Falling Through the Cracks: How the 20/40 Rule Discriminates Against Women Seeking Social Security Disability Insurance Benefits and What Congress Can Do About It

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I. INTRODUCTION

The Social Security Administration ("SSA") determines eligibility for Social Security Disability Insurance ("SSDI") benefits on the basis of both the disability and the work history of the applicant.[1] The 20/40 rule is a tool used by the SSA to evaluate whether an applicant's work history is sufficient to award benefits.[2] The rule provides that "[a]n individual shall be insured for disability insurance benefits in any month if . . . he [or she] had not less than 20 quarters of coverage during the 40-quarter period which ends with the quarter in which such month occurred. . . ."[3] Because the 20/40 rule requires recent and substantial work activity, it may discriminate against women, who leave their jobs much more frequently than men to care for their children.[4]

The United States Court of Appeals for the Second Circuit recently dealt with the issue of whether the 20/40 rule discriminates against women in *Collier v. Barnhart*.[5] This Comment uses the *Collier* case and newly proposed legislation as a vehicle to discuss the policies, goals, and effects of the 20/40 rule. Although the rule itself has withstood constitutional challenge,[6] this Comment demonstrates that the rule has an adverse effect on women, particularly stay-at-home mothers. After recognizing the discriminatory effect of the 20/40 rule, this Comment asks what Congress can and should do to address the problem.

II. BACKGROUND

A. A Significant Contribution and a Debilitating Disease

Claire Collier is a forty-five year old wife and mother who suffers from amyotrophic lateral sclerosis, or ALS, a debilitating and ultimately

1. *See* Collier v. Barnhart, No. 3:05CV1677 (PCD) (JGM), 2006 U.S. Dist. LEXIS 95425, at *9 (D. Conn. July 17, 2006), *aff'd*, 473 F.3d 444 (2d Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 353 (2007).

2. *See id.* at *20.

3. 42 U.S.C. § 423(c)(1) (Westlaw 2008).

4. Collier v. Barnhart, 473 F.3d 444, 447 (2d Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 353 (2007).

5. *See id.* at 448.

6. *See, e.g.*, *Collier*, 473 F.3d at 449 (holding that the 20/40 rule passes the rational basis test and is therefore constitutional); Harvell v. Chater, 87 F.3d 371, 373 (9th Cir. 1996) ("[W]e follow the Tenth Circuit in holding that the 20/40 rule does not violate the Due Process Clause of the Fifth Amendment."); Tuttle v. Sec'y of Health, Educ. and Welfare, 504 F.2d 61, 63 (10th Cir. 1974) ("Our concern is with the rationality of the 20/40 requirements. Because they have a rational base and are free from invidious discrimination, they do not violate the Constitution.").

fatal disease that affects the nervous system.[7] Before her diagnosis, Mrs. Collier was an active member of the workforce and society.[8] She was employed outside the home for 15 years, from 1979 until shortly before the birth of her oldest child in 1994.[9] Mrs. Collier spent the next six years as a stay-at-home mother, giving birth to and raising three children.[10] In 2000, when her youngest child was about three years old, Mrs. Collier returned to the workforce as a part-time teacher's aide.[11] In the 15 years that she worked before staying home to raise her children, Mrs. Collier and her employers contributed nearly $40,000 to the Social Security system and $10,000 to Medicare.[12]

Mrs. Collier began to develop symptoms indicative of amyotrophic lateral sclerosis in 2003.[13] She was diagnosed with the disease that same year, just three years after she went back to work.[14]

Amyotrophic lateral sclerosis, or ALS, is a neurological disease that involves the degeneration and death of nerve cells that control the movement of voluntary muscles.[15] ALS has been described as "devastating,"[16] "rapidly progressive," and "invariably fatal" by the National Institute of Neurological Disorders and Stroke.[17] It is also known as Lou Gehrig's disease, for the New York Yankees baseball

7. Petition for a Writ of Certiorari at 3-5, Collier v. Astrue, ___ U.S. ___, 128 S. Ct. 353 (2007) (No. 06-1343), 2007 WL 1059569 at 3-5. "Michael J. Astrue was sworn in [on February 12, 2007] as the Commissioner of Social Security," replacing former Commissioner Jo Anne B. Barnhart, who was originally named in Collier's suit. Press Release, Soc. Sec. Admin., Michael J. Astrue Sworn in as Commissioner of Social Security (Feb. 12, 2007), *available at* http://www.ssa.gov/pressoffice/pr/astrue-pr.htm. Please note, the author does not know Mrs. Collier's exact birthday, and therefore the age given is what the author reasonably believes it to be.

8. *See* Petition for a Writ of Certiorari, *supra* note 7, at 4.

9. *Id.*

10. Collier v. Barnhart, No. 3:05CV1677 (PCD) (JGM), 2006 U.S. Dist. LEXIS 95425, at *3 (D. Conn. July 17, 2006), *aff'd*, 473 F.3d 444 (2d Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 353 (2007); Petition for a Writ of Certiorari, *supra* note 7, at 3-4.

11. Petition for a Writ of Certiorari, *supra* note 7, at 3-4.

12. *Id.* at 4.

13. *Id.*

14. *Id.*

15. OFFICE OF COMMC'N AND PUB. LIAISON, NAT'L INST. OF NEUROLOGICAL DISORDERS AND STROKE, NIH PUBLICATION NO. 00-916, AMYOTROPHIC LATERAL SCLEROSIS FACT SHEET para. 1 (2003), *available at* http://www.ninds.nih.gov/disorders/amyotrophiclateralsclerosis/detail_amyotrophiclateralsclerosis.htm.

16. *Amyotrophic Lateral Sclerosis: Special Hearing Before a Subcomm. of the S. Comm. on Appropriations*, 106th Cong. 8 (2001) (statement of Gerald D. Fischbach, M.D., Director, National Institute of Neurological Disorders and Stroke), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_senate_hearings&docid=f:68402. pdf.

17. OFFICE OF COMMC'N AND PUB. LIAISON, NAT'L INST. OF NEUROLOGICAL DISORDERS AND STROKE, *supra* note 15.

player who succumbed to ALS in 1941 at 37 years of age.[18] In the U.S., approximately 20,000 individuals currently suffer from ALS, and there are roughly 5,000 new cases every year.[19] Researchers have yet to discover the cause of ALS, and there is no cure.[20]

The nerve cells affected by ALS are found in the spinal cord, brainstem, and brain.[21] When these cells deteriorate and die, messages from the nervous system cannot reach voluntary muscles.[22] Without these messages, the muscles are unable to move, resulting in muscle weakness, atrophy, and twitching.[23] Ultimately, ALS affects all of the voluntary muscles, paralyzing individuals and affecting their ability to breathe.[24] Within three to five years after the individual begins noticing symptoms, death usually occurs, most commonly as a result of respiratory failure.[25]

ALS does not discriminate.[26] No race or ethnicity is immune.[27] It affects men and women, young and old.[28] ALS is diagnosed most frequently, however, in individuals between 40 and 60 years of age.[29] In addition, it occurs more often in men than in women.[30]

The diagnosis of ALS has dealt a "crushing" financial blow to the Collier family.[31] The disease has not only made it impossible for Mrs. Collier to hold a job, but it has also required her family to spend enormous sums of money for her treatment and care.[32] Since her diagnosis, the Colliers have spent in excess of $500,000.[33] In addition, the Colliers incur ongoing costs each month for medication, physical and massage therapy, and 24 hour in-home health care.[34] Mrs. Collier's

18. *The Hall of Famers: Lou Gehrig*, http://www.baseballhalloffame.org/hofers/detail.jsp?playerId=114680 (last visited Oct. 9, 2008).

19. OFFICE OF COMMC'N AND PUB. LIAISON, NAT'L INST. OF NEUROLOGICAL DISORDERS AND STROKE, *supra* note 15, para. 6.

20. *Id.* para. 19, 24.

21. *Id.* para. 2.

22. *Id.*

23. *Id.*

24. OFFICE OF COMMC'N AND PUB. LIAISON, NAT'L INST. OF NEUROLOGICAL DISORDERS AND STROKE, *supra* note 15, para. 3.

25. *Id.*

26. *See id.* at para. 6.

