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Accuracy and Consistency In Categorical Decision-Making: A Study of Social Security's Medical-Vocational Guidelines—Two Birds With One Stone or Pigeon-Holing Claimants?

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ACCURACY AND CONSISTENCY IN CATEGORICAL DECISION-MAKING: A STUDY OF SOCIAL SECURITY'S MEDICAL-VOCATIONAL GUIDELINES—TWO BIRDS WITH ONE STONE OR PIGEON-HOLING CLAIMANTS?

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"A foolish consistency is the hobgoblin of little minds."
Ralph Waldo Emerson[1]

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1. R. W. EMERSON, *Self Reliance*, in THE WRITINGS OF RALPH WALDO EMERSON 152 (B. Atkinson ed. 1940).

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I. INTRODUCTION

In 1978, the Social Security Administration (SSA) amended its regulations by adding an appendix termed the Medical-Vocational Guidelines,[2] the major purpose of which was to increase consistency in the Social Security disability determination process.[3] The disability determination process requires complex medical and vocational judgments, because the statute requires that

> an individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, *considering his age, education, and work experience*, engage in any other kind of substantial gainful work which exists in the national economy. . . .[4]

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2. 43 Fed. Reg. 55,375 - 55,379 (1978), *codified at* 20 C.F.R. §404, Subpart P, App. 2 (1982).

3. 43 Fed. Reg. 55,349, 55,356 (1978). This article refers to disability determinations under Title II and Title XVI, two programs termed Disability Insurance Benefits and Supplemental Security Income, respectively. 42 U.S.C. §§401-433 (1976 & Supp. IV 1981), 20 C.F.R. Part 404 (1982); 42 U.S.C. §§1381-1383 (1976 & Supp. IV 1981), 20 C.F.R. Part 416 (1982).

Although age and blindness are categories for obtaining benefits under the Supplemental Security Income program (SSI), and blindness is an impairment for which one can receive benefits under the Disability Insurance Benefits program (DI), eligibility determinations based solely on those factors will not be addressed because the Medical-Vocational Guidelines do not apply in those cases. Children's Insurance Benefits, even for minors who become disabled, benefits for disabled widows and widowers, and the myriad of other disability benefits also will not be discussed. *See* 42 U.S.C. §402(d) (1974, 1976 & Supp. IV 1981) (children); 20 C.F.R. §404.350 - 404.368 (1982); 42 U.S.C.A. §402(e), (f) (West 1974 & 1982 Cum. Supp.) (widows, widowers). 20 C.F.R. §404.355 (1982). For a discussion of widow's benefits, including eligibility requirements and advocacy techniques, see Fournelle, *Social Security Disability Widow's Benefits: A Guide for Legal Assistance Advocates*, 13 CLEARINGHOUSE REVIEW 259 (1979). For a survey of various Social Security benefit programs, see D. SWEENEY, J. LYKO, JR., PRACTICE MANUAL FOR SOCIAL SECURITY CLAIMS (1980).

4. 42 U.S.C. § 423(d)(2)(A)(1976) (emphasis supplied).

The Medical-Vocational Guidelines (also referred to in this article as medical-vocational regulations) established a categorical system of decision-making which uses both textual regulations and tables. A categorical decision-making system is one that limits the factors to be used in making a decision to a finite and predetermined set and either mandates determinations or establishes guidelines for them.[5] Categorical systems contrast with clinical decision-making, in which adjudicators are free to respond to all the factors present in an individual case and discretion may be channeled simply by a general standard. Categorical systems are often characterized by their use of tables or "grids" and can focus either on a single factor,[6] or a number of factors, as in the Medical-Vocational Guidelines, which concentrate on residual functional capacity, age, education, work experience, and transferable skills. The importance of these guidelines, which play a major role in cases decided by the 700 Administrative Law Judges employed by the Social Security system to decide over 200,000 disability cases each year,[7] was highlighted recently by the Supreme Court's grant of certiorari in *Schweiker v. Campbell*,[8] in which the Second Circuit severely limited the impact of the regulations on disability decision-making.

This article focuses on the basic jurisprudential issues involved in creating consistency through the use of categorical systems and discusses whether or not the guidelines create accuracy and fulfill their basic purposes. Broad and normative in approach, this article examines several issues central to any moral legal system.[9] Two of these basic issues are accuracy and consistency. Accuracy can be defined as the proper substantive outcome in a case based upon correctly found

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5. This article adopts a rather narrow definition of the term categorical. At one extreme, categorical systems are those which have developed through the use of empirical data. Examples of categorical systems, in addition to the Medical-Vocational Guidelines, include sentencing and parole determinations which attempt to predict future behavior. In a very broad sense, the development of categorical decision-making might be thought to include the development of any particularized rule to replace a vague principle or standard. In this article categorical is not used to describe this larger phenomenon.

6. For example, the Federal Aeronautics Administration's regulation for determining pilot retirement uses age as a determinative factor. "No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday." 14 C.F.R. §121.383(c)(1982).

7. *See* STAFF OF SUBCOMMITTEE ON SOCIAL SECURITY, HOUSE WAYS AND MEANS COMMITTEE, 97TH CONGRESS, 1ST SESS., SOCIAL SECURITY HEARINGS AND APPEALS, PENDING PROBLEMS AND PROPOSED SOLUTIONS app. A, app. C (Comm. Print 1981).

8. Campbell v. Secretary, 665 F.2d 48 (2d Cir. 1981), *cert. granted sub nom* Schweiker v. Campbell, 102 S. Ct. 2956 (1982).

9. For a discussion of basic legal principles that produce a moral legal system, see L. FULLER, THE MORALITY OF LAW 95–151 (rev. ed. 1969).

facts appropriately applied to the proper standard of law. "Accuracy is . . . the substantive ideal; approachable but never fully obtainable."[10] Consistency is the treatment of like cases in a like fashion; in this article, consistency refers to the decision of disability cases having the same or very similar characteristics in the same way. Consistency, like accuracy, is a somewhat ethereal characteristic in disability determinations because "claimants are in fact not identical because of gross disparities in the impact of identical physical impairments on the general well-being and psychological vigor of different claimants."[11]

In a properly functioning determination process, accuracy and consistency should merge. Decision-makers will reach correct outcomes by properly applying appropriate substantive rules to correctly found facts, and they will do so on a consistent basis. But consistency and accuracy, although clearly related, are not the same. It is possible to achieve highly consistent decision-making but extraordinarily inaccurate decisions. For example, a highly consistent decision-making process would result if all black applicants who applied for disability were granted benefits, but accuracy would be a matter of chance.

Striving for accuracy and consistency exacts trade-offs. Attempts to reduce inconsistencies can produce over-generalized and inaccurate decisions. Improvements in accuracy can detract from other related principles, such as predictability and fairness. Fairness involves not only the system's actual accuracy, but also its perceived accuracy. This article examines the Medical-Vocational Guidelines' influence on these interrelated issues of accuracy, consistency, predictability, and fairness.[12]

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10. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on Assurance of Accuracy, Fairness and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 774 (1974), [hereinafter cited as Mashaw, *Management*].

11. R. DIXON, SOCIAL SECURITY DISABILITY AND MASS JUSTICE 18 (1973).

12. This article will not examine these guidelines empirically, although it recommends empirical study of the guidelines to determine their effectiveness. *See infra* § VIII. Several other interrelated issues are beyond the scope of this article. For example, timeliness is an important characteristic of any judicial process, and "[t]he characteristic of the hearing process that most enrages claimants and congressmen is its torpidity." J. MASHAW, C. GOETZ, F. GOODMAN, W. SCHWARTZ, P. VERKUIL, M. CARROW, SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARINGS SYSTEM xxii (1978) [hereinafter cited as MASHAW, HEARINGS]. Nevertheless, this article will not address timeliness for three reasons. First, "[t]he basic causes of the backlog of cases at [the Bureau of Hearings and Appeals and probably the entire Social Security Disability determination process] and the resulting delay are clear — an increasing demand for hearings without a corresponding increase in the resources to process the cases." *Id.* at xxii. Second, the time parameters for hearings and decisions at the various stages in the process have been set out by the courts. *See* Blankenship v. Secretary of HEW, 587 F.2d 329, 334-35 (6th Cir. 1978); White v. Matthews, 559 F.2d 852, 859-61 (2nd Cir. 1977). Third, and most important, al-

Any study of a complex system that must balance conflicting purposes would be incomplete without an inquiry into the value judgments that underlie those trade-offs. The disability determination process expresses value judgments in two distinct ways. First, in a broad jurisprudential sense, by designing a categorical system, policy-makers determine which goals will be primary and which will be subsidiary. For example, policy-makers could decide to promote the goals of consistency and aggregate accuracy even at the expense of individual accuracy. This decision is ultimately a value judgment because there is no objective basis for deciding when one goal is more important than another. Second, decision-makers in individual disability cases carry their own personal value judgments into the determination itself. These individual values or biases, often subconscious, can be curbed but can never be completely eradicated. This article explores some effects of these value judgments on disability determinations.

The categorical approach has become an increasingly popular decision-making model.[13] Study of the categorical procedures embodied in the Medical-Vocational Examination Guidelines may facilitate the proper development and application of categorical decision-making procedures in other contexts. Before discussing criticisms that have been made of the disability process and beginning an analysis of the Medical-Vocational Guidelines, however, a brief explanation of the basic standard for determining disability and its administration is useful.[14]

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though categorical decision-making often promotes efficiency, the Medical-Vocational Guidelines probably do not result in substantial time savings. Although using the medical-vocational regulations may result in cost savings, this article will not discuss the fiscal issues because they are ultimately less important than accuracy, consistency, predictability, and fairness. A claim, on the average, is worth approximately $30,000, and the administration spends less than $500 deciding this average claim. Mashaw, *How Much of What Quality? A Comment on Conscientious Procedural Design*, 65 CORNELL L. REV. 823, 824 (1980) [hereinafter cited as Mashaw, *Quality*]. Although a cost-conscious and budget-cutting mentality prevails, and substantial questions exist about how much additional money is needed to increase accuracy and consistency, the amount currently spent on decision-making in comparison to the worth of the claim seems more than reasonable.

13. Many states now use formula-like determinations to decide sentencing and parole. *See* Note, *Sentencing Women: Equal Protection and the Context of Discretionary Decision-Making*, 6 WOMEN'S RIGHTS L. REP. 85, 100-105 (1980). *Cf.* Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individual Judgment*, 88 YALE L. J. 1408, 1423 (1979) (comparative accuracy of statistical vs. individual decision-making).

14. For a more complete discussion of the process, see D. SWEENEY, *supra* note 3, at 20-28.

II. THE DISABILITY STANDARD AND PROCESS[15]

A description of disability determination is best begun with an explanation of the claims-handling process, followed by an examination of the procedure for determining disability.

A. *Claims-Handling Process*[16]

1. *Initial Determination*—The process begins when an applicant applies at a district office of the SSA for either Title II (Disability Insurance) or Title XVI (Supplemental Security Income) benefits.[17] The District Office interviews the claimant, obtains information about his or her work background, and obtains the names of the claimant's physicians. At this point, the SSA District Office refers the claim to a state agency for the determination of disability. This bifurcated system, which exists at both the initial determination and the reconsideration stages, is an unusual example of cooperative federalism.[18] The state agency collects the claimant's medical records, and a team composed of a medical consultant and a vocational specialist decides on disability. The state agency decision is then sent to the Bureau of Disability Insurance in the SSA Baltimore headquarters for review.[19] The SSA headquarters will then inform the claimant of its decision. If the claim is approved, they will arrange for payment.

2. *Reconsideration*—If the claim is denied during the initial determination, the claimant is entitled to a reconsideration of the claim by the state agency. This reconsideration tracks the procedure followed at the initial determination stage, but the determination is done by a different doctor and vocational specialist.[20]

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15. Readers familiar with the disability standard and process, both before and after the addition of the Medical-Vocational Guidelines, are invited to move on to p. 342.

16. This description of the claims process is highly simplified. For a more thorough description, see R. DIXON, *supra* note 11, at 24-50.

17. For Title XVI claims, the District Office checks income and resources because the program is need-based. For Title II claims, the office determines whether the individual is eligible based on his or her contributions to the social security system from past work. *See* D. SWEENEY, *supra* note 3, at 1-2.

18. *Cf.* Bloch, *Cooperative Federalism and the Role of Litigation in Development of Federal AFDC Eligibility Policy*, 1979 WIS. L. REV. 1, 1-8 (cooperative federalism in AFDC process).

19. The degree of finality of the state agency decision depends on its outcome. The Bureau of Disability Insurance cannot be more lenient than the state agency, but it can be stricter. For a discussion of finality, see R. DIXON, *supra* note 11, at 27.

20. Recipients whose benefits are terminated are entitled to a reconsideration of the termination and to the procedural rights claimants are allowed. 20 C.F.R. §§404.907 - 404.921 (1982).

3. *Hearing Stage*—Following a denial after reconsideration, claimants are entitled to a hearing before an Administrative Law Judge (ALJ) of the Bureau of Hearings and Appeals in SSA. This hearing is the first and only time that a claimant appears before the decision-maker.[21]

4. *Appeals Council Review*—Claimants whose claims have been denied by an ALJ at the hearing level can request review by the Appeals Council.[22] Staff Analysts attached to the council examine the case and prepare recommendations as to whether to review the decision. In addition to acting on claimants requests for reviews, the Appeals Council can review granted claims on its own motion. Following a claimant's request for review, the Appeals Council can refuse review, review the case and deny benefits, review the case and remand for additional medical evidence or testimony, or grant benefits.[23]

5. *Court Review*—After exhausting these administrative remedies, claimants can appeal to the United States District Courts,[24] the Courts of Appeals, and finally the Supreme Court, although the Supreme Court has taken only a few Social Security Disability cases since the program's inception.[25]

B. *The Procedure for Determining Disability*

Statutorily defined, "disability" means the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which

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21. D. SWEENEY, *supra* note 3, at 97-98.

22. For the criteria used by the Appeals Council in deciding whether or not to review a hearing officer's determination, see 20 C.F.R. §416.1470 (1982) (Supplemental Security Income); §404.970 (1982) (Disability Insurance). *See also* 20 C.F.R. §416.1469-1479; 20 C.F.R. §404.969-979.

23. Although this step is taken by few claimants, they can request the Appeals Council to reconsider its determination. *See* 20 C.F.R. §404.987 (1982) (DI); 20 C.F.R. §416.1487 (1982) (SSI).

24. 42 U.S.C. §405(g) (Supp. IV 1981).

25. For examples of the cases that the Supreme Court has taken in the Social Security disability area, see Matthews v. Diaz, 426 U.S. 67, 80 (1976) (the government may impose residency requirements on aliens applying for Social Security benefits); Mathews v. Eldridge, 424 U.S. 319, 349 (1976)(hearing not required before termination of benefits); Jimenez v. Weinberger, 417 U.S. 628, 637 (1974) (held unconstitutional a provision that denied disability benefits to a specified class of illegitimate children); Richardson v. Perales, 402 U.S. 389, 402 (1971) (held that medical records could be substantial evidence to support the SSA burden); Hopkins v. Cohen, 390 U.S. 530, 532 n. 3 (1968) (the wife and child of a disabled beneficiary need not become parties to a proceeding to review an administrative determination of eligibility).

> can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months. . . .[26]

In interpreting this definition,

> an individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, *considering his age, education, and work experience*, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.[27]

Although this statutory definition of disability has undergone some changes,[28] the basic test of disability is the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment. Disability decisions for both Title II and Title XVI benefits, unlike the scheduled determinations of disability in the Workmen's Compensation situation, are all-or-nothing situations.[29]

The regulations outlining the disability determination process establish a sequential five-step evaluation procedure. This sequential evaluation is similar for the initial, reconsideration, and hearing stages. And, if a fact-finder (either the ALJ or state agency team) can decide that a claimant is or is not disabled at any step in the sequential evaluation, subsequent steps are obviated.[30]

1. *Is the Individual Engaging in Substantial Gainful Activity?*— The first step in the process is to ascertain whether the claimant is en-

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26. 42 U.S.C. §423(d)(1)(A)(1976).

27. 42 U.S.C. §423(d)(2)(A)(1976) (emphasis supplied).

28. In 1965, the duration of disability was clarified by adding the 12-month period in place of the phrase "long-continued and indefinite duration." Pub.L. No. 89-97, 79 Stat. 366 (1965), *codified at* 42 U.S.C. §423(d)(2)(A)(1976) (amending 42 U.S.C. §423(c)(2)(1962)). In 1967, the phrase "substantial gainful activity" was clarified. Pub.L. No. 90-248, 81 Stat. 821 §158(b)(1968), *codified at* 42 U.S.C. §423(d)(2)(A)(1976) (amending 42 U.S.C. 423(d)(1962)).

