Toward a New Dynamic in Poverty Client Empowerment: The Rhetoric, Politics, and Therapeutics of Opening Statements in Social Security Disability Hearings

Linda S. Durston
Linda G. Mills†

The reader will recall the story of Aristippus, who, when he was reproached for having abjectly prostrated himself at the feet of Dionysius the tyrant in order to be heard by him, defended himself by saying that the fault was not his, but that of Dionysius who had his ears in his feet. Is the position of the ears, then, a matter of indifference?

I. INTRODUCTION

The Social Security Administration’s Hearings, Appeals, and Litigation Law Manual states that its Administrative Law Judges (ALJs) should make opening statements in Social Security disability hearings. While the matter

† Linda S. Durston, J.D., New College of California, School of Law (expected 1998); Legal Assistant, Hawkins Center of Legal and Support Services for the Disabled, Ph.D., University of California, Berkeley (1984). Linda G. Mills, Assistant Professor of Social Welfare, University of California, Los Angeles; Ph.D., Brandeis University (1993); M.S.W., San Francisco State University (1986); J.D., Hastings College of the Law (1983). Special thanks to Dr. Peter Goodrich, University of London, Birkbeck College of Law, for a thoughtful reading of an early draft of this essay; the dialogue was delightful and inspiring. We also thank Tony Alfieri for encouraging us to pay close attention to the details.


2. OFFICE OF HEARINGS AND APPEALS, SOCIAL SECURITY ADMIN., HALLEX: HEARINGS, APPEAL AND LITIGATION LAW MANUAL FOR ALJs I-2-650, I-2-652(A) (1992) [hereinafter HALLEX]; OFFICE OF TRAINING, SOCIAL SECURITY ADMIN., ALJ TRAINING MATERIALS (1992). HALLEX provides “guiding principles, procedural guidance and information to the Office of Hearings and Appeals staff... . . . It also defines procedure for carrying out policy and provides guidance for processing and adjudicating claims at the Hearing.” These policies have been cited in cases and some courts have recommended that new procedures be printed not only in the Federal Register, but also in HALLEX. For cases citing HALLEX as instructions to adjudicators, see Beno v. Sullivan, 1992 WL 1536321, at *3 (N.D. Ill. Jan. 27, 1992) and Steiberger v. Sullivan, 801 F. Supp. 1079, 1083 (S.D.N.Y. 1992).

The subject of this paper is the Social Security disability program in particular. Annually, the two Social Security disability programs, Disability Insurance (DI) and Supplemental Security Insurance (SSI), together provide over nine million people with a total of $40 billion in cash benefits and $13 billion in health care coverage. SOCIAL SECURITY ADMIN., ANNUAL REPORT TO CONGRESS (1994). 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. 42 U.S.C. § 1381 (1988).

Both DI and SSI provide benefits when the following statutory definition is met, along with other administrative requirements: “disability” means “[a]n inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A) (Supp. 1995).

A "physical or mental impairment" is defined as “an impairment which results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.” 42 U.S.C. § 423(d)(3) (Supp. 1995). In 1993 alone, 1.5 million

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is not formally prescribed one way or another, ALJs also typically invite claimant representatives—the advocates and attorneys who assist claimants in presenting their evidence before ALJs—to make opening statements. Despite this incentive to introduce remarks in disability hearings, a study of sixty-seven transcripts from Social Security disability hearings conducted in three major U.S. cities found that Social Security ALJs in 72% of the cases reviewed either gave no opening statement or gave an incomplete one. A review of these same transcripts shows that claimant representatives almost without exception declined to introduce their arguments and analyses.

From a rhetorical standpoint, an opening statement, introduction, or exordium is essential to establish a starting point for virtually any kind of communication. An audience's level of attention and retention is highest at the beginning of a speech, and the exordium raises the audience's expectations about the subject and form of the discourse. Moreover, the exordium sets pace, proportion, tone, character, stance, and style. According to one recent

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Americans applied for disability benefits, and roughly 850 Social Security Administrative Law Judges heard the appeals of more than 300,000 applicants whose claims had twice previously been denied. Record Applications and Appeals Pending, SOC. SECURITY F. (Nat'l Org. of Soc. Sec. Claimants' Reps., Pearl River, N.Y.), Mar. 1993, at 1.

There are two administrative decision-making procedures to which claimants are subjected before having their case heard by an independent adjudicator, the ALJ. At the initial and reconsideration stages, claimants' cases are evaluated by a disability adjudicator and a physician. The claimant does not appear before either of these decision-makers. The administrative hearing is the first opportunity the claimant has to meet a decision-maker face-to-face.


4. The study and practice of rhetoric emerged beside that of law: “It was when the tyrants had been got rid of in Sicily, and private property was being claimed back after a long interval by legal process, that ... a handbook and rules for oratory were first composed by Corax and Tisias; no one before that was accustomed to speak methodically and systematically, though many spoke with care and from a written text.” CICERO, ON THE PROGRESS OF GREEK ORATORY, Brutus 46. The association of law and rhetoric has survived to present day.

The study of rhetoric is as valuable for political and effective lawyering as it is for all critical theoretical approaches, for the acts and interactions of different speakers and audiences articulate (if not also embody) distinct experiences and concerns. This Article examines the speech of ALJs, representatives, and disabled claimants in the context of Social Security disability hearings to assess the persuasive effect of one speaker in relation to another. We argue that the existing rhetoric of disability hearings reflects and sustains the traditional balance of social power between the key hearing participants. From this we hypothesize that by significantly altering the form (and hence, the tone and style) of the discourse, claimant representatives can redistribute traditional balances of power. We also posit that the benefit of such disruption is long-lasting for claimant, representative, and ALJ, even if the outcome of the hearing is not favorable to the claimant.

5. The general principles of discourse may succinctly be illustrated in Gwendolyn Brooks's poem "my dreams, my works, must wait till after hell, in THE NORTON ANTHOLOGY OF POETRY 572 (1975):

I hold my honey and I store my bread
In little jars and cabinets of my will.
I label clearly, and each latch and lid
I bid, Be firm till I return from hell.
I am very hungry. I am incomplete.
observer, the beginning establishes "explicit and implicit rules of pertinence" that "authorize" the "links between steps" and that give rise to spontaneous arguments dealing with the subject and the speaker in the subsequent argument.\(^6\) According to Kenneth Burke, the *exordium* is the appetite, the arousing, "the arrows of our desires . . . turned in a certain direction."\(^7\) Frank Kermode describes as primordial the auditor's need for the certainty that a beginning establishes, exceeding the need for any other part of a discourse.\(^8\)

Given the complexity of the administrative hearing as a form of discourse and the importance of the introduction to virtually any speech, we contend that the prevailing practice on the part of ALJs and claimant representatives of either not making an opening statement or making an incomplete one presents grave injustices to claimants. It deprives the claimant the assertion of her voice in an institutional setting, reinforcing the essentializing and marginalizing forces that gave rise to her silence in the first place. In addition, because this practice too easily alienates clients from the hearing process, it undermines the claimants' capacity to meet their burden of proof. The process thereby bypasses an essential opportunity to promote the healing and empowerment of the disabled claimant.

These revelations, in one form or another, have dominated feminist and other critical legal discourses in the past five to ten years; Phyllis Goldfarb, in particular, in her comprehensive survey of feminist theory and its

And none can tell when I may dine again.
No man can give me any word but Wait,
The puny light. I keep eyes pointed in;
Hoping that, when the devil days of my hurt
Drag out to their last dregs and I resume
On such legs as are left me, in such heart
As I can manage, remember to go home,
My taste will not have turned insensitive
To honey and bread old purity could love.

It is possible to identify the intended audience of most speech. From a rhetorical perspective, discourse is regarded as suasory, and an audience is viewed as people (real or imagined) who embody a system of beliefs that the speaker intends to address and revise. Typically, the initial beliefs that the audience holds and the speaker intends to address (the "starting point") are indicated in the introduction. Looking at the first four lines of Brooks's poem as an introduction—as a sentence and a quatrain, it is complete in itself—we do indeed encounter an identifiable set of beliefs. Here is represented an assumed confidence in the strength of ideals, particularly the constancy of the human spirit, such that one can store "honey and . . . bread/in little jars and cabinets of my will" with the result that labeled, latched or lidded, and properly bid, one may reasonably expect them to remain "firm until I return from hell." This much is given, common ground, acceptable without explanation in the opening lines of the poem.

