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Cover Page Footnote
Professor, District of Columbia School of Law; Director, Public Entitlements Clinic. Natalie Wasserman, Esq., ably assisted with the research for this Article. I would like to express my appreciation to my father, Walter Gellhorn, University Professor Emeritus, Columbia University School of Law, and to the Honorable James L. Oakes, now Senior Judge of the United States Court of Appeals for the Second Circuit, who taught me the importance of keeping a watchful and constructive eye on administrative agencies charged with responsibility for our most vulnerable citizens. I am grateful to the Social Security Administration Office of Hearings and Appeals and the Washington, D.C., Disability Determination Service, in particular Daniel Skoler, Marianne Julian, Michael Brennan and Michael Billingsley of those offices, for providing data and comments. All social security advocates are indebted to Ethel Zelenske and Kim Savage, National Senior Citizens Law Center, for their Informational Mailings. Finally, I appreciate the collegial comments of Michael A. Schuster and Dorothy Siemon, Legal Counsel for the Elderly, and Prof. Susan L. Waysdorf, DCSL.

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IN DISABILITY AND WELFARE REFORM:
KEEP THE SUPPLEMENTAL SECURITY INCOME PROGRAM BUT REENGINEER THE DISABILITY DETERMINATION PROCESS

Gay Gellhorn*

I. Introduction

In comparison to the rather noisy discussion about the Aid to Families with Dependent Children program and teenage mothers, the welfare reform debaters are quieter about the Supplemental Security Income program and the disabled children and adults it assists. For twenty years, impoverished adults and children who are totally and permanently disabled, and therefore "unable to engage in any substantial gainful activity," have depended on this

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1. The primary focus of the debate on welfare reform is on the Aid to Families with Dependent Children program ("AFDC"), see infra note 27, but there are voices calling for elimination of all means-tested programs as the cure to perpetuating the cycle of dependence on government. The Cato Institute, for example, calls the Supplemental Security Income program "the black-hole of the welfare state." Testimony of Stephen Moore, Director of Fiscal Studies, Cato Institute, Before the House Committee on Ways and Means, Subcommittee on Human Resources (Jan. 27, 1995). Another Cato Institute writer lists sixty-three "major" means-tested programs (including SSI), and argues that the entire social welfare system should be eliminated "for individuals able to work." Michael Tanner, Ending Welfare As We Know It, 212 POLICY ANALYSIS 4 n.9, 23 (July 7, 1994). This Article is concerned with the protected category of persons unable to work because of disability.


federal entitlements program for survival. Some 4.6 million disabled persons are entitled to benefits that average $381 a month.\textsuperscript{4} The Social Security Administration ("SSA") estimates that 2.9 million people will file new disability claims in fiscal year 1995.\textsuperscript{5} That number will surely increase if Congress enacts legislation eliminating or restricting other entitlement programs, particularly as states cut back their welfare programs.\textsuperscript{6} Even in current times, when the "safety net" is woven out of many programs, some 40% of Supplemental Security Income applicants had applied for or were receiving other state-administered benefits the year preceding their application for Supplemental Security Income.\textsuperscript{7} A comprehensive

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\textsuperscript{4} 57 Soc. Security Bull. 129, tbl. 2.A9 (Fall 1994) (reporting June 1994 data). The Supplemental Security Income ("SSI") program also provides benefits for the very poor who are aged or blind; those programs are not within the scope of this Article. The recipients in June 1994, included 4,621,570 disabled persons, 1,470,240 aged persons and 85,735 blind persons. The total average monthly benefit for all SSI recipients in June 1994 was $347.28. Id.

\textsuperscript{5} 59 Fed. Reg. 47,900 (1994). This represents a 69% increase over fiscal year 1990 levels. Id.

\textsuperscript{6} After Michigan terminated its welfare program in October 1991, there was an unusual increase in SSI enrollments. Between 1989 and 1990, SSI recipients in Michigan increased by 6466; between December 1990 and December 1991, the increase was 10,818, and the following year the increase was 20,337. Soc. Security Bull., Annual Statistical Supplement 1989 (tbl. 9.B3); 1990 (tbl. 9.B3); 1991 (tbl. 7.B3); 1992 (tbl. 7.B3).

Most states are cutting back on their welfare programs. See Malcolm Gladwell, Remaking Welfare: In States' Experiments, a Cutting Contest, Wash. Post, Mar. 10, 1995, at A1, A4 (discussing experience of some of the forty-four states that have enacted legislation changing their welfare systems, and the competition among states "to find out who can do the best job of driving the poor out of their state or keep them from coming in."). An example is Virginia. Spencer S. Hsu & Donald P. Baker, Va. Overhauls Welfare, Gives Allen a Victory, Wash. Post, Feb. 26, 1995, at A1, A20 (74,000 women and their children to be affected by new law providing no payments to additional children born to welfare mothers; teenage mothers to live with parents and identify fathers; work requirement within 90 days of receiving first check; end of benefits in two years).

\textsuperscript{7} SSA refers to a "recent" study that showed that 40% of claimants filing for SSI disability benefits had filed for or received AFDC, welfare, or other state social services within the year preceding the SSA study. 59 Fed. Reg. 47,900 (1994). About three quarters of these claimants had been granted other benefits, and three quarters of those beneficiaries were still receiving them at the time they applied for federal disability benefits. Id. Nineteen percent of AFDC recipients have a disability, according to Deborah Weinstein, Director, Family Income Division, Children's Defense Fund (3/1/95) (transcript on file with the Fordham Urban Law Journal).

The incentives have been there to move clients from state welfare programs such as General Public Assistance to the federal Supplemental Security Income program. The local government's incentive has been improved cash flow and reduced welfare costs; as each state recipient of benefits moves on to the SSI rolls, the federal government both "repays" the state for benefits paid out to that recipient during any concurrent periods of coverage, 20 C.F.R. § 416.1901-22 (1994) (interim assistance
discussion of welfare reform must therefore include review of the Supplemental Security Income program.

Congress enacted the Supplemental Security Income ("SSI") program in 1972 to provide a uniform, federally-funded program to guarantee a monthly income to the poor and disabled.\(^8\) Congress, with the urging of a Republican President, was responding to a perceived need to "overhaul" existing, disparate state programs "to improve their adequacy, their equity, and their efficiency,"\(^9\) as well as to protect the wage-related social security program.\(^10\) Supplemental Security Income is an entitlement program for three groups of poor people: the disabled (the group with which this Article is concerned), the aged and the blind. Persons in each of these groups may also be covered by the Social Security Act. What distinguishes the two programs is their non-disability requirements. Eligibility for Social Security disability benefits (often referred to as Social Security Disability, "DI" or Title II) requires proof of "insured status" for those who have paid into the social security system through their FICA taxes on their earned income.\(^11\) Eligibility for Supplemental Security Income (often referred to as "SSI" or Title XVI) requires proof of limited income and resources.\(^12\) Only

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\(9\) Report of the Advisory Council on Social Security, March 31, 1971, reprint of Soc. Security Bull. 6, 17-18 (June 1971). It is ironic that Congress two decades ago concluded that the existing "crazy quilt" of state programs and federal-state partnerships didn't work, id., while the current Congress seeks to return welfare programs to the states and limit federal financial and administrative involvement.

\(10\) Id. at 18. The rhetoric offered then was not dissimilar to the rhetoric advanced by Republicans now. President Nixon, for example, supported the legislation as a companion piece to his proposals for work incentive programs such as earned income tax credits, workfare, and national wage supplements to "spur, rather than kill, the incentive to start working and keep on earning." Message from the President of the United States, H.R. Doc. No. 270, 92d Cong., 2d Sess. 4 (1972).


the very poor meet the Social Security Act's financial tests for SSI: resources and assets of no more than $2000 for a single person, and income no more than the maximum $458 SSI monthly benefit. Contrary to a popular stereotype of the SSI recipient as a nonworker, a great many of these very poor SSI recipients have work histories that entitle them to social security benefits. Over 40% of those who receive SSI also receive social security benefits.

The standard for disability, and the process for determining disability, are identical for the Supplemental Security Income program and for the Social Security Disability program. Claimants must prove that they are:

unable 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 which has lasted or can be expected to last for a continuous period of not less than twelve months (or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity).

For persons who meet this definition of disability—the disabled and unemployed—health insurance is a critical issue. They face high health care costs, and may be inadequately insured or barred from access to private insurance because of their preexisting conditions. Because current national policy does not include universal health care coverage, some disabled persons can only hope to obtain medical care if they prove that they are unable to work because of their disabilities, and thus qualify for Medicaid or Medicare. Health care reform is integral to the discussion of welfare programs and policy.

14. Many people receive social security disability or retirement benefits less than the maximum amount allowed under the SSI program. If they also have limited resources, they are eligible for SSI, which is reduced by the amount of their other income, including social security. In 1994, 40.1% of all SSI recipients also received Social Security benefits. Soc. Security Bull., Annual Statistical Supplement 296, tbl. 7.D (1994). The figure for disabled SSI recipients was 32%; for elderly SSI recipients it was 64%. Id.
16. Supplemental Security Income beneficiaries automatically receive Medicaid; Medicare covers DI beneficiaries beginning twenty-nine months after the onset of disability.
17. At the request of the Chairpersons of the Committee on Ways and Means and the Subcommittee on Social Security of the House of Representatives in March 1993, the nonprofit National Academy of Social Insurance ("NASI") is examining the relationship of health care insurance and public disability programs. NASI, Rethinking
A finding of disability under the SSI program does not confer lifetime benefits.\textsuperscript{18} The federal disability program has provisions for rehabilitation and encourages the disabled to undertake a plan to become self-supporting.\textsuperscript{19} Also, disability recipients are subject to periodic case reviews to redetermine continuing eligibility.\textsuperscript{20}

The Supplemental Security Income program is not lavish. The maximum monthly SSI payment to an individual in 1995 is $458; this amount may be less, depending on the recipient's countable income and living arrangements.\textsuperscript{21} The maximum payment is only 75\% of the poverty guidelines for an individual.\textsuperscript{22} Nevertheless, the program has been effective since its inception in closing the poverty gap for the vulnerable population of disabled adults and children. Comparison of the pre-SSI poverty gap in 1973 with the subsequent year under SSI showed that, in its first year, SSI eliminated 60\% of the preexisting poverty gap for the disabled.\textsuperscript{23} Another statistical study a decade later analyzed 1990 data on the

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impact of the federal benefits program on the poverty status of children.\textsuperscript{24} Although the percentage of children in families with income under the poverty threshold had climbed to an alarming 22\% in 1992, the number would have been vastly higher without the payment of federal social security and SSI benefits. These programs raised 1.1 million children above the poverty level and lessened the effects of poverty for 1.3 million more.\textsuperscript{25}

Although the SSI program accomplishes its objective of supporting persons whose disabilities prevent them from supporting themselves through work, the program is vulnerable because it costs a great deal—some $19 billion in cash benefits in 1994\textsuperscript{26}—and because its processes are complex and poorly understood and grind extremely slowly. It is not surprising, therefore, that there are major proposals to change the Supplemental Security Income entitlement program. The Republican-majority House of Representatives began the 104th Congress by introducing a variety of bills promised in the pre-election Contract With America, which made a broad promise to “cut spending for welfare programs and . . . promote individual responsibility” through a piece of legislation to be called the Personal Responsibility Act.\textsuperscript{27} Introduced early in the session as H.R. 4, the Personal Responsibility Act’s primary focus was on turning welfare over to the states, limiting welfare to teen-

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\textsuperscript{25} Kearney et al., \textit{supra} note 24, at 30 & tbl. 5 (1990 data). Supplemental Security Income benefits alone moved over 322,000 children out of poverty. \textit{Id.} If OASDI and SSI benefits had not been received in 1990, the number of children in families living below 50\% of the poverty line would have been four times greater than the approximately 400,000 in this category. \textit{Id.} An additional 1.3 million children were in families that remained below the poverty line, but whose income was raised above 50\% of that line by the receipt of OASDI and SSI benefits. \textit{Id.}

\textsuperscript{26} U.S. GENERAL ACCOUNTING OFFICE, \textit{SOCIAL SECURITY: FEDERAL DISABILITY PROGRAMS FACE MAJOR ISSUES tbl. 1 at 4 (Mar. 2, 1995) (GAO/T-HEHS-95-97). In 1994, the federal government paid SSI benefits to 893,000 disabled children and 2,311,000 disabled or aged adults. \textit{Id.}

