Disabled Clients, Disabling Lawyers

Anthony V. Alfieri

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### Introduction

People with disabilities, especially the impoverished among them, have long been the object of legal advocacy. Historically, lawyers acting on behalf of the disabled poor have fashioned litigation strategies to se-

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### Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Introduction</strong></td>
<td>769</td>
</tr>
<tr>
<td>I. Ideals and Discourses</td>
<td>778</td>
</tr>
<tr>
<td>II. Administration and Adjudication</td>
<td>794</td>
</tr>
<tr>
<td>III. Victimization Strategy</td>
<td>811</td>
</tr>
<tr>
<td>A. Structure-Preserving Practices</td>
<td>812</td>
</tr>
<tr>
<td>B. Context-Preserving Practices</td>
<td>815</td>
</tr>
<tr>
<td>(1) Hearing Discourse</td>
<td>816</td>
</tr>
<tr>
<td>(2) Litigation Discourse</td>
<td>822</td>
</tr>
<tr>
<td>IV. Enabling Strategy</td>
<td>828</td>
</tr>
<tr>
<td>A. Oppositional Narratives</td>
<td>828</td>
</tr>
<tr>
<td>B. Structure-Transforming Practices</td>
<td>836</td>
</tr>
<tr>
<td>(1) Role Redefinition</td>
<td>837</td>
</tr>
<tr>
<td>(2) Reversion Crisis</td>
<td>838</td>
</tr>
<tr>
<td>C. Context-Transforming Practices</td>
<td>840</td>
</tr>
<tr>
<td>(1) Relational Reorganization</td>
<td>841</td>
</tr>
<tr>
<td>(2) Redivisions of Labor</td>
<td>844</td>
</tr>
<tr>
<td>a. Task Definition</td>
<td>846</td>
</tr>
<tr>
<td>b. Task Execution</td>
<td>846</td>
</tr>
<tr>
<td>Conclusion</td>
<td>848</td>
</tr>
</tbody>
</table>
cure basic individual rights and to obtain much needed institutional reforms. Spanning both civil and criminal law contexts, these strategies reveal the ideological and discursive conjunctions linking disability and poverty.¹ Nowhere are such conjunctions more striking than in the practice of Social Security law.²

The Old-Age, Survivors, and Disability Insurance (OASDI) program³ and the Supplemental Security Income (SSI) program⁴ of the Social Security Act frame the litigation strategies pursued by lawyers for the disabled poor. Like the notion of the poor, the concept of the disabled is an artifact of American law and society.⁵ An artifact is a social construct—a thing—consisting of historically specific ideals and discourses.⁶ Ideals signify normative images.⁷ Discourses inscribe those

¹ See Marvin B. Sussman, Dependent Disabled and Dependent Poor: Similarity of Conceptual Issues and Research Needs, in SOCIAL AND PSYCHOLOGICAL ASPECTS OF DISABILITY 247, 247 (Joseph Stubbins ed., 1977) ("Disability and poverty as phenomena are socially defined and structured.").

² See ROBERT H. HAVEMAN ET AL., PUBLIC POLICY TOWARD DISABLED WORKERS 53 (1984) ("Social Security is a compromise between an insurance program and an income redistribution program."); THEODORE R. MARMOR ET AL., AMERICA'S MISUNDERSTOOD WELFARE STATE 26-27 (1990) ("The basic purpose is to provide economic security, to prevent people from falling into destitution rather than rescuing them after they have already fallen."); id. at 102 ("[S]ocial insurance payments to the disabled and to the survivors of deceased workers eliminate nearly four times as much poverty among the nonaged poor as do means-tested cash benefits."); Robert M. Ball, The Original Understanding on Social Security: Implications for Later Developments, in SOCIAL SECURITY: BEYOND THE RHETORIC OF CRISIS 17, 37 (Theodore R. Marmor & Jerry L. Mashaw eds., 1988) ("Poverty among the elderly is concentrated largely on single retired workers and single survivors."). For a comparative analysis of disability programs, see MARGARET S. GORDON, SOCIAL SECURITY POLICIES IN INDUSTRIAL COUNTRIES: A COMPARATIVE ANALYSIS 111-33 (1988).

³ See infra note 115 and accompanying text.

⁴ See infra note 116 and accompanying text.

⁵ See CLAIRE H. LIACHOWITZ, DISABILITY AS SOCIAL CONSTRUCT: LEGISLATIVE ROOTS 1 (1988) (conceptualizing disability as a social construct); see also JOHN GLEIDMAN & WILLIAM ROTH, THE UNEXPECTED MINORITY: HANDICAPPED CHILDREN IN AMERICA (1980) (citing handicap as a social construct); SEYMOUR B. SARASON & JOHN DORRIS, EDUCATIONAL HANDICAP, PUBLIC POLICY, AND SOCIAL HISTORY 12-13 (1979) ("When we use the term mental retardation, we tend to be unaware of the perceptions and attitudes toward the people we have put in this category as reflections of our culture rather than inherent or objective characteristics of these people."); Malcolm Johnson, Dependency and Interdependency, in AGEING IN SOCIETY: AN INTRODUCTION TO SOCIAL GERONTOLOGY 212 (John Bond & Peter Coleman eds., 1990) [hereinafter AGEING IN SOCIETY] ("Inclusion in the groupings of dependent people involves a process of social definition.") (emphasis in original); Robert M. Nelson, The Poverty of Justice: Ethics and the Physically Disabled, in PSYCHOSOCIAL INTERVENTIONS WITH PHYSICALLY DISABLED PERSONS 222, 223-24 (Bruce W. Heller et al. eds., 1989) ("Handicap is a more obviously social construct, which may include external barriers or disadvantages imposed by society upon the disabled.") (citations omitted). See generally PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY (1967) (exploring the sociology of knowledge).

⁶ On the genesis of artifacts, see ROBERTO UNGER, FALSE NECESSITY: ANTI-NECES-
images in sociolegal roles and relations. Because of its ideological and discursive character, disability is a thing both imagined in lawyer consciousness and inscribed in lawyer talk.

Artifactual construction marks the momentary fusion of legal ideology and discourse, the temporary merger of lawyer consciousness and talk in daily advocacy. Despite the pretense of agreement, this union is

sitarian social theory in the service of radical democracy 2 (1987) [hereinafter unger, false necessity]. Compare charles davis, religion and the making of society, 81 nw. u. l. rev. 718, 719 (1987) (complaining that unger's artifactual thesis "overlooks the ambiguity of modernity") with susan s. silbey & austin sarat, critical traditions in law and society research, 21 law & soc'y rev. 165, 167 (1987) (asserting that "[t]he concepts, texts, and situations we both live with and observe do not exist outside the very systems of thought we construct"). See also robert bogdan & douglas biklen, Handicapism, in allen d. spiegel & simon podair, rehabilitating people with disabilities into the mainstream of society 15, 15 (1981) (describing "handicapped people [as] . . . societally created rather than [as] . . . a natural or objective condition."); s.n. eisenstadt, explorations in the sociology of knowledge: The soteriological axis in the construction of domains of knowledge, in cultural traditions and worlds of knowledge: explorations in the sociology of knowledge 1-71 (s.n. eisenstadt & flana friedrich silber eds., 1988) (exploring the development of the sociology of knowledge); joseph a. kuypers & vern l. bengston, Perspectives on the older family, in independent aging 2, 8 (william h. quinn & george a. hughston eds., 1984) ("behavior is selectively perceived and fitted into already constructed meanings."); sussman, supra note 1, at 249 ("disability, then, is not only a physical fact but also a social fact.").

7. The public and private representation of normative images of the disabled creates and gives meaning to the sociolegal order of disability. This order is comprised of institutions (legislatures, courts, public agencies, and private organizations) and texts (statutes, regulations, rules, and practices). See, e.g., peter goodrich, legal discourse 208-09 (1987) ("ideology represents—although frequently in an unconscious form—a set of unrealised ideals as to the nature of collective existence, a prospective agenda predating and limiting general attitudes, prescribing and enforcing ways of life or modes of being."); robert wuthnow, communities of discourse: ideology and social structure in the reformation, the enlightenment, and european socialism 557 (1989) (describing the mediation of moral constructs and social experience by symbolic frameworks).

A similar process of representation affects the elderly:

The general tangibility and mimetic quality of such representations [of aging] and the associated mental pictures we carry around with us clearly have an immediacy and facticity which make us think that they are real and self-evident, and ignore the fact that such representations are only able to function within a symbolic order.

Mike Featherstone & Mike Hepworth, Images of Aging, in Ageing in Society, supra note 5, at 250, 252.


9. See Randall Collins, conflict sociology: toward an explanatory science 343 (1975) (observing that professional practitioners engage in a form of "ritual reality-creating").
fractured by conflict endemic to the very process of social construction. Indeed, the process itself enmeshes competing ideals and discourses in material practices. The conventions of legal advocacy constitute a discrete form of material practice. Their deployment activates an internal ideological and discursive contest. The ideal and discourse that survive this internal contest define the dominant legal vision of disability and the disabled.\textsuperscript{10}

The strength of that dominant vision lies in its given quality. Envisioning an artifact as given suggests both natural and necessitarian logics. Natural logic adverts to the inherent traits of an artifact, finding objective correlates in the material world. Necessitarian logic proffers the same traits as pliable attributes molded in conformity with changing institutional or systemic visions.

The sociolegal struggle to establish a unitary ideal and discourse of disability, and to thereby privilege an undisputed vision of the disabled, embroils administrators, adjudicators, lawyers, and clients in juridical role conflict. That conflict is not confined to conventional rights controversies under the auspices of the Social Security Act. More broadly cast, juridical role conflict is associated with the institutional organization of the state apparatus in administering and adjudicating disability, particularly conflict arising out of the often incompatible role functions of administrators, adjudicators, lawyers, and clients. Those roles implicate both client-state and client-lawyer relationships. Each relationship serves as a forum for ideological and discursive conflict.\textsuperscript{11}

The client-state relation is the primary situs of conflict throughout the administrative and adjudicative stages of the disability determination process.\textsuperscript{12} Although the presence of conflict is constant, the experience of

\textsuperscript{10} See Edwin M. Schur, Labeling Deviant Behavior 149 (1971) ("Opposing 'forces'—be they pressure groups or subcultures at the collective decision-making level, actors and others on the interpersonal level, or 'clients' and control agencies at the organizational-processing level—struggle to define situations, types of behavior, specific acts, and the essential 'character' of particular individuals.").

\textsuperscript{11} See Frances Fox Piven, Women and the State: Ideology, Power, and the Welfare State, in Gender and the Life Course 265, 266 (Alice S. Rossi ed., 1985) ("All social relationships involve elements of social control, and yet there is no possibility for power except in social relationships.").

\textsuperscript{12} While the client-state relation may appear fixed, it is in fact the outgrowth of continuing sociolegal struggle. See Joel Rodgers, Traveling Light: State Theory and Sociolegal Research, in Studies in Law, Politics, and Society 287, 290 (1991) ("State institutions are both the product of previous struggles, and, at any given moment, effectively 'fixed' for actors as part of their institutional environment."). For theoretical perspectives on the welfare state under capitalism, see Age, Class, Politics, and the Welfare State 22-49 (Fred C. Pampel & John B. Williamson eds., 1989); Linda Gordon, The New Feminist Scholarship on the Welfare State, in Women, the State, and Welfare 9-35 (Linda Gordon ed., 1990);
conflict varies at each stage of the determination process. This variation may be more or less significant depending upon the precise nature of the determination. The experience of conflict at the application stage, for example, may be more pronounced than at the reconsideration stage, but less so when compared to the hearing stage.

The client-lawyer relation poses a secondary locus of conflict, situated at points of advocacy in the determination process. These points of advocacy may correspond to the different stages of determination and to the assorted conventions of practice. Client-lawyer conflict may erupt, for instance, at the hearing stage regarding the form of direct and cross-examination.

Juridical roles and relationships mediate the interpretation of disability. Mediation occurs in the contexts of administration, adjudication, and advocacy. Here, the roles of administrator, adjudicator, and advocate filter competing images of disability. Moreover, the relations dictated by these roles provide an added screen, obscuring the lived reality falsely designated "disability." The mediation process aligns competing interpretations in hierarchical order, assembling dominant-subordinate groupings of ideals and discourses. Alignments that elevate ideals and discourses on necessitarian grounds are of limited virtue.


13. Cf. Paul R. Amato & Philip Pearce, A Cognitively-Based Taxonomy of Helping, in MICHAEL SMITHSON ET AL., DIMENSIONS OF HELPING BEHAVIOUR 22, 24 (1983) ("[S]hared perspectives and similar definitions of social episodes are likely to characterize the cognitive appraisals of similar groups of people. Such shared perspectives or intersubjectivities can be seen as the building blocks for the commonality and normative behaviour which takes place in social episodes.").

14. See SCHUR, supra note 10, at 51 ("[O]rganizational practices, particularly the selection and processing of individuals by formal agencies of control, often reflect common public stereotypes or more specific organizational ideologies grounded in stereotyped thinking.").

15. See NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS & MORAL EDUCATION 116-17 (1984) (asserting that individuals and institutions may contribute to the diminution of another's ethical ideal).

16. The polarity of hierarchical order cannot be fixed. Discursive and material contest shifts dominant-subordinate oppositional poles, relocating hierarchy in different forms and contexts. Compare Jeremy Paul, The Politics of Legal Semiotics, 69 TEX. L. REV. 1779, 1807 (1991) (claiming that the "careful systematization of legal argument often reveals the replication of patterns of opposed arguments occurring across a wide variety of contexts") with Featherstone & Hepworth, supra note 7, at 252 (arguing that "symbolic polarities are never final and fixed, but change historically as groups struggle to define and reconstruct images to suit their own particular purposes and advantages").
Though adept at prosaic description\textsuperscript{17} and instrumental explanation,\textsuperscript{18} necessitarian analysis accommodates only the dominant juridical vision of a sociolegal artifact. This accommodation excludes opposing visions, negating alternative sets of ideals and discourses. The upshot of this exclusion is silence, in the instant case the silencing of impoverished people with disabilities.

In this Article, I analyze the ideals and discourses of both dominant and subordinate juridical visions of disability. To frame this analysis, I deploy a theoretical structure extracted from the work of Roberto Unger.\textsuperscript{19} In a prior writing, I turned to Unger to explicate the ideology of poverty lawyers.\textsuperscript{20} Unger’s relevance to the subject of poverty law stems from his revision of social theory to meet the exigencies of societal cri-

\textsuperscript{17} Prosaic description refers to the “concreteness” of historical events, treating the events as “objective phenomena” rather than as partial images of the world. Anthony V. Alfieri, \textit{Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative}, 100 \textit{Yale L.J.} 2107, 2138 (1991) [hereinafter Alfieri, \textit{Reconstructive Poverty Law Practice}].


Poverty law is a field in crisis, its practice failing to alleviate either economic impoverishment or sociolegal powerlessness. The adjacent field of disability law is also in crisis, its overlapping practitioners expounding a vision of the disabled devoid of disabled people's own empowering ideals and discourses. For Unger, such silencing visions urge an investigation of ideological habits of interpretation.

Having ventured to expose the violent interpretive habits of poverty lawyers, I return to Unger to undertake a broader inquiry of law and ideology. Although sparked by my previous investigation of poverty law, both the form and substance of this inquiry are more expansive, contemplating the intersection of ideology and discourse in the area of disability law. This area is daunting in two respects. It encroaches on

22. See Alfieri, Reconstructive Poverty Law Practice, supra note 17, at 2118-30 (describing the discursive violence of traditional interpretive practices).
24. The early literature of disability law suffers from a preoccupation with mental impairments. This historical preoccupation is divulged by reviewing the primary subject matter of the Mental and Physical Disability Law Reporter. Published in 1976 by the American Bar Association Commission on the Mentally Disabled, the Reporter concentrated almost exclusively on mental disability until 1984.

the territories of both civil and criminal law. And it encompasses the public and private bar. These tendencies are considered only tangentially here, laying the groundwork for later inquiry. My main purpose is to show not only how disability ideals and discourses interlock to create a dominant vision, but also how they may be transformed and the vision upraised from below. To begin this transformative project, I address the subject of disabled widows.

The Article consists of four parts. Part I introduces Unger's critical framework, pointing out the basic elements of his analysis. Applying that analysis, I identify a dominant and subordinate set of disability ideals. Dominant ideals of disabled widows are infused by normative images of benevolence and discipline. Subordinate ideals are imbued with normative images of autonomy and community.

Part II assesses the dominant ideals of benevolence and discipline in the institutional context of disability administration and adjudication. This assessment reveals the systemic interconnection of ideals and dis-

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Brakel, 1979 AM. B. FOUND. RES. J. 211, 214, 216 (encouraging the interchange of legal and mental health disciplines).


25. See, e.g., Cynthia R. Farina, Getting from Here to There, 1991 DUKE L.J. 689, 708 (advocating "an anti-imperialistic conception of knowledge—a conception in which 'truth' is continually being created from the bottom up rather than imposed once and for all from the top down"); Mari J. Matsuda, Affirmative Action and Legal Knowledge: Planting Seeds in Plowed Up-Ground, 11 HARV. WOMEN'S L.J. 1, 2 (1988) (asserting the "separate knowledges" of outsider groups).

26. My decision to limit the scope of the Article to a study of disabled widows is motivated by two factors. First, the enormous breadth and complexity of the disability law system recommends a narrowly fashioned, incremental approach to the overall subject matter. Second, the treatment of disabled widows illustrates the main themes of an analysis I wish to enlarge and refine in subsequent works on disability law.

27. In identifying these two competing sets of ideals, I do not posit a strict dichotomy of meaning. The ideals are too closely intertwined to be reduced to simple polarities. See Johnson, supra note 5, at 209 (associating the characteristics of dependence and independence).

28. Although disability administration and adjudication are distinct tasks, both occur within the bureaucratic context of the juridical state. Administration occurs at the bureaucratic level of rule promulgation and implementation. Adjudication takes place at the street level of claim determination.
courses. Forging this interconnection is the power of normative inscription: the power to imprint normative images on the text of discourse. Once inscribed, the images are reproduced by discourse. In this sense, discourse is normatively self-inscribing. The daily reinscription of discourse in the disability determination process regulates the roles and relations of administrators and adjudicators. Here, regulation emulates the movements of ideology, constraining the ability both to imagine and to describe disabled people beyond conventionally inscribed stereotypes.

Adding to these constraints is the presupposition of neutrality, also an earmark of ideology. The cycle of discursive self-inscription obscures the exercise of power visible at the original moment of normative inscription. As the cycle of discourse repeats, the act of power and the moment of inscription become increasingly shrouded. The erasure of power from the surface of discourse sanitizes client-state relations. Hence, the institutional roles of disability administrators and adjudicators, and their relations with disabled clients, appear uncontaminated by power. Citing a recent widow's disability case history, I trace the operation of the dominant ideals in regulating the discursive practices of disability administrators and adjudicators at the center and at the margins of widows' disability law.

Part III appraises the dominant ideals of benevolence and discipline in the context of disability advocacy. The appraisal explores the inscription of ideals into the body of discourse and the reproduction of ideals through discourse. The dynamics of normative inscription and reproduction charge disability advocacy, actuating its conventions and mobilizing clients to enact roles based on ideal images of the disabled. Client role enactment and reenactment evolves in response to the advocacy commands of lawyer conventions. This distorting reciprocity gives rise

29. The case history is based on the litigation in Hill v. Sullivan, 125 F.R.D. 86 (S.D.N.Y. 1989). I served as a member of the Hill litigation team from 1986 until 1990, individually representing the named plaintiff, Marjorie Hill, throughout the administrative review process and collaborating with co-counsel in representing Mrs. Hill in the district court proceedings. All citations to the record of administrative and judicial proceedings are made with the permission of Mrs. Hill.

30. This method of investigation is feminist derived. As Cynthia Farina explains:

[T]he meaning and value of rules and institutions can be discovered only by understanding how they affect the people within them. Feminism typically understands knowledge as nonfinal—that is, as expanded by increasing perspective and seeking out voices on the margins. Therefore, ends and means must constantly be reassessed as new information is acquired.

Farina, supra note 25, at 707 (footnotes omitted).

to a victimization strategy of disability advocacy that is invented by lawyers and applied equally in administrative and judicial forums.

Part IV examines the subordinate ideals of autonomy and community. The examination focuses on the discursive practices of client-lawyer relationships, noting the expression of subordinate ideals in the oppositional narratives of disabled widows. Oppositional narratives are suppressed forms of discourse enunciated by subordinated people. Because neither state-levied nor lawyer-induced suppression is total, the narratives are spoken at the margins of dominant disability discourse, yet they recite ideals and impart images central to an alternative vision of the disabled. In essence, they are a counter discourse located alongside, beneath, and sometimes within dominant discourse. To transform disability advocacy, I propose the integration of oppositional narratives into traditional client-lawyer and client-state discourses. My hope is that such integration will yield an enabling strategy of disability advocacy. The explicit goal of this strategy is to enable disabled widows to avert the experience of victimization in advocacy and to construct an alternative experience inspired by their own ideals, images, and narratives.

I. Ideals and Discourses

My attempt to illuminate the constitutive ideals and discourses of widows' disability law is prompted by Unger's theoretical break from necessitarian styles of sociolegal analysis. Necessitarian styles of analysis infect both civil and criminal law advocacy, constructing interpretive as well as remedial strategies. Interpretive strategies redescribe the client's world, investing meaning in acts and omissions, assigning motives and needs. Remedial strategies designate roles and formulate stories to satisfy client-imputed goals. Necessitarian analysis constructs the phenomenon of widows' disability in artificial terms of dependence, in-

33. See Unger, Social Theory, supra note 19, at 174-77 (explaining necessitarian analysis).
34. See Robert C. Atchley, Social Forces and Aging 123 (4th ed. 1985) (discussing the perception and treatment of the disabled as dependent); George Henderson & Willie V. Bryan, Psychosocial Aspects of Disability 133-34 (1984) (discussing dependency as a coping mechanism); Hazel Qureshi & Alan Walker, The Caring Relationship: Elderly People and Their Families 69 (1989) (citing the frequent equation of disability with physical and psychological dependency); Margaret Clark, Cultural Values and Dependency in Later Life, in Aging and Modernization 263, 264-65 (Donald O. Cowgill & Low-
competence, and deviance. Under this analysis, the qualities of dependence, incompetence, and deviance are envisioned as inevitable aspects of a disabled widow’s social life attributable to a single factor or sequence of factors. For disability administrators, adjudicators, and

35. See Constantina Safilios-Rothschild, Disabled Persons’ Self-Definitions and Their Implications for Rehabilitation, in The Sociology of Physical Disability and Rehabilitation 39, 39 (Gary L. Albrecht ed., 1972) (“[T]he disabled person is often considered to be less intelligent, less able to make the ‘right’ decisions, less ‘realistic,’ less logical, and less able to determine his own life than a nondisabled person.”); Sussman, supra note 1, at 234 (“Related to the organizational power and status of the [rehabilitation] professional is his ability to label and stereotype his clients with different disabilities on the bases of the clients’ incompetence and to use the label effectively in controlled treatment.”).

