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# Rhetoric and Rupture: A Theory of the Event

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*Georgia State University*

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# RHETORIC AND RUPTURE: A THEORY OF THE EVENT

by

ROBERT E. MILLS

Under the Direction of Professor Mary Stuckey

## ABSTRACT

This thesis engages the problematic of agency and interiority in rhetorical studies by proposing a theory of evental rhetoric. The event is a rupture in the continuities of the symbolic, revealing the distance between the forces of symbolization and their phantasmagorical effects. This theory is built upon the works of Friedrich Nietzsche and Jacques Lacan, engaging questions of truth, being, and the relationship of the subject to herself and the world. The rhetorics of legal practice, particularly the per curiam opinions of the United States Supreme Court, I argue, provide the institutional and epistemological formations necessary to transcend the bonds of situated rhetoric and become truly evental. I turn to the Supreme Court decision in *New York Times Co. v. United States* as an example of such an evental rhetoric. These rhetorics clear the way for the introduction of the new, and found a conversation in which democracy can begin.

INDEX WORDS: Evental rhetoric, Event, Legal rhetoric, Law, Nietzsche, Pentagon papers, Per curiam

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by

ROBERT E. MILLS

A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of  
Master of Arts  
in the College of Arts and Sciences  
Georgia State University  
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RHETORIC AND RUPTURE: A THEORY OF THE EVENT

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ROBERT E. MILLS

Committee Chair: Mary Stuckey

Committee: Carol Winkler

David Cheshier

Electronic Version Approved:

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Georgia State University

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**Table of Contents:**

<b>Acknowledgments</b>	<b>iv</b>
<b>List of Figures</b>	<b>viii</b>
<b>Of Zombies, Psychoanalysts, and Supreme Court Justices: An Introduction</b>	<b>1</b>
<b>Part I: Evental Rhetoric</b>	<b>15</b>
<hr/>	
<b>1. Full Speech and Empty Speech</b>	<b>18</b>
The Lacanian Subject	19
Discourse and Idle Talk	24
Empty Speech	28
Full Speech I: Punctuation	31
Full Speech II: Historicity	36
Beyond Full and Empty Speech	39
<b>2. Philosophy of the Two</b>	<b>43</b>
Truth As Lies	45
Perspectivity	48
Beyond Imaginary and Symbolic	56
Event and Time	58
Discourses of the Event	60
<i>Double Affirmation</i>	62
<i>Double Truth</i>	66
Evental Rhetorics	69
Of the Vision and the Riddle	73
<b>Part II: What is Legal Authority?</b>	<b>76</b>
<hr/>	
<b>3. Translating Justice</b>	<b>78</b>
Normative Legal Rhetorics	80
<i>Discourses of Coherence: Stare Decisis and Legal Rhetoric</i>	81
<i>Normative Thought: Pragma-Dialectic Criticality and Realist Materialism</i>	84

Law, Literature, and Translation	91
<i>Translation: Ethics and the New</i>	97
Translating Justice	100
<b>4. The Law's Edge</b>	<b>105</b>
Authority of the Law	107
<i>The Purpose of Criminality</i>	108
<i>The Subject of Rehabilitation and the Rehabilitated Subject</i>	111
An Institutional Interlude: Authorial Voice and the Supreme Court	115
The Edge of the Law	122
<i>The Event Law</i>	124
<i>Waiting for the Law</i>	128
<b><u>PART III: <i>New York Times Co. v. United States</i></u></b>	<b>132</b>
<b>5. A Brief History of the Pentagon Papers Case</b>	<b>136</b>
The Leak	138
The Reaction	140
The Litigation	142
<i>The Prior Restraint Doctrine</i>	144
The Supreme Court Decision	146
<i>The Concurring Opinions</i>	146
<i>The Dissenting Opinions</i>	149
The Aftermath	152
<b>6. The Opinion of the Court</b>	<b>155</b>
Minimalism and Contingency: Justices [not] Black and White	156
<i>Mr. Justice Black, with whom Mr. Justice Douglas joins, concurring.</i>	158
<i>Mr. Justice White, with whom Mr. Justice Stewart joins, concurring.</i>	165
<i>Minimalism: A Condition of Encouragement for the Event</i>	170
<i>Minimalism as Minimal Distance</i>	174
We Agree: An Evental Rhetoric	179



<i>Question One: Who are “We”?</i>	179
<i>Question Two: Do “I” agree?</i>	185
<b>Rhetoric and Rupture</b>	<b>187</b>
<b>Works Cited</b>	<b>197</b>

**List of Figures:**

Figure 2.1	43
Figure 2.2	51
Figure 2.3	56
Figure 2.4	59
Figure 2.5	70

## Of Zombies, Psychoanalysts, and Supreme Court Justices: An Introduction

“In order to understand the world, one has to turn away from it on occasion.”  
–Camus

In their essay “Zombie Trouble: A Propaedeutic on Ideological Subjectification and the Unconscious,” Joshua Gunn and Shaun Treat suggest that rhetorical studies “is currently caught within the performative of what we term ‘the zombie complex’: a fantasy that ideology animates bodies and robs them of agency...that the specter of determinism haunts the discipline in spite of the attempts to move beyond it.”<sup>1</sup> The zombie complex, the authors argue, is most visible in terms of the disciplinary articulation of a theory of ideology. It is a function of two contradictory commitments: one the one hand rhetorical studies carries with the conscious subject of the Enlightenment as the source of agency, and on the other, the discipline has implicitly admitted the function and power of the unconscious.<sup>2</sup> This has manifested itself as a crisis of determinism, in which the rhetor is afforded complete agency as a “zombifying hypnotist,”<sup>3</sup> while the audience is treated as a determinable army of walking dead subjects.

Gunn and Treat suggest that the discipline must seriously engage the psychoanalytic notion of the unconscious (which for the authors is apparently limited to the Freudian account), in which the unconscious does not determine conscious thought, but nevertheless influences who we are and what we say. They argue that the unconscious is inextricably linked with ideology, and the process of subjectification (or creating subjects). Of critical importance is the notion that the manifestations of the unconscious (e.g. slips of the tongue) are invisible to the analysand, but are fully visible to the analyst/critic, enabling psychoanalytic therapy in a general sense. Thus, Gunn and Treat claim, “it is the possibility of seeing something in another that she does not see

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<sup>1</sup> Joshua Gunn and Shaun Treat, “Zombie Trouble: A Propaedeutic on Ideological Subjectification and the Unconscious,” *Quarterly Journal of Speech* 91 (2005): 160.

<sup>2</sup> *Ibid.*, 156-159.

<sup>3</sup> *Ibid.*, 161.

in herself that bespeaks the necessity of the unconscious for ideology critique.”<sup>4</sup> The rhetorical critic qua psychoanalyst can finally, it seems, get to the bottom of things.

As I argue more fully in Chapter One, the turn to psychoanalytic theory as a basis for rhetorical theory and criticism is both promising and dangerous. The theories of Freud (and his greatest “re-reader” Jacques Lacan) offer a set of theoretical and analytical tools with which the analyst-critic might gain profound insights into individual rhetors, texts, and audiences; but psychoanalysis is a complex, lengthy, and delicate therapeutic technique, whose practitioners require years of specialized training. While not dismissing the promise of an analytically inflected mode of ideology critique, I cannot help but think that a healthy dose of skepticism is required each time a turn to psychoanalysis is suggested.

This skepticism is due in part to the one of the major disciplinary commitments Gunn and Treat believe have led to the zombification of ideology in rhetorical studies: namely, “a general avoidance of interior or mental events.”<sup>5</sup> The zombie is thus a rather convenient figure for rhetoricians. For the zombie, any complex unconscious drives or interior desires are collapsed into the single signifier “Braaaiiiiiinnsss,” which is the zombie’s succinctly stated *raison d’être*, and is the full extent of its symbolic engagement with the non-zombie. The zombie’s motivations are clear and the available means of responding to its desire follow naturally from its being.<sup>6</sup> But what if the zombie is motivated not by the singular desire to kill (thereby creating more zombies), but by the complex desire to consume knowledge; and absent the ability to learn (the zombie’s brain is dead, after all), it expresses that desire through the literal consumption of the organ of knowing. Perhaps, armed with this tasty knowledge, we could undertake an impressive

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<sup>4</sup> Ibid., 162.

<sup>5</sup> Ibid., 157.

<sup>6</sup> Either kill it, run away, or give it brains.

act of rhetorical criticism and convince the zombie to consume books rather than our precious brains.

The point, however, is not to psychoanalyze zombies—or their representations in film, literature, or Gunn and Treat’s essay—but rather to encourage engaging the serious claim that the rhetor, text, and audience are involved in a complex interplay of influences, not only amongst each other, but within themselves individually. Which is not to say that such an engagement is not already taking place. To take but one example of many, Barbara Biesecker’s works on Derrida, Foucault, and Lacan all take up the question of rhetorical interiorities to varying degrees and in varying contexts.<sup>7</sup> Influenced in large part by Biesecker’s work, and motivated by Gunn and Treat’s critique of rhetorical zombification, this thesis takes up the relationship between interiority and agency as an animating problematic in the formulation of a theory of evental rhetoric.

Before turning more fully to evental rhetoric, one last thing must be said about Gunn and Treat’s revivification of ideological criticism. If the unconscious and ideology are inextricably linked, and if the unconscious is not visible to the subject, then all transformative criticism must occur through a dialectic with a secondary subject—the critic; a necessity the authors acknowledge.<sup>8</sup> This mirrors the dialectic of psychoanalysis, but raises an interesting problem: are we bound forever to an infinite regression of dialectical critique in which A analyzes B’s unconscious as exhibited in a text, then C analyzes B’s unconscious as it presences in the analysis of A, and then D analyzes the unconscious of C in the critique of B, etc.<sup>9</sup> In such a

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<sup>7</sup> Barbara Biesecker, “Rethinking the Rhetorical Situation from Within the Thematic of Différance,” *Philosophy & Rhetoric* 22 (1989): 110-130; Barbara Biesecker, “Michel Foucault and the Question of Rhetoric,” *Philosophy & Rhetoric* 25 (1992): 351-364; Barbara Biesecker, “Rhetorical Studies and the ‘New Psychoanalysis’: What’s the Real Problem? or Framing the Problem of the Real,” *Quarterly Journal of Speech* 84 (1997): 222-238.

<sup>8</sup> Gunn and Treat, “Zombie Trouble,” 162-163.

<sup>9</sup> Psychoanalysis is itself caught in such a trap, where each analyst must herself be analyzed in order to become an analyst, and new analysts are monitored by experienced analysts. For an elaboration of the problem, and a

system of perpetual critique, the final answer, insofar as the final answer is obtained once one has gotten out from under ideology, is always deferred.

Gunn and Treat's theory of ideology is thus groundless in the Heideggerian sense, insofar as one's understanding of a text is only obtainable through the ungrounded psychic structures of the analytic or critical unconscious. This is not a problem, the authors contend, because "there is no meaningful 'outside' to the symbolic coordinates subjectification provides for us."<sup>10</sup> The operative term in this sentence is the qualifier "meaningful," which suggests that despite its meaninglessness, an exterior to the symbolic exists. Lacan called this outside "the real," and the significance of its meaninglessness (i.e. of its "nothingness") is the point of departure for evental rhetoric.

### **Evental Rhetoric**

Evental rhetoric is not a new mode of ideological criticism or critical rhetoric; rather, evental rhetoric is a mode of speech that does something in the world by way of introducing the new. Biesecker sets evental rhetoric in opposition to situated rhetoric, insofar as the former ruptures the symbolic and the latter sutures an exigency into the symbolic.<sup>11</sup> She thus defines evental rhetoric as full speech in the Lacanian sense, which "enacts of doubled erasure, the emptying out of two salient signs, speaker and audience, thereby freeing both from the symbolic fate the big Other consigns."<sup>12</sup> Which is to say, an evental rhetoric is speech which opens up the possibilities of creating the new through its saying.

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sophisticated response, see Lacan's essay "The Situation of Psychoanalysis and Training of Psychoanalysts in 1956" in Jacques Lacan, *Écrits: The First Complete Edition in English*, trans. Bruce Fink (New York: W. W. Norton & Company, 2006), 384-411.

<sup>10</sup> Gunn and Treat, "Zombie Trouble," 163.

<sup>11</sup> Barbara Biesecker, "Prospects of Rhetoric for the Twenty-First Century: Speculations on Evental Rhetoric Ending with a Note on Barack Obama and a Benediction by Jacques Lacan," in *Reengaging the Prospects of Rhetoric: Current Conversations and Contemporary Challenges*, ed. Mark J. Porrovecchio (New York: Routledge, 2010), 16-36.

<sup>12</sup> *Ibid.*, 28.

Biesecker's theory of evental rhetoric pivots on the introduction of the Other to the communicative act. The Other is the Lacanian symbolic as manifest in language and law, and is one of two registers of human psychic being (the other is the imaginary). Biesecker contends that by adding the Other to a conversation, thereby creating a triangular relationship between speaker/text, audience, and Other, we call the very natures of meaning and desire into question. As she argues in a footnote, evental rhetorics give power "back to the people not in the form of an earnest *answer* to the Real—however liberal, progressive, radical, or even utopian—but in the form of the (terrifying) open *question* (*Che vuoi?* [What do you desire?]) that renders its receivers as answers to the Real."<sup>13</sup> Thus, evental rhetorics contain an implicitly democratic demand and create meaning based upon the authentic desires of the subject. By minimizing the presence of the symbolic (emptying out signifiers), evental rhetorics create the conditions under which the subject is able to establish a productive relation to the real, and introduce the new.

In contrast with the critical dialectic structure of Gunn and Treat's revived ideological criticism, Biesecker conceives of evental rhetoric as a speech act. Thus, evental rhetorics do not require interpretive criticism to achieve their effect, but rather carry their effect in their enunciation. These rhetorics are able to activate particular creative effects within the world by way of the mutual influence of rhetor, text, and audience.

This particular phenomenon is unique to Lacan's idiosyncratic formulation of speech, in which he claims that "all speech requires a response."<sup>14</sup> This response can take a variety of forms, such as speech, silence, or physical activity, and it has a particularly important function in the psychoanalytic setting. In responding to the analysand's speech at the opportune moment, an act which Lacan calls punctuation, the psychoanalyst can trigger a shift in the patient through

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<sup>13</sup> Ibid., 36n52 (emphasis in original).

<sup>14</sup> Lacan, *Écrits*, 206.

which the latter is subjectivized, that is, made into a subject. The subjectivizing effect of punctuated full speech causes the subject to assume both her history and her desire, and in that way she is able to radically encounter the Other and challenge the symbolic.

But here we run into two interrelated problems. First Lacan did not introduce the real, that which is “outside” of the symbolic and which is thus the point of departure for eventual rhetoric, until long after full speech had disappeared in his theoretical work; and punctuation, which is the condition of possibility for full speech, is only possible within the psychoanalytic dialectic. Thus, full speech is unable to extricate itself from the infinite deferral of meaning characteristic of groundlessness, which is a necessary task if one hopes to get “outside” the symbolic to the eventual space of the real.

In Biesecker’s essay, this problem manifests itself as a relatively thin explanation of the specific mechanisms by which full speech is able to empty out signifiers, and by which the subject of full speech is able to establish a relation between itself and the real.<sup>15</sup> Lacan, for his part, never fully explained the theory of full speech, and it thus appears to be a utopian magic box into which the analyst places the analysand and out of which pops a fully formed subject. Moreover, as Bruce Fink has noted, full speech is not supplemented by Lacan’s later work (including the real), but is in fact critiqued by it.<sup>16</sup> All of this is not to say that we must abandon the considerable work Biesecker has already done and start over. This thesis departs from Biesecker’s analysis in two ways: first, rather than relying on the enigmatic and opaque theory of full speech, a new theoretical foundation is required that fully explores the relationship between subjectivity and the symbolic, as well as the relationship between the symbolic and the real;

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<sup>15</sup> She turns to Raoul Moati’s essay on speech act theory to remedy this problem, which I discuss at length in Chapter One. Raoul Moati, “The Performative and Ordinary Conventions to the Real,” trans. Laura Morland, *The Symptom* 9 (2008): [EBSCO].

<sup>16</sup> Bruce Fink, *The Lacanian Subject: Between Language and Jouissance* (Princeton: Princeton University Press, 1995), 79.



second, evental rhetoric should not be considered as an external force effectuated upon the subject, but rather as a mode of internal rhetoric, whose enunciation and effect are fully contained within the subject itself.

Alenka Zupančič's synthesis of Lacanian psychoanalysis and the Nietzschean figure of noon provide such a foundation, and is grounded in much of the same Nietzschean philosophy that has been taken up in rhetorical studies in recent years.<sup>17</sup> To combat the infinite deferral of groundlessness, Zupančič qua Nietzsche proposes a philosophy of the two, expressed through the topology of the edge (as minimal difference) between two perspectives, as the means by which the subject is able to access the real. In shifting perspectives, the subject recognizes that something immutable exists within the object that allows her to persistently recognize it between the two perspectives. This "something" is nothing other than a part of the subject thrown into the world of objects that enables the subject/object split, which Lacan calls the gaze.

The Nietzschean event is thus the subjectivization of an already present subject, and takes the form of a declaration of a declaration "I, the event, am speaking!" This double-declaration consists of two mutually referential levels of speech: the enunciated "I, the event, am speaking!" and the enunciation of the same phrase. The declaration of a declaration is thus the subject taking itself in its objective capacity as gaze, creating two perspectives at once. The distance between the two perspectives, which is the Lacanian lack, the Nietzschean beyond, and Zupančič's edge, is taken not to be a lamentable loss but the source of being. It is through this mechanism that the

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<sup>17</sup> Alenka Zupančič, *The Shortest Shadow: Nietzsche's Philosophy of the Two* (Cambridge, MA: MIT Press, 2003); See also: Douglas Thomas, *Reading Nietzsche Rhetorically* (New York: Guilford Press, 1998); Gregory Desilet, "Nietzsche Contra Burke: The Melodrama in Dramatism," *Quarterly Journal of Speech* 75 (1989): 65-83; Peter Heckman, "Nietzsche's Clever Animal: Metaphor in 'Truth and Falsity'," *Philosophy & Rhetoric* 24 (1991): 301-321; James I. Porter, "Nietzsche's Rhetoric: Theory and Strategy," *Philosophy & Rhetoric* 27 (1994): 218-244; Claudia Crawford, "A Genealogy of Worlds According to Nietzsche," *Philosophy & Rhetoric* 27 (1994): 202-217; Debra Hawhee, "Burke and Nietzsche," *Quarterly Journal of Speech* 85 (1999): 129-145; Adrian Del Caro, "Nietzsche's Rhetoric on the Grounds of Philology and Hermeneutics," *Philosophy & Rhetoric* 37 (2004): 101-122; Bradford Vivian, "Freedom, Naming, Nobility: The Convergence of Rhetorical and Political Theory in Nietzsche's Philosophy," *Philosophy & Rhetoric* 40 (2007): 372-393.

subject is able to puncture the veil of meaning called the symbolic, and come face-to-face with the neutrality of being (the meaningless “outside” of the symbolic). Faced with the void of nothingness, the subject becomes Zarathustra, and wills the world (as the symbolic) again; and in recreating the symbolic, the eventual subject is granted the power to create the new.

Biesecker turns to (now) President Barack Obama’s speech at the 2008 Democratic National Convention as an example of eventual rhetoric, arguing that Obama empties out the signifiers “the Presidency” and “the People,” which creates the democratizing effect described above. While I agree with her analysis, I believe there to be a better example of the type of self-referential auto-authoritative speech which is required to form an eventual rhetoric: the per curiam (lit. “of the Court) opinions of the United States Supreme Court. Such opinions, I argue, create the conditions for an event both within the law, and without.

### **Legal Authority**

There is a longstanding relationship between rhetoric and law,<sup>18</sup> although as John Lucaites noted in 1990, contemporary rhetoricians have treated the relationship “with a tired nonchalance. We write the occasional article on oral arguments before the Supreme Court or on judicial decision making...but we seldom seriously engage the political and ideological implications of the relationship between rhetoric and law for *life-in-society*.”<sup>19</sup> Lucaites is drawing a distinction between the study of legal argument (including scholarship from both the rhetorical studies and the argumentation studies traditions), which seeks to describe and proscribe particular methods of legal advocacy in speech and text, and critical legal rhetoric,

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<sup>18</sup> In the developmental history of modern legal practice, however, the relationship between law and rhetoric has not always been clear. See, for example, the discussion of Enlightenment influences and legal formalism, as well as the subsequent resurrection of rhetorical approaches by legal realists, in Malthon Anapol, “Rhetoric and Law: An Overview,” *Today’s Speech* 18 (1970): 12-20.

<sup>19</sup> John Louis Lucaites, “Between Rhetoric and ‘The Law’: Power, Legitimacy, and Social Change,” *Quarterly Journal of Speech* 76 (1990): 445 (Emphasis in original).

which combines the praxis of McKerrow's critical rhetoric with that of the critical legal studies (CLS) movement.<sup>20</sup> Both legal argumentation studies and critical legal rhetoric have a significant role to play in the discussion of eventual legal rhetorics to follow.

Legal argumentation finds its roots in Aristotle's forensic rhetoric,<sup>21</sup> and focuses on the rhetoric of legal practice, detailing the ways in which rhetoric and argument function in the legal profession. This can take a variety of forms, such as specific argument analyses,<sup>22</sup> systematic normative programs,<sup>23</sup> or descriptive studies.<sup>24</sup> The study of legal argumentation provides insights into the rhetorical-epistemological commitments of the legal profession, which not only provides the proper institutional context for legal texts, but also provides a basis upon which to discuss the transformative potential of eventual legal rhetorics.

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<sup>20</sup> Raymie E. McKerrow, "Critical Rhetoric: Theory and Praxis," *Communication Monographs* 56 (1989): 91-111; Roberto M. Unger, *The Critical Legal Studies Movement* (Cambridge, MA: Harvard University Press, 1986); Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge, MA: Harvard University Press, 1987).

<sup>21</sup> Aristotle, *On Rhetoric: A Theory of Civic Discourse*, trans. George A. Kennedy (Oxford: Oxford University Press, 1991).

<sup>22</sup> Kurt Ritter, "Drama and Legal Rhetoric: The Perjury Trials of Alger Hiss," *Western Journal of Speech Communication* 49 (1985): 83-102; Marouf Hasian Jr. and Trevor Parry-Giles, "'A stranger to its laws': Freedom, civil rights, and the legal ambiguity of *Romer v. Evans* (1996)," *Argumentation & Advocacy* 34 (1997): 27-42; Clarke Rountree, "Instantiating 'The Law' and its Dissents in *Korematsu v. United States*: A Dramatic Analysis of....," *Quarterly Journal of Speech* 87 (2001): 1; Roger Stahl, "Carving Up Free Exercise: Dissociation and 'Religion' in Supreme Court Jurisprudence," *Rhetoric & Public Affairs* 5 (2002): 439-458; Paul Stob, "Chisholm v. Georgia and the Question of the Judiciary in the Early Republic," *Argumentation & Advocacy* 42 (2006): 127-142; Clarke Rountree, *Judging the Supreme Court: Constructions of Motives in Bush v. Gore* (East Lansing: Michigan State University Press, 2007); Katie L. Gibson, "The Rhetoric of *Roe v. Wade*: When the (Male) Doctor Knows Best," *Southern Communication Journal* 73 (2008): 312-331.

<sup>23</sup> Eveline T. Feteris, "A Pragma-Dialectical Approach to Legal Discussions," *Informal Logic* 15, no. 3 (1993): 180-188; Eveline T. Feteris, "A Pragma-Dialectical Approach of the Analysis and Evaluation of Pragmatic Argumentation in a Legal Context," *Argumentation* 16 (2002): 349; Eveline T. Feteris, "Strategic Maneuvering with the Intention of the Legislator in the Justification of Judicial Decisions," *Argumentation* 22 (2008): 335-353; Eveline T. Feteris, "The Pragma-Dialectical Analysis and Evaluation of Teleological Argumentation in a Legal Context," *Argumentation* 22 (2008): 489-506.

<sup>24</sup> William L. Benoit, "An Empirical Investigation of Argumentative Strategies Employed in Supreme Court Opinions," in *Dimensions of Argument: Proceedings of the Second Summer Conference on Argument*, ed. George Ziegelmüller and Jack Rhodes (Annandale, VA: Speech Communication Association, 1981), 179-195; Jon Brusckhe, "A Critical Analysis of Objectivity in the Legal Sphere," *Argumentation & Advocacy* 30 (1994): 220-235; Stefano Berteia, "Certainty, Reasonableness and Argumentation in Law," *Argumentation* 18 (2004): 465-478; Gerald B. Wetlaufer, "Rhetoric and its Denial in Legal Discourse," *Virginia Law Review* 76 (1990): 1545-1597; Robert A. Ferguson, "The Judicial Opinion as Literary Genre," *Yale Journal of Law & the Humanities* 2 (1990): 201-220.

James Boyd White argues that legal rhetoric is constitutive, insofar as it (partially) determines the ways in which legal rhetors (and audiences) engage legal controversies. More importantly for my purposes, however, White argues that the law has a constitutive effect in society at large, insofar as its regulative power creates particular social, economic, and political relations between individuals. In other words, while legal rhetoric forms a community in the law, that rhetoric in turn establishes communities outside of the law.<sup>25</sup>

Robert Hariman has made a similar claim, arguing “society reproduces itself through performance before spectators in public space...the drama [of a trial] has as its text the laws, which are themselves the record of prior dramatizations, and which are altered as well through the act of performance. *The performance of laws* then becomes a singularly powerful locus of social control, for it is the very means by which the members of the community know who they are.”<sup>26</sup> Taking Hariman and White together, the constitutive effect of legal rhetoric operates in three registers: through the specific rhetoric of legal practice, through the material and psychic effects of legal enforcement, and in the actual performance of trials themselves. Changes in the first register, legal argumentation, change the way the other two registers operate: that is, *how* the law is performed has implications for the effect of that performance and the effect of law’s enforcement. Thus, in order to become an eventual legal rhetoric, the law must change the very texture of its operation. As I argue in Chapter Three, White’s theory of justice as translation provides the starting point for such a transformation.

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<sup>25</sup> See generally: James Boyd White, *Heracles’ Bow: Essays on the Rhetoric and Poetics of Law* (Madison: University of Wisconsin Press, 1989); James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: The University of Chicago Press, 1990); James Boyd White, *Acts of Hope: Creating Authority in Literature, Law, and Politics* (Chicago: The University of Chicago Press, 1995); James Boyd White, *The Edge of Meaning* (Chicago: The University of Chicago Press, 2001).

<sup>26</sup> Robert Hariman, “Performing the Laws: Popular Trials and Social Knowledge,” in *Popular Trials: Rhetoric, Mass Media, and the Law*, ed. Robert Hariman (Tuscaloosa, AL: University of Alabama Press, 1990), 17 (emphasis in original).

Hariman's use of the phrase "social control," raises an interesting problem: namely, that the constitutive effect of the law is based on a particular authoritarian control and does not function democratically. In other words, the pronouncements of the United States Supreme Court are not the product of returning the power to the people, but gathering together legal authority in a single body. Thus, in order to challenge the law in its entirety, not just as laws or legal practice but as an institution of social control, a second level of critique is required; and it is precisely what is provided by CLS and critical legal rhetoric.

As Lucaites describes it, "CLS is not simply a theory of the relationship between law and society that implicitly recognizes the rhetorical nature of legal doctrine, but is rather a politically charged, disciplinary praxis...a consequential critique of both domination and freedom."<sup>27</sup> In other words, CLS challenges the institutional mechanisms by which the law privileges particular modes of social being.<sup>28</sup> As Victoria Kahn and others have indicated, White's reformulation of justice as translation not only fails to provide a self-reflexive critique of legal institutions, but in fact relies on institutional authority to effectuate an "ethical" reformulation of life-in-society.<sup>29</sup>

If an evental rhetoric is to empty out the salient sign "the Law" or "the Court" in order to open it up to redefinition, then attention must be paid to the very nature of the law as an institution of social control. The use of the *per curiam* opinion by the United States Supreme Court enacts this "emptying out" by replacing the authorial voices of the individual justices with

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<sup>27</sup> Lucaites, "Between Rhetoric and 'The Law'," 442.

<sup>28</sup> For examples of this type of scholarship, see: Wendy R. Olmsted, "The Uses of Rhetoric: Indeterminacy in Legal Reasoning, Practical Thinking and the Interpretation of Literary Figures," *Philosophy & Rhetoric* 24 (1991): 1-24; Marouf Hasian Jr., "Critical Legal Rhetorics: The Theory and Practice of Law in a Postmodern World," *The Southern Communication Journal* 60 (1994): 44-56; Marouf Hasian Jr. and Earl Croasmun, "Rhetoric's Revenge: The Prospect of a Critical Legal Rhetoric," *Philosophy & Rhetoric* 29 (1996): 384-399; Marouf Hasian Jr., Celeste Michell Condit, and John Louis Lucaites, "The Rhetorical Boundaries of 'the Law': A Consideration of the Rhetorical Culture of Legal Practice and the Case of the 'Separate But Equal' Doctrine," *Quarterly Journal of Speech* 82 (1996): 323-342.

<sup>29</sup> Victoria Kahn, "Rhetoric and the Law," *Diacriticis* 19 (1989): 21-34; Hasian Jr. and Croasmun, "Rhetoric's Revenge."

the institutional voice of the Court; and in doing so the Court calls the very nature of legal authority into question. This effect, I argue, lays the groundwork for an eventual rhetoric on a truly social scale; and it is the task of this thesis to illustrate precisely what the effect of this rhetoric is, and the methods by which it can be achieved.

This thesis is divided into three parts, each composed of two chapters. Part I is dedicated to the articulation of a theory of eventual rhetoric. In Chapter One I discuss Lacan's theory of full and empty speech, its relationship to Heidegger's phenomenological account of discoursing and idle talk, and its structure and effect in the specific psychoanalytic setting. I argue that, despite agreeing with much of Biesecker's analysis, full speech as Lacan sets it out provides an inadequate foundation for the "relatively seismic shift" called for in theorizing eventual rhetoric. In Chapter Two I argue that Zupančič's formulation of the Nietzschean event, based on the recurring literary figure of "noon" in his work and inflected with Lacan's theories of the real and gaze, is not only a suitable foundation, but in fact provides a more nuanced and rhetorically grounded explanation of the specific interior machinations of eventual subjectivity.

Part II takes the theoretical apparatus and applies it to the law in terms of both the interiorities of legal argumentation, and the institutional apparatus of the law itself. In Chapter Three I argue that legal rhetoric and epistemology are dominated by fundamentally anti-evental normative systems of thought. I critique two such systems—legal positivism and legal realism—to illustrate that normative thought conceals a fundamentally groundless set of rhetorical commitments, which calls into question the basis of its normative pronouncements. I turn to the study of law and literature, specifically White's discussion of justice as translation, as the foundation of an eventual legal rhetoric, and argue that the translator is an archetypal eventual subjectivity. In Chapter Four I engage the institutional authority of the law through a discussion

of the formation and enforcement of criminal laws. I argue that the per curiam opinions of the United States Supreme Court provide a means of radicalizing the contemporary relationship between subject and law, and are thus evental rhetorics.

Part III is composed of a specific case study of an evental legal rhetoric: namely, the per curiam opinion in *New York Times Co v. United States*, the Supreme Court case arising from the publication of the Pentagon Papers by the *New York Times* and the *Washington Post*. Chapter Five provides a brief history of the Pentagon Papers, their leak in the *Times* and the *Post*, the lower court litigation, and the legal issues at play in the case. I also provide a brief explanation of opinions of the Supreme Court Justices, and the political consequences of their decision. In Chapter Six I argue that the per curiam opinion is an evental rhetoric in two ways. First, it unites two sides of a controversy, without reconciling that controversy, by finding the minimal distance between them. The controversy, in this case, is the constitutionality of limiting press freedom, and I analyze the opinions of Justice Hugo Black and Justice Byron White, and their particular adherence to the per curiam to describe this effect. I then discuss rhetorical minimalism as a condition of encouragement for the event, as well as the ways minimalism transformed the per curiam into an evental rhetoric. Second, I argue that the minimal pronouncement “We agree” creates the conditions under which the subject can challenge the institutional authority of the Court, transforming the per curiam into an evental rhetoric.

This thesis occupies the unique space of a theoretical treatise and a critical rhetoric. While not advocating for change in any normative sense (i.e. change should happen in this way), I argue that the conditions of possibility for change exist, and outline the theoretical and practical mechanisms by which such change is possible. At the start of this introduction, I suggested that the animating question in this thesis is directly related to questions of agency and interiority. The

complex literatures in rhetorical theory, philosophy, and other humanities disciplines on agency do not, however, play a major role in this thesis. This is not to deny, of course, the need to reconcile the disciplinary history of agency with the theory of the event laid out in the following six chapters; but before such a reconciliation is possible, a foundation must be built upon which evental rhetoric can be adequately theorized. Unlike Gunn and Treat, my purpose is not to revivify an older mode of criticism; rather, I seek to aim the reader at the real, and set her free to love her will, to love her subjectivity, and to love the new.



## Part I | Evental Rhetoric

Event (noun) \i-ˈvent\ : The fundamental entity of observed physical reality represented by a point designated by three coordinates of place and one of time in the space-time continuum postulated by the theory of relativity.

–Merriam-Webster

In her essay on evental rhetoric, Barbara Biesecker sets out the project in the following way: “The aim of this essay is to spend some time thinking about evental rhetoric, its conditions of possibility, its features, and its force. Immediately this brings up the question of my usage of the words *evental rhetoric* to name the occurrence of discourse which is not merely situational but more than situational... what we are dealing with here is not the saying of the Event, not the inscription of the Event into language or into speech, but saying *as* the Event, saying as eventful and not as an eventuality.”<sup>1</sup> Biesecker presents evental rhetoric in a structuring binary relationship with situated rhetoric, setting her position against that of both Lloyd Bitzer and Richard Vatz. For Bitzer the rhetorical situation is objective, insofar as an object-exigency determines the speech that brings it into language.<sup>2</sup> Richard Vatz, on the other hand, treats the rhetorical situation as subjective, where speech constructs the contours of the exigency as well as our relationship to it through language.<sup>3</sup> In an essay responding to both, Biesecker urges rhetoricians to abandon the objective/subjective line of thinking altogether, recommending instead that “we move from the cramped logic of influence to the seemingly unbounded logic of articulation.”<sup>4</sup> To achieve this move, Biesecker turns to Derrida’s notion of *différance*, which she argues is the condition of possibility for all language and communication.

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<sup>1</sup> Barbara Biesecker, “Prospects of Rhetoric for the Twenty-First Century: Speculations on Evental Rhetoric Ending with a Note on Barack Obama and a Benediction by Jacques Lacan,” in *Reengaging the Prospects of Rhetoric: Current Conversations and Contemporary Challenges*, ed. Mark J. Porrovecchio (New York: Routledge, 2010), 19 (Emphasis in original).

<sup>2</sup> Lloyd F. Bitzer, “The Rhetorical Situation,” *Philosophy & Rhetoric* 1 (1968): 1-14.

<sup>3</sup> Richard E. Vatz, “The Myth of the Rhetorical Situation,” *Philosophy & Rhetoric* 6 (1973): 154-161.

<sup>4</sup> Biesecker, “Prospects of Rhetoric,” 19; Barbara Biesecker, “Rethinking the Rhetorical Situation from Within the Thematic of *Différance*,” *Philosophy & Rhetoric* 22 (1989): 110-130.

*Différance* is the “non-identity” of the sign, the idea that meaning is obtained not through the positive disclosure of something essential to the sign but through a system of difference that leads to meaning’s infinite deferral.<sup>5</sup> Signification is a process that is never closed, never finished; and active signification, which is internal to the sign, is the point around which Biesecker “resituates the rhetorical situation on a trajectory of becoming rather than Being.”<sup>6</sup> That is, the radicalization of the sign points toward the essential ungroundedness of symbolization in general, and thus the situation in which rhetoric unfolds is an always evolving and never stable environment. The rhetorical situation in the thematic of *différance* moves beyond the subjective/objective binary, and transitions toward the symbolic as always becoming through the articulation of language. It is this movement, she argues, which is the essential precondition for the “relatively seismic shift” called for in thinking about an evental rhetoric.<sup>7</sup>

The contemporary philosophical interest in the event is motivated by a desire to understand the creation of the truly new. In the symbolic characterized by *différance*, a “new” sign does not originate *ex nihilo* since the sign has no essential meaning, but is instead constituted through its difference from already extant signs. By unchaining the symbolic from its relationship to a material or ideational reality, Derrida specifically, and poststructuralism generally, created the conditions under which human being (through symbolization) is able to articulate the world, to create the relationships between things that constitute meaning. The event is the moment in which something new is created within those already-present spheres of meaning, and thus marks a rupture in the smooth functioning of differentiation and deferral

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<sup>5</sup> Biesecker, “Rethinking the Rhetorical Situation,” 115-118.

<sup>6</sup> *Ibid.*, 127.

<sup>7</sup> My own reading of Biesecker’s work is greatly indebted to her own re-reading found in Biesecker, “Prospects of Rhetoric,” 18-20.

characteristic of signification. It is because of this capacity to break free of the enchaining effect of symbolization that the event is central to any revolutionary politics.

However, as Biesecker notes, *différance* is a necessary but not sufficient condition of evental rhetoric. Thus she proposes a second pivot, a sort of “*ménage à trois*” between her problematized rhetorical situation (rhetoric *avec* deconstruction) and Lacanian psychoanalysis.<sup>8</sup> Evental rhetoric, she contends, is full speech in the Lacanian sense. The shortness of this statement belies the complexities of the theoretical apparatus underlying it, and thus in Chapter One I primarily discuss Lacan’s theory of full and empty speech, paying close attention to its origin in Heidegger’s philosophy of articulation. Provisionally, however, an evental rhetoric might be understood in tropological terms as the difference between metaphor (situation) and catachresis (event), where the former permutes two present terms into a third, while the latter creates something new by way of calling it to presence in reality. The charge of an evental rhetoric for Biesecker is not catachretic per se; rather, evental rhetorics create the conditions of possibility for catachresis through the “emptying out” of (a) sign(s), challenging current possibilities in an attempt to create something radically new.

The majority of Chapter One is devoted to introducing the complex theoretical concepts at play in Lacan’s theory of full and empty speech, as well as Biesecker’s application of it in her theory of evental rhetoric. Throughout, however, I argue that full speech is theoretically insufficient to form the basis for the “relatively seismic shift” required to properly ground an evental rhetoric. In Chapter Two, I provided a sustained reading of Alenka Zupančič’s discussion of Nietzsche’s figure of the noon as the basis for a theory of evental rhetoric. I rehabilitate Biesecker’s analysis of the Lacanian real in relation to Zupančič’s own discussion of the real, arguing that evental rhetorics, rather than consisting of full speech in the Lacanian sense, are

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<sup>8</sup> Ibid., 19.

double-declarations of affirmation and truth in the Nietzschean sense. These rhetorics occur not in a dialectic between one subject and another subject, but between two instances of the same subjectivity, that has taken itself both as subject and object.

## ONE | Full Speech and Empty Speech

“This assumption by the subject of his history, insofar as it is constituted by speech addressed to another, is clearly the basis for the new method Freud called psychoanalysis.”<sup>1</sup>

–Lacan, *Écrits*

### The Lacanian Subject

Psychoanalysis, developed by Sigmund Freud in the late 1800s and early 1900s, is first and foremost a method to treat problems in the psyche. In the words of Anna O., one of the first analysands (the psychoanalytic term for “patient”), it is a “talking cure.” The particular theoretical approach developed by French analyst Jacques Lacan represents a “re-reading” of Freud coupled with a metaphysical turn inspired largely by Heidegger’s ontological questioning of being. This section traces the “development” of the Lacanian subject, pointing toward important components of Lacan’s theory along the way. Temporalizing subjective development, a move taken from the work of Bruce Fink and Yannis Stavrakakis,<sup>2</sup> foregrounds the importance of time in Lacanian theory, but is more importantly “a way of introducing Lacan’s theoretical insights in a logically coherent and pedagogically accessible manner.”<sup>3</sup> Thus we begin—like the subject—with a child’s entrance into the imaginary.

A child obtains her original notion of self-identity upon seeing her reflection for the first time, in what Lacan calls the mirror stage. The child recognizes herself in the reflection, it moves as she moves, and she begins to identify with the image. This first sense of self exists in the register that Lacan calls the imaginary, not because it is illusory, but because it is literally composed of a series of psychic images. Lacan calls this imaginary self-image the ego,

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<sup>1</sup> Jacques Lacan, *Écrits: The First Complete Edition in English*, trans. Bruce Fink (New York: W. W. Norton & Company, 2006), 213.

<sup>2</sup> Bruce Fink, *The Lacanian Subject: Between Language and Jouissance* (Princeton: Princeton University Press, 1995); Bruce Fink, *A Clinical Introduction to Lacanian Psychoanalysis: Theory and Technique* (Cambridge, MA: Harvard University Press, 1997); and Yannis Stavrakakis, *Lacan and the Political* (London: Routledge, 1999).

<sup>3</sup> Stavrakakis, *Lacan and the Political*, 19-20.

appropriating the term from Freud. However, the self-image created in the mirror stage is problematic. The child does not actually see herself in the mirror; rather, she sees a reflection, an inverted image. Moreover, she may not see herself all at once, but only as a successive series of fragments. This fragmented reflection is an other, alienated from the child by its literal and imaginary distance from her. We are “originally an inchoate collection of desires – and there you have the true sense of the expression *fragmented body* – the initial synthesis of the ego is essentially an alter ego. It is alienated. The desiring human subject is constructed around the center which is the other insofar as it gives the subject his unity.”<sup>4</sup> Thus our first sense of self is decentered, constructed out of something *other*.

While the imaginary self image (ego) stays with us throughout our development, it is quickly subsumed by the second register: the symbolic. A child is born into a world already inhabited by language. Everything—objects, affects, qualities, and even the child herself—has a name. This language is not made by the child, but belongs to an Other. The child (henceforth called the subject) encounters the Other in language and in that moment immediately “drops out,” meaning that the subject fails to assert itself coequally to the Other. The subject is thus *manque-à-etre*, which carries the triple connotation of “fails to be,” “lack of being,” and “desire to be.” This lack has ontological significance—we will see additional resonances with Heideggerian thought throughout the chapter—insofar as it is the “first step beyond nothingness.”<sup>5</sup> The subject is alienated from her own being, and this alienation founds the symbolic order and crafts a place for the subject within it: “The signifier wields ontic clout, wresting existence from the real that it marks and annuls.”<sup>6</sup> Moreover, because the subject “drops

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<sup>4</sup> Jacques Lacan, *The Seminar of Jacques Lacan Book III: The Psychosis*, ed. Jacques-Alain Miller, trans. Russell Grigg (London: Routledge, 1993), 39 as cited in; Stavrakakis, *Lacan and the Political*, 18 (emphasis in original).

<sup>5</sup> Fink, *Lacanian Subject*, 52.

<sup>6</sup> *Ibid.*, 53.

out” as a result of its confrontation with the Other, its only means of presencing is through interruptions in speech. Language “bars” the subject (§) because “it has no other being than as a breach in discourse.”<sup>7</sup> Manifestations of this split can be seen throughout Lacanian theory (the failure of a fully representative self-consciousness, the split between the subject of speech and the speaking subject, etc.), although the common thread amongst them is the failure of the subject to coincide with itself, that the subject is constituted by a lack, that the subject desires.

The symbolic and the imaginary do not represent the totality of human existence, and in Lacan’s later work he introduces a third register: the real. The real, for Lacan (and Heidegger), is the source of anxiety. “The real is impossible”: impossible to symbolize, impossible to imagine. For scholars of communication the impossibility of the real is a familiar phenomenon: the fundamental lack in language, the inability of the signifier to correspond to the Kantian thing in itself, is a function of the real. Whereas language, which is a system of differences between signs, is fractured, the real is whole. The real, however, does not exist, insofar as existence for Lacan is more or less predicated on inclusion in the symbolic; rather, the real ex-cists, it is beyond (in the Nietzschean sense) the imaginary and the symbolic. The real “produces a series of structural effects (displacements, repetitions, and so on). The [real] is an entity which must be constructed afterwards so that we can account for the distortions of the symbolic structure.”<sup>8</sup> The real is not an object, or even series of objects, but pure cause.

