IMPLICIT DISABILITY BIAS DISINTERRED BY ZOMBIE FACTORS IN SOCIAL SECURITY DISABILITY DETERMINATIONS

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Social Security Administration (SSA) disability determinations rely on discriminatory and prejudicial factors to deny people with real disabilities crucial benefits. "Zombie factors" (coined here) are judicial requirements for activity restrictions in defining disability that could virtually only be met by fictitious zombies—such as living without food, personal hygiene, exercise, social interaction, and other necessities for human life. Administrative law judges (ALJs) often fail to recognize critical differences between activities of daily living (necessary for survival) and work activities—penalizing people with disabilities for activities like eating, bathing, and living alone, and supporting a prejudicial stereotype that people with work disabilities must be dependent. ALJs also often fail to recognize the differences between simple mainstream activities—like reading, watching television, and going for a walk—and job activities, perpetuating a stigma that people with disabilities cannot participate in mainstream society. The Honorable Judge Posner described these failures as "a recurrent, and deplorable, feature" of ALJ opinions. Implicit disability bias on the part of adjudicators likely plays a role. This paper exposes the SSA's use of zombie factors and offers some simple solutions to make SSA disability determinations less arbitrary and discriminatory.

Key Words

Disability, Social Security, Administrative Law Judge, Zombie Factor, Activities of Daily Living, Discrimination, Prejudice, Implicit Bias, Bias

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INTRODUCTION

The Social Security Administration's (SSA's) disability determination process perpetuates the discriminatory and false stigma that people with work disabilities cannot live independently, take care of themselves, or participate in mainstream society. The result is arbitrary interpretations of the law for claimants. Specifically, SSA's adjudicators confuse activities of daily living necessary for human survival and simple mainstream activities with activities required to work a full- or part-time job. According to the Honorable Judge Richard Posner of the Seventh Circuit, this failure is "a recurrent, and deplorable, feature of opinions by administrative law judges in social security disability cases" that has been going on for decades.[1] In essence, many SSA adminis-

[1] Bjornson v. Astrue, 671 F.3d 640, 647 (7th Cir. 2012) (describing "the failure to recognize" that the "critical differences between activities of daily living and activities in a full-time job are that a person has more flexibility in scheduling the former than the latter, can get help from other persons . . . and is not held to a minimum standard of performance, as

trative law judges (ALJs) require people with disabilities to be dependent, segregated, and isolated from society in order to qualify for benefits—perpetuating and reinforcing an unfavorable stereotypical view of people with disabilities.

The disability rights movement led to sweeping changes to the accessibility of American society, culture, and recreation, as well as the recognition of disability discrimination.[2] "[T]he exclusion and segregation of people with disabilities was viewed as discrimination" for the first time from a legal perspective with the passage of Section 504 of the Rehabilitation Act of 1973, "which banned discrimination on the basis of disability by recipients of federal funds."[3] Congress found that isolation and segregation of individuals with disabilities is a "form[] of discrimination" that continues "to be a serious and pervasive social problem" that prevents people with disabilities from "fully participat[ing] in all aspects of society."[4] Subsequent laws like the Americans with Disabilities Act of 1990 (ADA) and Americans with Disabilities Act Amendments Act of 2008 (ADAAA) have expanded coverage of disability discrimination broadly.[5]

"[A]ccess to shops, stores, restaurants, theaters, hotels and other public places defines community integration, inclusion and full participation" and helps improve both self-esteem and public perception of people with disabilities.[6] In 1990, the ADA helped lead to improvement in "access to transportation[] [and] access to independent and community living."[7] Today, for example, street corners often have "curb cuts" that make it "possible for people who use wheelchairs to cross the street and use sidewalks."[8] In addition, automatic lifts on more public buses and trains, elevators in subway systems, and automatic doors in public buildings are examples of many other ADA-compliant accessibility changes in place today.[9]

[the claimant] would be by an employer" and citing cases dating from 1996 to the current case).

[2] Judy Woodruff, *20 Years After the ADA, Is Life Better for Those with Disabilities?*, PBS NEWS HOUR (July 26, 2010, 3:55 PM), https://www.pbs.org/newshour/politics/on-anniversary-of-ada-is-life-better-for-those-with-disabilities [https://perma.cc/7D3X-NSK2].

[3] Arlene Mayerson, *The History of the Americans with Disabilities Act*, DISABILITY RTS. EDUC. & DEF. FUND (1992), https://dredf.org/about-us/publications/the-history-of-the-ada/ [https://perma.cc/MUE4-BMH3].

[4] 42 U.S.C. § 12101(a)(1)–(2).

[5] *See* 42 U.S.C. § 12101(a)(6)–(8), (b)(1)–(4).

[6] LEX FRIEDEN, THE IMPACT OF THE ADA IN AMERICAN COMMUNITIES 6 (2015), http://southwestada.org/html/publications/general/20150715%20ADA%20Impact%20Narrative%20(Rev-Final%20v2).pdf [https://perma.cc/6TTA-AQBV] (observing that over two-thirds of disabled individuals polled in one study "believe the ADA has been the most significant social, cultural or legislative influence on their lives in the past 25 years" with the greatest impact being "access to public accommodations, retail and commercial establishments"; also explaining that people with disabilities believe ADA improvements "improve both the self-esteem of individuals with disabilities, and how they are perceived by others").

[7] *Id*.

[8] Woodruff, *supra* note 2.

[9] *Id*.

"Implicit biases about persons with disabilities are pervasive" in American society.[10] Almost 84 percent of able-bodied participants in one study had "negative [implicit] attitudes towards images of people with a disability."[11] Implicit bias is defined as "the process of associating stereotypes or attitudes toward categories of people without our conscious awareness."[12] The concept of "implicit bias" has been supported by "a large body of evidence" amassed in social science research regarding the "operation of unconscious motivational and cognitive bias."[13] Implicit biases operate subconsciously "behind the scenes" and may "account[] for organizationally enabled forms of discrimination."[14] So, it is not surprising that the Supreme Court described "well-catalogued instances of invidious discrimination against the handicapped" often caused by "thoughtlessness and indifference."[15] The Supreme Court recognized a "glaring neglect" of people with disabilities as a "shameful oversight[]" of the U.S. that leads to people with disabilities being "shunted aside, hidden, and ignored" by our society.[16]

"Implicit attitudes . . . have been found to better predict actual discrimination behaviour [sic] [than explicit attitudes] because these [implicit] attitudes are not susceptible to social desirability," because implicit attitudes are unconscious and not readily apparent.[17] Researchers continue to show substantial effects of discriminatory biases on real-world decisions in many different contexts.[18] Most people can anecdotally think of an example of a person or two who is working (or appears to be working during their encounter) with an obvi-

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[10] ABA Comm'n on Disability Rts., *Implicit Biases & People with Disabilities*, AM. BAR ASS'N (Jan. 7, 2019), https://www.americanbar.org/groups/diversity/disabilityrights/resources/implicit_bias/ [https://perma.cc/RGJ2-5PNA]; *see also* Michelle C. Wilson & Katrina Scior, *Attitudes Towards Individuals with Disabilities as Measured by the Implicit Association Test: A Literature Review*, 35 RSCH. DEVELOPMENTAL DISABILITIES 294, 294, 314 (2014) (This review of 18 IAT studies "measuring implicit attitudes towards individuals with [disabilities]" revealed that "[a]cross all studies, moderate to strong negative implicit attitudes were found and there was little to no association between explicit and implicit attitudes.").

[11] Cassandra D. Dionne et al., *Examining Implicit Attitudes Towards Exercisers with a Physical Disability*, SCI. WORLD J., April 2013, at 1, 6, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3654286/pdf/TSWJ2013-621596.pdf [https://perma.cc/P64R-LWL7].

[12] ABA Comm'n on Disability Rts., *supra* note 10; Dionne et al., *supra* note 11, at 2 (explaining "[e]xplicit attitudes are conscious, controlled, and reflective, whereas implicit attitudes are defined as attitudes that exist without any conscious awareness of the respondent").

[13] Tristin K. Green, *Discrimination in Workplace Dynamics: Toward A Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 97–98 (2003).

[14] Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 854 (2007).

[15] Alexander v. Choate, 469 U.S. 287, 295, 295 n.12 (1985).

[16] *Id*. at 295–96 (quoting 117 CONG. REC. 45,974 (1971)).

[17] Dionne et al., *supra* note 11, at 2.

[18] Green, *supra* note 14, at 855 ("In a variety of contexts, researchers continue to document the substantial effect of discriminatory biases, whether conscious or unconscious, on real-world decisions.").

ous disability, which may kindle a bias that everyone can perform some type of work—unless they are totally dependent and unable to leave their home. But, as Judge Posner also has pointed out, "[a] person can be totally disabled for purposes of entitlement to social security benefits even if, because of an indulgent employer or circumstances of desperation, he is in fact working."[19] This paper will demonstrate that many SSA ALJs show an implicit bias (and sometimes an explicit bias) that people with work disabilities must be dependent, segregated, and isolated—otherwise those ALJs view the person as capable of work and not entitled to benefits.[20]

The SSA has been described as "the Mount Everest of bureaucratic structures,"[21] and the Social Security disability hearing system is "the largest adjudicative agency in the western world"[22] with over 1 million people awaiting an ALJ disability hearing request for an average of 600 days.[23] Over 10,000 people die each year while waiting for the outcome of social security disability determinations.[24] According to the Center for Disease Control and Prevention (CDC), 61 million American adults in 2016 were living with a disability.[25] The SSA receives 2.5 to 2.7 million applications for disability benefits per year, 65 percent of which are denied.[26] The SSA administers monthly disability benefits to approximately 10.1 million Social Security Disability Insurance (SSDI) re-

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[19] Gentle v. Barnhart, 430 F.3d 865, 867 (7th Cir. 2005).

[20] *See* discussion *infra* Part II.

[21] Paul R. Verkuil, *The Self-Legitimating Bureaucracy*, 93 YALE L.J. 780, 781 (1984) (reviewing JERRY L. MASHAW, BUREAUCRATIC JUSTICE (1983)) (describing the SSA as "the Mount Everest of bureaucratic structures: One studies it because it is there").

[22] Heckler v. Campbell, 461 U.S. 458, 461 n.2 (1983) (quoting JERRY MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS xi (1978)).

[23] *Social Security Testimony Before Congress: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 115th Cong. (2017) (statement of Bea Disman, Acting Chief of Staff, Social Security Administration) [hereinafter *SSA's Disman Statement*], https://www.ssa.gov/legislation/testimony_090607.html [https://perma.cc/RC68-J2JK].

[24] Mark Johnson, *Turned Down for Federal Disability Payments, Thousands Die Waiting for Appeals to Be Heard*, USA TODAY (Dec. 27, 2018, 11:43 AM), https://www.usatoday.com/story/news/nation/2018/12/27/thousands-die-waiting-social-security-disability-insurance-appeals/2420836002/ [https://perma.cc/32YN-LPZD] (pointing out that 10,0002 Americans died on the disability insurance waiting list in 2017).

[25] *Disability Impacts All of Us*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html [https://perma.cc/N8AL-UN7S]; Catherine A. Okoro et. al., *Prevalence of Disabilities and Health Care Access by Disability Status and Type Among Adults–United States, 2016*, 67 MORBIDITY & MORTALITY WKLY. REP. 882, 887 (2018), https://www.cdc.gov/mmwr/volumes/67/wr/mm6732a3.htm?s [https://perma.cc/68WE-8LDR].

[26] Center on Budget and Policy Priorities, *Chart Book: Social Security Disability Insurance*, CBPP (Feb. 12, 2021), https://www.cbpp.org/research/social-security/chart-book-social-security-disability-insurance#Section_three [https://perma.cc/NUD2-6JZY]; *SSA's Disman Statement*, *supra* note 23 (stating that SSA expected 2.5 million applications in 2017, which declined from 2.7 million in 2015).

cipients (averaging $1,197 per month) and 8 million Supplemental Security Income (SSI) recipients (averaging $551 per month).[27]

The SSA disability adjudication process generally follows the "bureaucratic rationality model of administrative justice" in pursuit of "efficiency, consistency, and . . . accuracy through hierarchal and rigid adherence to centrally formulated policies over fairness."[28] SSDI and SSI began during a time when "most individuals with disabilities remained in their homes, in institutions, or otherwise outside the mainstream of society."[29] Since then, new laws, like the ADA, have made independent living and mainstream activities more accessible than ever,[30] but have not necessarily led to more employment opportunities. People with disabilities still face "large obstacles when it comes to finding a job."[31] According to "Lex Frieden, a professor at the University of Texas Health Science Center at Houston who is credited with being the chief architect of the ADA," "[p]eople with disabilities . . . who are skilled, trained and ready to work simply can't get in the door to begin with."[32] From the ADA's passage in 1990 to 2010, the percentage of disabled people not working remains unchanged.[33] In 2018, only 19.1 percent of the disabled population was employed compared to 65.9 percent of the nondisabled population.[34] Jobless rates are

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[27] *Id*. (counting 8 million SSI recipients in 2017); 2017 SSA ANN. STAT. REP. ON SOC. SEC. DISABILITY INS. PROGRAM, https://www.ssa.gov/policy/docs/statcomps/di_asr/2017/di_asr17.pdf [https://perma.cc/TPU6-VC3U] (noting SSDI benefits were paid to 10.1 million people in 2017, averaging $1,196.87 per month); 2018 SSA SSI ANN. STAT. REP., https://www.ssa.gov/policy/docs/statcomps/ssi_asr/2018/background.html [https://perma.cc/H89W-GDGF] (observing monthly SSI benefits averaged $551 per month in 2018).

[28] Jon C. Dubin, *Overcoming Gridlock: Campbell After a Quarter-Century and Bureaucratically Rational Gap-Filling in Mass Justice Adjudication in the Social Security Administration's Disability Programs*, 62 ADMIN. L. REV. 937, 940 (2010) (describing "Yale Law Professor Jerry Mashaw's bureaucratic rationality model of administrative justice" as privileging "centrally formulated bureaucratic decisionmaking over more individualized approaches"); *see* JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 117 (1983).

[29] LAURA ROTHSTEIN & ANN C. MCGINLEY, DISABILITY LAW: CASES, MATERIALS, PROBLEMS 11 (6th ed. 2017).

[30] *Disability Policy & History: Statement Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 106th Cong. (2000) (statement of Edward D. Berkowitz, Chair, Department of History, George Washington University) [hereinafter *Berkowitz Statement*], https://www.ssa.gov/history/edberkdib.html [https://perma.cc/Q3PY-CA7U] (describing how laws like the ADA changed the landscape for people with disabilities, so that new levels of activities are available to them that were not available before these laws were enacted).

[31] Woodruff, *supra* note 2.

[32] *The ADA at 25: Important Gains, but Gaps Remain*, KNOWLEDGE@WHARTON (Aug. 7, 2015), https://knowledge.wharton.upenn.edu/article/the-gaps-that-remain-as-the-ada-turns-25/ [https://perma.cc/S7R2-JJJS].

[33] Woodruff, *supra* note 2.

[34] News Release, Bureau of Lab. Stat., Persons with a Disability: Labor Force Characteristics—2019 (Feb. 26, 2020, 10:00 AM), https://www.bls.gov/news.release/pdf/disabl.pdf [https://perma.cc/5GJ6-LKLX] (also noting, that in 2018, the unemployment rate was 8.0

higher for persons with disabilities regardless of age or education level.[35] Approximately two-thirds of people with disabilities want to work.[36]

Social Security disability programs "serve the American public by providing a vital safety net for . . . some of the most vulnerable members of society."[37] People with disabilities have been described as "lead[ing] their lives in an intolerable state of isolation and dependence," as "victims of widespread discrimination," and as "a severely disadvantaged segment of society."[38] Social Security benefits are a "lifeline when people are struck by a serious medical condition[(s)],"[39] and are also "vital to the Nation's economy."[40] The SSA operates two different disability benefits programs that pay benefits to the disabled—the SSDI program and the SSI program.[41] Both programs use the same disability determination process (discussed below), but their objectives and funding are different.[42]

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percent for disabled people and 3.7 percent for nondisabled, and "[u]nemployed persons are those who did not have a job, were available for work, and were actively looking for a job in the 4 weeks preceding the survey").

[35] *Id*. (noting "[a]cross all educational attainment groups, unemployment rates for persons with a disability were higher than those for persons without a disability," and "[a]cross all age groups, . . . persons with a disability were more likely to be out of the labor force than those with no disability").

