

Unraveling Bias

To formulate a more precise understanding of exactly how bias may be operating in the Social Security disability decision-making process, and to uncover more fully how judges find it difficult to carry out their affirmative duty to accommodate and appropriately engage claimants, it is useful first to reflect on the current doctrinal conception of impartiality. I begin with an account of the doctrinal analysis of impartiality and then draw from critical legal studies, feminist jurisprudence, and critical race theory to deconstruct the formalism that underlies impartiality. Through these lenses, I analyze the limitations of the dichotomy between impartiality and bias. I also do this work in the context of the social-psychological literature, which suggests that the suppression of bias may actually contribute to its reproduction. This presentation of the supporting literature forms the backbone for advancing both my theory that the repression that necessarily accompanies impartiality contributes to bias and my empirical findings, which this account supports. Finally, I reconsider the definition of bias and its relationship to impartiality in light of judges' apparently conflicting duties to accommodate and engage claimants in the hearing process.

Judicial Impartiality: Doctrinal Context for the Term *Bias* and Its Contemporary Application

The ideal of judicial impartiality is embedded in the U.S. Constitution (*Ward v. Village of Monroe*, 409 U.S. 57, 61–62 (1972)) and extends not only to state and federal court judges but to administrative proceedings as well (*Hummel v. Heckler*, 736 F.2d 91, 93–94 (3d Cir. 1984)). Judicial impartiality is a basic requirement of a fair tribunal and due process. The U.S. Supreme Court has defined *fairness* as an “absence of actual

bias” (*In re Murchison*, 349 U.S. 133, 136 (1955)). According to prevailing doctrinal conceptions, to apply the standard of judicial impartiality, judges must eliminate either “hostile feeling or spirit of ill will” or “undue friendship or favoritism” toward any litigant whose case they hear (46 *American Jurisprudence* 2d § 167).

The Social Security Act embodies a standard of impartiality (42 U.S.C. § 405 (b) (1); 42 U.S.C. 1383 (c) (1)), as does the definitive Social Security Administration’s OHA policy and rule book, *Hallex: Hearings and Appeals Litigation Law Manual* (hereafter, *Hallex*): ALJs “must inquire fully into all matters at issue and conduct the administrative hearing in a fair and impartial manner” (SSA 1992, I-2-601).¹ Indeed, key Social Security personnel have explicitly affirmed their commitment to impartiality in disability decision making. For example, as stipulated in the *Federal Register*, the associate commissioner of hearings and appeals “is responsible for maintaining a hearings and appeals system which is impartial and supports the tenets of fairness and equal treatment under the law” (53 Fed. Reg. 29779 (8 August 1988)). The Social Security commissioner’s response to the 1992 GAO report on the treatment of racial differences in disability decision making reiterates this commitment: “It is paramount that the Social Security Administration ensure that all people seeking assistance are afforded the fairness and equity that is so imperative to the soundness of the American system of government” (King 1992, 3).

Just as judicial impartiality has authoritatively been characterized as the absence of judicial bias, judicial bias has come to be defined as the opposite of judicial impartiality. Judicial bias, then, involves positively or negatively prejudiced “feelings or spirit” toward the claimants in the cases being heard. It involves, in other words, precisely the kinds of feelings that judges are obligated by the ideal of judicial impartiality to expunge from their reasoning and decisions (46 *American Jurisprudence* 2d § 147).

American Jurisprudence goes yet a step further in refining how judicial bias is currently formulated. It defines the word *bias* as the “leaning of the mind or an inclination toward one person or another” (§167). *Prejudice* is a “prejudgment or forming of an opinion without sufficient knowledge or examination” (§167). The Supreme Court has gone further to stipulate when this mental attitude disqualifies a judge from hearing a given case: “The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case” (*United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966); see also *Berger v. U.S.* 255 U.S. 22, 31 (1921) and *Liteky et al. v. U.S.* 510 U.S. 540 (1994)).

