

Planning for Prejudice

While the 67 transcripts I reviewed are not in any way representative of all denied cases in the Social Security system, my sample reveals a systematic pattern of prejudice that merits attention, particularly when my qualitative findings are considered together with the disturbing results of previous studies and the evidence of bias detected in Social Security doctrine. From the point of view of judges, the veil of impartiality protects them from allegations of personal bias, especially in the Social Security context, where the claimants are so obviously dissimilar from the judges, and hence very unlikely to evoke blatant sympathies or prejudices.

My account deconstructs prevailing interpretations and practices of impartiality and bias and suggests the myriad of ways that judges who interact with claimants, however briefly, fail to appreciate the subtle ways in which biased attitudes creep into the hearing and decision-making process. Bias not only essentializes and stereotypes claimants but also prevents ALJs from engaging these vulnerable groups in a way that the legal process positively demands.

Summary of Findings: Patterns of Noncompliance, Disengagement, and Stereotyping

Derived from a small sample, the findings of this study are tentative but nevertheless revealing. Overall, they suggest that judges frequently ignore mandated rules and do so regardless of claimants' race, gender, education, and socioeconomic background. In short, overall rates of noncompliance suggest that the rules promulgated to ensure impartiality and fairness are systematically disregarded.

For example, ALJs gave either no opening statement or an incomplete

opening statement in 47 out of 65 hearings (72 percent). Further, my findings revealed that ALJs did little in the way of compliance with the rules designed to put claimants at ease; in seven out of the seventeen relevant hearings (41 percent), for example, ALJs did not introduce claimants to interpreters, and in 48 out of 65 of the cases (74 percent) claimants were never informed that hearing assistants were present to run the recording equipment and to take notes. Judges did even less to encourage claimants' active involvement in the hearings: in only four out of sixty-five hearings did judges ask claimants if they had questions about the process (94 percent noncompliance), and in only two cases did ALJs inform claimants that they had the burden of proving their claims (97 percent noncompliance).

My findings also revealed that although most judges in my sample made opening statements in hearings involving unrepresented claimants, the ALJs undercut any positive effect such explanations could have had when they failed to comply with the very important rules governing the waiver of claimants' right to representation. In three of the nine cases (33 percent) involving unrepresented claimants, ALJs failed even to mention that the claimants had a right to be represented by counsel. In addition, in seven out of eight cases (88 percent), ALJs did not mention the availability of counsel and particularly of free counsel. In no case did the ALJ take the time to explain the benefit of having an attorney, particularly that unrepresented claimants are less likely to obtain new evidence which, in turn, can affect the outcome of their claim (GAO 1997). It is noteworthy that, for the most part, unrepresented claimants in my sample were uneducated and African American, so that the judges were particularly insensitive to the demands of people who were educationally challenged and racially subordinated.

When eliciting testimony from claimants, the ALJs in my sample similarly systematically violated important rules designed to ensure the fairness and impartiality of the process. Women, especially African-American women, were subject to judges' preconceived assumptions, as evidenced particularly by ALJs inappropriate use of titles. In addition, ALJs hindered claimants in 40 out of 65 cases (62 percent) and interrupted them in 26 out of 65 cases (40 percent) I examined. The judges also took the time to develop only certain aspects of claimants' cases, like work history (only 16 percent noncompliance), that provide evidence needed to reject claimants while neglecting other aspects of the case, such as impairments and literacy (43 and 60 percent noncompliance, respectively), that would more likely produce evidence to support disability claims.

Likewise, when I studied compliance with two procedural rules, my investigation also revealed that ALJs in my sample developed only those aspects of disability cases likely to support a denial of benefits. Overall, the rule requiring ALJs to allow claimants sufficient time to obtain records was violated in 11 out of 26 cases. In addition, in all three relevant cases, ALJs did not help claimants obtain the records needed to adequately develop the evidence for their claims. Similarly, in 22 out of 25 relevant cases, ALJs did not give specific reasons for disregarding the evidence of the claimant's treating physician. My sample revealed that women and people of color may be most disadvantaged by these results because they were disproportionately represented in the relevant samples; however, a larger study is necessary to confirm these tentative findings.