[36] Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 421–22 (1991) (noting that "[t]wo-thirds of those not working want to work" and "about 8.2 million people with disabilities want to work but cannot find a job"; also noting that "three-fourths of business managers affirmed that people with disabilities often encounter job discrimination from employers" (emphasis and internal quotation marks omitted) (quoting HARRIS (LOUIS) & ASSOCIATES, THE ICD SURVEY II: EMPLOYING DISABLED AMERICANS 12 (1987))); *see also* Frank Griffin, Author, Personal Experience (Years of orthopedic surgical practice consistently revealed that the majority of patients with disabilities in my practice wanted to return to work to maintain their standard of living and avoid taking a "handout.").

[37] *SSA's Disman Statement*, *supra* note 23.

[38] Burgdorf, *supra* note 36, at 416–17, 435–36.

[39] *Social Security Safeguards Our Most Vulnerable Citizens*, SOC. SEC. UPDATE ARCHIVE (Soc. Sec. Admin.), Aug. 2019, https://www.ssa.gov/news/newsletter/archive.html#2019 [https://perma.cc/5NFF-P2MP].

[40] *Social Security Testimony Before Congress: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means and Subcomm. on the Cts., Com. & Admin. L. of the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Michael J. Astrue, Comm'r, Social Security Administration), [hereinafter *SSA's Astrue Statement*], https://www.ssa.gov/legislation/testimony_071111.html [https://perma.cc/QCY2-726L].

[41] Javier Meseguer, *Outcome Variation in the Social Security Disability Insurance Program: The Role of Primary Diagnoses*, 73 SOC. SEC. BULL. 39, 40 (2013), https://www.ssa.gov/policy/docs/ssb/v73n2/v73n2p39.html [https://perma.cc/A5UC-MGWS]; Barnhart v. Walton, 535 U.S. 212, 214 (2002); 42 U.S.C. § 401 *et seq*. (Title II disability insurance benefits); 42 U.S.C. § 1381 *et seq*. (Title XVI supplemental security income).

[42] Meseguer, *supra* note 41, at 40.

The SSDI program was enacted in 1956[43] and "provides benefits to disabled workers who are younger than their respective full retirement ages . . . to their spouses [and/or] surviving disabled spouses, and [to their] disabled children."[44] SSDI is "funded through payroll tax contributions and is designed to protect workers contributing to the program."[45] SSDI's purpose is to "replace part of a worker's earnings" when a physical or mental impairment prevents the person from working.[46] The worker must meet eligibility requirement for SSDI benefits.[47] Once allowed, "[d]isability benefits continue for as long as the beneficiary remains disabled or reaches full retirement age, in which case there is a conversion to retirement benefits."[48] When SSDI was passed, lawmakers agreed to "let[] the states, rather than the federal government, make the initial determinations of disability."[49]

In contrast, the SSI program is funded by general revenues and is not contributory.[50] SSI is a "program of last resort" for the aged, blind, and disabled.[51] SSI "has no employment or contribution requirements, but imposes strict income and asset limits."[52] SSI's "main goal" is to "guarantee a minimal level of income to the poorest of the aged, blind, or disabled population."[53] SSI began in 1975, and "policymakers reflexively assigned welfare beneficiaries to the administrative apparatus already established [nineteen years earlier] to administer SSDI benefits."[54] Therefore, the two programs are administered via the same process "us[ing] a common definition of disability."[55]

To qualify for benefits, the claimant must be "disabled."[56] Under the Social Security Act, "disability" is defined by both programs as "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less

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[43] *Berkowitz Statement*, *supra* note 30; 42 U.S.C. § 401 *et seq*.

[44] Meseguer, *supra* note 41, at 40 (noting that SSDI was enacted in 1956 and SSI in 1972); Cleveland v. Pol'y Mgmt. Sys. Corp., 526 U.S. 795, 797 (1999); 42 U.S.C. § 423(d)(2)(A).

[45] Meseguer, *supra* note 41, at 40.

[46] *Id*. at 39.

[47] *Id*. at 41 (explaining "[e]ligibility for [SSDI] benefits requires a worker to be insured, younger than his or her full retirement age, and to meet the definition of disability. The applicant must have worked long enough in employment covered by Social Security (approximately 10 years) and recently enough (about 5 of the past 10 years)").

[48] *Id*.; *Berkowitz Statement*, *supra* note 30.

[49] *Berkowitz Statement*, *supra* note 30.

[50] Meseguer, *supra* note 41, at 40.

[51] *Id*. at 39.

[52] *Id*.

[53] *Id*. at 40.

[54] *Berkowitz Statement*, *supra* note 30.

[55] *Id*.

[56] *See* 42 U.S.C. § 1382.

than 12 months."[57] The SSA regulations specifically state that "activities like taking care of yourself, household tasks, hobbies, therapy, school attendance, club activities, [and] social programs" are not generally considered "substantial gainful activity."[58] Yet, as discussed below in detail, ALJs routinely deny claims based upon these activities.[59] Some judges have denied up to 96 percent of claims.[60] Denial of social security benefits is considered by some claimants to be a "death sentence" because without the benefits they cannot afford the basic necessities of life.[61]

This paper examines implicit biases present in the SSA disability determination process revealed by the use of discriminatory "zombie factors"[62] by adjudicators. Zombie factors are judicial rules related to activity restrictions that define disability in ways that are so restrictive they could virtually only be met by a "will-less," supernatural, un-dead being with only a "semblance of life" (i.e., like fictitious "zombies")—such as living without food, without personal hygiene or a clean home, without significant movement/exercise, without social interaction, without happiness provided by any recreational activity, and without other semblances of human life.[63] Use of zombie factors as evidence to deny disability claims perpetuates prejudicial stereotypes that suggest that people with real work disabilities are so incapacitated that they are unable to provide self-care and therefore, must require institutionalization or be dependent upon others. While some ALJ disability opinions do not rest on zombie factors alone,

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[57] 42 U.S.C. § 423(d)(1)(A).

[58] 20 C.F.R. § 404.1572(c) (2019).

[59] *See infra* Part I.

[60] HAROLD J. KRENT & SCOTT MORRIS, ADMIN CONF. OF THE U.S., ACHIEVING GREATER CONSISTENCY IN SOCIAL SECURITY DISABILITY ADJUDICATION: AN EMPIRICAL STUDY AND SUGGESTED REFORMS 15 (2013) (noting that "[t]he lowest and highest allowance rates (4% and 98%, respectively) very nearly spanned the full range of possible values").

[61] Terrence McCoy, *597 Days. And Still Waiting.*, WASH. POST (Nov. 20, 2017), https://www.washingtonpost.com/sf/local/2017/11/20/10000-people-died-waiting-for-a-disability-decision-in-the-past-year-will-he-be-next/ [https://perma.cc/N7D3-NTV9] (describing how a person with no health insurance considered another denial a "death sentence").

[62] This is a new term coined by the author, and first defined in detail here. The author previously used the term in his article entitled "Recognizing Pearls in the Medical Record of Meritorious Social Security Disability Cases." Frank Griffin, *Recognizing Pearls in the Medical Record of Meritorious Social Security Disability Cases*, 53 ARK. LAW., Winter 2018, at 34, 35.

[63] *Zombie*, DICTIONARY.COM, https://www.dictionary.com/browse/zombie [https://perma.cc/9UPG-VKW3] (defining a "zombie" as "the body of a dead person given the semblance of life, but mute and will-less"); *Zombie*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/zombie [https://perma.cc/JMK8-QWNX] (defining a "zombie" as "a will-less and speechless human . . . held to have died and been supernaturally reanimated" or "a person held to resemble the so-called walking dead"); *Zombie*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/view/Entry/232982?redirectedFrom=zombie#eid [https://perma.cc/48XU-FH3T] (defining a "zombie" as "a soulless corpse").

the use of such factors to deny claims reinforces bias and stereotypes and contributes to unfair outcomes in many SSA disability determinations.

I. INABILITY TO LIVE INDEPENDENTLY OR PARTICIPATE IN MAINSTREAM LIFE AS "ZOMBIE FACTORS" IN SSA DISABILITY DETERMINATIONS

Over time, our understanding of what it means to be disabled has evolved—so it is not surprising that an SSA disability system conceived in the 1930s and developed in the 1950s is having growing pains.[64] America has a long history of segregating and isolating people with disabilities, keeping them "out of sight, out of mind."[65] In colonial times, families were expected to take care of their relatives with disabilities, and some families chose to "hide or disown their disabled members or allow them to die."[66] By the 1820s, "protective isolation[ism]" or "warehousing" was embraced in a "shift towards more organized, institutionalized care," but abuse and neglect of institutionalized people emerged on a "massive scale."[67] From 1920 to 1960, "the development of welfare . . . programs as an alternative to total care institutions" was underway to provide "financial support for the retirement of individuals with disabilities."[68]

Paternalistic medical models of disability have fallen into disfavor with modern disability rights advocates "maintain[ing] that people with disabilities . . . have the right to govern their lives, and . . . that the proper goal of public policy is the creation of meaningful equal opportunity."[69] The integration of people with disabilities into mainstream society requires the "elimination of attitudinal . . . [and] policy . . . barriers" (like the attitudes and policies demonstrated by SSA adjudicators described below in this article).[70] In 1973, the idea of societal integration of people with disabilities was recognized for the first time from a legal perspective when "the exclusion and segregation of people with disabilities was [first] viewed as discrimination" "with the passage of Section 504 of the 1973 Rehabilitation Act."[71] The regulations issued for the Rehabilitation Act formed the basis for the ADA.[72] At the ADA's signing, President

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[64] *Berkowitz Statement*, *supra* note 30 (explaining that the "disability system developed in the 1930's and created during the political conflicts of the 1950's and 1970's should [be expected to] experience strains after nearly half a century of operation").

[65] Mayerson, *supra* note 3.

[66] ADA NAT'L NETWORK, *Findings, Purpose, & History*, ADA 30 YEARS, https://www.adaannniversary.org/findings_purpose [https://perma.cc/LBT9-B9BM].

[67] *Id*.

[68] *Id*.; ROTHSTEIN & MCGINLEY, *supra* note 29, at 10 (referencing EDWARD D. BERKOWITZ, DISABLED POLICY: AMERICA'S PROGRAMS FOR THE HANDICAPPED (1987)).

[69] ADA NAT'L NETWORK, *supra* note 66.

[70] *Id*.

[71] Mayerson, *supra* note 3 (also noting that "Section 504 was . . . historic because for the first time people with disabilities were viewed as a class—a minority group" and that class status "has been critical in the development of the movement and advocacy efforts").

[72] *Id*.

George H.W. Bush described the ADA as the beginning of a "bright new era of equality, independence, and freedom" for people with disabilities ensuring "equal opportunity and access to the mainstream of American life."[73]

According to the CDC, 61 million American adults are living with a disability,[74] but only around 2.5 million apply for disability benefits each year.[75] Those who apply deserve fair consideration of their claims free from discriminatory biases and stereotypes. The SSA acknowledges, "[i]t is our obligation to provide every person who comes before our agency . . . a timely, legally sound, policy-compliant decision."[76] Yet, ALJs and the court system often show implicit bias that people with work disabilities must be unable to live independently and unable to participate in simple mainstream activities because their opinions often require successful claimants to be (1) dependent and (2) isolated and segregated from mainstream life.

A. Requiring Dependency to Qualify for Disability Benefits

In order to survive independently, all people—including people with disabilities—must be able to perform "activities of daily living" (ADLs). According to the Centers for Medicare and Medicaid Services (CMS), ADLs "include bathing or showering, dressing, getting in and out of bed or a chair, walking, using the toilet, and eating."[77] ADLs are "essential and routine aspects of self-care," and the inability to perform ADLs leads to institutionalization, dependency, or death.[78] The CDC estimates that only "6.8 percent of people with a disability have an independent living disability with difficulty doing errands alone," and only "3.6 percent of people with a disability have a self-care disability with difficulty dressing or bathing."[79] In other words, 93.2 percent of

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[73] ADA NAT'L NETWORK, *supra* note 66.

[74] *Disability Impacts All of Us*, *supra* note 25; Okoro et al., *supra* note 25, at 887.

[75] *See SSA's Disman Statement*, *supra* note 23.

[76] *Id*.

[77] CTRS. FOR MEDICARE & MEDICAID SERVS., *Research, Statistics, Data & Systems*, Appendix B 200 (2008), https://www.cms.gov/Research-Statistics-Data-and-Systems/Research/MCBS/downloads/2008_Appendix_B.pdf [https://perma.cc/R5RH-RV7D]; *see also* Peter F. Edemekong et al., *Activities of Daily Living (ADLs)*, EUR. PUBMED CENT., https://europepmc.org/article/nbk/nbk470404#free-full-text [https://perma.cc/QL9E-7VUK] (noting that "[t]he activities of daily living (ADLs) are both essential and routine aspects of self-care" and describing "[t]he six essential ADLs [as] the ability to be able to independently eat, dress, walk or transfer from one position to another, bathe, and toilet, and maintaining bowel and bladder continence").

[78] CTRS. FOR MEDICARE & MEDICAID SERVS., *supra* note 77; Edemekong et al., *supra* note 77 ("Inability to accomplish essential activities of daily living may lead to unsafe conditions and poor quality of life; possibly serving as criteria to consider home care assistance or placement in assisted living, skilled care, or long-term care. Placement in a facility due to declining ADL's is often a difficult decision made collaboratively by the patient, significant others, and the healthcare team.").

[79] *Disability Impacts All of Us*, *supra* note 25; Okoro et al., *supra* note 25.

people with disabilities can live independently and run errands alone, and 96.4 percent can dress and bathe themselves.[80]

Some courts have repeatedly said that ADLs should not be used as evidence to deny claimants benefits. For example, Judge Posner pointed out the "critical differences between activities of daily living and activities in a full-time job," including the facts that (1) "a person has more flexibility in scheduling" their ADLs than a job, (2) a person can "get help from other persons" when necessary to perform ADLs more commonly than in a job, and (3) a person "is not held to a minimum standard of performance" in performing ADLs, "as she would be by an employer."[81] In addition, the SSA regulations specifically state that "activities like taking care of yourself, household tasks, hobbies, therapy, school attendance, club activities, [and] social programs" are not generally considered "substantial gainful activity."[82] The Eighth Circuit has reinforced this by saying, "[t]his court has repeatedly stated that a person's ability to engage in personal activities such as cooking, cleaning, and hobbies does not constitute substantial evidence that he or she has the functional capacity to engage in substantial gainful activity."[83] However, ALJs continue to rule otherwise, and while sometimes the courts correct them—many times the courts affirm their judgments.[84]

1. ALJ Bias: Activities of Daily Living as Evidence of Non-disability

ADLs are routinely among the factors listed by ALJs as evidence to deny claims by discounting claimants' credibility and the opinions of their treating physicians. ADLs often listed include the ability to live alone, to prepare food (i.e., cook, obtain groceries, wash dishes), to bathe, to put on clothing, among others. These "zombie factors"[85] expose the ALJ's implicit bias that people with true work disabilities are unable to take care of their own basic needs and live independently.

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[80] *See Disability Impacts All of Us*, *supra* note 25.

[81] Bjornson v. Astrue, 671 F.3d 640, 647 (7th Cir. 2012).

[82] 20 C.F.R. § 404.1572(c) (2019).

[83] Kelley v. Callahan, 133 F.3d 583, 588–89 (8th Cir. 1998) (citing Hogg v. Shalala, 45 F.3d 276, 278 (8th Cir. 1995)).

[84] The judicial record is replete with examples of ALJs and courts using these factors; only a few demonstrative cases are discussed here.

[85] *Supra* Introduction ("Zombie factors are judicial rules related to activity restrictions that define disability in ways that are so restrictive they could virtually only be met by a 'willless,' supernatural, un-dead being with only a 'semblance of life' (i.e., like fictitious 'zombies')—such as living without food, without personal hygiene or a clean home, without significant movement/exercise, without social interaction, without happiness provided by any recreational activity, and without other semblances of human life. Use of zombie factors as evidence to deny disability claims perpetuates prejudicial stereotypes that suggest that people with real work disabilities are so incapacitated that they are unable to provide self-care and therefore, must require institutionalization or be dependent upon others." (citations omitted)).