Despite the overarching significance of the real in Lacan’s theoretical work, it plays a relatively small role in pre-analytic subjective development. Analysis is largely focused on the relationships between the subject (and ego) to the other (alter-ego)/Other (symbolic). Imaginary relationships, between ego and alter ego, are characterized by two features: identification and

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<sup>7</sup> Ibid., 56.

<sup>8</sup> Slavoj Žižek, *The Sublime Object of Ideology* (London: Verso, 1989), 162.

rivalry.<sup>9</sup> We identify with those whom we perceive to have a similar relationship to the Other as our own, and we are rivals with those who do not. Symbolic relations, on the other hand, operate through the ego-ideal (superego in Freudian terminology) after the imaginary becomes structured by the symbolic through the Other as language, law, ideal, etc. The subject finds itself *within* the Other. However, the subject eventually comes to realize that the Other itself is barred ( $\bar{A}$ , “A” for the French *Autre*), that the symbolic is constituted by a lack, evidenced by the desires of the Other. Thus through a process called separation “the subject attempts to fill the [Other’s] lack...with his or her own lack of being, his or her own not yet extant self.”<sup>10</sup> Yet the subject fails to become the object of the Other’s desire, and thus in separation the subject attempts to force its desire to perfectly align with the Other’s, and fails.<sup>11</sup> The desire of the Other is caused by an Other Other (in a family metaphor, for example, the mother’s Other is the father) represented by a signifier (the name of the father). This primordial signifier, symbolizing nothing less than the Other’s desire, breaks the illusory Other-subject unity.

Separation from the Other’s desire constitutes the subject as such, “no longer just a potentiality, a mere place-holder in the symbolic, waiting to be filled out, but a desiring subject.”<sup>12</sup> The Other’s desire remains unknowable to the subject, yet it attempts to grasp that desire regardless. The desire of the subject is thus the desire of the Other: the subject desires the Other’s desire in its desirousness. The name of the object-cause of this desire is *objet petit a*, and the enjoyment derived from it *jouissance*. Fantasy, which stages *jouissance*, “takes the subject beyond his or her nothingness, his or her mere existence as a marker at the level of alienation, and supplies a sense of being. It is thus only through fantasy, made possible by separation, that

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<sup>9</sup> Lacan, *Écrits*, 85.

<sup>10</sup> Fink, *Lacanian Subject*, 54.

<sup>11</sup> *Ibid.*, 55.

<sup>12</sup> *Ibid.*, 58.



the subject can procure him or herself some modicum of what Lacan calls ‘being’...supplied only by cleaving the real.”<sup>13</sup> The goal of psychoanalysis is to traverse this fantasy.

In analysis the analyst occupies the position of *objet petit a*, which requires her to remain enigmatic, never telling the analysand what she wants. The analyst “aims, not at modeling the analysand’s desire on his or her own, but rather at shaking up the configuration of the analysand’s fantasy, changing the subject’s relation to the cause of desire.”<sup>14</sup> Traversing the fantasy, through an act of replacement, constructs a new fantasy. It requires the “assumption of a new position with respect to the Other” by the subject.<sup>15</sup> That the subject’s existence is the product of the Other’s desire (the parents’ desire for each other and, in some cases, desire to have a child) must be assumed (as in taken on), subjectified; “The traversing of fantasy is the process by which the subject subjectifies trauma, takes the traumatic event upon him or herself, and assumes responsibility for that *jouissance*.”<sup>16</sup> When the analyst intervenes in analysis (by speaking, ending the session, etc.) the analysand is immediately made aware of the analyst’s desire, which problematizes meaning in the multiplicity of an enigmatic desire, separating the subject further from desire. This interruption is called punctuation, and is the means by the analyst can help the analysand traverse the fantasy.

Speech is of fundamental importance to psychoanalytic practice. As Lacan noted, “Whether it wishes to be an agent of healing, training, or sounding the depths, psychoanalysis has but one medium: the patient’s speech. Now all speech calls for a response.”<sup>17</sup> Biesecker’s discussion of full and empty speech takes on what Dylan Evans has called the metaphysical dimensions of speech in Lacan’s work, influenced significantly by the concepts *Rede* and *Gerede*

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<sup>13</sup> Ibid., 60-61.

<sup>14</sup> Ibid., 62.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid., 63.

<sup>17</sup> Lacan, *Écrits*, 206.

from Heidegger's *Being and Time*. *Rede* is variously translated as "logos" or "discourse" and is related to full speech, while *Gerede*, translated as "idle talk" or "chatter," is related to empty speech.<sup>18</sup> Given this specific linkage, and the significant role ontology played in Lacan's thought, it is essential to ground his theory in the proper philosophical context, beginning with a discussion of Heidegger's discourse and idle talk.

### **Discourse and Idle Talk**

Discoursing "is the way in which we articulate 'significantly' the intelligibility of Being-in-the-world."<sup>19</sup> The term 'significantly' here is understood in a very limited sense as giving meaning, which suggests that discoursing breaks primordial wholeness into discrete parts. At the same time, as William Blattner has stressed, articulation has the rather idiosyncratic meaning of *structural articulation*,<sup>20</sup> the type we attribute to an articulated skeleton, consisting of a set of relations between two discrete entities by way of a joint.<sup>21</sup> Hubert Dreyfus translates *Rede* not as "discourse" but as "telling," as in "I can tell the difference."<sup>22</sup> Dreyfus thus gives discourse a discerning and organizational function, in that it constructs the fundamental relationships among different intelligibilities within the world. As a relational junction preserving a sense of differentiation among particular elements, discourse *makes* relations. It is an act of distinction as intelligibility.

Discoursing creates difference and is not language per se but is rather its condition of possibility, insofar as it creates objects as objects. In Heidegger's words, discoursing "lets us see

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<sup>18</sup> Dylan Evans, *An Introductory Dictionary of Lacanian Psychoanalysis* (London: Routledge, 1996), 193-194.

<sup>19</sup> Martin Heidegger, *Being and Time*, trans. John Macquarrie and Edward Robinson (New York: Harper & Row, 1962), 204.

<sup>20</sup> William Blattner, *Heidegger's Being and Time* (London: Continuum, 2006), 100; For a more detailed, though much more dense, discussion of the same Heideggerian notion, see: Hubert L. Dreyfus, *Being-in-the-world: A Commentary on Heidegger's Being and Time, Division I* (Cambridge, MA: MIT Press, 2001), 215-221.

<sup>21</sup> An example taken from both Dreyfus and Blattner.

<sup>22</sup> Dreyfus, *Being-in-the-world*, 215.

something from the very thing which the discourse is about,”<sup>23</sup> and one could draw a parallel between discourse and the symbolic in Lacan’s early work, where “the very thing the discourse is about” is the self-referential chain of signification. Insofar as discoursing creates objects as objects, creating the very way in which humans engage the world, it is thus related to what Heidegger calls “primordial understanding,” which is to know from the inside, and is obtained through *doing*.<sup>24</sup> Primordial understanding is not cognitive, although it is the condition of possibility for cognition, but is more closely related to apprehension. One simply knows what to do.<sup>25</sup>

Chess grandmasters provide an excellent demonstration of primordial understanding. As Dreyfus notes, grandmasters do not plan out large series of moves in their heads; rather, he or she sees “the issue in a [chess] position almost immediately, [and] the right response just pops into his or her head.”<sup>26</sup> Not everyone who plays thousands of games of chess will become a grandmaster, however, although the experiences gleaned through playing trend toward the level of apprehension exhibited in primordial understanding. Those with a primordial understanding of an activity communicate with each other on a unique level because their understanding is grounded in a shared doing. This does not mean that primordial understanding perfectly aligns with experience so as to successfully bridge the gap in communicative exchanges. Rather, original understanding orients speaking beings in a particular way that is more authentic, meaning that their communication is more directly related to doing something rather than simply knowing about it. The communication of those who simply know about a thing, rather than do that thing, is what Heidegger calls “idle talk.”

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<sup>23</sup> Heidegger, *Being and Time*, 56.

<sup>24</sup> Blattner, *Heidegger’s Being and Time*, 130-2; Dreyfus, *Being-in-the-world*, 229-232.

<sup>25</sup> Dreyfus, *Being-in-the-world*, 216.

<sup>26</sup> Hubert L. Dreyfus, *What Computers Still Can’t Do: A Critique of Artificial Reason* (Cambridge, MA: MIT Press, 1992), xii.

Idle talk, linked to Lacan's empty speech, is bivalent, associated with positive and privative understanding.<sup>27</sup> Positive understanding is our everyday understanding, what we think a normal doer does with something in a normal way. It does not originate in *doing* directly, but through tangential knowledge. While a concert pianist might have a primordial understanding of playing the piano, she might only have a positive understanding of teaching someone else how to play. Certainly she understands the importance and general structure of teaching, having herself been taught at some point, but although her knowledge of playing is expert she does not have a primordial understanding of *teaching* itself. She can only talk about it tangentially from her experiences of having been taught, and her knowledge of playing the piano. The vast majority of our communication, under normal circumstances, occurs at this positive level of understanding.

Privative understanding, on the other hand, is a step further removed from doing. Heidegger associates this mode of understanding with gossip, and it requires some explanation. Human communication does not function at the level of discourse, as the latter is the condition of possibility for the former. However, communication obtains a certain manner of genuineness simply because it is intersubjective. Where positive understanding is tangentially related to doing, privative understanding substitutes speaking itself for primordial doing and the word of the subject suffices to establish truth. Thus, Heidegger says, "Because this discoursing has lost its primary relationship-of-Being toward the entity talked about, or else has never achieved such a relationship, it does not communicate in such a way that this entity be appropriated in a primordial manner, but communicates rather by following the route of *gossiping* and *passing the word along*."<sup>28</sup> Whereas positive understanding is at least tangentially related to doing, privative understanding and its expression in idle talk are fully groundless since there is no relationship

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<sup>27</sup> Dreyfus, *Being-in-the-world*, 229-232; Blattner, *Heidegger's Being and Time*, 129-135.

<sup>28</sup> Heidegger, *Being and Time*, 212 (emphasis in original).

between speech and doing. In this sense Heidegger's use of the term "gossip" is quite literal, because each statement in idle talk is necessarily preceded by an implicit "I heard that..." Thus the lack of grounds in positive understanding gives way to a fully groundless talk, one that not only has no relationship to primordial understanding but actively conceals the possibilities of such understanding as well.

Positive understanding has no real corollary in Lacan's early work, but privative understanding is clearly associated with the formation of imaginary relationships through empty speech. Note the affinity between Heidegger's text quoted above and the following from Lacan: "Even if it communicates nothing, discourse represents the existence of communication; even if it denies the obvious, it affirms that speech constitutes truth; even if it is destined to deceive, it relies on faith in testimony."<sup>29</sup> Lacan finds in idle talk not a lamentable loss, but an opening through which psychoanalytic technique becomes possible. Whereas Heidegger construes the transition from primordial to privative understanding as a *fall*, Lacan treats that fall as the condition of possibility for an authentic subjectivization. As will become clear, empty speech plays a fundamental role in analysis because it points to the possibility of full speech.

Speech, for Lacan, is necessarily intersubjective because it establishes a relationship between the speaking subject and the subject of speech. In Lacan's words, speech "is thus an act and, as such, it presupposes a subject. But it is not enough to say that, in this act, the subject presupposes another subject, for it is rather that he establishes himself by being the other, but in a paradoxical unity of the one and the other by means of which...the one defers to the other in order to become identical to himself."<sup>30</sup> Statements such as "You are my wife" also signify "I am

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<sup>29</sup> Lacan, *Écrits*, 209.

<sup>30</sup> *Ibid.*, 291.

your husband.”<sup>31</sup> Speech gains its value from its constitutive, rather than representational, effect, and its necessary intersubjectivity is the precondition for the dialogic process known as psychoanalysis.<sup>32</sup>

Before engaging the distinction between full and empty speech directly, it should be understood that the distinction between empty and full speech, as Biesecker notes, is never concisely or clearly laid out by Lacan himself.<sup>33</sup> To be sure, ambiguity is both a benefit and a frustration in engaging Lacan’s texts in general, although it might be considered uniquely frustrating in this case since full speech largely disappears from Lacan’s work in 1955, a mere two years after its introduction.<sup>34</sup> I would like to suggest, however, that the ambiguity in the distinction between empty and full speech vanishes if one properly situates each form of speech in its original Lacanian register, resisting the temptation to read full speech into Lacan’s late work. The latter move is particularly precarious given Bruce Fink’s observation that Lacan’s later work critiqued, rather than supplemented, full speech.<sup>35</sup> With this in mind, we turn our attention to empty and full speech.

### Empty Speech

Following Mikkel Borch-Jacobsen and Raoul Moati,<sup>36</sup> Biesecker describes empty speech as “Lacan’s name for all those speech acts—indeed, the vast majority of utterances—that accord with the shared symbolic code and its correlative rationality, and that together constitute the

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<sup>31</sup> A conclusion also reached by Biesecker, see: “Prospects of Rhetoric for the Twenty-First Century: Speculations on Evental Rhetoric Ending with a Note on Barack Obama and a Benediction by Jacques Lacan,” in *Reengaging the Prospects of Rhetoric: Current Conversations and Contemporary Challenges* (New York: Routledge, 2010), 25.

<sup>32</sup> “Speech thus seems to be an all the more true instance of speech the less its truth is based on what is known as ‘corresponding to a thing.’” Lacan, *Écrits*, 291.

<sup>33</sup> Biesecker, “Prospects of Rhetoric,” 21.

<sup>34</sup> Evans, *Introductory Dictionary*, 194; Fink, *Lacanian Subject*, xvi.

<sup>35</sup> Fink, *Lacanian Subject*, 79.

<sup>36</sup> Mikkel Borch-Jacobsen, *Lacan: The Absolute Master*, trans. Douglas Brick (Stanford: Stanford University Press, 1991); Raoul Moati, “The Performative and Ordinary Conventions to the Real,” trans. Laura Morland, *The Symptom* 9 (2008): [EBSCO].

domain of reference we call reality and Lacan calls the Symbolic.”<sup>37</sup> Importantly, and Biesecker quotes Borch-Jacobsen at great length to this end,<sup>38</sup> empty speech not only shapes our belief in a reality it creates, but “[redoubles] our beliefs in signification’s noumenal beyond...[delivering] us over to the grand illusion of the signified, the spatial and temporal coordinates of the symbolic, and likely, then, to finitude’s grip.”<sup>39</sup> This definition is rather ambiguous, and glosses over an important dimension of empty speech (namely its significance in the psychoanalytic process) by equating it, I believe incorrectly, with the symbolic. In this section I offer another definition of empty speech, which situates it at the level of the imaginary.

Lacan describes the least rewarding analytic form of speech “as empty speech in which the subject seems to speak in vain about someone who—even if he were such a dead ringer for him that you might confuse them—will never join him in the assumption of his desire.”<sup>40</sup> The speaker of empty speech described in this quotation is not the subject per se; it is, rather, the ego—an imaginary object of self-identification.<sup>41</sup> This interpretation is justified both because of Lacan’s general claim that the speaking subject and subject of speech are different, but more importantly because that difference is made irreducible in the above quotation; that is, the subject of empty speech can never become the speaking subject, and vice versa. Empty speech attempts to create a relationship between the ego and alter-ego, which Lacan considers to be a form of mediation between the analyst and analysand.<sup>42</sup> Precisely because empty speech operates at the level of this ego/alter-ego exchange, it never rises to that of the subject or of the symbolic.

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<sup>37</sup> Biesecker, “Prospects of Rhetoric,” 21.

<sup>38</sup> Borch-Jacobsen, *Lacan: The Absolute Master*, 137.

<sup>39</sup> Biesecker, “Prospects of Rhetoric,” 22.

<sup>40</sup> Lacan, *Écrits*, 211.

<sup>41</sup> Fink, *Lacanian Subject*, 36-37.

<sup>42</sup> Colette Soler, “The Symbolic Order (I),” in *Reading Seminars I and II: Lacan’s Return to Freud*, ed. Richard Feldstein, Bruce Fink, and Maire Jaanus (Albany, NY: State University of New York Press, 1996), 41-42; Bruce Fink, “The Seminar of Jacques Lacan,” *The Symptom* 10 (2009): [EBSCO].

At the stage in his theorization in which empty speech is first described (1953) Lacan is “*forging* a distinction” between the imaginary and the symbolic, between the ego and the subject.<sup>43</sup> The link between empty speech and the ego determines the stance the analyst takes toward the analysand. As Lacan notes, “the only object that is within the analyst’s reach is the imaginary relation that links him to the subject qua ego; and although he cannot eliminate it, he can use it to adjust the receptivity of his ears.”<sup>44</sup> Beyond its auto-enunciative *interregotive* function, empty speech represents the analysand’s attempt to establish a relationship with the analyst through identification (which for Lacan is operative in the imaginary), and one of the major goals of analysis is to attenuate imaginary interference, while still relying on empty speech as the primary medium of analysis itself.<sup>45</sup>

Situating empty speech at the level of the imaginary has two significant implications, which form the basis of my argument against full speech as the theoretical basis for an evental rhetoric. First, it serves as a reminder that Lacanian psychoanalysis is, first and foremost, a specific therapeutic technique. Addressing the practical dimensions of Lacan’s theoretical work highlights certain features of his thought which might otherwise recede into the background, but which are nevertheless essential to his theory as a whole. This is especially true when attempting to take theory developed in the context of a relatively nuanced, intimate, and sustained communicative situation such as psychoanalysis and map it onto unpredictable, rowdy, and fleeting public situations such as political speech.

Second, treating empty speech as an expression of the ego provides a clear point of contrast that sharpens the distinction between empty and full speech, and structures how one conceives of the *effect* of the latter. The shift from empty speech to full speech is the shift from

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<sup>43</sup> Soler, “The Symbolic Order (I),” 39-40 (emphasis in original).

<sup>44</sup> Lacan, *Écrits*, 211.

<sup>45</sup> Fink, *Lacanian Subject*, 87.



the imaginary to the symbolic, from the ego to the subject. Rather than collapsing the therapeutic and descriptive into a single ontology, it becomes possible to recognize that empty speech has a particular significance within the interlocutory structure of the analytic session, *where speech itself is the means of treatment*.

### **Full Speech I: Punctuation**

As I noted in the introduction to Part I, Biesecker introduces the Lacanian other to the previously dyadic relationship presupposed by theories of communication (i.e. speaker ↔ audience). The presence of the Other calls attention to “the subjective mechanism by which...speaking and listening beings are integrated into a given sociosymbolic field,”<sup>46</sup> meaning that the discussion precipitated by the Other is one about the symbolic as such, about desire. This reconfiguration of the communicative act takes as its subject the very means of its practice, not in a general theoretical sense, but in terms of how the symbolic structures the given field of a particular rhetorical situation.

Communication through language, for Lacan, is not “a signal by which the sender informs the receiver of something by means of a certain code.”<sup>47</sup> Nor is language a series of signs that point directly to reality. Rather, language obtains its significance through the ever-evolving syntagmatic, paradigmatic, and phonological relationships amongst signifiers and signifieds.<sup>48</sup> To illustrate this distinction, Lacan compares the “waggle dance” of the honeybees (language-as-code) to a typical instance of direction-giving in human communication. The honeybees’ dance serves as a way to communicate the location of pollen to the hive. The dance corresponds directly to certain materialities such as distance or direction, and this

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<sup>46</sup> Biesecker, “Prospects of Rhetoric,” 24.

<sup>47</sup> Lacan, *Écrits*, 245.

<sup>48</sup> Ernesto Laclau, “Articulation and the Limits of Metaphor,” in *A Time for the Humanities: Futurity and the Limits of Autonomy*, ed. James J. Bono, Tim Dean, and Ewa Plonowska Ziarek (New York: Fordham University Press, 2008), 61-82.

correspondence is “fixed,” insofar as its message is one of direct reception rather than interpretation.<sup>49</sup> This fixity, Lacan argues, prevents the realization of subjectivity because although it determines the actions of the socius, it is never synthesized or abstracted.

Language-as-language, on the other hand, has the potential to define subjectivity, and is the domain of full speech.<sup>50</sup> “The form in which language expresses itself in and of itself defines subjectivity. Language says: You will go here, and when you see this, you will turn off there.”<sup>51</sup> While language-as-language communicates much of the same information as language-as-code (in this case, directions to a location) the means through which this information is transmitted are dramatically different. An essential component of this difference is that speech “always subjectively includes its own reply.”<sup>52</sup> The statement “You are my wife” establishes a relationship to an other and to the subject through it. This does not mean that “You are my wife” should be understood solely in its inverted form “I am your husband,” but rather as both together. “Full speech is speech that aims at, which forms, the truth as it becomes established in the recognition of one person by another. Full speech is speech which performs (*qui fait acte*).”<sup>53</sup> The act in question is a reciprocal definition of subjectivity, the truth established through the Other, erupting out of a shift between empty and full speech (although it is, strictly speaking, a function of the latter).

If speech is the only point of articulation between the analyst and analysand, then the transition to full speech must happen within that articulation. As Lacan explains: “When the subject’s question assumes the form of true speech, we sanction it with our response; but I have

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<sup>49</sup> Lacan, *Écrits*, 245.

<sup>50</sup> *Ibid.*, 246.

<sup>51</sup> *Ibid.* (internal quotation marks omitted)

<sup>52</sup> *Ibid.*

<sup>53</sup> Jacques Lacan, *The Seminar of Jacques Lacan: Freud’s Papers on Technique*, ed. Jacques-Alain Miller, trans. John Forrester (New York: W. W. Norton & Company, 1991), 107.

shown that true speech already contains its own response—thus we are simply doubling his antiphon with our lay. What can this mean except that we do no more than give the subject’s speech its dialectical punctuation?”<sup>54</sup> Punctuation is a form of intervention on the part of the analyst that ‘fixes’ full speech by arresting the signifying chain and anchoring it to a particular meaning. Taking a variety of forms, including speaking or ending the session at an opportune moment,<sup>55</sup> punctuation shows “the subject that he is saying more than he thinks he is.”<sup>56</sup> When Lacan claims that the effect of the analyst’s response to full speech is “truly to recognize or abolish [the analysand] as a subject,” he is not referring to the analyst’s full speech, but to the effect of response as a form of punctuation.

Here one might raise a series of objections to the use of Lacanian full speech as the theoretical basis for evental rhetoric. First, as I have already mentioned, it is precarious to map a concept dependent on the unique nature of analysis onto a public utterance. While Lacan acknowledges that full speech contains its own response, he emphasizes that the analyst’s unique training in *hearing through* empty speech is indispensable in recognizing and subsequently fixing the significance of full speech through punctuation. Second, it appears that the evental rupture in full speech is not the speech itself, which the subject could utter without a transformation of subjectivity, but in punctuation insofar as the latter solidifies the former as transformational.

These are both valid criticisms and to say, as Biesecker does, that intervention signals an “analyst’s movement into full speech,” conceals the truly revolutionary character of speech in Lacanian psychoanalysis.<sup>57</sup> The analyst never “transitions to full speech” because she must always already inhabit it. One of the greatest dangers an analyst faces is her own descent to the

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<sup>54</sup> Lacan, *Écrits*, 255.

<sup>55</sup> Hence Lacan’s support for the variable length session. see: *Ibid.*, 255-257.

<sup>56</sup> Lacan, *The Seminar of Jacques Lacan: Freud’s Papers on Technique*, 54.

<sup>57</sup> Biesecker, “Prospects of Rhetoric,” 28.

level of the imaginary where she “gets caught up in the same game of comparing [herself] with [her] analysands, sizing up their discourse in terms of [her] own.”<sup>58</sup> This point cannot be overemphasized, and is one of the central reasons that a psychoanalyst must have undergone her own analysis before practicing. The punctuation of full speech is an intervention in the symbolic register that cannot be carried out if too much interference remains from the imaginary. If punctuation fails, the analysand resists and “sinks his claws into the analyst...not being able to attain the full symbolic role Lacan assigns it, speech reverts to the imaginary role of pure mediation between the ego and its other.”<sup>59</sup> Thus, the importance of properly situating empty speech in the imaginary register becomes clear: the failure of analysis is the failure to attain full speech, the identification of the subject with the ego in the imaginary rather than with the Other in the symbolic.

Full speech causes the analysand to take up a “humble position vis-à-vis the big Other,”<sup>60</sup> precisely because of the subjectivizing effect of her recognition as a subject by the analyst through punctuation. Punctuation is thus part of the “*point de capiton*, by which the signifier stops the otherwise indefinite sliding of signification.”<sup>61</sup> The conceptual separation between punctuation and full speech is tenuous because the effect of the former is coextensive with—and solely operative through—the latter in its status as speech. It is this inseparability that gives full speech its evental nature; to paraphrase Biesecker: it is never the radical act nor event, and always the radical act of punctuated full speech, that offers the way out of the recurring imaginary impasse.<sup>62</sup>

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<sup>58</sup> Fink, *Lacanian Subject*, 86.

<sup>59</sup> Fink, “The Seminar of Jacques Lacan,” 2.

<sup>60</sup> Biesecker, “Prospects of Rhetoric,” 25.

<sup>61</sup> Fink translates *point de capiton* as “button tie,” though he leaves the original French in brackets. For consistency, all instance of that term in this essay will be left in the original French. Lacan, *Écrits*, 681.

<sup>62</sup> Biesecker, “Prospects of Rhetoric,” 26.

To put it another way, punctuation and its effect are only manifest within the subject, and their condition of possibility is the interlocutory structure of speech. Because speech carries with it its own response—the exteriority of the analyst’s intervention is interiorized by dialectical intersubjectivity—the subject was always already present in the act of full speech prior to its punctuation as such. Empty speech and full speech do not have a hierarchical relationship insofar as either is exhibited in language; rather, their utterances are coincident. The shift between empty and full speech is the shift in register of enunciation from ego to subject. To use a spatial metaphor, empty speech and full speech are two sides of a stone tablet: one side is viewed at the exclusion of the other. Yet the radical impossibility of simultaneously apprehending both sides is confounded by the simple fact that they are one tablet, joined by an edge. Full speech and empty speech, insofar as either could be reduced to language, are not really distinguishable. Empty speech is speech in which the subject seeks to identify with an external other, an alter ego, at the level of its own ego. Full speech is speech in which the subject seeks to stand alongside the Other as a subject.

In Biesecker’s account of evental rhetoric as full speech, however, it would appear that the ‘event’ itself is reducible to punctuation: “It is a rhetoric that enacts a doubled erasure, the emptying out of two salient signs, speaker and audience, thereby freeing both from the symbolic fate the big Other consigns...subtracted completely from the symbolic, it is a rhetoric that clears the way for its perlocutionary effect—the emergence of a “we” whose prospects will not be determined by the given horizon of what appears to be possible since its very emergency constitutes a breach in the very contours of the impossible.”<sup>63</sup> However, Lacan draws a distinction between the process by which full speech arises in the subject (the punctuation of previously unpunctuated full speech), and the *effects* of the transition between empty and full

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<sup>63</sup> Ibid., 28-29.

speech. This effect, provisionally described as the assumption by the subject of its subjectivity through its historicity, is the radical dimension of full speech, and the subject of the next section.

### **Full Speech II: Historicity**

The analyst's role in relation to full speech is its punctuation, which requires that the analyst avoid identifying with the analysand qua ego. If punctuation takes the form of speech, how exactly is the analyst to speak? It should be noted that the analyst does not need to speak often, "For he does not need to say much in the treatment (so little, indeed, that we might believe there is no need for him to say anything) in order to hear...the subject pronounce before him the very words in which he recognizes the law of his own being."<sup>64</sup> To achieve this end, Lacan insists, "the analyst must aspire to a kind of mastery of his speech that makes it identical to his being."<sup>65</sup> The effect of full speech is intimately connected with the ontological dimensions of Lacan's theory, specifically his notion of being, which was heavily influenced by Heidegger's philosophy of Dasein.<sup>66</sup>

A few paragraphs before he describes the effect of full speech, Lacan equates memory as history to the Heideggerian concept of *gewesend*, usually formulated as "Ich bin gewesen" meaning "I am having been."<sup>67</sup> However, *gewesend* is never simply an indulgence in the past; rather, it is part of a futural being. "*Being Dasein authentically as it already was...is possible only in such a way that the futural Dasein can be its ownmost 'as-it-already-was'—that is to say, its 'been' [sein 'Gewesen']...As authentically futural, Dasein is authentically as 'having been'...Only so far as it is futural can Dasein be authentically as having been.*"<sup>68</sup> This quotation illustrates the importance of having been, not only for the subject in the present but also in the

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<sup>64</sup> Lacan, *Écrits*, 298.

<sup>65</sup> *Ibid.*, 297-298.

<sup>66</sup> William J. Richardson, "Heidegger and Psychoanalysis?," *Natureza Humana* 5 (2003): 9-38.

<sup>67</sup> Lacan, *Écrits*, 212.

<sup>68</sup> Heidegger, *Being and Time*, 373 (emphasis in original).

future. It is unnecessary to explore the complex temporality found in *Being and Time* to reach the important point for Lacan: authentic being, which we might analogize to the subject of full speech, has the condition of *having-been* and *will-be-as-having-been*. As Fink notes, this is featured in Lacanian thought by the use of the future-anterior verb tense, as in the phrase “By the time you might bring dinner, I will have already eaten.”<sup>69</sup> The possibility of bringing dinner is determined by something that has already happened in the past of the future. Thus the subject finds itself in the future, as something that will have been. Its history is cast forth as the condition of its possibility.

What does history have to do with full speech? *Everything*. “Let’s be categorical: in psychoanalytic anamnesis, what is at stake is not reality, but truth, because the effect of full speech is to reorder past contingencies by conferring on them a sense of necessities to come, such as they are constituted in the scant freedom through which the subject makes them present.”<sup>70</sup> The assumption of history is the crucial effect of full speech, yet it receives little attention in Biesecker (or in Borch-Jacobsen or in Moati). What would otherwise have been an obscure utopian moment in analysis, the punctuation of full speech, is given a more concrete character insofar as we now begin to understand that “Analysis can have as its goal only the advent of true speech and the subject’s realization of his history and its relation to a future.”<sup>71</sup> Much like the authentic futural Dasein in Heidegger, the subject for Lacan takes hold of what it will become by recognizing itself as something that will have been.

Lacan draws a distinction between development (*Entwicklung*) and history (*Geschichte*), the former being a process of formation and the latter “that in which the subject recognizes

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<sup>69</sup> Fink, *Lacanian Subject*, 64.

<sup>70</sup> Lacan, *Écrits*, 213.

<sup>71</sup> *Ibid.*, 249.

himself, correlatively in the past and in the future.”<sup>72</sup> In other words, the subject recognizes herself as will-be-as-having-already-been, as the solidification of contingency into necessity. Analysis does not treat history as a series of events “producing” the subject; rather, psychoanalysis *reconstructs* history from the futurity of the subject.<sup>73</sup> However, the analyst can never “pronounce” this history to the subject; it cannot come in an alienated form. Moreover, the subject cannot come to its futurity through the ego. The analysand, alienated from history, must grasp her future from the position of subjectivity. The proper assumption of this history is only possible within psychoanalytic interlocution.<sup>74</sup>

It is difficult to read such an account of history into Biesecker’s theory. Although she quotes Lacan writing “what is realized in my history is neither the past definite as what was, since it is not more, nor even the perfect as what has been in what I am, but the future anterior as what I will have been, given what I am in the process of becoming,”<sup>75</sup> the specific passage receives no attention in the subsequent analysis. The reader, with little guidance, is left to wonder if evental rhetoric has a similar historicizing effect, how that effect is manifest, and to what extent it is concurrent with or subsequent to the speech act. The lack of a sustained discussion of the relationship between evental rhetoric and the subjective assumption of history is evidence of an unresolved incongruity between the relatively private experience of analysis and the public manifestation of an evental rhetoric, which points toward one of two ways in which full speech is an insufficient foundation for a theory of the event: namely, the essentiality of analysis to full speech.

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<sup>72</sup> Ibid., 157.

<sup>73</sup> Fink, “The Seminar of Jacques Lacan,” 3.

<sup>74</sup> Lacan, *Écrits*, 214.

<sup>75</sup> Ibid., 247; as quoted in Biesecker, “Prospects of Rhetoric,” 28.



### **Beyond Full and Empty Speech**

The assumption of subjectivity by the subject can only occur in a dialectical situation in which one party is in a position to recognize the other party as a subject. “The decisive function in my own response thus appears, and this function is not, as people maintain, simply to be received by the subject as approval or rejection of what he is saying, but to truly recognize or abolish him as a subject.”<sup>76</sup> Full speech does more than mask the projection of its inverted form; it invites recognition from the other and Other, establishing a relationship beyond mediation in which the subject can assume its co-equal subjectivity. Again, we are left to wonder how this type of dialectical situation can come to bear in public speech; what in public culture is capable of “suspending the subject’s certainties until the final mirages have been consumed;”<sup>77</sup> who is capable of punctuating full speech. The answers are central to the account of evental rhetoric as full speech, because the perlocutionary effect of the former is obtainable only as a result of an intervention that is, indeed, external in the form of punctuation. Lacan maintains that psychoanalysis is tenuous, precise, and time consuming, which complicates, if not precludes, the public manifestation of an analytic dialectic.

A provisional formulation of full speech as evental rhetoric might situate the speaker as the analyst and the cultural audience as the analysand. The speaker recognizes the pregnant currents of possibility within public discourse, and in a moment of brilliant oratory punctuates those possibilities as a true cultural form of full speech. Suspending the relationships of identification and rivalry which dominant current political discourses, rhetorical intervention as punctuation affords a sort of collective subjectivization, transcending the milieu of imaginary cultural relations and elevating the socius to a co-equal symbolic recognition. Evental rhetoric

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<sup>76</sup> Lacan, *Écrits*, 247-248.

<sup>77</sup> *Ibid.*, 209.

would be *both* the utterance of the speaker and the assumption of history qua subjectivity in the audience. Such an account of evental rhetoric seems utopian to the extreme, but its possibility in the dialectic of analysis hints at its plausibility within a broader cultural setting.

But it appears that this is *not* what Biesecker has in mind in describing evental rhetoric. While the imaginary/symbolic distinction is clear and instructional in Lacan's early work, it is complicated by his later theory that the imaginary is structured by the symbolic when the subject is ratified by the Other; that is, after the ego is "confirmed" in language and transforms into the ego-ideal. The mirror stage marks the introduction into the imaginary. The parent ratifies that self-image saying, "Yes, baby, that's you!" and the self-image is immediately restructured by the Other as language and shifts the register of identification from image to the signifier, manifest in ideals, laws, etc. Biesecker notes that full speech essentially "triggers an awareness of the limit of the Symbolic," that "full speech and evental rhetoric lend a sense of the noting 'inside' the Symbolic."<sup>78</sup> In other words, full speech recognizes the lack of the Other (as law, language, etc.), corresponding to *separation*, which Lacan claimed "gave rise to being."<sup>79</sup> This recognition within the barred subject that the Other is also barred, that the Other itself "hasn't got it, hasn't got the final answer,"<sup>80</sup> heralds the displacement of desire itself, hence "*Le désir de l'homme, c'est le désir de L'Autre.*"

Here we see the second way in which full speech is an insufficient account of evental rhetoric: the evisceration of the relationship of being to speech through the introduction of the real. As Soler notes, Lacan, before abandoning full speech, had not yet developed the real as a

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<sup>78</sup> Biesecker, "Prospects of Rhetoric," 26-27.

<sup>79</sup> Fink, *Lacanian Subject*, 53-55.

<sup>80</sup> Žižek, *The Sublime Object of Ideology*, 122; as quoted in Biesecker, "Prospects of Rhetoric," 26.

concept, and certainly not to the extent found in the later seminars.<sup>81</sup> Soler maintains that Lacan's theorization of the real (in its dissociation from the imaginary) undergoes a relatively significant shift, which is nothing less than a turn away from speech in the assumption of being:

Being is, in a certain way, the real, but a real transformed by symbolization. It is a first definition and is not far from identifying the subject and being: if the subject is a subject created by speech, subject and being are virtually identical. Lacan later changes on this point. When he says that the analysand has to become able to tolerate being, what he then calls being is not the real, for the analysand manages to say it. Rather, being is the real as impossible to say. In the end, he sometimes calls being the part that is impossible to symbolize, and remains impossible to symbolize, and that is what he calls object *a*. If analysis is always situated as a relation to being, it is not always in the same sense. There is an evolution which is, in fact, a complete reversal.<sup>82</sup>

Full speech sutures the analysand into the symbolic *as a subject*: speech always carries with it its own response, and the assumption of a subjectivity recognized by the analyst through punctuation produces *something new* that was already there in the form of subjectivity. By the time the subject is punctuated in full speech, it will have already arrived in the form of unpunctuated full speech. The relationship of the subject to being, from the outset of analysis, is that of the future anterior. Subject and being are identical in punctuated full speech.

Thus we arrive at the heart of the matter. Based upon Soler's observations in the above quotation, we see that the later Lacanian notion of the real is fundamentally incommensurable with the subjectivizing effect of full speech. If the real marks a lack in the symbolic, how could

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<sup>81</sup> Colette Soler, "The Symbolic Order (II)," in *Reading Seminars I and II: Lacan's Return to Freud*, ed. Richard Feldstein, Bruce Fink, and Maire Jaanus (Albany, NY: State University of New York Press, 1996), 58-59 (emphasis in original).

<sup>82</sup> *Ibid.*, 59.

speech, which in this formulation is the vehicle through which the subject might enter the symbolic, be able to “trigger an awareness” of its limit? What Moati achieves is not, as Biesecker suggests, a re-reading of full speech through later Lacan, but a dissociation of speech acts from full speech, and the elaboration of these speech acts in light of Lacan’s thinking from the 1960s forward. Moati’s critique of Borch-Jacobsen is thus a critique of full speech as a radical speech act. In other words, evental rhetoric as Biesecker lays it out is anathema to the theoretical presuppositions which undergird Lacan’s formulation of full speech.

None of this is to say, however, that the conclusions Biesecker has reached with regards to the transformational nature of evental rhetoric are incorrect. Instead, this long explanation illustrates that evental rhetoric is not full speech in the Lacanian sense, but something far more radical. Evental rhetorics “are the discursive interventions that function as ground zero for fashioning our way out of mistaking the given for “the all” and thereby delivering ourselves over to its endless repetitive cycle...evental rhetoric[s] lend a sense of the nothing “inside” the Symbolic, cast a doubt on its capacity to represent at all.” Thus, for Biesecker, “the failure of representation—the utter impoverishment of the sign into mere signifier—is [evental rhetoric’s] positive condition.”<sup>83</sup> The remainder of Part I articulates a robust theoretical defense of the event without reference to full speech, which not only accounts for the rhetoricity of the event itself, but also engages history in the future anterior sense, not as “I have been” but as “I will be as having been,” in which contingency shifts to necessity, and we are afforded access to the real as truth. Such a theoretical defense can be found in the relationship between Lacan and Nietzsche—as articulated by Alenka Zupančič, as a philosophy of the two.

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<sup>83</sup> Biesecker, “Prospects of Rhetoric,” 26-27.

## TWO | Philosophy of the Two

“It was at midday that One turned to Two...”<sup>1</sup>  
 –Nietzsche

Alenka Zupančič notes, in her book *The Shortest Shadow: Nietzsche's Philosophy of the Two*,<sup>2</sup> that the event is “the concept of something that, in Nietzsche, has no concept, only a recurrent (linguistic) image.”<sup>3</sup> That image is the figure of noon. While the discussion of the event that follows does not reference the figure of noon to a significant extent, several of its features animate the discussion extensively and are worth noting at the outset. First, the German word for noon, *Mittag*, would be transliterated as midday, *Mitte* meaning “middle” and *Tag* meaning “day.” Nietzsche places the event as noon in the middle of things, suggesting that it should be understood as an interruption. The event does not signal the beginning of a new day, nor does it mark the end of a previous regime; rather, the event as midday exists as the smallest interval between two coherent symbolic edifices. Our day is structured not around sunrise and sunset, nor around midnight (when one day turns to the next) but around noon: *ante meridiem* (A.M., lit. before midday) and *post meridiem* (P.M., lit. after midday). In this way, noon affects what comes before it and what comes after. Noon is an interstice that simultaneously links and separates two temporalities.

While midday is a single point in time, Nietzsche's figural treatment gives it a rather idiosyncratic, internal, temporality, which Zupančič calls “time-within-time.” This temporality receives a more extensive treatment in a later section; for now, however, we might characterize this temporality as an instance of one becoming two. Indeed, as the quotation introducing this

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<sup>1</sup> Friedrich Nietzsche, *Beyond Good and Evil: Prelude to a Philosophy of the Future*, trans. Marion Faber (Oxford: Oxford University Press, 2008), 180. [Note: All other references to *Beyond Good and Evil* are made to Kaufman's translation, see note 10 below.]

<sup>2</sup> Alenka Zupančič, *The Shortest Shadow: Nietzsche's Philosophy of the Two* (Cambridge, MA: MIT Press, 2003).

<sup>3</sup> *Ibid.*, 87.

chapter suggests, one turning to two is a significant characteristic of the event. Nietzsche's noon is not the time when the sun eliminates shadows; on the contrary, noon is the time of "the shortest shadow," when the subject casts its shadow on nothing other than itself.<sup>4</sup> As I explain over the course of this chapter, one turning to two is the condition of possibility for the emergence of an evental subject and thus an evental rhetoric. The event is "the conceptual name for something that simultaneously separates and links two subjects."<sup>5</sup> However, these two subjects are not distinct in the sense that two people are distinct. The two subjects are differentiated subjectivities of the same subject. They are different in the sense that who I will have been is different from who I will be. "The subject exists, so to speak, along the two edges of the event. In this sense the only 'proof' of the event is the coexistence of this double subjectivity."<sup>6</sup> The rhetorical production of a double subjectivity takes the form of a double declaration, "I, the event, am speaking," and could be diagrammed in the following way:

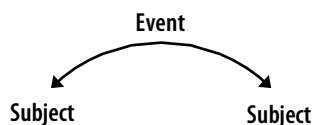


Figure 2.1

It would be a disservice to the reader and to Zupančič's richly complex theoretical work to attempt to summarize the substance of the event, its mechanics, and its effect in this introductory section. Instead, I will focus solely on the latter to provide some practical context for the philosophical discussion that follows.

The event and its various manifestations (as rhetoric, subjectivity, etc.) are defined most simply as the introduction of the new. In Lacanian terminology, one might think of the event in terms of a re-ordering of the symbolic in radically different terms. What Zupančič describes as

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<sup>4</sup> Ibid., 27.

<sup>5</sup> Ibid., 24.

<sup>6</sup> Ibid.

the event “Nietzsche,” for example, is a systematic de-centering of philosophical inquiry that abandons the traditional notions of “meaning” and valuation in favor of a philosophy of affirmation. The event “Nietzsche” is a philosophical attempt to get outside of the symbolic, and it is in fact intimately connected with the Nietzschean event(al rhetoric), with one major difference: an evental rhetoric does not necessarily require the abandonment of the symbolic *tout court* (in fact, as we will see, to attempt to live in the real is at best dangerous and at worst impossible). Instead, the event triggers in the subject a micro-event “Nietzsche,” a momentary abandonment of the symbolic, in order to create the conditions under which a radically *new* symbolic order might emerge. The event is, in other words, the recognition of the necessary contingency and contingent necessity of the present configuration of appearance. As one might suspect, this discussion takes its roots in Nietzsche’s complex relationship to the notion of truth, and it is there that our investigation begins.