High levels of noncompliance were also detected when I examined ALJ compliance with the failure-to-follow-prescribed-treatment rule. Judges violated the rule in almost every one of the eight cases in which they invoked it, failing to document who prescribed the treatment in seven cases, to document why the prescribed treatment was likely to restore the capacity for work in all eight cases, and to give claimants an opportunity to explain why they did not follow the treatment in all eight cases. In the course of testifying, two claimants did give justifiable reasons for not complying with particular treatments; in both cases, the judges failed to cite those reasons in their decisions.

I found that at least half of the judges did not comply with the rules regarding documenting of relevant evidence, which require ALJs to present in their decisions the medical or extramedical factors that influenced their credibility determinations. In 26 of 52 applicable decisions ALJs failed to report the medical evidence that supported their negative credibility determinations, and in 29 of 49 applicable decisions judges failed to report the extramedical factors that substantiated their negative credibility determinations. Without such documentation, reviewing courts were deprived of the information they needed to evaluate whether the judges' credibility determinations were based on substantial evidence. I found instead that some judges relied, at least in some measure, on such illegal and irrelevant evidence as race, gender, or socioeconomic status in 39 out of 66 decisions (59 percent). Other judges inappropriately considered housekeeping (16 out of 16 cases) or military status, prison history, and/or family background (33 out of 33 cases) without adequately investigating its relevance to the case. The use of personal observations in 19 out of 66 cases (29 percent), charged words in 13 out of 66 cases (20 percent), pejo-

rative statements in 8 out of 66 cases (12 percent), and personal judgments or opinions in 36 out of 66 cases (55 percent) was also a problem. Each of these violations raised questions about what stereotypical and other negative assumptions may have influenced the disability decision-making process.

My qualitative analysis explored this question in greater detail. Indeed, the judges in my sample failed to accommodate certain historically oppressed groups that the law mandates be engaged. ALJs skirted their responsibility to unrepresented claimants and when they elicited testimony from members of groups who have a difficult time expressing themselves in general because of their marginal position in the society at large. Especially in the elicitation of evidence, I found judges leading claimants' testimony to the point of influencing it, being unnecessarily judgmental and rude, not following up on important issues, and implying that the claimants' perspective was wrong and/or should be ignored. In these cases, I discovered that ALJ hearing practices particularly affected the cases of people with little education, people who were illiterate, and people alleging mental impairments. As previously noted, ALJs also failed to engage all claimants but particularly African-American and female claimants when they neglected to be carefully attentive to developing medical evidence. Instead of doing more to accommodate women and racial minorities, my findings reveal that some ALJs do less.

Moreover, I found that judges most often explicitly used stereotypical assumptions when addressing claimants alleging mental impairments (including addictions) and obesity and when addressing members of racial and ethnic minorities, including African-Americans. The judges also frequently imported such assumptions in hearings and decisions involving claimants with educational or linguistic limitations. Both genders were subject to stereotypical assumptions about the kinds of work they could do and about their daily activities. Recipients of such benefits as welfare and workers' compensation were also subjected to ALJs' stereotypical ideas. In many of these cases the judges' prejudicial assumptions not only affected their hearing of cases but their decisions as well.

This study answers the question of whether a close examination of hearing transcripts and decisions helps explain why women and African-Americans (and possibly other marginalized groups not previously studied) have been disadvantaged by Social Security ALJs' hearing and decision-making practices. In sum, this study detected in the hearing transcripts and decisions reviewed very few signs of clear-cut discrimination.

When closely analyzed, however, the hearing transcripts and decisions reveal patterns of noncompliance with key procedural and substantive rules designed to ensure fairness and impartiality. In addition, the case records reveal that judges' stereotypical ideas about most if not all marginalized groups probably lie behind many of these rule violations. Judicial intolerance and stereotyping was also revealed in the judges' difficulty in accommodating and engaging claimants with special needs.

