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NARRATIVE PREFERENCES AND ADMINISTRATIVE DUE PROCESS

Jason A. Cade¹

This Article illustrates, through sociolinguistic analysis, how an adjudicator's biases against certain narrative styles can erroneously influence his or her assessments of credibility, treatment of parties, and decision-making in the administrative law setting. Poverty lawyers have observed that many claimants in the administrative state continue to face procedural and discursive obstacles.² Applying insights from a growing field of inter-disciplinary research, including conversation analysis, linguistics, and cognitive studies, this Article builds upon those observations by more precisely demonstrating how structural and narrative biases can work to deny an applicant due process.

In the watershed decision *Goldberg v. Kelly*,³ the United States Supreme Court held that receipt of government benefits is a property interest⁴ that cannot be denied without timely, effective notice and a meaningful opportunity to contest the grounds for the denial.⁵ Though the debates among scholars⁶ and the judiciary⁷ about what constitutes effective notice or opportunity to contest a denial in particular situations will persist, applicants de-

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² See, e.g., Paris R. Baldacci, *A Full and Fair Hearing: The Role of the ALJ in Assisting the Pro Se Litigant*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 447 (2007); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 BUFF. L. REV. 1 (1990), reprinted in part in CLINICAL ANTHOLOGY: READINGS FOR LIVE-CLIENT CLINICS 215 (Alex J. Hurder et al. eds., 2nd prtg., 2003).

³ 397 U.S. 254 (1970).

⁴ *Id.* at 262 n.8.

⁵ *Id.* at 261.

⁶ Cf., e.g., Rebecca E. Zeitlow, *Giving Substance to Process: Countering the Due Process Counterrevolution*, 75 DENV. U.L. REV. 9 (1997); Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973 (1996); Jane Rutherford, *The Myth of Due Process*, 72 B.U.L. REV. 1, 41 (1992); Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189, 221, 269 (1991); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 673-74 (2d. ed. 1988); Lawrence Alexander, *The Relationship Between Procedural Due Process and Substantive Constitutional Rights*, 39 U. FLA. L. REV. 323 (1987); JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* (1985); Richard H. Fallon, Jr., *Some Confusions about Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 336-37 (1983); JERRY L. MASHAW, *BUREAUCRATIC JUSTICE* 21-23 (1983); Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978); Henry P. Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405 (1977); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three*

nied government benefits today are generally afforded more safeguards than they were prior to *Goldberg*.⁸ In the context of disability or unemployment insurance benefits, applicants can at least expect to know why the benefits may be denied, to have some opportunity to provide information (usually in writing) prior to an initial determination, and to be afforded a relatively prompt post-deprivation hearing with an administrative adjudicator upon request.

As important as these minimum procedural rights are, however, they sometimes remain insufficient to ensure administrative due process for many of those people most affected by the denial of government benefits. The way parties use and understand language invariably impacts the efficacy of the procedures in place. As Lucie White has observed, when persons disfavored by race or class employ “verbal strategies” that differ from the “dominant stylistic norms,” the available procedural safeguards may be less effective.⁹ There is nothing new, of course, about the claim that the law does not always treat similarly situated persons equally, and law and society scholars have explored socially-influenced inequalities in the legal system for at least seventy years. Nevertheless, that research has been “less successful at exposing the *mechanisms* by which inequality is produced.”¹⁰

This Article suggests that our understanding of factors that affect administrative due process (and whether, in fact, due process is provided) will be significantly enhanced by closely examining the linguistic and structural

Factors in Search of a Theory of Value, 44 U. CHI. L. REV. 28, 48-49 (1976); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

⁷ Cf., e.g., *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) (summary civil forfeiture of real property without exigent circumstances denies due process); *Zinerman v. Burch*, 494 U.S. 113, 138 (1990) (post-deprivation tort remedies not sufficient to protect confined mental patients against possibly erroneous deprivation of liberty); *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987) (motor carrier entitled to notice of employee's allegations and supporting evidence, opportunity to submit written response, and opportunity to rebut before Secretary of Labor could order it to temporarily reinstate an employee who was allegedly discharged for whistle blowing activity); *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532 (1985) (employees must be given opportunity to respond before termination); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (\$10 statutory limit on fees that may be paid an attorney or agent who represents a veteran seeking benefits does not violate due process); *Parham v. J.R.*, 442 U.S. 584 (1979) (evaluating procedures for allowing parents to commit their minor children to mental health facility); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (evidentiary hearing is not required prior to termination of disability benefits); *Goss v. Lopez*, 419 U.S. 565 (1975) (in non-exigent situations, students facing temporary suspension from public school must be given notice of charges and an opportunity to present their sides prior to removal); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (due process requires pre-termination evidentiary hearing before public assistance payments are discontinued). See generally *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162-63, 171-72 (1951) (Frankfurter, J., concurring).

⁸ See, e.g., Hon. Cesar A. Perales, *The Fair Hearing Process: Guardian of the Social Service System*, 56 BROOK. L. REV. 889, 891-92 (1990) (noting that in public assistance cases alone, the number of hearings requested per year increased from 1300 in the year before *Goldberg* was decided to 150,000 in 1989).

⁹ White, *supra* note 2 at 4.

¹⁰ Robert Dingwall, *Language, Law, and Power: Ethnomethodology, Conversation Analysis, and the Politics of Law and Society Studies*, 25 LAW & SOC. INQUIRY 885, 903 (2000) [emphasis added].

details of administrative hearings. A growing handful of socio-legal researchers have drawn upon the tools of conversation analysis (or “talk-in-interaction”),¹¹ linguistics, and cognitive studies to begin to map the precise ways that biases are reflected in, and influenced by, how participants in a variety of legal settings use language.¹² By similarly studying the linguistic interactions in administrative hearings, we can get a sense of the extent to which administrative due process is a function of not just procedure, but also of narrative difference. I hope to contribute to this goal here by closely exploring, as a case study, the interactive particulars of an unemployment insurance benefits hearing in New York that I worked on years ago as a student lawyer.

The reader may question what can be learned from looking closely at a single unemployment insurance benefit hearing. Foremost, this particular hearing provides a rich set of data because the contrast between the parties’ use of language – and the Administrative Law Judge’s (ALJ) reactions to those differing styles – was significant, so much so that his management of this hearing was later found to have deprived the applicant of due process. This hearing thus provides fertile opportunity to explore how social and discursive biases are connected not just motivationally, but linguistically, to decision-making that implicates fundamental rights.

Even if one remains unconvinced that the applicant in this case study, who for privacy reasons I refer to as “Ms. S”, was denied due process *because of* her narrative style, the unemployment benefits hearing as a data set is still important because it illustrates how the framework and relative leeway of the administrative hearing allows adjudicators to exploit (perhaps even unintentionally) differences in language style, and more fundamentally, in social class structure, thereby reinforcing unequal power dynamics. Professor Gregory Matoesian in particular has shown how social context – including race, power and status – is produced and reproduced in and through talk, including trial talk.¹³ In this Article, I demonstrate how the structure of

¹¹ See, e.g., GEORGE PSATHAS, CONVERSATION ANALYSIS: THE STUDY OF TALK-IN-INTERACTION 1-3 (1995).

¹² See, e.g., LAWRENCE M. SOLAN & PETER M. TIERSMA, SPEAKING OF CRIME: THE LANGUAGE OF CRIMINAL JUSTICE (2005); LANGUAGE IN THE LEGAL PROCESS (Janet Cotterill ed., 2002); ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000); Shonna L. Trinch, *The Advocate as Gatekeeper: The Limits of Politeness in Protective Order Interviews with Latina Survivors of Domestic Abuse*, 5(4) J. SOCIOLINGUISTICS 475-506 (2001); Calvin Morrill et al., *Telling Tales in School: Youth Culture and Conflict Narratives*, 34 LAW & SOC’Y REV. 521 (2000); Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767 (2000); JOHN M. CONLEY & WILLIAM M. O’BARR, JUST WORDS (1998) [hereinafter “JUST WORDS”]; Calvin Morrill et al., *Voice and Context in Simulated Everyday Legal Discourse: The Influence of Sex Differences and Social Ties*, 32 LAW & SOC’Y REV. 639 (1998); Gregory M. Matoesian, *Language, Law, and Society: Policy Implications of the Kennedy Smith Rape Trial*, 29 LAW & SOC’Y REV. 669 (1995); GREGORY M. MATOESIAN, REPRODUCING RAPE: DOMINATION THROUGH TALK IN THE COURTROOM (1993) [hereinafter MATOESIAN, REPRODUCING RAPE].

¹³ See GREGORY MATOESIAN, LAW AND THE LANGUAGE OF IDENTITY: DISCOURSE IN THE WILLIAM KENNEDY SMITH RAPE TRIAL 37-68 (2001) [hereinafter MATOESIAN, LAW AND THE LANGUAGE OF IDENTITY]; MATOESIAN, REPRODUCING RAPE, *supra* note 12, at 98-188.

these unemployment benefits hearings too easily allows an ALJ who reacts negatively to a particular applicant's disfavored narrative style to unfairly privilege the employer's account and to further disadvantage and dominate the applicant on a linguistic level. An adjudicator's exploitation of those who use more marginalized narrative styles, whether intentional or unintentional, reinforces the already lopsided power structure between applicant and government, and it therefore remains important to reveal how this sort of linguistic exploitation is realized in context.

Finally, unemployment insurance benefits hearing transcripts, like those of most administrative hearings, are not a matter of public record and are not easily accessible. I offer this analysis and data (minimally redacted for privacy reasons) to pull back the curtain on an area of law that, because it profoundly affects so many, deserves a closer look. Even a single administrative hearing provides rich opportunities to employ diverse and useful tools in legal analysis.¹⁴

To situate the discussion that follows, Part I of this paper surveys administrative due process doctrine and academic commentary. Part II defines "narrative style" and provides some relevant theoretical background for the analysis presented here. Part III lays out a brief explanation of New York's unemployment insurance benefits scheme and then contrasts administrative law hearings with trials in civil courts. In Part IV, I explore the hearing in more minute detail, examining how both the structure of the hearing and the linguistic interactions between the ALJ and the parties can work to deny claimants of a fair hearing. Part V concerns post-hearing developments, namely the ALJ's written decision denying benefits to Ms. S, and then her successful appeal of that decision on due process grounds. Finally, Part VI offers concluding thoughts about potential remedies and the need for further research in this area.

I. WHAT IS ADMINISTRATIVE DUE PROCESS?

The United States Supreme Court has emphasized that procedural due process is a flexible concept.¹⁵ This flexibility is essential given the wide range of applications to which courts must apply a single constitutional clause.¹⁶ Nevertheless, in all contexts where liberty or property may be legally deprived, we can identify some fundamental components of the pro-

¹⁴ On a personal level, there is additionally great pedagogical value in revisiting one's legal successes and failures and deeply reflecting on what was done well, what could have been done better or differently, and how our past strategies and understandings compare to present thinking. There are always more layers of meaning to unfold and engaging in this sort of periodic review and critique is, I believe, extremely beneficial to professional growth.

¹⁵ *See, e.g.*, *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 196 (2001); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162-63, 171-72 (1951) (Frankfurter, J., concurring).

