The Courting of Credibility, a Nervous Mistress

Edd Wheeler
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by Edd Wheeler

No one means all he says, and yet very few say all they mean, for words are slippery and thought is viscous.

An Oxford professor labored in the vineyards of philosophy over 80 years ago to show what is easily believed by judges and those initiated in administrative law: credibility can be difficult to measure. “Belief,” the professor wrote, “depends upon a complex of perceptions and emotions not amenable” to the calculus of probability. “Moreover, belief is not credibility,” he cautions. For example, even if we believe something with relative confidence, the question arises, “ought we so to believe?”

This article will not be stifled at the outset by the oily lamps of philosophy. A Cambridge professor more recently was on point: “Philosophers do not solve problems, but create them in forms ever more difficult to solve, thus perpetuating philosophy.” This article will cut no Gordian knot for simple reason that none will be tied, at least not at the beginning.

The truth about credibility is that it engenders belief, whether in the shallows or at depth, headlong or at acute angles. In 400 years, Richard Hooker’s observation has not been improved upon: “things are made credible either by the human condition and quality of the utterer, or by the manifest likelihood of truth

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1 U.S. Administrative Law Judge, Office of Hearings and Appeals (Atlanta), Social Security Administration. This article was written by Judge Wheeler in his private capacity. No official support or endorsement by the Office of Hearings and Appeals, the Social Security Administration, or the Department of Health and Human Services is intended or should be inferred.


3 Francis Edgeworth, Probability, 22 Encyclopedia Britannica 378 (1911).

4 James Beament, Notes and Queries, Manchester Guardian Weekly 23 (May 1, 1994).
which they have in themselves." But the observation of the Administrative Law Judge (ALJ) is seldom unimpeded. Stakes and stirrings, in the form of benefits and lawyering, can provide a clouded vista.

For many reasons, the world picture for the ALJ can be an anxious one. Credibility may not readily step forward in shining garb. It may have to be courted, at times assiduously by the trier of fact. Complexities, nervousness, and even guile might be expected. Our world is such that, in the convoluting circles of gender-loaded empowerment, some nervousness may even attend the title of this article. We seem to stand increasingly in the eye of someone’s camera, candid or otherwise. And framed in these terms, to paraphrase the camera advertisement and would-be rocking tennis star, demeanor is everything. Ours and the claimant’s. I will proceed accordingly, aware of Henry Adams’ warning above.

My purpose is to look briefly at credibility and its potential for use (or abuse) by the trier of fact. Although testing for credibility is a central concern of the hearing process, I will not attempt to slide it toward center stage. It is an instrument and not the end of the business of the administrative law judge, whose role classically is seen as “a specialist rather than a general practitioner in the science of finding facts.” In the elucidation of facts, the ring of credibility is a sideshow and not the circus.

**First Overtures**

In the quest for credibility, a look at demeanor is important. How a person maintains eye contact, uses body language, or reveals a convenient memory may

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Vol. XIV  Fall 1994

speak volumes. It can tell much about the witness' credibility, "that quality 'which renders his evidence worthy of belief.'" But take care: the limits of physiognomy, the judging of character by outward appearance, are all too immediate. We assumedly have progressed beyond 19th-century thought which, in the works of Enrico Ferri and others, held that lawless persons do not blush and that the ranges of physical appearance can be used by magistrates as criteria for judgment.

Carriage is not credibility. The latter "involves more than demeanor. It apprehends the over-all evaluation of testimony in light of its rationality or internal consistency and the manner in which it hangs together with other evidence." As we shall see, though, some courts would restrict the administrative law judge's assessment of credibility essentially to demeanor-based findings.

In courts of law, the issue of credibility is within the province of the jury while questions on the competency of witnesses are reserved for the judge. It is for the jury to say whether a witness' testimony is plausible, i.e., credible. Judges in courts of law control issues related to competency, such as evidence of bias, insanity, intoxication, or a witness' character for veracity.

In an administrative tribunal, however, the judge addresses credibility. If evidence is relevant, material, and not unduly repetitious, it is deemed admissible in the administrative hearing. Determinations of credibility are to be supported by

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9 Carbo v. United States, 314 F. 2d 718, 749 (9th Cir. 1963).