Introductions generally, and these opening lines in particular, do more than identify the beliefs of an intended audience. They engage the audience in discussion about those beliefs. The emotion, detail and intensity Brooks employs invites her audience's attention. Then, the disjunction between the deliberateness with which the speaker professes to act and the absurdity of her act (i.e., pleading with household items to defy laws of nature) characterizes the speaker's actions (and the shared or common ground beliefs of speaker and audience) as futile, if not naive. Thus, the first four lines of this poem establish emotional, even musical (meter, rhyme) tone, subject matter, and a stance toward that subject from which discussion (and eventually persuasion) can result.

relationship to legal clinical methods, describes how such practices as consciousness-raising, storytelling, and contextual reasoning are relevant to both self-definition and collective political struggle.\(^9\)

Consciousness-raising, in the legal context, involves a reflexive dynamic which moves freely between the interpersonal and the political. Its value is in its ability to legitimize the individual narrative, relate it to political contexts, and empower the law's most oppressed subjects to use these opportunities to reflect on how their silence is endemic of a larger socio-economic and socio-political condition.

Storytelling is both a liberatory practice and a method used to raise consciousness. It challenges, through the power and persuasiveness of individual experience, the unidimensional and essentializing accounts of the lives of people who have been silenced. They may have been silenced both by others more politically advantaged than they who perpetuate that oppression, and also by the politically sympathetic who fail to listen closely enough. However, storytelling is more than just a tool of empowerment. Storytelling has become recognized as a legitimate method on which to base social science and other research.\(^10\)

Contextual reasoning is the convergence of these methods. It uses the context of the storytelling to "find solutions that are tailored to the particularities of the situation."\(^11\) Indeed, as Goldfarb argues, the value of these methods is in their "capacity to expand context,"\(^12\) or, more relevantly, to use institutional contexts to identify new opportunities for storytelling and consciousness-raising, and to seize those moments for political action. Through contextual reasoning, it becomes apparent that the Social Security hearing has strong implications for the rhetoric, politics, and potential therapeutics\(^13\) of

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10. See, e.g., EDMUND HUSSERL, *THE IDEA OF PHENOMENOLOGY* (W. Alston & G. Nakhnikian trans., 1964). Alex Johnson makes the parallel argument that the entrance of the Voice of Color (and also of Feminism) and narrative into traditional scholarship empowers scholars who have historically been disadvantaged in traditional circles. The introduction of this new form of legal scholarship may empower scholars who employ it because it accommodates experience in a way that the "objective" voice and argumentative form of traditional legal scholarship cannot. In doing so, these voices create an opportunity for changing racist and other essential notions. See Alex M. Johnson, *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803 (1994).


12. *Id.*

administrative law hearings and for feminist and other critical jurisprudential methods.

II. CLASSICAL BACKGROUND

Classical rhetoricians from Tisias and Corax to Cicero, Horace, and Quintilian are unanimous in including what we call the introduction among the parts of a speech (partitiones oratoria). All of the ancient rhetoricians discuss what an introduction is and ought to do.14

The different classical rhetorical definitions of the introduction are quite similar, but Cicero's De Inventione is probably the most succinct. For him, the exordium is "a passage which brings the mind of the auditor into a proper condition to receive the rest of the speech," a purpose it achieves if it makes the auditor well-disposed, attentive, and receptive toward the case (or causa) at hand.15 The balance of goodwill, attention, and receptivity that an author attempts to establish in an exordium is a function of the kind of case the speaker has to make: honorable, difficult, mean, ambiguous, or obscure.16

Cicero recognizes two kinds of openings that correspond to two kinds of argumentation, "one of which aims directly at convincing, whereas the other is less direct and is aimed mostly at feelings."17 The overtly persuasive argument directly states its purpose, advances its reasoning, then restates its original proposition, and concludes.18 The "less direct" argument, on the other hand, proceeds "as it were backwards": it first presents its reasoning and then, only after thus exciting the minds of the hearers, does it expose its basic proposition.19

With some exceptions, noble, paradoxical, and often even confused cases call for direct argument and, correspondingly, direct introductions that straightaway state their basic propositions.20 Since, however, they may alienate the listener, shameful speeches call for subtle introductions that by less direct means bring the mind of the auditor into a proper condition to receive the rest of the speech.21 In general, in a direct exordium, the speaker announces up front the proposition he or she is going to defend. In the indirect or subtle exordium, on the other hand, the speaker merely raises a question pertinent to the subject or otherwise sets up the discourse in such a way that

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14. For a summary of the ancients' positions on introductions, see GEORGE KENNEDY, THE ART OF PERSUASION IN GREECE (1963); GEORGE KENNEDY, THE ART OF RHETORIC IN THE ROMAN WORLD (1972).
16. Id.; see also PERELMAN & OLBRECHTS-TYTECA, supra note 1, at 497.
18. Id. at I.XV.20-I.XVIII.25.
19. CICERO, PARTITIONES ORATORIA § 46.
20. Id. at 1 §§ 6-11.
21. Id.
he or she will state the conclusion after expounding its reasoning in the body of the speech.\textsuperscript{22}

In \textit{The New Rhetoric}, Perelman and Olbrechts-Tyteca imagine instances in which an \textit{exordium} might be reduced or even eliminated.\textsuperscript{23} This might occur where certain conditions exist at the moment of speaking: The audience knows (or believes it knows) the character of the speaker and, further, has trust in that character, and may already be familiar with the subject or occasion of the speech.\textsuperscript{24} When speaker and audience enjoy common society, culture,  

\begin{itemize}
\item[22.] In fact the distinction between subtle and direct \textit{exordia} is not absolute. Gwendolyn Brooks's poem \textit{my dreams, my works, must wait till after hell} provides an example of the indirect or subtle \textit{exordium}. Brooks, supra note 5, at 572. The first quatrain implicitly raises a question about whether the honey and bread will remain firm and whether her dreams and works will survive until she returns from hell. The second and third quatrains expound the reasoning that culminates with the conclusion of the final couplet, the effective (though still uncertain) answer to the question. The speaker is "hungry," "incomplete," and cannot tell when she "may dine again." Id. She finds in the only consolation man can provide, the word "Wait," a "puny light." Id. She reports on the difficulty of hell ("the devil days of my hurt") and hopes she will survive with some strength and feeling ("On such legs as are left me, in such heart/As I can manage"). \textit{Id.} Syntax leaves open the questions as to whether the speaker will "remember to go home" and, if she does remember, whether her taste will "have turned insensitive/To honey and bread old purity could love." \textit{Id.} The question raised in the \textit{exordium} (first quatrain) is formulated in such a way as to anticipate the conclusion which, it so happens, is itself a question.

The former plantation slave, Sojourner Truth, appears to employ the same strategy of an indirect or subtle \textit{exordium} in the following speech. \textit{NANCY HASON BRADBURY \& ARTHUR QUINN, AUDIENCES AND INTENTIONS} 212 (1991). Closer analysis, however, reveals a direct \textit{exordium} couched in the structure of indirect:

\begin{quote}
Well, children, where there is so much racket, there must be something out of kilter. I think that 'twixt the niggers of the South and the women of the North, all talking about rights, the white men will be in a fix pretty soon. But what's all this here talking about?