¹⁶ *See, e.g.*, *Farina, supra* note 6, at 269 (noting that the judiciary must evaluate due process in acts as diverse as "disciplining prisoners and school children, suspending drivers' licenses and welfare benefits, terminating employment and parental rights, curtailing public

cess that is due. The affected party must know the grounds for a deprivation. The affected party must have some opportunity to contest those grounds. And a fundamentally fair process also has an equal protection component: A party should be treated the same as others similarly situated. Thus, while what constitutes effective notice and opportunity to contest the grounds for deprivation will vary from situation to situation, if due process is implicated, these procedural protections must be present to some extent and to that same extent for all affected persons.¹⁷

Under well-settled tenets of administrative law and separation of powers, these agencies enjoy significant leeway to determine the appropriate processes by which affected persons can contest entitlements decisions, the idea being that the government branch that initially revokes or denies benefits or licenses should also be the first to adjudicate challenges to such decisions. Many administrative agencies utilize “independent” adjudicators (some more independent than others) to evaluate whether to grant government-based licenses or entitlements. Review by a state or federal judicial branch of government is generally possible only after at least two levels of administrative adjudication, and, where there is a possibility of an administrative appeal, sometimes three levels of adjudication. Due to cost, fatigue, docket management, and a host of other factors, the unsurprising practical effect is that the vast majority of parties will have their claims finally resolved by the administrative state.

In *Goldberg v. Kelly*, the United States Supreme Court set out the modern balancing framework for determining what procedural processes are required,¹⁸ but the algebra that courts employ to evaluate whether under a particular government scheme the affected persons are afforded sufficient process finds its genesis in *Mathews v. Eldridge*.¹⁹ Per *Mathews*, the process due in a given situation turns the balance of three variables: 1) the private interest affected; 2) the risk of erroneous deprivation through existing procedures and the probable value of any additional procedural safeguards; and 3) the fiscal and administrative burdens on the government if additional procedural safeguards are added.²⁰

The holding of *Mathews* was that applicants for disability benefits do not have a due process right to an evidentiary hearing *before* the administrative agency’s initial termination of their benefits. The Court deemed adequate the agency’s existing process of considering written submissions from an applicant and his or her doctors, followed by an internal review of the initial determination and the opportunity for *de novo* reconsideration in an

programs, prosecuting public offenders, and compelling public access to beachfront property. . . .”).

¹⁷ See, e.g., RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 125, 691 (4th ed. 2002).

¹⁸ *Goldberg*, 397 U.S. at 262-63 (stating that courts should balance the severity of deprivation against the costs to the agency).

¹⁹ 424 U.S. 319 (1976).

²⁰ See *id.* at 341-49.

adversarial post-termination hearing. Distinguishing *Goldberg*, the Court found that the claimant's private interest in disability benefits was not as significant as a person's need for public assistance, and that the additional cost and burden on the government if applicants were to be afforded pre-deprivation hearings was substantial.²¹

That the degree of procedure required would turn on the relative importance of what is at stake, the risks of error, and the potential burdens on the government, makes theoretical sense. It is just as apparent, however, that the *Mathews* variables are difficult, if not impossible, to quantify objectively. "[The Court's] holding that the degree and type of procedural protection that is due can be determined by weighing," Laurence Tribe observed, "provides the Court a facile means to justify the most cursory procedures by altering the relative weights to be accorded each of the three factors."²² Many have criticized in particular the risk of erroneous deprivation factor, and without a doubt it is an exceedingly difficult and subjective measurement to make. Jerry Mashaw and others have posited that "softer" variables such as credibility and discretion are critical, and therefore oral hearings are always an essential procedural protection.²³ Even where deprivation is inevitable, there are "'process values' that might inhere in oral proceedings. . . ."²⁴ There are substantial, albeit unquantifiable benefits to an administrative system that affords applicants the "dignity of being listened to. . . ."²⁵

Most administrative law practitioners are aware, however, that even when parties do have the opportunity to appear before an administrative adjudicator, for example in unemployment benefits hearings, whether pre- or post-deprivation, they are not guaranteed fair or equal treatment. Lucie White, among others, has written on the disjunction between the widely held belief that citizens should be able to meaningfully participate in government decisions that affect their lives and "the conditions in our society in which procedural rituals are actually played out."²⁶ White's experiences helping

²¹ See *id.* at 347 (noting that "experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden not insubstantial").

²² TRIBE, *supra* note 6 at 674; see also Farina, *supra* note 6 at 234 (taking issue with a test that measures due process based on "some calculus explicitly designed to maximize aggregate welfare"). Of course, the *Mathews* test sometimes leads courts to conclude that insufficient process is being provided. See, e.g., *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532 (1985) (holding that a public employee who can only be fired for cause is entitled to oral or written notice of the employer's charges and evidence, and an opportunity to present his or her side of the story before termination).

²³ See Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 48-49 (1976).

²⁴ *Id.* at 48.

²⁵ Perales, *supra* note 8, at 892. There is also a distinct symbolic, though similarly unknown, value in a system that, by placing a premium on process through the provision of oral hearings, recognizes how critical benefits may be to those in need.

²⁶ White, *supra* note 2, at 4.

indigent clients obtain public assistance led her to the insight that “[s]ocial subordination itself [by race, gender, or class] can lead disfavored groups to deploy verbal strategies that mark their speech as deviant when measured against dominant stylistic norms.”²⁷

In Part IV, I demonstrate with specificity some of the ways that narrative and discursive “difference” can be emphasized, exploited, and evaluated in an administrative hearing, but here I want to make a final general point about administrative law that illustrates why this kind of analysis is so critical in the administrative setting. Contested hearings for unemployment benefits, and in much of the administrative state, almost always turn to some degree on credibility determinations. Administrative appellate boards and courts are extremely reluctant to overturn a hearing adjudicator’s credibility interpretations, and warrantably so.²⁸ It is not uncommon for an ALJ’s decisions to be upheld on appeal based solely on the ALJ’s determination that one party’s testimony was more believable.²⁹ The written transcript is an incomplete and inevitably imperfect representation of the verbal and non-verbal events of a trial, and, as a normative and practical matter, few would quibble with the deference given to the credibility assessments of the adjudicator who has the opportunity to observe live testimony.³⁰ But because there are no limits on how an adjudicator may weigh or determine credibility a paradox arises:

[D]emeanor of witnesses is so significant that it cannot be disregarded, but the nature of this significance is so obscure that no rules can be established for assessing such evidence. Thus, an element at the very center of the functioning of the legal system is outside the law’s control.³¹

Credibility determinations are based on observational evidence such as “style, paralinguistic cues, and nonverbal behavior.”³² But which style, what cues, and whose behavior provide the benchmark? As I discuss further below, John Conley and William O’Barr have shown that the language of the courtroom is gendered, exhibiting a “clear preference for a distinctively

²⁷ *Id.*

²⁸ See Christopher B. McNeil, *Critical Factors of Adjudication: Language and the Adjudication Process in Executive and Judicial Branch Decisions*, 23 J. NAT’L A. ADMIN. L. JUDGES 411, 434 (2003) (“The significance of this delegation of adjudicative authority is substantial, in large part because the public has invested its faith in the ALJ to make key assessments of credibility, based on all available linguistic cues, cues that are beyond the reach of appellate courts (and thus are not likely to be rejected on appeal).”).

²⁹ See, e.g., WILLIAM M. O’BARR, *LINGUISTIC EVIDENCE: LANGUAGE, POWER AND STRATEGY IN THE COURTROOM* 42-43 (Academic Press 1982) (discussing a National Labor Relations Board case in which the court of appeals affirmed the Board’s order where it was based only on the hearing examiner’s finding that one party’s testimony was more credible).

³⁰ See generally PETER M. TIERSMA, *LEGAL LANGUAGE* 175-79 (The University of Chicago Press 1999).

³¹ O’BARR, *supra* note 29, at 43-44.

³² *Id.* at 42.

male style.”³³ Judges and jurors also tend to disfavor — through disbelief, discrediting, and ultimately adverse decision-making — speaking styles associated with lower socioeconomic class.³⁴ We can safely assume that this is generally even more true in the administrative state because, unlike in most judicial settings, the credibility determinations are not made by a jury comprised (at least theoretically) of one’s peers but by a single judge (oftentimes a white male) who is trained in and practices in the language of the law. The implication is that even where applicants for government benefits are given the opportunity to plead their case before an ALJ, they may not succeed if they are unable to conform to narrative styles more typically associated with the language of the court.³⁵

For these reasons, a more precise awareness of how narrative and discursive difference plays out may be critical in the administrative setting. If we conceive of *Goldberg*’s promise of procedural justice as “a normative horizon rather than a technical problem,”³⁶ how exactly can language styles and biases reduce important procedural rights to ineffectual rites? This Article aims to illustrate that phenomenon, allowing us to then ask the more difficult questions: How can the administrative state attempt to accommodate more marginalized narrative styles in benefits hearings? Is the concept of a “meaningful hearing” malleable enough to require ALJs to incorporate language-related insights?

II. WHAT IS “NARRATIVE STYLE”?

Narratives are usually thought of as stories about something that has happened. In the context of adversarial proceedings or contested hearings, some advocates and scholars distinguish between narrative-based testimony, through which a party is permitted to tell his or her “story” of the matter at hand with limited interruptions (quite rare), and testimony that is elicited through and tightly controlled by a questioning attorney or judge.³⁷ “Narrative style” is a broader concept that refers both to the type of story told and to the form and language that a person uses to tell the story.

Unsurprisingly, the narratives we choose to tell, and the way we tell them, are often linked to our professional training (or lack thereof), social status, background experiences, and cultural values. In a seminal study of litigants in small claims court, Conley and O’Barr found that narrative styles

³³ JUST WORDS, *supra* note 12 at 63; *see also* MATOESIAN, *REPRODUCING RAPE*, *supra* note 12, at 98-233 (discussing reproduction and influence of patriarchal structures in rape trials).

³⁴ *See infra* text accompanying notes 38-51; *see also* Bezdek, *supra* note 2, at 565-75, 583-85.

³⁵ *See, e.g.*, Baldacci, *supra* note 2, at 453-55; Bezdek, *supra* note 2, at 561-62, 586-91.

³⁶ Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 *BUFF. L. REV.* 1, 3 (1990).

³⁷ *See, e.g.*, TIERSMA, *supra* note 30, at 155-58; Baldacci, *supra* note 2, at 474-80.

fall along a continuum between rules and relationships.³⁸ Lawyers and other highly educated professionals, for example, tend to tell “rule-oriented” stories. Rule-oriented accounts “base claims for legal relief on violations of specific rules, duties, and obligations. . . .”³⁹ Rule-oriented accounts are usually sequential or chronological, deal explicitly with cause and effect, and emphasize evidence that is directly relevant to the claim being made.

At the other end of the spectrum, the narrative logic of a “relational account” foregrounds social conduct and personal details rather than causality and formal organization structures.⁴⁰ For a litigant who favors a relational account, what matters are the details of interpersonal interactions, the social network in which he or she is situated, and his or her (perceived or real) needs and entitlements.⁴¹

The particular language a party employs to tell a story is also part of narrative style. Looking at the question of why some trial witnesses are deemed more credible than others, Conley and O’Barr conducted studies that indicate that speakers who speak in “powerless language” are less likely to be believed.⁴² Some features of powerless language include: hedging or expressions of uncertainty (“I think,” “sort of”); hesitation or placeholder utterances (“um,” “uh,” “well”); answering with a rising question intonation; and unnecessary or inappropriate intensifiers (“very,” “surely”).⁴³ Speakers who use a powerless style are likely to be poor, undereducated, and/or of low social status. Previously, linguists had primarily associated the characteristics of powerless language with women, but Conley and O’Barr’s work showed that both men and women of lower socioeconomic status tend toward powerless language.⁴⁴

Conley and O’Barr showed that witnesses who speak assertively are more likely to be believed,⁴⁵ and it is surely tempting to view rule-oriented accounts as superior to relational accounts, especially in a court-room setting. Leading trial-technique textbooks specifically teach rule-oriented

³⁸ See generally JOHN M. CONLEY & WILLIAM M. O’BARR, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE* (1990) [hereinafter *RULES v. RELATIONSHIPS*].

