

Empty Formalities

In 1978 Mashaw et al. were disturbed by their finding that judges rarely gave adequate opening statements and often were insincere in their inquiries into the claimant's desire or need for representation. These formalities, which Mashaw et al. found "empty" involve a complex legal and emotional mandate on judges to insure both that the procedural requirements of a case are met (such as the right to an introduction, to be represented by counsel, and to obtain relevant medical evidence and testimony) and that these mechanisms are imbued with the passion necessary for the claimant to fully engage in the hearing process.

To formulate a more precise understanding of how uniformity fails to operate in any consistent manner in the Social Security disability decision-making process, at least in my sample of cases, I begin this chapter by presenting the method and design of my study of these formalities, or rules, including how I selected the 50 cases that comprise my sample and the salient characteristics of the claimants and judges I culled from the transcripts and decisions. I also present the procedural and substantive rules that comprised the focus of my investigation into whether judges adhered to their mandate to comply with the relevant rules and present my rationale for focusing on certain rules and not others. This chapter also summarizes why I chose to focus on judges' failure to comply with these rules and how their inability to accommodate or engage claimants and simultaneous tendency to stereotype them emerged as central themes in my research.

Description of Sample Cases

Origin and History of Cases

My findings are based on an analysis of 50 federal court cases that contain 67 ALJ hearing transcripts and decisions of Social Security claims that

were denied throughout the disability-review process and eventually appealed to federal court. This sample includes all such Social Security disability federal court cases that closed in San Francisco and Boston in 1990 and half of such cases that closed in Chicago in 1990. Thus, I reviewed a total of 17 federal court cases from San Francisco, 10 cases from Boston, and 23 cases from Chicago (where I selected all odd-numbered cases).

I chose Chicago because the GAO (1992) found it to be the region in which African Americans experienced the greatest disadvantage. As previously noted, African Americans were 17 percent less likely than whites to receive DI benefits from ALJs in Chicago. I selected Boston and San Francisco because they also represented regions with high racial differences according to the GAO's findings (14 percent and 12 percent, respectively). (Kansas City and Philadelphia had racial differences as low as 5 and 6 percent, respectively.) I focused on Chicago, Boston, and San Francisco because I wanted to learn more about what the GAO had detected. By selecting cases from three regions, I hoped to ensure that my study did not reflect merely local phenomena.

By selecting claims that closed in 1990, I restricted my sample to cases that were heard by ALJs between 1985 and 1989, which allowed me to ensure a representative cross-section of judges and a reflection of more recent attitudes and beliefs.

Although all the cases I reviewed were denied by ALJs at the hearing level, several of them were approved at the federal court level. The district court awarded benefits outright in six of the fifty cases, without requiring claimants to reappear before an ALJ. District court or court of appeals judges remanded 26 of the cases to ALJs for further proceedings.¹ The district court judges ruled in favor of Social Security and upheld the ALJs' denial of benefits in only 14 cases. Two cases were dismissed and never pursued further. I have no final disposition for two other cases.

Boundaries of the Study

Also of methodological concern is the small number of cases I reviewed, 67 total, which amounted to approximately 2,500 pages of case transcripts. While the size limited the generalizability of the study, it had several positive features. Every research formulation is a partial picture, a snapshot. This study was deliberately designed to build on the large quantitative studies that preceded it and that were also deeply flawed. Although those studies provided a sense of what may be operating, they failed to reveal the process

of decision making that led to the detected bias. The purpose of this study was not to supplant the work of other quantitative researchers but rather to understand how the bias they detected operates in everyday interactions.

The problem with looking only at cases appealed to federal district court is that these cases may not reflect the typical case denied by an ALJ. Most claimants denied at the hearing level do not appeal their cases to federal district court (while 87 percent of claimants appeal to the Appeals Council, only 10 percent appeal to federal district court). Given that federal court cases are the only Social Security files open to public review, these cases remained the only avenue I could pursue to learn more about how judges handled specific cases.

Characteristics of Claimants and Judges

The claimants of the cases I reviewed represented a broad mix of ethnic and linguistic backgrounds. Twenty of the claimants (twelve males and eight females) were African-American. Seventeen (nine males and eight females) were Caucasian. Thirteen claimants came from other racial or ethnic backgrounds: eight were Hispanic; two were Portuguese; one woman was Italian; one man was Greek; and one woman was Jordanian. The cases were almost evenly distributed between men and women: 26 claimants were male and 24 were female.²

I defined *illiteracy* as the inability to read English. Although Social Security defines *illiteracy* more broadly (the inability to read in any language), my analysis of whether judges violated the rules regarding their inquiry into illiteracy was interpreted more narrowly. Because I was not concerned with whether a claimant is capable of working (which is the SSA's primary concern) but rather with whether ALJs complied with rules relevant to inquiring into a claimant's ability to read, it was necessary to factor into my equation the effect of English illiteracy on people from other cultures who appeared before ALJs. I used the *illiteracy* designation most when I evaluated whether judges accommodated or engaged claimants or when or whether they stereotyped them. When I evaluated whether judges had properly complied with rules mandating them to elicit testimony about literacy, I naturally applied Social Security's broader standard.

Twenty of the fifty claimants, or 40 percent, were illiterate in English. Two Caucasian male claimants and seven African-Americans (five men and two women) were illiterate by this standard. All of the claimants who required the use of an interpreter were illiterate in English. Four of the His-

panic claimants (three males and one female) spoke English well enough not to require the use of an interpreter at the hearing. However, two of these four English-speaking Hispanic claimants (one man and one woman) were unable to read and, therefore, illiterate in English. In addition, four female Hispanic claimants spoke only Spanish and required interpreters at their ALJ hearings; these claimants were clearly considered to be illiterate for the purposes of this study. Of the two Portuguese applicants (one man and one woman) whose cases were reviewed for this study, the male spoke only Portuguese and required the use of an interpreter. The female Portuguese applicant spoke English but was not literate in it. The Italian and Jordanian women and the Greek man required interpreters at their hearings.

Compared to a national study of Social Security disability applicants who had been denied benefits, my sample included more women (49 percent compared to 37 percent), fewer Caucasians (42 percent compared to 67 percent), and more African-Americans (39 percent compared to 24 percent).³ As for “other”⁴ racial and ethnic minorities, my sample included 19.4 percent, whereas the national denied applicant pool contained only 9 percent. There were more women and minorities in my sample almost certainly because I selected cases from three large urban areas. Since both single women and minorities are more heavily represented in major American cities, it is understandable that they would also be more heavily represented in the disability applicant pool of such areas and, hence, in my sample. No comparative statistics were available on national applicants’ literacy.

Since I did not seek to estimate the extent or magnitude of ALJ compliance with rules and procedures in the Social Security disability system but rather to learn more about the phenomena that previous researchers had detected, the fact that my pool did not reflect a sample of denied applicants nationwide did not present a methodological problem. My sample was big enough to detect a variety of these deviations and geographically disparate enough to ensure that I was not seeing the peculiar culture of one or two local hearing offices.

Prior to their appearance in district court, several claimants whose cases I reviewed received more than one hearing before an ALJ either because the first ALJ had ordered a second hearing to obtain additional testimony or because the federal court remanded the case, resulting in a second or, in some cases, a third hearing. One judge heard seven cases and another judge heard five. Five ALJs each heard three cases. Another 9 ALJs each heard two cases. The remaining 22 ALJs each heard one case. Hence, a total of 38 judges heard and/or decided the 67 hearing transcripts

and decisions I reviewed. Further, in some of the federal court cases, hearing transcripts did not have accompanying decisions, and vice versa. I decided to examine every hearing and decision contained in each federal court case so that I could have more instances in which to understand the phenomena in which I was interested. This approach made sense since, again, I did not attempt to measure the extent or magnitude of any given phenomenon or the responsibility of any given judge.

Thirty-six male and two female judges generated the 67 hearing transcripts and/or decisions contained in these 50 federal court files. The transcripts and decisions contained no information on the racial or ethnic makeup of the judges.

Given Dixon's 1973 finding that ALJs' rates of approval vary from 8 to 88 percent, and given the possibility that such variation may still occur,⁵ I wanted to verify whether the approval rates of the judges whose cases I reviewed were typical. Social Security stopped publishing award rates for individual ALJs in the 1980s. Therefore, I was only able to obtain averages on 16 of the 38 judges I reviewed. The award statistics I reviewed were from 1982, at which time judges, on average, granted 50 percent of the cases they heard. Of the 16 judges on whom I could obtain statistics, 8 granted between 40 and 60 percent of the cases they heard. Six judges granted more than 60 percent of the cases they heard, while two granted less than 40 percent of the cases they heard (36.4 percent and 26 percent, respectively). I concluded from these statistics that the judges whose cases I was reviewing were probably typical.

The Study Approach

Step one of the study approach involved examining the hearing transcripts and decisions to determine whether judges complied with certain key rules that are designed and implemented to govern how ALJs conduct hearings, evaluate evidence, and make decisions. My focus on rules in the first step enabled me to gauge whether judges were capable of satisfying the most obvious requirement or mandate in the system. To follow or not to follow the rules, I reasoned, is a beginning point for assessing the judges' competence at complying with uniformity. This reasoning is consistent with SSA's peer review approach (1995, 1997), which also tests ALJ compliance with the rules. My study however, took a more critical look at ALJ compliance by examining rule nonconformity element-by-element and by

deconstructing the factors that might have influenced ALJ deviation. With regard to each set of rules, I highlight my quantitative results with qualitative data that describe the phenomena I uncover.

Rules with which I was particularly concerned included those that establish how ALJs introduce the hearing process, treat claimants' right to counsel, elicit their testimony, help claimants obtain evidence and apply the so-called treating-physician rule, analyze claimants' failure to comply with prescribed treatment, and evaluate credibility.