27. *Id.*

28. *Id.*

29. OFFICE OF COMMC'N AND PUB. LIAISON, NAT'L INST. OF NEUROLOGICAL DISORDERS AND STROKE, *supra* note 15, para. 6.

30. *Id.*

31. Petition for a Writ of Certiorari, *supra* note 7, at 5.

32. *Id.*

33. *Id.*

34. *Id.* at 6.

expenses continue to increase, and in 2007 she estimated that she would spend more than $500,000 just for in-home healthcare.[35]

B. The Fight for Social Security Disability Insurance

In January of 2004, Mrs. Collier applied for Social Security Disability Insurance benefits in order to alleviate some of the financial burden associated with her illness.[36] Despite her 15 year work history, Mrs. Collier's application was denied because she had not worked 20 of the last 40 quarters, the equivalent of five of the last ten years, before the onset of her disability.[37] In other words, Mrs. Collier had not worked long enough recently enough to satisfy the 20/40 rule.[38]

After reaching the end of the administrative appeals process,[39] Mrs. Collier filed suit in October of 2005, in the United States District Court for the District of Connecticut.[40] In her suit against the Commissioner of Social Security, Mrs. Collier argued that the 20/40 rule is unconstitutional.[41] Specifically, Mrs. Collier argued that the 20/40 rule violates the equal protection component of the Due Process Clause of the Fifth Amendment because it discriminates against stay-at-home mothers who have made significant contributions to Social Security and Medicare.[42] Mrs. Collier also relied on the Due Process Clause of the Fifth Amendment, arguing that "a rule which disregards her fifteen years of full employment cannot be rationally based."[43] Ultimately, the district court found that the 20/40 rule did not violate equal protection or due

35. *Id.*

36. *See* Petition for a Writ of Certiorari, *supra* note 7, at 6.

37. *See* Collier v. Barnhart, 473 F.3d 444, 447 (2d Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 353 (2007).

38. *See id.*

39. Petition for a Writ of Certiorari, *supra* note 7, at 7. Mrs. Collier's application for reconsideration was denied. *Id.* The following year, Mrs. Collier was granted a hearing in front of an Administrative Law Judge, or ALJ. *Id.* The ALJ sympathized with Mrs. Collier, finding that the disease had affected her mentally and physically and had burdened her financially; nevertheless, the ALJ also denied her application for benefits. Collier v. Barnhart, No. 3:05CV1677 (PCD) (JGM), 2006 U.S. Dist. LEXIS 95425, at *3 (D. Conn. July 17, 2006), *aff'd*, 473 F.3d 444 (2d Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 353 (2007). The Social Security Administration Appeals Council also refused to review her case. Petition for a Writ of Certiorari, *supra* note 7, at 7.

40. Petition for a Writ of Certiorari, *supra* note 7, at 7.

41. *See Collier*, 2006 U.S. Dist. LEXIS 95425, at *4.

42. *Id.* at *10-11. "Although the Fifth Amendment does not contain an equal protection clause, 'it does forbid discrimination that is "so unjustifiable as to be violative of due process.'" *Id.* at 11 (quoting Nicholas v. Tucker, 114 F.3d 17, 20 (2d Cir. 1997)). "The standards for analyzing equal protection claims under the Fifth Amendment and the Fourteenth Amendment are identical." *Id.* (citing Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975)).

43. *Id.* at *25.

process, and therefore, granted the Commissioner's motion for summary judgment.[44]

Mrs. Collier's possibilities for judicial relief ended after an unsuccessful appeal to the United States Court of Appeals for the Second Circuit[45] and the denial of her petition for a writ of certiorari by the United States Supreme Court.[46]

C. The Claire Collier Social Security Disability Insurance Fairness Act

In its opening statement, the Second Circuit called Mrs. Collier's situation "a matter of human tragedy," noting that ALS had taken a tremendous physical and financial toll on Mrs. Collier.[47] With obvious sympathy, the court stated that it was forced to affirm the district court's decision because Mrs. Collier had failed to prove that the 20/40 rule violated the United States Constitution.[48] Because of its inability to amend existing legislation, the court suggested that legislative action may be necessary to deal with this issue.[49]

In response to the problems faced by Mrs. Collier and others suffering from terminal diseases, U.S. Senator Christopher Dodd and U.S. Representative Christopher Shays introduced the "Claire Collier Social Security Disability Insurance Fairness Act" for the first time in the 109th congressional session.[50] The proposed act died in committee.[51] Both the House and Senate versions of the bill, which are identical, were re-introduced in the 110th congressional session.[52]

If enacted, the bill would operate to exempt those with covered terminal diseases from the 20/40 rule.[53] The SSDI statute, as currently

44. *Id.* at *22-23, 28-29.

45. *See* Petition for a Writ of Certiorari, *supra* note 7, at 9.

46. Collier v. Astrue, ___ U.S. ___, 128 S. Ct. 353, 353 (2007).

47. Collier v. Barnhart, 473 F.3d 444, 446 (2d Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 353 (2007).

48. *Id.*

49. *Id.* The Second Circuit also concluded its opinion by stating, "[w]hile we as a Court are without authority to provide the relief that petitioner seeks, Congress can do so. Petitioner must turn to the legislative branch to consider this issue of great human consequence." *Id*. at 450.

50. *Id.* at 449-50.

51. *See* Library of Congress, *S. 3839*, http://www.thomas.gov/cgi-bin/bdquery/z?d109:s.03839: (last visited Oct. 11, 2008) (referencing Bill Status and Summary); Library of Congress, *H.R. 6304*, http://www.thomas.gov/cgi-bin/bdquery/z?d109:h.r.06304: (last visited Oct. 11, 2008) (referencing Bill Status and Summary).

52. *See* Claire Collier Social Security Disability Insurance Fairness Act, S. 1736, 110th Cong. (2007); Claire Collier Social Security Disability Insurance Fairness Act, H.R. 2944, 110th Cong. (2007).

53. *Collier*, 473 F.3d at 449-50; Claire Collier Social Security Disability Insurance Fairness Act, S. 1736, 110th Cong. (2007); Claire Collier Social Security Disability Insurance Fairness Act, H.R. 2944, 110th Cong. (2007).

enacted, already provides an exception for those who fit the statutory definition of blindness.[54] The proposed bill would add the phrase "or suffering from a covered terminal disease" to the current language.[55] The amended statute would then state, "the provisions of [the 20/40 rule] shall not apply in the case of an individual who is blind . . . or suffering from a covered terminal disease."[56] Thus, it appears that the statutory exception for those with covered terminal diseases would operate just like the exception already in place for those who fit the SSA's definition of blindness.[57] In other words, terminally ill individuals, like those who are blind, would not be required to meet the requirements of the 20/40 rule to receive SSDI benefits.[58]

The bill allows the Commissioner of Social Security to define the term "covered terminal disease," but provides that the definition must include "those diseases that are incurable, progressive, and terminal, including neurodegenerative and neurological diseases that are likely to cause death within a 5-year period of onset."[59]

The bill introduced in the House of Representatives was referred to the House Subcommittee on Social Security on July 6, 2007,[60] while the Senate version was referred to the Senate Committee on Finance on June 28, 2007.[61] Both bills remain in committee today.[62]

D. Eligibility for Social Security Disability Insurance

The Social Security Administration determines eligibility for Social Security Disability Insurance based on two major criteria: disability and

54. 42 U.S.C. § 423(c)(1)(B)(iii) (Westlaw 2008). Blindness, under the statute, "means central visual acuity of 20/200 or less in the better eye with the use of a correcting lens." *Id.* § 416(i)(1). In addition, "[a]n eye which is accompanied by a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees shall be considered for purposes of this paragraph as having a central visual acuity of 20/200 or less." *Id.*

55. S. 1736, § 2(a); H.R. 2944, § 2(a).

56. 42 U.S.C. § 423(c)(1)(b)(iii); S. 1736, § 2(a); H.R. 2944, § 2(a).

57. *See* 42 U.S.C. § 423(c)(1)(b)(iii); S. 1736; H.R. 2944.

58. *See* 42 U.S.C. § 423(c)(1)(b)(iii); S. 1736; H.R. 2944.

59. S. 1736, § 2(b); H.R. 2944, § 2(b).

60. Library of Congress, *H.R. 2944*, http://www.thomas.gov/cgi-bin/bdquery/z?d110:HR02944: (last visited Oct. 11, 2008) (referencing Bill Status and Summary).

61. Library of Congress, *S. 1736*, http://www.thomas.gov/cgi-bin/bdquery/z?d110:s.01736: (last visited Oct. 11, 2008) (referencing Bill Status and Summary).