My quantitative and qualitative findings combined suggest that some claimants are afforded worse treatment than others in the ALJ hearing and decision-making process. Given that judges stereotype and complicate rather than ease the efforts of disadvantaged groups (women, African Americans, other racial and ethnic minorities, welfare and workers' compensation recipients, illiterate claimants, and people with mental disabilities, including addictions) to tell their stories, there is no doubt that bias underlies at least some of these violations.

Given the ever-present institutional influences on ALJs discussed in passing throughout this study, my work would be incomplete without a further exploration of their implications for my conclusions. Judges are under tremendous pressure to process hundreds of claims each year. But they are also under pressure to deny them (Bernoski 1997; Pear 1997; Tolchin 1989). Under such circumstances, it is not surprising that corners are cut and rules are violated. When trying to deny cases, it is easier not to explain the process, not to help a claimant obtain a lawyer, not to elicit testimony, to rely on CEs and reject the treating physician's evidence without full explanation, and so forth. These institutional factors, however, in no way undercut my finding that judicial bias, informed by larger cultural assumptions and prejudices, probably enters into and influences the ALJ hearing and decision-making process. These pressures in effect encourage judges to inject their personal feelings into the process.¹ As a result, my preliminary findings suggest that claimants who are disadvantaged in society at large because of their race, ethnicity, intelligence, education, and gender are further disadvantaged in the Social Security system.

In addition to the pressure to decide and to deny many claims, the requirement that ALJs assume multiple roles likewise seems to encourage the importation into the process of assumptions and beliefs. When playing defense counsel, prosecutor, and judge, ALJs' ability to adjudicate in a truly fair and impartial manner is necessarily compromised. An extension of this problem is that it is more difficult for ALJs to maintain their authority as judges when playing three roles. It is possible that in an effort

to maintain their authority and control, ALJs are inclined to establish their own rules: abbreviated opening statements, no explanation of the right to counsel, and so on. These unstated but observed practices deny claimants the opportunity to participate fully in the hearing process, especially when they are accompanied by the failure to accommodate and the propensity to stereotype.

One other institutional influence surfaced in the course of this study—that is, a rather pervasive assumption or belief among judges that at least some of the rules and mechanisms established to promote fairness are empty formalities. As previously noted, this concept was first introduced by Mashaw et al. (1978) when they found that ALJs failed to give opening statements and failed to properly assist claimants who required counsel (66). My findings reveal that nearly 20 years later, judges may still adhere to this belief, which certainly contributes to the high levels of noncompliance with at least some rules. Even SSA's (1995, 1997) DHQRP studies involving as many as 9,000 cases suggest that ALJs fail claimants, both procedurally and substantively. Most startlingly, this SSA self-assessment revealed that in 1995, 20 percent of unrepresented claimants were not adequately informed of their right to counsel. Given the suggestion in my study that these unrepresented claimants are from the most vulnerable groups, these assumptions about the rules might be a partial explanation for the findings of bias detected in previous studies.

The practice that seems to have developed as a result of these assumptions—judges in effect establish their own individual sets of rules to follow to differing degrees—is hardly conducive to fair and uniform decision making. Further, the association this study discovered between ALJ disregard of key rules and stereotyping and failure to accommodate claimants with special needs suggests that a cavalier or even relaxed attitude toward the rules can indeed result in exactly what the rules are supposed to prevent—the introduction of prejudicial assumptions that may influence the process.

Can Lawyers Plan for Prejudice?

As a method for recognizing and grappling with the bias I detected, conscious self-reflection (subsequently described in more detail) would provide judges with the tools they need to realize the nonessentialized justice they claim to uphold. The social-psychological literature presented in chapter 1 suggests that conscious self-reflection, at least in the case of low-

prejudiced people, will help ensure that negative stereotyping is not imported into the decision-making process (Devine 1989). Indeed, one study suggests that suppression can actually have the effect of heightening stereotyping (Macare et al. 1994). It is arguable that the impartiality doctrine is a form of suppression and therefore only exacerbates the problem it seeks to correct. Indeed, SSA's (1995, 1997) denial of the problem and systematic refusal to address bias in its self-assessment and related quality review activities further contributes to this suppression and to the belief that judges can be impartial.

