

## **Introduction: A Penchant for Prejudice**

My endeavor to understand judges began in 1984, when I presented my first case, a Social Security disability claim, heard by an administrative law judge (ALJ) at the Office of Hearings and Appeals (OHA). I remember wondering if he would be critical or pleasant, if he would care whether I wore pants or a skirt, or if he would know how inexperienced I was.

This judge was typical of the judges before whom I appeared over the course of the next 10 years: he was white, middle class, and at times bristly and impatient. His face was strong and deliberate, and he was opinionated. He was intimidating. Depending on his mood or the case I presented, he was pleasant or disagreeable. On one occasion, while using the OHA copy machine, he forgot to collect his copies. I became privy to a selection from an erotic novel he was writing. From that day forth, I assumed he preferred skirts.

Thus began my obsession with judges. What lies underneath the robes? What is the face behind the mask of a legal persona? Who are they really?

What is unique about practicing Social Security disability law is that you repeatedly appear before the same judges. You get to know them. You attend lunches with them and even occasionally meetings. You know the issues they tolerate, the claims they reject. You learn to know just how much you can get away with and what you cannot sneak past them. You become a master strategist, building a case based on whether the judge before whom you are scheduled to appear believes that depression is disabling or if he rejects, for example, all claims that suggest that childhood sexual abuse causes disabling illness in adulthood.

So when I began to design a study to examine Social Security judicial decision-making practices, I began with a history, a biography. I began with an advantage.

The two Social Security disability programs, Disability Insurance (DI) and Supplemental Security Income (SSI), are basic staples of the American welfare state. These two programs benefit applicants who prove they are physically or mentally unable to work for medical reasons that can be expected to last a year or result in death (42 U.S.C. § 423 (d); 42 U.S.C. § 1382 (c)(3)(B)). DI replaces income and covers medical costs for workers who become disabled after contributing substantially to Social Security. SSI provides cash assistance and, in most states, medical coverage to Americans who become disabled regardless of their work history (U.S. House 1994).

These two programs are what people rely on if they become too sick to work. Both rich and poor need and use these safety nets. Social Security disability applicants include a diverse cross-section of Americans: the parents of judges, the children of the rich and famous, and the otherwise faceless poor. As might be expected, a disproportionate number of poor women and people of color apply for these benefits (GAO 1992). The bulk of applicants, however, are working people, people who, after years of on-the-job physical and emotional strain, become incapable of meeting the demands of full-time employment.

Together, DI and SSI annually provide seven million people with a total of more than \$60 billion in cash benefits (GAO 1997). In 1996, approximately 2.5 million Americans applied for disability benefits (GAO 1997), and approximately 1,100 Social Security administrative law judges (Balkus 1998) heard the appeals of nearly 500,000 applicants whose claims had twice previously been denied (GAO 1997).

The Social Security system is no different from any other American juridical process: it involves large monetary awards—often exceeding the money damages awarded in civil court (one disability pension can amount to \$500,000 over a person's lifetime)—and judges who believe that they are fair and impartial adjudicators.

Given the monetary implication of an award of benefits and the administrative burden of deciding so many claims, the U.S. Social Security Administration (SSA) has not been beyond trying to pressure its employees in general, and its judges in particular, to decide claims more quickly and to deny the claims they hear. These pressures are exacerbated by the mandate that the ALJs play three distinct and conflicting roles in the adjudicatory process.

Judges are under constant pressure from the SSA to process an increasing number of cases. In 1974, ALJs received a total of 122,000

cases, whereas in 1996, ALJs received nearly 500,000 claims. In 1980, it took ALJs approximately 159 days to hear and decide a case, whereas in 1996, it took an estimated 350 days (NOSSCR 1997).