10 5 U.S.C. § 556(d) (1988); see also Administrative Procedure in Government Agencies: Report of the Attorney General's Committee on Administrative Procedure 70,71 (1941), quoted in 4 B. Mezines, J. Stein, & J. Gruff, Administrative Law § 22.01, at nn. 11-12 (1977), which advises that "[t]he ultimate
substantial evidence.\textsuperscript{11} This substantiability in practice, however, at times seems to vary with the reviewer who weighs it after the examiner's decision.

Findings by the administrative law judge on testimonial credibility are given special weight. The Supreme Court in \textit{Universal Camera Corp. v. NLRB}\textsuperscript{12} indicated that such weight will be accorded even greater emphasis if an agency and its examiner disagree on findings, though "[t]he [exact] significance of [the examiner's] report, of course, depends largely on the importance of credibility in the particular case."\textsuperscript{13} The Court showed distinct willingness to follow findings on veracity "when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions" concerning them.\textsuperscript{14} The Eighth Circuit has noted that if explicit findings on credibility are made, it is within the realm of the administrative law judge to determine whether to believe subjective complaints.\textsuperscript{15}

As suggested, most courts subscribe generally to the position that "special deference is traditionally afforded a trier of fact who makes a credibility finding."\textsuperscript{16} Yet the administrative law judge's track is of limited gauge. The Seventh Circuit Court of Appeals, for example, construes credibility very narrowly, essentially as

\begin{quote}
"test of admissibility must be whether the proffered evidence is reliable, probative and relevant."
\end{quote}

\textsuperscript{11} See, e.g., \textit{Rautio v. Bowen}, 862 F.2d 176, 179 (8th Cir. 1988). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." \textit{Consolidated Edison Co. v NLRB}, 305 U.S. 197, 229 (1938).

\textsuperscript{12} 340 U.S. 474 (1951).

\textsuperscript{13} Id. at 496.

\textsuperscript{14} Id.

\textsuperscript{15} See \textit{Taylor v. Bowen}, 805 F.2d 329, 331 (8th Cir. 1986).

\textsuperscript{16} See, e.g., \textit{Williams v. Bowen}, 844 F.2d 748, 755 (10th Cir. 1988).
The Courting of Credibility, a Nervous Mistress
Vol. XIV Fall 1994

"synonymous to witness demeanor."17 That court opined that an examiner's findings are most secure from attack when they are closest to the evaluation of demeanor: "To the extent that the ALJ's decision rests explicitly on his evaluation of demeanor, we are required to weigh those particular findings more heavily."18

The Third Circuit makes a not unreasonable request: "While the ALJ is empowered to evaluate the credibility of witnesses ... we would expect him at least to state that he found a witness not credible before wholly disregarding his testimony."19

I believe that the evaluation called for here can only be achieved by purposeful action on the part of the trier of fact. There may be little romance to credibility but romancing it is a chief role of the administrative law judge. This may be done both by searching the evidence for telling parallels or contradictions and by asking at times of the claimant what can only be described as searching questions. An administrative law judge should never be expected to apologize for civil persistence.20

In assessing credibility, the trier of fact will find it useful to cast a net anchored by three considerations. First, no one has a monopoly on Truth. As stated in the distant though not remote past, "no one is entirely virtuous or entirely

18 Id. at 954.
20 Federal district courts have been known to criticize, for example, the practice of checking the contents of medicine bottles at the hearing level. But compliance is not always susceptible to Olympian gaze. Sometimes, it must be gauged, if prosaically, by the firsthand evaluator of fact.
vicious." Even the person of dubious character may possess a degree of veracity; even the archbishop may quibble. Second, the truth may be wedged beside falsehood. Because a witness is not credible in one aspect of testimony does not mean that the whole testimony is flawed. Little credence, therefore, can be given to the maxim, "He who speaks falsely on one point will speak falsely upon all."

The third threshold consideration is that the witness may actually believe his testimony to be true, even if others, in more objective light, think otherwise. The philosopher tells us that "things which we conceive very clearly and distinctly are all true." There are few things more clear and distinct to claimants in a Social Security hearing than their perception of need for the benefits in question. It is futile to ask whether the need is real or imagined: perception is reality for the claimant. I need the money becomes I deserve the money. Many claimants, of course, are in acute economic need. Some, rightly or wrongly, may even view themselves as economically exploited. One ethicist observes that persons "who believe they are exploited hold that this fact by itself justifies dishonesty in rectifying the equilibrium." Credibility can be a mere word for claimants in this category. It is against this hardened background that the administrative law judge often must weigh credibility.