³⁹ JUST WORDS, *supra* note 12, at 67. As noted elsewhere in this Article, I disagree with the term “rule-oriented account” insofar as it suggests that other narrative styles do not follow an intrinsic set of rules or norms.

⁴⁰ *Id.* at 68.

⁴¹ *RULES v. RELATIONSHIPS*, *supra* note 38, at 58-59.

⁴² JUST WORDS, *supra* note 12, at 64-65. The term “powerless” is interesting, because it defines itself by what it is not. It thus recognizes subordination but may also work to reinforce it by designating the discursive features of an identifiable group as less than, as without power.

⁴³ See TIERSMA, *supra* note 30, at 173-74.

⁴⁴ JUST WORDS, *supra* note 12, at 65; see also John M. Conley et al., *The Power of Language: Presentational Style in the Courtroom*, 1978 *DUKE L.J.* 1375, 1376-78; see also William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 *OHIO N.U. L. REV.* 455, 470 (1994).

⁴⁵ JUST WORDS, *supra* note 12, at 65, 90.

methodologies,⁴⁶ and, as Atkinson and others have observed, maintaining order by enforcing conventions such as turn-taking, relevance, and so on, may be necessary to make complex, multiparty interactions possible.⁴⁷

Nevertheless, there is no objective basis to suggest that narrative styles employing relational values or powerless language are inherently less credible. Moreover, the development, perpetuation and use of any narrative style is contextual and complex. For instance, we know that language-use is a powerful tool for creating and maintaining group identity, and that some group speakers develop and renew linguistic variation and difference *in order* to distance themselves from the “mainstream” or dominating class, notwithstanding the inevitable stigmatization and downgrading that the hegemonic group assigns to the sub-group’s vernacular.⁴⁸ In a related study discussed by Jerome Bruner among others that focused on how children develop their “ways with words,” anthropologist Shirley Brice Heath compared lower-class African American children with middle-class white children in two neighboring towns in North Carolina.⁴⁹ She found that the African American children were praised for creatively embellishing their stories of what they had done each day, while the white children were admonished by both parents and teachers to “stick to the facts.” Through this reinforcement of differing norms, each group, unsurprisingly, continually internalized and became more facile with those differing narrative styles.

Additionally, there is evidence from recent literature in psychology that narratives about the self tend towards the stylistic features described above as “relational,” regardless of the identity or background of the speaker. Administrative benefits hearings usually involve evaluation of a claimant’s past actions; the claimant is called upon to describe, explain and defend what he or she did, did not do, or should have done. In this way, the claimant is compelled to present a narrative about his or herself (as, we will see, Ms. S was). Psychologist Jerome Bruner collected observations regarding narratives about the self from the work of leading scholars, and it turns out that such stories are, *inter alia*, replete with desires, intentions, and aspirations; sensitive to obstacles and oriented toward community (“reference groups” that set the cultural standards by which one judges oneself); moody and affective; and seek and guard their coherence through highly developed

⁴⁶ See, e.g., THOMAS A. MAUET, TRIAL TECHNIQUES 26, 61-84, 97-108, 405-30 (6th ed. 2002).

⁴⁷ See, e.g., J. Maxwell Atkinson, *Understanding Formality*, 33 BRITISH J. SOCIOLOGY 86, 92 (1982); Robert Dingwall, *Language, Law, and Power: Ethnomethodology, Conversation Analysis, and the Politics of Law and Society Studies*, 25 LAW & SOC. INQUIRY 885, 899-900 (2000).

⁴⁸ See generally Judith Rodby, *A Polyphony of Voices: The Dialectics of Linguistic Diversity and Unity in the Twentieth-Century United States*, in ENGLISH IN ITS SOCIAL CONTEXTS 183-97 (Tim William Machan & Charles T. Scott eds., 1992).

⁴⁹ See generally SHIRLEY BRICE HEATH, *WAYS WITH WORDS: LANGUAGE, LIFE, AND WORK IN COMMUNITIES AND CLASSROOMS* (1983).

psychic procedures.⁵⁰ Though these researchers were not writing about self-narratives in the context of court or other adjudicatory proceedings, the work collected by Bruner still suggests that the “natural” state of such stories may tend to be less rule-based and more relational.

In short, then, narrative style is both *what* we deem to be important to include in a story and *how* we go about presenting that story. A value-and-experience-driven endeavor, storytelling in the legal context is thus influenced by a multitude of interactive factors, as are one’s reactions to the narrative styles of others. The problem that arises is that adjudicators tend to be much more comfortable with rule-based narrative styles, sometimes to a degree that threatens fundamental rights of those who cannot or do not conform.

III. BACKGROUND FOR THIS UNEMPLOYMENT BENEFITS HEARING CASE STUDY

In this Part, I provide background that will aid the reader with the analytic sections that follow. First, I outline New York State’s unemployment insurance benefits scheme, which as a joint program with the federal government is similar to that of most states. I then give a non-technical overview of the dispute between the parties that will place the hearing, and the arguments made therein, in context.

A. *New York State’s Unemployment Insurance Benefits Scheme*

New York, like all states, participates in a joint program with the federal government that provides temporary, compensatory benefits to employees who become unemployed through no fault of their own. Federal law sets out the general requirements but allows each state to determine its own eligibility requirements.⁵¹ An applicant generally is eligible for benefits if he or she earned adequate past wages, is not at fault in losing his or her job, is still unemployed, and is ready, willing, and able to work.⁵²

Procedurally, in New York, the employee can apply for benefits over the telephone or on the internet. Usually within a few weeks, the applicant receives a notice stating the amount of monetary benefits he or she will receive if found eligible. The State Department of Labor (“DOL”) then notifies the applicant’s former employer of the claim, providing the employer with the opportunity to object. Once the DOL concludes its investigation, applicants who are determined to be ineligible are issued a written statement providing the grounds for the denial. The applicant may request a hearing

⁵⁰ JEROME BRUNER, *MAKING STORIES: LAW, LITERATURE, LIFE* 70-71 (2002).

⁵¹ See Federal Unemployment Tax Act, 26 U.S.C. § 3301-11. (2006); Federal Unemployment Compensation Act, 42 U.S.C. §§ 501-04, 1101-05 (2006).

⁵² See, e.g., N.Y. LAB. LAW §§ 500-643 (McKinney 2010); N.Y. COMP. CODES R. & REGS. tit. 12, §§ 460.1-490.7 (2010).

within thirty days,⁵³ which is typically scheduled to occur two to five weeks after the request. If the ALJ sustains the initial denial, the applicant may appeal to the DOL Appeal Board. Judicial review of the Appeal Board's decision is then possible in the New York Supreme Court, Appellate Division (Third Department).

In New York City, the administrative hearings at which DOL's initial determinations regarding unemployment benefits claims are contested are held in small rooms. The parties sit a few feet across from each other at a table, while the ALJ presides at an elevated desk at the head of the table. The table accommodates up to five people, not including the ALJ. Parties may be represented by counsel and are given an opportunity to present oral testimony and to submit relevant written evidence. Witnesses, if their proffered testimony is deemed relevant by the ALJ, may be called. Each party (or the party's counsel, if represented) has the opportunity to cross-examine the adversary's witnesses and to redirect testimony of the parties' own witnesses. The rules of evidence are not mandated, but a party's objections based on those rules, for example, objections to the introduction of hearsay, are frequently sustained. There is no formal discovery process, but parties may ask the ALJ to issue subpoenas for witnesses and documents to be produced at the hearing. Brief closing arguments are also permitted. Thus, Unemployment Insurance hearings (UI hearings) share some structural elements with civil trials.

But UI hearings also differ from the usual practice in civil trials in important ways. The ALJ can, and invariably does, directly question either or both parties at some length. There are no limits on the form or method of the ALJ's questions; he may cross-examine or lead the witness. And unlike civil court, the UI hearing begins with the employer's account of the reasons for discharge and the employer's evidence; the employee's version is not told until late in the proceeding. As we shall see presently, this is a structural element that, at least in cases involving significant differences in power and narrative style between the applicant and the employer, can work to reinforce and exacerbate those differences in critical ways.

B. Ms. S's Dispute with Her Employer

Ms. S⁵⁴ was a New York civil service employee for twenty-three years. More than the last ten of those years were at the Department of Human Resources Administration ("HRA"), with an intervening year on medical leave after a welfare applicant attacked her with a knife while she was at work. In Ms. S's account, for the first several years in HRA there were no problems. Eventually, however, the situation between Ms. S and her direct supervisor began to deteriorate. A major source of the problem seems to have been the escalation of symptoms associated with post-traumatic stress

⁵³ N.Y. LAB. LAW § 620(1)(a) (McKinney 2002).

⁵⁴ As noted above, the abbreviation "Ms. S" is used to protect the privacy of the applicant.

disorder (PTSD) following the knife attack. Because Ms. S was, she claims, increasingly unable to tolerate crowded subway trains, she was regularly late to work, and she was frequently docked pay or threatened with termination because of her inability to arrive on time.

Eventually, Ms. S, with the assistance of her doctor, began petitioning HRA for an adjustment of her working hours, to begin later in the day when trains would not be crowded, but these efforts were to little avail. The dispute came to a head in August of 2003, and finally Ms. S, her union representative, and HRA signed a probation agreement in which Ms. S agreed not to be late for a period of one year, and HRA agreed to allow her to arrive at work between 9:30 and 10:30 in the morning. Ms. S was terminated less than four months later, allegedly for violating the probation agreement.

Ms. S then applied for unemployment insurance benefits. DOL began its investigation, and Ms. S's former employer informed DOL that Ms. S had been fired because she had attempted to avoid being caught late by not swiping her time card upon her arrival at work. Based on this information, DOL's initial decision was to deny unemployment benefits. Ms. S elected to contest the initial decision in a UI hearing.

C. *Ms. S's Narrative Style*

When I was a student-lawyer in an Employment Law Clinic, Ms. S was one of my first clients. When another student and I first interviewed Ms. S, we attempted to let her tell her story without limiting her only to the details we thought might be relevant to her UI hearing.⁵⁵ We encouraged her to express all of her concerns and desires with respect to her employment. Using this process, we learned that Ms. S strongly *felt* she had been mistreated for the last five years by her direct supervisor. We learned that in spite of those feelings, Ms. S's primary wish was to have her job back. We also learned that Ms. S's linguistic style tended heavily towards what has been called a "relational account," beset with "powerless language."⁵⁶

The premise underlying Ms. S's version of her work history was that she is a good person who met her social obligations and therefore should have been treated more fairly. She catalogued her various ailments of the last decade. She described the uncomfortable relationship that she had developed with her direct supervisor at HRA. She recounted numerous examples of occasions in which she had done something nice for colleagues at work, or had performed her job well, or had tried to make amends with her supervisor. From a karmic perspective, Ms. S made a compelling case that the denial of six months of unemployment insurance following twenty-three years working for the city seemed unfair. Moreover, Ms. S was a good storyteller, with a flair for conveying emotion, humor and drama. But, somewhat paradoxically, lawyers labor to disguise or transform their stories

⁵⁵ See, e.g., DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS* 16-23 (1991).

