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Scapegoating Social Security Disability Claimants (and the Judges Who Evaluate Them)

Jon C. Dubin* and Robert E. Rains †

Last year, an account of an Administrative Law Judge (ALJ) who awarded social security disability benefits in 99% of the cases before him produced a feeding frenzy in conservative media about renegade ALJs and the need to curtail the Social Security Administration's (SSA) disability program.¹ This development came on the heels of a variety of similar articles that: (1) criticized the rise in disability benefit rolls; and (2) contained the supposition that the increase is largely a function of recent changes in the substantive eligibility standards that have authorized benefits for new, more subjective and supposedly less worthy medical conditions like mental illness and pain.²

A recent article by Professor Richard Pierce in the Cato Institute's Fall 2011 issue of *Regulation* fuses these two strands of thought and media anecdotes.³ Pierce asserts that the SSA ALJs, emboldened by the discretion inherent in the new and increasingly subjective standards for disability based on "nonexertional" impairments and limitations,⁴ such as mental illness and pain, are giving away benefits to undeserving claimants. And they are doing so without any meaningful check on their actions. Pierce then suggests that by according ALJs essentially unreviewable policy-making authority, the system is unconstitutional. He further posits that the primary value of ALJ hearings, over the paper file evaluations that occur at earlier stages of the disability decision-making process, is to provide the opportunity to evaluate the claimant's demeanor. This purpose, he believes, is significantly overrated.

Pierce also cites as evidence of inaccuracy or untrustworthiness the significant variation in ALJ decision rates and what he characterizes as the high and increasing rate at which ALJs reverse agency denial decisions. Therefore, rather than seeking to reform the disability hearing system, Pierce proposes that the entire SSA ALJ corps

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¹ Damian Paletta, *Disability-Claim Judge Has Trouble Saying 'No,'* May 19, 2011, <http://online.wsj.com/article/SB10001424052748704681904576319163605918524.html>; Damian Paletta, *Social Security Judge Retires Amid Probe*, WALL ST. J., July 18, 2011, <http://online.wsj.com/article/SB10001424052702303795304576454490618129186.html>; Damian Paletta, *Ex-Judge's Disability Rulings Probed*, WALL ST. J., Nov. 25, 2011, <http://online.wsj.com/article/SB10001424052970203764804577056490750827440.html>.

² See, e.g., *Disability Payments: The Elephant in the Waiting Room*, ECONOMIST, Mar. 10, 2011, <http://www.economist.com/node/18332928>; James Ledbetter, *America's Hidden Welfare Program*, SLATE, Sept. 13, 2010, http://www.slate.com/articles/business/moneybox/2010/09/americas_hidden_welfare_program.html.

³ Richard J. Pierce, Jr., *What Should We Do About Social Security Disability Appeals?*, REGULATION, Fall 2011, at 34.

⁴ Nonexertional limitations are simply any limitations other than those on standing, sitting, lifting, carrying, walking, pushing, or pulling. See 20 C.F.R. § 404.1569a (2011).

and ALJ hearing stage be abolished. According to Pierce, the savings from this measure should then be used to fund a large scale program of continuing disability reviews to reevaluate current disability beneficiaries to remove the undeserving from the lot. These measures would, in turn, arguably help avert a default in the Social Security disability trust fund in the next few years.⁵

Policy is often initiated, and sometimes adopted, based on popular misconceptions, partial truths, commonly repeated falsehoods, and isolated anecdotes with unfortunate consequences.⁶ Because neither the Pierce proposal's media-anecdote-driven factual assumptions nor core legal suppositions about the identified problem are well-founded and because the proposed solutions are both misguided and unsound, this initiative, and other similar initiatives, should be non-starters. This Issue Brief explains: (1) how Pierce misinterprets the problem; (2) why the SSA ALJ system is constitutional; and (3) why Pierce's proposed solutions are misguided.

I. THE PROBLEM IS MISINTERPRETED

The increase in disability applications and awards and resulting strain on the social security trust fund are neither principally a function of ALJ unsupported decision-making nor a product of increasingly liberalized and lenient substantive disability standards for evaluating nonexertional impairments and limitations.

First, ALJ decisions amount to a relatively small portion of disability awards, comprising fewer than 25% of total annual awards.⁷ SSA utilizes a multi-stage administrative review process, requiring claimants to have their applications decided at an initial evaluation stage and then to be reconsidered before having an opportunity for a hearing before an ALJ. Approximately 75% of favorable decisions are made at the initial and reconsideration stages.⁸ In the vast majority of jurisdictions, initial and reconsideration determinations are made not by SSA, but by state agencies known as state "disability determination services" (DDSs) under contract with the SSA to make these decisions. Thus, whatever can be gleaned about the consequences of a large number of disability awards, the predominant decision-makers are those at the state agencies and not the ALJs. Thus, Pierce's foundational assertion that "most of the increase in the proportion of the population that has been determined to be permanently disabled is attributable to ALJ decisions,"⁹ is erroneous.

⁵ *Id.*

⁶ See, e.g., Cheryl Bernard, *Caution Nation-Builders: Gender Assumptions Ahead*, 32 FLETCHER F. WORLD AFF. 25, 31 (2008) ("In discussions concerning gender-related policies, the extent to which anecdotes, suppositions and vaguely anthropological personal theories rule the day can often be astonishing. Clearly, these are not the foundations upon which a policy that directly affects half the population should rest. Instead such policies should be informed by fact."); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1161 (1992) ("[A]necdotes contribute little to developing a meaningful picture of the situation about which we are concerned. It makes a difference if for every ten anecdotes in which an undeserving plaintiff bankrupts an innocent defendant, one, ten, one hundred, or one thousand equal and opposite injustices are done to innocent plaintiffs.").

⁷ See SSA ODPMI (OFFICE OF DISABILITY PROGRAM MANAGEMENT INFORMATION), FISCAL YEAR 2010 WORKLOAD DATA: DISABILITY DECISIONS (2010).

⁸ *Id.* There are currently 10 "prototype states" (not all of which are actual states), in which most claims bypass the reconsideration stage. See 64 Fed. Reg. 47,218 (Aug. 30, 1999) and 71 Fed. Reg. 45,890 (Aug. 10, 2006). Since the vast majority of claims must go through the reconsideration stage before the claimant can seek an ALJ hearing, this article will generally describe the system as having four administrative levels.