That man over there says that women needs to be helped into carriages, and lifted over ditches, and to have the best place everywhere. Nobody ever helps me into carriages, or over mud-puddles, or gives me any best place! And ain't I a woman? Look at me? Look at my arm? I have plowed and planted and gathered into barns, and no man could head me! Ain't I a woman? I could work as much and eat as much as a man—when I could get it—and bear the lash as well! And ain't I a woman? I have borne thirteen children and seen 'em most all sold off to slavery, and when I cried out with my mother's grief, none but Jesus heard me! And ain't that 'twixt the niggers of the South and the women of the North, all talking about rights, the white men will be in for a fix pretty soon.\textit{Id.}

Sojourner Truth delivered this speech in 1851 to a mixed audience of women and men only after listening "to a series of men speak about man's superior intellect and the unsuitability of the weaker sex to take a role in public life." \textit{Id.} at 211. In the first paragraph \textit{exordium}, Truth acknowledges "so much racket" and asks "what's all this here talking about?" \textit{Id.} at 212. But she simultaneously answers up front: "'twixt the niggers of the South and the women of the North, all talking about rights, the white men will be in for a fix pretty soon." \textit{Id.}

\item[23.] \textit{PERELMAN \& OLBRECHTS-TYTECA, supra} note 1, at 496. Among the ancients, Aristotle alone imagined doing away with the poem—but then he would also have preferred all controversies to settle on logical rather than ethical and/or pathetic grounds. His ideal, in this respect, is modelled more closely on mathematics than the stuff of rhetoric, that is, matters of everyday politics. \textit{ARISTOTLE, RHETORIC} 3.13-3.14 (1414a-1416a) (W. Rhys Roberts trans., 1954).

\item[24.] \textit{PERELMAN \& OLBRECHTS-TYTECA, supra} note 1, at 496.
\end{itemize}
or shared values, the “meeting of minds” an introduction effects may exist already at the moment of speaking.25 The epidictic speaker, then, is the speaker whose role is to appeal to and reinforce commonly held values.

Such speakers enjoy “such a large measure of confidence that, unlike any other speaker, [they] need not adapt [themselves] to [their] hearers and begin with propositions that [their hearers] accept.”26 Instead, the epidictic speaker makes use of the kind of arguments “called ‘didactic’ by Aristotle that his hearers can adopt because ‘the Master said so.’”27 Similarly, self-deliberation would seem to free an individual from the niceties of formal introduction and other techniques associated with persuasion.28 The exordium, however, is rhetorically necessary where a community of minds is not a pre-existing condition but the purpose behind the moment of speaking.

The Social Security disability hearing is not an epidictic setting. As discussed below, the disparity between judge and claimant is often so great that the two often can barely understand each other. Thus, the question in such hearings is not whether or not the discourse should have an introduction but rather what kind of introduction it should have.

III. SOCIAL SECURITY DISABILITY HEARINGS: A COMPLEX DISCOURSE FORM

Like hearings or trials, the disability hearing involves multiple speakers—judge, claimant, representative, and witnesses—and with that multiplicity arises a rich potential for audiences and intentions. The roles of the participants in disability hearings are not only multiple, they are also interchangeable, for the judge and the claimant must hear and speak to each other in order to realize the purpose of the hearing. The roles of judge and claimant representative are also complicated in unique ways. Social Security ALJs “wear three hats,” as it were, acting simultaneously as prosecution, 

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25. Id. at 18. Except in the case of the drowning victim who shouts out “Help!” and nothing more, such instances may be more theoretically than actually plausible. The epidictic platform, however, is not a stable one. It often gives way to very different, often startling forms of speech. One might recall, for instance, Vanessa Redgrave’s appeal for Palestinian self-determination upon receiving an Oscar for best supporting actress in 1978. Another example would be the American 400-meter medalists Tommie Smith and John Wesley Carlos with heads bowed, black-gloved fists raised in a “black power” salute during the medal ceremony at the 1968 Mexico City Olympics.

26. Id. at 53.

27. Id.

28. Id. Acknowledging the uniqueness of their view, Perelman and Olbrechts-Tyteca argue that self-deliberation, as a category of discourse, is not distinct from argumentation. They remark that “[a]greement with oneself is merely a particular case of agreement with others.” Id. at 41.

Can we wholly rely on the sincerity of the deliberating subject to find out whether he is in quest of the best line of conduct or is pleading a case within himself? Depth psychology has taught us to distrust even that which seems unquestionable to our own consciousness . . . . Those who do not see, or will not allow, the importance of argumentation cannot account for rationalization: for them it would be merely the shadow of a shadow.

Id. at 41-42.
defense, and judge. At the same time, claimant representatives may assume roles that vary from that of the traditional advocate who seeks the simple victory of a favorable decision to one who strives through the whole advocacy process for the larger or deeper spiritual and political empowerment of the client. To be effective, an introduction for a Social Security disability hearing would accommodate the formal complexity generated by this convergence of interested voices.

A. Overall Form: A Classic Forensic Speech

According to LaVere, "ALJs vary in the manner in which they conduct hearings, but the basic structure of the hearing follows a logically sequential pattern" that generally unfolds as follows:

After the opening statement and introduction of the documentary evidence into the record as exhibits, the claimant is questioned . . . . Many ALJs will allow the representative to question the claimant first—in effect, allow the representative to put on his/her case . . . . If the claimant has witnesses, they will usually testify next. If there are expert witnesses, normally they will testify last (after . . . the claimant and his/her witnesses have [testified]) with a medical advisor's testimony always preceding a vocational expert's. The ALJ will ask if the representative has a closing argument or statement to make. Following the representative's argument/statement, the ALJ will close the record and conclude the hearing. Alternately, the ALJ may order a consultative examination and/or hold the record open for a specified period for receipt of additional evidence to be submitted by the claimant.

The shift from the ALJ's opening statement and introduction of documentary evidence into the record to the presentation of evidence is typically accomplished by the ALJ asking the representative if he or she wants to make an opening statement, by the judge's announcement that the representative may begin the questioning, or by the judge's move to interrogate the claimant.

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ALJs are prohibited from hindering or interrupting claimants' efforts to present their medical disability-related problems and must try to allow claimants to testify in their own way, if they have good reason for doing so. At the same time, judges are legally charged with developing the record to the fullest extent possible. In our experience, the ALJ in a Social Security hearing generally will elicit further evidence from the claimant after the representative has completed his or her first round of questions. Oftentimes, the representative again questions the claimant after the ALJ's interrogation in order to clarify any points which appear ambiguous from the perspective of the representative's theory of the case.

The composite of speakers and speeches that make up the Social Security disability hearing can be analyzed roughly according to the traditional forensic speech structure of introduction (exordium), narration of relevant facts or events (narratio), outline of the direction the speech will take (partitio), presentation of evidence or proof (confirmatio), refutation (reprehensio), and conclusion (conclusio). Typically the judge contributes the exordium. The judge, claimant, representative, and witnesses (if any) contribute to the middle parts of narration, partition, proof, and refutation. The judge, possibly with some participation from the representative, contributes the conclusion.

The primary purpose of the hearing is to enable the judge to elicit all information (including evidence of the claimant's credibility) relevant to ascertain the practical truth behind the documentary evidence in the claimant's record. Thus, however many voices are involved in clarifying the points at issue, developing the proof, and answering objections, and to however many intentions that complexity gives rise, the ultimate audience of the composite hearing includes the formal speaker of the discourse, that is, the ALJ. This rhetorical situation makes the Social Security administrative law hearing comparable, at least theoretically, to self-deliberation or epidictic, the two categories of discourse previously discussed that can arguably dispense with such formalities of persuasion as introductions because the audience in such speaking situations is ideologically, if not actually, identical with the speaker. Despite these formalistic similarities, the hearing setting is not epidictic or self-deliberative. We contend that it is crucial to recognize this reality if we are to advocate effectively on behalf of claimants. To the extent

33. Cicero, De Invenzione, supra note 15, at I.XIV.19. This forensic structure dates back to the earliest days of formal speech. See Aristotle, supra note 23, at 3.13 (1414a) ff. The pattern, however, can be found in nonforensic speech throughout the ages, as, for instance, in the Declaration of Independence.
34. Insofar as all adjudicated legal discourse replicates this form, it may easily be seen how legal discourse "represents the closure of the public sphere" and how "one of the principal effects of legal discourse is that of limiting communication to a restricted and specialized audience." Peter Goodrich, Reading the Law: A Critical Introduction to Legal Method and Techniques 182, 187 (1986).
claimants and representatives give in to the rhetoric of this fiction they also give up their voice and, with that, a tremendous potential to heal.