The doctrinal conception of bias is based on an opposition between bias and impartiality, a rejection of one for the other. Yet my findings and the studies that preceded them indicate that in practice, bias is a consistent dimension of what is considered “impartial” decision making. My results reveal that impartiality in the narrow scientific sense, in which doctrine has used it, is itself a form of bias and that a historically and contextually sensitive definition of bias, taking account of the communities and cultures that come to be judged in the legal system, must overcome the modern dualistic notion of impartiality as the exclusion of bias to respond to the fluid and fluctuating needs of the diversity of applicants and the judges who adjudicate their claims. Indeed, my findings reveal that to exclude bias is to engender prejudice in the form of what I will term repressed and therefore unconscious determinations of judgment.

While judicial impartiality is well recognized and much applauded by all levels of the legal system, there has always been debate on if and how judges should expunge bias, their positive or negative prior feelings, from legal proceedings (Minow 1995). My findings clearly indicate that the ALJs in the cases I reviewed consistently failed to eradicate such feelings and that infractions of the stipulated rules for impartial decision making are endemic to the system.

A case example illustrates this point. Miss Plain was, at the time she appeared before this ALJ, a 52-year-old woman with three years of formal education and no recent work history (87-5258, IL). She had last worked in 1966 as a nurse’s aid. In that capacity, she would “clean up . . . the old patients . . . change them and clean them up.” Miss Plain was disabled due to obesity, thrombophlebitis of the right leg, mild to moderate high blood pressure with heart enlargement, degenerative joint disease of the spine, osteoarthritis in the knees and ankles, and tension headaches. Miss Plain was illiterate and could write nothing more than her name.

Miss Plain was a homemaker. Since disability is defined as being unable to engage in paid employment, nothing in the rules prevents judges from finding a homemaker eligible for disability benefits. Indeed, the rules are sympathetic to those applicants who have not recently engaged in competitive employment. Embedded in these rules is the assumption (or bias) that people who have been unemployed for long periods of time often lack the necessary skills to compete in the job market. In addition, the rules recognize that such limitations as illiteracy prevent applicants from engaging in a panoply of employment opportunities.

Miss Plain’s case reveals the ways a judge’s bias creeps into the hearing process. Despite Miss Plain’s testimony of her illiteracy and 30-year

gap in employment, the judge suggests in the hearing, and subsequently in the decision, that she was not disabled and that she could work. The judge actually suggests, at one point in the hearing, that Miss Plain could get a job as a receptionist even though she could not read and write. This response to Miss Plain runs so contrary to the rules and to the judges' mandate to adjudicate claims fairly that any reflective account of the process of judgment must address the question of what motivated this judge to be so unreflective, to be so negatively predisposed to this case.

An initial answer can be suggested by turning to research in social psychology. One recent study has examined this question by means of an experimental design that explored the degree to which preexisting stereotypes ("category-based, subjective expectancies") determined the willingness of a judging subject to seek individuating information before making a decision (Trope and Thompson 1997). Trope and Thompson found that when negatively stereotyped people are asked questions, they are asked fewer questions, and the questions are asked in a way that tends to elicit confirmation of the stereotype rather than information that would individuate the subject or challenge negative stereotyping. In sharp contrast, questions to positively stereotyped people are more symmetric and therefore likely to elicit responses that would either confirm or disconfirm a particular stereotype. Trope and Thompson found that to disconfirm a stereotype, a relatively large amount of information was necessary to reach a conclusion attentive to individuals and their responses. Their study participants were willing to base their judgments on a relatively small amount of individuating information when the target was negatively stereotyped: "In essence, our participants gave stereotyped targets relatively few opportunities to express their personal views on the issues at hand" (240).

Trope and Thompson's study suggests that a judges' formula for approaching this and other cases involving people who are easily stereotyped, such as African-American women like Miss Plain, may be influenced by their unconscious tendency to search only for a confirmation of the stereotype rather than for a more complete picture of the overall ability to function. Had the judge taken the time to gather the information necessary to move beyond his stereotype of Miss Plain, he would have more fully discussed with her what realistic employment options existed. Such questions might have included: What are a typical day's activities? How much lifting can you do? How much sitting can you do? From the answers to these questions, the judge could have developed a list of skills, if any, from which he could extrapolate realistic jobs she might have done.