⁹ Pierce, *supra* note 3, at 34.

Second, the cited media anecdotes do not support the generalization that ALJ decision-making largely rewards unworthy recipients. The anecdotes focus largely on one particular ALJ who granted benefits in 100% of cases he decided in the first six months of 2011. This is an anomaly and does not accurately reflect either the norm or the range of ALJ decision-making. The *Wall Street Journal* series, for example, focuses on this one unusually high-granting ALJ rather than the vast bulk of ALJs with rates around the agency decisional norm, much less those at the other end of the bell curve who significantly deviate from the norm in the other direction and rarely grant benefits. For example, the agency's most recent ALJ quarterly data reveal that there is an ALJ with an approval rate as low as 12.7% and a significant group below 25% percent.¹⁰ The average approval rate for fiscal year 2011 was 58%.¹¹

Indeed, it is demonstrative of how unrepresentative the featured ALJ's performance was that he was not only suspended (as acknowledged by the articles), but saw fit to resign his post rather than fight for his continued employment. While Pierce notes that there are many other "outlier" ALJs (besides the one in the headlines) with grants rates above the norm, he also fails to account for the large number around the norm and the consequences of the many "outliers" with grant rates well below. The reality, of course, as with so many distributions of human beings, is that individual ALJ grant rates form a bell curve, with the great majority of ALJs being well within the agency norm.

Of course, mistakes can and are made by ALJs (and state agency adjudicators) in both directions. As Pierce points out, there are costs to taxpayers and the public when a claimant is mistakenly awarded benefits. Pierce also emphasizes the social, fiscal, and economic costs of "male worklessness" from disability awards.¹² And these costs are undoubtedly real and considerable (as with women's worklessness too!). However, the latter statement assumes that withdrawal from the workforce by disability claimants is largely voluntary. The modesty of benefit awards relative to wages undermines that assertion.¹³ As Professor Jerry Mashaw has explained, "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."¹⁴

More fundamentally however, there are also significant societal costs when claimants are improperly denied benefits. These costs include the concrete consequences from increased home foreclosures and evictions, homelessness, family dissolutions, bankruptcies, welfare payments, strains on Medicaid and other residual indigent

¹⁰ SOCIAL SECURITY ADMINISTRATION, PUBLIC USER FILES, ALJ DISPOSITION DATA, FY 2012 (For Reporting Purposes: 10/01/2011 Through 01/27/2012), http://www.ssa.gov/appeals/DataSets/03_ALJ_Disposition_Data.html (last visited Feb. 29, 2012); see also Mike Chalmers, *Delaware Legislators Push for Deep Look at Social Security Denials: Dover Office Rejects High Rate of Claims*, DELAWAREONLINE, Mar. 1, 2012, <http://www.delawareonline.com/article/20120301/NEWS/203010324?gcheck=1> (describing low approval rate ALJs in Dover, Delaware hearing office and impact on claimants).

¹¹ SSA ODPMI (OFFICE OF DISABILITY PROGRAM MANAGEMENT INFORMATION), FISCAL YEAR 2011 WORKLOAD DATA: DISABILITY DECISIONS (2011).

¹² Pierce, *supra* note 3, at 34.

¹³ See Jon C. Dubin, *The Labor Market Side of Disability Benefits Policy and Law*, 20 S. CAL. REV. L. & SOC. J. 1, 60 & n.248 (2011).

¹⁴ Jerry L. Mashaw, Book Review, 20 J. HEALTH POL'Y & L. 225, 226 (1995) (reviewing EDWARD H. YELIN, *DISABILITY AND THE DISPLACED WORKER* (1993)).

health care systems from postponed care, and sometimes even death.¹⁵ They also include the appellate litigation and legal system costs of further appeals from improper benefit denials in federal court. Finally, these costs also include the social malaise and frustration generated from a perception that the social contract has failed and that a government insurance system which most claimants have been required to pay into for decades on the promise of protection in the event of disability, has proven illusory.¹⁶

Third, Pierce's suggestion that greater accuracy and consistency would be achieved by relegating virtually all agency decision-making to the state agency DDS's paper review process is also unfounded for a number of reasons. State agency adjudicators handling the initial and reconsideration disability determinations have considerably less training, education, and relevant experience for the task than federal ALJs. The state adjudicators are civil servants and need not even have a basic university bachelor's degree in some states.¹⁷ In contrast, federal ALJs must be lawyers for at least seven years, pass an examination, and then score competitively well after a series of interviews to obtain one of these highly coveted jobs.¹⁸ The assumption that state adjudicators are better or even comparably equipped to issue accurate decisions in applying a complex federal statute, regulations, and guidelines belies common sense.

Nor would abolition of the ALJ hearing process eliminate significant human variation in disability approval rates by agency decision-makers. It would simply shift the variation to the state agency, non-hearing levels. There are dramatic and unexplained variations among the state agencies that handle initial and reconsideration decisions. Thus, in 2010, the DDS for Mississippi granted initial claims in 24.9% of cases, whereas the DDS for New Hampshire granted initial claims in 49.5% of them.¹⁹ Are residents of New Hampshire truly so much more impaired than those of Mississippi? In the smaller number of situations where SSA makes initial and reconsideration determinations, the disparities are even more marked. In 2010, the Atlanta Region Disability Program Branch (DPB) awarded benefits in 18.4% of initial claims, while the New York Region DPB awarded benefits in 58.4% of initial claims.²⁰ Thus, while

¹⁵ See, e.g., *Work or Die*, N.Y. TIMES, May 23, 1983, <http://www.nytimes.com/1983/05/23/opinion/work-or-die.html>; see generally *Schweiker v. Chilicky*, 487 U.S. 412, 416–17 (1988) (describing “the terrible effects on individual lives” from wrongful disability benefits denial decisions).

¹⁶ In addition to claimants for disability insurance benefits, there are also many claimants for Supplemental Security Income (SSI) under Title XVI of the Social Security Act. These individuals typically suffer from chronic, even lifelong, impairments, such as mental retardation, and have either never worked and paid FICA taxes or have only worked sporadically at marginal employment, so as not to be insured for disability purposes or to be insured at a level which produces only a very low monthly disability insurance benefit. SSI is paid out of general revenues as a welfare program and not out of the disability trust fund. See Linda G. Mills & Anthony Arjo, *Disability Benefits, Substance Addiction and the Undeserving Poor: A Critique of the Social Security Disability Independence and Program Improvements Act of 1994*, 3 GEO. J. ON FIGHTING POVERTY 125, 128 (1996).