62. Library of Congress, *S. 1736*, http://www.thomas.gov/cgi-bin/bdquery/z?d110:s.01736: (last visited Oct. 11, 2008) (referencing Bill Status and Summary); Library of Congress, *H.R. 2944*, http://www.thomas.gov/cgi-bin/bdquery/z?d110:HR02944: (last visited Oct. 11, 2008) (referencing Bill Status and Summary).

insured status.[63] The first step towards receiving Social Security Disability Insurance benefits is proving the existence of a disability, as defined by the Social Security Act.[64] According to the Act, a disability is the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."[65]

Although most individuals with ALS who apply for SSDI benefits can prove that they have a disability,[66] an amendment to the corresponding regulations eliminated this hurdle for victims of ALS in 2003.[67] Individuals with ALS are considered "presumptively disabled" under the new regulations.[68] If SSDI claimants do not have a condition that places them in the presumptively disabled category, they must go through a potentially lengthy five-step process to prove that they are disabled.[69]

63. *See* 42 U.S.C. § 423(a)(1); Collier v. Barnhart, No. 3:05CV1677 (PCD) (JGM), 2006 U.S. Dist. LEXIS 95425, at *7-9 (D. Conn. July 17, 2006), *aff'd*, 473 F.3d 444 (2d Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 353 (2007).

64. *See* 42 U.S.C. § 423(a)(1)(E); *Collier*, 2006 U.S. Dist. LEXIS 95425, at *7-8; 20 CFR § 404.1501 (2007).

65. 42 U.S.C. § 423(d)(1)(A).

66. *See* Revised Medical Criteria for Evaluating Amyotrophic Lateral Sclerosis, 68 Fed. Reg. 51,689, 51,691 (Aug. 28, 2003) (to be codified at 20 C.F.R. pts. 404 and 416).

67. *See Collier*, 2006 U.S. Dist. LEXIS 95425, at *8 (citing Revised Medical Criteria for Evaluating Amyotrophic Lateral Sclerosis, 68 Fed. Reg. at 51,691-92).

68. *Id.*

69. *See id.* at *8 n.3. First, the Social Security Administration determines whether the adult claimant is involved in "substantial gainful activity." 20 C.F.R. § 404.1520(a)(4)(i). If the claimant is found to be involved in such an activity, the claimant will not be considered disabled and benefits will be denied. *Id.* Second, the Administration will consider whether the claimant has a serious "impairment" or "impairments" that meet a specific "duration requirement." *Id.* § 404.1520(a)(4)(ii). The "duration requirement" is found in 20 C.F.R. § 404.1509 which states, "[u]nless your impairment is expected to result in death, it must have lasted or must be expected to last for a continuous period of at least 12 months." If the claimant does not have a severe impairment or impairments that meet the duration requirement, then the claimant will not be considered disabled and benefits will be denied. 20 C.F.R. § 404.1520(a)(4)(ii). Third, the Administration compares the claimant's "impairment" to the SSA's "listing" of "impairments." *Id.* § 404.1520(a)(4)(iii). If the impairment "meets or equals one of our listings . . . [the SSA] will find [the claimant to be] disabled." *Id.* If not, the claimant moves on to the fourth step. Bowen v. Yuckert, 482 U.S. 137, 141 (1987). Fourth, the Administration will determine whether the claimant is able to perform his or her "past relevant work." 20 C.F.R. § 404.1520(a)(4)(iv). "If [the claimant] can still do [his or her] past relevant work, [the SSA] will find that [the claimant is] not disabled." *Id*. Finally, the Administration will consider whether the claimant could "make an adjustment to other work." *Id.* § 404.1520(a)(4)(v). If the claimant could do so, he or she is not disabled. *Id.* However, if the claimant could not, the claimant has made it through the five-step process and will be considered disabled. *Id.*

A disabled individual must also prove that he or she has "'insured status'" to be eligible for SSDI.[70] Under current law, individuals over the age of 31 must fulfill two separate requirements.[71] To achieve insured status, these individuals must be both fully insured and also satisfy the 20/40 rule.[72] The fully insured requirement and the 20/40 rule are based on quarters of coverage earned by the individual.[73] An individual earns quarters of coverage according to the total amount of money he or she earned during that year.[74] The amount of money that an individual must make to earn a quarter of coverage depends on the year in question.[75] In 1978, an individual earned a quarter of coverage for every $250 he or she made.[76] In 2008, to earn one quarter of coverage, an individual must make $1,050.[77] Thus, if an individual makes a total of $4,200 in 2008, that individual will earn four quarters of coverage.[78] The maximum number of quarters of coverage an individual can earn in one year is four, regardless of the total amount of money made by that individual.[79]

To fulfill the "fully insured" requirement, an individual must have earned "one quarter of coverage for every calendar year" since he or she turned 21 or 40 quarters in his or her lifetime.[80] In effect, the fully insured requirement operates to determine insured status on the basis of the individual's total contribution to the Social Security system over the individual's career.[81]

The 20/40 rule is a more precise tool used to determine both length and recency of employment to ensure that beneficiaries were dependent on their wages at the time they stopped working.[82] The rule provides that "[a]n individual shall be insured for disability insurance benefits in any month if . . . he [or she] had not less than 20 quarters of coverage during

70. *Collier*, 2006 U.S. Dist. LEXIS 95425, at *9 (quoting 20 C.F.R. § 404.130).

71. *See* 42 U.S.C. § 423(c)(1) (Westlaw 2008); 20 C.F.R. § 404.130.

72. 42 U.S.C. § 423(c)(1); 20 C.F.R. § 404.130.

73. *See* 42 U.S.C. § 423(c)(B)(i); 42 U.S.C. § 414(a) (Westlaw 2008).

74. *See Collier*, 2006 U.S. Dist. LEXIS 95425, at *9 n.5.

75. *See* SOC. SEC. ADMIN., QUARTER OF COVERAGE (2007), http://www.ssa.gov/OACT/COLA/QC.html [hereinafter QUARTER OF COVERAGE]. "[T]he amount of earnings needed for a quarter of coverage increases automatically each year with increases in the national average wage index." *Id.*

76. *Id.*

77. *Id.*

78. *See id.*

79. *Id.*

80. 42 U.S.C. § 414(a) (Westlaw 2008); Winger v. Barnhart, 320 F.Supp.2d 741, 743 n.2 (C.D. Ill. 2004).

81. *See* 42 U.S.C. § 414(a).

82. *See* S. REP. NO. 85-2388 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 4218, 4229-30.

the 40-quarter period which ends with the quarter in which such month occurred. . . ."[83]

The requirement that one must have earned at least 20 of the last 40 quarters to qualify for disability insurance benefits applies to individuals who are over 31 but have not yet reached retirement age.[84] Individuals under 31 must satisfy a modified version of the rule.[85] "At full retirement age (65 and 8 months in 2006), disability benefits are converted automatically to retirement benefits."[86]

If an individual satisfies all the requirements discussed above, proof of disability, fully insured status, and the requirements of the 20/40 rule, he or she will qualify for Social Security Disability Insurance.[87]

E. The Social Security Disability Insurance and Supplemental Security Income Programs

Since its inception in 1956, the Social Security Disability Insurance program has seen a series of expansions.[88] The program was originally only for people over 50 years old and "disabled adult children whose disability began before the age of 18."[89] However, by 1972, it had grown to include "dependents," disabled individuals younger than 50, "disabled widow(er)s," and individuals disabled between the ages of 18 and 22.[90]

The Social Security Disability Insurance program operates on taxes paid by employers and employees.[91] Employees are required to contribute 7.65% of their earnings, and employers match that amount, making the total contribution equal to 15.3% of an employee's

83. 42 U.S.C. § 423(c)(1) (Westlaw 2008).

84. *See id.*

85. *See id.* § 423(c)(1)(B)(ii). To be insured for disability insurance benefits, an individual under the age of 31 must "have [quarters of coverage] in at least one-half of the quarters during the period ending with [the] quarter [in which he or she became disabled] and beginning with the quarter after the quarter [he or she] became age 21." 20 C.F.R. § 404.130 (2007). An individual will not be insured for disability insurance purposes, however, if he or she has not earned a minimum of six quarters of coverage. *See id.* Therefore, if an individual became disabled at age 26, he or she must have earned ten quarters of coverage to be insured for disability insurance purposes. *See id.*

86. SOC. SEC. ADMIN., SSA PUB. NO. 13-11831, TRENDS IN THE SOCIAL SECURITY AND SUPPLEMENTAL SECURITY INCOME DISABILITY PROGRAMS 3-4 (2006) [hereinafter SSA PUB. NO. 13-11831].

