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The Social Security Apocalypse: Manipulating Zombie Factors to Deny Mentally Ill Claimants

Annie Goldstein

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— Comment —

THE SOCIAL SECURITY APOCALYPSE:
 MANIPULATING ZOMBIE FACTORS TO
 DENY MENTALLY ILL CLAIMANTS

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INTRODUCTION

Mr. M hears the voices of zombies coming from the basement of his house. He lost his job because his co-workers found him hard to work with. Mr. M’s schizophrenia caused him to lash out at his partners. He was always agitated on the job. Mr. M has two daughters at home and a granddaughter on the way. He worries he can no longer provide for his young family.

The more time Mr. M spends at home, the louder the zombies in the basement become. Sleep is a cyclical battle for Mr. M: he either can’t sleep because he’s hearing the zombies, or he can’t stay awake after being sleep deprived. The Social Security Administration (“Social Security”) has denied Mr. M benefits twice. It reasoned that although Mr. M could not keep a job, he could bathe and cook, so his condition is not severe enough to amount to a disability.

Ms. A suffers from bipolar disorder. On her good days, Ms. A dresses herself. She looks presentable. Her hair is brushed, and her clothes are ironed. Ms. A makes jokes and converses with acquaintances. She’s very warm; she’s kind to those around her. Ms. A enjoys cooking and spending time with her partner. When all her days were good days, Ms. A was a schoolteacher. She spent many years shaping young children’s lives.

But then Ms. A started having bad days. They cost Ms. A her job. When she's experiencing mania, Ms. A causes disturbances severe enough to warrant police restraint. She's been charged with committing felonies. Ms. A is often confined to a hospital bed when she's manic. Her depression nearly removes her personhood. Ms. A stays in bed until the late afternoon on most of her bad days. Ms. A feels too detached and exhausted to cook for herself. In these times, she has great difficulty showering and dressing. Social Security only recognizes Ms. A's good days. It concluded that on those days, Ms. A can hold a job, so she is not disabled.

Clearly, Social Security's disability program is experiencing "growing pains."¹ Enacted in 1935 and developed throughout the 1950s, the system was bound to expire.² Social Security was created to "protect . . . [the] disabled"³ by replacing the income disabled persons would earn if their disability did not prevent them from working.⁴ But the program began before our treatment of the disabled was reformed. Before the twentieth century, disabled people were isolated from society.⁵ During the 1700s, families kept their disabled relatives confined to their homes, sometimes caring for them and other times leaving them to die. Institutionalized care emerged in the early nineteenth century, but the disabled were often abused and neglected at their institutions.⁶ When Section 504 of the Rehabilitation Act⁷ passed in 1973, "the exclusion and segregation of people with disabilities was [first] viewed as discrimination."⁸ Section 504 of the Act prohibited discrimination of any disabled person under programs receiving federal financial assistance, programs conducted by any executive agency, or by the

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1. Frank Griffin, *Implicit Disability Bias Disinterred by Zombie Factors in Social Security Disability Determinations*, 21 NEV. L.J. 161, 170 (2020).
 2. *Id.*
 3. *Introduction to Social Security*, SOC. SEC. ADMIN., https://www.ssa.gov/section218training/basic_course_3.htm#1 [<https://perma.cc/6SMU-7WYY>] (last visited Jan. 21, 2023).
 4. *Historical Background and Development of Social Security*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/briefhistory3.html> [<https://perma.cc/B5PW-625U>] (last visited Jan. 21, 2023).
 5. Griffin, *supra* note 1, at 170.
 6. *Id.*
 7. Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended in scattered sections of 29 U.S.C.).
 8. Griffin, *supra* note 1, at 170 (citing Arlene Mayerson, *The History of the Americans with Disabilities Act*, DISABILITY RTS. EDUC. & DEF. FUND (1992), <https://dredf.org/about-us/publications/the-history-of-the-ada> [<https://perma.cc/WK39-D73G>]).

United States Postal Service.⁹ The Rehabilitation Act was the first legal initiative centered at integrating the disabled into mainstream society.¹⁰

We've continued to reform disability rights through the passage of the Americans with Disabilities Act (ADA)¹¹ in 1990.¹² The ADA "prohibits discrimination against people with disabilities" in places of "employment, transportation, public accommodations, communications," and state and local government programs.¹³ After all this progress, Social Security's lackluster disability program is forcing applicants to go back into hiding.

To qualify for Social Security benefits, the Agency must find that the applicant is disabled.¹⁴ An applicant has five chances to prove his disability, and he'll encounter many decision makers along the way.¹⁵ First, an applicant submits an initial application.¹⁶ These claims are processed at local Social Security field offices and state agencies.¹⁷ If Social Security denies the initial application, an applicant can request a reconsideration of the Agency's initial determination.¹⁸

If an applicant disagrees with his reconsideration determination, he can appeal the decision and request a hearing.¹⁹ Over 1,500 Administrative Law Judges (ALJs) hear more than 650,000 disability benefit cases

9. 29 U.S.C. § 794(a).

10. Griffin, *supra* note 1, at 170.

11. 42 U.S.C. §§ 12101–12213.

12. *Id.* § 12101; *The 30th Mark—A Look at the History of the Americans with Disabilities Act*, NAT'L CTR. FOR LEARNING DISABILITIES (July 1, 2020), <https://www.ncl.org/news/ada-30/> [<https://perma.cc/X6WN-X6FV>].

13. *Americans with Disabilities Act*, U.S. DEP'T OF LAB., <https://www.dol.gov/general/topic/disability/ada> [<https://perma.cc/728M-UKWK>] (last visited Jan. 28, 2023). *See generally* 42 U.S.C. §§ 12101–12213.