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21 Noel v. Dickey, 6 Ky. (3 Bibb) 268, 269 (1814).

22 See 4 Wigmore, Evidence § 1008 (Chadbourn rev. 1972). Wigmore calls this maxim "worthless" and "pernicious."

23 Descartes, Discourse on the Method of Rightly Conducting the Reason 52, in Great Books of the Western World (R. Hutchins ed. 1952). The philosopher goes on to hedge, however, in observing that we may have trouble telling what is clear and distinct.

The trier of fact, as no one else, has the opportunity to observe the demeanor and appearance of the witness, qualities "which in many instances become 'the very touchstone of credibility.'" Touchstone, perhaps, but it is neither smooth nor polished nor uniformly reliable. For example, the witness betrays a dry mouth. Is this a result of subterfuge or of medication, maybe a strong antihistamine? Is it lie or is it Duralex?

Similarly, the witness responds "with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating." Very possible. Yet it is at least possible also that the spouse packed off that morning or that the witness is manifesting the ill effects of some other personal tragedy or malady.

It is true that "carriage, behavior, bearing, manner and appearance" go into forming the demeanor of a witness. However, we quickly migrate to less certain ground in describing precisely how these ingredients translate in deciphering credibility. But the task of categorizing credibility is not like catching mercury with a sledgehammer. If there are inconsistencies in the record as a whole, the administrative law judge can believe or disbelieve subjective complaints. If he disbelieves them, he must set forth the inconsistencies in the record that led to their rejection.

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26 Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952).

27 Id. at 268.

28 Polaski v. Heckler, 739 F.2d 1320, 1322 (8th Cir. 1984).

29 Jeffrey v. Secretary of Health & Human Servs., 849 F.2d 1129, 1132 (8th Cir. 1988).
Scholarship on the makeup of credibility is surprisingly sparse. McCormick’s modern classic on evidence states: “The components of credibility, i.e., the factors which determine whether testimony is believable, are the perception, memory, and narration of the witness.” Sometimes, the authors add, “sincerity is also named, but in fact it seems to be but an aspect of the other three.” The authors then proceed to identify five major ways for testing a witness’ credibility. These tests center on:

1. Measuring for consistency between present testimony and previous statements;
2. Assessing whether the witness is biased;
3. Investigating the witness’ character, but limiting this investigation essentially to an “inquiry to ‘reputation for truth and veracity’”;
4. Determining whether the witness has the capacity to observe, recall, and testify properly; and
5. Comparing the witness’ account of material facts to the testimony of other witnesses.

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31 Id.
32 Id. at 72.
33 Id.
34 Id. at 73, 101 (quoting McHargue v. Perkins, 295 S.W.2d 301 (Ky. 1956)).
35 Id. at 73.
36 Id.
Another standard treatise on evidence, that of Professor Wigmore and his disciples, lists almost identical methods of testing for credibility, with the exception that the demeanor and appearance of the witness are also cited as factors.\textsuperscript{37} Although not proffered as a litmus test on credibility, the holding of a Georgia appellate court adds a commonsense perspective: a party offering testimony in a claim on his own behalf is to have that testimony construed most strongly against him when it is vague, self-contradictory, or equivocal.\textsuperscript{38}

As a practical matter, of course, the administrative law judge is seldom occupied, for example, with questions regarding reputation for truth and veracity. The administrative law judge is not notably an arbiter of character. The hearing room is a place for harvesting fact, not for digging dirt. But harvest and earth run together. Only those who would emasculate the administrative law judge’s role will have difficulty with close questioning on daily matters. A claimant who alleges spending virtually the entire day, every day, in chair, recliner or bed may be more frozen to inaccuracy than to incapacity. At a point earlier than claimant’s attorney may admit, embellishment can become cold distortion. A reflective ALJ has reminded us that federal district courts “do not expect agency adjudicators to find disability when interpretations, however sincere, are the source of exaggeration.”\textsuperscript{39}

Other linkages are of interest in testing credibility. For example:

\textsuperscript{37} See Wigmore, \textit{supra} note 22, § 946 for demeanor; §§ 899 and 901 for bias and coercion; §§ 902-908 and 1063-1068 for contradictions and admissions; § 922 for character as to veracity; §§ 932-934 for incapacity; and §980 for conviction of former crimes disqualifying one as a witness.