First, for decades, some ALJs explicitly demonstrate a *disability dependency* bias by listing the fact that claimants live alone among evidence of a lack of disability;[86] this standard basically requires claimants to be dependent upon others or institutionalized to qualify for disability benefits. For example, one ALJ listed "the facts that [the claimant] *lives alone* [and] independently takes care of his personal needs" as being inconsistent with his complaints and medical record of disability.[87] Another ALJ "noted that plaintiff *lives alone* [and] can dress himself" among evidence to deny his claim.[88] Another ALJ used the facts that the "claimant . . . *lives alone* and cares for his own personal bathing" as factors to deny his claim.[89] The Eighth Circuit even recently reinforced this idea when it found substantial evidence in the fact that the claimant was "able to perform . . . personal care tasks . . . and *live alone*."[90] Living alone has been used extensively as a factor in denying claims for decades.[91]

Second, food preparation—including buying food at the grocery store, cooking, and washing dishes—is often cited by ALJs as a reason for denying disability claims. For example, one ALJ included the claimant's "ability to prepare meals . . . and *shop for groceries* [on a motorized cart]" among the factors that "belie his assertion of incapacity";[92] in other words, because the claimant can cook and shop for groceries, he is lying about his disability according to this ALJ. Another ALJ included the facts that the claimant was able to "*cook*" and "*grocery shop*" as substantial evidence factors to reject the opinion of the claimant's treating physician, to reject the claimant's subjective complaints of disabling pain, and to support a determination that the claimant was not disabled.[93] Another ALJ "attached great significance to the fact that [the claim-

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[86] *See, e.g.*, Coren v. Calvin, 253 F. Supp. 3d 356, 360 (D. Mass. 2017) (finding that the ALJ's denial of benefits was proper where that ALJ "credited evidence that [the claimant] is able to live independently"); *see also* Fulwood v. Heckler, 594 F. Supp. 540, 543 (D.D.C. 1984) (noting the fact that the ALJ relied on the fact that the claimant "lives alone" to discount his credibility).

[87] Bryant v. Colvin, 861 F.3d 779, 783 (8th Cir. 2017) (emphasis added).

[88] Smith v. Apfel, 69 F. Supp. 2d 370, 379 (N.D.N.Y. 1999) (emphasis added).

[89] Van Laningham v. Astrue, 496 F. Supp. 2d 1021, 1029 (S.D. Iowa 2007) (emphasis added).

[90] Twyford v. Comm'r, Soc. Sec. Admin., 929 F.3d 512, 517 (8th Cir. 2019) (emphasis added).

[91] *See, e.g.*, *Coren*, 253 F. Supp. 3d at 360 (finding that the ALJ's denial of benefits was proper where that ALJ "credited evidence that [the claimant] is able to live independently"); *see also Fulwood*, 594 F. Supp. at 543 (noting the fact that the ALJ relied on the fact that the claimant "lives alone" to discount his credibility).

[92] Craft v. Astrue, 539 F.3d 668, 680 (7th Cir. 2008) (emphasis added) (internal quotation marks omitted).

[93] Pardee v. Astrue, 631 F. Supp. 2d 200, 206, 210–11 (N.D.N.Y. 2009) (emphasis added) (noting that claimant's testimony that she was "able to . . . cook [and] . . . grocery shop" were factors supporting an ability to do "light work" and was substantial evidence to reject the opinions of her treating physician regarding her RFC and reject her subjective complaints of disabling pain).

ant] . . . is able to . . . *feed*, shelter and clothe herself . . . and is not prevented by her condition from . . . *cooking*."[94] Cleaning up after a meal is also a disqualifying factor for some ALJs who frequently list the fact that the claimant "*washes dishes*" among the evidence they use to deny claims.[95] Food preparation is often used as substantial evidence in Social Security disability determinations, and only a tiny fraction of case law is mentioned here.[96]

Third, personal hygiene is also often used as substantial evidence against claimants by ALJs. For example, one ALJ listed the claimant's ability to "take a *shower*" among factors used to ignore the claimant's doctor's opinions.[97] Another ALJ denied a disabled veteran's claim listing the fact that he was "able to *shower*" among evidence.[98] Another ALJ used the claimant's ability to "take a

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[94] Gentle v. Barnhart, 430 F.3d 865, 867 (7th Cir. 2005) (emphasis added) (internal quotation marks omitted).

[95] Rice v. Barnhart, 384 F.3d 363, 366 (7th Cir. 2004) (emphasis added).

[96] *E.g.*, Twyford v. Comm'r, Soc. Sec. Admin., 929 F.3d 512, 517 (8th Cir. 2019) (agreeing that claimant's ability to "shop for groceries" was substantial evidence for denial of claim); Rusin v. Berryhill, 726 F. App'x 837, 840 (2d Cir. 2018) (ruling that severe limitations claimed by the plaintiff were inconsistent with the plaintiff's report "that he cooked simple meals daily, left the house daily, can drive, and shopped for groceries every two weeks"); Youngblood v. Berryhill, 734 F. App'x 496, 499 (9th Cir. 2018) (including "grocery shopping" among "specific, clear, and convincing reasons" supporting an ALJ's denial of benefits); Singleton v. Colvin, 646 F. App'x 509, 511 (9th Cir. 2016) (noting that the ALJ relied on the claimants ability to "complete tasks . . . such as grocery shopping . . . as evidence that [the claimant's] impairments were not as severe as she claimed"); Cindy F. v. Berryhill, 367 F. Supp. 3d 1195, 1212 (D. Or. 2019) (stating, "[t]he ALJ found that Plaintiff's daily activities [we]re not limited to the extent one would expect, given the complaints of disabling symptoms and limitations," and mentioning the claimant's ability to "prepare meals daily," "shop for groceries once a week," and the fact that she "did not need help with . . . eating" as evidence of non-disability); Yates v. Colvin, 940 F. Supp. 2d 664, 670, 673–74 (S.D. Ohio 2013) (mentioning "preparing meals" as a disqualifying factor); Lewis v. Barnhart, 460 F. Supp. 2d 771, 786 (S.D. Tex. 2006) (listing among substantial evidence the fact that the claimant "is able to cook" and "grocery shop once per month"); Bergfeld v. Barnhart, 361 F. Supp. 2d 1102, 1112 (D. Ariz. 2005) (observing the ALJ implied that the claimant was not disabled because her daily activities included "cooking, . . . and grocery shopping"). *See, e.g.*, Clifford v. Apfel, 227 F.3d 863, 865, 868–70 (7th Cir. 2000) (finding the ALJ considered factors like "cooking, . . . washing dishes, and grocery shopping" in rejecting treating physician's opinion and in rejecting claimant's subjective complaints of pain); Velez-Pantoja v. Astrue, 786 F. Supp. 2d 464, 469 (D.P.R. 2010) (including among substantial evidence the fact that the claimant could "prepare light meals"); Ferguson v. Sec'y of Health & Hum. Servs., 919 F. Supp. 1012, 1021–22 (E.D. Tex. 1996) (including as factors listed as substantial evidence the fact that the claimant could "cook several meals daily; wash dishes by hand; . . . [and] do the grocery shopping").

[97] Helms v. Berryhill, 362 F. Supp. 3d 294, 302 (W.D.N.C. 2019) (emphasis added) (finding the ALJ erred in ignoring physician's opinion using as undermining factors including the fact that the claimant could "take a shower").

[98] Hunley v. Cohen, 288 F. Supp. 537, 538, 541 (E.D. Tenn. 1968) (emphasis added) (noting as a factor that the claimant "is able to shower" in denying benefits to a claimant with a Veteran's Administration rating of "permanent and total disability").

shower and dress herself" to deny benefits.[99] Still another ALJ included the claimant's ability to "*shower, bathe*, and dress" as factors against finding disability.[100] Another ALJ listed the fact that the claimant could "*bathe* and dress normally" among evidence for denying her claim.[101] Again, the judicial record contains many examples.[102]

Other ADLs used as factors to deny disability benefits range from brushing teeth to making the bed. For example, one ALJ relied on the claimant's ability to "complete tasks . . . such as . . . *making the bed, and folding clothes*—as evidence that [the claimant's] impairments were not as severe as she claimed."[103] Another ALJ was extremely specific and considered the claimant's ability to "*button[] a blouse"* and *"brush[] [her] teeth and hair*" as factors in denying her claim.[104] Many examples exist.[105]

2. *Judicial Bias: Inconsistently Reinforcing and Chastising ALJs for Using ADLs as Evidence for Non-disability*

Courts (including the Circuit courts) often both chastise and reinforce ALJs for using ADLs as evidence. These confusing and contrary decisions may be because implicit bias can be overcome with deliberate and careful consideration to avoid "cognitive shortcut[s]."[106] So, a busy ALJ or court might make a hur-

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[99] Clifford v. Apfel, 227 F.3d 863, 865, 874 (7th Cir. 2000) (emphasis added) (finding reversible error where the ALJ considered factors like her ability to "take a shower and dress herself" in rejecting treating physician's opinion and in rejecting claimant's subjective complaints of pain).

[100] Bonilla Mojica v. Berryhill, 397 F. Supp. 3d 513, 533 (S.D.N.Y. 2019) (emphasis added) (finding among substantial evidence that the claimant "can shower, bathe, and dress" to support denying her claim at step 3 under medical listings).

[101] Bjornson v. Astrue, 671 F.3d 640, 647 (7th Cir. 2012) (emphasis added).

[102] *See, e.g.*, Rice v. Barnhart, 384 F.3d 363, 365–66 (7th Cir. 2004) (including as factors in denial the fact that the claimant "able to bathe herself, but that she has problems getting out of the bathtub and therefore takes showers"); Velez-Pantoja v. Astrue, 786 F. Supp. 2d 464, 469 (D.P.R. 2010) (including among substantial evidence the fact that the claimant could "shower and dress himself"); Pardee v. Astrue, 631 F. Supp. 2d 200, 211 (N.D.N.Y. 2009) (noting that claimant's testimony that she was "able to shower" was a factor supporting an ability to do "light work" and was substantial evidence to reject the opinions of her treating physician and her subjective complaints of disabling pain).

[103] Singleton v. Colvin, 646 F. App'x 509, 511 (9th Cir. 2016) (emphasis added).

[104] Ferguson v. Sec'y of Health & Hum. Servs., 919 F. Supp. 1012, 1021 (E.D. Tex. 1996) (emphasis added).

[105] *See, e.g.*, Youngblood v. Berryhill, 734 F. App'x 496, 499 (9th Cir. 2018) (including "cleaning" among "convincing reasons" supporting ALJs denial of benefits); Craft v. Astrue, 539 F.3d 668, 680 (7th Cir. 2008) (noting the ALJ concluded that the claimant's four minutes of vacuuming each day "belie[d] his assertion of incapacity").

[106] Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1200–01 (1995) (discussing cognitive shortcuts as the representative heuristic); *see also* Tessa E. S. Charlesworth & Mahzarin R. Banaji, *Patterns of Implicit and Explicit Attitudes: I. Long-*

ried negative decision in one instance due to time constraints, but make a different positive decision using the same facts on a different day with more time to reflect.[107]

First, courts are sometimes supportive of using ADLs for evidence. For example, one New York court specifically noted that the claimant's "activities of daily living, including light *cooking and shopping*, . . . were appropriate factors for the ALJ to consider in weighing the medical opinions and other evidence of record . . . , and do suggest a level of functioning and stamina that is inconsistent with the extent of [the claimant's] claimed limitations, as well as with the more extreme limitations opined by [the testifying physicians]."[108] Likewise, a Texas court found the ALJ's negative "credibility findings [were] supported by the evidence in the record" like the fact that the claimant testified that "he was able to *cook*" and "*lift a gallon of milk*."[109] Similarly, a court in Ohio found that "*grocery shop[ping]* on a weekly basis" was a disqualifying factor.[110] Also, a court in Maine affirmed the ALJ's denial of benefits because the claimant was "capable of partak[ing] in several activities, such as *preparing her own meals . . .* and *shop[ping] in stores for basic necessities*."[111]

The Circuit courts also often support the use of basic ADLs as evidence to deny claims. For example, the Seventh Circuit affirmed a lower court ruling where the ALJ's "eminently reasonable credibility determination" ("due special deference") was based on the fact that the claimant "occasionally *cook[ed] for herself*" and "[went] *grocery shopping* with assistance."[112] The Fifth Circuit blessed the ALJ's evidence in another example noting that the claimant "admitted that she was able to dress and *bathe herself* and that she regularly *washed the dirty dishes*"; the Fifth circuit said "[claimant] herself related at the administrative hearing that she [was] able to care for her *personal needs*, *cooks meals*, [and drove] her car once or twice a week."[113] Similarly, the Eighth Circuit supported an ALJ's findings that "'regularly' perform[ing] the activities of self-care, such as *bathing/showering*, dressing, *shaving, and hair care*" were signs

Term Change and Stability From 2007 to 2016, 30 PSYCH. SCI. 174, 174 (2019) (revealing that implicit bias can change over time).

[107] Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1941–42 (2009) ("Although social psychologists frequently note the difficulties of controlling stereotypes that are by definition unconscious and automatic, most experts conclude that stereotypes are not permanent, but rather alterable. The two variables most often noted are (1) effort, and (2) situational context.").

[108] Burkey v. Colvin, 284 F. Supp. 3d 420, 425 (W.D.N.Y. 2018) (emphasis added) (citation omitted).

[109] Collins v. Astrue, 493 F. Supp. 2d 858, 876–77 (S.D. Tex. 2007) (emphasis added).

[110] Yates v. Colvin, 940 F. Supp. 2d 664, 670, 674 (S.D. Ohio 2013) (emphasis added).

[111] Smith v. Berryhill, 370 F. Supp. 3d 282, 285–86 (D. Mass. 2019) (emphasis added).

[112] Rice v. Barnhart, 384 F.3d 363, 366, 371 (7th Cir. 2004) (emphasis added).

[113] Anthony v. Sullivan, 954 F.2d 289, 292, 295 (5th Cir. 1992) (emphasis added).

that the claimant was not disabled.[114] Likewise, the Second Circuit affirmed the ALJ's findings that severe limitations claimed by the plaintiff were not consistent with the claimant's report that he "*cooked* simple meals daily, *left the house* daily, [could] drive, and *shopped for groceries* every two weeks."[115] Examples abound.[116]

Second, courts often strikingly contradict themselves and forcefully state that basic ADLs are not substantial evidence to be used to deny claims. For example, in remanding one case, the Seventh Circuit chastised the lower court saying, "[w]e have cautioned the Social Security Administration against placing undue weight on a claimant's household activities in assessing the claimant's ability to hold a job outside the home."[117] Similarly, the Third Circuit quipped that the Social Security Administration does not define "disability" in terms requiring a claimant to "vegetate in a dark room excluded from all forms of human and social activity" and chided that "statutory disability does not mean that a claimant must be a quadriplegic or an amputee."[118] Similarly, the Eighth Circuit has noted, "[w]e have repeatedly held . . . that the ability to do activities such as light housework and visiting with friends provides little or no support for the finding that a claimant can perform full-time competitive work."[119] Likewise, the Eighth Circuit found that evidence that the "claimant washed dishes, did light cooking, read, watched TV, visited with his mother, and drove to shop for groceries" was "not substantial evidence of the ability to do full-time, competitive work."[120] Further, the court said the fact that the claimant "trie[d] to maintain her home and [did] her best to engage in ordinary life activities . . . in no way direct[ed] a finding that she [was] able to engage in light work."[121]

Lower courts also often express the same findings. For example, one court noted, "[m]erely because an individual is somewhat mobile and can perform some simple functions, such as driving, dishwashing, shopping, and sweeping the floor, does not mean that he is able to engage in substantial gainful activi-

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[114] Wagner v. Astrue, 499 F.3d 842, 852 (8th Cir. 2007) (emphasis added).

[115] Rusin v. Berryhill, 726 F. App'x 837, 840 (2d Cir. 2018) (emphasis added).

[116] *See, e.g.*, Youngblood v. Berryhill, 734 F. App'x 496, 499 (9th Cir. 2018) (including "cooking" among reasons supporting ALJs denial of benefits); Merichko v. Astrue, 363 F. App'x 203, 206 (3d Cir. 2010) (finding that a claimant who "does her own weekly grocery shopping and carries her own bags" and "uses public transportation" as disqualifying); Pelkey v. Barnhart, 433 F.3d 575, 578 (8th Cir. 2006) (mentioning "shopping for groceries" among factors considered to be substantial evidence).

[117] Craft v. Astrue, 539 F.3d 668, 680 (7th Cir. 2008) (internal quotation marks omitted) (quoting Mendez v. Barnhart, 439 F.3d 360, 362 (7th Cir. 2006)).

[118] Smith v. Califano, 637 F.2d 968, 971 (3d Cir. 1981).

