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Article

Immigrant voices in the courts[1]

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Abstract

This is a study of how asylum seekers' persecution stories are represented in court opinions in the United States. The researcher analyzed the facts portions of ten asylum opinions in the Ninth Circuit Court of Appeals. Four linguistic analyses were conducted to compare renditions of the persecution narratives in winning versus losing cases. First, a breakdown of the narratives into component parts revealed that the overall organization was similar. Second, an analysis of quoted and reported speech showed that judges in winning cases chose more frequently to quote the applicant's own words. Third, an analysis of evaluative language demonstrated that the judges described the winning applicants' experiences in a highly positive light. The final analysis showed that winners' persecution events were portrayed as human-to-human interactions in which both victim and persecutor were personalized. Overall, judges appeared to recast the supposedly neutral persecution facts in a light that rationalized their decisions to grant asylum or to deport the applicant.

KEYWORDS ASYLUM, DISCOURSE ANALYSIS, NARRATIVE, JUDICIAL OPINIONS, JUDICIAL DECISIONS, IMMIGRATION LAW, REFUGEE

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Introduction

It is a demonstrable fact that immigrants receive unequal treatment in the United States federal immigration court system. In a study of 140,000 asylum hearings from 2000 to 2004, vast discrepancies were found in the rates at which immigration judges granted asylum (Preston 2007, citing Ramji-Nogales et al. 2007). Grant rates ranged from 3% to 75% depending on the judge. Judges showed bias based on the gender of the applicant as well as the country of origin. As Philip G. Schrag, a professor at Georgetown University Law Center and an author of the study stated, 'It is very disturbing that these decisions can mean life or death, and they seem to a large extent to be the result of a clerk's random assignment of a case to a particular judge' (Preston 2007: A1).

If there is to be any redress to the unfairness of these hearings, it is at the appellate level where a transcript of the hearing is reviewed. This paper analyzes the persecution stories of asylum applicants as they are presented in appellate court opinions. In all asylum hearings, applicants must recount the experiences of persecution that led them to leave their home countries. For cases that rise to higher courts on appeal, the appellate judge includes an abbreviated version of this persecution story in the final published opinion. Arguably, however, these narratives are not presented neutrally. Instead, it will be shown that judges recast the stories in a light that justifies their decisions. A comparison of the linguistic detail in both winning and losing asylum appeal cases will reveal several ways in which the applicants' stories are manipulated to support the official court position. Through these story versions, policies of immigration are enforced and perpetuated. Meanwhile, an ideology of 'blind justice', wherein judges objectively apply the law to the facts to grant asylum only to truly deserving applicants, is protected.

Asylum application and the persecution story

Under the United Nations Convention Relating to the Status of Refugees of 1951, and the 1967 United Nations Protocol Relating to the Status of Refugees, those who experience persecution have a basic human right to asylum in a safe country. Those countries that have ratified the Convention are obligated to offer a legal process for obtaining asylum for those who can establish that they are refugees. The United States passed the Refugee Act in 1980 to conform to these international laws, and therefore, is committed to granting asylum to those who qualify as refugees. Under the Act the term 'refugee' is defined as:

> [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which

> such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42)

According to United States law, a person may be granted asylum by demonstrating past persecution or a well-founded fear of future persecution on account of one of the five grounds.[2] Asylum status allows one to stay in the United States legally, work, obtain permanent residency and eventually become a United States citizen.

Among a series of steps in an asylum application, the hearing in the Immigration Court comprises a significant hurdle for many. The applicant is afforded a court hearing lasting one to four hours during which s/he will have an opportunity to tell the story of the persecution s/he experienced in answer to the attorneys' and judge's questions. This courtroom story-telling event is the only opportunity the applicant has to speak in court. If the applicant is denied asylum in the Immigration Court, s/he may appeal to the Board of Immigration Appeals (BIA), and above that, to the appropriate Circuit Court, and even in rare cases, to the Supreme Court. However, the applicant is not permitted to speak in the appellate courts. Instead, the transcript of the original persecution story will be read and reinterpreted at each level of appeal. Attorneys on each side will use the story to bolster their arguments. Ultimately, the judge will retell the story in an initial 'background' section at the beginning of the published opinion. It is these appellate renditions of asylum applicants' persecution stories that form the basis of the current analysis.

Circumscribed language in the court

It is widely acknowledged that the power structure of the courtroom and its ritualized communication requirements leave the language of the participants considerably circumscribed. As Tiersma (1999) points out, courtroom language is a highly stylized form of communication in which the speech of the participants is strictly limited by institutional constraints. A witness may only speak when authorized to provide answers to specific questions and may not engage in other speech acts, such as asking questions, making requests, or holding the floor for an extended period of time. When immigrants appear in court, the limitations on their speech are compounded (see e.g. Anker 1992, Bryant and Peters 2005, Moore 1999). Not only must they abide by the linguistic court conventions of an unfamiliar legal system, but they also face communication barriers due to their limited knowledge of English language, different cultural

norms of communication and, in some cases, the filtering of their talk through an interpreter.

For an asylum applicant, such communication problems can be especially damaging because each case requires that a 'credibility determination' be made; that is, the immigration judge must decide whether the applicant's story of past persecution is believable and whether s/he genuinely fears future persecution if returned to the home country. Therefore, miscommunications due to language or cultural barriers may take on extreme proportions because they can distort crucial components of an applicant's story and raise doubts in a judge's mind about credibility.

One source of miscommunication is faulty foreign language interpretation. Deborah Anker (1992) conducted a study of 193 Immigration Court hearings in which bilingual observers evaluated the proceedings. In a written analysis of these observations, Anker describes the detrimental effects of poor interpretation on asylum cases.

> [F]oreign language interpretation regularly suffered from inaccuracy, and other problems which affected the applicant's ability to convey subjective fear, or to recount the basic facts of her case in intelligible form. In many cases interpretation errors had a clear and substantial effect on a judge's decision to deny asylum. (1992: 509)

One type of interpretation error in Anker's study involved mistranslation of regional terms. For example, Spanish *oreja* was translated as 'ear' in a case from El Salvador, although the local meaning was really 'government informant'. This mistranslation obliterated crucial information about the applicant's dealings with the government, an important element of the case (Anker 1992: 510). Another mistranslation cited by Anker occurred when an applicant stated that he took a large risk (*aventura*) in his journey to the United States. This was translated as English 'adventure' conveying the impression that the applicant traveled to the United States looking for 'excitement and fun' rather than to escape persecution (Anker 1992: 513).