14. 42 U.S.C. § 423(a)(1)(A).

15. 20 C.F.R. § 416.1013 (2022) (state agency); *id.* § 404.903 (Social Security Administration); *id.* § 404.929–930 (Administrative Law Judge); *Appeal a Decision We Made*, SOC. SEC. ADMIN., <https://www.ssa.gov/apply/appeal-decision-we-made> [<https://perma.cc/3WGS-U9SM>] (last visited Jan. 28, 2023).

16. *Apply Online for Disability Benefits*, SOC. SEC. ADMIN., <https://www.ssa.gov/applyfordisability/?tl=1> [<https://perma.cc/3MJK-2DU2>] (last visited Jan. 28, 2023); *see also* 20 C.F.R. §§404.902, 404.905 (describing initial determinations).

17. 20 C.F.R. § 404.1613; *Disability Evaluation Under Social Security*, SOC. SEC. ADMIN., <https://www.ssa.gov/disability/professionals/bluebook> [<https://perma.cc/LEJ5-WATX>] (last visited Jan. 28, 2023).

18. 20 C.F.R. § 416.1407; *Appeal a Decision We Made*, *supra* note 15.

19. 20 C.F.R. § 416.1414; *Appeal a Decision We Made*, *supra* note 15.

each year.²⁰ ALJs review cases de novo, meaning they are not bound by initial and reconsideration decisions.²¹ Claimants who disagree with their ALJ's decision can request review from the Appeals Council. An appeal from this level will bring the claim to federal district court.²²

To create consistency among disability determinations, the Social Security Act defines “disability” as “the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment” for over twelve months.²³ ALJs determine disability by reviewing the interaction of anatomy, physiology, and mental status with factors including education, work exposure, social setting, psychological predispositions, and job availability.²⁴

ALJs will review the claimant's testimony, medical expert testimony, and medical records to render a decision.²⁵ During the hearing, the ALJ questions the claimant about his disability.²⁶ A common practice is for ALJs to question claimants about their ability to complete activities of daily living (ADLs), or activities “necessary for human survival,” like eating and bathing, and other “mainstream activities,” such as reading and walking.²⁷ ALJs frequently deny claimants disability benefits when they testify that they are capable of performing these tasks.²⁸

ALJs are criticized for confusing ADLs with duties required to hold a job.²⁹ Dr. Frank Griffin, a health law scholar at the University

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20. *Information About SSA's Hearings and Appeals Operations*, SOC. SEC. ADMIN., https://www.ssa.gov/appeals/about_us.html [<https://perma.cc/BZF4-N5N9>] (last visited Jan. 28, 2023).
 21. Griffin, *supra* note 1, at 190.
 22. 20 C.F.R. § 416.1479; *Appeal a Decision We Made*, *supra* note 15.
 23. 42 U.S.C. § 423(d)(1)(A).
 24. INST. OF MED., PAIN AND DISABILITY: CLINICAL, BEHAVIORAL, AND PUBLIC POLICY PERSPECTIVES 66 (Marian Osterweis et al. eds., 1987).
 25. *Applicant and Caseworker Information: The SSA Appeals Process*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., <https://soarworks.samhsa.gov/article/applicant-and-caseworker-information-the-ssa-appeals-process> [<https://perma.cc/62KX-6PCY>] (last visited Jan. 28, 2023).
 26. *What Do I Need to Know About Requesting a Hearing Before an Administrative Law Judge*, SOC. SEC. ADMIN., https://www.ssa.gov/appeals/hearing_process.html [<https://perma.cc/BKT5-D6TM>] (last visited Jan. 28, 2023).
 27. Griffin, *supra* note 1, at 162, 171.
 28. *Id.* at 162–63.
 29. *See id.* at 172–73.

Arkansas School of Law,³⁰ dubbed ADLs and similar tasks the “zombie factors” because Social Security’s disability criterion can only be met by zombies—claimants must be capable of “living without food, without personal hygiene or a clean home, without significant movement/exercise, without [social] interaction . . . and without other semblances of human life” for ALJs to classify them as disabled.³¹ The zombie factors support an outdated view of the disabled: disabled people are too incapacitated to become a part of mainstream society.³²

Medical impairments are distinctly difficult conditions to prove disability from.³³ Mental disorders are often subject to biases due to our limited understanding of the conditions.³⁴ Some professionals don’t believe in mental illness: mental disorders are not illnesses, so mental conditions do not qualify as disabilities.³⁵ They reason that not every form of “suffering” is an illness.³⁶ Others take the antiquated view that the invisibility of mental disease “mitigate[s] the impact of [the] disability,” so mental illnesses are not as serious as physical conditions.³⁷ Mental illnesses are oftentimes “invisible”³⁸ because many sufferers can accomplish their ADLs, despite their impairments complicating the tasks.³⁹ Some mental illnesses are notoriously cyclical, so the ability to