Of course the problem is that such a critical analysis requires that judges be willing to imagine a different or more engaged and hence enlightened judging process. This raises the question of whether judges, hired from pools of attorneys who are trained to value reason over emotion and rules over experiences, can fairly adjudicate the claims of some of our country's most subordinated people. As chapter 1 showed, attorneys are taught to isolate idiosyncracies and are trained in law schools by professors unsympathetic and often hostile to the plight of the poor and to the experiences of people of color. Judges are even more antagonistic toward the idea that they should reflect on their stereotypes.

People with disabilities who apply for benefits and appeal to ALJs are disproportionately poor and nonwhite and suffer from complex medical problems and intergenerational psychological conditions, such as depression, because of poverty. It seems fairly obvious that a cadre of mostly white male judges lacks the tools necessary to understand and process layers of disadvantage and disease and that ALJs' reliance on naive and professionally reinforced stereotypes is not only an unthinking expedient but also based on a mixture of fear of difference and denial of one's experience.

Thus, if judges are to retain the privilege of hearing disability claims, they must be educated about the limitations of their legal training. The distance from emotion and from experience inculcated at law school is of little or no value in preparing a lawyer to become a judge and to exercise the affective and interactive dimensions of judgment. I believe that judges must begin to use the stereotypes of their unidimensional legal education more consciously—they must become aware of how they were taught to disregard clients' cries or their own whimpers. They must recognize that they were admonished in their first-year law school courses and often throughout their legal educations when they took account of the feelings of the faceless claimants, plaintiffs, or defendants in a case method of legal pedagogy that is all too quick to erase the poverty, race, and gender of those whose lives are affected by legal judgment.

Disability adjudication is systematically flawed as long as judges in general and ALJs in particular are encouraged to disregard or repress the emotion—the passion, if you will—necessary to provide hearing conditions that accommodate claimants' limitations. I argue that these judges must learn to grapple with complexity and difference and that they need the tools to be self-critical. They must render judgments that think beyond the medical diagnosis as it narrowly applies to the rules. And they must consciously consider how their personal stereotypes may unconsciously influence their assessment of racial difference in relation to disease, of gender's influence on the course of certain maladies, and of subordination's effect on depression. They must be forced to understand exactly how these racist, sexist, classist, and other influences positively or negatively affect the evaluation of a claim by reflecting on them both during the hearing and in the decision. To expose this process to scrutiny, to make explicit what is now repressed and rendered unspeakable, will free judges, attorneys, and claimants to hear and present cases in an environment where suggestions of bias and instances when judges fail to accommodate claimants are safely and publicly exposed. Adjudicators must comprehend and hence tolerate the complexities of experience and of cultural context to which they are routinely subjected, and they must learn techniques for self-assessment.² Doing so will ensure a system where difference is anticipated and acknowledged and where all participants struggle to understand the text of their own intolerance.

In sum, policymakers should no longer take for granted the assumption that lawyers, trained in a formalistic, rule-bound tradition, can or should judge disability or other claims, particularly when the judges are expected to adjudicate large numbers of claims involving groups likely to be stereotyped or people who are illiterate and requiring special accommodation. If any professional group could supply adjudicators for disability hearings, it would more likely be that of therapists or social workers rather than lawyers, and I will now turn to aspects of these professionals' training.

Reflections on Affectivity

Feminist and critical race theories have provided the frameworks for mapping new methods of critical consciousness in jurisprudence. Psychoanalytic and postmodern traditions have also substantially contributed to the possibility of judicial reform. The conscious self-reflection that I advocate draws on these traditions, moving one step closer to realizing the affective

justice that Cardozo, Brennan, and the legal realists imagined, an affectivity in judging that feels and responds, touches and imagines. Such conscious self-reflection also draws on the social-psychological literature that so persuasively reveals the importance of self-reflection in overcoming stereotypes.