1. Did the claimant apply for unemployment compensation during the alleged period of disability?
2. Are the claimant's daily activities consistent with the claimed disability?
3. What was the most physically-demanding activity in which the claimant engaged in the week or month prior to the hearing?
4. Are the claimant's allegations of physical capacities believable?
5. Assuming an ability to pay, did the claimant seek and follow medical treatment for the impairments alleged?

**Establishing Lasting Relationships**

Many Social Security disability hearings involve an evaluation of the extent to which a claimant's subjective allegations of pain are supported by objective medical evidence. A determination on credibility obviously is integral to this process. About 70 percent of persons currently appealing state-level denials of disability claims are found by an ALJ to be disabled. This high reversal rate is due to several reasons. The obtaining of counsel by the claimant is perhaps the key factor. It is also arguably true that too few disability hearings deal comprehensively with credibility, especially on pain issues. Asking either no question or the wrong question yields the same result: no answer. With respect to alleged pain, no meaningful discussion at the hearing accrues essentially to the advantage of the claimant.

The trier of fact is expected to articulate substantial evidence in support of findings on credibility and, if pertaining, specifically why the claimant's subjective testimony on pain was not accepted. The Eleventh Circuit has stated, "Failure to articulate [this reasoning] requires, as a matter of law, that the testimony be accepted as true."40 The administrative law judge has latitude in making this

40 *Holt v. Sullivan*, 921 F.2d 1221, 1223 (11th Cir. 1991) (citing *Cannon v. Bowen*, 858 F.2d 1541, 1545 (11th Cir. 1988)).
determination, but his "discretionary power to determine the credibility of testimony is limited by his obligation to place on the record explicit and adequate reasons for rejecting that testimony."41 In formulating his reasoning, the administrative law judge may choose to believe none or only portions of a witness' testimony, but the whole of the testimony must be considered. The trier of fact "cannot believe that which he hears and then close his mind to all that comes thereafter."42

Further, though the "judge is free to resolve issues of credibility as to lay testimony or to choose between properly submitted medical opinions, he is not free to set his own expertise against that of a physician who testified before him."43 The freedom of judges in this troubled house of pain resembles at times restriction as much as license. For example, we are "free to disregard complaints of pain which are not supported by, or which are inconsistent with, medical findings."44_ The latter is a modest endowment — a bit like saying one is free to conclude the wind is not blowing if the trees are not swaying.

Federal courts not infrequently admonish ALJ's to avoid what has been designated, somewhere between wryness and derision, as the sit-and-squirm test. That is, administrative law judges are not overly to rely upon the physical appearance and mannerisms of the claimant at hearing, especially when such

41 Id.

42 Victor Products Corp. v. NLRB, 208 F.2D 834, 839 (D.C. Cir. 1953).

43 Gober v. Matthews, 574 F.2d 772,777 (3d Cir. 1978).

44 Bates v. Sullivan, 894 F.2d 1059, 1058 (9th Cir. 1990). Straying from this tether may cause problems. When the concurring opinion in Bates required objective medical evidence in order to support the severity of alleged pain, this requirement was struck down. Bunnell v. Sullivan, 947 F.2d 341, 347-48 (9th Cir. 1991).
observations on pain are in conflict with the opinions of medical doctors. Logic suggests, however, that the admonition against the so-called sit-and-squirm test can be taken too far, even as triers of fact can take too far mere empirical judgments regarding pain. Informed observation need give rise to neither squirm nor objection. When a claimant, for example, alleges to be in the most acute of pain at the hearing, expressly at or near the top of a 10-point scale, yet manifests little if any pain, the event may register as something more than a feather on the breath of fraud. It hardly seems out-of-bounds that the administrative law judge comments upon the event. Surely the federal courts do not intend that ALJ's practice avoidance when confronted with such inconsistencies.