B. Underlying Form: A Multiplicity of Speakers, Audiences, and Intentions

To elicit all relevant evidence necessary to adjudicate cases fairly, judges must interact meaningfully with competing, often interchangeable, speakers, purposes, and audiences. Hence, to allow claimants to tell their stories as fully, openly, and truthfully as possible, the judge must for some portion of the speech become the audience, and the claimant must for some portion of the speech become the primary speaker. With each additional speaker, the rhetorical situation grows increasingly complex. The ostensible role of claimant representatives is, of course, to help claimants present their cases fully and persuasively in order to convince the judge or a reviewing court to grant benefits. To fulfill this purpose, the representative and claimant engage in an interactive dialogue, similar to that which ensues between the judge and the claimant. The role of the representative, however, may extend further. Representatives may act as advocates not only for the immediate award of benefits, but also for the larger empowerment or healing of their clients. In doing so, the representative becomes a speaker with two audiences: claimant and judge.

Also critical to understanding the rhetoric of the Social Security disability hearing is the fact that the decisions of Social Security ALJs are not final but may be appealed to federal district and circuit courts. This opportunity to appeal means that ALJs conduct proceedings with yet another audience in mind: reviewing federal court judges. Because, as we explain below, the only procedural guidelines for the judge in opening the hearing pertain to the interests of this reviewing audience, we posit that the discourse is controlled by the potential audience of federal judges, not the actual audience of claimant.

Thus, one may view the overall structure of the hearing as suggesting a rhetorical situation in which the primary speaker and the ultimate audience are one and the same: the judge. In that case, the hearing would present a setting in which an *exordium* is not precisely necessary. However, since the hearing process in fact involves a multiplicity of speakers, speeches, and audiences there is a tremendous need for the presiding judge to open with statements

35. This role of the claimant representative is, without question, important. In 1990, 65.3% of claimants appearing before Social Security ALJs were represented by a friend, paralegal, or attorney, and 68.8% of these received favorable decisions, in contrast to only 50.4% of unrepresented claimants. *Representation Statistics, Soc. Security F.* (Nat'l Org. of Soc. Sec. Claimants' Reps., Pearl River, N.Y.), Sept.-Oct. 1991, at 28.

36. Though we had previously supposed that the effect of HALLEX was to increase the fairness of the hearing to the claimant, we now suspect that the guidelines in HALLEX may in important ways actually compromise the claimant's chances of a fair hearing by focusing exclusively on clarifying procedural elements important to reviewing the case and doing little to establish a genuine meeting of the minds.
designed to unite these audiences and establish a community of minds. A 
recent study of a random sample of the transcripts of Social Security 
Administrative hearings held in Boston, Chicago, and San Francisco and then 
appealed to federal district court, however, reveals that ALJs frequently omit 
this essential and highly political part of discourse.\textsuperscript{37}

\section*{IV. The ALJ's Introduction and Opening Statement}

\subsection*{A. The Hearings, Appeals, and Litigation Law Manual}

As prescribed by HALLEX, the Social Security Administration's manual 
for ALJs, the Social Security disability hearing should begin with 
introductions,\textsuperscript{38} an opening statement,\textsuperscript{39} and other remarks and 
procedures.\textsuperscript{40} Specifically, HALLEX states that judges must introduce 
themselves and any hearing office staff present in the hearing room, explain 
why the staff is present (for example, to run the recording equipment and take 
notes), and identify and explain the role of any other person present (including 
interpreters, vocational experts, medical experts, and the claimant's friends 
or family members). After the introductions, the hearing should officially begin 
with an opening statement that explains "how the hearing will be conducted, 
the procedural history of the case, and the issues involved."\textsuperscript{41}

HALLEX leaves the exact content and format of the opening statement to 
the discretion of the ALJ,\textsuperscript{42} although a strict interpretation of HALLEX 
suggests that the opening statement should satisfy numerous specific 
requirements. This opening should be brief.\textsuperscript{43} The judge should explain how 
the hearing will be conducted,\textsuperscript{44} mentioning, for example, that she will take 
the testimony of the claimant on questions about the claimant's age, education, 
work history, and impairment, and that the claimant will respond by giving 
testimony under oath. Pursuant to HALLEX, the judge should explain the 
procedural history of the case\textsuperscript{45} and should reference the filing dates of the 
initial application, the reconsideration, the request for hearing, and the date 
when notice of the hearing was sent. To explain the issues involved in the 
proceeding, the judge should mention whether this is a Social Security 
Disability Insurance or Supplemental Security Income claim; what the 
sequential evaluation process is and how it will be applied to evaluate his or

\textsuperscript{37} See Mills, The Hearing and Decision-Making Process, supra note 3, at 118.
\textsuperscript{38} HALLEX, supra note 2, at 1-2-650.
\textsuperscript{39} Id. at 1-2-652(A).
\textsuperscript{40} Id. at 1-2-610, 1-2-640.
\textsuperscript{41} Id. at 1-2-652(A).
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Id. at 1-2-660. See also Stevenson v. Heckler, 588 F. Supp. 980 (1984).
\textsuperscript{45} HALLEX, supra note 2, at 1-2-652(A).
her case; the reason for the presence of any vocational and/or medical experts present; and how these professionals (if any) will be questioned.\textsuperscript{46} The ALJ should inform the claimant that the burden of proof rests on the claimant in Social Security cases.\textsuperscript{47} Finally, the ALJ must ask whether the claimant has any questions about the hearing process.\textsuperscript{48}

Again, HALLEX leaves the exact content and format of the opening statement to the discretion of the ALJ. However, a sample opening statement provided by the Central Office of Hearings and Appeals illustrates how succinctly the above-mentioned conditions can be met:

The record in your case established that you filed an application for (SSI/SSDI) on (date). You were advised that your claim was denied on initial and reconsidered determination. On (date) you requested a hearing. A notice of hearing was sent to you and we are here pursuant to that notice. The general issue is whether you are entitled to a period of disability and disability benefits under the provisions of Title II of the Social Security Act (or to Supplemental Security Income under Title XVI of the Social Security Act). I will be taking evidence as to the severity and expected duration of your impairments and as to your age, education, and work experience. In preparing my decision, I will consider the following: First, whether you can be found under a disability solely on the basis of the medical evidence. If not, I will consider whether your impairments are severe and whether they prevent you from performing your past relevant work. If they are, I will next consider whether they are severe enough to prevent you from performing any work that exists in the national economy considering your age, education and work experience within the past 15 years. Do you have any questions as to the nature of these proceedings, the history of your case or the issues to be considered?\textsuperscript{49}

The introduction that ALJs should use to open hearings is important. The required information helps to ensure the reviewability of the hearing, should it be appealed to a higher court. Where they testify, identification of medical and vocational experts is crucial because judges rely heavily on expert testimony\textsuperscript{50} and because unidentified participants obviously cannot be held accountable for their statements or other contributions. It is important that

\textsuperscript{46} Id. at 1-2-670(B)(1).
\textsuperscript{47} Id. at 1-2-652(A); see also Mills, supra note 3, at 109 for author’s interpretation of this section of HALLEX as requiring information about the burden of proof as part of the general explanation about how the hearing will be conducted.
\textsuperscript{48} Office of Training, Social Security Admin., ALJ Training Materials (1993) (materials provided by Peter Dowd, ALJ Training Director, Baltimore, MD).
\textsuperscript{49} Id. at 2.
judges' opening statements specify the procedural history of the case and the issues involved.

Aside from facilitating review, this "formality" is necessary to ensure that all relevant participants know that each participant is aware at the time of the actual hearing that they are discussing the same and appropriate circumstances. Opening statements are also essential to ensure that all actual participants in the hearing—the judge, the claimant, the claimant representatives, and any witnesses—are afforded the opportunity to realize their respective intentions and to fulfill their particular responsibilities to the other speakers and audiences whose speech comprises the larger discourse.