⁵⁶ See *supra* Part II. See generally JUST WORDS, *supra* note 12, at 64-65, 68.

into unstorylike, self-evident accounts,⁵⁷ and even as second-year law students we knew then that Ms. S's tendencies to dwell on her personal status and her relationships with others, to wander from what we deemed to be "the point," and to background conventions such as chronology, were not going to help when it came time to make her case in the UI hearing. As her advocates, we were also concerned about Ms. S's imprecision with regard to dates and timelines, her hedging language, and her reluctance to make eye contact; her use of what has been called "powerless language."

We have seen that race, culture, gender, education, and social status can influence the types of stories people tell and the way they tell them.⁵⁸ Was Ms. S's narrative style influenced by the fact that she is a Latina woman? Was her status as a low-level worker in a hierarchical city agency a factor? Perhaps her storytelling was related to the violent knife attack by Ms. S's welfare client years earlier. One can only speculate, but whatever the reasons behind Ms. S's particular use of language, the clinic was concerned that it would negatively affect her unemployment insurance hearing. Judges, like jurors, tend to believe witnesses who speak assertively.⁵⁹

In preparing for Ms. S's hearing, we took what we had noticed about her linguistic traits into account. We did what advocates do, constructing lines of questioning for direct-examination that we hoped would focus her answers towards our case theory, practicing potential cross-examinations, advising her to listen carefully to the question and to answer only what was specifically asked, and explaining which information we thought the ALJ would be most interested in.⁶⁰ In short, we tried to convert Ms. S's story into what some refer to as a "rule-oriented" account.⁶¹ Nevertheless, Ms. S's intuitive sense of persuasion was powerfully aligned with the logic of the relational account,⁶² and, we would discover, the ALJ adjudicating Ms. S's case had little patience for her narrative style.

⁵⁷ BRUNER, *supra* note 50, at 48.

⁵⁸ *See supra* Part II.

⁵⁹ JUST WORDS, *supra* note 12, at 65, 90.

⁶⁰ *Cf.* Janet Cotterill, 'Just One More Time. . .': *Aspects of Intertextuality in the Trials of O.J. Simpson*, in LANGUAGE IN THE LEGAL PROCESS 148 (noting that "the constraints of courtroom interaction are such that the narrative account which is elicited in court may bear only a passing resemblance to the base version recorded in any foundational [] interview or statement.").

⁶¹ *See supra* Part II. My criticism of the label "rule-oriented account" is that it implies that narrative styles that preference different values, for example the role of relationships or the maintenance of group membership, are not following a system of rules. The process of attempting to convert a client's natural narrative style to the "language of the law" is one that many practitioners, including myself, have found to be jarring and even violent. *See, e.g., Alfieri, supra* note 2, at 2125.

⁶² *See* TIERSMA, *supra* note 30, at 175.

IV. MS. S'S UNEMPLOYMENT INSURANCE HEARING

A. *Ms. S's UI Hearing: A Non-Technical Overview*

Recall that when Ms. S applied for unemployment benefits after being fired, HRA, her former employer, alleged that she intentionally did not swipe in her time card upon arriving at work to avoid being caught late. The New York DOL preliminarily denied unemployment benefits based on this allegation, and Ms. S elected to contest that denial at a hearing before an ALJ.

The witness who testified at the hearing on behalf of Ms. S's former employer was "Mr. L,"⁶³ incidentally the same attorney who had drafted the probation agreement that Ms. S allegedly violated, resulting in her termination. Another city attorney, Mr. Williams, was present to represent the employer in the hearing. Thus, Ms. S was the only person in the room not trained (or in the process of being trained) in the law.

The Employment Law Clinic had subpoenaed the office manager from HRA, whose testimony we believed would corroborate Ms. S's claim that her time card was defective during the period in question, and thus that her card swipes did not register. We had also subpoenaed records from the time card unit at HRA on this issue, which supported our theory that her card had in fact been determined to be defective in the relevant time period and she had been issued a new card. During the hearing, however, the employer unexpectedly changed the asserted grounds for Ms. S's termination. Abandoning its prior allegation that Ms. S failed to swipe her card at all, the employer now alleged that Ms. S had swiped her card, but that she had been several minutes late on several days. The ALJ denied the clinic's request for an adjournment to prepare in light of these new allegations, and ultimately ruled against Ms. S based on the employer's oral testimony. In the next section, I connect the ALJ's management of the hearing and evidentiary rulings with his apparent biases regarding the parties' contrasting narrative styles.

B. *Ms. S's UI Hearing in Detail*

The ALJ began by eliciting from the employer's attorney, Mr. Williams, information about Ms. S's salary, the length of her employment, and the reason for her discharge:

Excerpt One⁶⁴:

1. **ALJ:** How long did the claimant work for the employer?

⁶³ The pseudonym "Mr. L" will be used to protect the privacy of the employer's witness.

⁶⁴ Transcript of Ms. S's UI Hearing (on file with author). A portion of the hearing was marked by the transcriber as inaudible. I have confined my analysis to those passages that have been transcribed.

2. **Williams:** Ah, the claimant has worked for the City since September 2nd, 1980.
3. **ALJ:** Okay. And her, actual, last day of work?
4. **Williams:** Ah, the last day of employment, December 10th, 2003.
5. **ALJ:** Okay. Now, was this a fulltime position?
6. **Williams:** That's correct.
7. **ALJ:** Approximate salary?
8. **Williams:** Salary we have - - Last salary reported \$36,519 annually.
9. **ALJ:** Okay. And was the claimant a member of a union?
10. **Williams:** That's correct.
11. **ALJ:** Okay. And how did the claimant's job end? Did she quit? Was she discharged?
12. **Williams:** The claimant was, actually, terminated after violation of a stipulation agreement.

Following this exchange, the ALJ permitted Mr. Williams to conduct a direct examination of the employer's witness, Mr. L, to more closely fill in the details, and then the ALJ had some follow-up questions for Mr. L. Thus, as is typical in a UI hearing, the ALJ's initial exposure to the facts of the case was completely from the employer's perspective.

As can be seen in Excerpt One, the ALJ's questioning of the employer and his attorney was executed almost entirely with non-leading questions, in stark contrast to the questioning style the ALJ was subsequently to employ with Ms. S. And as might be expected from two attorneys, the account presented by Mr. Williams and Mr. L was squarely rule-oriented. HRA's narrative, as told by Mr. L and Mr. Williams, was arranged sequentially, dealt explicitly with cause and effect, and identified those responsible for events germane to the narrative. In other words, HRA's presentation of its case, like other rule-oriented accounts, conformed to the usual logic of the law by emphasizing relevant evidence and excluding irrelevant evidence. The following excerpt is illustrative:

Excerpt Two⁶⁵:

1. **ALJ:** If you can just briefly tell me what led up to the claimant being terminated, maybe in sort of chronological —
2. **Mr. L:** Okay. There were disciplinary charges, lateness charges, that were filed against Ms. S. She opted to go to Section 75 to fight this case or try to renegotiate the case. During settlement, we agreed to alter her flex-time to a 10:30. The latest she could come in was 10:30. The time was 10:30 to 10:30.
3. **ALJ:** Um hum.
4. **Mr. L:** And if she violates this agreement, coming late after 10:30, she would be terminated. She agreed to it. She had union representation.

⁶⁵ *Id.*

5. **ALJ:** Let me just understand. What happened was that claimant had been late for work, from what you testified, on numerous occasions?
6. **Mr. L:** Correct.
7. **ALJ:** Okay. She was brought up on charges because of that?
8. **Mr. L:** Correct.

The ALJ begins this line of questioning with an explicit request that the testimony be chronological, signaling a preference for a rule-oriented narrative, and Mr. L was equipped to oblige. In a very short amount of time, the employer has now established (subject to later revision, perhaps) that Ms. S has had a problem with lateness, that she was brought up on charges due to this lateness, that HRA proposed a reasonable compromise, and that Ms. S was even represented by her union when she agreed to the compromise. This is a persuasive narrative, and there are no extraneous details.⁶⁶

In the following passage, the employer continues his account, explaining, on the ALJ's prompting, why Ms. S was fired, and it is here that the new allegations are raised for the first time:

Excerpt Three⁶⁷:

1. **ALJ:** Let me ask you this, Mr. L. Did you make the decision to terminate the claimant?
2. **Mr. L:** Ah, myself in conjunction with my superiors.
4. **ALJ:** Okay. In conjunction with your superiors, what caused you, in conjunction with your superiors, to terminate the claimant after she had signed, entered into the stipulation?
5. **Mr. L:** She violated the stipulation on six occasions.
6. **ALJ:** On six occasions. And, ah, what was the last occasion that she violated the stipulation?
7. **Mr. L:** This occasion was December 1st, 2003.
8. **ALJ:** On December 1st. Now, these six occasions, do you have those specific dates? Can you tell me the six occasions?
9. **Mr. L:** Yes. Beginning on August 27th, 2003, Ms. S was late past 10:30, two minutes. Then on September 3rd, 2003, it was one minute late. And then we proceed on to November 14, 2003, two minutes late. November 21st, 2003, one minute late. November 24th, 2003, two minutes late. And December 1st,

⁶⁶ For example, Mr. L did not bring up the antagonistic relationship that he and Ms. S had over the past few years. According to Ms. S, one particular instance of this animosity occurred on the day of the settlement agreement, when Mr. L acknowledged that he did not like Ms. S. Naturally, there are many reasons Mr. L would not volunteer such information, including that it might demonstrate some sort of bias against Ms. S and it does not fit the employer's narrative that Ms. S should not receive benefits because she was terminated for being late in violation of a stipulated agreement. But this sort of information demonstrates the distinction between rule-oriented and relational accounts – it is relevant to the latter but not the former. Ms. S thought it very important that the ALJ know about her poor relationships with Mr. L and with her direct supervisor.

⁶⁷ Transcript of Ms. S's UI Hearing (on file with author).

2003, four minutes late. Based upon those, those violations, I brought the case up to my superiors and discussed it. Determined she had violated the stipulation.

10. **ALJ:** At this point, I don't have any further questions of Mr. L.

In turns 5 and 9, the employer presents new grounds for the termination, abandoning the failure-to-swipe allegations of which Ms. S had been given prior notice and on which the DOL had based its initial denial of benefits. Stylistically, Mr. L's account in this passage is quite effective. It is chronological and detailed. And, in the face of the potential that the city will come off as unreasonable or callous, the employer's witness does a nice job of putting the basis for the termination in the best possible light. Though by the employer's own account Ms. S was cumulatively twelve minutes late over a period of four months, Mr. L focuses the ALJ on the number of times Ms. S violated the stipulation before the decision to terminate was made.⁶⁸ In this way, HRA seems almost lenient and reasonable, because it did not seek to terminate Ms. S until she allegedly had violated the probation agreement six times.⁶⁹ This excerpted passage also suggests that the ALJ found the employer's account highly credible. Consider again: these allegations were made for the first time at this hearing, and they contrasted distinctly with DOL's prior allegations. Mr. L, it had been established, did not work in the unit where payroll hours were maintained. Nor was any documentation of these new allegations offered. And yet, the ALJ had no further questions for Mr. L. Without knowing more, at this stage of the analysis we are obliged to give the ALJ the benefit of the doubt and assume that he may simply have wished to reserve judgment until hearing more testimony. After all, it is not necessarily the ALJ's role to probe the weaknesses of the employer's case, at least where the claimant is represented by counsel.