\textsuperscript{27} GOP’s \textit{Contract With America}, \textit{STAR TRIBUNE}, Nov. 9, 1994, at 14A. As noted, \textit{supra} note 1, the primary target of this proposal was teenage mothers. The Personal Responsibility Act was described in the Contract With America as follows: “‘Discourage illegitimacy and teen pregnancy by prohibiting welfare to minor mothers and denying increased AFDC for [mothers having] additional children while on welfare, cut spending for welfare programs and enact a tough two-years-and-out provision with work requirements to promote individual responsibility.’” \textit{Id.}
age mothers, and requiring AFDC recipients to work.28 Various versions of the Personal Responsibility Act emerged from committees and coalesced in a bill that passed the House of Representatives on March 24, 1995.29 This final bill would limit SSI eligibility for certain classes of recipients, including most legal aliens, children, and persons who are disabled primarily because of drug abuse or alcoholism.30 The Clinton Administration, in testimony presented by the Secretary of Health and Human Services, opposed much of the proposed legislation.31

Against this backdrop of legislative assault, the Social Security Administration, now an independent entity,32 assumes that the entitlement program will continue and that Congress's definition of "disabled" will remain unchanged. The agency, however, has articulated the urgent need to alter its disability determination process with a goal of reaching correct decisions on initial claims, rather than through a complex process of multiple appeals.33 The Social Security Administration's primary focus at this moment is on procedural, not substantive change. To this end, the agency recently released a Process Reengineering Program: Disability Reengineering Project Plan ("Reengineering Plan")34 to save money,

28. Among its less-publicized provisions was termination of SSI as an entitlement program, instead capping the federal expenditure at 1995 levels adjusted for inflation and the growth in the poverty population. H.R. 4, 104th Cong., 1st Sess. §§ 301(b)(2), 302(2) (as introduced Jan. 4, 1995).
29. H.R. 4. See infra discussion at part IV.
30. Id.
32. Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, 108 Stat. 1464 (1994). This Act, in part, established the Social Security Administration as a separate agency, effective March 31, 1995. The structure of the independent SSA, for example a six-year term for the Secretary, is intended to make SSA less vulnerable to political pressure. The President nominated the present Commissioner, Shirley M. Chater, to head the new agency. She is committed to implementing the Reengineering Plan discussed in this Article, infra part III.
33. The Social Security Administration states the "case for action" in 59 Fed. Reg. 47,889 (1994). The agency also cites the changes in demographics and technology.
decrease delays in decision-making, and increase citizen and employee satisfaction. Thus, Congress and the Social Security Administration are moving on separate tracks.

The thesis of this Article is that reform of the Supplemental Security Income disability program is properly on the welfare reform agenda, but not in the terms cast by proposed legislation. Procedural reform targeting identified problems should be the first step, rather than the termination of the federal entitlement program or the re-writing of the eligibility criteria. Substantive reform should follow such procedural reform. Therefore, this Article will focus particularly on procedural reform, although it will place that discussion in the context of the current legislative climate.

Part II of this Article describes the current disability determination process and why it needs to change. Part III discusses procedural reform, and in particular the major aspects of the agency's Reengineering Plan and its implementation. This Part also focuses attention on aspects of the Plan that deserve special vigilance and proactive participation by those who advocate on behalf of poor and disabled people. Part IV reviews current congressional proposals to restrict the reach of the SSI program. The Article argues for rejection of these proposals, which are not responsive to the identified need for change in the system, and which would have untoward and destructive impacts on state and local governments and the people whose survival depends on these entitlements. The Article concludes that the Reengineering Plan holds promise for procedural reform of a major welfare program in ways that will be beneficial to citizens.

II. Disability Determination: A Process in Need of Change

Disability determination has to change. The process costs too much and takes too long: agency graphs show rising claims, rising

37. 59 Fed. Reg. 47,890-91 (1994). SSA estimates 2.9 million initial disability claims in fiscal year 1995, a 69% increase over FY 1990 levels, and 542,000 requests for hearings before an Administrative Law Judge, a 75% increase over FY 1990 levels. Id. at 47,900.
costs, decreased staff, increased backlogs and increased processing times. Adjudication is based in part on rules that have not been adopted by notice-and-comment rulemaking. The incentives in the present system are skewed; the present system rewards both the government and claimants' representatives for delay, at the expense of claimants, and encourages outcomes that may not reflect the merits of cases. Although the system accomplishes its purpose of sustaining millions of very poor, disabled people, it does so at costs that are unacceptable to nearly everyone. From the claimants' point of view, there is a crisis of confusion and delay. They do not understand how to navigate the system successfully, why it takes so long and why different levels of the same agency reach opposite conclusions. As to delay, persons who meet the SSA standards of poverty can scarcely afford to wait for help. Yet the agency takes from five months to two years to determine that they are unemployed because of physical and/or mental impairments. The actual task time for SSA staff during this extended period is minuscule: thirteen hours of the 154 days from initial application to initial decision, for example, and only thirty-two hours of the 342 days from a request for a hearing to receipt of a hearing decision if the claimant has appealed unfavorable deci-

38. Id. at 47,892 (disability beneficiary growth). In fiscal year 1993, SSA spent $2.5 of its $4.9 billion administrative cost budget for processing disability applications and appeals. Id. at 47,896-97. The figure includes the costs of processing disability applications under both the SSI and the Social Security Disability programs. 57 Soc. Security Bull. 51, 52 (1994).


40. The backlog of cases awaiting a hearing before one of the agency's approximately 800 Administrative Law Judges ("ALJs"), for example, recently passed the half million mark. Even when ALJs issue an average of forty-four decisions a month, they cannot keep abreast of new filings or eliminate the backlog. Interview with Daniel Skoler, Associate Commissioner and Chief of the Office of Hearings and Appeals (Dec. 13, 1994); see also Christine M. Moore, SSA Disability Adjudication in Crisis, 33 Judges' Journal 2, 6, 46 n.1 (Summer 1994) (projecting backlog of 563,000 in 1996).

41. 59 Fed. Reg. at 47,898-99 (1994). SSA projects for 1995 that the average processing time for initial claims will be 154 days, about double the time required in 1988, and that time from request for an ALJ hearing to disposition will rise from about 220 days to about 342 days. Id. at 47,899-900.

42. See infra discussion at parts II.B, III.B.

43. See infra discussion at parts II.C.1-2.

44. See infra discussion at part II.C.3.

45. That is, an unemployed person with less than $2000 in assets and resources and countable monthly income of less than the SSI maximum benefit amount ($458 in 1995).
sions to that level. During the rest of the time, files move from desk to desk, travel between offices in different locations, are stacked in the in-box or are simply lost. To comprehend this requires understanding the agency's multilayered decision-making process, its lack of uniform standards for decision-making, and its system of incentives.

A. The Multilayered Administrative Process

The Social Security Administration may be unique among federal agencies in having four levels of administrative review. Further, in contrast to the pyramidal judicial system, where very few contested matters end up in court and only a small percentage go to trial or are appealed, a relatively small proportion of disappointed disability claimants drop out of the appeals process. Finally, it is astounding that approximately 75% of claimants are successful in getting benefits at the hearing level—that is, the third time around, after the agency has twice reviewed their claim and twice denied it.

1. Deciding to Apply

A person who is poor and unable to work because of disability may learn about the SSI program in a variety of ways. In most states granting their own interim disability benefits, recipients will be required to apply for SSI. Some learn of SSI through outreach programs, their social networks or through contact with Social Security for other reasons. Some of their information may be errone-

46. 59 Fed. Reg. 47,900-902 (1994). Task time is “the time employees actually devote to working directly on a claim.” Id. at 47,902.
47. SSA refers to this as “hand offs” and “queues.” Id. at 47,902.
48. Disability determination remains a cumbersome paper process. Reform is totally dependent on system-wide innovations that will permit receiving and processing information electronically. SSA acknowledges that its entire plan to redesign the disability determination process is dependent on its planned IWS/LAN environment and the automated disability claim system, scheduled for pilot implementation in March 1996. IMPLEMENTATION PLAN, supra note 36, at 6; see also OFFICE OF TECHNOLOGY ASSESSMENT, THE SOCIAL SECURITY ADMINISTRATION’S DECENTRALIZED COMPUTER STRATEGY: ISSUES AND OPTIONS (1994).
49. JUDICIAL BUSINESS OF THE U.S. COURTS, 1994 REPORT OF THE DIRECTOR, app. 1, tbl. C-4 at A-36 (3.5% of civil cases filed in federal district courts during twelve months ending Sept. 30, 1994 proceeded to trial).
50. Forty-eight percent of those denied benefits at the initial application stage request Reconsideration; 75% of those denied benefits at Reconsideration request a hearing. 59 Fed. Reg. at 47,902 (1994).
ous or incomplete. Studies indicate that the participation rate in SSI by eligible persons remains low. For example, only half the four million elderly persons living in poverty receive SSI, and participation varies within this group depending on race, gender, age and living arrangements. SSA has experimented with outreach projects in a variety of settings, ranging from hospital-based enrollment for low birth weight babies to corrections facilities-based enrollment for terminally ill inmates in anticipation of their release under state compassionate release laws. SSA relies heavily on its toll-free phone number to make appointments for applications and to explain the application process. It also relies on publications that are available at its offices in English and Spanish. Despite the agency’s efforts, the SSA application process is confusing and often unsuccessful for disabled claimants.

2. Initial Applications

A person seeking disability benefits under either the insured social security program or the supplemental security income program makes an application at one of 1300 local SSA offices. Most claimants are not represented at the initial application stage. After the claim is screened for eligibility criteria based on insured status (for a Social Security Disability claim) or limited resources (for an SSI claim) or both (for a concurrent claim), the local office for-

51. For example, claimants may incorrectly believe that anyone with an HIV-positive diagnosis is eligible for SSI. Moreover, claimants are often unsure of what papers are needed at the appointment.


53. SSA entered a consent decree in Cruz v. Califano, 78 F.R.D. 314 (E.D. Pa. 1978), agreeing to provide Spanish-language cover notices and interpreters. Some states provide other bilingual services.

54. DEPT. OF HEALTH & HUMAN SERVICES, OFFICE OF INSPECTOR GENERAL, SOCIAL SECURITY CLIENT SATISFACTION 1994: CLIENT SUBGROUPS 3-5 (June 1994) (OEI-02-92-00982) (disabled clients’ satisfaction with SSA mail, phone, and office contacts 68%, compared with 87% satisfaction for nondisabled clients).

55. 59 Fed. Reg. 47,902 (1994). Claimants make appointments by calling SSA’s toll-free telephone number, (800) 772-1213. They can expect to wait—both to get through to someone on the phone, and to be scheduled for the appointment, although terminally ill people can ask for faster scheduling. Because of the wait, SSA has declared that the effective date of application will be the date the claimant called to request an appointment. Because SSI benefits can only be paid from the date of application, this protected filing date is significant.
wards the claim folder to the Disability Determination Service ("DDS").56 These are odd hybrids: state agencies that effectively operate as SSA field offices, funded by SSA and following procedures promulgated by SSA.57 The DDS has in-house physicians who review the medical records and make recommendations to disability examiners. The DDS can also request consultative medical and psychiatric examinations from outside physicians.

The disability decision is made by an adjudicative team consisting of a disability specialist and a program physician, who is a DDS medical or psychological consultant.58 It is unlikely that DDS adjudicators ever see a claimant.59 The standards used by the DDS in determining disability are set forth in the Program and Operation Manual System ("POMS"). The POMS are not easily accessible to the public; the SSA permits claimants and their representatives to make an appointment to photocopy relevant sections, but the POMS are not available in law libraries or on computerized research services. When the DDS makes a decision, the SSA Disability Quality Branch reviews a sample of the claims. Ninety-five percent of this "sample" are DDS grants of benefits; only 5% are denials. The initial process takes an average of 155 days,60 of which only thirteen hours is task time.61 The most recent statistics indicate that the DDS awards disability benefits in 31% of initial claims.62

56. The local office also has authority to award "presumptive benefits" in specific instances, such as full-blown AIDS and terminal cancer. 20 C.F.R. § 416.934 (1994). Presumptive benefits can continue for up to six months while DDS evaluates the claim and do not have to be repaid if the claim is ultimately denied.
58. 20 C.F.R. §§ 404.1615(c), 416.1015(c) (1994).
59. DDS offices discourage claimant contact. In D.C., for example, DDS uses a post office box, rather than a street address, is not listed as an occupant in its building's lobby information board and does not list its telephone number with the information operator.
60. 59 Fed. Reg. 47,902 (1994) (data based on SSA Office of Workforce Analysis fiscal year 1993 Study). Sixteen to twenty-six employees handle the claim. Id. The target level of processing at DDS is thirty-seven days for a Title II claim, and forty-three days for a Title XVI claim. 20 C.F.R. § 404.1642 (1994).
62. DDS PERFORMANCE REPORT 3A (Jan. 1995) (allowance rate of 30.8% for first five months of fiscal year)(data supplied by Office of Hearings and Appeals; copy on file with author). The percentage of initial claims allowed has declined since the preceding fiscal year (33.7%, id.), and since publication of the Reengineering Plan, which reported 39% allowances. 59 Fed. Reg. 47,902 (1994). The advocacy community is watching this decline with concern.
3. Reconsideration

If the DDS denies benefits, the file returns to the local office. The claimant has sixty days to request a reconsideration. Forty-eight percent of those denied benefits do appeal. The claimants must submit a Reconsideration Disability Report stating how their situation has changed since they first applied, and listing any new hospitalizations, doctors, medications and the like. The file then goes back to the DDS, which assigns a different team to review the file and any new evidence. Again, DDS staff will likely never meet the claimant, nor will most claimants have a representative. The DDS allows only 14% of claims on Reconsideration. The time from initial contact with the agency to a reconsideration decision is approximately eight months. The regional Disability Quality Branch reviews 100% of the allowed claims. The disability file again travels back to the local office.