### **Truth As Lies**

One of the core Nietzschean theses to be adopted by the rhetorical studies tradition is the rhetoricity of truth, expressed clearly in Nietzsche’s essay “On Truth and Lying in the Extra-Moral Sense.”<sup>7</sup> While twentieth century philosophers from Heidegger to Derrida have written about the discursivity of truth generally, there is something decidedly rhetorical about the Nietzschean account, namely its tropology. For example: “What is truth? a mobile army of metaphors, metonyms, anthropomorphisms, in short, a sum of human relations which were poetically and rhetorically heightened, transferred, and adorned, and after long use seem solid, canonical, and binding to a nation. Truths are illusions about which it has been forgotten that

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<sup>7</sup> Friedrich Nietzsche, “On Truth and Lying in an Extra-Moral Sense,” trans. Sander L. Gilman, Carole Blair, and David J. Parent (Oxford: Oxford University Press, 1989), 246-257 (emphasis in original).

they *are* illusions, worn-out metaphors without sensory impact.”<sup>8</sup> Nietzsche is not (yet) making an ontological claim about the symbolic nature of truth; his reference to “illusion” suggests that Nietzsche is still operating within the Kantian duality of appearance/reality. Indeed, the question of Nietzsche’s epistemological relationship to realism has been addressed by scholars of rhetoric, and while it is not my intention to re-litigate this debate,<sup>9</sup> an analysis of Zupančič’s work on Nietzschean truth provides a useful middle ground between the realist and relativist interpretations of Nietzsche, one that paves the way for his theory of the event.

In *Beyond Good and Evil*, Nietzsche argues that “untruth,” the fiction through which we live our lives (e.g. values, language, law), is a “condition of life...and a philosophy that risks [admitting] this would by that token alone place itself beyond good and evil.”<sup>10</sup> Nietzschean untruth is in many ways similar to the Lacanian symbolic (specifically the construction of reality), and truth, Zupančič argues, is roughly equivalent to the real. She quotes the above passage from Nietzsche alongside another from *Ecce Homo*, in which he suggests that truth is “dangerous,” and the relationship of being to truth is one of courage, strength, and endurance.<sup>11</sup> These two passages make a common claim, that truth is not an “adequate medium” for life, and that it is our fictions that enable us to live.<sup>12</sup> Here we see a shift in Nietzsche’s elaboration of truth from an illusion to the dangerous real; however, this does not mark a transition in Nietzsche’s philosophical trajectory, but one between the registers of the epistemological and the

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<sup>8</sup> Ibid., 250.

<sup>9</sup> James W. Hixson, “The Seductive Waltz: Rhetoric and Contemporary Interpretations of Nietzsche,” *Quarterly Journal of Speech* 85 (1999): 380-399; Michael McGuire, “Dancing in the Darkness on the Edge of Town: A Reply to Hixson’s ‘Seductive Waltz,’” *Quarterly Journal of Speech* 87 (2001): 96-104; Kevin Ayotte, John Poulakos, and Steve Whitson, “Mistaking Nietzsche: Rhetoric and the Epistemic Pest,” *Quarterly Journal of Speech* 88 (2002): 121-127.

<sup>10</sup> Friedrich Nietzsche, *Beyond Good and Evil: Prelude to a Philosophy of the Future*, trans. Walter Kaufman (New York: Vintage Books, 1989), 12.

<sup>11</sup> Friedrich Nietzsche, “Ecce Homo,” in *On the Genealogy of Morals/Ecce Homo*, ed. Walter Kaufman, trans. Walter Kaufman (New York: Vintage Books, 1989), 218; Zupančič, *The Shortest Shadow*, 91-92.

<sup>12</sup> Zupančič, *The Shortest Shadow*, 92.



existential. In the chapter “Why I am a Destiny,” in *Ecce Homo* Nietzsche draws this distinction clearly: “The truth speaks out of me—but my truth is terrible; so far one has called *lies* truth...I was the first to *discover* the truth by being the first to experience lies as lies.”<sup>13</sup> Truth, in the sense Nietzsche uses the term here, is not concerned with the felicity of a representation to materiality, of signifier to signified, but of the relationship of human being to the symbolic apparatus itself (what was called truth). Despite Nietzsche’s apparent belief in a truth, he is not a realist in the traditional sense since his investigation of truth is ontological rather than ontic.<sup>14</sup> Thus the question becomes how Nietzsche conceived of the relationship between truth and being.

Nietzsche addressed the relationship of being to truth in two ways. On one hand, “The strength of a spirit should be measured according to how much ‘truth’ one could still barely endure”; and on the other, “Why couldn’t the world *that concerns us*—be a fiction?”<sup>15</sup> In the former, the disjunction between truth and life is *dynamical* and human apprehension of truth is a

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<sup>13</sup> Nietzsche, “Ecce Homo,” 326 (emphasis in original).

<sup>14</sup> This has some bearing on the realism/relativism debate mentioned earlier. Zupančič notes that attempts to demarcate “stages” in Nietzsche’s philosophy (e.g. early versus late), especially on the question of truth, are ultimately futile. (96) In *Beyond Good and Evil* Nietzsche says: “Something might be true [in the sense of the real] while being harmful and dangerous in the highest degree. Indeed, it might be a basic characteristic of existence that those who would know it completely would perish, in which case the strength of a spirit should be measured according to how much of the “truth” one could still barely endure—or to put it more clearly, to what degree one would *require* it to be thinned down, shrouded, sweetened, blunted, falsified.” (49, emphasis in original) Two pages earlier Nietzsche says “If, with the virtuous enthusiasm and clumsiness of some philosophers, one wanted to abolish the “apparent world” altogether—well, supposing *you* could do that, at least nothing would be left of your “truth” either. Indeed, what forces us at all to suppose that there is an essential opposition between “true” and “false”? Is it not sufficient to assume degrees of apparentness and, as it were, lighter and darker shadows and shades of appearance—different “values,” to use the language of painters? Why couldn’t the world *that concerns us*—be a fiction?” (47, emphasis in original) Zupančič claims that the proximity of these two passages suggests that Nietzsche held both views at once together, and that the uniting characteristic is not the approach to truth and untruth but of *nuance*: “In the first passage, the nuance refers to the act of shading (diluting, disguising sweetening, muting, falsifying) the Truth as the Real. The latter is conceived as inaccessible on account of the discrepancy between its power or violence and our strength or capacity to tolerate this violence—we can approach it only by shading and deforming it to a certain extent. A nuance refers here to the degree of this shading; it refers to the “veil of truth,” a veil that is not essential to the truth itself, but only to *our* confronting and coping with truth.” (96-97) The second nuance, which will be treated at length as the notion of perspectivity, approaches the question of truth from *within* the structure of perspective. What we are dealing with here is precisely the division Douglas Thomas described between the philosophical (Platonic) Nietzsche and the rhetorical Nietzsche. (Douglas Thomas, *Reading Nietzsche Rhetorically* (New York: Guilford Press, 1998), 1.) They are two philosophical currents running through the same event “Nietzsche”.

<sup>15</sup> See note 14 above.

function of nuance (tempering the danger of exposing ourselves to the real).<sup>16</sup> In the latter the relationship between being and truth is *structural*, “stemming not from the disproportion of two powers, but from the nonrelation of two terms.”<sup>17</sup> The importance of this distinction lies in the effect of the dynamic relationship on epistemological objectivity. If objective truth (in the Enlightenment sense) exists and the apprehension of that truth is possible, then truth-seeing becomes a question of personality, strength, intelligence, etc. Ideology critique, for example, is a much stronger position when truth and being are dynamically related, because the critic is able to assert an imperative to objective truth, which has a culturally implicit normative dimension, at the heart of her criticism. Such an assertion is impossible if the relationship of being to truth is structural—that is, if truth in the objective sense is a condition of impossibility for human being—and it is within this approach, characterized as Nietzsche’s theory of perspectivity, that Zupančič grounds her theory of the event.

### **Perspectivity**

The Nietzschean theory of perspectivity could be summarized in the following way: “There is no objective truth, only perspective.” It is necessary first and foremost to dispel the misconception that perspectivity is equivalent to skeptical relativism. The latter falls prey to a paradox which functions as a performative contradiction: if the statement “all truth is relative” is true, then the statement too must be relative; if relativity is relative, then universal truth must exist somewhere, which disproves the claim that “all truth is relative”; thus, paradoxically, for “all truth is relative” to be true, it must also be false. Skeptics typically respond by positing relativism as the “last” (and only) metaphysical truth. As we will see, and Zupančič insists emphatically on this point, Nietzschean perspectivity is *not* skeptical, both as a matter of

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<sup>16</sup> Zupančič, *The Shortest Shadow*, 95.

<sup>17</sup> *Ibid.*, 97.

definition and the association of the latter with passive nihilism, a position Nietzsche rejected.<sup>18</sup> However, Nietzsche's investigation of truth is animated by a question raised in the relativist paradox: "Is the truth about a given configuration a part of this configuration too, or can it only be posited or formulated from outside this configuration?"<sup>19</sup> Whereas skeptical relativism treats truth as external (i.e. that relativism is the "last truth"), perspectivity treats truth as immanent to its situation. The internality of truth to the situation is, as we will see, one of the central components of eventual rhetoric.

If all human apprehension is perspectival, where different people have, in some cases quite literally, different points of view, any theory of truth immanent to a situation would itself exist as a perspective. The true perspective is not one that has greater affinity to the situation *qua* the real; it is not that  $S_1$  sees things more clearly than  $S_2$ . Zupančič argues that truth as perspective "belongs to no subject...although there is an intrinsic link between this singular perspective and the constitution of every subject belonging to the situation."<sup>20</sup> This quotation is important for several reasons. First, the perspective truth belongs to no subject because it is the condition of possibility of perspectivity itself; in other words, the perspective truth is the object-cause of knowledge. Second, if the perspective truth constitutes the relationship of every subject to the situation, the encounter with the truth must have a subjectivizing effect. In order to function in this way, truth as perspective must be intimately connected to the elimination of the Freudian oceanic self through the introduction of subjective split from the world of objects. Here it is helpful to return to Heidegger's discourse.

Discoursing, as we have seen, articulates the intelligibility of Being-in-the-world by dividing the world up, creating joints that connect discrete objects to the subject and each other

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<sup>18</sup> Ibid., 97-98.

<sup>19</sup> Ibid., 97.

<sup>20</sup> Ibid., 99.

as a way of making those objects significant and knowable. However, discoursing “lets us see something from the very thing which discourse is about,”<sup>21</sup> which implies that, at least originally, the subject and object were unified. Structural articulation is thus only possible if the subject cuts itself out of the object in order to establish a certain distance between them. It is through this distance that the subject is able to perceive the world *as* objects, and not merely as an extension of itself. While the act of severing the subject from the object constitutes the subject as such, there is still a joint between them. However, this severance leaves something behind: “The subject finds itself on the opposite side of objects or things (seeing them, exploring them, learning about them) only insofar as there is a ‘thing from the subject’ that dwells among these objects or things, a fragmentary remainder of subjectivity dissolved into the ‘stuff of the world’ through the occurrence of a primordial severance.”<sup>22</sup> Lacan called the position of the subject within the object the “gaze.” The gaze constitutes all subjects belonging to a situation precisely because it is the condition of possibility of those subjective relationships in the first place. Thus, the question of truth is not so much where we stand *in relation* to an object (point of view), but where we stand within the object itself, which enables us to *look at* the object as such. In other words, the perspective of truth is nothing other than the gaze.

In her day-to-day encounters with objects, however, the subject does not recognize her gaze, because the latter remains invisible to her. Indeed, the failure of objective knowledge is nothing other than a failure to recognize the point of gaze. Consider, for a moment, the optic nerve: it connects the brain to the eye allowing us to see; however, the very point of that connection creates a blind spot. Sight is only possible because of a lack of photoreceptors at the center of the iris. Likewise, the presence of the gaze suggests that the object is constituted by a

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<sup>21</sup> Martin Heidegger, *Being and Time*, trans. John Macquarrie and Edward Robinson (New York: Harper & Row, 1962), 56.

<sup>22</sup> Zupančič, *The Shortest Shadow*, 105.

lack that must be filled by a part of the subject. This lack structures knowledge like desire, insofar as each new discovery fails to address the lack, fails to account for the gaze.<sup>23</sup> The gaze is, in other words, the object-cause of knowledge, of untruth. To properly rupture knowledge (the symbolic), the subject cannot simply be aware of the gaze in an abstract sense, as we are all aware of the blind spot in the eye. To rupture the fantasy of representational “wholeness,” we must *encounter* the gaze. It is the job of an evental rhetoric to facilitate such an encounter.

Before addressing the mechanics of an encounter with the gaze, it is important to note that the encounter has a subjectivizing effect. In discoursing, the subject does not properly realize that its own constitution is a function of its differentiation from the field of objects. The encounter with the gaze establishes within the subject its own subjectivity through the recognition of itself in the object as gaze. Thus for Nietzsche the subject precedes subjectivization, and it is only by way of the latter that “one becomes ‘what one is,’ namely, that one becomes the subject one is.”<sup>24</sup> While the perspective truth has the special quality of constituting every subject belonging to a situation, it does not create universal subjective perspective. While truth is, ontologically, the abstract universal gaze, the constitution of the latter and the encounter with it are immanent to a situation, and unique to the particularity of which they are a part. Because of the relationship between the discursive production of subjectivity and the radical particularity of a situated encounter with the gaze, it seems relatively clear that the (evental) encounter will occur through language. The discursivity of the event will be discussed at length in a later section, but suffice it to say at this juncture that the rhetorical function of the event is predicated upon rhetoric’s ability to facilitate subjectivization in some way. In this sense evental rhetoric *cannot* be considered in terms of the speaker/message model of situated

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<sup>23</sup> Ibid., 106-107.

<sup>24</sup> Ibid., 111.

rhetorics. Rather, an evental rhetoric requires articulation in the Heideggerian sense, the ability to access the very relationship of the subject to the moment of severance between herself and the object.

That said, the encounter with truth becomes possible through a shift that occurs within the field of perspective as a shift *between* perspectives. This move does not exalt relativization through the recognition of multiplicity; rather it is a particular enunciation of the possibility of *two* exclusive positions and the possibility of moving between them.<sup>25</sup> In the moment of the shift the subject apprehends the possibility of the two, introducing a disjunction into the situation:

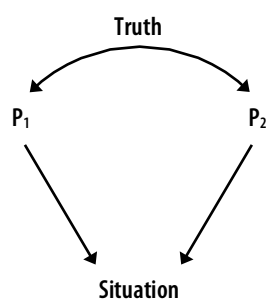


Figure 2.2

The shift in perspective instigates two significant realizations on the part of the subject. On the one hand, the possibility of distinguishing between two perspectives requires that they contain a kernel of immutable difference; otherwise they would simply be the same perspective. For example, viewing the same scene with only one eye open at a time highlights that despite the closeness of the two points of view, they are irreducibly dissimilar. On the other hand, the two perspectives contain a second kernel, one of immutable similarity, insofar as the objects perceived and the subject perceiving them remains the same. In shifting perspectives the subject comes to realize that what really matters is not her point of view from any particular position, but whatever it is that enables her to experience, simultaneously, the radical sameness and radical difference of two perspectives. In other words, the shift in perspectives fosters a sustained

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<sup>25</sup> Ibid., 113.

*decentering* of the subject, which enables her to encounter the gaze, the radical sameness that only emerges through a recognition of radical difference, as the perspective of truth.

Here we might hazard a provisional definition of evental rhetoric. The first characteristic of an evental rhetoric is not that it is “revolutionary” in the sense of a constructing a new center around which our worldview might orbit. Nor does it simply recognize an “absent center” in the field of objects as we see in postmodern linguistics. Rather, and Zupančič equates this move with Lacanian analytic discourse, the aim of an evental rhetoric must be a discourse that sustains the decentering of the subject.<sup>26</sup> One example of such a discourse, as we will see, is the double declaration: “I, the event, am speaking.” The autoreferential rhetorical structure of the statement allows the subject to shift perspectives between the subject of speech and the speaking subject. And it is from within the circulation around those elliptical foci that the subject is able to glimpse the truth as the gaze.

For a concrete example of the shift in perspectives, and double declaration, Zupančič turns to the play-within-the-play in *Hamlet*.<sup>27</sup> Hamlet asks a company of traveling thespians to stage *The Murder of Gonzago* for his uncle Claudius, which tells the story of a king who is murdered in the exactly the same way that Claudius killed his brother (Hamlet’s father) the King of Denmark. Despite having already heard the truth of his uncle’s treachery from the ghost of his father, Hamlet hopes to confirm the truth of his father’s murder by watching Claudius’ reaction to the staging of *Gonzago*; as expected, Claudius becomes upset during the murder scene and abruptly leaves. Zupančič highlights two effects from the *mise en abyme*: first, it establishes truth as truth within the play through the staging of truth itself; second, it illustrates that the truth is structured like fiction. We shall explore both effects in turn.

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<sup>26</sup> Ibid., 114.

<sup>27</sup> Ibid., 116-122.

The staging of truth within the play functions as a shift in perspective, emphasized particularly in Laurence Olivier's 1948 film version of the play. The film audience shifts between being the audience of *Hamlet*, and the audience of *Gonzago*. This does not cause the film audience to question the nature of watching a play in the abstract sense (i.e. a perspective *on* perspective). Rather, it has the specific effect within the situational structure of *Hamlet* of producing truth as perspective through decentering the audience as subject. Hamlet, and the audience, first hear the truth of the King's murder from his ghost. Since the audience did not witness the murder, the "truth" of the murder is not established in the play directly. In watching Claudius react to the murder in *Gonzago*, the audience occupies a position of the spectator within the play itself. To recognize Claudius' reaction as a reaction to the truth of the murder, the audience must already have some idea of the King's murder. However, once the audience recognizes that Hamlet's relationship to Claudius is the same as their own, they are immediately reminded that they do not exist alongside Hamlet, but are observers of the play *Hamlet*, and simultaneously occupy two perspectives. Thus, for the audience, Claudius' reaction, insofar as they identify with Hamlet's position, is structured as: "I, the truth, am speaking."

At the same time, however, we must remember that the murder of the King is never staged in the play *Hamlet* proper; it is only established through innuendo in the play-within-the-play. The truth, which spoke through the shift in perspectives, is structured like fiction. This structuring extends beyond the properly fictionalized account of *Hamlet*, and is a function of truth in the ontological sense. Here we see one of several reasons why Nietzsche *avec* Lacan is a more fitting theoretical model for evental rhetoric than Lacanian full speech. As Zupančič explains:



If we were to venture to propose a definition, we could say that truth is the staging of the Real by means of the Symbolic. The truth *aims* at the Real, and this expression is to be taken quite literally. Truth is neither truth *about*, or is it identical or synonymous with the Real. Truth is a certain relation to the Real, a relation that can be described as “privileged”...in order to assert this privilege, truth cannot appeal to any real outside of itself.<sup>28</sup>

Here, again, we see the central animating thesis of perspectivity: “I, the event, am speaking,” does not say anything outside of the situation in which it erupts. In other words, evental rhetoric does not contain an eternal (or universal) truth, or say something essential about the human condition. It does not re-center the subject’s world. Rather, evental rhetoric exposes something fundamental about the situation itself, however broadly it might be conceived, and consequently occurs *within* life. The event is not a stranger knocking at the door who “changes everything for the subject,” and in this sense it cannot be understood along the lines of full speech in the Lacanian sense (where punctuation occupies the position of that stranger). The event is immanent to a situation, and emerges from it, articulated through a rhetoric inaugurating a (sustained) shift in perceptive that exposes a truth which aims at the real.

In the final analysis, to say that “truth is structured like fiction” suggests that truth is self-contained yet holistic; there is no “outside” of truth. Fiction only extends as far as it is written by an author (and who that author is, of course, might change), and it is impossible to interpret fiction through non-fiction in the strictest sense (in that case, one would simply be rewriting the fiction). Nietzsche’s question, “Why couldn’t the world that *concerns us*—be a fiction?” is not an attack on philosophical investigations that endeavor toward the real. Instead, Nietzsche is arguing that the proper goal of epistemological investigation is not transcending appearance. The

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<sup>28</sup> Ibid., 121 (emphasis in original).

only account we have of the world is through the symbolic and the imaginary, through Heideggerian discourse. The severing of subject from object is an essential precondition to truth in the human sense. James Boyd White, in the preface to his book *The Edge of Meaning*, characterizes this fictionalization as a practice of *imagining* the world, and as I will argue in Part II the law functions precisely in this way.<sup>29</sup> Much like in *Hamlet*, where truth is established at the point where fiction folds back on itself (the play-within-the-play), truth can only be established when the symbolic folds back on itself through a shift in perspective. And it is in that moment that truth, positioning the subject toward the void in appearance called the real, emerges under the guise of the event.

### **Beyond Imaginary and Symbolic**

It would be a significant mistake to construe Nietzschean truth on the level of appearance versus the real. Nietzsche rejected the idea that appearance is not enough, that some hidden universal (real) structure gives meaning to the world, as the psychological state of nihilism. “Meaning” translates the split between the will (to know) and its objects into the split between appearance and the real, through which epistemology gains ethical significance as antagonistic toward symbolization.<sup>30</sup> The search for meaning is a “factory of nihilism,” which separates the immanent quality of the object from its categorical significance. However, and this is crucial, “the real cannot be reached or attained by its *differentiation* from the Imaginary and the Symbolic...this tendency that ultimately identifies the Real with some unspeakable authenticity or Truth is the nihilistic tendency *par excellence*.”<sup>31</sup> Appearance (the imaginary and symbolic) and the real are constituted in a non-relationship: their intersection is empty. However, they

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<sup>29</sup> James Boyd White, *The Edge of Meaning* (Chicago: The University of Chicago Press, 2001), xi-xiv.

<sup>30</sup> Zupančič, *The Shortest Shadow*, 128 (emphasis in original).

<sup>31</sup> *Ibid.*, 130.

appear to be related because, taken together, they exhaust a totality of epistemological possibilities.

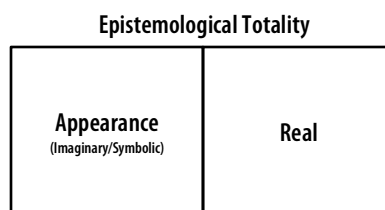


Figure 2.3

Appearance and reality exist in a non-relationship as a matter of definition. Appearance is only appearance because it fails to “fully” represent the real, because if it succeeded it would be indistinguishable from and become the real. Appearance and the real are constitutively separated. Truth, however, is not explicitly represented in above figure. For realists the truth is synonymous with the real, and for relativists the truth is synonymous with appearance. However, for Nietzsche, truth is neither appearance *nor* the real. Truth, as we have seen in the previous section, establishes a relationship between the subject (a product of the imaginary/symbolic) and the real. Truth is not the symbolic or the imaginary because those two registers conceal the real rather than aim at it, and truth is not the real because the latter exists universally and truth is particular to the situation of which it is a part. Nevertheless, truth is still represented in the above figure, not as either appearance or reality, but the edge between them. Nietzsche argued that binaries such as objective/subjective, appearance/reality, good/evil are not created out of recognition of the ontologically coextensive qualities of the two terms. In fact, those binaries “[do] not even allow for the second [term]. We exclude [a] third possibility in order to make people accept the first one, since the second (or the other) one is always ‘bad,’ forbidden, or despicable.”<sup>32</sup> The Nietzschean event, like eventual rhetoric for Biesecker, seeks to include a third term in the binary Appearance-Real: the Other (as truth). We will return to the Other in the

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<sup>32</sup> Ibid., 133.

discussion of discourses of affirmation; for now, however, we might provisionally note that Nietzsche's "beyond good and evil" is not spatially or hierarchically separated from valuation; it is the minimal distance between the two terms. A shift between two perspectives crosses the immutable difference between them, and their empty non-coincidence is full of truth *as* perspective. Truth, in its most abstract sense, is neither appearance nor reality, but a third term between (and beyond) the binary.

Thus far we have seen several characteristics of the event. First, the event involves the encounter with the subjective gaze as the perspective of truth. Second, truth has a subjectivizing function in which the subject recognizes itself as such. Third, the truth found in the event is neither the symbolic or the real, but the edge between the two, their minimal distance. Fourth, the event does not reveal the real *per se*, but aims the subject at it. Therefore we can infer that the effect of an evental symbolic rupture is not to occupy the real at all, but to introduce a new possibility into the symbolic order. In other words, the event disrupts the current symbolic structure. It is in this sense that Zupančič argues that Nietzsche was himself a philosophical event. The mechanics of the event, however, have only been loosely defined as the sustained decentering of the subject to foster a shift in perspective that provides the opportunity to encounter the gaze. The remainder of this chapter will explore the specific parameters of the evental rupture, its structural components, and the ways in which the event inaugurates the new.

### **Event and Time**

One of the features of the figure of noon discussed at the beginning of this chapter was the idiosyncratic temporality of the event, "time-within-time." This temporality creates the conditions under which a shift in perspective might occur and, more importantly, creates a temporal space in which the decentering of the subject can be maintained. For Zupančič this time

loop is paradoxical: the subject announces the event and that announcement *is* the event, hence the formulation “I, the event, am speaking.”<sup>33</sup> This formulation gives the event an elliptical character, in which the logic of the event flows infinitely around two poles (the subject of speech and the speaking subject). I suggest, however, that the event can best be understood as exhibiting two orders of temporality, one that fits within the broader history of the situation interrupted by the event, and the other within the event itself. While certainly not existent in reality, the second order temporality arrests the flow the symbolic, clearing the way for a confrontation between the subject and the part of it thrown into the field of objects, which as we have already seen is the condition of possibility for subjectivization and the event.

Events exist within particular points of time, what I will call first order temporality, as an edge between the past and the future. The effective time of the event, which is second order temporality, is embedded into the first, akin to the aesthetic experience of the “bullet time” technique in the film *The Matrix* (1999). The classic example of this technique is the scene in which the protagonist Neo dodges a series of bullets fired at him by Agent Smith. Bullet time, like traditional slow motion, detaches the viewer from normal temporality, allowing her to perceive phenomena that would otherwise be imperceptible (e.g. the bullet traveling toward Neo). Bullet time, however, does not simply slow down time, it creates a second temporality, time-within-time, by detaching the camera from its otherwise stationary position, creating the uncanny experience of the ability to move in stopped time. Just as the camera shifts perspectives in bullet time, the second order temporality of the event creates a new time within the event, in which the subject is able to walk around in the frozen symbolic order and shift perspectives. The diagram of the Nietzschean event presented at the beginning of this chapter illustrates this idiosyncratic temporality.

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<sup>33</sup> Ibid., 19.

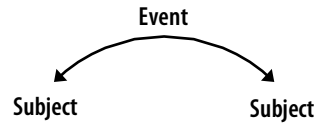


Figure 2.4

The singular temporality of the event contains an internal oscillation (represented by the doubled arrow) between two subject positions, two perspectives, discursively sustaining the decentering of the subject proper, which allows the subject to shift between perspectives and encounter that which lies between them (the gaze) as truth.

Shifting perspective is no trivial task. It requires the reconfiguration of the self in order to approach a situation in a radically different way. Evental time thus takes the form of the future anterior. “I will be as having been” projects subjectivity into the future not once, but twice. “I will be” is the subject thrown into the future as contingency; “as having been” casts the subject back into past of the future as necessity. In order to be in the future, one must have been in the past. In this sense, the radically new in the event is not the introduction of an object-exigency that alters the material conditions of a certain situation to produce a new one. Rather, the event inaugurates, to borrow a term from Heidegger, an authentic subjectivity that can break free from the current procession of necessities and activate contingency itself. “I will be” says “yes” to one future, “no” to every other future, and “yes” to both of those judgments. Double affirmation allows the subject to adopt a radically new stance toward contingency as necessity. That is the effect of an evental rhetoric.

### **Discourses of the Event**

The event is necessarily part of a situation, yet remains unique from it. The evental situation, in its fully imaginative and symbolic mode, doubles back on itself, revealing its constitutive lack, which is nothing other than the fallen part of the subject as gaze. Thus, that

which occurs in the event is also the form of the event. This is one example of the major thematic running through the Nietzschean event, namely, one becoming two. Other examples include the previously discussed evental temporality, the event as double declaration, and the subjectivization of an already present subject. This section will address the latter in relation to the production and character of evental rhetoric. As we have already seen, the subject of the event, who was already a subject, is subjectivized *again* in the encounter with her gaze. The second subjectivization does not involve the subject becoming something different, as a sort of transformation or displacement subjectivity; rather, she becomes what she is. What is new in the event is this becoming itself, as the subject establishes a relation to the real.

One turning to two is not simply a duplication of the One, as in  $1+1=2$ . In the event, the second term, the second One, is (an)Other One. The stated non-existence of the Other of the Other by Lacan suggests that the truth value of the Other (as language, law, etc.) does not exist *outside* of the symbolic because that which is outside the symbolic is nothing(ness) itself, not substantive nothing, but nothing as no-thing.<sup>34</sup> Rather, the Other of the Other is a part of the Other. By introducing the Other to the rhetorical act, evental rhetorics cannot appeal to anything outside of the situation in which they are uttered, and in that sense they are radically situational. The ability to create the new requires not something external, but that one must speak in a way that activates contingency, that activates something which is not *necessary* to the situation. The new, in other words, must originate outside the symbolic.

This effect is quite similar to that which Biesecker argued is achieved in Lacanian full speech; however, as I argued in Chapter One, full speech does not activate something within itself. Rather, catalytic punctuation is required to inaugurate the shift from empty to full speech; and punctuation is external, originating from the analyst; it is not an internal product of the full

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<sup>34</sup> Ibid., 139-140.

speech act alone. This is the crux of Moati's response to Borch-Jacobsen: he argues that full speech is not performative but constative, because full speech ratifies the subject position recognized by the Other that is nothing more than the already present ego-ideal.<sup>35</sup> The Nietzschean event, to use analogous language, treats punctuation as an internal condition of the event itself. This is why that which is "beyond good and evil" is not outside the duality: it is the internal beyond of the minimal distance between the two terms, structured as an edge. The event is beyond the situation in the same sense, and the new must arise from the already extant corpus of the situated symbolic.

In its simplest formulation, an evental rhetoric contains a specific discursive structure: the event's declaration of itself, the event. Here I make explicit a division found implicitly in Zupančič between two evental discourses: the discourse of affirmation and the discourse of truth. Discourses of truth aim the subject at the real, while discourses of affirmation activate that relationship in the form of contingency. Affirmation and truth are mutually influential, as in the affirmation of truth and true affirmation. Therefore, at its core, an evental rhetoric must say "yes" to truth with that "yes" operating *as* truth. These discourses are inseparable; they are both the event after all, but this provisional differentiation enables us to explore each discourse fully, beginning with discourses of affirmation.

### *Double Affirmation*

Nietzschean affirmation is not simply a "yes" on the part of the subject. It takes the form of a double affirmation, a "yes to a yes." Double affirmation, in other words, positions the subject to *love* contingency.<sup>36</sup> Evental rhetorics, whose condition of possibility is affirmation, seek to activate contingency in order to rupture the symbolic and create something new. Situated

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<sup>35</sup> Raoul Moati, "The Performative and Ordinary Conventions to the Real," trans. Laura Morland, *The Symptom* 9 (2008): 3-4.

<sup>36</sup> For a discussion of love in the sense used here, see: Zupančič, *The Shortest Shadow*, 165-181.



rhetorics, on the other hand, respond to something that supposedly occurs outside of language. Rhetoric stands by, always waiting for the exigency to come out of nowhere like a stranger knocking on the door in the night. These reactive rhetorics are composed of discourses of negation.<sup>37</sup>

Affirmation and negation are dialectical, not with each other, but within themselves. Before discussing each in turn, it is necessary to note that the names of each discourse are derived not from the first term in the dialectical structure, but from the second. A discourse of negation can begin with either a “yes” or a “no,” but its second term is always a “no,” ultimately taking the form of a “no to a yes,” or a “no to a no.” Likewise, the second term in a discourse of affirmation is always a “yes.”

The second “no” in negation says “no” to contingency. Nihilism, negation *par excellence*, which endeavors to find meaning in everything, cannot accept pure contingency precisely because it is meaningless by definition. Negation converts contingency into necessity at first glance by saying, “There must be a reason for this; it must have meaning.” Saying “no” to contingency covers up an ontological void—the real or nothingness itself—at the center of being. Karma, fate, or God, for Nietzsche, are all products of a discourse of negation.<sup>38</sup> For example, anyone who thanks God for something says “yes” to the phenomenon, but “no” to its contingency. Religious belief converts that contingency into necessity by positioning it an eternal, and universal, will. On the other hand, a woman who, knowing she will die in childbirth, says “no” to death, might say “no” to that “no” by believing her sacrifice justified in order to bring her child into the world as “part of God’s plan.” This “no to a no” becomes a “yes,” although it is not affirmation, but negation “stuck at the limit, and the only affirmation it

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<sup>37</sup> Ibid., 24-25.

<sup>38</sup> For Zupančič’s in-depth discussion of Nietzschean negativity, see: Ibid., 30-85.

produces is a *reaction* to its own radicality, to its own capacity to—as Nietzsche put it—‘deny life truly, actively.’”<sup>39</sup> This discourse, which can never love contingency, pervades situated rhetoric—the “yes” to the exigency in language is fundamentally a denial of life in the service of a transcendental category we call “meaning.”

Obversely, discourses of affirmation say “yes” to contingency. Deleuze noted that Nietzschean affirmation “is not to take responsibility for, to take on the burden of what is, but to release, to set free what lives.”<sup>40</sup> This “setting free” breaks the metonymic chain of negation inscribed in a metaphysics of meaning, and it was on this point that Nietzsche criticized Schopenhauer’s asceticism. Schopenhauer argued that rupturing the principle of individuation, which has been characterized here as the severing of the subject from its holistic unity with the other, by way of a proto-Lévinasian care of the other would cause us to realize our complicity in the other’s suffering. The only ethical response to such a realization, he claimed, was the suppression of the individual will, leading to asceticism.<sup>41</sup> Schopenhauer’s ethics are thus a “no” to suffering and a “no” to contingency by treating suffering as the necessary outcome of the will. Paradoxically, however, this “no to a no” creates a “yes” through a willful injunction against the will, manifest as the will toward asceticism. But this “yes” denies contingency through and through, precisely because it eliminates responsibility for and complicity in the suffering of the other. Nietzsche, of course, criticized Schopenhauer for his life-denying philosophy, opting instead for the aestheticization (in the Kantian sense) of life through double affirmation.<sup>42</sup>

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<sup>39</sup> Ibid., 135 (emphasis in original).

<sup>40</sup> Gilles Deleuze, *Nietzsche & Philosophy*, trans. Hugh Tomlinson (New York: Columbia University Press, 1983), 185; cited in: Zupančič, *The Shortest Shadow*, 136.

<sup>41</sup> Arthur Schopenhauer, *The World as Will and Representation*, trans. E.F.J. Payne, vol. One (Mineola, NY: Dover Publishers, 1969), 378-380.

<sup>42</sup> Friedrich Nietzsche, *The Will to Power*, ed. Walter Kaufman, trans. Walter Kaufman and R.J. Hollingdale (New York: Vintage Books, 1968), 419-446.

Nietzsche's response is a "yes to a yes" insofar as he said "yes" to whatever happened and "yes" to its happening qua contingency.

There is still a possibility of a "yes to a no," which is a rejection of whatever happens but an affirmation of its contingency. The character Tarrou in Camus' *The Plague* embodies this third way. Tarrou adopts the initial "no" from Schopenhauer, the rejection of the suffering of the other, in saying "We can't stir a finger in this world without the risk of bringing death to somebody."<sup>43</sup> However unlike the ascetic who would deny his will and life in turn, Tarrou adopts a path of sympathy, saying "yes" to his will and "yes" to contingency. He promises to keep fighting against the suffering of others, attempting to transform reality through his will. Equating negativity with the plague, Tarrou says "Yes, Rieux, it's a wearying business, being plague stricken. But it's still more wearying to refuse to be it."<sup>44</sup> Tarrou's position, a "yes to a no," is essential because affirmation must not take the form of an unqualified "Yes" to everything as it is. This type of affirmation, which Nietzsche called the "swine's manner," conceals a fundamental denial of the will through the denial of change; hence Zupančič's claim that true discourses of affirmation are qualified as a "yes that knows how to say no."<sup>45</sup> In effect these discourses of affirmation question the symbolic, which implies that eventual rhetorics must remain, at their core, discourses of creation.

Biesecker notes that "evental rhetoric achieves its aim not by assaulting the Symbolic with its own alternative truth (say, for example, "these are our real interests...")."<sup>46</sup> "Truth" as Biesecker uses the term is Nietzschean untruth, or the construction of reality in the Lacanian

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<sup>43</sup> Albert Camus, *The Plague*, trans. Stuart Gilbert (New York: Vintage books, 1991), 254.

<sup>44</sup> *Ibid.*, 253.

<sup>45</sup> Zupančič, *The Shortest Shadow*, 136.

<sup>46</sup> Barbara Biesecker, "Prospects of Rhetoric for the Twenty-First Century: Speculations on Evental Rhetoric Ending with a Note on Barack Obama and a Benediction by Jacques Lacan," in *Reengaging the Prospects of Rhetoric: Current Conversations and Contemporary Challenges*, ed. Mark J. Porrovecchio (New York: Routledge, 2010), 27.

sense, and as Biesecker (correctly) suggests, evental rhetorics do not simply replace one fiction with another. However, reading this phrase through the Nietzschean framework proposed thus far gives it an entirely new valence. Truth operates as the edge between the symbolic and the real, and it is precisely with this truth that one must bombard the symbolic. As Zupančič notes, Nietzschean truth is not presymbolic; “On the contrary, what is at stake is the capacity to distinguish between, on the one hand, the power of the Symbolic, and, on the other, its products (which can well be imaginary in their nature).”<sup>47</sup> Thus we should read Biesecker not as implying a topological separation between the real and the symbolic/imaginary, in which affording the “void of being” positive substance does nothing more than recreate the old appearance/reality binary inherited from Enlightenment idealism. The positive condition of evental rhetoric is not the distance between the symbolic and the real, but the distance between the symbolic *and itself*. And it is this distance *within* the symbolic that points to the real. Achieving this distance requires a true discourse, or discourse of truth, in the Nietzschean sense.

### *Double Truth*

Borch-Jacobsen articulates the radicality of full speech in the following terms: “Full, true speech, in this sense, says nothing other than what empty, lying speech says. But it *says* that it says (it).”<sup>48</sup> For Biesecker this account does not go far enough because it does not address the later Lacanian notion of the real. However, such an autoreferential mode of speech that articulates its truth value alongside its enunciative content is precisely what we find in a discourse of truth. The task of this section is thus twofold: first, to explore the construction of a discourse of truth vis-à-vis a double enunciation of the truth, and to then illustrate how truth orients the subject toward the real.

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<sup>47</sup> Zupančič, *The Shortest Shadow*, 137.

<sup>48</sup> Mikkel Borch-Jacobsen, *Lacan: The Absolute Master*, trans. Douglas Brick (Stanford: Stanford University Press, 1991), 139; as quoted in Biesecker, “Prospects of Rhetoric,” 25.

Recall the paradox of relativism discussed earlier.<sup>49</sup> The relativist position is paradoxical because it asserts a self-implicating meta-truth. The formulation “It is universally true that all truth is relative,” explicitly highlights the paradox at play here. Modern logic, Zupančič argues, dealt with this problem in two ways: either by claiming that statements implicating their own truth value are *prima facie* invalid, or by claiming that the statement operated at two levels, the statement and the truth value of the statement. A third position, advanced most clearly by Richard Rorty, asserts that relativism and its paradox are only problematic if one has already rejected the former’s possibility, since logical validity is not epistemologically normative in relativism. In other words, relativism is only a problem for foundationalists.<sup>50</sup> Zupančič, by way of Lacan, proposes a fourth way: “The point where we are uttering a truth in such a way that we are *simultaneously* saying something about [that] utterance.”<sup>51</sup> This does not take the form of  $S_T(S)$  (i.e. “It is true that...”); rather, the truth and its truth value are the same utterance. “I, the truth, am speaking,” states not only that the truth is speaking, but also that what it says is the truth. Such a possibility immediately resonates with other features of the event laid out thus far: it is a double declaration, it posits two perspectives, and it directly implicates the speaking subject. Evental rhetoric thus requires a self-referential discourse, whose utterance is validated in its speaking.

We must be careful not to lapse back into a conception of truth as adequacy to the thing, a sort of material or metaphysical intervention into the symbolic that says, “This is really what is going on here.” Truth is, in the final analysis, the interval in the symbolic experienced when the

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<sup>49</sup> Zupančič bases her discussion on the Epimenides paradox in which a Cretan says “all Cretans are liars.” The discussion on truth presented here largely paraphrases Zupančič, *The Shortest Shadow*, 138-148.

<sup>50</sup> Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989), 23-34; Richard Rorty, *Objectivity, Relativism, and Truth* (Cambridge: Cambridge University Press, 1991), 21-23; Richard Rorty, *Philosophy and Social Hope* (London: Penguin Books, 1999), xvi-xxxii; Richard Rorty and Pascal Engel, *What’s the Use of Truth*, ed. Patrick Savidan, trans. William McCuaig (New York: Columbia University Press, 2007).

<sup>51</sup> Zupančič, *The Shortest Shadow*, 138 (emphasis in original).

latter folds in on itself and we are able to distinguish its function from its objects. Evental rhetoric “empties out the signifier” insofar as it redirects attention not to the positive substance of the object in a material sense, but to the lack in the object filled by severed part of the subject. Evental rhetoric recognizes that truth, like the object, is constitutively not whole—and this recognition is, in itself, the truth. However, the encounter between the subject and her gaze is not one of recognition *per se*, but of misrecognition. The subject does not assume the fragmented parts of her subjectivity, thus reconstituting the prediscursive unity of subject/object. The very act of subjectivization, as with Heideggerian discoursing, requires the subject to *maintain the split*. True discourse is thus the saying of the thing and its simultaneous affirmation of that thing *as truth*.

Discourses of truth and affirmation taken together create the condition of possibility for the event. In the final pages of *The Shortest Shadow*, Zupančič defines the event as “nothing other than the time when being appears in all its neutrality...The event is...what makes us experience being itself (and its orders or laws) as radically contingent.”<sup>52</sup> To experience the neutrality of being is not to simply declare “anything goes,” but to abandon meaning itself as a philosophical and rhetorical possibility. The world is revealed: a horrible sublime of indifferent contiguities and tenuous contingencies. Human beings cannot live in this world, cannot survive without meaning, without something upon which to ground ourselves within the terrifying miasma of significant insignificance. The event achieves the recognition of the radical contingency of the process of the symbolic and its imaginary products. Truth aims the subject toward the real, but never pulls the trigger. And as quickly as the event begins, it ends.

Zupančič characterizes the moment of the event, the Nietzschean figurative noon, in this way: “This moment when life (with all that this implies: desire, illusion, enjoyment...) stands

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<sup>52</sup> Ibid., 160.

still, and ‘draws a breath,’ is presented by Nietzsche as a kind of reversal of perspective: we see from a point where things, dead things, are looking at us... The liberating effect resides in the fact that, from the perspective of noon, we see the very necessity (of what is) in the light of contingency.”<sup>53</sup> She follows with a quote from Nietzsche, which includes: “I delivered them from their bondage under Purpose... when I taught that over them and through them no ‘eternal will’ wills.”<sup>54</sup> These passages taken together suggest that the event liberates us of the notion of a necessity of necessity, the human *need* to find meaning in the world. The idea of a need for meaning challenges the foundationalism of meaning itself, because need presupposes another underlying position that frames meaning as necessary *a priori*. The event reveals the world as radical contingency, and it is through this revelation that the subject sees from the point of view of “dead things.” It is precisely the shift, possible only within frozen time, that is the condition of possibility for the subjectivizing effect of the event.

### **Evental Rhetorics**

Thus far the event has been represented by the declaration of a declaration, “I, the event, am speaking,” or “I, the truth, am speaking.” There is a third way to formulate the event, one that reveals more fully what happens to the subject in the course of the event, as: “I, the subject, am speaking.” One might initially think this a fitting example of Lacanian full speech, and to some extent it is. However, read through the framework of the Nietzschean event, we find something quite different. For Lacan the declaration requires an implicit “Yes! You, the subject, are speaking,” from the analyst in the form of punctuation. In evental rhetoric, however, the declaration is already validated through its own enunciation as a discourse of truth. *The subject*

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<sup>53</sup> Ibid., 160-161.

<sup>54</sup> Friedrich Nietzsche, *Thus Spoke Zarathustra*, trans. Walter Kaufman (Harmondsworth: Penguin Books, 1978), 166; cited in Zupančič, *The Shortest Shadow*, 161.