A further problem is that the sheer disruption created by interpretation matters may render a coherent persecution story into a fragmented, chaotic collection of facts which a judge is unlikely to find credible. In cases of an obscure language, two interpreters may be required (Cohen 2007). For example, a Mayan Indian asylum applicant whose native language is Yucatec might tell his persecution story through a Spanish-Yucatec interpreter who then conveys it to an English-Spanish interpreter who conveys it to the judge in English (Cohen 2007). Interpretation may also occur telephonically, over a video telecommunication system, or both.[3] Such procedures considerably dilute the impact

of an applicant's story and may result in information gaps, inconsistencies, and mistranslations, all to the detriment of the applicant's chances of gaining asylum (Anker 1992: 509).

Even when the applicant speaks English, the cultural expectations of American judges may lead them to disbelieve the applicant's story. As Anker observes, '[I]mmigration judges tended to project their own political and cultural experiences onto the applicant' (1992: 516). For example, Anker found that judges were inclined to view governments as benevolent and fair and to therefore be skeptical of claims of government officials behaving badly (Anker 1992: 519). She describes one case in which a judge disbelieved a story of a Sikh applicant who claimed to have escaped from prison by bribing an official with a gold bracelet. The American judge simply had no cultural experience of bribery and corruption within the government (Anker 1992: 519).

Finally, crosscultural differences in communication style can introduce problems in Immigration Court (see e.g. Anker 1992, Conley and O'Barr 1998: 98–115, Goldman 1994, Moore 1999, Tiersma 1999). For example, applicants may come from a culture where it is common to use euphemisms to minimize fears or otherwise avoid unpleasant subject matter. The result of such euphemistic language may be that the judge underestimates the severity of the persecution (Anker 1992: 524). An applicant may also fail to provide chronological information with precision due to a different cultural conception of time. Such omissions may be perceived as evasions by the judge, which in turn can lead to a finding of adverse credibility (Anker 1992: 525–526).

For all of these reasons, applicants' stories may not be thoroughly heard in American courts. Whatever their original experience of persecution may have been, the story related in the Immigration Court may be severely circumscribed. However, it is only this filtered version of the story that makes its way into the court record, and on appeal, into the higher courts. From this record, an appellate judge will select certain facts to relay in the published opinion. At the writing stage, the judge has already accepted or rejected the story as credible, and the applicant as deserving of a grant or denial of asylum. How the judge chooses and presents the facts will form the basis of a legal, and arguably moral, justification for the decision.

The diagram in Figure 1 attempts to capture the voice of an asylum applicant as it is filtered through the various legal processes and finally makes its way into a published appellate court opinion. As the diagram shows, the original events become ever more remote as the story is processed through the many court procedures. By the time the story appears in writing, it has been considerably distilled and reorganized to suit the court's agenda. Meanwhile, the voice of the original speaker is only faintly echoed.

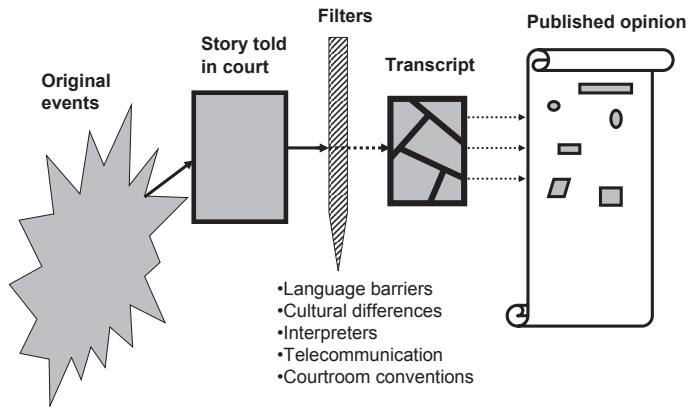

Figure 1: Versions of the applicant's story from original event to judicial opinion

Despite the abbreviated nature of the story versions in the final published opinions, they are a matter of interest to those who care about immigration jurisprudence. The fragments of the original immigrant voices that a judge selects reflects his/her own perceptions of what is relevant and what should be emphasized (Maley 1994: 47). It is these echoes that set the precedent, influencing the shape of future immigration law in the United States and upholding an ideology of what constitutes a deserving immigrant.

The nature of judicial rhetoric

In the well-entrenched Anglo-American tradition of legal formalism, a judge's activity is understood as logically deducing a decision by applying the law to the relevant facts.[4] A judge is seen to make a value-free decision about whether a particular fact passes, or does not pass, a fixed legal threshold. The decision then creates a precedent for future cases: the facts of each new case will be compared to those of the old to determine whether they are the same or different, assuming that there is one right answer. A long-standing line of critical scholarship, however, finds fault with this 'logical positivist' account of the judicial process (see e.g. Cohen 1933/1996, Frank 1930/1996, Moore 1981/1996, Kennedy 1986). In positing that every legal question has a logically predictable right answer, goes the argument, the formalist position incorrectly forces a continuum of human behavior into a finite set of legal categories (Cohen 1933/1996). Frank (1930/1996) and later Kennedy (1986) have suggested that judges actually make their decisions at an intuitive level, whether consciously or not, within the framework of their own sociopolitical agendas. They then justify them by construing the facts so as to emphasize those aspects that fit the rules (Kennedy 1986). In Frank's words:

> Viewed from any angle, the rules and principles do not constitute the law. They may be aids to the judge in tentatively testing or formulating conclusions; they may be positive factors in bending his mind towards wise or unwise solutions of the problem before him. They may be the formal clothes in which he dresses up his thoughts. But they do not and cannot completely control his mental operations … (1930/1996: 187)

In this critical view, the rhetoric of a judge's opinion is seen as a rationalization, making a biased choice seem like a foregone conclusion.

The elements of this critique are amply illustrated through asylum law: a judge is required to decide whether a set of abusive and/or violent behaviors constitutes 'persecution' as required by statute. There can be only one correct judgment per case. The facts either cross the threshold to establish persecution or they don't. Yet persecution may take an infinite variety of forms. What may seem like an yes-or-no choice is actually a decision about where the facts fall along a continuum. Where to draw the line will inevitably reflect the bias of the judge, who is never free of his underlying value system nor the social order that has helped to shape it (Kennedy 1986). The resulting opinion, however, is crafted as if, given the rules, the judge had 'no choice' in the decision to grant or deny asylum. In this way, judicial opinions in immigration cases perpetuate the prevalent ideology wherein judges are neutral arbiters with no personal bias.