87. *See* 42 U.S.C. § 423(a)(1); Collier v. Barnhart, No. 3:05CV1677 (PCD) (JGM), 2006 U.S. Dist. LEXIS 95425, at *7-9 (D. Conn. July 17, 2006), *aff'd*, 473 F.3d 444 (2d Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 353 (2007).

88. David Autor & Mark Duggan, *The Growth in the Social Security Disability Rolls: A Fiscal Crisis Unfolding*, 4-5 (Nat'l Bureau of Econ. Research, Working Paper Series No. 12436, 2006).

89. SSA PUB. NO. 13-11831, *supra* note 86, at 3.

90. *Id.*

91. *Id.*

earnings.[92] The combined percentage amount of 15.3% funds not only the SSDI program, but "all Social Security programs and most of Medicare."[93] This method of funding SSDI makes the benefits "an earned right."[94] The 20/40 rule and the fully insured requirement are in place to make sure that beneficiaries of the program have earned their right to the benefits.[95] As a result, benefits are not based on the financial need of the beneficiary, but, instead, are determined according to the employee's earnings.[96]

One of the greatest benefits of qualifying for SSDI is that the beneficiary automatically qualifies for Medicare 24 months after he or she begins receiving SSDI benefits.[97] Qualifying for Medicare means that the beneficiary will receive partial to full coverage for "inpatient hospital care," doctor's visits, prescriptions, and other services.[98] Congress eliminated the 24 month waiting period for Medicare for individuals with ALS as of July 1, 2001.[99]

Disabled individuals may also be eligible for Supplemental Security Income (SSI) disability benefits, either in conjunction with SSDI or in the alternative.[100] Supplemental Security Income is similar to SSDI in that it also requires that an individual be disabled, under the same statutory definition as SSI, to receive benefits.[101] However, unlike the SSDI program, SSI is based on financial need and does not require an individual to have "insured status" or any other work history.[102] In addition, dependents of qualifying disabled individuals are not eligible for SSI benefits; only the disabled individuals themselves will receive

92. *Id.* Individuals who are self-employed are responsible for the full 15.3%. *Id*.

93. *Id*. There is a yearly "taxable maximum" of $106,800 in 2009 for Social Security, but there is no maximum amount for Medicare. SOC. SEC. ADMIN., AUTOMATIC INCREASES: CONTRIBUTION AND BENEFIT BASE, http://www.ssa.gov/OACT/COLA/cbb.html (last visited Oct. 23, 2008). In essence, this means that every dollar an employee earns over $106,800 will not be subject to the percentage of the tax that funds Social Security. *See id.*

94. SSA PUB. NO. 13-11831, *supra* note 86, at 3.

95. *See id.* The 20/40 rule, along with the fully-insured requirement, ensures that individuals earn their right by requiring that "[i]ndividuals . . . work[] in employment covered by Social Security for a specified time to be insured for benefits." *Id.*

96. *See id.*

97. *See id.* at 4.

98. *Id.*

99. Collier v. Barnhart, No. 3:05CV1677(PCD)(JGM), 2006 U.S. Dist. LEXIS 95425, at *26 (D. Conn. July 17, 2006), *aff'd*, 473 F.3d 444 (2d Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 353 (2007); JULIE M. WHITTAKER, LIBRARY OF CONG., CRS REPORT FOR CONGRESS: SOCIAL SECURITY DISABILITY INSURANCE (SSDI) AND MEDICARE: THE 24-MONTH WAITING PERIOD FOR SSDI BENEFICIARIES UNDER AGE 65 at 2 (2005), *available at* http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-7749:1.

100. SSA PUB. NO. 13-11831, *supra* note 86, at 4.

101. *See id.* at 3.

102. *Id.*

benefits.[103] Instead of qualifying for Medicare, however, most SSI beneficiaries are immediately eligible for Medical Assistance ("Medicaid").[104]

F. Women in the Workforce

Employment history is obviously a major factor in determining whether an individual is eligible for Social Security Disability Insurance benefits under the 20/40 rule.[105] In the United States, however, employment rates vary significantly between men and women.[106] In 2006, among individuals 16 years of age and older, 70% of American men were employed outside the home compared to only 57% percent of American women.[107]

For a while, it appeared that women were on the verge of closing the employment gap.[108] "One of the well-known economic trends of the past several decades is an increase in women's labor force participation, particularly among married women with children."[109] The percentage of mothers of minor children in the work force increased from 47 to 73% over the last quarter of the 20th century.[110] However, this trend appears to be slowing.[111] In 2004, the percentage decreased to 71%.[112]

103. *Id.* at 5.

104. *Id.* Medicaid is a medical insurance program implemented by the states under "federal guidelines." *Id*. Unlike Medicare, Medicaid is specifically for those in financial need, and is supported by a combination of federal and state funds. *Id*. at 4-5. Since states determine eligibility, and eligibility varies from state to state, it is possible that some SSI beneficiaries will not qualify for Medicaid. *Id*. at 5. However, most SSI beneficiaries will qualify, either by virtue of their status as a SSI beneficiary or for some other reason. *Id*.

105. *See* QUARTER OF COVERAGE, *supra* note 75.

106. *See* U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, WOMEN IN THE LABOR FORCE: A DATABOOK 4-6 tbl.1 (2007), *available at* http://www.bls.gov/cps/wlf-databook-2007.pdf.

107. *Id.* at 5-6 tbl.1.

108. *See id.* at 1.

109. Philip N. Cohen & Suzanne M. Bianchi, *Marriage, Children, and Women's Employment: What Do We Know?*, 122 MONTHLY LAB. REV. 22, 22 (1999), *available at* http://www.bls.gov/opub/mlr/1999/12/art3full.pdf.

110. U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *supra* note 106, at 1.

111. *See id.*

112. *Id.* The gender gap in employment is still quite evident in professional fields. *See* Pamela Stone & Meg Lovejoy, *Fast-Track Women and the "Choice" to Stay Home*, 596 ANNALS AM. ACAD. POL. & SOC. SCI. 62, 63 (2004). In professional occupations, women "are out of the labor force at a rate roughly three times that of their male counterparts and overwhelmingly cite 'family responsibilities' as the reason." *Id.* The legal profession provides one example. *See id.* A study conducted in 1993 found that 12.1% of female attorneys left the work force within ten years of law school, while only four percent of male attorneys had stopped working. *Id.*

The 13 point percentage gap between the number of employed men and women may be partially explained by women's decisions to stay at home in order to care for their children.[113] According to the United States Census Bureau, approximately 5.4 million women were stay-at-home mothers in 2003.[114] A mother is most likely to leave the work force when her children are young and need the most care.[115] The U.S. Bureau of Labor Statistics has found that, "[i]n general, mothers with older children (6 to 17 years of age, none younger) are more likely to participate in the labor force than mothers with younger children (under 6 years of age)."[116]

In addition, women who are looking for work are more likely to be unemployed if they have young children.[117] Although some women choose to stay home with their children, others who prefer to be working mothers may be hindered by having small children.[118] In 2006, among women actively looking for work, 6.6% of women with children younger than three were unemployed as compared to 4.5% of women without children.[119]

Because eligibility for SSDI benefits hinges on the length and recency of employment outside the home, a woman's choice to stay home and raise her children jeopardizes her ability to qualify for benefits if she ever needs them.[120] Mrs. Collier is a prime example of this unfortunate reality.[121]

However, this "choice" that causes women to leave the workforce may not really be a choice at all.[122] Researchers conducted a qualitative study of 43 stay-at-home mothers who had previously been employed in a "managerial" or "professional" capacity to determine what prompted their decision to stay home.[123] The researchers found that the overwhelming majority of these women were unsure whether they

113. *See* Press Release, U.S. Census Bureau, "Stay-At-Home" Parents Top 5 Million, U.S. Census Bureau Reports (Nov. 30, 2004), *available at* http://www.census.gov/Press-Release/www/releases/archives/families_households/003118.html.

114. *Id.*

115. *See* U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *supra* note 106, at 1.

116. *Id.*

117. *See id.* at 18-20 tbl.7.

118. *See id.*

119. *See id.* at 19-20 tbl.7.

120. *See* Collier v. Barnhart, 473 F.3d 444, 448 (2d Cir. 2007) (quoting Olivia S. Mitchell & John W.R. Phillips, *Eligibility for Social Security Disability Insurance*, at 4 (Univ. Mich. Ret. Research Ctr., Project #: UM 00-06, 2001)), *cert. denied*, ___ U.S. ___, 128 S. Ct. 353 (2007).