In addition, judges are subtly and, at times, not so subtly pressured to keep their award levels to a minimum (*Association of Administrative Law Judges, Inc. v. Heckler*, 594 F. Supp. 1132, 1141 (D.D.C. 1984). Although ALJs have fought for and supposedly enjoy judicial independence, they are nevertheless employed by an agency that is often on the brink of bankruptcy (Kollmann 1997). ALJs are concerned that SSA wants to undermine their independence and that they are subtly pressured to deny claims (Tolchin 1989; Pear 1997).<sup>1</sup>

Social Security disability hearings are nonadversarial; Social Security attorneys do not oppose an applicant's claim for disability benefits. As a result, a judge is under pressure to play multiple, conflicting roles at the hearing. That is, ALJs must be prosecutor for Social Security, defense counsel for claimants (whether or not they are represented), and adjudicator. As one judge anonymously commented, "As long as ALJs continue to swim through the warm jello of the 'three hat' fiction, we will have bad results."<sup>2</sup>

While these institutional influences may provide some explanation for why judges routinely violate rules, it cannot in any way explain or excuse the stereotyping I and other researchers have detected in the system.

About six years ago, I was invited to design a training on bias for Social Security ALJs. The training series, titled "Justice and Diversity," was initiated by those members of Congress who became concerned that the findings of a 1992 U.S. General Accounting Office (GAO) study suggested that Social Security judges systematically discriminated against African-American applicants. When, in the training, we confronted the judges with statistically significant evidence of their biased decision-making patterns, they not surprisingly became defensive, so much so that they sabotaged the consciousness-raising exercises that were offered. One senior judge read the newspaper while a diverse group of experienced trainers, myself included, presented material on the judges' propensity to stereotype. When pressed, these resistant judges claimed that once ordained as judges, they were able to transcend the prejudices to which all men and women fall prey. They believed that no matter what they said or did, they could hide behind the disinterested veil of judicial impartiality.

I pondered the judges' defense as I recalled my experience as a public-interest lawyer representing the applicants about whom these judges had

claimed their impartiality. After attending hundreds of Social Security hearings, it was my experience (and that of my clients) that a claimant's ethnicity and poverty, addiction and illiteracy, depression and obesity were all too often judged less deserving than those claimants whose circumstances more closely resembled those of the judges who adjudicate the claims. Haunted by the divide between my impression of the Social Security hearing process and the ALJs' perceptions, I was driven to explore the problem of bias more systematically.

To determine whether my experience applied to more than just a few judges in one locale, I decided to scrutinize transcripts of Social Security hearings in which Social Security ALJs denied claimants' benefits. Only one set of records relevant to the Social Security disability decision-making process is, however, open to public review. These records are the ALJ hearing transcripts and decisions of Social Security claims that were appealed to federal court after having been denied at four levels within the system (initial evaluation, reconsideration, face-to-face hearings before an ALJ, and appeals to the Appeals Council). These transcripts and decisions constitute the only hard evidence available with which to study how bias may influence the way disability decision-making rules are applied and represent only a very small sample of the cases heard by Social Security ALJs nationwide.<sup>3</sup>

I selected three cities—Boston, Chicago, and San Francisco—on which to focus my research because these cities were revealed in the 1992 GAO race-bias study to be representative of the differential treatment by Social Security ALJs of African-American and Caucasian applicants. In total, I examined 67 hearing transcripts and decisions for uniformity and affectivity and reviewed more than 2,500 pages of materials. The cases involved a total of 38 judges, 36 of whom were male. Although no specific information is available on the racial and ethnic makeup of the judges whose cases I reviewed, statistics from 1992 revealed that nearly 90 percent of the 856 ALJs were white men (Office of the Chief Administrative Law Judge, personal communication, March 1992) and their average age was 63 (Stephen Kennedy, personal communication, November 1992).<sup>4</sup>

With the hearing transcripts and decisions in hand, I developed a two-step method for analyzing ALJ compliance with key rules. Toward this end, I developed a checklist that enabled me first to identify hearing and decision-making rule violations and second to analyze qualitatively the context and implications of these violations.