[119] Baumgarten v. Chater, 75 F.3d 366, 369 (8th Cir.1996) (internal quotation marks omitted) (quoting Hogg v. Shalala, 45 F.3d 276, 278 (8th Cir. 1995)).

[120] Draper v. Barnhart, 425 F.3d 1127, 1131 (8th Cir. 2005) (citing Rainey v. Dep't of Health & Hum. Servs., 48 F.3d 292, 293 (8th Cir.1995)).

[121] *Id.*

ty";[122] the court went on to point out, "[t]hese tasks can be performed intermittently, when the individual is not experiencing severe symptoms, and do not require the sustained effort necessary for any substantial, sustained and regular gainful employment."[123] Another court noted, "a claimant need not be totally helpless in order to be entitled to benefits"; the court went on to say, "*[i]t should go without saying* that [the claimant] can handle these limited tasks—if she were unable to do so, she would be truly 'helpless' in the literal sense of the word."[124] Another district court found that an ALJ improperly failed to "afford controlling weight to" the testifying physician's opinion, without good reason, where the claimant reported that she could independently "dress[] . . . bath[e], groom[], cook[], clean[], do[] laundry, shop[], manag[e] money, and driv[e]" while undergoing chemotherapy.[125] Likewise, another lower court explained, "[t]he Social Security Act does not require that claimants be utterly incapacitated to be eligible for benefits."[126]

3. ADLs Measure Ability and Will to Survive—Not Employability

ADL's are necessary for survival, so all people living somewhat autonomously must perform at least some of these activities to stay alive. The "Listing of Impairments" includes over one hundred impairments, and claimants "[who] 'meet' the Listings are allowed [disability benefits], based solely on medical criteria" without further evaluation.[127] "Most of the listed impairments are permanent or expected to result in death," and many have specific rules that apply to assessment.[128] Examples of listed impairments include breast cancer,[129] leukemia,[130] and major dysfunction of a joint with gross anatomical deformity.[131]

Even most people with disabilities among those in the Listing of Impairments perform their ADLs. For example, "most cancer survivors accomplish

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[122] Fulwood v. Heckler, 594 F. Supp. 540, 543 (D.D.C. 1984).

[123] *Id*.

[124] Amick v. Celebrezze, 253 F. Supp. 192, 196 (D.S.C. 1966) (emphasis added.

[125] Insalaco v. Comm'r of Soc. Sec., 366 F. Supp. 3d 401, 408–10 (W.D.N.Y. 2019).

[126] Bergfeld v. Barnhart, 361 F. Supp. 2d 1102, 1112 (D. Ariz. 2005).

[127] 20 C.F.R. § 404.1525 (2017) (The Listing of Impairments "describes for each of the major body systems impairments that [the SSA] consider[s] to be severe enough to prevent an individual from doing any gainful activity, regardless of his or her age, education, or work experience"); BERNARD WIXON & ALEXANDER STRAND, SOC. SEC. ADMIN., RESEARCH AND STATISTICS NOTE NO. 2013-01, IDENTIFYING SSA'S SEQUENTIAL DISABILITY DETERMINATION STEPS USING ADMINISTRATIVE DATA 5 (2013), https://www.ssa.gov/policy/docs/rsnotes/rsn2013-01.pdf [https://perma.cc/K2SA-DLJ6]; *Listing of Impairments-Adult Listings (Part A)*, SOC. SEC. ADMIN., https://www.ssa.gov/disability/professionals/bluebook/AdultListings.htm [https://perma.cc/92MA-YXZF].

[128] 20 C.F.R. § 404.1525(c)(4) (2017).

[129] 20 C.F.R. § 404.1573(13.10) (2017).

[130] 20 C.F.R. § 404.1573(13.06).

[131] 20 C.F.R. § 404.1573(1.02).

[ADLs] without any problems" because "effectively completing activities of daily living indicates a very low level of function."[132] One cancer researcher noted that activities "such as performing household chores or going to the grocery store to get food" are "not enough" to expose "functional problems" that "cause significant disability" when assessing cancer patients.[133] In other words, ability to perform ADLs is not a good measure of function (and thus, employability).

Whether or not the ALJ ultimately grants or denies the claim, ADLs are not a sign of ability to work. For example, a proper diet is just as important for disabled people as for healthy people, so food preparation is essential to survival—including gathering of food (e.g., going to the grocery store), cooking the food, and washing the dishes. For example, under the List of Impairments, kidney transplant recipients are recognized by the SSA as being disabled for one year after the transplant;[134] the Transplant Society notes that "[t]here [is] abundant data from the general population that a lifestyle that includes . . . a proper diet and avoidance of obesity improves longevity and quality of life," and "[t]here is no reason not to believe that a proper diet can help prevent [cardiovascular disease] and other complications in [kidney transplant recipients] as in the general population."[135] The same—that one must eat a proper diet and avoid obesity to ensure longevity of lifealso applied to many other types of disabilities that are undisputed by the SSA.

Even back in the late 1980s before the ADA requirements for accessibility at grocery stores, eight-seven percent of people with disabilities shopped in grocery stores at least occasionally and 62 percent of people with disabilities went once per week.[136] In order to have a proper diet, people with disabilities must prepare food to eat, which usually includes going to the grocery store, cooking/preparing the food, and cleaning up afterward (e.g., washing dishes). In addition, some type of transportation—possibly walking, driving, or taking public transportation—is often necessary to get to the grocery store or other food source. So, all of these activities are necessary and expected of most disabled people.

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[132] Julie K. Silver et al., *Impairment-Driven Cancer Rehabilitation: An Essential Component of Quality Care and Survivorship*, 63 CA: CANCER J. FOR CLINICIANS 296, 297 (2013), https://acsjournals-onlinelibrary-wiley-com.ezproxy.library.unlv.edu/doi/full/10.3322/caac.21186 [https://perma.cc/5BRA-EVGX].

[133] *Id*.

[134] 20 C.F.R. § 404.1573(6.04) (2017).

[135] *Chapter 26: Lifestyle*, 9 AM J. TRANSPLANTATION S110, S110 (Supp. 2009), https://tts.org/kdigo/downloads/kdigo/S5-C26_Lifestyle.pdf [https://perma.cc/FS45-DRT5].

[136] Burgdorf, *supra* note 36, at 423, 423 n.53 (reporting that "thirteen percent of persons with disabilities never shop in grocery stores"; so, 87 percent must shop sometimes; also noting that "[a]bout six out of ten (62%) individuals with disabilities visit a grocery store at least once a week").

Extraordinary food prep—for example, if the claimant is doing it in a way that demonstrates he or she could do it for pay—could rise to the level of substantial evidence in some cases, but the ALJ should distinguish the unusual characteristics about the food prep that makes it relevant to employability when using it as a factor to deny benefits. It is hardly surprising that disabled people find a way to get to a food source and prepare food, since food is necessary for survival; what is surprising is that many ALJs believe cooking, grocery shopping, and washing dishes should be considered substantial evidence that a person is *not* disabled.[137]

Personal hygiene is also as important for people with disabilities as for healthy people. The CDC notes that "[m]any diseases and conditions can be prevented or controlled through appropriate personal hygiene and by frequently washing parts of the body and hair with soap and clean, running water."[138] The CDC also notes, "[g]ood body washing practices can prevent the spread of hygiene-related diseases" including body lice, chronic diarrhea, tooth decay, pinworms, scabies, and numerous other illnesses that could lead to further complications, poor quality of life, and possibly even death among people living with disabilities.[139] The point that people must bathe and maintain personal hygiene—even people suffering from the worst disabilities—seems obvious and is not belabored here. The same can be said for many other ADLs sometimes cited by ALJs and courts.[140]

B. Requiring Isolation and Segregation from Mainstream Life to Qualify for Disability Benefits

ALJs routinely list simple mainstream activities as evidence of a lack of disability even though "[t]hese tasks can be performed intermittently, when the individual is not experiencing severe symptoms, and do not require the sustained effort necessary for any substantial, sustained and regular gainful employment."[141] Simple mainstream activities like going to church, watching television, owning a pet, walking for exercise, sewing, fishing, and hunting are often listed by ALJs among evidence to deny claims.[142] However, simple mainstream activities include "flexibility in scheduling," the possibility to "get help from other persons," and no "minimum standard of performance"—unlike job

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[137] *See supra* Section I.A.1.

[138] *Body, Facial, & Dental Hygiene*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 26, 2016), https://www.cdc.gov/healthywater/hygiene/body/index.html [https://perma.cc/TEP3-F6LJ].

[139] *Id.*; *Hygiene-related Illnesses*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 26, 2016), https://www.cdc.gov/healthywater/hygiene/disease/index.html [https://perma.cc/6MBK-Z5V9].

[140] *See infra* Section I.B.1, B.2.

[141] Fulwood v. Heckler, 594 F. Supp. 540, 543 (D.D.C. 1984).

[142] *See infra* Section I.B.1.

requirements, as noted by Judge Posner.[143] At least one ALJ even considered a claimant's ability to "color[] in [a] coloring book[]" as evidence of employability.[144]

SSA regulations specifically state that "activities like . . . household tasks, hobbies, therapy, school attendance, club activities or social programs" are not generally considered "substantial gainful activity."[145] The Eighth Circuit explained, "the test [for evidence of the ability to engage in substantial gainful activity] is whether the claimant has 'the ability to perform the requisite physical acts day in and day out, in the sometimes competitive and stressful conditions in which real people work in the real world.' "[146] The Fourth Circuit recognized that for an activity to be a substantial gainful activity "some degree of regularity should be inferred . . . [and when] a person's activity may be frequently or transitorily restricted, [it] cannot be the premise for a finding of ability to engage in any substantial gainful activity."[147] The Third Circuit similarly noted, "[i]t is well established that sporadic or transitory activity does not disprove disability," and therefore, "even two sporadic occurrences such as hunting might indicate merely that the claimant was partially functional on two days."[148] Additionally, the Ninth Circuit stated, "the ability to do limited household chores, interspersed with rest, does not demonstrate the ability to work eight hours a day, five days a week, where it might be impossible to periodically rest" and that claimants "should not be penalized for attempting to lead normal lives in the face of their limitations."[149]

1. ALJ Bias: Simple Mainstream Activities as Evidence of Non-disability

Simple mainstream activities often cited by ALJs as evidence of employability include voluntary physical activities (e.g., walking, attending church, owning a pet, household chores), recreational activities (e.g., social activities, family functions, fishing, hunting), voluntary mental activities (e.g., watching television, reading), and leaving the home (e.g., walking, driving, or taking public transportation).[150]

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[143] Bjornson v. Astrue, 671 F.3d 640, 647 (7th Cir. 2012).

[144] Orn v. Astrue, 495 F.3d 625, 639 (9th Cir. 2007).

[145] 20 C.F.R. § 404.1572 (2017).

[146] Draper v. Barnhart, 425 F.3d 1127, 1131 (8th Cir. 2005) (quoting McCoy v. Schweiker, 683 F.2d 1138, 1147 (8th Cir. 1982) (en banc)).

[147] Wilson v. Richardson, 455 F.2d 304, 307 (4th Cir. 1972) (internal quotation marks omitted) (quoting Ellerman v. Flemming, 188 F. Supp. 521, 526 (W.D. Mo. 1960)).

[148] Smith v. Califano, 637 F.2d 968, 971–72 (3d Cir. 1981).

[149] Bergfeld v. Barnhart, 361 F. Supp. 2d 1102, 1115 (D. Ariz. 2005).

[150] The judicial record is filled with examples for each of the categories and specific activities listed below (as well as other similar activities); only a few illustrative examples are discussed here. *See, e.g.*, Butler v. Colvin, No. 2:15-CV-282, 2016 WL 2848883, at *7 (N.D. Ind. May 16, 2016) (even sexual activity is scrutinized with one ALJ concluding that a claimant's "sexual activity was inconsistent with her alleged low back pain").

First, voluntary physical activities (e.g., walking, attending church, owning a pet, household chores) that are clearly sporadic and transitory—unlike job requirements—are often included among disqualifying evidence. Short walks can be disqualifying. For example, one claimant's "own admissions" that she could "read, walk short distances, and attend church twice weekly" were considered evidence to deny her claim for widow's benefits.[151] Another ALJ discredited the claimant's credibility because "she can walk up to one block . . . [and] even drive" during her "one or two good days each week."[152] Going to church can be disqualifying. For example, one ALJ included the fact that the claimant "regularly attended church" among evidence.[153] ALJs frequently list "attend[ing] church services" among their evidence.[154] Doing household tasks can be disqualifying. An Ohio court affirmed an ALJ's findings of non-disability and listed the fact that the claimant could do some "cleaning, sweeping, and general straightening up around the house"; the court included "taking out the trash" among substantial evidence to deny her claim.[155] Another ALJ considered factors like "vacuuming[] [and] making the bed" in rejecting treating physician's opinion and in rejecting claimant's subjective complaints of pain.[156] Owning pets can be disqualifying. For example, the Ninth Circuit noted that "taking care of her pets" was evidence to support denying benefits to a claimant.[157] Another ALJ used the fact that the "claimant feeds and waters his dog" as a factor to deny his claim.[158]

Second, sporadic recreational activities (e.g., social activities, family functions, fishing, hunting) are often included among disqualifying evidence. For example, one ALJ discounted the claimant's testimony because she could "engage in social activities without much difficulty."[159] Another ALJ considered, among other things, the claimant's ability to engage in "social activities" as evidence of non-disability.[160] Similarly, the Eighth circuit noted that the claimant's ability to "participate in family functions" was evidence for denial of the claim.[161] Another ALJ found that a claimant's ability to "go outside in the morning and do cat fishing" was substantial evidence to discredit the claimant's

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[151] Crosson v. Shalala, 907 F. Supp. 1, 3 (D.D.C. 1995).

[152] Bjornson v. Astrue, 671 F.3d 640, 647 (7th Cir. 2012).

[153] Anthony v. Sullivan, 954 F.2d 289, 292 (5th Cir. 1992).

[154] *See, e.g.*, Rice v. Barnhart, 384 F.3d 363, 366 (7th Cir. 2004); Velez-Pantoja v. Astrue, 786 F. Supp. 2d 464, 469 (D.P.R. 2010) (including among substantial evidence the fact that the claimant could "go to church").

[155] Yates v. Colvin, 940 F. Supp. 2d 664, 674 (S.D. Ohio 2013).

[156] Clifford v. Apfel, 227 F.3d 863, 865 (7th Cir. 2000).

[157] Youngblood v. Berryhill, 734 F. App'x 496, 499 (9th Cir. 2018).

[158] Van Laningham v. Astrue, 496 F. Supp. 2d 1021, 1029 (S.D. Iowa 2007).

[159] Matthews v. Apfel, 239 F.3d 589, 590–91 (3d Cir. 2001).

[160] Shultes v. Berryhill, 758 F. App'x 589, 591 (9th Cir. 2018).

[161] Twyford v. Comm'r Soc. Sec. Admin., 929 F.3d 512, 517 (8th Cir. 2019).

reported pain.[162] Another ALJ considered a claimant's "two sporadic occurrences" of going hunting as evidence he was not disabled.[163]

Third, transient mental activities (e.g., watching television, reading) are often listed as evidence. Even "color[ing] in coloring books" has been viewed by an ALJ as evidence worth listing as a reason to discredit a claimant's testimony.[164] In Ohio, an ALJ mentioned "watching television" as a disqualifying factor.[165] "Watching television, reading, [and] receiving visitors" were all considered substantial evidence by another ALJ.[166] Yet another ALJ included "enjoys watching television" among factors in denying a claim.[167] And another ALJ found that "playing cards[] [and] watching television . . . [had been] held inconsistent with disabling pain."[168] The Ninth Circuit also found that "crocheting, sewing, and learning new computer programs" were among "specific, clear and convincing reasons" supporting an ALJs denial of benefits.[169]

Fourth, leaving home is evidence in favor of denying benefits according to many ALJs. Walking can be disqualifying. For example, another ALJ found that the claimant's " 'daily walk' . . . to the mailbox at the end of the driveway" was evidence of non-disability.[170] Driving can be disqualifying. An Ohio court ruled that "driv[ing] a car" was a disqualifying factor.[171] One court held that the ALJ's credibility finding—based largely on the claimant's ability to drive her boyfriend to work—was within the "great deference" to which ALJs are entitled.[172] Taking public transportation can be disqualifying. For example, one ALJ discounted the claimant's testimony because she could "use public transportation."[173] At least one ALJ nailed all three modes of leaving home in one case by including among evidence the fact that the claimant could "walk, drive, [and] use public transportation."[174] If a claimant cannot walk, drive, or use public transportation and still qualify for benefits, then the SSA is basically saying that beneficiaries must be home-bound or institutionalized.

