy Families (TANF) program. TANF includes mandatory work requirements, a five-year lifetime time limit on benefits, and time frames and incentives for states to have claimants engaged in work activities among other new restrictions. *See generally* WEAVER, *supra* note 28 (describing PRWORA's provisions).

B. PROPOSALS TO IMPOSE A “WELFARE REFORM” MANDATORY-
WORK-INCENTIVES MODEL

A variety of suggestions have urged amending the disability benefits programs by adding stronger or mandatory work incentives and time limits, like those at the core of PRWORA’s “welfare reform” initiatives.²⁴² Similar to PRWORA’s treatment of the Temporary Assistance for Needy Families (TANF) program, this would presumably entail active supervision of claimants by Agency and professional-rehabilitation personnel, with the goal of maximizing return to the workforce and reducing the amount of benefits received. Apart from perceptions of the success of TANF’s time limits and mandatory work requirements,²⁴³ some

²⁴² See, e.g., Paul Armstrong, *Toward a Unified and Reciprocal Disability System*, 25 J. NAT’L ADMIN. L. JUDGES 157, 171 (2005) (“[C]hanging attitudes about the possible productivity of disabled individuals, induced in part by the rhetoric of the ADA supporters and their repeated use of successfully productive examples of disabled individuals, together with the experience of declining caseloads of former AFDC recipients under the mandatory work requirements of TANF, may lead to public support for mandatory vocational evaluations and work referrals for disability applicants and recipients.”); *Social Security Disability: Management Action and Program Redesign Needed to Address Long-Standing Problems, Testimony before the Subcomm. on Social Security of the House Ways and Means Comm.*, 104th Cong. (1995) (statement of Jane L. Ross, Director of Income Security Issues for the Health, Education, and Human Services Division), <http://www.gao.gov/cgi-bin/getrpt?T-HEHS-95-233> (“Time limits are intended to set the expectation that disability benefits are to be considered temporary. This expectation is intended to encourage beneficiaries to take some responsibility, such as obtaining treatment and pursuing rehabilitation, to overcome their disabling conditions and return to productive employment.”).

²⁴³ See *supra* note 242. TANF’s “success” is dependent on a frame of reference. If success is measured by reductions from the AFDC/TANF welfare roles or the vindication of a newer emerging social consensus on the unworthiness of impoverished single mothers with children for relief from work obligations, TANF has been quite successful. On the other hand, if success is measured by long-term, significant reduction in poverty and extreme poverty and improvement in the quality of former recipient families’ lives, a declaration of success is at best premature and at worst patently inaccurate. See SHARON PARROT & ARLOC SHERMAN, PROGRAM RESULTS ARE MORE MIXED THAN OFTEN UNDERSTOOD (Aug. 17, 2006), available at www.cbpp.org/8-17-06tanf.htm. While TANF initially increased work activity by former AFDC single mothers, the 2000 economic slowdown again diminished work participation. *Id.* at 1. Further, there is a greatly increased number and percentage of persons lacking either welfare or work, and of persons, especially children, living in extreme poverty (defined as living below one-half of the poverty line). *Id.* at 1. The percentage of families eligible for cash assistance who are receiving benefits has also diminished from 80% in the early 1990s to only 48% in 2002. *Id.* at 2; see also Peter B. Edelman, *Changing the Subject from Welfare to Poverty to a Living Income*, 4 N.W. J.L. & SOC. POL’Y 14, 18–23 (2009) (citing similar studies making similar findings and concluding that “TANF remains a deeply flawed program”); see Liz Schott, *Summary of Final TANF Rules: Some Improvements Around the Margins* (Feb. 20, 2008), available at www.cbpp.org/2-20-08tanf.htm. See generally Joel Berg, *Welfare Reform: The Promise Unfulfilled*, 11 J. GENDER RACE & JUST. 47, 47–48 (2007) (“[J]udging the success of

commentators and public policy bodies have viewed the enactment of the Americans with Disabilities Act (ADA) of 1990²⁴⁴ as reflecting a recognition of a shift in disability social policy away from income supports to a paramount focus on entering or returning to the workforce by surmounting obstacles to work.²⁴⁵ The availability of cash assistance is perceived as an impediment to the ADA's work thrust.²⁴⁶

welfare reform solely by how many people leave welfare is a bit like judging the success of a hospital by how many people leave it, without differentiating between how many people leave it cured, ill or dead . . . [T]his issue has become the social policy equivalent of Bush's 'mission accomplished' . . ."). New rules implementing state work participation rates and time limits under TANF also provide some new incentives to states to terminate assistance to disabled TANF applicants who have not yet been found eligible for disability benefits and are not in work activities, including those applicants in the SSA's labyrinthine disability benefits application process. See Schott, *supra*.