The opening statement establishes the tone, structure, and procedure of the entire hearing. Without it, claimants, whether represented or not, would be highly unlikely to understand how to participate in the process according to their best advantage (Durstun and Mills 1996). Similarly, the means by which judges question applicants about their right to an attorney and especially their decision to forgo legal counsel involves a very fundamental right that may bear heavily on the outcomes of the cases.⁶ Finally, the methods judges use to question applicants—that is, to elicit testimony—influence directly the kind and depth of answers. Misunderstandings are common because different people interpret the same question differently; it is critical to explore verbal interactions from different points of view.

The treating-physician rule, the rule governing an applicant's failure to comply with prescribed treatment, and the rules governing how judges make credibility determinations also warrant brief explanation. The treating-physician rule gives controlling weight to the opinion of the physician who treats the applicant rather than to a consultative physician who examines the claimant once for the purpose of determining eligibility for disability, assuming it is well supported by clinical and laboratory findings and it is not inconsistent with other evidence in the record. The rule is predicated on the assumption that treating physicians know patients best and therefore have the most accurate medical information on them. This rule, a long-standing feature of the disability program, requires judges to prioritize the evidence they evaluate and therefore functions as one of the mechanisms the SSA uses to standardize judges' decisions.⁷

The rule governing applicants' failure to comply with prescribed treatment is also critical to the fairness and impartiality of disability decisions. Holding that claimants whose medical conditions fall within the definition of disability may not be entitled to benefits if they fail to follow physicians' prescribed treatment that could improve their condition, this rule provides

one of the only ways judges can deny medically qualified applicants. Since this rule is often used and since, when applied, it is used to deny claims, it seemed a likely place where judges might use their discretion.

The third substantive area I examined was credibility—the determination judges make regarding whether claimants' testimony and demeanor are believable. I chose to evaluate credibility because it involves the judges' discretion and personal judgment. Many prevalent disabling conditions, most notably pain, fatigue, and shortness of breath, are impossible to measure objectively; moreover, as Deborah Stone (1984) has persuasively contended, even seemingly objective clinical and laboratory tests are open to wide interpretation. Consequently, a judge's evaluation of the believability of a claimant's testimony regarding such subjective matters can be crucial to the outcome of the case. Given the Ninth Circuit Gender Bias Task Force's (1992, 1993) finding that several claimant representatives believed that judges evaluated women as less credible than men, and given the findings of other gender-bias studies and research, which revealed that female witnesses are less often believed than male witnesses (Swent 1996), it was particularly important to study how ALJs evaluate credibility.

To ensure that the rules I considered were fair and accurate test sites for identifying and measuring potential bias, I focused my research on rules and formalities common to many legal proceedings. All jurists, for example, make opening statements in courts of law; most judges must address a claimant's right to counsel; all judges must elicit and weigh testimony; and all make credibility determinations. While not all judges encounter the treating-physician rule or a rule that assesses a claimant's failure to follow prescribed treatment, all are required both to comply with a prioritization of evidence (as is the function of the treating-physician rule) and to make step-by-step analyses of the evidence (as is required by the rule governing an applicant's failure to follow prescribed treatment).

Hence, given that the SSA seeks to decide disability claims uniformly and that the rules here examined are common expressions of that ideal, it made sense to use ALJ noncompliance with the rules as a starting point—that is, as the first step for evaluating whether claimants are disadvantaged by ALJ hearing and decision-making practices. Step two of my method, which isolated specific instances in which ALJs violate rules for concomitant effects of ALJ inability to accommodate or engage claimants (described more fully in chapter 5), and/or to stereotype them (described more fully in chapter 6), presents a tentative assessment of why, how, and

under what circumstances these rule violations may occur. The second step of my critical investigation, then, elaborated on and qualified the first.

The ALJs' Introduction and Opening Statement

As prescribed by *Hallex*, the Social Security disability hearing should begin with introductions, an opening statement, and other remarks and procedures (SSA 1992 I-2-650). Specifically, *Hallex* mandates that judges introduce themselves and any hearing office staff present in the hearing room, explain the reason the staff is present (i.e., to run the recording equipment and take notes), and identify and explain the role of any other people present (including interpreters, vocational experts, medical experts, and the claimant's friends or family members) (I-2-652). After the introductions, the hearing officially begins with an opening statement that explains "how the hearing will be conducted, the procedural history of the case, and the issues involved" (I-2-652).

Hallex leaves the exact content and format of the opening statement to the discretion of the ALJs; nevertheless, a strict interpretation of *Hallex* suggests that the opening statement should satisfy numerous specific requirements. It should be brief yet explain how the hearing will be conducted, including mentioning that ALJs will take claimants' testimony on questions about their age, education, work history, and impairment and that claimants will respond by giving testimony under oath. The mandate to explain the procedural history of the case is usually thought to require judges to reference the dates when the initial application, the reconsideration, and the request for hearing were filed and when the notice of hearing was sent. To explain the issues involved in the proceeding, judges mention whether the claim is for DI or SSI, what the sequential evaluation process is and how it will be applied to evaluate the case, and the reason, if applicable, that vocational and/or medical experts are present and how these professionals will be questioned. ALJs should inform claimants that the burden of proof initially rests on them in Social Security cases. Finally, ALJs must ask whether claimants have any questions about the hearing process.

Again, *Hallex* leaves the exact content and format of the opening statement to the discretion of ALJs. However, a sample opening statement provided by the central OHA (SSA 1993) illustrates how succinctly these conditions can be met:

The record in your case established that you filed an application for (SSI/SSDI) on (date). You were advised that your claim was denied on initial and reconsidered determination. On (date) you requested a hearing. A notice of hearing was sent to you and we are here pursuant to that notice. The general issue is whether you are entitled to a period of disability and disability benefits under the provisions of Title II of the Social Security Act (or to Supplemental Security Income under Title XVI of the Social Security Act). I will be taking evidence as to the severity and expected duration of your impairments and as to your age, education, and work experience. In preparing my decision, I will consider the following: First, whether you can be found under a disability solely on the basis of the medical evidence. If not, I will consider whether your impairments are severe and whether they prevent you from performing your past relevant work. If they are, I will next consider whether they are severe enough to prevent you from performing any work that exists in the national economy considering your age, education and work experience within the past 15 years. Do you have any questions as to the nature of these proceedings, the history of your case or the issues to be considered?

The introduction with which ALJs are legally mandated to open hearings is important. Such information as that mandated helps to ensure the reviewability of the hearing, should it be appealed to a higher court. Identification of medical and vocational experts is crucial because judges rely heavily on expert testimony and because unidentified participants obviously cannot be held accountable for their statements or other contributions. It is important that judges mention in their opening statements the procedural history of the case and the issues involved. Aside from facilitating review, this formality is necessary to ensure that all relevant participants know that each participant is aware at the time of the actual hearing that they are discussing the same and appropriate circumstances.

The judge's introductions and opening statements are important, however, not only for that potential future audience—the federal court judges who may eventually review the case. The introductions are also essential to ensure that all participants in the hearing—the judge, the claimant, the claimant's representatives, and any witnesses—are afforded the opportunity to realize their respective intentions and fulfill their particular responsibilities to the other people present whose contributions comprise the larger discourse (Durstun and Mills 1996).

To make an opening that is clear and engaging to the claimant whose testimony the judge is about to hear requires the judge to recognize the claimant as actually present; such acknowledgment increases the likelihood that the judge will listen to the claimant. To the extent that the ALJ delivers an introduction that not only acknowledges the claimant but actually engages the claimant in a genuine community of minds, that judge satisfies the often-conflicting hearing requirements, which simultaneously makes the hearing uniform and engaged, impartial and unique for this particular claimant. It establishes the claimants as free to speak to the best of their ability. To the extent that judges fail to engage claimants, perhaps delivering the mandated introduction in a language and tone that would satisfy only reviewing courts, judges effectively disregard their mandates for both uniformity and affectivity. Such judges contribute to the “exclusion of dialogue in favor of monologue” (Goodrich 1986, 188). These claimants are never engaged as a being capable of having and telling stories.

Thus, ALJs’ introductions are important for their effective participation in their role as judges. The statements are certainly also crucial for the claimants whose cases are being heard. For the most part, claimants are nervous when they sit down for their hearings. Few are familiar even with informal court procedure and fewer still have the training required to follow the language, details, and sequence of events that make up the disability hearing. Moreover, claimants are about to discuss issues ranging from impotence to anorexia. Finally, for most claimants, the stakes are very high. By the time they enter the hearing room, many claimants have waited two years or longer to have the issue of their future benefits decided. The combination of economic hardship since becoming disabled and unable to work, the suffering experienced from the disability, and the pain of having been denied benefits at the initial and reconsideration levels makes the hearing itself an extremely charged event. Effectively confronting anyone in those circumstances with a room full of strangers conversing in abstract language that appears to have no beginning, middle, and end no doubt is intimidating and even antagonizing. In no way could such a situation be expected to encourage the openness and presence of mind needed to act effectively and meet the burden of proof of the complex Social Security hearing process. Introductions of strangers, explanations of their roles, and a complete opening statement that establishes a genuine community of minds and explains to claimants what they can expect in the hearing can help lessen the intimidation they are likely to face and encourage them to participate as freely and effectively as they must to prevail.

Thus, the judge's introductions and larger opening statement are essential to ensure fairness in the process (Durstun and Mills 1996). These opening remarks provide the only orientation into this highly complex hearing procedure that claimants, who are often largely, if not wholly, unschooled in the process, are legally entitled to receive. The opening statements are essential to instruct claimants on what to expect from the hearing and what is expected of them. At the same time, the introductions provide an assurance that judges acknowledge claimants and the special claimant-judge relationship.