36. On the interwoven characterization of dependence and deviance, see Johnson, supra note 5, at 216 (“To carry the label ‘dependent’ is to carry the burden of being deviant—someone who no longer enjoys a place in the mainstream of society and whose behaviour is ‘abnormal.’”). See also Atchley, supra note 34, at 291 (“The handicapped or disabled deviate from the expectation that ‘normal’ adults should be of ‘sound’ body.”); Talcott Parsons, Patients, Physicians, and Illness 165-87 (1958) (describing illness as a deviation); Qureshi & Walker, supra note 34, at 70 (claiming that the link between disability and dependency is neither “clear-cut” nor “uniform”); Schur, supra note 10, at 24 (“Human behavior is deviant to the extent that it comes to be viewed as involving a personally discreditable departure from a group’s normative expectations, and it elicits interpersonal or collective reactions that serve to ‘isolate,’ ‘treat,’ ‘correct,’ or ‘punish’ individuals engaged in such behavior.”) (emphasis in original); Sussman, supra note 1, at 249 (“Disability is thus created and is viewed as a form of deviance in the sense that the individual is disadvantaged in social terms because of an ‘imputation of an undesirable difference.’ ”).

37. Edward V. Roberts, A History of the Independent Living Movement: A Founder’s Perspective, in Psychosocial Interventions with Physically Disabled Persons, supra note 5, at 231, 231 (“Historically, people with disabilities have been seen as physically or mentally ill, as permanent clients of the ‘medical model’ of lifetime care.”).

38. See Michael Smithson et al., supra note 13, at 2, 12 (“Attribution theory is concerned with the attributions people make about the causes of their own and other people’s behaviour.”); Beatrice A. Wright, Physical Disability—A Psychosocial Approach 39 (2d ed. 1983) (“Attribution theory deals with the conditions under which we assign attributes (causes, characteristics, properties) to various entities in our world, such as people, things, events, and situations.”); Nancy Eisenberg et al., The Development of Self-Perceptions, in Altruistic Emotion, Cognition, and Behavior 77, 78 (1986) (endorsing findings that “people are inclined to view their own behaviors as being situational determined, whereas they attribute others’ behaviors to dispositional qualities”) (citations omitted); John P. Meyer & Anne Mulherin, From Attribution to Helping: An Analysis of the Mediating Effects of Affect and Expectancy, 39 J. Personality & Social Psychol. 201 (1980) (applying Bernard Weiner’s attributional model of motivation to the study of helping behavior); Bernard Weiner, A Cognitive (Attribution)-Emotion-Action Model of Motivated Behavior: An Analysis of Judgments of Help-Giving, 39 J. Personality & Social Psychol. 186 (1980) (proposing attributional model based on experiments studying attributional and affective determinants of helping judgments).
lawyers, these factors include age, gender, spousal and state dependence, non-wage-earner history, and physical or mental impairment.

The authority of necessitarian analysis is bound to the institutional contexts of disability administration, adjudication, and advocacy. Without this institutional tie, necessitarian analysis carries no force or legitimacy. Decontextualized, it offers merely another version of instrumentalism. Only when fastened to a juridical institution or agent does necessitarian analysis acquire the authority to enforce an artifactual vision of the client world. Administrators, adjudicators, and lawyers adopting that analysis exercise descriptive and explanatory power. Their power is role-specific and emerges in the discursive practices regulating the client-state and client-lawyer relationships. Such practices display the stereotyping tendencies of self-reference and self-regulation. Implicit in these tendencies is the inversion of subject-object relations and the ensuing loss of the client subject. In necessitarian discourse, the client-as-subject is displaced by the institutions, agents, and conventions

39. Artifactual ideals shape societal expectations of the elderly. Minimal expectations of performance and behavior by the family, by society, and sometimes by elderly people themselves, inhibit their functioning at full capacity. Inasmuch as people, to a large extent, live up to their own and others' expectations, low expectations lead to low performance or functioning levels. Further, a disregard for the importance and of compensation and of adjustment to decreasing functional capacities stabilizes the problem.

INDEPENDENT AGING, supra note 6, at xii-xiii.

40. See ATCHLEY, supra note 34, at 291 ("[T]he stigma for the disabled more often comes from their physical appearance.") (emphasis in original); CONSTANTINA SAFILIOS-ROTHSCHILD, THE SOCIOLOGY AND SOCIAL PSYCHOLOGY OF DISABILITY AND REHABILITATION 123 (1970) ("[The nondisabled] behave as if there were a natural incompatibility between the presence of a physical disability and 'positive' traits and qualities.") (footnote omitted).


43. This exercise of power may be unconscious. Joseph Kuypers and Vern Bengston contend that:

[K]eople do not usually notice that they are selecting or constructing a certain view of a situation rather than another view. The meaning seems to be in the situation, not in their hands. They simply 'make sense' of the matter and continue, unaware that they have done it, that the meaning resides in the person and not inherently in the external world.

Kuypers & Bengston, supranote 6, at 7 (emphasis in original).


45. Cf. SCHUR, supra note 10, at 41 ("[Stereotyping] reflects the needs of participants in complex interactions to order their expectations so that they can predict the actions of others, at least to an extent sufficient for coherent organization of their own behavior.").
of the juridical state. Discursive practices reflect this shift, repeatedly referring to the imperatives of administration, adjudication, and advocacy. These imperatives instate administrators, adjudicators, and lawyers as subjects, relegating disabled clients to the status of objects. Continuous reference to the client-as-object exerts a regulating influence on discourse. State bureaucratic officials, for example, refer to the constraints of their role in administering and adjudicating disability claims. Lawyers also point to such constraints in fashioning advocacy strategies. This self-regulating discourse reinforces an institutionally based necessitarian logic.

In place of necessitarian logic, Unger employs a contingent style of analysis. This style of analysis views ideals and discourses as contestable visions fluctuating within unstable contexts. Under this view, all visions waver, all contexts change. The cardinal point of contingent analysis is to locate and dislodge momentarily fixed visions and thereby revise the contexts that they inform. Contingent and necessitarian styles of analysis are distinguished by their treatment of facts, causation, and sequence. Contingent analysis describes disabled widows tentatively, without necessary inferences of dependence, incompetence, or deviance. Lawyers espousing this analysis treat signs of disabled widows' dependence and incompetence not as indicia of deviance, but as artifactual patterns created by a particular mix of ideals and discourses in a distinct sociolegal

46. See Michael J. Sallnow, Cooperation and Contradiction: The Dialectics of Everyday [sic] Practice, 14 DIALECTICAL ANTHROPOLOGY 241, 254 (1989) ("Since the process of ideological reification amounts to the gradual suppression of the voice of alternative meaning, the culmination of that process is the silencing of the voice altogether, the metamorphosis of conscious subject into pure object.").


48. See Paul R. Tremblay, Toward a Community-Based Ethic for Legal Services Practice, 37 UCLA L. REV. 1101, 1104-16 (1990) [hereinafter Tremblay, A Community-Based Ethic].

49. Unger, SOCIAL THEORY, supra note 19, at 193-95 (discussing the qualities and weaknesses of structural constraints).

50. Unger defines contingency in terms of illusion: "all things or some things might be otherwise than they are." Unger, SOCIAL THEORY, supra note 19, at 173. His discussion is aided by the idea of historicity in natural science and social theory. Id. at 188-92; cf. Adelaide H. Villmore, Women, Differences, and Rights as Practices: An Interpretive Essay and a Proposal, 25 LAW & Soc'y REV. 385, 387-88 (1991) (viewing law as "contingent, plural, multilayered, not exclusively of state institutions or any single or unitary meaning") (citation omitted).

51. Schur, supra note 10, at 8 (viewing deviance as a "continuously shaped and reshaped outcome of dynamic processes of social interaction") (emphasis in original) (footnote omitted).
These socially constructed patterns are loosely connected to a number of determinative factors. But no one factor determines the design. Once accumulated, the factors are distributed in varied sequences. There is no single causal sequence, no direct linkages to be discovered. While the factors at work include considerations of age, gender, spousal and state dependence, nonwage-earner history, and medical impairments, contingent analysis also takes account of the ideals and discourses articulated within institutional roles and relationships.

By enlarging the range of determinative factors available to understand false patterns of widow dependence, incompetence, and deviance, contingent styles of analysis challenge the dominant vision of disabled widows. The key to this alternative method of analysis is the location of ideological and discursive anomalies or discontinuities in the institutional contexts of disability administration, adjudication, and advocacy. Contextual anomalies are moments of contradiction or inconsistency experienced in client-state and client-lawyer roles and relationships. These discontinuities occur randomly, the causal effects of imperfectly integrated formative structures and formed routines. A case in point is the victimization strategy widely utilized by lawyers on behalf of disabled

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52. Id. at 160 (asserting the created and thus political nature of deviance); Sussman, supra note 1, at 249 ("Disability is a deviation defined by the nondisabled: it is a social condition imposed upon the individual for real or alleged impairments."). Cf. Austin J. Shelton, Igbo Child-Rearing, Eldership, and Dependence: A Comparison of Two Cultures, in The Dependencies of Old People 97-106 (Richard A. Kalish ed., 1969) (cross-cultural comparison of social dependence); Sarah M. Nelson, Widowhood and Autonomy in the Native-American Southwest, in On Their Own: Widows and Widowhood in the American Southwest 1848-1939, at 22-41 (Arlene Scadron ed., 1988) (associating the autonomy enjoyed by southwestern Native American women with the decreased level of economic and social penalties suffered by widows).

53. Qureshi & Walker, supra note 34, at 70 ("Disability . . . is a function of social and environmental factors.") (citation omitted).

54. Hazel Qureshi and Alan Walker observe:

There is, of course, a correlation between disability and dependency but, for any given degree of disability measured in functional terms, physical dependence on another person for care and tending will vary between individuals according to the interaction of disability and environment. In fact the degree and impact of both, over much of their range, is determined to a significant extent by social and environmental factors.

Id.

55. Independent Aging, supra note 6, at xii ("Economic, political, and social structures exist that, by their nature, keep older persons unjustifiably dependent.").

56. I use the terms "anomaly" and "discontinuity" interchangeably throughout the text.

widows who, in a turnabout, articulate powerful oppositional narratives of independence and competence.

Like any artifactual order, widows’ disability law is composed of formative structures and formed routines.58 The ideals of benevolence, discipline, autonomy, and community comprise the formative structures of widows’ disability. These ideals are entrenched in the sociolegal context of the Social Security Act. The original Act spoke in benevolent terms of alleviating distress, destitution, and dependency.59 That purpose was compromised by the congressionally recognized need to instill the discipline of thrift60 and cost conservation.61 Both ideals, in turn, were counterposed against the ideals of autonomy and community. The Act articulated the ideal of autonomy in terms of the economic independence62 and self-support63 guaranteed by the right64 to cash benefits.65


59. See H.R. REP. No. 615, 74th Cong., 1st Sess. 3 (1935) (“We must relieve the existing distress and should devise measures to reduce destitution and dependency in the future.”).

Subsequent amendments in 1939 reiterated this congressional purpose. See H.R. REP. No. 728, 76th Cong., 1st Sess. 6 (1939) (“Old-age insurance is designed to prevent future old-age dependency; old-age assistance is designed to relieve existing needs. A contributory system of old-age insurance keeps the cost of old-age assistance from becoming excessive and assures support for the aged as an earned right.”).


60. See S. REP. No. 628, 74th Cong., 1st Sess. 6 (1935) (“Free pensions, moreover, have tended to discourage thrift, and, while better than institutional care of old people, clearly have some undesirable effects.”).

61. See H.R. REP. No. 728, 76th Cong., 1st Sess. 119-20 (1939) (“Many of those interested in the problem of social security are of the opinion that the existing system should not be extended or liberalized until it has been in effect for a longer period. Especially is there need for study into the ultimate costs involved. Care must be taken that unforeseen future liabilities of great magnitude are not being placed upon the taxpayers of the country by reason of providing benefits not contemplated by the original law.”).

62. H.R. REP. No. 615, 74th Cong., 1st Sess. 13 (1935) (“Preservation of health is a prime necessity for economic independence, sickness being one of the major causes of dependency.”).

63. S. REP. No. 628, 74th Cong., 1st Sess. 28 (1935) (“The Social Security Act . . . will go far toward realizing ‘the ambition of the individual to obtain for him and his a proper security, a reasonable leisure, and a decent living throughout life.’”); H.R. REP. No. 615, 74th Cong., 1st Sess. 16 (1935) (“While humanely providing for those in distress, [the Social Security Act] does not proceed upon the destructive theory that the citizens should look to the Government for everything. On the contrary, it seeks to reduce dependency and to encourage thrift and
The ideal of community was expressed more narrowly in terms of family, emphasizing security and support. The discursive practices of victimization constitute the formed routines of widows' disability. These practices embody ways of speaking. They talk of disabled widows as victims. To the extent that it is apportioned among administrators, adjudicators, and lawyers, such talk is redundant. The incessant talk of widows as victims is a formed routine of disability law. The integration of this practice routine into a regularized strategy lends stability to the administration, adjudication, and advocacy of widows’ disability.

The formative structures of widows’ disability law undermine the stability of their own formed practice routines. Although entrenched, the structures retain an internal ideological tension that survives the imposition of hierarchy and the standardization of routine. To Unger, the self-support.

64. S. REP. No. 628, 74th Cong., 1st Sess. 2 (1935) ("desirability of providing old-age security as a right and not as public charity"); Ball, supra note 2, at 19 (tracing the origins of social insurance to the tradition of self-help).

S. REP. No. 744, 90th Cong., 1st Sess. 2 (1967) ("Monthly cash benefits for disabled widows and disabled dependent widowers"); S. REP. No. 628, 74th Cong., 1st Sess. 30 (1935) ("Old-age assistance is confined to payments in cash."); JOEL F. HANDLER & MICHAEL SOSIN, LAST RESORTS: EMERGENCY ASSISTANCE AND SPECIAL NEEDS PROGRAMS IN PUBLIC WELFARE 240 (1983) ("One of the major reforms of the original Social Security Act passed in 1935 was to insist that public assistance be in cash, to increase client dignity and control by allowing welfare recipients to make their own household and budgetary choices.").

65. See S. REP. No. 628, 74th Cong., 1st Sess. 2 (1935) ("We think that children who are able to do so should continue to support their aged parents and the legislation we are proposing is framed with this thought in mind.").

66. Cf. Kuypers & Bengston, supra note 6, at 7 ("A second feature of constructed meaning is the natural pressure to maintain a stable interpretation.").
dominant-subordinate arrangements of practice roles and relationships fail to insulate contexts from the anomalous, and thus disruptive, effects of that tension. Neither the administrative nor the advocacy contexts of widows' disability are immune from disruption. This point is essential to Unger's method of analysis. The most rudimentary features of the disability determination process—application, reconsideration, hearing, and appeal—are buffeted by ideological disruption. The basic aspects of the advocacy process—interviewing, investigation, counseling, and trial—are likewise unsettled.

The disruptive effects of ideological tension are alternately mitigated and aggravated by the formed routines of discourse. Discursive routines mitigate such effects by muting disabled widows' public declarations of autonomy and community, thereby stifling oppositional narratives of

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For a philosophical defense of autonomy, see Richard Double, The Non-Reality of Free Will 27-61 (1991) (criticizing Frankfurtian conception of second-order volitions); Gerald Dworkin, The Theory and Practice of Autonomy 20 (1988) ("[A]utonomy is conceived of as a second-order capacity of persons to reflect critically upon their first-order preferences, desires, wishes, and so forth and the capacity to accept or attempt to change these in light of higher-order preferences and values."); Susan Wolf, Freedom Within Reason 67 (1990) (noting the autonomous agent's ability to act in discordance with reason); Meir Dan-Cohen, Conceptions of Choice and Conceptions of Autonomy, 102 Ethics 221, 232 (1992) ("The core idea behind the ideal of autonomy is that of the self-governing person, who can effectuate his will and thus exercise control over his life."); Harry G. Frankfurt, Freedom of the Will and the Concept of a Person, in Moral Responsibility 65-80 (John M. Fischer ed., 1986) (introducing the concept of "second-order volitions" to describe regulating second-order desires).

71. Community embodies the values of solidarity and mutual aid. See Robert E. Goodin, Reasons for Welfare 70-118 (1988); id. at 72 ("[A] social grouping will be said to constitute a 'community' if and only if it embodies (1) a sense of solidarity and (2) a sense of significance for all those who are within the group."); see also Ball, supra note 2, at 39 ("The [Social Security] program is built on traditional values and concepts—self-help, mutual aid, insurance, and incentives to work and save.") Compare Dov Ronen, The Quest for Self-Determination 56 (1979) ("Conscious aggregations are formed when an aspired-to point of reference prompts activation of an identity or identities that emphasize the distinction between 'us' and 'them,' the obstacles to 'our' aspirations.") with Steven L. Winter, Contingency and Community in Normative Practice, 139 U. Pa. L. Rev. 963, 1001 (1991) ("[C]ommunity is
independence, competence, vulnerability, and solidarity. At the same time, discursive routines aggravate the effects of ideological contest by publicly confronting disabled widows with institutionally enforced constructions of dependence, incompetence, and deviance. This con-

located in and reproduced by a self that cannot be abstracted from its social context nor understood apart from it."


73. See Independent Living for Physically Disabled People (Nancy M. Crewe & Irving K. Zola eds., 1983); see also Herbert H. Hyman, Of Time and Widowhood 67 (1983) (finding no consistent evidence that widowhood damages personal competence in achieving goals); Kuypers & Bengston, supra note 6, at 14 (“Feelings of personal power, of the ability to influence one’s environment, and of self-determination are characteristics of the competent person.”); Irving Kenneth Zola, Developing New Self-Images and Interdependence, in INDEPENDENT LIVING FOR PHYSICALLY DISABLED PEOPLE, supra, at 55 (recognizing that disabled people “could have the expertise to help both themselves and others.”).

74. See Helena Znaniecka Lopata & Henry Brehm, Widows and Dependent Wives 25-209 (1986); Dorothy C. Miller, Women and Social Welfare: A Feminist Analysis 115-34 (1990); see also Herbert H. Hyman, Homemakers 13 (1981) (“[A] physically or psychologically disabled homemaker receives no federal support. She becomes dependent on her husband or family.”); Haveman et al., supra note 2, at 25 (“[Disabled workers] are concentrated in low-status occupations and are probably subject to some labor market discrimination, which depresses their earnings below those expected from their disability alone.”); Arlene Scadron, Conclusion, in On Their Own: Widows and Widowhood in the American Southwest 1848-1939, supra note 52, at 301, 304 (“Many [poor and middle-class widows] had to piece together several ‘jobs’—serving as domestics and cooks, taking in laundry, sewing, and boarders, and running hotels and restaurants.”); Ball, supra note 2, at 39 (“[A]mong our most economically vulnerable groups are the retired aged, widows, orphans, and the totally disabled . . . .”); Kuypers & Bengston, supra note 6, at 18 (finding that widowhood may increase vulnerability). Cf. Robert L. Rubinstein, Women as Widows on Malo (Natawambo), Vanuatu (South Pacific), in WIDOWS: THE MIDDLE EAST, ASIA, AND THE PACIFIC 24, 39 (Helena Znaniecka Lopata ed., 1987) (“Widowhood creates vulnerabilities in ties that eventually must be reproduced.”).

75. See David Knoke, Networks of Political Action: Toward Theory Construction, 68 SOC. FORCES 1041 (1990); Nicholas González Yuen, Alienation or Empowerment? Law and Strategies for Social Change, 14 LAW & SOC. INQUIRY 551, 557-58 (1989) (emphasizing the importance of solidarity to the disabled in reducing social isolation); see also S. REP. No. 28, 102d Cong., 1st Sess. 32 (1991) (“Many of the disabled individuals denied, rightly or wrongly, simply accept the decision and seek the assistance of family and friends.”); Noddings, supra note 15, at 40 (noting that “women often define themselves as both persons and moral agents in terms of their capacity to care”); Piven, supra note 11, at 283 (“[P]oor women who depend on welfare-state programs . . . are not, as is often thought, simply atomized and, therefore, helpless people. Rather, the structure of the welfare state itself has helped to create new solidarities and has also generated the political issues that cement and galvanize these solidarities.”).

76. See Stephen Murgatroyd, Counselling and Helping 31-32 (1985) (defining “confrontation” as a powerful means of illuminating the extent and nature of the discrepancy between ideals and the world).
frontation provides an opening for the assertion of oppositional narratives.\textsuperscript{77} The opening emerges from the explicit unveiling of victimization. The vividness of that disclosure provokes opposition.

Mitigating discursive routines—the institutional ways of speaking that inhibit disabled widows from invoking experiences of autonomy and community—falter when they are unable to compensate for or suppress the disruptive effects of ideological clashes.\textsuperscript{78} This inability marks the deficiencies of structure- and context-preserving practices. These practices are grounded in the structure of ideals and the context of roles and relationships. The victimization strategy evinced in widows' disability advocacy illustrates the imperfections of such practices. Despite the authority of formative ideals and the sanction of formed routines, the practice of victimization fails to negate competing normative claims of autonomy and community, or to silence accompanying oppositional narratives. Given the contestability of ideals and the revisability of contexts, full negation or silencing is implausible.

The accumulation of uncompensated or unsuppressed oppositional norms and narratives furnishes an alternative set of discursive practices.\textsuperscript{79} Contingent analysis supplies a method of implementing these practices that is both context-bound and context-revising.\textsuperscript{80} It is bound by the content of formative structures and the organization of formed routines. Yet, contingent analysis is also revisionist in that it divulges ideals and practices capable of reconstructing the structures and routines that dominate contexts. This dual tendency is well tailored to advocacy, offering the ability to preserve as well as extend entitlement rights.

\textsuperscript{77} Although oppositional narratives defy traditional verification, they are validated in everyday acts of widow independence, competence, vulnerability, and solidarity.

In searching for an alternative basis for objectivity, Unger asserts that the mind holds the "capacity to discover truth—to reason in new ways or to have incongruous perceptions." \textsuperscript{81} Accordingly, he claims the mind "can achieve insights that it may not be able to verify, validate, or even make sense of within the established criteria of validity, verification, or sense." Id.

\textsuperscript{78} On the forms of opposition in discursive practice, see \textit{MICHEL FOUCAULT, THE ARCHEOLOGY OF KNOWLEDGE} 149-56 (1972); \textit{but see} Bryan S. Turner, \textit{The Rationalization of the Body: Reflections on Modernity and Discipline}, in \textit{MAX WEBER, RATIONALITY AND MODERNITY} 222, 235 (Scott Lash & Sam Whimster eds., 1987) ("Foucault has not provided an adequate explanation of how there are ruptures in dominant modes of discourse.").

\textsuperscript{79} See, e.g., \textit{Piven, supra} note 11, at 279 ("[T]he institutional arrangements that achieve social control are never entirely secure, for people discover new resources and evolve new ideas, and sometimes these resources and ideas are generated by the very arrangements that, for a time, seemed to ensure their acquiescence.").

\textsuperscript{80} For reference to these concurrent tendencies, see \textit{UNGER, SOCIAL THEORY, supra} note 19, at 200.
The indeterminate results of a contingent style of analysis impede the transition from critique to politics.81 Unger seeks to escape this postmodern dilemma through visionary argument, appealing to utopian notions of faith, transcendence, and redemption.82 Such an appeal would be inappropriate for a critique of this Article’s narrow scope. While Unger’s emancipatory vision influences this project, my critique offers only internal, deviationist reforms.83 This modest offering rests on the judgment that lawyers must maintain their commitment to advocacy, and yet also deviate from the ideological and discursive conventions restricting its practice. Deviation requires the deconstruction and reconstruction of the interior structure and context of such conventions, an undertaking Unger declines. Nonetheless, adhering to his essential framework, I look first to the formative ideals of disability law: benevolence and discipline.