²⁴⁴ Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12,101–12,213 (2006)).

²⁴⁵ See, e.g., SOCIAL SECURITY ADVISORY BOARD, A DISABILITY SYSTEM FOR THE 21ST CENTURY 6 (Sept. 2006), available at <http://www.ssab.gov/documents/disability-system-21st.pdf> (“[W]e have heard widespread agreement that the current overall approach to disability is harmful to people with disabilities, is contrary to basic societal values, and in particular, contradicts the policies and values of the *Americans with Disabilities Act*.” (emphasis in original)); Edward Berkowitz, *Implications for Income Maintenance Policy*, in IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT 193, 195 (Jane West ed. 1996) [hereinafter Berkowitz, *Implications*] (“If we are to allow the ADA to set the tone for our disability policy . . . [w]e must create a climate in which people with disabilities expect to work and employers expect to hire them. The only way to do that is to change the rules for awarding SSI and SSDI benefits.”). Diller argues that the implicit or explicit assumption that the ADA disability discrimination protections in the workplace are necessarily inconsistent with the SSA's provision of disability benefits to persons not working is misguided. See Diller, *Dissonant Disability Policies*, *supra* note 23, at 1059–75. Because the disability standard more properly reflects an exemption from the social obligation to work as opposed to an objectively verifiable determination of complete inability to perform any work, there are circumstances in which a claimant can justifiably claim entitlement to benefits while still retaining belief in his or her ability to engage in some work activity. *Id.*; see also *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 803–07 (1999) (rejecting assertion of necessary inconsistency between ADA and disability benefits programs as would justify presumed judicial estoppel from one program to the other and citing examples that reflect lack of conflict). There are at least five explicit situations where a claimant could both claim an entitlement to benefits and a consistent belief in the ability to perform some work activity: 1) claimant is working (i.e. part-time or sheltered work) but is not performing and cannot perform SGA; 2) claimant's condition meets or equals a listing and inability to engage in SGA is merely presumed; 3) claimant fulfills “worn-out manual laborer” profile and non-adaptability to lighter work is presumed; 4) claimant can adjust to some other jobs but cannot adjust to a “significant number” of jobs based on the grid or individualized vocational testimony or evidence; or 5) claimant is participating in a trial work period or related eligibility preserving voluntary work incentive.

²⁴⁶ See Berkowitz, *Implications*, *supra* note 245, at 193–226.

Such mandatory “sink or swim”²⁴⁷ approaches to work incentives for disabled claimants are misguided for several reasons. First, they are predicated on the assumption of claimants’ largely voluntary withdrawal from the workforce. As Mashaw and others have explained, the strictness of the standard already in place, coupled with the modesty of benefit awards relative to wages, debunks that assertion.²⁴⁸ Second, the ADA has not yet created significantly expanded employment opportunities for persons with disabilities.²⁴⁹ The opportunities it may create are most likely to benefit persons with less medically and vocationally disadvantaged profiles than those found eligible for disability benefits.²⁵⁰

²⁴⁷ The disability programs currently contain a variety of voluntary work incentives such as a nine-month trial work period for disability insurance beneficiaries, a ticket to work program providing a voucher for professional rehabilitation and employment services and extended Medicare or Medicaid benefits while working, an expedited re-entitlement period, and an extended period of eligibility, among other incentives. See Barbara Samuels, *Post-Entitlement Issues and Benefit Terminations*, in *SOCIAL SECURITY DISABILITY CLAIMS: PRACTICE & PROCEDURE* §§ 29:3, 29:56–58 (2010) (available at WESTLAW SSDCPP database); see generally Diller, *Dissonant Disability Policies*, *supra* note 23, at 1067–68 (discussing proposal to strengthen voluntary work incentives “to promote the goals of the ADA without compromising the income support of the disability benefit programs”).

²⁴⁸ Mashaw writes:

Although Charles Murray [in *LOSING GROUND* (1984)] and others have popularized the myth of the modestly impaired migrating out of the workforce in pursuit of ever-more-available disability benefits, serious social science has completely discredited that claim The availability and real value of disability benefits were decreasing during much of the period that work disability was increasing. Furthermore, it is difficult to imagine that a person who can continue to work will instead leave work to seek disability benefits that pay (on average) one-third of the mean wage, require a six month waiting period for application, a two-year waiting period for medical benefits, and provide any benefit to fewer than one-half of those who apply.