Despite the tremendous importance of an effective introduction and all the rules in place to ensure that in every case judges make one, I found in my sample of cases that Social Security ALJs rarely fulfill this basic obligation. Of the 65 cases that required introductions (two cases involved claimants whose cases were continuing from previous hearing dates and therefore did not require an exordium), I found that judges did not introduce themselves 57 percent of the time (37 cases) and failed to introduce their staff 86 percent of the time (56 cases). The judges failed to explain why staff people were present in the hearing room in 74 percent of the cases (48). Similarly, judges introduced interpreters in only 10 of the 17 instances in which interpreters were involved. Although judges tended to do a better job of introducing experts (17 of the 19 experts were introduced), only 2 of 19 judges explained what role the experts would play.

Furthermore, judges in 18 of the 65 cases (28 percent) reviewed failed to give any opening statement at all, and another 44 percent (29) gave only an incomplete opening. Thus, judges in 47 out of 65 cases (72 percent) fell considerably short of their legal responsibility. Eleven of the thirty-four cases (32 percent) in which ALJs did not so inform applicants involved claimants who did not speak English. Social Security already has a poor reputation for communicating with claimants in languages other than English, and these violations appear only to perpetuate the non-English speakers' alienation from the process (U.S. Senate 1992).⁸

With respect to other rules, almost all judges failed to comply with the rule requiring them to summarize the procedural history of the case before them. Thus, 72 percent (47 out of 65 cases) failed to mention even the crucial detail of when the initial application was filed. Noncompliance with reference to other important dates was even higher. More than half of the judges (34 out of 65 cases, or 52 percent) failed to mention whether claimants had applied for DI or SSI, despite the legal requirement to do

so. Failing to verify such information with the claimant can and does result in unnecessary administrative delay and appeals.

In 97 percent of the applicable 65 hearing transcripts (63 out of 65) studied, the judge failed to explain to the claimant that the SSA employs a sequential evaluation to make disability determinations, that the sequence involves five steps, and what those five steps are. Also in 63 out of the 65 cases, judges neglected to inform claimants that the burden of proof initially rests on them in Social Security cases. Even in the two cases in which judges complied with this rule, the statement was only implicit. One judge said merely, “The hearing allows you an opportunity to show you cannot return to your past work,” and the other stated, “You have to show” that you are too disabled to work. Neither of these judges and no other judges in the study sample explained what the “burden of proof” means in a Social Security claim—that is, that claimants had the responsibility to provide evidence and testimony that makes a *prima facie* showing to the judge that their medical impairments prevent them from performing their previous work activity (*Gallant v. Heckler* 753 F.2d 1450 (9th Cir. 1984)).

Given that so few judges made opening statements and that even fewer explained the rules to which they were bound when making decisions, it was not surprising that 94 percent of the judges failed to offer claimants the opportunity to ask questions about the hearing process (61 out of 65 cases). This oversight may reflect the belief suggested by one ALJ at the Justice and Diversity training that asking claimants if they have questions about the process may encourage them to challenge the process too vigorously and, hence, undermine the judge’s authority.

Left to devise their own opening statements, Social Security ALJs in the sample of cases studied did not satisfy even the basic *Hallex* mandates necessary to ensure the reviewability of hearings. Judges almost unilaterally avoided any statements that would engage claimants in a genuine community of minds. Rather than acknowledging the introduction’s importance for raising expectations and setting standards for all that is to follow, these ALJs appeared to treat the introduction as an empty formality.

ALJs often justify procedural omissions on the grounds that claimants’ attorneys have already informed their clients of the hearing procedure, and, indeed, ALJs did make opening statements of some sort in the hearings of eight of the nine claimants who appeared without representatives. Relying on attorneys to explain the process, however, is not wise. A small study found that when asked whether they felt prepared for

their hearings, claimants expressed a need for judges to explain the process even when their attorney had previously done so (Mills 1988). Moreover, attorneys' and representatives' activities are far less regulated in this regard than are those of judges. But even if all representatives could convey to their clients the basic hearing procedure, judges would still have the responsibility in their introductions to engage in some way with the claimants to ensure anything like genuine justice.

Unrepresented Claimants

My findings reveal that ALJs' oversight of rules governing waivers of the right to representation undercut whatever effort they made to provide opening statements to unrepresented claimants. Social Security regulations and case law require judges to inform claimants of their right to be represented by an attorney before their testimony is taken (SSA 1992 I-2-652). In addition, ALJs must secure on the record unrepresented claimants' acknowledgment that they understand their right to representation and their unequivocal affirmation of their decision to proceed without a representative (SSA 1992 I-2-652). Finally, ALJs must inform claimants that attorneys can be retained on a contingency-fee basis or that attorneys may be available for free.⁹

Nine of the sixty-seven hearing transcripts and decisions I reviewed involved hearings of claimants unrepresented by counsel. In three of the nine hearings of unrepresented claimants, ALJs failed to mention that claimants had a right to an attorney. One of these cases involved an illiterate man who had no formal education, and a second case involved a woman whose IQ tested in the borderline mentally retarded range. People with borderline intelligence have been identified by federal courts as requiring special assistance in exercising their right to representation (*Vidal v. Harris* 637 F.2d 710 (9th Cir. 1981)).¹⁰ In seven of the nine cases, judges failed to inform claimants that they could retain an attorney for free. In Mrs. Moore's case (89-6436, IL), for example, the ALJ told the claimant that there are lots of "attorneys in the phone book," and there is a "list of Legal Aid attorneys," but he never informed this claimant that attorneys could be retained on a contingency-fee basis or for free. When Mr. Prince (87-9662, IL), a claimant who had a fifth-grade education and was illiterate, asked whether the judge felt a lawyer was necessary, the judge responded, "I'm not here to give you advice." The ALJ then gave Mr. Prince a list of attorneys and informed him that he had 30 days to find

a lawyer before his case would be rescheduled. Mr. Prince was offered no assistance in reading the list.

Of all the rules governing the right to representation, ALJs complied most frequently with the rule prohibiting them from attempting to dissuade claimants from obtaining attorneys or other representation, yet the judges still violated this rule in two cases. In Mrs. Moore's case (89-6436, IL), the judge promised to protect the claimant's rights, and in Mr. Prince's case (87-9662, IL), the judge said that it was the claimant's responsibility to make sure all the evidence was considered.

In six of the cases, judges failed to include in the transcript or decision the claimants' acknowledgment that they knew that they had a right to representation. In five of the cases, the judges did not obtain from the unrepresented claimants an unequivocal affirmation of their decision to proceed without a representative. In all the cases involving unrepresented applicants, ALJs neglected to ensure that claimants understood how counsel could assist with their cases. In no hearings, for example, did a judge inquire whether unrepresented claimants had fully read and evaluated the exhibit file containing their medical evidence and whether they had any objections to it. In the case of Mr. Costello, a man who was illiterate and had no formal education, the ALJ failed to inquire whether the claimant had even read the file (88-7350, IL). In other cases where judges did ask, they neglected to investigate with any vigor whether illiteracy or a lack of education may have hindered the claimants' review of the evidence in the file. Instead, as chapter 6 reveals in detail, the judges would rely on claimants' assertions that illiteracy or educational deficit posed no difficulty. It is the duty of lawyers who represent disability claimants to read, review, and critically evaluate the exhibit file. As my evidence reveals here, and in the next two chapters, it is difficult to imagine any of these unrepresented claimants not benefiting from the assistance of counsel.

One other relevant factor regarding the treatment of unrepresented claimants is worth noting: While no other study has ever analyzed the characteristics of unrepresented claimants, my randomly selected (albeit small) sample revealed that they are members of the most disadvantaged groups and hence need more, not less, assistance through the application process. Of the nine unrepresented claimants, seven were African-American and one was Cuban. Four of the nine unrepresented claimants were illiterate. Six of the nine unrepresented claimants were female. Six of the nine unrepresented claimants had not attended high school or did not

complete their high school education; none had more than a high school education. The fact that claimants who entered the system unrepresented were also members of the most disaffected groups raises the possibility that disregard for the rules governing claimants' representation may be related to the judges' disinterest or may be deliberate attempts to further alienate these applicants from the hearing process in general and from representing their own best interests in particular.

Eliciting Testimony

Legally, judges are charged with developing the record to the fullest extent possible.¹¹ They are responsible, in other words, not only for collecting medical and other written evidence but also for eliciting oral testimony from claimants whose cases they hear. Indeed, eliciting oral testimony is the primary purpose of the ALJ hearing. Several rules establish the parameters of judges' efforts to elicit testimony, but to what extent do ALJs comply with these regulations? An analysis of this question provides additional insight into how the Social Security disability decision-making process works.

ALJ training materials (SSA 1993),¹² Social Security case law, and *Hallex* outline the rules that apply when ALJs elicit testimony. The training materials direct judges to address women and men by last names and appropriate titles. While *Hallex* in general permits ALJs to determine what testimony they elicit from claimants and witnesses at the hearing (SSA 1992, I-2-660 A), both *Hallex* and Social Security case law establish precise formal and substantial parameters that limit ALJs' inquiries.

To develop what reviewing courts have regarded as the full and necessary record (20 C.F.R. 404.944), an ALJ must elicit ample testimony on the key facts on which disability decisions fairly and impartially rest: the claimant's age, education, literacy, work experience, and impairment. *Hallex* further stipulates that the ALJ should make reasonable efforts to allow claimants to testify in their own ways if they have good reason (SSA 1992, I-2-660 A). While testifying, claimants may, for example, need to stand up, sit with their feet propped up on a pillow, or leave the hearing room for air or to get a drink of water.