To reflect on Miss Plain's case and on her circumstances, to engage her rather than to respond with a predisposed negativity, is the ideal we should strive to achieve in judicial practice.

Miss Plain was eventually vindicated by the federal court that reversed the judge's denial of her benefits on the grounds that he ignored Miss Plain's illiteracy. As for the race and gender implications of this case, my theory, which is supported by the social-psychological literature, is that ALJs in the Social Security system may all too easily be influenced by the stereotyping that is driven underground by the ethos of impartiality.

Miss Plain's case supports the contention that it is necessary to become aware of the ways in which racial, gender, or other indistinguishable prejudices are embedded in people's cores and illuminate those hidden forms by scrutinizing the ways they appear in routine interrogations of claimants. To do so, it is useful to explore further the role that emotional detachment or objectivity, the staple fare of legal education and of the professional myth of the rule of law, play in contributing to the judges' propensity to stereotype.

Acknowledging Emotion

Despite the apparently self-evident bias that my study reveals, most judges will, no doubt, unwittingly adhere to the implausible belief that impartiality demands a neutral and detached decision maker and, more particularly, one who is in no way guided by emotion (46 *American Jurisprudence* 2d § 147). Such a view could be explained in terms of the self-interest of decision makers or the ideology of judicial sanctity. But it could also at a more fundamental level reflect an inherent flaw in the conception of decision making, which contemporary doctrine inherits largely unreflectively from its nineteenth-century forebears. This conception is predicated on the classical liberal view that law should remain outside of society and should judge disputes from a position that somehow transcends the political conflicts of everyday life.

The classical liberal view depicted law as the governance of rules rather than of men. The position of judgment was defined by a tradition of sovereign arbitration in which the judge passed on or disinterestedly "declared" a law that existed external to and independently of him and of the subject to be judged. In its late-nineteenth-century formulation, law was a science of rules, and judgment was the deductive enterprise of subsuming particular facts under general norms. In the hands of Langdell and

his followers, the science of law, and more particularly of legal education, was that of abstracting the fundamental doctrines and principles of law from exemplary cases and then applying them in a neutral and objective manner to the task of systematizing the substantive legal disciplines (Goodrich 1986).

This formalist and Olympian view of law was neither uncontested at the time of its elaboration nor universally adhered to as perceptions of the role of law in society gradually began to change. Practitioners such as Justice Benjamin Cardozo, for example, recognized that the deductive model of legal decision making was, at the least, superficial, in that “[d]eep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge” (1921, 167).

Justice William Brennan similarly rejected the prevailing myth that a judge’s personal values are irrelevant to the decision-making process, acknowledging the important role that qualities other than reason must play in the judicial process. “In ignoring these qualities, the judiciary has deprived itself of the nourishment essential to a healthy and vital rationality” (1988, 9). Such essentially psychological sensitivity to the biography, elite status, privilege, and concomitant sensibility of those who judge was one of several defining themes in the work of legal realists and has also been important in contemporary critiques of gender and race bias in the legal system as a whole.

My argument elaborates and refines the position developed by Justice Cardozo and the legal realists. It also augments and radicalizes their awareness of the social context of legal rules by suggesting unequivocally that the scientific ideal of impartiality is inappropriate to legal decision making. Legal realists certainly augmented the factors that should be taken into account in assessing the grounds of decision. They argued, for example, that in addition to logic, “[s]ocial context, the facts of the case, judges’ ideologies, and professional consensus critically influence individual judgments and patterns of decisions over time” (Singer 1988, 470). Implicit in this view, as Joseph Singer has argued, is the assumption first that legal rules are often “vague” and “ambiguous” and are therefore subject to broad interpretation: “reasonable persons could disagree about what these concepts meant” (1988, 470). Second, legal realists assumed that a holding in a case can always be interpreted in at least two ways: “it could be read broadly to establish a general rule applicable to a wide range of situations, or it could be read narrowly to apply only to the specific facts

of the case” (Singer 1988, 470). And finally, given the ambiguity of the law and the numerous interpretations to which cases are subject, the realists argue that jurists could always seek “competing and contradictory rules” to decide any given case (Singer 1988, 470).