29. An exception to this concept occurs in cases where claimants are found to have been disabled in the past but are not currently disabled. In such cases, they may receive retroactive benefits but are denied current benefits.

30. 20 C.F.R. §404.1520 (1982) (DI); 20 C.F.R. §416.920 (1982) (SSI).

gaged in substantial gainful activity (SGA).[31] Obviously, a claimant who is involved in substantial gainful activity does not meet the basic statutory definition. Consequently, benefits will be denied, and the process will end at this stage, unless the claim is for retroactive benefits.[32]

2. *Does the Individual Have a Severe Impairment?*—If the claimant is not involved in substantial gainful activity, the fact-finder next determines whether the claimant has a "severe" impairment. At this second step, the fact-finder must evaluate whether medical factors significantly limit the claimant's ability to perform basic work-related functions or tasks. If no severe impairment is found, the claim is denied.[33] As with step one and later steps, a claimant who is denied can appeal.

3. *Does the Individual Have an Impairment that Meets or Equals the Listing?*—Assuming a severe impairment is found, the fact-finder then decides if the claimant's severe impairment equals or exceeds those listed in Appendix 1[34] of the regulations, which lists medical impairments with specific diagnostic requirements.[35] Finding that the claimant's impairment equals or exceeds this listing necessitates a finding of disability and obviates the need for additional steps.

4. *Can the Individual Do Past Work?*—As a fourth step, the fact-finder must determine if the claimant is able to return to any work he or she performed within the last fifteen years.[36] To make this determination, the fact-finder must assess the claimant's physical and mental "residual functional capacity" and the claimant's ability to function in that prior employment situation despite his or her impairment.[37] The claimant's residual functional capacity, or what the claimant can still do despite his or her physical or mental limitations, is evaluated according to work-related abilities. For example, the claimant's residual

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31. 20 C.F.R. §404.1520(b) (1982) (DI); 20 C.F.R. §416.920(b) (1982) (SSI).

32. *See supra* note 29. Another exception, and one which is quite rare, is the trial work period. *See* 20 C.F.R. §404.1592 (1982).

33. 20 C.F.R. §404.1520(c) (1982) (DI); 20 C.F.R. §416.920(c) (SSI).

34. 20 C.F.R. §404.1520(d) (1982) (DI); 20 C.F.R. §416.920(d) (1982) (SSI).

35. Appendix 1 is itself a system of categorical decision-making. Unlike the Medical-Vocational Guidelines, however, the appendix works only to require grants and not to deny benefits. This shift from using categorical decision-making solely to grant benefits (Appendix 1), to using it both to grant and to deny benefits (Appendix 2), seems to show a shift in the way the administration values erroneous denials and erroneous grants.

36. 20 C.F.R. §§404.1520(e), 404.1565 (1982) (DI); 20 C.F.R. §§416.920(e), 416.965 (1982) (SSI).

37. 20 C.F.R. §404.1545(a) (1982) (DI); 20 C.F.R. §416.945(a) (1982) (SSI).

functional capacity is based upon the claimant's physical ability to walk, stand, lift, carry, and perform other tasks which might be required in a work setting[38] as well as mental and emotional factors, such as the "ability to understand, to carry out and remember instructions, and to respond appropriately to supervision, co-workers, and work pressures in a work setting."[39] In deciding whether or not the claimant can return to his or her prior work, the fact-finder reviews the medical documentation and, if this documentation is insufficient, studies other evidence including the claimant's and other witnesses' statements or, at the hearing stage, testimony about the impairments and their effect on the claimant.[40] If the evidence shows that the claimant cannot return to his or her prior work, a prima facie case of disability is established.

5. *Can the Individual Perform Jobs that Exist In Significant Numbers In the National Economy?*—At this fifth step in the sequential evaluation of disability, the fact-finder must determine if jobs that the claimant can perform exist in the national economy.[41] Up to this point in the sequence, the current process for determining disability is very similar to that used before the introduction of the Medical-Vocational Guidelines.[42] To understand the importance of the changes made by the Medical-Vocational Guidelines, one needs to know how the process worked before their adoption, both at the initial determination and reconsideration stages as well as at the hearing stage.

At the initial determination and reconsideration stages, a two-person decisional team, would make the step-five decision based upon both their training and instructions contained in a document entitled Disability Insurance Letter III-3. This document, however, does little more than paraphrase the disability statute.[43] In addition, a vague form of the Medical-Vocational Guidelines may have been used at these stages, but how widely or consistently it was used is unclear.[44] The step-five decision was largely within the discretion of the decisional team based on their training.

At the hearing level in step five, the Secretary has the burden of showing that jobs the claimant can perform exist in significant numbers in the national economy.[45] Before the SSA adopted the Guidelines,

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38. 20 C.F.R. §404.1545(b) (1982) (DI); 20 C.F.R. §416.945(b) (1982) (SSI).
39. 20 C.F.R. §404.1545(c) (1982) (DI); 20 C.F.R. §416.945(c) (1982) (SSI).
40. 20 C.F.R. §404.1545(a) (1982) (DI); 20 C.F.R. §416.945(a) (1982) (SSI).
41. 20 C.F.R. §404.1551 (1982) (DI); 20 C.F.R. §416.961 (1982) (SSI).
42. *See* 20 C.F.R. Part 404, Subpart P (1978); 20 C.F.R. Part 416, Subpart I (1978).
43. *See* R. DIXON, *supra* note 11, at 58.
44. *See infra* note 90.
45. This shift in burden of proof was established by Judge Friendly in Kerner v. Flem-

vocational expert testimony was used to sustain the Secretary's burden. Although there was no absolute requirement that vocational testimony be given to support a denial, "in the absence of substantial evidence from other sources bearing directly on the issue of 'substantial gainful activity,' the testimony of a vocational counselor is essential for the affirmance of an examiner's findings."[46] At the hearing, before the examination of the vocational expert, the claimant already would have testified about his or her age, educational background, prior work experience, daily activities and hobbies, physical and emotional problems, and the effect of those problems on the claimant's ability to function. In addition, medical records, which would have been examined by the vocational expert before the start of the hearing, would have been submitted into evidence. The vocational experts would be asked to respond to a series of hypothetical questions which addressed a range of employment-related abilities that the claimant might be found to possess.[47] For example, the Administrative Law Judge would pose a hypothetical to the vocational expert which would include a series of characteristics similar to those of the claimant, including age, educational background, work history, medical problems suffered by the claimant, and restrictions on the claimant's physical abilities. In addition, the hypothetical might include emotional impairments characterized by deterioration in activities, interests, and personal hygiene, and impairments in the ability to relate to others and to follow instructions. At this point, the expert would be asked to address "three inter-related [sic] questions: (1) What transferable skills does the claimant have? (2) Are there jobs that he can perform with those skills, given the functional limitations resulting from his medical condition? and (3) How many such jobs exist locally and in the national economy?"[48]

At the hearing stage, the medical-vocational regulations dramatically alter and often eliminate the need for vocational testimony. The Guidelines take administrative notice of jobs that, given a claimant's age, education, transferable work skills, and physical limitations, exist in significant numbers in the national economy and, at least according to the regulations, can be performed by those individuals. For claim-

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ming, 283 F.2d 916, 921-22 (2nd Cir. 1960). It has survived the scrutiny of Congress (the 1967 amendments to the entitlement programs, P.L. 90-248, 81 Stat. 821 (1949), left the *Kerner* doctrine essentially untouched) and the courts. *See* Garrett v. Richardson, 471 F.2d 598, 603-604 (8th Cir. 1972); Meneses v. Secretary of HEW, 442 F.2d 803, 806 (D.C. Cir. 1971). *See also* MASHAW, HEARINGS, *supra* note 12, at 75-76.

46. Garrett v. Richardson, 471 F.2d 598, 603, 604 (8th Cir. 1972).

47. D. SWEENEY, *supra* note 3, at 114-15.

48. MASHAW, HEARINGS, *supra* note 12, at 77.

ants having physical impairments, the above questions (2) and (3) are eliminated from the examination of the vocational expert.

At the initial determination and reconsideration stages, the Medical-Vocational Guidelines severely limit the discretion of the vocational specialist. As mentioned, the Medical-Vocational Guidelines are composed of a series of regulations and tables,[49] and classify jobs into sedentary, light, and medium work.[50] Appendix 2 of the Medical-Vocational Guidelines is made up of three tables—often referred to as the "grid"—one each for sedentary, light, and medium work.[51] The fact-finder at this stage, having already determined the claimant's residual functional capacity,[52] must decide whether or not the claimant meets the exertional requirements of certain job classifications. Once a finding is made that the claimant's residual functional capacity limits him or her to sedentary, light, or medium work, the fact-finder examines that table and then charts the claimant's various vocational factors on the table. These factors include age, education, the level of previous work experience, and, when applicable, transferability of work skills.

The vocational factors of age, education, and previous level of work are themselves broken down into several categories. Age is divided into: (1) younger individuals (under age 50), sometimes divided into ages 45-49 and 18-44;[53] (2) individuals closely approaching advanced age (age 50 to 54); and (3) individuals of advanced age (age 55 or over), sometimes narrowed further to ages 60-64.[54] Education, primarily formal schooling,[55] is classified in the Medical-Vocational Guidelines within the categories of: (1) illiteracy, meaning inability to read or write, and little or no formal schooling; (2) marginal education, meaning completion of the sixth grade or less; (3) limited education, meaning completion of grades seven through eleven; (4) high school education and above; and (5) inability to communicate in English.[56]

The regulations classify past work into the categories of: (1) unskilled, requiring little or no judgment to do simple duties which can be

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49. 20 C.F.R. Part 404, Subpart P, App. 2 (1982).

50. *Id.* "Heavy" and "Very Heavy" categories are excluded. The regulations explain that claimants able to perform heavy and very heavy work in spite of their impairment are presumably able to find work in the national economy regardless of their age, education, or previous work experience. Claimants limited to the lighter categories of work, according to the regulations, are those whose employability is affected by these other three factors. 20 C.F.R. Part 404, Subpart P, App. 2, §204.00 (1982).

51. *See, e.g.*, *infra* Appendix A & Appendix B (tables).

52. *See infra* text accompanying notes 37-40.

53. *See e.g.*, Table no. 3, *infra*, Appendix B.

54. 20 C.F.R. §404.1563(a)-(d) (1982) (DI).

55. 20 C.F.R. §404.1564(a) (1982).

56. 20 C.F.R. §404.1564(a)-(b)(1982).

learned on the job in a short period of time; (2) semi-skilled, requiring some judgment and alertness and possibly coordination and dexterity; and (3) skilled work, requiring independent judgment, substantial training, and possibly dealing with personnel, data, or ideas at a high level of complexity.[57] Prior work skills are evaluated for transferability, based on whether the same or a lesser degree of skill is required, whether the same or similar machines or tools are used, and whether the same or similar raw materials, products, processes or services are involved.[58]

Once the claimant's residual functional capacity and vocational factors are found, the fact-finder examines the tables, or "grids," of the Medical-Vocational Guidelines. "Where the findings of fact made with respect to a particular individual's vocational factors and residual functional capacity coincide with all of the criteria of a particular rule, the rule directs a conclusion as to whether the individual is or is not disabled."[59] For example, if a person were found to be able to perform light work, were of advanced age (over the age of 55), had a limited education, and had done skilled or semi-skilled work which gave him transferable skills, the tables would lead to a finding of not disabled.[60] But, if that same individual had done skilled or semi-skilled work but did not have transferable work skills, a finding of disability would result if the tables were applied mechanically.[61] Conversely, in both these hypothetical situations, individuals would be found not disabled if they were less than 55 years of age. The difference in outcome between these hypotheticals illustrates that age is highly significant in determining disability under the Guidelines. Persons of advanced age, unlike younger individuals, find it relatively easy to be found disabled under the Guidelines.

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57. 20 C.F.R. §404.1568(a)-(c) (1982).

58. 20 C.F.R. §404.1568(d) (1982).

59. 20 C.F.R. Part 404, Subpart P, App. 2, §200(a) (1982). The current language of the regulations suggests that findings of disability are made directly from the tables of the Medical-Vocational Guidelines. Earlier versions, however, suggested that, instead of finding disability, the Medical-Vocational Guidelines found adjustment. These earlier versions stated that

> if an individual cannot perform any past relevant work because of a severe impairment(s), but the individual's remaining physical and mental capacities are consistent with his or her meeting the physical and mental demands of a significant number of jobs (in one or more occupations) in the national economy, and the individual has the vocational capabilities (considering age, education, and past work experience) *to make an adjustment to work different from that which he or she has performed in the past, and it shall be determined that the individual is not under a disability*.

43 Fed. Reg. 55,363 (1978), *codified at* 20 C.F.R. §404.1503(f) (1982) (emphasis supplied).

60. 20 C.F.R. Part 404, Subpart P, App. 2, Rule 202.03 (1982).

61. 20 C.F.R. Part 404, Subpart P, App. 2, Rule 202.02 (1982).

Although the Medical-Vocational Guidelines at first appear to mandate disability decisions, they require that some factors not be treated in a purely mechanical fashion. For example, the regulations state that the considerations given to age are not to be applied mechanically in borderline situations.[62]

In addition, the regulations mandate disability determinations in cases where the impairments are exertional.[63] Where solely nonexertional impairments, such as mental, sensory, or skin, exist, the regulations do not apply. But if the claimant has both exertional and nonexertional impairments, the Medical-Vocational Guidelines provide a framework for consideration of how much the individual's work capability is further diminished in terms of any types of jobs that would be contraindicated by the nonexertional limitations.[64] They provide little guidance, however, on how to apply this framework in deciding cases. These flexibility issues will be dealt with extensively later.[65]

III. BACKDROP TO THE MEDICAL-VOCATIONAL GUIDELINES

A. *The Criticisms of Disability Decision-Making*

1. *Inconsistency and Inaccuracy*—The Medical-Vocational Guidelines were developed as a response to criticisms of the disability decision-making process. Although fiscal issues have dominated recent concerns[66] and some scholarship has focused on those issues,[67] most studies have centered on methods for improving the decision-making process itself rather than on the fiscal questions.[68]

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62. 20 C.F.R. §404.1563(a) (1982) (DI); 20 C.F.R. §416.963(a) (1982) (SSI).

63. 20 C.F.R. Part 404, Subpart P, App. 2, §200.00(e) (1982).

64. *Id.*

65. *See infra* § IV.

66. Fiscal concerns about the Social Security system seem based on the premise that it is a disability and retirement insurance system rather than a public welfare program, even though it functions more like the latter. The inherent solvency of the program continues to be questionable in light of resistance to using general tax revenues as a means of funding.

67. *See, e.g.*, Martin, *The Art of Decoupling: Keeping Social Security's Promise Up-To-Date*, 65 CORNELL L. REV. 748 (1980).

68. In addition to studies performed by the Department of Health and Human Services (DHHS), its predecessor the Department of Health, Education and Welfare (HEW), and the SSA, outside authorities undertook major evaluations. *See* MASHAW, HEARINGS, *supra* note 12; R. DIXON, *supra* note 11; 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §10 (2nd ed. 1979); M. DERTHICK, POLICYMAKING FOR SOCIAL SECURITY (1979). Most studies of the process have focused on the disability benefit program of Social Security, 42 U.S.C. §§401-433 (1976 & Supp. IV 1981), but the analysis is equally applicable to the Supplemental Security Income program (SSI), 42 U.S.C. §§1381-1385 (1976 & Supp. IV 1981), because the disability standards and decision-making processes are essentially the same for both. *Compare* 20 C.F.R. §§404.1501 - 404.1598 *with* 20 C.F.R. §§416.901 - 416.998 (1982) (most sections identical).

The primary criticism of the system has been its lack of consistency and accuracy in decision-making. For example, in a study sponsored by the National Center for Administrative Justice, the authors concluded that "the inconsistency of the disability decision process is patent. Indeed, it is widely believed that the outcome of cases depends more on who decides the case than what the facts are."[69] And, in 1977, the *New York Times* reported that "the Social Security Disablity program has become, in the view of its critics, the most arbitrary of the government's programs to help the needy, one in which poor people in similar circumstances often receive vastly different treatment."[70]

A true picture of the accuracy and consistency problems is difficult to determine. First, the absence of an objective external standard for accuracy[71] makes error difficult to detect. Because the standard of disability includes a host of factors that must be considered, a different determination of any factor or combination of factors may cause contrary final determinations. Second, many of the cases dealt with by the system are close ones.[72] In many of these cases, because there simply may not be a "correct outcome," the problems of error detection are increased. Third, reliance on statistical information about the Social Security system is difficult because of differences in the procedural stages, and because evidence can be added to a claimant's case as it progresses through the review stages. Also, a claimant's condition can change, warranting the introduction of new evidence, and, claimants are present before decision-makers only at the ALJ hearing. Despite the difficulties in making an accurate assessment, some basic statistics about reversal rates and variation among Administrative Law Judges point to the serious accuracy and consistency problems within the disability determination system.