84. For a discussion of “deviationist doctrine,” see Roberto Unger, The Critical Legal Studies Movement, 96 HARV. L. Rev. 561, 576-83 (1983). Cf. Bernice L. Neugarten, Interpretive Social Science and Research on Aging, in GENDER AND THE LIFE COURSE, supra note 11, at 291, 292 (“The goal is not to discover universals, not to make predictions that will hold good over time, and certainly not to control; but, instead, to explicate contexts and thereby to achieve new insights and new understandings.”).
Benevolence describes the shared paternalism of the lawyer and state towards the artifactually dependent and incompetent disabled widow. Discipline characterizes the joint lawyer and state's devaluation.

85. For helpful discussions of paternalism, see Dworkin, supra note 70, at 121-29. See also id. at 124 ("One useful heuristic to guide our judgments about the justifiability of [paternalistic] intervention is to ask under what conditions does [sic] A's attempts to substitute his or her judgment for B's constitute treating B as less than a moral equal."); Donald VanDeveer, Paternalistic Intervention 12, 22 (1986) ("[A] paternalistic act is one in which one person, A, interferes with another person, S, in order to promote S's own good.").

By definition, paternalistic intervention implies coercion. See, e.g., Timo Airaksinen, Ethics of Coercion and Authority: A Philosophical Study of Social Life 91 (1988) ("[T]he crucial factor in the definition of coercion is its cruel structure: the victim is facing two bad alternatives, among which he cannot refuse to choose."); Virginia Held, Coercion and Coercive Offers, in Coercion 49, 50-51 (J. Roland Pennock & John W. Chapman eds., 1972) ("Coercion is the activity of causing someone to do something against his will, or of bringing about his doing what he does against his will.").


87. See Morris Janowitz, Social Control of the Welfare State 77 (1976) ("[W]elfare transfers and allocations have their specific normative definitions."). Compare Jerome McCristal Culp, Jr., Toward A Black Legal Scholarship: Race and Original Understandings, 1991 Duke L.J. 39, 78 ("Eventually, the law evolved into a paternalistic system that treated blacks as lesser beings whom white masters and overseers needed to protect from their own ignorant, sloven, and evil nature.") with R.F. Khan, Mental Retardation and Paternalistic Control, in Moral Issues in Mental Retardation 57 (Ronald S. Laura & Adrian F. Ashman eds., 1985) (objecting to paternalistic controls over the "mildly retarded").

88. Recent amendments to the Act recapitulate the ideal of benevolence. The 1967 Senate Report, for example, stated:
The committee's bill modifies the provision of the House bill which would provide social security benefits for certain totally disabled widows (including surviving divorced wives) and totally disabled dependent widowers. (Present law does not provide social security benefits for widows and widowers on the basis of disability.) The committee believes that there is a need to provide monthly benefits for the severely disabled widow and dependent widower who are unable to support themselves by working.

S. REP. NO. 744, 90th Cong., 1st Sess. 44 (1967). Similarly, the House Ways and Means Committee commented:

[T]here is a need to provide monthly benefits for the severely disabled widow in her fifties who cannot qualify for widow's or mother's benefits under present law. The widows and widowers for whom benefits would be provided are unable to support themselves by working.

H.R. REP. NO. 544, 90th Cong., 1st Sess. 26 (1967); see also Nelson, supra note 5, at 227 ("The welfare of the disabled depends on the virtue of benevolence within the community based on a sense of common vulnerability and neediness.").

89. Discipline may take both discursive and material forms. For an exposition of discursive and material forms of discipline, see Michel Foucault, Discipline and Punishment: The Birth of the Prison 135-228 (Alan Sheridan trans., 1979).

See also Henry J. Aaron, Economic Effects of Social Security 53-66 (1982) (analyzing the effects of social security on the labor supply); Edward D. Berkowitz, Disabled Policy 44 (1987) ("The higher the unemployment rate, the more people who would regard themselves as disabled."); Kathi V. Friedman, Legitimation of Social Rights and the
ation of the artifactually deviant\textsuperscript{92} disabled widow. Both benevolence

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\textbf{Western Welfare State: A Weberian Perspective} 156 (1981) ("[T]he limiting factor in welfare state redistributions is that point at which initiative and enterprise are discouraged with resulting loss in productivity."); \textit{Haveman et al., supra} note 2, at 91 ("A combination of benefit level and allowed earnings must be found sufficient to satisfy the income needs of recipients, but not cause a large reduction in work effort and program costs."); \textit{id.} at 97 (finding "consistent evidence of a statistically significant effect of disability benefits on the work-status choice [of older workers]"); \textit{Susan Gluck Mezey, No Longer Disabled: The Federal Courts and the Politics of Social Security Disability I} (1988) ("[A]s more beneficiaries were incorporated into the program and monetary awards were increased, concern for costs and increasing worker dependency arose and the support for the steadily expanding disability program began to erode."); \textit{Keith C. Pheby, Interventions: Displacing the Metaphysical Subject} 85 (1988) ("[T]he notion of discipline also incorporates training and behavioral modification."); \textit{Frances Fox Piven & Richard A. Cloward, Regulating the Poor: The Functions of Public Welfare} 123-80 (1971) (discussing enforcement of low wage work); \textit{Graham Room, The Sociology of Welfare} 9-40, 146-95 (1979) (comparing Marxist and liberal views of market discipline); \textit{Jerry L. Mashaw, Disability Insurance in an Age of Retrenchment: The Politics of Implementing Rights, in Social Security: Beyond the Rhetoric of Crisis, supra} note 2, at 151, 154 [hereinafter Mashaw, \textit{Disability Insurance}] (early program opposition fueled by the ideological "commitment to maintaining work incentives in a market economy"); \textit{Robert Morris, Re-Thinking Welfare in the United States: The Welfare State in Transition, in Modern Welfare States: A Comparative View of Trends and Prospects} 83, 105 (Robert R. Friedmann et al. eds., 1987) (documenting continuing "[efforts to return all dependents to work status . . . despite the condition of the labour market"); \textit{Amy S. Wharton, Labor Segmentation and Gender Divisions, in The Marx-Weber Debate} 121, 137 (Norbert Wiley ed., 1987) ("Sharp and persistent differences in labor market outcomes and opportunities have become a permanent feature of the U.S. (and international) economy, affecting not only workers' life chances but their politics and consciousness as well."); \textit{cf. Jeffrey S. Lehman, To Conceptualize, To Criticize, To Defend, To Improve: Understanding America's Welfare State, 101 Yale L.J.} 685, 694 n.31 (1991) (book review) ("[I]n the United States, any simple link between social insurance and 'work' is mediated by a more complicated conception of family rights and obligations.").

\textit{90. Cf. Alfieri, Reconstructive Poverty Law Practice, supra} note 17, at 2118-30 ("[D]iscipline occurs when the lawyer consistently excludes from his account of client story the normative meanings embedded in client narratives."); \textit{Roberts, supra} note 37, at 232 ("[T]hough served by the medical profession, people with disabilities are also devalued by it.").


\textit{92. The historical image of a disability claimant is that of a married, heterosexual, wage-earning white male. The disabled widow deviates radically from this normal image. Indeed, her attributes are "discrediting." Erving Goffman, Stigma 3 (1963) (using the term stigma "to refer to an attribute that is deeply discrediting"); Deborah Kent, Disabled Women: Portraits in Fiction and Drama, in Images of the Disabled, Disabling Images 47-63 (Alan Gartner & Tom Joe eds., 1987) (surveying the negative stereotypes of disabled women in literature). She is unmarried, Kimberlé Williams Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. Chi. Legal F. 139, 165 n.72 ("units other than the norm are treated as aberrant and unworthy of societal accommodation."); \textit{Martha L. Fineman, Images of Mothers in Poverty Discourses, 1991 Duke L.J.} 274, 291 ("Single motherhood, therefore,
and discipline rely on discursive practices of victimization. Discipline represents the stronger version of victimization, benevolence the weaker.

The ideals of benevolence and discipline form the discursive practices of widows' disability administration, adjudication, and advocacy. These formed routines define the roles of disability administrators, adjudicators, lawyers, and clients. Furthermore, they organize the conduct of client-state and client-lawyer relationships. Ideals that depict disabled widows as dependent, incompetent, or deviant are structure-pre-

could be considered deviant and threatening simply because it is a rejection of the primacy of the sexual connection as the core organizing familial concept and the privacy basis for social organization."), asexual, PHILOMENE GATES, SUDDENLY ALONE: A WOMAN'S GUIDE TO WIDOWHOOD (1990); RUTH JEAN LOEWINSOHN, SURVIVAL HANDBOOK FOR WIDOWS (1979), non-wage-earning, Jason Koo, Widows in Seoul, Korea, in WIDOWS: THE MIDDLE EAST, ASIA, AND THE PACIFIC, supra note 74, at 56, 78 (discussing the "traditional [Korean family] norm of restricting women to their domestic functions"); Sylvia A. Law, Women, Work, Welfare, and the Preservation of Patriarchy, 131 U. Pa. L. Rev. 1249, 1318 (1983) ("At the same time that federal welfare and labor policy denies the value of women as wageworkers, it also denies the value of the homemaking and childcare work that women have traditionally done."); Lehman, supra note 89, at 693 n.30 ("[I]n American society, raising others' children for pay is 'work,' but raising one's own children does not qualify as 'work.' "); Louise A. Tilly, Family, Gender, and Occupation in Industrial France: Past and Present, in GENDER AND THE LIFE COURSE, supra note 11, at 193, 194 (contending that the movement of production out of the household in early industrial France made possible a development, elaboration, and generalization of a segregated housewife occupation in the household), female, EDWIN M. SCHUR, LABELING WOMEN DEVIANT, 22-48, 51-132 (1983) (describing the categorical devaluation of feminality imposed through gender norms), and in this case, black. See Saffilios-Rothschild, supra note 35, at 39 (citing the "popular notion that disability, physical or mental (as well as old age, poverty, the female gender, or blackness of skin color), entails biological inferiority"). Hence, she is not only deviant, but devalued. Cf. VASH, supra note 72, at xvii (describing the experience of devaluation as "being regarded as a lesser being, inferior, not very capable, not very useful, possibly burdensome, unaesthetic, and, generally, one down"); Margaret Thornton, Feminism and the Contradictions of Law Reform, 19 Int'l J. Soc. L. 453, 455 (1991) ("The public world of men is perceived to be a qualitatively superior world to that of the private world of women: culture always trumps nature.").

93. See, e.g., Jack Katz, Caste, Class, and Counsel for the Poor, 1985 AM. B. FOUND. RES. J. 251, 254-59 (describing the rhetoric of moral and primordial social construction associated with the poor); Thomas Ross, The Rhetoric of Poverty: Their Immorality, Our Helplessness, 79 Geo. L.J. 1499, 1502-08 (1990) (explicating the rhetoric of law and poverty); see also JOEL F. HANDLER & YEHEZKEL HASENFELD, THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA 25 (1991) (describing the ideology of "worthy" widows); JAMES T. PATTERSON, AMERICA'S STRUGGLE AGAINST POVERTY, 1900-1980, at 115-25 (1986) (comparing cultural perspectives on poverty); WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE 203 (4th ed. 1989) (arguing that state widows' pension laws "removed the stigma of charity for a large number of welfare recipients").


94. On formed routines, see UNGER, SOCIAL THEORY, supra note 19, at 4.
serving.\textsuperscript{95} Practices that place disabled widows in dependent roles and relationships are context-preserving.\textsuperscript{96}

Conversely, ideals that portray disabled widows as independent and competent are structure-transforming.\textsuperscript{97} Structure-transforming ideals emancipate the disabled from benevolent and disciplinary constraints.\textsuperscript{98} Similarly, practices that permit disabled widows to embrace independent roles and collaborative relationships are context-transforming.\textsuperscript{99} Context-transforming practices redefine client-lawyer roles and reorganize client-state relations.

The contexts of widows' disability administration, adjudication, and advocacy offer numerous transformative opportunities. The opportunities arise out of discursive anomalies provoked by the ideological contest among administrators, adjudicators, lawyers, and clients.\textsuperscript{100} The anomalies materialize as incoherent intervals of discourse, brief episodes of ambiguity, silence, or evasion. At stake in this contest of interpretive communities are the ideals and discourses of widows' disability law.

In both client-state and client-lawyer contexts, ideological and discursive contest is spurred by the narratives of disabled widows.\textsuperscript{101} Their narratives challenge both the procedure\textsuperscript{102} and substance\textsuperscript{103} of disability law.

\begin{itemize}
\item \textsuperscript{95} On structure-preserving practices, see id. at 5.
\item \textsuperscript{96} On context-preserving practices, see id.
\item \textsuperscript{97} On structure-transforming practices, see id. at 5-6.
\item \textsuperscript{99} On context-transforming practices, see UNGER, SOCIAL THEORY, supra note 19, at 5-6.
\item \textsuperscript{100} In his proposed semiotics of legal argument, Duncan Kennedy identifies a similar tendency operating within doctrinal contexts. He defines this "nesting" tendency as "the reproduction of particular argumentative oppositions within the doctrinal structures that apparently resolve them." Duncan Kennedy, A Semiotics of Legal Argument, 42 SYRACUSE L. REV. 75, 112, 97-103, 113-16 (1991).
\item \textsuperscript{101} See Kathryn Abrams, Hearing the Call of Stories, 79 CAL. L. REV. 971, 982 (1991) (addressing feminist narratives as a "distinctive form of legal argument").
\item \textsuperscript{102} On the legality of procedures governing disability benefit fraud and termination, see Ross, supra note 93, at 1532-35 (discussing disability benefit fraud and termination). See also Irving Ladimer, Hearing and Review of Old-Age and Survivors Insurance Claims and Wage Record Cases by the Social Security Board, 9 GEO. WASH. L. REV. 58, 64 (1940-41) (Social Security hearing and review system "implies not only administrative fairness and application of tests not otherwise available, but it introduces the element of psychological satisfaction to the claimant.") (footnote omitted).
\item \textsuperscript{103} For discussions of the substantive legal and cultural import of women's narratives,
law. The ambiguity of that challenge is ascribable to the elusiveness of voice\textsuperscript{104} and to the difficulty of interpretive representation.\textsuperscript{105} This ambiguity will not be cured by subjecting disabled widows' narratives to univocal readings. The texts of narratives resist such totalizing readings.\textsuperscript{106} Moreover, reading is itself a medium of discursive authority and production.\textsuperscript{107} The act of reading calls upon an interpretive authority—the subject—residing outside the text to engraft new meaning on the text.\textsuperscript{108}

Notwithstanding the epistemological complexity of textual construction, fruitful application of Unger's analytic scheme demands experimentation with narrative exposition.\textsuperscript{109} Indeed, narrative study serves to clarify Unger's central concepts.\textsuperscript{110} Clarification is reached through the contextual description, however problematic, of narrative-based

\textsuperscript{104} Disentrenching ideological structures and their allied images releases a multiplicity of voices. The voices fit a "myriad of possible categories," spanning differences of class, gender, and race. Joan C. Williams, \textit{Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory}, 1991 DUKE L.J. 296, 322. This diversity renders voice elusive.


\textsuperscript{106} \textit{See} Betsy B. Baker, \textit{Constructing Justice: Theories of the Subject in Law and Literature}, 75 MINN. L. REV. 581 (1991); \textit{see also} R. Radhakrishnan, \textit{Negotiating Subject Positions in an Uneven World}, in \textit{FEMINISM AND INSTITUTIONS} 276, 277 (Linda Kauffman ed., 1989) ("The story we need to tell is of a world characterized by a non-synchronous and multi-temporal development: a world animated by plural subject positions that are simultaneous but not synchronous.").

\textsuperscript{107} On the assignment and constitution of the subject, see Michel Foucault, \textit{The Ethic of Care for the Self as a Practice of Freedom}, in \textit{THE FINAL FOUCAULT} 1-20 (James Bernauer & David Rasmussen eds., 1988); Pierre Schlag, \textit{The Problem of the Subject}, 69 TEX. L. REV. 1627 (1991).

\textsuperscript{108} The act of reading constitutes a re-marking or re-presentation of the text. \textit{JACQUES DERRIDA}, \textit{POSITIONS} 33, 60, 63 (1981) ("Reading is transformational.").

\textsuperscript{109} Experimentation is encouraged by Milner Ball's insight that "[t]here can be no set of legal institutions, no nomos, no universe of meaning, no formative context (entrenched or disentrenched), no empowered democracy—and no theory—apart from a locating, animating narrative." Milner S. Ball, \textit{The City of Unger}, 81 NW. U. L. REV. 625, 659 (1987); \textit{see also} Dennis Patterson, \textit{Postmodernism/Feminism/Law}, 77 CORNELL L. REV. 254, 313 (1992) ("Narration is the analytical device through which we realize the aspirations of a practice-based, nonpropositional account of legal knowledge.").

\textsuperscript{110} \textit{See} Kathryn Abrams, \textit{Feminist Lawyering and Legal Method}, 16 LAW & SOC. INQUIRY 373, 393-94 (1991) (book review) (observing that the lawyer's presentation of a multiplicity of women's experiences and perspectives "makes the dominant [legal] understanding appear less natural or necessary, and more the contingent product of one group's power to make its perspective the norm").
transformative movements\textsuperscript{111} and breaks.\textsuperscript{112} In the next section, I describe the transformative movements and breaks reverberating throughout the administration and adjudication of widows' disability claims.

II. Administration and Adjudication

Cataloguing the ideological and discursive breaks incited by oppositional disability narratives is a complex, and perhaps futile, endeavor. Certain anomalies and disruptions may resist classification. Moreover, those that prove conducive to classification may nonetheless fail to indicate the decisive moment of breach—the moment that signifies a challenge to the procedure and substance of disability law. The background of formative ideals and formed practices, in fact, may be too deeply rooted and multilayered to isolate single, unambiguous breaks. Instead, what emerges from the backdrop of widows' disability law may be more accurately and fruitfully described as an ongoing contest, a discursive series of strategic moves and counter moves to institute a vision of disability and the disabled.\textsuperscript{113}

In 1985, Marjorie Hill, a black\textsuperscript{114} fifty-year-old widow, entered this contest when she filed concurrent applications for disability benefits under the OASDI\textsuperscript{115} and SSI\textsuperscript{116} programs of the Social Security Act.\textsuperscript{117}

\textsuperscript{111} See Ananta Giri, Narratives of Creative Transformation: Constituting Critical Movements in Contemporary American Culture, 14 DIALECTICAL ANTHROPOLOGY 331 (1989); Patterson, supra note 109, at 313 ("On a narrative account of legal knowledge, understanding emerges not as a conservative notion but as the focus of interpretive activity.").

\textsuperscript{112} See, e.g., David Kennedy, Spring Break, 63 TEX. L. REV. 1377, 1422 (1985).

\textsuperscript{113} The incoherence of that vision stems in large part from the frustrated state effort to "fuse or harmonize the ethical structure of social insurance with that of a market economy," Mashaw, Disability Insurance, supra note 89, at 155-56. Numerous state agents—administrators, adjudicators, federal judges—are engulfed in this effort. Id. at 153 ("[T]he story of disability politics in the decade from 1975 to 1985 reveals that the ideology of entitlements or rights, implied by social insurance, gives a crucial political role to two sets of institutional actors—administrative law judges and the federal judiciary.").

\textsuperscript{114} On the status of black widows, see FAMILY ISSUES IN CURRENT GERONTOLOGY 52 (Lillian Troll ed., 1986) (citing the greater impoverishment of black widows); E. Percil Stanford & Shirley A. Lockery, Aging and Social Relations in the Black Community, in INDEPENDENT AGING, supra note 6, at 164, 166 (noting that in 1980, approximately 32% (1,221,000) of all American blacks 55 years of age or older were widowed). See also Toinette M. Eugene, Sometimes I Feel Like a Motherless Child: The Call and Response for a Liberational Ethic of Care by Black Feminists, in WHO CARES?: THEORY, RESEARCH, AND EDUCATIONAL IMPLICATIONS OF THE ETHIC OF CARE 45, 46 (Mary M. Brabeck ed., 1989) ("[B]lack women are not special specimens of womenhood; rather, they are women who have been given less protected and more burdensome positions in society.").

\textsuperscript{115} 40 U.S.C. §§ 401-433 (1988); see BERKOWITZ, supra note 89, at 41-151 (history of the Disability Insurance program); Ball, supra note 2, at 35-36 ("The essence of OASDI is that while people work, they and their employers make contributions earmarked for Social Security; and when earnings are lost because of retirement in old age, long-term total disability, or
In her applications, Mrs. Hill claimed to suffer from a combination of severe physical impairments including coronary heart disease, pulmonary disease, status posthysterectomy and cholecystectomy, uncontrolled hypertension, and severe pain.118

Adjudicators119 denied both applications, initially as well as upon reconsideration.120 Whereupon Mrs. Hill timely requested and appeared at a de novo hearing.121 After conducting initial and supplemental hearings, an administrative law judge (ALJ) issued two decisions. The first found Mrs. Hill disabled and therefore eligible for SSI benefits. In awarding SSI benefits, the ALJ concluded that Mrs. Hill’s impairments....
not only prevented her from performing her past relevant work, but also limited her residual functional capacity to "less than" sedentary work.123

The ALJ's second decision found Mrs. Hill not disabled and therefore ineligible for OASDI widows' insurance benefits. In denying widows' benefits the ALJ concluded that "none" of Mrs. Hill's impairments "singly or in combination meet or equal any of the Listing" of impairments.124

In 1987, Mrs. Hill requested administrative review of the ALJ decision denying her widows' benefits.125 Without further investigation or hearing, adjudicators declined to grant review.126 Hence, the ALJ's unreconciled decisions became the final bureaucratic judgment of the judicial state.127

The finality of that judgment disguises the continuing contest over the meaning of widows' disability.128 That latent controversy entangles disability administrators, adjudicators, lawyers, and clients. The administrative and adjudicative functioning of the bureaucratic state provide

122. Sedentary work is the least physically demanding of the five job classifications—the other four being light, medium, heavy, and very heavy work—that HHS uses to determine the physical exertion requirements of work in the national economy. 20 C.F.R. § 404.1567 (1991).

Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although HHS defines a sedentary job as one that involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met. 20 C.F.R. § 404.1567(a) (1991).

HHS rulings elaborate on the capabilities necessary to perform sedentary work, adding that sedentary work requires the capacity both to stand or walk two hours and to sit for six hours in an eight-hour day. Soc. Security Rul. 83-10, S.S.R. 179 (Cum. ed. 1983).

123. Plaintiff's Complaint, supra note 117, at 3-4.
124. Id. at 4.
127. For an account of such bureaucratic inconsistencies, see Daniel J. Gifford, Need Like Cases Be Decided Alike? Mashaw's Bureaucratic Justice, 1983 AM. B. FOUND. RES. J. 985, 995 ("[Administrative] decisional differences do not necessarily establish either maladministration or injustice.").
128. The internal structure of widows' disability law is characterized by the competition between two sets of formative ideals: benevolence-discipline and autonomy-community. Each set of ideals presents a vision of disability irreconcilable with the other. The visions oscillate in the formed practices of administration and adjudication. See, e.g., Mashaw, Disability Insurance, supra note 89, at 156 ("[T]he institutional structure of implementation is as heavily weighted toward generous provision and rights protection for social insurance beneficiaries as it is toward managerial control of a potentially unruly program.").
129. For helpful discussions of the administrative and adjudicative operations of the bureaucratic state, see JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983); JERRY L. MASHAW ET AL., SOCIAL SECURITY
one of the three primary juridical contexts for encoding ideological and discursive struggle into legal rules and regulations. The outcome of that struggle determines the award and denial of widows’ disability benefits.131

The natural and necessitarian logics of widows’ disability determinations fail to immunize the discourse of widows’ disability administration and adjudication from internal controversy. For immunity to adhere, administrators and adjudicators must sustain a coherent discourse.132 While continuity is a basic element of coherence, alone it is insufficient to immunize discourse. Coherence requires discursive integration and unity. That unity is absent due to the opposing narratives of disabled widows.