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30. *Lecturers and Part-Time Faculty*, U. ARK. SCH. L., <https://law.uark.edu/directory/directory-parttime-faculty.php> [<https://perma.cc/7KAM-DEBL>] (last visited Jan. 10, 2023).
31. Griffin, *supra* note 1, at 169.
32. *Id.* at 171.
33. Howard H. Goldman, Julia Porcino, Guy Divita, Ayah Zirikly, Bart Desmet, Maryanne Sacco, Elizabeth Marfeo, Christine McDonough, Elizabeth Rasch & Leighton Chan, *Informatics Research on Mental Health Functioning: Decision Support for the Social Security Administration Disability Program*, 74 PSYCHIATRIC SERVS. 56, 56–57 (2023).
34. *Stigma, Prejudice and Discrimination Against People with Mental Illness*, AM. PSYCHIATRIC ASS’N, <https://www.psychiatry.org/patients-families/stigma-and-discrimination> [<https://perma.cc/DA92-US89>] (last visited Jan. 9, 2023); *see, e.g.*, Clare Kelley, Note, *The Call for FAA Regulation Change: Why Individuals with ADHD and ADHD Medications Should Be Permitted to Become Pilots*, 34 HEALTH MATRIX (forthcoming 2024) (describing biases toward mental health preventing mentally impaired individuals from obtaining their pilot’s licenses).
35. *See* THOMAS S. SZASZ, *THE MYTH OF MENTAL ILLNESS: FOUNDATIONS OF A THEORY OF PERSONAL CONDUCT* 22 (Harper Perennial eds., 1st ed. 2010).
36. *Id.*
37. N. Ann Davis, *Invisible Disability*, 116 ETHICS 153, 154 (2005).
38. *Id.* at 153.
39. *13 Everyday Things that Mental Ill-Health Makes Difficult*, BLURT IT OUT, <https://www.blurtitout.org/2019/09/05/13-everyday-mental-ill-health>

perform ADLs at one moment is not always indicative of the ability to perform at another.⁴⁰

These conflicting beliefs and understandings cause ALJs to deny many who are deserving of assistance.⁴¹ The zombie factors allow ALJs to ignore the complexities of mental illness and abandon disadvantaged applicants. Part I of this Comment details the federal courts' inconsistent responses to ALJs' use of the zombie factors and common criticisms of their application. Part II explains how ALJs manipulate the zombie factors to render unfavorable determinations for mentally ill claimants. Part III suggests alternative methods for review of mental impairments at the ALJ level.

I. RESPONSES TO THE ZOMBIES AND THEIR FAULTS

Social Security will find a claimant “disabled,” and thus qualified for benefits, if the claimant is unable to engage in “substantial gainful activity” due to a mental or physical impairment that has persisted for at least twelve months.⁴² Regulations urge decisionmakers to refrain from considering ADLs or other similar tasks, like “taking care of [oneself], household tasks, hobbies, therapy, school attendance, club activities, [and] social programs,” as instances of “substantial gainful activity.”⁴³

Despite these regulations, district and circuit courts are faced with appealed decisions after ALJs find their claimants capable of ADLs and deny them disability benefits. Some courts will affirm the decision of the ALJ and support the denial because of the claimant's capabilities. Others differentiate ADLs from the ability to work a full-time job and refrain from using ADLs as evidence of non-disability. The zombie factors have been criticized for their failure to distinguish between employability and survivability, creating different standards for different disability types, promoting implicit disability bias, and ignoring significant differences between the home and work environments.

-difficult/?doing_wp_cron=1673447541.2826280593872070312500 [https://perma.cc/QQ3Q-VVKK] (last visited Jan. 11, 2023).

40. See *Living Well with Serious Mental Illness*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., <https://www.samhsa.gov/serious-mental-illness> [https://perma.cc/C9MP-HKZG] (last visited Jan. 10, 2023) (describing bipolar disorder as causing “intense shifts in mood, energy, and activity levels” and stating that serious mental illness is “not something that just ‘passes’ or can be ‘snapped out of’ with willpower”).

41. Frank Griffin, *Recognizing Pearls in the Medical Record of Meritorious Social Security Disability Cases*, 58 ARK. LAW. 30, 34 (2018).

42. 42 U.S.C. §§ 423(d)(1)(A), 1382(a)(1).

43. 20 C.F.R. § 404.1572(c) (2022).

*A. District and Circuit Courts' Inconsistent Reactions to
Using Zombie Factors as Tools to Assess Disability*

Courts inconsistently respond to ALJs' employment of ADLs and other zombie factors to deny claimants disability benefits. There are many courts that use zombie factors to deny applicants. Federal courts have affirmed denials because claimants could live on their own,⁴⁴ dress themselves,⁴⁵ bathe themselves,⁴⁶ and shop for groceries.⁴⁷

Many district courts use zombie factors. The District of Massachusetts affirmed a denial of benefits for an applicant suffering from depression and panic disorder because she could "prepar[e] her own meals, clean, wash laundry and iron on good days."⁴⁸ The Western District of New York gave more weight to evidence of ADL capability than expert testimony when denying a claimant.⁴⁹ The court explained ADLs including cooking and shopping were important considerations because they "suggest a level of functioning and stamina that is inconsistent with the extent of [the claimant's] claimed limitations, as well as with the more extreme limitations opined by [the testifying physicians]."⁵⁰ Similarly, the Southern District of Texas found a claimant's disability was not "supported by substantial evidence," despite the claimant's testimony that he "had problems taking care of his personal needs," because the claimant could "cook" and "drive on occasion."⁵¹

Other district courts did not consider zombie factors sufficient grounds for denying a claimant benefits. The D.C. District Court explained that even if a claimant can perform basic tasks, it "does not mean that he is able to engage in substantial gainful activity" because those menial tasks "do not require the sustained effort necessary for any substantial, sustained and regular gainful employment."⁵² The District of Arizona reasoned that "[t]he Social Security Act does not

44. *Coren v. Calvin*, 253 F. Supp. 3d 356, 360 (D. Mass. 2017); *Fulwood v. Heckler*, 594 F. Supp. 540, 543 (D.D.C. 1984).

45. *Jones v. Berryhill*, 415 F. Supp. 3d 401, 417 (S.D.N.Y. 2019).

46. *Van Laningham v. Astrue*, 496 F. Supp. 2d 1021, 1029 (S.D. Iowa 2007).

47. *Craft v. Astrue*, 539 F.3d 668, 680 (7th Cir. 2008); *Yates v. Colvin*, 940 F. Supp. 2d 664, 670 (S.D. Ohio 2013).