These problems can be seen by examining the rate at which decisions are reversed at various levels along the appeals process, the variation among decision-makers at the same stage in the claims process, and geographic variation. Administrative Law Judges have reversed approximately fifty percent of the decisions that have been appealed to them over recent years.[73] Of course, hearings are more personalized,

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69. MASHAW, HEARINGS, *supra* note 12, at xxi.

70. New York Times, July 27, 1977, §A, at 1, col. 2.

71. MASHAW, HEARINGS, *supra* note 12, at xx.

72. Mashaw, *Quality*, *supra* note 12, at 827-28.

73. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 38 (1976) [hereinafter cited as Mashaw, *Due Process*]. In 1978, ALJ's reversed 50% of the initial denials and 54% of the terminations in disability insurance claims. COMMITTEE ON FINANCE, UNITED STATES SENATE, 97TH CONG. 2ND SESS., STAFF DATA AND MATERIALS

medical records are more likely to be well developed, and claimants are far more likely to be represented before an ALJ than at earlier stages in the process. Nevertheless, the magnitude of this reversal rate reflects fundamental problems with accuracy and consistency.[74] In fact, this reversal rate could be much higher if it were not for the fact that, until recently, only denied claims moved through the review process.[75] Allowances, which account for more than one-half of the administrative level of determinations, had not been reviewed by either the Appeals Council or the federal courts.[76] Looking at these reversal statistics, one might conclude that the disability determination system was designed to decide clear cases at early stages and have large numbers of questionable cases reviewed at the hearing and Appeals Council levels. But because denials are not reviewed except upon a claimant's appeal, this conclusion does not appear to reflect the intent of the designers. Additionally, almost seventy percent of the Disability Insurance claimants whose cases are denied at the state agency level never appeal.[77]

The variation in reversal rates among ALJ's shows an even greater problem with the system: the outcome in a particular case may depend more on the hearing officer selected than on the facts of the case.[78] In 1980, only fifty percent of the Administrative Law Judges hearing disability claims were within ten percent plus or minus of the average reversal rate of approximatey sixty percent. Twelve percent of the Administrative Law Judges reversed fewer than forty percent of the claims they heard and fifteen percent reversed over seventy percent.[79] This variation is similar to that before the adoption of the guidelines.

RELATED TO THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM 58 (Comm. Print 1982) [hereinafter cited as STAFF DATA AND MATERIALS]. In fiscal 1979, after the adoption of the Medical-Vocational Guidelines, the percentages in these types of cases were 56.4% and 59%, respectively. In fiscal year 1980, ALJ's reversed 59.4% of the initial denials that came before them for review and 63.8% of the terminations.

74. In addition to the problems already mentioned in trying to evaluate error rate, the use of reversal rates may skew our perspective on the system. An extraordinarily high percentage of disabled claimants who were denied benefits may appeal their cases, and, conversely, very few claimants who are not disabled may move ahead in the appeals process. On the other hand, appeals may more accurately reflect persistence and stamina rather than actual disability. In fact, a very disabled or emotionally impaired claimant simply may "give up."

75. 42 U.S.C. §405(b) (1974); 20 C.F.R. §404.967 (1982) (DI); 20 C.F.R. §416.1467 (1982) (SSI).

76. R. DIXON, *supra* note 11, at 5. Pre-effectuation review is now being done on a limited scale at the state agency levels and Appeals Council. *See Pre-effectuation Review*, 3 SOCIAL SECURITY FORUM No. 12, at 11 (1981).

77. STAFF DATA AND MATERIALS, *supra* note 73, at 58.

78. MASHAW, HEARINGS, *supra* note 12, at 19.

79. *ALJ Reversal Rates by Percentile, Fiscal Year 1980*, 3 SOCIAL SECURTY FORUM No. 4, at 4 (April, 1981).

Assuming the ALJ's are hearing similar cases, these figures suggest, and one study has concluded, that ALJ's employ different criteria in making their determinations, resulting in inconsistency.[80] Some variation among decision-makers is to be expected, but the wide variation existing among Administrative Law Judges in the Social Security Administration is greater than an acceptable normal distribution.

In addition to variation among state agency denial rates,[81] variation in reversal rates among ALJ's, and variation between the Administrative Law Judges and the state agencies, the variation among geographical areas is also great. For example, in one three month period in 1977, the average claimant in Springfield, Massachusetts had only a 14.4% chance of winning his or her case before an Administrative Law Judge while claimants in Fort Smith, Arkansas had a 72.8% chance.[82] Although some variation based on geographical distribution is expected because of the test for disability,[83] these regional differences are not sufficiently significant in the disability process to account for the varying statistics among various cities. The variation may be due to regional attitudes toward work and disability as well as differences between the standards actually used by persons deciding cases and the standards that appear within the regulations and state manuals. Despite difficulties in drawing precise conclusions from these statistics, taken together they demonstrate serious problems with consistency and accuracy in the disability determination process.

2. *The Use of Vocational Experts*—Although lack of consistency has been the major thrust of criticism against the disability evaluation process, and properly so,[84] the use of vocational experts also has come under the proverbial gun. Vocational experts, who testify at the hear-

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80. MASHAW, HEARINGS, *supra* note 12, at 21-24.

81. SUBCOMMITTEE ON SOCIAL SECURITY OF HOUSE COMMITTEE ON WAYS AND MEANS, 95TH CONG., 2ND SESS., DISABILITY ADJUDICATION STRUCTURE 113 (Comm. Print 1978) (Chart II).

82. *Federal-State Relations and Quality Assurance Under the Disability Insurance Program: Hearings before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 95th Cong., 2nd Sess. 96, 96-97 (1978).

83. For a determination that a claimant is not disabled, jobs that the claimant can perform must exist in the region where the claimant resides or in several regions of the country. 42 U.S.C. §423(d)(2)(A) (1976).

84. Perhaps no characteristic of a procedural system is so uniformly denounced as a tendency to produce inconsistent results. When disposition depends more on which judge is assigned to the case than on the facts or the legal rules, the tendency is to describe the system as lawless, arbitrary, or the like even though case assignment is random and petitioners have *ex ante* perfectly even chances with respect to which judge they get.

MASHAW, HEARINGS, *supra* note 12, at 19.

ings about the kind and number of jobs available for claimants with certain physical and emotional restrictions, were used in over 87,000 hearings in 1978 at an approximate cost of four million dollars.[85] A report by the Office of the Inspector General found that the questioning of vocational experts by Administrative Law Judges was improperly handled. "As a result, some hearings were poorly documented, the potential for inappropriate ALJ decisions existed, and full value was not obtained from vocational experts in return for the annual four million dollars spent by SSA for their expert fees."[86] One study concluded that ALJ's may use vocational experts simply to substantiate a conclusion the ALJ has already drawn.[87] The same study and others[88] called for experimentation with the use of administrative notice to replace testimony by vocational experts in many situations. And, in one study headed up by Jerry Mashaw, the authors concluded: "We also believe that a sensitive use of official notice would eliminate substantial expenditures for unnecessary testimony by vocational experts, and might, in addition, increase the accuracy and fairness of the decision process."[89] The Medical-Vocational Guidelines were a response, in part, to the criticisms that vocational expert testimony was not worth its cost and often played a minimal role in the outcome of disability cases.[90]

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85. Office of the Inspector General, *Review of Vocational Expert Usage in the Hearings and Appeals Process by the Social Security Administration* (1980), *cited in* 2 SOCIAL SECURITY FORUM No. 9, at 5 (September, 1980).

86. *Id.* at 6.

87. Our observations and interviews suggest the possibility that not only may ALJs choose vocational experts with whom they generally agree, but also some vocational experts may mold their testimony to fit what they believe to be the predilections of the ALJ before whom they are appearing. If this occurs, it is certainly not surprising. The vocational experts are well paid for their efforts and can be excluded by the ALJs if they are thought to be unhelpful. Moreover, the questions they are asked are close judgment calls in any event, and it is easy and natural to shade one's judgment depending on the contexts. One ALJ said, "you can get a vocational expert to say anything you want him to." Vocational experts who were interviewed denied that this was the case.

MASHAW, HEARINGS, *supra* note 12, at 79.

88. *Cf.* R. DIXON, *supra* note 11, at 150 (calling for revision of manner of proof of existence of jobs).

89. MASHAW, HEARINGS, *supra* note 12, at xxiii.

90. Although courts and Administrative Law Judges have viewed the medical-vocational regulations as a clear departure from former practice, HEW, in its summary of the regulations, stated that "in publishing the amendments, the Social Security Administration intends to consolidate and elaborate upon long standing medical vocational evaluation policies for adjudicating disability claims in which an individual's age, education, and work experience must be considered in addition to the medical condition." 43 Fed. Reg. 55,349 (1978). Many state disability determination programs and the Bureau of Disability Insurance have used, and continue to use, a form of these guidelines, but the guidelines are new at the hearing and appeals stages. To test the Social Security Administration's assertion that

B. *The Purposes of the Medical-Vocational Guidelines*

The regulations seek to advance several goals, some of which find expression in the regulations themselves while others are implicit. Chief among these goals are consistency, not only among claimants at the same stage but also for claimants throughout the application and appeals process, and understandability. The regulations state generally that they "will provide information about the applicable rules and will promote more equitable, consistent and understandable decisions."[91] They also state that "consolidating these policies and incorporating them into the regulations . . . will serve to better assure the soundness and consistency of disability determinations in all claims that are filed regardless of the level at which they are adjudicated . . . ."[92] The SSA expected the regulations to "promote better understanding and acceptance by the public and the courts of disability determinations that are made."[93] In addition to making the rules of decision-making and the final decision itself more understandable to claimants and their representatives, the SSA stated that the regulations "better serve to advise the public, adjudicatory personnel within the Social Security Administration, and the courts, [sic] of the specific rules followed by the Social Security Administration."[94] Finally, the introductory comments to the regulations express the balance the rules attempt to achieve between providing more uniform and definitive standards "while preserving the individuality of the determination."[95] Another major, albeit implicit, goal of the regulations is administrative efficiency through the use of administrative presumptions and administrative notice.[96] More circumspect commentators have described the regulations as "designed to

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the Medical-Vocational Guidelines are simply an embodiment of long-standing policy, the author requested documentary support from the administration under the Freedom of Information Act. Documents obtained indicate that a "grid" system similar to the present guidelines was in effect beginning in 1968. The system was used in cases in which the issue to be decided was whether the claimant was capable of performing work other than his previous employment. Traces of a system of categorical decision-making can be found in administration manuals written in 1963. How widely or consistently these policies were used since their inception is not clear. They were not written with the clarity that characterizes the current Medical-Vocational Guidelines. OASI Disability Insurance Letter No. III-3 (September 20, 1963) (on file with author); Social Security Administration, *Adjudicative Guides 404.1502(b) — Ability To Do Other Work* (September 20, 1968) (on file with author).

91. 43 Fed. Reg. 55,349, 55,355 (1978).

92. *Id.* at 55,349.

93. *Id.*

94. *Id.* at 55,351.

95. *Id.* at 55,362.

96. Holmes v. Harris, No. 79-0730-H, recommendation of magistrate, slip op. at 8-9 (S.D.Ala., Aug. 18, 1980).

save time and money."[97]

IV. ACCURACY, CONSISTENCY, AND RELATED ISSUES

A preliminary inquiry is whether the Medical-Vocational Guidelines achieve or can be expected to achieve their purposes. In any system of categorical decision-making, a strong attempt to achieve one major jurisprudential goal of the system, such as consistency, inevitably requires trade-offs and sacrifice in other features or values, such as accuracy, efficiency, understandability of standards, and acceptance of the system. This section of the article looks at some of the trade-offs involved in promoting one of these major features over another in any decision-making process. Both consistency and accuracy stand out among these goals, but accuracy receives special attention because the Supreme Court has focused repeatedly on it when analyzing the due process aspects of procedural systems.[98]

To evaluate the system's ability to achieve consistency and accuracy, one first must determine the standard by which the system is to be judged. Deciding on such a standard in the disability area is difficult, however, and the standards that can be found suffer from various limitations. The medical-vocational regulations base determinations of disability on the factors of functional capacity, age, education, previous work, and transferability of skills.[99] The regulations' use of these vocational factors is obviously appropriate and important because of their inclusion in the statutory definition of disability.[100] But one must look beyond the vocational factors and residual functional capacity in judging the accuracy and consistency of the medical-vocational regulations to avoid the circularity of evaluating the medical-vocational decision-making process by its own definition of disability. For this reason, in judging major jurisprudential features of the system, this article uses the basic definition of disability in the statute and certain other factors that are normally considered to be a part of disability.[101]

Despite the availability of a statutory definition of disability, accu-

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97. Frady v. Harris, 646 F.2d 143, 145 (4th Cir. 1981) (Hall, J., dissenting).

98. For a discussion of the Supreme Court's due process jurisprudence, see MASHAW, HEARINGS, *supra* note 12, at 8-11, 35; Mashaw, *Due Process*, *supra* note 73, at 37-46.

99. 20 C.F.R. Part 404, Subpart P, App. 2, §200.00 (1982).

100. 42 U.S.C. §423(d)(2)(A) (1976).

101. In judging major features of the Social Security system, one might look beyond the statutory definition and factors usually considered to be a part of disability and analyze the system from the perspective of the program's underlying purpose. Although this tack can be helpful, discerning the program's underlying purpose is difficult. As mentioned, this article will not examine the underlying purpose of the disability program in assessing the Medical-Vocational Guidelines but rather the statutory definition of disability.

racy is difficult to measure because there is no objective or empirical test outside the disability process for determining whether a decision is correct. Saad Nagi's clinical approach,[102] in which a team that included doctors, vocational experts, and psychologists assessed the accuracy of disability determinations, provides the most helpful mode for judging accuracy. But even this approach suffers from the want of an objective external standard, and it is much too expensive and cumbersome for general use. Regardless of the method used to measure accuracy, the factors used in determining disability and the process's methodology must be examined to see if the system is capable of producing accurate results.

A. *The Problem of Over-generalization*

The push for consistent decision-making in a categorical process requires some generalization. The issue then becomes whether this process produces, on balance, greater losses in accuracy than gains in consistency. In disability decision-making, one must ask: as the system approaches over-generalization, are cases being decided and classified incorrectly that would most likely be decided correctly under the more clinical approach that was used before the medical-vocational regulations came into effect?[103] Because of this tendency to over-generalize, categorical decision-making has "been criticized as inappropriately 'fixed and mechanical' and insufficiently sensitive to individual differences."[104] The Medical-Vocational Guidelines also have been criticized[105] and challenged[106] as replacing individualized decision-making with an "average man" concept.

1. *Are Critical Factors Included?*—Any decision-making process, whether clinical or categorical, will be accurate only if the decision-maker considers those features most relevant to the decision at hand. In a categorical decision-making process, the system's designers have predetermined which features will be dispositive. If the standard is a very simple one, it obviously is easier for the decision-makers — under

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102. *See* R. DIXON, *supra* note 11, at 65-73 (summarizing Nagi).

103. *See* Mashaw, *Quality*, *supra* note 12, at 829.

104. Underwood, *supra* note 13, at 1425.

105. J. Lyko, D. Sweeney, D. Carroll, Comments of the Administrative Law Center and National Senior Citizens Law Center on Draft of "Rules For Adjudicating Disability Claims in which Vocational Factors Must be Considered" 6 (December 8, 1976) (on file with the Social Security Administration and the author).