I undertook such microresearch because I was interested in learning

more about how the dynamic of bias manifests in the day-to-day life of the American judicial system. I was eager to learn more about the intersecting layers of both negative and positive bias as they express themselves in a system committed to following rules that are inherently flexible, as they relate to both the evidence that is presented to adjudicators and the people who present that evidence. And I was particularly interested in learning how, in everyday interactions between judge and claimant, adjudicator and subject, the legal system, in political lawyering terms, is intolerant and judgmental of the diversity the system invites. I came to the research with a working hypothesis that judges often disregard rules, particularly when and if it suits their predilections and prejudices, and I thought this a useful unit of analysis for learning more about these critical dynamics.

What I found when I undertook this research was that no transcript was without rule violations. I also found that these violations consistently suggested that judges failed to positively accommodate claimants' special needs and that the ALJs negatively stereotyped the claimants most deserving of the attention the law mandated.

Specifically, I found that the rules themselves were often biased and that despite the presumed objectivity of the physicians who generate and interpret the medical evidence on which the system relies, they too may be gender and race biased. Indeed, I found that the literature tracing the Social Security disability decision-making process revealed a documented history that suggested prejudice at every level of the system. In the hearing transcripts and decisions I scrutinized from my own sample of cases, judges all too often failed to give a proper introduction to the hearing process despite a mandate to do so. Furthermore, the ALJs systematically failed to comply with rules governing the handling of unrepresented claimants, to assist claimants in obtaining necessary evidence and testimony, to follow rules related to a claimant's decision to adhere to prescribed treatment, and to make appropriate credibility determinations. These judges, as previous researchers had found, rendered both the uniform and affective dimensions of their judicial duties empty formalities.

Judges also failed, despite an affirmative duty, to engage and accommodate the historically oppressed groups they were mandated by law to engage, including such claimants as those who were unrepresented, who suffered from mental impairments, and who were illiterate or unable to speak English. Judges failed to engage such claimants when exploring their right to counsel, eliciting evidence by leading testimony to the detriment of these groups, being unnecessarily judgmental and rude to them,

not following up on important issues these claimants or their evidence raised, and implying that the perspective of such claimants was wrong and/or should be ignored.

I found, too, that the hearing transcripts and decisions suggested that these judges stereotyped certain claimants, especially members of racial and ethnic minorities, women, those alleging mental impairments, people who are obese, and persons with educational or linguistic limitations. Recipients of welfare and workers' compensation benefits were also the subject of numerous prejudicial assumptions by judges.

In reflecting on the findings of my research and on the supporting documentation provided by other scholars, I am convinced that an important reason judges fail to accommodate and engage claimants is that the ALJs lack the ability or tools to do so. Similarly, I believe that the reason they stereotype claimants is that they lack insight which would help them reveal their prejudices. Too often, it seems, judges perceive that their appointment imbues them with an ethos of impartiality. That is, once assuming office, they forever reject or deny the possibility that their personal character or experience affects their ability to judge. Given these mostly unquestioned assumptions, judges lack the critical mind-set and/or emotional structure to recognize, acknowledge, and address the onslaught of stereotypical images that are bound unconsciously to prevent them from accommodating and engaging, and from reflecting on those images when processing and deciding claims.

The necessity of such reflection and the development of a method that helps judges recognize and acknowledge their prejudices are urgent tasks. I argue in this book that such a critical method, sensitive to the affective and interactive dimensions of judging, would make judges applying rules and interviewing claimants bound to acknowledge prejudicial beliefs and to address and evaluate the inadmissible and unconscious features of the cases they hear.