121. *See, e.g.*, Petition for a Writ of Certiorari at 4-6, Collier v. Astrue, ___ U.S. ___, 128 S. Ct. 353 (2007) (No. 06-1343), 2007 WL 1059569 at 4-6.

122. *See* Stone & Lovejoy, *supra* note 112, at 66.

123. *Id.* at 64-65.

should leave their jobs and "for many the decision was protracted and agonizing."[124] Of the 43 women interviewed, only five left the workforce as a result of their own desire to stay at home full-time with their children.[125] The other women pointed to long workweeks, inflexible schedules, and mommy-tracking, among other factors as reasons for their decision to quit.[126]

Despite the study's focus on professional women, it is probable that its findings also apply to women in less demanding or lower paying sectors of the workforce. These women may be forced to stay home due to the lack of suitable child care or the expense of child care that is available.

G. Disability and Women

According to the United States Census Bureau, in 2002, more than 28 million American women stated that they suffered from a disability.[127] Eighteen million of these women were considered severely disabled.[128] In fact, of Americans over the age of 45, women are more likely to suffer from a disability than their male counterparts.[129] The Census Bureau has found that in the 45 to 54 age group, "women had a higher prevalence of disability, 21.9 percent, compared with 16.7 percent for men."[130] In 2002, the number of disabled women outnumbered the number of disabled men by over five million.[131]

Thus, if disability insurance were disbursed on the basis of disability alone, the number of women receiving disability insurance benefits would exceed the number of men receiving benefits.[132] However, according to the Social Security Administration, the number of

124. *Id.* at 66.
125. *Id.*
126. *Id.* at 68-69. Pamela Stone and Meg Lovejoy explain that "[m]any of the women who worked part-time or job shared found themselves 'mommy-tracked,' a career derailment that ultimately played a role in their decision to quit." *Id.* at 69. One of the authors' research subjects described mommy-tracking as having the word "'MOMMY' stamped in huge letters on your head." *Id.* at 69-70. Another described "hav[ing] the feeling that you just plateaued professionally" because of the inability to work after hours, travel, and do additional tasks. *Id.* at 70.
127. ERIKA STEINMETZ, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS: AMERICANS WITH DISABILITIES 2002 at 3-4 (2006), *available at* http://www.census.gov/prod/2006pubs/p70-107.pdf.
128. *Id.* at 4.
129. *See id.*
130. *Id.*
131. *Id.* at 4-5.
132. *See* STEINMETZ, *supra* note 127, at 4.

men receiving disability insurance benefits in 2002 outnumbered the number of women by 596,021.[133]

This disparity between the genders might be explained by traditional social norms. It is possible that fewer disabled women apply for disability insurance because they have a spouse that is able to provide for their financial and health insurance needs.[134] One could also assume that more men apply because they are the breadwinners of the family.

While these conclusions might seem plausible, a comparison between statistics for Social Security Disability Insurance and Supplemental Security Income suggests otherwise.[135] Despite women's greater likelihood of suffering a disability,[136] for the past 30 years, the number of disability insurance awards given to women have never equaled the number of awards given to men.[137] On the other hand, in that same time period, women have consistently received about half of the number of awards given for Supplemental Security Income, which is based on disability and financial need.[138] In fact, in at least one year, women received almost 53 percent of all SSI awards given.[139] Therefore, it seems that the answer cannot be that disabled women are less in need.[140]

Instead, the answer seems to be that it is the work component, not financial need, that keeps women from qualifying for SSDI at equal or greater rates than men.[141] Tellingly, since 1970, and almost assuredly since the beginning of the disability insurance program, the number of women "insured" for disability insurance purposes has never equaled the number of men with insured status.[142] If the requirement that individuals be "insured" has created the disparity between men and women's eligibility for SSDI, then the question becomes whether such requirements are in fact constitutional.

133. *See* Soc. Sec. Admin., Social Security Beneficiary Statistics: Number of Disabled Workers and their Dependents Receiving Benefits on December 31, 1970-2007, http://www.ssa.gov/OACT/STATS/DIbenies.html (last visited Feb. 3, 2008).

134. Interview with Robert E. Rains, Professor of Law, Penn State Dickinson School of Law, in Carlisle, Pa. (Oct. 23, 2008).

135. *See* SSA PUB. NO. 13-11831, *supra* note 86, at 42, 46.

136. STEINMETZ, *supra* note 127, at 4.

137. *See* SSA PUB. NO. 13-11831, *supra* note 86, at 42.

138. *Id.* at 46.

139. *Id.*

140. *See id.* at 42, 46.

141. *See id.*

142. *See* SSA PUB. NO. 13-11831, *supra* note 86, at 67 chart 45.

III. ANALYSIS

A. The 20/40 Rule Does Not Violate the Constitution

Mrs. Collier challenged the 20/40 rule on the basis of both the equal protection component and Due Process Clause of the Fifth Amendment to the United States Constitution.[143] The district court and the United States Court of Appeals for the Second Circuit used the rational relationship test to evaluate both of her constitutional claims.[144] According to the United States Supreme Court, the rational relationship test will be used when "a law neither burdens a fundamental right nor targets a suspect class."[145] The rational relationship test merely requires that the classification be "rational[ly] relat[ed] to some legitimate [government] end."[146]

As presented by Mrs. Collier, it appears at first glance that the 20/40 rule does in fact target women, a quasi-suspect class.[147] Although the classification is not apparent on the face of the statute, Mrs. Collier has argued persuasively that the 20/40 rule discriminates against women because women are more likely than men to lose their insured status when they become parents.[148]

However,

> When a statute[,] gender-neutral on its face[,] is challenged on the ground that its effects upon women are disproportionately adverse, a twofold inquiry is . . . appropriate. The first question is whether the statutory classification is . . . indeed neutral in the sense that it is not gender-based. If the classification itself, covert [or] overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. In this second

143. Collier v. Barnhart, 473 F.3d 444, 447 (2d Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 353 (2007).

144. *Id.* at 449; Collier v. Barnhart, No. 3:05CV1677 (PCD) (JGM), 2006 U.S. Dist. LEXIS 95425, at *24 (D. Conn. July 17, 2006), *aff'd*, 473 F.3d 444 (2d Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 353 (2007). The Second Circuit refers to the rational relationship test as "rational basis review." *Collier*, 473 F.3d at 449.

145. Romer v. Evans, 517 U.S. 620, 631 (1996). "The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Id.* (citing Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 271-272 (1979); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

146. *Id.*

147. *Collier*, 473 F.3d at 448. Women are considered a "quasi-suspect" class. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 325 (1976) (Marshall, J., dissenting) (internal quotations omitted).

148. *See Collier*, 473 F.3d at 448.

> inquiry, impact provides an important starting point, but purposeful discrimination is the condition that offends the Constitution.[149]

This second question was problematic for Mrs. Collier.[150] Although she could prove the existence of a disproportionate effect, she was unable to prove that the 20/40 rule was a reflection of purposeful or intentional discrimination.[151] Mrs. Collier's evidence of a disproportionate effect, supported by various studies and statistics on disability, women, and program eligibility was well received by the courts.[152] In fact, both the district and the circuit courts agreed that Mrs. Collier's evidence of the 20/40 rule's disproportionate effect was "compelling."[153] However, establishing that the rule's discriminatory effect against women was purposeful has proven to be impossible.[154] Since there was no evidence of purposeful or invidious discrimination behind the 20/40 rule, the rule only needed to satisfy the rational relationship test in order to be upheld.[155]

The Commissioner of Social Security has consistently argued that the 20/40 rule is rationally related to two government ends: (1) the solvency of the Social Security Disability Insurance Program and (2) the assurance that a beneficiary was dependent on lost income.[156] In fact,