4. Hearing Before an Administrative Law Judge

If the DDS again denies benefits, 75% of the disappointed claimants will request a hearing, which they must do within sixty days of the denial. Again, they will fill out an updated disability report. The local office then forwards the claims file to the nearest Office of Hearings and Appeals ("OHA"). There, it is taken apart and reassembled in the exhibits format used by Administrative Law Judges, and is reviewed for any additional evidentiary development.

Once at the hearing level, most claimants obtain representation. As in the preceding stages, the claimant may submit additional evidence. Some will request a decision on the record in

64. Only 46% of the claimants at the Reconsideration level are represented. Statement of Michael Billingsley, Director of Quality Assurance, D.C. Disability Determination Service (Apr. 29, 1994).
65. Id.
66. 59 Fed. Reg. 47,902 (1994). Up to thirty-six different employees will have handled the claim by the end of the Reconsideration process. Id.
69. Id. This labor-intensive process, called "pulling the file," will end in 1996 when OHA starts to receive a "standardized folder." SSA is initiating the new tool at local offices and DDSs in April-May 1995.
70. Seventy-five percent are represented at the hearing. Id. at 47,902. Representatives need not be attorneys. 20 C.F.R. § 416.1505(b) (1994).
hopes of speeding up the process; about a quarter of the appeals at this level are favorably disposed of without a hearing.\(^71\)

Those who proceed to a hearing now have their first face-to-face determination. Because the agency is not represented, hearings are not considered adversarial. Administrative Law Judges, therefore, fill several roles. They serve as independent fact-finders in a de novo adjudication, but they also are charged with representing the interests of the agency and with developing the record.\(^72\) The legal standards used by ALJs are the United States Constitution, the Social Security Act, the Code of Federal Regulations and case law precedent. The POMS applied by the DDS are not binding on Administrative Law Judges.

The process from request for a hearing to receipt of a decision takes an average of 345 days,\(^73\) of which only thirty-two hours is task time.\(^74\) Administrative Law Judges currently rule in favor of claimants in an average of 75% of the claims decided on the merits.\(^75\)

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71. Memorandum from Marianne Julian, SSA Office of Hearings and Appeals (Mar. 3, 1995) (for the past six months, on average, 23-24% of total hearing dispositions were made on the record) (on file with author). Recently, SSA has been flagging cases likely to be reversed according to various computer-generated profiles. Screening units at OHA review these and may be able to issue a fully favorable "modified reconsideration" decision, thus avoiding a hearing. Presentation by Rita Geier, Deputy Associate Comm'r, SSA Office of Hearings and Appeals (Mar. 13, 1995). OHA is also expanding prehearing conferences, where senior OHA attorneys meet with claimants' representatives and, if possible, issue a modified reconsideration decision, or at least attempt to narrow the issues and develop the record for the hearing. Id. Sixteen states have agreed to delegate DDS authority to OHA to develop the record and issue "revised" reconsideration decisions. Id. See discussion of Adjudication Officers, infra part III.D.


73. Interview with Marianne Julian, Administrative Assistant to Assoc. Comm'r Daniel Skoler (Feb. 22, 1995) (based on date in SSA Office of Hearings and Appeals, FIRST QUARTER REPORT FISCAL YEAR 1995 (Sept.-Dec. 1994)). The average processing time in fiscal year 1994, which ended Sept. 30, 1994, was 300 days. FISCAL YEAR 1994 ANNUAL REPORT. The average processing time is misleading because approximately a quarter of the cases are decided without a hearing, see supra note 71 and accompanying text, thus skewing the data concerning those who wait for a hearing.


5. Appeals Council

The hearing decision, however, is not the final decision of the agency. The disappointed claimant may next seek review by the SSA Appeals Council, which may also review cases on its own motion. Eighty-seven percent of disappointed claimants request review by the Appeals Council. Although very few ALJ decisions are reversed by the Appeals Council, its review yields a large number of cases remanded to the ALJs, who then grant benefits in three-quarters of the remanded cases. Nevertheless, this appeal is a time-consuming step to establish exhaustion of administrative remedies. Only after disposition by the Appeals Council, by which time the claimant has been in the system for an average of two years, may a claimant appeal to federal district court.

6. Judicial Review

Disappointed claimants proceed to federal district court for review of unfavorable agency decisions in 20 to 25% of the cases. In 1994, this translated into 3682 SSI appeals. At this point, claimants must hire a lawyer or attempt to represent themselves; their non-attorney representative cannot appear in federal court. Judicial review is on the record. The applicable standards are the United States Constitution, federal statutes, regulations promulgated pursuant to the Administrative Procedure Act and the controlling case law. Courts rule for claimants in approximately 8% of

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77. Letter of Chief Judge John F. Gerry, on behalf of the Judicial Conference of the United States, to Commissioner Shirley Chater (May 26, 1994) (on file with author) [hereinafter Gerry Letter].

78. The Appeals Council reverses in 3% of the cases, remands in 27%, and affirms in 70%. 59 Fed. Reg. 47,902 (1994). This results in approximately 18,000 awards of benefits a year. In contrast with the Quality Assurance process for review of DDS decisions, there is no systemic review process for hearing decisions. Id. at 47,904.

79. Remands resulted in approximately 15,000 allowances in fiscal year 1994. Data supplied by Assoc. Comm'r Daniel Skoler, SSA OHA (Mar. 13, 1995). This was three times the allowances that resulted from federal court review.

80. Id.

81. Memorandum from Marianne Julian, supra note 71 (20-25% appeal rate to federal court in fiscal year 1994).

82. JUDICIAL BUSINESS OF THE U.S. COURTS, supra note 49, at app. 1, tbl. C-2 at A-26. Figures are for the twelve months ending Sept. 30, 1994. In the same time period, district courts terminated 3195 SSI cases, 2878 of them at the pretrial stage. Id. at tbl. C-4 at A-37. The number of appeals to federal court has more than doubled in the past four years. In 1990, claimants commenced 1770 SSI cases in federal district court. Id. at tbl. C-2A at A-29.
cases, and remand an additional 40% to the agency for further administrative action, which often results in favorable decisions.\textsuperscript{83}

7. Summary

In summary, SSA has four levels of administrative review of claims for disability benefits: Initial Application, Reconsideration, Hearing before an Administrative Law Judge and Appeals Council review. Claimants may seek review of the final adverse SSA action in federal district court. On average, disabled persons seeking subsistence benefits spend up to two years navigating the current disability determination process before they are judged to be entitled to SSI benefits. Although Social Security’s Quality Assurance reviews conclude that very high percentages of claims are correctly decided at the first two levels of consideration, Administrative Law Judges do not agree, and reverse the agency in approximately 75% of the claims decided on the merits. As the next section discusses, the disparity can be explained, in part, by the lack of uniform decision-making standards.

B. Lack of Uniform Standards for Decision-Making

A fundamental flaw calling for procedural reform is the lack of uniform rules guiding decisions. While ALJs apply court precedent and the Code of Federal Regulations, the local SSA offices and state Disability Determination Services, which determine claims at the application and reconsideration levels, follow the POMS, policy guidelines not readily available outside the agency. The POMS is a three-foot long loose-leaf binder of interpretive rules. SSA describes the POMS as “instructions which provide the substance of the statute, regulations, and rulings in a structured format” supplemented by “other administrative issuances which clarify or elaborate specific policy issues”\textsuperscript{84} promulgated by SSA and sent to the fifty-four DDS offices. The public can make an appointment to read or photocopy particular POMS, but claimants and many claimants’ representatives are unaware that the POMS even exists. Often challenged in litigation as being inconsistent with the Social Security Act and regulations,\textsuperscript{85} the POMS may add unknown hurdles for claimants. As SSA euphemistically puts it, the situation of

\textsuperscript{83} Data from SSA Litigation Staff, provided by Office of Hearings and Appeals (Mar. 9, 1995) (on file with author).
\textsuperscript{85} See, e.g., Schweiker v. Hansen, 450 U.S. 785, 789 (1981) (“[T]he Claims Manual is not a regulation. It has no legal force, and it does not bind the SSA.”).
two systems of adjudicative rules, one published and one internal to the agency, "fosters the perception that different policy standards are used at different levels of decision-making in the claims process."86

The empirical basis for that perception is the disparity between the quality assurance score for decisions made at the reconsideration and hearing levels. For example, the SSA regional quality assurance office scores the District of Columbia DDS as making correct decisions in 97% of the cases it decides. If that judgment is correct, one would expect approximately 3% reversals on appeal. The actual reversal rate for these "correct" decisions at the D.C. Office of Hearings and Appeals, however, is 70%, somewhat lower than the national average of 77% reversals.87 One critic of the current adjudicatory framework identifies as the "most glaring and obvious source of the discrepancy" the fact that "administrative law judges apply the statute, the regulations, and the case law, while DDS applies the POMS."88 There are other explanations for the disparity. The extended delay means that claimants will be older and possibly sicker by the time of the hearing, when they can present updated medical evidence. Also, because the hearing is the first face-to-face determination, Administrative Law Judges can clarify the record by questioning and simply observing the claimant. The fact remains, however, that almost a quarter of the ap-

86. 59 Fed. Reg. 18,228 (1994). "Perception" is clearly an understatement, because SSA states that decision-makers other than ALJs "are bound by interpretative guidance in the Program Operations Manual System and supplemental issuances." Id.

87. Statement of Michael Billingsley, supra note 64. The national reversal rate at the Administrative Law Judge level is 77%. 59 Fed. Reg. 47,902 (1994); see also Nat'l Org. of Social Sec. Claimants' Representatives (NOSSCR), Different Conclusions of Different Reviewers of ALJ and Reconsideration Decisions, 16 SOC. SECURITY FORUM 13-15 (1994) (summarizing Sept. 1994 report of the SSA Office of Program Integrity and Review showing disparate conclusions as to whether decisions were supported by substantial evidence when the decisions were reviewed by judges (81% of ALJ allowances supported by substantial evidence) as compared to review by medical consultants and disability examiners (only 41% so supported)) [hereinafter NOSSCR, Different Conclusions]. The address for the NOSSCR is: National Organization of Social Security Claimants' Representatives, Nancy G. Shor, Esq., Exec. Dir., 6 Prospect St., Midland Park, NJ 07432, telephone: (201) 444-1415.

88. Moore, supra note 40, at 6-7. Christine Moore is a former SSA Administrative Law Judge and chairs the Health and Benefits Committee of the National Conference of Administrative Law Judges. Her article expresses the views of the National Conference, which, in February 1994, adopted the recommendations appended to her article. Id. at 46-47. The first recommendation is for a single standard for deciding disability.
pealed cases are disposed of on the record, prior to a hearing. The vast discrepancy between the results in initial decisions and appeals makes the social security disability determination system unique among appellate systems.

C. The Incentive Structure of the Social Security Act

Federal laws and the disability determination process are now structured with incentives that contribute to the problems of multi-layered appeals and application of disparate standards which were identified in the preceding sections. Additional budgetary resources might be an answer to reducing delay. But a larger budget is unlikely. Congress has steadily decreased the agency's appropriation and staffing levels even in the face of rising numbers of claims and increasing backlogs, and the agency intends to "downsize" further. In addition to looking at ways to streamline its processes to save time and money, Congress, SSA and advocates must look at the incentive structure.