Where legal realism argues that discretion is an inevitable feature of the indeterminacy of rules and therefore that the process of decision making cannot be understood without taking account of the individual biases, social ideologies, or institutional or cultural predilections of judges, it was nevertheless the goal of realism to bring decision making as close to impartiality as was possible: “The focussing of conscious attack on discovering the factors thus far unpredictable, in good part with a view to their control” (Llewellyn 1962, 61). Indeed, as Llewellyn argues, “Close study of particular unpredictables may lessen unpredictability” (1962, 61). At root, legal realism criticized legal science for not being scientific enough. Later work associated with critical legal studies, feminist jurisprudence, and critical race theory has moved toward a more radical position. Knowledge is culturally and politically embedded, and even science has been shown to have proceeded historically within the constraints of gender and race bias.

The concept of a science of law is the product of the legal academy, and in this regard it makes sense to trace the problem of impartial judging back to law school training and more particularly to the scholarly model of legal reason. Critical legal studies grew out of a leftist political critique of law and attempted to further the legal realist project by making explicit the extent to which the classical conception of an objective system of legal rules perpetuated the interests of economic elites and promoted class-based privilege. This theme of inequality and of the legal perpetuation of privilege is central to Roberto Unger’s famous 1983 book, *The Critical Legal Studies Movement*.

In Unger’s at times eloquent and at times opaque account, the legal academy still trains a priesthood, a sacral profession of law. Maintenance of the necessary faith in law depends on the inculcation of a faith in the scientific rationality of law. Legal formalism dominates in the law school and preaches a deductive logic of law that not only promises veneration of the system but also requires the existential adoption of a position of obedience to the hierarchy that such a system implies (Kennedy 1992). The formalism of the legal academy serves to train a profession that is in principle protected—by science, by logic, by reason—from the social and political realities of the subjects that the judge must eventually manipulate the rules of law to judge.

Other critiques endeavored systematically to prove the inevitability of the political character of legal decision making by evidencing the linguistic indeterminacy of the normative order. Thus, in an influential piece on the metaphysics of American law, Gary Peller (1985) demonstrates that legal language and specifically a system of precedent based on reasoning by analogy, by likeness, could not help but force judges to resort to value choices in deciding which application of a rule to enforce. Jack Balkin (1987) similarly resorted to Continental philosophy to evidence the extent to which contemporary linguistic thought requires that the indeterminacy of legal texts and hence the value choices of their interpreters determine textual outcomes. Feminist and critical race scholarship have specifically addressed this substantive and experiential challenge to the formalist's faith in rules.

Feminist jurisprudence has contributed to the critique of objectivity and, by extension, impartiality by arguing that legal rules simply reflect the inequalitarian social reality of a masculine—or, more technically, homo-social—legal institutional order (Naffine 1990). More specifically, feminist legal scholars have argued, as I do, that the rules, the case law, and the judges who interpret them adjudicate from a point of view, from their experience as social beings embedded in a gendered political and economic culture. These points of view, which are based in male privilege, blind adjudicators to their partiality, while the doctrine of impartiality protects the blind from seeing. As Martha Minow has cogently argued, impartiality prevents observers of the legal system from noticing “the coincidence between the viewpoints of the majority and what is commonly understood to be objective or unbiased” (1990, 60).