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[162] Collins v. Astrue, 493 F. Supp. 2d 858, 876–77 (S.D. Tex. 2007) (internal quotation marks omitted).

[163] Smith v. Califano, 637 F.2d 968, 971–72 (3d Cir. 1981).

[164] Orn v. Astrue, 495 F.3d 625, 639 (9th Cir. 2007) ("[T]he ALJ rejected Orn's testimony because his activities of 'read[ing], watch[ing] television and color[ing] in coloring books' 'indicate that he is more functional than alleged.' ").

[165] Yates v. Colvin, 940 F. Supp. 2d 664, 670 (S.D. Ohio 2013).

[166] Bergfeld v. Barnhart, 361 F. Supp. 2d 1102, 1115 (D. Ariz. 2005).

[167] Rice v. Barnhart, 384 F.3d 363, 366 (7th Cir. 2004).

[168] Casey v. Astrue, 503 F.3d 687, 696 (8th Cir. 2007) (citing Riggins v. Apfel, 177 F.3d 689, 693 (8th Cir. 1999)).

[169] Youngblood v. Berryhill, 734 F. App'x. 496, 499 (9th Cir. 2018).

[170] Craft v. Astrue, 539 F.3d 668, 680 (7th Cir. 2008).

[171] Yates v. Colvin, 940 F. Supp. 2d 664, 670 (S.D. Ohio 2013).

[172] Samantha S. v. Comm'r of Soc. Sec., 385 F. Supp. 3d 174, 188 (N.D.N.Y. 2019).

[173] Matthews v. Apfel, 239 F.3d 589, 590 (3d Cir. 2001).

[174] Velez-Pantoja v. Astrue, 786 F. Supp. 2d 464, 469 (D.P.R. 2010).

The judicial record is filled with examples of simple mainstream activities being used to disqualify claimants, and this article cites only a few representative examples to give the reader a feel for the degree of restriction present.

2. Judiciary Bias: Inconsistently Reinforcing and Chastising ALJs for Using Simple Mainstream Activities as Evidence of Non-disability

Similar to the pattern discussed above for ADLs, courts often both chastise and reinforce ALJs for using simple mainstream activities as evidence. To help show the arbitrary nature of the rulings even among the same court, this section will concentrate on one circuit court—the Eighth Circuit.[175] Again, these conflicting and inconsistent results likely reflect an internal struggle with implicit bias.[176]

In spite of its assertions otherwise,[177] the Eighth Circuit has numerous cases supporting the idea that simple mainstream activities are substantial evidence of lack of disability. For example in one case, the Eighth Circuit considered "the facts that [the claimant] lives alone, independently takes care of his personal needs, drives automobiles, shops, prepares meals, does his laundry, and occasionally attends church" as adequate substantial evidence to support denying his claim.[178] Similarly, in another case, the court noted that "playing cards, watching television, shopping, performing occasional housework, and driving children and wife [have been] held inconsistent with disabling pain."[179] Comparably, earlier this year, the Eighth Circuit listed the fact that the claimant was "able to perform some household and personal care tasks; drive, shop for groceries, and live alone; and participate in family functions" as adequate to support an ALJ's findings that the claimant was not disabled.[180] In another recent case, the physician declared the claimant disabled, but the court found the ALJ was justified in discrediting the physician's opinion for the following reasons: the claimant was "caring for her young son, preparing his meals, doing housework, shopping for groceries, handling money, watching television, and driving a car when necessary, among other things—show[ing] that she could work,"[181] and because "she could care for . . . her indoor dog and cat."[182] In another case,

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[175] Similar case series can be found in virtually every circuit, although there is some variability between the circuits as discussed later in this article. *See, e.g.*, Craft v. Astrue, 539 F.3d 668, 680 (7th Cir. 2008); Anthony v. Sullivan, 954 F.2d 289, 292 (5th Cir. 1992).

[176] Bartlett, *supra* note 107, at 1941–42; Krieger, *supra* note 106, at 1200.

[177] *See, e.g.*, Draper v. Barnhart, 425 F.3d 1127, 1131 (8th Cir. 2005); Peterman v. Chater, 946 F. Supp. 734, 739 (N.D. Iowa 1996).

[178] Bryant v. Colvin, 861 F.3d 779, 783 (8th Cir. 2017).

[179] Casey v. Astrue, 503 F.3d 687, 696 (8th Cir. 2007) (citing Riggins v. Apfel, 177 F.3d 689, 693 (8th Cir. 1999)).

[180] Twyford v. Comm'r, Soc. Sec. Admin., 929 F.3d 512, 517 (8th Cir. 2019).

[181] Thomas v. Berryhill, 881 F.3d 672, 676 (8th Cir. 2018).

[182] *Id.* at 674.

the Eighth Circuit affirmed an ALJ's denial of benefits where the claimant was able to perform daily activities such as "fishing and dog training."[183] Similarly, the court supported an ALJ's findings that activities including "working on the computer, watching TV, . . . reading a variety of magazines and newspapers[,] visit[ing] friends at their residences . . . , and get[ting] involved socially on a weekly basis" were signs that the claimant was not disabled.[184]

In contrast, the Eighth Circuit has often—sometimes passionately—pointed out that simple mainstream activities do not indicate an ability to participate in substantial gainful activity. For example, the court noted, "[d]isability under the Social Security Act does not mean total disability or exclusion from all forms of human and social activity."[185] As mentioned above, the Eighth Circuit emphatically explained:

> we have reminded the Commissioner that to find a claimant has the residual functional capacity to perform a certain type of work, the claimant must have the ability to perform the requisite acts day in and day out, in the sometimes competitive and stressful conditions in which real people work in the real world . . . . The ability to do light housework with assistance, attend church, or visit with friends on the phone does not qualify as the ability to do substantial gainful activity.[186]

Similarly, the Eighth Circuit pointed out that a "claimant's[] sporadic and transitory activities may demonstrate not his ability but his inability to engage in substantial gainful activity."[187] The court also remarked, "an applicant need not be completely bedridden or unable to perform any household chores to be considered disabled."[188] Likewise, the Eighth Circuit explained that "the mere fact that plaintiff can drive a car and is mobile does not establish that he can engage in substantial gainful activity."[189] Similarly, the court noted that the "ability to . . . engage in hobbies does not amount to substantial evidence that claimant has functional capacity for substantial gainful activity."[190] Other circuit courts have made similar observations.[191]

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[183] Fentress v. Berryhill, 854 F.3d 1016, 1021 (8th Cir. 2017).

[184] Wagner v. Astrue, 499 F.3d 842, 852 (8th Cir. 2007).

[185] Peterman v. Chater, 946 F. Supp. 734, 739 (N.D. Iowa 1996).

[186] Draper v. Barnhart, 425 F.3d 1127, 1131 (8th Cir. 2005) (internal block quotation omitted) (quoting Thomas v. Sullivan, 876 F.2d 666, 669 (8th Cir. 1989)).

[187] Willem v. Richardson, 490 F.2d 1247, 1249 n.4 (8th Cir. 1974) (quoting Wilson v. Richardson, 455 F.2d 304, 307 (4th Cir. 1972)).

[188] Pollard v. Astrue, 867 F. Supp. 2d 1225, 1233 (N.D. Ala. 2012) (quoting Easter v. Bowen, 867 F.2d 1128, 1130 (8th Cir. 1989)).

[189] Yawitz v. Weinberger, 498 F.2d 956, 960 (8th Cir. 1974) (quoting Robinson v. Richardson, 360 F. Supp. 243, 250 (E.D.N.Y. 1973)).

[190] Dodson v. Astrue, 346 F. App'x 123, 124 (8th Cir. 2009) (citing Wagner v. Astrue, 499 F.3d 842, 852 (8th Cir. 2007)).

[191] Orn v. Astrue, 495 F.3d 625, 639 (9th Cir. 2007) (pointing out that "daily activities may be grounds for an adverse credibility finding 'if a claimant is able to spend a substantial part of his day engaged in pursuits involving the performance of physical functions that are trans-

3. Simple Mainstream Activities Measure Ability and Will to Survive—Not Employability

Doctors often recommend physical and mental activities to treat pain and disabilities in people with unquestionable work disabilities.[192] Inactivity can cause numerous chronic illnesses including heart attack, obesity, coronary artery disease, high blood pressure, stroke, metabolic syndrome, high cholesterol, osteoporosis, some cancers, depression, anxiety, and others.[193] Inactivity also increases death rates (i.e., "all-cause mortality") among people with disabilities.[194] Physical inactivity has been estimated to cause 9 percent of premature mortality[195] and ranked as the "fourth leading risk factor for death in the world."[196] Therefore, physicians recommend that most people with disabilities be as active as their disability allows, which usually means participation in light exercise and simple mainstream activities.[197] Recommended physical activities can include formal exercise, but also includes activities like vacuuming, mopping, cleaning, walking to the mailbox, going to church, and similar activities.[198] "Life is motion, motion is life" is a well-recognized saying among orthopedic surgeons who specialize in restoring

ferable to a work setting' " (quoting Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989))); Gentle v. Barnhart, 430 F.3d 865, 867 (7th Cir. 2005) ("The administrative law judge's casual equating of household work to work in the labor market cannot stand [because the claimant] *must* take care of her children, or else abandon them to foster care . . . and the choice may impel her to heroic efforts."); *Pollard*, 867 F. Supp. 2d at 1233 ("What counts is the ability to perform as required on a daily basis in the 'sometimes competitive and stressful' environment of the working world." (quoting *Easter*, 867 F.2d at 1130)).

[192] Kirsten R. Ambrose & Yvonne Golightly, *Physical Exercise as Non-pharmacological Treatment of Chronic Pain: Why and When*, 29 BEST PRAC. & RSCH. CLINICAL RHEUMATOLOGY 120, 121–26 (2015); *see also Physical Activity*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/physicalactivity/index.html [https://perma.cc/J7PK-WMXZ] (noting the importance of physical activity in improving overall health and reducing the risk of many chronic diseases).

[193] *Health Risks of an Inactive Lifestyle*, MEDLINEPLUS, https://medlineplus.gov/healthrisksofaninactivelifestyle.html [https://perma.cc/ZQC8-J5CB].

[194] Susan A. Carlson et al., *Percentage of Deaths Associated with Inadequate Physical Activity in the United States*, 15 PREVENTING CHRONIC DISEASE, March 2018, at 1, 1, 4–5; *see also*, I-Min Lee et al., *Effect of Physical Inactivity on Major Non-communicable Diseases Worldwide: An Analysis of Burden of Disease and Life Expectancy*, 380 LANCET 219, 219–20 (2012).

[195] Lee et al., *supra* note 194, at 227.

[196] Laurent Huber & Trevor Shilton, *The 4th Leading Risk Factor for Death Worldwide: Physical Inactivity Is an Urgent Public Health Priority*, NCD ALL. (May 9, 2016, 9:53 AM), https://ncdalliance.org/news-events/blog/the-4th-leading-cause-of-death-worldwide-physical-inactivity-is-an-urgent-public-health-priority [https://perma.cc/P4HB-LBBK] (citing *Physical Activity*, WORLD HEALTH ORG., https://www.who.int/health-topics/physical-activity [https://perma.cc/CPA8-AKHP]).

[197] Carlson, *supra* note 194; *Health Risks of an Inactive Lifestyle*, *supra* note 193; Huber & Shilton, *supra* note 196.

[198] *Health Risks of an Inactive Lifestyle*, *supra* note 193.

patients' mobility.[199] Legal precedents that set unrealistic stereotypical limits on physical activity or recreational activity for people with disabilities are basically death sentences for some claimants hoping to receive social security benefits.

Cancer is a diagnosis included in the Listing of Impairments as meeting the requirements for benefits in many instances, yet if people with other diagnoses and similar disabilities perform the same activities recommended by physicians for cancer patients, they may not qualify for social security benefits. For example, for patients with breast cancer, "[p]hysical activity after a breast cancer diagnosis may lower the risk of death from [this] disease."[200] Researchers found the "greatest benefit [for breast cancer patients] occurred in women who performed the equivalent of walking 3 to 5 hours per week at an average pace," which would be approximately six to fifteen miles of walking each week if the average pace is two to three mph.[201] Another study found as much as a 50 percent decreased in the risk of death from breast cancer for women who walked for as little as two to three hours per week.[202] As noted above, many ALJs consider walking much shorter distances as disqualifying (e.g., walking to the mailbox or "short walks" each day) for social security disability benefits, so patients with similar disabilities to breast cancer patients could easily be disqualified if they follow the same guidelines.[203]

Recreational physical activity has proven valuable for other types of cancer patients as well. "Research indicates that physical activity may have beneficial effects for several aspects of cancer survivorship—specifically, weight gain, quality of life, cancer recurrence or progression, and prognosis . . . [with] [m]ost of the evidence . . . com[ing] from [patients] diagnosed with breast, prostate, or colorectal cancer."[204] For example, multiple studies show "that physical activity after a colorectal cancer diagnosis is associated

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[199] Rick C. Sasso, *Orthopaedic Surgery*, AM. COLL. OF SURGEONS, https://www.facs.org/education/resources/residency-search/specialties/ortho [https://perma.cc/7KE5-9UUR].

[200] Michelle D. Holmes et al., *Physical Activity and Survival After Breast Cancer Diagnosis*, 293 JAMA 2479, 2485 (2005); *see also Physical Activity and Cancer*, NAT'L CANCER INST., https://www.cancer.gov/about-cancer/causes-prevention/risk/obesity/physical-activity-fact-sheet [https://perma.cc/R9KJ-RR2Y] (observing epidemiologic students link physical activity with better breast cancer outcomes).

[201] Holmes et al., *supra* note 200, at 2479.

[202] Melinda L. Irwin et. al., *Influence of Pre- and Postdiagnosis Physical Activity on Mortality in Breast Cancer Survivors: The Health, Eating, Activity, and Lifestyle Study*, 26 J. CLINICAL ONCOLOGY 3958, 3958 (2008).

[203] *See, e.g.*, Craft v. Astrue, 539 F.3d 668, 680 (7th Cir. 2008); Crosson v. Shalala, 907 F. Supp. 1, 3 (D.D.C. 1995).

[204] *Physical Activity and Cancer (Fact Sheet)*, ONCOLOGY NURSE ADVISOR (Dec. 13, 2018) https://www.oncologynurseadvisor.com/home/for-patients/fact-sheets/physical-activity-and-cancer-fact-sheet/2/ [https://perma.cc/BAJ5-USG4] ("Being physically active after a cancer diagnosis is linked to better cancer-specific outcomes for several cancer types.").

with reduced risks of dying from colorectal cancer."[205] More specifically, one study of colorectal cancer patients showed a "31% lower risk of death" for patients who "engaged in leisure-time physical activity" than those who did not.[206]

People with disabilities other than cancer also benefit from physical and mental activities. For example, kidney transplant recipients are specifically among those recognized as disabled under the Listing of Impairments for one year, and "there is no reason to believe that exercise is not as beneficial to [kidney transplant recipients] as in the general population."[207] Likewise, early onset Alzheimer's patients are encouraged to "[e]ngage in regular physical activity," "to participate in leisure activities, where possible, preserving function and quality of life," and to "keep socially engaged."[208] More specifically, Alzheimer's disease patients are encouraged to "[c]ontinue or take up activities that help to stimulate the brain, e.g., Tai Chi, dancing, puzzles," and to "[i]nclude music in daily life" by "listening to music, playing an instrument, singing"—activities clearly more difficult than many ALJ zombie factors (like reading, watching television, sewing, or coloring in a coloring book).[209]

If Alzheimer's patients and cancer patients are encouraged by medical practitioners to participate actively in voluntary physical activities, recreational activities, mental activities, and trips away from home, then it seems reasonable to suggest that all people with disabilities are likely to similarly benefit from the same types of activities, and participation in simple mainstream activities does not disprove a disability. Even in the late 1980s before today's improved accessibility, over two-thirds of disabled Americans went to church or synagogue at least occasionally, and 36 percent were active in religious, volunteer, or recreational groups;[210] in addition, every year one-third went to a movie, one-fourth went to live theater or music performance, 83 percent went to restaurants, and one-third went to a sports event.[211] Disabled Americans are not zombies and should not have to become zombies in order to qualify for social security disability benefits. Promoting zombie factors perpetuates a dependent, institutionalized stereotype of people with disabilities that is simply inaccurate and medically dangerous.

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[205] *Id*.