1. Government Incentives

Delay might be alleviated by changing the cost-benefit balance. Presently, the government actually saves money, or at least does not spend any additional money, when it delays decisions on claims. For example, assume that an ALJ awards benefits two years after a claimant first applied for benefits. SSA will then begin to pay out monthly benefits. SSA will also make a "lump sum" payment covering the prior two-year period when the claimant should have been receiving benefits. The government pays no interest on this lump sum back payment, so it does not compensate claimants for the delay. Moreover, Congress has permitted the agency to withhold future SSI payments if the lump sum is not "spent down" within six months, on the ground that claimants who

89. See supra note 71.
90. Moore, supra note 40, at 4.
91. 59 Fed. Reg. 47,893-94 (1994). SSA staffing levels, expressed in work years, decreased from over 80,000 in fiscal year 1983 to about 65,000 in fiscal year 1993. DDS staff has remained fairly constant, but applications have increased from about 1.2 million to close to 2 million between fiscal years 1988 and 1993. Id. at 47,891.
92. 20 C.F.R. §§ 416.535, 416.536, 416.543 (1994). When claimants receive state benefits, they sign Interim Assistance Agreements with the state agreeing to apply for SSI and to repay the state from any lump sum SSI payment they receive that covers the same period as state benefits.
receive such a payment are no longer "poor" because the lump sum payment pushes them above the SSI resource level.\(^{93}\)

Another incentive for government to make the right decision quickly would arise if SSA were made responsible for attorney's fee awards to prevailing plaintiffs. Congress has largely removed this incentive for the SSA, which has no liability for attorney's fees as a cost of making incorrect decisions at the administrative level. Although Congress enacted a fee-shifting law—The Equal Access to Justice Act ("EAJA")\(^{94}\)—to encourage the federal government to act reasonably and make correct decisions at the administrative level, Congress exempted the SSA from the provisions covering fees for administrative proceedings.\(^{95}\) Under EAJA, fees against the SSA are recoverable only for work done on appeal to a federal court. Thus, Congress removed a major incentive to improved agency performance.

2. **Representatives' Incentives**

Congress also created financial incentives for advocates to assist claimants late in the administrative process. The Social Security Act allows claimants' representatives (who need not be attorneys) to recover fees from the claimant for work undertaken at the

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93. 20 C.F.R. § 416.1233 (1994). Claimants continue to receive their monthly checks during the six months following payment of the lump sum, but if they have not spent it down to the resource level required by the statute at that point, the agency is entitled to withhold SSI checks until claimants become poor again.


95. When Congress enacted the EAJA in 1980, it disallowed fee-shifting to prevailing parties in administrative proceedings in the Social Security Administration, while allowing fees at the agency level elsewhere. The legislative history is explicit: to sell EAJA, proponents traded off social security recipients' fee awards. H.R. REP. No. 1418, 96th Cong., 2d Sess. 14, 22 (1980) (noting in discussion of costs that excluding Social Security administrative adjudications from EAJA eliminated fees against the government in 91% of 230,000 administrative adjudications in fiscal year 1978, and noting further that "decision to award fees only in adversary adjudications reflects a desire to narrow the scope of the bill in order to make its costs acceptable"). When EAJA was reenacted in 1985, Congress did not extend its coverage to SSA administrative proceedings. Sen. Hefflin, who supported SSA coverage, stated that the provision failed because of "institutional opposition." "While I believe this is an area ripe for protection, political realities dictate otherwise. And this seems to be a fight which will have to be fought another day." 131 CONG. REC. 20,350 (1985) (statement of Sen. Hefflin (D-Ala)).
agency level. Fees under the Act can be as large as 25% of the claimant's lump sum award for back benefits. The representative who puts twenty hours into successfully assisting a claimant at the initial application stage is essentially engaged in pro bono work, since the SSI claimant by definition has no resources with which to pay a fee, and there is no past-due lump sum payment from which to seek a fee under the Act. In contrast, a representative who puts the same twenty hours into successfully assisting a claimant at the hearing stage, after two years of delay, can expect to receive a fairly substantial fee. Thus, representatives, including attorneys, may be financially precluded from assisting claimants early in the disability determination process, and, indeed, may be said to benefit from delay.

3. Other Incentives

Yet another problem with the SSA disability determination structure is the lack of incentives to settle cases that characterizes most systems of dispute resolution. The SSA disability determination process requires a bright-line answer: for purposes of receiving SSI, claimants are either totally disabled or they are not disabled at all. Other systems, notably Worker's Compensation, 

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97. 42 U.S.C. §§ 406(b), 1383(d)(2)(A). If SSA awards benefits, the agency will certify a representative's fee of the smallest of: 25% of the total amount of past-due benefits (up to $4000); the amount of the fee approved by SSA; or the amount agreed upon between the claimant and the attorney. Id. Most claimants retain a lawyer or other representative for the hearing stage, but not before. The fee incentives encourage this delay.

98. In D.C., several major pro bono legal services providers have moved to early intervention in claims, providing assistance at the initial application and reconsideration stages. The D.C. School of Law Public Entitlements Clinic, Whitman-Walker AIDS Legal Clinic and the Judge David L. Bazelon Mental Health Law Center also train volunteer lawyers in this strategy through the D.C. Bar pro bono training program. The result for clients is awards of benefits within weeks (if the client meets the criteria for presumptive disability) or months rather than years. By careful interviewing and comprehensive evidentiary development, the claimant's representative can present a complete package at the time of the initial application.

99. It would be a violation of attorneys' rules of professional responsibility to delay a proceeding improperly. The Reengineering Plan proposes to adopt standards and sanctions applicable to misconduct committed by social security claimants' representatives. See infra discussion at part III.G.
evaluate percentages of disability. The only aspect of an SSI disability claim open to possible negotiation is the onset date of the disability.

Additionally, the agency's Quality Assurance process may encourage line staff to reach decisions that will not be reviewed. At the DDS level, review is heavily weighted toward cases in which benefits were awarded; at the ALJ level there is no systematic review of favorable decisions, but disappointed claimants are very likely to appeal. Finally, advocates have an incentive, born of experience, to keep appealing. Advocates know that Administrative Law Judges reverse some 75% of the denials appealed to the hearing level. The costs of case preparation are modest compared with the likelihood of success on the merits.

In sum, the present disability determination system is beset by problems caused by the sheer numbers of claims and resulting backlogs of cases, by confusion in standards between the various levels of administrative decision-making, and by incentive systems that do not encourage change. The following Part describes and analyzes the agency's proposals for responding to these problems through procedural reforms.

III. The Social Security Administration's Reengineering Proposal and Plan for Implementation

On March 31, 1994, the SSA announced a conceptual proposal for a new disability claims process that not only holds promise for fixing problems and better delivering services, but also offers claimants' advocates an opportunity to influence changes in the determination procedures. The House Ways and Means Committee, Subcommittee on Social Security, held a hearing on the proposal on April 14, 1994. After publication of the Disability Reengineering Project Proposal in the Federal Register, SSA received over 6000 written comments, as well as comments at a

100. See supra discussion at note 77.
101. The SSA and Congress are moving on separate tracks. For a discussion of the House of Representatives disability welfare reform bill, which the author concludes is not responsive to the identified need for changes, see infra part IV.
103. SSA extended the May 27 deadline for comments to June 14, 1994. 59 Fed. Reg. 27,569 (1994). The agency received 6210 written comments from employees, unions, professional associations, members of the public, claimants' representatives and advocacy groups, physicians, state governors, and others. SSA summarized the comments in a one-page Appendix to the revised proposal. 59 Fed. Reg. 47,940 (1994).
variety of fora. The agency then published its revised Reengineering Plan in mid-September,\(^{104}\) omitting some of the original proposal.\(^{105}\) In November 1994, the Social Security Administration published *Disability Process Redesign: Next Steps in Implementation*,\(^{106}\) ("Implementation Plan"), a "living document"\(^{107}\) that SSA plans to supplement as implementation of the Reengineering Plan proceeds over the next six years.\(^{108}\)

The Reengineering Plan describes procedural reforms of the intake process, each of the existing levels of adjudication (including new methods of evidentiary development and standards of decision-making), quality assurance, standards of professional responsibility for claimants' representatives and electronic processing of claims. Several of the proposals are particularly responsive to the need for changes in the disability determination process identified in Part II. These include changing the initial claims process, eliminating the Reconsideration level of administrative review and creating a unified set of rules for use at all levels of adjudication rather than the competing systems now in place. Additionally, the Plan calls for creation of Adjudicative Officer positions at the Hearing level to oversee prehearing development, meet claimants, narrow issues for appeal, and recommend decisions on the record. The Plan calls for substantial modification, if not elimination, of the fourth level of agency review, the Appeals Council.

The Plan also proposes several substantive modifications in disability methodology,\(^{109}\) which the advocacy community approaches cautiously, concerned that changes may eliminate many currently-eligible persons from the SSI program. The following sections fo-


\(^{105}\) The original Reengineering Proposal suggested that the accommodations that employers might make in accordance with the Americans With Disabilities Act ("ADA") should be considered, both in determining whether impairments were disabling, and in considering whether jobs exist in the national economy that could be performed by disabled claimants. These references to ADA were omitted from the revised Reengineering Plan, in the face of uniform and articulate opposition to shifting the burden of complying with ADA, a civil rights law, to disability claimants, the persons ADA was intended to protect. See, e.g., Testimony of Prof. Matthew Diller, Fordham University School of Law, before the House of Representatives Subcommittee on Social Security at 43 (Apr. 14, 1995); Testimony of Martha E. Ford, id. at 48.


\(^{107}\) Id. at 1.


\(^{109}\) See infra discussion at part III.F.
cus on these aspects of the agency's Reengineering and Implementation Plans.

A. Initial Claims for Disability Benefits

It is extraordinarily difficult under the current process for claimants to understand what information is needed to prove disability. When applying for benefits, claimants are faced with a vast array of forms. They may come to the benefits office without all the facts they will be asked to provide. Few of us could accurately produce the requisite information on the spot, yet the data provided at the initial application is the basis for the agency's evidentiary development of the claim, and completeness is therefore crucial. In addition, claimants are asked to describe their disability. Because they may be unaware of aspects of their medical history, or may be in denial or perhaps ashamed, claimants may not reveal such disabilities as mental illness or substance addiction. Further, claimants are rarely provided with a clear framework to understand how the information requested by the agency drives the determination process.

When their claims are denied, claimants have a hard time accepting the decision because they do not feel they have been heard. Under the current process, they are unlikely to meet the decision-maker face-to-face, either to tell their story or to be told why they are being denied benefits. It is common for Social Security to deny a claim simply because hospitals or doctors have not responded to the agency's request for medical records in a timely manner, resulting in the absence of evidence on which to award benefits. As the agency explains, "[o]ften claimants do not understand how the decision was made and, therefore, believe that it was reached arbitrarily," rather than on the basis of lack of evidence. This necessary evidence may have been obtainable through the claimants' own efforts if the agency had encouraged a more active role

110. The agency is a harsh self-critic of its "complex, confusing process," a "'one size fits all' approach to the intake and processing of claims." 59 Fed. Reg. 47,904 (1994).

111. The application forms ask, for example, for name and address and dates of treatment for each medical provider, names and dosages of medications, job titles and employers' addresses for the last fifteen years, as well as detailed financial information. Claimants need to show a birth certificate, original social security card, rent receipt and original statement of any public benefits they are receiving.

112. Some SSA local offices do not provide a private space for taking disability claims. Applicants whose responses can be overheard by others may be unwilling to discuss their situation fully.

for them. Claimants who do not believe that they have been treated fairly are likely to appeal, regardless of the merit of their claim. The Reengineering Plan addresses these problems in several ways, from providing new informational packets (in English and other languages) both for claimants\(^{114}\) and for the doctors and hospitals\(^{115}\) to whom SSA looks for evidence, to creating face-to-face decision-making at the initial determination.\(^{116}\) No claimant would be denied benefits without first receiving a notice stating exactly what evidence the agency has in the record, and offering the claimant the opportunity to submit additional evidence and to have a personal interview.\(^{117}\)

To accomplish the above changes, the original Reengineering Proposal would create a new position, titled Disability Claims Manager, as a claimant's single point of contact for processing both the medical and nonmedical aspects of the initial claim.\(^{118}\) The Claims Manager would meet with the claimant and would use a "simplified decision methodology" and "one set of standards for decision-making" in an automated claim processing system to store information, develop evidence and communicate with medical consultants and others.\(^{119}\) The Claims Manager proposal is a dramatic shift from the current claims examiner process, where those who

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114. *Id.* at 47,907. The goal is to target likely beneficiaries through community outreach and known sources of referrals, such as doctors and third-party organizations that assist disabled persons, and explain the medical and nonmedical requirements, as well as the decision-making process. SSA will also put the information on line for electronic retrieval and filing. SSA will replace the multiple-form application with a "starter application" for the claimant to complete (filing this would protect the claimant's filing date) and a medical information form designed for the claimant's treating source(s) to complete. Every claimant will have an intake interview in person or by video-conferencing (within three to fourteen days according to SSA predictions). *Id.*

115. *Id.* at 47,915-16 (describing development of standardized request forms to replace wholesale procurement of actual medical records, with compensation to health care providers for time spent preparing forms).

116. *Id.* at 47,908-10.

117. *Id.* at 47,910. The Reengineering Plan would allow video conference or telephone interviews as well. Current regulations permit a face-to-face predetermination interview as demonstration projects. 20 C.F.R. § 404.906 (1994).