Given the evidence and pervasiveness of the bias detected in the cases I reviewed, Social Security judges, at a minimum, should be taught to develop a critical consciousness in relation to their hearing and decision-making practices. Judging, according to this model, requires a radical restructuring—that is, adjudicators must evaluate the facts and apply the law while considering the unconscious dimensions that the litigants and their stories evoke. This more critical approach is relevant not only to the judges hearing and deciding cases but also to the legislators writing and passing laws. To advocate that lawmakers also undertake such a self-reflective attitude is to avoid the problem described in chapter 3, in which unexamined bias is so often detectable in the core of the rules, such as the listings and the Grid.

Here I want to make explicit the methods I use to unravel and reveal judicial prejudice and therefore to avoid the negative consequences it can have on the people who are inadvertently touched by it. Although implicit in feminist, critical race, and psychoanalytic traditions, these methods are often unarticulated, particularly in the theoretical literature, as having practical application. They include three interlocking and confluent considerations.

First, this more affective justice requires judges or legislators to do critical self-analysis, thereby situating their privilege, assessing their points of view. Such analysis reveals what is usually taken for granted or viewed as normative. That the canvas of one's core identity is multilayered and complex should go without saying. Privilege involves what are often conflicting dimensions rendered opaque by their long and undissected history, including such identity issues as one's relationship to one's nationality, race, geography, gender, age, socioeconomic status, education, religion, language, parental status, occupation, and sexual orientation. Hence, to reveal and reflect on these issues is to understand how, for example, one's Ivy League education affects one's relationship to an African-American heritage or to the experience of being a woman. But to reflect on one's biography is to reflect both on one's personal or core identity and on one's institutional or occupational affiliation and culture, especially for lawyers and judges, whose professions are riddled with cultural

influences and values that, as I have demonstrated, are likely to affect how they judge claimants who appear before them.

Second, and inextricably intertwined with the first requirement, is the necessity for legislators and adjudicators to stand in the shoes of their constituents, their litigants. This requirement is more than empathy. This work requires that one examine one's history for instances of oppression and so experience and reexperience the shame, fear, and humiliation that affect most human beings. The reexperiencing of shame, no matter how repressed or ancient, will allow adjudicators and legislators to feel the brittle feelings of the vulnerable (and often angry) people they will encounter either directly or indirectly in their constituencies.

One aspect of feeling the feelings of others requires assuming that the most vulnerable citizens feel their oppression, in one form or another, consciously or unconsciously. It is therefore safe for legislators or adjudicators to assume that women, people of color, and members of other disaffected groups (including, as my study revealed, people who are illiterate or who suffer from mental illness, including addictions to drugs and food) will experience forms and layers of oppression. While it is safe to assume this experience of oppression, such an inquiry demands that when judging or legislating, it is useful to attempt to understand everyone's unique experience or relationship to the negative prejudice they encounter. Such understanding is easily accomplished after doing one's own work of recollecting personal experiences of shame and oppression. Armed with this recovered history, judges or legislators can at least begin to understand claimants, litigants, or citizens by hearing their stories, regardless of how temporary or brief the interaction and regardless of how different their biographies seem from those of the judges or legislators.

A third dimension of this work that provides the link between the first two forms of self-reflection insists that legislators and decision makers understand the interrelationship between their privileged status and position and their recovered history and more specifically, how that personal drama intersects with the stories of their subjects. This concept might best be understood in light of the psychoanalytic principle of countertransference (Jung 1966). Countertransference occurs in relationships between patients and psychoanalysts when the latter bring to the therapeutic relationship their own biographies or histories.