Persisting with our own case theory based on the original allegations, we first established that HRA had never investigated the possibility of a defective card before terminating Ms. S (the probation stipulation, we had intended to argue, required the employer to "substantiate" the basis for a violation of the agreement). When my clinic partner Ms. Saeed began to cross-examine Mr. L on HRA's decision to change the grounds for why Ms. S was terminated, however, the following exchange took place:

⁶⁸ Of further possible interest on this subject, but certainly speculative, is Mr. L's grammatical shifting of responsibility for the decision to terminate Ms. S. By adding the prepositional clause "in conjunction with my supervisors," a formulation that the ALJ picks up and appends (twice) to his follow-up question in turn 3, Mr. L is able to depersonalize the decision to terminate, implying that it was, at least as possibly, made by a group. This hedging continues, culminating in turn 8 with a missing subject that would indicate who actually made the penultimate critical "determin[ation]" that led to Ms. S's termination. That the regular verb form does not change in English language depending on who is doing the action lends itself to interesting linguistic ambiguity and strategy.

⁶⁹ Nor do I wish to suggest that chronic lateness is not problematic for any employer, and Ms. S did sign a probation agreement.

Excerpt Four⁷⁰:

1. **Saeed:** You told the Department of Labor just the one day? Is that correct?
2. **Williams:** Objection.
3. **ALJ:** Maybe I'll clarify the question in this way. According to the initial notice of determination, it indicates that claimant — The Department of Labor found that claimant was discharged after she was previously warned when, on December 3rd, 2003, she failed to swipe in or out again. Do you recall talking to the Department of Labor regarding how the claimant's job ended?
4. **Mr. L:** No, I did not speak to the Department of Labor.
5. **ALJ:** Okay.
6. **Mr. L:** The determination was —
7. **ALJ:** Okay. You've explained it. Your question has been answered, Ms. Saeed. Next question.

Knowing the factual allegations one will have to counter is a fundamental component of administrative due process.⁷¹ For this reason (and others), the basis for the discrepancy between the grounds forming the rationale for DOL's initial denial of benefits and the employer's new allegations was a relevant area of evidence to explore. But in this excerpt, the ALJ does a great deal to minimize any negative impact on the employer's account thus far. First, in turn 3, he reframes the clinic's questioning from whether there was a discrepancy in allegations, to whether Mr. L personally spoke to the DOL on behalf of the employer. The reformulation is not the relevant question; Mr. L was testifying as a representative of the employer so the proper question concerns what the employer conveyed previously, and why the allegations are different now. Then, when at the end of the exchange it appeared that Mr. L was about to offer some further explanation for the discrepancy, the ALJ cut him off, indicated his answer was satisfactory, and instructed Ms. Saeed to move on to the next question (turn 7).

When the clinic concluded its brief (and largely ineffectual) cross-examination of Mr. L, the hearing turned, finally, to Ms. S's testimony. In the following excerpts, then, we can contrast the ALJ's interactions with Ms. S, which illustrate his reactions to her very different narrative style. The ALJ began this portion of the hearing with leading questions to corroborate the less controversial details of the employer's story:

Excerpt Five⁷²:

1. **ALJ:** In terms of the particulars, you worked for the New York City Human Resources Administration as a principal administrative associate from about September of 1980, and your last day

⁷⁰ Transcript of Ms. S's UI Hearing (on file with author).

⁷¹ See *supra* Part I.

⁷² Transcript of Ms. S's UI Hearing (on file with author).

worked was December 20, 2003, and you were a fulltime employee, and you made about \$36,000 a year, is that correct?

2. **Ms. S:** Yes.
3. **ALJ:** Okay. And you were a member of the union? Is that correct?
4. **Ms. S:** Yes.
5. **ALJ:** Okay. And was this the last employer that you worked for before you applied for Unemployment benefits?
6. **Ms. S:** Yes, it is.

In principle there is nothing objectionable about establishing relevant, non-controversial details through the use of leading questions. One reasonable explanation for doing so is efficiency: perhaps the ALJ knew that Ms. S would have a story to tell and wanted to save time by getting the uncontroversial “particulars” out of the way quickly. On the other hand, beginning with leading questions for the employee, after having used open-ended questions to learn the information from the employer, affects the power dynamic at play, especially where the employer is an institutional, repeat player (here, an agency of the City of New York).

Leading questions are highly coercive because the formulation of the question suggests the answer desired. A witness answering leading questions is telling the examiner’s story, not her own.⁷³ For that reason, in both civil and criminal trials, leading questions are only permitted on cross-examination. In Ms. S’s administrative hearing, the ALJ allowed the employer to build the narrative framework by answering open-ended questions, and then challenged Ms. S to contradict what he had learned. The sub-textual message may thus have been: “I have gotten the truth from the employer; your job is to corroborate that account.”

After the non-controversial details were corroborated, the ALJ retained control of the hearing and turned his questioning to the reasons for discharge:

Excerpt Six⁷⁴:

1. **ALJ:** Can you just tell me, in your words, what reason were you given for being discharged?
2. **Ms. S:** I was told — Well, the letter told me that I was in violation of the stipulation that I had signed August 19th.
3. **ALJ:** Let me ask you this. Ah, what ah - - you mentioned you were a member of a union. As a result of your termination, are there any kind of grievances pending or anything like that?
4. **Ms. S:** I was never informed of my right to grieve or to have any—
5. **ALJ:** Um hum.

⁷³ See, e.g., LANGUAGE IN THE LEGAL PROCESS, *supra* note 12, at 149; Matoesian provides a fascinating and meticulously detailed analysis of how the defense attorney in the rape trial of William Kennedy Smith used leading questions to tightly control and dominate a prosecution witness. See MATOESIAN, LAW AND THE LANGUAGE OF IDENTITY, *supra* note 13, at 69-79.

⁷⁴ Transcript of Ms. S’s UI Hearing (on file with author).

6. **Ms. S:** I later learned that I could have an appeal, but it was not given to me in my letter of termination. Nor was I made aware of my — the process that I could have taken.
7. **ALJ:** Ah, now, you indicated that you were discharged because of a violation of the agreement you signed on August 19th, 2003. First the — Can you tell me what led up — What led you to sign the stipulation on August 19? What caused that?
8. **Ms. S:** Oh, well, I —
9. **ALJ:** Please tell me in brief.
10. **Ms. S:** I received an injury from being on the job, by being assaulted by a client. And since then I have post-traumatic stress syndrome, and I have an active compensation case in which the department pays for my medication and my doctor's treatment. And I asked for a reasonable accommodation, and I was denied. Denied for about five years. Many times. Finally, I was awaiting a trial, and I was presented with this stipulation.

Though the ALJ begins by asking Ms. S to explain the reasons she was given for her discharge “in her words,” it quickly becomes clear that he has little patience for her sense of narrative and relevance. When Ms. S provides more than a simple “no” to the ALJ’s query in turn 4 whether there were any grievances pending, the ALJ utters “Um hum” (turn 5), which though may have been intended simply to signal that he was listening, functioned as an interruption because of the timing. In turns 4 and 6, Ms. S tries to express what she feels was unfair process at the time of termination, but the ALJ simply ignores this appeal to moral probity, which is irrelevant to the prevailing framework of the matter thus far, and steers the questioning back to the stipulation agreement (turn 7). Conley and O’Barr’s research study of judges led them to conclude that this is a common phenomenon:

Judges who see themselves as rule-bound often work to frame litigants’ accounts within categories to which rules will apply. Such judges typically respond with interest and affirmation when litigants talk about contracts, property lines, or documents, but they react passively or negatively when litigants seek to introduce lengthy personal histories into their accounts. Rule-bound judges frequently told us that litigants who sought to mix the personal and the legal were unfocused, unintelligent, or even crazy.⁷⁵

More subtly, the ALJ inaccurately restates Ms. S’s testimony that the dismissal letter “told me that I was in violation of the stipulation” (turn 2) as “you indicated that you were discharged because of a violation of the agreement” (turn 7). Though it retains several possible readings, the ALJ’s reformulation of the testimony turns a statement in which the focus is on what

⁷⁵ JUST WORDS, *supra* note 12, at 90.

she was told (and how she was told it)⁷⁶ to a statement focused on cause and effect. This is accomplished by way of the insertion of an adverbial “because” clause. Then, evidently weary of Ms. S’s relational discursive style, in turn 9 the ALJ interrupts her, just as she is beginning to speak, to demand brevity. In the face of the ALJ’s interruption, however, Ms. S’s response here is fairly coherent and relevant. She plausibly explains why she had problems with lateness (her medically diagnosed PTSD) and suggests that the stipulation was the first “reasonable accommodation” that HRA had offered, which is why she signed it (turn 10).⁷⁷

There followed a few tangential questions to attempt to clarify what Ms. S had meant by “trial” in turn 10, and then the ALJ asked her again:

Excerpt Seven⁷⁸:

1. **ALJ:** Well, why did you sign the stipulation?
2. **Ms. S:** I was under duress, and I didn’t understand. I really didn’t understand what was entailed there, and the union representative did not represent me very well. And I, in fact, was waiting to see a Judge that day. I was under the impression that I was going to see a Judge, and the Judge would over - - would see this stipulation and look at it.

Though Ms. S undoubtedly felt she had been under “duress,” whether that was the case was a digression that would ultimately be unpersuasive to the ALJ. But after the ALJ had challenged the details of her first response and then repeated the same “why did you sign the stipulation” question, only slightly rephrased, and irrespective of the fact that she had just given him an answer, Ms. S fell back on her intuitive internal logic and attempted a more relational-oriented explanation. Thus, in this second response (excerpt seven, turn 2), Ms. S tries to convey the pressure she was under at the settlement, the fact that no one present seemed to be on her side, and the necessity for a judge to make sure the agreement was fair. The technique of repeating or rephrasing a question is fairly common in cross-examinations because it is a useful way to convey skepticism and may lead the witness to contradict herself. The message is: “I didn’t buy your first answer so I’m going to ask you one more time.” In this instance, the technique was being utilized by the participant whose institutional role is supposed to be impartial, the ALJ.

⁷⁶ There is an interesting self-repair event in turn 2, in which Ms. S drops “I was told” in exchange for “the letter told me.” By putting agency on a letter rather than person (albeit, an implied person, as the former abandoned construction lacks a subject), the effect is to emphasize that impersonal way that she was fired, which arguably violates a norm inherent in the kind of narrative account that puts a primacy on relations.

⁷⁷ Incidentally (and perhaps by way of ego-preservation), the clinic did not suggest or coach Ms. S to employ the legal terminology in this passage (e.g., “post-traumatic stress syndrome” and “reasonable accommodation”).

⁷⁸ Transcript of Ms. S’s UI Hearing (on file with author).