118. 59 Fed. Reg. 18,212, 218 (1994). The Disability Claim Manager position is described in the September Plan as a goal to be achieved in the longer term as SSA puts in place tools, technological support and staff training. 59 Fed. Reg. 47,908-09 (1994).

119. 59 Fed. Reg. 18,218-19 (1994); 59 Fed. Reg. 47,908-09 (1994). The original proposal sidestepped the question of paramount interest to current employees: what will happen to our jobs? The qualifications for a Claims Manager, and the role of local field office staff and state Disability Determination Service staff when such a position is created, were not stated in the proposal. It is, therefore, perhaps unsurprising that Commissioner Chater has put the single claims manager concept on hold.
decide medical eligibility never meet the claimant and where several people at the local office handle different pieces of the claim before shipping the file to an entirely different location (the state Disability Determination Service) for decision on medical eligibility.120

The revised Reengineering Plan, however, took a step back, saying that in the near term, SSA “will seek ways of working in teams” to improve service at the application decision-making level.121 The “team” concept rather than a single claims manager was forcefully advocated by the National Council of Disability Determination Directors (“NCDDD”).122 NCDDD argued that creating a single claims manager position would have negative labor relations implications, would hold potential for employee fraud and could not be achieved for many years because the concept is dependent on complex training and computer technology.123 The NCDDD proposal preserves but modifies the Reengineering Plan’s face-to-face feature. The claimant’s first contact would be, as it is now, a Claims Representative who would complete the non-disability portion of the application before introducing the claimant to a Disability Examiner, who would then be responsible “for taking the disability portion of the claim, case development, adjudication, and generally ‘managing’ the claim.”124 The SSA task team charged with developing team approaches for processing claims recommended this scenario.125

Another significant and responsive reform proposed by the Reengineering Plan is providing claimants with an opportunity to

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120. As noted in part II, supra note 60, currently, up to twenty-six employees have handled an initial claim by the time it is decided. SSA has been testing five models of face-to-face interviewing. See Milton M. Carrow, A Tortuous Road to Bureaucratic Fairness: Righting the Social Security Disability Claims Process, 46 ADMIN. L. REV. 297, 298-99 (1994).


122. See Letter from Lloyd Moses, President, NCDDD, to Commissioner Shirley Sears Chater, Social Security Administration 2-4 (July 25, 1994) (on file with author) [hereinafter Moses Letter]. In part, Commissioner Chater is responding to union concerns about the effect of the Claims Manager proposal on staff at the state Disability Determination offices.

123. Id. at 2-3.

124. Id. at 3. This proposal seems to contemplate locating Disability Determination staff in local SSA field offices. Currently, the DDS and SSA operate at different locations.

125. DCM Team Scenarios: Report from the EA/DCM Task Team 1-2, Tab A (Feb. 16, 1995) (on file with author). The report outlined other approaches, including teaming with third-party providers, Reconsideration interviews at DDS, “outstationing” of DDS disability examiners in SSA field offices, and making direct referrals to DDS. Id. at Tabs C-E, G.
supplement the record and meet the decision-maker face-to-face prior to an initial denial. As noted in the preceding discussion of the need for change in the disability determination process, claims often are denied simply for lack of evidence. A doctor or hospital may not have responded to SSA’s request for records, or the claimant may not have listed some care providers or divulged sensitive information. The proposed predecision interchange between claimants and SSA should be helpful in remedying this.

A final reform at the initial claim level is a “Statement of the Claim” approach to decisions. SSA describes this approach as one that would give claimants more information on the issues, relevant facts, evidence and rationale behind the decision. SSA reasons that if it provides fuller information to claimants, they can make more informed decisions whether or not to appeal. Reengineering will be successful only if the new procedures ensure more correct decisions at an earlier stage and reduce the number of cases appealed to ALJs.

Taken together, these changes should increase the number of correct initial decisions, as well as satisfy claimants’ concerns about receiving fair consideration. The changes are consistent with recommendations made by others who have proposed reform of the disability determination process, including the American Bar Association. Advocates should be vigilant, however, as the qualifications and training for frontline personnel take shape. Whether the Disability Claims Managers are single persons or a team, it will be crucial that they see their job as developing the claim. To do this successfully will require a comprehensive understanding of the legal and medical standards for disability so that claims managers ask the right questions. Claim managers also will need skills in listening and creating empathetic relationships with claimants.

127. Id. at 47,910. The American Bar Association has urged this reform of the application process since 1986, and reiterated it in comments on the Redesign Proposal. See Letter of Robert D. Evans, ABA Governmental Affairs Office, to Rhoda M.G. Davis, Director, SSA Disability Reengineering Project (May 19, 1994) (attaching 1986 and 1991 Resolutions adopted by the ABA House of Delegates) (on file with author).
129. See Report accompanying ABA Resolution 109A, supra note 22, at 7-10; see also Moore, supra note 40, at 42 (emphasisizing importance of visual picture of claimant and providing opportunity to present favorable evidence).
B. A Single Rule Book Throughout the Disability Determination Process

The Plan announces that SSA will develop "a single presentation of all substantive policies used in the determination of eligibility for benefits. All decision-makers will be bound by these same policies, which will be published in accordance with the Administrative Procedure Act." This proposal is on a fast track. The "Process Unification Disability Process Redesign Team" addressing this aspect of the Reengineering Proposal states that by the end of fiscal year 1996, it will:

create a plan to ensure that all adjudicative policy guidelines adequately reflect the requirements of the Act and regulations;
create a plan to meld existing adjudicative policy documents into a unified vehicle, addressing the level at which this would be promulgated (regulation, ruling, sub-instruction), procedures for compiling and updating, an expedited clearance mechanism, and a mechanism to ensure timeliness and flexibility in responding to immediate needs such as legislative changes and litigation;
and decide how procedures contained in existing policy documents (including the Disability Determination Services and the Office of Hearings and Appeals manuals) will be handled or eliminated and how nonadjudicative policy will be separated from adjudicative.

Every commentator on disability determination reform who addresses the issue agrees on the need for a uniform decision-making standard, but not as to what that standard should be. The administrative law judges and advocates agree that the DDS should conform to the legal standards set forth in the statute, regulations and

130. 59 Fed. Reg. 47,910 (1994). To the lawyer, this statement is odd: of course one set of standards should be used throughout the process, and of course these standards should be promulgated through notice-and-comment rule-making. As noted, supra part II, one of the Alice in Wonderland aspects of social security practice, however, is the use of disparate standards by the Disability Determination Services (which decide claims at the application and reconsideration stages) and the Office of Hearings and Appeals. Administrative Law Judges in the OHA consider themselves bound by both case law and by APA-enacted regulations published in the Code of Federal Regulations ("CFR"). SSA publishes Social Security Rulings, which are precedential court decisions and policy statements or interpretations that SSA has adopted as binding policy. Disability determination staff at the various state agencies, however, do not consider themselves bound by regulations published in the Code of Federal Regulations, by legal precedent or by the Social Security Rulings. Rather, they decide claims through the application of SSA's internally-published POMS.

The disability examiners, on the other hand, speaking through their national association, think that radical changes have to be made at the Office of Hearings and Appeals level. SSA takes the middle ground. SSA recently concluded that decision-makers at both levels sometimes use inappropriate review criteria.

SSA projects that it can create a single policy compilation within six to twelve months. The challenge of creating a unified set of APA-enacted policies is daunting. Not only must SSA find some way to merge a full volume of the Code of Federal Regulations, legal precedent and a vast compendium of interpretations, but it must also find a way to present this material in a form that can be used by its frontline staff and claimants.

A single source of decision-making rules, adopted with the procedural safeguards of notice-and-comment rulemaking, is a positive goal. Advocates for claimants should take a proactive position. The new rules, it seems clear, will not be purely procedural since the Reengineering Plan also proposes substantial changes in the decisional methodology. Advocates should certainly be alert to changes in standards that are inconsistent with the statute and to favorable court decisions achieved through hard-fought litigation. Such precedent is the currency of advocacy, the fruits of cumulative lawsuits to enforce Congress’s intent to assist disabled people. “Starting over” to accumulate construals of new

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133. E.g., Nat’l Conf. of Administrative Law Judges SSA Disability Resolution #12 (Feb. 1994), reprinted in Moore, supra note 40, at 47.
135. See NOSCCR, Different Conclusions, supra note 87-90 and accompanying text. (reporting on Office of Program Integrity and Review study indicating that judges and medical consultants/disability examiners disagree whether each others’ decisions are supported by substantial evidence).
137. Although SSA has deferred the decision to create a single person as a point of contact who will both originate and adjudicate a claim, ultimately the Plan contemplates a single disability claim manager who will be expected to understand all the aspects of the rules governing both non-medical and medical criteria for eligibility. 59 Fed. Reg. 47,908 (1994). The Plan does not suggest that the Disability Claim manager will be a person with either legal or medical training.
138. A stated goal of new rules is ease of understanding. For example, although Commissioner Chater states that SSA is deferring decision whether to replace the current “Listings” of impairments with a new Index of Disabling Impairments, the September Plan states that there will be such an Index in time, and that it “will be as nontechnical as possible... and simple enough so that laypersons will be able to understand what is required to demonstrate a disabling impairment in the index.” Id. at 47,912.
139. See infra discussion at part III.F.
rules can drain the energies of the advocacy community and the agency. On the other hand, advocates should be open to modifying rules that now delay determinations for their clients. Alternative decision-making systems may work better.

Because the majority of claimants are unrepresented, the rules of decision must be accessible to all, not just the highly trained. Therefore, advocates have an obligation to be actively involved in the course of creating a unified decision-making process, and to ensure that simplification does not mask destructive substantive changes in standards.

C. Elimination of Reconsideration Level of Review

As discussed above, delay is a primary issue for disability claimants. SSA's computer-generated test model projects that implementation of the Plan—a six-year process—will enable it to shorten the time from application to initial decision from 155 to less than forty days and the time from appeal to a hearing decision from eighteen to five months. A key factor in reducing the delay is the elimination of the Reconsideration level of appeal which is planned for fiscal years 1997-98, after publication of implementing regulations. The agency reasons that the need for intermediate appeal will not be necessary once the planned reforms are in place for initial determinations. There will be a fully developed evidentiary record, the claimant will have been given a chance to submit additional evidence prior to an adverse ruling, and the agency will issue a “statement of the claim” decision that will state the basis and rationale for its decision. Further, as discussed below, the adjudicator for the initial determination will have used the same standards that will apply if the decision is appealed. Additionally, SSA will have standardized how it puts together files (and eventually make this process entirely electronic)

140. An example of this kind of open-minded examination is Walter Gellhorn's comparative study of the United States’ litigation model medical malpractice system and New Zealand's statutory no-fault social insurance system, which compensates all injured persons. Walter Gellhorn, Medical Malpractice Litigation (U.S.)—Medical Mishap Compensation (N.Z.), 73 CORNELL L. REV. 170, 188-202 (1988).
142. Id. at 47,916. SSA projects that elimination of Reconsideration will shorten decision time from application to issuance of a decision by an Administrative Law Judge from the present average of one and a half years to five months. Id. at 47,929.
143. IMPLEMENTATION PLAN, supra note 36, at 10.
145. Id.
so that a case can move easily from the initial determination to the Office of Hearings and Appeals.\textsuperscript{146}

Because so few claimants succeed at Reconsideration—only 14\%\textsuperscript{147}—the elimination of this step in the process will not be mourned by many. Various groups and scholars have urged this reform.\textsuperscript{148} Although one might expect Administrative Law Judges, who are currently facing a backlog of over half a million cases, to be nervous about the removal of a buffer between them and disappointed claimants,\textsuperscript{149} in fact the National Conference of Administrative Law Judges favors abolition of Reconsideration.\textsuperscript{150}

D. Adjudication Officers

The Reengineering Plan proposes a new position at the local Offices of Hearings and Appeals, an Adjudication Officer, who may serve some of the same screening functions as the Disability Determination Services. SSA has stepped up implementation of Adjudication Officer positions, originally scheduled for 1997-98.\textsuperscript{151} By summer of 1995, Adjudication Officers ("AOS") should be in place at nine to twelve test sites, with nationwide implementation possi-

\textsuperscript{146} \textit{Id.} SSA began implementing a "standardized folder" in April-May 1995. See supra discussion at note 69. Eventually, disability files will be entirely electronic.

\textsuperscript{147} 59 Fed. Reg. at 47,902 (1994).

\textsuperscript{148} \textit{See, e.g.,} American Bar Association Resolution 109A, supra note 22, at Point 6 (eliminate reconsideration; appeal directly from initial denial to ALJ); Carrow, supra note 120, at 302-03 (citing other studies making this recommendation); \textsc{Frank S. Bloch}, \textit{Disability Determination: The Administrative Process and the Role of Medical Personnel} 192 (1992) (noting that reconsideration is unnecessary if other recommendations, including fully-developed medical records, face-to-face interview and opportunity to supplement record, are provided).