Two additional requirements when eliciting testimony apply: claimants must be given the opportunity to explain their medical or dis-

ability problems without being hindered and to state their positions without being interrupted (*Ventura v. Shalala* 55 F.3d 900 (3rd Cir. 1995); *McGhee v. Harris* 683 F.2d 256 (8th Cir. 1982)). Being “hindered” at a hearing refers to ALJs either directly or indirectly interfering with claimants’ efforts to explain their impairments. ALJs directly hinder testimony when they lead it in a specific direction or put words in claimants’ mouths. In my experience, when judges hinder or interrupt claimants, it silences them; claimants then tend to underplay their complaints or characterize their impairments as less severe than they believe them to be. ALJs indirectly hinder testimony when they neglect to ask important or relevant questions, either to elicit information on key facts or to follow up on incomplete testimony. ALJs also hinder testimony more directly when they become argumentative, demanding, irritable, or accusatory. Interrupting testimony refers to instances where judges break into testimony with further questions, comments, or corrections.

Rules regarding hindering and interrupting are deeply embedded in the American sense of fairness and justice. Anthony Taibi describes this sense most astutely:

The perception that natural justice includes the independent right to tell one’s tale at a fair tribunal is as old as civilized society itself. In a democracy, the procedural process due to an individual can only be legitimately determined by the community’s sense of fairness. To the extent that agency procedures are not consistent with what people think justice requires, those procedures are unfair. (1990, 932)

Certain rules are integral to the elicitation of evidence and proved key when evaluating judicial compliance, including:

1. ALJs should address women and men by last names and appropriate titles (Mr./Ms./Mrs./Miss/Claimant).
2. Claimants must receive an opportunity to describe their medical or disability-related problems without being (directly or indirectly) hindered.
3. Claimants must receive an opportunity to state their positions without being interrupted.
4. ALJs must make an effort to allow claimants to testify in their own ways if they have a good reason to do so.

5. ALJs must attempt to obtain all evidence pertinent to claimants' cases, including (a) age, (b) education, (c) literacy, (d) work experience, and (e) impairments.

Appropriate titles. When I evaluated whether ALJs complied with the gender-bias training materials that mandate that they address women and men by last names and appropriate titles, I found that the judges violated these rules in 24 of the 65 hearings (37 percent). While the violations ranged from the judge never referring to the claimant by name to a reference to one claimant as “grandmother,” it was clear that ALJs often had little regard for this rule. The most serious violations involved two women of color (four hearing transcripts and decisions in total), one white woman, and one man of color. Each of these examples merits fuller explanation.

In the case involving the white woman, Ms. Thompson, the judge told the claimant and her witness, a friend, “Okay, I think I’ll swear you ladies in together” (88-6104, IL). Ms. Thompson was a 56-year-old woman with an extensive work history. Being lumped together with her friend and reduced to the designation of “a lady” with all of its historical connotations of subservience, idleness, and fragility suggested the possibility that this judge viewed Ms. Thompson not as a deserving, previously hard-working disability applicant—that is, not as equivalent to the deserving stature of a man but rather as an undeserving “lady” who was typically dependent on others for her security and livelihood.

A similar violation occurred when another ALJ referred to Mrs. Moore, a 45-year-old African-American woman, as “ma’am” and “dear” (89-6436, IL). In so doing, it felt very much as though the judge was infantilizing her or treating her as subservient. *Dear*, a term used with children, and *ma’am*, used historically as a reference to black slaves or mammies, seem inappropriate terms for a judicial hearing in which all claimants should be treated with the same respect (Collins 1991). Clearly, judges should avoid even the appearance of racism or sexism.

In another example, also involving Mrs. Moore, the claimant testified that she was married, yet the judge consistently referred to her as “Miss.” While some may argue that these distinctions seem trivial, Patricia Hill Collins (1991) has persuasively argued to the contrary.¹³ The term *miss* has often been used to refer to African-American women in their roles as servants, nannies, and maids. By using *miss*, then, a judge renders an African-

American woman's true identity invisible—ignoring the fact that she is a married woman with a black family and verifying, instead, her unattached quality, which allows her to serve as nanny to her white employer. What is most distressing about this characterization of Mrs. Moore is that it is a clue that stereotyping is occurring, and the judges seem so completely oblivious to the prejudices they seem to be holding (von Hippel, Sekaquaptewa, and Vargas 1995).

In another instance, also involving Mrs. Moore and a different ALJ, a male judge took the “lady” reference one step further. Describing the lengths to which Mrs. Moore had gone to care for her family, the judge referred to the claimant as “a very nice lady that takes care of herself and her two handicapped family members.” This comment stereotypes Mrs. Moore not only as a homemaker but also as someone who, if able to care for her family, is also able to work outside the home. In fact, two different judges reviewing Mrs. Moore's claim were so persuaded that her caretaking activities rendered her able to work that they overlooked medical evidence that proved Mrs. Moore's inability to work because of a listing-level impairment. In this case, the judges' stereotyping blinded them to the evidence they were mandated by law to evaluate. This case suggests the importance of making judges conscious of stereotyping clues and of forcing them to look beyond the stereotypes that lead to these unjust results.

In another case, an ALJ violated the rule of appropriate titles when he referred to the claimant, Miss Plain, a 51-year-old African-American woman (87-5258, IL), as “Grandmother,” asking, “Grandmother, ever pick the baby up?” The ALJ's question apparently attempted to manipulate the claimant into assuming a grandmotherly posture to respond more honestly to an assessment of her physical capacity. This kind of question illustrates how simple violations of seemingly minor rules such as the use of appropriate titles open the door to stereotyping a claimant to a gender-essentialized role.

Two other violations occurred when ALJs referred to claimants, both of whom were African-Americans (one male and one female), by their first names (James, 88-1712, CA; Moore, 89-6436, IL). The fact that the worst of these appropriate-titles violations involved women and men of color (and four of the six worst cases involved women of color) suggests that ALJs may fail to show due respect to women of color and more particularly to African-American women.

Hindering and/or interrupting claimant testimony. When I evaluated

whether ALJs hindered or interrupted claimants in their testimony, non-compliance rates proved disturbingly high. ALJs hindered claimants in 40 of the 65 cases (62 percent) and interrupted them in 26 cases (40 percent).

Allowing claimants to testify in their own ways. When I examined the transcripts for violations of the rules allowing claimants to testify in their own ways, I counted violations in 25 percent (16 of 65) of the cases. Two claimants were forced to testify in English despite their stated preference for testifying in their native language, and in one case the ALJ told the claimant to “Speak up!” after she testified that her throat hurt.

Eliciting testimony about claimants’ age, education, literacy, work experience, and impairments. Judges complied better with the duty to determine the claimants’ age (13 percent noncompliance), education (25 percent noncompliance), and work history (16 percent noncompliance) than with the duty to inquire into claimants’ ability to read (60 percent noncompliance) and impairments (43 percent noncompliance).

Analysis of ALJs’ behavior when eliciting claimants’ oral testimony again reveals systematic noncompliance with rules designed to ensure that all claimants are treated uniformly and with the necessary affectivity. As reported, judges commonly violated the rules prohibiting hindering and interrupting claimant testimony, mandating appropriate use of titles, and requiring ample development of the record, with the result that virtually no case was free of violations.

It is not surprising that claimants who are undereducated, linguistically challenged, and different from the judges hearing their claims would probably need more assistance in being drawn out. They are less likely than their counterparts to be schooled in professional etiquette and style. They are thus less likely to read judges’ implicit instructions through body language, tone, and the like about when to offer testimony. These claimants are less likely to have confidence and competence to respond in ways considered appropriate in the legal arena—that is, with controlled and well-articulated testimony. As a result of these shortcomings stemming from intellectual, cultural, racial, and gender differences, this class of claimants is more likely to feel uncomfortable testifying before ALJs than others would and hence is likely to be more reticent and less forthcoming with relevant testimony.

While such claimants require more time, attention, and patience from ALJs, it appears that judges, who are most often white and male, may actually be less rather than more patient with these people. Thus, instead of drawing them out, ALJs often fall into patterns of hindering and inter-

rupting these claimants. This is consistent with the social-psychology literature, which suggests that stereotyped people are asked fewer questions and that questions are asked in a way that tends to elicit confirmation of the stereotype rather than information that would disconfirm stereotyping or individuate people (Trope and Thompson 1997). As chapter 5 will illustrate, when thus directing unempowered claimants' testimony still fails to produce the desired information, ALJs can become abrupt, irritated, even aggressive.

That judges frequently hinder and interrupt claimants may indicate the undue pressure on them to process claims as quickly as possible. That they develop the record with respect to work history more fully than they consider literacy or impairment may speak to the pressure judges feel to deny as many cases as possible. With more information about claimants' work history, ALJs are more likely to find skills that can be transferred to other work, rendering the claimants employable and ineligible for benefits. Similarly, the less ALJs know about a claimants' literacy and impairments, the less information the judges will have to grant benefits. It is hard to see, however, how institutional pressures might explain ALJs' failures to comply with rules mandating the appropriate use of titles. Since the most serious violations of rules mandating appropriate use of titles affected women, particularly African-American women, it seems all too likely, at least in the cases I reviewed, that other factors that reflect larger cultural prejudices may, in some instances, affect the Social Security disability-hearing process.

Mandate to Obtain and Prefer Treating-Physician Evidence

On the condition that their opinions are supported by clinical and laboratory findings, the Code of Federal Regulations grants controlling weight to the opinions of treating physicians—that is, physicians who see a claimant over a period of time, prescribe treatment, and order and interpret tests (Social Security Rulings 1996, 96-2P). This preference is predicated on the assumption that treating physicians develop relationships with and knowledge of their patients and can therefore more accurately document the extent, nature, and degree of their impairments.