ALJs should not be faulted for probing for the truth and it may well be that the judge felt Ms. S's first answer was not responsive or comprehensible. Perhaps he felt she had something more persuasive to say about why she would sign such a severe probation agreement; or perhaps he just wanted her to admit that she thought it was in her best interest to sign it and thereby assumed the risk of non-compliance. For our purposes, the principle relevance of the exchange in excerpt seven is how the dominating effect of this sort of cross-examination technique by an ALJ leads Ms. S to fall back on her preferred narrative logic of relational accounts, and in this way, works to reinforce and reproduce social order. This phenomenon is even more palpable in the next excerpt:

Excerpt Eight⁷⁹:

1. **ALJ:** I'm looking at this stipulation. I'm seeing your signature. You signed it. I'm also seeing underneath "Counsel for Respondent" which, evidently, is you, Ms. S. Gwen Richardson — Is that your attorney?
2. **Ms. S:** No, she's just a union representative.
3. **ALJ:** Now, you said you were under duress. What kind of duress were you under?
4. **Ms. S:** I was waiting for a trial. I'm on medication, and I — I was nervous, because I was waiting to see a Judge.
5. **ALJ:** I still don't understand. If you didn't want to sign this, a, stipulation, I don't understand why being nervous somehow made you sign the stipulation.
6. **Ms. S:** I - I - I - was confused, and I was — I didn't know that was part of the trial. At first, I didn't know that was part of the trial. I thought the Judge was going to come in. If you're waiting for a Judge, — The Judge never came. I went there for a trial, and both my union representative, and the counselor for the Department, were, you know, very . . . You know, like, I was supposed to sign, and I was confused, and I didn't understand it, and it was not, exactly, explained to me.
7. **ALJ:** All right. Now after you signed this stipulation, and, ah, — Now the employers indicated you were late to work on six occasions.

In turn 5 of this passage, the ALJ employs a different cross-examination tool for discrediting a witness's response. Unsatisfied with Ms. S's response in turn 4, the judge directly states his skepticism and lets it hang in the air. Even more cutting than merely repeating a question, this technique puts the witness in a very defensive position (and in fact would probably be objectionable in a court where rules of evidence strictly apply). Forced to attempt to explain herself a third time, Ms. S's narrative now thoroughly breaks down, largely losing any rule-based orientation. Perhaps to over-

⁷⁹ *Id.*

come the ALJ's obvious lack of sympathy, Ms. S struggles to elaborate on her feelings at the time of the probation agreement. Her response in turn 6 shows her to have been operating under the assumption that if only the ALJ could know more about her poor relationships with the HRA and her union representative, and the hurried and perhaps unclear nature of the settlement, he would agree that the stipulation was unfair. In particular, Ms. S again tries to emphasize how upset she was that the judge never appeared to oversee the settlement, whose impartial presence she seems to be suggesting was necessary for a fair agreement to be reached. When Ms. S's attempt at a rule-oriented account seemed to have failed so miserably, she was compelled to fall back on relation-based explanations, putting primacy on her interactions with her employer, the union representative, and the absent judge.

When Ms. S concluded this final attempt at an explanation in turn 6, the ALJ's utterance ("All right") is unresponsive except as a cursory acknowledgement that she had said *something*; a placeholder until he shifts the testimony to the evidentiary heart of the matter: the days the employer was now alleging that she was late. The following passage immediately follows Excerpt Eight:

Excerpt Nine⁸⁰:

1. **ALJ:** [T]he employers indicated you were late to work on August 27, 2003. Now, were you late to work on that day? Do you remember?
2. **Ms. S:** I don't recall, no.
3. **ALJ:** Okay. For September 3rd, do you recall whether or not you were late for work on that day? September 3rd?
4. **Ms. S:** No, I don't.
5. **ALJ:** All right. On November 14th, 2003, do you recall if you were late for work on that date?
6. **Ms. S:** No.
7. **ALJ:** For November 21st, 2003, do you recall if you were [late]?
8. **Ms. S:** [Oh,—]
9. **ALJ:** Let me finish. On that date? Yes or no? You don't recall?
10. **Ms. S:** No, I don't recall.
11. **ALJ:** Now, for November 24th, 2003, do you recall if you were late for work on that date?
12. **Ms. S:** I recall having a problem with the card, with my time card, and on several occasions, there were problems with the clock also. Around that date, I started looking at the fact that we had problems with the time cards. With the I.D. cards.
13. **ALJ:** Okay. Let me understand something. The first of the – Step by step.
14. **Ms. S:** Um hum.

⁸⁰ *Id.*

15. **ALJ:** For November 24th, do you recall whether or not you were late for work on that day?
16. **Ms. S:** No, I don't.
17. **ALJ:** Okay. On December 1st, 2003, do you recall whether or not you were late for work on December 1st?
18. **Ms. S:** No I don't recall. I'm pretty sure that I wasn't late. This is the first time that I've heard of that.
19. **ALJ:** Okay. You've indicated – Actually, I'm not quite sure that I understand your answer to my last question. You've answered me to – you've said two things: “No, I don't recall.” But you also say, “I was pretty sure that I wasn't late.”
20. **Ms. S:** I was pretty sure that I wasn't late all along. But December 1st was the date that I was called here, and we were addressing. That's why I remember. . . . The Department of Labor was informed that I did not swipe in for December 1st. That was one of the dates.
21. **ALJ:** I'm not asking you whether you've not been swiped in. At this point, I'm going to find out do you recall whether or not you were late for work on December 1st. That's all I'm asking you.
22. **Ms. S:** Do I recall? Yes. I recall that I was not late for work.
23. **ALJ:** [You do?]⁸¹
24. **Ms. S:** Yes, I do recall.
25. **ALJ:** Now, I'm – How would you indicate that – You recall that you were not late for work. How did you know that? That you were not late for work on that date?
26. **Ms. S:** Because I was well aware that I had a problem with my I.D. card by December 1st.

The conventions of courtroom discourse have been shown to facilitate lawyers' linguistic power over the witnesses they question.⁸² The conventions of Unemployment Insurance Benefits hearings, and perhaps many other contested hearings in the administrative state, allow for even greater domination over witnesses, not just because the rules of evidence are relaxed and the prospects for meaningful appellate or judicial review dim, but also because the ALJ is largely free to prosecute as well as referee the proceedings. As we have seen, in Ms. S's hearing the principal actor exercising considerable linguistic power over her was the ALJ. In the passage just excerpted, the ALJ's repetitive questioning technique repeatedly hammers Ms. S's inability to recollect timeliness for each individual day, and has the effect of making the sum seem much greater than its parts. Though Ms. S

⁸¹ The transcriber could not hear what the ALJ said on this turn, but the clinic's recollection was that he said, “You do?” This, or some equivalent, seems borne out by Ms. S' response in her next turn.

⁸² MATOESIAN, LAW AND THE LANGUAGE OF IDENTITY, *supra* note 13, at 54; JUST WORDS, *supra* note 12, at 21; LANGUAGE IN THE LEGAL PROCESS, *supra* note 12, at 149.

was only accused of being a few minutes late on each of the days⁸³ (a fact that the ALJ never acknowledged during the hearing or in his final decision), the repetition gathers emotional force, creating the powerful cumulative impression that Ms. S is a serious repeat offender. Repetitive question technique is also a well-recognized method of breaking a witness down. Finally, it has the consequence of making Ms. S seem unreliable and untrustworthy, because she is forced to admit she does not recall so many times in a row.

Note also how the ALJ reins in Ms. S whenever she strays from the precise answer he is seeking. In turn 12, she is able to offer an explanation why she was likely not late on November 21 (i.e., due to the defective card), but the ALJ forces her back to the “step by step” (turn 13) technique he prefers: the dialogue that continually reiterates her lateness and her failure to recollect.⁸⁴ By repeating his tightly controlled question forms, which demand that she answer only yes or no, Ms. S is quickly forced to admit that she does not recall whether she might have been minutes late on a particular day five months earlier.

There is linguistic evidence that the ALJ is using this questioning technique (at least subconsciously) largely for its effect on the witness rather than for evidence-gathering, and with the underlying objective to support his imminent categorization of Ms. S as not entitled to unemployment benefits. Observe again what transpires in the above excerpt when Ms. S offers an answer the ALJ is not expecting, or, the data suggests, preferring (turns 18-26). *Adjacency pairs* are a significant feature of many verbal exchanges. In most adjacency pairs, the speaker of the first part (here, a question) is anticipating, or in fact *preferring*, a particular second part (an answer).⁸⁵ The ALJ hammers through each step of his repetitive questioning list, in turn 9 even explicitly broadcasting the answer he is looking for (“you don’t recall?”). But when Ms. S states that she was *not* late on December 1st, the ALJ is surprised; this is not the expected response. He again utilizes the reign-in technique of rejecting her explanation that her time card was defective, and repeating the yes / no “do you recall” question (turn 21), but this time Ms. S is able to maintain her answer. The ALJ demonstrates his incredulity by repeating the question a third time (turn 23), and through a barrage of questions the ALJ expressed his disbelief that a person could accurately recall such a thing (turn 25).

⁸³ The total number of minutes she was allegedly late over a period of four months was twelve minutes, and six of those minutes were during the period when her time card was apparently defective.

⁸⁴ See LANGUAGE IN THE LEGAL PROCESS, *supra* note 12, at 149 (“[R]esearchers on courtroom language [] have written about the extent to which the question-and-answer model of testimony elicitation within the adversarial system, which prioritises the use of closed and controlling question forms, has the effect of constraining the witness’ freedom to present narrative testimony, thereby preventing them from ‘telling their own story.’”) (citations omitted); see also MATOESIAN, LAW AND THE LANGUAGE OF IDENTITY, *supra* note 13, at 54; TIERSMA, *supra* note 30, at 154 (“We often say that a witness *gives* testimony. In reality, the legal system *takes* it.”)

⁸⁵ JUST WORDS, *supra* note 12, at 83; see also MATOESIAN, LAW AND THE LANGUAGE OF IDENTITY, *supra* note 13, at 92-93.

Demonstrating disbelief through questions is a kind of evaluative comment, and thus another source of domination available to lawyers (and adjudicators). The ALJ demands that Ms. S remember, without notice, whether she had been few minutes late on various particular dates in the months preceding her termination. When she inevitably cannot, he (later) transforms her inability to do so into admissions that she was in fact late.⁸⁶ But the repetitive pattern is broken when she surprises him by recalling that she was not late on December 1, even offering explanations why she could recall that fact about that particular date (turns 20 and 26). The ALJ is forced to regroup and challenge her recollection as implausible. In this way the question is actually a double-bind: if the witness answers that she does not recall, she plays into the category and rationale the ALJ is constructing to deny benefits. If she answers that she does recall, however, she comes off as not credible: how can anyone plausibly recall whether or not they were a few minutes late nearly half a year ago? And finally, there is striking contrast between this passage and the ALJ's failure to similarly challenge how the City "knew" that Ms. S was late.

Mr. Williams, the attorney for HRA, also cross-examined Ms. S. He began by picking up the ALJ's challenge to Ms. S recollection that she was not late on December 1st:

Excerpt Ten⁸⁷:

1. **Williams:** Is it your testimony that on December 1st, you reported to work 10:25 a.m.?
2. **Ms. S:** Could have been before. Could have been 10:20. Could have been 10:15. I'm not sure.
3. **Williams:** Okay. And according to time records, it states that you appeared at 10:34. Did you note that – Did you ever review a discrepancy?
4. **Cade:** Objection, Your Honor.
5. **ALJ:** What is the objection?
6. **Cade:** We don't have any time records.
7. **ALJ:** We have what we've gone through. Specifically, Mr. L testified the claimant was late to work on, a, December 1st. And I believe it indicates the time that was recorded. Which, I believe, was 10:34. So, we have that testimony. So, the objection is overruled. Okay. Just repeat the question.