This proposition supports and goes beyond the general premise advanced by legal realists, and more recently by critical and feminist legal scholars, that judges, as human beings, cannot entirely disengage emotionally from the legal proceedings they judge. I contend, rather, that the modernist legal notion of impartiality blinds judges to the subtle ways in which subjectivity, in the form of stereotyping, unconscious predilection, or prejudice, necessarily enters into their decision-making process. I argue that a mandate forcing judges to make a deliberate effort to expose their biases is necessary to address the prejudice I and other researchers have

detected. Only in this way, by acknowledging the affective and unconscious dimensions of judges' responses to concrete situations and specific claimants, is it possible to make some critical use of judges' prejudice. To deny the existence of prejudice under the legalistic guise of impartiality, or to denounce it as an evil that cannot somehow be expunged, simply renders it unconscious and its effect more virulent and pernicious. I argue, and there is social-psychological research to support my position, that acknowledgment of prejudices is the first step to analyzing and critically utilizing them.

My thesis, however, goes beyond the need for self-reflexivity and the unraveling of judicial biases. The Social Security system, like most—if not all—legal institutions in the United States, is interesting and worthy of reflection insofar as it is part of a system of justice that ideally hears and responds to individual claimants and provides them with substantively just decisions. In the denied claims reviewed for this study, I found that judges had little or no trouble criticizing the claimants appearing before them. However, these ALJs were entirely incapable of expressing any affirmative feeling toward the claimants who, by law or mandate, were entitled to such positive treatment. This negativity was repeatedly demonstrated in the judges' inability to provide the legal or judicial support necessary to collect relevant evidence when adjudicating a claim made by an unrepresented person. The judges further illustrated this point when taking testimony, particularly that of claimants who were handicapped by illiteracy, limited education, poor English-language skills, mental impairments, or institutionalized sexism or racism.

Together, the themes of affectivity and duty, critical self-reflection and client narrative, traverse the three primary arguments in this book. Chapter 1 argues that prevailing notions of impartiality, particularly among members of the judiciary, are inadequate because they deceive judges and the public at large—they perpetuate the myth that emotion, in the form of bias, does not enter the hearing and decision-making process. The previous studies discussed in chapter 3 and the hearing transcripts and decisions scrutinized in chapters 4, 5, and 6 provide evidence that unconscious and unspoken dynamics of prejudice—that is, negative emotion—influence the hearing narratives and decision discourses, at least in my sample of cases. The definitional and theoretical literature on bias and affectivity discussed in chapter 1, the procedural history of Social Security decision making in chapter 2, and the empirical evidence in chapters 4, 5, and 6 reveal that the myth of detached decision making is actually only one of two conflicting

ideals. On the one hand, the system proclaims a commitment to impartiality, the idea that everyone deserves uniform treatment regardless of the adjudicator hearing the individual claim. On the other hand, the system mandates that judges take the time and make the effort to engage individual claimants. This book reveals that in the Social Security context there are regulations and accompanying case law that direct judges to accommodate and engage the needs of special claimants, including such vulnerable groups as claimants who are unrepresented and people who are illiterate. This requirement demands judges to feel—to discriminate positively on behalf of claimants who require special treatment.

Although the system proclaims an emotional distance through the ideal of impartiality (chapter 1), it is in practice riddled with negative emotion in the form of prejudice, most prominently in the form of stereotyping (chapter 6). Not only do the judges in my sample prove incapable of achieving impartiality in decision making—indeed, have outright biases against some claimants—but this negative emotion impedes their expression of positive emotion in the form of accommodation or engagement (chapter 5). Ironically, my evidence reveals that the same claimants who are not accommodated are also those who are stereotyped.

I conclude from this evidence that judicial case narratives and judgments are necessarily influenced by unconscious bias and that, in consequence, the ideal of impartiality, as it is currently conceptualized, will never be realized and indeed is self-defeating. The conventional nature of impartiality in effect forces the judges to deny their biases and so precludes them from ever addressing the influence of prejudices or stereotypes on judgment. They are forced to pretend, to act as if they have no feelings, experiences, or biases. The critique of this notion is developed most deliberately through my proposal for mandating judges to become aware of their positive and negative emotional involvement in cases through self-reflection and training (chapter 7).