Numerous feminist authors have advanced the argument that neutrality and objectivity hide the oppressive quality of legal decision making. To take a synoptic example, Ann Scales (1986) argues that male legal norms are often coded as neutral. She illuminates this historical fact by presenting numerous case examples. In one celebrated 1872 Supreme Court opinion (*Bradwell v. The State* 83 U.S. 130), Justice Bradley in a concurring opinion held that the Fourteenth Amendment's privileges and immunities clause did not entitle Myra Bradwell, a woman, to membership in the bar:

The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . The paramount destiny and mission of

woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things. (141–42)

These and other case examples of judges who are so obviously directly influenced by their perspective of class and gender privilege and denial trace a history of bias in judicial decision making that exists well beyond the Social Security context. That history also traces an inevitable danger that accompanies a fixed, homosocial law, a legal system that fails to take account of the affectivity that translates oppression to violence. As Robert Cover has so eloquently described, “The relationship between legal interpretation and the infliction of pain remains operative even in the most routine of legal acts” (1986, 1607). This is evidenced throughout my study, as case example after case example uncovers an abuse claimants are forced to endure at the hands of the “impartial” judge. Rectifying the violent underpinnings of the so-called neutral or impartial legal system is no easy task.

Scales (1986), like other feminists, myself included, argues for a relational concept of law. This relational notion moves beyond abstract legal-rights jurisprudence and its objectifying practices and embeds feminist legal practice in the everyday experience of people’s lives. In this regard, law is emotionally engaged; it responds not to the fixed and distant male norms to which doctrine has historically adhered but rather to the fluid needs and interests of the lives of people who are touched by law (Mills 1996). This relational approach is evidenced throughout this book, as I hold judges accountable to the mandate that they engage and accommodate the claimants who appear before them.

Pivotal to the arguments advanced by critical legal scholars and by feminists is the method of training received by lawyers and, hence, judges. L. Amede Obiora (1996) traces the history of legal education beginning with Harvard Law School and explores how the earlier formalist framework became the cornerstone for the homosocial training of lawyers. The science of legal education and its presupposition of the neutrality and objectivity of law insulated legal scholars, practitioners, and judges from the complexity of human relations. Emotion was seen as outside the realm of legal reasoning, as divorced from the practice of men and of law. This analysis of the homosociality of law is central to the feminist argument which claims that gender dynamics in the legal academy reflect biased dynamics in society as a whole (Guinier, Fine, and Balin 1997). Studies consistently reveal that women students must tolerate stereotypical images

of themselves, sexist language, and other negative characterizations in the classroom and that male students witness tacit approval for it (Frug 1992; Lahey 1991; Banks 1990). Male professors either perpetrate this biased behavior or participate in it through their silence (Krauskopf 1994). It is not surprising, then, that people trained in these law schools, in this language, and in these methods would reflect and embody these images once ordained as judges.

The experience of oppression and the approval for certain biased values in law school are not limited to women students. Students of color and, by extension, faculty and other members of the profession who are of color experience the domination and alienation that they have learned to expect from the culture at large. Critical race theory provides the intellectual landscape in which these vexing problems have been explored conceptually. In critical race theory, postmodernism converges with radical politics to create a movement by legal scholars that reinterprets legal philosophy and practice and decenters legal conventions in light of these critiques.

For example, Derrick Bell (1995), one of the movement's leaders, observes that abstract legal principles such as *equality* harm African Americans and perpetuate their marginalization. "Racism provides a basis for a judge to select one available premise rather than another when incompatible claims arise" (302). Bell and critical race theory more generally recognize and seek to publicize the violence inflicted on people of color through the myth of legal neutrality and abstract law.

As numerous examples exist in feminist jurisprudence of gender-based judicial bias, so too is critical race theory rich with instances of judicial action that denies racism in the guise of objectivity. In one of the most famous examples, Bell (1995) deconstructs the violence evident in the *Regents of the University of California v. Bakke* (438 U.S. 265 (1978)) decision by arguing that the U.S. Supreme Court, in holding that it was illegal to discriminate against whites in favor of historically disadvantaged groups, took what looked like a racially neutral position by ignoring the rampant disparity between blacks and whites, especially with regard to their access into higher education. Bell argues that the Court was able to hide its racist intent by relying on abstract concepts such as *equality* to mask the real history of black oppression. For critical race theory, like legal feminism, *equality*, *objectivity*, and *impartiality* are veils for protecting the privilege of the white male elite. It is from this privileged history that the points of view of judges are finally revealed.