48. *Smith v. Berryhill*, 370 F. Supp. 3d 282, 286 (D. Mass. 2019).

49. *Burkey v. Colvin*, 284 F. Supp. 3d 420, 425 (W.D.N.Y. 2018).

50. Griffin, *supra* note 1, at 176 (brackets in original) (quoting *Burkey*, 284 F. Supp. 3d at 425).

51. *Collins v. Astrue*, 493 F. Supp. 2d 858, 876–77 (S.D. Tex. 2007).

52. *Fulwood v. Heckler*, 594 F. Supp. 540, 543 (D.D.C. 1984).

require that claimants be utterly incapacitated to be eligible for benefits.”⁵³

Certain circuit courts approve of using a claimant’s ability to perform ADLs as evidence of non-disability. The Fifth Circuit claimed an applicant with depression and incapacitation did not show “substantial evidence” of disability because “she is able to care for her personal needs.”⁵⁴ The Eighth Circuit agreed with an ALJ who denied disability benefits because the claimant could “perform daily living activities with minimal limitation, such as taking care of himself and performing household chores.”⁵⁵ The Seventh Circuit affirmed a denial of benefits for a claimant who suffered from a limp and could not lift heavy objects because she “occasionally cook[ed] for herself” and could bathe herself, even though “she ha[d] problems getting out of the bathtub.”⁵⁶

But these same courts have expressed distrust in the use of ADLs to prove non-disability. The Seventh Circuit “ha[s] cautioned the Social Security Administration against placing undue weight on a claimant’s household activities in assessing the claimant’s ability to hold a job outside the home.”⁵⁷ The Eighth Circuit has “repeatedly held” that the ability to complete ADLs “provides little or no support for the finding that a claimant can perform full-time competitive work.”⁵⁸

B. Criticisms of Using Zombie Factors to Deny Claimants

The application of zombie factors is criticized for measuring the “[a]bility and [w]ill to [s]urvive” instead of employability and setting a higher disability standard for claimants who do not qualify for benefits under Social Security’s “Listing of Impairments.”⁵⁹ The “Listing of Impairments” details several impairments that automatically qualify claimants for benefits.⁶⁰ Many individuals with disabilities included in the listed impairments can accomplish their ADLs.⁶¹ For example, cancer patients are included in the “Listing of Impairments.”⁶² Many

53. *Bergfeld v. Barnhart*, 361 F. Supp. 2d 1102, 1112 (D. Ariz. 2005) (citing *Gallant v. Heckler*, 753 F.2d 1450, 1453 (9th Cir. 1984)).

54. *Anthony v. Sullivan*, 954 F.2d 289, 295 (5th Cir. 1992).

55. *Wagner v. Astrue*, 499 F.3d 842, 847 (8th Cir. 2007).

56. *Rice v. Barnhart*, 384 F.3d 363, 366 (7th Cir. 2004).

57. *Craft v. Astrue*, 539 F.3d 668, 680 (7th Cir. 2008) (quoting *Mendez v. Barnhart*, 439 F.3d 360, 362 (7th Cir. 2006)).

58. *Draper v. Barnhart*, 425 F.3d 1127, 1131 (8th Cir. 2005) (quoting *Baumgarten v. Chater*, 75 F.3d 366, 369 (8th Cir. 1996)).

59. Griffin, *supra* note 1, at 178; 20 C.F.R. § 404.1525 (2022).

60. 20 C.F.R. § 404.1525.

61. Griffin, *supra* note 1, at 178–79.

62. 20 C.F.R. § 404.1525, Subpt. P, App. 1, Pt. A, Sec. 13.

cancer patients and survivors can still complete ADLs, because ADLs require only “a very low level of function.”⁶³ Nevertheless, these patients are entitled to disability.

Critics also argue zombie factors promote implicit disability bias, or the notion that people with “real” disabilities are “unable to take care of their own basic needs and live independently.”⁶⁴ The zombie factors therefore “penalize people with disabilities ‘for attempting to lead normal lives in the face of their limitations.’”⁶⁵ When ALJs apply ADLs to disability determinations, they support an archaic bias that there is no place for disabled individuals in mainstream society.⁶⁶

Moreover, medical professionals encourage disabled claimants to perform their ADLs as a means for combating their disabilities and maintaining physical and mental health. Physicians “recommend avoid[ing] inactivity to prevent further disability, chronic disease, and early death—even in people with painful disabilities.”⁶⁷ Doctors may suggest engaging in recreational activities to prevent conditions such as “contractures, disuse atrophy, osteopenia, depression associated with disability, and death from inactivity.”⁶⁸ A physician’s recommendation that an individual complete ADLs and recreational activities is “not inconsistent with a finding that the claimant is experiencing disabling pain and unable to engage in gainful employment activities.”⁶⁹

Judge Posner has largely criticized using the zombie factors to determine disability. Judge Posner noted that some Social Security recipients are capable of working.⁷⁰ He also found “critical differences” between ADLs and work tasks.⁷¹ First, Judge Posner noted that an individual has “more flexibility in scheduling” his ADLs than his work.⁷² ADLs can be “carried out at the whim of the claimant” when the claimant is feeling well.⁷³ But many jobs have scheduled work time and

63. Griffin, *supra* note 1, at 178–79 (citing Julie K. Silver, Jennifer Baima, & R. Samuel Mayer, *Impairment-Driven Cancer Rehabilitation: An Essential Component of Quality Care and Survivorship*, 63 CA: CANCER J. FOR CLINICIANS 296, 297 (2013)).