For example, if the patient is discovering a history of child abuse during the treatment and the therapist has lived a similar trauma or has perpetrated child abuse, there is, unless otherwise rendered conscious, an

anticipated and expected effect of the therapist's trauma on the unveiling of the client's history. Needless to say, therapists are always "on duty" to recognize issues of countertransference—they are trained to render these issues conscious to themselves when doing therapeutic work with clients. The best therapists not only become aware of the effect of such personal issues on treatment but actually take the time to work out the countertransference in their own professional treatment.

I am arguing here and have previously argued (Mills 1996) that judges, lawyers, and lawmakers could benefit from a more conscious justice that reflects the intersecting and dissimilar histories of those who meet in the juridical theater. Toward this end, a form of legal countertransference can help the system move closer to realizing the importance of unveiling intersecting oppressions for all to see and underscores the need to acknowledge experiential similarities, both positive and negative.

For example, I recently attended a legislative forum at UCLA (Mills 1997). Representatives from the Los Angeles City Attorney's and District Attorney's offices also attended, as did Sheila Kuehl, a member of the California Assembly. The subject of the forum was mandatory prosecution of domestic-violence cases. Previously I had taken the position that victims of domestic violence should be given an opportunity to decline to prosecute batterers after counseling sessions with the prosecutor's office in which they explored the violence in their lives and their propensity to tolerate it. I argued that any coercive action on the part of the state that did not consider the battered women's feelings mimicked the actions of the abusers or even surpassed them, unwittingly forcing battered women to choose between batterers, a familiar form of violence in their lives, or the state, an unfamiliar but similar violently inflicted relationship (Mills 1998). I feared that all too often the state's coercive action through such policies as mandatory prosecution led battered women to rescue batterers, sending future incidents of violence between these intimates away from the law's monitoring eye.

The prosecutors who defended mandatory prosecution policies found my position untenable because they felt incompetent to function as counselors or therapists to battered women who felt sympathetic to or emotionally, culturally, or financially intertwined with their batterers. The prosecutors preferred the "big stick" approach, or law-and-order method, and rejected my suggestion that the system learn to be more flexible (Jackson 1996; Wills 1997).

While the prosecutors' denial of my argument for flexibility was in

and of itself disturbing, the form of their argument was particularly revealing. These prosecutors, part of a nationwide movement to establish specialized domestic-violence units in district attorneys' offices, essentially argued that they were incapable, because of their lack of training, of providing a "feeling" environment that encouraged battered women to explore their complex and multilayered emotions, an exploration that would likely help them achieve a sense of empowerment and even of action. The prosecutors vehemently defended their belief that their duties did not include discussing with battered women, the victims of these crimes, what action they could or should take (Jackson 1996). Rather, it was the prosecutors' job to represent the state, to defend its laws, to protect these women—whether or not they wanted protection—by exacting an appropriate punishment (Wills 1997). A clinical colleague who attended the forum astutely observed that lawyers in general—and these prosecutors in particular—did seem incompetent to enter a feeling relationship with these victims. She intuitively observed that law training seems to deprive people of their natural capacity to hear and empathize, to feel and respond.

Prosecutors, judges, other court personnel, and policymakers must be taught to address what they perceive as differences and similarities between themselves and the parties who appear before them. They must address their emotions, repressed and otherwise, and how they affect the understanding of clients, how legal professionals' feelings influence their judgments of claimants. In this next section, I present a brief sketch of a training program that might help judges and other juridical personnel resolve the tensions between personal experience and prejudice and the experience of lawyering and judging.

Affective Training Program

While training for judges is an integral part of their job, there is virtually no literature on its effectiveness—especially with regard to bias training. These training suggestions are offered to those who believe that judges should accept that they, like all other human beings, hold certain stereotypical assumptions that are likely to surface when discharging their duties. Those judges who deny this reality or who are unwilling to explore these issues should be considered unqualified for carrying out the duties of judging, which require a sensitivity and engagement that all adjudicators should strive to achieve.