149. *Id.*
150. *See id.*
151. *Id.*
152. *See id.*
153. *Id*.
154. *See id.* at 448-49. The Second Circuit stated, "[i]t is here that petitioner's argument fails, as she has no evidence that Congress was motivated by an 'invidious discriminatory purpose' in enacting the 20/40 Rule. At best, her evidence indicates a recognition that women may suffer because of the 20/40 Rule." *Id*. at 448. The Second Circuit explained that Mrs. Collier would have to prove that Congress had enacted the 20/40 rule because they knew it would discriminate against women. *Id.* at 449 (quoting Johnson v. Wing, 178 F.3d 611, 615 (2d Cir. 1999)).
155. *Id.* at 449. The rational relationship standard is seen as a particularly appropriate standard of review in the area of social welfare because it is not for the courts to decide how to spend public monies. Collier v. Barnhart, No. 3:05CV1677 (PCD) (JGM), 2006 U.S. Dist. LEXIS 95425, at *12-13 (D. Conn. July 17, 2006) (quoting Dandridge v. Williams, 397 U.S. 471, 487 (1970)), *aff'd*, 473 F.3d 444 (2d Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 353 (2007).
156. *See Collier*, 473 F.3d at 449; *Collier*, 2006 U.S. Dist. LEXIS 95425, at *19-20; Collier v. Barnhart, No. 3:05CV1677(PCD), 2006 U.S. Dist. LEXIS 95426, at *13 (D. Conn. April 25, 2006), *adopted by, judgment entered by* No. 3:05CV1677 (PCD) (JGM), 2006 U.S. Dist. LEXIS 95425 (D. Conn. July 17, 2006), *aff'd*, 473 F.3d 444 (2d Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 353 (2007); Brief for the Respondent in Opposition at 4, Collier v. Astrue, 128 S. Ct. 353 (2007) (No. 06-1343), 2007 WL 1684897 at 4.

these same arguments were used over 30 years ago in another suit challenging the 20/40 rule.[157]

Mrs. Collier questioned the legitimacy of the Commissioner's argument that the 20/40 rule is rationally related to the Social Security Disability program's solvency.[158] She pointed out that Social Security is far from "self-supporting" and faces insolvency in the foreseeable future.[159] Nonetheless, the Magistrate Judge, whose opinion was adopted by the district court, agreed with the Commissioner.[160] The Magistrate Judge found that the rule is related to a "goal of self-sufficiency," and that there was a rational relationship between the two when the statute was passed.[161] Interestingly, however, the district court sidestepped this issue with a few cursory statements.[162] Moreover, the Second Circuit did not mention solvency once in its rational relationship analysis.[163]

157. Tuttle v. Sec'y of Health, Educ. and Welfare, 504 F.2d 61, 62-63 (10th Cir. 1974). As mentioned at the beginning of this Comment, Mrs. Collier is not the first individual to challenge the constitutionality of the 20/40 rule. *See, e.g.*, Harvell v. Chater, 87 F.3d 371, 372 (9th Cir. 1996); *Tuttle*, 504 F.2d at 62. In 1974, Edgar Tuttle argued that the 20/40 rule violated the Equal Protection and Due Process Clauses after being denied benefits because he had only worked 19 of the last 40 quarters, instead of 20. *Tuttle*, 504 F.2d at 62. In a brief opinion, the United States Court of Appeals for the Tenth Circuit upheld the 20/40 rule, finding that it satisfied the rational basis test and was "free from invidious discrimination." *Id*. at 63.

Mrs. Collier is also not the first to argue that eligibility requirements for Social Security discriminate against stay-at-home mothers. *See* Winger v. Barnhart, 320 F. Supp. 2d 741, 746–47 (C.D. Ill. 2004). In *Winger*, the husband and son of a stay-at-home mother with a sporadic work history sued after being denied survivor's benefits. *Id*. at 743-44. They argued that the SSA's refusal to grant survivors benefits "violate[d] equal protection . . . because [the quarters of coverage system] discriminates against homemakers." *Id*. at 744. In another brief opinion, the court held that the quarters of coverage system was rationally based and, therefore, did not violate the Constitution. *Id*. at 747.

158. *See Collier*, 2006 U.S. Dist. LEXIS 95426, at *24 n.13.

159. *Id.*

160. *See id.*

161. *Id.*

162. *See* Collier v. Barnhart, No. 3:05CV1677 (PCD) (JGM), 2006 U.S. Dist. LEXIS 95425, at *21-22 (D. Conn. July 17, 2006), *aff'd*, 473 F.3d 444 (2d Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 353 (2007). In response to Mrs. Collier's argument that the Social Security program is not self-sufficient, the court merely stated that her argument "[was] not persuasive." *Id.* at *21. The court further stated that "[e]ven if the goal of self-sufficiency were rejected, it remains the case that one legitimate purpose behind the enactment of the 20/40 rule was Congress' desire to preserve disability benefits for those persons who are currently dependent on their employment income." *Id.* at *22.

163. *See* Collier v. Barnhart, 473 F.3d 444, 449 (2d Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 353 (2007).

The second government end, ensuring dependency on earned income, appears to be much more legitimate.[164] The courts have consistently relied on the same quotation from Senate Report 2388, published in 1958.[165] Regarding the protection provided by Social Security Disability Insurance, Senate Report 2388 states, "it is reasonable and desirable that there be reliable means of limiting such protection to those persons who have had sufficiently long and sufficiently recent covered employment to indicate that they probably have been dependent upon their earnings."[166] The courts have found that a rational relationship exists because the 20/40 rule uses the length and recency of employment to measure employees' reliance on their income.[167] Ultimately, in *Collier*, both the district court and the Second Circuit held that the 20/40 rule passed the rational relationship test.[168]

Interestingly, the Senate report relied on by the courts is not really about the 20/40 rule.[169] Rather, it is a report on a 1958 amendment to the Social Security Act that removed the currently insured requirement for disability insurance benefits.[170] Prior to the amendment, an employee was required, in addition to satisfying the 20/40 rule and the fully insured requirement, to meet the currently insured requirement.[171] To be currently insured, an employee had to earn six of the last 13 quarters before the onset of disability.[172] In the report, the committee concluded that the 20/40 rule and the fully insured requirement would be sufficient

164. Legislative history seems to support dependency on earned income as a legitimate government end. *See* S. REP. NO. 85-2388 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 4218, 4229-30.

165. *See Collier*, 473 F.3d at 449 (quoting S. REP. NO. 85-2388 at 4229); Tuttle v. Sec'y of Health, Educ. and Welfare, 504 F.2d 61, 63 (10th Cir. 1974) (quoting S. REP. NO. 85-2388 at 4229); *Collier*, 2006 U.S. Dist. LEXIS 95425, at *20 (quoting *Tuttle*, 504 F.2d at 63).

166. S. REP. NO. 85-2388 at 4229.

167. *See Collier*, 473 F.3d at 449 ("Congress could rationally choose to distribute a scarce resource among those who both have contributed more recently to the system and have indicated, by their actions, that they are more dependent on the salaries they draw from being employed."); *Tuttle*, 504 F.2d at 63 ("The 20/40 requirement rationally screens out those who have not established a substantial attachment to the labor force because they do not have a reasonably long, as well as recent, record of covered earnings."); *Collier*, 2006 U.S. Dist. LEXIS 95425, at *21 (quoting *Tuttle*, 504 F.2d at 63 ("[T]he 20/40 rule is rationally related to and promotes this objective by 'screen[ing] out those who have not established a substantial attachment to the labor force because they do not have a reasonably long, as well as recent, record of covered earnings.'")).

168. *Collier*, 473 F.3d at 449; *Collier*, 2006 U.S. Dist. LEXIS 95425, at *22-23, 28.

169. *See* S. REP. NO. 85-2388 at 4229-30.

170. *Id.*; *see also* GEOFFREY KOLLMANN, LIBRARY OF CONG., CRS REPORT FOR CONGRESS: SUMMARY OF MAJOR CHANGES IN THE SOCIAL SECURITY CASH BENEFITS PROGRAM: 1935-1996 at 7 (1996), *available at* http://www.ssa.gov/history/pdf/crs9436.pdf.

171. S. REP. NO. 85-2388 at 4229.

172. *Id.*

to uphold the program's purpose of protecting individuals who have lost their income because of a disability.[173]

The courts' reliance on Senate Report 2388 is not misplaced, however, despite the fact that it deals with the elimination of the currently insured status requirement. The report shows the clear intention of the legislature to maintain the 20/40 rule as an eligibility requirement.[174] The report makes it clear that the program is intended for individuals who could no longer work because of a disability, and not for those who voluntarily left the workforce for unrelated reasons.[175] In essence, the 20/40 rule is even more essential after the elimination of the currently insured status requirement because it is the only requirement that, if met, suggests that the individual stopped working because of a disability.[176] The committee was concerned about the currently insured status requirement's negative effect on individuals "whose work was interrupted by a progressive illness."[177]

It is obvious in the *Collier* case that Mrs. Collier's work was interrupted by her decision to stay at home to raise her children.[178] She did not stop working because of ALS.[179] Thus, it appears that Mrs. Collier is not the type of individual that the legislature intended to provide for through the use of SSDI benefits.[180]