¹⁷ See, e.g., NEB. DEPT. OF EDUC., DDS ADJUDICATOR TRAINEE (2007), <http://insidende.education.ne.gov/humanresources/RE-DESIGN/ClassSpecs/DDSAdjTraineeFinalJune07.pdf>.

¹⁸ See U.S. OFFICE OF PERSONNEL MANAGEMENT, QUALIFICATION STANDARD FOR ADMINISTRATIVE LAW JUDGE POSITIONS, <http://www.opm.gov/qualifications/alj/alj.asp> (last visited Feb. 29, 2012).

¹⁹ SSA SAOR (STATE AGENCY OPERATIONS REPORT), SOCIAL SECURITY DISABILITY AND SUPPLEMENTAL SECURITY INCOME (SSI) DISABILITY CLAIMS ALLOWANCE RATES INITIAL AND RECONSIDERATION ADJUDICATIVE LEVEL FISCAL YEAR 2010 BY NATION, REGION AND STATE (2011).

²⁰ *Id.*

citing significant variation in disability approval rates as a reason to abolish the ALJ hearing process,²¹ Pierce's proposed remedy will not supply the cure.²²

Moreover, another factor relevant to the differential and higher rates of benefit approval at the ALJ hearing stage over the state agency process, is the greater vulnerability to agency pressure to restrict awards at the state level. Both a rarely unanimous United States Supreme Court and a recent CBS investigative study have found that state disability agency personnel experience significant pressure to deny claims.²³ Federal ALJs, while intermittently experiencing pressure to limit benefit approvals as well,²⁴ are at least insulated with "good cause" Administrative Procedure Act job security, as Pierce has explained.²⁵ In the past few years, while the ALJ approval rate has significantly exceeded the state agency rates, the ALJ rate has nevertheless decreased from 63% in 2009 to 62% in 2010 to 58% in 2011.²⁶ Approval rates are also on the decline at the state agency level from 36.9% and 13.8% respectively at the initial and reconsideration stages in 2009 to 35.4 and 12.7% at these respective stages in 2010.²⁷ The lower and diminishing state agency approval rates are also likely influenced by the documented greater downward pressure on approvals by, and greater employment vulnerability of, state agency personnel vis-à-vis their federal ALJ counterparts. If, as a consequence, the state agencies are denying a greater proportion of meritorious claims, it follows that the ALJs will see a higher ratio of such valid claims on appeal at the hearings.

But fourth and more fundamentally, by calling into question the accuracy of ALJ favorable decisions simply because they reach a different result from those at the state agencies, Pierce fails to take into account critical distinctions in decision-making at the respective levels. Because of these distinctions, the evidentiary records before the ALJs at the hearing are not the same and sometimes bear little relationship to those before the state agency. Accordingly, the resulting ALJ decision is often not so much a rejection of the state agency's judgment as it is an entirely new, (*de novo*) decision based on a broader and more layered panorama of the claimant's condition.

When compared to their state agency level counterparts, ALJs more frequently have highly developed medical evidence and narratives from claimants' treating physicians at hearings. At the DDS level, agency adjudicators work with, and rely most

²¹ Pierce, *supra* note 3, at 36.

²² See *infra* notes 81–84 and accompanying text for suggestion of a less drastic yet more inclusive remedy to the "outlier" decision-maker problem that would address significant outlier deviation at both the DDS and ALJ levels.

²³ See *Bowen v. City of New York*, 476 U.S. 467, 475 n.5 (1986); "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.

²⁴ See note 82 *infra* and accompanying text.

²⁵ Pierce, *supra* note 3, at 36–37.

²⁶ SSA ODPMI (OFFICE OF DISABILITY PROGRAM MANAGEMENT INFORMATION), FISCAL YEAR 2011 WORKLOAD DATA: DISABILITY DECISIONS (2011); SSA ODPMI (OFFICE OF DISABILITY PROGRAM MANAGEMENT INFORMATION), FISCAL YEAR 2010 WORKLOAD DATA: DISABILITY DECISIONS (2010); SSA ODPMI (OFFICE OF DISABILITY PROGRAM MANAGEMENT INFORMATION), FISCAL YEAR 2009 WORKLOAD DATA: DISABILITY DECISIONS (2009).

²⁷ SSA SAOR (STATE AGENCY OPERATIONS REPORT), SOCIAL SECURITY DISABILITY AND SUPPLEMENTAL SECURITY INCOME (SSI) DISABILITY CLAIMS ALLOWANCE RATES INITIAL AND RECONSIDERATION ADJUDICATIVE LEVEL FISCAL YEAR 2010 BY NATION, REGION AND STATE (2011); SSA SAOR (STATE AGENCY OPERATIONS REPORT), SOCIAL SECURITY DISABILITY AND SUPPLEMENTAL SECURITY INCOME (SSI) DISABILITY CLAIMS ALLOWANCE RATES INITIAL AND RECONSIDERATION ADJUDICATIVE LEVEL FISCAL YEAR 2009 BY NATION, REGION AND STATE (2009). State agency disposition data for FY 2011 were not yet available at the time of this writing.

heavily on, state medical advisors who have never treated or even examined the claimants in question. There is also a much higher degree of representation by counsel at the ALJ stage, which almost always makes a significant difference in the amount, quality and presentation of medical and other evidence.²⁸

ALJs have the discretion to call Medical Experts (MEs) and Vocational Experts (VEs) to testify at hearings on certain medical and vocational issues and sometimes are required by SSA policy or court order to do so. ALJs can also order additional consultative medical examinations by medical specialists, and subpoena medical reports and records from treating physicians, hospitals, educational institutions, or employers, all to obtain a fuller and more accurate record than that assembled at the DDS.

And the ALJ hearings provide far more than the mere opportunity for evaluating “demeanor,” as Pierce emphasizes; they also provide a forum to explain confusing aspects of conditions and treatment and clarify ambiguous aspects of the record through responsive face-to-face inquiries at the hearing. Claimants have the first true opportunity to describe matters not likely apparent from the paper records before the DDS, such as the side-effects of prescribed medication, the negative synergies from the combined or cumulative consequences of multiple impairments, and the burdens and limitations of various treatment regimens.