An affective training program for judges, lawyers, and/or legislators would necessarily include the dual goals of providing trainees with frameworks for exploring systematically how organizational and professional culture and identity (such as race and gender) influence hearing dynamics, decision making, and the legislative process. To do so, judges, legislators, or lawyers would begin with themselves—gaining insight into their personal core beliefs, values, and behaviors and simultaneously being educated on the core beliefs, values, and behaviors of different cultures. The analytic concepts and self-reflection exercises are then blended through opportunities for participants to develop practical strategies for coping with the countertransference issues that are bound to arise in their work.³ This targeted effort can help them learn to comprehend, anticipate, and address issues raised by their subjects' or constituents' similarities and differences.

The training would demand the participants' active participation, requiring disclosure of what may be perceived as very personal material. Given the overall sensitivity of such a request, judges, lawyers, and legislators should be assigned to training situations in which they feel safe and secure to explore their old wounds as well as their more privileged or enlightened experiences. The training should last two to three days to ensure the kind of honesty, intimacy, and full disclosure necessary to achieve real and deeply felt personal growth. The faculty selected for such a training must be knowledgeable in the experiences of many cultures as well as sensitive to the norms and assumptions likely to surface in a group composed primarily of Caucasian men.

The training session should begin with opening exercises that promote safety among group members. The session might begin with a brief introduction in which participants self-identified (explained how they situated themselves in the culture at large). This process would involve the telling of a story or experience in which the participant recalled being shamed or humiliated. In addition, some introductory remarks by the trainers in which they too disclosed stories or experiences would help facilitate safety and honesty.

The session following the initial introductions should involve a discussion of cultural categories and overlapping boundaries. Such categories should be broadly defined in this era of identity politics, including nationality, race, geography, gender, age, socioeconomic status, religion, language, parental responsibility, and so forth. Specific questions that the faculty should encourage participants to address include family history as it

relates to cultural/ethnic and gender identity as well as how one's family of origin tended to relate to communities perceived to be different from itself. For example, if prosecutors for battered women were involved in the training, it would be helpful for them to explore their own personal repressed histories of violence, which would likely contribute to their stereotypes about and fears of battered women. An exercise that challenged how people categorized others would be particularly helpful, including a gamelike exercise that requires participants to seek the acknowledgment or initials of people participating in the training who might fall within certain categories ("an African-American woman," "a person who is battered," "a white man"). Subsequent discussion should address how participants perceive each other and themselves. This exercise can begin the process of making prejudice conscious.

In the third session, it is helpful for trainers and participants to explore the organizational or professional culture of the group being trained. *Organizational culture* would refer to the larger culture to which judges and legislators belong. For example, Social Security judges are part of the Social Security system and therefore are influenced by its basic premises. *Professional culture*, in the case of ALJs, would refer to identification with other judges or with lawyers. Once the culture to which participants belong is identified, it is easier to unravel its norms and assumptions and to determine how they might influence and interfere with how judgments are made. Judges, lawyers, and legislators participating in the training can help identify cultural dynamics—its basic assumptions, operating principles, methods for resolving conflicts.

The final sessions of the training should involve a description of how countertransference works and how to help participants identify and intervene to understand it. This is very deep emotional work and requires participants to become aware of unspoken dynamics and subtexts. In the words of George Eliot, the process would be like "hearing the grass grow and the squirrel's heart beat": "we should die of that roar which lies on the other side of silence" (1871/1992, 177–78). To assist judges, lawyers, and legislators untrained in self-analysis in hearing the roar, it may be helpful to label large sheets of paper with the names of groups such as "ALJs," "policymakers," "battered women," and so on and ask participants to record the stereotypes they have heard about each of the groups represented. This exercise can be used as a jumping-off point for persuading participants that these assumptions float in the culture at large, that

people are subjected to them unconsciously, and that attitudes are affected through the unconscious.

Deliberate self-reflection becomes the only method by which to purge stereotypes entirely from experience (Devine 1989). This process marks the beginning of the training's deeper experience, providing the opportunity to design special sessions that relate to the specific work of the groups being trained, such as mock Social Security or legislative hearings or mock client interviews. These situations become the opportunity for teaching participants exactly how to identify the unconscious dimensions of the hearing, decision-making, or lawmaking process to become more sensitive to the complexities of these dynamics.