106. *See, e.g.*, Stallings v. Harris, 493 F. Supp. 956, 958 (W.D.Tenn. 1980) *aff'd sub nom.* Kirk v. Secretary of Health and Human Services, 667 F.2d 524 (6th Cir. 1981); *Cf.* Santise v. Harris, 501 F. Supp. 274, 276 (D.N.J. 1980), *rev'd sub nom.* Santise v. Schweiker, 676 F.2d 925 (3rd Cir. 1982).

either a clinical or statistical/categorical method — to discover the relevant features of the case. For example, if disability is defined as being over the age of thirty, the dispositive feature of disability is age. Although there may be the odd cases in which age is difficult to determine because of the want of a birth certificate or an alleged error in birth records, for most cases we have a standard that generally is both simple and easy to apply. If the standard is simple, accuracy and consistency will merge. That is, because standards are being applied correctly to correctly found facts, like cases will be treated in a like manner. Additionally, a simple standard promotes predictability in decision-making. In our example, an individual over the age of thirty will be able to predict, as will his or her lawyer, that disability will be found. As the standard becomes more complex, however, such as the statutory definition of disability which requires the assessment of numerous vocational, medical, and psychological factors, the relevant factors become more difficult to determine, and it becomes more difficult to approach the ideal where accuracy and consistency merge. Under a complex standard, seeking to assure consistency will produce inevitable trade-offs in terms of limiting discretion, individualization, and individual accuracy. A well-designed categorical decision-making process should minimize these trade-offs and should offset them by gains in efficiency and aggregate accuracy.

Although the medical-vocational regulations correctly focus on the various vocational factors set out in the statutory definition of disability, which include age, education, and prior work experience,[107] they ignore completely one crucial factor: the individual's adjustment to his or her disability. Scholars of the disability process and of vocational rehabilitation have recognized the significance of this factor. For example, Robert G. Dixon has stated that, in borderline cases, "the claimant's personal 'set' in the relation to his handicaps is often really the key factor. This is not specified in the statute, regulations, or disability insurance letters, but an observer at several hearings is immediately struck by its overwhelming nature."[108] Dixon goes on to say that:

> The claimant's set regarding enduring pain, discomfort, and restricted movement, regarding his willingness to try to learn a new

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107. 42 U.S.C. §423(d)(2)(A) (1976).

108. R. DIXON, *supra* note 11, at 61. Dixon considers borderline cases to be those in which no listed impairment has been found and which do not involve " 'individuals with a marginal education and long work experience (*e.g.*, 35-40 years or more) limited to the performance of arduous unskilled labor' who 'is not working and is no longer able to perform such labor because of a significant impairment or impairments and, considering his age, education, and vocational background is unable to engage in lighter work.' " *Id.* at 54-56 (quoting 20 C.F.R. §404.1502(c) (1972)).

> skill, regarding his willingness to adjust his life style to the need for greater off-the-job rest, regarding his residual 'zip' in general and especially his pride, are all relevant . . . .[109]

An individual's "set" also has been recognized by vocational rehabilitation specialists as most important in making a prognosis as to future work capacity.[110] The failure to account for this key factor, although contributing to consistency because of the highly subjective nature of this concept, seriously undermines the regulations' worth in accurately assessing disability.

Although the regulations do allow the "grid" to be used simply as a framework where non-exertional limitations exist, it is unlikely that the mental impairments mentioned as one example of nonexertional limitations are meant to include the factor of an individual's "set."[111] Both the regulations' failure to mention adjustment to disability, as well as the medical-vocational regulations' function as a basic rule rather than as a guideline to be used in the case of exceptions, support this conclusion. Because adjustment is a major factor in most of the cases that are governed by the Medical-Vocational Guidelines, and because the existence of a mental impairment is looked at as an exception to the required conclusions of the regulations, the drafters of the regulations probably did not intend to include this concept of adjustment within their framework of decision-making.

In addition to not accounting for a claimant's adjustment to his or her disability, the regulations fail to accommodate minor psychological problems, as distinguished from psychiatric disorders of the magnitude referred to in the regulations as mental impairments.[112] The regulations further fail to recognize the strong link between physical problems and emotional states and, outside of the basic "framework" concept, make no accommodation for this factor.[113]

A recent case upholding the validity of the regulations illustrates their inadequate handling of nonexertional limitations such as minor

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109. R. DIXON, *supra* note 11, at 61.

110. J. CULL & R. HARDY, UNDERSTANDING DISABILITY FOR SOCIAL AND REHABILITATION SERVICES 98-103 (1973).

111. This failure to include the concept of adjustment seems to go against the requirement that cases be decided on an individualized basis. *See infra* notes 178-85 and accompanying text.

112. The failure to consider adjustment also supports this view. *See supra* notes 108-111 and accompanying text. The same evidence discussed above concerning adjustment also supports this view.

113. For examples of links between emotional and physical problems, see M. Friedman & P. Bennet, *Depression and Hypertension*, 39 PSYCHOSOMATIC MEDICINE 134 (1977); Teiramaa, *Psychic Factors and the Inception of Asthma*, 23 JOURNAL OF PSYCHOSOMATIC RESEARCH 253 (1979).

psychiatric and psychological problems. In *Stallings v. Harris*,[114] the claimant was found not disabled despite severe symptoms. He suffered from arthritis, low back pain after two back operations, high blood pressure, nervousness, duodenitis (inflammation of the lower intestine), diabetes, an enlarged liver, poor eyesight, and diarrhea. Records showed that he had suffered two schizophrenic breakdowns, and other psychiatric evidence included findings of "chronic undifferentiated type schizophrenic reaction in partial remission,"[115] a diagnosis of anxiety neurosis with a prognosis that was "guarded, in view of the number of somatic complaints and duration,"[116] and a statement by one doctor "that the plaintiff was 'fairly convinced that he cannot return to work and I doubt that anything is going to change this impression.' "[117] In addition, the record described alcoholism and a rash caused by an anxiety reaction. Another doctor, however, reported that "I see no psychiatric reason why his activities should be significantly reduced."[118] This last report may have provided the "substantial evidence" to support the court's finding of not disabled. Considering the extent of the claimant's emotional problems, this case suggests some courts may demand that psychiatric and psychological impairments be substantial indeed before such impairments become appropriate for consideration in decision-making under the medical-vocational regulations.

In addition to the possibility of excluding a class of important factors, like adjustment, any categorical system is likely to overlook unique characteristics in cases that appear similar but should be decided differently because of some unusual feature.[119] By focusing on a predetermined set of characteristics or categories, the system also may prevent claimants from presenting evidence they regard as favorable by restricting testimony to certain predetermined categories of injury. Categorical decision-making thus not only suffers from the possibility of inaccuracy but also creates a sense of unfairness in claimants who may feel that they are unable to participate in the fashion they believe to be important.[120]

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114. 493 F. Supp. 956 (W.D.Tenn. 1980), *aff'd sub nom.* Kirk v. Secretary of Health and Human Services, 667 F.2d 524 (6th Cir. 1981).

115. 493 F. Supp. at 962.

116. *Id.*

117. *Id.* at 961.

118. *Id.* at 962.

119. "The eye sees in things what it looks for, and it looks for what is already in the mind." G. BELLOW & B. MOULTON, THE LAWYERING PROCESS 296 (1978) (Motto of Michael Demiashkevitch, adopted by the School of Scientific Police in Paris).

120. *See* Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring); Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 279-80 (1978).

Any categorical decision-making process therefore should include those factors necessary to a correct decision under the proper standard, and should not prevent the important characteristics of individual cases from being considered. In addition, those categorical factors that are used should accurately reflect or interpret the information they categorize and should not be overly generalized themselves. The categorical factors of age, education, and transferability of work skills in the medical-vocational regulations all have been criticized as being overly generalized and not accurately reflecting real facts.

2. *Are Included Factors Workable?*

a. *Age*—Age, as defined in the regulations, reflects the conventional wisdom that younger workers are generally better able to adjust to physical problems than their seniors because of their supposed greater ability to learn new skills and to adapt to new work settings. Although this assumption seems to work as a gross reflection of how the aging process affects workers, there are serious questions about its usefulness as a factor in deciding individual cases. As one commentator observed, "[t]he typical response of vocational expert witnesses was that while older workers are generally less adaptable to change than younger workers, it is virtually impossible to apply that generalization to specific situations; moreover, if necessity requires, most individuals will adapt to new situations and new jobs."[121] The Social Security Administration concedes that "there are no conclusive data which relate varying specific chronological ages to specific physiologically-based vocational limitations for performing jobs . . . ."[122] Some advocates of the system, even though troubled by the inaccuracy that can result in individual cases, have justified the system by saying that it creates a certain rough justice in recognizing the effects of the aging process and, although arbitrary distinctions may result, the system is the only feasible way of recognizing the proposition that aging affects adaptability.[123] Others, however, even though convinced of this assumption and of the possibility of drawing roughly accurate lines to reflect the effects of the aging process have come to question this line-drawing as they themselves grow older.[124] Additional empirical study needs to be done

121. Goldhammer, *The Effect of New Vocational Regulations on Social Security and Supplemental Security Income Disability Claims*, 32 AD. L. REV. 501, 508 (1980).

122. 43 Fed. Reg. 55,349, 55,359 (1978).

123. Goldhammer, *supra* note 121, at 508.

124. One of the funniest things that happened in a long time — I guess it was 1960 or whenever the age fifty limitation for cash payments was repealed — was members of the Ways and Means Committee sort of looking at each other and saying, "Well, there's no logic to age fifty. Whatever made anyone think that that had any

to discern whether this "rough justice" produces better decision-making and, within acceptable limits, accurately reflects the effect of age on an individual's ability to work in new settings and positions.

Another criticism of the age factor has been that insignificant differences in age create dramatic differences in outcome. If cases that might have been decided either way prior to the medical-vocational regulations are now decided one specific way because of the regulations, this over-generalization creates no significant problem.[125] It seems more likely, however, that decisions now turn on the factor of age, and outcomes are significantly different now than they were before the medical-vocational regulations took effect. Older individuals will fare much better under the Medical-Vocational Guidelines than younger workers, for whom disability will be virtually impossible to establish. Regardless of the category of work into which a claimant's residual functional capacity falls, the claimant in every case will have a better chance of collecting benefits if he or she is of "advanced age" or "closely approaching advanced age."[126] In only one category — Sedentary Work — does the table give an individual in the 39-to-45-year-old age range a chance of being found disabled.[127]

Examination of the age factor suggests that a danger may be inherent in all categorical decision-making systems: they create an almost irresistable temptation to apply their criteria mechanically, as a means to find easy answers to hard questions. Although the regulations caution that flexibility should be used in their application[128] and that age may not be important in specific cases,[129] it is likely that these caveats will go unheeded in many cases because the "grid" seems to offer a basic formula to determine disability — a prospect too appealing to turn down. Although there has been little empirical research into how fact-finders decide cases, the basic strategy of both appellate and trial attorneys has been to develop simple theories that can be easily con-

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> sense to it?" When we recall that some of those very same members just a couple of years earlier had been accepting very logical rationalizations that people are giving them as to why you're much less likely to be rehabilitated after fifty and why it was a much more logical approach to at least go that far if you weren't going to meet the cost of going all the way.

M. DERTHICK, *supra* note 68, at 314, (quoting Interview with Arthur E. Hess, 41-42 (Oral History Collection, Columbia University)) (1966).

125. Mashaw, *Quality*, *supra* note 12, at 829.

126. *See* 20 C.F.R. Part 404, Subpart P, App. 2, Tables 1, 2, 3 (1982).

127. *Id.*

128. "Ages 45, 50, 55 and 60 are intended as specific indicators but are not intended to be applied mechanically in borderline situations . . . ." 43 Fed. Reg. 55,349, 55,359 (1978).

129. "This designation of age is an expectation only and not an arbitrary limit and may not be crucial in a particular case." 43 Fed. Reg. 55,349, 55,354 (1978).

veyed and readily understood. The underlying rationale for this strategy is that simple concepts are more easily grasped, more easily dealt with, and more likely to be used in decision-making than complicated ones. Accordingly, rather than deciding the issue of disability based on more complex and primarily subjective issues such as one's ability to adapt to a new work setting or the effect of a particular physical impairment, the fact-finder will apply the simple and easily discernible fact of the claimant's age in a mechanical fashion, giving it unwarranted significance.

The Appeals Council's decision in a case shortly after the guidelines went into effect illustrates this process. In *Freeman v. Harris*,[130] the court remanded a claimant's case for an additional hearing before an Administrative Law Judge. At the first hearing, the Administrative Law Judge had found that the claimant's physical problems, his pain, and the drowsiness caused by medication caused him to be disabled in 1975. The Appeals Council modified this decision and found that disability began on September 3, 1977, the date of the claimant's 55th birthday. Although the court refused to permit the Medical-Vocational Guidelines to be applied retroactively to a claimant's detriment, the case suggests that even at the Appeals Council — the highest level within the Social Security Disability system — age will become a strong determining factor and will result in decisions that have the appearance of being overly generalized.[131]

b. *Education*—The regulations' treatment of education's effect on disability is another over-generalized area having the potential for creating arbitrary decisions. The regulations do reflect the generally accurate proposition that employability increases with additional education, but they create rather vague, ill-defined categories of educational level that may not be valid in determining the outcome in individual cases. The regulations divide educational levels into four categories: illiterate and unable to communicate in English, limited education and at least able to communicate in English, limited education or less, and high school graduate or more. The category of high school graduate is divided into education which provides for direct entry into skilled work and that which does not.

The regulations allow the educational factor to be used more flexibly than the general grid-like structure of the Medical-Vocational

130. 1 SOCIAL SECURITY FORUM No. 6, at 7 (1979), citing Freeman v. Harris, No. 76-A-1648-M (N.D.Ala. October 3, 1979).

131. *See Grids: Age Factor and Onset Date*, 4 SOC. SEC. LAW FORUM No. 12, at 4 (Dec. 1982).

Guidelines would indicate. For example, the regulations state that lack of formal schooling is not necessarily proof that the individual is uneducated or lacks such capacities.[132] Additionally, prior work experience and daily activities such as hobbies may indicate higher capacities than an individual's formal education might suggest.[133] Conversely, the regulations also note that formal education that was completed many years before the beginning of an impairment may no longer be useful in determining work ability.[134] Although far more flexibility is called for in applying the educational factor than in the application of age, claims examiners, Administrative Law Judges, and the Appeals Council are likely to consider a person's formal educational level without a thorough inquiry into the claimant's real educational skills. The regulations are likely to be applied in a mechanical fashion, and the arbitrary limits they set probably will lead to inaccurate decisions.

c. *Transferability of Skills*—The transferability of skills factor is especially problematic because it compounds the problems of over-generalization with an additional difficulty: the factor itself is difficult to determine. Unlike the simple fact of age and the somewhat more complex education factor, transferability involves a very difficult determination of whether the claimant's skills are transferable to a wide range of jobs that exist in significant numbers for a given functional capacity, or to only a few jobs or categories within that functional capacity range.[135] The complexity of these issues makes it very likely that inconsistent and inaccurate determinations will be made. Additionally, the regulations assume that skills are less transferable as age increases and, for certain age categories, drop the transferability inquiry completely. The transferability factor thus incorporates the age factor's potential for inaccuracy described above. Finally, like age and education, transferability provides overworked or lazy deciders with tests that promise easy answers to difficult questions.

The structure of the age, education, and transferability categories in the medical-vocational regulations is likely to cause problems of inaccurate determinations. Additional inaccuracy is likely to be generated because the effects of these factors, especially that of age upon transferability, are of questionable validity. In addition, decision-makers likely will use the factors with greater rigidity than the guidelines require. These problems, combined with the guidelines' failure to take

132. 20 C.F.R. §404.1564(a) (1982).
133. *Id.*
134. 20 C.F.R. §404.1564(b) (1982).
135. J. Lyko, D. Sweeney, and D. Carroll, *supra* note 105, at 44.

into account certain critical factors, especially a claimant's "set," results in an over-generalized handling of cases.

B. *The Mix of Rules and Discretion*

As pointed out earlier, a major goal in the adoption of the Medical-Vocational Guidelines was to increase consistency in an administrative process heavily criticized for its inconsistency. Generally, one method for increasing consistency — applied extensively in the "grid" — is to curb discretion. Although consistency is the treatment of like cases in a like fashion, one needs to decide what makes cases similar. The Medical-Vocational Guidelines channel discretion when dealing with the factors of age, education, and work experience. Consistency, if judged on the basis of these vocational factors, is likely to be increased. But, the more important standard for judging consistency is that of the statutory standard of disability, and consistency merges with accuracy when the disability statute becomes the standard against which it is judged. But consistency judged by the statutory standard of disability is unlikely to be achieved despite the costs that have been incurred in adopting the Medical-Vocational Guidelines.

First, the Medical-Vocational Guidelines limit discretion during the final stage of the decision-making process, which is too late in the process to improve consistency greatly. That is, the rules limit discretion when the decider is applying the already determined factors of age, education, etc. (in cases where no nonexertional limitations have been found), but decision-makers can exercise great discretion in developing the subordinate facts that make up the vocational factors.