[206] *Id*.

[207] *Chapter 26: Lifestyle*, *supra* note 135, at S110.

[208] *Program Operations Manual System: DI 23022.385 Early-Onset Alzheimer's Disease*, SOC. SEC. ADMIN., https://secure.ssa.gov/apps10/poms.nsf/lnx/0423022385 [https://perma.cc/X387-TE7T]; Jeffrey L. Cummings et al., *A Practical Algorithm for Managing Alzheimer's Disease: What, When, and Why?*, 2 ANNALS CLINICAL & TRANSLATIONAL NEUROLOGY 307, 308–09 (2015).

[209] Cummings et al., *supra* note 208, at 308.

[210] Burgdorf, *supra* note 36, at 423 n.54, 424 n.55.

[211] *Id*. at 423.

II. REMOVING ZOMBIE FACTORS FROM THE DISABILITY DETERMINATION PROCESS

Zombie factors do not demonstrate employability, and therefore, have no relevance to the disability determination process. As first defined in this paper, "zombie factors" are activity restrictions that judges require to find a disability—such as an inability to perform ADLs and simple mainstream activities—which do not accurately reflect the capabilities of real people living with real disabilities today.[212] Zombie factors likely reflect an implicit disability bias present in almost 84 percent of able-bodied adults[213] that perpetuates a stereotypical view that people with true disabilities are unable to live independently or participate in mainstream life. The courts' inconsistent and contradictory rulings involving zombie factors described above likely reflect an internal struggle with this implicit bias that is sometimes tamed with deliberate thought and sometimes allowed to come to the fore by time constraints on decision-making or even by "thoughtlessness and indifference."[214]

When used in the social security disability determination process, zombie factors penalize people with disabilities "for attempting to lead normal lives in the face of their limitations."[215] Zombie factors like ADLs and simple mainstream activities are not relevant to the disability determination process because they are not evidence of employability. In other words, zombie factors are not consistent with Posner's characteristics that translate into employability because zombie factor activities (1) "[have] more flexibility in scheduling" than a job (e.g., the person could perform the activities on a "good day" and skip them on a "bad day"), (2) include the possibility of obtaining assistance from a friend or a family member, unlike a job, and (3) do not require "a minimum standard of performance," unlike a job.[216]

Structural changes to the law and the SSA disability determination process are needed to ensure deliberate and careful consideration before ruling on these life-altering cases because almost all adjudicators likely carry some disability bias.[217] Systematically removing zombie factors from the disability determination process will help remove implicit bias by forcing adjudicators to explain and list only activities relevant to employment; it also will prevent the Social Security Administration from contributing to invalid stereotyping of disabled people as dependent and segregated.

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[212] Griffin, *supra* note 62, at 35.

[213] Dionne et al., *supra* note 11, at 6.

[214] Alexander v. Choate, 469 U.S. 287, 295 (1985).

[215] Bergfeld v. Barnhart, 361 F. Supp. 2d 1102, 1115 (D. Ariz. 2005) (quoting Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998)).

[216] Bjornson v. Astrue, 671 F.3d 640, 647 (7th Cir. 2012).

[217] Dionne et al., *supra* note 11, at 2; Wilson & Scior, *supra* note 10, at 319; *see also*, Green, *supra* note 14, at 858.

Judge Henry Friendly of the United States Court of Appeals for the Second Circuit listed the components that he considered the "elements of a fair hearing."[218] Here, three of those elements will be the focus of proposals to remove zombie factors: (A) an unbiased tribunal, (B) the making of the record, and (C) the statement of reasons.

A. An Unbiased Tribunal: Testing, Monitoring, and Disciplining the ALJ Corp for Implicit Disability Bias

Subjective judgment is important in interpreting the SSA's definition of disability and ability to work.[219] Almost 84 percent of the general population in one study "had negative [implicit] attitudes towards . . . people with a disability."[220] If ALJs harbor implicit biases that perpetuate stereotypes of people with disabilities as being dependent and isolated, those biases can have self-fulfilling effects. Because negative implicit biases against people with disabilities are pervasive, the SSA should assume its ALJs have these negative biases and take action to address disability biases structurally. Addressing implicit bias at the ALJ level will likely have a "trickle down" effect throughout the Disability Determination Services (DDS) offices because, in a 2010 study, researchers found that "knowledge of the extent to which ALJs reverse initial denials was . . . a factor in explaining higher reported allowance rates among examiners."[221]

The Social Security Act requires the SSA to hold hearings.[222] ALJ SSA hearings are non-adversarial, and "the [SSA] is not represented at the hearing."[223] At the hearing, "the ALJ serves as both [the] fact-finder and decision-maker" and "gathers evidence and calls vocational and medical experts, as needed."[224] ALJs have "no constitutionally based judicial power" and "do not exercise the broadly independent authority of an Article III judge, but rather operate as subordinate executive branch officials [i.e., as bureaucrats] who perform quasi-judicial functions within their agencies."[225] ALJs review cases de novo and are not bound by determinations made at lower levels.[226] After the hearing, the ALJ can order consultative examinations and further

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[218] Henry J. Friendly, "*Some Kind of Hearing*," 123 U. PA. L. REV. 1267, 1279–82, 1287, 1291, 1293–94 (1975).

[219] Meseguer, *supra* note 41, at 43 ("SSA's statutory definition of disability in terms of 'ability to work' is inevitably open to subjective judgment on the part of decision makers.").

[220] Dionne et al., *supra* note 11, at 6.

[221] Meseguer, *supra* note 41, at 44.

[222] *SSA's Astrue Statement*, *supra* note 40 ("Since the passage of the Social Security Amendments of 1939, the Social Security Act . . . has required us to hold hearings to determine the rights of individuals to old age and survivors' insurance benefits.").

[223] *Id*.

[224] *Id*.

[225] *Id*.

[226] *Id*.

consider evidence.[227] The ALJ "decide[s] the case based upon [the] preponderance of the evidence" standard.[228] The ALJ's decision is final unless the claimant appeals or the Appeals Council decides to review the decision on its own.[229] The claimant "may request [a] review of the decision by the Appeals Council."[230]

The Office of Personnel Management (OPM) establishes a process through which the SSA makes "competitive service appointments" of ALJs.[231] OPM administers the ALJ examination as a part of the process.[232] Over time, the ALJ Corp has grown due to increased worklogs, to address the "backlog crisis" and to "keep pace with demand."[233] In September 2017, the SSA had "more than 1,600 ALJs on duty."[234]

Significant variations in rulings are apparent statistically. The average ALJ denied around 44 percent of claims from 2009–2011 with significant variations between ALJs signified by a standard deviation of 15 percent.[235] However, some ALJs denied up to 96 percent of claims, while some denied only two percent.[236] More recently, the ALJ denial rate has averaged 37 percent.[237] One re-

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[227] *Id*.

[228] *Id*.

[229] *Id*.

[230] *Id*.

[231] *SSA's Disman Statement*, *supra* note 23; *see also The Supreme Court, 2017 Term—Leading Cases:* Lucia v. SEC, 132 HARV. L. REV. 287, 287 (2018) (discussing Lucia v. SEC, 138 S. Ct. 2044 (2018) and noting that in *Lucia*, the Supreme Court held that ALJs of the Securities and Exchange Commission (SEC) were subject to the appointments clause, but explaining that "*Lucia* also include[d] language emphasizing the 'adversarial' nature of the hearings overseen by SEC ALJs, which could provide a basis for" not including SSA ALJs because their hearing are non-adversarial; and also stating that the Trump Administration responded to *Lucia* by "exempting all ALJs from competitive civil service hiring requirements and requiring them to be appointed by a head of department").

[232] *SSA's Disman Statement*, *supra* note 23.

[233] *SSA's Astrue Statement*, *supra* note 40.

[234] *SSA's Disman Statement*, *supra* note 23. *Cf. SSA's Astrue Statement*, *supra* note 40 (showing that 1,500 ALJs were part of the corps in 2011).

[235] KRENT & MORRIS, *supra* note 60, at 1 n.7 (noting that the annual ALJ allowance rate in the 2013 study was 56 percent with a standard deviation of 15 percent). "A standard deviation . . . is a measure of how dispersed the data is in relation to the mean. Low standard deviation means data are clustered around the mean, and high standard deviation indicates data are more spread out." *Standard Deviation*, NAT'L LIBR. OF MED., https://www.nlm.nih.gov/nichsr/stats_tutorial/section2/mod8_sd.html [https://perma.cc/S95V-7L7Q].

[236] KRENT & MORRIS, *supra* note 60, at 15–16 (noting that "[t]he lowest and highest allowance rates (4% and 98%, respectively) very nearly spanned the full range of possible values").

[237] JACK SMALLIGAN & CHANTEL BOYENS, URB. INST., IMPROVING THE SOCIAL SECURITY DISABILITY DETERMINATION PROCESS, 4 (2019), https://www.urban.org/sites/default/files/publication/100710/improving_the_social_security_disability_determination_proces_0.pdf [https://perma.cc/A87L-SUX8] (reporting that "63 percent who appealed to the ALJ level were . . . allowed").

searcher observed, the "results of an SSDI appeal may turn more on the hap of which district judge or magistrate judge is slated to review the appeal than on the merits of the case."[238] Some of the variability is attributable to differences in claimant populations encountered by particular ALJs because denial rates are impacted by the ALJ's population's unemployment rates, geographical location, and mix of impairments/diagnoses.[239] Age also plays a role in denial rates, which explains some of the geographic variability given that some states have older populations than others.[240] Even so, "a great deal of variation in outcomes remains unaccounted for,"[241] suggesting that the law is being applied unevenly—either from confusion, bias, or some other cause. One researcher noted that "statistics strongly suggest that the 'culture' within a particular judicial circuit makes a substantial difference in . . . decisionmaking."[242] For instance, "[r]emand rates from both judges and magistrates in the Seventh, Ninth, and Tenth Circuits . . . were almost double those from judges and magistrates in the First and Fourth Circuits.[243] The SSA is aware of some unfairness in the process but has only acknowledged that there are a "small number of judges who underperform or do not apply the statute fairly."[244]

Although typically applied to employment law, "structural discrimination" (i.e., an "organizationally enabled form of discrimination") may be present in the SSA disability determination process, which involves an "interplay between individuals [like ALJs and DDS workers] and the larger [SSA] organizational environments in which they work."[245] The "specific organizational context" in which ALJs interact with claimants and coworkers may "influence[] the operation and effect of bias."[246] The SSA has an "obligation to avoid facilitating or enabling discriminatory bias" in the disability determination process and to try to "reduce bias indirectly by triggering change in the context of everyday decisions, perceptions, and judgments."[247] The SSA needs to investigate how the organizational structure of the ALJ Corp and the Social Security disability determination process can lead its ALJs to decide that the ability to "color in a coloring book" or "watch television" somehow translates into employable

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[238] Harold J. Krent & Scott Morris, *Inconsistency and Angst in District Court Resolution of Social Security Disability Appeals*, 67 HASTINGS L.J. 367, 372 (2016).

[239] Meseguer, *supra* note 41, at 44 (reviewing a study that discussed "three factors affecting initial allowance rates: (1) the demographic characteristics of applicants, (2) the diagnostic mix of applicants, and (3) local labor market conditions").

[240] *Id*. at 54 (noting that allowances are sharply higher after age 50, with an additional final allowance spike at age 55, and final denial spike at age 62).

[241] *Id*. at 67.

[242] Krent & Morris, *supra* note 238.

[243] *Id*.

[244] *SSA's Astrue Statement*, *supra* note 40.

[245] Green, *supra* note 14, at 857.

[246] *Id*. at 854.

[247] *Id*. at 857–58.

skills—it seems plausible considering the examples above that the SSA has a structural discrimination issue at play here.[248] No matter how egalitarian ALJs and SSA employees may believe that they are, the odds are very high that they harbor significant implicit disability biases,[249] and the SSA should work harder to eliminate those biases from its determination process.

Reducing ALJ implicit disability bias by increasing conscious awareness through testing, monitoring, and disciplinary actions could help achieve Judge Friendly's first goal of an unbiased tribunal. The ALJ Corp's implicit bias should be addressed by (1) Implicit Association Test (IAT) testing of potential new ALJs, (2) training and monitoring during a probationary period for new ALJs, and (3) making it easier to remove poorly performing ALJs.

First, Applicants for SSA ALJs positions should be tested for implicit disability bias, and outliers should not be hired. However, since studies reveal a very high prevalence (up to 83.6 percent) of "negative implicit attitudes towards people with a disability,"[250] some level of implicit disability bias should be expected in all people and addressed with training discussed below. Testing is needed because implicit bias is difficult to detect in new ALJs. "[S]tudies . . . have found that people often behave in ways that appear to be inconsistent with their feelings in the presence of those who are stigmatized."[251] For example, "a person may hold negative attitudes towards people with a physical disability, but their actual behaviour may reflect sympathy and kindness."[252] Therefore, it is hard to recognize bias during interviews or when reviewing other external observations made about a candidate (e.g., letters of recommendation).

The Disability-Attitudes and Disability-Activity IAT should be used to test applicants for SSA ALJ positions to both raise awareness of implicit bias and to eliminate outliers from consideration. The IAT is a "web-based test that measures the strength of associations between concepts (e.g., 'Disabled Persons,' 'Abled Persons') and evaluations (e.g., 'Bad,' 'Good')."[253] IAT scores are based upon "how long it takes (speed) the individual, on average, to sort words and images/symbols when the categories are combined, such as Good or Disabled Persons and Bad or Abled Persons and vice versa."[254] The

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[248] *See generally* Green, *supra* note 14.

[249] *See, e.g.*, *id.* at 858 (pontificating that "[e]ven those of us who subscribe wholeheartedly to an egalitarian ideal (and spend much of our working lives trying to further that ideal) tend to register some bias on the IAT.").

[250] Dionne et al., *supra* note 11.

[251] *Id.*

[252] *Id.*

[253] ABA COMM'N ON DISABILITY RTS., *supra* note 10; Dionne et al., *supra* note 11, at 2 (noting that a paper-based version of the IAT was "developed and validated by [researchers] called the Disability-Attitudes IAT," which "measures implicit attitudes towards people with a disability compared to people without a disability").

[254] ABA COMM'N ON DISABILITY RTS., *supra* note 10.

IAT is based on the fact that "our minds work faster when we make stereotype-consistent associations and more slowly when we fight against those stereotype-consistent associations."[255] Studies have shown a correlation between IAT scores and behavior, "suggesting that these biases . . . do translate into behavior."[256] Except in clear outlier cases, the test does not have to be disqualifying for the applicant—but could be used to alert the applicant and the SSA to potential implicit biases, giving them the opportunity to consciously address biases during training.

Second, there should be a probationary and training period for newly hired ALJs, which could help the SSA to meet its obligation to provide policy-compliant decisions free from implicit bias. The President of the United States' budget for fiscal year 2018 included "a proposal that would amend the Administrative Procedure Act to create a probationary period for newly hired ALJs," and this policy should be adopted.[257] In addition, implicit bias training should be a part of this probationary period.

The American Bar Association (ABA) notes that "implicit biases are malleable and their effect on behavior can be managed and mitigated" with attention and training.[258] Research has shown that "'effortful, deliberative processing' can help mitigate the influence of implicit bias."[259] "De-biasing interventions to counter the negative effects of implicit biases by building new mental associations" specifically endorsed by the ABA include intergroup contact,[260] counter-stereotypes,[261] individuation,[262] perspective taking,[263] deliberative processing,[264] common ground,[265] education,[266] self-monitoring,[267] and accountability.[268] Data from over 4 million IAT tests from 2004 to 2016 have shown that Americans' implicit "attitudes toward race, skin tone, and sexuality have . . . decreased in bias over time."[269] Unfortunately, the same cannot be

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[255] Green, *supra* note 14, at 855.

[256] *Id*.

[257] *SSA's Disman Statement*, *supra* note 23.

[258] ABA COMM'N ON DISABILITY RTS., *supra* note 10; *see* Bartlett, *supra* note 107, at 1941–42.

[259] CHERYL STAATS ET AL., KIRWIN INST., 2015 STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 10 (2015) (quoting Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1177 (2012)).

[260] ABA COMM'N ON DISABILITY RTS., *supra* note 10.

[261] *Id*.

[262] *Id*.

[263] *Id*.

[264] *Id*.

[265] *Id*.

[266] *Id*.

[267] *Id*.

[268] *Id*.