Face-to-face opportunities are particularly valuable in cases involving mental impairments. Such claimants diagnosed with either mental retardation²⁹ or psychiatric illness are classic “poor historians” who are often unable to provide SSA with accurate medical and work histories and lack insight into the nature of their disabilities. It is not uncommon for the claimant with mental limitations to allege disability based only on a perceived and often undocumented physical condition. A competent representative who can take the time to interview the claimant and obtain the full medical and mental health records can often demonstrate disabling mental impairments which the claimant cannot or will not assert, and can call supporting witnesses to testify at the hearings. In contrast, the state disability agencies do not interview the claimants, much less seek information from potential witnesses.

Finally, on this point, Pierce’s citation of a significant increase in general ALJ “reversal” rates as further evidence of ALJ decisional untrustworthiness is factually unsupported.³⁰ In reality, ALJ approval rates are near a quarter-century low at 58% in 2011.³¹ They have fluctuated significantly over the past 25 years, reaching a high of 72.3% in 1994 to a low of 56.9% in 1998. It was 59.4% in 1980.³² Thus, Pierce’s assertion that “the average ALJ grant rate...h[as] increased dramatically over the past three decades [and that] [t]he net effect has been a doubling of the proportion of the population that has been determined to be disabled,”³³ is false.

Fifth, Pierce’s subsidiary assumption that an increasingly liberal and subjective substantive disability standard for evaluating nonexertional limitations is a principal

²⁸ See William J. Popkin, *The Effect of Representation in Nonadversary Proceedings—A Study of Three Disability Programs*, 62 CORNELL L. REV. 989 (1977).

²⁹ Pierce never mentions mental retardation or persons with intellectual disabilities, in his attack on supposedly unmeasurable nonexertional mental impairments.

³⁰ Pierce, *supra* note 3, at 36.

³¹ See note 11 *supra*.

³² See STAFF OF H. COMM. ON WAYS & MEANS, 110TH CONG., BACKGROUND MATERIAL AND DATA ON THE PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS (“GREEN BOOK”) 1–90, table 1–40 (Comm. Print 2008), available at <http://democrats.waysandmeans.house.gov/media/pdf/111/ssgb.pdf>.

³³ Pierce, *supra* note 3, at 25.

cause of benefit increases also reflects a number of misperceptions. The Social Security Act and agency regulations require that all impairments be supported by appropriate clinical and objective methodologies.³⁴ Pierce confuses and mislabels nonexertional limitations and impairments as entirely subjective and undocumentable in contrast to exertional conditions. This contrast is falsely drawn. Nonexertional limitations can be objectively and clinically evaluated; exertional limitations and impairments can be supported by subjective symptomatology.

Nonexertional limitations are simply any limitations other than those on standing, sitting, lifting, carrying, walking, pushing, or pulling. Thus, examples of nonexertional limitations include visual limitations from blindness, auditory limitations from deafness and severe pulmonary sensitivity to environmental irritants. They are all objectively documentable. Other nonexertional limitations include restrictions that usually flow from the same objectively documented physical impairments that produce exertional restrictions on standing, walking, and lifting, such as postural or manipulative restrictions on bending, stooping, reaching, kneeling, fine and gross manipulation, crawling or balancing. Even the most objectively documentable physical impairments often produce some postural or manipulative nonexertional limitations that must be evaluated.³⁵ Thus, when Pierce indicates that there has been a significant (323%) increase in ALJ approval decisions for claimants with nonexertional restrictions,³⁶ this statistic, without more context, has little meaning.

Strictly speaking, if a disability approval decision were based solely on a claimant's nonexertional restrictions, this would mean the claimant's condition imposed no limitations on standing, sitting, walking, lifting, carrying, pushing, or pulling. Yet, Pierce identifies, for example, musculoskeletal condition cases as a major category in the burgeoning constellation of nonexertional impairment ALJ approval decisions.³⁷ It would be a remarkably rare case for a claimant determined disabled based solely on a musculoskeletal condition, such as severe arthritis, to be impaired solely due to nonexertional restrictions and lacking any restriction on exertional functions.

Nor is the pain that flows from objectively and clinically documented impairments, such as musculoskeletal conditions, necessarily classifiable as a nonexertional restriction; it depends on whether the pain produces exertional or nonexertional limitations as described above. Pain can produce both exertional and nonexertional limitations which can contribute to a disability.³⁸ And while the existence of a potential pain-producing impairment can and must be medically determinable and objectively and clinically documented,³⁹ it is true that there is no definitive scientific device for ascertaining the precise degree and extent of pain (whether exertional or nonexertional) that flows from such an objective impairment.⁴⁰ However, numerous studies, including a congressionally mandated Pain Commission report, have rejected the suggestion that faking or malingering cannot be sufficiently screened in the SSA adjudicative process. The Pain Commission report specifically found that "there is a clear

³⁴ See 42 U.S.C. §§ 423(d)(3), (d)(5)(A) (2011).

³⁵ See Jon C. Dubin, *Overcoming Gridlock: Campbell After a Quarter-Century and Bureaucratically Rational Gap-Filling in Mass Justice Adjudication in the Social Security Disability Programs*, 62 ADMIN. L. REV. 937, 943, 974-75 & nn. 149-52 (2010).

³⁶ Pierce, *supra* note 3, at 35.

³⁷ *Id.*

³⁸ See Social Security Ruling 96-8p, 61 Fed. Reg. 34,474, 34,475 (July 2, 1996); see also 20 C.F.R. § 404.1569a (2011).

³⁹ See *supra* note 34.

⁴⁰ See *Bunnell v. Sullivan*, 947 F.2d 341, 347 (9th Cir.1991) (en banc).

consensus that malingering is not a significant problem [and] that it can be diagnosed by trained professionals, medical and other.”⁴¹

More to the point of Pierce’s suggestion about the temporal relationship between the increase in disability awards and pain standards, it is worth noting that the courts have always interpreted the Act as requiring the evaluation of pain and its resulting exertional and nonexertional limitations in the disability determination process. The agency agrees that the most recent pain statutory standard (adopted in the 1980s) and its regulations merely conform to both case law and longstanding prior agency practice.⁴² Accordingly, the evaluation of pain is neither a new development nor a new requirement. As such, the suggestion that the SSA’s pain standards, as applied by ALJs or otherwise, are a significant new cause of the increase in benefit applications and allegedly unwarranted new recipients is not well-supported.