Patricia Williams (1995) traces the dynamics that give rise to such sub-textual racism to elementary school education. According to Williams, one white first-grade teacher in Pennsylvania asked two black students to pretend to be slaves during a discussion on the topic and displayed these pupils to the class to illustrate how their experience might have felt. The girl, the teacher explained, would have been sold for \$10 as a housecleaner; the boy was used to demonstrate how slaves were flogged. Williams interprets this thoughtless lesson as a reenactment of a power dynamic “in which some people get to imagine oppression, and others spend their lives having their bodies put through its most grotesque motions” (26). What Williams is most concerned about, as am I, are the ways in which this kind of education reinforces among the dominant group, the belief that they have become sensitive to oppression. This disguise helps the dominant group avoid a deeper reflection on racism and their role in perpetuating it and reinforces the unspoken silence in which these dynamics become inextricably intertwined.

If law school marks the beginning of the judge’s professional life, it is useful to explore how racial dynamics in the legal academy may be contributing to judge’s points of view. Linda Greene’s (1997) essay on her experience as a black law teacher reveals a similar dynamic to that witnessed for women more generally, but also exposes its distinctly racialized dimensions. Greene describes the marginalization black women law professors experience in the academy both from their students and from their colleagues. Tokenism, as she sees it, represents only a symbolic equality and blurs the racism and sexism that underpins the appointment of women of color in the legal academy. She argues that the reluctance of white men to welcome black women into their law faculties stems from the resistance of members of the academy to relinquishing their power. These efforts by the dominant group are disguised by what has been called a color-blind meritocracy (Kennedy 1995), which is no more than code for racial privilege and white isolationism. The danger is that the white students who ultimately become judges witness these dynamics in law school and obtain, in new and powerful forms, unconscious approval for negative raced and gendered texts and subtexts.

The interpretations advanced by critical legal studies, feminist jurisprudence, and critical race theory traverse with the theme of law and emotion presented in this book. Formalism and the objectivist model of judgment that it proposes are detached from emotion and from the real experiences of people. Critical and feminist approaches unravel that myth

and situate judges squarely in the sexist and racist paradigms from which they judge.

Ironically, while the legal system has been reluctant, even unwilling, to recognize that impartiality is only an ideal, the system has nevertheless been cognizant of the need to have an engaged judiciary. The system has come to rely on the judge's awareness of difference to ensure that the important goal of an accommodating justice is embraced. Far from being an undesirable or alien element of the legal decision-making process, bias in the sense of attachment or affection, culture or context, is an intrinsic dimension of judging (Brennan 1988; Minow 1995). Justice has always required that the judge pay attention to the singularities of litigant or claimant, evidence or plea, and that the judge listen to the unique and individual characteristics, to see the face of the person who appears before the law. To ignore this reality would simply be to repress bias and to deny the emotive dimensions of the art of judging.

As has been claimed cogently by Martha Minow and Elizabeth Spelman (1988), it is quite simply futile to ignore emotion. They argue that the consequence of ignoring emotion is a severe injustice that results from the failure to recognize or perceive the details of the case. In Minow and Spelman's view, to repress emotion is in effect to expunge or exclude a highly significant dimension of the dispute that the judge is supposedly in office to hear. Their article ends laudably with a call for judicial decisions to be based on a combination of emotion and reason in the belief that doing so will lead to compassionate and more predictable justice. The authors' argument and the criteria they suggest for the incorporation of emotion into the justification of decision making imply but do not expressly dictate the abandonment of the doctrinal conception of impartiality. My argument wholly vindicates their position but also suggests that it is necessary to rethink radically the dualisms of bias and impartiality as well as of reason and emotion. For administrative law judges to act justly and to judge fairly does not require impartiality to the exclusion of bias. It requires, rather, a sensitivity to personal biases and a recognition of fears, blindnesses, and desires, however indirectly they seem at first sight to affect the perception of the claimant or the ability to recognize the context of the claim.

As philosophers and psychologists have increasingly begun to doubt the ability of the human mind to separate reason from emotion, so too have legal scholars, myself included, realized the futility of perpetuating the myth that judges or lawyers can make such distinctions (Zipursky 1990; Mills 1996). Rejecting the notion that a judge must cease to be

human or else be impermissibly prejudiced, I and others acknowledge emotion's role in the judicial process and argue that judges always bring their own perspectives and experiences to the cases they hear (Minow 1995; Resnik 1988).