Given this crucial role of judicial rhetoric, several scholars have emphasized the efficacy of linguistic analysis as a methodology for understanding sociolegal power (e.g. Conley and O'Barr 1998, Eades 2004, 2006, Ehrlich 2001). Following Foucault, Conley and O'Barr show how the minute details of courtroom interaction reflect, and in turn reproduce, the power structure of a society as it is embedded in its legal systems (1998: 14). Eades (2006), with her work on Aboriginal Australians in legal settings, emphasizes how language constrains what takes place in court, thereby sustaining the inequalities within the larger Australian social order. More specifically, Solan (1993) demonstrates how a line-by-line analysis of the language of judges can unveil the careful crafting behind seemingly inevitable decisions. Similarly, Philips (1998) shows how judges' linguistic resources reveal their underlying political views. If it is correct that the power structure of a society is displayed in the linguistic details of its legal procedures, then by studying the word-by-word choices in supposedly neutral judicial opinions, one can begin to understand underlying ideologies. The insidious process of 'institutional prejudice', for which no individual is responsible, can be explored specifically through a fine-grained linguistic analysis of legal texts.

Method of analysis

In the present project, Circuit Court asylum opinions[5] will be the focus of linguistic analysis. What follows is a detailed explanation of how the opinions were selected and analyzed. The goal of the analysis was to discover differences in the linguistic structure in winning versus losing cases to reveal how the judges crafted the texts to justify their supposedly neutral opinions.

The texts

Ten published opinions from the Ninth Circuit Court of Appeals (five winning and five losing) were chosen for analysis. Each was issued by a different judge as primary author.[6] All were asylum cases which involved issues of the applicant's credibility. Cases involving extraneous issues such as habeas corpus, serious crimes, and other confounding factors were excluded so that the persecution story and the credibility of the applicant were most central to each case. All cases were published between 2001 and 2007. From each opinion, the facts portion was broken down into 't-units' for analysis.[7] Because all of the opinions began with a 'background' section, this facts portion formed a consistent and comparable basis for analysis. The cases are listed in Table 1 with an abbreviated summary of the main facts:

Table 1: Case summaries

Case citation	Outcome	Summary of facts
Fedunyak v. Gonzales, 477 F.3d 1126 (9th Cir. 2006)	Win	Ukrainian man who refuses to pay extortion money to government officials is arrested and tortured.
Lin v. Gonzales, 472 F.3d 1131 (9th Cir. 2007)	Win	Chinese man is beaten by authorities for refusing sterilization.
Orlando Ventura v. I.N.S., 264 F.3d 1150 (9th Cir. 2001)	Win	Guatemalan man with ties to the military is threatened and harassed for not joining a guerilla group.
Suntharalinkam v. Gonzales, 458 F.3d 1034 (9th Cir. 2006)	Win	Falsely accused of being a Tamil Tiger, a Sri Lankan man is jailed and tortured by the government.
Thomas v. Ashcroft, 359 F.3d 1169 (9th Cir. 2004)	Win	Daughter-in-law of South African white racist 'Boss Ronnie' is persecuted by his black workers in retaliation for his abusive acts.
Don v. Gonzales, 476 F.3d 738 (9th Cir. 2007)	Lose	After the cook at his restaurant is arrested for being a Tamil Tiger, terrorist groups pressure a Sri Lankan man to get the cook released, believing he turned the cook in.
Gu v. Ashcroft, 454 F.3d 1014 (9th Cir. 2006)	Lose	Chinese man is persecuted by authorities for distributing Christian literature.

Case citation	Outcome	Summary of facts
Hosseini v. Ashcroft, 464 F.3d 1018 (9th Cir. 2006)	Lose	Iranian man and family are persecuted after he argues with authorities about politics.
Kohli v. Gonzales, 473 F.3d 1061 (9th Cir. 2007)	Lose	Indian woman is arrested and threatened for protesting against *sati* and other patriarchal customs.
Ramadan v. Gonzales, 427 F.3d 1218 (9th Cir. 2005)	Lose	Egyptian woman is persecuted by family members and Muslim groups for her outspoken feminist views.

Analysis tools

Because persecution stories are narratives, the analysis tools were chosen from accepted linguistic models for narrative analysis (mainly stemming from Labov and Waletzky 1967). In addition, Halliday's (1994) model for categorizing verbs into 'process types' was employed. Crucially, these linguistic structures have all been recognized in the narrative literature as markers of an author's personal stance toward a subject matter. Four linguistic analyses of the persecution narratives were conducted:

a) a breakdown of the narrative into its component parts;

b) an analysis of 'evaluations' in which judges revealed their moral stance toward the narrative;

c) a categorization of whose speech the judge cited and how it was presented;

d) an analysis of whether or not the narrative participants were 'personalized' as human agents.

Brief examples from the actual court opinions are provided below to illustrate each analysis type (while more detailed examples will be shown in the Results section).

a) Narrative components

Labov and Waletzky's (1967) model identifies six major components (explained in Table 2), which they claim, and many subsequent analyses have confirmed, are universal to the structure of the narrative. Accordingly, as a way of understanding and comparing the basic organization of the persecution stories, each t-unit of the story was categorized as to its narrative component. For each component in the table, an example from one of the asylum cases is provided for purposes of illustration:

Table 2: Narrative components

Component	Definition	Example
ABSTRACT (optional)	An introduction or overview describing the narrative about to be told.	(None recorded in these data)
ORIENTATION	The setting and/or background for the narrative.	Kohli was born in Kuwait on October 13, 1980, of Indian parents and is a citizen of India. (*Kohli* at 1063)
COMPLICATING ACTION	The events of the narrative's plot; what actually happened?	First, on January 19, 2000, several members of the army entered his home, where Suntharalinkam was with his mother. (*Suntharalinkam* at 1083)
RESOLUTION	The result or outcome of the narrative; the ending. In these data, it was usually the asylum application itself which resolved the tale.	In June 2001, Ramadan applied for asylum, fearing a return to Egypt because of the threats made in 1999 and the recent events that had been relayed to her by her family. (*Ramadan* at 1221)
CODA (optional)	A final comment or conclusion to the narrative. In these data it was often an expression of fear of future persecution.	Gu speculates that if he were to return to China, 'the Chinese government will arrest me again'. (*Gu* at 1018)
EVALUATION	An assessment of the narrative events; the teller's stance. What was morally or emotionally noteworthy in the story?	'At this stage I was really, really fearing for my life'. (*Thomas* at 1173)