64. Griffin, *supra* note 1, at 172 & n.85, 189.

65. *Id.* at 189 (quoting *Bergfeld v. Barnhart*, 361 F. Supp. 2d 1102, 1115 (D. Ariz. 2005)).

66. *Id.* at 205.

67. Griffin, *supra* note 41, at 31.

68. *Id.*

69. *Id.*

70. *Gentle v. Barnhart*, 430 F.3d 865, 867 (7th Cir. 2005).

71. *Bjornson v. Astrue*, 671 F.3d 640, 647 (7th Cir. 2012).

72. *Id.*

73. Griffin, *supra* note 41, at 31.

physical requirements.⁷⁴ An occupation's schedule won't allow for unexpected days off when a claimant is having a "bad day," but individuals can postpone their ADL tasks to a "good day."⁷⁵ Second, it is easier for a person to "get help from other[s]" when needed to accomplish ADLs at home than it is to get help with work at a job.⁷⁶ Finally, unlike a job, individuals are not "held to a minimum standard of performance" when completing ADLs.⁷⁷

II. EXPLOITING THE ZOMBIES: ALJS USE ADLS AND OTHER MAINSTREAM ACTIVITIES TO MINIMIZE THE MAGNITUDE OF MENTAL ILLNESS

Mental illness creates a "special challenge in the disability determination process" because the determination relies on "objective medical evidence."⁷⁸ The medical evidence consists of "observation[s] of signs of mental impairment consistent with symptoms self-reported by the claimant."⁷⁹ Social Security currently uses ADLs to make such observations.⁸⁰

But ADLs cannot expose the full reach of mental illness. Mental illnesses are often "invisible": sufferers "may . . . appear 'normal' to people with whom they have casual interactions."⁸¹ Even if the symptoms can be traced, their presence may be variable.⁸² Affected individuals may have periods when they are asymptomatic and other instances where their conditions are debilitating.⁸³

A. Employing Zombie Factors to Mask Integral Symptoms of Mental Illness

Using ADLs to determine disability benefits permits ALJs to stop their inquiry at the surface and allows the severity of mental illness to

74. *Id.*

75. Grffin, *supra* note 1, at 189.

76. *Bjornson*, 671 F.3d at 647.

77. *Id.*

78. Goldman et al., *supra* note 33, at 57.

79. *Id.*

80. *SSA Revises Criteria for Evaluating Mental Disorders*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (Sept. 2016), <https://soarworks.samhsa.gov/about-the-model/ssa-updates/ssa-revises-criteria-for-evaluating-mental-disorders> [<https://perma.cc/HKH9-55PT>].

81. Davis, *supra* note 37, at 153–54.

82. Sarah Powell, *Dispelling Myths on Mental Illness*, NAT'L ALL. ON MENTAL ILLNESS (July 17, 2015), <https://www.nami.org/blogs/nami-blog/july-2015/dispelling-myths-on-mental-illness> [<https://perma.cc/PDC2-NY2D>].

83. *Id.*

remain concealed. Adjudicators often allow the achievement of ADLs to overshadow the possibility that completing these tasks is much more challenging for someone battling mental illness than for a healthy individual.⁸⁴ There is some indication that ALJs consciously ignore this possibility. The Middle District of Tennessee supported an ALJ's claim that a woman's bipolar and anxiety disorders did not amount to a disability because she could sometimes "clean[], garden[], and take[] care of [her] mother" despite testimony that she experiences great difficulty with the interpersonal functioning and concentrating skills necessary to accomplish such tasks.⁸⁵

Symptoms of mental disorders "make[] the simplest tasks feel impossible."⁸⁶ An obsessive-compulsive individual may be capable of cleaning his kitchen, but his compulsions can make him feel highly uncomfortable while performing the task.⁸⁷ The task may become more time consuming for the sufferer than for unaffected persons because he cleans the kitchen more precisely to appease his compulsions.⁸⁸ Someone suffering from depression can force herself to eat, but the action is nearly painful for her because the condition makes her feel unmotivated to consume food.⁸⁹ There is also a strong association between mental illness and fatigue, which may further impede sufferers' ability to perform their ADLs.⁹⁰

Mentally ill patients may also have more difficulty performing ADLs, despite their physical capabilities, because they often experience executive dysfunction, a side effect of their mental conditions. "Executive dysfunction" is a "disrupt[ion] [to] a person's ability to manage their own thoughts, emotions and actions"⁹¹ and is very

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84. *13 Everyday Things that Mental Ill-Health Makes Difficult*, *supra* note 39; Griffin, *supra* note 1, at 172–73.
85. Christian v. Astrue, No. 3:10-CV-0455, 2010 WL 4822542, at *2, 6, 11 (M.D. Tenn. Nov. 22, 2010), *rep. & recommendation adopted*, No. 3:10-CV-0455, 2011 WL 3348078 (M.D. Tenn. Aug. 2, 2011).
86. *The Hunger–Depression Cycle*, SOVA (July 30, 2019), <https://sova.pitt.edu/educate-yourself-the-hunger-depression-cycle> [<https://perma.cc/NFT4-TXF8>].
87. See Fred Penzel, *How Clean Is "Clean?"* BEYONDOCD.ORG, <https://beyondocd.org/expert-perspectives/articles/how-clean-is-clean> [<https://perma.cc/LM2U-KVPM>] (last visited Jan. 9, 2023).
88. *Id.*
89. *The Hunger–Depression Cycle*, *supra* note 86.
90. Marie-Louise Dick & Josie Sundin, *Psychological and Psychiatric Causes of Fatigue: Assessment and Management*, 32 AUSTL. FAM. PHYSICIAN 877, 879 (2003).
91. *Executive Dysfunction*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/symptoms/23224-executive-dysfunction> [<https://perma.cc/H2V4-YVGJ>] (June 5, 2022).

common in patients with neurologic disorders, including mental health conditions, behavioral disorders, and mood disorders.⁹²

Executive dysfunction affects one's working memory, cognitive flexibility, and inhibition control. The symptom complicates performing ADLs because sufferers become more distracted, experience more difficulty motivating themselves to complete tasks, and struggle to move from one task to another.⁹³

These integral symptoms are concealed by claimants' testimony of their ADL capabilities. ALJs employ ADLs to devalue the complications mental illness creates in day-to-day life. ALJs subsequently deny benefits for claimants who experience great difficulty achieving their ADLs and other similar mainstream tasks because their difficulties did not result in failure.