In this passage, the ALJ's differing assignments of credibility to the accounts presented by HRA and by Ms. S are made fairly explicit. Without any time records to substantiate the alleged lateness, whether Ms. S arrived at work late on December 1st can only be determined by evaluating credibility. As we have seen, the fact that what "he said" was presented in a rule-

⁸⁶ Transcript of Ms. S's UI Hearing (on file with author).

⁸⁷ *Id.*

oriented fashion, and that what “she said” was presented more as a relational account (compounded by the structural ways that the claimant’s account is fragmented and diminished in a UI hearing), played a significant part in the ALJ’s decision who to believe.⁸⁸ Of course, it may also be the case that the ALJ simply disliked or disbelieved Ms. S for other unknowable reasons such as her differing background and status, or for something innocuous, and then he simply exploited her less powerful narrative style to help substantiate his imminent decision against her. Either way, the ALJ actively labored, through questioning techniques, trial management, and evidentiary rulings, to aid the employer and to disadvantage Ms. S. Consider, as another example, the following passage in which he helps the employer’s attorney formulate the cross-examination:

Excerpt Eleven⁸⁹:

1. **Williams:** Okay. Let me ask you. As a supervisor, did you have any access to look at your time or the auto time system to see time entries?
2. **Ms. S:** Yes, everyone has that.
3. **ALJ:** – Let me — (Inaudible). When you get into work, and want to make sure that you’ve been clocked in on time, that the correct time has been recorded, can you go onto, let’s say — You worked at a terminal? You had a computer?
4. **Ms. S:** Yes.
5. **ALJ:** Can you go onto the computer and see what time has been recorded?
6. **Ms. S:** You can.
7. **ALJ:** Can you do that — Like, so, you come in five minutes late. You can go to your computer, log on, and see what time has been recorded? Is that correct?
8. **Ms. S:** Yes, you can.
9. **ALJ:** Okay. That’s the question. Go ahead.
10. **Williams:** So, basically, it would be your testimony that it would be your responsibility to check all the time systems to insure that the time is correct?
11. **Cade:** Objection, Your Honor.
12. **ALJ:** Now, let me just think. Let me see if we can formulate it. Let me put it this way: Afterward, when you had swiped in, did you check your time? Starting in — After this stipulation that you signed in August 19th, 2003, when you swiped in, did you when you got to your desk, did you look on — Go into the auto time screen, I guess the auto time screen, to see if you had been clocked in correctly?

⁸⁸ Cf. JUST WORDS, *supra* note 12, at 4 (“[La]w displays a deep gender bias in the way it performs such basic tasks as judging credibility and defining narrative coherence.”).

⁸⁹ Transcript of Ms. S’s UI Hearing (on file with author).

13. **Ms. S:** I do sometimes.

In this passage, the ALJ twice steps in to aid the employer's line of questioning. First, in turn 3, he takes over to unpack and lay foundation for the employer's counsel's line of questioning. Then, in turn 12, after the employer's attorney makes a grossly incorrect restatement of the claimant's testimony, the ALJ does not require the attorney to rephrase the question; rather, he reformulates and proceeds with a mini-series of questions, although his version is quite different.

By the time Ms. S was allowed to frame her own story on redirect, late in the hearing, her relational account was in full swing. In this next excerpt, we again attempted to introduce corroborating evidence of the defective time card:

Excerpt Twelve⁹⁰:

1. **ALJ:** We will take this in, this memo, this E-mail, copy of an E-mail from [Ms. S's supervisor], sent on December 9th, 2003, to [Ms. S]. I'm taking it as Claimant's Exhibit Number Three.
2. **Cade:** When you sent — When you communicated to [your supervisor] that you thought your card was defective at the end of November, the beginning of December, what was — what was his response to you?
3. **Ms. S:** His response was that my — my reason was not good enough. That I should have clocked in on the card. And he was not going to approve my time, because he didn't accept it, the explanation.
4. **Cade:** How did you respond to him?
5. **Ms. S:** He referred me to the memo that told me to punch in on the card, and I brought it to his attention that it was not the time clock that was defective. It was my time card. My I.D. card, that, in fact, was defective. And he just — He refused to — He refused to approve my time. He said it wasn't good enough for him. The explanation. It says it right there. I kept asking him to do that. He didn't understand that my I.D. card was — I felt that my I.D. card was defective, which, in fact, it was, and not the time clock.

Consider also this excerpt, on the issue of Ms. S's PTSD:

Excerpt Thirteen⁹¹:

1. **Cade:** Ms. S, you testified that your hours had been adjusted as a result of this conference and that you had a posttraumatic stress disorder — (inaudible)
2. **Ms. S:** Yes.

⁹⁰ *Id.*

⁹¹ *Id.*

3. **Cade:** Why did — Why did the posttraumatic stress disorder make you late to work?
4. **Ms. S:** Because I couldn't be in a crowded train, or I couldn't be in a crowded situation, as in rush hour. And I needed to come to work when the trains were not crowded, when the buses were not crowded.
5. **Cade:** Okay. Ah, and was this a medically diagnosed posttraumatic stress disorder?
6. **Ms. S:** Yes, it is. It is. I was seen under the care of a doctor.
7. **Cade:** Okay.
8. **Ms. S:** Under medication.
9. **Cade:** Okay. Your Honor, I have a document here. (inaudible) Do you recognize this, Ms. S?
10. **Ms. S:** Letter from my doctor.

The testimony in these excerpts is not only at odds with a rule-oriented narrative style, but it conceptualizes a story that by this point is relevant to another narrative universe than that created or accepted by the ALJ and Ms. S's former employer. Despite the proof marshaled to demonstrate that Ms. S's time card was faulty, and a letter from Ms. S's doctor corroborating her fear of crowded trains, the framework established by HRA and taken up by the ALJ through which to view Ms. S's discharge leaves no room to justify even negligible lateness. There is administrative case law in New York holding that discharge for absenteeism caused by a verified illness is not misconduct despite a probation agreement that any future absences would be cause for immediate dismissal.⁹² But the ALJ's focus is on whether Ms. S voluntarily entered into a stipulation, because this renders *any* excuses for lateness unimportant. In the ALJ's conceptual framing of the dispute, as long as the employer is credible, there is no excuse for being even one minute late. Thus, at no time during the hearing or in his written decision does the ALJ even acknowledge the evidence presented on Ms. S's medical illness.

After all the testimony was taken, the ALJ put on the record that he was modifying the charges against Ms. S from "failure-to-swipe her time card" on December 1st to the six days she was allegedly late in the months following the probation agreement. If there was any doubt about how he was going to rule on this hearing it was removed after the following colloquy:

Excerpt Fourteen⁹³:

1. **Cade:** Your Honor. We would like a chance to review with our client what happened on those days. In addition, we would like to see and have a chance to look over any records provided by the employer to substantiate —

⁹² A.B. 408, 972; A-750-2044, summary available at http://www.labor.state.ny.us/ui/aso/Section_1100.htm#1110.

⁹³ Transcript of Ms. S's UI Hearing (on file with author).

2. **ALJ:** I'm - I'm going to deny that. I've got the claimant's testimony on that. I don't see the purpose of reviewing that. She's testified regarding those specific occasions. So, I'm not going to allow that.
3. **Cade:** Your Honor, —
4. **ALJ:** Yes.
5. **Cade:** As Ms. S testified, she couldn't recall what happened on those occasions. We'd like the chance to refresh her recollection on what happened on those occasions.
6. **ALJ:** I'm not going to – I'm going to deny that. I think it should be obvious why. I'm not going to, essentially, allow testimony that would come after what she's already testified to would be in my view very suspect.

The ALJ again credits the employer's story over that of Ms. S. Though she had testified only that she could not recall, without prior notice, whether she had been late, the ALJ seems to transform that testimony into an admission that she was in fact late (and as we see in the next section, his written decision makes this syllogism even more explicit). His reaction to the clinic's request for an opportunity to prepare for the charges is to suggest that further testimony would be tainted. In the next section, I discuss the ALJ's written decision and the clinic's successful appeal of that decision to the NY DOL Appeals Board.

V. THE ALJ'S WRITTEN DECISION AND MS. S'S APPEAL

In the ALJ's decision denying Ms. S's benefits after the hearing, he wrote that the "only reasonable inference" to draw from her inability to recall whether she was late on the days in question was that she was in fact late. This is highly questionable as a matter of logic. One might also be unable to recall being timely, especially when the question is about a matter of minutes. It is troubling that an adjudicator would transform a person's failure to recall whether she was a few minutes late many months before into an admission of misconduct in this context. That the ALJ was aware, on some level, of the unreasonableness of this line of questioning is illustrated by his incredulity when Ms. S *did* recall that she was not late on December 1st (Excerpt Nine, turn 25). But it is well known that "judges deciding cases often write exactly like advocates arguing them. . . ."⁹⁴

What the ALJ likely intended to convey by writing that the "only reasonable inference" was that Ms. S was in fact late, was that he found the employer's account more credible than Ms. S's account. Ultimately, an adjudicator must render a verdict or decision. In so doing he or she necessarily must decide between several differing accounts of what happened and side with one of the parties. In Ms. S's case, the ALJ's ultimate task was to

⁹⁴ AMSTERDAM & BRUNER, *supra* note 12, at 176.

categorize Ms. S as either in the class of persons eligible for benefits or the class of persons not eligible for benefits. Built into this meta-goal are a multitude of discrete categorizations. The ALJ had to determine whether this was an employer whose account of the facts could be trusted, whether this was an employee whose account could be trusted (not necessarily mutually exclusive), and which portions of these accounts, if reliable, were relevant. He also had to take the rhetorical steps necessary to immunize his conclusions from doubt, for a judge writes his or her decision to be self-justifying, by making the result uncontestable and beyond debate.⁹⁵

In other words, as in most adjudications, the ALJ in Ms. S's case had to decide between competing narratives, encompassing all the things that concept conveys: discursive style, the type of story told, and the version of story within that type. By issuing a judgment or ruling that credits one narrative over another, the adjudicator actually completes the prevailing party's narrative and negates the losers.⁹⁶ Almost inevitably, the adjudicator's reactions to the parties' narrative styles are bound up in his or her choices about what narrative story should frame the entire debate. The "relevant facts" are determined by which overall narrative the adjudicator chooses, and thus are not simply lying in wait to be discovered and inevitably preordain the outcome of the dispute, as Jerome Bruner and Anthony Amsterdam masterfully articulated in their work together:

[I]ncreasingly we are coming to recognize that both the questions and the answers in such matters of "fact" depend largely upon one's choice (considered or unconsidered) of some overall narrative as best describing *what happened* or *how the world works*. . . . To the extent that law is fact-contingent, it is inescapably rooted in narrative.⁹⁷

This Nietzschean insight, that whether we consider a fact relevant may expose our values – and the cultural or political biases that lie behind them – though probably not avoidable, should nonetheless be continually acknowledged. An attorney will always do his or her best, within ethical bounds, to present an account that invokes relevant considerations that are favorable to her client and not to her adversary. Likewise, judges write opinions that justify the decision rendered, and doing so always privileges a particular version of the facts.