It should be emphasized that these components need not occur in a strict order. The story teller or writer (in this case the appellate judge who wrote the opinion) may insert evaluations at any point of the story, or provide additional orientation material between complicating actions. Certain components, most frequently abstracts and codas, may even be omitted.[8] In the current analysis, every t-unit in the facts portions of the ten immigration cases was classified into one of the six narrative categories. This narrative structure analysis was used to determine whether judicial opinions in winning versus losing cases were structured similarly.

b) Evaluation analysis

As many scholars besides Labov and Waletzky have discussed, the evaluation component of the narrative model is particularly crucial (see e.g. Labov 1972, Linde 1993, Wennerstrom 2001, Wolfson 1982). Evaluation is a way of turning a mere series of events into a story that reflects the teller's personal and cultural values. Labov (1972) identifies both 'external' and 'internal' types of evaluations. He defines external evaluations as statements that are separate from the actual story action in which the teller inserts a clause to indicate his stance toward the events in progress. This external type of evaluation was exemplified in Table 2 above, as repeated here:

> EXTERNAL EVALUATION: 'At this stage I was really, really fearing for my life'. (*Thomas* at 1173)

Here, the fear described is not a story event; rather, the judge allows this sentence to come into the opinion as a separate statement of Thomas' emotion. This choice tends to indicate the judge's belief that the applicant was truly afraid.

In contrast, internal evaluations are defined by Labov (1972) as syntactic, lexical, and phonological mechanisms embedded within the clauses of the story events themselves, to indicate the teller's perspective. Storytellers may use 'loaded' lexical items, intensifying language, or even a particular word order to cast the story events in the desired light. In the written opinions of the current project, judges regularly inserted evaluative material into the persecution stories. The key to this classification was whether the judge could have described the events more neutrally but *chose* a particular turn of phrase to indicate a positive or negative stance toward the events. Below are two examples to illustrate internal evaluation. The first works in favor of the applicant's case (positive evaluation) and the second against it (negative evaluation):

> The police chief issued a thinly veiled death threat and threatened to throw Fedunyak into jail unless he withdrew the complaint. (*Fedunyak* at 1128)

The phrase 'thinly veiled death threat' indicates that although there was no direct death threat, the judge interprets it as such.

> Gu was not interrogated further, nor does Gu assert that he was subject to further physical mistreatment. (*Gu* at 1018)

These are story events that did *not* happen to Gu. By relating them in the negative, the judge indicates his belief in a *lack* of persecution.

In the analysis of judges' versions of the asylum applicants' stories, evaluations could be authored by the judges or attributed to the applicants. The amount and type of evaluative material were compared in winning versus losing cases.

It was predicted that the winning cases would have more positive evaluations than losing ones.

c) Speech attribution analysis

Labov (1972) considers quotations and reported speech to be mechanisms of evaluation. By quoting or reporting another's words, the teller makes the story more realistic. Wolfson (1982) also discusses quotation as an evaluation device that enables the hearer/reader to see through the eyes of the teller/ writer and thereby better support his or her moral position. Further support for the link between quotation and a story-teller's priorities comes from Bauman (1986: 64) who has noted that the crucial punch line of a narrative is often rendered through a direct quotation.

Given the widely recognized relationship between quoted speech and moral attitude, each of the asylum applicant's facts was categorized as to 'whose mouth' the judge put them into in the opinion. For this analysis, there were three major categories: a fact could be stated directly by the judge with no attribution; it could be reported (as in *X claimed that …*); or it could be quoted from the original words.[9] The following examples from the *Thomas* case illustrate these categories:

> COURT STATEMENT: In December 1996, Michelle's life was threatened. (*Thomas* at 1173)
>
> REPORTED SPEECH: Michelle testified that one of the men wore Strongshore overalls. (*Thomas* at 1173)
>
> QUOTATION: She describes the incident as follows: 'I was sitting on the veranda the one evening with my children playing in the front yard and a Black man had come up to me and asked me if I knew Boss Ronnie … and he said to me he's come back and cut my throat'. (*Thomas* at 1173)

Again, the focus of this analysis was to compare the types of speech attributions in winning versus losing cases. It was expected that the applicants' own words would be quoted most in winning cases.

d) Personalization analysis

The last analysis measured how frequently the applicant was portrayed in human terms. If the applicant was described as making active decisions, feeling emotion or pain, or being in the bosom of a family, this personalized him or her, adding a human element to the description. The analysis also relied on whether active versus passive voice was used to describe the events (*the police threatened him* versus *he was threatened*) and whether verbs described mental,

behavioral, or verbal processes rather than mere actions (*She felt / worried / cried* versus *she went / sat / took*).[10] Halliday describes mental and behavioral verbs as humanizing:

> In a clause of mental process, there is always one participant who is human; this is the one that 'senses' – feels, thinks or perceives … [T]he significant feature of such a participant is that of being 'endowed with consciousness'. (1994: 114)

> [Behavioral processes] are processes of (typically human) physiological and psychological behavior, like breathing, coughing, smiling, dreaming and staring. (1994: 115)

Illustrating this category are two examples which respectively personalize and do not personalize the applicant:

> PERSONALIZATION: It was at that point that Michelle decided that she needed to leave. (*Thomas* at 1173)

In the above sentence, Michelle is presented as a conscious decision maker, making deliberate choices.

> NO PERSONALIZATION: At the police station the participants were kept together in a waiting room and questioned separately. (*Kohli* at 1063)

In the second, Kohli is not personalized because neither she nor her group exhibits conscious choices or behaviors. Kohli is not named individually. Her group of protesters (*the participants*) is mentioned only with the passive voice ([*they*] *were kept together* and *questioned*). The expectation for this analysis was that judges granting asylum would be more likely to personalize the applicant while depersonalizing the persecutor.