The training program should end with suggested methods for participants to become more conscious of these latent aspects of decision or law-making. For example, some judges may want to use checklists to remind them that when adjudicating claims of parties who evoke prejudices within them (both positive and negative), they should "check" themselves to ensure that they have not been unwittingly influenced (Mills 1993). Similarly, judges could use such a checklist to encourage themselves to be more engaging in hearings in which they are mandated to accommodate claimants. For example, if they have claimants who cannot read, the checklist would help them ensure that they exhibit and express a level of accommodation that the claimants require. These tools or methods can make conscious what is now unconscious, can force judges, legislators, or lawyers to ask themselves what particular situations evoke or demand. They can then more consciously respond accordingly.

My own experience working with judges in training sessions and endeavoring to understand their resistance, their tendency to deny bias, and to sabotage self-reflexive exercises has led me to question the appropriateness of law school or legal training for judges. The exercises outlined here are based on therapeutic techniques and draw on my experience as a therapist. Again, judges unwilling to explore these issues may not be appropriate candidates for judging.

When completed, the training should have accomplished three goals. First, it should help judges, legislators, or lawmakers be self-critical, both of their repressed histories, which signal their hidden personal differences, and of their legal training, which prevents them from embracing their own stories, let alone narratives of the Other. Second, the training should provide an opportunity for participants to understand how dynamics work: experiences of oppression are similar, only inverted, twisted, turned inside

out; hearing others' experiences evokes personal histories. To make this process conscious is to reveal the legal countertransference that underpins current juridical psychodynamics. Third, such training should inspire each individual judge, lawmaker, or lawyer to develop a method for hearing the silence that this study reveals. Through mental checklists and/or computer forms, this training should teach participants to deliberately reveal what everyone would prefer to repress and to address it through exposure. Together, these training goals and deliberate methods should expose a penchant for prejudice and will enable adjudicators, lawmakers, and lawyers to use universal biases in a just and deliberate manner.

The current construction of impartiality and its overriding importance in the judicial hearing and decision-making process helps to explain not only why judges stereotype (there is no obvious mechanism for them to reflect on what they do) but also why they fail to accommodate claimants with special needs (the unconscious stereotyping prevents judges from engaging the claimants they reject due to stereotyping). Accommodation presupposes close attention and sensitivity to individual difference, and sensitivity implies involvement on an emotional level. Hence, the mandate for accommodation contradicts the current notion of impartiality, and as the mandate to accommodate expands, so does the tension between these two components of justice. This tension, as I have argued, may well explain why judges in my study had difficulty accommodating claimants with special needs and why stereotyping reveals itself in the way it does.

Together, the forces of postmodernism and psychoanalysis, critical and feminist studies, and multiculturalism render the current rationalistic legal system dysfunctional. This dysfunction provides the impetus for rethinking modernist approaches to impartiality and for building a system of adjudication that values not only reason and intellect but also passion and emotion, a passion and emotion that celebrate self-reflection and yearn to uncover the insidious ways bias hides in crevices and collects in corners. Given deeply embedded judicial or legalistic resistance to that emotion, only through externally imposed self-reflection, with mandated methods that reinforce it, can a legal system that respects all differences be constructed.

In sum, I argue that current notions of impartiality must be enlarged to embrace the inevitable presence of judicial emotion in the form of stereotyping in legal proceedings. Accommodation, as a concept and as a working principle, takes us closer to a form of justice that ensures that

those who live at the margin are protected from stereotyping and that judges have the mind-set necessary to ensure a fair and open process.

New methods for judging vulnerable groups are urgently needed, given the disturbing history of these Social Security judges, who seemed largely incapable of judging the claims of vulnerable people. The synthesis of law and emotion, the marriage of distance and accommodation, and the recognition of bias in all forms is the only path in which the medieval maxim *corde creditur ad iustitiam* will be realized. In this vein, believing in the heart is the path to justice.