*ratifies itself as a subject*, and it is through self-subjectivization that the event facilitates the emergence of the new.<sup>55</sup>

“I, the subject, am speaking,” constitutes the self as the subject of speech and constitutes the subject *again* as the speaking subject. The use of “again” here is misleading, because it suggests a certain temporal procession between the two effects. As a discourse of truth, the enunciation of subjectivity and the subjectivization of the subject are coincident. Put another way, in declaring “I, the subject, am speaking” the subject takes itself as an object, creating a circulating relationship of shifting perception between two points of view: that of “living things” (subject qua subject,  $S_s$ ) and “dead things” (subject qua object,  $S_o$ ). Thus, the schematization of the event presented earlier becomes:

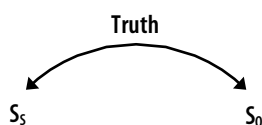


Figure 2.5

The subject does not, as in the mirror stage, see its reflection as ego; nor does the subject assume the fallen part of itself to create a perfectly objective (in the traditional sense) knowledge. Rather, the subject initially *fails to recognize* the fallen part of itself as such. The event begins in an uncanny moment of radical misrecognition between the subject and its gaze. In each shift, the gaze escapes and transfers over to the other perspective. It is only through the shift in perspective, where the subject at once perceives itself from the position of subject and object, that she arrives at the uncanny realization that she is not whole. “I, the subject, am speaking,” folds subjectivity back on itself and exposes the lack at its center. In taking itself as an object, the

<sup>55</sup> There is great affinity between this theory and that of symbolic interactionism. See generally: George Herbert Mead, *Mind, Self, & Society From the Standpoint of a Social Behaviorist* (Chicago: University of Chicago Press, 1934); Herbert Blumer, *Symbolic Interaction: Perspective & Method* (Berkeley, University of California Press, 1969); Norman Denzin, *Symbolic Interactionism and Cultural Studies* (Oxford: Oxford University Press, 1992); for an overview of the field, see: Ken Plummer, “Symbolic Interactionism in the 20<sup>th</sup> Century” in Bryan S. Turner, ed. *The Blackwell Companion to Social Theory*, Second Edition (Malden, MA; Wiley-Blackwell, 2000) 194-222.



evental subject is thrown into an asymptotic relationship with the very possibility of its wholeness through the recognition of the impossibility of assuming the part of itself that constitutes the gaze. There remains an irreducible interval between subject/object, which is, after all, the condition of possibility for subjectivity.

Non-evental subjectivity covers up the exposed lack within the symbolic, interposing a veil of “meaning” between the subject and the world, which structures knowledge like desire. The epistemological Freudian Thing is the possibility of a Theory of Everything (the scientific equivalent of reestablishing the object/subject unity) and the object-cause of knowledge as desire is the gaze itself. What is particularly dangerous about a lack-less epistemology is not that it has any more claim to the real than an evental one; rather, non-evental subjectivity does not contain the potential to get out of its current course. Heidegger called this mode of being “enframing,” and argued that its danger was found precisely in the ability to cover up its own contingency.<sup>56</sup> Despite the negative function of non-evental subjectivity, it should be noted that there is no imperative of the event, and there is most certainly not a normative dimension to the philosophy discussed thus far. The only moral imperative for change could be found in the situation the event interrupts, and that morality extends only as far as the edge of first order evental temporality. Zupančič is being quite literal when she describes the effect of the event as laying bare the *neutrality* of being, and it is only from within this neutral space that the subject emerges as a herald of the new.

To take itself as object, the subject must adopt a stance toward being as the future anterior. We have already seen how “I will be as having been” treats subjectivity as both necessary and contingent, where the subject must have been in order to be as it will be.

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<sup>56</sup> For an excellent discussion of this phenomenon, see: Martin Heidegger, *The Question Concerning Technology and Other Essays*, trans. William Lovitt (New York: Harper & Row, 1977).

Underlying the future anterior is a double affirmation because the subject, in loving the future, also loves that future's past. The future is open to an infinite possibility, it is radically contingent, and the subject of the event says "yes" to that very contingency. Affirming the future also affirms the past, but in a different way. The future cannot be without having been, and the future-past is itself contingent. To imagine a future is to convert this past from contingency to necessity and this "'willing backward' is nothing but affirmation (saying 'Yes' to) what one might call 'contingent necessity' (or, alternatively, the unavoidable necessity of contingency itself)."<sup>57</sup> The coextension and interpenetration of contingency and necessity prevents the latter from smoothing over the rupture of the former as meaning or purpose. The subject, standing on the precipice of this impossible paradox, is able to glimpse the significance of contingency itself, shattering the continuity of the symbolic.

The event separates the function of the symbolic ( $S_s$ ) from its imaginary product ( $S_o$ ), and it is precisely in this break that the subject is re-subjectivized as contingent subjectivity. The evental subject is still *manque-à-être* in the Lacanian sense, but it is no longer experienced *as a lack*; rather, the subject takes the lack (of necessity/as radical contingency) as constitutive of its being. For Heidegger this lack was the structural articulation of discourse constituting intelligibility. An evental subject takes its lack at face value, as a lack, as truth, as the split between the subject and the world. This lack, which has been characterized elsewhere as an interval, minimal distance, or the edge, is the very possibility of subjectivity in the first place, and the subject must carry it through to eternity. In other words, it is only within the event that the subject is able to assume his lack.

The rupture between the subject and the symbolic is only accessible in language, and thus the event is *always* an evental rhetoric. In more familiar terms, there are (at least) two ways to

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<sup>57</sup> Zupančič, *The Shortest Shadow*, 163.

respond to an exigency. One way encounters the exigency, wraps it layers of necessity as meaning, and sutures it perfectly into the symbolic order. This is what we have thus far called situated rhetoric. The other way, the way proposed here, encounters the exigency as an act of radical contingency and stops. The evental subject severs itself, if only fleetingly, from the symbolic and in that moment the subject is truly free. To realize, completely, that the lack is an essential characteristic of being is to break fully with meaning. The subject does not assume a humble place vis-à-vis the Other; the subject becomes the *master* of the Other. The subject does more than recognize that the Other “doesn’t have it” the subject recognizes that *nothing* has it. Freedom from the symbolic, from meaning, does not mean that the subject is free to want *anything*; rather, the fact that the subject wants a future, and is willing to affirm it at the expense of all others, is a double affirmation: “Yes” to the future and “Yes” to its contingency: “I, the subject, want *this* come what may.” And in doing so the subject of the event says one final thing: “I love you-” to contingency, to neutrality, to possibility, to herself. She declares to the universe: “I love *being*.”

### **Of the Vision and the Riddle**

“Upward – despite the spirit that drew it downward, drew it towards the abyss, the Spirit of Gravity, my devil and arch-enemy. ‘O Zarathustra,’ he said mockingly, syllable by syllable, ‘you stone of wisdom! You have thrown yourself high but every stone that is thrown must fall.’”<sup>58</sup> Like Zarathustra, the evental subject is plagued by its own spirit, the Spirit of Necessity. No matter how far the subject moves beyond the symbolic, she will eventually move back, for she cannot live in the real, in a world without human being. But the Spirit of Necessity weighs her down, sits atop her shoulders willing her to turn away from the real, away from contingency,

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<sup>58</sup> Nietzsche, *Thus Spoke Zarathustra*, 177.

and back toward the symbolic not as it will be, but as it was. For all its effort, the Spirit of Necessity is not always successful: indeed, its constant pleas for a return fall on deaf ears. For like Zarathustra, the subject will eventually fall, eventually return; but it is not the inevitability of the fall that matters, but how the subject responds to it. If the subject is courageous, facing the Spirit of Necessity and saying “Spirit! You! Or I!” she will be able to face necessity, to love it for its relation to contingency, and press ahead.

“Courage,” Zarathustra says, “is the best destroyer, courage that attacks: it destroys even death, for it says: ‘Was *that* life? Well then! Once more!’”<sup>59</sup> It is at this point in *Thus Spoke Zarathustra* that Nietzsche introduces the eternal return, in the condensation of the moment, the willing again of what has already been and what will be thereafter:

‘Behold this gateway, dwarf!’ I went on: ‘it has two aspects. Two paths come together here: no one has ever reached their end. This long lane behind us: it goes on for an eternity. And that long lane ahead of us – that is another eternity. They are in opposition to one another, these paths; they abut one another: and it is here at this gateway that they come together. The name of the gateway above it: “Moment.”’<sup>60</sup>

The moment, the point at which the future and the past diverge as differentiated, is nothing other than the event, the Nietzschean figure of the noon. The moment is not properly the past or the future, but the intervention, the gap between the two; it severs and separates one from the other. But the paths are infinite, everything that has been will be again, and everything that will be already was; and so one asks, what is the difference between the two? The answer: nothing and everything. The two paths strive continually to become the other, but always fail, for they are blocked by the gateway, by the moment. The closest point of coincidence is simultaneously that

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<sup>59</sup> Ibid., 178 (emphasis in original).

<sup>60</sup> Ibid.

which constitutes the impossibility of the same. An evental rhetoric, the event, evental subjectivity etc. are all various manifestations of the moment, of the constitutive separation between what was, what is, and what will be. In the event, the subject abandons the symbolic and establishes a relation to the abyss of the real.<sup>61</sup> But she is not satisfied (as Nietzsche notes, “Courage also destroys giddiness at abysses”<sup>62</sup>), and the subject turns back toward the symbolic and yells “Was that life? Well then! Once more!”

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<sup>61</sup> Toward the end of the theoretical section of her essay, Biesecker suggests three additional propositions for evental rhetoric: (1) that it takes the form of an exorbitant demand, (2) that it functions as sublimation, and (3) that the evental encounter is uncanny. (Biesecker, “Prospects of Rhetoric,” 29.) Without additional context, it is difficult to know what qualifies as an exorbitant demand, although the severance of the self from the symbolic would perhaps meet the standard. [If, however, Biesecker intends this demand to function as a Lévinasian demand, I would provisionally disagree. The Nietzschean event is neutral all the way down, and would resist ethicizing *tout court*. That said, for an excellent attempt to reconcile Lévinas, Badiou, and Lacanian sublimation, see: Simon Critchley, *Infinitely Demanding: Ethics of Commitment, Politics of Resistance* (London: Verso, 2007).] Similarly, I, via Zupančič, have argued that the event necessarily involves an uncanny encounter with the gaze. (Zupančič, *The Shortest Shadow*, 14.) This leaves sublimation, and while the argument advanced below is provisional, it may guide future inquiry into the ways in which an event escapes the individual subject and extends to the culture at large.

In *The Ethics of Psychoanalysis*, Lacan writes, “It is, after all a function of the problem of ethics that we have to judge sublimation; it creates socially recognized values.” (Jacques Lacan, *The Ethics of Psychoanalysis*, ed. Jacques-Alain Miller and Dennis Porter (London: Routledge, 1992), 107.) The *creation* of values immediately resonates with a theory of the event as a theory of the new, and the idea that those values are social implies that the event does not need to be isolated to the individual. Sublimation elevates an object “to the dignity of the Thing,” allowing us to challenge the criterion of the reality principle. What is significant here, as Zupančič suggests, is that sublimation functions like the event: “[sublimation] aims at the Real precisely at the point where the Real cannot be reduced to reality. One could say that sublimation opposes itself to reality, or turns away from it, precisely in the name of the Real.” (Zupančič, *The Shortest Shadow*, 77.) In this sense sublimation is involved in the socialization of the evental rupture. The subject channels the freedom of the event into a Thing (an object, a cause, an action, an idea...), and in doing so creates a space in which cultural forces can latch on to the rupture of the event. Through evental rhetoric, speech as declaration, the evental subject becomes an epicenter of a seismic cultural shift, as the event spreads to more and more subjects. The resulting pathological freedom is, I would think, the condition of possibility for a seismic cultural shift. That said, a more thorough reading of Lacan and his interpreters on this subject will ultimately determine whether the provisional account provided here is sustainable and, indeed, correct.

<sup>62</sup> Nietzsche, *Thus Spoke Zarathustra*, 177.

## Part II | What is Legal Authority?

“For, from our beginnings, a most important consequence of the constitutionally created separation of powers has been the American habit, extraordinary to other democracies, of casting social, economic, philosophical, and political questions in the form of law suits, in an attempt to secure ultimate resolution by the Supreme Court.”<sup>1</sup>

–William J. Brennan

At their very core, evental rhetorics question the hermeneutic authority of the symbolic over the judgment of phenomena. The event discloses to the subject that what underlies all authority is nothing more than subjective cathexis, a fully contingent and wholly groundless system of investment. In order to challenge authority one must know what authority is and how it comes about; and if Justice Brennan is correct that Americans primarily engage cultural controversies from the vantage point of legal argument, then we must explore legal authority specifically. It is under these auspices that we are compelled to ask “What is legal authority?” Part II of this thesis addresses two of this question’s many valences: authority *within* the law, and authority *of* the law to illustrate the possibility of an event *within* the law, and an event *of* the law. The prepositional difference between them points to a shift in register between the specific community of the legal profession and the cultural production of the law as such. This shift is significant because the possibility of translating public controversies into legal disputes and back again as law is a site of evental possibility. That is, the differences between legal and non-legal rhetorics, including their concomitant epistemological commitments, are so great that successfully moving between the two achieves the essential movement of the event—namely, a shift in perspective.

The notion that the law can be evental might appear at first to be deeply flawed. The law is, by its very nature, reactive. Court cases arise out of controversies that already exist, whose

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<sup>1</sup> William J. Brennan Jr., “The Constitution of the United States: Contemporary Ratification,” in *Interpreting Law and Literature*, ed. Sanford Levinson and Steven Mailloux (Evanston: Northwestern University Press, 1988), 14.

contours and possibilities have already been defined. The law intervenes, in other words, only after the symbolic has proven itself inadequate to its task. It is situated rhetoric *par excellence*. Moreover, judicial rulings are most often formed in response to, and from the language of, the arguments presented by advocates in a trial, and are rarely issued *sua sponte*.<sup>2</sup> While this view has some merit, it glosses over the more nuanced possibilities of a legal event. Chapter Three explores the rhetorical processes that create authority within the law, as well as what is currently authoritative therein. Central to this question is the difference between normative and constitutive rhetorics, and a shift from static being to unbounded becoming. I argue that despite the anti-evental nature of normative thought, legal rhetoric can be transformed into evental rhetoric through the figure of translation.

In Chapter Four I address the second valence of legal authority: the authority *of* the law. In part, this chapter critiques the condition of possibility of its predecessor, namely, the remnants of the legal apparatus which persist to enable an event *within* the law. This enduring skeletal apparatus points toward the fundamental authority with which the law is exercised, an authority originating from the demands of individual subjects. I argue that shifts in authoriality (as the combination of authority and authorship) found in the per curiam opinions of the United States Supreme Court create the conditions under which the subject can come face-to-face with her demand, or in other words, her gaze; and in that capacity, they are evental rhetorics.

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<sup>2</sup> *Sua sponte* (by their own will) rulings are those made by a judge when no party has filed a motion requesting the ruling. See, for instance, the dismissal of a *habeas corpus* claim in *Trest* based upon a procedural mistake: *Trest v. Cain*, 94 F.3d 1005 (1996).

### THREE | Translating Justice

“Logic is unshakable; but it cannot withstand the will of a person determined to live.”  
-Kafka

Language, as we have seen in the discussions of Nietzsche, Lacan, and Derrida, is necessarily contingent: it produces and is produced by the speaking subject. Moreover, language use is not smoothly distributed throughout a culture; rather, language is used differently in different situations, which the philosopher Ludwig Wittgenstein called “language games.”<sup>1</sup> Interactions between a customer and a waiter in a restaurant, among department members at a faculty meeting, or between a father and daughter before the latter’s wedding, are all governed by distinct and context-dependent vocabularies composed not only of symbols (words, gestures, style, tone, etc.) but also the norms governing their use. It would seem out of place, for example, for a woman to speak to her wife in the same way and on the same terms as she would the chair of her academic department, if she spoke about the struggle to buy a house in the same way as she spoke of the troubling state of institutional funding. Nevertheless, these games implicate the entirety of an individual’s performative engagement with a community and its constitutive activities. Language, in other words, is not only co-productive with individual subjectivity, but also the constitution of the social as such.

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<sup>1</sup> Ludwig Wittgenstein, *Philosophical Investigations*, ed. P.M.S Hacker and Joachim Schulte, trans. G.E.M Anscombe, P.M.S Hacker, and Joachim Schulte, Revised Fourth Edition. (West Sussex, UK: Wiley-Blackwell, 2009). Turning to Wittgenstein in this instance is not a benign choice. Both James Boyd White and Richard Rorty, whose thought has greatly influenced my own, reference Wittgenstein in this capacity to make largely the same point. See: James Boyd White, *When Words Lose Their Meaning* (Chicago: The University of Chicago Press, 1984), 272; Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989), 11. Moreover, Stephen Toulmin’s theory of argument fields is in many ways the same as Wittgenstein’s language games, see: Stephen Toulmin, *The Uses of Argument*, Updated Edition. (Cambridge: Cambridge University Press, 2003). A final example can be seen in Goodnight’s theory of argumentative spheres. While the spheres themselves are not language games *per se*, they suggest a sort of meta “family resemblance” between individual argumentative fields that influence the contours of their argumentative structure, see: G. Thomas Goodnight, “The Personal, Technical, and Public Spheres of Argument: A Speculative Inquiry into the Art of Public Deliberation,” *Journal of the American Forensic Association* 18 (1982): 214-227.



The technically complex and jargon-laden language game of the legal profession, manifest most obviously in the relatively uniform rhetorical style of legal argumentation, is one of the most, if not *the* most, highly visible language games in contemporary culture. As law professor John D. Feerick notes: “Indeed, it seems to have become part of our popular culture that when one individual says to another ‘You think like a lawyer,’ it is taken as a compliment; when that individual states, ‘You write like a lawyer,’ however, it is a serious criticism.”<sup>2</sup> The distinction between thought and communication raises an interesting and important question: is it possible to separate the rhetoric of a language game from its epistemological commitments? In other words, is there really any difference between thinking like a lawyer and communicating like one? For legal scholar James Boyd White, as well as Lacan and Nietzsche, rhetoric and epistemology are inseparable.<sup>3</sup> Rhetoric constitutes and constrains the individual, institutional, and practical possibilities of the law, and it is through the language game of the legal profession that authority *within* the law is established. To effectuate an event within the law—that is, to change the law as judiciary—thus requires a properly evental rhetoric.

This chapter will proceed in two parts. First, I offer a critique of the anti-eventality of normative legal rhetoric. I discuss two schools of normative thought; positivism (via pragma-dialectics) and legal realism, arguing that while both schools claim to ground their theory in an external norm, those norms are themselves recursively produced rhetorical commitments. Here we see that authority in the law is not based upon an external standard of justice, but is instead constituted through the institutional arrangements of the legal system and the rhetoric of legal argument. Second, I argue for the possibility of an event that is fully contained within the law, focusing on White’s work in constitutive legal rhetoric and law and literature. I turn to the figure

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<sup>2</sup> John D. Feerick, “Writing Like a Lawyer,” *Fordham Urban Law Journal* 21 (1994): 381.

<sup>3</sup> James Boyd White, *Heraclides’ Bow: Essays on the Rhetoric and Poetics of Law* (Madison: University of Wisconsin Press, 1989).

of the translator as the archetypal evental subjectivity, exploring both how the translator functions in a general sense, and how translation might become the foundation for a new modality of legal thought. In order to change the law one must first understand the language in which it is created, and thus we begin with a discussion of the stylistic and epistemological commitments of contemporary legal rhetoric.

### **Normative Legal Rhetorics**

Authority *within* the law is not based upon an external standard or norm, nor is it simply, as Thrasymachus suggests in Plato's *Republic*, "the advantage of the stronger";<sup>4</sup> rather, authority in the law is created through the rhetorics constituting its practice.<sup>5</sup> This claim flows naturally from White's literary approach to the law, under which rhetoric is "the central art by which culture and community are established, maintained, and transformed."<sup>6</sup> However, White's constitutive view of rhetoric and authority are not shared by all in the legal profession. Indeed, the predominant rhetorical style of contemporary legal practice is decidedly normative.<sup>7</sup> The difference between constitutive and normative rhetoric is primarily one of orientation and movement. Constitutive rhetorics take their productive force as a starting point for creation, and are in that sense processual and unbounded.<sup>8</sup> Normative rhetorics, on the other hand, are constrained by whatever external norm they idealize. These rhetorics are teleological, actively regulating human activity to fit a particular model of futurity. Instead of carving their own path as constitutive rhetorics do, normative rhetorics pull themselves along a predetermined course. These differences and their implications for the theory of evental rhetoric developed here will be

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<sup>4</sup> Plato, *The Republic of Plato*, trans. Allan Bloom, Second Edition. (New York: Basic Books, 1991), 338c.

<sup>5</sup> See generally: James Boyd White, *Acts of Hope: Creating Authority in Literature, Law, and Politics* (Chicago: The University of Chicago Press, 1995).

<sup>6</sup> White, *Heracles' Bow*, 28.

<sup>7</sup> Pierre Schlag, "Normative and Nowhere to Go," *Stanford Law Review* 43 (1990): 167-191.

<sup>8</sup> My interpretation of constitutive rhetoric is drawn from White's use and definition of the term, see: White, *Heracles' Bow*, 28-48.

discussed throughout this chapter; the present section, however, addresses the role of normative legal rhetoric in creating authority within the law.

*Discourses of Coherence: Stare Decisis and Legal Rhetoric*

In the common law judicial system, of which the United States' is an example, judicial authority is function of the judge's dispositive power in the trial setting and the doctrinal adherence to and respect for precedent. This doctrine, known as stare decisis, has two different regulative effects, described as "vertical" and "horizontal" precedent. Vertical precedent binds lower courts to the rulings of hierarchically superior courts (e.g. all lower courts must follow the decisions of the Supreme Court), while horizontal precedent binds courts to their own decisions, allowing courts to overrule themselves only in extraordinary cases.<sup>9</sup> In both cases, as Supreme Court Justice Louis Brandies noted, "Stare decisis is usually the wise policy because, in most matters, it is more important that the applicable rule of law be settled than it be settled right."<sup>10</sup> Adherence to precedent results in a stable and uniform application and interpretation of statutory and constitutional rules. Moreover, the systematic commitment to stare decisis suggests that the law is ultimately less interested in the particularities of resolving a single dispute than it is in its own systematicity. Privileging uniformity *over* justice is symptomatic of normative thought, insofar as stability is essential to the smooth functioning of juridical systems. Authority in the law is thus, upon first blush, an institutional rather than rhetorical phenomenon.

Judicial authority is not, however, simply a product of institutional prejudices. The authority of a judge is also constituted through her rhetorical style. The opinions of appellate justices, Robert A. Ferguson argues, share generic qualities that significantly influence the way

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<sup>9</sup> Keenan D. Kmiec, "The Origin and Current Meanings of 'Judicial Activism'," *California Law Review* 92 (2004): 1442-1477.

<sup>10</sup> *Burnet v. Coronado Oil & Gas Co*, 285 U.S. 393, 406 (1932) (Brandies, J., dissenting).

those texts are received and operationalized by the legal community.<sup>11</sup> Justices employ what Ferguson, following Kenneth Burke, calls “rhetorics of inevitability,” which are stylistically composed of a combination of the monologic voice, a selectively interrogative dialectic mode (raising only those question in the opinion which the justice’s position can answer deftly), and a declarative tone.<sup>12</sup> Taken together, these rhetorical strategies make it appear as though there is only one possible answer to a given legal question, and that if one approaches the question properly (i.e. as the opinion does), one will inevitably reach the same answer. Thus, quoting Burke, Ferguson notes that rhetorics of inevitability create an “immutable scene...of ‘eternal truth, equity, and justice.’”<sup>13</sup> In Nietzschean terms, the appellate decision rhetorically abandons the possibility of a contingent future by converting it into necessity. These rhetorics, despite initially appearing intellectually isolationist, implicitly establish connections with imagined communities of right-minded thinkers who agree with the justice’s position.<sup>14</sup> Those communities are subsequently made real through *stare decisis*, as precedent comes to influence language and thought of those who practice law. The appellate opinion creates a homogenous rhetorical community both as a matter of institutional force and of rhetorical practice, which provides a concrete basis for White’s theory of the constitutive force of rhetoric within the profession of the law.

Because lawyers, judges, scholars, and law students constantly quote from canonical texts, the vast majority of which are Supreme Court opinions, it seems only natural that they would mimic those texts’ rhetorical style. As Gerald B. Wetlaufer notes, lawyers craft their

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<sup>11</sup> Robert A Ferguson, “The Judicial Opinion as Literary Genre,” *Yale Journal of Law & the Humanities* 2 (1990): 201-220.

<sup>12</sup> *Ibid.*, 213.

<sup>13</sup> Kenneth Burke, *A Grammar of Motives* (Berkeley: University of California Press, 1969), 258-259, 379-380; as cited in: Ferguson, “The Judicial Opinion as Literary Genre,” 213.

<sup>14</sup> Ferguson, “The Judicial Opinion as Literary Genre,” 207.

briefs under the assumption that they will be reviewed and potentially redeployed by a judge, providing an additional incentive to use the appellate style.<sup>15</sup> Justices, in turn, almost exclusively issue rulings in response to specific motions or arguments raised by the advocates in a case. This rhetorical feedback loop has created a relatively uniform, stable, and pervasive set of field-specific rhetorical commitments that shape legal thought. As Wetlaufer explains:

These include commitments to a certain kind of toughmindedness [sic] and rigor, to relevance and orderliness in discourse, to objectivity, to clarity and to logic, to binary judgment and to the closure of controversies. They also include commitments to hierarchy and authority, to the impersonal voice, and to the one right (or best) answer to questions and one true (or best) meaning of texts.<sup>16</sup>

These commitments suggest that legal rhetoric is grounded in normative thought. Mimicking the appellate style is therefore not simply an attempt to persuade a justice by using language that is familiar to her; rather, these conventions indicate a set of systematic commitments that guide the activities of the legal profession. The commitments to logic, authority, and orderliness are all consistent with, for example, the view that a jurist's engagement with rules and statutes is and ought to be conducted through a heuristic rather than hermeneutic process, privileging the purity of rigorous logical thought to an empathetic encounter with the other. The idea that there is a single "best" answer delimits legal authority, relating it to the rhetorical production of truth as such, in addition to the previously described constitutive authority of the opinion itself. That is, the law is a process that determines truths, rather than simply settling disputes.

It is impossible to separate the rhetorical style of legal argument from the normative epistemology that guides its evaluation. The two are, in other words, coextensive. Not only does

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<sup>15</sup> Gerald B. Wetlaufer, "Rhetoric and its Denial in Legal Discourse," *Virginia Law Review* 76 (1990): 1560.

<sup>16</sup> *Ibid.*, 1551-1552.

this suggest that rhetoric constitutes communities vis-à-vis language games, it also suggests that rhetoric in large measure shapes (and is shaped by) our relationship to the world. This is particularly true in the legal profession, in which one of the major activities of its practice is the permutation of abstract concepts (laws and their justifications) and concrete materialities (the facts) into language. Legal argument, in other words, literally produces competing interpretations of the world, and thus we turn to a discussion of the means by which those interpretations are judged.

*Normative Thought: Pragma-Dialectic Criticality and Realist Materialism*

In this section I discuss two valences of normative thought that are quite influential in contemporary legal argument: legal positivism and legal realism. I have selected these two philosophies in particular a number of reasons: first, legal positivism is closely related to the study of legal argumentation within the speech communication tradition and thus serves as a familiar point of departure for the discussions in the latter portions of this chapter;<sup>17</sup> and second, legal realism arose as a response to positivism and the relationship between the two schools is generally antagonistic.<sup>18</sup> The extent of their divergence accentuates the points of contact between them, thus distinguishing universal normative characteristics from contingent ones and sharpening the critique. We will begin with a discussion of positivism and pragma-dialectics.

The positivist position takes the purity of rational argumentation as the normative value against which all legal argument should be evaluated. One of the most prolific areas of contemporary engagement between communication studies and legal scholarship, pragma-

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<sup>17</sup> For a survey of the literature concordant with positivism, see Chapters 2, 3, and 6 of Eveline T. Feteris, *Fundamentals of Legal Argumentation: A Survey of Theories on the Justification of Judicial Decisions* (Dordrecht: Kluwer Academic Publishers, 1999).

<sup>18</sup> See generally: Michael Steven Green, "Legal Realism as Theory of Law," *William & Mary Law Review* 46 (2005): 1915-2000.

dialectic argumentation theory, is thus quite similar to the positivist position.<sup>19</sup> Created by Frans H. van Eemeren and Rob Grootendorst, pragma-dialectics treats argument as a critical dialectic discussion composed of a series of pragmatic speech acts.<sup>20</sup> One of the central tenets of the theory is the notion that intersubjective agreement is not a sufficient standard for reasonableness in a dialectic. Reasonableness also depends upon the agreement meeting an external norm of validity, which for van Eemeren and Grootendorst is “whether an argumentative procedure is *adequate* for” the resolution of a difference of opinion (emphasis added).<sup>21</sup> For example, an agreement reached through coercion or subversive and intentional misrepresentation would not be valid, despite the fact that both parties had agreed. The normative dimension of pragma-dialectics could thus alternatively be described as the pursuit of both an idealized argumentative situation and an idealized subjective position.<sup>22</sup>

Eveline Feteris, the foremost scholar applying pragma-dialectics to legal argument, claims that the latter embodies the pragma-dialectic ideal through a series of field-specific argumentative conventions, the most important of which is the agreement between competing parties that the judge constitutes the final dispositive authority in any dispute.<sup>23</sup> The critically

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<sup>19</sup> One could make the case, of course, that pragma-dialectic theory could incorporate the context-dependent realist position, by re-casting its normative value in terms of the material product of the critical discussion. However, this would mean that any assessment of validity would be *ex post facto*, and the consequentialist nature of such an assessment calls into question the fundamentally deontological nature of the pragma-dialectic analysis itself. For example, if the outcome of a discussion is all that matters, the fidelity of the argumentative process to the “principle of communication” would be irrelevant. In other words, the consequentialism of materialist realism and the idealistic abstraction of pragma-dialectics are wholly irreconcilable.

<sup>20</sup> Frans H. van Eemeren and Rob Grootendorst, *Argumentation, Communication, and Fallacies: A Pragma-Dialectical Perspective* (Hillsdale, NJ: Lawrence Erlbaum Associates, 1992), 7.

<sup>21</sup> *Ibid.*, 6-7.

<sup>22</sup> The analysis that follows should not be read as an indictment of pragma-dialectics in a universal sense, but rather as a targeted critique of the theory’s application to legal argument. The recent turn toward strategic-maneuvering provides some prospects for extricating pragma-dialectics from the quagmire of normative thought; however, given the constraints of this thesis it cannot be discussed here. See, for example: Frans H. van Eemeren, ed. *Examining Argumentation in Context: Fifteen Studies on Strategic Maneuvering* (Philadelphia: John Benjamins Publishing Company, 2009).

<sup>23</sup> Eveline T. Feteris, “Conditions and Rules for Rational Discussion in a Legal Process: A Pragma-dialectical perspective,” *Argumentation & Advocacy* 26 (1990): 108-117; Eveline T. Feteris, “A Pragma-Dialectical Approach to Legal Discussions,” *Informal Logic* 15, no. 3 (1993): 180-188; Eveline T. Feteris, “The Judge as a Critical

antagonistic role of the judge encourages lawyers, whose allegiance is typically not to the authenticity of the argumentative process but to their client's interests, to adhere to the rules of the argumentative situation (e.g. rules of evidence, civil procedure, etc.), ensuring a rational discussion between the two parties. Moreover, the judge herself is subject to review via the appellate process and therefore "must show that [her] decision is acceptable in view of the arguments which have been put forward by the parties involved, and in view of accepted legal rules and principles that must be taken into account in legal decision-making."<sup>24</sup> The latter obligation forms the core of the normative gesture guiding legal pragma-dialectics. Feteris rather uncritically accepts the rules governing legal practice and the laws themselves, and judges a legal interaction solely based upon whether or not those rules are properly applied and followed.

Setting aside the question of whether or not the specific provisions of legal pragma-dialectics adequately describe the American judicial system,<sup>25</sup> it is clear that Feteris' external

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Antagonist in a Legal Process: A Pragma-dialectical Perspective," in *Argument and the Postmodern Challenge*, ed. Raymie E. McKerrow (Annandale, VA: Speech Communication Association, 1993), 476-480; Eveline T. Feteris, "Comments on 'Rhetoric and Dialectic: Some Historical and Legal Perspectives'," *Argumentation* 14 (2000): 235-239; Eveline T. Feteris, "A Pragma-Dialectical Approach of the Analysis and Evaluation of Pragmatic Argumentation in a Legal Context," *Argumentation* 16 (2002): 349.

<sup>24</sup> Feteris, "Comments on 'Rhetoric and Dialectic,'" 237.

<sup>25</sup> In the case of the descriptive failure, I see three fundamental problems in applying Feteris' model to the judicial system of the United States. First, and this is something Feteris acknowledges (cf. Feteris, "Conditions and Rules for Rational Discussion," 111 n8.), her normative model assumes that factual questions and legal questions are resolved by the same entity in the courtroom (the judge), whereas in the American legal system those duties are divided between a jury and judge respectively. The ability of the judge to determine factual questions is essential to the validity of a trial (Ibid., 111; Feteris, "A Pragma-Dialectical Approach to Legal Discussions," 182.), and a jury's lack of legal training significantly undermines the regimented rules-oriented analysis Feteris requires. Second, the judge in Feteris' ideal trial functions heuristically, using a set of guiding rules (determined by the legislature) to assess the validity of a legal question (Feteris, "The Judge as Critical Antagonist," 477-479.). In the United States, judges do not simply apply a set of relatively clear rules, they *interpret* those rules, giving them additional meaning. These difference might be attributed to the difference between common law and civil law judicial systems, and while they may appear to be preliminary objections, they in fact undermined the entirety of Feteris' theoretical apparatus. If the textuality of the law is inherently unstable, then it is impossible to have a discussion in which all participants come to the table with a shared understanding of the rules governing the dispute. Some Supreme Court decisions, for example, hinge on a particular question of legal doctrine which is resolved by the Court, and the case is remanded back to a lower court for reconsideration in light of the Court's interpretation. In those cases, are we to distinguish between the prior and secondary case? Or, more importantly, when those cases are *not* remanded back to a lower court, does one simply separate the simultaneous interpretative and regulative rulings? While these objections do not address the *normative* dimensions of Feteris' argument, they certainly suggest that the theory is, in the case of the American system, far more critical than descriptive.



norm is related to rhetorical commitments described by Wetlaufer. Objectivity is necessary to properly interpret the rules, and apply them as the legislature intended; closure is required not only to settle a dispute *prima facie*, but also to ensure that rules are applied uniformly. Indeed, the commitments of clarity and relevance receive considerable attention in Feteris' argument as two of the most important features of pragma-dialectic argumentation theory.<sup>26</sup> To a considerable degree, then, the rhetorical commitments made by pragma-dialectics are directed primarily to the process of argument, rather than to its outcome.

This focus on pure argumentation raises an interesting issue about the nature of the statutes and regulations that form the rules governing legal practice. If Feteris' normative standard is largely based upon adherence to a set of argumentative rules, what ultimately grounds those rules? Legal realism purports to answer this question, but in doing so undermines the idealistic presuppositions of pragma-dialectic theory by questioning the importance of argumentative purity itself. As James Boyd White notes, legal realists seek "to penetrate the seemingly deceptive, or self-deceptive, formulations of traditional legal discourse" to reach the reality of the situation underlying the legal dispute, "which can best be talked about not in legal but in social, psychological, or economic terms."<sup>27</sup> For the realist, the external norm is not abstract or ideational (rational argument) but concrete and material (reality), which shifts the locus of legal thought from justice *qua* argument to the balancing of material conditions. Legal realism is consistent with the rhetorical commitment to a single best answer, rigor, and concrete certainty, although the validity of the legal ruling is no longer based on its consistency with

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<sup>26</sup> Both clarity (comprehensibility) and relevance are part of the "principles of communication," Feteris, "Conditions and Rules for Rational Discussion," 110-111.

<sup>27</sup> James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: The University of Chicago Press, 1990), 95.

“accepted legal rules and principles,” but with its ability to achieve a particular social outcome—a position diametrically opposed to that of positivism.

Several scholars in the rhetorical studies tradition have noted that realism, especially its manifestation in the law and economics movement, is fundamentally anti-rhetorical.<sup>28</sup> White argues, for example, that realism attempts to recode legal argument in the language of the social sciences, changing the major judicial function from adjudication to policymaking.<sup>29</sup> Indeed, the realist position attempts to *mask* the rhetoricity of its commitments by equating them with scientific certainty. Realism thus takes as its center the ability to cut through the ideational construct of legal discourse itself and apprehend the truth of the legal dispute, so as to judge it upon a purportedly scientific assessment of human behavior. Positivism, on the other hand, hopes to achieve the reverse. By constructing an abstract system of argumentative procedures, pragma-dialectics hopes to reduce or eliminate the negative impulses of human behavior.

The fundamental incommensurability of the two positions should be understood as the difference between deontological and consequentialist normative thought. For the positivist, justice is a matter of process rather than outcome, which is to say that the value of the outcome is determined solely by the reasonableness of the argument that produced it. For the realist, on the other hand, the analysis is reversed, and the process matters only insofar as it reaches an outcome that is socially desirable. In both cases, however, justificatory validity is located externally, assuming that the law is a human construct whose sole purpose is to reach a decision in concordance with something outside of itself. Normative thought envisions the law as it should be: as a regulative relation to that which structures human being.

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<sup>28</sup> Victoria Kahn, “Rhetoric and the Law,” *Diacriticis* 19 (1989): 21-34; Edward M. Panetta and Marouf Hasian, Jr., “Anti-rhetoric as Rhetoric: The Law and Economics movement,” *Communication Quarterly* 42 (1994): 57-74; James Arnt Aune, “On the Rhetorical Criticism of Judge Posner,” *Hastings Constitutional Law Quarterly* 23 (1996): 658-669.

<sup>29</sup> White, *Justice as Translation*, 94-96.

Pierre Schlag has argued, however, that these normative systems are not based on externally grounded and ontologically certain principles, but are instead rhetorically structured to recursively perpetuate themselves. “Normative legal thought,” he writes, “systematically turns us away from recognizing that [it] is grounded on an utterly unbelievable representation of the field it claims to describe and regulate. The problem for us is that normative legal thought, rather than assisting in the understanding of the present political and moral situations, stands in the way. It systematically reinscribes its own aesthetic—its own fantastic understanding of the political and moral scene.”<sup>30</sup> Normative thought does not describe the ontological conditions of the terrain it is meant to regulate, but *produces* that terrain *through* its regulation. In other words, the rhetoric of the law does not flow from the epistemological foundation of the law as justice, in fact quite the contrary: the separation of rhetoric and epistemology in normative thought actively conceals their coextensive nature, reifying legal presuppositions which are no more than fictional constructs of a groundless fantasy.

Turning back to the two examples of normative thought discussed above, the phenomenon Schlag describes is quite easy to identify. The norm of validity in pragma-dialectics treats the system of rules governing the rationality of an argument as *necessary*, while they are, in the final analysis, fully contingent. The external criterion of reasonable discussion, embodied in legal argumentation, turns back on itself to justify the normative structure of an argument. Even if pragma-dialectics were to admit that the rules which constitute its normative gesture are themselves grounded in an external standard, the existence of that standard would have to be psycho-empirically established, at which point one would realize that the constitutive limits of the value-concept “adequacy” are to be found within the rhetorical commitments of the argument

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<sup>30</sup> Schlag, “Normative and Nowhere to Go,” 188.

itself.<sup>31</sup> To say that the law *should be* a certain way requires one to rhetorically constitute the standards by which that claim can be reached in the first place. The concept of rationality, as we saw in both Chapters One and Two, is nothing more than the nihilistic metaphysics that substitutes the symbolic for the real. The same is true of legal realism, insofar as it claims to apprehend a reality beyond the law around which the judicial system must be formed. Realism gives positive content to the void of the real, i.e. covers it over with the symbolic, by normativizing a purely descriptive mode of thought (derives an “ought” from an “is”),<sup>32</sup> which does nothing more than recursively strengthen the descriptive claim by regulating social action in its image.<sup>33</sup>

Normative thought appraises the law in terms of its potential to systematically regulate human behavior toward a particular end. That regulative impulse gains its authority by insisting that its foundation is not rhetorical when there is, in the final analysis, nothing else that it could be. The strength of both positions lies in their ability to throw their rhetoricity into the future as a utopia. For pragma-dialectics this utopia is the society governed by rational thought and argumentation. For legal realism the utopia is a system of law based upon a purportedly scientific understanding of human behavior. Normative thought denies life completely, worshipping instead with a hollow facsimile of a long dead god.

Thus far we have seen that legal authority is composed through two different rhetorical procedures. The first is the institutional authority granted to the judge both in her dispositive role

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<sup>31</sup> Reason, rather than grounded in any external and immutable standard, may be a fully contingent product of evolution; see: Hugo Mercier and Dan Sperber, “Why Do Humans Reason? Arguments for an Argumentative Theory,” *Behavioral and Brain Sciences* 34 (2011): 57-74.

<sup>32</sup> Schlag makes this argument in slightly different terms. He says that normative thinking is solipsistic because it only engages criticisms from within the reality it has symbolically constructed. This critique is quite similar to the one made by Rorty in response to the logical inconsistency of a relativist position. Schlag, “Normative and Nowhere to Go,” 175-177.

<sup>33</sup> See also Heidegger’s claim that *Ge-stell* is dangerous precisely because it conceals its contingency from us: Martin Heidegger, “The Question Concerning Technology,” in *The Question Concerning Technology and Other Essays*, trans. William Lovitt (New York: Harper & Row, 1977), 3-35.

in a particular legal dispute and in the respect for her opinions through the doctrine of stare decisis. From this point forward this type of authority will be called *enunciative authority*. The second, which I will call *argumentative authority*, is the authority created through rhetorical commitments, particularly the simulation of enunciative authority through Burkean rhetorics of inevitability and the compelling force of normative thought, which although initially appearing necessary are ultimately contingent. The difference between these two procedures is not based upon their terminal effect, which is authoritative through and through, but in their modes of effectivity. Enunciative authority is explicitly authoritarian, has concentrated and specific rhetorical force, but is more fragile and contestable than argumentative authority, which is implicitly authoritative, and more diffuse and slower in effect. Enunciative and argumentative authority are, in the final analysis, mutually productive forces, since judges are influenced by legal rhetoric and rhetoric is changed through the practical mutation and redeployment of the appellate opinion.<sup>34</sup> Taken together, they constitute authority within the law. Now that the form and function of this authority have been established, we turn our attention to the means by which it can be effectively challenged, reordered, and ruptured through eventual rhetoric.

### **Law, Literature, and Translation**

At the outset of Part II I noted that eventual rhetorics seek to challenge the hermeneutic authority of the symbolic over the judgment of phenomena. Under this view, normative legal thought is inherently anti-evental. Its core gesture does not challenge symbolic authority, and its different manifestations are not evidence of a shift in its fundamental rhetorical commitment, but are simply a reconfiguration of its internal coordinates. All normative thought is, after all, normative. A legal event, on the other hand, would accomplish something fundamentally

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<sup>34</sup> See: Wendy R. Olmsted, "The Uses of Rhetoric: Indeterminacy in Legal Reasoning, Practical Thinking and the Interpretation of Literary Figures," *Philosophy & Rhetoric* 24 (1991): 1-24.

different. The event would pry open the symbolic, altering the possibilities of legal thought, while leaving the law's enunciative authority (i.e. the authority of the appellate opinion) intact. The justification for this constraint is twofold. First, the law in its most limited sense is an architectural distribution of social power with minimal essential normative content (a claim to be more fully elaborated in the next chapter). Changing both the enunciative and normative authority of the law would change the entire legal apparatus and would not be, as a matter of definition, an event fully contained within the law. Second, preserving enunciative authority gives strength to whatever changes result from the event. In the previous chapter we saw that it would be deadly, if not structurally impossible, to live in the evental space of the real. The event is merely a subjective relation *to* the real. Preserving the exclusivity and clearly demarcated boundaries of the legal apparatus acts both as a buffer between the legal evental space and other areas of life, and as a force to effectuate cultural change. Thus, it is possible for the law to become a purely evental phenomenon, but only through an elimination of the fundamental gesture of normative thought. The enunciative authority of the law gives voice (both literally and figuratively) to the regulative (productive) capacity of the law over and throughout the symbolic—it acts as a vector for the spread and solidification of a cultural-evental contagion.