Judges are permitted to disregard opinions of treating physicians if the judges support their conclusions with persuasive medical evidence (Social Security Rulings 1996, 96-2P). To support such dismissals, judges typically

rely on the opinions and reports of CEs (physicians contracted by Social Security specifically to help decide disability claims). CEs usually examine a claimant only once but perform several clinical tests (e.g., EKGs, blood tests), and they prepare detailed reports that take into account the entire medical record, the listings, and other Social Security rules. Claimants often cannot afford to obtain comparable medical/legal reports from their treating physicians and instead must rely on the treating physicians' office notes, which are often unspecific and illegible. This situation can make it more difficult for claimants to convince judges that the records of treating physicians are more persuasive than CEs' reports.

The Code of Federal Regulations and Social Security case law acknowledge this problem and, by holding ALJs responsible for developing claimants' medical records, seek to prevent ALJs from relying too conveniently on medical reports that make sweeping conclusions based on little or no previous history of the patient's condition. This responsibility translates into requirements to give claimants adequate time (up to 30 days) to obtain the evidence that they need from a treating physician or facility (SSA 1992, I-2-514A.1) and, in some cases, for judges themselves to write to treating sources and order reports needed to complete claimants' medical records (I-2-514.A.3).

Social Security case law has interpreted the circumstances under which ALJs should write to treating sources. In *Marsh v. Harris*, the court held that "where the ALJ fails in his duty to fully inquire into the issues necessary for adequate development of the record, and such failure is prejudicial to the claimant, the case should be remanded" (632 F.2d 296, 300 (4th Cir. 1980)). The *Marsh* court considered an unrepresented illiterate claimant to be "completely unschooled on the requirements for proving his case" (299). For that reason and because, if obtained, the report, "might well have contributed to a proper ALJ decision" (300), the court held further that it was not enough for the ALJ to attempt to contact the treating physician; the ALJ was himself held responsible for obtaining the report.

My research evaluated whether or not ALJs complied with the treating-physician rule by posing three basic questions. The first two questions examine the extent to which judges help claimants obtain information necessary to develop their medical records. The first question assesses how much time judges allow claimants to obtain needed records. A 30-day period, specifically designated in *Hallex*, is reasonable in light of the time it takes to obtain and submit copies of records and reports from treating facilities such as county hospitals, county clinics, and health maintenance

organizations.¹⁴ The second question examines the extent to which judges are willing to help claimants disadvantaged by education and/or intelligence secure the evidence they need by writing to treating sources on behalf of illiterate, poorly educated, or unrepresented claimants. The third question is designed to determine whether judges properly articulated reasons for rejecting a treating physician's opinion.

Allowing 30 days to obtain records. Claimants in 26 transcripts reviewed for this research requested additional time to obtain and submit reports from treating physicians. In 11 of these 26 cases (42 percent), ALJs allowed fewer than 30 days to submit the new evidence. Most judges of the 11 hearings who violated the rule allowed claimants between 10 and 14 days to obtain and submit medical evidence. All but one of the eleven claimants denied a 30-day period were represented by attorneys; a judge requested that an unrepresented claimant with an IQ of 70 submit additional evidence within 14 days of the date of the hearing (Moore, 89-6436, IL).

Helping claimants obtain records. Either because the claimant was not limited by literacy, education, or representation conditions or because the hearing transcript did not reveal the need for additional evidence from the treating source, the requirement on the judge to write to treating physicians for additional medical records applied in only three transcripts and decisions. In each case involving unrepresented claimants, one of whom had an IQ of 70 and an incomplete high school education, ALJs asked claimants to collect and deliver their own medical records (Moore, 89-6436, IL; Bell, 90-5548, IL; and Redd, 87-3348, IL).

Specifying reasons for disregarding the treating-physician rule. In 22 of the 25 cases (88 percent) in which the treating-physician rule was applied, the ALJ did not comply with the third part of the rule, which requires judges to state in their decisions specific reasons for disregarding the opinions or reports of treating physicians.

As was evident in their treatment of unrepresented applicants, ALJs seemed to make little or no effort to insure more generally that needy claimants' cases were adequately developed and that the files contained treating-physician documentation. My findings that judges fail to assist claimants in developing their evidence seem particularly troubling in the disability cases of white women and people of color because, as previously discussed, research shows that they are less likely to get the medical workup and treatment necessary to provide persuasive documentation of disability eligibility (Ayanian and Epstein 1991; Blendon et al. 1995; Burns et al. 1996; Colameco, Becker, and Simpson 1983; Mirvis et al. 1994; Red-

man et al. 1991; Steingart et al. 1991; Unger and Crawford 1992; Whittle et al. 1993).

In some cases, claimants owed money to doctors and therefore could not obtain detailed medical reports because they could not pay for them. In many of these cases, judges did little or nothing to help claimants overcome this disadvantage, and in some cases ALJs discouraged claimants from obtaining evidence from their treating physicians.

The case of Mr. James (88-1712, CA) illustrates my point. Mr. James was an African-American applicant whose treating physician saw him “for years without payment.” Because he was owed money, the doctor was unwilling to prepare a medical report for Mr. James’s disability claim. Mr. James, like many disability applicants, was medically insured during his employment and briefly following an industrial accident. However, at some point his medical coverage expired, and he remained ill without the medical insurance he needed.

The effect on his disability case was devastating: the judge relied on the reports of several workers’ compensation CEs to deny Mr. James’s claim. What further disadvantaged Mr. James, however, was the judge’s apparent preference for consultative evaluations: when Mr. James’s attorney gave the judge the choice of obtaining a report from a treating physician or from the workers’ compensation consultative evaluators, the judge insisted on the workers’ compensation reports. While the judge said he would be willing to consider the treating physician’s report, he did not insist on receiving it or offer to pay for it. This raises an important concern: Do judges circumvent reliance on treating-physician reports by discouraging claimants and their advocates from obtaining evidence prepared by treating physicians?¹⁵

In Mr. James’s case, the ALJ ended up considering the treating physician’s office notes but dismissed them as “relatively uninformative.” The judge did not mention that Mr. James’s attorney expressed the desire to obtain a more detailed and informative report but was apparently unable to afford one. Rather than obtaining a report from Mr. James’s treating physician, the ALJ denied the claim on the findings and conclusions of a one-time visit to a few workers’ compensation and Social Security CEs.

Mr. Tommie (89-4093), a poor, white Vietnam veteran, was also disadvantaged when he could not afford to obtain the medical evidence he needed: Mr. Tommie had been tentatively diagnosed with a number of ill-

nesses, including Graves' disease, AIDS, cancer, and Agent Orange exposure. No definitive medical findings could be made, despite visits to the Veterans' Administration and University of California at San Francisco Medical Center and various county clinics. Stanford Medical Center was apparently his only hope. He was seen there once before his disability hearing and could not return for lack of medical coverage. He planned to marry an AFDC recipient to render him eligible for the Medicaid he needed to visit the Stanford physicians. It can be assumed from the judge's decision that Mr. Tommie did not visit the Stanford Medical Center in time to provide the documentation the judge needed. The ALJ denied the claim without ever mentioning that Stanford might have provided the necessary medical evidence.

In a similar case, involving an African-American claimant, Ms. Burr, (87-10636, IL), the ALJ neglected to order the evidence that was needed to evaluate her claim. Although the claimant in this case had a treating physician, the record was inadequate because the claimant lacked the money to seek appropriate medical care from epilepsy specialists. Lack of funds undoubtedly prevented her from developing a more accurate medical picture of her condition (as cited in the federal district court order).

In this case, a U.S. magistrate in federal district court ordered the ALJ to arrange for Ms. Burr to be evaluated by a CE for the purpose of determining whether the claimant met the listing for epilepsy. Both Mr. Tommie's and Ms. Burr's cases highlight the importance of fully developing the record so that even applicants with treating physicians can get the specialized information they need to have their claims fully evaluated.

In cases where a judge explicitly disregards a favorable treating-physician's report, another important issue is raised: how influential should CE reports be when they conflict with the opinions of treating physicians? In the case of Ms. Curran (88-2459, MA), a white woman, the judge disregarded the opinion of her treating neurologist despite the unusual fact that he attended the disability hearing to testify on her behalf. The judge rejected the doctor's testimony because the

claimant may well have some chronic low back discomfort secondary to some obscure disorder, but her tendency to exaggeration was obvious. She testified that she was unable to sit for more than 20 minutes, but she sat throughout the hearing, which lasted for more than one hour, in a normal position with no outward indications of discomfort.

As in Ms. Curran's case, the judge in the case of Ms. Smith (86-6054, IL) disregarded the favorable report of the treating physician and instead relied on a CE's report to deny her claim. Ms. Curran's and Ms. Smith's cases suggest that judges do indeed try to overcome treating-physician evidence by relying on one-time CE reports. However, in both cases, the federal district court found the judges' reasoning erroneous. The district judge in Ms. Curran's case, in which benefits were granted outright, held that the ALJ erred in substituting "his own opinion for that of uncontroverted medical evidence or opinion." In Ms. Smith's case, which was remanded, the district judge held that the ALJ improperly disregarded relevant evidence and should therefore reconsider it in light of the court's findings.

These cases seem to suggest that applicants who cannot afford to purchase detailed medical reports are both consciously and unconsciously neglected by ALJs who are indifferent to the rules governing the gathering of evidence for claimants. This issue is particularly important in cases involving claimants of color or white women, who are already at a disadvantage in obtaining the medical evidence they need to win a disability claim. Even white male claimants, as in Mr. Tommie's case, are disadvantaged solely on socioeconomic grounds.