Moreover, apart from temporal inaccuracy, the “blame the new pain standard” assertion is questionable on other grounds. The assertion conjures nostalgia for an earlier, perhaps mythical, era in the disability benefit programs’ history when claimants largely established eligibility with conditions that presumably produced no pain, or in which pain was otherwise irrelevant to the claimants’ disabling exertional limitations. This categorical proposition is medically dubious and undermined by the failure to delineate what painless (or pain –irrelevant), yet exertionally limiting medical conditions predominated in this earlier period. However, to the extent claimants largely established eligibility without ever experiencing pain from their exertionally limiting impairments in an earlier unspecified time period, it does not necessarily follow that a proportionate increase in documented severe pain among those more recently found disabled would reflect a loosening or liberalization of eligibility criteria or decision-making as opposed to a tightening to restrict claims by persons with pain-free conditions.

Similarly, there have been no significant new changes to the Act to require evaluation of cognitive and psychiatric nonexertional mental impairments in disability determinations, as these conditions have always been potentially disabling impairments under SSA standards.⁴³ Thus, the mere presence of mental impairment eligibility, whether evaluated by ALJs or otherwise, is also not a new development that could account for a significant recent increase in benefit applications and recipients. And while there are also no definitive objective measurements of the precise degree and extent of mental impairments, psychiatrists and psychologists routinely provide professional and clinical evaluations and severity assessments of patients diagnosed with mental retardation or a psychiatric illness. They employ professionally accepted clinical and diagnostic criteria in their assessments and these professional assessments inform the disability determination.⁴⁴ Indeed, professional assessments of mental impairment severity are widely accepted as bases for determining a host of other legal

⁴¹ COMMISSION ON THE EVALUATION OF PAIN, U.S. DEP’T OF HEALTH AND HUMAN SERVS., REPORT 12 (1986); *see id.* at 71-72 (elaborating on Commission’s conclusion that malingering is not a significant problem in the disability evaluation process); *see also* NATIONAL ACADEMY OF SCIENCES INSTITUTE OF MEDICINE, PAIN AND DISABILITY: CLINICAL, BEHAVIORAL AND PUBLIC POLICY PERSPECTIVES 152 (Marian Osterweis et al. eds., 1987) (finding that “there is no evidence that malingering is common in the SSA disability context”); DEBORAH STONE, THE DISABLED STATE 135 (1984) (stating that “[t]he clinical literature frequently discusses the problem of distinguishing genuine from faked pain ... [and] [t]here is fairly wide agreement that clinicians can recognize patient deception....”).

⁴² Dubin, *supra* note 13, at 52 n.218.

⁴³ *Id.*

⁴⁴ *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000); 20 C.F.R. pt. 404, subpt. P, app. 1 (Listings 12.02–08) (2011).

determinations, often with somewhat more at stake, such as imposition of capital punishment, competency for trial with substantial incarceration on the line, and the need for civil commitment or other significant infringements on basic liberty. In short, Pierce's assertion that a claim for disability benefits for claimants with mental impairments or pain may neither be refuted nor supported through accepted diagnostic criteria and professional evaluation⁴⁵ is erroneous.

Moreover, to the extent new or recent changes in substantive disability standards have affected disability rates they have most likely diminished those award rates. Virtually every amendment to the Social Security Act in the past forty-five years (with the exception of a few provisions of the 1984 Disability Benefits Reform Act) and virtually every recent regulatory change, have rendered the substantive disability standard more strict.⁴⁶ Benefits based on substance abuse, alcoholism, and for most immigrants, and for persons with outstanding felony warrants have been eliminated; other impairments like obesity and diabetes have been removed as separate disabilities, and medical standards for conditions such as HIV, mental retardation, and certain rheumatological disorders have been made stricter.⁴⁷ Benefits have also been expressly restricted for claimants deemed capable of performing no gainful employment other than previously performed work which no longer even exists in the American economy.⁴⁸

The current SSA Commissioner, Michael Astrue, a long-time Republican appointee who served in the Reagan and George H.W. Bush administrations before being appointed SSA Commissioner by President George W. Bush, has characterized the substantive disability standard as "very tough" in a 2008 CBS investigation titled "Failing the Disabled."⁴⁹ The standard is unquestionably strict relative to disability benefit standards in other developed Western countries. Its strictness is further underscored by the significant percentage of claimants who die within two years of receiving benefits and the substantial majority of those who remain out of work even after being denied benefits.⁵⁰

Sixth, there are myriad other factors which more properly explain the increase in Social Security disability applications and resulting benefit awards. To be insured for the Social Security Disability Insurance program, a worker must participate in covered work, resulting in contributions to the Social Security Trust Fund through employee

⁴⁵ See Pierce, *supra* note 3, at 35.

⁴⁶ Dubin, *supra* note 13, at 51–53 & nn.218–20; see also *id.* at 25–26 n.95.

⁴⁷ See *id.*; see also Charles Martin, *Opposing View: Disability Benefits Remains a Vital Lifeline*, USA TODAY, Feb. 3, 2012, <http://www.usatoday.com/news/opinion/story/2012-02-02/Social-Security-disability-claimants/52940212/1?loc=interstitialskip>.

⁴⁸ Dubin, *supra* note 13, at 53 n.220 (citing 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)); *Barnhart v. Thomas*, 540 U.S. 20 (2003) (sustaining agency denial based on ability to perform previous job as elevator operator, even though the job no longer exists in significant numbers in the American economy and the claimant was found unable to adjust to alternative work)).

⁴⁹ "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. Pierce's suggestion that the eligibility standard is so lenient or inclusive that anyone with a little anxiety, depression, or pain has "a plausible claim for permanent disability benefits," is unfounded. See Pierce, *supra* note 3, at 35. It is like the assertion that anyone who needs glasses has a plausible claim of disability based on blindness. However, agency regulations establish a preliminary screening step or process to winnow out medically non-severe claims that do not significantly restrict basic work functions. See 20 C.F.R. § 404.1520(c) (2011); see also *Bowen v. Yuckert*, 482 U.S. 137 (1987).