[269] *Implicit Attitudes Can Change over the Long Term*, ASS'N FOR PSYCH. SCI. (Jan. 7, 2019), https://www.psychologicalscience.org/news/releases/implicit-attitudes-long-term-change.ht

said for implicit disability bias; perhaps with deliberative attention among ALJs and the leadership of the SSA, a similar trend of decreased implicit disability bias can be seen over time in the U.S.[270]

Third, it should be easier to discipline and remove ALJs who are making discriminatory or biased rulings. The SSA has acknowledged that there are a "small number of judges who underperform or do not apply the statute fairly"[271] and that "there have been some recent cases in which we hired an ALJ, and it later became clear the individual would be unsuccessful at the job."[272] The SSA has limited statutory authority to discipline ALJs for "underperformance or misconduct" other than counseling and reprimand.[273] The SSA cannot remove or suspend an ALJ, reduce government grade or pay of an ALJ, "or furlough [an ALJ] for 30 days or less unless the Merit Systems Protections Board (MSPB) finds that good cause exists."[274] Use of the MSPB can take "years" to remove a bad ALJ.[275] For example, in the four years from 2007 to 2011, only eight ALJs were referred for removal and only twenty four suspensions were brought to the MSPB.[276] The MSPB is subject to political drama which may further limit its effectiveness.[277]

It certainly is important to preserve the "decisional independence" of ALJs. But the SSA has expressed an interest in "examining statistical evidence showing very significant variation between the decisions of a small number of ALJs and the decisions of other agency ALJs (whether in the direction of approving or denying claims) and peer review by other ALJs."[278] ALJs are not Article III judges, but instead are bureaucrats as previously noted;[279] thus, statistical analysis of the use of zombie factors should be initiated, subject to peer review and more intense agency scrutiny. Because removal is so difficult through the MSPB, preliminary testing before hiring, additional training, and a probationary period as suggested above are especially important until

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ml [https://perma.cc/CVB7-23DB]; *see* Charlesworth & Banaji, *supra* note 106.

[270] Charlesworth & Banaji, *supra* note 106, at 186–87.

[271] *SSA's Astrue Statement*, *supra* note 40.

[272] *SSA's Disman Statement*, *supra* note 23.

[273] *SSA's Astrue Statement*, *supra* note 40.

[274] *Id*.; *see* JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RSCH. SERV., R45630, MERIT SYSTEMS PROTECTIONS BOARD (MSPB): A LEGAL OVERVIEW 10 n.99 (2019).

[275] *SSA's Astrue Statement*, *supra* note 40.

[276] *Id*.

[277] *See, e.g.*, Nicole Ogrysko, *Senate Forces 'First' for MSPB as the Agency Loses All Members*, FED. NEWS NETWORK (Mar. 1, 2019, 10:49 AM), https://federalnewsnetwork.com/workforce-rightsgovernance/2019/03/senate-forces-first-for-mspb-as-the-agency-loses-all-members/ [https://perma.cc/JN94-2YRD].

[278] *SSA's Astrue Statement*, *supra* note 40.

[279] *Id*.

laws are changed giving the SSA more freedom to remove biased ALJs.[280] As noted earlier, SSA ALJs are bureaucrats, and people with disabilities should not be "left to the mercy of a bureaucrat's caprice."[281]

B. Making of the Record: Eliminating Zombie Factors from the Record

The fact that a person with a disability can bathe, walk short distances, drive, or go to church does not demonstrate that the person can hold substantial gainful employment. Simply listing these activities as evidence of non-disability demonstrates laziness or indifference, at best, on the part of the adjudicator and bias against people with disabilities, at worst. Zombie factors should be included in the record only under unusual circumstances where there is something unique about the way the activities are being done that demonstrates employability. For example, the claimant takes daily hikes to a remote waterfall to bathe, then climbs into his commercial vehicle parked in its spot near the waterfall, which he drives on a long and windy road to the church, where he dances and sings while intermittently standing and sitting for eight hours before driving the commercial vehicle back to its remote parking spot and hiking home. Routine daily self-care activities and simple mainstream activities that do not specifically demonstrate employability have no place in the record because they only serve as potential outlets for implicit biases regarding dependency and isolation of people with disabilities. Therefore, zombie factor lists should be systematically eliminated from disability determination records at every stage.

1. The Initial Determination

In the SSA disability determination process, the record begins when the claimant files an application for SSDI or SSI in a Social Security field office, over the phone, or via the internet.[282] The application forms elicit a "description of the claimant's impairment(s), treatment sources, and other information that relates to the alleged disability" along with verification of "non-medical eligi-

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[280] Further, vocational experts (VE) who testify in SSA hearings should be subject to the same testing, training, monitoring, and review as ALJs. SSA employs VEs upon whom ALJs often rely as "professionals under contract with the SSA to provide impartial testimony in agency proceedings." *See* Biestek v. Berryhill, 139 S. Ct. 1148, 1152 (2019). VEs help ALJs identify the types of jobs the claimant could perform with his or her disabilities and "ascertain whether those kinds of jobs exist[] in significant numbers in the national economy." *Id*. (internal quotation marks omitted). To be reliable, VE's testimony should be free from implicit disability bias.

[281] *Id*. at 1163 (Gorsuch & Ginsberg, JJ., dissenting).

[282] *SSA's Disman Statement*, *supra* note 23; *Disability Determination Process*, SOC. SEC. ADMIN. [hereinafter SSA, *Disability Determination Process*], https://www.ssa.gov/disability/determination.htm [https://perma.cc/8BSP-XSYY] (also stating that the application itself includes forms that "ask for a description of the claimant's impairment(s), treatment sources, and other information that relates to the alleged disability").

bility requirements, which may include age, employment, marital status, or Social Security coverage information."[283] Some zombie factors may be included in the initial application and should be removed.

Because disability applications are processed through local offices, the "ideology of elected officials may . . . influence the organizational culture of offices that process disability claims" raising the possibility of structural discrimination noted earlier.[284] Historically, "[c]onservatives have been more likely to criticize the SSA as an example of a bloated government bureaucracy."[285] So theoretically, "[c]onservative local officials may be more likely to act in ways that dissuade individuals who are unsure about whether to move forward in the formal claiming process."[286] In addition, the "ideology of [local] government officials can directly influence the attitudes and behavior of potential claimants by legitimating or denigrating public agencies and programs."[287] Specifically, the "antigovernment/antiwelfare rhetoric of conservative state officials may decrease the legitimacy of social welfare programs [like the Social Security disability programs] and, in so doing, decrease demand."[288] Some evidence suggests this might be occurring. For example, southern states tend to be more conservative, and "[o]verall . . . southern states tend to have low[er] initial allowance rates,"[289] and "the three divisions with the lowest initial allowance rates are the southern ones."[290]

Most cases are sent by the field office to a state DDS, "which is responsible for developing all medical evidence and initially determining whether a claimant meets [the Social Security Administration's] definition of disability."[291] DDSs are state agencies, "fully funded by the [f]ederal [g]overnment," that are "responsible for developing medical evidence and making the initial determination on whether or not a claimant is disabled."[292] This stage occurs "without the state disability examiner seeing the applicant."[293] DDS examiners use an Electronic Claims Analysis Tool (eCAT) to help them process applica-

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[283] *Id*.

[284] Joe Soss & Lael R. Kaiser, *The Political Roots of Disability Claims: How State Environments and Policies Shape Citizen Demands*, 59 POL. RSCH. Q. 133, 137–38 (2006).

[285] *Id*. at 137.

[286] *Id*. at 138.

[287] *Id*.

[288] *Id*.

[289] Meseguer, *supra* note 41, at 50.

[290] *Id*. at 48 ("[T]he three divisions with the lowest initial allowance rates are the southern ones," including "West South Central, East South Central, and South Atlantic.").

[291] *SSA's Disman Statement*, *supra* note 23.

[292] SSA, *Disability Determination Process*, *supra* note 282.

[293] SMALLIGAN & BOYENS, *supra* note 237, at 3; *see SSA's Disman Statement*, *supra* note 23 ("Generally, the disability examiner works with a medical or psychological consultant, or both, to determine whether the claimant is disabled.").

tions.[294] eCATs could be used to help scrub zombie factors from the application automatically by using computer prompts that prevent the entry of zombie factors without explanation as to their relationship to employability.

Determinations are made "largely based on the medical evidence the applicant provides, with the DDS offices procuring only a limited amount of additional evidence."[295] Once the evidence it collected, DDS "staff make[] the initial disability determination."[296] The initial determination took "three to five months" or "an average of 111 days" in 2018.[297] Approximately 55 percent of initial applications are denied.[298] Applicants have 60 days from notice of denial to appeal.[299] The majority of initial denials are appealed.[300] "The first stage [of an appeal] is a reconsideration by the state DDS, where the case is reviewed by a different examiner and the applicant has the opportunity to submit additional evidence."[301] Approximately 12.6 percent of reconsideration level claims are allowed.[302]

Initial application forms should exclude zombie factors or any questions that reinforce biases that work-disabled people must be dependent and isolated (i.e., unable to live independently or participate in simple mainstream activities). Applications should query activities for signs of being relevant to employability like daily prolonged activities consistent with the demands of a work schedule. If simple mainstream activities are included, their duration and frequency should be queried because, with new accessibility laws, mainstream recreational activities like fishing,[303] hunting,[304] owning a pet,[305] going to a

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[294] *SSA's Disman Statement*, *supra* note 23 ("eCAT is a policy compliant web-based application designed to assist the user throughout the sequential evaluation process. The tool aids in documenting, analyzing, and adjudicating the disability claim according to our regulations.").

[295] SMALLIGAN & BOYENS, *supra* note 237, at 3.

[296] SSA, *Disability Determination Process*, *supra* note 282 ("After completing its development of the evidence, trained staff at the DDS makes the initial disability determination.").

[297] SOC. SEC. ADMIN., NO. 05-10029, DISABILITY BENEFITS 4 (July 2019) (indicating that "[p]rocessing an application for disability benefits can take three to five months"); SMALLIGAN & BOYENS, *supra* note 237, at 6 ("In 2018, a worker with a disability who filed a new claim for SSDI benefits had to wait an average of 111 days for an initial decision. This wait time has been fairly consistent over the past five years, ranging from 110 to 114 days.").

[298] Meseguer, *supra* note 41, at 42 tbl.1.

[299] *Id*. at 42.

[300] *Id*. at 42 tbl.1 (revealing that of the 2.8 million denials, 1,778,805 or 63 percent appealed).

[301] *Id*. at 42.

[302] SMALLIGAN & BOYENS, *supra* note 237, at 4.

[303] *See, e.g.*, *Colorado Accessible Fishing*, COLO. FISHING NETWORK, https://coloradofishing.net/Accessible.htm [https://perma.cc/4TWH-WTXB] ("Colorado has many river and lake locations which offer accessible fishing with facilities such as handicapped fishing piers, paved trails, and wheelchair access."); *Fishing Equipment*, MOVE UNITED, https://www.moveunitedsport.org/sports/adaptive-equipment/fishing-equipment/ [https://perma.cc/U4R4-VHCX].

movie,[306] and similar activities are now common among people with disabilities. The applications should be modified to emphasize activities that actually demonstrate the claimant can work eight hours per day, five days per week—not occasionally participate in a voluntary recreational activity.

In addition, SSA employees should be trained to avoid relying upon zombie factors in making their determinations. Zombie factor "evidence" should be removed from the file by law to help prevent reliance and bias. eCAT could also be modified to help spot and eliminate reliance on zombie factors.

2. The ALJ Hearing

If dissatisfied with the reconsideration determination, the claimant can request a hearing before an ALJ through the Office of Disability Adjudication and Review (ODAR).[307] "[Eighty-five] percent of the reconsideration denials are appealed."[308] In 2017, approximately 632,000 requests were made for an ALJ hearing, and over one million people were "waiting for a decision on their hearing request" with an average wait time of around 600 days for a hearing decision.[309]

Nowhere are the differences between courts and agencies more pronounced than in Social Security proceedings, which are not based on the judicial model of decision-making.[310] The most important difference is that "Social Security proceedings are inquisitorial rather than adversarial."[311] ALJs act as "examiner[s] charged with developing the facts" and have a "duty to investigate the

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[304] *See, e.g.*, *Hunting*, MOVE UNITED, https://www.moveunitedsport.org/sport/hunting/ [https://perma.cc/RB35-LMSS]; *Deer Hunting for Hunters with Disabilities*, WIS. DEP'T OF NAT. RES., https://dnr.wi.gov/topic/hunt/disdeer.html [https://perma.cc/DAT6-2JTN].

[305] *See, e.g.*, Lynette A. Hart, *Community Context and Psychosocial Benefits of Animal Companionship*, *in* HANDBOOK ON ANIMAL-ASSISTED THERAPY 73, 82 (Aubrey H. Fine ed., 2d ed. 2006).

[306] *See, e.g.*, *Assistive Moviegoing*, AMC THEATRES, https://www.amctheatres.com/assistive-moviegoing [https://perma.cc/B5E9-52LC].

[307] Meseguer, *supra* note 41, at 42.

[308] *Id.* at 43.

[309] *SSA's Disman Statement*, *supra* note 23.

[310] Sims v. Apfel, 530 U.S. 103, 110 (2000) ("The differences between courts and agencies are nowhere more pronounced than in Social Security proceedings. Although '[m]any agency systems of adjudication are based to a significant extent on the judicial model of decision-making,' . . . the SSA is '[p]erhaps the best example of an agency' that is not. . . . 'The most important of [the SSA's modifications of the judicial model] is the replacement of normal adversary procedure by . . . the investigatory model.'" (internal quotation marks and citations omitted) (quoting Judge Henry Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1290 (1975))).

[311] *Id.* at 110–11.

facts and develop the arguments both for and against granting benefits."[312] The ALJ is "to conduct a disability hearing in 'an informal, non-adversarial manner.' "[313]

ALJs "review[] . . . disability case[s] *de novo*."[314] The ALJ will consider evidence, applicant testimony, and witness testimony under oath.[315] ALJs often also use questionnaires that require patients to list their basic activities of daily living in detail.[316] "The ALJ may call vocational and medical experts to offer opinion evidence, and the claimant or the claimant's representative may question these witnesses."[317] The hearing rules "are less rigid than those a court would follow," and evidence may be presented "in a disability hearing that would not be admissible in court."[318] Some ALJs and courts erroneously combine "the substantial evidence standard . . . with procedural rules governing the admission of evidence," significantly lowering the bar for the SSA's burden of proof.[319] "[T]he ALJ considers all of the evidence" and makes a decision "[o]nce the record is complete."[320] A claimant may appeal an ALJ's decision to the Appeals Council, "which is comprised of a panel of ALJs."[321]

A claimant who has completed the SSA's administrative review process can appeal the decision in the federal court system.[322] The SSA processed 16,448 new court cases in 2018.[323] District courts remand an average of 43.7 percent of cases.[324] Remand rates vary significantly across circuits such that

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[312] Richardson v. Perales, 402 U.S. 389, 410 (1971) (stating that the social security hearing examiner "acts as an examiner charged with developing the facts"); *see also Sims*, 530 U.S. at 111 (explaining that "[i]t is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits").

[313] Biestek v. Berryhill, 139 S. Ct. 1148, 1152 (2019) (citing 20 C.F.R. §§ 404.900(b), 416.1400(b) (2018)).

[314] *SSA's Disman Statement*, *supra* note 23.

[315] Meseguer, *supra* note 41, at 42.

[316] *See, e.g.*, Crysler v. Astrue, 563 F. Supp. 2d 418, 443 (N.D.N.Y. 2008) (mentioning the claimant's *daily activities questionnaire*); Wagner v. Astrue, 499 F.3d 842, 852 (8th Cir. 2007) (discussing activities listed on a "Daily Activities Questionnaire").

[317] *SSA's Disman Statement*, *supra* note 23.

[318] *Biestek*, 139 S. Ct. at 1152 (internal quotation marks omitted).

[319] *Id*. at 1162 (Gorsuch & Ginsberg, JJ., dissenting) ("Some courts have even conflated the substantial evidence standard—a substantive standard governing what's needed to sustain a judgment as a matter of law—with procedural rules governing the admission of evidence. These courts have mistakenly suggested that, because the Federal Rules of Evidence don't apply in Social Security proceedings, anything an expert says will suffice to meet the agency's burden of proof.").

[320] *SSA's Disman Statement*, *supra* note 23.

[321] Meseguer, *supra* note 41, at 42.

[322] *SSA's Disman Statement*, *supra* note 23.

[323] *Hearings and Appeals: Federal Court Review Process*, SOC. SEC. ADMIN., https://www.ssa.gov/appeals/court_process.html [https://perma.cc/QTW3-TKQD].