\textsuperscript{149} Social Security acknowledges that the present drawn-out appeal process discourages some claimants from pursuing their appeal rights. They simply drop out. 59 Fed. Reg. 47,916 (1994). Over half of those initially denied benefits do not appeal. \textit{Id.} at 47,902 (52\%).

\textsuperscript{150} \textit{See} SSA Disability Resolution Adopted by the National Conference of Administrative Law Judges, Point 3 (Feb. 1994), appended to Moore, \textit{supra} note 40, at 46. Moore opines that "under the current system, DDS is simply doing half the job, but doing it twice." \textit{Id.} at 43. This Resolution came to the ABA House of Delegates in Jan. 1995, but was withdrawn, largely because of the concerns expressed by the ABA Commission on Legal Problems of the Elderly, which thought many of its recommendations duplicated existing ABA policy, and that others were ill-advised. Letter of John H. Pickering, Special Advisor to the Comm'n (Dec. 22, 1994) (on file with author). Pickering's group, however, fully supports elimination of Reconsideration, \textit{id.} at 2, as has the ABA since August 1991. See Report accompanying Resolution 109A of the American Bar Ass'n, adopted by the House of Delegates, Feb. 1994, at 3-4 (reiterating position).

\textsuperscript{151} \textit{Implementation Plan}, supra note 36, at 10.
bly occurring as early as December 1995. AOs will meet with claimants and/or their representatives to explain the hearing process, obtain new evidence and attempt to narrow the issues being appealed. AOs can issue fully favorable decisions, if supported by the evidence, and can approve the representative’s fee, thus shortening the time that claimants spend waiting for a hearing and the time that representatives spend waiting for payment.

Procedural reform at the hearing level is critical. The backlog of cases has passed half a million. Advocates should be attentive to the development of this reform. One concern is job qualifications. Apparently, SSA has decided that AOs will not be required to have law degrees or legal training, but must have “a college degree or equivalent qualifying experience.” If AOs are not trained in the law, they may perpetuate some of the defects in the DDS decision-making. Another concern is claimants’ due process rights. If unrepresented claimants agree to narrow the issues at a hearing, or to take on the agency’s responsibility to develop the evidentiary record, they may be seriously prejudiced. On the other hand, SSA is already experimenting with methods to identify cases that are likely to be reversed on appeal, and to expedite them. Because AOs will be able to issue only fully favorable decisions, some claimants will benefit from this reform because their cases will be decided with less delay. Other claimants should not be harmed; they should proceed to a hearing.

152. Pre-implementation Testing Plan in ADJUDICATION OFFICER PROCEDURES HANDBOOK (n.d.) (copy provided author Mar. 17, 1995) (on file with author) [hereinafter AO HANDBOOK]. SSA will test the AOs in at least nine sites, located equally in local field offices, DDS offices and OHA offices. Id. at 10.
153. AO HANDBOOK, supra note 152, at 1. The AO Handbook allows AOs to issue fully favorable decisions without meeting with the claimant. Id. at 2.
154. Id. at 1, 7.
155. Id. at Testing Plan p. 9. SSA emphasizes competencies in analysis, writing, negotiation, oral communication, practice management and substantive knowledge of the relevant law and the disability programs.
156. SSA has compiled profiles for screening cases appealed to an ALJ, using a score according to a set of case characteristics associated with higher than normal incidence of decisional error, and is implementing a prehearing conference initiative using senior attorneys. See NOSSCR, SSA Profile Screening Project, 17 Soc. Security Forum 11-13 (1995). NOSSCR criticizes applying the screening only to appealed cases, rather than to all reconsideration denials, since many claimants do not request a hearing because they are confused or discouraged. Id. at 12.
E. A Modified Role for the Appeals Council

The Reengineering Plan proposed eliminating the Appeals Council as a prerequisite to appealing to federal court. The Council would evaluate all claims filed, however, and seek voluntary remand from the court for the purpose of affirming, reversing or remanding—a power it now has under existing law.

Advocates have mixed views about this proposal. On the one hand, the Appeals Council stage accounts for additional delay, and only a small percentage of cases are successful. On the other hand, appealing to federal court is costly for claimants, who must obtain a lawyer, pay filing fees, and the like. Additionally, in terms of sheer numbers, more claimants prevail at the Appeals Council than in court. On balance, the better position is to retain the Council, but to impose a time limit on its review, after which claimants can choose to proceed to federal court without further delay. In any event, influential voices, such as the Department of Justice, oppose elimination of the Appeals Council until SSA can demonstrate that its procedural reforms will reduce, rather than increase, the number of cases appealed to federal court.

F. Decisional Methodology

The Plan describes a simplified, four-step disability decision methodology for both adults and children, relying on a new Index of Disabling Impairments, “standardized” functional assessments, and a concept of “baseline of occupational demands.” Advocates felt blind-sided when the reengineering team proposed changes in decisional methodology, exceeding its stated mandate of examining disability procedures. The definition of disability had been expressly declared to be off limits. Several such advocates have

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158. Id. See Social Security Act, § 205(g) (permitting voluntary remand prior to SSA’s filing an answer). The Judicial Conference of the United States believes this power raises serious jurisdictional issues. Gerry Letter, supra note 77, at 1-2.
159. See supra discussion at part II.A.5.
160. NOSSCR, 16 Soc. Security Forum 3 (Dec. 1994) (Dept. of Justice opposition to eliminating Appeals Council as mandatory step of review causing slow down of this aspect of Reengineering until SSA can substantiate its projections that federal court appeals will decrease, not increase, under the Plan). The Judicial Conference of the U.S. Courts opposes the elimination of the Appeals Council for the same reason. See Gerry Letter, supra note 77, at 2-3.
161. E.g., Letter from Ethel Zelenske & Kim Savage, Staff Attorneys, Nat’l Sr. Citizens L. Center, to SSA Disability Reengineering Project, at 8 (May 26, 1994) (on file with author); Diller testimony, supra note 105, at 43.
criticized SSA for proposing changes in the standards for disability in the guise of administrative reform. The Commissioner has mollified critics by stating that this aspect of the Reengineering Plan will not be “fully developed, tested, and implemented nationally” within the six-year project period.

The current process of determining disability involves five sequential steps. First, the claimant must not be “engaged in substantial gainful activity.” Second, the impairment or combination of impairments must be severe. Third, SSA, through the DDS, evaluates whether the medical records establish that the claimant’s physical and/or mental disability or combination of disabilities “meet or equal” an impairment in the “Listing of Impairments.” If the impairments are severe but do not meet or equal a listing, SSA evaluates whether the claimant has the residual functional capacity to return to past relevant work. If the claimant cannot, then SSA evaluates whether, considering the claimant’s age, education, work experience and residual functional capacity, there is any work in the national economy that the claimant can perform. A finding of disability can be made at Steps 3, 4 or 5. The claimant has the burden of proof for the first four steps; the burden shifts to the agency at Step 5.

The Reengineering Plan proposes changing this structure. First, the Plan eliminates the second step (severe impairment) for adults. Second, the current “Listings” would be replaced with an “Index” of impairments to apply at Step 3. The Index would be “nontechnical” and easy for laypersons to understand. Third, the Plan eliminates “medical equivalence.” Fourth, SSA would employ a new standardized measure of functional assessment. Rather than the

163. See, e.g., Diller testimony, supra note 105; Zelenske & Savage, supra note 161, at 8-17.
164. IMPLEMENTATION PLAN, supra note 36, at 2. When the SSA released the revised “Disability Reengineering Project Plan” in September, the advocacy community was relieved that the Commissioner stated that the agency was deferring its conclusions about the “ultimate place in the disability process” of proposals to change the “decisional methodology that deal with functional assessment, baseline of work, and the evaluation of age,” pending “study and deliberation with experts and consumers.” 59 Fed. Reg. 47,889 (1994) (message from Commissioner Shirley S. Chater). However, the Implementation Plan uses less definite language, implying that the question is not whether to develop, test, and implement the proposed simplified methodology, but rather how long that process would take. This ambiguity makes it especially important that claimants' advocates track the development of the “simplified decisional methodology.”
167. Id.
current, individualized assessment, which compares claimants’ functional capacity and the existence of jobs they can actually perform in light of their age, education and work experience, the Plan suggests adoption of a single “baseline of occupational demands” against which all (except those nearing full retirement age) would be measured. If this proposal were adopted and applied, advocates conclude that thousands of current recipients of SSI would be found “not disabled.”

Similarly, in determining children’s disability, the Plan proposes substantive changes, although it accepts as given both the current statutory definition of disability (a child is disabled “if he suffers from any medically determinable physical or mental impairment of comparable severity [to an adult]”) and the Supreme Court’s interpretation of the relevant statutory language in Sullivan v. Zebley. The Plan proposes, however, both to use an Index of Disabling Impairments to determine medical eligibility, and to create a standardized instrument to measure a child’s functional ability as objectively as possible. These changes would be put off until the use of such instruments had been tested for adults.

There are several reasons not to disturb the present children’s disability methodology as part of the Reengineering Plan. A panel appointed by Congress is currently preparing a report on children’s disability. Any change in the process should at least await this report expected to be issued in November 1995. Further, a panel of experts overhauled the children’s disability process in the wake

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170. 42 U.S.C. §§ 416(i), 423(d)(1)(A), 1382c(a)(3)(A). If enacted into law, the Personal Responsibility Act, H.R. 4, would modify this definition. See infra discussion at part IV.
171. 493 U.S. 521 (1990). As noted infra note 197, the Personal Responsibility Act proposes to overturn the Zebley decision by eliminating the requirement that SSA consider the effects of children’s impairments on their functional ability. Under the proposed legislation, children will be found disabled only if their condition is described in the Index of Disabling Impairments.
173. Id.
of Sullivan v. Zebley\footnote{493 U.S. 521 (1990). See generally Julie A. Clark, Determining Disability for Children: Implementation of Sullivan v. Zebley, 25 CLEARINGHOUSE REV. 246 (1991); The Advocate's Guide to SSI for Children (1992 & 1994 Supp.), published by Judge David L. Bazelon Center for Mental Health Law, 1101 15th St. NW, Suite 1212, Washington, D.C. 20005.} four years ago. The Plan does not explain why SSA should rethink this process so soon.\footnote{SSA reassessed the factual validity of the Grids in 1992 and concluded that they remain valid. 57 Fed. Reg. 43,005; see also Diller testimony, supra note 105, at 42.} Although the media has carried stories critical of SSA for awarding benefits to growing numbers of "undeserving" children,\footnote{See, e.g., John B. O'Donnell & Jim Haner, America's most wanted welfare plan \cite{sic}, BALTIMORE SUN, Jan. 22, 1995, at 1A.} some advocates maintain that the growth of beneficiaries in this category since 1990 largely reflects the agency's improper denial of benefits until the Supreme Court mandated compliance with the Social Security Act. SSA's own empirical studies demonstrate the gap between reality and anecdote. For example, the perception that large numbers of children are coached by adults to present fraudulent information about their functioning was not supported by data in an SSA study.\footnote{A case-by-case review by SSA of 617 children's cases with diagnoses that are suspected to be "faked" most often found only thirteen instances of possible coaching or malingering. SSA, Findings From the Study of Title XVI Childhood Disability Claims ii (1994). SSA had granted benefits in only three of the thirteen cases. Id.} The Government Accounting Office recently acknowledged that there is "limited empirical data" but "widespread media reports \cite{that} have weakened the public confidence in the integrity of the SSI program."\footnote{GAO, Federal Disability Programs Face Major Issues, supra note 26, at 10-11. Perceptions based on anecdotal evidence are influencing the Republican House of Representatives, as recent legislation attests. See infra discussion at part IV.D.}

Although advocates should be watchful as SSA considers changes in methodology, they should not be inflexible about change if they are to help solve their clients' most pressing concern—delay in decision-making. Advocates must be willing to discuss changes in the procedure and substance of the methodology that will enable fewer SSA staff to reach correct decisions more quickly than SSA can today. The reengineering process offers advocates an opportunity to suggest systems that better effectuate Congress's intent to assess a claimant's functional capacity in light of the factors of age, work experience, education and limitations resulting from their disabilities.
G. Ethics Rules

The Reengineering Plan proposes to create a code of professional conduct, providing for sanctions against representatives, including suspension and disqualification. It would be more accurate to say “revise a code” because current regulations provide some guidance in these areas. SSA predicts that such standards will be implemented in the very near term. The Task Team circulated a first draft for comments in February 1995 and plans to circulate revised drafts before SSA issues a Notice of Proposed Rulemaking in June 1995. The first draft was flawed by lack of clarity as to its purpose, and by overbroad language. For example, it proposed incorporating the attorney’s Model Rules of Professional Conduct by reference, but then imposed responsibilities, such as supplying evidence adverse to one’s client, that are in direct conflict with the Rules.