Insofar as the judge in these hearings is not only the formal speaker but also the ultimate audience and decision-maker, we can see that the judge's introduction may affect the claimant's participation as well as the judge's own participation in the hearing. Making an opening that is clear and engaging to the claimant whose testimony the judge is about to hear requires the judge to recognize the claimant as an actual audience. Such acknowledgement of the claimant as audience increases the likelihood that the judge will actually listen to the claimant. In other words, the willingness to address a particular audience confers a certain honor on the audience and presupposes a certain humility on the part of the speaker. To the extent he or she delivers an *exordium* that not only acknowledges the claimant as an audience but also engages the claimant in a genuine community of minds, that judge effectively democratizes the rhetorical situation of the hearing and establishes the claimant as interlocutor, as one who is free to speak to the best of his or her ability. To the extent the judge fails to engage the claimant, perhaps delivering the mandated introduction in a language and tone that would satisfy only the potential audience of reviewing court judges, the judge effectively privileges the dominant model of self-sufficient self-deliberation over all other potential rhetorical models of the hearing process. In so doing, the judge restricts and reduces the claimant to the fixed and unitary status of "speech," or proof, or evidence. The judge, in this case, contributes to the "exclusion of dialogue in favor of monologue." The claimant in this case is never allowed to enter the discourse as a true interlocutor, as a being capable of having and telling a story.

Thus, the ALJ's *exordium* is important for the effective participation of the judge in his or her role as judge. It is certainly also crucial for the claimant whose case is being heard. For the most part, claimants are very nervous at their hearings. Few are familiar even with informal court procedure and fewer still have the training required to follow the language, details, and sequence of events that make up the disability hearing. Moreover, the claimant must discuss issues ranging from bodily functions to reliance on public aid. Finally,

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52. *Goodrich*, supra note 34, at 188.
for most claimants, the stakes are very high. By the time they enter the hearing room, many claimants have waited two years or longer to have the issue of their future benefits decided. The combination of economic hardship they have endured since becoming disabled and unable to work, the suffering experienced from the disability, and the pain of having been denied benefits at the initial and reconsideration levels makes the hearing itself an intensely charged event. Anyone in those circumstances confronting a room full of strangers conversing in abstract language that appears to have no beginning, middle, or end, would no doubt be intimidated and perhaps even antagonized. In no way could such a situation be expected to encourage the openness and presence of mind the claimant needs to act effectively and meet the required burden of proof through the complex Social Security hearing process. Introductions of strangers, explanations of their roles, and a complete opening statement that both establishes a genuine community of minds and explains to the claimant what he or she can expect in the hearing can help lessen the intimidation that disability claimants likely face and encourage them to participate as freely and effectively as they must in order to prevail.

Thus, the judge’s introductions and larger opening statement are essential to ensure fairness in the process. These opening remarks provide the only orientation into this highly complex hearing procedure that claimants, who are often unschooled in the process, are entitled to receive. They are essential in order to inform the claimant what to expect from the hearing and to orient the claimant as to his or her expected role in the hearing. At the same time, opening remarks provide assurance that the judge acknowledges the claimant and their relationship.

B. Actual Practice

Despite the tremendous importance of an effective *exordium* and all the guidelines in place to ensure that in every case judges make one, Linda Mills recently found that Social Security ALJs rarely fulfill this basic obligation. Of the relevant sixty-five cases reviewed in her study of sixty-seven hearing transcripts and decisions, she found that judges introduced themselves only 43% of the time and their staff only 14% of the time. They explained why that staff person was present in the hearing room only 26% of the time. Similarly, judges introduced interpreters in only ten of the seventeen hearing transcripts reviewed where interpreters were involved. Although judges tended to do a better job of introducing experts at the hearing (seventeen of the nineteen experts were introduced), only two of nineteen judges explained to the claimant what role the expert would play.53

Beyond that, judges in 28% of the sixty-five cases reviewed failed to give any opening statement at all, and another 44% gave only an incomplete

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opening. Thus, judges in a total of 72% of all cases studied fell considerably short of their professional and rhetorical responsibilities.\textsuperscript{54} Eleven of the thirty-four cases (32%) in which ALJs did not so inform applicants involved claimants who were non-English speakers. Social Security already has a poor reputation for communicating with claimants in languages other than English, and these violations only perpetuate the alienation of non-English speakers from the process.\textsuperscript{55}

Furthermore, almost all judges failed to comply with the guideline requiring them to summarize the procedural history of the case before them in their opening statements. Thus, 72% failed to mention even the crucial detail of when the initial application was filed. Noncompliance with reference to other important dates was even higher. Over half of the judges (52%) failed to mention whether claimants had applied for Social Security Disability Insurance or Supplemental Security Income, despite HALLEX.\textsuperscript{56} Failing to verify such information with the claimant can and does result in unnecessary administrative delay and appeals.

In 97% of the applicable sixty-five hearing transcripts studied, the judge failed to explain to the claimant that the Social Security Administration employs a five-step sequential evaluation process to make disability determinations and failed to specify what those five steps entailed. Likewise, in 97% of the transcripts reviewed, judges neglected to inform the claimant that the burden of proof in Social Security cases rests on the claimant. Even in the two cases in which judges complied with this rule, their compliance was less than explicit. One judge merely said that the hearing "allow[s] you an opportunity to show that you cannot return to your past work." The other stated that the claimant would have to show that he was too disabled to work.\textsuperscript{58} Neither of these judges, and no other judges in the study sample, explained what the "burden of proof" means in a Social Security claim: that claimants must proffer evidence and testimony proving by a preponderance of the evidence that their medical impairments prevent them from performing their previous work activity.\textsuperscript{59}

Given that so few judges made opening statements and that even fewer explained the rules to which they were bound when making decisions, it is not surprising that 94% of the judges failed to offer claimants the opportunity to direct questions about the hearing process to them.\textsuperscript{60} This oversight may reflect the belief suggested by one ALJ that asking claimants if they have

\textsuperscript{54} Id. at 112-23.
\textsuperscript{55} See Senate Select Comm. on Aging, 102d Cong., 2d Sess., Insurmountable Barriers: Lack of Bilingual Services at Social Security Administration Offices (Comm. Print 1992).
\textsuperscript{56} Mills, The Hearing and Decision-Making Process, supra note 3, at 112-23.
\textsuperscript{57} Reed v. Sullivan, No. 88-6170, slip op. at 3 (N.D. Ill. 1990).
\textsuperscript{58} Dealmeida v. Bowen, No. 87-3402, slip op. at 109 (N.D. Cal. 1988).
\textsuperscript{60} Id.
questions about the process may encourage them to challenge the process too vigorously, thereby undermining the judge's authority.\textsuperscript{61}

Left to devise their own opening statements, Social Security ALJs in the sample of cases studied did not satisfy even the basic HALLEX guidelines necessary to ensure the reviewability of the hearings over which they presided. Beyond that, judges almost uniformly avoided any statements that would engage the claimant in a genuine community of minds and democratize the situation for the claimant. Rather than acknowledge its importance for raising expectations and setting the standard for all that follows, the ALJs studied appear to treat the \textit{exordium} as an "empty formality."\textsuperscript{62}

ALJs often justify procedural omissions on the ground that the claimant's attorney informs a claimant of the hearing procedure before he or she appears before a judge. Indeed, ALJs did make opening statements of some sort in the hearings of eight of the nine claimants studied who appeared without representatives.\textsuperscript{63} Relying on attorneys to explain the process, however, is not wise. A small study found that when asked whether they felt prepared for their hearings, claimants expressed a need for judges to explain the process even when their attorney had previously done so.\textsuperscript{64} Moreover, the activities of attorneys and representatives are far less regulated in this regard than are those of judges.\textsuperscript{65} But even if all representatives conveyed to their clients the basic hearing procedure, judges would still retain the responsibility in their \textit{exordia} to identify with the claimants in order to ensure anything resembling genuine justice.

\textbf{V. Claimant Representatives' Opening Statements}

The role of claimant representatives is greatly affected by this context of a hearing in which judges—acting both as formal speakers and ultimate audience/adjudicators—violate their responsibility to the claimant to conform to the guidelines and adhere to the social expectations inherent in a speech act. In this peculiar rhetorical setting, we contend that the role of the representative, whether traditional or radical, involves a definite, largely unrealized, responsibility to make opening statements that empower claimants to stand up boldly as speakers and engage in the therapeutic process of public storytelling.