[324] JONAH GELBACH & DAVID MARCUS, A STUDY OF SOCIAL SECURITY DISABILITY LITIGATION IN THE FEDERAL COURTS, PENN L.: LEGAL SCHOLARSHIP REPOSITORY 96 (2016),

"[k]nowing the judicial circuit in which the appeal was filed was the single most significant factor . . . in predicting whether there would be a remand."[325] For example, "[r]emand rates from district court judges in the Seventh, Ninth, and Tenth Circuits almost doubled the rates within the First and Fourth Circuit."[326]

There are several potential solutions related to zombie factors that could help. Removal of zombie factors from the record and from consideration by adjudicators could result in more consistent application of the law between circuits and ALJs. Zombie factors should not be included in any pre-hearing ALJ questionnaires nor in information obtained during the hearing because they have no relationship with employability as previously noted.[327] Some hearing rules prohibiting questions and entry of zombie factors into the record as "evidence" should be formulated.

C. Statement of Reasons for the ALJ's Decision: Eliminating Zombie Factors from the Five-Step Process

A five-step sequential evaluation process[328] is used by DDS employees, ALJs, and the courts to analyze whether the applicant qualifies for benefits.[329]

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https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2669&context=faculty_scholarship [https://perma.cc/56L3-H9B6].

[325] Krent & Morris, *supra* note 238, at 395.

[326] *Id.*

[327] *See supra* Part I.A.3.

[328] 20 C.F.R. § 416.920 (2018) provides the five-step sequential evaluation process:

> (4) The five-step sequential evaluation process. The sequential evaluation process is a series of five "steps" that we follow in a set order. See paragraph (h) of this section for an exception to this rule. If we can find that you are disabled or not disabled at a step, we make our determination or decision and we do not go on to the next step. If we cannot find that you are disabled or not disabled at a step, we go on to the next step. Before we go from step three to step four, we assess your residual functional capacity. (See paragraph (e) of this section.) We use this residual functional capacity assessment at both step four and at step five when we evaluate your claim at these steps. These are the five steps we follow: (i) At the first step, we consider your work activity, if any. If you are doing substantial gainful activity, we will find that you are not disabled. (See paragraph (b) of this section.) (ii) At the second step, we consider the medical severity of your impairment(s). If you do not have a severe medically determinable physical or mental impairment that meets the duration requirement in § 416.909, or a combination of impairments that is severe and meets the duration requirement, we will find that you are not disabled. (See paragraph (c) of this section.) (iii) At the third step, we also consider the medical severity of your impairment(s). If you have an impairment(s) that meets or equals one of our listings in appendix 1 to subpart P of part 404 of this chapter and meets the duration requirement, we will find that you are disabled. (See paragraph (d) of this section.) (iv) At the fourth step, we consider our assessment of your residual functional capacity and your past relevant work. If you can still do your past relevant work, we will find that you are not disabled. See paragraphs (f) and (h) of this section and § 416.960(b). (v) At the fifth and last step, we consider our assessment of your residual functional capacity and your age, education, and work experience to see

"[E]mployment, medical, and vocational factors [are considered] in that order."[330] In the analysis, ALJs must state reasons for discounting claimants' credibility and for discounting treating physicians' testimony.[331] As noted by Judge Friendly, a written statement of reasons is important for a fair hearing because (1) it is "almost essential" for judicial review, (2) "necessity for justification is a powerful preventive of wrong decisions," (3) it "tends to effectuate intra-agency uniformity," (4) it "may even make a decision somewhat more acceptable to a losing claimant," and (5) the "requirement is not burdensome."[332] Zombie factors should not be allowed among the list of reasons for negative determinations; to be clear, activities are not zombie factors if the adjudicator explains how the activity translates into an employable skill (e.g., duration, repetition). In other words, the ALJ should not be able to simply list the fact that a claimant can "bathe," "drive," or "take care of a pet" as evidence that he or she is employable without explaining what it is about bathing or pet care in his or her particular situation that makes it relevant to employability or discredits testimony about pain or disability.

Physician testimony should withstand zombie factors. It is a "well-established rule . . . that the [ALJ] must give substantial weight to the testimony of a claimant's treating physician, unless good cause is shown," so physician opinions regarding disability are well-recognized as being important.[333] Courts recognize that "[t]he treating physician's continuing relationship with the claimant makes him especially qualified to evaluate reports from examining doctors, to integrate the medical information they provide, and to form an overall conclusion as to the [claimant's] functional capacities and limitations."[334] ALJs must "set[] forth 'specific, legitimate reasons' supported by substantial evidence in the record" to reject treating physicians opinions "by setting out a detailed and thorough summary of the facts and conflicting clinical evi-

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> if you can make an adjustment to other work. If you can make an adjustment to other work, we will find that you are not disabled. If you cannot make an adjustment to other work, we will find that you are disabled. See paragraphs (g) and (h) of this section and § 416.960(c). (5) When you are already receiving disability benefits. If you are already receiving disability benefits, we will use a different sequential evaluation process to decide whether you continue to be disabled. We explain this process in § 416.994(b)(5).

20 C.F. R. § 416.920 (2018) (emphasis omitted).

[329] Meseguer, *supra* note 41, at 41 (describing the five-step sequential process used by DDS employees to determine whether the applicant qualifies for benefits); *see also* WIXON & STRAND, *supra* note 127, at 1.

[330] Meseguer, *supra* note 41, at 41.

[331] Bergfeld v. Barnhart, 361 F. Supp. 2d 1102, 1111 (D. Ariz. 2005).

[332] Friendly, *supra* note 218, at 1292.

[333] Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987).

[334] *Bergfeld*, 361 F. Supp. 2d at 1111 (quoting Lester v. Chater, 81 F.3d 821, 833 (9th Cir. 1995)).

dence."[335] "The phrase 'substantial evidence' is a 'term of art' used throughout administrative law to describe how courts are to review agency [fact finding]."[336] "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[337]

Zombie factors are not "substantial evidence" of lack of pain or disability because people with painful disabilities must continue to perform these activities to survive—as noted above.[338] "[C]learly mistaken evidence, fake evidence, speculative evidence, and conclusory evidence aren't substantial evidence."[339] When ALJs list zombie factors among their evidence, they are at best listing speculative conclusory evidence and at worst listing clearly mistaken or fake evidence based on implicit disability biases. Physicians are usually aware that people with disabilities and with pain must still participate in ADLs and in simple mainstream activities—so, as experts, they have likely already taken those facts into consideration in developing their opinions; therefore, ALJs should not be able to overrule their expertise using irrelevant zombie factors.

Similarly, ALJs should not be able to list zombie factors in their negative credibility assessment of the claimant's subjective reports of pain or disability. "[I]n evaluating a claimant's subjective complaints of pain [or other symptoms], the adjudicator must give full consideration to all of the available evidence, medical and other"—"includ[ing] the claimant's prior work record, her daily activities, and observations by treating and examining physicians and third parties about the claimant's symptoms and their effects."[340] "Subjective complaints may be discounted if there are inconsistencies in the evidence as a whole."[341] To discount the claimant's subjective complaints, the adjudicator generally "must make an express credibility determination detailing reasons for discrediting the testimony[] [and] must set forth the inconsistencies."[342] Zombie factors should not be used among those "inconsistencies," because zombie factor activities are not inconsistent with pain or disability—i.e., people in the worst pain and with the worst disabilities (e.g., cancer patients) must usually continue to perform ADLs and simple mainstream activities to stay alive and have basic quality of life.[343]

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[335] *Id*. (first quoting Lester v. Chater, 81 F.3d 821, 833 (9th Cir. 1995) and then quoting Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002)).

[336] Biestek v. Berryhill, 139 S. Ct. 1148, 1154 (2019).

[337] *Id*.; *see also* Bryant v. Colvin, 861 F.3d 779, 782 (8th Cir. 2017) (defining that "[s]ubstantial evidence is less than a preponderance but . . . enough that a reasonable mind would find it adequate to support the conclusion" (quoting Lawson v. Colvin, 807 F.3d 962, 964 (8th Cir. 2015))).

[338] *See supra* Part I.A.2.

[339] *Biestek*, 139 S. Ct. at 1160 (Gorsuch & Ginsberg, JJ., dissenting).

[340] Smolen v. Chater, 80 F.3d 1273, 1285 (9th Cir. 1996) (emphasis omitted).

[341] Polaski v. Heckler, 739 F.2d 1320, 1322 (8th Cir. 1984).

[342] Kelley v. Callahan, 133 F.3d 583, 588 (8th Cir. 1998).

[343] *See, e.g.*, Section I.A.3.

ALJ's credibility findings are particularly important. "It is well settled that an ALJ's credibility findings on a claimant's subjective complaints are entitled to deference" because "'the ALJ is best positioned' to make these determinations because of the opportunity to observe the claimant first-hand."[344] Therefore, courts have a more difficult time overturning ALJ decisions based upon adverse credibility findings, so ALJs must get these determinations right to avoid unjust outcomes. To do so, zombie factors should be eliminated from credibility determinations.

To avoid biased and discriminatory outcomes, the SSA should ban the use of zombie factors during the five-step sequential evaluation analysis. As noted above, zombie factors are *not* signs of employability and their use propagates a stigmatic discriminatory view of people with disabilities as dependent and unable to participate in mainstream activities.[345] If zombie factors are all that the ALJ has to list, then either there is no evidence of disability[346] or the ALJ is not doing a proper inquisitorial review. Either way, claimants should not continue to be victimized by the implicit disability biases of some ALJs, and the SSA disability determination process should not prop up biases and stereotypes that negatively impact the disability community.

CONCLUSION

People with disabilities are not zombies. "It should go without saying"[347] that people with disabilities must do the things necessary to stay alive—including performing ADLs and simple mainstream activities. Yet, many ALJs and courts seem to struggle with this basic fact. As defined for the first time in detail in this paper, "zombie factors" are judicial rules related to activity restrictions that define disability in ways that are so restrictive that they could virtually only be met by fictitious zombies—such as living without food, without personal hygiene or a clean home, without significant movement/exercise, without social interaction, without happiness provided by any recreational activity, and without simple, mainstream semblances of human life. Posner correctly recognized that this failure to differentiate between job requirements and personal care requirements is "a recurrent, and deplorable, feature of opinions

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[344] Holiday v. Barnhart, 460 F. Supp. 2d 790, 804 (S.D. Tex. 2006).

[345] *See* Part I.

[346] Biestek v. Berryhill, 139 S. Ct. 1148, 1160 (2019) (Gorsuch & Ginsberg, JJ., dissenting) (observing that "[t]he refusal to supply readily available evidentiary support for a conclusion strongly suggests that the conclusion is, well, unsupported"; and also explaining that "[t]he unfavorable inference . . . is especially applicable where the party withholding the evidence has had notice or has been ordered to produce it" (ALJs have such notice in SSA disability cases) (quoting in part 31A C.J.S. *Evidence* § 156(2) (1964))).

[347] Amick v. Celebrezze, 253 F. Supp. 192, 196 (D.S.C. 1966).

by administrative law judges in social security disability cases" that has been going on for decades.[348]

By using zombie factors in their disability determinations, the SSA validates and propagates prejudicial stereotypes of people with disabilities as being unable to live independently or participate in mainstream society. In addition, zombie factors contribute to arbitrary outcomes of the social security disability determination process that cause real people with real disabilities great suffering and loss. As a physician, I personally witnessed this devastation in my disabled patients' lives.

America has made significant progress in correcting some invidious discrimination and indifference[349] toward people with disabilities by enacting laws like the ADA, the Rehabilitation Act, and the ADAAA, among others.[350] However, implicit bias remains a pervasive problem for people with disabilities[351]—especially when it affects major programs that are meant to be lifelines like SSDI and SSI. Courts' and ALJs' arbitrary use of ADLs and simple mainstream activities as evidence to deny benefits demonstrated in this paper reflects an implicit bias that people with true work disabilities must be unable to live independently or enjoy simple mainstream life.[352]

Even though the SSA is the "Mount Everest of bureaucratic structures,"[353] some simple changes to the disability determination process could help prevent future applicants from being "left to the mercy of a bureaucrat's caprice."[354] Ability to perform ADLs and simple mainstream activities does not transfer into employable skill because these zombie factor activities (1) "[have] more flexibility in scheduling" than a job, (2) include the possibility of obtaining assistance from a friend or a family member, unlike a job, and (3) do not require "a minimum standard of performance," unlike a job.[355]

Zombie factors do not demonstrate employability, and therefore, should be systematically eliminated from the disability determination process; this can be done by concentrating on three of Judge Friendly's elements of a fair hearing.[356] First, an unbiased tribunal should be sought by (1) testing ALJs for implicit disability bias, (2) including a probationary and training period for ALJs to recognize and avoid biased determinations, (3) monitoring of ALJs for use of zombie factors in their decisions, and (4) disciplining ALJs who routinely use

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[348] Bjornson v. Astrue, 671 F.3d 640, 647 (7th Cir. 2012).
[349] Alexander v. Choate, 469 U.S. 287, 295 n.12 (1985).
[350] *See* FRIEDEN, *supra* note 6, at 4.
[351] *See* Dionne et al., *supra* note 11, at 1; ABA Comm'n on Disability Rts., *supra* note 10.
[352] *See* Part II.
[353] Verkuil, *supra* note 21, at 781.
[354] Biestek v. Berryhill, 139 S. Ct. 1148, 1163 (2019) (Gorsuch & Ginsberg, JJ., dissenting).
[355] Bjornson v. Astrue, 671 F.3d 640, 647 (7th Cir. 2012).
[356] Friendly, *supra* note 218, at 1279–94.

zombie factors to deny benefits.[357] Second, the record should be kept clean from zombie factors. For example, the fact that a person with a disability can bathe, walk short distances, drive, or go to church does not demonstrate that the person can hold substantial gainful employment;[358] so, such information should not be included in the record at all—including at the initial determination level, the ALJ hearing level, and all the way through the federal court system. Finally, ALJs should not be allowed to list zombie factors among the reasons for denying claims, discounting claimant credibility, or ignoring physician statements regarding disability during the five-step sequential analysis process.

Removal of subjective bias related to zombie factors would help adjudicators focus on true measures of disability and decrease the arbitrary nature of their decisions. Evidence suggests that implicit biases can be changed over time.[359] Social Security disability programs are a lifeline for some of the most vulnerable members of American society. ALJs need to better understand when to throw that lifeline to someone with a disability. Drowning victims do not always look like the stereotypes (e.g., they may not appear to be in distress and may even swim weakly) even though they are really drowning, so trained lifeguards must recognize the reality and not the stereotype.[360] Similarly, people with disabilities often do not look like the stereotypes (e.g., they are not dependent and segregated from society) even though they really are disabled, so ALJs (and the courts) must recognize the reality and not the stereotype. In my opinion, people with real disabilities continue to attempt to survive with as much quality of life as possible, often by living independently and by participating in some simple mainstream activities; however, that does not mean they are employable. SSA needs to better train ALJs on when to throw the lifeline.

The ADA was said to "reflect[] deeply held American ideals that treasure the contributions that individuals can make when free from arbitrary, unjust, or outmoded societal attitudes and practices that prevent the realization of their potential."[361] America has made significant progress in removing some of the thoughtlessness and indifference of the past with regard to people with disabili-

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[357] *See* Section II.A.

[358] *See* Section I.A.

[359] *See, e.g.*, *Implicit Attitudes Can Change over the Long Term*, *supra* note 269; *see also* Charlesworth & Banaji, *supra* note 106, at 189.

[360] Catherine Roberts, *How to Spot the Real Signs of Drowning*, CONSUMER REPS. (June 25, 2018), https://www.consumerreports.org/outdoor-safety/how-to-spot-the-signs-of-drowning/ [https://perma.cc/597W-98GJ] (noting that "despite the pervasive image" of waving and screaming, drowning often looks much different than "popularized in media and movies"); *see also Know the Signs of Water Distress*, CEDARS-SINAI BLOG (July 13, 2017), https://www.cedars-sinai.org/blog/summer-safety-know-the-signs-of-water-distress.html [https://perma.cc/MGZ9-FZH6] (noting that swimmers near drowning may continue to swim weakly or in the wrong direction, among other signs).

[361] ADA NAT'L NETWORK, *supra* note 66 (referencing the ADA Preamble).

ties. However, if the ideals expressed in the ADA are really deeply held American ideals, then it is time to bring the SSA into the twenty-first century by eliminating outdated zombie factors from disability determinations.

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