B. ALJs' ADL Analyses Ignore the Cyclical Nature of Mental Illness

Mentally disabled claimants may be weakened by their disabilities and unable to perform their ADLs, but their helplessness is rarely permanent. Many symptoms of mental illness recur, and the severity of symptoms fluctuate.⁹⁴ People who experience bipolar disorder alternate between periods of mania, where they experience increased activity and energy, and periods of depression that cause a loss of interest in activities.⁹⁵ Persistent depressive disorder is a chronic condition that causes feelings of sadness and emptiness that interfere with daily activities, but symptoms "come and go over a period of years" and "[t]he intensity of symptoms can change over time."⁹⁶ Those who suffer from seasonal affective disorder experience symptoms of depression that are present only during certain seasons of the year.⁹⁷ Obsessive-

92. *Id.*; Gil D. Rabinovici, Melanie L. Stephens & Katherine L. Possin, *Executive Dysfunction*, 21 CONTINUUM J. 646, 648, 657 (June 2015).

93. *Executive Dysfunction*, *supra* note 92.

94. *Does Mental Illness Go Away on Its Own?*, MENTAL HEALTH AM., <https://screening.mhanational.org/content/does-mental-illness-go-away-its-own/> [<https://perma.cc/UUV7-X9SJ>] (last visited Jan. 10, 2023).

95. *Mental Disorders*, WORLD HEALTH ORG. (June 8, 2022), <https://www.who.int/news-room/fact-sheets/detail/mental-disorders> [<https://perma.cc/NS6N-9EFN>].

96. *Persistent Depressive Disorder*, MAYO CLINIC (Dec. 2, 2022), <https://www.mayoclinic.org/diseases-conditions/persistent-depressive-disorder/symptoms-causes/syc-20350929> [<https://perma.cc/N79X-WLX3>].

97. WHAT IS DEPRESSION?, NAT'L INST. OF MENTAL HEALTH (2021), https://www.nimh.nih.gov/sites/default/files/documents/health/publications/depression/21-mh-8079-depression_0.pdf [<https://perma.cc/VSY5-B9ZF>].

compulsive disorder symptoms often “begin gradually and tend to vary in severity throughout [an individual’s] life.”⁹⁸

Some people who suffer from mental illness experience heightened symptoms after being exposed to a trigger, or “an action or situation that can lead to an adverse emotional reaction.”⁹⁹ There are many different types of triggers that can elicit an emotional response, such as external stimuli, internal feelings, past trauma, and physical changes.¹⁰⁰

The appearance or exacerbation of symptoms is generally unpredictable.¹⁰¹ Living with a permanent mental illness is like “walking on eggshells” because “you never know which one is going to break.”¹⁰² A claimant cannot foresee when symptoms of her mental illness will reappear, so it is possible that symptoms may not be present at the time of her hearing.¹⁰³

It is hard to know how often a sufferer will experience symptoms of mental illness.¹⁰⁴ Some sufferers experience symptoms constantly, while others experience symptoms for a distinct period of time. Symptoms can present in multiple, discrete episodes that come and go throughout one’s lifetime.¹⁰⁵

Federal courts recognize that ALJs will “cherry pick[]’ the record” and use periods of ADL capability to justify their denials and “fail[] to acknowledge the cyclical pattern of [claimants’] symptoms.”¹⁰⁶ Some courts reverse these decisions for ignoring instances where symptoms of

98. *Obsessive-Compulsive Disorder (OCD)*, MAYO CLINIC (Mar. 11, 2020), <https://www.mayoclinic.org/diseases-conditions/obsessive-compulsive-disorder/symptoms-causes/syc-20354432> [<https://perma.cc/2GM2-TN7U>].

99. Katherine Ponte, *Understanding Mental Illness Triggers*, NAT’L ALL. ON MENTAL ILLNESS (Jan. 10, 2022), <https://www.nami.org/Blogs/NAMI-Blog/January-2022/Understanding-Mental-Illness-Triggers> [<https://perma.cc/DN75-NW9E>].

100. *Understanding Mental Health Triggers*, HEELS CARE NETWORK (Jan. 27, 2022), <https://care.unc.edu/understanding-mental-health-triggers/> [<https://perma.cc/98A9-Z5MQ>].

101. *Psychiatric Impairments*, DO-IT, <https://www.washington.edu/doi/psychiatric-impairments> [<https://perma.cc/Y24T-9Z46>] (last visited Jan. 11, 2023).

102. Kevin Grimm, *An Invisible Illness Is Still an Illness*, NAT’L ALL. ON MENTAL ILLNESS (May 22, 2017), <https://www.nami.org/blogs/nami-blog/may-2017/an-invisible-illness-is-still-an-illness> [<https://perma.cc/GP2H-HVKZ>].

103. *Does Mental Illness Go Away on Its Own?*, *supra* note 94.