To ensure discursive dominance, disability administrators and adjudicators silence opposing widow narratives.133 The practice of silencing


131. See HAVEMAN ET AL., supra note 2, at 179 ("[D]ecisions in disability insurance programs have been intimately related to government policy toward low-income or unemployed people in general.").

132. Cf Stephen Kalberg, The Role of Ideal Interests in Max Weber’s Comparative Historical Sociology, in A WEBER-MARX DIALOGUE 46, 57-58 (Robert J. Antonio & Ronald M. Glassman eds., 1985) ("[Bureaucratic] legitimacy is accorded and procedures carried out not simply as a result of expedient adaptation but also due to a value-rational belief in the legitimacy of this type of [means-ends] domination and correctness of its procedures.").

133. State silencing strategies are consistent with fiscal austerity regimes. Overthrowing such regimes does not ensure the repudiation of such strategies. Cf Mashaw, Disability Insur-
permeates the disability determination process, enforcing the ideals of benevolence and discipline and excluding the alternative ideals of autonomy and community. Sanctioned as a necessary aspect of the determination process, the practice of silencing persists in historically overt and covert forms of regulatory policy. Administrators and adjudicators overtly silence disabled widows under the aegis of the Social Security Act. The original 1935 Act made no provision for widows' disability benefits. Nor was there pro-

ance, supra note 89, at 156 ("SSA will be the 'heavy' whenever fiscal restraint is on an administration's political agenda.").


135. See, e.g., Mashaw, Disability Insurance, supra note 89, at 156 ("The politics of disability insurance is a micropolitics in which ideologically charged issues of social insurance adequacy versus market incentives may be transformed into technical issues of implementation.").


137. The statutory omission of women represents a linguistic codification of inferior status. Legal codification is a political and economic decision. Shelley Bannister & Dragan Milovanovic, The Necessity Defense, Substantive Justice and Oppositional Linguistic Praxis, 18 Int'l J. Soc. L. 179, 180 (1990) ("The particular legal codification of reality ... can be seen as a political economic decision.").

vision for the payment of dependent derivative benefits to a widow, though benefits could accrue to her indirectly through a deceased spouse's estate.

In 1939 Congress amended the Act to include a widow's nondisability benefit payable upon her retirement. The amendments required

Spouses, 63 CORNELL L. REV. 789 (1978); Alicia H. Munnell & Laura E. Stiglin, Women and a Two-Tier Social Security System, in A CHALLENGE TO SOCIAL SECURITY, supra, at 101-23; Jacob Perlman, Changing Trends Under Old-Age and Survivors Insurance, 1935-1950, 4 INDUS. & LAB. REL. REV. 173 (1950-51); Marjorie Dick Rombauer, Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey, 52 WASH. L. REV. 227 (1977); Jane C. Sherburne, Note, Women and Social Security: Seizing the Moment for Change, 70 GEO. L.J. 1563 (1982); see also S. REP. No. 628, 74th Cong., 1st Sess. 18 (1935) ("There is great need for expansion in actual operation of the mothers' pension laws and in many States for the liberalization of the pensions."); H.R. REP. No. 615, 74th Cong., 1st Sess. 10 (1935) (estimating "above 350,000 families on relief the head of which was a widowed, separated, or divorced mother and whose other members were children under 16"); ANDRE, supra note 74, at 15 ("The Social Security system is primarily designed to benefit paid workers, and most women have not been active members of the paid labor force."); Beth B. Hess, Aging Policies and Old Women: The Hidden Agenda, in GENDER AND THE LIFE COURSE, supra note 11, at 319, 323 ("Public programs have been shaped by assumptions based on the life experience of men.").

138. Cf. S. REP. No. 628, 74th Cong., 1st Sess. 17 (1935) (recognizing the needs of dependent children in "families with female heads who are widowed, divorced, or deserted").


The present law is, therefore, limited in its scope in that it does not provide current monthly benefits to the surviving wife of an aged annuitant, nor to the surviving widow with dependent children. The payment of these survivorship benefits and supplements for the wife of an annuitant are more in keeping with the principle of social insurance than the 3 1/2-percent lump-sum payments now provided. Under a social-insurance plan the primary purpose is to pay benefits in accordance with the probable needs of the beneficiaries rather than to make payments to the estate of a deceased person regardless of whether or not he leaves dependents. There is ample precedent for such provision, since 15 out of 22 old-age insurance systems of foreign countries make provision for survivor benefits.

See also Johanna Brenner & Barbara Laslett, Gender, Social Reproduction, and Women's Self-Organization: Considering the U.S. Welfare State, 5 GENDER & SOC'Y 311, 314 (1991) ("In the New Deal . . . the debate over state policy focused overwhelmingly on men, particularly men as workers and family providers."); Helen S. Carter, Legal Aspects of Widowhood and Aging, in ON THEIR OWN: WIDOWS AND WIDOWHOOD IN THE AMERICAN SOUTHWEST 1848-1939, supra note 52, at 271, 285 ("It was common practice during the late 1800s and early 1900s for the male-dominated legislatures of the territories and states of the United States to provide for a 'widow's allowance.'").


This title amends title II of the Social Security Act. It revises and extends the pres-
the widow to elect payment of primary or secondary benefits. Primary benefits flowed from a widow's individual earnings account.141 Secondary provisions for old-age insurance benefits. It includes benefits for qualified wives and children of individuals entitled to old-age insurance benefits and for qualified widows, children, and parents of deceased individuals, who, regardless of age at death, have fulfilled certain conditions. It also provides a lump-sum payment on death where no monthly benefits are then payable ....

Id.

The Social Security Act now provides a certain amount of survivor protection in the form of lump-sum payments. These are small and inadequate in the early years of the system and entirely unrelated to the needs of the recipients. However, eventually, they will be rather costly and may not provide protection where most needed. The new plan will eliminate most lump-sum benefits and will substitute monthly benefits for those groups of survivors whose probable need is greatest. These groups are widows over 65, widows with children, orphans, and dependent parents over 65. The monthly benefits payable to these survivors are related in size to the deceased individual's past monthly benefit or the monthly benefit he would have received on attaining age 65.

In case of a widow, the monthly benefit is three-fourths of the deceased's monthly benefit or prospective benefit. In the case of an orphan or dependent parent, it is one-half of the deceased's monthly benefit or prospective benefit.

Id. at 11.

The Report explicitly addressed the problem of system-wide cost controls. The basic problem confronting the committee was how to provide more adequate and effective benefits, .... without increasing the future cost of the old-age insurance system. The committee has solved this problem in two principal ways, as follows:

.... Monthly benefits to wives, children, widows, orphans, and surviving dependent parents are substituted for the present 3 1/2-percent lump sums payable to the estates of deceased workers.

Id. at 7.


A widow's insurance benefit for a month is equal to three-fourths of the monthly primary insurance benefit of her husband, but, if she is or becomes entitled to a monthly primary insurance benefit under subsection (a) which is less than three-fourths of the monthly primary insurance benefit of her husband, then her widow's insurance benefit for the month in which she becomes entitled to such primary insurance benefit, and for each month thereafter, is equal to the difference between three-fourths of her husband's monthly primary insurance benefit and her monthly primary insurance benefit.

.... Widow's insurance benefits are payable beginning with the month in which the widow becomes eligible for them, having met conditions (1), (2), (3), (4), and (5) above. All of such conditions may be met in a single month, or part in one month and part in another month or months. Benefits end when the widow remarries, dies, or becomes entitled to a monthly primary insurance benefit equal to or exceeding three-fourths of the monthly primary insurance benefit of her husband.


Primary benefits were often unavailable or meager due to the economic disadvantages women suffered. See JOHN MYLES, OLD AGE IN THE WELFARE STATE: THE POLITICAL ECONOMY OF PUBLIC PENSIONS 135 (1989) ("As wage-earners, women have typically been concentrated in low-wage job ghettos and, because they have traditionally played the role of
The widow elected to claim benefits from one of these two reserves.143 Her election barred the accumulation of benefits from child-rearers, have been less likely to accumulate the years of service necessary to maximize their pension benefits.

142. On secondary benefits, see BERNSTEIN & BERNSTEIN, supra note 141, at 19-21. See also H.R. REP. No. 1461, 76th Cong., 1st Sess. 7, 10 (1939) (technical amendments to lump-sum death payment and marriage provisions). Congress defined widows' entitlement to secondary benefits as follows:

A widow of a fully insured individual, who has attained age 65 and who was living with such individual when he died, is eligible for a monthly benefit which when added to her primary insurance benefit, if any, is equal to three-fourths of a primary insurance benefit of her husband.

H.R. REP. No. 728, 76th Cong., 1st Sess. 8 (1939). In section 202(d) of the amended act Congress enumerated the conditions of entitlement.

[M]onthly "widow's insurance benefits" for an aged widow (defined in see. 209 (j)) whose husband died a fully insured individual (defined in sec. 209 (g)). The purpose of these widow's benefits, which are based on the wages of the deceased husband, is to assure the widow of a monthly amount equal to three-fourths of the amount to which her husband was entitled, or would have been entitled if he had, before his death, met the conditions for a primary insurance benefit under subsection (a). A benefit is payable to the widow for each month, upon condition that she (1) is at least 65 years of age, (2) has not remarried, (3) has filed application for the benefits, (4) was living with her husband at the time of his death, and (5) is not herself entitled to a monthly primary insurance benefit which is equal to or greater than three-fourths of the monthly primary insurance benefit of her husband.

Id. at 36, 37; see also FERRARA, supra note 136, at 230-43 (documenting gender discrimination in the social security benefit structure).

143. Social Security Act Amendments of 1939, ch. 666, § 202, 53 Stat. 1360, 1363. Recognizing the stringency of its eligibility conditions, Congress included a limited provision applicable to caretaker widows.

Section 202 (e) . . . provides for: "widow's current insurance benefits," which are based on the wages of a husband who died a fully or currently insured individual (as defined in sec. 209 (g) and (h)). The purpose of this subsection is to extend financial protection to the widow regardless of her age, while she has in her care a child of the deceased husband entitled to child's insurance benefits. It provides assurance for such a widow, before she becomes 65 years of age, of a monthly amount equal to three-fourths of the amount to which her husband would have been entitled if, before his death, he had met the conditions for a primary insurance benefit under subsection (a). When she becomes 65 such widow, if her husband was a fully insured individual, will become entitled to a widow's insurance benefit under subsection (d). If her husband was currently (but not fully) insured, she will continue to be entitled to her widow's current benefit under subsection (e) so long as there is a child of her husband who is entitled to receive child's insurance benefits. A benefit is payable to the widow for each month, upon condition that she (1) has not remarried, (2) is not entitled to receive a monthly widow's insurance benefit under subsection (d) or a monthly primary insurance benefit which is equal to or greater than three-fourths of a monthly primary insurance benefit of her husband, (3) was living with her husband at the time of his death, (4) has filed application for the benefits, and (5) at the time of filing such application has in her care a child of the deceased husband entitled to receive child's insurance benefits. By "in her care" is meant that she takes responsibility for the...
both accounts.144

In 1956 Congress lowered the widows' statutory retirement age to sixty-two, but did not otherwise lessen eligibility requirements.145 In 1965 Congress lowered the age to sixty.146 More notably, in 1967 Congress enacted a disability benefit provision for widows aged fifty to sixty.147 Established under the OASDI program, the provision affords insurance benefits to disabled widows of individual wage earners.148

welfare and care of the child, whether or not she actually lives in the same home with the child at the time she files application.


144. See HELENA ZNANIECKA LOPATA, WOMEN AS WIDOWS 42 (1979) [hereinafter LOPATA, WOMEN AS WIDOWS] (["Social Security] programs for widows of insured workers operate on the assumption that only a portion of the income needs to be replaced after the death of the husband."); Judith Treas, Women's Employment and Its Implications for the Status of the Elderly of the Future, in AGING, SOCIAL CHANGE 561, 568 (Sara B. Kiesler et al. eds., 1981) ("[The 1939 Amendments to the Social Security Act introduced new considerations emphasizing income adequacy rather than equity.").

145. Social Security Act Amendments of 1956, ch. 836, § 102, 70 Stat. 807, 809; cf. MEZETZ, supra note 89, at 41 (["A"]bout twenty years after the disability insurance program was begun, it appeared that the Social Security Administration's enthusiasm for growth faded and was replaced by an increasingly restrictive attitude toward disability entitlement.").


147. Social Security Act Amendments of 1967, Pub. L. No. 90-248, § 104, 81 Stat. 821, 828 (current version at 42 U.S.C. § 402(e)(1) (1988)). The provision also applied to widowers. See also H.R. REP. No. 544, 90th Cong., 1st Sess. 25 (1967) (noting that the House Ways and Means Committee's "bill would provide social security benefits for certain totally disabled widows (including surviving divorced wives) and totally disabled dependent widowers who are not old enough to qualify for the benefits now provided for aged widows and dependent widowers"); S. REP. No. 744, 90th Cong., 1st Sess. 45 (1967) ("About 70,000 totally disabled widows and widowers under age 62 would immediately become eligible for cash benefits. About $71 million in additional benefits would be paid out during the first 12 months of operation."). Still, the 1971 Advisory Council on Social Security was unsatisfied with the 1967 age limits:

[T]here is no justification for withholding benefits until the disabled widow reaches age 50. The need of a disabled widow younger than age 50 may be greater than that of an older widow; her husband, having died at an early age, may have had less opportunity to accumulate savings or provide for future needs.

1971 Advisory Council on Social Security, supra note 146, at 42 ("Disabled widows and disabled dependent widowers should be eligible for benefits without regard to age, and the benefits should not be reduced by reason of their beginning before age 65.").


The legislative history of the 1967 enactment discloses congressional disagreement over the appropriate definition of disability applicable to widows and widowers. The House initially
Until 1990, a widow's entitlement to disability insurance benefits turned on evidence that her physical or mental impairment reached a proposed "a more restrictive definition of disability for disabled widows and widowers than exists in present law for disabled workers." H.R. REP. NO. 1030, 90th Cong., 1st Sess. 52 (1967). According to that definition, "a widow or widower would not be found to be under a disability unless his or her impairments are of a level of severity deemed sufficient to preclude an individual from engaging in any gainful activity." Id. A Senate amendment eliminated this new, more restrictive definition of disability; however, the conference agreement retained the special test provision of the House bill. Id; see also S. REP. NO. 744, 90th Cong., 1st Sess. 45 (1967). Under the conference version, "a person would be disabled only if the disability is one that, under regulations prescribed by the Secretary of Health, Education, and Welfare, is deemed to be severe enough to preclude any gainful activity." H.R. REP. NO. 544, 90th Cong., 1st Sess. 6 (1967).

The Senate report indicates growing congressional concern regarding the "rising cost" of the disability insurance program.

The committee recognizes and shares the concern expressed by the Committee on Ways and Means regarding the way this definition has been interpreted by the courts and the effects their interpretations have had and might have in the future on the administration of the disability program by the Social Security Administration. The allocation to the disability trust fund has increased from 0.50 percent of payroll in 1956 to 0.70 percent today, and will be increased to 0.95 percent by the committee's bill. In 1965 the Congress adopted an increase in the social security taxes allocated to the disability insurance trust fund; a large part of which was needed to meet an actuarial deficiency of 0.13 percent in the system. Again this year the Administration has come to the Congress asking for an increase in the taxes allocated to that fund to meet an even larger actuarial deficiency, which has reduced the 0.03 percent surplus, estimated after the 1965 amendments, to a 0.15 percent deficiency. The studies of the Committee on Ways and Means indicate that over the past few years the rising cost of the disability insurance program is related, along with other factors, to the way in which the definition of disability has been interpreted. The committee therefore includes in its bill more precise guidelines that are to be used in determining the degree of disability which must exist in order to qualify for disability insurance benefits.

S. REP. NO. 744, 90th Cong., 1st Sess. 46-47 (1967). See also MZEZ, supra note 89, at 39 ("[A]s costs continued to increase, there were some stirrings of congressional unrest over the size and expense of the disability program in the latter part of the 1960s.").

Moreover, the Report demonstrates the substantial discretion delegated to HHS in establishing the test for widow disability.

The bill would also provide benefits (as discussed in the statement on benefits for disabled widows and widowers) for certain disabled widows (including surviving divorced wives) and disabled dependent widowers under a test of disability that is somewhat more restrictive than that for disabled workers and childhood disability beneficiaries. The determination of disability in the case of a widow or widower would be based solely on the level of severity of the impairment. Determinations in disabled widow and widower cases would be made without regard to nonmedical factors such as age, education, and work experience, which are considered in disabled worker cases. Under this test, the Secretary of Health, Education, and Welfare would by regulation establish the severity of impairment which may be deemed to preclude an individual from engaging in any "substantial gainful activity" (as opposed to "gainful activity" as provided in the House bill). An individual whose impairments meet the level of severity established by the regulations of the Secretary would generally be found to be disabled, although, of course, if other evidence estab-
level of severity deemed sufficient to preclude her from engaging in any gainful activity. The Social Security Act defines an individual's im-

lishes ability to engage in substantial gainful activity despite such impairments, he would not be found disabled; and individuals whose impairments do not meet this level of severity may not in any case be found disabled.


The restrictive scope of the House provision, coupled with HHS regulations, adversely affected disabled widows even though they suffered an already disproportionate share of pov-

erty in 1967. According to the 1971 Advisory Council on Social Security, [S]urveys of social security beneficiaries have shown that, as a group, women getting widows’ benefits had less regular income other than social security than did most other classes of beneficiaries. About two-thirds of the widow beneficiaries had in-
comes of less than $1500 in the entire year of 1967. About 69 percent of the widows were classified as poor.

1971 Advisory Council on Social Security, supra note 146, at 33 (footnote omitted).

ments must be of a level of severity to prevent a person from doing any gainful activity."). The widow standard of proof also extends to widowers and surviving divorced spouses. Widower application followed generally from the Supreme Court's extension of equal protection prin-


A widow(er) or surviving divorced spouse with no child in care and who is under age 60 but at least age 50 may be eligible for widow(er)'s benefits as a disabled widow(er).

Generally, disability is defined as an inability to engage in any substantial gain-
ful activity (defined in regulations as earnings of more than $500 per month, effective January 1, 1990) by reason of a physical or mental impairment. The impairment must be medically determinable and expected to last for not less than 12 months or to result in death. A person (other than a disabled widow(er)) may be determined to be disabled only if, due to this impairment, he or she is unable to engage in any kind of substantial gainful work, considering his or her age, education and work experience, which exists in the national economy.

The definition of disability which is applied to widow(er)s, however, is stricter than that which is applied to workers and to Supplemental Security Income (SSI) disability applicants. First, a widow(er) must have a disability severe enough to pre-
vent him or her from engaging in "any gainful activity" (little or no earnings at all) rather than substantial gainful activity (ordinarily, earnings of more than $500 per month). Second, for a disabled widow(er) the three vocational factors used in deter-
ing a worker's disability—age, education, and work experience—are not consid-
ered. Therefore, the disability must be established based on medical evidence alone.

The stricter test of disability for disabled widow(er)s was established in the So-
cial Security Amendments of 1967, which created this new entitlement to benefits. In explaining the reasons for the more restrictive rules, Ways and Means Committee Chairman Wilbur Mills stated on the House floor, "We wrote this provision of the bill very narrowly, because it represents a step into an unexplored area where cost potentials are an important consideration.
pairment as a physical or mental condition resulting from anatomical, physiological, or psychological abnormalities demonstrable by medically acceptable clinical and laboratory diagnostic techniques.\textsuperscript{150} Congress' 1984 amendments require consideration of the combined effect of all of an individual's impairments without regard to whether any single impairment, if considered separately, would rise to a level of medical severity sufficient to warrant eligibility for benefits.\textsuperscript{151}

By comparison, during the same period from 1967 to 1990, an individual wage earner's entitlement to disability insurance benefits hinged on proof that her physical or mental impairment attained a degree of severity leaving her unable to engage in her previous work and, considering her age, education, and work experience, unable to perform any other kind of \textit{substantial} gainful work existing in the national economy.\textsuperscript{152} In ascertaining the existence of \textit{substantial} gainful work, it is statutorily irrelevant whether a specific job vacancy exists in the immediate area where the wage earner lives for which she would be hired if she ap-


By amendment, the Senate moved to repeal the stricter test of disability. The Senate amendment declared:

Providing benefits to widow(er)s on the basis of disability has been found not to be a significant cost to the trust fund. Therefore, the provision would repeal the stricter definition of disability that must be met by a disabled widow(er) age 50-59 in order to qualify for widow(er)'s benefits and instead apply the definition of disability used for workers.

\textit{Id.} at 926-27.

The Senate report concurred.

The largest change in the Social Security benefit structure enacted in 1990 amended the eligibility standard to disabled widows and widowers. The provisions repealed the stricter definition of disability long applied to these individuals. Based on legislation introduced by Senator Heinz, disabled widows will not [sic] qualify under the same definition of disability that is applied to all other disabled individuals. Prior to this change, a more stringent test of disability resulted in the denial of benefits to approximately 5,000 applicants each year.

The previous, more restrictive test that had to be met to establish eligibility for widows/widowers benefits was that they could not engage in "any gainful" activity." This meant that they had to be completely incapacitated to the extent that no work whatsoever could be accomplished. This standard was repealed in favor of the same test that other workers must meet, which is that they cannot engage in "substantial gainful activity," currently defined by regulation as $500 per month.

This landmark legislative provision removes a major inequity in the Social Security program, and will assist many thousands of deserving older Americans in the future.


\textsuperscript{151} \textit{Id.} § 423(d)(2)(B).

\textsuperscript{152} \textit{Id.} § 423(d)(2)(A).
According to the Act, work counts within the national economy when it exists in significant numbers either in the region where the wage earner lives or in several regions of the country.

To implement these contrasting entitlement standards, administrators promulgated a multistep disability evaluation process. The first three steps of the evaluation process have applied to both widows and wage earners from the start. Step one is a threshold step inquiring whether the claimant is working and, if so, whether that work constitutes substantial gainful activity. A finding that the claimant is engaged in substantial gainful activity dictates a determination of not disabled regardless of the claimant’s medical condition, age, education, or work experience. If no such finding is made, the claimant continues to step two.

Step two is a severity step evaluating whether the claimant suffers any physical or mental impairment or combination of impairments significantly limiting her physical or mental ability to do basic work activities. Evidence of insignificant limitations compels a determination of not disabled. That determination is unaffected by factors of age, education, and work experience. If the claimant manifests significant impairment-related limitations, she continues to step three.