There is a premium on comprehensive development, including deliberate and rational findings regarding credibility. Nothing suggests that the process be an encyclopedic one. Yet there is reason to believe that administrative law judges should be at pains to see evidence on credibility sufficiently articulated and that this can be assisted through an examination of credibility which is more specific and purposeful in its approach.

Nothing, though, insures that even the skilled tester of credibility will get uniformly good results. Pertinent here are the observations of three seasoned New York trial judges, who, in sum, stated that their many years upon the bench had led to a couple of interesting, if disquieting, conclusions. "Examining their own experience, the judges found that they had overrated both their ability to detect a deceitful witness and the extent to which they relied on visual observation for weighing credibility."45

45 See, e.g., Freeman v. Schweiker, 681 F.2d 727, 731 (11th Cir. 1982), in which "sit and squirm" jurisprudence is condemned; i.e., it is not to be "improperly suggest[ed] that unless the pain is visible to the ALJ at the hearing, it is proper to deny the claim."

Of Courtesy, Necessity, and Bulldogs

The Social Security Administration and government at all levels emphasize the importance of treating the public with courtesy and respect. This is as it should be, especially within an agency charged with the proper disbursement to qualified citizens of monies derived from public tax dollars duly paid into the Social Security trust fund. This approach, however, is not without caveat as it applies to the adjudicatory process. In a well-publicized drive to reengineer government and indeed to re-invent it, the Social Security Administration has pledged, as part of its participation in the wider crusade, to "measure customer satisfaction" and to move to improve it.47

Improving the quality of services, of course, is almost universally sought; but this cannot be taken to mean that ALJ’s are responding to "customers" in the traditional sense. Persons requesting justice, through administrative law and the disability process, are actually something higher than customers; they are claimants, who deserve decisions in accordance with an objective rendering and interpretation of the evidence. The concept of "customer satisfaction" is not compatible for the most part with adjudication. Few who are denied benefits are going to be satisfied customers. Administrative law judges who explore more thoroughly than others on issues of credibility might logically expect to encounter more dissatisfied "customers."

The Social Security Administration wisely cautions ALJ’s against making comments which are unduly critical of claimants. But there is a crucial point not to be lost here. Where does truth become derogatory? A clear majority of claimants doubtless testify in good faith under oath; while others, on more than occasion, lie and sometimes these untruths are laid bare. It is hardly an attack upon "human

47Disability Process Reengineering Team (U.S. Department of Health and Human Services), Disability Process Redesign 56 (March 1994).
dignity" when the administrative law judge addresses these instances. Indeed, truth is a mainstay of human dignity and the elemental objective of judicial proceedings. The ethicist reminds us of a fact too seldom heard: "[T]rust in some degree of veracity functions as a foundation of relations among human beings; when this trust shatters or wears away, institutions collapse."49

Continuing on point, it must be said that the threat of political correctness is not altogether an idle one. Daily, terminology once neutral becomes pejorative, and new attempts at neutrality only ring absurd. Lest, however, an atmosphere is fostered inimical to the most basic tenets of Credibility writ large, we must guard against policies which discourage the administrative law judge, when appropriate, from identifying the probable lie as a likely falsehood.

Among the architecture at Yale Law School, there is a humorous finial, humorous but fitting. It is a symbolic figure of the judge as a bulldog. The symbolism is appropriate: the figure is not just another pretty face or, worse, a faceless bureaucrat. A few wags, with penchant for initials, might even pursue the symbolism in terms of parentage. In any event, the figure conjures up strong and apt associations. The bulldog possesses proverbial tenacity. It is difficult to muzzle. Its temperament is less formidable than its visage. It is not an attack dog. Nor is it a Chihuahua.

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49 S. Bok, supra note 24, at 31. Claimants are not alone in distorting the truth in attempts to derive benefits. The problem, essentially one born of desperation, extends to persons actively seeking employment. "The National Credit Verification Service says that 25 percent of the MBA degrees it checks out on resumes are fake." Atlanta J.-Const., May 11, 1992, at B5.
Credibility can be a problem. It can even be problematic and, in some cases, nonexistent. Tact and judiciousness are appropriate in decisional writing. But it is a necessity that the administrative law judge be free, if not encouraged, to state the obvious. To advocate otherwise is, in a word, incredible.