I believe that we must move beyond approaches that merely or negatively acknowledge emotion's effects on decision making and instead affirmatively integrate and reflect on emotion's role in the judicial decision-making process, a method I have come to call Affective Lawyering (Mills 1996) or Affective Advocacy (Mills 1998).

Rejecting the prevailing notion of impartiality that mandates that adjudicators should be neutral and detached, my argument suggests, on the contrary, that the only way to avoid negative stereotyping and the failure of judges to engage and protect claimants is to mandate that judges show their affectivity by publicly exposing their likes and dislikes, prejudices and predilections, and affirmatively integrating them into their hearing and decision-making practices. This issue is explored in more depth in chapter 7, where I present a method for mandating judges to confront their biases.

By *affectivity* I refer to the emotion, feeling, predilection, and most relevantly the penchant for prejudice that judges have been trained to hide. By *affective approaches* I mean the experience everyone feels in meeting someone new, judging them, and categorizing and stereotyping them. Whether or not people are conscious of these judgments or thoughts, the social-psychological literature suggests that they are inevitably there (von Hippel, Sekaquaptewa, and Vargas 1995). This affectivity takes the form of both positive and negative emotion. Most importantly, if it is revealed as it should be, as emotion that colors judgment, it is then up to the judge to reject the irrelevant criteria and to be sure that relevant factors are considered in the face of that honesty. This kind of reflection actually holds promise for addressing the insidious bias, described in chapter 3, to which the system has been victim since its inception.

Social psychologists have long recognized the difficulty of divorcing emotion from judgment, impartiality from bias. Patricia Devine's groundbreaking work on the mechanics of prejudice is relevant to my critique of prevailing juridical practice. Her studies have analyzed stereotypes and prejudices, particularly whether people can or want to control their biases. In her most famous study (1989), Devine used three research designs to test automatic and controlled processes involved in prejudice. Her study which focused on African-Americans, assumed that both high- and low-

prejudiced people are equally knowledgeable about cultural stereotypes based on the assumption that people are commonly socialized. In addition, she assumed that stereotypes are automatically activated when in the presence of an African-American and that both low- and high-prejudiced people cannot escape the activation of the stereotype. Finally, she assumed that high- and low-prejudiced people differ with respect to their personal beliefs about African-Americans. High-prejudiced people are likely to have beliefs similar to the cultural stereotype, whereas low-prejudiced people have decided that the stereotype is an inappropriate basis on which to judge a person. This new thought structure, or way of processing and rejecting negative stereotypes, does not, according to Devine's theory, supplant the older belief system and therefore is only activated when there is an intentional inhibition of the old belief system.

Using this model, Devine sought to test her hypotheses. Study 1 of her three-part research design examined whether high-prejudiced people (where personal beliefs overlap substantially with cultural stereotypes) and low-prejudiced people (where cultural stereotypes have been rejected as criteria for evaluation) are equally knowledgeable of cultural stereotypes. Devine found that stereotypes (in this case, about African-Americans) are automatically activated in both high- and low-prejudiced people. In study 2, Devine tested the degree to which high- and low-prejudiced people can control their automatically activated stereotype. She found that when subjects were unable consciously to monitor the activation of stereotypes, both high- and low-prejudiced people are equally biased. Study 3 examined what happens when high- and low-prejudiced people can consciously direct their prejudice. She found that when given the opportunity to control their negative stereotyping, low-prejudiced subjects could inhibit the stereotypical thoughts and could replace them with thoughts reflecting the rejection of the stereotype.