Failure-to-Follow-Prescribed-Treatment Rule

The Code of Federal Regulations defines the parameters of the failure-to-follow-prescribed-treatment rule. They both acknowledge a claimant's failure to follow prescribed treatment as a justifiable reason to deny otherwise medically qualified claims and specify precise conditions or circumstances that justify or excuse a claimant's failure to follow prescribed treatment. Perhaps more than any other rule considered in this study, laws governing the failure to follow prescribed treatment are straightforward and, hence, establish clear criteria on which ALJs can systematically analyze an applicant's failure to comply with prescribed treatment.

The laws governing the failure to follow prescribed treatment stipulate that to deny claimants benefits on the grounds that they failed to follow prescribed treatment, the treatment in question must not only be prescribed but must also be "expected to restore [the] capacity to engage in any substantial gainful activity" (20 C.F.R. 404.1530; Social Security Rulings 1982, 82-59). Further, to deny applicants benefits on the grounds that they failed to follow prescribed treatment, judges must document certain relevant factors, including: (a) what treatment the claimant has not com-

plied with; (b) who prescribed the treatment; (c) that the prescribed treatment is likely to restore the capacity for work; and (d) why the prescribed treatment is likely to restore the capacity to work (20 C.F.R. 404.1530; Social Security Rulings 1982, 82-59). I analyzed the hearing transcripts and decisions for ALJ compliance with these rules.

In addition to these documentation requirements, regulations and federal case law further require ALJs to give claimants an opportunity to explain their failure to follow prescribed treatment and to acknowledge in the decision any of several reasons the courts recognize as acceptable for not following treatment (20 C.F.R. 404.1530; Social Security Rulings 1982, 82-59). If an ALJ denies benefits because a claimant fails to follow prescribed treatment, the ALJ must acknowledge in the decision any of the following acceptable reasons given for failing to follow the treatment: (a) religious beliefs, (b) an inability to afford prescribed treatment, (c), a treating source's recommendations against such treatment, or the need to undergo (d) a high risk procedure, (e) certain cataract operations, (f) the amputation of an extremity, or (g) a previous and similar unsuccessful surgery.

Because the failure-to-follow-prescribed-treatment rule is so straightforward, I could unambiguously identify cases in which judges concluded that claimants failed to follow prescribed treatment and evaluate the judges' compliance in those cases with the relevant rules. A case was deemed relevant when judges used claimants' failure to follow prescribed treatment to deny claims. Judges in 8 of the 67 transcripts and hearings analyzed for this study (12 percent) concluded that claimants failed to follow prescribed treatment. Seven of the eight claimants who were found to have failed to follow prescribed treatment were racial or ethnic minorities.

Further analysis of findings revealed that judges violated the failure-to-follow-prescribed-treatment rule almost every time they invoked it. Hence, they failed to document who prescribed the treatment in seven of eight cases, to document why the prescribed treatment was likely to restore the capacity for work in all of the cases, and to give claimants an opportunity to explain why they did not follow the treatment in all of the cases. ALJs who failed to allow claimants to explain why they did not follow treatment obviously could not acknowledge in their decisions the claimants' justifiable reasons. In the course of their testimony, two claimants did give justifiable reasons for not complying with a particular treatment; in both cases, the judges failed to cite those reasons in their decisions.

My findings reveal that when ALJs invoke rules governing a claimant's failure to follow prescribed treatment, they almost always deny the claim and, moreover, that in each such case, the judges violate the parts of the rule that require them to fully evaluate the claimant's alleged noncompliance. Institutional pressures to deny cases and to decide cases quickly may at least partially explain why the ALJs in my research invoked this rule. That judges invoke the rule to deny cases seems consistent with the spirit of the rule, but the tendency not to fully evaluate these issues certainly does not. Whatever the reasons for doing so, systematic violation of rules in my small sample of judges raises questions at least of the possibility that other factors may be operating. When, as in the case of the failure-to-follow-prescribed-treatment rule, violations are made overwhelmingly in the cases of claimants of color, the assumption that no extrajudicial factors are operating is weak. A larger, more comprehensive study that looks more closely at these issues would be helpful in establishing with more certainty what is really operating.

Judgments of a Claimant's Credibility

The cases that come before Social Security ALJs are typically difficult and ambiguous. As experts in matters of disability, judges are expected to review each case in depth. To award or deny benefits, ALJs are legally required to rely heavily on the compilation of usually conflicting clinical evaluations and laboratory reports from treating physicians and workers' compensation and other medical professionals that make up the exhibit files. To deny benefits, not only must ALJs demonstrate in their decisions why unfavorable evidence supports their assertion that the claimants' conditions are not disabling, but judges must also justify why they have rejected evidence that supports the applicants' claims.¹⁶

This evaluation of evidence is no easy task. Guided by the sequential evaluation process, ALJs evaluate the testimony of claimants and, in some cases, of vocational and medical experts. This testimony, too, typically contains many variables and inconsistencies. To balance the conflicting accounts of medical records and testimony, the judge must determine whether the claimants are to be believed—whether, that is, their allegations of pain, fatigue, shortness of breath, or other symptoms are credible. A credibility determination is often the essential link between favorable and unfavorable testimony and evidence, between an award of benefits or a denial.¹⁷

But determining credibility is a complex matter. To do so, judges must rely on innumerable, indescribable, and immeasurable facts and feelings. Pain, fatigue, and other symptoms present a very difficult challenge to judges, because to determine whether such factors are, in any given case, truly disabling, a judge must “assess . . . as objective something that is really subjective, a complexly determined personal experience” (Stone 1984, 137). Indeed, when SSA (1995) evaluated the top five reasons for ALJ allowance rates, claimant credibility and the impact of pain figured prominently in their results. This finding suggests that subjectivity is particularly critical to ALJ decision making, and that credibility can both positively and negatively affect outcomes.

In the following section, I identify and explain the laws governing an ALJ’s credibility inquiry that I incorporated into my study. I then present and interpret findings from my analysis of transcripts and decisions. Again, I find that judges’ violations of basic rules impede the chances of all claimants to receive a fair hearing and decision. Strong quantitative evidence appears to confirm that in the hearing process, some of these violations may reflect the cultural assumptions of the judges deciding the cases. As findings are already beginning to suggest, such is true, in part, because these violations seem to affect certain historically disadvantaged groups more severely than others.

As indicated, credibility determinations are key because they underlie judges’ other important decisions—for example, whether to agree with a treating physician or with a CE or whether to elicit testimony on a matter more likely to strengthen or on a matter more likely to weaken a claimant’s case. But how do judges make credibility determinations? They watch claimants, ask and receive answers on a series of questions, and consider the comments of others who have viewed or examined the claimant. In so doing, judges are given discretion on the format, style, and questions they employ, but they are also bound by certain rules.

The most important rule governing credibility determinations requires judges explicitly to describe the medical and extramedical factors that influenced their thinking. One federal court described this requirement as follows:

When the decision of an ALJ rests on a negative credibility evaluation, the ALJ must make findings on the record and must support those findings by pointing to substantial evidence on the record This rule is simply a specific application of a bedrock principle of

administrative law. A reviewing court can evaluate an agency's decision only on the grounds articulated by the agency. (*Ceguerra v. Secretary*, 933 F.2d 735, 738 (9th Cir. 1991))

Not only are judges required to state the factors that influenced their credibility determinations, but they are also required to base their determinations exclusively on relevant factors. Social Security rules, regulations, and case law have clearly identified some factors and behaviors as irrelevant and/or inappropriate for credibility determinations. For example, ALJs are prohibited from basing credibility determinations on race, gender, and socioeconomic status (42 U.S.C. § 405 (b) (1); 42 U.S.C. 1383 (c) (1); SSA 1992, I-2-601); thus, a claimant who receives welfare or workers' compensation benefits should not be categorically denied (*Coria v. Heckler* 750 F.2d 245 (3rd Cir. 1984); *Desrosiers v. Secretary*, 846 F.2d 573 (9th Cir. 1988); *Macri v. Chater* 93 F.3d 540 (9th Cir. 1996)). Further, if ALJs examine a claimant's military service, prison history, or family background, they should expressly evaluate the relevance of this personal history to the credibility determination by explaining their reasons (*Ghant v. Bowen* 930 F.2d 633 (8th Cir. 1991); *Novotny v. Chater* 72 F.3d 669 (8th Cir. 1995)). ALJs are prohibited from automatically regarding housekeeping or caretaking abilities as ability to do paid work (*Ghant v. Bowen* 930 F.2d 633 (8th Cir. 1991); *Davis v. Callahan* 125 F.3d 670 (8th Cir. 1997)).¹⁸ Moreover, an ALJ's observations, for instance, of a claimant who shows no physical manifestation of pain at the hearing called the "sit and squirm" test, are essentially irrelevant unless supported by medical evidence (*Perminster v. Heckler*, 765 F.2d 870 (9th Cir. 1985)).¹⁹ Finally, ALJs are instructed to avoid using in their decisions emotionally charged words, pejorative terms, and personal judgments or opinions (SSA 1992, I-2-830).

In my study of these issues, I formulated seven rules that fall into two main groups. The first six comprise the "documentation rules," and the first two, which can be considered one subgroup, refer specifically to rules governing documentation of evidence that is clearly relevant to the credibility-determination process. The first rule is as follows:

1. When making a negative credibility determination, ALJs must state in the decision the factors about the claimants' character, testimony, or evidence that influenced the credibility determination.