\textsuperscript{61} Id. at 123.
\textsuperscript{62} JERRY L. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS 66 (1978). After reviewing ALJ transcripts and observing disability hearings, these authors found that judges rarely gave adequate opening statements. Id.
\textsuperscript{63} See Mills, The Hearing and Decision-Making Process, supra note 3, at 124.
\textsuperscript{64} Linda Mills, The Disability Benefit Applicant 7 (1988) (unpublished manuscript, on file with the Yale Journal of Law and Feminism).
\textsuperscript{65} Reasoning that some claimants' lawyers do an inadequate job of representing them, at least one federal court has held that a judge retains his or her duty to develop the record even in cases where claimants are represented by counsel. Thompson v. Sullivan, 987 F.2d 1482, 1492 (10th Cir. 1993).
Regardless of the judge's compliance with the established hearing procedure, the primary and obvious role of the claimant representative is to act as facilitator. In this sense, the job of the representative is to work dialogically with the claimant to ask the questions that help the claimant present his or her full story. In classical terms, this traditional role implies actually putting on the legal mask or persona for the claimant by making sure that all information of persons, places, and actions needed to prove the claim is disclosed in an order and a manner that will convince the judge.

However, a claimant representative's job as facilitator is not restricted to helping the claimant present evidence favorably to a judge. According to certain modern theorists, claimant representatives, particularly in civil rights and poverty or welfare law, have a more subtle obligation—one related to the empowerment, or even healing, of the claimant. Thus, a potential second role of the representative is to act as an advocate in the sense described by Anthony Alfieri and Gerald Lopez. Such an advocate collaborates with the client to work through the structural constraints that comprise the legal process in a way that redefines traditional roles and empowers the client to strive for individual and social justice.

A. Traditional Representation

With respect to the former, more traditional role of the representative as facilitator, the opening statement may appear not to be formally necessary. The occasion of the speech would seem clear: the representative is about to help the claimant produce favorable evidence in the speech the judge has previously introduced. The claimant and representative are not in this sense making a speech as much as they are contributing to a significant part of speech, the portion given over to proof (confirmatio). Given this perception of the


Feminist and critical race scholars have also proposed political lawyering theories and methods. See, e.g., Marie Ashe, "Bad Mothers," "Good Lawyers," and "Legal Ethics," 81 GEO. L.J. 2533 (1993); Goldfarb, supra note 9; Margaret M. Russell, Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice, 43 HASTINGS L.J. 749 (1992); Angelo N. Ancheta, Community Lawyering, 81 CAL. L. REV. 1363 (1993) (reviewing GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992)).

67. Alfieri, Practicing Community, supra note 66; LOPEZ, supra note 66.
representative’s role in the hearing process, our experience is not surprising. Observing and reading the transcripts of hundreds of Social Security disability hearings, we have typically found that nothing more than a weak transition distinguishes the division between an ALJ’s opening remarks and a representative’s elicitation of testimony. A typical exchange proceeds as follows:

ALJ: Counsel, you may proceed with questioning.
Rep: Thank you, Your Honor. To begin, then, Ms. Smith, please state . . . .68

At the same time, even if representatives perceive their role as limited to contributing to a composite speech, there is no formal reason why they should not make opening statements. The solemn invocations to the gods that Plato inserts between major structural divisions in his dialogues lend emphasis to the philosophical importance of the passages to follow.69 Often even characters who play facilitator roles in drama and fiction are introduced.70 Similarly, when writing a chapter to a book or a section of a long article, one generally adds an appropriate introduction even though one has previously introduced the text as a whole. The confirmatio in an administrative law hearing is in this sense no different from a significant part of any other kind of discourse.

68. Of course, the fact that most judges do not give attorneys a meaningful opportunity to present an opening statement may account for why at least some attorneys choose to transition directly from the judge’s initial remarks, no matter how brief, to the questioning.
69. For example, in Phaedrus, after Socrates (with covered head) delivers a persuasive but “false” (displeasing to the gods) speech, he performs “an ancient rite of purification,” begs the gods for forgiveness, uncovers his head, and then delivers his “true” (and pleasing) speech. The excursion into mythology serves both as a commentary on the “false” speech and as an introduction to the true, pleasing one. PLATO, PHAEDRUS 242-43 (W.C. Helmbold & W.G. Rabinowitz trans.).
70. In Beloved, for instance, Toni Morrison creates the character of Amy to deliver Denver, the baby girl to whom Morrison’s main character Sethe gives birth as Sethe crosses the Ohio river from slavery into freedom. Amy is a true facilitator. Her role is precisely to deliver the child, sustain Sethe through the delivery and across the river, and perhaps also to help define in its early stages the supernatural character of the novel.

As the narrative unfolds in flashbacks of Sethe’s “rememory” from her place of freedom at “124,” Amy appears three times. She is introduced twice. In the first instance, we learn of her potential to serve as Sethe’s helper:

- Her name was Amy and she needed beef and pot liquor like nobody in this world. Arms like cane stalks and enough hair for four or five heads. Slow-moving eyes. She didn’t look at anything quick. Talked so much it wasn’t clear how she could breathe at the same time. And those cane-stalk arms, as it turned out, were as strong as iron.

In the second introduction, we learn of her place on the psychic or supernatural level on which the novel also unfolds. Several pages before Amy’s second appearance, Sethe explains Denver to Paul D, who had just found his way to Sethe’s home, and, in doing so also explains how a creature like Amy could even have come about:

- Uh huh. Nothing bad can happen to [Denver]. Look at it. Everybody I knew dead or gone or dead and gone. Not her. Not my Denver. Even when I was carrying her, when it got clear that I wasn’t going to make it—which meant she wasn’t going to make it either—she pulled a whitegirl out of the hill. The last thing you’d expect to help.

Id. at 42.
When we further consider the complexity of the hearing discourse, the typical claimant's frame of mind, the inherent insufficiency of the Social Security Administration manual's prescribed opening statement to create a community of minds, and the tendency of ALJs to rush through or omit even that, then the representative's responsibility seems clear. Even representatives who subscribe to traditional ideas about a lawyer's role should begin their questioning with an exordium to help orient the claimant, focus his or her attention on the task ahead, and decrease as much as possible the discomfort the claimant naturally feels the instant before he or she begins to speak.  

B. Therapeutic Advocacy

For representatives who perceive their advocacy in the more radical terms we describe above, the opening statement is indispensable. The opening statement presents one of the "practical moments" that often go unnoticed. These moments may actually provide a central opportunity for rebellious lawyering, in part because they are "unpredictable" and, thus, among the "small everyday details" of practice that offer the greatest chance of reorienting the traditional sensibilities and skills of advocacy. We will take two routes, one theoretical and one practical, to explain how the claimant representative's opening statement can fulfill this revolutionary role.

Kristin Bümiller has argued that victims of discrimination often fail to pursue claims for damages because they accept the legitimacy of their own defeat. Their identification with their oppressor causes them to blame themselves for their plight and undermines their ability to transcend the situation. Ironically, Bümiller argues, the silence resulting from a victim's decision to avoid, hide from, or submit to social pressure may be evidence of his or her own will to survive. Similarly, victims of poverty and disability have been excluded from legal procedures by an institutional environment that reduces them to silence and inaction. We suggest that the disability hearing, if used therapeutically, provides clients like those Bümiller encountered an empowering and affirmative experience in and through the system, rather than outside it.

In The Antinomies of Poverty Law and a Theory of Dialogic Empowerment, Anthony Alfieri argues that current attorney-client relationships in the poverty law tradition "leave a tragic legacy for the poor" in that poverty lawyers, presented daily with opportunities to empower their clients, typically discard

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72. Lopez, supra note 66, at 62-68; Alfieri, Practicing Community, supra note 66, at 1761.
73. Alfieri, Practicing Community, supra note 66, at 1762.
75. Id.
these important opportunities. He provides the example of the mixed direct service/law reform case of *Williams v. Axlerod* to illustrate a general principle: While poverty lawyers may successfully pursue a claim, they nevertheless frequently fail “to synchronize the vindication” of the individual interest with that of the community. They fail because they never lay the “basic groundwork” of an “attorney/client engagement in dialogue, specifically in socio-economic and political discourse,” that is relevant to the issues of the case.