Step three is an equivalence step evaluating whether the claimant’s physical or mental impairment meets a twelve month duration requirement and a set of body system criteria compiled in a Listing of Impairments, or equals such criteria, without considering age, education, or work experience. To meet a listed impairment, the claimant must submit medical findings of a condition “shown in the Listing of that impair-

153. Id.
154. Id.
155. 20 C.F.R. § 404.1520 (1991). Adjudicators may, however, halt the evaluation process at any point at which they find a claimant disabled or not disabled. Id. § 404.1520(a).
156. Id. § 404.1520(b).
157. Id. § 404.1520(c).
158. To satisfy the duration requirement, the claimant’s impairment “must have lasted or must be expected to last for a continuous period of at least 12 months.” Id. § 404.1509. The claimant is permitted to waive this requirement when her impairment “is expected to result in death.” Id.
160. 20 C.F.R. § 404.1520(d).
Medical findings encompass symptoms, signs, and laboratory findings. The term equals, by contrast, implies an equivalence determination. The evaluation of equivalence compares the claimant's impairment-related symptoms, signs, and laboratory findings with medical criteria indicative of a listed impairment. If the asserted impairment is not listed, the comparison centers on a materially similar impairment. Alternatively, if multiple impairments are alleged but none meets or equals a listed impairment, the comparison enlarges its scope to consider whether the combination of impairments is medically equal to any listed impairment.

To demonstrate equivalence, each comparison of impairments must adduce medical findings at least equal in severity and duration to the listed medical criteria. If the wage earner claimant is unable to muster medical evidence deemed adequate to meet this level of severity, she nonetheless continues to step four. The similarly situated widow claimant, however, was barred from concluding the disability evaluation process. For the widow claimant lacking adequate medical evidence, step three was a denial step.

Step four is a function step assessing the claimant's residual functional capacity as well as the physical and mental demands of her past work. Residual functional capacity is a medical assessment of what the claimant can still do in a work setting, despite impairment-caused physical and mental limitations. It is a functional measure of the claimant's remaining physical and mental capacity for work. That measurement is matched against the demands of the claimant's past work to determine whether she can still do such work. If the wage earner claimant is unable to perform her previous work, she continues to step five.

161. *Id.* § 404.1525(d).
162. *Id.* § 404.1528.
163. *Id.* § 404.1526(a).
164. *Id.*
165. *Id.* § 404.1520(e).
166. *Id.* §§ 404.1577-1578.
167. *Id.* § 404.1545(a).
168. Physical capacity is assessed in terms of the claimant's physical ability (e.g., strength) to accomplish work activities on a regular and continuing basis. The activities include walking, standing, lifting, carrying, pushing, pulling, reaching, handling, and other physical functions. The claimant's limited ability to do these activities may be found to reduce her ability to do work. *Id.* § 404.1545(b).
169. Mental capacity is an assessment of the claimant's mental ability to understand, to carry out and remember instructions, and to respond appropriately to supervision, coworkers, and work pressures in a work setting. *Id.* § 404.1545(c).
170. *Id.* § 404.1520(e).
Step five is a vocational step considering whether the claimant’s residual functional capacity, age, education, and past work experience enable her to perform other work in the national economy. If the claimant is unable to perform other work, she is determined to be “disabled.”

Prior to January 1991, administrators and adjudicators applied only steps one through three of the five-step disability evaluation process to widow claimants. This truncated evaluation excluded considerations of residual functional capacity as well as age, education, and work experience. As a consequence, the evaluation process was reduced to a determination of (1) whether a widow’s impairment presented specific clinical findings matching those enumerated in a listed impairment or representing some condition medically equivalent to a listed impairment, and (2) whether the impairment satisfied the appropriate duration requirement. The widow claimant subjected to this determination and unable to produce specific clinical findings of a listed or unlisted impairment was deemed not disabled, even though her impairment may have risen to a level of severity equivalent to a listed impairment.

171. Id. § 404.1520(f).


173. This instance of state stringency proved not to be an isolated incident. See, e.g., MEZEY, supra note 89, at 41 (“The Agency’s stricter approach to disability entitlement was also evidenced in increased denials on the basis of the no severe impairment stage of the sequential evaluation and, with a further revision of the regulations in 1980, a new formulation of the standard used to evaluate pain.”) (footnote omitted); Carolyn Weaver, Social Security Disability Policy in the 1980s and Beyond, in DISABILITY AND THE LABOR MARKET 29, 45 (Monroe Berkowitz & M. Anne Hill eds., 1989) (examining the “crisis in administration and adjudication” following congressional passage of the 1980 periodic review legislation).


175. Medical findings include symptoms, signs, and laboratory findings. Symptoms are descriptions and statements of the claimant’s physical or mental impairments. Signs are observations—corroborated by medically acceptable clinical diagnostic techniques—of the claimant’s anatomical, physiological, and psychological abnormalities. Laboratory findings are anatomical, physiological, and psychological claimant-specific phenomena confirmed by medically acceptable laboratory diagnostic techniques. Id. § 404.1528(a)-(c).

176. Id. § 404.1578.
This outcome was ratified by internal administrative rulings governing the consideration of medical equivalency and the evaluation of symptoms, especially pain. The equivalency ruling declared the administrative policy and designated the criteria for determining disability when a claimant's impairment met or equaled a listed impairment. Policy statements proclaimed the Listing of Impairments to be "the basic frame of reference for the medical evaluation of all disability claims." The statements presumed that "the severity of each listed impairment generally preclude[d] the effective performance of any gainful work activity." They did not, however, equate that "level of severity" with the claimant's residual functional capacity.

To the contrary, the ruling prohibited consideration of residual functional capacity in determining medical equivalence. The ruling expressly stated: "[I]t is incorrect to consider whether the listing is equaled on the basis of an assessment of overall functional impairment." Even when the claimant asserted a number of impairments in combination, "[t]he functional consequences of the impairments (i.e., RFC [residual functional capacity]), irrespective of their nature or extent, cannot justify a determination of equivalence."

The pain ruling announced the administrative policy and outlined the consideration accorded to the claimant's symptoms, particularly pain, in evaluating the severity of her impairment and her functional ca-

177. See Titles II and XVI: Finding Disability on the Basis of Medical Considerations Alone—The Listing of Impairments and Medical Equivalency, Soc. Sec. Rul. 83-19, S.S.R. 89 (Jan. 1983 ed.) (hereinafter SSR 83-19); Titles II and XVI: Evaluation of Symptoms, Soc. Sec. Rul. 82-58, S.S.R. 120 (Cum. ed. 1982) (hereinafter SSR 82-58); see also PROGRAM OPERATIONS MANUAL SYSTEM (POMS) INSTRUCTIONS DI 24505.015, DI 24501.025, DI 24510.030 (1986); DONNA P. COFER, JUDGES, BUREAUCRATS, AND THE QUESTION OF INDEPENDENCE: A STUDY OF THE SOCIAL SECURITY HEARING PROCESS 125 (1985) ("[T]he states follow this manual whose provisions are neither published nor subject to rulemaking under the APA."); MEZEY, supra note 89, at 58 ("Unlike regulations and rulings, the POMS is an internal Agency document; it is not published in the Federal Register and does not have the force of law.").

178. SSR 83-19, supra note 177, at 89.

179. Id. at 90 ("The listing permits adjudicators to quickly and readily identify those persons who clearly have disabling impairments.").

180. Id. ("The listing contains over 100 examples of medical conditions which ordinarily prevent an individual from engaging in any gainful activity.").

181. Id. ("When certain functional limitations are specified for a listed impairment, they relate only to the degree of dysfunction for that particular listing section and only to the specific function identified.").

182. Id. at 91.

183. Id. ("The level of severity in any particular listing section is depicted by the given set of findings and not by the degree of severity of any single medical finding—no matter to what extent that finding may exceed the listed value.").

184. Id. at 91-92 (emphasis in original); cf. POMS, supra note 177, at DI 24505.015(C).
pacity limitations.\textsuperscript{185} The ruling defined symptoms in terms of the claimant's own subjective perceptions of the effects of a physical or mental impairment.\textsuperscript{186} In addition to pain, common symptoms also included shortness of breath and weakness.\textsuperscript{187}

Policy statements emphasized that the claimant's symptoms were "not controlling for purposes of evaluating disability."\textsuperscript{188} Although conceding that "[s]ymptoms can sometimes suggest a greater severity of impairment than is demonstrated by objective medical findings alone,"\textsuperscript{189} the statements rejected independent reliance on symptoms as a basis for establishing a severe impairment.\textsuperscript{190} Absent additional medical findings of impairment severity, policy statements mandated the denial of a claimant's disability application, notwithstanding the intensity of her symptoms or related functional limitations.\textsuperscript{191}

The wage-earner claimant suffering a severe impairment and significant impairment-related symptoms, such as pain, escaped this administratively mandated denial. Even if her impairment and symptoms did not meet or equal the medical criteria for a listed impairment, she advanced to step four of the disability evaluation process.\textsuperscript{192} At step four, adjudicators assessed her residual functional capacity. In making that assessment, adjudicators admitted that the functionally limiting effects of the claimant's symptoms "[could] play a significant role."\textsuperscript{193}

For the widow claimant, by contrast, the evaluation of medical equivalence and functional limitation was sharply curtailed. Despite proof of a severe impairment and associated symptoms, without the support of clinical signs and laboratory findings delineated by the Listing of Impairments, the claimant's symptoms "[could not] be persuasive that the Listing is met or equalled."\textsuperscript{194} Further, "[n]o alleged or reported intensity of the symptoms [could] be substituted to elevate impairment severity to equivalency."\textsuperscript{195}

\begin{thebibliography}{195}
\bibitem{185} SSR 82-58, supra note 177, at 120.
\bibitem{186} Id.
\bibitem{187} Id.
\bibitem{188} Id.
\bibitem{189} Id. at 122.
\bibitem{190} Id. at 121.
\bibitem{191} Id.
\bibitem{192} Id. at 120-21.
\bibitem{193} Id. at 121-22.
\bibitem{194} Id. at 121.
\bibitem{195} Id. (emphasis in original). The ruling expressly instructed:
[I]f pain is present and is a requisite for a listed impairment, but one (or more) of the requisite clinical or laboratory findings for meeting the Listing is missing or are of a
Relying on these administrative rules and regulations, adjudicators deemed Mrs. Hill not disabled for the purposes of widows' disability benefits, even though an ALJ found her incapable of performing any relevant categories of work. This conclusion approved an administrative policy of determining medical equivalence without weighing the combined effect and impact of a widow's multiple impairments and pain related symptoms, or assessing and considering her residual functional capacity.

Consistent with that policy, adjudicators dismissed Mrs. Hill's claims of medical equivalence with a summary finding that her impairments did not "meet or equal" any listed impairment. Their failure to weigh the combined effect and impact of Mrs. Hill's multiple impairments and pain, and to assess and consider her residual functional capacity, silenced narratives crucial both to the vindication of her widow's disability entitlement and to the public recognition of her autonomy and community. Confronting and disrupting that practice in its original administrative and succeeding judicial contexts is the critical objective of an enabling strategy of advocacy.

Before embarking on this enabling strategy, it is imperative to understand the basis for the well-accepted victimization strategy pressed by lawyers for disabled widows. In the following section, I examine the ideals and practices fostering such a victimization strategy.

III. Victimization Strategy

The ideals of traditional widows' disability advocacy conform to the logic of administrative and adjudicative silencing. The imperative of silencing summons the deployment of structure-preserving and context-preserving practices. The product of this convergence is a victimiza-

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Id. (emphasis in original).
196. Plaintiff's Complaint, supra note 117, at 3-4.
197. Id.
198. Unger argues that critical understanding turns on "see[ing] the settled from the angle of the unsettled." UNGER, SOCIAL THEORY, supra note 19, at 65. He explains:

The settled is the region or the moment where relationships become fixed and, through their fixity, take on a specious aura of necessity. The unsettled is the experience that discloses the perilous, uncertain, malleable quality of society. By seeing the settled unsettled or by looking toward the disturbances that take place in its vicinity, we begin to understand how the settled really works and what it really is.

Id.
tion strategy. Formed by the ideals of benevolence and discipline, the strategy reproduces images of widow dependence, incompetence, and deviance in daily discourse. That discourse inhibits counter narratives of widow autonomy and community.

A. Structure-Preserving Practices

Structure-preserving practices fortify the ideals of benevolence and discipline against contest from oppositional narratives. Fortification squanders opportunities to realign ideological hierarchy and reorganize client-lawyer roles and relations. Hierarchy welds the ideals of benevolence and discipline to the strategy of victimization.

Three practices rationalize this fusion. The first relies on disclaimer. Put simply, the lawyer denies privileging benevolent and disciplinary ideals. Instead, she invokes a series of natural or necessitarian defenses, all consistent with a victimization strategy. Disability lawyers rely on disclaimer to disavow expressions or acts of paternalism and devaluation, preferring to mention widows' natural state of dependence and incompetence or the necessity of portraying claimants in that


For the private bar, economic incentives may encourage the use of victimization strategies. See Safilios-Rothschild, supra note 40, at 260 ("Because the lawyer has a vested interest (the size of his fee) in presenting his client's disability as maximum, he is often portrayed as being preoccupied with his client's being labeled considerably or totally and permanently disabled."). The public bar is similarly preoccupied, though for altruistic, rather than economic, reasons.


202. Unger describes these framework-denying devices as techniques of avoidance. Unger, Social Theory, supra note 19, at 133-35.

203. Cf. Safilios-Rothschild, supra note 35, at 40 (claiming that rehabilitation professionals often "define the self-concepts, goals, and inner motivations of disabled persons and determine their 'real' wishes and potential... either without asking the individuals about their problems, preferred solutions, and alternatives or by openly disregarding all information received from the disabled persons themselves about desirable goals and solutions").

204. See Safilios-Rothschild, supra note 40, at 123 ("Through the 'spread' phenomenon of perceptual association, the nondisabled tend to create consistently and on the whole usually negative impressions about the disabled person, who is then necessarily viewed as inferior in terms of all possible attributes simply on the basis of his visible or known but nonvisible disability.") (footnote omitted). Cf. Bogdan & Biklen, supra note 6, at 16 (defining handicap as a "set of assumptions and practices that promote the differential and unequal treatment of people because of apparent or assumed physical, mental, or behavioral differences") (citations omitted).
In the lexicon of disability advocacy, widows are naturally dependent upon the largess of a spouse or the state. Their dependence is of two kinds: economic and psychological. This dual dependence is ingrained and irrevocable.

In the same vocabulary, widows are naturally incompetent, that is, they are by intrinsic disposition physically and mentally unable to manage independent, self-sufficient lives. This incapacity logically depletes their decisionmaking and self-help skills. Coinciding with their natural state of dependence, widows' parallel state of incompetence is irreversible.

Even when disability lawyers reject the notion of a natural order of widow dependence and incompetence, they readily take up the cloak of dependence and incompetence in their advocacy. Their justification is bluntly instrumental: to gain an advantage in obtaining or safeguarding widows' benefits. The advantage they seek appertains to discourse and to images. By wrapping their clients' disability claims in the imagery and language of dependence and incompetence, they appeal to the ideological inclinations of administrators and adjudicators. Under both natural and necessitarian logics, therefore, disability lawyers implement the same cluster of ideals and discourses.

A second practice rests on idealization. Here, the lawyer justifies the ideals of benevolence and discipline on the grounds of efficiency. Easily invoked and manipulated, efficiency epitomizes an instrumental logic guided by considerations of time management and resource saving. This logic obeys two recurring institutional mandates of disability administration and adjudication: time abatement and resource conservation.

205. See Safilios-Rothschild, supra note 35, at 40 ("[T]he goals and solutions arrived at by the experts often serve to keep the disabled within the constraints of the inferior and dependent role reserved for the disabled as a category and to discourage any significant deviations from it.").

206. Disabled widows are subject to periodic review to determine whether they have experienced any medical improvement in their impairments and, if so, whether such improvement is related to their ability to work. 20 C.F.R. § 404.1579(a).

207. See Alferi, Reconstructive Poverty Law Practice, supra note 17, at 2130 (discussing temporal and emotional measures of efficiency).


209. See Berkowitz, supra note 89, at 229 ("Rising disability insurance costs precipitated a major effort to reduce incentives to go on the disability rolls, producing first a major reform of the Social Security Disability Insurance program (in 1980) and then a major reform of the reform (in 1984).").

In 1990, a bipartisan congressional Special Committee on Aging investigated the Social Security Administration's disability determination system. The investigation found the system to be "erring on the side of bureaucratic injustice: individuals who are disabled are being
Disability lawyers cite efficiency in excluding widows from the planning and conduct of hearing and litigation strategy. Measuring advocacy efficiency in terms of the investment of lawyer time and resources, they contend that the inclusion of widows in hearing and litigation strategy slows the pace and drains the stock of advocacy.\footnote{210}

A third practice depends on concession. In this instance, the lawyer admits the contingency of benevolent and disciplinary ideals, but retains her adherence to those ideals, pronouncing widow narrative discontinuities as temporary. The fact that such discontinuities may upset client-lawyer and client-state discursive routines is discounted, given their minimal scale and brief duration.

The chief requirement of concession is classifying client-lawyer narrative discontinuities as temporary. Without a rhetorical taxonomy available to classify and evaluate discursive conflicts, closer inspection of the conflict, both as to form and substance, might prove obligatory. Burdened by this obligation, disability lawyers might not so easily discount or minimize the incongruity of their own natural or necessitarian discourse when matched against the oppositional narratives of disabled widow clients.

denied benefits.” S. REP. No. 28, 102d Cong., 1st Sess. 32 (1991) (“According to SSA’s own studies, while the number of people who received benefits in error has not changed appreciably, the number of people who are denied in error has increased by over one-third in the last 5 years.”). The Senate Report recited the findings of the investigation:

The Senate study identified a severe budget crisis facing the Disability Determinations Services (DDSs), which are administered by the States for SSA. The majority of State DDS directors stated in a survey that they had inadequate funds to perform their duties properly. Budget shortfalls forced the DDSs to take shortcuts, delay responses, and go without needed medical evidence which might help them make fairer decisions.

The study found that these problems leave the DDSs in the tenuous position of doing little more than crisis management. The survey of the State disability determination directors shows that 72 percent of the States do not have adequate staff to process their caseloads in a timely manner and that the situation is growing progressively worse. Many disability examiners are now forced to cut corners, eliminating all consultative examinations and discontinuing any reviews of pending Continuing Disability Review (CDR) cases.

Unfortunately, the impact of staff reductions implemented during the 1980’s, inadequate budgetary resources, and the sheer administrative complexity of the disability determination process have left the system unable to properly fulfill its mission.

\textit{Id.}

\footnote{210. \textit{Cf.} Tremblay, \textit{A Tragic View}, supra note 20, (manuscript at 33) (“It seems to be a fair inquiry, and an important ethical inquiry, to wonder whether the lawyers who choose to educate clients less about the complexities of their case in order to have time to offer some representation to other excluded clients are not modelling a more effective poverty law practice.”). \textit{See also} Tremblay, \textit{A Community-Based Ethic}, supra note 48, at 1110-29 (describing the rationing of care in subsidized law practice).}
Structure-preserving practices blunt challenges to a victimization strategy of advocacy. Their appeal lies in their restraint.211 Asserted separately in terms of role requirements or in combination with relational requirements, these practices make limited claims of desirability, couching their defense of client-lawyer role and relation configurations in natural or necessitarian claims. These claims count on the reinforcement of entrenched hierarchy to prevail.212 Hierarchy is integral to natural and necessitarian defenses of structure-preserving practices. With hierarchical client-lawyer roles and relations already firmly in place, there is no need to mount a strong claim of desirability. Hierarchical roles and relations, it is argued, are simply the natural or necessary order of things. The conventions of advocacy supply proof of this “common sense” observation. To construe the client-lawyer relation otherwise is evidently to misapprehend an elementary and immutable ordering of the social world. At bottom, it is the dominant-subordinate positions of client-lawyer hierarchy that arrange the roles and relations of advocacy as well as the context-preserving practices which sustain them.

B. Context-Preserving Practices

Context-preserving practices circulate benevolent and disciplinary ideals in the discourse of widows’ disability advocacy. The natural and necessitarian logic of that victimization discourse is evident in both the Hill hearing213 and litigation214 strategies.

211. See, e.g., Phil Brown, Public Policy and the Rights of Mental Patients, 6 MENTAL DISABILITY L. REP. 55, 56 (1982) [hereinafter Brown, The Rights of Mental Patients] (describing the restraint of federal community health program advocacy as compared to “community-based struggles for the control of human services programs and facilities”).

212. The entrenchment of hierarchy undermines the liberal notion of the client as an autonomous self-directed subject, thus rendering the modality of consent problematic. Compare Safilios-Rothschild, supra note 35, at 41 (“[T]he disabled are said to accept their disability when they accept not only their strictly functional limitations but also the stereotyped ‘appropriate’ role that implies their being different from the nondisabled and thereby deviant.”) with MICHAEL P. MALONEY & MICHAEL P. WARD, MENTAL RETARDATION AND MODERN SOCIETY 286 (1979) (“The data that are available ... strongly indicate a broad negative response by mentally retarded persons to being called ‘mentally retarded.’”).


(1) Hearing Discourse

The narratives and images elicited at Mrs. Hill's hearing comport with the administrative ideals of benevolence and discipline.215 Consistent with the administrative regulations symbolic of those ideals, Mrs. Hill’s lawyers devised a strategy of victimization216 calculated to show her as physically dependent and incompetent and, therefore, socially devalued.217

The Hill lawyers commenced their victimization strategy with Mrs. Hill’s testimony of spousal and state dependence.

Q What is your marital status, Miss [sic] Hill?
A I'm a widow.
Q How long have you been widowed?
A I think it's about 19 years.218

Q What income or resources do you have?
A Public assistance.219

To bolster the image of dependence, they highlighted Mrs. Hill's sparse work history.220 In the opening statement, the Hill lawyers em-
phasized Mrs. Hill's "[v]ery limited work history." They also insisted that because her work history was "unskilled" Mrs. Hill possessed "no transferrable skills."

Q When did you last work, Miss [sic] Hill?
A 1971.[]

Q And in what position did you work . . . ?
A Billing clerk.

Q [C]ould you describe your job as a billing clerk for us?
A I used to record the amount of contributions that was sent in

Q How many days a week did you work as a billing clerk in 1971?
A Think it was about 3 days a week.
Q How many hours a day?
A Four.
Q And how long did you continue in your position as a billing clerk?
A Worked there about 4 months.

Q . . . Why did you leave work?
A My health.

Q Have you since tried to return to work?
A Yes, I, yes.
Q And could you describe what efforts you've made to return to work?
A I went to volunteer service, Division of Volunteer Service.
Q Could you specify dates for us? When did you go?
A '84.
Q What did you do . . . for Volunteer Services?
A Record the days that the people came into work so they could get the coffee.
Q And how long did you work for Volunteer Services[?]
A 2 months.
Q And why did you leave after 2 months?
A My health.

Many administrative law judges feel that effective evidence of disability is found in unsuccessful work attempts.

221. Record, supra note 218, at 31.
222. Id.
223. Record, supra note 218, at 35-36.
224. Id. at 36.
225. Id. at 37.
Q ... Were there any other health problems that caused you to leave work?
A Yes.
Q Please describe them.
A My hypertension.

Q ... How did that affect you at that point?
A I was getting dizzy and sick. And when I take my medication I fall asleep at the desk.
Q ... Since your attempt to return to work in 1984, have you made any additional attempts to return to work?
A No, I haven't.
Q Why not?
A Again, because of my health. 226

To further diminish Mrs. Hill's work history, the Hill lawyers sought to maximize the physical demands of her work, but minimize its economic value.

Q ... Can you describe for us exactly what you did during the course of a day? Let us begin, for example, with the time you spent sitting or standing or walking on the job.

A About a half an hour [sitting] for a time and then I'll go to the bathroom and get a rest.