Second, the system allows great discretion in making decisions about the individual's "residual functional capacity," i.e., whether the individual is able to do sedentary, light, medium, or heavy work. Like the vocational factors, this issue of capacity must be decided before one uses the "grid" which limits discretion and requires certain disability findings. "[A]nd it is usually that capacity [residual functional capacity] which is the determinative issue in a disability case."[136]

The decision on physical capacity, which takes into account a wide range of medical information, testimony from the claimant, and testimony from any witnesses the claimant calls, is a highly judgmental and subjective determination. Yet the "grid" provides no guidance at this juncture. An accurate determination of this major and dispositive factor would create more consistent decision-making in the disability determination process.

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136. Goldhammer, *supra* note 121, at 509.

Consistency can be hampered further by fact-finders who disagree with the disability determinations required by the varying vocational factors found in the "grid" and manipulate the functional capacity findings to achieve results with which they agree. This practice is similar to that followed by Administrative Law Judges who were faced with vocational testimony requiring outcomes with which they did not agree.[137] Although manipulation of outcomes is possible in any deliberative process, the problem is more troubling in categorical systems like the Medical-Vocational Guidelines where decision-makers can hide their manipulation and bias behind a system which initially appears to have greater impartiality and precision.

Another potential source of inconsistency is the regulation's handling of the transferability factor. As the prefatory materials to the guidelines acknowledge, "while *understanding of skills and the basis of transferability* can be obtained from Volume II of the DOT and the lists of occupations in 'Selected Characteristics of Occupations By Worker Traits and Physical Strength, Supplement 2 to the Dictionary of Occupational Titles, Third Edition', this *remains a judgmental area*."[138]

These examples of how consistency may not be achieved under the Medical-Vocational Guidelines illustrate the complex mix of rules and discretion that exists in disability determinations. "The unthinking assumption that an officer either follows a rule or exercises discretion is false, because rules overlap with discretion in many ways."[139] The particular mix of discretion in the Medical-Vocational Guidelines, which allows great variation in the initial stages in the disability determination process and channels discretion later in the process, demonstrates why consistency is unlikely to be dramatically increased when one uses the statutory definition of disability as a yardstick for consistency. This analysis of the mix between discretion and rules reveals the theoretical problems that exist in the Medical-Vocational Guidelines' attempt to promote consistency. Much empirical work needs to be done on this issue, but studies of the state programs which, according to the Social Security Administration, used a form of the Medical-Vocational Guidelines before its appearance in the Federal Register, have criti-

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137. MASHAW, HEARINGS, *supra* note 12, at 78. The dangers of manipulation in categorical judicial decision-making have been expounded in other areas. *Cf.* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS at 48-89 (2nd ed. 1980) (incorrect initial classification of substantive problem determines choice of law).

138. 43 Fed. Reg. 55,349, 55,361 (1978) (emphasis added).

139. 2 K. DAVIS, *supra* note 68, §8:7, at 186.

cized the states for their inconsistent decisions.[140]

C. *The Escape Clause Concept*

Although the Medical-Vocational Guidelines create irrebuttable adjudicative rules,[141] the regulations contain, both implicitly and explicitly, certain escape devices. The discretion allowed in finding adjudicative facts which are to be plugged into the "grid" implicitly provides flexibility in the disability determination. Explicit provisions in the regulations provide an escape by allowing the guidelines to be used as a "framework" for decision-making where nonexertional factors exist.[142] Although the regulations do not contain an exhaustive list of nonexertional limitations, they do cite mental, sensory, and skin impairments as examples. When assessing mental disorders, the Social Security Administration looks at factors such as "ability to understand, to carry out and remember instructions, and to respond appropriately to supervision, co-workers and work pressures in a work setting."[143] When a claimant has other nonexertional impairments and an impairment which affects physical exertion, the decision-maker "must consider both in deciding [the claimant's] residual functional capacity."[144] This escape clause concept explicitly changes the governing rules of the regulations into guiding rules,[145] and thus preserves some discretion. It also allows for some needed individualization in determining disability.

Although the designers of the regulations should be commended for allowing individualization through this escape clause for nonexertional impairments, the "framework" concept is unlikely to increase accuracy substantially because its use is likely to be severely limited, especially at the initial determination and reconsideration stages. First, some degree of nonexertional impairment, usually emotional, exists in

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140. REPORT OF THE COMPTROLLER OF THE UNITED STATES, THE SOCIAL SECURITY ADMINISTRATION SHOULD PROVIDE MORE MANAGEMENT AND LEADERSHIP IN DETERMINING WHO IS ELIGIBLE FOR DISABILITY BENEFITS, SUBCOMMITTEE ON SOCIAL SECURITY OF THE COMMITTEE ON WAYS AND MEANS, 94TH CONG., 2ND SESS., (Comm. Print on H.R. 15630, 1976).

141. "[T]he distinction should be made between adjudicative facts, which can be rebutted, and the adjudicatory rule to be applied to these facts, which is conclusive." 43 Fed. Reg. 55,349, 55,361 (1978).

142. 20 C.F.R. Part 404, Subpart P, App. 2, §200.00(e)(2) (1982).

143. 20 C.F.R. §402.1545(c) (1982).

144. 20 C.F.R. §404.1545(d) (1982).

145. For some basic propositions about rules and discretion, see 2 K. DAVIS, *supra* note 68, §8:7, at 183-92.

most disability cases.[146] If nonexertional impairments and the framework concept are taken seriously, given the number of situations in which the "grid" is to be used as a framework rather than conclusively, the exceptions to the rule may outnumber the situations in which the categorical rule itself applies. Because of the nonexertional impairments stature as an exception, fact-finders are likely to avoid applying the escape clause concept even when its application is warranted. Second, the escape clause is both less obvious and more difficult to comprehend than the tables which make up the "grid." Hence, most fact-finders will use the "grid" as often as possible to simplify their work and to avoid both criticism from supervisors and reversals by higher level adjudicators in the Social Security Administration. *Stallings v. Harris*, discussed earlier,[147] supports the view that the escape clause is unlikely to be applied when appropriate.

D. *The Problem of Vocational Testimony*

Another major goal of the regulations is to eliminate problems with vocational testimony. One of the problems with vocational testimony has been that experts' opinions differ, creating some inconsistency in the Social Security decisions. For example, in a case concerning an individual restricted to sedentary work because of a back impairment, one expert might testify that the claimant could perform a significant number of entry-level unskilled jobs. Another might disagree with that conclusion because of the individual's lack of familiarity with sedentary settings. To a degree, this particular form of inconsistency is eliminated by the Medical-Vocational Guidelines by limiting the number of situations in which vocational testimony is needed.[148]

The SSA also expected to cut costs by eliminating the need for vocational experts in most cases where they were previously used. Louis Zinn, the Vocational Consultant Program Administrator, expressed his opinion in a memorandum to vocational experts that their testimony would be used only on the issues of transferability and perhaps on the classification of past work into categories such as unskilled, semi-skilled, etc. He stated: "[Y]our testimony will be directed to these matters only, and you must refrain from offering testimony which conflicts with a conclusion stated in the rules."[149] Others expected the

146. R. DIXON, *supra* note 11, at 80 (citing Social Security Administration Operations Research Staff, Evaluation, Progress Report (M. Rock and F. Ichniowsky) 3, 19 (1967)).

147. *See supra* text accompanying notes 114-18.

148. Goldhammer, *supra* note 121, at 505.

149. Memorandum of Louis Zinn, Vocational Consultant Program Administrator, Bu-

need for vocational testimony to be virtually eliminated by the Medical-Vocational Guidelines.

These goals are unlikely to be realized. The regulations plainly still contain many areas where vocational testimony is necessary. Because the testimony is costly and experts will differ, to the degree that this testimony is required, both the goals of economic efficiency and consistency are undermined. If the vocational testimony is properly used, however, and allows for more expert consideration of complex areas, individual accuracy may be increased. But this increase in accuracy and any correlated increase in consistency will occur only if the Medical-Vocational Guidelines are generally well constructed for making disability determinations and the assistance of vocational experts in classifying work aids in fine-tuning an already well-constructed machine.

As pointed out in Zinn's memorandum, transferability is an area that will continue to require the testimony of vocational experts. The regulations give some guidance on the issue of transferability[150] but continue to rely heavily on the vocational expert. For example, one section states that:

> The presence of acquired skills that are readily transferable to a significant range of skilled work within an individual's residual functional capacity would ordinarily warrant a finding of ability to engage in substantial gainful activity regardless of the adversity of age, or whether the individual's formal education is commensurate with his or her demonstrated skill level.[151]

Although the regulation gives guidance, it leaves open the issue of whether a person's skills are "readily transferable" and whether the individual's formal education is "commensurate with demonstrated skill level." These issues, which many ALJ's will feel capable of resolving, require the expertise of vocational experts.

A similar area requiring vocational expertise is the classification of past employment into one of two categories: 1) semi-skilled or skilled work, or 2) unskilled or none. This step is absolutely required in using the "grid."[152] Although some past work is easily classified by Administrative Law Judges and other fact-finders in the Social Security Administration, many forms of work require classification by a vocational expert. Fact-finders should look not only at the title of the job that was

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reau of Hearings & Appeals, Social Security Administration, at 2 (January 16, 1979) (on file with author).

150. *See, e.g.*, 20 C.F.R. Part 404, Subpart P, App. 2, §201.00(e)-(h) (1982).

151. 20 C.F.R. Part 404, Subpart P, App. 2, §201.00(e) (1982).

152. *See* 20 C.F.R. Part 404, Subpart P, App. 2, Tables 1, 2, 3 (1982).

performed but also at the specific skills that were used. In individual cases, if an ALJ does not fully explore the skills of a particular job or classify the level of work without calling a vocational expert, who can state specifically for the record the reasons for the classification of prior work, he or she will risk reversal.[153]

In many instances where residual functional capacity, age, and previous work experience are not determinative, the disability determination turns on whether or not the individual's education provides for direct entry into skilled work,[154] another area that often requires vocational testimony. The complexity of this area is demonstrated by the manner in which the regulations deal with education as a vocational factor.[155] The regulations point out that education may not be demonstrated simply by examining formal schooling because past work experience, daily activities, hobbies, or the results of testing may show capacities that exceed those expected if one considers only formal schooling. The regulations themselves thus recognize the complexity that the tables ignore, further evidencing the difficult vocational judgments that may need to be made in what appear to be rather ordinary disability claims.

As discussed earlier, in cases where claimants have nonexertional impairments or are unable to perform a full range of work within a specific physical category, the Medical-Vocational Guidelines "provide a framework for consideration of how much the individual's work capability is further diminished in terms of any types of jobs that would be contraindicated by the nonexertional limitations."[156] Although the regulations do state that full consideration must be given to all the relevant facts and that examiners must look through the definitions and discussions of the factors found earlier in the regulations,[157] they provide little guidance on how this framework concept is to be used in a wide range of individual cases. Because of this lack of guidance, it seems that the existence of nonexertional factors requires the assistance of vocational experts to give accuracy to the disability determinations in all but the fairly obvious cases.

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153. *See* O'Banner v. Secretary of HEW, 587 F.2d 321, 323 (6th Cir. 1978); Garrett v. Richardson, 471 F.2d 598, 603-04 (8th Cir. 1972); Henninger v. Celebreeze, 349 F.2d 808, 817-19 (6th Cir. 1965). *See also* Goff v. Harris, 502 F. Supp. 1086, 1091 (D.Va. 1980); Wilson v. Harris, 496 F. Supp. 746, 747-48 (D.Wis. 1980).

154. *Compare* 20 C.F.R. Part 404, Subpart P, App. 2, Table 1, Rule 201.06 (1982) (education does not provide for direct entry into skilled work: finding, disabled) *with* Rule 201.08 (1982) (education provides for direct entry into skilled work: finding, not disabled).

155. *See* 20 C.F.R. §404.1564 (1982) (DI); 20 C.F.R. §416.964 (1982) (SSI).

156. 20 C.F.R. Part 404, Subpart P, App. 2, §200.00(e)(2) (1982).

157. *See* 20 C.F.R. §§404.1520 - 404.1569 (1982).

Because of the complex fact patterns found in most disability cases and the failure of the Medical-Vocational Guidelines to deal effectively with cases that have in them factors other than exertional limitations, a strong need for vocational testimony remains. In fact, the case law seems to be recognizing this complexity and to be moving to limit the kinds of cases that can be decided without vocational testimony.[158] To the degree that this need is met, the goal of consistency which the SSA sought to achieve by replacing the possibly varying opinions of experts with rules is undermined. Despite this need and its judicial recognition, vocational experts are unlikely to be called in the wide range of cases in which their testimony would be not only helpful but also necessary. This is caused in part by the Social Security Administration's expectation that the Medical-Vocational Guidelines largely would eliminate the need for vocational testimony. Undoubtedly, the cost of calling vocational experts and the failure of Administrative Law Judges to explore fully the complex facts in individual cases also will be reasons for limited vocational testimony. By failing to call vocational experts, ALJ's will be involved in vocational judgments that they are completely unqualified to make. This will undoubtedly cause inaccurate individual determinations. It remains to be seen if aggregate accuracy will be lower than pre-Medical-Vocational Guidelines levels, and whether losses in accuracy will be offset by any gain in consistency and economic efficiency.

E. *A Fair and Understandable Process*

In addition to the goal of consistency in decision-making, the Medical-Vocational Guidelines espouse goals of making "clearer to claimants and their representatives how disability is determined where vocational factors must be considered" and "promot[ing] better understanding and acceptance by the public and the courts of disability determinations that are made."[159] It is laudable for any adjudicative

158. *See, e.g.*, Freeman v. Harris, 509 F. Supp. 96, 102-03 (D.S.C. 1981). Of special interest on the issue of the need for vocational testimony is the recent case of Hall v. Harris, 658 F.2d 260, 267 (4th Cir. 1981). Although the court had recognized in an earlier case, Frady v. Harris, 646 F.2d 143, 145 (4th Cir. 1981), the ability of the SSA to make disability determinations based on the tables in the Medical-Vocational Guidelines, in *Hall* the court noted that the ALJ failed to make findings on the skills required in the claimant's past work, the transferability of those skills, whether the past work was semi-skilled or skilled, and whether the claimant was capable of performing a full range of sedentary skills. Because of these issues, the court suggested that "if upon remand a vocational expert's testimony is received on the question whether claimant is able to perform specific alterative jobs available in the national economy," any uncertainty whether the grid could be used to direct conclusions of non-disability would be avoided. Hall v. Harris, 658 F.2d at 268.

159. 43 Fed. Reg. 55,349 (1978).

system to make its determination process and standards understandable and acceptable to those affected by it.[160] But anyone who is familiar with the workings of the Medical-Vocational Guidelines, let alone the basic Social Security disability determinations process, and who has some understanding of the claimant's role within the system, would be hard-pressed to imagine that the system has become more understandable to more than a handful of claimants. Claimants obtain their understanding of disability from the common-sense meaning of the word. Most believe that if they cannot find work because of medical impairments, they are disabled. In short, they believe that if there is no reasonable possibility of their being employed, they are entitled to Social Security disability. It defies their understanding to hear that they can be denied benefits because of their theoretical ability to do a job for which they would never be hired and for which there may be no openings.[161]

The claimant's common-sense understanding of disability is antithetical to the statutory definition. This is especially true for persons who have worked and contributed to the Social Security fund and are applying for Title II benefits. They have paid into the fund for years, have heard television advertisements extolling their ability to rely on Social Security, and have developed a strong faith in the system of government benefits; they are incredulous when they discover the difficulties they face in obtaining Disability Insurance Benefits. Claimants need to be educated in how the statute and the guidelines define disability. This might be done through informative advertising, claimants' contacts with claims examiners, and employers who withhold Social Security taxes. But the promulgation of regulations, especially those with the specificity and complexity of the Medical-Vocational Guidelines, is an extraordinarily unlikely route to raise claimants' understanding of the disability process.

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160. *See* L. FULLER, *supra* note 9, at 63-65.

161. 20 C.F.R. Part 404.1566(c)(1982) states,

> *Inability to obtain work*. We will determine that you are not disabled if your residual functional capacity and vocational abilities make it possible for you to do work which exists in the national economy, but you remain unemployed because of
> (1) Your inability to get work;
> (2) Lack of work in your local area;
> (3) The hiring practices of employers;
> (4) Technological changes in the industry in which you have worked;
> (5) Cyclical economic conditions;
> (6) No job openings for you;
> (7) You would not actually be hired to do work you could otherwise do; or
> (8) You do not wish to do a particular type of work.