A further example of such missed opportunities is provided in Lucie White’s celebrated article *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.* Here White argues that Mrs. G., “a woman subordinated by race, gender, and class,” becomes empowered when she tells the truth to the ALJ hearing her welfare overpayment appeal—she bought Sunday School shoes for her children, a prohibited expenditure, rather than school shoes, an allowed expense:

By talking about Sunday shoes, Mrs. G. claimed, for one fragile moment, what was perhaps her most basic “life necessity.” She claimed a position of equality in the speech community—an equal power to take part in the making of language, the making of shared categories, norms, and institutions—as she spoke through that language about her needs.

Even though Mrs. G. lost her appeal, White considers Mrs. G.’s experience empowering. We wonder if it is so beyond the “one fragile moment” she identifies. Mrs. G.’s attorney never discussed with her client why Mrs. G. departed from her prepared testimony during the hearing or the long-term ramifications for her client of her “empowering” statement. Even White concedes that Mrs. G’s victory was severely limited:

Mrs. G.’s unruly participation at her hearing was itself political action. Yet it was an act that did little to change the harsh landscape which constricts Mrs. G. from more sustained and more effective political participation. Substantial change in that landscape will come only as such fragile moments of dignity are supported and validated by law.

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77. *Id.* at 694.
78. *Id.* at 695.
79. *Id.* at 694.
81. *Id.* at 5.
82. *Id.* at 50.
83. *Id.* at 52.
In contrast, we believe that potential for substantial change and empowerment dwells in the honesty and partnership that can be established in attorney/client relationships. We can use what Alfieri calls transformational dialogue—dialogue that unfolds when we reject prevailing mythologies about clients; dialogue that arises from faith, practical wisdom, respect, and sympathy. By engaging in such dialogue, representatives can help create space and provide tools for client participation that are so powerful that they outlive whatever assertion the client succeeds in making in the hearing. Such dialogue is a springboard from which clients can act as political agents not only to influence their everyday lives in interactions within the system that traditionally disempowers them, but also to take affirmative steps to influence these institutions. We argue that to have a meeting of minds between client and representative over how the case is presented, including whether and how an opening statement is delivered, is one of the few transformational acts in the hearing process. As such, it is a seed for ongoing client action, whether independent or community-based.

The following hypothetical example illustrates how instrumental a representative’s opening statement can be:

Ms. Davis is a 24-year-old woman who suffers from chronic depression. Her sadness has been so pervasive that she has been unable to work since graduating from high school. She would get a job and lose it when she couldn’t extricate herself from bed in the morning. After many failed attempts at working, she began seeing a county therapist. After a year of psychotherapy, she and her therapist unraveled a history of childhood sexual and physical abuse that not surprisingly rendered Ms. Davis paralyzingly unable to function. Further devastated by the recovery process, Ms. Davis applied for Social Security benefits.

In most disability hearings, it is the depression, not the history of abuse, that would be the subject of the hearing. In questioning the claimant, both the representative and the judge would focus on such factors as the severity of the depression, how often Ms. Davis had attempted therapy, and how the depression has affected her ability to function at work. There would be little or no mention of the history of abuse, an omission of truth that would likely further the claimant’s shame and exacerbate the pain of her public denial.

84. As an example of a client influencing her everyday life, we consider the individual who, after winning Social Security benefits, is able to take independent action to speed up payments or to secure an emergency payment.

85. Examples might include clients giving testimony at county board of supervisors meetings to prevent the elimination of welfare or health benefits.

86. Public exposure of a history of childhood sexual assault can have effects that are culturally differential. Especially in this area, claimant representatives should be sensitive to cultural differences.
By contrast, hearing the narrative of sexual abuse linked as a primary factor to her narrative of disability would potentially have tremendous therapeutic value for a claimant such as Ms. Davis. First, it attributes to the disability the only cause that has the emotional power to explain it. Further, it does so in a public arena in which Ms. Davis can obtain compensation for her disability. Ms. Davis will never be free of the pain of her past, but to have its effect on her ability to function publicly stated and acknowledged can help her reach closure with the past experience and can empower her to come to terms publicly with something that probably everyone she knows has until now denied. It may well represent a turning point in her life.

Many, perhaps most, claimants seeking benefits with the Social Security disability system are disabled in part because they never found a voice within the larger and smaller communities in which they were raised and where they attempted to live and work as adults. Rather, many of these claimants have been the victims of childhood, domestic, and street violence that interfered with the development of an effective voice.

It is impossible to overstate the importance of the hearing in the lives of such claimants. Currently, a claimant's hearing before an ALJ occurs, on average, two years after his or her original application for benefits. A claimant must experience two previous denials of benefits before reaching this point. The denial letters are so cursory in content and tone that many claimants are so devastated that they become suicidal. At the same time, the persistent effort to secure benefits to alleviate poverty and obtain desperately needed medical care constitutes the first concerted effort many disabled individuals have ever made as agents on their own behalf. For many, too, the hearing is their first experience with self-sought legal representation. For such claimants, the experience of hearing their representative stating their

87. By therapeutic, we mean the use of storytelling to raise the claimant's consciousness to the point of personal transformation. This empowers her to feel as though she is capable of her own identity challenging (hence changing) her external conditions and even the institutions that rob her of that to which she is entitled, including a decent income, a safe and comfortable place to live, and a dignity which helps her move in the world.

88. As Goldfarb explains, "storytelling . . . serves as a corrective. Speaking one's experience can disrupt theory through . . . personal stories for which the theory cannot account." Goldfarb, supra note 9, at 1630-31. Thus, a woman's own explanation of her impairment may prevent her from subscribing to the "theory" of abuse that she does not deserve happiness, a sense of well-being, or personal power. See Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87 MICH. L. REV. 2411, 2437-48 (1989) (discussing therapeutic value of storytelling).

89. See, e.g., Alfiere, Disabling Lawyers, supra note 66; Mills, The Hearing and Decision-Making Process, supra note 3.


91. Though the Social Security Administration is making efforts to speed up the process, these efforts are expected to take five years to implement, and may or may not live up to expectations. SOCIAL SECURITY ADMIN., PUB. NO. 01-002, DISABILITY PROCESS REDESIGN 87 (1994).


93. The authors have seen this phenomenon all too many times in our fourteen years' combined experience in representing disability claimants in California.
claim in positive light before a judge can be tremendously empowering. It can substantially restore to such historically disempowered claimants the voice and, with that, the spirit needed to tell their stories fully and openly at the hearing and to view themselves as effective public personae.

C. Toward a Client-Oriented Hearing Process

There are two interconnected reasons why representatives seldom make opening statements. First, representatives wish to preserve the informal nature of the hearing. Second, representatives often feel bound to show deference to the absolute authority of the judge. As LaVere argues:

ALJs want the hearing to be as informal as possible but they also want to be in control of the proceedings. . . . Because an ALJ asks the representative if he or she wants to make an opening statement, it does not mean that the representatives should make one. It facilitates the hearing and signals that the hearing will, in fact, be informal if the representative waives making an opening statement. (Argument is best made at the close of the hearing.) Also, comments on proposed exhibits should be reserved and the making of motions and objections should be avoided.95

LaVere's statement is based on his characterization of the hearing as an "informal" and "nonadversarial" quasi-judicial event staged for the sole benefit of the ALJ. It presumes that any strategy that makes the hearing more formal and adversarial, or that acknowledges the complex rhetoric of the hearing, disadvantages the claimant because it challenges the authority of the judge to set the tone and to control the structure of the hearing. In part because it is unexpected, the representative's opening statement may introduce tension into the process and potentially dispose the ALJ against the testimony of the claimant. While a strong opening statement may put the claimant in the best possible frame of mind to tell his or her story, it may also put the ALJ in the worst possible frame of mind to hear that story fairly and impartially. For these combined reasons, very few representatives deliver opening statements on behalf of their clients.