Ironically, however, Senate Report 2388 not only provides the rationale for work requirements, but it also provides the rationale for eliminating one.[181] The report is evidence that Congress has previously eliminated an eligibility requirement for SSDI when it prevented certain deserving individuals from receiving benefits.[182] The currently insured status requirement unfairly denied disabled individuals benefits "even though they [had] worked for substantial periods in covered employment . . . and have normally been dependent upon their earnings."[183] To alleviate this situation, the requirement was eliminated.[184] Thus, Mrs. Collier could argue that the 20/40 should also

173. *Id.* at 4230.
174. *See id.* at 4229-30.
175. *See* S. REP. NO. 85-2388 at 4229-30.
176. *See id.* The individual may also have "intended to leave the work force for only a finite period of time" but was prevented from returning due to a disability. Interview with Robert E. Rains, Professor of Law, Penn State Dickinson School of Law, in Carlisle, Pa. (Oct. 23, 2008).
177. *Id.* at 4230.
178. *See* Petition for a Writ of Certiorari, *supra* note 7, at 4.
179. *See* Petition for a Writ of Certiorari, *supra* note 7, at 4.
180. *See* S. REP. NO. 85-2388 at 4230.
181. *See id.* at 4229-30.
182. *See id.*
183. *See id.* at 4230.
184. *See id.* at 4229-30; KOLLMANN, *supra* note 170, at 7.

be eliminated as an eligibility requirement for SSDI. Like the currently insured requirement, the 20/40 rule prevents deserving individuals, like stay-at-home mothers who have previously made a substantial contribution to the system, from receiving benefits.[185]

Mrs. Collier, who worked for 15 years, has argued that she has made a substantial contribution to Social Security.[186] Under the requirements for individuals under 31, "an applicant 31 years old who worked from ages 21 through 26 years and paid into Social Security and Medicare for five years would be entitled to SSDI and Medicare benefits under the 20/40 Rule."[187] Denying Mrs. Collier these same benefits seems patently unfair, considering that she has worked three times as long as this hypothetical individual. In fact, a disabled individual under the age of 31 could qualify with an even shorter work history.[188] Certainly, allowing a younger individual to receive benefits with less work history does not promote the solvency of the Social Security system. Unfortunately for Mrs. Collier, "flaws . . . found in [Congress'] logic" are not sufficient to find a statute unconstitutional.[189]

Ultimately, Mrs. Collier's constitutional challenge of the 20/40 rule proved unsuccessful because the 20/40 rule passed the rational relationship test despite its disproportionate effects.[190]

B. Options for Legislative Reform

In order to find a solution to the problems presented by Mrs. Collier's case, Congress must first have a clear understanding of the purpose of the Social Security Disability Insurance program.[191] Today, the program has "an ill-defined mission" as a result of more than 50 years of amendments and changes.[192] The program began as an "early retirement" program for disabled individuals over 50 but not yet of retirement age.[193] As such, its purpose was "to protect against the

185. Mrs. Collier is one example of such an individual. *See generally*, Petition for a Writ of Certiorari, *supra* note 7.

186. Collier v. Barnhart, No. 3:05CV1677 (PCD) (JGM), 2006 U.S. Dist. LEXIS 95425, at *25 (D. Conn. July 17, 2006), *aff'd*, 473 F.3d 444 (2d Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 353 (2007).

187. Collier v. Barnhart, No. 3:05CV1677 (PCD), 2006 U.S. Dist. LEXIS 95426, at *19 n.11 (D. Conn. April 25, 2006), *adopted by, judgment entered by* No. 3:05CV1677 (PCD) (JGM), 2006 U.S. Dist. LEXIS 95425 (D. Conn. July 17, 2006), *aff'd*, 473 F.3d 444 (2d Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 353 (2007).

188. *See* 20 C.F.R. § 404.130 (2007).

189. *Collier*, 2006 U.S. Dist. LEXIS 95425, at *14 (citing Brown v. Bowen, 905 F.2d 632, 635 (2d Cir. 1990).

190. *Collier*, 473 F.3d at 449; *Collier*, 2006 U.S. Dist. LEXIS 95425, at *22-23, 28.

191. *See* Autor & Duggan, *supra* note 88, at 4.

192. *Id.* at 3.

193. *Id.* at 4.

specific economic hardships created by involuntary, premature retirement."[194]

Senate Report 2388 suggests that the purpose of the program is to replace income lost because of the onset of a disability.[195] This purpose seems to be in tune with the modern perception of the program.[196] The District Court for the Southern District of West Virginia has maintained that the program is for those who have previously been gainfully employed, and that it is not meant to be a welfare program for the needy.[197] The Supreme Court has echoed this sentiment, stating that the program's purpose is not to "simply pay money to those who need it most."[198]

Congress must ultimately determine what the purpose of the program should be, and use that purpose to guide its choices in making the necessary reforms.[199] The options for reform are limited only by Congress' collective imagination and the funds available; these options range from eliminating the 20/40 rule to adopting the legislation proposed by Senator Dodd and Representative Shays. Below is a brief analysis of three options for reform.

1. Eliminate the 20/40 Rule

Congress could decide to eliminate the 20/40 rule, just as it removed the currently insured requirement in 1958.[200] Under the current statutory provisions, an individual must be fully insured, in addition to satisfying the 20/40 rule, to receive Social Security Disability Insurance benefits.[201] Therefore, if the 20/40 rule were eliminated, disabled individuals would still be required to be fully insured before receiving benefits.[202]

Before the 20/40 rule could be eliminated, however, Congress would have to seriously consider the ramifications of such a decision. It would have to determine whether eliminating the rule is a feasible option considering the current status of the Social Security System. The

194. Mathews v. de Castro, 429 U.S. 181, 186 n.6 (1976) (citing H.R. REP. NO. 81-1300, at 27-28, 53-54 (1949); S. DOC. NO. 80-208, AT 69-70, 95-97 (1949); S. REP. NO. 84-2133, at 3-4 (1956); H.R. REP. NO. 84-1189, at 3-6 (1955)).

195. S. REP. NO. 85-2388 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 4218, 4230. *See also* earlier discussion *supra* text accompanying notes 174-179.

196. Autor & Duggan, *supra* note 88, at 3.

197. Coleman v. Gardner, 264 F. Supp. 714, 718 (S.D. W. Va. 1967). In *Coleman*, the court affirmed the SSA's denial of SSDI benefits for an individual who was found to be capable of performing "light jobs." *Id.* at 719-20.

198. *Mathews*, 429 U.S. at 185.

199. *See* Autor & Duggan, *supra* note 88, at 4.

200. KOLLMANN, *supra* note 170, at 7.

201. *See* 42 U.S.C. § 423(c)(1)(A) (Westlaw 2008).

202. *See id.*

Disability Insurance Trust fund is the source of funding for disability insurance benefits received by disabled individuals, their spouses, and their children.[203] Without congressional intervention, this trust fund is expected to be bankrupt by 2027.[204] The impending bankruptcy of the Social Security Disability Trust fund suggests that Congress either needs to restrict access to the program by imposing additional eligibility requirements, increase the taxes that fund the program, or both.[205]

Elimination of the 20/40 rule in light of the impending insolvency of the Social Security Disability Insurance program would be counterproductive. If fully insured status were the only work requirement used to determine eligibility, individuals would qualify for SSDI if they had earned one quarter of coverage for every year since they turned 21.[206] Thus, a disabled 32 year old individual would be eligible for SSDI if he or she had earned 11 quarters of coverage.[207]

In a system with limited funds, giving disability insurance benefits to individuals who have made little contribution to the system would be unfair to those who previously qualified under the 20/40 rule. Disabled individuals who had made significant and recent contributions to the system could receive reduced benefits and eventually lose their benefits altogether.[208] Therefore, eliminating the 20/40 rule would not only be unfair, but also irresponsible.

2. Create an Exception to the 20/40 Rule for Those Who Have Made a Significant Contribution

Congress could also consider creating an exception to the 20/40 rule for individuals who have made a significant contribution to the system. In effect, the exception would disregard the recency requirement if an individual met a high minimum requirement of total quarters of coverage. For example, Congress could allow individuals who have worked a total of 60 quarters or more to receive disability insurance benefits, regardless of when the 60 quarters were earned. This exception to the 20/40 rule would allow individuals like Mrs. Collier, who have paid a large amount into the Social Security system, to receive benefits. Mrs. Collier's 15 years of work, prior to her decision to stay home to raise a family, would give her a total of 60 quarters of coverage.[209]

203. SSA PUB. NO. 13-11831, *supra* note 86, at 4.
204. *Id.* at 103.
205. *Id.*; *see also* Autor & Duggan, *supra* note 88, at 27.
206. *See* 42 U.S.C. § 414(a) (Westlaw 2008).
207. *See id.*
208. *See* SSA PUB. NO. 13-11831, *supra* note 86, at 103.
209. *See* Petition for a Writ of Certiorari, *supra* note 7, at 4.