The second dominant theme in the book builds on the first. Here I deconstruct the doctrine—both the policies and the rules on which Social Security decision making are based—to uncover its prejudicial underpinnings (chapter 3). In addition, I critically examine the hearing transcripts and decisions, or case material. In this undertaking (chapters 4, 5, and 6), I give the claimant a voice beyond the text; I make the effort to understand how claimants would feel had they been given the space and support to express themselves. Simultaneously, I hear the judges: their spoken and unspoken predilections and prejudices, their reason, and the emotions that



inform it. Since the rules as well as the texts are flat, merely words on a page, my task in the evidentiary chapters is to make the rules, the hearing, and its accompanying decision three dimensional; the challenge is to reveal the face of Social Security doctrine and decision making. Like a psychotherapist, I interpret and uncover hidden or unconscious material—the story behind the story. However, this is no easy task, as narratives are often opaque, it is unclear what they really mean or how they are to be interpreted. In this regard, I attempt to navigate my way through the dark night of the law's soul using not only the hearing transcripts and decisions themselves but the supporting federal court materials as well.

The third argument builds on the first two in that the theoretical problem and practical solution find themselves inextricably intertwined in how the concepts of impartiality and accommodation and the evidence of bias converge. In the book's conclusion, I argue that judges trained in a formalist legal tradition may be incapable of truly feeling their own prejudice (chapter 7). I raise a heretical question: Should lawyers be judges? This question must be addressed directly. If judges are otherwise incapable of realizing that judging is expression, not repression, emotional engagement, not detached distance, then policymakers should reconsider whether judges trained in law schools are appropriate adjudicators for a legal system that demands sensitivity, not disdain, engagement, not distance, relation, not estrangement. A passionate and engaged decision-making process, I suggest, will enable adjudicators—whether lawyers or therapists—to ensure that they are conscious of the ways they stereotype claimants and of the ways they must compensate emotionally to ensure that they accommodate appropriately and effectively engage claimants. In the conclusion, I build on such psychoanalytic methods as conscious self-reflection and countertransference (a technique for unraveling how interactions evoke reactions) to present a model for training judges in the affectivity of decision making.

Most directly, chapter 1 presents historical and social psychological evidence of the tension between impartiality and bias and the inevitability that stereotyping will enter the decision-making process. I also draw on critiques of formalism from critical and feminist scholars to reveal how objectivity and hence impartiality are contingent on the normative assumptions that underlie them. This analysis helps illuminate the connection between bias and accommodation and the significance of injecting affectivity into the decision-making process.

In chapter 2, I review the rules that are designed to lend the Social

Security disability decision-making process legitimacy and objectivity. In chapter 3, I reveal how the rules themselves may be biased and trace the history of studies on Social Security decision making, which suggests that the system is riddled with prejudice.

Chapters 4, 5, and 6 present my findings from my quantitative and qualitative analysis. Chapter 4 documents how judges violate particular rules. Chapter 5 reveals how they fail to accommodate claimants despite a mandate to do so, and chapter 6 presents evidence of stereotyping detected in the transcripts. In chapter 7, I present my policy recommendations and suggest directions for judicial selection, training, and practice.

This book provides the material and impetus for exploring a new definition of judicial impartiality and for formulating an innovative method for adjudicating claims. This method realistically incorporates the negative and positive features of the stereotyping that inevitably affects the process of decision making when resolving the claims of disaffected applicants who are so easily stereotyped. The cornerstone of such an approach, I argue, is a self-reflective method in which judges would have the tools not only to resolve the facts in any given dispute and to apply the law but also to be conscious of their propensity to stereotype negatively and positively. Judging, I argue, requires the judge to learn to engage claimants to afford them the nonessentialized justice they deserve. Without such an affective approach, my evidence and other studies reveal that the Social Security system will continue to inflict unconscious stereotypes on innocent people who are otherwise powerless to counteract the vicissitudes of life that bring them to these legal tribunals.