Results and discussion

At the outset, it is noteworthy that the average length of the facts sections did not differ from winning to losing cases. Out of a total of 293 t-units in all of the ten cases, 145 came from the winning cases and 148 from the losing ones. However, overall trends indicate that the supposedly neutral facts of the applicants' persecution stories were presented quite differently in winning versus losing cases. In the former, judges crafted their presentations of facts in a way that placed the applicant in a more favorable light than in the latter. The four analyses will be discussed one by one. Descriptive statistics are presented to show general trends and the results of chi-square tests for significant differences are given where appropriate.

a) Narrative structure

This analysis considered the overall structure of the persecution stories, and how they were broken down into narrative component parts (as were defined in Table 2). The narrative structure analysis, shown in Figure 2, revealed a similarity between winning and losing cases in how judges structured the basic components of the persecution stories.

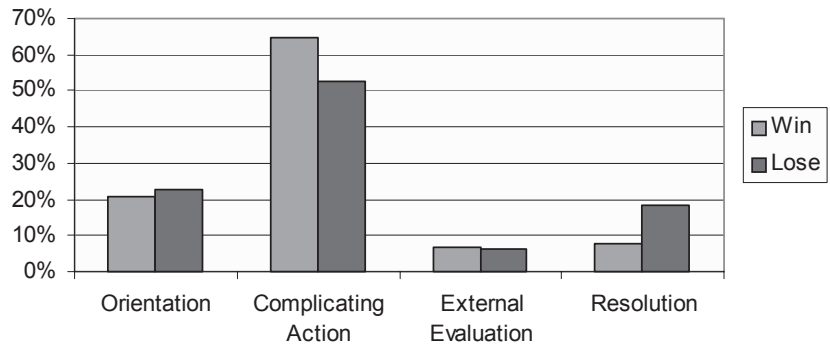

Figure 2: Similar narrative structure in winning and losing cases

Despite certain variations,[11] complicating actions formed the bulk of the persecution stories, followed by orientations. This was as expected because it is the actions of persecution that build the story line in most asylum cases. Neither winning nor losing cases had many external evaluations. As will be shown in the next section, however, internal evaluations (wherein a value judgment was encoded within the story lines themselves) were much more frequent. The resolution category showed the greatest disproportion between winning and losing cases. This was because resolutions described the applicant's flight and asylum application process (which resolved the persecution problems in all cases). In losing cases, these descriptions tended to be more complex, emphasizing missed deadlines or falsification of documents; hence, a larger proportion of the stories was devoted to this component.

b) Evaluations

As was shown in Figure 2, there were few external evaluations among the facts (n=19), as was expected. It would be strange if judicial opinions were peppered with personal commentary such as 'That poor man!' or 'What a terrible night!' Instead external evaluations tended to come from the applicants' mouths. For example:

> At this stage I was really, really fearing for my life. The kids were really upset. (*Thomas* at 1173)

Or, as one applicant stated about his cousin:

> Oswaldo 'is like a brother to me'. (*Orlando Ventura* at 1153)

In both examples, the judge sets aside the story line to allow an emotional comment into the opinion.

On the other hand, internal evaluations, which can occur in any narrative component within the persecution story lines themselves, were frequent in both winning and losing cases. As Figures 3 and 4 show, winning cases had slightly higher numbers than losing ones.

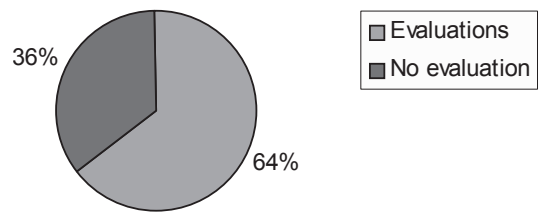

Figure 3: Judges used evaluations in almost two-thirds of winning-case t-units

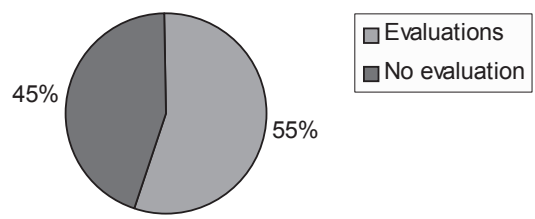

Figure 4: Evaluations were slightly less frequent in losing cases

However, the picture changes when the effect of the evaluative words is considered. For losing cases, the percentage of evaluations that revealed a judge's negative attitude toward the fact in question was 57%. In contrast, for winning cases, only 6% of the evaluations were negative (see Figures 5 and 6).

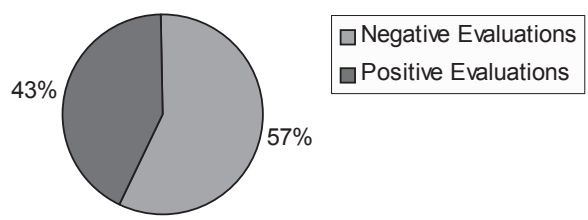

Figure 5: Both positive and negative evaluations appeared in losing cases

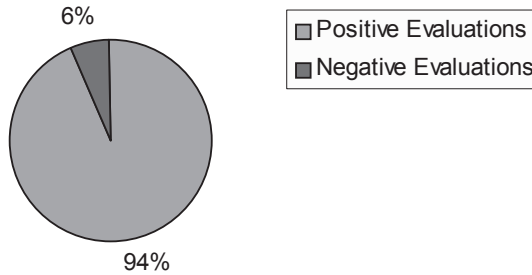

Figure 6: Judges almost never used negative evaluations in winning cases

Several examples comparing the language of negative and positive evaluations will illustrate these differences. One common way to evaluate was through what Labov (1972) calls 'loaded lexical items'. This term echoes Eades' (2006) reference to the 'lexical struggle' in trials, the courtroom battle for control of the labels given to events (for example, is a stabbing called 'murder' or 'an accident'). It should be noted that because the stories here are about persecution, they all had many violent words. Therefore, for the purpose of this analysis, the violent nature of the words alone was not enough to lead to an 'evaluative' categorization. Only if the judge wrote at a level of detail and intensity to indicate an emotional stance toward the violence was the item counted as 'evaluative'.