The ethics questions raised by social security representation are complex and inadequately explored. Advocates should pay attention to the development of these rules. While the goal of promulgating rules that ensure that representatives are qualified, adequately represent their clients and are accountable for misconduct are worthy, other goals, such as a duty to develop the record fully, are questionable. In any case, the language of the rules deserves close review.

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181. 59 Fed. Reg. 47,921 (1994). SSA hopes its “user-friendly new process” will make it more realistic for claimants to proceed without representation, since many resent having to pay up to 25% (a maximum of $4000) of retroactive benefits they may be awarded to their representatives as the Social Security Act now permits.

182. 20 C.F.R. §§ 404.1720, 45; 416.1540, 45.

183. IMPLEMENTATION PLAN, supra note 36, at 13 (fiscal years 1995-96).

184. NOSSCR, 16 Soc. Security Forum 1 (Dec. 1994). The letter of agreement between the reengineering office and the Office of Hearings and Appeals states three objectives for the rules: assuring qualified representatives for all claimants; defining SSA’s expectations and responsibility to work with claimants to develop the record; and establishing a code of professional conduct with sanctions. Id.

185. For analysis of sources of attorneys’ conflicting ethical obligations, see Rains, supra note 180, at 105-29.

186. Id.

187. Advocates should be attentive to the ramifications of a statement that it is a claimant’s representative’s duty to develop the record fully. This has always been the responsibility of the agency—and is of considerable importance in the case of unrep-
In sum, the Reengineering Plan contains many suggestions that are responsive to the identified need for procedural reform. Many of the proposals, such as improvements in the initial application stage and elimination of the Reconsideration stage in the appeal process, have been recommended by scholars and practitioners for years. Other ideas have less of a pedigree, but are worthy of serious consideration by concerned advocates. The Social Security Administration, with the active participation of claimants' advocates, should be encouraged to "reengineer" the disability determination process so that it costs less, works more quickly, and reaches correct decisions the first time. Advocates should contact SSA to insist that it act on its commitment to open communication about its process.\textsuperscript{188} Advocates should ask to meet with a "task team" assigned to develop further planning in the various substantive and procedural aspects of the proposed reengineered disability determination process, or ask for regular meetings in the various SSA regions.\textsuperscript{189}

IV. The 104th Congress and the Supplemental Security Income Program

The Republican-controlled House of Representatives opened the 104th Congress with a focus on reducing welfare spending. As introduced in the House of Representatives, the Personal Responsibility Act\textsuperscript{190} would have ended SSI as an entitlement program,\textsuperscript{191} represented claimants. The Plan also proposes that claimants take an active role in obtaining record evidence but states that SSA will retain ultimate responsibility for development of claims for unrepresented claimants. 59 Fed. Reg. 47,909-10 (1994). In particular, the Plan shifts to the representative, or claimant when able to do so, "the primary burden of compiling an evidentiary record" at the hearing level. \textit{Id.} at 47,917.

\textsuperscript{188} \textit{Id.} at 47,920.

\textsuperscript{189} The Director of the Disability Process Redesign Team is Chuck A. Jones, formerly Director of the Michigan Disability Determination Service. His address is SSA, 929 Altmeier Bldg., 4401 Security Blvd., Baltimore, MD 21235, phone: (410) 966-8255, FAX: (410) 966-9884. Ethel Zelenske, Staff Attorney at the National Senior Citizens Law Center, has urged Mr. Jones to put such processes in place so that advocates can keep their constituencies informed, as well as share their "wealth of substantive and practical knowledge about the disability process" with the redesign task teams. Letter from Ethel Zelenske, Staff Attorney, Nat'l Sr. Citizens L. Center, to Chuck A. Jones (Oct. 28, 1994) (on file with author).

\textsuperscript{190} H.R. 4, 104th Cong., 1st Sess. (1995), is the Republican welfare reform bill promised in the Contract With America, \textit{supra} note 27.

\textsuperscript{191} H.R. 4 § 302(2) (terminating the SSI as an entitlement program effective October 1, 1995); §§ 301 (a)(1), (2)(B), (b)(2) (capping federal expenditures for the program at fiscal year 1995 levels with limited adjustments for inflation and the change in the poverty population). The inflator "shall be the percentage change in the Implicit
a possibility that had not been mentioned in the Contract With America. The bill reported out of the House Ways and Means Committee\textsuperscript{192} and the final version of H.R. 4 enacted by the House of Representatives on March 24, 1995, did not terminate SSI, but did cap benefits for children and also restricted the SSI eligibility of three groups: legal aliens, drug and alcohol-disabled persons, and disabled children.

Whether the Senate will concur in these major substantive changes in the SSI disability program is unclear as this Article goes to press. Among all legal aliens, only new refugees, very elderly legal residents, and those who serve in the armed forces would remain eligible for SSI if H.R. 4 is enacted\textsuperscript{193} Among all who are disabled because of drug addiction or alcoholism, only those for whom drug addiction or alcoholism is not "a contributing factor

\textsuperscript{192} On March 7, 1995, the House Committee on Ways and Means reported out H.R. 1157, the "Welfare Transformation Act of 1995," a variant of the Personal Responsibility Act. Title IV addressed SSI; Title III restricted welfare for aliens. These titles were incorporated in the final version of H.R. 4.

\textsuperscript{193} H.R. 4, 104th Cong., 1st Sess. § 403 (a)(1)-(5) (Mar. 24, 1995) (with exceptions, legal aliens ineligible for SSI, Medicaid, food stamps, temporary assistance for needy families and Title XX social services block grant programs). Excepted are refugees for five years after arrival in the United States; lawful permanent residents over age seventy-five who have been resident in the United States for at least five years; uniformed services members, honorably discharged veterans, and their spouses and dependent children; and lawful permanent residents whose physical, developmental, or mental impairment render them unable to comply with naturalization requirements. \textit{Id.} at §§ 403(b)(1)-(3), (6). Legal aliens on the date of enactment remain eligible for the programs for one year. \textit{Id.} at § 403(b)(5).
material to the Commissioner’s determination that the individual is disabled”\(^4\) would be eligible for SSI.\(^5\)

The House bill that was sent to the Senate in late March also proposed transformative changes in the federal disability program for poor children.\(^6\) It would amend the 1972 definition of childhood disability in Title XVI (SSI) to eliminate the language the Supreme Court has interpreted as requiring individualized functional assessments for disabled children.\(^7\) Children would be disabled only if they meet the financial-eligibility requirements for SSI and have a medically-determinable physical or mental impairment or combination of impairments included in the Listings of Impairments.\(^8\) One estimate considered by the legislators is that the House proposal would eliminate 224,000 of 890,000 children from SSI soon after enactment.\(^9\)

The House bill also would eliminate cash benefits to disabled children, except to those who currently receive them and to those who are institutionalized or who require “personal assistance” to remain at home.\(^10\) This would create the anomaly that among all poor children, only the disabled poor child would be ineligible for

\(^{14}\) H.R. 4 § 601(a)(1). Under current regulations, drug addiction or alcoholism is “material” when the individual would not be found disabled if drug or alcohol use were to stop. 20 C.F.R. §§ 404.1535(b)(1), § 416.935(b)(1) (interim final rules enacted Feb. 10, 1995, effective Mar. 1, 1995, pursuant to Pub. L. No. 103-296, supra note 32).

\(^{15}\) Public Law No. 103-296, enacted by the preceding Congress, limited disability benefits based on drug addiction and alcoholism to thirty-six months in a lifetime, required treatment and suspension of benefits for those who do not comply with treatment and required representative payees rather than direct payment to the disabled person. See generally Ethel Zelenske, The Social Security Reform Act of 1994, 28 CLEARINGHOUSE REV. 897 (1994). The House bill sent to the Senate Mar. 29, 1995 would totally eliminate disability benefits to this subgroup. The bill, however, would provide funding for public health treatment, medication development, and capacity expansion through formula grants to states that apply. H.R. 4 § 601(d).


\(^{17}\) Section 602(a)(1)(D) of H.R. 4 would strike the following language: “(or, in the case of an individual under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity [to an adult]).”

\(^{18}\) Id. at § 602(a)(1)(E). H.R. 4 requires the Commissioner to report to Congress annually on necessary revisions to the Listings. Id. The Listings are discussed supra at part III.


\(^{20}\) H.R. 4 § 602(a)(1)(E)(III)(aa)-(bb). “Personal assistance” means the child needs hands-on or stand-by help for administering medical treatment or for eating, toileting, dressing, bathing, and transferring. Id. at § (E)(iii).
Instead of cash, beginning in fiscal year 1997, almost all disabled children would receive vouchers redeemable for medical and nonmedical services "designed to meet (or assist in meeting) the unique needs of qualifying children that arise from physical or mental impairments." States would not be able to give cash to these disabled children even if they wished to do so. The money for services would come from a federal block grant available to states that apply for funds. Under the grants, the states would have discretion to decide which authorized services to provide, who among qualifying children in the state will receive the services, how many services to provide any child, and how long the services should last.

These proposals raise several questions. Fundamentally, they raise the question whether the government should provide subsistence funds to totally disabled persons. If so, should SSI remain a federal program and should it remain an entitlement program, rather than a program in which the federal government provides block grants to the states in a fixed amount, while or while out regulating how that money is spent. Further, the proposals raise the question whether limiting benefits available to certain subgroups—legal aliens, substance abusers, children—is good public policy. Finally, in light of the foregoing discussion of the ways in which the social security disability determination process needs to be changed, the legislative proposals raise the question of responsiveness to these identified problems and need for procedural reform.

A. Governments Should Provide Subsistence Benefits for the Disabled

Saving money by eliminating subsistence benefits to the disabled is unacceptable to voters, as evidenced by recent state initiatives in welfare reform. In October 1991, the State of Michigan eliminated its state program for General Public Assistance ("GPA"), which paid cash benefits and provided Medicaid to the unemployed and

201. Children who are receiving SSI are not eligible for AFDC. H.R. 4 states that a "qualifying child" shall be considered to be an SSI recipient, and therefore eligible to receive Medicaid, even if the child is not receiving any SSI block grant services. Id. at § 1645(b)(2).
202. Id. at § 1644.
203. Id.
204. Id. at § 1643(1)-(3).
poor, including the disabled. Although Michigan purged some 82,000 people from the GPA rolls overnight, it concluded that it could not justify eliminating benefits for the severely disabled. It therefore created a new entitlements program—the State Disability Assistance program (“SDA”)—for this population, continuing Medicaid and a small monthly stipend. Maryland also scaled back its General Public Assistance program in 1992, but retained a renamed component, the Disability and Assistance Loan Program (“DALP”), providing $157/month loans and outpatient medical care to disabled persons, primarily to bridge the gap while an SSI application is in process. The District of Columbia retained an entitlement program for the totally disabled when it eliminated the temporarily incapacitated from its General Public Assistance rolls in July 1991. In short, even in the worst of times, governments maintain programs for the some of disabled.

B. SSI Should Be Retained as a Federal Entitlement Program

SSI should remain a federally-funded and federally-administered program. Congress has already experimented with block grants to the states and the experiment did not work, thus creating the incentive to establish a uniform federal program in 1972. Prior to the 1972 SSI enabling legislation, Congress gave states matching grants to encourage them to adopt means-tested support programs for the elderly, blind and disabled. The result was “1300 separate state and local programs with differing eligibility requirements and payment levels, including some with very low benefit amounts. Other programs had specific eligibility requirements that discouraged

205. Telephone Interview with Clifford Weisberg, Esq., Center for Social Security Rights, in Southfield, Michigan (Jan. 9, 1995).
206. Id.
207. Id. The monthly SDA stipend is $246. Even with SDA, 25% of the former recipients of public assistance became homeless within a year, according to a 1992 University of Michigan study. Terry M. Neal, Welfare Program for Disabled Big Target of Glendenning’s Ax, WASH. POST, Jan. 30, 1995, at B1, B5.
208. Neal, supra note 207, at B5. The new Democratic Governor, Parris Glendenning, proposed eliminating DALP as a “$48 million Maryland-only welfare program . . . we can no longer afford.” Id. DALP serves 21,000 Marylanders; supporters estimate that elimination of DALP would put a minimum of 5500 disabled people on the street. Id. (citing Jeff Singer, Baltimore Health Care for the Homeless).
209. D.C. CODE ANN. § 3-205.42a (1994). The District adopted disability standards identical to the SSA’s. Id. at § 3-205.42(2) (1994). Again, the program is intended to supply interim aid while the disabled person applies for SSI. Recipients sign Interim Assistance Agreements with the District that they will repay the District for any periods of duplicate benefits when they receive their SSI lump sum back awards.
needy persons from seeking assistance.” 210 Congress replaced this hodgepodge with a uniform federal program that would guarantee an income floor to impoverished elderly and disabled people who met a uniform standard, as well as support recipients in rehabilitation and help them to return to the workforce. By coordinating the SSI program with Title II Social Security, Medicaid and food programs, the federally-administered program was more efficient and cheaper than 1300 separate state programs.