The rhetoric of the legal event is homologous with that of an evental rhetoric, insofar as it is a double-declaration of affirmation and truth, which establishes a productive relation between the subject and the real. The legal event recognizes that the normative content of legal thought is not ontologically necessary—or externally justified—but is instead contingent. The question shifts from what the law systematically is or ought to be, to what the legal community will make it to be. The event, in other words, frees the law to *want* something, purely and completely.

There is no better example of such a seismic shift in legal thinking than the integration of law and literature in the work of James Boyd White, whose theory of constitutive legal rhetoric has been influential in communication studies for several decades. White explicitly breaks with the two established strains of normative legal thought outlined above, arguing that both are symptomatic of an ends-means rationality that systematically instrumentalizes human life.<sup>35</sup> For White, the force of law should be measured by its productive ability to establish relationships between individuals—its ability to “create a rhetorical community over time”<sup>36</sup>—rather than by its ability to resolve disputes. The constitutive nature of legal rhetoric is not isolated to its culturally regulative effect (e.g. “community building”); rhetoric is also an internally dynamic force within the law itself. Our interest at this juncture is decidedly in the latter effect precisely because it is the condition of possibility for change in the former. That is, a shift in the culturally productive force of the law is impossible without a prior change in legal rhetoric. I do not mean to suggest that the legal codification of an eventual rupture is a necessary precondition of any cultural change heralded by the introduction of the new; rather, if the law is to be the mechanism by which change is concretized then it too must remain susceptible to eventual contagion. The law cannot be reduced to systematic being, it must be transformed into an unbounded becoming, and the first step in such a transformation is abandoning normative legal thought.

In normative thought, futural contingency is mastered through the retrojective normalizing force of projected necessity. By throwing its norm outside of itself, and binding action to it, normative thought implicitly throws that norm into the future as utopia. The end of law, and the end of society for that matter, is already given, and rhetorics of inevitability chain individual agency to the regulative authority of teleological thought. History itself is

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<sup>35</sup> cf. White, *Justice as Translation*, 22-88.

<sup>36</sup> *Ibid.*, 98.

retroactively reconstituted as symptomatic of an anti-utopian past. White, while expressing the problem in different terms, offers a solution—a way of approaching the law that does not extend “a structure of propositions...it does not precipitate out into a system or doctrine but is always a fresh demand upon the particular moment, the particular mind.”<sup>37</sup> Such an approach takes the contingency of legal disputes and our responses to them as its central question. The law is emptied out of teleological necessity. At the same time, the effectual force of the law undergoes a conversion from regulative authoritarianism to constitutive authoritativeness.<sup>38</sup> This shift is, in other words, the law’s assumption of its own constitutive power, which can only be exercised through the rhetorics that constitute its practice. White argues:

The current habit of regarding the law as an instrument by which “we” effectuate “our policies” and get what “we want” is wholly inadequate. It is the true nature of the law to constitute a “we” and to establish a conversation by which that “we” can determine what our “wants” are and should be. Our motives and values are not on this view to be taken as exogenous to the system (as they are taken to be exogenous to an economic system) but are in fact its subject. The law should take as its most central question what kind of community we should be, with what values and motives and aims; it is a process by which we make ourselves by making our language.<sup>39</sup>

Here White reveals at least two movements essential to the possibility of an eventual legal rhetoric. The first is the dislocation of the subject of legal discourse from an external norm, shifting it to an interior attachment to becoming. As we saw in the previous chapter, Nietzsche

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<sup>37</sup> White, *Acts of Hope*, 40-41. In this quotation White is discussing the dialogic structure of the *Crito* and not constitutive legal rhetoric directly, although I think it nicely summarizes the change White hopes to see in the latter.

<sup>38</sup> The distinction between authoritarian and authoritative is one that White suggests falls roughly along the lines of good and bad authority, respectively; see: *Ibid.*, xii. However, for the present analysis, authoritativeness should be understood in terms of the process of creating authority from the bottom up, whereas authoritarianism is the application of a pre-given authority.

<sup>39</sup> White, *Heracles’ Bow*, 42.



grounded his theory of perspectivity on the notion that truth is internal to a situation. The law, in a similar fashion, must take as the subject of its own interrogation its ability to cause cultural change, transforming its rhetorical commitment from the closure of controversies to the continuity of conversation. Undoubtedly each court case must still be resolved in some capacity, but that resolution would not be appraised in terms of its consistency with propositional values (e.g. does it fit the “plain language” of the law). Rather, each case becomes a “fresh demand” upon the conversation of the law, and whatever decision arises as a result of that demand must be taken contingently in relation to the future of the conversation itself. To treat any crystallization of dynamic legal becoming as indicative of a future is to become normative, to change the course of the conversation from eventality to eventuality. Every trial, every controversy, is an instance of the law becoming what it is, not what it should be or what it will be, and the law is thus unchained from any particular end, free to pursue the possibilities of the new.

The second movement, concurrent with the first, is the constitution of a community that is capable of having this ongoing conversation about itself and its relationship to others. However, this community does not come into being as a result of rhetorics of inevitability, as it does under normative thought. That is, the community must not be based upon a shared belief in teleological necessity. In the case of normative thought, as Burke made clear,<sup>40</sup> the utopian future is already-given, and any act of interpretation violently (and necessarily) excludes its alternatives. Communities constituted around inevitability are dialectically negative, in that they deny fundamentally their internal constitutive authority. Such a community will remain servile to its normative attachments, forever unable to achieve the new.

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<sup>40</sup> “However, ‘higher law’ and the precedents based upon it referred not to changing material conditions, but to a kind of “immutable scene” that could be idealized and generalized in terms of “eternal truth, equity and justice” Burke, *A Grammar of Motives*, 379-380.

Conversely, White's community, fashioned after Stanley Fish's interpretive community,<sup>41</sup> must be built ethically. By "ethics," White means that which is concerned with the relationships between and amongst people, the relationship of the self (however broadly conceived) to the other.<sup>42</sup> Those questions regarding our values and motives must be asked in terms of their own becoming, in the constantly articulated relationship of one person to another. Language, and the community which forms around it, must remain an open conversation—and for White, reading literature is the best model for such a conversation. Literary texts, White explains, "are not coercive of their reader, but invitational: they offer an experience, not a message, and an experience that will not merely add to one's stock of information but change one's way of seeing and being and talking."<sup>43</sup> Reading literature establishes a connection between reader and text: a relationship we call interpretation. A reader brings something to the interpretation, her own histories, languages, prejudices, and experiences. However, the text is not passive: it has its own histories and languages. The reader is caught up in the text, engaged in a reciprocal exchange through which she produces meaning as interpretation while the text changes her over the course of the reading. No one, White maintains, is the same before and after they have read a literary work.<sup>44</sup>

Rhetorically, the texts of the law must become invitational rather than propositional, abandoning their commitment to logical proof in favor of an ethical commitment to the synthesis of human relations. This ethic does not take the form of an infinite obligation to the other as we

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<sup>41</sup> Stanley Fish, *Is there a Text in This Class? The Authority of Interpretive Communities* (Cambridge, MA: Harvard University Press, 1982).

<sup>42</sup> White, *Justice as Translation*, 41-42.

<sup>43</sup> *Ibid.*, 42. The text before the quoted segment is similarly illustrative: "Literary texts are, therefore, not propositional, but experiential and performative; not language-free, but language-bound and language-centered; not reducible to other terms—especially not to logical outline or analysis—but expressing their meanings through their form; not bound by the rule of noncontradiction [sic] but eager to embrace competing or opposing strains of thought; not purely intellectual, but affective and constitutive, and in this sense integrative, both of the composer and of the audience, indeed, in a sense, of the culture." *Ibid.*

<sup>44</sup> White, *Heracles' Bow*, 89-95.

saw in Schopenhauer's ascetic ideal. In terms reminiscent of Nietzsche, White explains, "The heart of this set of ethical practices is the art of simultaneous affirmation of oneself and recognition of the other."<sup>45</sup> The recognition of the other must, in turn, remain authentic—it must attempt to understand the other on his own terms. The ethical, and eventual, subject "reads" the other like she would a literary text. She enters into a reciprocal relationship with the other, establishing between them a conversation and community of mutual interpretation. But, the other is foreign, composed in a language which does not belong to the subject. In order to relate to the other, she must learn to speak his language, and it is on that point that White introduces the notion of translation.<sup>46</sup>

*Translation: Ethics and the New*

Translation in its most basic sense is the ability to render something in one language that had originally been rendered in another. Translation, argues Edith Grossman, the celebrated translator of Cervantes and Gabriel García Márquez, is both critical interpretation and creative writing.<sup>47</sup> The translator writes the work in a new language, "Hoping that the readers of the [translation]...will perceive the text, emotionally and artistically, in a manner that parallels and corresponds to the esthetic experience of its first readers."<sup>48</sup> Translation involves a deep method of reading, of engagement with a text, one that allows the translator to crystalize her experiences and recreate them in another language. The translator, Grossman says, is "the most penetrating

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<sup>45</sup> White, *Justice as Translation*, 42.

<sup>46</sup> See generally: Lawrence Venuti, ed. *The Translation Studies Reader* (London: Routledge, 2000); Anthony Pym, *Exploring Translation Studies* (London: Routledge, 2009); Jeremy Munday, *Introducing Translation Studies: Theories and Applications*, Second Edition (London: Routledge, 2008); John Biguenet and Rainer Schulte, eds., *Theories of Translation: An Anthology of Essays from Dryden to Derrida* (Chicago: University of Chicago Press, 1992); see also: Noam Chomsky, *Reflections on Language* (New York: Pantheon books, 1975); Jerry A. Fodor, *The Language of Thought* (Cambridge, MA: Harvard University Press, 1980); and William van Orman Quine, *Word and Object* (Cambridge, MA: The MIT Press, 1964).

<sup>47</sup> Edith Grossman, *Why Translation Matters* (New Haven: Yale University Press, 2010).

<sup>48</sup> *Ibid.*, 7.

reader and critic a text can have.”<sup>49</sup> She must explore the syntactic and paradigmatic relationships between words, the relationships among(st) the culture, the reader, the language, and the text. The job of the translator is much more than substituting the words of one language for another; she builds a new text, creating correspondences between the two different languages, aesthetic experiences, and their affective dimensions. Translation is “as a living bridge between two realms of discourse, two realms of experience and two sets of readers.”<sup>50</sup> Translation is a never-finished process, a continuing relation between two communities. The translator must shift between the perspective of one language, one culture, and another, between the original text and her recreation of it: she must be an ideal reader and a creative force in her own right. It is in this capacity that the translator should be considered the archetypal evental subject.

White summarizes (evental) subjectivity as translation along the following lines: the translator recognizes the foreignness of a situation to her own, and the inadequacy of her language to describe that situation. This foreignness is nothing less than the irreducible difference between two perspectives, manifest in those features of a text that are “impossible” to translate. Translation, in the first instance, exposes the limits of language by “reminding the reader that one is always at the edge of what can be done; [and] that beyond it is something unknown and if for only that reason wonderful.”<sup>51</sup> Consider those literary experiences that are “impossible” to translate, those specific moments, themes, figures, or phrases which are so tangled up in their cultural context that one cannot hope to cut them free. Those moments are the ones that define a translator, that define the quality of her work. When a translator reaches such an impasse she has three options: she can yield to the impossibility, excluding that part from her translation; she can find similar experiences in her own language and pile them together in hopes

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<sup>49</sup> Ibid., 73.

<sup>50</sup> Ibid., 75.

<sup>51</sup> *Justice as Translation*, 252-253.

of approximating the foreign experience; or, she can create that experience in her own language, in her own culture. It is this latter move which makes translation eventful.

The recognition that her language is inadequate to describe a foreign situation is the translator's confrontation with her own linguistic gaze. The symbolic-order as language folds back on itself, exposing the lack at its center, allowing the translator to embrace the creative force demanded by the void of the real. Her reality needs something new, needs something it has never had before, and that thing cannot simply be approximated—the ethics (in White's sense of the term) of translation preclude such a lazy, and ultimately inauthentic, move. After all, “translators,” Grossman says, “translate context.”<sup>52</sup> Instead the translator *creates the new*. This phenomenon extends beyond those singular “impossible” experiences to embrace the process of translation as a whole. A literary work, especially one as magnificent as (for example) *Don Quixote*, is itself an “impossible” experience, one that has no correspondence in the English language world. Translating such a text, or any text as long as it is engaged ethically, is thus a process of creating something new. While the inspiration for the work may be the original text, it is the translator's writing we ultimately read; it is her text.<sup>53</sup> A translation is thus an active and enduring relationship of one work to another, of one culture, one language, to another. It is a bridge between two worlds that does not seek to make them commensurable, but simply to create a link between them, to create a community around the interpretation of a text.

Because translation is measured by its experiential similarity to the original, the correspondence between the two can only be judged *through* their reading. The translation declares its authority as it declares its text; it is always, “I, the translation, am speaking.” Translation does not endeavor to create a simulacra of the original work in a different language,

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<sup>52</sup> Grossman, *Why Translation Matters*, 71.

<sup>53</sup> *Ibid.*, 31.

but something that is entirely new, entirely its own. The translator must apprehend the limits of her language and traverse them in order to create that which was previously unknown, that which is wonderful. Translators must (constantly) obtain an unparalleled knowledge of both Language A and Language B in order to know a text in one language and create it in another. I hesitate to use the qualifiers “native” and “foreign” to describe these languages because, as we saw in the previous chapter, the subject must thoroughly adopt two perspectives in order to apprehend the shift between them as truth. A translator is affected by both languages, they are both “native” to who she is, and “foreign” to her because the languages do not belong to her alone, they belong to a community because they are created by—and create—that community. Thus, the commitment of a translator to throwing herself into the world of the other, letting it influence who she is while still affirming her own subjectivity, is one of the most ethical acts possible.

### **Translating Justice**

What does translation have to do with the law? According to White, *everything*. For White, the lawyer, judge, jury, scholar, and law student are already translators.<sup>54</sup> The lawyer, for example, has to translate his client’s narrative out of his client’s language and into legal language, finding those parts of that narrative that correspond to legal concepts, or would be persuasive to a jury.<sup>55</sup> Adjudication and opinion writing are also acts of translation, taking the language of the trial and converting it into the authoritative discourse of a decision.<sup>56</sup> Given the enunciative authority of appellate justices, especially Supreme Court justices, and the ways in which their rhetorical commitments precipitate out into the legal community and define *its* rhetorical commitments, it is imperative that judges embrace their role as translator, and do so ethically.

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<sup>54</sup> White, *Justice as Translation*, 241.

<sup>55</sup> *Ibid.*, 260-262.

<sup>56</sup> *Ibid.*, 263.

Authentic translation is, as we have seen, an inherently ethical activity because the translator affirms her native language while endeavoring to know the language and text of the other. Justice, then, becomes the ethical commitment of constitutive rhetoric as translation. A translator must always ask who “we,” as a community of language users, are, if she is to know how to translate a text at all. In creating her text she must also ask what that community wants, what matters to them, and what type of community is made through the interpretation of her text. Those who read her text, who form a rhetorical community around that text, ask those same questions of themselves and others. The conversation of the law, as described by White, is established through a community of readers and authors who share the same language, and attempt to translate the cultural phenomena of another language into their own. This is precisely why White resists the rhetorical homogenization of legal realism, which would replace the complex language of the law with sociological or policymaking language.<sup>57</sup> The forced shift in perspective between legal and non-legal language is the condition of possibility for translation as justice and the event. The law learns how to change itself by recognizing that its language is contingent, limited, and constitutively lacking. It takes up that lack, faces the demand for creation inherent in the void of the real, and becomes susceptible to the new in its own language and in the culture of which it is a part. The law assumes its role in the present, becoming what it is.

Pierre Schlag, however, raises an important objection. He notes that “the basic question [asked by White], ‘How should we talk?’ assumes that how we talk is somehow our choice—that we (you and I) are already intellectually and politically enabled to decide one way or another.”<sup>58</sup> Schlag’s skepticism is perhaps the result of the post-structuralist “death” of positive subjectivity,

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<sup>57</sup> Ibid., 95.

<sup>58</sup> Schlag, “Normative and Nowhere to Go,” 171.

which maintains that the productive forces shaping who we are, and who we will become, are impossible to move beyond. However, assuming that the subject has no agency replicates, in many ways, the problematic gesture of normativity. If the subject is unable to get outside of her rhetorical situation, if language creates her while she *does not* create language, then the future is not contingent at all—it is necessary. The Nietzschean theory of the event is founded upon the rejection of the chaining effects of a dead subjectivity through and through. Evental subjectivity restores temporality to the future as contingency. The problematic elements of normative thought are abandoned by embracing discourses of affirmation and truth. The dialectical affirmation of evental rhetoric rejects the dialectical negation of normative thought, and the truth of the event is only achievable through the dislocation of subjectivity from the future as necessity. The retrogressive authority of teleological thought evaporates as evental rhetorics constitute themselves as pure becoming. By adopting the position of the translator, the evental subject creates a space in which she is able to shift perspectives in order to pry open the symbolic and challenge its authority, learning to create the new.

This chapter has illustrated two important points in the relationship between the law and evental rhetoric: first, the current rhetoric of the law is not only unsuitable to the task of the event, it actively prevents its possibility; second, the ethics of translation provide a suitable model for evental subjectivity. Translation is evental for a number of reasons. As we have seen, translation inherently involves a shift in perspectives between two linguistic appraisals of the same aesthetic phenomenon. The translator's question "How can I create this experience in my language?" at once exposes the limits of (the void in) language, and at the same time contains an exorbitant demand of creation. However, it is not simply the activity of translation that is evental. Translation produces a text, a text that is at once authoritative and open to interpretation. A



successful translation does not *force* an experience on its reader, that experience must be created through the act of reading. Any literary text implicitly invites its reader to interpret it, to make it his own. Reading and translation are, in the final analysis, very similar activities, the difference being that the act of creation is foregrounded in the latter while merely encouraged in the former. To truly embrace the constitutive power of authoritative rhetoric, one must recognize and love the possibilities of the unknown.

There is an important limitation to this account. The legal event retains the architectural distribution of social power that we call the apparatus of the law. White's theory of constitutive rhetoric requires the specialized and adaptable language game of legal communication in order to sustain the type of conversation he envisions—that is, an evental conversation. Without its constitutive power, the law could not establish relations between people, and thus could not establish communities beyond its own. The minimal retention of the symbolic edifice is beneficial if for no other reason than that it ensures the existence of a specialized language game to act as a barrier across which one might translate social texts, in order to achieve an evental subjectivity. Many scholars rightly object to this move. Hasian and Croasmun, for example, argue that White “maintains a level of epistemological realism,” which prevents his theoretical approach from reflexively questioning the authoritative role of the law.<sup>59</sup> Victoria Kahn also criticizes White for ignoring the importance of ideological critique, and ignoring the structural inequalities between speakers of different races, genders, etc.<sup>60</sup> Both critiques lodge essentially the same complaint: that the law is inherently unequal, privileges the voices of those in power, and does not allow for its own criticism. While many of these concerns are significantly

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<sup>59</sup> Marouf Hasian Jr. and Earl Croasmun, “Rhetoric’s Revenge: The Prospect of a Critical Legal Rhetoric,” *Philosophy & Rhetoric* 29 (1996): 295. While White explicitly rejects any sort of “realism,” the remainder of the critique is well taken.

<sup>60</sup> Kahn, “Rhetoric and the Law,” 26.

mitigated by the ethical dialectics of translation, they are certainly not eliminated. Thus the question becomes how exactly the law itself can be subject to an evental force, how it can be completely reconfigured, or made visible. It is this question that animates the next chapter.

## FOUR | The Law's Edge

“Yet is it ill to disobey...Thou has withstood authority, a self-willed rebel, thou must die.”  
 –Sophocles, *Antigone*

In his essay on psychoanalysis in criminology, Lacan notes: “There is no society that does not include positive law, whether traditional or written, common law or civil law.”<sup>1</sup> Lacan’s claim is not simply empirical: it is ontological. Laws are, in their most basic sense, the codification of the rules governing social life, and for Lacan, society is understood in terms of the rules which structure its order. Two humans living in proximity to one another are not social simply as a function of that proximity; they must *interact* in a rule-bound way before one would entertain the thought that they composed a society. Laws represent the ossification (suggesting both the hardening and structuring effects of skeletal formation) of the rules by which an individual knows how to act with another, and by which a group of individuals might come together and call themselves a community. Thus the existence of these rules, as laws, is a condition of possibility for society itself.

While laws are necessary for the creation of the social, the authority of the law is not ontologically given. The notion that legal obedience is somehow a condition of human being is, for Lacan, “mythical,” because just as the existence of the law is a feature of every society, so it is its transgression.<sup>2</sup> Not every human automatically, or inherently, obeys the law. However, this observation does not prove that legal authority, as a force, is evitable; rather, it suggests that the specific content of the law is contingent. Nietzsche argued, for example, that the concept of justice is created after the law is formed as a kind of fiction, tying the provisions of a specific

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<sup>1</sup> Jacques Lacan, *Écrits: The First Complete Edition in English*, trans. Bruce Fink (New York: W. W. Norton & Company, 2006), 103.

<sup>2</sup> *Ibid.*, 103-105.

legal system to a universal concept used to justify them.<sup>3</sup> Tying the law to a purportedly immutable foundation is, for example, what Hobbes and Locke sought to achieve through the articulation of theories of natural law or divine right.<sup>4</sup> By grounding the normative force of the law outside of its social articulation, these philosophers attempted to *naturalize* obedience, creating a subject that is necessarily a subject of *this* law. If specific laws (as opposed to the force of the law) are contingent, however, then the subject of the law is no longer necessarily constrained and constituted by the content of the law. That is, at the edge of the law, the subject is free to create the new.

The distinction between the authority of the law tout court and the substance of the law is the same as the distinction drawn by Zupančič between the force of the symbolic and its effects. Freeing the law from nature, from necessity, does not free the subject from legal authority. The law, like language, is a symbolic construct, and its authority only extends as far as we allow it. Yet, despite the substantive contingency of the symbolic, as Burke reminds us, humans are symbol-using animals.<sup>5</sup> While we might rid ourselves of the law just as might rid ourselves of language, it seems unlikely that we will do either; and, more importantly, it is hard (if not impossible) to imagine the social without law or language. As we saw in Zupančič's analysis of Nietzschean truth, the denial of the symbolic is simultaneously a denial of life—a dangerous, if not unbearable, proposition. The demand of an evental rhetoric is not the call to *live* in the evental space of the real, but rather to create an enduring and productive relationship to it. After the event, the symbolic will inevitably reemerge to structure our psychic lives, to give meaning

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<sup>3</sup> Friedrich Nietzsche, "On the Genealogy of Morals," in *On the Genealogy of Morals/Ecce Homo*, ed. Walter Kaufman, trans. Walter Kaufman and RJ Hollingdale (New York: Vintage Books, 1989), Second Essay, §11.

<sup>4</sup> John Locke, "Second Treatise of Government," in *Classics of Modern Political Theory: Machiavelli to Mill*, ed. Steven M. Cahn (Oxford: Oxford University Press, 1997), 217-291; Thomas Hobbes, *Leviathan*, ed. Edwin Curley (New York: Hackett, 1994), 79-100.

<sup>5</sup> Kenneth Burke, *Language as Symbolic Action: Essays on Life, Literature, and Method* (Berkeley: University of California Press, 1966), 3.

to the world. And it must. The authority of the law is inevitable, it is the necessity of contingency; the shape it takes, however, is determined by those who heed its call.

### **Authority of the Law**

Many consider legal authority to have an essential existence; that is, legal authority is something in itself, something to which we are subject. James Boyd White, for example, notes that “for the most part we go through life yielding to the demands made upon us by the world, without thinking much about them: we stop at red lights, pay our taxes...and so on.”<sup>6</sup> These demands are not made by the law itself, but by individuals acting in its name. These individuals are granted their authority by an institutional apparatus: in the context of the United States, for instance, the legislature makes laws, the judiciary interprets them, and they are enforced by the executive. But these institutions gain their authority from elsewhere, and if we are to challenge the apparatus of the law, then we must find the final source of its authority, that place in which the law originates and grows. Legal authority is not located in the threats of violence by the state, the laws of nature or those created by a deity, or through rationally divined propositions of logic. The authority of the law emanates from a subjective demand, which is thoroughly concealed by the institutionalization of law in modern society. For the subject to face that demand is to find the edge of the law, the space between legal and illegal that gives structure to both.

Many laws are created and enforced to ensure that our society is orderly and safe. If every driver, for example, ignored red lights, speed limits, or the use of turn signals, our roads would be chaotic, inefficient, and extraordinarily dangerous. Despite their grounding in safety and order, traffic laws are not enforced solely on those criteria. Red light cameras, for example, automatically cite drivers regardless of the relative safety of their actions. Those drivers are cited

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<sup>6</sup> James Boyd White, *Acts of Hope: Creating Authority in Literature, Law, and Politics* (Chicago: The University of Chicago Press, 1995), ix.

and punished because they have broken the law. For some, breaking the law is the ultimate taboo, and intentionally engaging in illegal activity is unthinkable. For others it is a simple cost-benefit calculation. And for others still, the law has no normative force whatsoever, or perhaps its force extends only as far as their agreement with its propositions. To find the subjective demand from which the law originates, however, requires an understanding of why we obey the law in the first place.

### *The Purpose of Criminality*

James Boyd White argues that the common understanding of criminal punishment is divided into four purposes: (1) deterrence, (2) separation, (3) rehabilitation, and (4) retribution.<sup>7</sup> These purposes, however, are not only characteristics of criminal law: they are representative of disciplinary practices in a general sense. The punishment “time out,” for example, models all four purposes nicely. Consider a group of kindergartners playing a game. One child consistently defies the rules, which is disruptive both because it makes the game chaotic (the other children no longer know what to expect) and because the teacher must constantly correct the child’s behavior. Fed up with the constant disruptions, the teacher sends the child to time out: she is told to sit in the corner facing the wall, and to “think about what she’s done wrong.” This act of separation is effective for a variety of reasons. In the short term, the game is no longer disrupted by the rule-breaking child, and can continue as planned. Moreover, thinking about her behavior may cause the child to change that behavior, either by associating the punishment with breaking the rules or by realizing what was wrong with her action in the first place. In time she may even be rehabilitated and be able to join the other students. Her visible isolation is also a public display, which shames the child internally and reinforces the rule of law in the other children.

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<sup>7</sup> James Boyd White, *Heraclides’ Bow: Essays on the Rhetoric and Poetics of Law* (Madison: University of Wisconsin Press, 1989), 194.

Some of the other children may have wanted the teacher to punish the rule breaker as a matter of principle, and others to restore order to the game. In any case, the other children know they have done well, learn to stigmatize those who do not follow the rules, and come to fear punishment, making it a deterrent. The specter of time out, its fantastic possibility, lets those in the group know who they are and what they stand for. This mode of discipline does not require physical violence to achieve its ends. The teacher simply separates the student, placing her outside the group; it is, in Foucault's words, the gentle way of punishment.

Deterrence, rehabilitation, and retribution intersect in and gain their meaning from the act of separation (or, more broadly, the deprivation of liberty). Just as time out has replaced corporal punishment in most schools, separation has replaced violence as the physical manifestation of social power, as the method of extracting punishment on the body of the condemned. Execution, the most extreme form of punishment in our culture, is also the ultimate act of separation: an irreversible expulsion from the socius, the complete elimination of a specific, individual threat. But even death has been made gentle, and theoretically, at least, modern execution is only as physically painful as a pinprick.

Foucault argues that the loss of liberty (separation) is the ideal egalitarian punishment in a society where liberty is the ultimate good.<sup>8</sup> Those who partake of the liberties denied under the law lose all liberty in return. The latter impulse, in its normative form, is the retributive purpose of punishment, the social desire to castigate those who break the rules. Retribution should be understood in a broad sense, encompassing the desire to harm, the desire to establish deterrence, and the externally grounded desire to restore order. Our *demand* for punishment, however, solidifies our *fear* of punishment. We have spent our entire lives implicitly or explicitly

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<sup>8</sup> Michel Foucault, *Discipline & Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1995), 232.

demanding retribution, and we know that someone will demand the same if we too one day defy the law. We know the horrible consequences of separation, and our fear keeps our actions in line. Separation is thus the physical manifestation of retribution and the physical grounding of deterrence.

Rehabilitation, however, has a slightly different relationship to separation. Foucault argues that the prison “must be an exhaustive disciplinary apparatus...the prison has neither exterior nor gap; it cannot be interrupted,” meaning that its sole function is disciplining the criminal, and that everything in the prison is set up to achieve that effect.<sup>9</sup> Not only does this allow the techniques of power to operate externally upon the body of the prisoner by, for example, correctly training him through the regimentation of the schedule; it also creates the conditions under which the prisoner might *internalize* the disciplinary function itself.<sup>10</sup> The latter effect, called rehabilitation, involves the assumption of an established connection between retribution and deterrence: the prisoner comes to demand his own punishment while at the same time fearing its recurrence. The internalization of discipline requires the criminal to believe that what he did was wrong and thus *requires* punishment, while at the same time dispersing the authority to punish into the institutional apparatus of the judicial system. That is, the prisoner integrates himself into and participates in an economy of punishment that implicates *every* criminal act. The prisoner is reintegrated into the purposeful flow of legal authority, becoming a subject produced by the simultaneous desire for and fear of punishment. Indeed, the deterrent effect should be strongest in the rehabilitated criminal because for him the punishment is no mere fantastic possibility: it is real, he has lived it. The act of separation thus treats the operationalization of legal authority as the exertion of social power through the physical act, and

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<sup>9</sup> Ibid., 235-236.

<sup>10</sup> Ibid., 237.



the internalization of disciplinary practices, as retribution and deterrence. It is these two forces, taken together, that constitute the *enforcement* of the law and form the foundation of the latter's legitimation in modern society.

Foucault says "Discipline 'makes' individuals; it is the specific technique of power that regards individuals as objects and instruments of its exercise."<sup>11</sup> Nevertheless, the substantive goal of discipline, i.e. correct behavior, is ultimately a product of and determined by human will. Power does not exist *externally* to society. Every facet of the *dispositif*, the symbolic apparatus that structures the world (philosophy, law, language, science, politics, architecture, etc.) tries to conceal the contingency at its core. Rehabilitation is thus an anti-evental mode of subjectivization. Through rehabilitation the prisoner momentarily assumes her own subjectivity, immediately reinvesting it on the other side of the symbolic order, denying at once the contingency of her own being and the world around her.

This phenomenon requires further elaboration, especially as it relates to the Nietzschean theory of the event, because the movements of rehabilitation contain a kernel of evental possibility. That is, the interstice between criminal and *rehabilitated* criminal is a moment of subjectivization that illustrates how one might move beyond legal and illegal, to arrive at the edge of the law. Similarly, rehabilitation illustrates the mechanism by which the authority of the law comes to be institutionalized, obscuring its fundamentally subjective origin. It is through an analysis of rehabilitation that the possibilities of an event law begin to take shape.

### *The Subject of Rehabilitation and the Rehabilitated Subject*

Criminals, for whatever reason, reject the authority of a given set of laws to govern their actions. A parent stealing bread to feed starving children, a pacifist dodging the draft, or an addict using heroin, all reject the regulative function of the law, creating chaos where there was

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<sup>11</sup> Ibid., 170.

order. Those criminals who ground their actions in a higher-order authority than the law (family ties, personal ethics, happiness) have not embraced contingency; rather, they are simply subject to a system of meaning that is *different* from the law. If any of those criminals are to be rehabilitated, they must assume the authority of the law as retribution and deterrence, moving subjective authority away from non-legal values over to the law. Such a movement is a shift in perspective *par excellence*.

The failure of disciplinary power is the condition of possibility for criminal action in the first place. In most cases the criminal assumes, either in committing the act or asserting a defense, that there are gaps in the law that limit its authority. Indeed, the law has built gaps into its very exterior.<sup>12</sup> The concept of intentionality (applicable to all but “strict liability” crimes<sup>13</sup>), for example, positions intent as hierarchically superior to the authority of the law to punish someone who defies it. In other words, the act and its material consequences are only accessible to the law if a prior and external condition is met, the condition of criminal intent. The common criminal, on the other hand, asserts his or her own gaps: either the law does not apply to him, she is justified in breaking it, or they refuse to acknowledge its authority in the first place. In any case, however, the possibility of committing a crime denies the ontological grounding of legal authority as a matter of definition: legality and illegality are equiprimordial; creating one automatically creates and ensures the existence of the other. Criminality, either through committing the act or imagining its fantastic possibility, exposes the contingency at the center of the law and its authority.

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<sup>12</sup> This is a theoretically, rather than empirically, grounded claim. The belief that it is possible to “get away” with a crime, for example, presupposes that the enforcement of the law is inadequate; that there are literal gaps in the panoptic vision of the so-called surveillance state. Whether or not any criminal actually makes this assumption explicitly is irrelevant to the argument, as the gaps remain theoretically possible.

<sup>13</sup> Richard A. Wasserstrom, “Strict Liability in the Criminal Law,” *Stanford Law Review* 12 (1959).

Rehabilitation, which is the assumption of a specific mode of legal authority, does not change the material circumstances of the crime or subsequent punishment; rather, it shifts the perspective of the criminal from outside the community (i.e. from the excluded position of law-breaker) created by the law to inside that community. Instead of denying legal authority (and her punishment), the criminal now demands it. Rehabilitation can occur simultaneously with the commission of the crime if, for example, someone were to immediately agree to a legal penalty for an unintentional violation of the law. In that case, the criminal masks the contingency of legal authority by not asserting the supremacy of intentionality, despite the obvious failure of the supposed auto-regulativity of disciplinary power.

The effect is more prominent in cases where the criminal intentionally and knowingly commits a crime, however, where the criminal's attachment visibly shifts from an explicitly recognized hierarchically superior or structurally exclusive commitment over to the authority of the law. Nevertheless, the shift in perspectives characteristic of rehabilitation is not an evental shift. It does not involve a decentering of the subject within second-order evental temporality. The criminal subject, upon rehabilitation, immediately reestablishes her constellation of meaning around the symbolic as law, sidestepping the oscillation between perspectives found in the internal temporality of an evental subjectivity. Rehabilitation contains the fundamental (and radical) movement of the event, but it does not establish a relation between the subject and the real. Rehabilitation, in this sense, cannot create the new; indeed, as a matter of definition, it recreates the old.

Rehabilitation's anti-eventality is, of course, not its failure; on the contrary, the practice is meant to reintegrate a divergent person into the symbolic system of the social as law. However, the possibility of rehabilitation illustrates that the authority of *this* law is not necessary, and that

the content of the law itself is contingent. A crucial distinction must be maintained, however, between the physical authority of separation and the psychic authority of retribution and deterrence as they relate to rehabilitation. Separation is the physical authority of legal enforcement, and provides a mechanism by which retribution can be effectuated and deterrence given significance. Separation, however, is not a manifestation of the autonomous force of the law, as though the institutions of the judiciary gained power from a foundational wellspring of authority that exists outside of society and structures the institutional apparatus (e.g. natural law theory). Rather, enforcement is the result of a collectivization and displacement of individual retributive impulses. That is, the physical authority of the law is materially created and authorized by a gathering together of individual desires to enforce and punish. This authority is displaced, however, when the burden of its operation transcends the collective physical action of the individuals locally demanding punishment, and is instead redistributed into a specific body designated for the enforcement of the law—namely, the executive. Such a displacement masks the internal function of individually authorized enforcement, disassociating act and agency from the retributive demand. Rehabilitation, in the same sense, displaces agency by investing it in the institutional structure of the law as punishment. By severing the connection between the individual and her authorization of action, the law appears to derive its authority not from the individual demand, but from an internal source: from the institution itself. Thus the law begins to act *upon* a population rather than *for* that population. The institutionalization of the law, which began as the architecture through which an individual demand for retribution was actualized, now functions as an independent agent on a grand scale.

An eventual rhetoric that is capable of producing an event law must reestablish the linkage between agent and agency by forcing a recognition of the individual contribution to the legal

apparatus. It is only when agent and agency coalesce that the interstitial “time out” of the event can be maintained, in which the subject might establish a proper relation to the real. The law operates as a conduit for judgment, a mode of engagement between norm and action, by functioning as an external container for the subjective gaze.<sup>14</sup> As Hariman notes, “*The performance of the laws* then becomes a singularly powerful locus of social control, for it is the very means by which members of the community know who they are.”<sup>15</sup> This performance, however, is not put on by the community, or even by actors representing the community on a stage. The performance of the law in contemporary society is a phantasmagoria, a projection of the symbolic onto the surface of the world. The images of the performance of the law encompass the real, cover it up, blocking the realization that the plane of illusion is created by those who are entranced by it. An evental rhetoric would disrupt that performance, revealing it *as* a performance and nothing more. Such a break is possible when the law speaks with two voices, that of the institution (as pure authority) and that of its representations (as its effects): when the law declares “I, the law, am speaking!” To understand this declaration requires a prior understanding of the institutional arrangements of the judiciary as the interpretive voice of the law, and their effects on legal voice. It is with this in mind that we turn to the question of authorial voice in Supreme Court opinions.

### **An Institutional Interlude: Authorial Voice and the Supreme Court**

In his opinion in *South Central Bell v. Alabama* (1999),<sup>16</sup> Associate Justice Stephen Breyer caused something of a scandal in the legal community by using the first-person singular

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<sup>14</sup> “Gaze” is used here in Zupančič’s sense of the term, which has a Lacanian rather than Foucauldian inflection. For an excellent discussion of the distinction between Lacan’s and Foucault’s understandings of the gaze, see: Joan Copjec, *Read My Desire: Lacan Against the Historicists* (Cambridge, MA: MIT Press, 1994), 15-38.

<sup>15</sup> Robert Hariman, “Performing the Laws: Popular Trials and Social Knowledge,” in *Popular Trials: Rhetoric, Mass Media, and the Law*, ed. Robert Hariman (Tuscaloosa, AL: University of Alabama Press, 1990), 17.

<sup>16</sup> *South Central Bell v. Alabama*, 526 U.S. 160 (1999).

pronoun *I* in the majority opinion he had written in the case.<sup>17</sup> As Vanderbilt University Law Professor Barry Friedman noted, the slip was “like the Wizard of Oz stepping out from behind the curtain.”<sup>18</sup> Some may not understand Friedman’s shock, because as we are so often reminded during the nomination process, Supreme Court Justices matter on an individual level: their ideologies matter, their life experiences matter, their political positions matter, and their individual judicial philosophies matter.<sup>19</sup> Nevertheless, the Court maintains a semblance of its institutional unity in the judicial opinion. Because majority opinions presumably represent the opinion of multiple justices, they are usually written in the first person plural, using *we* instead of *I*, despite the fact that they are authored by, and in most cases signed by, only a single justice. As Laura Krugman Ray notes, “The text insists throughout on its shared provenance as the voice not just of its author but of all those who have voted for it.”<sup>20</sup> This rhetorical maneuver is meant to promote the appearance of consensus amongst the justices, and it is a convention whose roots reach back to the beginnings of the Court.

In the earliest days of the Union, the Supreme Court issued its opinions *seriatim*, a practice adopted from the British House of Lords in which each justice would write his own opinion in every case, leaving the legal community to determine what precisely constituted precedent.<sup>21</sup> The venerable Chief Justice John Marshall, however, believed the perception of

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<sup>17</sup> The mistake appeared in the slip opinion, but was corrected before the final opinion was published in the United States Reports. He wrote: “In *Richards*, we considered an Alabama Supreme Court holding that state-law principles of res judicata prevented certain taxpayers from bringing a case (which I will call Case Two) to challenge on federal constitutional grounds a state tax that the Alabama Supreme Court had upheld in an earlier case (Case One) brought by different taxpayers.” (*South Central Bell v. Alabama*, slip op. at 6). A copy of the slip opinion is available at: <http://www.law.cornell.edu/supct/html/97-2045.ZO.html> (accessed: May 25, 2011).

<sup>18</sup> As quoted in Tony Mauro, “Breyer’s ‘I’ Scream,” *Legal Times*, April 26, 1999.

<sup>19</sup> See generally: Trevor Parry-Giles, *The Character of Justice: Rhetoric, Law, and Politics in the Supreme Court Confirmation Process* (East Lansing: Michigan State University Press, 2006).

<sup>20</sup> Laura Krugman Ray, “The Road to Bush v. Gore: The History of the Supreme Court’s Use of the Per Curiam Opinion,” *Nebraska Law Review* 79 (2000): 517.

<sup>21</sup> John P. Kelsh, “The Opinion Delivery Practices of the United States Supreme Court 1790-1945,” *Washington University Law Quarterly* 77 (1999): 137-182.

unanimity to be essential to the Court's legitimacy, a claim still echoed by legal scholars today.<sup>22</sup> Marshall persuaded the Court to write unanimously both for the purpose of clarity and in order to establish itself as a coequal branch of government with a unified voice. Thomas Jefferson despised Marshall's decision, writing in a letter that "the practice is certainly convenient for the lazy, the modest, & the incompetent," arguing further that a cloistered Court was fundamentally anti-democratic.<sup>23</sup> Marshall prevailed despite Jefferson's criticism, and Justices of the Supreme Court of the United States have maintained vestiges of his rhetorical commitment ever since.

The consensus amongst justices is more than a façade of unanimity: a majority opinion needs at least five justices to concur with it (including the author) in order for it to become established as precedent. At the same time, however, consensus building is not an *a priori* concern when a justice decides a case. Political scientists Jeffrey Segal and Herald Spaeth argue, based on quantitative statistical analyses of Supreme Court opinions and qualitative evidence from the personal papers of several justices, that we can reasonably assume that members of the Court make their decisions based primarily on their individual political attitudes.<sup>24</sup>

Lee Epstein and Jack Knight nuanced Segal and Spaeth's "attitudinal model," arguing that the ideological interests of the justices are constrained by the institution of the Court (e.g. the five justice consensus requirement for precedent), the other branches of government, and public perception.<sup>25</sup> In order to navigate the antagonistic relationship between constraints and goal seeking, Epstein and Knight argue that the justices engage in strategic behavior. Marshall's insistence on the unanimous opinion is an excellent example of such behavior: in order to more

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<sup>22</sup> James Markham, "Against Individually Signed Judicial Opinions," *Duke Law Journal* 26 (2006): 923-951.

<sup>23</sup> Letter from Thomas Jefferson to William Johnson (Oct. 27, 1822) quoted in Kelsh, "The Opinion Delivery Practices of the United States Supreme Court 1790-1945," 145.

<sup>24</sup> Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002).

<sup>25</sup> Lee Epstein and Jack Knight, *The Choices Justices Make* (Washington: Congressional Quarterly Inc, 1998).

effectively achieve the outcomes desired by the Court, the justices must present a unified front to maintain legitimacy in the face of the influence from the executive and legislative branches. The rhetorical maintenance of unanimity, which is certainly a constraint on the opinion writing process, is at the same time an effective tool for ensuring the effectiveness of a given decision. In other words, judicial voice is rhetorically and materially significant to the expression of legal authority.

It is difficult to believe, however, that the Court's rhetorical legerdemain has been effective in concealing the individual motivations guiding the decision making process. Marshall's façade of unanimity has been systematically eroded by the polarization and fracturing of the Court since the early part of the last century, evidenced by the increasing frequency and severity of dissenting and separately concurring opinions.<sup>26</sup> Nevertheless, members of the Court still treat unanimity as a means of exerting authority. *Cooper v. Aaron* (1958), for example, is the only instance in which every justice has co-signed an opinion, a role traditionally reserved for the justice(s) who author(s) it.<sup>27</sup> *Cooper* was, in effect, a test of the authority of the Court in desegregation cases, and as such posed a potential challenge to its institutional legitimacy in general. Members of the Court were aware of this, and leveraged the rhetorical power of unanimity in their favor: during the opinion writing process Justices Harlan and Frankfurter argued that each justice should sign the opinion, noting that the move was categorically different from and considerably more significant than a unanimous opinion signed by a sole author; moreover, as Warren read the opinion in front of the press, he implicitly acknowledged the same

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<sup>26</sup> Karl M. ZoBell, "Division of Opinion in the Supreme Court A History of Judicial Disintegration," *Cornell Law Quarterly* 44 (1958): 186-214; Laura Krugman Ray, "Justices Write Separately: Uses of the Concurrence by the Rehnquist Court, The," *U.C. Davis Law Review* 23 (1989): 777-831.