(emphasis added).

Even if achieved through regulations or some educational process, understanding is very different from acceptance. "By acceptability of the decision process we mean its perceived fairness."[162] A claimant's perception of fairness of the disability process, like his or her understanding, is likely to come from common sense and experience. Claimants' perceptions of fairness[163] are based on their knowledge of and comparison to other claimants' situations as well as other factors such as their treatment by Social Security personnel, including Administrative Law Judges.[164] Although perceived fairness, at least to the degree it is affected by the relationship between claimants and personnel of the Social Security Administration, may be increased by the efficient and courteous handling of claims and inquiries, it is unlikely that much, aside from the effect of more accurate decision-making, can be done to increase the perception of fairness based on the limited sample of cases claimants are familiar with and their probably minimal familiarity with the facts of those claims.

In any event, it seems unlikely that acceptance of the disability process will be improved through the promulgation and use of the Medical-Vocational Guidelines. It is unlikely that the claimant who has heard a vocational expert testify that he can perform certain jobs for which he knows he will never be hired will perceive the process as fair. By concealing from the claimant this process of determining whether the jobs he can perform exist in significant numbers — which is the situation for unrepresented claimants in cases where the Medical-Vocational Guidelines are applied — perceived fairness of the process might be increased. But mystifying, hiding, and lessening a claimant's understanding of the disability process are, at the least, extraordinarily questionable methods for increasing perceived fairness.

An important element of both understandability and acceptability is predictability: surprise outcomes create confusion and give the impression of arbitrariness. The regulations, at least to the extent that they state specific procedures to be followed and a set of rules to be used in determining disability, certainly make the procedures more

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162. "This [acceptability of the decision process] is an extremely slippery notion. It is confusing in part because there are a number of different perspectives from which to view fairness — the claimants, the Congress, the legal profession, the society as a whole." MASHAW, HEARINGS, *supra* note 12, at xxiii.

163. This opinion of clients' perceptions of fairness comes from discussions with a limited number of claimants and conjecture about how other claimants perceive the system.

164. This concept of "fairness" is distinct from the concepts of fairness embodied in procedural due process and the Administrative Procedure Act, 5 U.S.C. §§551-59, 701-06, 3105, 3344, 5371, 7521 (1976 & Supp. V 1981). *See also* 5 U.S.C. §556(e) (1977); Holmes v. Harris, No. 79-0730-H, recommendation of magistrate, slip op. at 14-15, (S.D.Ala. Aug. 18, 1980).

concrete and clearer to a claimant's representative.[165] They do little, however, to make case outcomes more predictable.

At the extremes of the regulations, in cases where most or all factors point to or away from a determination of disability, prediction is easy. For example, where an individual is limited to sedentary work, is quite old, has a limited education, and has no transferable skills, the outcome is easily predicted. But cases of this nature are the unusual ones, and advocates had the ability to predict the outcome of these cases before the promulgation of the Medical-Vocational Guidelines. Prediction seems to be only marginally aided by the guidelines.

One advantage of the promulgation of the Medical-Vocational Guidelines for advocates — and consequently a disadvantage for unrepresented claimants — is that the guidelines have created a number of interesting lawyering issues. These issues have arisen not only in cases challenging the regulations but also in the most routine of claims. The advocate, in cases not resolved by the listing of impairments, accumulates evidence to show that various medical and vocational factors fit his client on a line of the "grid" that requires a finding of disabled. Where this approach is unlikely to reach a favorable result, the advocate works at finding and developing facts that require the tables in the guidelines to be used only as a framework for deciding the case or that take the case completely outside the guidelines. Although the guidelines provide strategy options to a claimant's representative, this need for sound lawyering could aggravate the disparity in outcomes between represented and unrepresented claimants under the guidelines. Thus, although the Medical-Vocational Guidelines make the disability process more understandable to claimants' representatives, they do little to achieve the espoused goals of making the process more understandable to claimants and promoting "better understanding and acceptance by the public and the courts of the disability determinations that are made."[166]

V. CASE CHALLENGES TO THE MEDICAL-VOCATIONAL GUIDELINES

Claimants and their advocates have challenged the Medical-Vocational Guidelines on a number of theories. This section, by no means an exhaustive discussion of the challenges made and cases in the area,

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165. The proposition that the process is clearer to representatives because of the regulations assumes that representatives will be diligent enough to search out and work through these difficult regulations. My observations of hearings and those of my students lead me to believe that large numbers of representatives are ill prepared in their cases, and, among other things, have not considered how the Medical-Vocational Guidelines apply.

166. 43 Fed. Reg. 55,349 (1978).

gives the reader an overview of the basic arguments advocates have used and some of the ways these arguments have been handled by the federal courts.

Advocates have most frequently argued that the Medical-Vocational Guidelines establish a system for adjudication that is at variance with the applicable statutes, decisions, and the Constitution. The regulations have been upheld in almost all the circuits;[167] but two circuits, the second and the eleventh, have severely limited the use of the regulations.[168] The fact that the regulations have been upheld by some courts, struck down by others, and allowed only as a means of granting benefits in still others, may result in the replacement of previous inconsistencies in decision-making with new ones based on a circuit's acceptance or rejection of the Medical-Vocational Guidelines.[169] This inconsistency among circuits is likely to be remedied by the Supreme Court's upcoming decision in *Schweiker v. Campbell*,[170] which presents the question of whether the SSA may rely on the guidelines rather than individualized proof that a claimant is able to perform substantial gainful activity.

One major thrust of arguments challenging the medical-vocational regulations is that they improperly use administrative notice. Professor Davis has described the balance that must be struck between the efficiency of notice and the fairness of individualized proof as follows:

> the basic principle is that extra record facts should be assumed whenever assuming them is convenient but that convenience should always yield to the requirement that parties should have opportunity to meet in an appropriate fashion all facts that influence the disposition of the case.[171]

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167. Torres v. Secretary of Health and Human Services, 677 F.2d 167, 169 (1st Cir. 1982); Santise v. Schweiker, 676 F.2d 925, 935 (3rd Cir. 1982); Rivers v. Schweiker, 684 F.2d 1144, 1155 (5th Cir. 1982); Kirk v. Secretary of Health and Human Services, 667 F.2d 524, 530-32 (6th Cir. 1981); Commins v. Schweiker, 670 F.2d 81, 83 (7th Cir. 1982); McCoy v. Schweiker, 683 F.2d 1138, 1141 (8th Cir. 1982); Frady v. Harris, 646 F.2d 143, 145 (4th Cir. 1981).

168. *See, e.g.*, Campbell v. Secretary of Health and Human Services, 665 F.2d 48, 53-54 (2d Cir. 1981), *cert. granted sub nom.* Schweiker v. Campbell, 102 S.Ct. 2956 (1982); Broz v. Schweiker, 677 F.2d 1351, 1359-61 (11th Cir. 1982).

169. For those who believe the regulations simply are the embodiment of long-standing Social Security policy or a more accurate and consistent method for making decisions in disability claims, the lack of uniform application of the regulations in various circuits may not create great problems. For those who believe the regulations created a substantial change in the disabilty determination process, however, the realization that claimants in one circuit will be treated very differently from those in another is more troublesome.

170. Campbell v. Secretary of Health and Human Services, 665 F.2d 48 (2d Cir. 1981), *cert. granted sub nom.* Schweiker v. Campbell, 102 S.Ct. 2956 (1982).

171. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE, §15.17, at 198 (1980).

The regulations plainly make wide use of administrative notice. Administrative notice is taken of: various definitions and data, for example, the requirements of sedentary work; of specific facts, such as the effect age has upon the transferability of acquired work skills; and more conclusively, of the disability or nondisability of people with certain physical capacities and vocational characteristics. Thus, under the regulations, claimants have little or no opportunity to question, to respond to, or to revise adverse evidence that is set up against them by the medical-vocational regulations.

Claimants challenging this heavy reliance on administrative notice succeeded at first, but recently have suffered several significant defeats. In a 1981 case, *Holmes v. Harris*, the Southern District of Alabama found that precluding claimants from presenting contrary rebuttal employment evidence at a hearing violated the Administrative Procedure Act.[172] The magistrate's recommendation in *Holmes* also found that the Medical-Vocational Guidelines and the administrative notice used in them violated 42 U.S.C. § 405(b)'s "adduced at the hearing" requirement[173] because the Administrative Law Judge had not even mentioned that he was noticing the facts contained in the medical-vocational regulations and would later base his decision upon them. In 1982, however, three circuits (including the eleventh) held that the regulation's use of administrative notice does not violate the APA.[174]

Other cases have challenged the regulations' inconsistency with the Social Security statute.[175] In *Santise v. Harris*,[176] for example, the regulations were challenged as being inconsistent with the Social Se-

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172. No. 79-0730-H, recommendation of magistrate, slip op. at 13-15, (S.D.Ala. Aug. 18, 1980).

173. "Upon request by [a claimant] who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered, [the Secretary] shall give [the claimant] reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, *on the basis of evidence adduced at the hearing*, affirm, modify, or reverse his findings of fact and such decision. . . ." 42 U.S.C. §405(b) (Supp. IV 1981) (emphasis supplied).

174. *See* McCoy v. Schweiker, 683 F.2d 1138, 1145-46 (8th Cir. 1982); Rivers v. Schweiker, 684 F.2d 1144, 1155 (5th Cir. 1982); Broz v. Schweiker, 677 F.2d 1351, 1362 (11th Cir. 1982). The relevant section of the Administrative Procedure Act provides: "When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on a timely request, to an opportunity to show the contrary." 5 U.S.C. §556(e) (1977).

175. In Cummings v. Harris, 513 F. Supp. 35 (S.D.Ohio 1980), the court stated that:

> As a general matter, use of the tables can be viewed as conflicting with the statutory requirements and Sixth Circuit precedents. 42 U.S.C. §423(d)(2)(A) provides that a person is disabled when he can neither return to his former job nor, considering his age, education and work experience, engage in any other "gainful work which exists in the national economy." Under the shifting burden of production rule in this Circuit, the emphasized language would seem to put the burden on the Secretary to show (a) that

curity Act.[177] The district court found that the Act required the Administrative Law Judge to determine, as a matter of fact, whether a claimant is capable of engaging in substantial gainful activity, and that the regulations, which require the judge to make only subsidiary findings and then dictate a conclusion on substantial gainful activity, were inconsistent with the Act and could not be relied upon in denying benefits. The court in *Santise* concluded that "the newly promulgated regulations are at odds with the established judicial interpretation of the Act, which requires individualized treatment of each claim."[178] Like the *Holmes* holding, however, *Santise* was subsequently overturned by the court of appeals.[179]

In addition to statutory challenges, claimants also have attacked, under federal common law, the official notice concept set out in the regulations.[180] Although there is no absolute requirement that a vocational expert be used in all cases, the leading case in the area, *Garrett v. Richardson*,[181] and its progeny make the use of vocational testimony necessary in many cases and thus limit the use of administrative notice. The rationale for this position is that although some claimants may be able to do a wide range of jobs in a general category of work, for example, light work,[182] the claimant should not be required to disprove his or her ability to perform all of the jobs imaginable within a broad category. Based on this rationale, the courts have held that administrative notice is insufficient to sustain the Secretary's burden of showing that there are jobs a claimant is capable of performing and that vocational testimony about specific jobs is necessary in most cases. Many courts, despite the promulgation of the medical-vocational regulations, have

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claimant could perform some job and (b) that job exists in the national economy. The tables stop short of this.

513 F. Supp. at 38.

176. 501 F. Supp. 274 (D.N.J. 1980), *rev'd sub nom*. Santise v. Schweiker, 676 F.2d 925, 934-35 (3d Cir. 1982).

177. *Id*. at 277. Specifically, §223(d)(2)(A) of the Social Security Act, 42 U.S.C. §423(d)(2)(A) (1976), states that a claimant "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . . ."

178. *Santise*, 501 F. Supp. at 277.

179. Santise v. Schweiker, 676 F.2d 925, 934-35 (3d Cir. 1982).

180. Meneses v. Secretary of HEW, 442 F.2d 803, 809 (D.C.Cir. 1971) limits the use of administrative notice. For a discussion of that case and methods that might be used to get around its prohibitions on administrative notice, *see* MASHAW, HEARINGS, *supra* note 12, at 79-82.

181. 471 F.2d 598 (8th Cir. 1972).

182. *See* McLamore v. Weinberger, 538 F.2d 572, 575 (4th Cir. 1976).

adhered to this requirement, reversing cases in which the use of administrative notice by way of the Medical-Vocational Guidelines was the basis for denying a claimant's eligibility.[183] Courts also have determined that the requirements for vocational testimony mandate the Secretary to specify a particular job or jobs which the claimant can perform[184] and have struck down the use of the vocational regulations on this basis. Other courts have said simply that "reliance on a grid, drawn in advance to cover a wide variety of individual cases, does not satisfy [the Department of Health and Human Services'] obligation of basing its conclusion on substantial evidence."[185]

Another basis for challenges to the Medical-Vocational Guidelines is that the regulations create an irrebuttable presumption and thus violate the due process clause of the Constitution. In dismissing this argument, one court has stated that "[t]he short answer to this theory is that the regulations do not create any presumption that requires the exclusion of relevant, rebuttal evidence, but rather direct a conclusion that is

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183. Cowart v. Schweiker, 662 F.2d 731, 735-36 (11th Cir. 1981); Woodworth v. Secretary of HEW, 626 F.2d 46, 47 (8th Cir. 1980); Parker v. Harris, 626 F.2d 225, 233-34 (2d Cir. 1980); Minuto v. Secretary of Health and Human Services, 525 F. Supp. 261, 266 (S.D.N.Y. 1981); Colyer v. Harris, 519 F. Supp. 692, 694-95 (S.D.Ohio 1981); Cummings v. Harris, 513 F. Supp. 35, 38 (S.D.Ohio 1980); Peryea v. Harris, No. 80-21, slip op. at 4-5 (D.Vt. February 10, 1981). Other courts have found that vocational-expert testimony is unnecessary when the medical-vocational regulations apply. *See* Kirk v. Secretary of Health and Human Services, 667 F.2d 524 (6th Cir. 1981); New v. Harris, 505 F. Supp. 721, 726 (S.D.Ohio 1980). In *New*, the court considered a statement in Hephner v. Matthews, 574 F.2d 359 (6th Cir. 1978) that phrases such as "light work" were unacceptable because it was not based on a clear standard. 574 F. Supp. at 362-63. (*Hephner* was decided before the "grid" became applicable law.) The court in *New* was satisfied by the definition of "light work" in the regulation itself. *See* 20 C.F.R. §404.1510(c) (1982). Because of the amount of information that went into production of the grid, the court in *New* found that the testimony of a vocational expert would be necessary only when a case presented "unusual facts." 505 F. Supp. at 726. The court did not specify what facts qualified as "unusual."

Kirk v. Secretary of Health and Human Services, although upholding the Medical-Vocational Guidelines, did so in a very limited fashion. In *Kirk*, the court reconciled the requirement of individualized decision-making with the role of the Medical-Vocational grid. The court found that "a claimant's particular characteristics [had to] be evaluated before a disability decision is reached; the grid merely identifies the weight to be given each characteristic found." 667 F.2d at 530. Further, "the grid is only used when the components of the grid precisely match the characteristics of the claimant. Thus, the only role the guidelines play is to take administrative notice of the availability of jobs, or lack thereof, for claimants whose abilities are accurately described by the grid." 667 F.2d at 531. In the case of a claimant whose disability profile did not fit the grid, as when non-exertional limitations were involved, the court commented that the Secretary would need the help of expert testimony to satisfy his burden of proof as to jobs available to that particular claimant. 667 F.2d at 531.

184. *See* Peryea v. Harris, No. 80-21, slip op. at 5 (D.Vt. February 10, 1981) (citing Bastien v. Califano, 572 F.2d 908, 912-13 (2d Cir. 1978)).

185. Santise v. Harris, 501 F. Supp. 274, 276 (D.N.J. 1980), *rev'd sub nom.* Santise v. Schweiker, 676 F.2d 925 (3d Cir. 1982).

based on consideration of all relevant factors and evidence."[186]

Challenges to the regulations can be expected to continue until the Supreme Court decides the issue. At that point, the cases may move toward interpretation and application of the regulations and away from direct challenges.

VI. THE STATUTORY STANDARD

To this point, this article has criticized the guidelines for failing to achieve their major goals of accuracy and consistency and has outlined some of the court challenges brought against the guidelines. Subsequent sections will discuss proposals for improving decision-making under the Social Security system. But there is no panacea for the consistency problems plaguing the system, largely because the major stumbling block to achieving consistency is not to be found in the system but rather in the standard of disability itself.