Jerry L. Mashaw, 20 *J. HEALTH POL’Y & L.* 225, 226 (1995) (reviewing EDWARD H. YELIN, *DISABILITY AND THE DISPLACED WORKER* (1993)); see also RENO, *OUT OF SYNC*, *supra* note 189, at 7 (recognizing that, while “any wage-replacement system can be characterized as a disincentive to work to some degree . . . [disability] benefits are not a strong deterrent to work . . . [because] benefits and replacement rates are relatively modest,” anecdotal evidence shows people turn to disability benefits “only as a last resort,” and “empirical studies show people often remain on jobs after the onset of disability and many change jobs or continue looking for work before applying for benefits”); Weber, *Disability and the Law of Welfare*, *supra* note 23, at 911 (“[T]he prospect of benefits is not enough of an incentive to induce individuals to become disabled to obtain benefits.”); see generally *id.* at 630 (noting that SSI benefits pay only approximately 70% of the federal poverty level).

²⁴⁹ See Bagenstos, *ADA as Welfare Reform*, *supra* note 23, at 1017–19 (citing studies showing a small decline in employment participation by disabled persons since the ADA’s passage).

²⁵⁰ See Weber, *Disability and the Law of Welfare*, *supra* note 23, at 910 (noting that only the most medically and vocationally limited claimants are eligible for benefits and are thus less

Thus, it is more likely that such measures would have a deleterious impact on recipients of disability benefits, and would cause “unnecessary suffering, anxiety and turmoil” for a particularly vulnerable population.²⁵¹ Third, to the extent a mandatory-work-incentive model would require active supervision and discretionary management by vocational and rehabilitation professionals, the model would suffer from the greater unpredictability and inconsistency inherent in professional judgments and characteristic of the professional treatment model of benefactory agency administration.²⁵²

Finally, this approach to disability benefits would be expensive. While some persons advocated passage of the ADA as a way to reduce expenditures in the disability-benefits programs, Samuel Bagenstos has explained that more meaningful integration of disabled persons into the workforce, beyond the ADA’s initial, limited achievements, would require “massive ongoing public investments” in many other social welfare initiatives.²⁵³ This, according to Bagenstos, follows from the fact that, for a large number of people with disabilities, it is not the discriminatory acts of particular employers that keep them out of the workforce, but deep-rooted structural barriers—such as the lack of personal-assistance services, assistive technology, and accessible transportation, and, above all, the current structure of our health insurance system—that stand in the way of their employment.²⁵⁴ Without a fuller understanding of an alternative, work-supportive, social welfare safety net, and without the ability to

likely to be persons qualified for jobs for which reasonable accommodation may be required under the ADA since “qualification” requires ability to perform the jobs’ essential functions); see also Motoko Rich, *Disabled, but Looking for Work*, N.Y. TIMES, April 6, 2011, www.nytimes.com/2011/04/07/business/.../07disabled.html (“[O]ne question is: How many of these beneficiaries could work, given the right services and workplace accommodations? Social Security officials say relatively few.”).

²⁵¹ Schweiker v. Chilicky, 487 U.S. 412, 417 (1988); Diller, *Dissonant Disability Policies*, *supra* note 23, at 1073.

²⁵² See MASHAW, BUREAUCRATIC JUSTICE, *supra* note 17, at 26–29, 38 (describing a professional treatment model option for SSA disability program administration and concluding that “[o]utside some matrix of bureaucratic standards, routines, and structures, the vocational professionals’ decisional behavior might be both unpredictable and inconsistent. Simple delegation to professionals did not seem a responsible strategy”).

²⁵³ Bagenstos, *ADA as Welfare Reform*, *supra* note 23, at 1025.