⁵⁰ Dubin, *supra* note 13, at 51–53 & nn.218–20.

payroll (FICA) taxes from that work. Applications are up due to the increasing size of the covered work force and insured worker population compared to the 1960's, 70's and 80's. Women, African-Americans and other minorities are now working in SSA-covered employment settings in much greater numbers than in the period before fruition of the civil rights and women's rights movements.⁵¹

In addition, because the substantive disability standard has always significantly credited advanced age in the disability calculation, the baby boom demographic bump has produced significantly more 50–64 year olds in the advantaged substantive categories in recent times than in the 60's, 70's and 80's.⁵² Other causes of the increase in benefit applications and awards include: recurrent or sustained economic recessions; a trend toward corporate downsizing of less productive workers;⁵³ the elimination or reduction of other benefit programs for people with disabilities and people living in poverty; the rise in the Social Security retirement age to 66; declining access to quality ongoing and preventive health care for low-wage workers; transformations in the low wage economy; the rise in community-based alternatives to institutional care for claimants with mentally illness; outreach efforts to homeless persons with disabilities; state and local welfare agency requirements that certain persons apply for federal disability benefits; and technological, scientific, medical, and psychiatric diagnostic advances that more readily reveal clinical and objective bases for impairments and their severity, among other reasons.⁵⁴

II. THE SSA ALJ SYSTEM IS NOT UNCONSTITUTIONAL

Pierce attempts to buttress his argument that SSA ALJs should be eliminated by asserting that “the present method of SSA disability decision-making is clearly unconstitutional.”⁵⁵ His argument is premised on the theory that Social Security ALJs are “officers of the United States,” rather than “employees,” and are therefore subject to the Appointments Clause of the Constitution, Article II, Section 2, Cl. 2. If this is true, then he further argues that it is unconstitutional that the Commissioner of Social Security cannot directly remove an SSA ALJ, but rather can only petition the Merit Systems Protection Board to remove an ALJ for “good cause.” In support of these

⁵¹ See generally KATHY A. RUFFING, CENTER ON BUDGET AND POLICY PRIORITIES, WHAT THE 2011 TRUSTEES REPORT SHOWS ABOUT SOCIAL SECURITY 8 (2011); MARY POOLE, THE SEGREGATED ORIGINS OF SOCIAL SECURITY: AFRICAN AMERICANS AND THE WELFARE STATE (2006).

⁵² See RUFFING, *supra* note 51, at 8.

⁵³ The Center For Economic and Policy Research has recently pointed out that the total numbers of social security disability applicants and beneficiaries could be rising because many companies since the mid 1990s have “striven to downsize to save money and increase productivity.” As the Center explained:

[A]n implication of this downsizing is that less productive workers will lose their job. A worker who is downsized out of a job at age 50, who may actually have serious mental and or physical problems that limit their ability to work, will have a very difficult time finding a new job. Such a person may well end up getting disability whereas in prior times a company may have been willing to keep them on the payroll until retirement.

See CENTER FOR ECONOMIC AND POLICY RESEARCH, *Rising Disability Claims and Higher Productivity Growth*, Feb. 13, 2012, <http://www.cepr.net/index.php/blogs/beat-the-press/rising-disability-claims-and-higher-productivity-growth>.

⁵⁴ 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 (1996); see also RUFFING, *supra* note 51, at 8.

⁵⁵ Pierce, *supra* note 3, at 40.

propositions, Pierce relies on two decisions, one by the Supreme Court and one by the United States Court of Appeals for the District of Columbia Circuit, which not only fail to support his position, but actually rebut it.

Pierce argues that “the holding in the Supreme Court’s 2010 opinion in *Free Enterprise Fund v. Public Company Accounting Oversight Board (PCAOB)* applies directly to SSA ALJs.”⁵⁶ This is demonstrably inaccurate. In its decision, the Supreme Court explicitly noted that “our holding also does not address that subset of independent agency employees who serve as administrative law judges.”⁵⁷ The *Free Enterprise Fund* case focused on the President’s power to remove “officers” who make policy for the executive branch of government. But Social Security ALJs do not, and cannot, make policy for SSA. Rather, their job is to apply SSA policy in order to adjudicate claims for benefits. The Supreme Court recognized this critical distinction between ALJs and the Public Company Accounting Oversight Board, explaining “unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions”⁵⁸ This precisely describes the function of Social Security ALJs. Strikingly, although all ALJs are experienced attorneys, they are not even permitted to interpret decisions of the federal circuit courts of appeals on their own. Rather, they must await SSA’s issuance of “Acquiescence Rulings” instructing them what policy SSA is taking toward any circuit court opinion.⁵⁹

The other case relied upon by Pierce in support of his conclusion that SSA ALJs are clearly “officers of the United States” is the D.C. Circuit’s decision in *Landry v. FDIC*.⁶⁰ There are several flaws with Pierce’s reliance on *Landry*. First, the case did not even address ALJs in the Social Security system. Second, as acknowledged by Pierce, the *Landry* court ruled that the FDIC ALJs at issue in that case are *not* officers of the United States, but rather are “employees.”⁶¹ Thus Pierce is interpreting a case that held that other ALJs are not “officers of the United States” to clearly mandate that SSA ALJs are such “officers.”

A critical underpinning of Pierce’s rationale is his belief that:

[t]he SSA’s rules allow an appeal of an ALJ decision to a higher authority in the agency only at the behest of an applicant whose application for benefits has been denied by an ALJ. ALJ decisions that grant benefits are final. They are not reviewable by any institution of government.⁶²

There is no factual or legal basis for these assertions. Under SSA’s regulations, the final administrative authority, SSA’s Appeals Council, does have the authority to review any ALJ decision—granting or denying benefits—on its “own motion.”⁶³ Any experienced Social Security practitioner (including both authors of this Issue Brief)

⁵⁶ *Id.*

⁵⁷ *Free Enterprise Fund v. PCAOB*, 130 S. Ct. 3138, 3160 n. 10 (2010).

⁵⁸ *Id.*

⁵⁹ 20 C.F.R. §§ 404.985, 416.1485 (2011). *See also* 63 Fed. Reg. 24,927, 24,931 (1998).

⁶⁰ 204 F.3d 1125 (D.C. Cir. 2000).

⁶¹ *Id.* at 1134.

⁶² Pierce, *supra* note 3, at 40.