<sup>27</sup> *Cooper v. Aaron*, 358 U.S. 1 (1958).



in the dramatized emphasis he placed on each justice's name.<sup>28</sup> All three justices were correct in their assumption, and the media seized upon the rhetorical gesture.<sup>29</sup> The *New York Times* noted that "it became apparent at the start of the reading by Chief Justice Earl Warren, that this was more than an ordinary opinion," going on to emphasize both the rarity and the importance of unanimous co-signature.<sup>30</sup> The move is an example of the strategic behavior Epstein and Knight highlight, but more importantly, the differential between the co-signature in *Cooper* and simple unanimity is evidence of the rhetorical effect of authorship and voice on authority, and provides the basis for the possibility of realizing an event of the law.

*Cooper* was exceptional because it shifted authority and authorship together, thus coming to represent the highest possible form of consensus the Court has been able to project. The institutional requirements for consensus, that five justices at minimum must concur in order for an opinion to constitute precedent, is quite different, because it decouples authority and authorship by investing the former in the practice of *concurrence* rather than coproduction. However, the Court apparently no longer feels the need to project unanimity in order to ensure its legitimacy, as the number of coauthored opinions declined after Rehnquist was appointed Chief Justice, and continues to decline to this day. Under both Warren and Burger, it was common to see multiple coauthored opinions per term. Since 1986, the beginning of the Rehnquist Court, there have only been two: the plurality opinions in *Planned Parenthood v. Casey* (1991), authored by Justices O'Connor, Kennedy, and Souter, and *McConnell v. Federal Election Commission* (2003), authored by Justices Stevens and O'Connor.<sup>31</sup> Moreover, this

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<sup>28</sup> Seth Stern and Stephen Wermiel, *Justice Brennan: Liberal Champion* (New York: Houghton Mifflin Harcourt, 2010), 148-149.

<sup>29</sup> *Ibid.*, 149.

<sup>30</sup> Anthony Lewis, "Court Forbids Evasion to Balk Integration; 9 Write opinion; It goes Far Beyond Little Rock Case--Officials Warned," *The New York Times*, September 30, 1958.

<sup>31</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

decrease is to some degree independent of the overall decrease in the number of cases decided by the Court since Rehnquist became Chief Justice (the Court, for example, decided fewer than half the number of cases between 2000-2009 as it did between 1970-1979).<sup>32</sup> Regardless of the reason for the change, it is clear that Court no longer feels a strong institutional need to project consensus or authorial cooperation amongst justices.

The per curiam opinion is another type of opinion in which the Court speaks with a unified voice, and it too has seen a significant decrease in use since the end of the Warren Court.<sup>33</sup> Per curiam literally means “of the Court,” and the designation replaces the individual or collective authorial signature, indicating that opinions issued per curiam are those of the Court as an institution. Initially one might suspect that *Cooper* is an example of just such an opinion, but there are several qualitative differences between *Cooper* and the per curiam as it is commonly understood.<sup>34</sup> Whereas the change in authorship in *Cooper* was used to highlight the legal and social significance of the decision, per curiam opinions are usually regarded as routine, settling either procedural or facially obvious and insignificant substantive issues.<sup>35</sup>

Moreover, despite theoretically achieving the same end—that of the entire Court speaking the same words unanimously—*Cooper* and the per curiam function in rhetorically incongruous ways. *Cooper* was meaningful because the presumption at the time, which continues today, was that unanimity on a contentious social issue was evidence of an important and true decision. In other words, the Court’s authority varied directly with the number of justices who

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<sup>32</sup> Indeed, while 7.6% of decisions under Warren were coauthored (168 out of 2,201), they represented less than 0.1% of the decisions during the Rehnquist Court (2 out of 2,041), and as of 2009 none have been issued during the Roberts Court. These data were obtained from The Supreme Court Database, (2011 release 01) compiled by Harold Spaeth, Lee Epstein, Ted Ruger, Keith Whittington, Jeffery Segal, and Andrew D. Martin. The dataset and supporting materials can be found at: <http://scdb.wustl.edu/index.php> (accessed: April 13, 2011).

<sup>33</sup> As an example, per curiam opinions in cases with oral argument comprised 11.6% of all opinions issued under Warren, 6.0% under Burger, 2.9% under Rehnquist, and 3.7% under Roberts.

<sup>34</sup> The Supreme Court Database has coded *Cooper* as a per curiam opinion, and much of the popular and scholarly literature on the case refers to it as one.

<sup>35</sup> Stephen L. Wasby et al., “The Per Curiam Opinion: Its Nature and Functions,” *Judicature* 76 (1992): 29-38.

agreed with an opinion. The per curiam opinion in its conventional use outlined above, empties the Court of the individual authority of the justices. That is, whatever authority is gained from the perceived intellectual, personal, or ideological superiority of the justices is eliminated from the authoriality (as the combination of authorship and authority) of the per curiam. Indeed, despite speaking in the name of the Court, per curiam opinions are perceived to be used to swiftly dispose of easy or unimportant cases to clear the docket for issues more important to the justices.<sup>36</sup> Thus, the institutional authority of the Court appears to be hierarchically inferior to the authority of the justices that compose it. However, there are exceptions.

The use of the per curiam to clear the docket is considered its “conventional” use,<sup>37</sup> but the Court also leverages the subject position of institutional voice in other, more interesting, ways. *New York Times Co. v. United States* (1971) (the censorship of the Pentagon Papers), *Furman v. Georgia* (1972) (the constitutionality of the death penalty), and *Bush v. Gore* (2000) (effectively determining the 2000 presidential election), were all politically significant and contentious cases without clear legal resolution, and yet, despite defying the norms of conventional use, each majority opinion was issued per curiam.<sup>38</sup> Not only were these decisions controversial in a broad social sense, but there was also considerable disagreement amongst members of the Court during each case as well: *New York Times Co.* was a 6-3 decision with ten total opinions, while *Furman* and *Bush* were both 5-4 decisions with ten opinions in the former and four dissenting opinions in the latter.

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<sup>36</sup> *Ibid.*, 38; see also, generally: Ray, “The Road to *Bush v. Gore*,” 537-540.

<sup>37</sup> Wasby et al., “The Per Curiam Opinion,” 38.

<sup>38</sup> *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Furman v. Georgia*, 408 U.S. 238 (1972); *Bush v. Gore*, 531 U.S. 98 (2000).

These cases indicate a second, although much less common, use of the per curiam: to mask dissensus.<sup>39</sup> Shifting authority from the individual justices to the Court magnifies the effect of rhetorics of inevitability because, as Ray notes, it “throws the institutional weight of the Court against individually named justices who oppose it.”<sup>40</sup> The unified and depersonalized authorship makes it appear as though the institution itself has proclaimed a particular position to be correct, which affords the pronouncement a considerable amount of legitimacy. This effect is compounded by the allusion to the conventional use of the per curiam, suggesting that these significant cases are insignificant or procedural, minimizing their importance.

For our purposes, however, the per curiam achieves something more fundamental: it returns the authoriality of the Court from the hands of the strategic justices to the institution in which they operate. In a case like *New York Times Co.* or *Furman*, where each member of the Court issues an opinion in addition to the per curiam, it creates the conditions under which one might realize that the authority and authorship of the law have been decoupled, not only in the institutional example, but on a massive social scale. That is, these opinions create the conditions for the subjectivization of the subject in its encounter with the part of itself thrown into the world of objects—the investment of individual authority into the apparatus of the law—which is the condition of possibility for an event.

### **The Edge of the Law**

“The only ‘proof’ of the event [indeed, the only universal characteristic of the event]” Zupančič notes, “is the coexistence of [a] double subjectivity,”<sup>41</sup> the subjectivizing encounter of the subject with itself as gaze. This movement is derived from Nietzsche’s belief that subjectivity

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<sup>39</sup> Wasby et al., “The Per Curiam Opinion,” 30; Ray, “The Road to Bush v. Gore,” 576.

<sup>40</sup> Ray, “The Road to Bush v. Gore,” 546.

<sup>41</sup> Alenka Zupančič, *The Shortest Shadow: Nietzsche’s Philosophy of the Two* (Cambridge, MA: MIT Press, 2003), 24.

preceded subjectivization, hence “becoming what one is.” Doubled subjectivity, one turning to two, is represented in several of the structural elements of the Nietzschean event: the internal temporality of the future anterior, the figure of Noon, the double declaration “I, the event, am speaking,” etc. And eventual rhetoric marks the internal and irreducible difference between the subject and itself as gaze, but more importantly it signals the assumption of the lack as constitutive of being—transforming the lack from negativity, i.e. something to be filled, into the positive enunciation of a love for contingency. The event pushes the subject to the edge of the symbolic, to the edge of meaning, thereby establishing a relationship between the subject and the real as the recognition and love of contingency as truth and affirmation. In freeing herself from her stubborn attachment to an “eternal will that wills,” the subject is free to want, to create, and to authentically love the new.

The production of a double subjectivity in relation to the law as symbolic is made possible through the recognition that the authority of the law is nothing more than the subjective gaze thrown into an institution. Laws are the codification of acceptable modes of interaction, which are determined by those who interact. The power of separation, that is, the enforcement of the law which gives it deterrent power, is nothing more than the gathering together of individual demands for retribution. These demands need not be the specific demand to punish an individual, but are instead a general demand for the fantastic possibility of enforcement and its promise of order. Rehabilitation reveals this process as the prisoner transitions from denying her punishment, not to passively accepting it, but to *demanding* it. The enunciation of the demand mixes authority with normativity, investing the will of the prisoner into the specific symbolic of *this* society, of *this* law. It is here that the law as subjective authority masks its own contingency, transforming the subject as law into a subject of the law. In disassociating herself from her

agency, the subject creates the illusion that the law possesses inherent authority, that the law acts upon the population rather than the population acting through the law.

The notion that the authority of the Court is derived from the consensus of its justices provides a good example of this transformation. The decision in *Cooper* suggests that the Court is the most visible, and most effective, when all nine justices speak as individuals together, as the gathering together of nine individual wills into one. But the true authority of the Court is *not* derived from the justices, but from the people whose demands for retribution created the judicial institution in the first place. This argument is quite similar to the philosophy of the social contract advanced by Hobbes and Locke, but with one key difference: for them the law was determined by an external and immutable authority, that of natural or divine law. For Nietzsche however there is no natural law, no “eternal will that wills,” and the law’s authority extends only so far as those who authorize it. Whereas *Cooper* ossifies the belief that judicial authority is derived from consensus, the per curiam opinion creates the conditions under which that illusion can be challenged, especially when the opinion is used in cases of significant social or political import. Part III of this thesis will engage the specific rhetorical mechanisms by which the “cult of the judge” evaporates in *New York Times Co. v. United States*, creating the conditions under which an event could occur, but I offer a more general outline of the process here to provide adequate theoretical context for the discussion to come.

### *The Event Law*

The edge of the law is the interval between legal and illegal, not as manifestations of order and disorder, but as qualified and categorical fields of meaning. The edge is a necessary third term in a binary, an intrusion *as* difference between perspectives which structures them topologically and substantively. The interstice of the event is, in other words, that which creates a distinction *between* legal and illegal, between good and evil. The edge of the law is beyond the

binary but internal to it. Specifically, the edge of the law is not a world without law, but the void from which the law obtains the possibility of its presence: it is the place from which one becomes two, where the world is split into legal and illegal. The edge of the law, then, is the void of the real, and the moment of the law's founding is itself an event.

As Foucault illustrates in *Discipline & Punish*, the contemporary subject is defined as the subject of the law, as that through which and upon which the law is manifest. The picture of strategic behavior painted by Epstein and Knight is a brilliant example of this subjectivity. The Supreme Court Justice, the highest legal authority in the United States, is an agent of creation. She wills the world to be in a particular way and molds it with the power granted to her by the institution of the law: there is no higher interpretive authority than her own; she is the arbiter of meaning, of language, and of life. Yet she is not able to will truly and freely—she is not able to *want*—because she is systematically and structurally constrained. She is constrained by the past through *stare decisis*, she is constrained by the future through interpretation and political intervention, she is constrained by the present through the conventions of legal argumentation and the institutional requirements of consensus. Her power, her authority, is bounded by the very terms of its instantiation. She does not become what she is, but what she has to be. The Justices of the Supreme Court, those for whom will and law should be coincident, are nothing more than subjects of the law themselves.

To a considerable extent, and James Boyd White illustrates this at length throughout his work, the constraints imposed on the justices are contingent. As we saw in the previous chapter, for example, the epistemological and rhetorical commitments of legal argumentation are not the product of ontological certainties, but are created by groundless normative systems of thought. White proposes the figure of translation as a means by which to eliminate many of these

constraints, and I in turn suggested that the translator is an archetypal evental subject. Certainly reformulating the legal conversation as one of becoming rather than being would free justices to *want* something in a more direct, and authentic, sense; but it would not establish an authentic relation between the subject and the law. In Žižek’s words, such a move does not show that the Other as law “hasn’t got it, hasn’t got the final answer.” Indeed, White’s suggested reformulation *conceals* the subjective origins of legal authority by generating them internally as a function of the rhetoric of the judicial opinion. Whatever reflexivity is inherent in justice as translation does not go all the way down to the root of authority, to the very moment in which the law is created *ex nihilo*. To challenge the authority of the law—and not merely authority in the law—one must move outside of it, and establish a relation to the part of the self that exists as a demand for retribution, as the genesis of authority.

Biesecker writes that it “is in the emptying out of the given regime’s most salient signs in which the trace of the Other or ego-ideal is inevitably to be found that the advent of something other depends.”<sup>42</sup> She is, although in different terms, identifying the same effect that Zupančič qua Nietzsche identified as the encounter with the gaze, a recognition of that part of the subject that exists as an internal coordinate of the Other, of the symbolic. The utterance of an opinion per curiam enacts this “emptying out,” the very moment in which the symbolic folds back on itself. Our day-to-day encounters with the Court occur in terms of the justices, their ideologies, their preferences, their voices, their philosophies. But the per curiam opinion is an act of rhetorical erasure, replacing the voice of the nine with the voice of the institution, and transforms bounded authority into unbounded articulation. The per curiam is the law declaring itself, the institution declaring its own content, and is thus a moment in which the subject can experience an

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<sup>42</sup> Barbara Biesecker, “Prospects of Rhetoric for the Twenty-First Century: Speculations on Evental Rhetoric Ending with a Note on Barack Obama and a Benediction by Jacques Lacan,” in *Reengaging the Prospects of Rhetoric: Current Conversations and Contemporary Challenges*, ed. Mark J. Porrovecchio (New York: Routledge, 2010), 27.



unmediated encounter with the law as authority. The per curiam opinion is “I, the law, am speaking!” At the same time, and this effect is most clearly seen in cases like *New York Times Co.* or *Furman*, in which every justice issues an individual opinion in addition to the per curiam, the distance between justice and law becomes visible. The two are severed, and without a human agent to function as the law’s literal voice, the subject is left to wonder what exactly this law that speaks for itself is.

The per curiam opinion is quite literally the law declaring itself. More importantly, however, it creates the authority of its own declaration. When a justice cites precedent, she cites the institutional authority of canonical law. When a per curiam cites precedent, it cites the very texture of its own substance: the Court declares again what it has already declared, and it is the declaration of a declaration which reinforces them both as authoritative. The per curiam clears the stage of ancillary actors—judges and lawyers, policemen and executioners—turning the performance of the law into a monologue. The only remaining actor is the law, and the only spectator, the subject. In the stillness of the empty stage, the subject begins to hear the echoes of her own demand for retribution. The policemen and executioners, the judges and the lawyers, she comes to realize, were not actors on the stage at all; rather they were the phantasmagorical products of her demand gathered together with the similar demands of other subjects. Cleared of these other demands, however, the subject is left only with the part of herself she has thrown into the world as authority, as the projected desire for punishment. This desire is distinct from the desire to punish, which is the desire for punishment coupled with a desire to act. The act is an intermediary between agent and agency, just as doing is the intermediary between being and will. The desire for punishment is an existential desire, and is thus the substance of authority: it is that

which is turned over and cast off, thrown outside the subject into the institution of the law as the authoritative grounding of institutional enforcement.

The event, Zupančič notes, “involves a specific articulation of the relationship between the Real and representation. This articulation does not place the Real as somewhere beyond or outside of representation, nor does it abolish the Real in the name of reducing everything to mere representational semblances. It suggests that the Real exists as an internal fracture or split of representation, as its intrinsic edge on account of which representation never fully coincides, not simply with its objects, but with itself.”<sup>43</sup> Encountering the retributive demand as authority has a subjectivizing effect: the subject realizes she is the originator of legal authority, that she is the one that produced it, and through its architecture her will as demand is carried out.

In other words, the authority of the law is her will, it is what she has demanded – consciously or otherwise. The distinction between legal and illegal, between the law and its opposite, is a distinction forged by her own desire. What lies beyond her will, however, is nothingness itself, the void of the real. In this sense, the event distinguishes between the force of the symbolic and its effects, between the authority of the law as subjective demand and the substance of the law as *this* law. It is in the gap between force and effect that the subject realizes the contingency of existence and is able to realize her ability to create the new.

### *Waiting for the Law*

In Kafka’s parable “Before the Law,” a man from the country stands before the law, hoping to gain access to it. He waits and waits, under the supposed threat of violence from the doorkeeper should he try to enter, and he finally dies without ever being granted entrance. The law itself, in Kafka’s story, is always deferred. As Avital Ronell writes, “Maybe that is the nature of the law, to withhold presencing, except in the parceled out form of representatives – cops,

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<sup>43</sup> Zupančič, *The Shortest Shadow*, 27-28.

security guards, a judge, surveillance cameras, the lease you signed. Endless metonymies of what never takes place as an essence; there is no place where one could find the law, dashing the only hope of the man from the country.”<sup>44</sup> To find the law is to find its authority, to see the place where the law originates and grows, the place from which it draws its power. Its representatives are phantasms, projections of something else onto the surface of other objects: a policeman is not the law, but the law is projected onto him. We witness the law’s effects in the structure of society, in the creation and character of communities, in our relationship to the natural world, in our relationships to each other, the things we own, the buildings we live in, the food we eat. The law is everywhere, always demanding adherence, creating us through constraints and guides. If Ronell is correct, if the law is structurally outside of our grasp, then there is no hope for change. But here we must follow Kafka to the end:

‘Everyone seeks the law,’ the man says, ‘but how is it that in all these years no one apart from me has asked to be let in?’ The doorkeeper realizes that he man is nearing his end, and so, in order to be audible to his fading hearing, he bellows at him, ‘No one else could be granted entry here, because this entrance was intended for you alone. I shall now go and shut it.’<sup>45</sup>

The door was not shut to the man from the country, and the law was not essentially deferred. Rather, the law is absent as a function of the man’s very cowardice, his inability to defy his own internal commitment to the law: he could not enter for fear of breaking the rules, of defying the doorkeeper. The tale can thus be read as a parable of the eventual failure of rehabilitation. The criminal and those who abide by the law are both defined by their placement within the law as binary (legal/illegal) and the constitutive relationship of their position to the other.

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<sup>44</sup> Avital Ronell, *The Test Drive* (Urbana: University of Illinois Press, 2005), 13-14.

<sup>45</sup> Franz Kafka, *The Trial*, trans. Mike Mitchell (Oxford: Oxford University Press, 2009), 154-155.

That is, both the criminal and the citizen know who they are as a function of exclusion. The man from the country is unable to achieve the law because to do so would require him to *break the authority* of the doorkeeper, and by extension the authority of the law. The doorkeeper never explicitly says that he will use force to keep the man out; rather, the man presupposes that force, and is kept out only by his own submission to authority. But the authority of the law is generated solely as a function of the man's subjective investment, and this is why the door is for him alone.

To reach the law one must break through the institutional phantasms that take its place, and upon whom the authority of the law is projected. To break through the façade of internal authority, to come face to face with the gaze as retributive demand, is to come to realize that the law is only what we make it to be. This realization, like the door in Kafka's parable, is for the subject. The retributive demand of the judge in a trial, of the police officer arresting a suspect, or of the Supreme Court Justice interpreting the constitution, is *not* the subject's way to the law. Her door belongs to her alone, and she must take it before it is shut.

“‘Here you run in to a contrary opinion,’ said the priest. ‘Some people say that the story does not give anyone the right to judge the doorkeeper. However he appears to us, he is, after all, a servant of the Law, he belongs to the Law and is, therefore, beyond human judgment. Nor can one think that he is subordinate to the man. To be bound as a servant of the Law, even if only at its entrance, is incomparably more than to live in freedom out in the world. The man has only just come to the Law, the doorkeeper is already there. He is appointed by the Law, to doubt whether he is worthy would be to doubt the Law.’ ‘I don't agree with that opinion,’ K. said, shaking his head. ‘If one accepts it, one has to take everything the doorkeeper says as truth. But that isn't possible, as you yourself have demonstrated at great length.’ ‘No,’ said the priest, ‘one

doesn't have to take everything as the truth, one just has to accept it as necessary.' 'A depressing opinion,' said K. 'It means that the world is founded on untruth.'"<sup>46</sup>

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<sup>46</sup> Ibid., 159.

### PART III | *New York Times Co. v. United States*

“You say that ‘no law’ means ‘no law,’ and that should be obvious. I can only say, Mr. Justice, that to me it is equally obvious that ‘no law’ does not mean ‘no law’ and I would seek to persuade the Court that this is true.”

–Solicitor General Erwin Griswold

“Controversy,” G. Thomas Goodnight contends, “is a creature of the between. In the old days, it was between opposing advocates, i.e. Webster v. Haynes, Lincoln v. Douglas, Bryan v. Darrow; now it is likely to be featured as a dispute opposing agencies, i.e. liberals v. conservatives, environmentalists v. developers, absolutists v. skeptics.”<sup>1</sup> Controversy emerges from a rupture in the symbolic, the failure of two competing systems of meaning to account for the world. The signifier of the interstitial—v—forms an irreducible gap between two sides, a constitutive void around which controversy forms. In addition to abbreviating the word versus, which is itself a marker of opposition, the “v” graphematically separates both sides of the controversy while simultaneously uniting them toward an unrepresented point between them, which is both a point of departure and an impossible point.<sup>2</sup> In other words, the “v” points towards the real as the lack in the symbolic. Controversies are thus sites of eventual possibility: they are a moment where the contingency of meaning pulses throughout the culture, in which the subject might orient herself toward the real qua “v” and inaugurate the new through an eventual rhetoric.

As the signifier of controversy, “v” features prominently in the names of court cases, which are iterations of controversy. In Part II I argued that the judiciary in the United States is currently considered to be an institution that can effectively close controversies and (re)establish meaning in an enduring sense. The Supreme Court interprets and decides upon the contours of

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<sup>1</sup> G. Thomas Goodnight, “Controversy,” in *Argument in Controversy: Proceedings of the Seventh SCA/AFA Conference on Argumentation*, ed. Don Parsons (Annandale, VA: Speech Communication Association, 1991), 2.

<sup>2</sup> The point is ontologically impossible because convergence negates controversy as a matter of definition.

many contemporary controversies (desegregation, censorship, abortion, religion, etc.); however, the social stability afforded by a Court decision is always open to challenge. While the Court may be able to smooth over a controversy in the long term through the constitutive effects of its regulative authority, it is unlikely that the losing party and those who agree with them will be mollified in the short term by the enunciative authority of the Court. Moreover, it is unlikely that any single litigation will address the totality of a controversy. More often than not a case can only cut off one head of the hydra, temporarily deciding a particular manifestation of controversy while leaving the underlying antagonism unresolved.

While the inability to close controversy may be considered a failure by some, it is nevertheless one of the reasons why Court cases can precipitate an event. Some might consider the intransigence of a losing party to be a sign of their “unreasonableness” or “irrationality,” but it is equally a sign of the inherent contingency in the symbolic. Such contingency resides, however, wholly within the institutional structure of the law, because it is reflected in the positive substance of the law itself. The shift in authoriality found in the per curiam opinion, however, carries with it a second radicalization of legal authority, which as I argue in Chapter Four can produce a subjectivizing effect characteristic of the event. These two effects seldom coincide—most cases are not issued per curiam, and most per curiam opinions do not resolve important manifestations of a social controversy—but they sometimes do, creating the conditions for an event that not only challenges the effect of the symbolic as the positive content of law, but also the force of the symbolic as legal authority.

This is precisely what occurred in *New York Times Co. v. United States*, the Supreme Court case precipitated by the *New York Times*' and *Washington Post*'s publication of a confidential Pentagon study on the history of decision-making in Vietnam. At the outset, it is

important to draw a conceptual distinction between the controversies at play in this case and the social and political controversies surrounding it. At its core, *New York Times Co.* is not about Vietnam or the Pentagon Papers, nor is it about Nixon's hatred of the press or his attempts to expand executive power; rather, the case navigates the controversy formed by the intersection of national security and free speech. Thus, I do not discuss the wider context, but confine myself to the more narrow issue.

This controversy is fundamental to our national identity because, as legal scholar Steven Shiffrin notes, it involves “debates about social power and cultural struggles about the meaning of *America*,”<sup>3</sup> which is to say that controversies over speech implicate the constitutive foundations of legal authority as such. These controversies, in other words, question the history and character of the nation, but they also question the scope of governmental power and the relationship between citizens and the apparatus of the law. *New York Times Co.* did not resolve the controversy formed by the antagonism between press freedom and national security—indeed, several justices in the case condemned the *Times* and the *Post* for publishing the classified material; however, the opinions written in the case do provide an excellent backdrop against which the theory of evental rhetoric laid out in the preceding four chapters can be seen and its contours sharpened.

The evental possibility of *New York Times Co.* is dependent in part upon the controversy at its core, and Chapter Six will juxtapose various ways in which national security v. free speech is manifest in the opinions of the Court. However, the analysis will not focus on the essence of the controversy. This limitation is practically motivated by the constraints of this particular thesis, and I hope to pursue the possibilities of the national security v. free speech controversy as

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<sup>3</sup> Steven H. Shiffrin, *Dissent, Injustice, and The Meanings of America* (Princeton, NJ: Princeton University Press, 1999), xi (emphasis in original).



an eventual rhetoric in future research. For now, however, my analysis will focus upon the authoriality through which the controversy is articulated.

The main opinion in the case—indeed the only opinion with precedential value—was the per curiam opinion; yet each justice also chose to write separately, setting himself apart from the institutional opinion of the Court. Thus, the central issues in Chapter Six are precisely the ability of the per curiam to unite divergent responses to the controversy out of which *New York Times Co.* arose, and the expression of that unity through the minimalist rhetoric of the Court-as-author. The shift between individual justice and institution, I argue, creates the concrete conditions in which an eventual subjectivity becomes possible. That said, court cases are the situated products of social controversy, meaning that they arise out of an extant dispute outside of the confines of the judiciary. A case cannot be disembedded from its context, and understanding that context is essential to reconstructing the decision of the Court. Thus we begin with a brief history of the Pentagon Papers.

## FIVE | A Brief History of the Pentagon Papers Case

“The very word ‘secrecy’ is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths, and to secret proceedings. We decided long ago that the dangers of excessive and unwarranted concealment of pertinent facts far outweighed the dangers which are cited to justify it.”<sup>4</sup>

–President John F. Kennedy

It is unlikely that when commissioning the study in 1967, Secretary of Defense Robert S. McNamara could have anticipated the political scandal that the “History of U.S. Decision-Making Process on Vietnam Policy, 1945-1967”<sup>5</sup> (more commonly known as the Pentagon Papers) would cause. The study was a document-based history of American involvement in Southeast Asia, focusing on Vietnam, which McNamara intended to be used by scholars to study the war after its conclusion.<sup>6</sup> Completed in approximately one and a half years, the study spanned some 7000 pages containing (primarily) Department of Defense documents related to

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<sup>4</sup> President John F. Kennedy, “The President and the Press: Address before the American Newspaper Publishers Association” (Waldorf-Astoria Hotel, April 27, 1961).

<sup>5</sup> The official title of the report is “United States – Vietnam Relations, 1945-1967: A Study Prepared by the Department of Defense,” and is also known as the Report of the OSD (office of Secretary of Defense) Vietnam Task force. Both the Court and the media at the time referred to it by the title used in the text: cf. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971)(the Court omitted the dates from the title); Sanford J. Ungar, *The Papers and the Papers: An Account of the Legal and Political Battle over The Pentagon Papers*, Revised Edition. (New York: Columbia, 1989).

<sup>6</sup> Rudenstine has noted that “the precise reasons McNamara commissioned the Pentagon Papers remain uncertain and continue to be a subject of controversy,” although he does note that, based upon his interview of the former Secretary of Defense, “McNamara has insisted that he authorized the study to preserve for scholars the government documents that chronicled the key decisions resulting in the United States’ involvement in an Asian land war.” See: David Rudenstine, *The Day the Presses Stopped: A History of the Pentagon Papers Case* (Berkeley: University of California Press, 1996), 20. McNamara’s memoirs confirm Rudenstine’s claim. As McNamara wrote, addressing the foundation of the study, “The thought that scholars would surely wish to explore [questions related to the war] after the war had ended was increasingly on my mind,” and more directly: “But overall the work was superb, and it accomplished my objective: almost every scholarly work on Vietnam since then has drawn, to varying degrees, on it.” Robert S. McNamara, *In Retrospect: The Tragedy and Lessons of Vietnam* (New York: Times Books, 1995), 280-281. An alternate explanation, which Rudenstine attributes to both President Johnson and Secretary of State Dean Rusk, maintains that McNamara was influenced by Robert Kennedy, and commissioned the study to provide Kennedy with a solid point upon which to attack Johnson during the 1968 presidential election. Rudenstine notes that the explanation is “not unreasonable,” although he ultimately suggests that the claim “deeply angered McNamara,” and that although “Johnson’s and Rusks’ suspicions are understandable, it is highly unlikely that McNamara commissioned the Pentagon Papers study to help Kennedy challenge Johnson for the presidency.” See: Rudenstine, *The Day the Presses Stopped*, 21-24. While I find Rudenstine’s analysis on this question persuasive, and it is consistent with the justifications provided in other studies (see: Ungar, *The Papers and the Papers*, 26; Daniel Ellsberg, *Secrets: A Memoir of Vietnam and the Pentagon Papers* (New York: Penguin Books, 2002), 186; John Prados and Margaret Pratt Porter, eds., *Inside the Pentagon Papers* (Lawrence, KS: University of Kansas Press, 2004), 12-14.), it is nevertheless important to acknowledge that the Pentagon Papers may have been, from the outset, intended to cause a political scandal.

Vietnam and concomitant historical and political analysis.<sup>7</sup> It was authored by 36 specialists drawn equally from the military and defense establishment,<sup>8</sup> many of whom had either been employed by or educated at Harvard University, in some cases working directly with Henry Kissinger (a fact central to understanding the Nixon administration's reaction to the leak).<sup>9</sup> The study's director Leslie H. Gelb declared the project complete a mere five days before the Nixon administration took office—and the entire study was classified Top-Secret.

Only fifteen copies were made: five were stored in the safe of Nixon's newly appointed Secretary of Defense, Melvin R. Laird and copies were sent to the Kennedy and Johnson Libraries; several Johnson administration officials, including McNamara and his replacement Clark Clifford, received one copy of the study each; and one copy was sent to Kissinger who, having recently been named National Security Advisor, was the only official in the Nixon administration to receive of the report directly.<sup>10</sup>

Two copies of the study, one jointly claimed by Gelb and Morton Halperin (who together had been the study's chief administrators), the other by Assistant Secretary of Defense for International Security Paul Warnke, were deposited by their owners in a safe at the RAND Corporation office in Washington, out of fear that the study would be destroyed by the new administration. As Gelb later recalled, "I think Paul, Mort, and I were all concerned that the papers survived."<sup>11</sup> Despite the security at the think tank, and the organization's vested interest in maintaining good relations with the government (its largest client), the three worried about the

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<sup>7</sup> McNamara, *In Retrospect*, 281.

<sup>8</sup> Hannah Arendt, "Lying in Politics: Reflections on the Pentagon Papers," in *Crises of the Republic* (New York: Harcourt Brace Jovanovich, 1972), 10.

<sup>9</sup> Leslie H. Gelb and Morton Halperin, who administrated the study, had been faculty assistants for Kissinger, and Robert Gard, Daniel Ellsberg and many others involved with the study were Harvard-trained. Harvard Professors Richard Neustadt (Political Science) and Ernest May (History) were both asked to lead the study, and both declined (although May would ultimately join the study as an author/analyst). See: Prados and Porter, *Inside the Pentagon Papers*, 13-17.

<sup>10</sup> Rudenstine, *The Day the Presses Stopped*, 31.

<sup>11</sup> Quotation from interview, as cited in: *Ibid.*, 32.

study potentially finding its way out of RAND, and agreed that no one would be allowed to access their copies without the consent of at least two of the three men.<sup>12</sup> Nevertheless, it was one of these copies that Daniel Ellsberg (an author of the study, an anti-war activist, and an employee of RAND) would smuggle out of RAND headquarters, photocopy, and ultimately distribute to the *New York Times* and *Washington Post*, effectuating what Nixon would later call “the most massive leak of classified documents in American history.”<sup>13</sup>

### **The Leak**

In a bit of historical irony, Kissinger was indirectly responsible for Ellsberg’s possession of the Pentagon Papers. During Nixon’s transition into office in December of 1968, Kissinger asked RAND president Henry Rowan to prepare a list of options for the administration related to the Vietnam War, a job Rowan subsequently assigned to Ellsberg.<sup>14</sup> After meeting in New York to discuss the list, Kissinger requested that Ellsberg prepare “an exhaustive list of questions about Vietnam” to be posed to a variety of government agencies, which Ellsberg worked on throughout the early months of 1969.<sup>15</sup> During the course of his research Ellsberg requested access to one of the copies of the Pentagon Papers stored in Washington. Despite Gelb’s initial reservations, Halperin eventually convinced him that Ellsberg was both qualified for and justified in being granted access to the study.<sup>16</sup> Ellsberg was subsequently credentialed as a confidential document courier, and he transported the Papers to RAND’S headquarters in Santa Monica, CA where he worked.<sup>17</sup>

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<sup>12</sup> Ibid.

<sup>13</sup> Richard Nixon, *The Memoirs of Richard Nixon* (New York: Grosset & Dunlap, 1978), 508.

<sup>14</sup> Ellsberg, *Secrets*, 231.

<sup>15</sup> Rudenstine, *The Day the Presses Stopped*, 39.

<sup>16</sup> Ibid., 39-40.

<sup>17</sup> Ellsberg, *Secrets*, 239-245.

Ellsberg and Kissinger met again in August, and the former insisted upon the importance of the papers, pleading with the National Security Advisor that he read and consider the study fully. Kissinger protested: “But do we really have anything to learn from this study?...After all, we make decisions very differently now.”<sup>18</sup> Ellsberg, perturbed by Kissinger’s flippancy, reacted: on October 1, 1969, he began surreptitiously photocopying portions of the study, with the intent to make them public by any means necessary.<sup>19</sup>

The same month, Ellsberg met for the first time with Senator William J. Fulbright, an anti-war Democrat from Arkansas and chairman of the Senate Foreign Relations Committee. Ellsberg hoped that the Senator would read portions of the study into the record during one of his committee’s hearings, although the Senator ultimately refused.<sup>20</sup> A year later, Ellsberg turned to Senator George McGovern, hoping that he would use the study in his presidential campaign to attack Nixon’s Vietnam policy. He, like Fulbright, refused, and McGovern recalled suggesting that Ellsberg leak the Papers to the *New York Times* or *Washington Post*.<sup>21</sup> Ellsberg, who some years later noted that Fulbright had made the same suggestion, took the Senators’ advice and called Neil Sheehan, a reporter at the *Times* who Ellsberg knew from his time serving in Vietnam.<sup>22</sup> On March 22, Sheehan returned from Cambridge to Washington with a copy of the study, and the *Times* began a 3-month process of analysis, writing, and internal deliberation on how to proceed with the scoop of a lifetime.

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<sup>18</sup> As Prados and Porter note, the substantive claims about this exchange have been public since 1973, and despite many opportunities to do so (including the three volumes of his memoirs), Kissinger has neither refuted Ellsberg’s characterization nor indicated that he had more than passing familiarity with the existence of the papers, and little knowledge of their content. See: Prados and Porter, *Inside the Pentagon Papers*, 51.

<sup>19</sup> *Ibid.*, 51-52; Ellsberg, *Secrets*, 299.

<sup>20</sup> Ellsberg, *Secrets*, 323-329.

<sup>21</sup> Ungar, *The Papers and the Papers*, 80.

<sup>22</sup> Ellsberg, *Secrets*, 368.

## The Reaction

The first installment of the *New York Times*' ten-part series of stories based on (and including copies of) classified documents from the Pentagon Papers appeared on Sunday, June 13, 1971—the day after Nixon's daughter Patricia's wedding.<sup>23</sup> According to most commentators, Nixon was not very concerned about the *Times* story initially: he was not mentioned in the 7000 page study, while the *Times*' report was quite damaging to both the Kennedy and Johnson administrations. Moreover, given the age of the documents, there was little chance that they posed a major national security threat.<sup>24</sup> White House Chief of Staff H.R. Haldeman's diary entry from June 13 is consistent with this view, as it notes that “the key now is for us to keep out of it and let the people that are affected cut each other up on it.”<sup>25</sup> However, by Monday afternoon Attorney General John Mitchell had contacted the *Times* requesting that they stop publication. Legal Scholar David Rudenstine has asked the appropriate question: “What happened between Sunday morning and Monday afternoon to cause Nixon and others in his administration to decide to seek to enjoin the nation's most prestigious newspaper?”<sup>26</sup> The answer, according to Rudenstine and others is quite simple: Henry Kissinger persuaded President Nixon to act.

In his memoirs, Kissinger argues that the initial reaction of the administration (to use the study to discredit the Democrats) was “against the public interest.”<sup>27</sup> Moreover, he worried that any perceived insecurity of secret government documents, and more nebulously the information contained within the Papers, would damage ongoing negotiations with China, North Vietnam,

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<sup>23</sup> Nixon, *Memoirs*, 497.

<sup>24</sup> Richard Reeves, *President Nixon: Alone in the White House* (New York: Simon & Schuster, 2001), 331-332; Anthony Summers, *The Arrogance of Power: The Secret World of Richard Nixon* (New York: Viking Press, 2000), 384; Ungar, *The Papers and the Papers*, 19.

<sup>25</sup> H.R. Haldeman, *The Haldeman Diaries: Inside the Nixon White House* (New York: Putnam, 1994), 300.

<sup>26</sup> Rudenstine, *The Day the Presses Stopped*, 67.

<sup>27</sup> *Ibid.*, 73.

and the Soviet Union.<sup>28</sup> However, based on the claims of Haldeman and other Nixon staff<sup>29</sup> as well as liberal journalist and Kissinger biographer Seymour Hersh, Rudenstine argues that Kissinger's reaction to the leak was motivated less by magnanimous concern for international relations and more by his anger toward Ellsberg and fear of the damage the leak might cause to his status. Kissinger, who was familiar with the Pentagon Papers from his meetings with Ellsberg on the subject, was incensed that one of his Harvard "boys" had betrayed him.<sup>30</sup>

Moreover, Hersh claims Kissinger was worried that Nixon would attribute the unending stream of leaked confidential documents that had plagued the administration to the National Security Advisor's office, and that knowledge of Kissinger's reliance on Ellsberg in formulating Vietnam policy during the early days of the administration would alienate him further from the President.<sup>31</sup> This is not to say, however, that Kissinger's personal motives dominated Nixon's thinking: the former simply fanned the flames of the already substantial anti-press sentiments of the latter.<sup>32</sup>

As Nixon wrote in his memoirs: "On consideration, we had only two choices: we could do nothing, or we could move for an injunction that would prevent the *New York Times* from continuing publication. Policy argued for moving against the *Times*; politics argued against it."<sup>33</sup> While Mitchell was not terribly interested in the *Times* leak early on, one of his subordinates was. Robert Mardian, who would go on to direct the administration's legal proceedings against

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<sup>28</sup> Henry A. Kissinger, *White House Years* (New York: Little, Brown and Company, 1979), 729-730.

<sup>29</sup> These staff included: Nixon Aide Charles Colson, and Assistant to the President on Domestic Affairs John Ehrlichman. See: Rudenstine, *The Day the Presses Stopped*, 72-74.

<sup>30</sup> Rudenstine quotes both Haldeman and Hersh to this effect. *Ibid.*, 73. As quoted: "What really bothered Kissinger... was a personal factor... Henry had a problem because Ellsberg had been one of his 'boys'." in: H.R. Haldeman and Joseph DiMona, *The Ends of Power* (New York: Simon & Schuster, 1978), 110.; also as quoted: "Ellsberg was a personal security threat' to Kissinger" in: Seymour M. Hersh, *Price of Power: Kissinger in the Nixon White House* (New York: Summit Books, 1983), 383.

<sup>31</sup> Rudenstine, *The Day the Presses Stopped*, 73-74; citing: Hersh, *Price of Power*, 91, 319-21, 325, 385.

<sup>32</sup> Stanley I. Kutler, *The Wars of Watergate: The Last Crisis of Richard Nixon* (New York: Knopf, 1990), 110.

<sup>33</sup> Nixon, *Memoirs*, 509.

the *Times* in federal district court, enlisted William Rehnquist to evaluate the laws regarding prior restraint and freedom of the press.<sup>34</sup> Mardian himself began assessing the national security threat posed by the documents, and the legal recourse against both the *Times* and the leaker under the Espionage Act of 1914.<sup>35</sup> Ultimately, however, Mardian believed that a civil suit for prior restraint, rather than a criminal charge, would be the only way to stop publication in the short-term, and with Mitchell and Nixon's consent, he called Harding Bancroft, executive vice president at the *Times*, and informed him that the government would file a lawsuit the following morning if the *Times* did not suspend publication. The paper refused, and the United States filed suit on June 15, 1971.

### **The Litigation**

The United States sued the *New York Times* in district court to obtain a preliminary injunction barring further publication, alleging that additional disclosures of the Pentagon Papers would threaten national security. The judge in the case, Murray I. Gurfein, issued a temporary restraining order against the *Times*, preventing them from publishing during the course of the trial,<sup>36</sup> and heard arguments in the case on Friday, June 18. The central question in the case was whether or not the government could prove sufficient risk to national security to warrant the censorship of the Pentagon Papers. Despite the government's best attempts, however, their witnesses were unable to persuade Gurfein that the Pentagon Papers posed a substantial threat, and he rejected their request for an injunction.<sup>37</sup> Gurfein extended his temporary restraining order "until such time during the day as the Government may seek a stay from a Judge of the Court of

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<sup>34</sup> Rudenstine, *The Day the Presses Stopped*, 81.

<sup>35</sup> *Ibid.*, 80-87.

<sup>36</sup> *Ibid.*, 107.

<sup>37</sup> *United States v. New York Times Co.*, 328 F. Supp. 324 (1971).



Appeals for the Second Circuit.”<sup>38</sup> The Nixon administration sought and received their stay, and also filed for appeal. In an en banc<sup>39</sup> per curiam decision, issued on June 24, the court of appeals remanded the case back to Gurfein for further in camera (secret) proceedings to determine if the Pentagon Papers posed security risk.<sup>40</sup> The *New York Times*, anxious to beat the government, fearing that the leak would spread to more papers, and confident of a victory, petitioned the Supreme Court for a writ of certiorari the same day, which was granted.<sup>41</sup>

After the *Times*’ restraining order had been instituted, the *Washington Post* obtained a copy of the Papers from Ellsberg and began publishing stories based upon them. Just as it had with the *Times*, the Nixon administration filed suit against the *Post* seeking a preliminary injunction. Whereas Gurfein in the *Times* case granted a temporary restraining order, district court judge Gerhard Gesell denied the same for the *Post*, although his decision was reversed on appeal and a temporary restraining order was granted.<sup>42</sup> After hearing arguments in the case, Gesell denied the Nixon administration’s claim and decided in favor of the *Post*. The government appealed, and on June 23 the Court of Appeals for the District of Columbia decided 2-1 to affirm Gesell’s decision and deny the injunction.<sup>43</sup>

The United States petitioned the Supreme Court for a stay of the appeals court’s decision, which the Court treated as a petition for a writ of certiorari, which was granted on June 25.<sup>44</sup> The Court combined the two cases, and oral arguments were set for 11:00 a.m. on June 26, 1971.