²⁵⁴ Bagenstos, *ADA as Welfare Reform*, *supra* note 23, at 23; see also *id.* (“Antidiscrimination laws like the ADA are a singularly ineffective means of eliminating such structural barriers.”).

finance such an alternative,²⁵⁵ an analysis of such mandatory-work and rehabilitation proposals is categorically premature.²⁵⁶

VI. CONCLUSION: THE GRID SYSTEM: “MEND IT, DON’T END IT”

The grid has represented a positive and important development toward improving consistency and fairness in disability-benefits adjudications involving labor-market assessments, notwithstanding its considerable empirical, temporal, and structural deficiencies. It is a major advancement over the pre-grid, entirely ad hoc approaches of agency

²⁵⁵ The process of distinguishing between disability beneficiaries who are realistic candidates for rehabilitation and those who are not would also create significant decisional or adjudicative complexity and expense. It would also create “perverse” incentives for recipients to be found incapable of rehabilitation to avoid a classification that would result in time-limited, significantly delayed or otherwise restricted benefits, thereby likely inhibiting voluntary rehabilitation or labor market re-entry efforts. Diller, *Dissonant Disability Policies*, *supra* note 23, at 1073.

²⁵⁶ A recent proposal by David Autor and Mark Duggan calls for employers to purchase private disability insurance (PDI) with minimum contributions by employees, which would combine a mandatory-rehabilitation and work-accommodation-focused screening and diversion process for most disability insurance claimants with immediate resort to the existing SSA disability eligibility process for the limited group of obviously disabled persons who fall under the Agency’s compassionate allowance criteria and, after a period of at least twenty-one months, resort to the SSA disability insurance process for the other putative disability claimants who had been unsuccessful in the mandatory vocational rehabilitation and work-focused activities. See David H. Autor & Mark Duggan, *Supporting Work: A Proposal for Modernizing The U.S. Disability System* 5–7 (Dec. 2010) [hereinafter, Autor & Dugan, *Supporting Work*], available at www.brookings.edu/papers/2010/12_disability_insurance_autor.aspx; see also Peter Orszag, *Making Disability Work*, N.Y. TIMES, Dec. 9, 2010 (describing this program). This PDI coverage would provide vocational assistance, workplace accommodation, and limited wage replacement to employees. Autor & Duggan, *Supporting Work*, *supra*, at 18–24. Employers would have incentives to minimize disability applications because their premiums would increase based on higher disability rates. *Id.* at 26–27. This proposal does not seek to eliminate or alter the SSA disability programs’ work-adjustment criteria and methodology for claimants who ultimately seek SSA disability benefits at the “back end” of this process after the PDI period. *Id.* at 5. This proposal has garnered recent criticism as both unaffordable and potentially counterproductive for truly disabled persons. See Jagadeesh Gokhale, *Disability Insurance Must Be Restructured to Protect Vulnerable, Incentivize the Fit*, INVESTOR’S BUS. DAILY, Dec. 17, 2010, available at www.investors.com/NewsAndAnalysis/Article/557196/201012171838/Disability-Insurance-Must-Be-Restructured-To-Protect-Vulnerable-Incentivize-The-Fit.aspx (suggesting the Autor and Duggan PDI proposal would involve larger upfront costs, much longer delays and unnecessary impediments in qualifying for social security disability insurance benefits, and some hidden costs, and, if its assumptions about ultimate-benefit-cost-saving from such early rehabilitation-focused diversion actions were accurate, could be implemented more efficiently as an addition to the SSA disability insurance system than through a separate PDI bureaucracy).

adjudicators' intuition-based official notice and vocational experts' unguided supposition. Evaluation of suggested alternatives to the disability programs' labor-market work-adjustment process and grid system reveals that the proposed alternatives are either fundamentally misguided or politically unpalatable. Accordingly, the SSA should take a number of steps to preserve the grid's use and enhance its empirical and methodological foundation and integrity.

First, the Agency should adopt the National Research Council's recommendation that the DOL and the SSA collaborate on the development of an up-to-date and methodologically appropriate labor-market taxonomy that can provide empirical support for an updated grid.²⁵⁷ Second, because any such instrument will become obsolete in a dynamic and fluid labor market, these agencies should establish a mechanism for mandatory periodic—at least decennial—revisions that account for the inevitable and foreseeable labor market evolution.²⁵⁸ To the extent necessary, the grid should be updated based on such data. It is conceivable that an updated grid might be expanded to cover a larger range of circumstances than its present exertional scope, provided there are methodologically reliable and accurate data supporting inclusion of