In the first example from a winning case, the judge describes a violent incident affecting the applicant's uncle 'Arnoldo' (italics are this author's):

> Approximately five years before Ventura fled Guatemala, Arnoldo was *nearly killed* by guerrillas, who attacked him with machetes. (*Orlando Ventura* at 1153)

The judge states that Arnoldo was 'nearly killed' when in reality he was not killed. The lexical choice intensifies the incident to a near death experience when the judge could have simply described what happened (he was cut in many places, he was hospitalized, etc.). This was analyzed as a positive evaluation because severe violence helps the applicant's case. Another 'loaded' lexical item occurred in the following example:

> Fedunyak agreed to pay the debt by delivering the money to two policemen who warned Fedunyak that he would not survive if anybody found out about the *shakedown*. (*Fedunyak* at 1128)

By calling the incident a 'shakedown' the judge indicates his belief that the police were engaging in highly corrupt behavior. In contrast, in the following example a lexical choice emphasizes the mildness of police behavior:

> Some time after this, Kohli and other members of the association were in a park drawing flyers and planning for the next rally. *A single police officer approached the group*. The group leader explained that they were not doing a rally, just planning for a future rally, and the police officer left. (*Kohli* at 1064)

The sentence describing the police approach minimizes the threat to Kohli. The judge could have described the situation neutrally as 'A police officer approached the group' but instead chose the phrase 'a *single* police officer.'

Grammatical structure could also be used to show a value judgment. In the following excerpt from a losing case, the facts are presented in a 'concessive structure' (Halliday 1994: 211–213), in which the first clause concedes some truth value, while the 'but clause' emphasizes the most important facts.

> After his release, the police asked him to report to the police station once a week, *but after four or five visits*, *the police lost interest and no longer required him to report*. (*Gu* at 1018)

By putting the mildest facts in last position in a 'but clause' (the police may have asked him to report, *but* they lost interest over time) the judge minimizes the danger to the applicant. In contrast, by putting a serious persecution event in last position of a concessive structure, the danger to the applicant is maximized:

> Suntharalinkam's sister was released the day after the arrest as a result of her school principal's intervention. *Suntharalinkam*, *however*, *was detained for seventy days*. (*Suntharalinkam* at 1039)

In this case, the detention, part of a concluding 'however clause', receives the most prominence.

In a final example, the judge negatively evaluates the degree of persecution an applicant experienced by explicitly stating the lack of violence:

> The LTTE [terrorist organization] never came to Don's home, and neither he nor his family was physically harmed. (*Don* at 740)

In this losing case, a non-event (nothing happened) is included among the facts to minimize the persecution.

To summarize this section, much of the judges' language was evaluative, indicating either a positive or negative stance toward the facts. The most striking result here was that negative evaluations were largely absent from opinions in which asylum was granted.

c) Attribution of speech

This analysis looked at whether each fact was presented as a direct quotation of the applicant's words, as reported speech, or as a statement of 'truth' by the court. Figure 7 indicates the overall trends for the three types of attribution:[12]

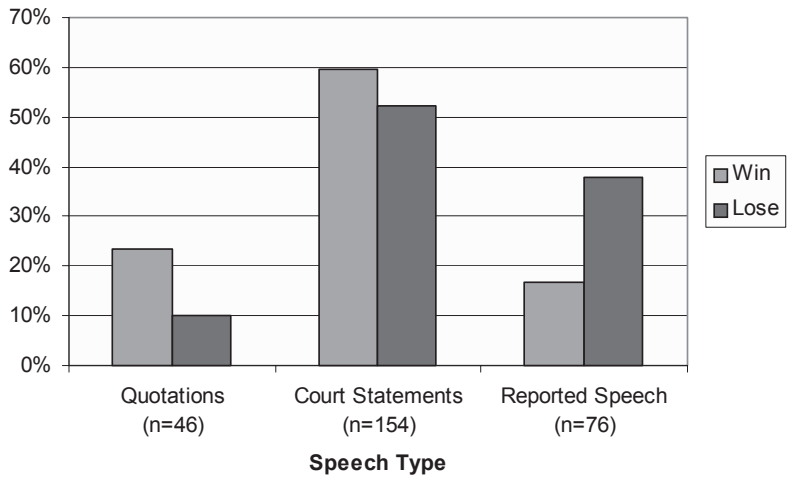

Figure 7: Judges attributed the facts differently in winning versus losing cases

This graph shows that court statements, for which judges simply recorded the facts without a particular reporting phrase, were the most frequent category, being slightly more prevalent in winning cases. The following are examples of court statements of the facts with no attribution to another speaker:

> The next month, the petitioners' car was vandalized, and its tires were slashed, though nothing was taken out of the car. (*Thomas* at 1173)

> Suntharalinkam was hospitalized for the next ten days to receive treatment for the injuries he sustained while he was in detention. (*Suntharalinkam* at 1039)

The graph also indicates that quotations, though not frequent, were more prevalent in winning cases than losing ones. This was as predicted because couching facts in the immigrant's own voice is a powerful way to convey anguish and desperation in a grantable case. Judges tended to put the most climactic part of a persecution event into the words of the applicant, as in the following examples:

> '[T]hey surrounded me and the next thing I knew is that they were trying to get Tyneal [my daughter] out of my arms. I held her tight and fell to the ground with her…' (*Thomas* at 1173)

> 'I detest [the birth control officials'] action and tried to stop them, but they beat me up. I had no other alternative and I couldn't stand [it] any more, so I resisted them.' (*Lin* at 1132)

Another strategy used by judges in losing cases was to insert direct quotations of the applicant to allow them to 'damn' themselves. In the following example, the judge quotes Kohli's description of supposed persecution by police for her women's rights activities in India. At the most climactic point of the story, the policeman has taken Kohli into the station.

> '[W]hen he took me instead of telling me to sit down he actually took my shoulders and told me to sit down, pushed me down on the chair.' (*Kohli* at 1063)

By choosing to quote Kohli here, the judge emphasizes that the *maximum* of her persecution is to be pushed down into a chair. Instead of making Kohli appear more deserving of asylum, this quotation makes her seem to be whining about a relatively minor infraction.

Another use of quotations was to call attention to certain key words from the applicant's testimony. For example, the following description of this (winning) applicant's father-in-law's house paints a picture of a strongly fortified structure or 'fortress':

> [H]er family, rather than her father-in-law, was the subject of attacks because her father-in-law lived in what was essentially a 'fortress.' (*Thomas* at 1173)

In his choice to repeat the word 'fortress' from the applicant's testimony, the judge indicates his belief that the father-in-law (who had abused black workers in South Africa) was paranoid and untouchable, leaving his son's family vulnerable.

In contrast, in the following excerpt from a losing case, quoted words from the applicant's speech are used against him:

> Don testified that some 'unknown' people were hanging around his house after he left and 'unidentified' persons stoned his house, but these people were not identified as individuals affiliated with the LTTE or the TDB. (*Don* at 740, n. 3)

By putting the quotation marks around 'unknown' and 'unidentified', the judge emphasizes that even the applicant doesn't know who these people are. The implication is that these were random individuals, rather than political persecutors.