For this first point, I analyzed whether ALJs stated the specific factors considered when making credibility determinations, including the trust-

worthiness of the claimants' character, the content and manner in which they gave testimony, and other nonmedical evidence. Testimony presented by the claimants' family and friends may also produce relevant extramedical factors influencing ALJs' decisions.

The second rule was formulated as follows:

2. When making a negative credibility determination, ALJs must document in decisions the medical evidence that supports the negative credibility determination.

Since reviewing courts hold ALJs responsible for documenting medical evidence in specific detail, I regarded incomplete analyses of medical records as noncompliance with this rule.

Rules 3, 4, 5, and, to a lesser extent, 6 comprise the second subgroup of documentation rules, the documentation of potentially or certainly irrelevant evidence. This subgroup measures the extent to which ALJs follow rules that limit their use of irrelevant evidence. The third rule was worded as follows:

3. When making a credibility determination, ALJs must document in the decision with testimony or medical evidence why housekeeping or caretaking activities constitute an ability to work.

The fourth and fifth rules relate to characteristics of race, gender, and family history and to status issues like socioeconomic status, military status, and prison history. Of all the areas examined, rules 4 and 5 most clearly revealed the influence in disability decisions of culturally based assumptions. Rules 4 and 5 were formulated as follows:

4. ALJs must never use race, gender, or socioeconomic status when making a negative credibility determination.
5. When relying on a claimants' military status, prison history, or family background, ALJs must obtain and explicitly evaluate details of those experiences to be sure they are relevant to the credibility determination.

Given the difficulty of detecting and the importance of determining the potential effect of subtle forms of institutional and/or cultural bias on the decision-making process, I applied what may seem at first a rather stringent principle for rules 4 and 5. I assumed that judges who asked ques-

tions about or commented on claimants' race, gender, socioeconomic status, military history, prison record, or family background presupposed ideas or obtained information related to these issues that was then consciously or unconsciously factored into their decision-making process.

This assumption is consistent with the social-psychological literature, which suggests that inadmissible evidence is difficult if not impossible to disregard. Johnson et al. (1995) studied the differential effects of exposure to inadmissible evidence. In their study, a group of subjects were directed to disregard the inadmissible evidence. The research revealed that in a simulated criminal trial, if subjects were instructed to disregard inadmissible evidence, they did not and in fact used that evidence to justify their perception that a harsher verdict was appropriate. It is noteworthy that the subjects denied that the inadmissible evidence had any effect. Johnson et al.'s study is consistent with the argument that judges may very well use the inadmissible evidence they collect and then deny that it has any effect.

For purposes of this part of the study I considered any judge who raised issues of race, gender, and social status in either the hearing or the decision to be in violation of rule 4. I reasoned that the use of such factors was unconscious (as the transcripts seemed to suggest) and negative in all instances. Issues of military, prison, and family history, the subject of rule 5, may in some cases be relevant to a credibility determination; thus, I counted as violations of rule 5 instances in which judges raised such issues but did not follow them up in sufficient detail to determine whether they were relevant to the claimant's credibility.

The sixth point reflects the prohibition against ALJs relying exclusively on their own observations and applying, as federal courts have termed it, the "sit and squirm" test, whereby claimants' credibility is judged solely on whether they sit and squirm throughout the hearing. Rule 6 was formulated as follows:

6. When making a negative credibility determination, ALJs must never rely exclusively on their observations of the claimant without citing support from the medical evidence in the decision.

Like rules 3 and 5, rule 6 concerns documentation of potentially irrelevant evidence. In a sense, however, rule 6 establishes a category of its own, personal-judgment rules (to which rule 7c also partially belongs).

The seventh and final rule concerning credibility determinations is

taken directly from *Hallex* (SSA 1992, I-2-830); it refers to the language ALJs use to refer to or describe claimants in the hearings and in their written decisions. I refer to it as the harmful-language rule.

7. When making a negative credibility determination, ALJs should avoid using (a) emotionally charged words, (b) pejorative terms, and/or (c) personal judgments or opinions, even if the harmful language appears in evidence or testimony.

Hallex explicitly proscribes ALJs from using emotionally charged words or pejorative terms in hearings or decisions. ALJs are also prohibited from using personal judgments when evaluating claimants' credibility. I considered words to be emotionally charged if they were likely to insult or offend claimants unnecessarily. For example, in one case the ALJ referred to an illiterate and clearly unsophisticated African-American claimant as "somewhat evasive" and his testimony as "changeable" (Prince, 87-9662, IL). In another case, an ALJ, citing a medical report in the file, quoted the doctor as referring to the claimant as "greedy"; the emotional charge was inherent in the judge's suggestion that the claim was driven by greed rather than by the need for benefits to which the claimant was entitled (Neri, 84-20289, CA).

I considered comments that were clearly sarcastic and unnecessarily judgmental as those containing pejorative terms. In one case, for example, the ALJ told a claimant who testified that he was short of breath that smoking "could sure have something to do with chest pains" (Reed, 88-6170, IL). As noted earlier, rules 6 and 7c in a sense comprise a category of personal-judgment rules. Judges use their personal judgment when, for example, they substitute their own opinions or judgments for those of the medical evidence or the law. This situation often occurred when judges evaluated the allegations of drug addicts, alcoholics, or people with mental disabilities.

Findings

Overall credibility findings. The overall findings for each of the seven rules are as follows:

- Rule 1. In 29 of the 49 applicable decisions (59 percent),²⁰ judges failed to report the extramedical factors of character and testimony that

substantiated and validated their negative credibility determinations.

Rule 2. In 26 of the 52 applicable hearings (50 percent), ALJs failed to report the medical evidence that supported their negative credibility determinations.

Rule 3. In all 16 decisions in which judges concluded that claimants could work because of their ability to keep house or take care of one or more other people, ALJs failed to explain how the housekeeping or caretaking activities demonstrated that these claimants could do paid work.

Rule 4. Judges violated the rule prohibiting them from using factors such as race, gender, and socioeconomic status in 39 of the 66 decisions reviewed (59 percent).

Rule 5. In all 33 decisions in which judges used military status, prison history, or family background to make credibility determinations, they failed to obtain and carefully evaluate details of those experiences to ensure that they actually were relevant to the credibility determination.

Rule 6. ALJs violated the rule prohibiting them from basing credibility determinations exclusively on their own observation of claimants in 19 of the 66 decisions (29 percent).

Rule 7. ALJs violated the rule prohibiting them from using harmful language in credibility decisions as follows: of the 66 relevant decisions, judges used charged words in 13 (20 percent), pejorative statements in 8 (12 percent), and personal judgments or opinions in 36 (55 percent).

Rules 1 and 2: Documenting relevant evidence. As noted, credibility is the backbone of the judicial decision, for it is both the determination on which interpretations of ambiguous evidence rests and the most subjective of judicial decisions. The rules herein discussed provide the only mechanism for regulating credibility assessments. Rules 1 and 2 require ALJs specifically to document the extramedical factors that influence their decisions (e.g., trustworthiness of the claimants' character, content and manner of their testimony) and to present the medical evidence that substantiates and validates the judges' determination. Rules 1 and 2 are thus fundamental to making credibility determinations fair because they mandate that judges base these very influential but potentially highly subjective judgments on legally relevant and verifiable written (or recorded) evidence.

Against this backdrop, my findings reveal that in 59 percent of the cases in my sample, judges failed to explicate extramedical factors to substantiate and validate their negative credibility determinations, and in half of the cases judges failed to document the medical evidence that supported their negative credibility determinations. Hence, even though ALJs are mandated to support their negative credibility determinations with medical or extramedical evidence, a majority of the judges disregarded this requirement and instead relied on factors beyond the law. When judges disregard the only credibility rules that bind them to legally relevant criteria, it raises the question of the basis on which credibility decisions are made. ALJs' rates of noncompliance with rules 3, 4, 5, and 6, subsequently discussed more fully, confirm my unfolding thesis that many judges, at least those in my small sample of cases, relied significantly, at least in some kinds of judgments, on largely if not wholly irrelevant and illegal factors.

Rules 3, 4, and 5: Documenting potentially relevant and avoiding certainly irrelevant evidence. As indicated above, rules 4 and 5 and, to a lesser extent, 3 most clearly revealed the influence of normative assumptions in disability decisions. Given the importance of this outcome, I separately analyze my findings for each rule governing the documentation of relevant evidence and avoidance of clearly irrelevant evidence.

Rule 3: Housekeeping. Rule 3 grows out of a series of concerns raised by scholars and claimant advocates. Previously, I documented instances where judges denied benefits to both women and men who had testified that they had cared for a child or a spouse since becoming disabled (Mills 1993). According to Social Security case law, the ability of an applicant to keep house or to care for others does not necessarily indicate a capacity to do paid work. As one federal district judge concluded, "Ghant's ability to do housework is not necessarily substantial evidence that he can perform the requirements of light work. We have previously held that a person who is able to do light housework is not necessarily able to perform gainful employment" (*Ghant v. Bowen*, 930 F.2d 633, 638 (8th Cir. 1991)).²¹

In every denied case examined for this study in which ALJs questioned claimants about housekeeping and caretaking (regardless of the gender of the claimant), the judges failed to explain in their decisions why these activities constituted the capacity for gainful employment. Given that all of the judges who regarded housekeeping or caretaking activities as evidence of capacity to do paid work failed to adequately defend their

conclusions and given that these rule violations disadvantaged every claimant in which the rule was invoked, it seems highly likely that normative or gendered assumptions about the people who perform housework and caretaking influenced judges' thinking and even their decisions. Judges simply cannot assume that performing tasks in the home, at one's own pace, and in an environment in which one can regulate one's activities is equivalent in any way to the demands of paid employment.