104. *Id.*

105. *Id.*

106. *See, e.g.,* *Gonzales v. Colvin*, 69 F. Supp. 3d 1163, 1173 (D. Colo. 2014) (citing *Robinson v. Barnhart*, 366 F.3d 1078, 1083 (10th Cir. 2004)).

mental illness stifle performance.¹⁰⁷ The Ninth Circuit reversed an ALJ's determination of non-disability when the bipolar claimant could "clean[] her room, talk[] on the phone . . . , and help[] care for her own daughter" but had bouts of being "non-functional," finding that "it is error to reject a claimant's testimony merely because symptoms wax and wane in the course of treatment."¹⁰⁸ The District of Colorado reversed an ALJ decision for dismissing the "severe and recurrent" symptoms of a claimant's major depressive disorder.¹⁰⁹ The ALJ justified the denial with the claimant's fleeting ability to "read[] the Bible . . . , us[e] the bus . . . , and liv[e] on her own."¹¹⁰ The District of Oregon criticized an ALJ for ignoring the "cyclical nature of bipolar disorder" and using zombie factors to disregard instances when the claimant had "difficulties in performing activities of daily living."¹¹¹ The effect of ALJs highlighting periods of ADL activity is that claimants' dark times remain unseen in the shadows.

III. TAMING THE ZOMBIES: SUGGESTIONS FOR ALTERING ALJs' APPROACH TO EVALUATING MENTAL ILLNESS

ALJs currently invoke the zombie factors to "penalize people with disabilities 'for attempting to lead normal lives in the face of their limitations.'"¹¹² Evaluating merely whether a claimant can perform ADLs and other simple tasks does not demonstrate a claimant's ability to hold a job; current analyses of the zombie factors merely "serve as [a] potential outlet[] for implicit biases regarding dependency and isolation of people with disabilities."¹¹³

Zombie factors can be especially harmful for claimants with mental impairments.¹¹⁴ By applying zombie factors to a determination, ALJs only scratch the surface of disability. They fail to understand the invisible hardships of mental illness.¹¹⁵ Zombie factors are usually

107. *See, e.g.*, *Garrison v. Colvin*, 759 F.3d 995, 1023 (9th Cir. 2014).

108. *Id.* at 1008, 1017.

109. *Horton v. Saul*, No. 18-cv-03149-NRN, 2019 WL 3928621, at *5–6 (D. Colo. Aug. 19, 2019).

110. *Id.* at *4.

111. *Sunwall v. Colvin*, 158 F. Supp. 3d 1077, 1081–82 (D. Or. 2016).

112. *Griffin*, *supra* note 1, at 189 (quoting *Bergfeld v. Barnhart*, 361 F. Supp. 2d 1102, 1115 (D. Ariz. 2005)).

113. *Id.* at 196.

114. *See supra* Part II.

115. *See 13 Everyday Things that Mental Ill-Health Makes Difficult*, *supra* note 39 (describing the struggles of completing ordinary tasks or engaging in normal social activities when suffering from mental illness).

applied to a singular period of time,¹¹⁶ but mental illness does not stagnate.¹¹⁷ For an accurate understanding of mental illness, ALJs must adjust their examination of the zombie factors during the hearing process.

Dr. Griffin suggests removing zombie factors from the hearing process entirely.¹¹⁸ He believes that to kill the zombies, Social Security must work to reduce implicit disability bias. The Agency can create an unbiased tribunal through ALJ selection, monitoring, and removal.¹¹⁹ Griffin suggests screening potential ALJ candidates through an Implicit Association Test (IAT), an exam that “measures the strength of associations between concepts (e.g., ‘Disabled Persons,’ ‘Able Persons’) and evaluations (e.g., ‘Bad,’ ‘Good’).”¹²⁰ The exam scores are determined by the time it takes for an individual to “sort words and images/symbols when the categories are combined, such as Good or Disabled Persons and Bad or Able Persons and vice versa.”¹²¹ The idea is that individuals work faster when making “stereotype-consistent associations” and slower when they fight against those associations.¹²²

Studies have found IAT scores correlate with behaviors: scores indicative of bias translate to biased behavior.¹²³ Therefore, candidates who demonstrate more biased thinking through their IAT should not be appointed. Griffin argues the IATs are necessary because it is “hard to recognize bias during interviews or when reviewing other external observations”¹²⁴ because candidates often “behave in ways that appear to be inconsistent with their feelings in the presence of those

116. See, e.g., *Sunwall*, 158 F. Supp. 3d at 1081–83; *Rice v. Barnhart*, 384 F.3d 363, 366 (7th Cir. 2004).

117. *Does Mental Illness Go Away on Its Own?*, *supra* note 94.

118. Griffin, *supra* note 1, at 189, 199–201.

119. *Id.* at 193–95.

120. *Id.* at 193 (quoting ABA Comm’n on Disability Rts., *Implicit Biases & People with Disabilities*, AM. BAR. ASS’N, https://www.americanbar.org/groups/diversity/disabilityrights/resourcer/implicit_bias/ [https://perma.cc/YLK3-8R98] (last visited Jan. 26, 2023)).

121. *Id.*

122. *Id.* at 194 (quoting Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 847, 855 (2007)).