This exception to the 20/40 rule is also consistent with the Social Security Administration's characterization of disability insurance benefits as an "earned right."[210] In addition, it would appear that there is a greater chance that an individual who has worked for 15 years or more has generally been dependent on his or her earnings. After an individual makes such a significant contribution, it seems unfair that disability benefits would be denied when the individual needs it most.

There would be some drawbacks, however, to such an exception. The exception would exclude disabled individuals who had worked less than 60 quarters and were also unable to satisfy the 20/40 rule. For example, a stay-at-home mother who had worked outside the home for 14 years and was unable to satisfy the 20/40 rule would still be ineligible for SSDI benefits. The 60 quarter figure is used here to illustrate how such an exception might operate. However, Congress could use any number of quarters to signify a significant contribution. Unfortunately, some disabled individuals would still be unable to qualify for benefits, regardless of the number of quarters chosen by Congress.

Congress would also have to consider the impact of an exception to the 20/40 rule on the solvency of the Social Security Disability Insurance program. Although fewer individuals would become eligible if Congress created an exception than if Congress eliminated the rule itself, legislators would still have to determine how much such an exception would cost. Before Congress created an exception, it would have to conduct a cost-benefit analysis to determine whether an exception is a feasible option.

In addition, an exception to the 20/40 rule based on a significant contribution would not fully address the 20/40 rule's adverse effects on women. Although the exception would benefit some stay-at-home mothers who had made a significant contribution before having children, it would not help women who spent the majority of their life working inside the home.

3. Enact Proposed Legislation

The legislation proposed by Senator Dodd and Representative Shays goes a long way toward helping those with terminal illnesses receive SSDI benefits and Medicare.[211] However, there are two significant flaws in the bill.

210. SSA PUB. NO. 13-11831, *supra* note 86, at 3.

211. *See* Claire Collier Social Security Disability Insurance Fairness Act, S. 1736, 110th Cong. (2007). The Senate version of the bill will be used for discussion purposes, but it should be noted that use of the House bill would produce the same result, because the bills are identical. *See supra* text accompanying note 52.

Although the bill helps those with terminal illnesses, it does little to address the discriminatory effects that the 20/40 rule has on women.[212] For example, a stay-at-home mother suffering from a severe but not terminal disability, perhaps multiple sclerosis instead of ALS, would not qualify for the new terminal illness exception.[213] Or even more troubling, a woman with an insufficient work history suffering from a terminal illness, but not a "covered" terminal illness, would also slip through the cracks.[214]

Because a "covered terminal disease" is "incurable, progressive, and terminal,"[215] much litigation could ensue on the issue of whether a disease fits this description. For example, some cancers are curable only if detected in the beginning stages. It is unclear if such a cancer would be considered "incurable, progressive, and terminal"[216] for purposes of eligibility for disability insurance benefits. In addition, it is also unclear how fast a disease must progress. The bill provides that the definition of covered terminal illness must include "neurodegenerative and neurological diseases that are likely to cause death within a 5-year period of onset."[217] This wording may be construed to mean that any covered terminal illness must cause death within five years to be considered "progressive" or "terminal."[218] This ambiguous language would likely be the subject of litigation.

Although individuals diagnosed with ALS are only expected to live for three to five years past their diagnosis, some victims live much longer than that.[219] Stephen Hawking, a renowned scientist and author of *A Brief History of Time*,[220] has lived with the disease for more than 40 years since his diagnosis at age 21.[221] Even Mrs. Collier, who was diagnosed in 2003, has reached the five year anniversary of her diagnosis.[222]

The second significant flaw in the bill is the fact that individuals with covered terminal illnesses would only be required to satisfy the

212. *See id.*
213. *See id.* § 2(b).
214. *See id.*
215. *Id.*
216. S. 1736 § 2(b).
217. *Id.*
218. *Id.*
219. OFFICE OF COMMC'N AND PUB. LIAISON, NAT'L INST. OF NEUROLOGICAL DISORDERS AND STROKE, *supra* note 15, para. 3.
220. Stephen Hawking, *A Brief History of Mine*, http://www.hawking.org.uk/about/index.html (last visited Oct. 24, 2008).
221. *See id.*; Stephen Hawking, *Disability: My Experience with ALS*, http://www.hawking.org.uk/disable/ dindex.html (last visited Oct. 24, 2008).
222. *See* Petition for a Writ of Certiorari, *supra* note 7, at 4.

fully insured requirement to be eligible for benefits.[223] The bill's compassion for the terminally ill is certainly not its second significant flaw, but the bill's lack of consideration for the solvency of the program is. If passed, this bill would allow terminally ill individuals with as few as six quarters of coverage to receive disability insurance benefits.[224] Individuals 31 and older would be eligible for benefits with as little as ten quarters of coverage.[225] Thus, a 31 year old terminally ill individual who has worked for only two and a half years could receive benefits indefinitely.[226]

IV. CONCLUSION

A thorough analysis of *Collier v. Barnhart* reveals that the U.S. District Court for the District of Connecticut and the U.S. Court of Appeals reached the correct legal outcome on the basis of a well-reasoned constitutional analysis. The 20/40 rule satisfies the rational relationship test and therefore does not violate the Constitution.[227] Nonetheless, *Collier v. Barnhart* is a powerful case that highlights some specific problems with the 20/40 rule as an eligibility requirement for disability insurance. The 20/40 rule has an adverse effect on women and harms disabled individuals who have made significant contributions to the Social Security system in the past. Mrs. Collier is a prime example of an individual who has made a significant contribution to the system but has not been protected by SSDI or the "safety net" provisions of SSI.[228]

The U.S. Supreme Court has described the Social Security Act as one of "the most intricate [pieces of legislation] ever drafted by Congress," further commenting that "[i]ts Byzantine construction . . . makes the Act 'almost unintelligible to the uninitiated.'"[229] Thus, reform is not a simple task.[230]

223. *See* 42 U.S.C. § 423(c)(1) (Westlaw 2008). If the bill operated to exempt those with terminal illnesses from the 20/40 rule, Collier v. Barnhart, 473 F.3d 444, 449-50 (2d Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 353 (2007), those individuals would still be required to satisfy the fully insured requirement. *See* 42 U.S.C. § 423(c)(1).

224. *See* 42 U.S.C. § 414(a) (Westlaw 2008).

225. *See id.*

226. *See id.*; Claire Collier Social Security Disability Insurance Fairness Act, S. 1736, 110th Cong. (2007).

227. Collier v. Barnhart, 473 F.3d 444, 449-50 (2d Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 353 (2007).

228. Interview with Robert E. Rains, Professor of Law, Penn State Dickinson School of Law, in Carlisle, Pa. (Fall 2007).

229. Schweiker v. Gray Panthers, 453 U.S. 34, 43 (1981) (citing Friedman v. Berger, 547 F.2d 724, 727 n.7 (2d Cir. 1976)).

230. Autor & Duggan, *supra* note 88, at 30. The complexity of the Social Security Act is not the only reason that reform will be difficult. *See id.* In the United States,

Although Congress has many options, it appears that creating an exception to the 20/40 rule for those who have made a significant contribution may be the most reasonable option currently available. Creating an exception may be the only way to provide benefits to deserving individuals without hastening SSDI's insolvency or encouraging litigation. Unfortunately, however, this issue does not appear to be foremost in the minds of our legislators, considering that the proposed legislation has been introduced twice and has yet to make it out of committee.[231] Nevertheless, it is an issue that should be addressed when Congress considers how to deal with the Social Security system's impending insolvency.

disabled individuals "are generally held in high regard by the public." *Id.* In fact, "Americans believe[] that the federal government should be spending 'more' or 'much more' on poor adults who are disabled." *Id.* at 31.

231. *See* Collier v. Barnhart, 473 F.3d 444, 449-50 (2d Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 353 (2007) (noting that the Claire Collier Social Security Disability Insurance Fairness Act was originally introduced in the 109th Congress); Library of Congress, *S. 1736*, http://www.thomas.gov/cgi-bin/bdquery/z?d110:s.01736: (last visited Oct. 11, 2008) (referencing Bill Status and Summary); Library of Congress, *H.R. 2944*, http://www.thomas.gov/cgi-bin/bdquery/z?d110:HR02944: (last visited Oct. 11, 2008) (referencing Bill Status and Summary).