Devine's research is significant to my work for several reasons. First, it is relevant because she found that even low-prejudiced people, who pride themselves on their nonracist beliefs, were as knowledgeable about cultural stereotypes as those people who were considered highly prejudiced. This is important because it suggests that prejudicial beliefs exist in our psyches, in our unconscious. This is confirmed in study 2, where Devine revealed that even low-prejudiced people were unable to control the entry of stereotypes into their thinking when the influence involved a process they could not control. Study subjects were not given time to reflect on their responses, which allowed Devine to test automatic or unconscious

response. She found that if subjects were prevented from consciously monitoring the activation of their stereotypes, both high- and low-prejudiced subjects had “prejudice-like” responses. Her conclusion from the first two studies was that both high- and low-prejudiced people hold stereotypes that support prejudiced responses. These findings imply that if judges, even those with low prejudices, are actively discouraged from reflecting on their stereotypes (insofar as they have been convinced that impartiality protects them from those beliefs), they too are likely to be held captive to those stereotypes. As Devine describes it, “Thus, even for subjects who honestly report having no negative prejudices against Blacks, activation of stereotypes can have automatic effects that if not consciously monitored produce effects that resemble prejudiced responses” (1989, 12).

In study 3, Devine found that when forced to contemplate their prejudice, low-prejudiced people were able to replace the negative stereotyping information with thoughts that expressed nonprejudiced values. High-prejudiced people, conversely, were willing to ascribe prejudicial traits to the group at large. Devine concluded that “controlled processes can inhibit the effects of automatic processing when the implications of such processing compete with goals to establish or maintain a non prejudiced identity” (1989, 15). This finding underscores the importance of developing a method for judges to reflect on their biases and for making gender, race, and other stereotypes conscious through deliberate and direct efforts.

Other researchers have further refined Devine’s work. Macare et al. (1994) suggest that efforts to suppress stereotypes may actually heighten their accessibility and influence. Even Devine (1989) suggested that prejudice could be reduced by inhibiting stereotypical thought. Macare et al. suggest that to the contrary, there are costs associated with the act of suppression. When perceivers attempt to suppress their prejudicial thoughts, “unwanted stereotypic thoughts were shown to return and impact on [the] perceivers’ treatment of a stereotyped target” (1994, 815). These findings have important implications for my policy suggestion that judges should be mandated to reflect on their penchant for prejudice and my proposal for training judges, both of which are addressed more fully in chapter 7.

In sum, I argue that judicial impartiality, as it is currently constructed, mandates the absence of even a reflection on bias or emotion and hence creates an institutional ethos that promotes stereotyping and a deliberate denial of the affective dimensions of judging. I propose a new definition of

impartiality that attends to bias as a necessary ingredient in the attempt to achieve justice and judgment. My argument begins with judges' formalist and detached training in the legal academy and proposes changes appropriate to the recognition of the particularized emotional as well as factual complexity that each case presents. I argue that it is precisely the affectivity of judgment that creates the process of accommodation, one that is aware of and does not deny how unconscious forces prevent judges from realizing the ideal of justice that the classical conception of impartiality so desperately and so ineffectively endeavored to achieve.

Tempted as judges—even realist judges—are to pretend that their office itself is imbued with the objectivity necessary to judge fairly, this book supports the conclusion that in so doing, judges are remiss in their responsibility to adjudicate in a consistent, measured, and particularized manner. As my evidence will reveal, not only are the facts of any given case necessary and relevant for judicial consideration, as is the law, but equally important are the unspoken, unspeakable, emotional features of the claimants and claims presented and the feelings generated in relation to them. While judges believe they have the benefit of neutrality and detachment, the previous studies outlined in chapter 3 as well as the evidence described in subsequent chapters confirm that judges are mired in biography, in stereotypes reflecting the dominant culture's judgment of good and evil, deserving and undeserving, worthy and worthless. To rework the modern notion of impartiality is to recognize that there is no detached observer and that no judges can escape the affective parameters of their role. I argue that an understanding of the prejudice that is inevitably bound up in judgment will allow the law to recollect the forms of engagement and accommodation on which a judge depends to do substantive justice.

In the next chapter I set out in detail the rules that govern the Social Security disability decision-making process, including the five most essential mechanisms designed to distinguish the deserving from the undeserving. In addition, I present supporting materials that underpin my contention that Social Security judges must accommodate and engage the claimants who appear before them.