However, good rhetoric and client-oriented politics combine to suggest that claimant representatives no less than judges should make opening statements in Social Security disability administrative law hearings. To help create an

94. We realize that in some cases an opening statement can be disempowering. For example, the client who denies that she has a mental impairment would not be empowered by a statement of this type. This raises the ethical question of whether an advocate should present her client's case as persuasively as possible, despite the fact that presentation of some of the relevant evidence will meet with the claimant's disapproval. Similarly, an opening statement can terrify a claimant who is very ill or near death.
95. LAVERE, supra note 30, at 268.
arena in which the claimant can shift roles and become a storyteller (a kind of public speaker), representatives need to provide some on-the-spot orientation. They need not necessarily advance the basic theory of the case as a proposition that the claimant will then defend; they need not, in other words, advance a direct introduction. A more subtle introduction, such as follows, may more effectively draw both audiences, claimant and judge, into the proceeding through voice and gesture:

Ms. Davis, it is our purpose here and now to explore your disability and to examine its effect on your functioning. As we have discussed, your disability stems from a history of childhood physical and sexual abuse. The judge and I will ask you questions not only about the extent and nature of your disability but also about its cause and manifestations. Together, Your Honor, we will establish the relevance of that history to your daily functioning, Ms. Davis. I understand that these are difficult, deeply personal issues for you to speak on, Ms. Davis. We have discussed them previously and I just want to be sure that you are comfortable discussing them now. Are you ready to tell your story?

For representatives who intend, further, to employ the hearing situation as an extension of the transformational dialogue that begins in the privacy of the client/attorney relationship, the obligation multiplies. The representative needs to employ the hearing as a means to obtain for that client not just his or her fifteen minutes of justice but a sense of efficacy as a public figure that foreshadows a future of self-advocacy if not also public action.

But does the recommendation for opening statements by claimant representatives pose too great a risk? Is it advisable to present an opening statement and thereby empower and possibly assist in the spiritual recovery of one's client if doing so means that the claimant loses his or her case? Would it not be better in such instances to submit to a certain tyranny that further disempowers the client but that wins the case?

It may very well be true in some cases that an opening statement—any opening statement—will jeopardize the chances that a given ALJ will grant a given claimant's benefits. As we see it, the judicial system represents one of the last vestiges in American culture of a system in which one figure, a judge, possesses authority, or—let us correct ourselves—on too many occasions improperly assumes authority, to "rule over" all those who come before him or her.96 However, over time, representatives come to know the judges who hear cases in their geographical area and the propensity of any given judge to

96. Perhaps physicians comprise the profession with the second most dangerously over-elevated status in our culture, but with national health care in the vanguard, the authority of physicians in this country will likely over time come more to approximate that of physicians in European countries and Israel.
Opening Statements

so control the hearing situation. Representatives need to know their audiences, meaning the judges they appear before, as well as the claimants they represent, and to plan strategies accordingly.

In other cases, a representative’s opening statement may have little or no effect on the judge’s final decision. Legal discourse is and has historically been a highly restrictive genre. As Goodrich suggests, “the more strictly controlled access to the audience is,” the less other avenues of persuasion matter to the outcome of the speech. The judge, for instance, who does not recognize a particular impairment, like Chronic Fatigue Syndrome, as disabling, may not be much persuaded by any structuring (or even logical) device employed to treat the disease as such. Similarly, a judge who carries a prejudice against granting benefits to claimants of particular classes, for instance, “younger” individuals or claimants who contacted HIV through intravenous needle use, may not be much persuaded by any characterization of the claimant beyond that entrenched idea.

However, there are different kinds of opening statements, and almost any claimant will benefit strategically and, depending on the client/representative relationship that precedes the event, possibly also therapeutically, from some kind of orientation from his or her representative and mediator in the hearing situation. The answer to the questions of whether or not to deliver an opening statement and of what kind of opening statement to deliver must certainly take into consideration the very practical reality that not obtaining long-awaited benefits is itself dispiriting and disempowering. This disappointment is only temporary if the client appeals his or her case to the Social Security Appeals Council and, if necessary, to federal district court, and ultimately wins. If the client gives up her case after an ALJ denial, however, that disempowerment may be tremendous, because the client may have been enduring homelessness in addition to the impairment for the past year or so on the sheer hope of an award and some financial relief. In such cases,

97. Goodrich, supra note 34, at 175.
98. Chronic Fatigue Syndrome (CFS), also commonly termed Chronic Fatigue Immune Dysfunction Syndrome (CFIDS) and formerly also known as Epstein-Barr virus, is a syndrome of unknown cause, generally thought to be triggered by an infection. Its primary symptoms include exhaustion, fatigue, and other “flu-like” symptoms. Different CFS patients suffer with fluctuating severity from several or all of the following: mild fever, sore throat, painful or swollen lymph nodes, general muscle weakness/pain, headaches, joint pain, sensitivity to light, forgetfulness, irritability, confusion, inability to concentrate, depression, and insomnia. The syndrome is marked by an absence of detectable physical or laboratory abnormalities. See Keiji Fukada, et al., The Chronic Fatigue Syndrome: A Comprehensive Approach to its Definition and Study, 121 ANNALS INTERNAL MED. 953 (1994); Gary P. Holmes et al., Chronic Fatigue Syndrome: A Working Case Definition, 108 ANNALS INTERNAL MED. 387 (1988).
99. It is arguable that even if a claimant eventually wins his/her claim for benefits that the process itself has so irreparably damaged her self-worth that she can never entirely recover either physically or emotionally. This may account for the fact that less than 1% of disability recipients ever leave the rolls to work. See Charles Scott, Disabled SSI Recipients Who Work, 55 SOC. SECURITY BULL. 26, 26-36 (1992).
100. Thirteen percent of claimants who were denied benefits at the hearing stage did not pursue their claims further. House Comm. on Ways and Means, 103d Cong., 2d Sess., Overview of Entitlement Programs: Green Book 57 (1994).
that disempowerment may be total, even final. At the same time, representatives should not overlook the therapeutic effect on the individual of finding public expression for private pain and the importance of the representative in setting the appropriate stage for such expression. Equipped with awareness of our rhetorical responsibility, we cannot help but wonder whether legal therapy might in some ways be every bit as effective as psychological therapy.

VI. CONCLUSION

It is in the beginnings and the ends of speeches that we wield the greatest power to influence our auditors. Hence, the reputation of first and last impressions, opening acts, closing scenes. Though both structures have tremendous powers to influence, the impact of beginnings and endings is not the same. An ending refreshes the memory and amplifies what it contains, emphasizing its importance, its consequence, its uniqueness, or its harmony with other things of its kind. It brings to fruition all that has been said by giving the impression of saying all that can be said. It is the satisfaction of an appetite aroused by the beginning. The rhetorically and politically astute representative who bears these principles in mind need not anticipate negative strategic repercussions just because he or she makes an opening remark that genuinely raises the interest of the judge in the important questions that frame the case and perhaps, too, the larger policy issues that surround it. The risk, which may not be so great as many seem to expect, is especially worth taking if, at the same time, it helps to elevate claimants to their deserved position as full partners in their own making.

101. In the early 1980s when the Reagan Administration terminated benefits of over 500,000 disability recipients, at least six suicides were directly attributable to what amounted to mostly illegal terminations. For a description of the crisis, see generally MARTHA DERTHICK, AGENCY UNDER STRESS: THE SOCIAL SECURITY ADMINISTRATION IN AMERICAN GOVERNMENT (1990).

102. This suggestion assumes that lawyers should be empathetic and psychoanalytic in their practices—a much debated approach. Empathy has been a topic of much concern to the progressive lawyering community, generating debate on its practical merit. Few, if any, legal academics believe in it unconditionally. For some recent works on the uses and limits of empathy, see Richard Delgado & Jean Stefancic, Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?, 77 CORNELL L. REV. 1258, 1267 (1992); Toni M. Massaro, Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?, 87 MICH. L. REV. 2099 (1989); Lucie White, Seeking "... The Faces of Otherness ...": A Response to Professors Sarat, Felstiner, and Cahn, 77 CORNELL L. REV. 1499 (1992); for the application of psychoanalytic practices to law, see also Mills, supra note 13.

103. Walter Weyrauch has compared "legal therapy" to "psychological therapy," arguing that legal therapy may be more effective. See Massaro, supra note 102, at 2107 n.41.