A. *The Difficulty of a Vague Standard*

To even the most casual observer, the vagueness of the Social Security standard is readily apparent. The notion of "inability to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment . . ."[187] contains a myriad of factors that need to be considered in decision-making beyond those set forth in the statute.[188] Physical ailments, perhaps one of the most measurable of the factors, are themselves often difficult to diagnose with precision. In addition, many disabilities are based on purely emotional problems, and others involve a mix of physical and emotional impairments. The diagnosis of the emotional component of a disability determination is often more ambiguous than that of a physical one and, when one adds the subjective nature of pain and restrictions in activities and interests that can be caused by emotional factors, consistency even on a solely medical basis would be difficult to find. But the standard also requires fact-finders to consider the demands of a variety of jobs, the education of the claimant, the claimant's past work, and any transferable skills the claimant might possess. The number of variables involved in this equation of disability, the difficulty involved in accurately measuring each, and the obvious need to synthesize these variables into a determi-

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186. Stallings v. Harris, 493 F. Supp. 956, 960 (W.D.Tenn. 1980), *aff'd sub nom.* Kirk v. Secretary of Health and Human Services, 667 F.2d 524 (6th Cir. 1981).

187. 42 U.S.C. §423(d)(1)(A) (1976).

188. The statute goes on to speak of "impairment[s] which can be expected to result in death or which [have] lasted or can be expected to last for a continuous period of not less than 12 months . . . ." *Id.*

nation embodying an all-or-nothing decision on disability clearly show the difficulty in achieving accuracy and consistency using the disability standard. As the variables in any decision increase in either number or difficulty of measurement, consistency of decision-making becomes more difficult to define, let alone achieve.

"As Saad Z. Nagi has remarked, the concept of total disability simply may not lend itself to indications or criteria on the basis of which routine decisions can be made."[189] The Medical-Vocational Guidelines have attempted to create consistency through a process of categorical decision-making. The main problem with the guidelines, however, is not that they need fine-tuning and refinement, but that the standard for which they are attempting to achieve accurate and consistent decisions is one that simply defies mechanical, classified, and highly routinized determinations. Added to this basic difficulty is the manner in which public policy is intertwined with any disability decision:

> The fundamental imponderable under this congressional statute is the determination of how much employment-directed effort society is to insist on for borderline claimants, none of whom are totally incapacitated, as a precondition of subsidized premature retirement. Such a question is ultimately a public question for lay determination, not a medical question or a psychological-psychiatric question. And it is also one not readily susceptible of significant clarification by the traditional common law process of reported and rationalized decisions and case-by-case precedent building . . . .[190]

Even Jerry Mashaw, perhaps the leading scholar in the Social Security area and one who has supported the concept of categorical decision-making in disability cases, has recognized the difficult value judgments involved and, at least in the past, has recognized that "[s]uch adjudications by their very nature elude objective verification and cannot be effectively controlled for consistency."[191]

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189. R. DIXON, *supra* note 11, at 141 (quoting letter from Saad Z. Nagi to Roger C. Cramton, Chairman, Adminstrative Conference of the United States (November 26, 1971)).

190. *Id.* at 133.

191. Mashaw, *Due Process*, *supra* note 73, at 45:

> SSA disability adjudications should perhaps be viewed as really concerned with difficult value judgments — individualized exemptions from the moral, social, and economic constraints of the work ethic, determined by a complex of medical, vocational, and environmental factors as they impinge on particular individuals. Such adjudications by their very nature elude objective verification and cannot be effectively controlled for consistency. Accordingly, they can be legitimized only by invoking either authority or consent. In a democracy consent is undoubtedly the preferable justifica-

B. *Changing the Statutory Standard*

Because a major difficulty with achieving accuracy and consistency in disability determinations is the rather vague and imprecise concept of disability itself, especially as embodied in the statutory definition, the obvious answer for resolving the accuracy and, consequently, the consistency conundrum, is a change in the disability standard. In addition to the truism that obvious answers often provide poor solutions, however, is the political reality that, at least right now, there will be much discussion, but little probability, of major changes in the Social Security disability determination system.[192] Additionally, it can be convincingly argued that, because of the interplay among the myriad of programs that can be broadly termed welfare,[193] reforms of the Social Security system should be done as part of an overall evaluation of the entire public benefits system.[194] Given the need both to understand and to deal with the interplay between such public welfare programs as Veterans Benefits, Social Security, Unemployment Insurance, and Aid to Familes with Dependent Children, it is the height of understatement to say that prospects are unlikely.

Despite the unlikelihood of major revisions in the public disability benefits system or even changes in the statutory definition of disability under the Social Security system, some discussion of potential changes in the statutory standard for disability is worthwhile. In fact, changes have been proposed by the Reagan administration[195] and scholars of

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tion. Its procedural approximation would seem to be the fullest possible participation in the decisional process.

192. New York Times, January 21, 1983, §A, at 12, col. 1. *See also Report of the National Commission on Social Security Reform*, UNEMPLOYMENT INSURANCE REPORTS WITH SOCIAL SECURITY (CCH) No. 1127 (Special Edition — Jan. 27, 1983); although some fiscal and structural changes in Social Security have been endorsed by Congressional Committees, no significant changes in disability determination procedures have come to light.

193. *See* Martin, *Welfare Law: The Problem of Terminology*, 60 CORNELL L. REV. 792, 792 (1975).

194. Martin, *Welfare Law: A Challenging Field for Lawyers*, 64 ABA JOURNAL 1255, 1258 (1978).

195. In May, 1981 the Reagan administration proposed that, to receive Social Security disability, the claimant's disability should last or be expected to last for a period of 24 months as opposed to the currently required 12 months, that there be a waiting period of six months instead of five (it had been reduced from six to five in 1972), and that recipients have had sufficient earnings in 30 rather than 20 of the past 40 quarters. Additionally, the current administration proposed adoption of a standard of disability that would base disability determinations solely upon an individual's medical condition without reference to previous work experience, educational background, or age. SUBCOMMITTEE ON SOCIAL SECURITY OF HOUSE COMMITTEE ON WAYS AND MEANS, 97TH CONG., 1ST SESS., REAGAN ADMINISTRATION DISABILITY PROPOSALS 3-13 (Comm. Print 1981). The Reagan administration has since withdrawn these proposals.

the Social Security system.[196] One suggestion has been "clarification of the presumption to apply in close cases . . . ."[197] Such a change, depending on the nature of the presumption, might create greater friction between those who are taxed to support the disability system and those who apply for its benefits and tacitly consent to be ruled by its statutory definition and regulations.[198]

Perhaps the most controversial change would be to eliminate from the disability equation all vocational factors, and to make disability dependent solely upon physical or perhaps both physical and mental impairments. This type of reform, which has been proposed by some scholars[199] and more recently by the Reagan administration,[200] undoubtedly would create greater accuracy and consistency measured by the reform standard but would most likely move us to a system that favored younger and better educated claimants.[201] Such a system would move us further away from a concept of disability geared towards differentiating between those who can and cannot work. In addition, such a statutory change in the definition of disability in the Social Security area would undoubtedly impose tremendous pressures on other public benefit programs to which those not eligible for DI or SSI would need to turn. The issue of a dramatically changed disability standard opens a morass of public policy issues far beyond the scope of this article.

Thus, given the existing political realities, in addition to a myriad of difficult policy issues and substantive trade-offs involved in a re-definition of the statutory concept of disability, we are left with a vague

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196. *See, e.g.*, R. DIXON, *supra* note 11, at 139-40.

197. *Id.* at 139.

198. Presumptions in some cases may already be in effect. For a brief discussion, see LEGAL AID BUREAU OF MARYLAND, INC., LEGAL SERVICES CORPORATION QUALITY IMPROVEMENT PROJECT, FINAL EVALUATION REPORT, DISABILITY EVALUATION ASSISTANCE PROJECT 14 (October 1981) [hereinafter cited as LEGAL SERVICES CORPORATION QUALITY IMPROVEMENT PROJECT].

199. *See, e.g.*, R. DIXON, *supra* note 11, at 139.

200. SUBCOMMITTEE ON SOCIAL SECURITY, *supra* note 195, at 3.

201. The Administration's proposal to drop vocational factors from the disability equation would most affect older, poorly educated, or nonwhite claimants; yet these groups are composed of individuals who are more likely to be disabled. A study published in 1972 found that 42% of the disabled failed to attend school past the 8th grade but only 22% of the nation at large did not achieve at least this educational level. Allan & Cinsky, *General Characteristics of the Disabled Population*, 35 SOC. SEC. BULL. No. 8, 24, 25 (Aug. 1972). This study also found that 21% of the black population as opposed to 11% of the white population was severely disabled. *Id.* Another study found that minority group members were more likely to be receiving Social Security Disability benefits in that 2.7% of insured minority workers received benefits as compared with 1.9% of insured white workers. Goff, *Disabled Worker Beneficiaries Under O.A.S.D.H.I.: Regional and State Patterns*, 36 SOC. SEC. BULL. No. 9, 3, 7 (Sept. 1973).

standard, perhaps an almost unadministerable one, encompassing a large number of soft variables. But difficult-to-administer, vague standards, as this article suggests, are not necessarily bad. In fact, in the Social Security area, any standard that truly attempts to differentiate between those who can and cannot work will of necessity be somewhat vague. Difficult-to-administer standards are by no means unique to the Social Security system,[202] and there is no question that the concept of disability will continue to create problems of consistency and accuracy in the future. But a number of steps, some of which have already been tried to a degree by the Social Security Administration, should be considered, adopted, or refined to promote quality in process and decision-making.

VII. SOME SUGGESTIONS FOR IMPROVEMENT

A. *Case Development*

Among the areas for improvement in the Social Security process is increased case development at both the state agency and Bureau of Hearings and Appeals levels. This suggestion is by no means novel,[203] and the Social Security Administration has made efforts in this area. The comment of Jerry Mashaw and his coauthors remains a telling criticism of the system today: "Observation of hearings leads more often to bifurcation between clear and underdeveloped cases than between clear and close cases."[204] Despite its burden to assist claimants in fully developing their records, and the recommendations of students of the system that case development would vastly improve decision-making, the SSA has failed to develop records in a meaningful and effective fashion. This problem exists at the Bureau of Hearings and Appeals level but is especially troublesome at the state agency level where proper development could obviate the need for any additional decision-making steps, or at least make those additional steps far more efficient.[205]

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202. The "public interest" standard used in granting radio and television licenses is such a standard. *See* R. DIXON, *supra* note 11, at 18. As another example, federal courts and administrative agencies have long struggled with the Freedom of Information Act's vaguely worded exemptions. *See* The Wall Street Journal, December 15, 1981, at 33, col. 3.

203. *See* 43 Fed. Reg. 27,507, 27,508 (codified at 1 C.F.R. Chapter III, §305.78-2(B)(1)).

204. MASHAW, HEARINGS, *supra* note 12, at 18.

205. These observations of the problem of case development come from having supervised students in clinical programs at both the University of Maryland School of Law and the Cornell Law School. The cases the author has supervised have been accepted by the clinic almost exclusively at the hearing stage. Although our advocacy for clients involves development of legal issues, the framing of questions at the hearing stage, and the preparation of any necessary or helpful documents or memoranda, it seems that the greatest assist-

Increased case development would make the decision-making process more accurate, potentially more consistent, and, if done at early stages, more efficient although not necessarily cost-effective. The Social Security Administration should continue to work to achieve this very basic goal.

B. *Developing Precedents*

Another suggestion for the Social Security Administration is continued work at developing and communicating precedents. Recommendations for this reform are by no means new; in fact, numerous studies have pointed to the additional need for precedental material.[206]

The continued development of precedents would produce several advantages. Most important, it would allow the Social Security Administration to move toward the most appropriate mix of rules and discretion in disability determinations. Discretion is obviously needed in the disability process because of the strong need for individualization. At the same time, rules aid predictability and foster consistency. The difficulty, not only for the Social Security Administration but for every adjudicative system, is how to reach the optimum mix of rules and discretion.[207] One step toward this desideratum is the development of precedents, for "an agency's normal progression is from unguided discretion to some use of precedents[,] to clarification of standards[,] to greater use of precedents[,] to discovery of principles[,] and finally to formulation of guiding rules and even of governing rules."[208] As has been mentioned many times in this article, the Social Security Administration, through the adoption of the Medical-Vocational Guidelines, has gone too far in adopting governing rules. Perhaps one reason for this error was the ineffective development of precedent in the move from discretion to rules, because "[t]he best rules are often the ones that result from recording precedents growing out of exercise of discretion, coupled with a requirement that the precedents either be followed or

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ance we provide claimants is the thorough development and compilation of their medical records. The administration needs to be more thorough in its development of records concerning both physical ailments and psychiatric impairments, but it is especially lax in the latter. Whether this is a product of the difficulty in recognizing psychiatric impairments or a decision by the administration to give less importance to psychiatric impairments is not clear. For support for the proposition that psychiatric impairments are not conscientiously considered at the state agency level, see LEGAL SERVICES CORPORATION QUALITY IMPROVEMENT PROJECT, *supra* note 198, at 14.

206. *See, e.g.*, MASHAW, HEARINGS, *supra* note 12, at 105; 2 K. DAVIS, *supra* note 68, §9:11.

207. 2 K. DAVIS, *supra* note 68, §8:7(19), (20).

208. *Id.* §8:4, at 170.

that departures from them be acknowledged and explained."[209]

In addition to aiding rule-making, the development of precedent would provide a helpful foundation from which to approach the difficult problems involved in applying general rules of disability to the extraordinarily complex fact patterns of disability cases. Precedents, not in a sanitized form[210] but with strong factual descriptions of the cases upon which they are based, would give clarity and life to the rather abstract and generalized principles of disability.[211] The development of case-based precedents not only would guide decision-makers in this factually complex field but also would assist claimants and their counsel in presenting their cases as well as in making the difficult decision of whether to appeal.[212]

The kind of precedents that might be developed and the way in which they could be communicated merit some comment. The Social Security Administration should do a more effective job of including judicial precedents within its instructional materials to both state agencies and Bureau of Hearings and Appeals employees. To a degree, this has already been done and it certainly has been a major suggestion of a number of studies of the system.[213] This effort, in addition to making Social Security decisions more effectively reflect judicial precedents, might also help relieve the consistency problems that have plagued the Social Security Administration.[214] The incorporation of judicial precedent, however, is not without its problems given the variance among circuits in dealing with the disability standard and the tendency of courts, in a splendidly human way, to construe disability in a commonsense rather than a strictly legalistic fashion.[215]

In addition to the incorporation of court-based precedent into in-

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209. *Id.* §8:7(15).

210. *See* Dixon, *The Welfare State and Mass Justice: A Warning From the Social Security Disability Program*, 1972 DUKE L. J. 681, 709.

211. MASHAW, HEARINGS, *supra* note 12, at 109.

212. In some instances, the Social Security Administration has already created precedents which simply need to be more effectively communicated to decision-makers. In fact, the Medical-Vocational Guidelines themselves have within them examples that can be used as precedents. *See, e.g.*, 20 C.F.R. Part 404, Subpart P, App. 2, §201.00(h), Example 2 (1982).

213. For example, a regional office report has suggested that the Social Security Administration should issue major policy directives to assist uniform interpretation by state agencies and that court precedents should be incorporated into the Disability Insurance State Manual (DISM). Dallas Regional SSA Office, Service Delivery Assessment of Social Security Disability Programs (May 19, 1978) (on file with author).

214. MASHAW, HEARINGS, *supra* note 12, at 110-15.

215. "The standard which emerges from these decisions in our circuit and elsewhere is a practical one: whether there is a reasonably firm basis for thinking that this particular claimant [who has shown inability to perform his usual vocation] can obtain a job within a reasonably circumscribed labor market." HOUSE COMMITTEE ON WAYS AND MEANS, SO-

structional materials, the Appeals Council's decisions should be used more often and more effectively as precedents. Prior studies have called for this change[216] and have recognized that the Appeals Council needs to shift its focus from a review of outcomes to the development of disability principles or precedents.[217] In addition to developing precedent out of individual cases, the Appeals Council could take administrative notice of facts that have been proven and developed in a large number of highly similar cases.[218] As mentioned earlier, the major problem in the development of the Medical-Vocational Guidelines was that they did not emerge from the natural progression of administrative rules from cases through precedents and onto guidelines and rules, but rather developed as a virtually all-inclusive set of decision-making rules in the absence of strongly-developed precedental materials.