123. *Id.*

124. *Id.* at 193–94.

stigmatized.”¹²⁵ IATs can also bring conscious awareness to bias that may not manifest through the traditional interview process.¹²⁶

After an ALJ is appointed, Griffin suggests implementing a probationary period where new hires engage in implicit bias training.¹²⁷ The American Bar Association found that implicit biases can be alleviated through this kind of intervention.¹²⁸ For example, training that “counter[s] the negative effects of implicit biases by building new mental associations” has decreased racial and sexual biases.¹²⁹ Finally, Griffin recommends disciplining or removing ALJs who demonstrate biased decision-making. By reducing implicit disability bias among ALJs, Griffin believes the zombie factors will not invade Social Security determinations.¹³⁰

While it is imperative to decrease implicit disability bias among ALJs, it may not be necessary to remove the zombie factors from analyses of people with mental impairments. However, should an ALJ invoke the zombies, she must deepen her inquiry. A claimant’s ADL performance may be telling: if a claimant describes the unique, inconspicuous struggles he faces while completing ADLs, the claimant may expose more of his disability.¹³¹ For claimants who are in a “good” period at the time of their hearing, ALJs should expand their investigation over a longer period of time, ideally the entire length of the illness, to better understand the recurrent nature of mental conditions.¹³² A description of both productive periods and times of dysfunction may help portray the intensity of repetitive illness. By describing ADL performance and the complications associated with completing their daily tasks, claimants can better illustrate the debilitations their disabilities cause. Instead of exterminating the zombies, perhaps we can train them for good.

125. *Id.* (quoting Cassandra D. Dionne, Heather L. Gainforth, Deborah A. O’Malley & Amy E. Latimer-Cheung, *Examining Implicit Attitudes Towards Exercisers with a Physical Disability*, 2013 SCI. WORLD J. 1, 1 (2013)).

126. Griffin, *supra* note 1, at 193.

127. *Id.* at 194.

128. *Id.* (citing ABA COMM’N ON DISABILITY RTS., *supra* note 120).

129. *Id.*

130. *Id.* at 189–90, 195.

131. *See 13 Everyday Things that Mental Ill-Health Makes Difficult*, *supra* note 39.

132. *Does Mental Illness Go Away on Its Own?*, *supra* note 94.

CONCLUSION

When a claimant applies for disability benefits, he must fill out an initial application.¹³³ He can do it online.¹³⁴ If he doesn't have internet access, he must go to his local Social Security office to retrieve the application.¹³⁵ He may not know which office to go to. The claimant can call the national hotline to find out, but he'll stay on hold for over thirty minutes before talking to a representative.¹³⁶ He may not own a car, so he'll need to find transportation. He may not be capable of applying on his own, so he'll need to find assistance. The claimant needs to complete the application correctly, or he won't be considered. He'll wait several months before he gets an initial determination.¹³⁷

The claimant will probably be denied.¹³⁸ He has sixty days to file for reconsideration, or else he'll have to start from scratch.¹³⁹ He'll wait another few months, then he'll likely find he was denied again.¹⁴⁰ All while managing a severe impairment that gave rise to his application in the first place.

If the claimant is given a hearing, the least his judge can do is try to understand the complexity of the condition that led him there. To truly grasp the complexities of disability, we must look beyond what we can see. Disability cannot be measured by what someone can do.

133. *Apply for Benefits*, SOC. SEC. ADMIN., <https://secure.ssa.gov/iClaim/dibw> [<https://perma.cc/2WRT-SUTM>] (last visited Jan. 11, 2023).

134. *Id.*

135. *What Should You Know Before You Apply for Social Security Disability Benefits*, SOC. SEC. ADMIN., <https://www.ssa.gov/disability/Documents/Factsheet-AD.pdf> [<https://perma.cc/6AYV-VWC2>] (last visited Jan. 11, 2023).

136. *Social Security Administration (SSA) Monthly Data for National 800 Number Network Average Speed to Answer*, SOC. SEC. ADMIN., <https://www.ssa.gov/open/data/800-number-average-speed-to-answer.html#datasetDescription> [<https://perma.cc/CC4Y-FAGL>] (last visited Jan. 11, 2023) (finding that in 2022, a caller would wait on average 1,962 seconds to speak to a Social Security representative).

137. *What Should You Know Before You Apply for Social Security Disability Benefits*, *supra* note 135.

138. *Annual Statistical Report on the Social Security Disability Insurance Program, 2020*, SOC. SEC. ADMIN., https://www.ssa.gov/policy/docs/statcomps/di_asr/2020/sect04.html [<https://perma.cc/5FTQ-D4ND>] (last visited Jan. 11, 2023) (finding that in 2019, only 29.2 percent of applicants were ultimately awarded disability benefits).

139. *Understanding Supplemental Security Income Appeals Process—2022 Edition*, SOC. SEC. ADMIN., <https://www.ssa.gov/ssi/text-appeals-ussi.htm> [<https://perma.cc/93M5-BV6J>] (last visited Jan. 11, 2023).

140. *What Should You Know Before You Apply for Social Security Disability Benefits*, *supra* note 135.

Disability cannot be found by asking “yes” or “no” questions. Disability cannot be recognized by objective metrics.

ALJs must strive to fully acknowledge the mentally ill claimants that are brave enough to stand before them. Asking if they can accomplish their daily tasks is not enough. ALJs are currently invoking zombie factors in a way that causes harm to claimants. Zombie factors are used to perpetuate bias. The ability to bathe and eat cannot demonstrate the full complexity of mental illness. We need to remove the zombies or tame them and allow our claimants to explain their struggles. Maybe then they’ll have a fighting chance.

Annie Goldstein[†]

[†] J.D. expected 2023, Case Western University School of Law; B.S. 2019, The Ohio State University. I dedicate this Comment to my grammy, who would have been thrilled to read this. I would like to thank the editors of the *Case Western Reserve Law Review* for their wisdom and support. Thank you to my clinic advisors, Jessica Edelstein and Laura McNally, for providing me with meaningful experiences in the health law clinic that gave rise to this Comment. Special thanks to Professor David Carney for believing in me. Thank you to my dad and sister, Shelby, for reading my drafts and providing me insight. Thank you to my papa, for all your support throughout law school. Thank you to my mom for bringing me snacks as I wrote and for being my biggest cheerleader during law school. I could not have done it without you!