⁶³ 20 C.F.R. §§ 404.969, 416.1469 (2011); *See* 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, 246–49 (1990).

has had the experience of having had “defeat snatched out of the jaws of victory” by the Appeals Council’s own motion review of a favorable ALJ decision. Indeed, recently SSA’s Appeals Council has been more aggressive in undertaking reviews in thousands of cases of ALJ decisions granting benefits. In fiscal year 2011, SSA established a Quality Review initiative in which it reviewed a computer-generated sample of approximately 3,700 unappealed favorable ALJ decisions.⁶⁴

Over four decades ago, in *Richardson v. Perales*,⁶⁵ the Supreme Court confronted multiple challenges to the conduct of Social Security hearings, including the role of the SSA administrative law judge (then known as a “hearing examiner”). The Court upheld both the conduct of such hearings and the role of the hearing examiner. While Pierce’s precise claim of unconstitutionality was not before the Court in *Perales*, it seems highly unlikely that more than forty years later, the Court would overturn a system that it lauded as “designed, and working well, for a government of great and growing complexity.”⁶⁶

III. THE PROPOSED SOLUTIONS ARE MISGUIDED

The ALJ hearing abolition proposal would produce undesirable consequences. For one, it would overwhelm an overburdened federal judiciary with requests for judicial review since all appeals from the agency paper file decisions would proceed directly to federal court without the screening buffer of the hearing stage. Consider that in fiscal year 2010, the state DDSs denied over 625,000 claims (87% of 719,270) at the reconsideration level, whereas ALJs denied or dismissed approximately 235,500 claims (out of 619,887 claims, ALJs dismissed 13% and denied 25%).⁶⁷ Even if one were to assume that same percentage of denials appealed to federal court, this would represent more than a doubling of federal court filings. But dismissals, unlike denials, are usually not appealable for jurisdictional reasons, so the real comparison is probably between, 625,000 denials at the state DDS level and 161,000 denials at the ALJ level.

Moreover, unsuccessful applicants today must have been rejected at all four administrative levels (initial determination, reconsideration, ALJ hearing, and Appeals Council) before seeking judicial review in federal court. Although Pierce is curiously silent on the subject of SSA’s fourth administrative level, the Appeals Council, one must assume that he would eliminate that, too. Indeed, Pierce bases his argument that ALJ decision-making is unconstitutional on his erroneous belief that ALJ decisions constitute the final decision of SSA on disability claims. In fact, it is the Appeals Council, not the individual ALJ, which can either make the final decision itself or formally adopt the ALJ’s decision as the final decision of SSA.⁶⁸ In either event, the Appeals Council’s action is the last agency action prior to court review. Under Pierce’s constitutional theory, then Administrative Appeals Judges at the Appeals Council must also be engaging in unconstitutional decision-making. In fiscal year 2010, the Appeals Council denied approximately 61,425 claims (74% of 83,008). Thus, if the system eliminated appeals to ALJs and to the Appeals Council, then, using the fiscal

⁶⁴ See *ODAR Updates Hearing Level and Appeals Council at San Antonio NOSSCR Conference*, NOSSCR SOCIAL SECURITY F., Oct. 2011, at 1, 9.

⁶⁵ 402 U.S. 389 (1971).

⁶⁶ *Id.* at 410.

⁶⁷ *Fiscal Year 2010 Workload Data: Disability Decisions*, NOSSCR SOCIAL SECURITY F., Feb. 2011, at 11.

⁶⁸ 20 C.F.R. §§ 404.981, 416.1481 (2011).

year 2010 figures, the potential number of annual appeals to federal court would skyrocket from 61,425 to over 625,000!

Additionally, applicants who have been rejected at only two administrative levels without ever having had the opportunity for a face-to-face encounter with any decision-maker will be far more likely to seek judicial review than unsuccessful applicants in the current system. It is readily predictable that a higher percentage of applicants denied at two levels would seek review in federal court than currently seek review after four levels of denial. Compounding this burden on the federal courts, judicial review would become far more difficult without the more focused records produced through ALJ hearing adjudication.

More fundamentally, the ALJ abolition proposal is an indirect and circuitous response to the perceived problem. The proposal responds to perceived substantive disability standard concerns and larger Social Security trust fund insolvency problems through an entirely procedural solution—eliminate ALJs and abolish a hearing right. This will simply make it procedurally more difficult to prove disability under the perceived disfavored standards and thus reduce the amount of awards in ways that are not calculated to produce greater fairness, accuracy, equity or even efficiency in light of the strains on federal court judicial review resources.

Pierce's secondary proposal for funding another large scale, indiscriminate, continuing disability review (CDR) program is misguided as well. The article notes that "[d]uring the period 1980-83, the SSA reviewed a large number of prior awards. It found that 40% of the beneficiaries whose cases it reviewed were not disabled."⁶⁹ However, by as early as 1984, federal officials were reporting that while over 470,000 people had been removed from the disability rolls, 160,000 had already been reinstated after appeals, and another 120,000 cases were pending.⁷⁰ Moreover, this wholesale purge of the Social Security rolls caused incredible hardship to many disabled persons and produced a large public outcry and widespread congressional condemnation.⁷¹ SSA should preserve CDR funding for a targeted program that focuses on benefit recipients with conditions that are identified as ameliorable over time.

Finally, the larger trust fund solvency issue is a joint Social Security Old Age Survivors Insurance (OASI) Trust Fund and Social Security Disability Insurance (DI) Trust Fund issue. The Congressional Budget Office has most recently projected that the DI Trust Fund will be exhausted in 2017.⁷² But the same report notes that this came close to happening in 1994 and Congress simply redirected revenue from the OASI Trust Fund to the DI Trust Fund. The remedy of allocating payroll taxes between the DI and OASI Trust Funds—which has been employed on several occasions in either direction—is available today, as well.⁷³ The CBO estimates that if the OASI and DI Trust Funds were to be combined (which would not entail any increase in FICA taxes), "funds would be exhausted in 2038," rather than 2017.⁷⁴

⁶⁹ Pierce, *supra* note 3, at 38.

⁷⁰ See Robert E. Rains, *A Specialized Court for Social Security?*, 15 FLA. STATE L. REV. 1, 8 (1987).

⁷¹ See *Schweiker v. Chilicky*, 487 U.S. 412, 416–17 (1988) ("The Social Security Administration itself apparently reported that about 200,000 persons were wrongfully terminated . . . Congress was also made aware of the terrible effects on individual lives that CDR had produced."); see *id.* at 416 (disability reform legislation drafted in response to the excesses of the CDR program "was enacted without a single opposing vote in either Chamber.");

⁷² CONGRESSIONAL BUDGET OFFICE, CBO'S LONG TERM PROJECTIONS FOR SOCIAL SECURITY: ADDITIONAL INFORMATION (Aug. 2011), <http://www.cbo.gov/doc.cfm?index=12375>.