Meanwhile, reported speech, which tended to place a distance between the judge-writer and the fact, was more common in losing cases. Looking more closely at this category, the three most frequent reporting verbs were *testify*, *state*, and *claim* (see Figure 8).

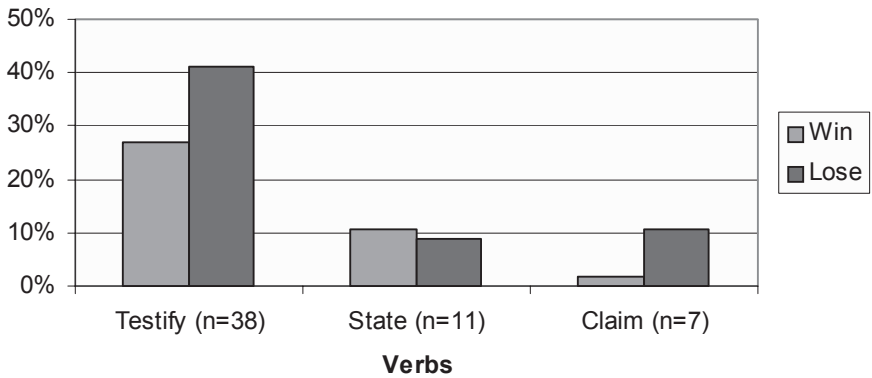

Figure 8: The top three reporting verbs

As the graph shows, both *testify* and *claim* were more common in losing cases, with examples as follows:

> He claimed that he was interrogated for two hours, asked where he obtained the religious materials and to whom he had distributed them. (*Gu* at 1017–1018)

> She testified that her father and brothers would beat her, and that members of a nearby mosque would call her names and talk to her in a vicious way. (*Ramadan* at 1220)

It is as if the judge were introducing a slight doubt to the veracity of the fact – the applicant claims it, but is it really true? In the next example, the judge directly indicates his doubt of the fact by inserting 'falsely' along with the reporting verb:

> He falsely claimed that Iranian authorities harassed his family in Iran in retaliation for an argument he had with Iranian officials. (*Hosseini* at 1021)

Finally, (and unsurprisingly) certain loaded reporting verbs only occurred in losing cases: *admit*, *allege*, *confess.* Other more neutral verbs occurred only in winning cases: *describe*, *document*, *note*, *say.*

In sum, most often, judges simply reported the facts directly without specifically attributing them to a speaker. However, judges who allowed the applicants' own voices to enter the opinion in the form of a quotation did so more frequently in winning cases than in losing ones. In contrast, reporting verbs tended to appear more in the opinions of judges who intended to deny, with certain verbs revealing a more dubious stance than others.

d) Personalization

The last category of analysis, personalization, shows the extent to which the written opinions portrayed the applicant as having human qualities. The expectation was that applicants would be personalized more frequently in winning opinions while persecutors would be dehumanized. Instead, as Figure 9 shows, both applicants and persecutors were described more personally in winning cases than in losing ones.

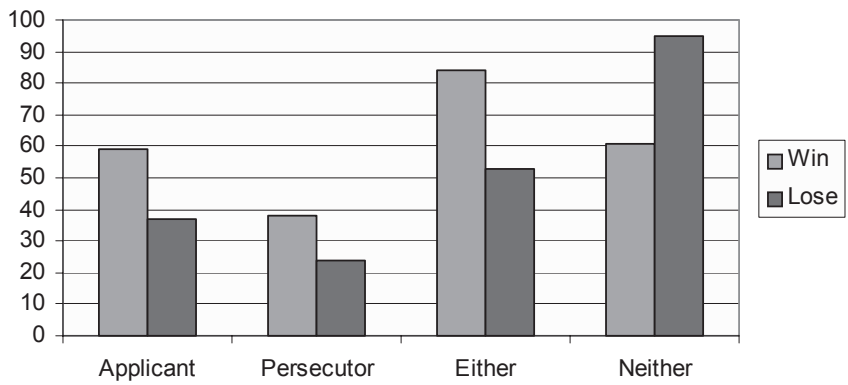

Figure 9: Both applicant and persecutor were personalized more in winning cases

Illustrating these findings is a striking contrast between descriptions of abuse in a losing case, *Gu*, versus in a winning case, *Fedunyak*. The former is almost clinical in its description of a beating, while the latter brings in many more details about the human activities of both the applicant and his persecutors:

> LESS PERSONALIZATION (losing case): At his asylum hearing, Gu testified that, in October 1997, he was arrested by Chinese authorities and detained at a police station for three days. He claimed that he was interrogated for two hours, asked where he obtained the religious materials and to whom he had distributed them. After arguing that the religious materials would not disturb the society and refusing to disclose where he distributed the materials, Gu asserted that the police hit his back with a rod approximately ten times.

> Gu testified that he was in pain at the time and that the strikes left temporary red marks, but required no medical treatment. Gu testified that no scars, bruises, welts, or injuries of any kind remain. Gu was not interrogated further, nor does Gu assert that he was subject to further physical mistreatment. (*Gu* at 1018)

> MORE PERSONALIZATION (winning case): As punishment, three unidentified gunmen beat Fedunyak until he lost consciousness. Upon regaining consciousness, the assailants demanded that Fedunyak pay $2,000 to the registration department chief. After forcing Fedunyak to sign a promissory note, the assailants knocked him unconscious once again. Fedunyak awoke in a hospital, where he was treated for a concussion, a broken nose, a torn ear and bruises. While recuperating, Fedunyak asked the police to investigate the attack. However, once Fedunyak was released from the hospital, a police inspector subpoenaed him and threatened to subject him to additional beatings if he did not fulfill the registration department chief's $2,000 extortion demand. (*Fedunyak* at 1128)

In Gu's losing case, several of the activities of the persecutors are introduced in the passive voice (*Gu was arrested … and detained; Gu was not interrogated further.*) In contrast, Fedunyak's persecutors' actions are in the active voice (*gunmen beat Fedunyak; the assailants demanded that Fedunyak pay; the assailants knocked him unconscious; a police inspector subpoenaed him and threatened* [*him*].)