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<sup>38</sup> *Ibid.*, 331.

<sup>39</sup> Meaning that all eight justices (Nixon had not yet filled a vacancy on the second circuit bench) heard the case. This is rare, as most federal appellate cases in the United States are heard by a three-judge panel.

<sup>40</sup> *United States v. New York Times Co.*, 444 F.2d 544 (1971).

<sup>41</sup> Rudenstine, *The Day the Presses Stopped*, 259; *New York Times Co. v. United States*, 403 U.S. 942 (1971).

<sup>42</sup> *United States v. Washington Post Co.*, 446 F.2d 1322 (1971).

<sup>43</sup> *United States v. Washington Post Co.*, 446 F.2d 1327 (1971).

<sup>44</sup> *United States v. Washington Post Co.*, 403 U.S. 943 (1971).

*The Prior Restraint Doctrine*

During the editorial process, the *Times*' in-house council James Goodale urged the paper to publish all of its intended stories based on the Pentagon Papers at once so as to avoid being sued for prior restraint,<sup>45</sup> a form of censorship which proactively prevents publication of certain information, as opposed to so-called subsequent sanctions which are applied retroactively to punish an entity who has made material available illegally. Goodale's argument rested upon the notion that by publishing everything at once, the government would be unable to partially censor any of the material the *Times* intended to include, although both his and the editorially preferred piecemeal publication strategies would leave the paper open to possible criminal charges (which, it should be noted, never came). From a legal standpoint, however, the choice to sue for prior restraint was an interesting one because as Rudenstine notes, Gurfein's temporary restraining order "was the first ever to enjoin publication based on national security."<sup>46</sup> In other words, the legal strategy employed by the Nixon administration was untested and without practical precedent.

The doctrine of prior restraint originated in 1931 in the case *Near v. Minnesota*, in which the Supreme Court struck down a Minnesota law that targeted "malicious, scandalous, or defamatory" publications.<sup>47</sup> Generally, the Court in *Near* noted that "the exceptional nature of its limitations places in a strong light that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship."<sup>48</sup> The Court identified four cases in which the press was not immune from prior restraint, only one of which is relevant to *New York Times Co.*, to wit: "No one would question but that the government might prevent actual obstruction to its recruiting

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<sup>45</sup> Ungar, *The Papers and the Papers*, 102.

<sup>46</sup> Rudenstine, *The Day the Presses Stopped*, 2.

<sup>47</sup> *Near v. Minnesota*, 283 U.S. 671 (1931).

<sup>48</sup> *Ibid.*, 716.

service or the publication of sailing dates or transports or the number and location of troops.”<sup>49</sup>

This language is significant precisely because it suggests that the Constitution only permits prior restraint in those cases in which publication of the questioned material would directly imperil military operations and/or the lives of soldiers.<sup>50</sup> That is, and as the Court reiterates in the per curiam in *New York Times Co.*, prior restraint has a “heavy presumption” *against* its validity, and the government has a “heavy burden” to justify its request for censorship.

It is important to keep in mind, however, that the exceptions highlighted in *Near* are not themselves derived from precedent; rather, they were hypothetical examples. This is because, as David Rudenstine points out, no administration prior to Nixon’s “had tried to enjoin the press from publishing information it possessed.”<sup>51</sup> Thus, while several cases including *Near* were tangentially related to the legal questions in *New York Times Co.*, there was no controlling precedent and the justices had significant discretion in how they decided this important first amendment issue. However, the per curiam opinion was little more than a short statement of the Court’s agreement with the lower court rulings rejecting the government’s plea. The more expansive explanations came in the nine individually signed concurring and dissenting opinions, which highlighted not only the ambiguities of the novel legal question, but also the deep political and jurisprudential divisions amongst the justices.

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<sup>49</sup> The other three include: “obscene publications,” “incitements to acts of violence and the overthrow by force of orderly government,” and “to protect private rights according of the principles governing the exercise of the jurisdiction of the courts of equity.” *Ibid*.

<sup>50</sup> Moreover, this language should be understood as a limitation on the relatively expansive precedent the Court cites as precedent for this example. *Schenk v. United States* (1919) limited the freedom of expression during wartime, and is the basis for the “clear and present danger” test. The text of *Schenk* which was cited in *Near* (at 716) reads as follows: “When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.” *Schenk v. United States*, 249 U.S. 47, 52 (1919). The relatively expansive meaning of “hindrance,” without the narrow interpretation in *Near*, could easily have provided sufficient interpretive ambivalence to allow the Nixon administration’s prior restraint to be considered justified.

<sup>51</sup> Rudenstine, *The Day the Presses Stopped*, 4.

## The Supreme Court Decision

The United States Supreme Court announced its decision on Monday, June 28, 1971. By a vote of 6-3, the Court vacated the lower court injunctions, and held that the Nixon administration had not met the “heavy burden” required by the Constitution to justify prior restraint.<sup>52</sup> This holding was expressed in a per curiam opinion written (but not signed) by Associate Justice William Brennan. Each justice also wrote his own opinion, with Justices Black, Douglas, Brennan, Stewart, White, and Marshall concurring, and Justices Burger, Harlan and Blackmun dissenting.

### *The Concurring Opinions*

The first opinion concurring with the majority was written by Justice Hugo Black, the Court’s most senior associate justice—it was also his last opinion on the Court.<sup>53</sup> He offered a spirited defense of his absolutist interpretation of the First Amendment, arguing that the lower court injunctions were a “flagrant, indefensible and continuing violation of the First Amendment,” and that any prior restraint would make a “shambles” of the freedom of speech.<sup>54</sup> Black’s opinion was widely quoted by the press both because of his eloquent and unwavering defense of press freedom, but also because he was the only justice to openly show hostility toward the Vietnam War and praised the *Times* and *Post* for their “courageous reporting.”<sup>55</sup> His opinion was joined by Justice Douglas, who was his frequent collaborator in defending an unrestrained interpretation of the First Amendment.

Justice William Douglas’ opinion, on the other hand, was largely occupied with illustrating Congress’ explicit decision against legalizing prior restraints (or any press

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<sup>52</sup> *New York Times Co. v. United States*, 403 U.S. 714 (1971).

<sup>53</sup> Justice Black resigned from the Court on September 17, 1971. He died on September 25, after suffering a stroke several days before.

<sup>54</sup> *New York Times Co.* 715 (Black, J. concurring).

<sup>55</sup> Rudenstine, *The Day the Presses Stopped*, 304-305; *New York Times Co.*, 717 (Black, J., concurring).

ensorship) in the Espionage Act of 1917 and subsequent legislation. However, Douglas, like Black, believed that Congress was constitutionally barred from restricting press freedom in any way, and argued that “Secrecy in government is fundamentally anti-democratic...Open debate and discussion of public issues are vital to our national health.”<sup>56</sup> Douglas was joined by Black, and together their two opinions formed one of two factions on the majority, the other consisting of Justices Stewart and White.

Justice Brennan joined no other opinions, nor was his joined by any other justice. Unlike Douglas and Black, Brennan argued that prior restraints were constitutional in some cases; however, the justificatory standard Brennan employed for those injunctions (that they would “almost inevitably” result in harm) had such a high threshold that it would be nearly impossible to meet.<sup>57</sup> Brennan made clear in his opinion that lower court restraining orders like the ones granted against the *Times* and the *Post* should now, based on the ruling in *New York Times Co.*, be understood as unconstitutional, noting that “Unless and until the Government has clearly made out its case, the First Amendment commands that no injunction may issue.”<sup>58</sup> Brennan understood the First Amendment to be an “absolute bar” against censorship, and sought to minimize the circumstances under which that bar might be removed in the service of national security.

Justice Potter Stewart’s opinion opened with a paradox: because the Constitution gives power over national security exclusively to the President, neither Congress nor the Courts may limit that power expressly, only the citizens of the country have that right. However, the citizens cannot fulfill their limiting role effectively unless they are thoroughly informed, which requires a free and unfettered press. However, the President may deem it necessary to limit the free flow of

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<sup>56</sup> *New York Times Co.*, 724 (Douglas, J. concurring).

<sup>57</sup> Rudenstine, *The Day the Presses Stopped*, 308.

<sup>58</sup> *New York Times Co.*, 727 (Brennan, J., concurring).

information to properly protect the nation, and indeed has that right under the constitution. Stewart resolved this paradox by asserting that “the responsibility must be where the power is,”<sup>59</sup> and that the President’s obligation to protect the nation must supersede the people’s obligation to limit his power. However, Stewart argued that the Court did not have the authority to issue that injunction without prior authorization from the Congress and that the United States had not proven a grave threat to national security that would justify judicial intervention. Thus, despite validating the theoretical constitutionality of statutorily-backed prior restraints, he concluded that the First Amendment forbid the issuance of injunctions in this case.

Justice Stewart was joined by Justice Byron White, and vice versa, thus forming the second faction on the majority. White’s opinion began by observing that his concurrence is based solely upon the “concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system.”<sup>60</sup> White, as well as Stewart, thought the information contained in the Pentagon Papers posed a grave danger to the nation; and despite his denial of prior restraint, White wrote an extensive argument suggesting that the *Times* and *Post* could still face criminal charges, that such charges were likely constitutional, and that he would likely vote to sustain them if such a case reached the Supreme Court.<sup>61</sup> Justice Burger and Blackmun, both of whom dissented, signaled their agreement with White’s analysis on possible criminal charges. The Nixon administration, however, did not respond to the justices’ implicit invitation to prosecute the newspapers, and criminal charges were never filed.

Despite vastly different interpretations of the limits of the First Amendment, Justices Black, Douglas, Brennan, Stewart, and White all voted against the United States for essentially the same reason: the government had failed to meet its “heavy burden” in justifying the

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<sup>59</sup> Ibid., 728 (Stewart, J., concurring).

<sup>60</sup> Ibid., 731 (White, J., concurring).

<sup>61</sup> Ibid., 733-740 (White, J., concurring).

injunctions it sought. The final concurring opinion, written by Justice Thurgood Marshall, articulated the problem in a significantly different way. Marshall argued that the Court could not authorize injunctive relief in this case because the United States did not have equity jurisdiction, meaning there was no statutory authority granting the government the right to sue.<sup>62</sup> In Marshall's words, "It would, however, be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit."<sup>63</sup> Thus, without resolving the constitutionality of prior restraint on First Amendment grounds, Marshall rejected the United State's request for injunctive relief.

### *The Dissenting Opinions*

Chief Justice Burger, and Associate Justices Harlan and Blackmun were the three dissenting votes in the case, and each dissented for largely the same reason: the Court, as well as the lower courts, had been forced to decide these cases with undue haste. Chief Justice Warren Burger's opinion gives several reasons for his objection to the speed of the trials, including the complexities of free speech v. national security controversy, the size of the Pentagon Papers and the justices' inability to read them in such a short timeframe, and the lack of time provided to the government to prepare its case.<sup>64</sup> Burger was "not prepared to reach the merits," and ended his opinion by noting "We all crave speedier judicial processes but when judges are pressured as in these cases the result is a parody of the judicial function."<sup>65</sup>

Like Black, Justice John Marshall Harlan II's<sup>66</sup> opinion in *New York Times Co v. United States* was his final opinion on the Court.<sup>67</sup> Joined by Chief Justice Burger and Justice Blackmun, although joining neither of their opinions, Harlan began his opinion by quoting a

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<sup>62</sup> Ibid., 741 (Marshall, J., concurring).

<sup>63</sup> Ibid., 742 (Marshall, J., concurring).

<sup>64</sup> Ibid., 748-752 (Burger, C.J., dissenting).

<sup>65</sup> Ibid., 752 (Burger, C.J., dissenting).

<sup>66</sup> His grandfather, also named John Marshall Harlan, was a Supreme Court Justice from 1877-1911.

<sup>67</sup> Justice Harlan resigned four days after Justice Black, on September 21, 1971.

“wise admonition” from Justice Oliver Wendell Holmes, that “great cases, like hard cases, make bad law,”<sup>68</sup> because they are often too quickly decided. Unlike Burger, Harlan felt compelled to reach the merits, determining that the Court must issue injunctions in which the executive shows that the “subject matter of the dispute does lie within the proper compass of the President’s foreign relations power,” and that “the head of the Executive Department concerned...after actual personal consideration” determines that publication of the material in question would imperil national security.<sup>69</sup> Harlan argued, in other words, in favor of an extremely low threshold for the justification of prior restraints, which would effectively eviscerate the limits set out in *Near*.

Justice Harry Blackmun’s opinion was quite similar to Justice Burger’s,<sup>70</sup> insofar as he thought the litigation had been too speedy, and did not reach the merits. Unlike any other justice of the Court, Blackmun ended his opinion with a direct plea to the press for restraint and caution in publishing further excerpts from the Pentagon Papers:

If...damage has been done, and if, with the Court’s action today, these newspapers proceed to publish the critical documents and there results therefrom ‘the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate,’ to which list I might add the factors of prolongation of the war and of further delay in the freeing of United States prisoners, then the Nation’s people will know where the responsibility for these sad consequences rests.<sup>71</sup>

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<sup>68</sup> *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting); as quoted in *New York Times Co.*, 752 (Harlan, J., dissenting).

<sup>69</sup> *New York Times Co.*, 757 (Harlan, J., dissenting).

<sup>70</sup> They were the “Minnesota Twins,” after all! Linda Greenhouse, *Becoming Justice Blackmun: Harry Blackmun’s Supreme Court Journey* (New York: Macmillan, 2006), 63.

<sup>71</sup> *New York Times Co.*, 763 (Blackmun, J., dissenting).



Blackmun, as Rudenstine notes, “was outraged and enraged by the newspapers”;<sup>72</sup> however, the enigmatic conclusion (“the Nation’s people will know...”) has no clear antecedent. While in the context of the overall argument one could reasonably claim that Blackmun means to implicate the newspapers, the phrase “if, with the Court’s action today,” imparts at least some measure of responsibility to those justices who voted with the *Times* and the *Post*.

If Black’s anti-war sentiment (“And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers”<sup>73</sup>) constitutes one pole of the Court’s disposition toward the political question in front of the Court, Blackmun’s clearly constitutes the other. There were other clear divisions on the Court: Harlan’s extreme deference to the judgment of the executive v. Brennan’s “almost inevitable harm” justificatory standard; Douglas’ strong conclusion that the statutory landscape clearly prohibited criminal sanctions against the newspapers v. White’s near-demand for prosecution, etc. If anything, the opinions in *New York Times Co. v. United States* illustrate how tenuous the majority was, and the deep political and jurisprudential divisions that existed amongst the nine justices.

The relatively short per curiam opinion in *New York Times Co.* answered two interrelated but distinct questions: first, what is the standard against which the justifications of prior restraint should be judged in cases involving national security; and second, does the government’s claim meet that standard. Despite the social and political upheaval which resulted from the publication of the Pentagon Papers, I argue in the next chapter that the Court’s answer to the former question, rather than the latter, provides the necessary condition of possibility for an eventual

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<sup>72</sup> Rudenstine, *The Day the Presses Stopped*, 320.

<sup>73</sup> *New York Times Co.*, 717 (Black, J., concurring).

rhetoric. The remainder of this chapter, however, is dedicated to the political consequences of publishing the Pentagon Papers and the decision of the Court in *New York Times Co.*

### **The Aftermath**

Much of the scholarship on the Pentagon Papers suggests, rather conclusively, that the disclosures did not have a significant effect on the antiwar movement, or on ending the war itself. Indeed, these scholars conclude that much of the information revealed in the disclosure of the Papers only served to confirm assumptions the press and public already had about the conduct of the war.<sup>74</sup> There is also little to no evidence that the leak caused significant disruptions in the war effort, or imperiled national security. Even Kissinger's fear that the perception of weak diplomatic security would derail sensitive talks with China, which Prados and Porter characterize as the "basis" for Nixon's decision to sue the papers, did not bear out.<sup>75</sup> Indeed, at first glance it appears as though the most significant result of the disclosure was the decision in the Supreme Court case itself. However, while the Court's decision was a major victory for advocates of press freedom, and while the Papers, as McNamara notes, have been of significant import to the scholarship on Vietnam,<sup>76</sup> perhaps the most significant consequence of the disclosures was their effect on Richard Nixon himself.

"The Pentagon Papers," Chester et al. write, "tipped the Nixon administration over the edge."<sup>77</sup> Theodore H. White contends that the scandal affected Nixon so greatly because it was born from two forces Nixon despised: low-level (liberal) bureaucrats and the press.<sup>78</sup> Nixon perceived both groups as "out to get him," (the former internally through subterfuge and an

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<sup>74</sup> Ungar, *The Papers and the Papers*, 301-316; Rudenstine, *The Day the Presses Stopped*, 323-348; Prados and Porter, *Inside the Pentagon Papers*, 183.

<sup>75</sup> Prados and Porter, *Inside the Pentagon Papers*, 183.

<sup>76</sup> McNamara, *In Retrospect*, 280-281.

<sup>77</sup> Lewis Chester et al., *Watergate: The Full Inside Story* (New York: Ballantine Books, 1973), 52.

<sup>78</sup> Theodore H. White, *Breach of Faith: The Fall of Richard Nixon* (New York: Dell Publishing, 1975), 190-191.

unending stream of leaks to the press, the latter by way of swaying public opinion and disrupting his domestic and international policy objectives), and the leaking of the Pentagon Papers only served to confirm what he considered to be fundamental disloyalty to the Presidency and the nation.<sup>79</sup> Nixon, as he recounted years later in his memoirs, believed that something had to be done to stop the leaks, to stop the press, and to stop Daniel Ellsberg.<sup>80</sup>

However, from the outset of the affair Nixon had little faith in the FBI or the courts,<sup>81</sup> which was only compounded by the Supreme Court's decision. Not only had the Court ignored the foreign policy judgments of the executive, the decision "energized the press and endowed it with a new confidence and sense of legitimacy."<sup>82</sup> Moreover, as the administration prepared to file criminal charges against Ellsberg, Nixon "learned that J. Edgar Hoover was dragging his feet and treating the case on a merely medium-priority basis."<sup>83</sup> Without recourse to the traditional means of investigation and enforcement, and faced with what Nixon (recalling the words of Kissinger) perceived as a "'revolutionary' situation,"<sup>84</sup> the President took the matter into his own hands and established an investigative team, eventually known as the White House Plumbers.

While the Plumbers did engage in illegal activity directly related to the Pentagon Papers case (they broke into Ellsberg's psychiatrist's office to obtain evidence, an act which eventually got the case against Ellsberg thrown out<sup>85</sup>), the group was far more famous for its involvement in the Watergate scandal. Based on the literature, and archival work with the Nixon tapes, Rudenstine and others argue that the Pentagon Papers case constituted a radical break in Nixon's

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<sup>79</sup> Theodore H. White, *The Making of the President 1972* (New York: Bantam, 1973), 353-354, 379; Kutler, *The Wars of Watergate*, 111.

<sup>80</sup> Nixon, *Memoirs*, 511-513.

<sup>81</sup> Keith W. Olson, *Watergate: The Presidential Scandal that Shook America* (Lawrence, KS: Kansas University Press, 2003), 18.

<sup>82</sup> Kutler, *The Wars of Watergate*, 111.

<sup>83</sup> Nixon, *Memoirs*, 513.

<sup>84</sup> *Ibid.*

<sup>85</sup> Ungar, *The Papers and the Papers*, 6-8.

perception and approach to his opposition: not only did he want to punish Ellsberg, Nixon wanted “ammunition” against high level Democrats involved in the antiwar movement; members of the administration even considered bombing the Brookings Institute after learning that some portions of the Papers might be there, etc.<sup>86</sup> While not directly responsible for the Watergate affair itself, the Pentagon Papers scandal was a turning point for the administration, one that created the conditions under which extra-judicial activity was not only tolerated, but actively encouraged. In his memoirs, Nixon wrote of the Pentagon Papers and formation of the Plumbers: “History will make the final judgments on the actions, reactions, and excesses of both sides; it is a judgment I do not fear.”<sup>87</sup>

Much still remains unknown about the Pentagon Papers. While significant portions of the study have been available since the 1970s, the full text (minus 11 redacted words) was only made public 40 years after the first story appeared in the *Times*, on June 13, 2011,<sup>88</sup> with this (nearly) full disclosure, the Pentagon Papers can be used for precisely the purpose McNamara intended. However, despite the intentions of Ellsberg and the claims of the Nixon administration, the substance of the report was one of the least consequential aspect of the leak in 1971. As the Supreme Court decision and subsequent unraveling of the Nixon administration illustrate, the Pentagon Papers constituted a significant moment in American history precisely because they called the controversy over free speech and national security to the forefront of American national consciousness. A controversy that reaches throughout the culture and throughout history, to the very foundation of the nation.

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<sup>86</sup> Rudenstine, *The Day the Presses Stopped*, 345-348; White, *The Making of the President 1972*, 379, 387; White, *Breach of Faith*, 190-191; Olson, *Watergate*, 171-172; Ellsberg, *Secrets*, 422-443; Reeves, *President Nixon*, 331-339; Summers, *The Arrogance of Power*, 385-391.

<sup>87</sup> Nixon, *Memoirs*, 514-515.

<sup>88</sup> The full text is available here: <http://www.archives.gov/research/pentagon-papers/> (accessed: June 13, 2011)

## SIX | The Opinion of the Court

“The judgments shall issue forthwith. So ordered.”  
 –The Supreme Court of the United States

The per curiam opinion in *New York Times Co. v. United States* is incredibly short: its text is less than three hundred words.<sup>1</sup> Yet, despite its brevity, the opinion decided an issue of significance to American politics, one that continues to be important: the holding of the Court in *New York Times Co.* circumscribed the power of the executive and delimited the freedom of the press. The opinion reads, in substantive part, as follows (internal citations moved to footnotes):

We granted certiorari in these cases in which the United States seeks to enjoin the New York Times [sic] and the Washington Post [sic] from publishing the contents of a classified study entitled “history of U.S. Decision-Making Process of Viet Nam [sic] Policy.”<sup>2</sup>

“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”<sup>3</sup> The Government “thus carries a heavy burden of showing justification for the imposition of such a restraint.”<sup>4</sup> The District Court for the Southern District of New York in the *New York Times* case and the District Court of Columbia and the Court of Appeals for the District of Columbia Circuit in the *Washington Post* case held that the Government had not met that burden. We agree.<sup>5</sup> The Court gives no justification for its decision. It does not provide any commentary on the novel legal issue before it, nor does it offer any guidance to lower courts that might find themselves faced with a similar issue in the future. The opinion does not contain the words

<sup>1</sup> *New York Times Co. v. United States*, 403 U.S. 713 (1971).

<sup>2</sup> *Post*, pp. 942, 943 [Referencing the two writs of certiorari]

<sup>3</sup> *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); see also *Near v. Minnesota*, 283 U.S. 671 (1931).

<sup>4</sup> *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

<sup>5</sup> *New York Times Co.* 714.

“national security” or “First Amendment.” But for all it does not do, the per curiam opinion in *New York Times Co. v. United States* achieves something remarkable: it creates the conditions under which the symbolic as law can be challenged, called into contingency, and ultimately reimagined as something wholly new.

The eventual possibility of the per curiam opinion is a product of two of its textual features: on the one hand, the text’s minimalism clears the way for the encounter with the symbolic as pure contingency; on the other, the auto-enunciative authority of the decision (both through the citation of precedent and the minimal phrase “We agree”) catalyzes the encounter between the subject and itself-as-gaze. In this chapter I lay out both processes in detail, and taking them both together I argue that, while not inaugurating the new on a social scale per se, the decision in *New York Times Co. v. United States* is nonetheless an eventual rhetoric.

### **Minimalism and Contingency: Justices [not] Black and White**

In Chapter Three I argued that in normative thought the authority of jurisprudence, that is the originary authority by which a justice establishes the authority of her argument, is located outside of the law. I analyzed two examples, the deontological commitments of positivism and the consequentialist commitments of realism, both of which purport to ground the judicial apparatus by creating justificatory frameworks for the mechanics of different forms of decision making, and subsequently claiming those frameworks to be essential features of human existence. The rhetoric of inevitability (the sense that there is only one right answer, and that those who think “correctly” will inevitably reach that answer) so pervasive in contemporary legal argument is but one rhetorical formation of normative thought. James Boyd White (hereinafter

Professor White)<sup>6</sup> outlines others, including the adherence to “original intention...the plain meaning of language...the clear commands of precedent...[or] the facts.”<sup>7</sup> Professor White sees each of these formations as “ways of avoiding the true responsibility of judging,” which is to build authority internally through the text of the opinion.<sup>8</sup>

Treating authority as an interior coordinate of a text is, in a sense, to treat the text as generating its own context. That is, the text creates the necessary conditions for its relevance. Translations achieve this as a matter of necessity. The original text contains certain foreign elements that do not exist in the language into which the work is to be translated. There is no external referent to which a given emotional or aesthetic reaction (which Edith Grossman identifies as the substance of “good” translation<sup>9</sup>) might correspond, and the (good) translator is thus obligated to create them within her work. In other words, the narrative’s aesthetic or emotional situation is created solely through its reading; and thus the exigency to which the text responds is nothing other than itself. It is Professor White’s contention that (good) justices achieve something similar in writing an opinion, by creating a “conversation in which democracy can begin.” By this he means the type of conversation described in Chapter Three, one that acknowledges the contingency of society and the law together. Those opinions, like (good) translation, are evental rhetorics.

To begin such a conversation a justice asks a series of related questions such as who “we” are and what we want. However, for those questions to be answered authentically, that is democratically, they must not be subject to the tyranny of the symbolic. Creating the space in

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<sup>6</sup> To avoid confusion, James Boyd White will be referenced throughout this chapter as “Professor White,” and Justice Byron White will be referred to simply as “White,” where such truncations are appropriate.

<sup>7</sup> James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: The University of Chicago Press, 1990), 216 (internal quotation marks omitted).

<sup>8</sup> *Ibid.*, 216-217.

<sup>9</sup> Edith Grossman, *Why Translation Matters* (New Haven: Yale University Press, 2010), 7.

which the symbolic is radicalized and its authority challenged, however, is a difficult task. In this section, I argue that the per curiam opinion in *New York Times Co. v. United States* achieves that effect by creating a minimal distance between two disparate approaches to the legal issues in the case. The first of those approaches, typified by Justice Hugo Black's opinion, attempts to treat press freedom as the starting point for a conversation about who we are, but ultimately falls short of Professor White's ideal by binding interpretive authority to the original intent of the framers of the Constitution and the Bill of Rights. The second approach, typified by Justice Byron White's opinion, does not treat press freedom as the start of a conversation at all, but converts it into a procedural or methodological question through a turn to criminality. That these two opinions, which are fundamentally opposed in their approaches to the press freedom v. national security controversy, can be united under the per curiam opinion is a function of that opinion's minimalism. Minimalism, discussed in Chapter Two as the figure of the edge, is a condition of encouragement for the event, and a central characteristic of an eventual rhetoric. This section will proceed with an analysis of Justice Black's opinion, turning then to Justice White's, and finally their reconciliation in the per curiam.

*Mr. Justice Black, with whom Mr. Justice Douglas joins, concurring.*

Justice Hugo Black's stance toward the First Amendment has been described as "absolutist," meaning he believed there to be no conditions under which the government is justified in limiting the freedom of speech or of the press.<sup>10</sup> Because of the rigidity of his commitments, Black, along with Justices Douglas, Brennan, and Marshall, argued during certiorari review that the Court did not need to hear oral arguments in the case at all, and should

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<sup>10</sup> See generally: Howard Ball, *Hugo L. Black: Cold Steel Warrior* (Oxford: Oxford University Press, 1996), 188-209.



simply vacate the injunctions from the lower courts. He reiterates this sentiment in the first paragraph of his opinion, and then goes on to lay out his substantive position as follows:

I believe that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment. ... In my view it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment.<sup>11</sup>

Black's absolutist construction of the First Amendment was, as the Solicitor General acknowledged during oral argument, "well known,"<sup>12</sup> and it would have come as no surprise to any Court observer that Black would take such a hardline stance against the lower court injunctions and the Government's request for prior restraint. There will be more to say about his absolutist position at the end of this section; for now, however, his position is important insofar as it determines that for which Black must build authority within his opinion.

While Black obviously values the effect of the First Amendment, he construes the authority of his interpretation not in terms of its social value (i.e. the First Amendment does something worth fighting for), but rather in terms of the intentions of those who enacted it. This form of jurisprudence is known as originalism, and is both a common and controversial method of determining the meaning of legal document.<sup>13</sup> Originalists believe that the Court should make a good faith effort to determine what the "framers" of the Constitution (or any statute, for that matter) intended when enacting a law, since that intent governed the legislative act and should thus govern its interpretation.

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<sup>11</sup> *New York Times Co.* 714-715 (Black, J., concurring).

<sup>12</sup> As quoted in: *Ibid.*, 717 (Black, J., concurring).

<sup>13</sup> See generally Sections I and II of Sanford Levinson and Steven Mailloux, eds., *Interpreting Law and Literature: A Hermeneutic Reader* (Evanston, IL: Northwestern University Press, 1988).

Black determines the framers' intent in two ways: by evaluating the historical contexts in which the amendment was created and analyzing the language in which it is written. He argues that the government's suit asks the Court to hold that the First Amendment "does not mean what it says," and that the government "seems to have forgotten the essential purpose and history of the First Amendment."<sup>14</sup> These quotations highlight the specific normative commitment Black makes, i.e. that one should interpret the Constitution and its amendments in terms of the framers' intent, while simultaneously suggesting that the meaning of language and history are discernable, essential, and stable. Interpretation, under his view, is a matter of discovering something necessary to a text that can be apprehended in a universal way, and given the proper historical work one can come to know—truly and completely—an author's intent. This mode of interpretation, as I argue in a later portion of this chapter, is fundamentally anti-evental.

Despite conceptually splitting the "purpose and history of the First Amendment," the majority of Black's opinion seems to be committed to making the two indistinguishable by implicitly arguing that the purpose of the amendment can only be understood through its historical context.<sup>15</sup> He begins by noting that at the time of its creation there was considerable opposition to the Constitution because it did not contain specific provisions protecting individual liberties or limiting the power of government. Characterizing this opposition as "an overwhelming public clamor," Black argues that James Madison proposed the Bill of Rights to

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<sup>14</sup> *New York Times Co.*, 715 (Black, J., concurring).

<sup>15</sup> Given the centrality of text and context to rhetorical criticism, I feel it necessary to offer a nuanced explanation of my intent here. I do not mean to suggest that context does not matter in understanding texts as they were at their origin; rather, I mean that historical context as original intent does not determine the appropriateness or value of those texts to the present. The general propositions that were used to justify the amendment at the time of its enactment are only relevant to the contemporary situation if they are abstracted from their historical context and reembedded in the present. For example, the belief that the press should be free has a fundamentally different meaning in 1789 than it did in 1971. Whatever value we find in the arguments made before the Congress in support of the amendment is to be found in the applicability of those arguments to the different contexts of the later time.

“satisfy citizens that these great liberties would remain safe and beyond the power of government to abridge,” citing Madison’s speeches to Congress as evidence.<sup>16</sup>

Furthermore, in a footnote Black cites Madison’s famous claim that if the amendments were to be ratified, “independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive...”<sup>17</sup> In Black’s construction, the framers intended the First Amendment to go one direction—limiting governmental authority rather than authorizing its expansion. Any government action is thus automatically subject to a binary test: either the activity expands governmental power by sacrificing the right to free speech or it does not; and given Madison’s characterization of the Court as the right’s paladin, protecting the citizenry from the political branches of government (and protecting one branch from the other), the Court is obligated to reject any act that expands governmental power. Hence Black’s absolutist position.

His analysis of historical context is strengthened by his appeal to what he considers to be the unambiguous language of the First Amendment. Black writes: “Madison and the other Framers of the First Amendment, able men as they were, wrote in language they earnestly believed could not be misunderstood: ‘Congress shall make no law...abridging the freedom...of the press.’”<sup>18</sup> He characterizes these words as an “emphatic command,” one that is both obvious in meaning and strict in purpose, which forms the textual justification for his absolutist position.

Black provides little proof for his linguistic interpretation other than to suggest that any other understanding of the phrase “no law” than his own misconstrues the framers’ intent. He gently mocks the government by quoting Solicitor General Erwin Griswold’s claim, made during

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<sup>16</sup> *New York Times Co.*, 715-716 (Black, J., concurring).

<sup>17</sup> as quoted in: *Ibid.*, 718n5 (Black, J., concurring).

<sup>18</sup> *Ibid.*, 716-717 (Black, J., concurring).

oral argument, “that to me [Griswold] it is equally obvious that ‘no law’ does not mean ‘no law,’ and I would seek to persuade the Court that this is true.”<sup>19</sup> Black characterizes Griswold’s position as “based on premises entirely different from those that guided the Framers,”<sup>20</sup> indicating both that the framers’ intent could be derived through the language in which the amendment was written, and that the government’s position must be rejected because it does not flow from Black’s interpretation.

Essential to Black’s position in a larger context is his belief that in clashes between the original text of the Constitution and that of the amendments, the latter always supersedes the former. To wit: “The amendments were offered to *curtail* and *restrict* the general powers granted to the Executive, Legislative, and Judicial Branches two years before in the original Constitution. The Bill of Rights changed the original constitution into a new charter under which no branch of government could abridge the people’s freedoms of press, speech, religion, and assembly.”<sup>21</sup> Thus the intersection of the executive’s power to protect national security and press freedom is governed solely by the amendment’s provisions guaranteeing the primacy of the latter. The same would be true of the Thirteenth Amendment’s implicit nullification of the three-fifths compromise (which was later explicitly superseded by the Fourteenth Amendment’s apportionment clause). It is through this hermeneutic gesture that Black is able to strictly read “no law” as “no law,” forming the basis of his absolutist position.<sup>22</sup>

Taken together, Black’s discussions of history and language constitute his construction of original intent. For Black, the framers had chosen unambiguous language to craft the First

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<sup>19</sup> as quoted in: *Ibid.*, 718 (Black, J., concurring).

<sup>20</sup> *Ibid.*, 717 (Black, J., concurring).

<sup>21</sup> *Ibid.*, 716 (Black, J., concurring).

<sup>22</sup> Griswold’s construction, on the other hand, reads “no law” less expansively by holding the original Constitution and the amendments side by side, treating them as coproductive. That is, the “no law” commandment of the First Amendment competes with the foreign affairs and national security commandments of the original Constitution. Determining the just course is not a binary test as it was for Black, but is rather a question of balancing between two competing commitments.

Amendment in response to a strong public demand to limit the power of government, and that intention should guide the interpretation of the text to this day. The legitimation of this interpretive mode makes two assumptions about the nature of meaning: first, meaning can be clearly apprehended given an accurate set of premises; and second, this meaning is stable, inviolable, and universal. Situating the authority of an interpretation in the intentions of its authors denies the coproductive effect of reading, and thus presupposes either an essentialist or “dead” subject. The subject in this formulation is fully produced by the symbolic into which she is born, and she remains powerless to change it. The authority of Black’s opinion thus does not emanate from the value of press freedom alone, but from the wisdom of long-dead men. His hermeneutics of intent exercise an exclusive control over the text, and his jurisprudence is thoroughly subordinated to the tyranny of the symbolic.

To meet Professor White’s standard for the “true responsibility of judging,” that is, to foster a conversation in which democracy can begin, Black’s opinion would need to build the justificatory framework for his absolutist position in terms of that position’s effects, desirability, and appropriateness in contemporary society. He does this to some extent by closing his opinion with a quote from *De Jonge v. Oregon* (1937), which eloquently expresses the importance of the First Amendment to the “security of the Republic.”<sup>23</sup> Nevertheless, the majority of Black’s opinion builds authority for his absolutist position because it is the “correct” one, and we must surrender to it out of an obligation to the abstract quality of “correctness.” Indeed, even his most emphatic defense of the First Amendment is cast in terms of the framers intent: “*The press was*

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<sup>23</sup> The quotation reads in full: “The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press, and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that change, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.” As quoted in: *New York Times Co.*, 719-720 (Black, J., concurring).

*protected* so that it could bare the secrets of the government and inform the people... And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell... [the newspapers] should be commended for serving the purpose that the Founding Fathers saw so clearly.”<sup>24</sup> The text thus intimately binds the controversy to symbolic necessity; it closes off the possibility of seeing the world with different eyes. It demands that its own interpretation be always and everywhere the only interpretation. By chaining the reader/interpreter to the intentions of the author, Black in effect silences himself: he is nothing more than the mouthpiece of history.

While Black’s appeal to original intent is fundamentally anti-evental, it is nevertheless a powerful legal argument in support of his absolutist reading of the First Amendment. As he notes toward the end of his opinion: “No one can read the history of the adoption of the First Amendment without being convinced beyond any doubt that it was injunctions like those sought here that Madison and his collaborators intended to outlaw in this nation for all times.”<sup>25</sup> This quotation is a prime example of the rhetoric of inevitability discussed in Chapter Three. It not only appeals to those who consider themselves “originalists,” but also articulates the conclusion as foregone. For Black the First Amendment was clear and immutable, any position other than his was arbitrary and anathema to history.

Original intent is an indispensable part of Black’s larger project to delimit the First Amendment, and together with Douglas’, his sentiment comprises one half of the controversy which formed internally on the majority in *New York Times Co.* Black explicitly references this fracturing when, in the portion of the opinion quoted at the beginning of this section, he writes:

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<sup>24</sup> *Ibid.*, 717 (Black, J., concurring). (emphasis added)

<sup>25</sup> *Ibid.*, 719 (Black, J., concurring).

“In my view it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment.” We now turn our attention to the other side of this controversy, typified by the opinion of Justice Byron White. The gathering together of these disparate viewpoints in the *per curiam* is precisely the mechanism by which it becomes an evental rhetoric.

*Mr. Justice White, with whom Mr. Justice Stewart joins, concurring.*

From the outset, Justice White makes clear that he is not terribly pleased to be voting against the United States in this case:

I concur in today’s judgments but only because of the concededly extraordinary protection against prior restraint enjoyed by the press under our constitutional system. I do not say that in no circumstance would the First Amendment permit an injunction against publishing information about government plans or operations. Nor, after examining the materials the Government characterizes as the most sensitive and destructive can I deny that revelation of these documents will do substantial damage to public interests. Indeed, I am confident that their disclosures will have that result. I nevertheless agree that the United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases, at least in the absences of express and appropriately limited congressional authorization for prior restraints in circumstances such as these.<sup>26</sup>

The above quoted text constitutes the first paragraph of White’s opinion, and three important features of his decision emerge from it:

First, White’s vote in this case (as opposed to the sentiment expressed in the opinion) was based on a strict interpretation of the Court’s precedent in prior restraint cases. White does not

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<sup>26</sup> *Ibid.*, 730-731 (White, J., concurring).

cite any of the cases cited in the per curiam, and of those cases he does cite none are related to national security. However, the phrase “concededly extraordinary protection” suggests that prior restraints are exceptional, and his claim that prior restraints are at times justified indicates that this standard does not arise from the First Amendment itself, but rather from the Court’s interpretation of it. Thus, White’s concurrence is based solely on his institutional obligation to respect the precedent of the Court.

Second, White makes clear that he would thoroughly reject Black’s absolutist position both in regard to prior restraint and the general constitutionality of congressional limitations on press freedom. The most obvious way he does so is through the explicitly stated belief that prior restraints are justifiable in some circumstances. In a footnote to the second sentence he discusses several exceptions to the ban on prior restraints, although he concedes that those cases are considerably different from *New York Times Co.*<sup>27</sup> However, the fact that White’s concurrence is at least partially contingent upon a lack of “express and appropriately limited congressional authorization” for the injunction sought by the Nixon administration suggests that he might consider such authorization constitutional. It would seem that White agrees with Griswold’s belief that “Congress shall make no law,” in the First Amendment does not mean “Congress shall make no law,” although White, unlike Griswold, does not seek to persuade us that it is true.<sup>28</sup> He provides no textual, precedential, historical, theoretical, normative, or any other form of justification for the constitutionality of limitations on press freedom—he simply asserts it.

Third, White’s “confidence” “that the revelation of these documents will do substantial damage to public interests,” signals that he is generally sympathetic to the administration’s

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<sup>27</sup> Ibid., 731n1 (White, J., concurring).

<sup>28</sup> White does join Justice Stewart’s concurring opinion, which does justify limitations on press freedom in cases of national security. White does not, however, reference Stewart’s opinion to this effect within the text of his own. See: Ibid., 727-730 (Stewart, J., concurring).



arguments. His concurrence is thus incongruous with his general disposition toward the controversy formed by press freedom v. national security. His self-confessed “discomfiture” with his vote “is considerably dispelled by the infrequency of prior restraint cases,” not because they are an extraordinary (and thus rarely sought) remedy, but because leaks are rarely as expansive as the Pentagon Papers and are thus usually published all at once rather than in serialization.<sup>29</sup>

Thus, as I discuss above, the specific ban on prior restraints is not a function of the unconstitutionality of restricting press freedom but is instead a question of frequency and scope. It is only the *procedure* of prior restraints that are unconstitutional, not their inherent gesture.

Based solely on these three observations of the opening paragraph of White’s opinion, it is clear that he and Justice Black have diametrically opposed understandings of the First Amendment and its relationship to national security. Nevertheless, White’s institutional obligation to respect precedent supersedes his desire to prevent an act that he believes “will work serious damage on the country.”<sup>30</sup> White treats the significant limitations placed on prior restraint as methodologically based (i.e. that the Court has only specifically made it difficult to apply prior restraint as a remedy, and has not ruled that the Government cannot restrict the press’ speech in any form), and he therefore concurs with the majority.

Despite his concurrence and his commitment to precedent, the majority of White’s decision is committed to narrowing the effect of the Court’s holding in the per curiam and all but explicitly suggesting that the Nixon administration file criminal charges against the *Times* and the *Post*. As a prelude to this series of arguments, White notes: “Prior restraints require an unusually heavy justification under the First Amendment; but failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal

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<sup>29</sup> Ibid., 733 (White, J., concurring).

<sup>30</sup> Ibid. (White, J., concurring).

publication. That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way.”<sup>31</sup> His sentiment here is directly related to his apparent belief that the First Amendment is superseded by national security concerns and his sympathy with the United States’ national security claims, and is constituted in a turn to criminality.

White’s turn is predicated upon a rather thin distinction between prior restraint and subsequent sanctions, and much could be (and has been) said about the arbitrary way in which that distinction has been drawn in First Amendment jurisprudence.<sup>32</sup> Regardless, White explicitly acknowledges the potential for such a distinction in two places. Of the Espionage Act of 1917, he says, “I would have no difficulty in sustaining convictions under those sections on facts that would not justify intervention of equity and the imposition of prior restraint.”<sup>33</sup> Later, and more explicitly, he says, “It [Congress] has not, however, authorized the injunctive remedy against threatened publication. It has apparently been satisfied to rely on criminal sanctions and their deterrent effect on the responsible as well as the irresponsible press.”<sup>34</sup> In both cases White signals to the administration that criminal prosecution under the cited statutes would be constitutionally sound, despite the ruling in *New York Times Co.*, and also signals the likely direction of his vote should those cases ever reach the Court.

These later portions of White’s opinion shift the terrain of the debate over free speech v. national security from its social and political consequences to methodological questions. That is, rather than discussing the relative benefits of Congress’ purported censorship policies White

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<sup>31</sup> Ibid. (White, J., concurring).

<sup>32</sup> See generally: John Calvin Jeffries, “Rethinking Prior Restraint,” *Yale Law Journal* 92 (1983): 409-437; Ariel L. Bendor, “Prior Restraint, Incommensurability, and the Constitutionalism of Means,” *Fordham Law Review* 68 (1999): 289-359; Richard Favata, “Filling the Void in First Amendment Jurisprudence: Is there a Solution for Replacing the Impotent System of Prior Restraints?,” *Fordham Law Review* 72 (2003): 169-206.

<sup>33</sup> *New York Times Co.*, 737 (White, J., concurring).