⁷³ See RUFFING, *supra* note 51, at 6.

⁷⁴ CONGRESSIONAL BUDGET OFFICE, *supra* note 72.

The bottom line is that the longer term solution to Social Security trust fund solvency and comprehensive Social Security reform requires rational and comprehensive thought and planning and direct solutions, not indirect and piecemeal procedural diversions. A number of such proposals that involve realistic and equitable approaches to provide long-term stability to the trust fund beyond 2038 exist.⁷⁵ And it bears repeating that the insurance obligations and expectations for workers paying into the Social Security system over decades of their work lives are no less settled for disabled workers than for retired workers or workers' survivors.

Concern for the overall solvency of the trust funds is certainly valid, if frequently overblown, for political purposes. And certainly persons with disabilities who are able to work and want to work, even if only part-time and on an occasional basis, should be able to do so. Ironically, one of the ideas that Pierce first posits, and then rejects, merits serious consideration. He suggests that employers be given incentives to accommodate an individual's disabilities in various ways.⁷⁶ This would be highly desirable, and of course, some employers already engage in such practices. Unfortunately, the Americans with Disabilities Act (ADA) of 1990, has not yet created significantly expanded employment opportunities for persons with disabilities through the often limited nature of mandated accommodations.⁷⁷ The enactment of the Americans with Disabilities Amendments Act of 2008 has the potential to provide greater scope to the employment provisions of the original ADA. One can only hope that the Supreme Court will give the ADA Amendments a more generous interpretation than it repeatedly accorded the original ADA's employment provisions.⁷⁸ However, even an expanded ADA may not reach many persons with the degree of medically and vocationally disadvantaged profiles that usually lead to disability benefit awards.⁷⁹ And the Supreme Court has recognized that the SSA's disability benefit programs and the ADA provide separate yet non-mutually exclusive remedies for the population of persons with disabilities.⁸⁰

Finally, with respect to the problem of substantial adjudicatory decisional variation, there is a less drastic and more targeted alternative to the overinclusive, underinclusive and blunderbuss remedy of ALJ abolition. Indeed, Pierce raises and largely rejects a less sweeping alternative, a systematic review of outlier ALJs' decisions.⁸¹ He notes that some prior agency review efforts to evaluate or review exclusively only favorable ALJ decisions (or only decisions by ALJs with high benefit approval rates) have garnered an unfavorable reception by the courts. Such one-sided review programs, conducted by the agency which employs the ALJ, has a chilling effect on ALJ

⁷⁵ See, e.g., RESTORING AMERICA'S FUTURE, BIPARTISAN POLICY CENTER, DEBT REDUCTION TASK FORCE 70–83 (2010).

⁷⁶ Pierce, *supra* note 3, at 37.

⁷⁷ See Samuel R. Bagenstos, *The Americans With Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 1017–19 (2003) (citing studies showing a small decline in employment participation by disabled persons since the ADA's passage).

⁷⁸ See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, § 2.

⁷⁹ See Mark C. Weber, *Disability and the Law of Welfare: A Post Integrationist Examination*, 2000 U. ILL. L. REV. 889, 910 (noting that only the more medically and vocationally disadvantaged claimants are eligible for benefits and are therefore less likely qualified for jobs for which ADA reasonable accommodation may be required since ADA "qualification" requires the ability to perform the jobs' essential functions); Motoko Rich, *Disabled, but Looking for Work*, N.Y. TIMES, Apr. 6, 2011, www.nytimes.com/2011/04/07/business/economy/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.").

⁸⁰ See *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999).

⁸¹ Pierce, *supra* note 3, at 38.

decision-making, sends an unmistakable message to ALJs to limit claimant-favorable decisions to avoid scrutiny, and treads on the claimant's due process right to an impartial decision-maker.⁸² However, to the extent a remedy is sought to reduce significant overall decisional variation, and not merely the claimant-favorable variety, a review system predicated on significant deviation from the decisional norm in either direction sends no similar particular message and has been sustained against a facial challenge.⁸³

Such a systematic, evenhanded outlier review program would continue to supply a considerably less drastic and more targeted alternative to the problem of decisional variation than complete ALJ abolition. This remedy could also be applied to substantial outlier state agency adjudicators who decide a much greater proportion of cases than ALJs and therefore commit a much greater proportion of errors. The reviews could include targeted investigation of the reasons for the substantial statistical deviations from the norm, supplementary education, and training. Where the substantial decisional disparities reflect a systematic pattern of disregard or indifference to governing law, basic facts, or settled procedure, discipline should be sought.⁸⁴

IV. CONCLUSION

The population of claimants with disabilities or various claimant subpopulations (and the ALJs who judge them) should neither be discriminated against nor scapegoated in the search for remedies to improve the Social Security Disability adjudication system and in the laudable and necessary process of achieving comprehensive Social Security reform. As the working population ages and the eligibility age for full Social Security retirement benefits gradually rises to 67 (and perhaps beyond), it is simply inevitable that we will see a higher percentage of persons validly receiving disability benefits. It would be a breach of the social contract to deny them those benefits through a procedural dodge—particularly one so ill-suited to addressing the perceived problems. As Vice President Hubert Humphrey once said, “[t]he moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; those who are in the shadows of life; the sick, the needy and the handicapped.”⁸⁵

⁸² See *Stieberger v. Heckler*, 615 F. Supp. 1315, 1393-98 (S.D.N.Y. 1985).

⁸³ See *Nash v. Bowen*, 869 F.2d 675, 681 (2d Cir. 1989).

⁸⁴ See, e.g., *Soc. Sec. Admin., Office of Hearing and Appeals v. Anyel*, 58 M.S.P.R. 261 (1993) (finding that ALJ's decisional independence did not extend to systematic disregard of binding law and governing procedure, and that a high rate of adjudicatory error can establish good cause for removal and recommending suspension or greater sanction).

⁸⁵ Hubert H. Humphrey, Speech at Dedication of Hubert H. Humphrey Office Building and Headquarters of the United States Department of Health and Human Services (Nov. 1, 1977).