Additionally, Gu's harm is described with little mention of his bodily condition. Although the opinion does state the he was 'in pain', his torture seems separate from his physical state (*the police hit his back with a rod* – not Gu but 'his back'; *the strikes left temporary red marks* – not the police but 'the strikes'; not Gu's body but 'marks'). Gu is curiously disembodied in these descriptions. The greatest detail about Gu's physical harm is couched in the negative (*no scars*, *bruises*, *welts*, *or injuries of any kind remain*). Meanwhile, Fedunyak-the-man is very much joined with his body during the torture: (*gunmen beat Fedunyak until he lost consciousness; assailants knocked him unconscious; Fedunyak awoke in a hospital;* details describe *a concussion*, *a broken nose*, *a torn ear and bruises*). Not only is there more detail about the injuries and hospitalization, but the reader is made aware of Fedunyak's personal consciousness of them. In all, Fedunyak's scene is alive with human activity. Both the persecutors and the applicant are personalized. In the losing case, the applicant and his persecutors are depersonalized, while the violence is described dispassionately.

Another criterion for personalization was the unnecessary mention of family members in a description of events, as in the following example:

> Lin lived in the Fujian province of China, in the same house as his parents, sister, two brothers, sister-in-law, and two nieces. (*Lin* at 1132)

The numerous family members mentioned here are not essential to the case. Instead they add a human element to Lin as a member of a warm household with children and other relatives. Lin was granted asylum. The next example also involves family, but not in a personal way:

> Iranian authorities harassed his family in Iran in retaliation for an argument he had with Iranian officials. (*Hosseini* at 1021)

Here, the judge cannot discuss this element of Hosseini's persecution without mentioning his family. However, the description does not portray him with his family in warm, personal terms. Hosseini lost his case.

The general point is that judges in winning cases portrayed more personal settings with human-to-human scenarios of persecution. Such characterizations would tend to justify a decision to grant asylum to a deserving human being while less personalized descriptions would better justify a decision to deny.

Conclusion

A close analysis of the language of published court opinions reveals that the judges' linguistic choices vary systematically, even in the supposedly objective descriptions of the basic facts of an asylum applicant's persecution. Although the stories have a similar overall structure, the applicant's voice emerges differently in grants versus denials of asylum. In winning cases, this voice is more likely to be a human one, described in favorable terms as having experienced painful persecution. There are more direct quotations and positive evaluations included in a judge's description of events. Losers' stories are related with a more skeptical stance, minimizing the human drama. These results are consistent with views expressed by Solan (1993), Kennedy (1986), and others, that judicial opinions are justifications for decisions. What is meant to be a neutral rendition of the applicant's experience displays the underlying stance of the judge toward the facts of the case.

Methodologically, these results support the use of linguistic analysis for understanding the rhetorical choices underlying legal processes. The analysis mechanisms used here have long been recognized by many linguists as revealing an author's stance toward narrative subject matter. Through a line-by-line analysis of the linguistic details of grammar and vocabulary, concrete evidence for a judge's stance toward a particular asylum case emerged. Rather than making vague statements about the 'judicial tone' or 'nuance', a researcher can point directly to quantifiable linguistic items. As Conley and O'Barr state,

linguistic analysis allows investigation of 'the places where language and justice converge' (1998: 14).

On a purely practical note, it would behoove attorneys who support immigrants' rights to construct briefs in similar human terms, mirroring the language of the granting judges. Key climactic facts of the persecution story could be presented in quotations of the applicant's words. The applicant could be personalized by using the active voice and by selecting verbs that involve mental and emotional activity. Lexical items could be chosen to emphasize the deliberate viciousness of a persecutor and the conscious suffering of the applicant. In other words, supportive briefs would let the human voice shine through.

As immigrants struggle to be heard in the U.S. courts they face linguistic and cultural barriers, technological filters, procedural hurdles, and bias in the lower courts (Preston 2007). Their stories are further manipulated in the appeals process to rationalize the judge's decision. Meanwhile, the real human being glimmers but faintly between the lines of rhetoric.

Notes

1 I would like to thank Kristen Stilt, Gail Stygall, and Sandra Silberstein for their comments and suggestions on this project. I am also grateful to Andrew Siegel for statistical assistance.

2 Subject to other restrictions that regulate asylum grants.

3 I once witnessed a Chinese asylum applicant speaking Chinese into a video camera in one city to a judge in another while a Chinese interpreter translated the testimony from a third locale through a speaker phone on the judge's podium.

4 This philosophy can be traced, for example, to the work of legal philosophers John Austin and Jeremy Bentham.

5 The United States has an appellate system of federal Circuit Courts directly below the Supreme Court.

6 One reviewer points out that judges may collaborate on published opinions. This may lead to style variation within a single opinion.

7 The 't-unit' is roughly equivalent to the sentence and is a standard unit of analysis for many linguists. A t-unit is defined more precisely as a main clause plus all embedded clauses. For example, *The soldiers broke into his home* and *The soldiers broke into his home, brandishing rifles, because they believed he was a collaborator* both consist of only one t-unit. However, coordinated clauses are independent t-units because they are thought to express two separate informational units. For example, *The soldiers broke into his home and he fled through the back door* consists of two t-units, conjoined by the coordinating conjunction *and* (Mackey and Gass 2005).

8 For example, in these stories there were no instances of 'abstracts' unless the subtitle 'Background' could be said to serve as such. This may be because the genre of the judicial opinion presupposes that facts will be included so there is no need to use specific introductory language.

9 One reviewer points out that judges may include large portions of background facts for which a single attribution phrase is intended to cover the whole block. Nevertheless, I retain the distinction between 'reported speech' and 'court statements' for such cases. The choice to associate a reporting phrase with a particular fact while listing others thereafter 'on its coattails' (without a specific reporting phrase) arguably endows the respective facts with a certain rhetorical significance. In fact, certain segments of text have reporting phrases clustered more densely than others. To consider all t-units that follow an initial reporting phrase to be 'reported speech' would not present an accurate picture of the actual distribution of reporting phrases.

10 This analysis overlapped with the quoted speech analysis in that instances in which the applicant was quoted (in other words, given a human voice) were also categorized as instances of personalization.

11 Significant ($p < 0.05$, chi-squared = 8.9196 with 3 degrees of freedom, $p = 0.03038$).

12 Very highly significant ($p < 0.001$, chi-squared = 20.7921 with 2 degrees of freedom, $p = 0.00003055$).

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