C. *Quality-Assurance Systems*

The quality of decision-making in the Social Security system could also be improved by the continued development and more aggressive application of the Social Security Administration's quality-assurance system. Advocates have recognized the need for this kind of system in social welfare claims.[219] Its operation has been discussed by others[220] and will not be outlined here. The suggestion made here, which is not

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CIAL SECURITY AMENDMENTS OF 1967, H. R. REP. NO. 544, 90th Cong., 1st Sess. 29 (1967) (quoting uncited case).

216. MASHAW, HEARINGS, *supra* note 12, at 105. The authors point out that development of precedent by the Appeals Council has drawbacks. The Appeals Council rarely creates new law or policy; its decisions do not so much establish principles of precedential value as simply restate what is already in the administrative regulations. *Id.* at 106.

217. Recommendations of The Administrative Conference of the United States, 43 Fed. Reg. 27,507, 27,508-509, *codified at* 1 C.F.R. Chapter III, §305.78-2(c).

218. But if the information has been developed in the usual course of business of the agency, if it has emerged from numerous cases, if it has become a part of the factual equipment of the administrators, it seems undesirable for the agency to remain oblivious of their own experience and strip themselves of the very stuff which constitutes their expertness. It appears far more intelligent, if fairness to the parties permits, to utilize the knowledge that comes from prior acquaintance with the problems. Laborious proof of what is obvious and notorious is wasteful; or, in the alternative, decision in disregard of the obvious and notorious in absence of such laborious proof, is foolish, and contrary to the demands that decisions be as correct as possible.

MASHAW, HEARINGS, *supra* note 12, at 81, (quoting MONOGRAPH OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, PART 3, 77TH CONG., 1ST SESS. 72 (SEN. DOC. Nov. 10, 1941)).

219. MASHAW, HEARINGS, *supra* note 12, at 116-20. *See also* Mashaw, *Management*, *supra* note 10, at 784-87.

220. Chassman & Rolston, *Social Security Disability Hearings: A Case Study of Quality Assurance and Due Process*, 65 CORNELL L. REV. 801 (1980).

novel,[221] is simply that the quality-assurance system should be more aggressive.

D. *The Effect of Bias on Decision-Making*

In addition to increased rigor in the quality-assurance program, there needs to be a close look at how the biases of decision-makers affect the quality of their determinations. Everyone knows that an individual's own experiences create bias, but only recently have researchers begun to study how this bias can affect the decisions of fact-finders.[222] The social welfare programs and the concept of disability are emotion-laden topics; some studies have shown that the outcome of a particular case may be more correlated with the decision-maker's emotional reaction to a claimant than to factors generally thought to be determinative of disability.[223] The Social Security Administration needs to examine more closely how factors generally not considered to be relevant to disability become highly predictive in these cases. And the SSA also should strive to hire and to train decision-makers who will base their decisions on factors concerning disability rather than individual bias.[224]

E. *Review of Unappealed Cases*

Accuracy and fairness could be enhanced if the Social Security Administration would review unappealed cases. Although the SSA certainly should not force claimants through the reconsideration, hearing, and Appeals Council processes, it is likely that encouraging appeals and reviewing denied cases would increase the aggregate accuracy of the system. Given the current fiscal squeeze, however, such

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221. *See* Mashaw, *Quality*, *supra* note 12, at 834.

222. *See* Nagel, *Bringing the Values of Jurors in Line with the Law*, 63 JUDICATURE 189, 191 (1979).

223. One analysis of disability decisions showed that the basic characteristics that should be important determinants of decisions have virtually no predictive value. These characteristics include factors found in the Medical-Vocational Guidelines: age, prior work history, education level, and the claimant's ability to do sedentary, light, medium, or heavy work. The study concluded:

> Hence the cases get decided on other grounds. That is, those grounds that show up as highly predictive factors in a discriminant factor analysis. [sic] Those factors include such things as whether the claimant was represented, the existence and character of the report of a consulting physician, the neediness of the claimant, whether the case involved a medical problem that included disfigurement, and the race and sex of the claimant.

MASHAW, HEARINGS, *supra* note 12, at 19.

224. For a brief discussion of the failure of instructional and reporting programs to have an effect on the accuracy of the hearing process, *see* Chassman & Rolston, *supra* note 220, at 817.

a suggestion is unlikely to be adopted. But unless claimants, many of whom are unrepresented and may be poorly educated (especially Supplemental Security Income claimants), are highly effective in selecting cases for appeals, it is hard to argue in favor of the aggregate accuracy of the present determination process, let alone the justness of the results. Additionally, in the disability area, many claimants may find it physically or emotionally too difficult to continue through the appeals process without a great deal of assistance. Estimates of aggregate accuracy and fairness are inconclusive absent consideration of unappealed claims.

F. *Revising the Medical-Vocational Guidelines*

Although developing precedent along the lines discussed earlier seems to be one of the best ways for creating sound rules and guidelines in Social Security disability decision-making, this process is an evolutionary one which is likely to require years of development. Because of major inconsistency and inaccuracy problems in Social Security decision-making, some form of guidelines, as a stop-gap measure, seems appropriate. The Medical-Vocational Guidelines, despite their many drawbacks, might be modified in several ways and serve this function. First, the Guidelines need to include in the disability equation the critical factor of adjustment. The current regulation's exclusion of this factor, so important to assessing disability, leads to both inaccuracy and inconsistency. Although its inclusion in the disability equation has the potential for seriously undermining the consistency goals so strongly espoused in the Medical-Vocational Guidelines, it is important enough to the disability determination that a trade-off is required. Second, the use of the Medical-Vocational Guidelines should be limited to the initial determination and reconsideration stages. Unlike the decision-makers at these stages, the Administrative Law Judges are highly trained and their independence is largely assured. For the less qualified and less independent decision-makers at the initial stages, however, substantial curbs on discretion are justified. Although the use of different decision-making regulations between the initial stages and the hearing stage would add another cause of inter-stage variance, there are already so many causes of variations between stages that this additional one seems inconsequential. Third, the Guidelines should be updated to take into account the very latest data on the availability of jobs and the physical and vocational requirements for them. This is important not only because the data upon which the current Guidelines are based was outdated at the time the Guidelines were developed, but also

because of the tremendous changes that technology has created in the job market.

The preceding suggestions for tuning the disability process are by no means exhaustive. Nor do they offer a panacea for the consistency and accuracy problems which are truly the results of the complex, subjective, and somewhat elusive concept of disability itself. They are set forth simply to show that measures, some of which already have been partly adopted by the Social Security Administration, can be taken that are alternatives to the attempted solution in the existing Medical-Vocational Guidelines.

VIII. THE NEED FOR EMPIRICAL STUDIES

This article's criticism and comments about the Medical-Vocational Guidelines have been predominantly normative and analytical. But assuming the Social Security Administration plans to retain the Medical-Vocational Guidelines, much empirical work needs to be done.[225] Empirical analysis might effectively test the Medical-Vocational Guidelines for the goals of consistency and accuracy.

One area for empirical study would be to test whether the guidelines have aided consistency. One of the goals for regulations was to lessen the variation among Administrative Law Judges on how cases were decided. In addition, variation should be lessened among other decision-makers in the system as well as in the various geographic areas across the country. Assuming that similar cases reach most Administrative Law Judges, a gross but perhaps fairly representative measure of the Medical-Vocational Guidelines' effect might be found by examining the variation in reversal rates among Administrative Law Judges as well as other decision-makers to see if it has decreased. Although other factors, such as quality assurance programs and regional variation, would need to be taken into account in drawing conclusions about the effects of the guidelines, empiricists likely could design a method for reliably testing the grid's impact on consistency.

Naturally, consistency should be increased as measured against the vocational factors which make up the major features of the Medical-Vocational Guidelines. If consistency has not increased dramatically when measured against these factors, it would be reasonable to say that the Medical-Vocational Guidelines have truly been a failure. But, as set out earlier in this article, consistency as measured against

225. In a response, dated June 28, 1982, to a Freedom of Information request, the SSA stated that it has no studies underway to evaluate the effectiveness of the Medical-Vocational Guidelines in aiding decision-making. (Copy of response on file with author).

these factors is not a reliable measurement of accuracy under the statutory definition of disability.

To better assess accuracy, the Social Security Administration should consider evaluating determinations under the grid system by comparing those decisions with determinations made by clinical teams. These clinical teams, similar to those in a comparable past study,[226] could evaluate claimants in a number of areas including medical and psychological status as well as occupational, vocational, and social skills. These teams, with participants from a variety of disciplines, should be able to form a relatively accurate disability evaluation. Although there are obviously problems in attempting to use determinations made by these teams as a measure for accuracy within the disability process, the absence of any objective external reference in disability cases leaves these teams as the most reasonable alternative available. If the hypothesis of the Social Security Administration is correct — that accuracy should be increased under the Medical-Vocational Guidelines — there should be a higher correlation between the decisions made by the team and those made by the claims examiners and Administrative Law Judges using the Medical-Vocational Guidelines than in controls decided without the assistance of these guidelines.

In addition to performing studies to check the accuracy and consistency of decision-making under the Medical-Vocational Guidelines, the Social Security Administration should undertake a study to see if the guidelines are being applied correctly. This study should focus on whether cases which should fall under the guidelines are being decided under them, and, if they are, whether the guidelines are being followed. In addition, the study should focus on whether decision-makers are identifying other factors, such as nonexertional impairments, and are properly using the guidelines as a "framework." Because the Medical-Vocational Guidelines set up a complex categorical decision-making process for disability determinations, it is incumbent upon the Social Security Administration to make sure that this process can and will be correctly applied by decision-makers.

IX. CONCLUSION

The concept of disability is a vague and elusive one. It is also a concept requiring an individualized approach and therefore is difficult to capture within the framework of categorical decision-making. The Medical-Vocational Guidelines — a complex categorical decision-

226. *See* R. DIXON, *supra* note 11, at 65-73. (summarizing S. NAGI, DISABILITY AND REHABILITATION: LEGAL, CLINICAL, AND SELF-CONCEPTS AND MEASUREMENTS (1969)).

making formula — were expected by the Social Security Administration to increase both consistency and accuracy in disability determinations. But because of failings within that categorical decision-making process, such as the failure to focus on certain critical features of disability and the frailty of certain escape clauses within the process, the guidelines are unlikely to achieve either of these goals.

Assuming the Social Security Administration continues to use the Medical-Vocational Guidelines, it should conduct a number of empirical studies to determine whether and to what extent the guidelines have achieved their intended goals. If they have not, the Social Security Administration should consider alternative means of accomplishing these ends.

APPENDIX A

TABLE NO. 2—RESIDUAL FUNCTIONAL CAPACITY: MAXIMUM SUSTAINED WORK CAPABILITY LIMITED TO LIGHT WORK AS A RESULT OF SEVERE MEDICALLY DETERMINABLE IMPAIRMENT(S)[a]

Rule	Age	Education	Previous work experience	Decision
202.01 ...	Advanced age	Limited or less	Unskilled or none	Disabled.
202.02 ...	..do	..do	Skilled or semiskilled—skills not transferable.	Do.
202.03 ...	..do	..do	Skilled or semiskilled—skills transferable.	Not disabled.
202.04 ...	..do	High school graduate or more—does not provide for direct entry into skilled work.	Unskilled or none	Disabled.
202.05 ...	Advanced age	High school graduate or more—provides for direct entry into skilled work.	Unskilled or none	Not disabled.
202.06 ...	..do	High school graduate or more—does not provide for direct entry into skilled work.	Skilled or semiskilled—skills not transferable.	Disabled.
202.07 ...	..do	..do	Skilled or semiskilled—skills transferable.	Not disabled.
202.08 ...	..do	High school graduate or more—provides for direct entry into skilled work.	Skilled or semiskilled—skills not transferable.	Do.
202.09 ...	Closely approaching advanced age.	Illiterate or unable to communicate in English.	Unskilled or none	Disabled.
202.10 ...	..do	Limited or less—At least literate and able to communicate in English.	..do	Not disabled.
202.11 ...	..do	Limited or less	Skilled or semiskilled—skills not transferable.	Do.
202.12 ...	..do	..do	Skilled or semiskilled—skills transferable.	Do.
202.13 ...	..do	High school graduate or more	Unskilled or none	Do.
202.14 ...	..do	..do	Skilled or semiskilled—skills not transferable.	Do.
202.15 ...	..do	..do	Skilled or semiskilled—skills transferable.	Do.
202.16 ...	Younger individual	Illiterate or unable to communicate in English.	Unskilled or none	Do.
202.17 ...	..do	Limited or less—At least literate and able to communicate in English.	..do	Do.
202.18 ...	..do	Limited or less	Skilled or semiskilled—skills not transferable.	Do.
202.19 ...	..do	..do	Skilled or semiskilled—skills transferable.	Do.
202.20 ...	..do	High school graduate or more	Unskilled or none	Do.
202.21 ...	..do	..do	Skilled or semiskilled—skills not transferable.	Do.
202.22 ...	..do	..do	Skilled or semiskilled—skills transferable.	Do.

[a] 20 C.F.R. Part 404, Subpart P, App. 2, Table No. 2 (1982). ("do" means "ditto").

APPENDIX B

TABLE NO. 3—RESIDUAL FUNCTIONAL CAPACITY: MAXIMUM SUSTAINED WORK CAPABILITY LIMITED TO MEDIUM WORK AS A RESULT OF SEVERE MEDICALLY DETERMINABLE IMPAIRMENT(S)[b]

Rule	Age	Education	Previous work experience	Decision
203.01 ...	Closely approaching retirement age	Marginal or none	Unskilled or none	Disabled.
203.02 ...	..do	Limited or less	None	Do.
203.03 ...	..do	Limited	Unskilled	Not disabled.
203.04 ...	..do	Limited or less	Skilled or semiskilled—skills not transferable.	Do.
203.05 ...	..do	..do	Skilled or semiskilled—skills transferable.	Do.
203.06 ...	..do	High school graduate or more	Unskilled or none	Do.
203.07 ...	..do	High school graduate or more—does not provide for direct entry into skilled work.	Skilled or semiskilled—skills not transferable.	Do.
203.08 ...	..do	..do	Skilled or semiskilled—skills transferable.	Do.
203.09 ...	..do	High school graduate or more—provides for direct entry into skilled work.	Skilled or semiskilled—skills not transferable.	Do.
203.10 ...	Advanced age	Limited or less	None	Disabled.
203.11 ...	..do	..do	Unskilled	Not disabled.
203.12 ...	..do	..do	Skilled or semiskilled—skills not transferable.	Do.
203.13 ...	..do	..do	Skilled or semiskilled—skills transferable.	Do.
203.14 ...	..do	High school graduate or more	Unskilled or none	Do.
203.15 ...	..do	High school graduate or more—does not provide for direct entry into skilled work.	Skilled or semiskilled—skills not transferable.	Do.
203.16 ...	..do	..do	Skilled or semiskilled—skills transferable.	Do.
203.17 ...	..do	High school graduate or more—provides for direct entry into skilled work.	Skilled or semiskilled—skills not transferable.	Do.
203.18 ...	Closely approaching advanced age.	Limited or less	Unskilled or none	Do.
203.19 ...	..do	..do	Skilled or semiskilled—skills not transferable.	Do.
203.20 ...	..do	..do	Skilled or semiskilled—skills transferable.	Do.
203.21 ...	..do	High school graduate or more	Unskilled or none	Do.
203.22 ...	..do	High school graduate or more—does not provide	Skilled or semiskilled—skills not transferable.	Do.

		for direct entry into skilled work.		
203.23 ...	..do	..do	Skilled or semiskilled—skills transferable.	Do.
203.24 ...	..do	High school graduate or more—provides for direct entry into skilled work.	Skilled or semiskilled—skills not transferable.	Do.
203.25 ...	Younger individual	Limited or less	Unskilled or none	Do.
203.26 ...	..do	..do	Skilled or semiskilled—skills not transferable.	Do.
203.27 ...	..do	..do	Skilled or semiskilled—skills transferable.	Do.
203.28 ...	..do	High school graduate or more	Unskilled or none	Do.
203.29 ...	..do	High school graduate or more—does not provide for direct entry into skilled work.	Skilled or semiskilled—skills not transferable.	Do.
203.30 ...	..do	..do	Skilled or semiskilled—skills transferable.	Do.
203.31 ...	..do	High school graduate or more—provides for direct entry into skilled work.	Skilled or semiskilled—skills not transferable.	Do.

[b] 20 C.F.R. Part 404, Subpart P, App. 2, Table No. 3 (1982).