²⁵⁷ This recommendation requires the assumption that vocational science is capable of sufficiently identifying and linking occupational traits, characteristics, skills, and worker profiles with jobs in the economy to permit reasonably supportable work-adjustment determinations. It assumes that these technical facts are not significantly more epistemically indeterminate than other scientific facts regularly decided by judges and other decisionmakers. See *In re: Japanese Electronic Products Litigation*, 631 F.2d 1069, 1079 (3d Cir. 1980) (finding that some complex technical issues are beyond the capacity of certain decisionmakers and noting that “[t]he law . . . does not contemplate scientific precision but does contemplate a resolution of each issue on a fair and reasonable assessment of the evidence and a fair and reasonable application of the legal rules”); see generally Scott Brewer, *Scientific Expert Evidence and Intellectual Due Process*, 107 YALE L.J. 1535, 1672–81 (1998) (arguing that decisionmaking in cases with complex scientific evidence is often beyond the epistemic competence of judges, juries, and other decisionmakers, and calling for epistemically competent expert decisionmakers in all such cases). At least one commentator has questioned whether vocational science can ever adequately support SSA work-adjustment determinations. See Public Comment from David F. Traver to SSA Office of Program Dev. and Research, Occupational Information Development Project, June 29, 2010 1–8, available at <http://ssaconnect.com/tfiles/OIDAP-Comments.pdf>. Greater exploration of this ultimate scientific and epistemic issue is beyond the scope of this article.

²⁵⁸ I recognize that the suggestion of any given time period for updating and revising a labor-market taxonomy is somewhat arbitrary. I have chosen decennial revision so that this process, which will also utilize Census Bureau statistics and data, can follow a census time line. The point is that unlike some aspects of the disability process, the Agency's work-adjustment assessment process will always and inevitably become obsolete when predicated on a static labor-market snapshot of an inevitably increasingly distant era. Cf. A NEW DOT, *supra* note 180, at 6 (recommending updating of DOL job data at least every five years).

other factors. Perhaps, for example, reliable data may permit these agencies to quantify and generalize certain non-exertional postural or manipulative limitations to a degree comparable to the exertional limitations in the grid. It is highly unlikely, however, that mental limitations can be quantified in a manner that comports with the grid's matrix of generalized work adjustment presumptions. Furthermore, the Agency's past attempts in utilizing mental-impairment findings and matrix rating-systems to ascertain claimants' presumptive ability to perform unspecified, unskilled work were discredited by medical professionals and the courts alike, and specifically condemned in a unanimous Supreme Court opinion.²⁵⁹ This history strongly counsels against removing mental limitations and other highly individualized and contextual non-exertional limitations from case-by-case assessments. As examined in a companion article,²⁶⁰ the grid's adjudicatory framework, if properly applied, can still provide consistent and non-arbitrary bases to circumscribe the labor-market work-adjustment assessment in mental-impairment and other non-exertional cases. The assessment should be informed by particularized vocational evidence on the extent of erosion of the grid's administratively noticed occupational bases attributable to these highly variable and individualized limitations.

Finally, it is manifest that, in updating the grid, the Agency must resist the temptation to which it has succumbed in virtually all substantive regulatory changes or proposals in the past few decades²⁶¹: to make its strict disability standard even less inclusive. In light of the substantially restricted safety-net alternatives and the depressed and constricted economy for the characteristically low-skilled disability-benefits claimant, the consequences of wrongfully denying disability benefits have never been greater.²⁶²

²⁵⁹ See *Bowen v. City of N.Y.*, 476 U.S. 467 (1986), *aff'g sub nom. City of N.Y. v. Heckler*, 742 F.2d 729 (2d Cir. 1984), *aff'g* 578 F. Supp. 1109 (E.D.N.Y.); see also *Mental Health Ass'n of Minn. v. Schweiker*, 554 F. Supp. 157 (D. Minn. 1982), *aff'd*, 720 F.2d 965 (8th Cir. 1983) (finding a Department of Health and Social Services policy, which presumed that persons whose mental impairment did not meet or equal listings of impairment could do unskilled work, to be a violation of the Social Security Act and "arbitrary, capricious, irrational, and an abuse of discretion").

²⁶⁰ See Dubin, *Gridlock*, *supra* note 3.

²⁶¹ See, e.g., *supra* note 220 (describing SSA regulatory and proposed regulatory changes from 2000 to 2009).

²⁶² See *supra* notes 237–238 and accompanying text; *supra* notes 241, 243. The Supreme Court's mid-1970s assumption that low-income persons denied disability benefits can nonetheless avoid deprivation of "the very necessities of life" by obtaining welfare benefits is no

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longer palatable after the 1990s era of “ending welfare as we knew it.” *Cf.* Mathews v. Eldridge, 424 U.S. 319, 342–43 (1976).