Q ... How many hours did you spend sitting during the entire period? ...
A ... I think it's maybe about 3 hours.
Q ... How much time did you spend standing and walking? ... The remainder of the time?
A Yes. 227

Q Now, what kind of machinery or tools did you use on the job?

A Pens, paper, no typewriter.
Q Did you have to do any kind of lifting or carrying on the job?
A No.
Q Did you have to do any kind of grasping or use your hands to manipulate pens?
A Yes.
Q ... Did you require any training for these jobs?
A No.
Q Could you return to either of those jobs?
A No.
Q Why not?

226. Id. at 37-38.
227. Id. at 38-39.
A . . . [T]hey wouldn't accept me back.
Q Why?
A I'm a risk, a health risk.228

. . . .
Q . . . [C]ould you do the work on a full-time basis?229
A No.
Q By full-time I mean an 8 hour a day, 5 days a week—
A No.
Q Why not?
A It would be too strenuous for me.
Q Could you explain why?
A One, I cannot use my hands like I used to. Two—
Q How do you mean you can't use your hands like you used to?
A Well, when I write too long, my right hand gives out.
Q You are right-handed?
A Yes I am.
Q Any additional problems that would prevent you from going back on a full-time basis?
A My health.
. . . .
A I'm on quite a bit of medication and it makes me very tired.230

. . . .
Q . . . [D]uring the course of a day, how do you feel because of the medication?
A Tired, listless.
Q Do you ever suffer from dizziness?
A Yes.
Q Do you ever suffer from nausea?
A Yes.
. . . .
Q . . . [P]rior to 1971 did you hold any other jobs?
A No.231

Having adduced evidence of Mrs. Hill’s scant work history and her imputed dependence on spousal support and state public assistance, the Hill lawyers focused on demonstrating her physical incompetence to work.232 Proof of incompetence was gleaned from Mrs. Hill’s testimony

228. Id. at 40.
229. Id. at 41. This question was prompted by the ALJ's brief colloquy with Mrs. Hill:
   Q Ma'am, could you do the work?
   A Yes.

Id. at 40.
230. Id. at 41.
231. Id. at 42.
concerning the functional impact of her impairments, especially her manifold pain.

Q . . . How long do you have to sit before you experience [back] pain?
A About a hour or so.
Q Then how long will it stay with you?
A It will stay with me until I go laydown [sic].

. . . . How often during the day, typical work day that you spend at home, do you have to lie down and rest? How many hours during that day?
A Oh, about 4 or 5 hours.
Q And the remaining hours of the day, what do you do?
A Get up sometimes I'll go to my sister's house.
Q How do you get there?
A I'll walk and sometime I take a cab.
Q How far is your sister's house from your home?
A I think it's about 5 blocks, I'm not quite sure about that, but I think it's about 5.
Q How long does it take you to walk 5 blocks from your home to your sister's?
A About 45 minutes.
Q Have you actually timed that trip?
A Yes I did.
Q . . . [A]re you walking constantly during that period?
A Well, I have to stop and rest sometimes.
Q Why do you have to stop and rest?
A Because I get shortness of breath and pain in my chest.
Q Would you describe that shortness of breath for us?
A It's like a ball coming up in my throat and it cuts off the circulation.
Q How often do you suffer from shortness of breath?
A I get them everyday.
Q Without exertion?

function of an attorney at the hearing level should be to establish the manner in which these particular medical findings affect the particular client's ability to work.

233. Heavy reliance on claimant testimony is a function of the "fractured nature of health care delivery systems for the poor." Charles K. Barber, Social Security Disability Hearings: Securing Additional Medical Evidence for the Indigent Claimant, 37 ADMIN. L. REV. 479, 480 (1985). See also Mark S. Coven, Problems with the Disability Adjudicatory Process, 15 CLEARINGHOUSE REV. 26, 26 (1981) ("Physicians in the community have little understanding of the provisions and requirements of the disability insurance claims, applicants are often erroneously stamped with the welfare label, and physician cooperation is frequently difficult to obtain.")

234. Mrs. Hill complained of daily chest, back, and abdominal pain. She also mentioned shoulder and groin pain. Record, supra note 218, at 43-44, 45-46. Indeed, she stated: "I don't go without pain. I have pain everyday." Id. at 50.
A Yes.\textsuperscript{235}

To emphasize the functional severity of Mrs. Hill’s multiple impairments, the Hill lawyers proffered a particularized showing of her physical restrictions. The accumulation of these restrictions accentuated the images of Mrs. Hill’s incompetence.

Q . . . How long in that 8-hour day do you, . . . think you can stand?
A An hour or two.
Q And what happens? What makes you sit down?
A Terrific pains.

. . . .
Q . . . [W]hat do you do when these pains hit?
A I go get my pills, put a nitroglycerin under my tongue, and I go lay down.
Q . . . [H]ow long do you have to lay down?
A I go to sleep . . .
Q How long can you sit in an 8 hour day . . . ?
A Without twitching, about 2 hours.
Q And then what happens?
A I start having pains.\textsuperscript{236}

. . . .
Q How much can you lift at one time in terms of weight?
A I think I could approximately lift 5 pounds.

. . . .
Q Could you pick up a 5 pound bag of sugar once every hour . . . ?
A No.
Q . . . [D]o you have any problems bending?
A Yes, I do.
Q What kind of problems do you have?
A Pain in the stomach and the back.

. . . .
A And dizziness.
Q Do you have any problems climing [sic] stairs?
A Yes.
Q What kind of problems?
A I get out of breath. I have pains of the chest.\textsuperscript{237}

The detailed summary of Mrs. Hill’s physical restrictions established her workplace incompetence. The Hill lawyers then extended the range of Mrs. Hill’s incompetence to her household.\textsuperscript{238}

\textsuperscript{235} Id. at 44-45.
\textsuperscript{236} Id. at 47.
\textsuperscript{237} Id. at 48-49.
\textsuperscript{238} In contrast, the HHS Medical Adviser testified that Mrs. Hill “could do housework[.]” Id. at 56.
Q Let's discuss household chores for a few minutes. Now you testified that you live with your daughter and your granddaughter?
A Yes.
Q Who does the shopping around the house?
A My daughter does.
Q Do you do any shopping at all?
A Well, if I go my sister's, I may pick up one or two things, but nothing heavy.

Q Who does the cleaning in the house?
A My daughter does.
Q Do you do any cleaning at all?
A No, . . . straightening, cause I've always maintained my home.
Q . . . Who does cooking in the house?
A My daughter.
Q . . . [W]hat do you do all day?
A I sleep, read, look at television.
Q Do any housework?
A I try.

A Sometimes I wash dishes. Sometimes I will try to cook.239

The ideals and images forming the discursive practice of the Hill hearing strategy also shaped the litigation strategy. That strategy adopted the same ideals of benevolence and discipline, and the corresponding images of dependence, incompetence, and deviance in formulating its discursive practices. To the extent that those practices further muted Mrs. Hill's narratives, they made victimization strategy an even more powerful instrument of silencing.240

(2) Litigation Discourse

The Hill litigation strategy of victimization shifted the primary locus of discourse from Mrs. Hill to her lawyers. Under both a natural and necessitarian analysis, the shift from an allegedly client-centered to a lawyer-centered discourse accords with the move from an administrative to a judicial context. This contextual move carries a different set of discursive practices apportioned to the technical complexities of litigation. Those complexities rule out the inclusion of anything but the most con-

239. Id. at 50-51.
240. Cf. Safilios-Rothschild, supra note 35, at 44 (“The stereotyped beliefs about the limited mental and physical capacities of the disabled and the inferior status assigned to them have had a considerably negative effect on the self-confidence and self-esteem of the disabled.”).
trolled client narratives. On this analysis, even the restricted narratives typical of Mrs. Hill's administrative hearing are unacceptable.

The nullification of Mrs. Hill's narratives in litigation is an accredited advocacy strategy devised to fit the ideals and discourses of the Social Security Act. Nullification permits disability lawyers to stress the victimization of disabled widows and thereby appeal to the ideal and discourse of paternalism. The supplicating plea to paternalism avoids the risk of judicial misconstruction posed by accenting oppositional narratives.

The necessitarian logic of victimization was an integral part of the Hill litigation strategy. That logic mandates both overt and covert lawyer acts of silencing. Overt acts exclude the client from participation in litigation activities such as investigation, planning, drafting, trial, and negotiation. Covert acts exclude the client's narratives from full exposition in the discursive routines of pleadings, motions, and memoranda.

The Hill lawyers mastered each method of exclusion. Indeed, nowhere did Mrs. Hill participate in the core activities of litigation. Subsequent to the exhaustion of administrative remedies and commencement of the civil action, Mrs. Hill's participation was confined largely to status conferences and ministerial tasks241 related to the amendment of the original complaint and her standing to serve as class representative on behalf of similarly situated widows.242 After discharging these tasks,243 Mrs. Hill was periodically apprised of litigation developments. Active consultation concentrated instead on the investigation of new medical evidence.244

Nor did Mrs. Hill's lawyers integrate her narratives into the discursive texts of the litigation pleadings, motions, and memoranda. Although they compiled a voluminous litigation record, the Hill lawyers collected only two documents—the administrative hearing transcript and an affidavit245—containing fragments of Mrs. Hill's narratives. Like her hearing testimony, Mrs. Hill's affidavit is effectively muted by the discourse of victimization. The two page affidavit announces that Mrs. Hill

241. Typical ministerial tasks assigned to Mrs. Hill included the review and execution of documents drafted by the Hill lawyers.


243. The lawyers also obtained Mrs. Hill's consent to additional plaintiff intervention. See Proposed Notice of Motion for Intervention—Class Action at 1.

244. In the event of a federal district court remand to HHS, the new medical evidence would speed the redetermination of Mrs. Hill's widow's benefit claim. 20 C.F.R. § 404.983.

245. The affidavit was drafted in support of a preliminary Hill motion for leave to proceed in forma pauperis. See Ex Parte Order for Leave to Proceed in Forma Pauperis at 2.
is the plaintiff in a civil action seeking to annul a federal agency's decision denying her application for widows' disability insurance benefits because she is disabled and unable to work. The affidavit identifies her residence and household composition. Additionally, it tabulates her meager income and resources. Albeit the main purpose of the affidavit, this tabulation stresses a narrative of dependence, rather than an alternative narrative of economic vulnerability. The salience of this distinction hinges on the misleading but common sense conflation of dependence and victimization. While it is possible to dismantle the notion of dependence, rendering it less evocative of passivity and helplessness, the better option is to select a more exact notion, in this instance, economic vulnerability.

The discursive routines of the *Hill* pleadings, motions, and memoranda are no less stringent in silencing Mrs. Hill's narratives. The pleadings, for example, articulate three central narratives: dependence, incompetence, and deviance. Dependence is verified by Mrs. Hill's public source of income and marital status. Incompetence is confirmed by her physical impairments. Deviance is validated by her inability to work. Only in the original complaint is there mention of Mrs. Hill's multigenerational household. Without the predicate of family support, Mrs. Hill's ideal of community and narrative of solidarity are extinguished. It is the predicate of family that implies the intersecting communities of widows and the disabled.

The *Hill* motions and memoranda either countenance or repeat the narratives of dependence, incompetence, and deviance. The motion for class certification, for instance, fails to refer explicitly to subordinate narratives, sacrificing a valuable opportunity to find mutual vulnerability and solidarity in the narratives of similarly situated widows. The motion for intervention, by contrast, includes a four page affidavit of a proposed plaintiff-intervenor that reveals the potential vitality of oppositional narratives.

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249. *See* PATRICIA SIMPSON, LIVING IN POVERTY (1990) (claiming the continued integrity of extended family networks in poor communities).
ratives, particularly the narratives of vulnerability and solidarity. Although the affidavit presents the narratives in an inchoate form, they are powerfully spoken. The narrative of solidarity is articulated in a statement regarding the plaintiff-intervenor’s reliance on “friends, relatives, and neighbors” to drive her to the doctor. The narrative of vulnerability is expressed in a statement concerning the plaintiff-intervenor’s housing. She states:

I have been unable to afford to rent my own apartment. Instead, I live in my mother's cramped, one-bedroom apartment with both my mother and my adult son. My mother sleeps in the bedroom, while my son and I sleep in the living room. There is no space in the living room to put a bed and therefore I must sleep on a sofa.

The motions for summary judgment and supporting memoranda retreat from these alternative narratives, reasserting the images of widows’ dependence, incompetence, and deviance. The image of dependence, in both spousal and state forms, is mentioned repeatedly. The Hill lawyers describe Mrs. Hill as “the widow of David Hill, a wage-earner who had paid into the Social Security Trust Fund to provide security for himself and his family.” They extend this dependent status to the entire plaintiff class, asserting that:

Many class members, like Marjorie Hill, are widows who depended upon the income of their deceased spouses for support and, as a result, are not eligible for Social Security benefits based on their own work records. Their deceased husbands worked for years and contributed to the Social Security Trust Fund to provide a modicum of security for their families in the event of their own death or disability.

The Hill lawyers reinforced the image of widows’ dependency by stressing Mrs. Hill’s subsistence reliance on state public assistance, adding that “[d]isabled widows denied [widows’ disability] benefits are often reduced to poverty or near poverty levels of subsistence.”

The image of incompetence is also reiterated. The Hill lawyers introduce this image to delineate the limits of Mrs. Hill’s household activi-

251. Id. at 4.
252. Id. at 3.
254. Memorandum in Support of Plaintiffs’ Motion for Summary Judgment on Class-Wide Claims, supra note 253, at 5.
255. Id. at 9.
256. Id. at 9-10.
ties. They assert: "Due to constant pain and shortness of breath, [Mrs. Hill] is unable to perform basic household activities such as cleaning, cooking, and shopping."\(^{257}\) Next, they extend the image of incompetence to sedentary work, maintaining that "Mrs. Hill's combined impairments and pain are sufficiently severe to leave her unable to perform even sedentary work."\(^{258}\) In their concluding argument, they extend the reach of incompetence to address the dispositive subject of gainful activity. Here, they contend: "Mrs. Hill's testimony, documented by treating physician opinion and medical records, demonstrated that she lacks the functional capacity to engage in any gainful activity on a sustained basis without chronic pain and disabling physical limitations."\(^{259}\)

The image of deviance is similarly recapitulated. In this instance, the Hill lawyers mix gender, caretaker, nonwage-earner, and impairment imagery to stigmatize Mrs. Hill. They assert: "Mrs. Hill presents a limited history of employment because of her ongoing responsibilities as a mother of four children and because of the disabling impact of her medical impairments, spanning more than twenty five years."\(^{260}\)

The Hill lawyers' mastery of victimization strategy and its component methods of overt and covert client silencing is manifest in the exceptional results of their litigation efforts. At the district court level, they prevailed in opposing the United States Department of Health and Human Services' (HHS) motion to dismiss.\(^{261}\) Moreover, they obtained class certification\(^{262}\) and intervention.\(^{263}\) Seven circuit courts of appeals have similarly granted preliminary and permanent forms of relief in favor of disabled widows.\(^{264}\) Numerous district courts have also granted relief.\(^{265}\)

\(^{257}\) Memorandum in Support of Plaintiff's Motion for Judgment on the Pleadings, supra note 253, at 4.

\(^{258}\) Id. at 22.

\(^{259}\) Id. at 27.

\(^{260}\) Id. at 7.


\(^{262}\) Id. at 88, 93-96.

\(^{263}\) Id. at 88, 96.

\(^{264}\) See Marcus v. Sullivan, 926 F.2d 604 (7th Cir. 1991); Finkelstein v. Sullivan, 924 F.2d 483 (3d Cir. 1991); Bennett v. Sullivan, 917 F.2d 157 (4th Cir. 1990); Davidson v. Secretary of Health & Human Servs., 912 F.2d 1246 (10th Cir. 1990); Ruff v. Sullivan, 907 F.2d 915 (9th Cir. 1990); Cassas v. Secretary of Health & Human Servs., 893 F.2d 454 (1st Cir. 1990); Kier v. Sullivan, 888 F.2d 244 (2d Cir. 1989).

The triumph of the Hill litigation strategy, together with its predecessor and successor suits, follows the direction of necessitarian logic. The necessitarian route re-entrenches benevolent and disciplinary ideals of widows' disability. This logic is not inescapable. Victimization strategies of advocacy exhibit both reversionist and revisionist tendencies. Reversionist tendencies are best indicated by the habitual lawyer readoption of natural and necessitarian logics to guide disability advocacy. Revisionist tendencies are detected in the regular switching of ideals and discourses in all three juridical contexts, again most prominently in advocacy. These cycles are marked by conceptual shifts that break down and reconsolidate the meaning of ideals and practices. The shifts are continuing, acted out in the daily routines of client-lawyer roles and relations. As such, the shifts are recognizable.

The disintegration and reinvention of the ideals and practices of victimization dispel the illusion that all practices associated with dominant structures and routines must be rejected. The impulse to reject traditional practices springs from impatience with the intermediate stages of reconstruction. Enacting change is a piecemeal endeavor. Hierarchical roles must be carefully disassembled and recombined, relational positions extricated and reassigned.

These transformations will cause tensions in the discursive routines of disability advocacy. Some lawyers will respond defensively to these tensions, others defiantly. Others will compensate by reverting to nat-


266. Unger describes periods of breakdown and reconsolidation as central to Marx's social theory. UNGER, SOCIAL THEORY, supra note 19, at 205-06.


268. The theme of disintegration is central to Unger. He contends that "the disintegrating traditions of social thought have forged many of the instruments required for their transformation." UNGER, SOCIAL THEORY, supra note 19, at 143.

269. On the piecemeal nature of institutional and imaginative change, see UNGER, SOCIAL THEORY, supra note 19, at 157. See also Lucie White, Paradox, Piece-Work, and Patience, 43 HASTINGS L.J. 853 (1992).

270. Cf. Alan Watson, Legal Change: Sources of Law and Legal Culture, 131 U. PA. L. REV. 1121, 1156 (1983) ("The more basic an element of the culture, the more diffident a member of the group will be in modifying it and the more violent will be the attack by the group on anyone who suggests change.").
ural or necessitarian practices. The hope is that many will revisit narratives to transform dominant discourse.

IV. Enabling Strategy

The transformation of victimization strategies into enabling strategies of disability advocacy requires the development and implementation of an alternative set of ideals and practices. Progress in such applied development is unlikely to follow a prescribed sequence. Rather, progress is more likely to advance through experimental variations within traditional advocacy structures and routines.

To consolidate experimental variations into a sustained strategy and vision of advocacy, disability lawyers must compile two sets of alternative practices: structure-transforming, and context-transforming. Structure-transforming practices seek to subvert the dominant ideals of disability advocacy by redefining client-lawyer roles. The goal of redefinition is to interrupt lawyer cycles of ideological reversion. Reversion cycles reintroduce natural and necessitarian logics into advocacy. Attendant to this reintroduction is the reinstallation of hierarchical client-lawyer roles. Reasserting her dominant role, the lawyer reverts back to traditional ideals to justify long-standing discursive practices.

Context-transforming practices seek to disrupt the dominant routines of disability advocacy by reorganizing client-lawyer relations. The aim of reorganization is the alteration of established divisions of labor. Traditional divisions distinguish between task-definition and task-execution. Task-definition refers to the lawyer’s function of making tasks. Task-execution pertains to the client’s job of following tasks.

A. Oppositional Narratives

The development of structure-transforming and context-transforming disability advocacy practices is prodded by the oppositional narratives of disabled widows. The narratives I assemble here are

271. Cf. Minow, supra note 199, at 732 ("Working within existing legal rules makes it difficult to resist the patterns that our experiences as outsiders should lead us to protest.").


273. See Piven, supra note 11, at 269 ("There is at least a developing agreement that ideas pattern action, and that oppositional ideas underlie oppositional action.").
cumulative, representing an aggregate discourse informed by the Hill litigation and amplified by additional disability advocacy spanning a six year period.\(^{274}\)

The concurrent administration of Marjorie Hill's OASDI and SSI claims\(^ {275}\) ensnared five interrelated narratives. Had disability administrators considered Mrs. Hill's OASDI claim in isolation, without the fuller inquiry of residual function capacity and work ability demanded by SSI determinations,\(^ {276}\) her narratives would be absent. Even with the closer scrutiny and factual findings required in SSI determinations, Mrs. Hill's narratives are barely heard.\(^ {277}\)

The first of Mrs. Hill's administratively silenced narratives addressed the meaning and valorization of work.\(^ {278}\) This is the narrative of uncounted work;\(^ {279}\) it describes the devaluation of widows' domestic and household labor devoted to the care of children and family.\(^ {280}\) As a mother\(^ {281}\) and spouse,\(^ {282}\) Mrs. Hill engaged in years of uncounted domes-
tic labor. At her hearings, she testified: "I've always maintained my home." She also stated: "I would like to go back to [part-time] work." Asked why she had not attempted to return to work, Mrs. Hill answered: "Just couldn't because I'm more weaker and I see more fatigue."

A second excluded narrative concerned Mrs. Hill's attempt to maintain her independence and self-sufficiency. This is the narrative of independence. It asserts her willingness to engage in independent, self-reliant living. She testified: "I straighten[]" the house. Additionally, she stated: "Sometimes I wash dishes. Sometimes I will try to cook."

A third excluded narrative pertained to Mrs. Hill's functional capacity. This is the narrative of mental and physical competence. The narrative declares Mrs. Hill's modest ability to care for her own daily needs. In testimony, Mrs. Hill asserted a daily functional capacity to stand "an hour or two," to sit "about two hours," to "lift 5 pounds," and to walk "about five blocks" (with periodic stops along the way to rest). She described frequently traveling to her "sister's house" on foot and by taxi. En route, she commented: "I may pick up one or two things [shopping], but nothing heavy.

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exchange for their services.")); Nancy Folbre, The Unproductive Housewife: Her Evolution in Nineteenth-Century Economic Thought, 16 SIGNS 463, 465 (1991) ("[T]he economic devaluation of the home was accompanied by the economic devaluation of the work performed there."). See Piven, supra note 11, at 270 ("[W]omen also developed a traditional moral economy, a moral economy of domesticity, reflecting both their universal life tasks of motherhood . . . and their more particular experience within a Western patriarchal family that made them dependent on male wages.").

See Becker, supra note 137, at 281 ("Social Security, as currently structured, is incapable of giving women credit for both wage employment and domestic production and reproduction.").

Record, supra note 218, at 50.

Id. at 52.

Id. at 74.

Id. at 50.

Id. at 51.

Cf. M. Brinton Lykes, The Caring Self: Social Experiences of Power and Powerlessness, in Who Cares?: Theory, Research, and Educational Implications of the Ethic of Care, supra note 114, at 165, 173 (illustrating how women's traditional tasks may be reconstructed as instruments of female power).

Record, supra note 218, at 47.

Id.

Id. at 48.

Mrs. Hill estimated that a five block walk required "[a]bout 45 minutes," adding that she had "to stop and rest sometimes." Id. at 45.

Mrs. Hill testified that she did not travel by subway "too often" because the stairs proved "too much" for her. Id. at 52.

Id. at 50.
A fourth excluded narrative struck upon Mrs. Hill's economic vulnerability.296 This is the narrative of vulnerability. It articulates Mrs. Hill's need for the economic subsidy afforded by widow disability benefits,297 but decries the implication of dependency.298 As before, the distinction to be made here turns on the demeaning status customarily associated with the notion of dependence. Like many disabled widows, Mrs. Hill acknowledged her economic need and vulnerability. This acknowledgment, however, is not tantamount to an admission of dependence. The narrative of vulnerability spoke of her reliance on public assistance for income and other resources.299 It did not speak of a broader state-affiliated reliance based on helplessness.