<sup>34</sup> Ibid., 740 (White, J., concurring).

simply asserts their validity and explains how they work, and why the Court's decision in *New York Times Co.* does not apply to them. That White thought it necessary to express his thoughts on criminal prosecution in this opinion, despite emphatically—and repeatedly—insisting that the civil and criminal procedures were completely unrelated, highlights both the strength of his commitment to precedent on the procedural issue of prior restraint, and the simultaneous ire he felt toward the *Times* and the *Post*. Thus, this turn to criminality, irrelevant as it is to White's actual vote in *New York Times Co.*, magnifies the degree to which his position is fundamentally irreconcilable with Black's, in turn deepening the controversy within the majority.

There are two more features of White's opinion to note before turning fully to the per curiam. First, White's opinion falls short of Professor White's standard for the "true responsibility of judging" in two ways. White's unyielding commitment to precedent cannot be the basis for a conversation in which democracy can begin, because it bases its authority not on the constitutive rhetoric of justification but upon an appeal to ancient authorities. Second, White conceals the contingency of the constitutionality of congressional limits on the rights guaranteed in the First Amendment. That is, White actively prevents the type of conversation Professor White hopes to begin by determining its outcome in advance. This may be due in part to the rhetorical commitments of legal argumentation, the rhetoric of inevitability in particular, but White's refusal to engage or express the contingency of his position renders his opinion a fundamentally anti-evental rhetoric.

Second, White's exposition on criminal prosecution creates something of a doppelgänger majority, with Justice Stewart joining his opinion, Justices Burger and Blackmun stating explicit agreement with it, and Justice Marshall suggesting that White's is a plausible construction of relevant statutes. While White's opinion has no precedential force, as it was only officially

joined by Stewart, it would nevertheless send a strong signal to the Nixon administration that criminal prosecution might receive a more favorable reaction from the Court. In other words, the substance of White's opinion served largely as a vehicle through which he could signal his inherent and unyielding desire to see the newspapers punished, if only by the appropriate means.

It would be difficult for Black's and White's opinions to be more divergent in their approaches to the First Amendment and national security. Yet, both of those opinions concurred with the per curiam. In the remainder of this section, I argue that this concurrence signals what Zupančič called the "minimal distance" between two perspectives, which is the condition of possibility for the emergence of an evental subjectivity.

*Minimalism: A Condition of Encouragement for the Event*

As discussed in the introduction to this chapter, the substantive portion of the Court's opinion in *New York Times Co. v. United States* consists of three statements: (1) that prior restraints are presumed to be unconstitutional and that the equity-seeking party has a "heavy burden" to justify them; (2) that three lower courts had held that the United States had not met that burden in these cases; and (3) that the Court agrees with that judgment. The first two are more or less statements of fact that set up the Court's dispositive utterance, which is limited to two words: "We agree." While these two words will be discussed at length in the next section of this chapter, it is important here to note the Court's contribution to the litigation in this case was nothing more than "We agree." The per curiam opinion in *New York Times Co. v. United States* is thus a minimalist opinion par excellence.

"Judicial minimalism" is typically used to refer to those opinions that narrowly decide a single case, leaving broader constitutional questions unresolved.<sup>35</sup> It is used here in a more

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<sup>35</sup> See generally: Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard University Press, 1999).

general sense, as Antoine de Saint-Exupéry once defined perfection: “It seems that perfection is achieved, not when there is nothing more to add, but when there is nothing more to take away.”<sup>36</sup> The notion that there is “nothing more to take away” indicates not only a particular narrowness to the ruling, but also another sort of textual narrowness, indicative of rhetorical minimalism. Rhetorical minimalism suggests both brevity, and limited (apparent) neutrality, and is thus to say something in the most limited way possible, to neither provide nor offer anything more than what is asked. For example, the minimal answer to “Which is your favorite Mozart opera?” would begin and end with a single name. Minimalism thus inevitably involves some level of ambiguity, which is a limitation in some ways and an advantage in others. In the *New York Times Co. v. United States*, the ambiguities of the minimalist per curiam limited the opinion’s precedential scope, but also made that very same opinion possible in the first place.

The opinion’s minimalism is at least somewhat attributable to Brennan’s uncanny ability to understand and anticipate his fellow justices, with which he was often able to craft approaches to contentious issues that built consensus on the Court.<sup>37</sup> Brennan likely knew that in order to create a majority he would have to win over either White or Stewart, and would therefore need to balance their generally conservative views with Black’s and Douglas’ absolutist views of the First Amendment. The impressiveness of Brennan’s strategy in the per curiam is magnified by the fact that he wrote it before oral arguments,<sup>38</sup> and thus before the conference at which each justice expresses the direction of his or her vote and the justifications for his or her decision. Despite the anteriority of its authorship, Brennan was able to craft a document that united

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<sup>36</sup> In the original French: *Il semble que la perfection soit atteinte non quand il n’y a plus rien à ajouter, mais quand il n’y a plus rien à retrancher.*

<sup>37</sup> See generally: Seth Stern and Stephen Wermiel, *Justice Brennan: Liberal Champion* (New York: Houghton Mifflin Harcourt, 2010).

<sup>38</sup> Laura Krugman Ray, “The Road to *Bush v. Gore*: The History of the Supreme Court’s Use of the Per Curiam Opinion,” *Nebraska Law Review* 79 (2000): 552.

opinions as wildly divergent as those of Justices Black and White, by limiting the issues discussed and tempering the per curiam opinion's language and the scope of its pronouncements.

The limited nature of the opinion was strategically valuable precisely because minimalism in general provides fewer sites of disagreement and thus fewer opportunities for the eruption of controversy.<sup>39</sup> Based on this observation one might initially assume that minimalism is ill-suited for an evental rhetoric. By appealing to the minimal common ground between two opposing perspectives, the per curiam in this view would entrench the symbolic as law by papering over its groundlessness. It would not, in other words, create controversies that uncover the contingency of the symbolic.

This criticism is well taken, but ultimately does not apply to *New York Times Co.*, and indeed misunderstands the relationship of minimalism to evental rhetoric. The justices wrote separately in addition to concurring with (or dissenting from) the per curiam, thus ensuring that their individual views were expressed despite (or as a supplement to) the continuity of the concurrence and the nominal unity with which the per curiam speaks (i.e. the voice of the Court). Second, the doppelgänger majority which formed around White's turn to criminality transformed the legal status of free speech into a methodological rather than social or political problem. Thus the contingency of the law as a systematic (stable) doctrine and as the manifestation of social values was not converted into necessity. That is, the majority and its doppelgänger still existed as two sides of a controversy. Taken together, these two gaps in continuity suggest that the minimalism of the per curiam did little to truly (or effectively) suture the rupture in the symbolic that arose out of the intersection of its competing demands for the freedom of speech and national security.

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<sup>39</sup> Except in the case of controversies *about* minimalism.

Moreover, minimalism encourages the event, rather than forecloses upon it, in at least two ways. First, minimalism has a focusing effect as a byproduct of limiting controversy and finding common ground. It clears away those parts of the symbolic that conceal, muddle, or complicate an issue—or, put another way, it cuts through complex webs of meaning. The commitment to original intent in Black’s opinion provides an excellent example. The intentions of the framers have no inherent or necessary relationship to the disposition of a legal case that occurred nearly 200 years after they signed the Bill of Rights, involving wars and machines of which those men could only dream. Black’s opinion, however, relies upon a synthetic necessity, manufactured by the symbolic as common law, which creates and insists upon such a relationship.<sup>40</sup> The minimalist opinion actively resists being bound by such a rigid, though illusory, apparatus by its very nature. That is, some members of the majority (White or Stewart, for example) would likely have rejected Black’s opinion as the opinion of the Court. Brennan was forced to limit the justificatory commitments of the per curiam out of concern that any additional attachments would alienate a justice who opposed them.

Minimalism in this sense is therefore not properly a condition of possibility for the event; after all, it is conceivable that one of particularly keen insight or ability could apprehend the symbolic’s ontological groundlessness without the focusing effect employed in the per curiam. Rather, minimalism encourages the emergence of an eventual subjectivity by clearing the way for it, by making it more likely that the subject will be able to free herself from the symbolic into which she is born. An opinion like the one in *New York Times Co.* weakens the ties that bind

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<sup>40</sup> A frequent objection to this claim raised by several friends involved with the law is that the Court has sets of rules and practices that must be followed because they are what the law is. While this position is respectable, and certainly understandable from someone trained in the law, it nevertheless misses the point: “the law” has no essential content, no necessary attributes. The “framers’ intent” argument only has meaning because that meaning is fabricated by already-present symbolic structures. This is in large measure the substance of James Boyd White’s critique of contemporary judging: judges are no longer accountable for their decisions because the latter are seen as the products of a system of analysis that is always-already determined in advance.

a legal issue to its broader symbolic context, and in doing so the opinion is reduced to its authoritative pronouncement: “We agree.”

Minimalism thus encourages the event much like a shoveled sidewalk encourages a morning stroll in the middle of winter: it does not positively motivate the event per se, but has a similar effect by lowering the threshold for the event to happen. Minimalism is more profoundly related to the event, however, as the aesthetic manifestation of the edge. Zupančič describes the topology of the event as the minimal distance between two sides of a symbolic controversy: good v. evil, legal v. illegal, appearance v. reality, etc. The per curiam opinion in *New York Times Co.* establishes common ground between the two sides of a controversy, acting as an anchoring point for the shift between perspectives. This function is unique to the per curiam and only possible because of its minimalism—a claim which requires explanation.

#### *Minimalism as Minimal Distance*

The Court is often divided amongst itself, and these divisions tend to fall along voting lines, i.e. majority v. minority. *New York Times Co.* is unusual because, in addition to the majority/minority split, there was a second split within the majority between those with an absolutist interpretation of the First Amendment (Black/Douglas) and those with far more permissive interpretations (White/Stewart).<sup>41</sup> Given the high threshold for prior restraints

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<sup>41</sup> The other two members of the majority, Justices Brennan and Marshall, do not advance positions that map easily onto this binary. First and foremost, Douglas and Black joined each other’s opinions, as did Stewart and White, while neither Brennan nor Marshall joined any other opinion, nor were their opinions joined by any of the other four justices. Thus, the fault lines of this controversy form naturally around explicit alliances rather than those forced through interpretation. Second, Brennan concedes in his opinion that prior restraints might be constitutional in some cases, but as Rudenstine notes Brennan set the burden for justifying such restraints incredibly high. For Brennan, the equity-seeking party must prove that the published material would “almost inevitably” lead to injury—a nearly impossible standard to meet. Thus, while his position is not absolutist, it is as close as possible to it, and is clearly incongruous with the sentiment expressed by White and Stewart. (David Rudenstine, *The Day the Presses Stopped: A History of the Pentagon Papers Case* (Berkeley: University of California Press, 1996), 308.) Marshall, on the other hand, ruled on completely different grounds from the other five members of the majority, and did not take a strong stand either way on the constitutionality of prior restraint. Although his position appears to be less absolutist than Douglas’ and Black’s, he is certainly far from advocating the same as White and Stewart. Third, both Brennan and Marshall joined Douglas and Black in arguing that the Court should deny certiorari and simply overturn the



endorsed by (or at least acknowledged by) Stewart and White, the distinction between the two sides may appear to be so small as to be irrelevant. However, the substantive differential between the two positions is significant precisely because the two sides express fundamentally irreconcilable perspectives on the interpretation of the First Amendment, yet remain a singular majority through their concurrence with the per curiam.

In its most limited sense, the majority in *New York Times Co.* was composed of those justices who rejected the United States' request for an injunction against the *Times* and the *Post*.<sup>42</sup> The minimalist per curiam expressed only the sentiment that would bind the majority together as such: it stated that the Court agreed with those lower courts which held that the government had not met its "heavy burden" in justifying an injunction. If no justice in the majority had issued a concurring opinion, the per curiam would not have functioned as rhetorical minimalism but instead as the totality of the majority's sentiment, since the majority would have appeared to be whole. However, because each justice wrote separately, and because a controversy internal to the majority formed, the unity of the per curiam ceases to cover the majority as such and becomes constrained through internal fracturing. In other words, the per curiam is no longer an expression of a majority in its positive sense, and became the minimal distance between two sides of a controversy.

It is important to remember, however, that the unity created by the per curiam is the condition of possibility for fracture, since something cannot be divided if its original or ideal

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lower court injunctions against the *Times* and the *Post*, indicating that their positions are qualitatively different from those of White and Stewart, who both sought to grant cert. Thus, given that both Marshall and Brennan hint at the constitutionality of prior restraints in some cases as White and Stewart maintain, they are both much closer to Black and Douglas on the resolution of the national security v. free speech controversy. Given these complexities, it seems neither prudent nor accurate (and it is certainly not necessary) to put Brennan or Marshall on either side, thus casting the controversy firmly along the lines of Black/Douglas v. White/Stewart. The entirety of the majority need not be divided in this way, as the possibility of division and the highly visible example of the per curiam are sufficient to function topologically as the "edge".

<sup>42</sup> The dissenting justices, it should be noted, did not accept the United States' claim per se; rather they rejected rejecting it, claiming instead that the trial had proceeded too quickly.

state is other than wholeness. The phrase “We agree” simultaneously signals the justices’ agreement with the findings of the lower courts (“We agree with them”), and an agreement amongst the justices constituting the majority (“We agree with each other”): that is, “We agree” functions to establish the majority in continuity as a whole. This dual agreement is not related to the constitutionality of prior restraints in general, but to the unconstitutionality of the specific prior restraint sought by the United States in this particular case. The per curiam thus creates a zero point internal to the decision out of which division originates and through which the two sides of the controversy gain their substance. In other words, the edge (the per curiam) functions paradoxically by at once signaling the almost-unity of two irreconcilable points while simultaneously being the condition of possibility for their division. Thus, the per curiam does not signify a point of concurrence between Black and White; rather, it establishes the minimal distance between them.

The notion of the minimal distance is essential to the theory of evental rhetoric because it represents the point at which the subject is best able to shift perspectives, taking the constitutive edge (the per curiam, in this case) as her point of focus. The movement of the shift, which is emblematic of an evental subjectivity, reveals the groundlessness of the symbolic in two ways. First, the subject recognizes that neither side of the controversy is “true” in its approach to the edge, that both are equally grounded in the symbolic, leading to the realization of the symbolic’s own groundlessness since it should not be able to support two opposing viewpoints if it represented “truth” in any sense of the word. The realization that neither side “has got the final answer” is a structural component of a shift in perspectives, because if the subject were to latch on to one side she would no longer be able to authentically shift to the other. Thus, she sees, the only true (in the Nietzschean sense) position in the controversy is the edge between its two sides.

Second, the subject sees that two incommensurable perspectives reach the same conclusion from within their own symbolic structures, without the division between them collapsing. This realization is impossible in the very sense that it requires the point of agreement—the edge, “We agree”—to function in an impossible way by simultaneously signaling the truth of two mutually exclusive positions. But the edge has no essential meaning beyond its unifying function, because “meaning” is a phenomenon relegated to the faces joined by the edge.<sup>43</sup> The *per curiam*’s minimalist pronouncement, in other words, has no meaning outside of the webs of symbolization into which it is cast. As an edge, the *per curiam* is essentially absent, and that absence has a constitutive function insofar as it establishes the almost-continuity between the antagonistic perspectives. Thus, and in the sense described at length in Chapter Two, the impossible *per curiam* points toward the real-as-impossible, carving out a path through which the subject might travel and become able to establish her own productive relationship to the abyss.

Together these two realizations form the foundation of an eventual subjectivity. The subject who takes the *per curiam* as her point of focus and is able to shift between the perspectives of Black and White recognizes that both men advance arguments that are not grounded in a necessary relationship to the world, but are fully articulated within the unbounded space of contingency. The relationship of each perspective to the *per curiam* is asymptotic, because neither perspective can encompass the part of the *per curiam* which is occupied by the other. But the subject here does not simply lapse into nihilistic relativism by throwing up her

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<sup>43</sup> The next section might appear to contradict this point, as I argue that the words “We agree” have an inherent meaning that challenges the relationship between the subject and the law itself. However, it is important to remember that these two processes operate on two distinct levels of the conceptualization of the law. The differentiation in register is the same as that between the authority in the law (the present discussion) and the authority of the law (the discussion in the next section), as described in the introduction to Part II and the end of Chapter Three.

hands and crying “There is no truth, anything goes!” Rather, she heeds the call of the real to create something new. The call does not emanate from the real itself—the only sound of which is nothingness—but originates from the subject’s authentic want, from her own will to creation. It is in this moment that the subject transforms the lack from a *lack* into the point from which her very being originates: the “lack” not as something missing, but as something out of which the impulse to live arises. Freed from the symbolic controversies of the law, the subject of the per curiam is able to create something truly, and freely.

None of this would be possible, however, without the minimalist nature of the per curiam. Had either Black or White been the Court’s majority opinion, it is likely that the other would have concurred separately rather than in unison. The two positions would have remained incommensurable, reducing the possibility of a shift in perspective. The per curiam, however, united them. Instead of covering up their divergence, the per curiam gave topological texture to the two perspectives and thus had the impossible task of representing both completely. It is important here to recall the Court’s only substantive contribution to the litigation: “We agree.” Both Black and White, as synecdoches for the controversy that extends beyond the two men and their written opinions, laid equal claim to the pronouncement, and create a site of perpetual shift: as soon as “We agree” represented one perspective, it would exclude the other, and vice versa. Because each opinion is actively articulated in its reading, the claim of the per curiam is constantly moving. Brennan was able to achieve this only by finding the minimal distance, the edge, between the two perspectives. It is in this way that the per curiam is an evental rhetoric.

Minimalism, it must be noted, limits the Court’s ability to provide arguments justifying or clarifying its decision, which weakens its precedential value. If, as Wetlaufer suggests, the rhetorical commitments of the legal profession emphasize axiomatic justification and rational

explanation as the basis for legal reasoning, then an opinion like the per curiam in *New York Times Co.* might be understood as a relatively weak method of advancing its legal position. However, minimalism in this case achieves the opposite rhetorical effect. The extraordinary protections afforded the press against prior restraint appear uncontroversial, due in part to the cited language's status as precedent, but also because the Court does not discuss those previous holdings more fully. The interpretation of the First Amendment is asserted with only the authority of the Court to serve as its backing. It is on this point that we turn to the authoritative manifestation of the Court's institutional authority in the words, "We agree."

### **We Agree: An Evental Rhetoric**

In this section I focus solely on the effect of reading the phrase "We agree" from the per curiam. In addition to its inherent minimalism, which I have just discussed, I argue that the phrase constitutes an evental rhetoric through two movements which are the results of two basic questions any reader of the per curiam must ask. In answering these questions, the subject is thus drawn into a face-to-face encounter with the part of herself that has been in the apparatus of law as legal authority. I address each question, and the contribution it makes to the overall eventality of the per curiam, in turn.

#### *Question One: Who are "We"?*

This question arises from the minimalist statement "We agree," and in the context of the per curiam in *New York Times Co.* the answer is almost automatic. "We," one assumes, refers to the Court who is speaking. Indeed, the answer is so obvious that many readers may not even realize that they have asked the question. However, the answer is far more complex than it might initially appear. The per curiam, as a matter of definition, speaks for the Court as an institution in a way that is unique from other modes opinion authorship. In the vast majority of cases, a single

justice writes and signs the opinion and those justices who endorse it and are not exclusively writing separately “join” it. Textually, this authorship is styled as “Justice X delivered the opinion of the Court,” at the start of the opinion, and the joining justices are each specifically mentioned at the end of the syllabus.<sup>44</sup>

In a per curiam opinion, however, the only indication of authority is the phrase “Per Curiam” at the start of the opinion. No individual justices “join” the opinion, because the opinion speaks for the entirety of the Court as an institution, covering and implicating each individual justice as a collective. However, three justices in *New York Times Co.* dissented from the majority, which problematizes the totalizing interpretation of “We” as the Court. So, in a move which is less automatic than the first, the reader may think that “We” refers to the majority, those six justices who voted for the *Times* and the *Post*.

But reducing the scope of “We” in this way also reduces the scope of the enunciative position “per curiam,” privileging the subject of speech over the speaking subject. However, as we saw in Chapter One, the two are coextensive and coproductive: one cannot simply say that the “We” of the text is different from the “We” of the Court and call it a day, when the latter speaks the former as indicative of itself. Moreover—and this is the essential point of the previous section—each justice wrote separately in *New York Times Co.*, and thus all justices are excluded as the essential constituents of the “We,” in the per curiam. Thus, the signifier per curiam (as Court) is emptied out of its constitutive content; “We,” then, is reduced to nothing less than the pure institutional authority of the Court.

Reading the phrase “We” generally is itself a unique phenomenon. Since “We” is a first-person pronoun, the reader takes one of two positions in relationship to it: either she adopts the

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<sup>44</sup> For example: “ROBERTS, C. J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. BREYER, J., filed a dissenting opinion, in which GINSBURG and SOTOMAYOR, JJ., joined.” *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010).

position of the author and takes “We” to be inclusive of herself, or she stands at a critical distance from the text, converting “We” into “They.” For many this decision may not be conscious, but it is nevertheless a decision that must be made in order to create an enduring interpretation of the text. The qualitative difference between the two, for our purposes, is based upon the mobility of the subject to adopt a new perspective other than her own, a mobility which is only achieved if one treats “We” as inclusive of the self. Converting “We” into “They,” on the other hand, crates a distance between the reading subject and authorial subject, a relationship of rigid non-identification. The relationship between “I” and “They” is not one of minimal distance, but rather of maximal distance: an infinite and ineliminable lexical separation between the subject and (an)Other.

“We” as “They” is not simply a non-evental rhetoric, but is in fact an anti-evental rhetoric. That is, a subject unwilling or unable to become part of “We” is a subject unwilling or unable to shift perspectives, and thus a subject who will not achieve evental subjectivity. A subject of the “They” is unwilling or unable to displace his own symbolic formulation of the controversy to which *New York Times Co.* responds, and the critical distance he establishes between himself and alterity is one of eternal noncoincidence. The world of others remains precisely that, and the subject systematically fails to recognize the part of himself that already exists in that world as gaze. By excluding the other from himself this subject is not decentered, and thus fails to achieve evental subjectivity.

The subject of the “We,” however, achieves the opposite. By becoming part of the enunciated subjectivity of the per curiam, she is able to shift her own perspective to that of the Court. The subject establishes herself as part of the unity of the Court through the specific enunciation (in reading) “We agree”; yet, every “We” implicitly includes an “I.” Thus to say

“We” is to at once be the subject of speech (as the unity constituted through “We”) and the speaking subject (as the “I” that says “We”). To call the others that constitute “We” into the speech of “I” is to establish not a pure coincidence between the two, but a sustained and evolving noncoincidence between them. That is, “We” is an almost-unity, a not quite being-as-one but a being-together. The evental subject creates the minimal distance between herself and the Court as an emptied signifier of the authority of the law, and in doing so she encounters the thrown part of herself that exists in the symbolic as law. This encounter is the moment of subjectivization characteristic of the event, where an already-present subject experiences the subjectivizing effect of encountering herself as gaze; where one turns to two.

In the particular instance of *New York Times Co.*, this entire process can be understood through the per curiam’s minimalism. The only justification the Court provides for its position, a position with which “We agree,” is the citation of two assertions, both the precedent of the Supreme Court, regarding the constitutionality of prior restraints: “Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”<sup>45</sup> The Government “thus carries a heavy burden of showing justification for the imposition of such a restraint.”<sup>46</sup> There is no external justification for either assertion, e.g. original intent, social value, etc.; thus, the authority of each statement must emanate solely from its status as precedent. Yet, the authority of precedent is nothing other than the institutional authority of the Court, which is the authority already invoked through the emptied out signifier per curiam in the minimalist phrase “We agree.” As shown in Chapter Four, the institutional authority of the Court is the authority of the law itself. Thus, the per curiam in *New York Times Co.* is both literally and figuratively the declaration “I, the law, am speaking!” This declaration is

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<sup>45</sup> *Bantam Books, Inc. v. Sullivan*, 372:70; see also *Near v. Minnesota*, 283:.

<sup>46</sup> *Organization for a Better Austin v. Keefe*, 402:419.



a discourse of truth (which operates both as a statement and as an assertion about the truth value of that statement), insofar as the per curiam minimally says what it says while simultaneously saying that it is law. The latter statement, (i.e. “What we say is law.”) is not actively spoken, but is instead said through the saying of the former. That is, the authority of the Court invoked as precedent, and in the phrase “We agree” is its very enunciative authority *as the law*.

The exceptional nature of this relationship may not be immediately clear. When an individual justice cites precedent, the authority of her argument is not drawn from reason, history, or language, but from the Court’s authority itself. However, as I discuss above, the authorial position of the individual justice is qualitatively different from that of the Court, and as I argued in Chapter Four, we perceive this difference as a differential in authority between the raw authority of the Court in the per curiam versus that authority modulated through the subjectivity of a justice. I illustrated this differential through the comparison of *Cooper v. Aaron* (1958), in which all justices signed the opinion, versus the common understanding of the per curiam.

Thus, given that justice exists outside of the Court, the citation of Court pronouncements without a concomitant discussion of the logic of those pronouncements is an appeal to the pure institutional authority of the Court. If the logic of the argument is discussed, then the authority shifts over to the external commitment of reason or whatever else grounded the pronouncement. If, for example, someone were to cite Black’s discussion of historical context and original intent, he or she would not be appealing directly to Black’s authority but rather to the authority of history as such, to buttress their argument. He or she may, as a matter of course, argue that Black’s authority as a justice suggests that this particular account of history is true, but on the

most basic level the argument is based upon an implicit (symbolic) belief that history matters to the present.

The subject, who enunciates the very authority of the Court as “We agree,” thus comes face to face with the pure authority of the law. As I argue in Chapter Four, the authority of the law is the gathered together subjective desire for punishment, abstracted from the agent of the retributive demand (i.e. the subject) and reinvested in the institutional apparatus of the law. Over time, the institutions of the law begin to assert that their agency originates not from the thrown desire of the subject, but from an internal source. In this way the law becomes a false agent, and begins to act upon the population rather than for it. The subject of the “We” encounters the part of the Court (as law) that is occupied by her retributive demand. The presence of this thrown part of the subject is precisely what enables a shift in perspective characteristic of the assertion “We” and the event. The encounter between the subject and her gaze (as herself), as described in Chapter Two, is the condition of possibility for the event, and the function of an evental rhetoric.

However, the subject of the “We” is not necessarily an evental subject: the subject can identify fully with the “We” of the Court, not establishing the minimal distance between her enunciating “I” and enunciated “We.” In other words, the subject becomes re-centered rather than decentered, and she never fully experiences the contingency of the symbolic as law. Instead of becoming two as “We agree,” the subject becomes fully one as “I agree.” In the case of the former, the subject of speech and the speaking subject are different (but minimally so), whereas in the latter the subject of speech and the speaking subject are one and the same. This substitution collapses evental possibility, and forecloses on the sustained decentering of the subject which is a central characteristic of the event. The means of preventing this collapse, however, are a function of the second question asked when reading the text.

*Question Two: Do “I” agree?*

In Chapter Two I argued that the double declaration of the event is composed of two discourses: discourses of truth and discourses of affirmation. The statement “We agree,” as I have just illustrated is a discourse of truth, insofar as its truth (“This is the law”) is a function of its enunciation (“What we say is the law”). This minimal distance between the law as enunciated and the law as enunciation is assumed by the subject by becoming the “We” that speaks in the opinion. However, the subject must not lose herself in this becoming law, and the discourse of affirmation functions as a bulwark against it. Discourse of affirmation is a dialectic between two terms: a “yes” or a “no” to some thing that happens (e.g. the publication of the Pentagon papers), and then a secondary “yes” to contingency of that thing happening. However, the uncritical “yes to a yes” was described by Nietzsche as the swine’s manner, because it accepts everything as it is (as a swine eats whatever is put before it) and has no critical relationship to the world. Those with the swine mentality, in other words, are unable to want anything in particular because they want everything, and their uncritical demand on contingency causes them to throw up their hands and say “Anything goes!” This swine subjectivity, unable to say “no” to the world, can never actively want the new at the exclusion of the old.

The subject replacing “We agree” in the opinion uncritically with “I agree” is thus a manifestation of the swine subjectivity. The subject must instead ask herself whether or not she agrees with the decision, whether or not the first term in the dialectic of affirmation is a “yes” or a “no.” The ambivalence inherent in this question is a manifestation of what Zupančič, following Nietzsche, calls the “Dionysian ‘yes’ ... a Yes that knows how to say ‘No,’ and can put negation in the service of the force of affirmation.”<sup>47</sup> Which is to say that the answer the subject gives is

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<sup>47</sup> Alenka Zupančič, *The Shortest Shadow: Nietzsche’s Philosophy of the Two* (Cambridge, MA: MIT Press, 2003), 136.

ultimately irrelevant, but the ambivalence inherent in asking the question of herself ensures that she does become what she is rather than becomes something else. The Dionysian yes is a yes that loves contingency, freeing the subject from the binding force of the symbolic as a law; and as I argue in the previous section, it is also the means by which the subject is able to establish a productive relationship to the real, and come to authentically want—and create—the new.

What the per curiam opinion in *New York Times Co. v. United States* achieved was not the radical reconstitution of society. Indeed, despite its role in Nixon's turn away from the legitimate channels of justice, it is would be impossible to prove that he was influenced by the decision as an evental rhetoric in the way described above. The only "proof" of the event is the existence of a double subjectivity, which I have shown is possible through the reading of the per curiam in *New York Times Co.* Despite the highly individual nature of the event, its effect is nevertheless, to use Biesecker's term, "seismic." The unique textual configuration of the per curiam not only unites incongruous and impossible positions, it also creates the conditions under which the subject is able to challenge the content of the laws and the law itself. The subject is liberated from the tyranny of the symbolic: she is free to want, not simply as desire, but as a positive will toward the future of the world. The discussion created within the subject by an evental rhetoric is, in a very real sense, one in which democracy can begin.

## Rhetoric and Rupture

“In people devoted to knowledge, pity seems almost ridiculous, like delicate hands on a Cyclops.”

–Nietzsche

Evental rhetoric, as I have thus far described it, is a rhetoric of rupture. These rhetorics do not abolish the dominant symbolic order, nor do they allow the subject to somehow “get outside” of symbolization in any permanent sense. Evental rhetorics rupture the appearance of continuity in the symbolic; they poke holes in the very fabric of meaning to reveal that beyond meaning, beyond language, beyond law, beyond etc. there is only nothingness itself. There is no “final answer,” to borrow Žižek’s phrase. This realization is not itself a “final answer,” as the relativists would have it. Indeed, to posit a final answer in any sense is to be fundamentally anti-evental, to suggest that contingency can somehow be mastered through symbolic necessity. There is no “final answer,” there is only *something else*.

The evental nature of *New York Times Co. v. United States* should be understood in two distinct registers. The discussion of minimalism and its relation to the controversy over free speech and national security operates at the level of the laws, whereby the subject is able to accept that particular manifestations of legal authority, and their normative dimensions, are fully contingent.<sup>1</sup> That is, not singular interpretation of the law has any more claim to real than any other. The subject, occupying the position of the edge, is thus able to challenge the “effects” of the symbolic as law. This is precisely what White identifies as the moment in which legal rhetoric assumes its constitutive effect, which is the condition of possibility for the transition from propositional normative discourse to the unbounded and processual conversation of the law as translation. Which is to say that the almost-concurrence of White and Black, which is only

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<sup>1</sup> Recall the discussion of Goodnight’s theory of controversy in the introduction of Part III.

possible through the minimalist *per curiam*, makes the emergence of an evental subjectivity possible.

The second register is the reading of “We agree,” which lays bare the raw institutional authority of the Court. I described this effect as a shift in authoriality, as the combination of authorship and authority, which reveals the part of the subject thrown into the legal apparatus as a retributive demand. We must remember, however, that rhetoric is only made evental in its reading by the subject; in other words, evental rhetorics and their effect are fully contained *within* the subject. The effect of an evental rhetoric, in a more specific sense, is to unchain the subject’s will to want from the constraints of the normative dimensions of the symbolic. In fact, the subject’s will to want becomes her central question: “What do I, the subject, want?” The will to want that is the result of an evental rhetoric is not mediated by the (Lacanian) symbolic, as the ego-ideal sitting atop the subject’s shoulder whispering, “But my dear, you could not possibly want *that*.” Much like a translator builds experience internally to her text, the subject must build her wants out of whatever constitutes herself. The subject, faced with the void of the real, wants something, anything, and in recognizing the contingency of the symbolic the subject is able to *create* it. This authentic want is the condition of possibility for the new, as well as its means of invention.

The subject, we must remember, is influenced to a significant degree by the symbolic; but the subject is also a being in the world. The world, that is the real, *ex-cists*, it is ontologically present but is not part of the symbolic-order; the “nothingness” of the real is the nothingness of an existence without meaning, not the amorphous nothingness of the dark void. Recall Heideggerian discoursing, or the structural articulation of the intelligibility of the world. The undifferentiated pre-discursive is a state of wholeness where the subject does not experience the

world as objects or herself as a subject, because she is not yet a subject at all. This world is impossible to simulate, in the sense that it is impossible to return to in an enduring way, because we are already subjects. To return to the undifferentiated world would be to eliminate subjectivity itself, and in that sense “I” would not be “there” at all, because “I, the subject” would not exist. The purpose of an evental rhetoric is to pull back the veil of meaning and to establish a relationship between the subject and this pre-discursive world; not inhabiting it, but assuming its possibility. The purpose of an evental rhetoric, in other words, is to afford the subject a glimpse of the real at the zero point.

The act of subjectivization, in the first instance, is the severance of the subject and object through discoursing. This severance is inherently an act of creation, insofar as it creates the subject and what the subject then calls “the world,” which is the subjective relation to the real as objects. The subject is not aware of its creation (awareness is a function of subjectivity, arriving *after* creation), but she is aware that she exists, and that objects exist. This “awareness” of existence is nothing other than the formation of the symbolic, which is to say that the subject immediately projects meaning onto the world like a phantasmagoria. For those of us who are born into a world inhabited by a symbolic-order, much of the work has already been done; for those born into a fresh existence, much work lies ahead. Regardless, the initial act of subjectivization interposes a veil of meaning between the subject and object, a veil we call the symbolic. The purpose of an evental rhetoric, then, is to force the recognition that the symbolic is synthetic, and establish a relation toward the world in its pre-discursive wholeness. This is precisely what Zupančič describes as the disclosure of the “neutrality of being,” which is the effect of the Nietzschean event.

Evental rhetorics are able to achieve this disclosure by way of facilitating an encounter between the subject and herself as gaze. As the subject shifts perspectives—a structural component of evental rhetoric, and a process I have described at great length in Chapters Two, Three, Four, and Six—she recognizes that there is a constant in the shift, something which brings two different perspectives together as perceiving the same phenomenon. This constant is her gaze. Evental rhetorics thus create an encounter between the subject and the object, but this object has gained a new significance. Rather than treating the object as an external phenomenon, existing in the world as a product of the symbolic, the subject realizes that the object's status as an object is a function of her subjectivity. That is, the subject comes to encounter the object as something she herself created as an object, both in the existential sense (i.e. this is an object) but also in the specific sense (e.g. this is my donkey). This encounter is the point around which the evental enterprise is built, because to recognize the object as a function of the subject's being is to recognize that meaning is not a stable, external category but something radically contingent and radically subjective.

By aiming the subject at the real, evental rhetorics cause the subject to experience the subjectivizing effect of discoursing *a second time*. That is, the subject becomes a subject recognizing her own subjectivity. This second subjectivization is what I described in Chapter Two as the effect of a discourse of truth; that is, the subject now articulates the truth of her subjectivity through being-as-subject. Her very existence in the world is what defines her being as true. In this doubled-subjectivity the subject assumes the creative power by which she herself was created; she assumes the power of discoursing, and this power is nothing other than the power to create meaning. Nothing has changed in the world—this point is a particularly delicate one, because it is so easily misunderstood—that is, all that has changed is the subject's



disposition toward herself and the world as her creation. However, the subject cannot live in the undifferentiated pre-discursive real, pondering the pen of existence for all eternity. Her will, indeed the will of an evental subjectivity, is Zarathustra: the evental subject wills the symbolic *again*: “Was that life? Well then! Once more!”

In this sense, the change in the subjective relation to objects and the real, that is a change from necessity to contingency, a change from subjugation to mastery, has the capacity to change *everything* in the world, because the world-as-symbolic (as opposed to world-as-real) for the subject is only what she makes it to be. Thus, an evental rhetoric distinguishes between the force of the symbolic (the phantasmagorical creation of meaning) and its effects (the particular meanings of particular signifiers). The subject takes hold of the symbolic force, which is her will to want thrown out into the world as meaning, and creates the new.

Conceiving of the effect of evental rhetoric in this way takes on different valences depending upon the position from which it is to be examined. For the evental subject, the practical effect of an evental rhetoric is to change everything about the subject’s relationship to the world. Not everything in the totalizing sense, i.e. that every single phenomenon encountered in the world is somehow different, but rather everything in the specific sense of the totalized subjective relationship to a single object. Of course the event may implicate nearly every part of the symbolic-order, but this is neither a requirement nor a matter of necessity. The individual rupture in the continuity of the symbolic may be small, or it may be large, but the salient measure of an evental rhetoric is the “completeness” of the singular rupture.

For a non-evental subject, the event will not appear as the event directly, but as something else. To ask the question in this way is similar to asking “What is the effect of sunlight during the dead of night?” One does not directly experience sunlight, but one can see its

effects upon the moon. The moon thus operates as a point of translation, introducing sunlight to the night; but to understand it as such requires one to know the sun, otherwise the moon appears to be its own source of light. This analogy illustrates two modalities of evental contagion, which is how the rupture of an evental rhetoric spreads throughout the symbolic of other individuals. I will address both modalities in turn.

The first modality, understanding the moon as a point of translation between the sun and the night, is closely related to Biesecker's theory of evental rhetoric. In this view, an evental rhetoric exerts its subjectivizing effect on more than one subject at once, which would create multiple instance of what I have just described as the individual effect of evental subjectivization. This is the modality exemplified by Zupančič's "I, the event, am speaking!" The evental nature of the *per curiam* in *New York Times Co. v. United States* is dependent upon this phenomenon, insofar as reading the phrase "We agree" invites a series of questions which, when answered, constitute an evental rhetoric.

But there is no guarantee that the radicalization of the subject and the symbolic invited by such a rhetoric will spread, because there is no guarantee that each subject will encounter the text in a particular way (there will be more to say on this question, which is intimately related to a theory of agency, in the next section). In other words, I do not believe I have thoroughly solved the problem of rhetoric as a direct vector for evental contagion. Biesecker proposed the Lacanian theory of sublimation as one mechanism by which we might understand the widespread manifestation of the event, and it would likely be an excellent starting point to further develop our understanding of the political and social effect of evental rhetoric.

The second modality is likewise related to the process of translation, but in a very different way. The subject in the first modality understands the moon as translating the sunlight

into moonlight because it knows the sun; that is, the subject understand an evental rhetoric as translating evental subjectivity into the symbolic because the subject is itself an evental subject. In the second modality, the sun is concealed, and the subject perceives the moon as emitting its own light. While moonlight is still a translation of sunlight, it is not perceived as such. In this second modality, the evental subject does not drag other subjects into the event with her, but conceals her eventality and reconfigures the symbolic, signifier-by-signifier, in an attempt to remake the symbolic on a much wider scale. In Part II I turned to the law as the means by which the new might be spread, given the constitutive nature of the law's regulative effect, described by Harriman as performance and White as legal rhetoric.

The law defines society, insofar as it creates and shapes intersubjective communities, and thus a properly evental justice is one that takes up the creation of communities as a function of discoursing. As Avital Ronell suggests, "Henceforth, Justice can no longer permit itself to be merely backward looking or bound in servility to sclerotic models and their modifications (their 'future'). A justice of the future would have to show the will to rupture."<sup>2</sup> Here we see justice operating in a dual sense as concept (Justice) and subjective position (justice), and my use of the word should invoke both senses. An evental justice is justice with a will to rupture, but more importantly it is justice with a will to want. That is, an evental justice must break through the symbolic and become Zarathustra, willing the symbolic around the coordinates of subjective/conceptual want. Given its constitutive effects, and the enunciative authority of a justice as Justice, the law provides a point of translation through which the event can be brought to bear on the symbolic, signifier-by-signifier.

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<sup>2</sup> Avital Ronell, *Crack Wars: Literature, Addiction, Mania* (Lincoln, NE: University of Nebraska Press, 1992), 21.

## Ruptures in Rhetoric

The theory of the event I have proposed has two major components: on the one hand, I have described the *effect* of the event as the radicalization of the subject and the symbolic, as a means of rupture to introduce the new; on the other, and this is the more important to of the two, I have described the specific way in which the subject and rhetoric become evental. Evental rhetoric is certainly a counterpoint to situated rhetoric, complicating the objective/subjective models proposed by Bitzer and Vatz, as well as the idea that rhetoric responds to an exigency (and the implicit claim that rhetoric cannot *create* something new). However, I do not propose a particular means by which one might formulate an evental rhetoric; and despite whatever the concreteness of my language has inevitably suggested, I do not mean to say that evental subjectivity can be “activated” in the way that one turns on a light switch. To suggest that any particular configuration of speech, text, materiality, etc. will inevitably function as an evental rhetoric is to convert contingency into necessity, to determine the future, or at the very least, to proceed as if the future is determined or determinable. A text is only made evental through its reading as evental, and in that sense eventality is radically contingent. Evental rhetoric and evental subjectivity are therefore coextensive. One does not cause the other, for they are the same rupture.

The theory of subjectivity and the concomitant love for contingency developed herein provide the starting point for a theory of agency, which I will define (if only provisionally) as the force of discoursing, or that which determines meaning. As in Lacanian theory, the “signifier [still] wields ontic clout” in the theory of evental rhetoric, but the signifier does not determine the subjective relationship to objects, concepts, or phenomena; the evental subject is able to wield the same ontic clout by assuming the creative power of discoursing. Insofar as discoursing

is the process by which the subject creates itself in an act of primordial severance, discursing is the ontological *source* of agency.

Agency, in the theory of evental rhetoric, is “thrown” into the symbolic by the subject immediately after the initial act of subjectivization. For Heidegger this is manifest as the shift from primordial understanding to privative understanding through being-together, where idle talk (the symbolic) covers over and replaces doing as the basis for knowledge. This is also the same effect I described in Chapter Four as severance of the subject from her retributive demand invested in the apparatus of the law, which is the mechanism by which the law becomes the source of its own authority (i.e. the law begins to act upon the population).

In all three cases, (subjectivization, idle talk, the law), agency original lies with the subject as the product of the initial moment of subjectivization—it is only thrown into the symbolic in order to create meaning. In the event, and through the subjectivizing encounter with the gaze, the subject reassumes her agency (e.g. the subject transitions from a subject *of* the law to a subject *as* the law). But the subject does not keep her agency for long, and willing the symbolic again she throws her agency into the symbolic a second time. Thus, rather than a static quality, agency is a co-productive force that eternally shifts between the subject and the part of the subject that remains (or rather, is the condition of possibility of) the symbolic as gaze.

Under this view, rhetoricians cannot (and smart rhetoricians do not) simply treat the audience an army of zombies, hypnotized completely by the words of a nimble rhetor; nor can we simply abandon the rhetor and claim that the symbolic—the text—determines the audience; nor can we burn the text, dive headlong into the nihilism of relativist thought, and give everything over to the audience. The author and the audience (dual manifestations of the subject) and the text (as the symbolic) all wield ontic clout—as does the real. Rhetorical theorists, rather

than attempting to locate the “final answer” of agency, must develop a more sophisticated means by which to address shifts in agency as the effective force of persuasion.

At stake in the theory of the event, however, is nothing other than politics itself. Paraphrasing Hannah Arendt: without the ability to say “yes” or “no” to existence—to challenge not just the propositions we advance but our very relationship to the phenomena we perceive (aesthetically, affectively, or otherwise)—action would not be possible, “and action is of course the very stuff politics are made of.”<sup>3</sup> It is in this sense that the an eventual rhetoric creates a discussion in which democracy can begin, in which the political subject (rather than the subject of politics), who is made democratic through the radicalizing contingency of the event, is able to express and act upon her will to want, truly and freely.

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<sup>3</sup> Hannah Arendt, “Lying in Politics: Reflections on the Pentagon Papers,” in *Crises of the Republic* (New York: Harcourt Brace Jovanovich, 1972), 5-6.

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