Capping expenditures in a program that already provides support at only 75% of the poverty guidelines would mean that government is prepared to watch a great many citizens slip further into destitution. Further, setting a cap based on current funding ignores the fact that vast numbers of currently eligible impoverished people have not applied for benefits and are not now enrolled in the SSI program. Government cannot predict how many persons will be unable to support themselves in a given year because of their disabilities. Nor can government or individuals control the disabled person’s place in line to receive a limited number of awards. If they meet the criteria for benefits, the disabled who apply after funds are expended are as deserving and as needy as those who applied first. Therefore, neither funding caps on a federally-administered program nor block grants to the states makes sense or is fair. 211 The proposal to limit children’s SSI to vouchers for services, but with no assurance that any particular qualifying child will receive services, supports this contention.

Proponents of returning welfare to the states do not cite any evidence to show that history will not simply repeat itself, and that once again the nation would have a fragmented and unfair response to the needs of the most vulnerable. One notion behind the


211. As introduced in the House, The Personal Responsibility Act capped federal spending for the entire SSI program; as enacted by the House on March 24th, only the children’s disability program would be capped and responsibility for dispensing benefits transferred to the states as a block grant program. H.R. 4 § 602(b). At the January meeting of the National Governors’ Association, a bipartisan working group of governors introduced a proposal to allow states to choose between retaining the current federally-guaranteed entitlements programs, but with guarantees of additional flexibility to the states, or receiving federal block grants. A group of Republican governors favored instructing Congress to end entitlements in favor of block grants. The governors were unable to reach agreement on a position. Judith Havemann & Dan Balz, Governors Seek Common Ground on Welfare Reform, WASH. POST, Jan. 31, 1995, at A4.
proposals is "to create a kind of welfare reform marketplace, where states compete to develop the most efficient and innovative program and have the flexibility to design welfare policies to their own requirements."\textsuperscript{212} The result, however, may not be creative experimentation, but more likely "a race to the bottom."\textsuperscript{213} The National Governors' Association has criticized the House legislation precisely because it does not, in fact, promote state flexibility, but imposes "prescriptive federal standards" and "represent[s] a substantial and unacceptable cost shift to states."\textsuperscript{214}

C. Funds Should Go to the Disabled, Not to Creating New State Infrastructures

One of the primary selling points for federalizing welfare for the disabled, aged and blind in 1972 was that the SSA would assume 100\% of the burden of administering the program.\textsuperscript{215} Today, states are largely out of the business of determining disability. Shifting responsibility for SSI to the states would result in increased, costly state and local bureaucracy, draining scarce dollars from the people the program is intended to help.\textsuperscript{216} The House version of the Personal Responsibility Act narrowly avoided transferring the entire SSI program to the states. If such a transfer were to take place, taxpayers would bear a double burden to maintain two infrastruc-


\textsuperscript{213} \textit{Id.} at A4 (quoting Paul Peterson, Harvard Univ.). Peterson notes that economic theory does not support the notion that state experiments with redistributive policy will result in beneficial competition, because "the efficient way to keep costs down is to keep the poor from coming into your state. What you have then is a race to the bottom." \textit{Id.}

\textsuperscript{214} Letter from Governors Dean, Thompson, Carper, Engler, Carnahan and Carlson on behalf of the National Governors' Ass'n to Representative Bill Archer, Chair, House Comm. on Ways & Means at 1-2, 4 (Feb. 23, 1995) (on file with author).

\textsuperscript{215} \textit{See Conference Report on H.R. 1, Social Security Act Amendment, CONG. REC. H36,914, 16-17 (Oct. 17, 1972). Although the medical determination of disability is made by state agencies, SSA pays 100\% of the costs of these agencies and furnishes 100\% of the administrative structure for their work.}

\textsuperscript{216} Studies of states that have passed welfare reform measures show that the programs are, indeed, saving states millions of dollars, but that administrative costs have soared. Judith Havemann, \textit{Red Tape May Snarl Turnover of Welfare}, \textit{WASH. POST}, Mar. 20, 1995, at A4 (citing study by Lawrence M. Mead, Visiting Prof., Woodrow Wilson Sch. of Int'l Affairs, Princeton Univ., showing that Wisconsin administrative costs have risen by 72\% since welfare reform, while direct payments to clients have fallen; citing also Michigan figures showing the state spent $46 million more on administration in 1994, after terminating state welfare, than in previous year, but overall saved money); \textit{see also} Editorial, \textit{More Overkill on Welfare Reform}, \textit{WASH. POST}, Feb. 16, 1995, at A22 (opposing proposal to reduce and limit cash grants in favor of voucher system with high level of government involvement).
tures—a federal agency to determine disability claims under Title II of the Social Security Act, and a state agency to determine disability claims for poor people not covered by the Act. 217 Currently, the federal government bears all the costs and burdens of disability determination under both programs.

There is a near-total absence of an infrastructure in the states to administer block grant disability programs in place of the existing SSA program. In the District of Columbia, for example, which has maintained a General Public Assistance program for the totally and permanently disabled, largely as a transition program to assist people while they wind their way through the tortuous SSI process, the District employs only two medical examiners to evaluate disability and Medicaid claims and only one hearing officer to determine appeals. 218 If the approximately 16,000 D.C. residents now receiving SSI disability payments 219 and their successors 220 suddenly became the responsibility of the District, the District would have to increase its welfare infrastructure and attendant costs dramatically. The same would be true in other states 221

But even if Congress does not effect a wholesale transfer of SSI to the states, the House-enacted bill does transfer responsibility and discretion to the states to administer a voucher program for disability-related services to children. This would require states to set up bureaucracies to identify relevant services, process applications from children to have access to services, monitor whether all other sources have been exhausted before providing a service, and adjudicate which children should receive a service, from whom, and for how long. All these decisions are now made by families who use the cash benefits they receive to meet the priorities they identify, whether it is food and shelter, or a motorized wheelchair, or a home health aide, or a contractor to install ramp access to the child’s home. If states are forced to assume these duties, far too

217. The federal government would have to keep its infrastructure intact because of its responsibility to insured workers who file for benefits under Title II when they become disabled. Giving disability welfare back to the states means that the taxpayers will pay for two, instead of one, administrative infrastructure.


many dollars will go into creating a bureaucracy, rather than to assisting children. Delays and unfairness seem inevitable. The House bill is unlikely to foster state experimentation, since the block grants are hedged with so many restrictions.

D. Limiting Benefits to Particular Groups at This Time Is Poor Public Policy\(^2\)

Children would not seem a likely target for cutting welfare spending, but the dramatic rise in numbers of children receiving SSI in recent years has drawn Congressional attention.\(^2\) Thus, the 103rd Congress appointed a Commission on Childhood Disability to study and make recommendations on the appropriateness of changing the current children's SSI program.\(^2\) The Chairman of the House Ways and Means Committee also asked a prestigious nonprofit group to research and report on more general questions of disability policy.\(^2\) H.R. 4, however, would preempt those processes.

The policy choice to end cash benefits to children was based on an interest in reducing federal spending, and on anecdotal evidence of "coaching" resulting in awards of benefits to undeserving children (sometimes several children in a family).\(^2\) The notion that impoverished families with the added responsibilities of caring for a disabled child do not need cash for food, shelter and clothing seems ludicrous; nevertheless, the proposal passed the House of Representatives, and therefore must be taken seriously. Even if

\(^2\) The issues and public policy questions regarding government's role in providing subsistence benefits differ for each of the groups of persons—children, substance abusers and legal aliens—identified by the House bill. A variety of voices oppose and defend the limitations. The testimony at Congressional hearings is a good starting place for the reader who wishes to explore the issues further. A full discussion is beyond the scope of this Article.

\(^2\) H.R. REP. No. 81, 104th Cong., 1st Sess. pt. 1 at 49 (The Welfare Transformation Act of 1995, H.R. 1157) (Mar. 15, 1995) (noting that the number of children on SSI grew from 300,000 to 900,000 between 1989 and 1994, that spending increased from $1.2 billion to $4 billion and that "[t]he SSI program is out of control").

\(^2\) Commission on Childhood Disability, supra note 174.

\(^2\) NASI, supra note 17.

\(^2\) H.R. REP. No. 81, supra note 223, at 49 (noting testimony that cash payments induce some families with children who are not severely disabled to apply for SSI, and further noting "reports of 'coaching' on the part of parents and generally broadened eligibility criteria resulting in a program characterized by explosive growth in enrollment and also mounting costs to taxpayers"). GAO, however, testified recently that there was "limited empirical data" on either coaching or children's disability fraud, but that "widespread media reports have weakened public confidence in the integrity of the SSI program." Testimony of Jane L. Ross, Director, GAO Income Security Issues, Before the Senate Special Committee on Aging at 10-11 (Mar. 2, 1995).
the concerns that prompted the proposal were accurate, the response is overbroad. Rather than terminating cash benefits to all disabled children, Congress should enact two more narrowly tailored responses. First, identify and punish those who defraud the government. Second, amend the Social Security Act to provide for a graduated benefit to families where more than one child is disabled. The latter makes sense because subsistence benefits cover costs, such as rent, that are shared among family members.

State governments are rightly concerned about the House bill. The National Governors' Association, which opposes the House bill's prohibitions on paying cash benefits to children, legal aliens and substance abusers, has framed another line of public policy argument focusing on the substantial cost shift from the federal to the state governments. The Governors' Association notes that states would remain legally responsible to make their services available to legal immigrants, whether or not the federal government eliminates their eligibility for SSI. Furthermore, if large numbers of persons are eliminated from SSI, as they would be under the House bill, then the need for aid from the proposed block grant programs to assist needy families with dependent children will grow exponentially at the very time that funds for AFDC would be capped. The Governors therefore urged Congress to keep the children's SSI program intact, at least until it receives the report of the Commission on Childhood Disability. The Governors also urged Congress not to re-legislate in the area of drug abuse and alcoholism, but rather to allow the 103rd Congress's amendments to be implemented.

One would expect the Governors' Association opposition to aspects of the Personal Responsibility Act to be effective. One would also expect the Senate to resist the House proposal on the ground that "reforms" such as eliminating cash benefits for children do not have a reasoned, empirically sound basis, and that proposals of this magnitude should await the reports and recommendations of Congressionally-appointed groups which are due to report to Congress before the close of 1995.

228. Id. at 4.
229. Id. at 5. See supra notes 194-95.
E. Current Legislative Proposals Ignore the Identified Need for Procedural Reform

The various versions of the Personal Responsibility Act not only ignore the history surrounding the enactment of SSI in 1972, but also ignore the studies and proposals for reform that are ripe for implementation. The bills do, indeed, promote the primary one-line goal stated in the Contract With America: cut welfare spending. That approach, however, eliminates responsibility for social service, rather than, as the Social Security Administration proposes, providing a humane and critically important social service more efficiently.

Thus, the legislative proposals would "reform" welfare only in the sense that they would limit it, terminating benefits for many and diminishing the financial support for children. The legislation would cause more disabled people to slip further into poverty. To the extent that parts of the SSI program are turned over to the states, the legislation would require new state infrastructures. These results are not in the public interest. Although the disability determination process clearly needs reform, the Supplemental Security Income program should survive the Contract With America.

V. Conclusion

Disabled persons who are without resources are caught in cross currents. National policy, embodied most recently in the Americans with Disabilities Act, mandates a society that accommodates the disabled in the workplace. So far, however, national policy does not ensure health care for all. Medical insurance is only guaranteed for working-age persons when they are unable to work because of their disabilities. On account of this limitation, government can be said to provide an incentive for disabled persons in need of health care to take themselves out of the workforce. If Congress truly wants to encourage work over welfare, and wants to reduce the costs of the SSI program, it would do well to turn its attention first to the complex interrelationships that health insurance and other factors bear to disability and self-sufficiency.

The inevitable consequences of precipitously dismantling the SSI program are increased individual suffering and social costs. This Article has argued that Supplemental Security Income should remain a federal entitlement program, and that procedural reform should move forward, prior to Congress's or the SSA implementation of massive substantive changes in the disability program. The
agency's comprehensive plan for procedural reform promises to remedy many of the egregious program deficiencies that currently characterize the vast enterprise of disability determination. In times when the "safety net" was woven out of many programs, there was less urgency to enroll qualifying individuals in SSI, and many social and legal services providers were not deeply involved in legislative and regulatory developments affecting social security, Supplemental Security Income, and, in particular, the disability determination process. This Article urges a broader participation by advocates in shaping the debate and crafting solutions to identified problems. A unified, redesigned, cost-efficient and effective system for determining eligibility for federal financial support to very poor disabled persons is an essential part of our social fabric.