A fifth excluded narrative referred to Mrs. Hill's connection to her family,300 especially her twenty-seven-year-old daughter and eight-year-old granddaughter with whom she lived.301 This is the narrative of solidarity.302 Mrs. Hill testified that her daughter assumed the responsibili-

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296. On the economic sources of widows' vulnerability, see LOPATA, WOMEN AS WIDOWS, supra note 144, at 336 ("Social Security cannot replace a man's earnings."); ON THEIR OWN: WIDOWS AND WIDOWHOOD IN THE AMERICAN SOUTHWEST 1848-1939, supra note 52, at 301, 303 (underscoring the "critical importance of a woman's economic situation in determining her experience of widowhood."); Donald J. Treiman, The Work Histories of Women and Men: What We Know and What We Need to Find Out, in GENDER AND THE LIFE COURSE, supra note 11, at 213, 229 ("[I]t is evident that most women experience little upward mobility over the course of their careers, and that upward mobility prospects are particularly poor for married women with children.").

297. See HAVEMAN ET AL., supra note 2, at 179 ("DI and SSI have become important potential sources of aid to those most vulnerable to economic downturns—older workers, the impaired, the unskilled.").

298. See Piven, supra note 11, at 277-78 ("[T]he [income maintenance and insurance] programs that make women a little less insecure also make them a little less powerless. The availability of benefits and services reduces the dependence of younger women with children on male breadwinners, as it reduces the dependence of older women on adult children.").

299. Record, supra note 218, at 35.

300. See Mitchell Rosenthal, Psychosocial Evaluation of Physically Disabled Persons, in PSYCHOSOCIAL INTERVENTIONS WITH PHYSICALLY DISABLED PERSONS, supra note 5, at 43, 46 ("Disability has a significant impact upon family members, who can greatly influence the rehabilitation process.").

301. Record, supra note 218, at 33; see also LOPATA, WOMEN AS WIDOWS, supra note 144, at 177-203 (documenting the contribution of children to the widowed mother's support systems); Elizabeth Mutran, Intergenerational Family Support Among Blacks and Whites: Response to Culture or to Socioeconomic Differences, in FAMILY ISSUES IN CURRENT GERONTOLOGY, supra note 114, at 189, 201 ("Black families do appear to be more involved in exchanges of help across generations.").

302. Cf. INDEPENDENT AGING, supra note 6, at xiii ("Autonomy and a connectedness or sense of belonging to a social group, such as the family, comprise a major proportion of well-being as perceived by the elderly."); Eugene, supra note 114, at 57 ("A primary moral value of black people is articulated in the overarching and enduring black feminist position: solidarity among black women and black men is essential for survival.").
ties of household shopping, cleaning, and cooking.\textsuperscript{303} Moreover, Mrs. Hill's sister testified that she accompanied Mrs. Hill shopping as well as to movies and plays.\textsuperscript{304}

From a traditional advocacy standpoint, Mrs. Hill's five silenced narratives appear inconsequential, except insofar as they amply demonstrate the functional severity of her physical impairments.\textsuperscript{305} In this respect, they supply material corroboration of her claim of entitlement to widows' disability benefits.\textsuperscript{306} This view, however, underestimates the significance of Mrs. Hill's narratives. Under a transformative strategy, the narratives provide the groundwork for an alternative vision of client autonomy and community. To surface, that vision must be rescued from the traditional strategy of client victimization.

Proposing to build a transformative strategy on the foundation of client narrative doubtless invites objection.\textsuperscript{307} Disability lawyers may object, for example, that narratives present only partial recitations of a fuller, perhaps inaccessible, client story. Hence, they may discount the narratives as misleading. Moreover, lawyers may argue that client narratives are often contradictory and therefore unreliable.\textsuperscript{308}

Even when client narratives seem accurate, coherent, and whole, disability lawyers may object that a narrative-based advocacy strategy is

\textsuperscript{303} Record, supra note 218, at 50; see also Qureshi & Walker, supra note 34, at 175 ("[T]o depend on others for help with some of the routine activities of daily living is experienced as a loss of independence by elderly women, but much less so by elderly men."); Carla Masciocchi et al., Support for the Impaired Elderly: A Challenge for Family Care-Givers, in Independent Aging, supra note 6, at 115, 117 ("The family is the primary and largest unit of service for the impaired aged.").

\textsuperscript{304} Record, supra note 218, at 65; see also Stanford & Lockery, supra note 114, at 171 ("The [black] family has not only depended upon the nuclear group for services, but it has looked toward the community-at-large as a part of that support network.").

\textsuperscript{305} The experience of functional severity is reinforced by victimization strategies. Safilios-Rothschild remarks:

[T]he disabled is made to feel that his efforts to localize the handicapping effects of his disability, to make maximum use of his capacities, and to avoid self-devaluation are futile, since the majority of the non-disabled will not easily permit him such a "localization" and will tend to see him through the effect of psychological "spread."

Safilios-Rothschild, supra note 40, at 123 (footnote omitted).

\textsuperscript{306} That material showing, however, is irreversible. See id. at 71 ("[T]he label of disability . . . carries the connotation of permanency and irreversibility regardless of the degree of severity of the condition.").

\textsuperscript{307} See Kathryn Abrams, Lawyers and Social Change Lawbreaking: Confronting A Plural Bar, 52 U. Pitt. L. Rev. 753, 782 (1991) (questioning "what it means to embrace a critical client perspective and how it should be expressed in practice.").

\textsuperscript{308} Cf Safilios-Rothschild, supra note 40, at 262 ("[A]t the end of [workers' compensation] procedures, the disabled person may be thoroughly confused and uncertain about what he can do and what he cannot do, who he is, and what his prospects for the future are, and may finally become—unnecessarily—a true invalid, psychologically and physically.").
too costly. They may insist that the uncertain process of culling out suppressed narratives requires an overinvestment of lawyer time, and thus results in an inefficient allocation of scarce organizational resources to equally, if not more, deserving client communities. Further, they may observe that the narrative-oriented slowing of the disability determination process may provoke administrative intransigence and conflict. They also may note that the delays caused by institutional intransigence and the antagonism aroused by lawyer-state conflicts may prove detrimental to the client.

Additionally, disability lawyers may contend that overreliance on narratives may divert the lawyer from her primary task of marshaling “relevant” evidence in support of the client’s widow disability claim, thereby compromising the client’s main objective. Notwithstanding lawyer speculation regarding cost-efficient resource allocation, institutional delay, or retaliation, this last objection highlights the double bind imposed by a narrative-based advocacy strategy.

Indeed, if the lawyer pursues a narrative advocacy strategy, she not only risks misallocating the community delivery of legal services and incurring the retaliatory ire of state administrators and adjudicators, she also risks losing the case. At the same time, if the lawyer fails to conduct a narrative advocacy strategy, she risks reverting to a victimization strat-

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309. The plain response to this argument is to reduce the demands on lawyer time through institutional restructuring of client participation opportunities. Cf. Sussman, supra note 1, at 254 (“Since bureaucracies do not tend to be patient, and by nature focus on efficiency, it is essential to confront directly the problem of building organizational patience into the structural apparatus.”); Lawrence E. Schlesinger, Staff Authority and Patient Participation in Rehabilitation, in Social and Psychological Aspects of Disability, supra note 1, at 167, 170 (“When time pressures are reduced, patient participation can be increased.”).


Erecting a strategy on these grounds falsifies the social world. Moreover, it denigrates the ideals and discourses of disabled widows. Further, it deprives disabled widows of the opportunity to determine how they will be represented in public. This cumulative disparagement weakens the integrity of the diverse disabled widow community, impairing its willingness and ability to organize and mobilize politically.

For many disability lawyers, the resolution of this double bind is found in the award of widow disability benefits. For them, the material outcome itself provides sufficient resolution. Together with a growing number of teachers, scholars, and advocates studying the theoretics of practice, I find no satisfactory resolution in material outcomes. My own dissatisfaction is fed by anecdotal and empirical evidence of growing client dissatisfaction with conventional advocacy practices, material benefits notwithstanding. But neither am I confident in expounding alternative resolutions, however appealing. Instead, like many, I offer tentative observations and proposals in the hope of contributing to a daily process of continuing investigation and contingent resolution.

Oppositional narratives are contingent forms of client discourse that contest the absolute interpretive structures and routines of traditional lawyer advocacy. Because of the hazards of overt discursive contest, the narratives are often veiled. Even the opaque rhetoric of widows' narra-

tives offers alternative versions of the sociolegal meaning of disability. Their descriptions and explanations disclose an experience of disability characterized by struggles to maintain independence,\textsuperscript{313} competence, and solidarity. This traditionally unheard version adds contextual thickness to client-lawyer discourse.

Recognizing the contingency of sociolegal description undermines natural and necessitarian defenses of dominant disability advocacy ideals and practices. The disintegration of these long held justifications results from the assertion of enabling ideals contained in oppositional widows' narratives. Suppressed by traditional discourse, these counterideals exemplify the values of autonomy\textsuperscript{314} and community.\textsuperscript{315} The emergence of openly competing values leads to a contest of disability ideals aligning benevolence and discipline against autonomy and community.\textsuperscript{316}

The outcome of this contest is determined in the discursive settings of disability advocacy. The form and content of that discourse coincides with the constituent elements of client-lawyer narratives. Narratives depicting disabled widows as independent and competent are traditionally excluded from this discourse, whereas narratives portraying disabled widows as dependent and incompetent are usually encoded in the discourse. Structure- and context-transforming practices seek to integrate excluded narratives into the discursive practices of traditional advocacy.

\textsuperscript{313} Cf. Frank Bowe, Rehabilitating America: Toward Independence for Disabled and Elderly People 133 (1980) [hereinafter Bowe, Rehabilitating America] ("People with disabilities and senior citizens are also persons with abilities."); Wright, supra note 38, at 8 ("[A] 'disabled person' is also an able person.") (emphasis in original).


\textsuperscript{316} Unger argues for a conception of community that permits "heightened mutual vulnerability" and the "partial reconciliation of self-affirmation and attachment." Unger, Social Theory, supra note 19, at 44; see also Drucilla Cornell, Beyond Tragedy and Complacency, 81 Nw. U. L. Rev. 693, 696-98 (1987) ("In order to achieve reciprocity, the individual's striving must culminate in the recognition of her own fundamental interconnectedness with others.").
B. Structure-Transforming Practices

Structure-transforming practices interfere with the cycles of lawyer reversion responsible for reproducing the formative ideals of benevolence and discipline, as well as the formed discourses of client dependence, incompetence, and deviance. They are variable, open-ended practices subject to ongoing review.317 Although innovative, they carry forward the traces of benevolence and discipline.

The partial repetition of formative ideals through structure-transforming practices is unavoidable. The formative influence of existing ideal structures continues even during transformative breaks. These structures are too implanted to be dislodged fully or permanently. As practices evolve, some of the traces may be abandoned, others modified. The remnants that persist generate profound ideological conflicts over the primacy of benevolence and discipline. The conflicts resist easy containment. Notwithstanding lawyer sentiment, it is mistaken to expect a divisive transformative practice to preserve a mythical harmony of disability advocacy ideals and routines. The roiling of contested ideals and discourses cannot be disguised by false sentiment.

Yet, this sentiment fuels two of the principal objections to structure-transforming practices. The first objection denounces client-lawyer ideological conflict as unproductive. This objection perceives any divergence from benevolent and disciplinary ideals as inefficient, and therefore, irrational. Unsurprisingly, lawyer task-definition and client task-execution are the measures of efficiency. These measures, of course, reflect the tenacity of reversionist tendencies rather than the patience of revisionist challenges.

A second objection condemns conflict for fear that unchecked ideological clashes will eradicate client-lawyer as well as lawyer-community trust. This fear compounds two points of lawyer apprehension: politicization and populism. Lawyer qualms about politicization emanate from the worry that ideological battles will abrade lawyers’ standing as neutral craftsmen. Lawyer consternation regarding populism arises from skepticism of popular, community-based movements and a preference for elite, vanguard leadership.

The consolidation of these objections amounts to an authoritative defense of the ideals of benevolence and discipline. That defense reimposes the social hierarchy of lawyer dominance and client dependence as

317. See UNGER, FALSE NECESSITY, supra note 6, at 166 ("In the most general terms, the less entrenched or naturalized a set of arrangements becomes, the more the activity of reproducing these arrangements resembles the practice of subjecting them to permanent review and occasional transformation.")
a necessary corrective to prevent conflict. The quick resort to benevolence and discipline as a practical necessity demonstrates the prevailing influence of formative ideals and formed routines, as well as the deep-seated fear of ideological conflict. Halting the reversion cycle of benevolence and discipline requires the redefinition of client-lawyer roles.

(1) Role Redefinition

Like any revisable sociolegal contexts, the contexts of disability advocacy—interviewing, investigation, counseling, negotiation, hearings, and litigation—furnish interior spaces for ideological and discursive contest. Certain of these spaces are susceptible to lawyer-client role redefinition. That susceptibility indicates a plasticity of institutionalized roles. This plasticity is not unlimited. The constraints of structure-preserving ideals circumscribe the institutional space available for definitional experimentation. Nonetheless, such experimentation is viable.

318. For criticism of necessitarian interpretations of historical situations, see UNGER, FALSE NECESSITY, supra note 6, at 215.

319. Ideals and practices furnish the resources employed in client-lawyer contest. Schur mentions the decisive relevance of such resources in shaping the outcomes of client-lawyer interactions. He states:

[In relations between actual or suspected deviators and agents of social control—particularly in the latter's efforts to attach negative labels to the former, in both informal and formal interaction—the parties' stocks of relevant resources and their relative capacities to wield or resist power are clearly important in shaping outcomes.]

SCHUR, supra note 10, at 66.

320. See FRANK BOWE, HANDICAPPING AMERICA: BARRIERS TO DISABLED PEOPLE 131-32 (1978) (describing role reversal simulation and training).

321. See Martin L. Hoffman, The Development of Empathy, in ALTRUISM AND HELPING BEHAVIOR: SOCIAL, PERSONALITY, AND DEVELOPMENTAL PERSPECTIVES 41, 46-47 (J. Philippe Rushton & Richard M. Sorrentino eds., 1981) (defining role-taking as the most developmentally advanced mode of empathic arousal). In role-taking, "the person imagines how he or she would feel if in the other's place." Id. at 47.

322. To Unger, plasticity is an institutional quality favorable to change. See UNGER, PLASTICITY INTO POWER, supra note 19, at 153. He assesses the plasticity of social life according to "the relative ease with which people can subject their forms of production and exchange, of machine design and work organization, to the logic of problem solving." Id. at 210, 210-14; see also Helena Znaniecka Lopata, Role Changes in Widowhood: A World Perspective, in AGING AND MODERNIZATION 275-303 (Donald O. Cowgill & Lowell D. Holmes eds., 1972) (analyzing the role shifts in the lives of widows).

323. See, e.g., Yuen, supra note 75, at 577 (noting the "rigid and ritualized patterns" of lawyer and client roles).

324. See WRIGHT, supra note 38, at 342 ("Role playing is a widely accepted approach for effecting change both in behavior and attitudes."); see, e.g., Alice Schlegel, Hopi Family Structure and the Experience of Widowhood, in ON THEIR OWN: WIDOWS AND WIDOWHOOD IN THE AMERICAN SOUTHWEST 1848-1939, supra note 52, at 42, 44 ("Hopi terms [for widow or widower] are descriptive and do not place the individual into a socially distinct category with markedly different role expectations and behavior patterns.").
The very act of definitional experimentation constitutes a rejection of dependent client roles and an affirmation of independent client capabilities, especially the capacity for self-help. The accumulation of role experiments gradually precipitates a lawyer reversion crisis. The crisis is marked by the lawyer's inability to revert to a traditionally benevolent and disciplinary role.

(2) Reversion Crisis

At bottom, the crisis of reversion is lawyer induced. It is a crisis propelled by self-subversion. To spark its onset, the lawyer must continually experiment with alternative roles. The relative plasticity of disability advocacy contexts facilitates self-subverting role experimentation. The roles of interviewer, investigator, counselor, negotiator, and advocate all supply lawyer role subverting opportunities.

Tailoring specific acts of self-subversion to the changing contexts of disability advocacy hinges on definitional tactics. To be sure, formative

325. See Unger, Plasticity into Power, supra note 19, at 12 ("[E]xperiments encourage the individual to treat his settled character as the incomplete and corrige expression of a self.").

326. Elizabeth Midlarsky extends the concept of self-help to others. She asserts: it is quite likely that especially for persons such as the elderly, the handicapped, and other members of "recipient groups," should the opportunity be provided for them to be effective helpers, then this strategy may enhance mental health and generally lead to positive psychosocial outcomes as well as benefits for society. Elizabeth Midlarsky, Competence and Helping: Notes Toward a Model, in Development and Maintenance of Prosocial Behavior, supra note 70, at 291, 305. Cf. Roberts, supra note 37, at 240 ("The peer counseling model should get wider currency since people with disabilities are demonstrably more effective in counseling each other.").

327. Cf. Dennis Krebs & Cristine Russell, Role-Taking and Altruism: When You Put Yourself in the Shoes of Another, Will They Take You to their Owner's Aid?, in Altruism and Helping Behavior, supra note 321, at 137, 161 (contending that "role-taking is an information-gathering process that is not in itself intrinsically altruistic, but that the cognitive states it produces and the moral reasoning it mediates may give rise to altruistic motivation").

328. Cf. Frances M. Slaney, Psychoanalysis and Cycles of "Subversion" in Modern Art and Anthropology, 14 Dialectical Anthropology 213, 231 (1989) (cautioning that "the modernist intensification of representing the Western self was based upon the absorption of 'exotica' from others") (emphasis in original).

329. See Eisenberg, supra note 38, at 102 (subdividing role-taking into three types of perspective-taking: perceptual, cognitive, and affective). Two of these types are germane to client-lawyer relations: the cognitive and the affective. Eisenberg defines cognitive perspective-taking as "the ability to predict and understand another's thoughts, motives, intentions, and behaviors." Id. She defines affective perspective-taking as "the ability to infer another's feelings and emotional reactions." Id. (citations omitted).

330. See Ervin Staub, Promoting Positive Behavior in Schools, in Other Educational Settings, and in the Home, in Altruism and Helping Behavior, supra note 321, at 109, 122 ("Because it is enactive, what is done in the course of role playing appears to function—and to be experienced by people—as similar to the actual performance of behavior.").
ideals and formed routines are the preponderant influences on the definition of the disability lawyer's role. These influences, however, cannot quiet contest over the substance of that definition. Definitional tactics are a device to counter and dilute such influences. Two role subverting definitional tactics are crucial to lawyer self-subversion: denaturalization and personalization. Denaturalization tactics call for the lawyer to renounce her professional claims of insight concerning client capabilities and, to a lesser extent, juridical—legislative, administrative, and judicial—conduct.331

The natural and necessitarian pretenses enclosing these claims shield lawyer judgments of client dependence, incompetence, and deviance, as well as predictions of juridical behavior, thus securing the formative ideals of benevolence and discipline against attack.333 Consequently, however false her judgments of client character or inaccurate her predictions of juridical action, the lawyer’s claim of insight is trusted and thereby defended.334 Denaturalization subverts the lawyer’s character judgments and institutional predictions by repudiating the pivotal claim of insight.

Personalization tactics build on the results of denaturalization. After the lawyer’s professional claims of insight are self-impeached, the secondary tactics of personalization attempt to return the power of making judgments and predictions to the client.335 These tactics will flounder if not joined with the counter ideals and discourses of disabled widows. The ideals of autonomy and community and the narratives of independence, competence, vulnerability, and solidarity enable disabled widows to assert the power to make judgments in their private lives. Personalization tactics harness that power and extend it to the public world. Due to the corrosive traces of benevolent and disciplinary ideals in the public

331. Unger notes two different approaches to the denaturalization of social life. The first involves the “emancipation of [collective] experiences of practical or passionate connection from the constraints of an entrenched scheme of social division and hierarchy.” UNGER, FALSE NECESSITY, supra note 6, at 125. The second entails the “effacement of the contrast between fighting within a structure of social life and fighting about such a structure.” Id. at 126.

332. See, e.g., Paul R. Harrison, Power, Culture and the Interpretation of Democracy, 11 PRAXIS INT’L 340, 345 (1991) (“Foucault accords to humans the capacity to consciously ‘put into question’ the meanings they have attached to the world. They are no longer merely thought of as the effects of rules or of power.”).

333. See WRIGHT, supra note 38, at 422 (“The helping relationship itself tends to reinforce the attitude that the expert has the answers, or at least should have the answers.”).

334. See, e.g., Carrie Menkel-Meadow & Robert G. Meadow, Resource Allocation in Legal Services, 5 LAW & POL’Y Q. 237, 243 (1983) (“[T]he legal services client must trust the lawyer to know what is wrong as well as what to do about it.”).

335. Cf. Safilios-Rothschild, supra note 35, at 50-51 (maintaining that actual control of the rehabilitation decisionmaking process by the disabled involves a significant shift of power).
discourse of disability advocacy, only a partial restoration of such power is plausible. Even a partial reinstatement of discursive power may relativize the formative images of widow dependence, incompetence, and deviance, and thus convince advocates of the contingency of those images' base. By reacquiring the discursive power to declare her own insights in public, the disabled widow personalizes her role, infusing it with the values of independence and competence.

C. Context-Transforming Practices

Context-transforming practices undertake to reorganize the client-lawyer relations of traditional disability advocacy by reintegrating the private productive capabilities of disabled clients into public settings. Client productive capabilities consist of two main properties: independence and competence. The best means of reintegrating and safeguarding those properties is to encourage their exercise.

Reorganizing disability practice relations to encourage the exercise of client independence and competence is hampered by reversion cycles to benevolence and discipline. Such cycles impede experimentation with alternative relational arrangements. This impediment flows out of the

336. Cf. Schlesinger, supra note 309, at 169 ("[W]e are suggesting bringing the patient in the authority process and reducing the discrepancy between his power and that of the [hospital] staff.").

337. Cf. Safilios-Rothschild, supra note 35, at 51 ("There is . . . considerable evidence that whenever disabled persons have a say in, or even better, determine their own rehabilitation goals and plans, they are highly motivated and reach the peak of their potential.") (citation omitted).

338. In this way, disability lawyers may secure two perspectives of disability. Cf. Jeanne L. Schroeder, Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination, 70 Tex. L. Rev. 109, 206 (1991) ("Seeing two perspectives of the same thing may be more adequate than seeing only one perspective.").

339. Unger contends that empowerment calls for the development of practical productive capabilities and the diminution of dependence and depersonalization. See Unger, False Necessity, supra note 6, at 210.

340. Cf. Bowe, Rehabilitating America, supra note 313, at 5 ("Disabled people are more able than they are disabled; the difference between those who become self-sufficient and those who do not is less a function of the severity of the disability than it is a reflection of the power and timeliness of the rehabilitation intervention."); James W. McDaniel, Physical Disability and Human Behavior 158 (1969) (endorsing restoration of client responsibility and decision-making participation in rehabilitation programs); Rosenthal, supra note 300, at 43 ("[Rehabilitation] goals are complementary and often identical: to assist the physically disabled individual and family regain as much independence as possible in order to achieve a high quality of life, regardless of the specific nature of physical impairments that accompany a given disability.").