Rule 4: Race, gender, socioeconomic status. For further insight into the possible operation and influence of bias, I examined the transcripts and decisions for questions and comments that violate the clear prohibition against basing credibility decisions on the race, gender, or socioeconomic status of the claimant (rule 4). If a judge asked questions related to race, gender, or socioeconomic status that had no clear bearing on the disability determination, I counted that judge in violation of the rule.

I considered that judges factored race into their credibility determinations when they asked foreign-born claimants such questions as "Where were you born?" "When did you come to this country?" "Have you been naturalized?" and "When were you naturalized?" Though on the surface and out of context such questions seem harmless, it is nevertheless true that where disability claimants were born and when they came to this country are irrelevant at the ALJ-hearing level. While the issue may be relevant when a Social Security district officer first takes a claim (assessing such matters as eligibility for benefits), an ALJ can reasonably assume that a claimant who has appealed to the stage of a face-to-face hearing is legally entitled to benefits.

I also considered that ethnicity probably factored into the decision making of judges who assumed that a claimant who needed the assistance of an interpreter could and should at least attempt to speak English. As unlikely as it seems in this age and nation of diversity, the small number of ALJs reviewed in this study did in fact make such demands in 3 of the 17 hearings (18 percent) in which claimants required the use of an interpreter (Acevedo hearings 1 and 2, 87-2767, CA; Vatistas, 88-6532, IL).

Similarly, I considered judges in violation of the gender category of rule 4 when they gathered or commented on information specific to a claimant's gender role. For example, comments made about a woman's lifestyle choice as wife, girlfriend, mother, or homemaker, such as "claimant's lifestyle as mother and homemaker is essentially the same as in the past [i.e., before she became ill]" and "the claimant's not working at substantial gainful activity was one of choice, not one imposed upon her by debilitating illness" were considered gendered references and hence

should have been considered irrelevant to the credibility determination. The second comment implied that the judge applied a different standard to women who previously worked only in the home than to men who previously performed paid work in the national economy. Against this standard, which suggests that women who have worked only in the home have never participated in “real” work, women’s claims to disability are easily deemed less credible than men’s. Social Security rules, however, do not penalize claimants who have not previously worked in the paid labor force. Rather, judges’ inquiries into a claimant’s work history, whether paid or unpaid, are relevant to the disability determination process only for the purpose of identifying skills that may be used or transferred to a paid work environment or, as described in detail in chapter 5, for purposes of accommodating or engaging the special needs of female claimants.

Other examples of comments that I counted as violations of the gender category of rule 4 include instances in which ALJs assumed that claimants were somehow limited to gender-specific work roles (e.g., when ALJs asked female claimants whether they could perform such traditionally female jobs as receptionist and male claimants if they could perform such traditionally male jobs as manual laborer) and when ALJs commented on physical appearance in gender-specific terms (e.g., when they noted that certain female claimants “looked good” but that male claimants “looked fit”). Also noteworthy as a violation of rule 4 was an ALJ’s comment that if a claimant could walk in three-inch spike heels, as she was noted to have worn to the doctor, then clearly her back condition was not as debilitating as she had alleged (Davenport, 89-1268, MA). The assumption that a claimant’s attire provides evidence of the severity of a claimant’s impairment is more likely to disproportionately disadvantage women who are, regardless of a physical or mental impairment, under more social pressure to dress or otherwise present well.

Violations of the part of rule 4 that prohibits ALJs from using socioeconomic status as a factor when making credibility determinations were relatively easy to detect. The source of claimants’ income is relevant to judges’ disability determination only if they are working. The Social Security district office may decide that claimants are not entitled to SSI or DI because they receive other income or benefits, but an ALJ is not in a position to do so. The source and amount of a claimant’s income should not be a factor in judging a claimant’s credibility. Consequently, I counted all such questions as “How much welfare do you receive?” and “How long have you received it?” as violations of the rule.

A more subtle violation of this rule occurred when an African-Ameri-

can claimant with a fifth- or sixth-grade education could not respond with certainty to the question about which grade he had completed (Prince, 87-9662, IL). In his decision, the judge interpreted the claimant's inability to remember as evasive and manipulative rather than as a broad reflection of an impoverished education or intelligence.

While several of these examples seem minor when viewed out of context, as I illustrate in chapters 5 and 6, the ALJs in my sample of cases often made several—not just isolated—comments that suggest a penchant for prejudice.

Rule 5: Military, prison, family history. While the issues regulated by rule 4—race, gender, and socioeconomic status—are certainly irrelevant to the Social Security decision-making process, the issues regulated in rule 5 have not always been thought so. However, judges who gather testimony or make comments on a claimant's military, prison, or family history are obligated to explore the issue in enough detail to reasonably assess whether such evidence is relevant to the determination process.

With rule 5, like rule 4, I assumed that judges who asked, directly or indirectly, about claimants' military status, prison history, or family background factored something of that information into their decision-making processes, whether or not they explicitly mentioned these factors in their decisions. Thus, I marked in violation of rule 5 any ALJ who asked about or commented on these issues but failed to obtain sufficient details about them to assess the relevance of the issues to the disability decision-making process. For example, if a judge asked if a claimant had served in the military but did not establish the relevance of the claimant's military record (or lack thereof) to the disability determination,²² I assumed that the judge believed that military status in and of itself was relevant to the decision-making process when in fact it is not.²³ Similarly, if ALJs asked claimants if they had prison histories but did not establish whether that prison history had any bearing on the claimant's credibility, I concluded that the judge believed that a prison history in and of itself was relevant to the decision-making process, which it is not. A prison record can and should influence a judge's credibility determination but a prison term should not in and of itself taint a claimant's credibility (*Ghant v. Bowen* 930 F.2d 633 (8th Cir. 1991)). For example, approximately 20 years before his hearing, one claimant in my sample had served time in San Quentin for assault with a deadly weapon and robbery. He had since worked and not returned to prison (James, 88-1712, CA). I question whether the judge in that case could fairly assume that the claimant's prison history, which the judge mentioned in passing in the decision, necessarily discredited his testimony,

especially since the judge did not ask follow-up questions to establish the relevance of the crime to the claimant's behavior after he was released.

Rule 5 also regulates a judge's questions regarding a claimant's family background, another aspect of credibility that is not in and of itself relevant to a disability determination. A question like "Is there a family history of bipolar disease?" is clearly related, whereas "Does your child/wife/husband/mother/father work or receive welfare?" is not. Again, I marked in violation any judges who asked unrelated family history questions but failed in their decisions to link the information gained specifically to the issue of the claimants' alleged disabilities.

Judges invoked rule 5 in half of all cases reviewed for this study (33 out of 66 cases) and, like rule 3, they violated it each time they invoked it. In light of this finding, my study suggests that judges be strictly monitored when relying on factors such as military status, prison history, and family background and that they be mandated, as in the case of race, gender, and socioeconomic status, to explicitly consider how such factors influenced their decision-making process. Chapter 7 describes how judges might explore the relevance of such factors in greater detail.

Rule 6: Documenting personal observations. As noted, ALJs violated the rule prohibiting them from basing their credibility determinations exclusively on their personal observations of claimants in 19 out of 66 decisions. This finding, which reveals the extent to which ALJs rely on their personal observations of claimants, confirms the pattern established by this credibility analysis: when ALJs are left unregulated, a number of them are likely to rely not on documented and legal medical or nonmedical factors but rather on their eyeball assessment of the claimant. This finding, together with the fact that ALJs used race, gender, or socioeconomic status in more than half of the cases, leads to the development of a pattern in which my small sample of ALJs seem to use prejudicial assumptions when making credibility determinations. These issues are developed more fully in the next two chapters.

Rules 7a, 7b, 7c: Avoiding harmful language. The pattern of noncompliance with the harmful language rules (charged words in 20 percent of the cases, pejorative statements in 12 percent of the cases, and personal judgments or opinions in 55 percent of the cases) is consistent with results reported earlier in this chapter—that ALJs hindered claimants' testimony in 62 percent of the cases and interrupted claimants in 40 percent of cases examined. Like hindering and interrupting claimant testimony, the ALJ's

use of harmful language reaffirms the power imbalance between judge and claimant, further undermining the capacity of claimants to present their cases as effectively as possible. I believe that claimants are entitled to judges who come to the decision-making table with an awareness of their penchants for prejudice and regulate them according to what the circumstances may demand.

The use of personal judgments found in 55 percent of the cases poses similar problems. ALJs' personal judgments are supposedly irrelevant to the decision-making process. However, violations of these rules underscore the difficulty judges have in keeping those personal judgments out of the hearing process. Again, I suggest that if judges were given the tools to become conscious of how their personal judgments affected the hearing process, they could draw on their personal resources when the hearing called for it and temper those judgments when it did not.

My findings reveal how judges consistently neglect uniformity in a number of areas: when making introductions; when providing assistance to unrepresented claimants; through both deliberate and unconscious efforts to circumvent rules regarding the gathering of evidence; in applying the compliance-with-prescribed-treatment rule; and in credibility determinations. My results also suggest that negative affectivity, especially ALJs' prejudicial emotions, creeps into the hearing process as it is currently formulated through such unconscious dynamics as hindering testimony and inflicting personal judgments.

The next chapter explores in much more textual depth the experiences of unrepresented claimants and those claimants needing special assistance in the elicitation of their testimony. This closer reading reveals the kinds of difficulties judges have in expressing positive affectivity toward those claimants whose backgrounds differ from those of the judges. Chapter 6 complements the findings in chapters 4 and 5 by revealing exactly how stereotyping operates in the hearing transcripts and decisions and how the judges' penchant for prejudice, even in my small sample of cases, overshadows the entire system of Social Security justice.