As in most adversarial proceedings then, the hearing considered here presented a clash of facts interlaced with values. The deeper narrative that Ms. S was trying to relay in her UI hearing was the story of an employee

⁹⁵ See DAVID I. KERTZER, *RITUAL, POLITICS, AND POWER* (Yale University Press 1988); LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 13-14 (1993).

⁹⁶ See TIERSMA, *supra* note 30, at 148 (discussing this concept in the context of civil litigation); Anthony G. Amsterdam, *Telling Stories and Stories About Them*, 1 CLIN. L. REV. 9 (1994) (contrasting the narratives presented by the opposing lawyers who argued *Brown v. Board of Education*).

⁹⁷ AMSTERDAM & BRUNER, *supra* note 12, at 111.

who worked twenty-one years for the city, was attacked at work, and who, as a result, developed a fear of crowded trains that affected her ability to get to work on time. Although her employer eventually adjusted her start time, in Ms. S's narrative, this accommodation was inadequate to prevent tardiness from continuing to be an issue. Moreover, Ms. S believed the employer just wanted to get rid of her, exemplified by her supervisor's failure to look into the possibility of a defective I.D. card (and perhaps also by the employer's willingness to terminate her for being late a total of twelve minutes over four months, if that was indeed the basis for dismissal).⁹⁸

The dialectically contrary conceptualization presented by the employer and accepted by the ALJ was far simpler: Ms. S voluntarily entered into a strict probation agreement that allowed the employer to terminate her for any infringement of its time and leave procedures. Within this framework, any explanations for lateness, even lateness of only one minute, are irrelevant. Thus, undoubtedly part of why Ms. S's testimony seemed unpersuasive to the ALJ is because it spoke to a narrative structure that simply called for different facts to be relevant. Whether or not there are plausible or rational explanations for the ALJ's decision not to grant Ms. S an adjournment to adequately respond to the previously undisclosed allegations, he had concluded that Ms. S was not in the category of persons eligible for unemployment benefits.

The clinic appealed the ALJ's decision. We argued on appeal that the ALJ had denied Ms. S due process by not giving her a reasonable opportunity to defend against newly asserted charges. We pointed out that the ALJ had blindly accepted HRA's testimony, without requiring them to substantiate these new charges or to show good cause why they had not been raised in the first place. We argued that the more logical interpretation of Ms. S's inability to recollect whether she was late on those occasions was that it is unreasonable to expect someone suddenly to remember, without notice, whether they had been one to four minutes late on various days seven months earlier. The Appeal Board reversed and remanded the ALJ's decision.⁹⁹ Finding (in a characteristically terse decision) that the "record may not have been sufficiently developed," the Board held that "[t]he parties should have another opportunity to submit additional testimony on this issue," with the objective that "at the end of the hearing all parties will have had a full and fair opportunity to be heard."¹⁰⁰

Regardless of whether an applicant for unemployment insurance is ultimately eligible for benefits, she is nonetheless entitled to fair process, as the New York Appeal Board recognized and affirmed in Ms. S's case. There is a critical distinction between fair treatment and a successful outcome. As Richard Saphire perceptively observed after *Goldberg*, "fairness in government-individual relations can never be defined solely in terms of outcomes

⁹⁸ The clinic's related narrative backgrounded the personal elements of Ms. S's story and focused on the defective time card.

⁹⁹ *In the Matter of [L.S.]*, A.B. No. 518704 (Aug 26, 2004) (on file with author).

¹⁰⁰ *Id.*

. . . rather, the processes of interaction themselves are always important in their own right.”¹⁰¹ Whether a hearing to deny unemployment benefits is legitimate depends as much upon how the party has been treated as it does upon whether the party was correctly awarded or denied benefits. After a career of adjudication in administrative agencies, the Honorable Cesar A. Perales had this insightful comment:

[I]t is more than holding hearings that fulfills the promise of *Goldberg*. Not only must a hearing be impartial, but it must appear impartial to the appellant. The appellant should leave the hearing feeling that she had an opportunity to tell her story fully and to have an impartial person listen to that story. The appellant must know that the decision will be a fair one.¹⁰²

VI. CONCLUSION: WHERE DO WE GO FROM HERE?

Many more Americans will appear before adjudicators in the administrative law context than will ever appear before adjudicators in the judicial branch. The benefits, rights, and responsibilities that are decided by the administrative state frequently have profound effects on individual lives. With unemployment currently at record high levels in the United States,¹⁰³ it is critical that claimants be fairly evaluated and actually heard, even when their narrative style does not conform to rule-oriented discourse.

This paper explored the ways in which the particular linguistic phenomena occurring during Ms. S's administrative law hearing both reflected and influenced the power dynamics involved in the dispute, ultimately implicating constitutional concerns about the fairness of her hearing. Limited to the analysis of a single hearing, this Article is merely one illustration of the relationship between biases about narrative styles and administrative due process, and we must continue to describe in detail how language-use can affect the playing field in the administrative state. Sociolinguistic analysis of the “mechanics of domination and privilege,” Conley and O’Barr argue, is crucial if we wish to challenge the subordination of those who do not speak the language privileged by adjudicators.¹⁰⁴ Of course, it may prove just as useful to closely study the linguistic phenomena in hearings where

¹⁰¹ Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 124 (1978). See also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162-63, 171-72 (1951) (Frankfurter, J., concurring).

¹⁰² Perales, *supra* note 8, at 891-92.

¹⁰³ See BUREAU OF LABOR STATISTICS, UNITED STATES DEPARTMENT OF LABOR, available at http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data_tool=latest_numbers&series_id=LNS1400000.

¹⁰⁴ JUST WORDS, *supra* note 12, at 76 (“Because it is at the level of language-in-action that abstractions such as patriarchy become reality, linguistic analysis is of more than academic interest. Those who would transform the law’s patriarchy are probably wasting their time unless they are prepared to challenge the practices that both reflect and reproduce it.”).

the ALJ does *not* demonstrate (or act on) biases against less-favored narrative styles.¹⁰⁵

That Ms. S has not acquired the skill of presenting a rule-oriented account was to her significant detriment, despite the fact that she was represented by counsel. Ms. S's adversary, on the other hand, was authoritative, was able to marshal a chronological, cause-and-effect account, and presented details that were relevant to this account. While one cannot ascertain to a certainty the extent to which these differing styles of persuasion affected the ALJ's assessment of credibility, the effect clearly was not negligible. The hard reality is that adversarial proceedings are more about winning than truth, and in Matoesian's formulation, legal victories "depen[d] on which side best wields language as an instrument of persuasion, of domination."¹⁰⁶ Moreover, in an administrative hearing, no less than in a judicial courtroom, the consequences can be considerable; without the assistance of counsel Ms. S likely would not have appealed the ALJ's decision and the failure to provide due process would not have been remedied.

One commentator has lauded that "[g]iven their advanced education, familiarity with the subject matter, forensic ability, and experience, ALJs can perform the required credibility determinations with uncommon skill."¹⁰⁷ But if ALJs are not sensitive enough to cultural and narrative differences, they may err when presented with a claimant like Ms. S, who does not organize her narrative like those exposed to professional cultures such as law, medicine, or business. The point is not merely that advocates need to help their clients speak the language of the court (although a close examination of exactly how an adjudicator's assessments of credibility and treatment of parties are influenced by narrative and discursive styles will certainly aid in that endeavor¹⁰⁸). Policy makers, administrative agencies, and ALJs themselves should understand how biases about language may influence entitlements adjudications, regardless of whether or not such biases are ultimately unavoidable.

Jane Rutherford urges us to ensure that those parties who do not hold powerful tools can still participate on an equal footing,¹⁰⁹ and I believe that there are ways that unemployment insurance benefits hearings (and other

¹⁰⁵ As Steven Winter observed in his critique of *MINDING THE LAW*, "one does not profitably study a phenomenon by observing only those portions of it with which one disagrees and about which one has strong feelings." Steven L. Winter, *Making the Familiar Conventional Again*, 99 MICH. L. REV. 1607, 1611-12 (2001).

¹⁰⁶ MATOESIAN, *LAW AND THE LANGUAGE OF IDENTITY*, *supra* note 13, at 30.

¹⁰⁷ Christopher B. McNeil, *Critical Factors of Adjudication: Language and the Adjudication Process in Executive and Judicial Branch Decisions*, 23 J. NAT'L A. ADMIN. L. JUDGES 411, 414 (2003).

¹⁰⁸ My own experiences with this endeavor, which began with my work in this clinic and continued through years of practice in immigration courts, is that it can be a psychologically jarring process for both the client and the attorney. See generally Alfieri, *supra* note 2; see also Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law As Language*, 87 MICH. L. REV. 2459 (1989).

¹⁰⁹ Jane Rutherford, *The Myth of Due Process*, 72 B.U.L. REV. 1, 41-42 (1992).

administrative hearings) can become more egalitarian. First, the current structure of the hearings is too heavily weighted in favor of the employer, in that the employer is given the initial and principle opportunity to define the legal issues and the facts. This imbalance is especially felt where, as in the hearing explored here, the employer is a major institutional player. The fact that opening arguments are permitted is not sufficient to ameliorate the problem. For one thing, most employees are *pro se*, and are wholly inexperienced with administrative hearings (and therefore are unlikely to be able to marshal rule-oriented, effective opening arguments), whereas employers, especially repeat players like city agencies, will be much more familiar with the law and practice of contested hearings and will be able to articulate opposition in language and through legal claims that are familiar to the ALJ. As Professor Baldacci and others have suggested, the issue is not solely about chronology; it is about the ALJ's deference to the more powerful party's "presentation of the issues as the *sole* lens through which the evidentiary hearing is seen."¹¹⁰

To avoid this, the structure of these hearings must be modified to allow the applicants to participate earlier and more significantly in the initial framing of the issues. For example, before proceeding to test evidence or credibility through questioning, the ALJ could give each party the opportunity to fully state his or her legal claim, alternating back and forth between the parties as needed. The ALJ may have to employ "modalities of intervention" – solicitation through non-leading questions, summarization, indication of where narrative should begin and end, etc. – to assist the claimant with this issue-defining stage of the process.¹¹¹ The ALJ should then attempt to ensure that the claimant understands the former employer's version, and solicit any relevant defenses to explore. Finally, the ALJ should explicitly define the issues by summarizing and restating each side's claims and defenses.

Second, ALJs should limit their use of leading questions and other adversarial cross-examination forms with claimants. This is not to suggest that they should not probe for the truth, but as we have seen, this form of questioning frequently does not allow claimants a full enough opportunity to get their story onto the record, and it has the effect of reinforcing unequal power dynamics and reproducing hierarchical social structures. Finally, and underlying both of the above recommendations, ALJs need far more training on issues of cultural and narrative difference.

My hope is that the case study considered here does more than illustrate the fact that judges might prefer one style of narrative over another. It reveals an important consequence of those preferences: When adjudicators

¹¹⁰ Baldacci, *supra* note 2, at 474-75, n. 75.

¹¹¹ Baldacci, *supra* note 2, at 475-78 (reviewing suggestions from commentators on the ways judges can help *pro se* witnesses more effectively convey information).

marginalize people's narrative styles too much, they may violate constitutional rights. Administrative due process – justice – should require that applicants are not only given a chance to speak, but are actually heard.