341. Cf. Schlesinger, supra note 309, at 169 ("[I]f the staff has the strengths to leave certain areas of decisionmaking open and not to rush in to fill the power gap, patients will eventually increase their participation.") (citation omitted).
relations of benevolence and discipline, especially the exclusion of clients from participation in practice routines involving the definition and execution of advocacy tasks.\textsuperscript{342}

The self-subverting tactics of denaturalization and personalization are inadequate guarantees of client participation in essential practice routines. Although such tactics may trigger a reversion crisis, they fail to ensure that clients enter into participatory routines of independent task definition and execution. This irresolution invites the creation of transitional forms to reorganize provisional client-lawyer relations and divisions of labor.

The risk in creating short-term, transitional forms of client-lawyer organization is that such makeshift schemes may acquire longer life. This unanticipated effect narrows the prospects of relational reorganization. Absent the assurance of a sequential progression from transitional to permanent forms of reorganization, disability lawyers employing transformative practices must resist the temptation to adhere to particular forms based solely on the short-term results of advocacy. Additionally, they must withstand the tendency to opt for interim stability in favor of the fluctuations of renewal.

Reservations about the uncertainty and tumult of constant renewal suggest the need to reorganize client-lawyer relations in a manner that preserves the material interests of disabled clients, but continuously revises lawyer practices.\textsuperscript{343} The tactics available to accommodate these competing imperatives conjoin the lawyer's technical knowledge and the client's practical capabilities to fashion a collaborative relation.\textsuperscript{344}

(1) Relational Reorganization

Reorganizing the traditional client-lawyer relations and task divisions of disability advocacy to redistribute decisionmaking power is a

\begin{itemize}
  \item \textsuperscript{342} Cf. id. at 169 ("One method of making the patient more active, more productive, and more involved in the rehabilitation process is to increase his participation in the decisionmaking system.").
  \item \textsuperscript{343} For Unger, each new occasion for revision reveals both new ambiguities and new requirements for change. See UNGER, FALSE NECESSITY, supra note 6, at 452.
  \item \textsuperscript{344} Appraising the vanguardist style of military warfare, Unger endorses the "development of revisable operating procedures, sustained by a hierarchy that combines, at every level, supervision and coordination from above with initiative and discretion from below." UNGER, PLASTICITY INTO POWER, supra note 19, at 159. Whether this endorsement dictates a specific collaborative arrangement is unclear. At a minimum, Unger's vanguardist model implies a form of mutual compensation. Cf. INDEPENDENT AGING, supra note 6, at xiii ("[W]hen independence is limited because of health, economic status, social situation, mental functioning, and the like, compensation to offset such liabilities is feasible.").
\end{itemize}
fundamental transformative practice. Collaborative reorganization injects flexibility into the formed routines of practice. The introduction of more flexible practice routines softens the rigid distinction between lawyer task-making and client task-executing.

Collaboration tactics attempt to loosen, rather than abolish, client-lawyer divisions of labor. The tactics permit the increased exercise of disabled widows' productive capabilities and the preservation of their material welfare. Contextual instability heightens the tension already surrounding the concurrent enlargement of client capabilities and the safekeeping of client welfare. This tension will not be resolved by the lawyer's application of technical expertise or the client's vindication of disability rights. Resolution depends on the recognition of client-law-

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345. Commenting on a like transformation in the rehabilitation context, Constantina Safilios-Rothschild states:

The main issue pointed out by the disabled and by some rehabilitation practitioners is the need to diminish the social distance between experts and nonexperts and thereby to decrease the degree of control exerted by the former over the latter. The existing social distance is legitimized by a model specifying that the expert has all the pertinent and valid information while the nonexpert has none. Hence, the decision of the expert can be legitimately imposed upon the nonexpert client without any challenge or scrutiny on the part of the client and his significant others. Safilios-Rothschild, supra note 35, at 47 (citation omitted).

346. On the fixity of this distinction, see UNGER, PLASTICITY INTO POWER, supra note 19, at 187.

347. Unger employs the comparable notion of "tactical partnership." UNGER, FALSE NECESSITY, supra note 6, at 426. He argues that tactical partnerships include alliances of coordinate and inferior groups against common superiors. Id.; cf. WRIGHT, supra note 38, at 417-41 (advocating a specialist-client relationship based on the principles of active client participation and comanagement).

348. The social distance established by divisions of labor cannot be fully overcome, but it may be diminished. Citing the rehabilitation context, Safilios-Rothschild remarks:

In order to diminish the social distance between expert and nonexpert, the [rehabilitation] model must be changed to assume only a difference of degree and type of knowledge between expert and nonexpert. Thus, the nonexperts would be legitimized to contribute their knowledge of their own idiosyncratic reactions, preferences, and choices as supplementary to the scientific expertise. Safilios-Rothschild, supra note 35, at 47.

349. Cf. WRIGHT, supra note 38, at 309 ("Transforming the helping relationship from a one-sided affair to a relationship of interdependence provides a basis for reducing inferiority, strengthening responsibility, and achieving a healthy balance between needs for dependency and independence.") (emphasis in original).

350. Unger equates instability with "a heightening of the intensity and a broadening of the scope of conflict over the uses of governmental policy," understanding it "as a resurgent threat to the individual's most vital interests in material security and welfare." UNGER, FALSE NECESSITY, supra note 6, at 464.

351. Unger's claim that welfare rights enable the individual to accept destabilizing conflicts "without feeling they jeopardize his basic safety," UNGER, FALSE NECESSITY, supra note 6, at 469, both overestimates the immunizing power of rights and underestimates the retributory power of the state actors, such as administrators and adjudicators. For criticism of Un-
ary collaborative tension as an opportunity to adjust fixed relations and divisions of labor.352

The opportunity to reorganize the rudimentary tasks of the client-lawyer relation arises throughout disability advocacy. In fact, reorganizational opportunities are abundant, abiding in the client-lawyer relations involved in, for example, interviewing, investigation, counseling, planning, and hearing examination. Dispersed among a succession of advocacy tasks, this transformative opportunity is attended by client-lawyer and client-state conflicts. The motivation behind such conflicts is the impounding of discursive authority: the power to declare formative ideals. In effect, these conflicts are the transaction costs of relational reorganization. To minimize such reorganization costs, lawyers must devise conflict containment and conversion tactics.353

Containment tactics explicate the conflicts internal to the routines of disability advocacy by exposing their benevolent and disciplinary basis.354 Traced back to their formative ideals, the conflicts reveal the assumptions of client dependence, incompetence, and deviance.355 Pinpointing these assumptions as the source of client-lawyer and client-state conflicts illuminates the natural and necessitarian character of dominant practice routines and relations. This contextual insight does not, however, emancipate clients from context-preserving practice routines. The purpose of containment tactics is to illuminate, rather than convert, conflict situations.

Conversion tactics exploit client-lawyer and client-state conflicts to expand client productive capabilities.356 Such tactics start from the point

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352. The mental patients' rights movement illustrates the partial reorganization of advocacy relations and tasks. See, e.g., Brown, The Rights of Mental Patients, supra note 211, at 56-57 (“Clients receiving medical and psychiatric care have become more aware of professional failures and abuses, as well as their own abilities to seek redress, restructure care-giving, and provide self-care.”); Phil Brown, The Mental Patients' Rights Movement and Mental Health Institutional Change, 11 INT'L J. HEALTH SERVS. 523 (1981) (discussing the changes in mental health care due to liberation movement and patients' rights litigation).


354. On the containment of social conflict, see UNGER, PLASTICITY INTO POWER, supra note 19, at 169.

355. Cf. Roberts, supra note 37, at 243 (“Assumptions that disability necessarily means dependence, nonproductivity, and powerlessness have to be rooted out.”).

356. Cf. Marlene Ross et al., Community-Based Residential Services For Mental Health Clients, 3 MENTAL DISABILITY L. REP. 150, 150 (1979) (arguing for the development of program models that maximize “individual client growth and the development of individualized
of conflict, assaying its dimensions and refining the issues in controversy. A recurrent example concerns the disability lawyer or adjudicator’s refusal to allow a disabled widow to speak freely either independent of or in response to questions. In both client-lawyer and client-state contexts, such conflicts subsume contests over the primacy of ideals and discourses. To penetrate this internal contest, conversion tactics investigate the external signs of conflict: images, language, gestures. These signs pervade the offices and hearing rooms of disability lawyers and adjudicators. Although equivocal and frequently enigmatic, the signs nonetheless betray the wavering hierarchy of dominant-subordinate relations. Having uncovered evidence of relational hierarchy, conversion tactics seek to upend it. In the example given above, one tactic would be to encourage the client to speak in a rambling fashion without lawyer intrusion or, alternatively, to invite the client to present her own opening statement or conduct portions of direct and cross examinations. In sum, conversion tactics are a means of publicly exposing, naming, and reordering hierarchy.

Participating in practical situations of conflict allows clients to locate and revise the counterproductive restrictions of formed routines and relations. Revision converts these restrictions into broader normative controversies. In this sense, conversion is a maneuver to amplify the meaning of client-lawyer and client-state conflicts.

(2) Redivisions of Labor

The double exercise of containment and conversion tactics to elucidate and seize conflicts as a means of reorganizing client-lawyer relations threatens the formative compromise of traditional practice routines. That compromise concerns the definition and execution of tasks. Under its overarching terms, the lawyer commands the prerogatives of profes-

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service plans to assist and teach clients to live as normal a life as possible in the mainstream of the community[,]” and that recognize each person’s capacity “to learn, grow and develop, no matter how severely disabled”) (emphasis in original).

357. See, e.g., Piven, supra note 11, at 271 ("[C]aretaking values sometimes armed women to challenge or defy the dominant values of the public world, and particularly the values of the market[.]").

358. Unger refers to the “double exercise” of reason and labor in imaginative effort. See UNGER, FALSE NECESSITY, supra note 6, at 146. But he cautions: “The double exercise is fully successful only when it does more than execute the task, solve the problem, or analyze the perception: it generates a changed task, problem, or image—one that lends itself to further practical or conceptual work.” Id.
sionism, claiming the insight and competence to define tasks for client execution.  

The organization of disability advocacy relations according to spheres of lawyer task definition and client task execution reifies traditional ideals of benevolence and discipline.  

Unger mentions two variants of task definition and execution available in organizational settings. The rigid variant sharply restricts the kinds of activities assigned and the categories of people eligible. The flexible variant loosens those restrictions, departing from social hierarchy and affording the opportunity to experiment with alternative arrangements of task definition and execution. According to Unger, effacing the contrast between the conceptual labor of definers and the executions of operators "disturbs" the commitments of social compromise. Those commitments constrict the recombination of traditional client-lawyer roles and the substitution of transformed relations. Construing client-lawyer and client-state conflicts as transformative opportunities relaxes ideological strictures, denaturalizing existing relations even as they are reproduced.

The denaturalization of traditional client-lawyer relations disturbs enshrined divisions of labor. The keynote of this division is the separation of lawyer task-defining and client task-executing activities. Reorganizing the division of lawyer-client tasks is a contingent process. There is a wide range of task-defining and task-executing combinations and sequences available. Two obvious examples drawn from widows' disability advocacy regard the conduct of investigations and hearings. The tasks of defining and executing the investigation of employers, doctors, and witnesses or the planning of opening and closing statements, direct and cross examinations, and objections are all susceptible to revision in multiple combinations and sequences. The great variety of alternative stratagems available recommends a series of provisional modes of organization encompassing small adjustments as well as large shifts.

359. For a discussion of professionalism and claims of specialized knowledge, see Unger, False Necessity, supra note 6, at 148.

360. See id. at 146.

361. On the constraints of formative contexts limiting internal recombination and substitution, see id. at 166.

362. See id. ("The extent to which arrangements are disentrenched—that is, available for effective challenge—infuences the character of the activities that reproduce them.").

363. For a discussion of task-defining and task-executing activities in economic production and warfare, see Unger, Plasticity into Power, supra note 19, at 158-59; cf. Menkel-Meadow & Meadow, supra note 334, at 252 (data "suggest[ing] very strong support for professional rather than client dominance of legal services attorney resource decisions").

364. See Unger, Plasticity into Power, supra note 19, at 192 (stressing the invention of "structures that make structures easier to change").
a. Task Definition

Redistributing the power and expanding the sphere of task definition is a precondition for the provisional reorganization of traditional client-lawyer relations. This expansion contemplates the inclusion of disabled widows as task definers, rather than rote task followers.\textsuperscript{365} That inclusion cabins the role of disability lawyers to more confined, technical functions where specialized knowledge is indispensable. Functional lawyer confinement offers clients greater room to exercise independence and competence. This exercise generates alternative ideals and practices of advocacy. Self-help and mutual aid ideals and practices are already being actualized in community networks established by widows.\textsuperscript{366} The accommodation required to reconcile autonomy and community in sustaining these networks is within the social power of widows.\textsuperscript{367}

b. Task Execution

The ideals and practices conceived by disabled widows engaged in independent task definition are neither comprehensive nor permanent. Indeed, they are endlessly revisable. The potential for revision is mani-

\textsuperscript{365} Cf. Noddings, supra note 15, at 73 ("The cared-for plays a vital role in the caring relation.").

\textsuperscript{366} See Lucia H. Bequaert, Single Women Alone & Together 49-50 (1976) (describing the Widow-to-Widow Project); Scott Campbell, Widower 5 (1987) (Widow-to-Widow Program "outreach would come from another widow, from a woman who had successfully accommodated her own loss and wanted to help others"); Helping Each Other in Widowhood 1-72 (Phyllis R. Silverman et al. eds., 1974) (background and organization of the Widow-to-Widow program); Alfred Allan Lewis & Barrie Berns, Three Out of Four Wives 157-66 (1975) (discussing widow consciousness-raising groups); Help in Widowhood: World Perspectives on Support Systems, in Widowhood: The Middle East, Asia, and the Pacific, supra note 74, at 1, 7 ("Service supports can be supplied to widows informally through an exchange system with people other than members of the household."). Cf. Helena Znaniecka Lopata, Widowhood in an American City 237 (1973) ("The Porgy and Bess image of the black woman immersed in frequent and mutually beneficial interaction with neighbors is not representative of the black Chicago area widow.").

\textsuperscript{367} Cf. Edward L. Deci, The Psychology of Self-Determination 218 (1980) ("Organizations that encourage self-determination will also encourage some accommodation."); Lykes, supra note 289, at 175 ("An analysis of the social character of the diversity of women's lives expands the range of behaviors that constitute 'ethical action' and demonstrates the complexity of women's social location.").
fested daily in routine task execution. The advocacy routines of benevo-

lence and discipline enforce the execution of tasks through a "context-

transcending norm of rationality."\textsuperscript{368}

It is misguided to attribute client acceptance of this norm to unvar-

nished lawyer power. The rationality of benevolence and discipline is the

ingrained product of context-preserving routines evinced in interviewing,
counseling, and litigation. The routines follow a sequence of discursive

moves denoting when and where the client may speak, and what she

may say. The localized effects of the moves are reflected in client task

execution. Perhaps the most telling example of client task execution is

silence.

The benevolent and disciplinary assignment of task-executing duties
to disabled widows stabilizes the practice routines of disability advo-
cacy.\textsuperscript{369} The routines are steadied by the repeated reenactment of task
execution. When execution is disrupted, the interruption is recast as a
structure-respecting dispute.\textsuperscript{370} That construction is intelligible as a de-
defensive reaction intended to control client-lawyer and client-state con-
flict. Insulation from conflict, however, is never full. Like other
stabilizing forces, control generates destabilizing opportunities.\textsuperscript{371} These
opportunities arise out of resistance to control itself, for power and resis-
tance are interdependent.

The false assurance of benevolent and disciplinary control is the res-
idue of the lawyer's projection of dependent, incompetent, and deviant
client images.\textsuperscript{372} The ambiguity of these images lends uncertainty to
their application in the multiple practice settings of disability law.\textsuperscript{373} The

\textsuperscript{368} Unger, False Necessity, supra note 6, at 249.

\textsuperscript{369} Cf. Qureshi & Walker, supra note 34, at 70 (noting proclivity of professional staff
to "underestimate the capacity of [disabled] residents to look after themselves and manage
their own affairs," and to "adopt summary judgments about residents' abilities or mental states
or limit freedom in order to maintain an orderly regime and thereby increase the level of
dependency experienced by elderly people in their care") (emphasis in original) (citation
omitted).

\textsuperscript{370} In structure-respecting disputes, the client departs from the script of her assigned
role, but does not deviate from the role itself. Hence, the reproduction of the institutionalized
social relations of the lawyer and client through the practical and conceptual activities of advo-
cacy continues uninterrupted. Unger, False Necessity, supra note 6, at 247.

\textsuperscript{371} Id. at 272 (positing the nexus between stabilizing force and destabilizing
opportunities).

\textsuperscript{372} See Eisenberg, supra note 38, at 108 ("[T]he effect of attributions regarding control-
ability and behavior is largely mediated by the actor's affective response to the personal attribu-
tions he or she makes."). Controllability includes internal (ability) and external
(environmental) factors of dependency. See Meyer & Mulherin, supra note 38.

\textsuperscript{373} On the concealed ambiguities of ideal images, see Unger, False Necessity, supra
note 6, at 272.
unsettling of practice routines ensues from client-lawyer disagreements regarding the content of the task to be executed\textsuperscript{374} and the form of task execution.\textsuperscript{375}

Quarrels over the form and content of client tasks confirm the tensions inherent in disability advocacy. The benevolent and disciplinary practice routines used to defuse those tensions and reinstate traditional divisions of labor render the contexts of advocacy disabling.\textsuperscript{376} Furthermore, these formed routines produce the very tactics that may destabilize and transform those contexts.\textsuperscript{377} Led by the subordinate ideals of autonomy and community,\textsuperscript{378} such tactics affirm practical visions of client independence, competence, vulnerability, and solidarity.\textsuperscript{379}

**Conclusion**

Before hailing the transition from victimization to enabling strategies of widows' disability advocacy, it is appropriate to entertain two closing objections. Chief among these objections is the instrumental argument that victimization advocacy strategies work. The outcome of the *Hill* litigation strongly supports this argument.

In *Hill*, widows' disability lawyers formulated an advocacy strategy conforming to the ideals and practices of benevolence and discipline in order to alleviate administratively decreed silencing in the disability determination process. Because a federal court shared the same ideals, the strategy prevailed. Indeed, the court certified the *Hill* plaintiff class, invalidated two administrative regulations, awarded relief to the named

\textsuperscript{374} Unger characterizes such disagreements as "horizontal conflicts" over social ideals and their range of practical application. For Unger, these "border disputes" push "familiar ideals onto slightly unfamiliar social territory." *Id.* at 273.

\textsuperscript{375} Unger refers to disagreements over the appropriate form of social practices as "vertical" conflicts. The conflicts may arise from discrepancies in the practical realization of ideals or from aspirations to higher ideals. *See id.* at 274.

\textsuperscript{376} Unger points out the "paradox of contextuality: our need to settle down to a particular context and our inability to accept any context in particular as fully satisfactory." *Id.* at 342.

\textsuperscript{377} *Id.* at 277. Unger explains that stabilizing devices present opportunities as well as constraints. *Id.*

\textsuperscript{378} The contest of normative values within disability advocacy limits the full embrace of autonomy and community ideals. Professing a minimalist version of these ideals on feasibility grounds, however, merely perpetuates the dominant ideals of benevolence and discipline. It is perhaps better, therefore, to promote alternative ideals unambiguously in alternative practice routines.

\textsuperscript{379} *See Unger, False Necessity, supra* note 6, at 367 ("Our inherited practices of internal argument (in legal doctrine, moral casuistry, and partisan debate) must incorporate more of the characteristics we traditionally attribute to visionary thought.").
plaintiff and a plaintiff-intervenor, and remanded class member claims for remedial administrative proceedings.\(^{380}\)

Measured by any standard of instrumental litigation, these results should be applauded. Simultaneously, it must be acknowledged that the results fall short of the goals of alleviating administrative silencing, realizing autonomy, rebuilding community, and mobilizing political power.\(^{381}\) At best, the \textit{Hill} litigation moderated the administrative regulations and policies that overtly silence widow disability claimants. While moderation increases the likelihood that widow claimants will obtain disability benefits, it also instigates more covert administrative acts of silencing.\(^{382}\)

The foreseeability of covert institutional silencing is attributable to the formative ideals of state benevolence and discipline. Victimization strategies leave both ideals in place. Central to their operation are the ideal images of widow dependence, incompetence, and deviance. Blurred by the periodic intervention of lawyers and federal courts, these images remain nonetheless formative. Their influence continues to subordinate the alternative ideals and practices of autonomy and community.\(^{383}\) That continued subordination suppresses the counterimages of client independence, competence, vulnerability, and solidarity.

The subordination of alternative ideals and practices and the suppression of counterimages are consistent with the victimization strategy of disability advocacy. This structure- and context-preserving strategy raises a second objection, one based on the formalist argument that vic-

\(^{380}\) See \textit{Hill} v. Sullivan, 125 F.R.D. 86, 86 (S.D.N.Y. 1989). At the time of this writing, the district court had not yet ordered an award of attorneys' fees to the \textit{Hill} litigation team. Telephone Interview with Matthew Diller, Staff Attorney, Civil Appeals & Law Reform Unit, The Legal Aid Society, New York (Oct. 24, 1991).


\(^{382}\) This possibility challenges the traditional resort to federal court intervention in technical matters of bureaucratic administration and adjudication. Nonetheless, federal court intervention continues to receive widespread backing. Robert Cover explicated the logic of intervention when he wrote:

\[\text{[C]}\text{lassificatory differences relating to widows and widowers or to legitimate and illegitimate children do present problems of justice that should be decided not as technical matters of pension law but as part of a broad conception of the salience of gender and legitimacy; that is, they should be decided by courts, not by administrative law judges or the secretary's delegates.}\]

Cover, supra note 64, at 86.

timization strategies function in accord with appropriate client-lawyer hierarchical practices. Lawyers defend these context-preserving practices on natural and necessitarian grounds. They contend that the traditional definition of client-lawyer roles and the organization of their relations in terms of strict divisions of labor—namely, lawyer task definition and client task execution—correspond to the natural abilities and disabilities of lawyers and clients, and are thus necessary to the basic enterprise of representative advocacy.

Instrumentalists argue that the enterprise of disability advocacy requires the rational exercise of technical and organizational skills, and the efficient coordination of labor and institutional resources. To the extent this is true, instrumentalist arguments may be defensible. But when those arguments overlook the contingencies and costs of instrumentalism to justify a permanent strategy of victimization, they warrant rejection.

Like the unqualified version of instrumentalism, formalist arguments justify a victimization strategy on practical grounds. But unlike instrumentalism, formalism deduces that justification from a fixed set of ideals that directs immutable client-lawyer roles and relations. To formalists, the roles and relations are given, rather than contingent. Practice routines that fail to conform to such given roles and relations are unnatural. In this way, formalism converts the necessitarian justification of victimization into a natural justification. Under formalism, victimization strategies of advocacy are inherently practical.

Under the formalist view, there is no purpose to structure- or context-transforming practices, no need to change the disabling quality of widows’ disability advocacy. Hence, collaboratively revising practice routines to allow disabled widows to assert enabling narratives is not simply impractical, it is futile.

To disclaim the futility of transformative practices without evidence of productive experiments would be facile. Yet, it is equally facile to ignore the intermediate forms of ideology and practice currently generat-
ing alternative varieties of advocacy. Although fragmentary, these inchoate forms anticipate the broader possibility of transformative projects. That is the visionary impulse and trajectory of a theoretics of practice.

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