

"Humanitarian Aid is Never a Crime."

A Study of One Local Public's Attempt to Negotiate

Rhetorical Agency with the State

by

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## ABSTRACT

At its core, this dissertation is a study of how one group of ordinary people attempted to make change in their local and national community by reframing a public debate. Since 1993, over five thousand undocumented migrants have died, mostly of dehydration, while attempting to cross the US/Mexico border. Volunteers for No More Deaths (NMD), a humanitarian group in Tucson, hike the remote desert trails of the southern Arizona desert and provide food, water, and first aid to undocumented migrants in medical distress. They believe that their actions reduce suffering and deaths in the desert. On December 4, 2008, Walt Staton, a NMD volunteer placed multiple one-gallon jugs of water on a known migrant trail, and a Fish and Wildlife officer on the Buenos Aires National Wildlife Refuge near Arivaca, Arizona cited him for littering. Staton refused to pay the fine, believing that he was providing life-saving humanitarian aid, and was taken to court as a result. His trial from June 1-3, 2009 is the main focus of this dissertation. The dissertation begins by tracing the history of the rhetorical marker "illegal" and its role in the deaths of thousands of "illegal" immigrants. Then, it outlines the history of NMD, from its roots in the Sanctuary Movement to its current operation as a counterpublic discursively subverting the state. Next, it examines Staton's trial as a postmodern rhetorical situation, where subjects negotiate their rhetorical agency with the state. Finally, it measures the rhetorical effect of NMD's actions by tracing humanitarian and human rights ideographs in online discussion boards before and after Staton's

sentencing. The study finds that despite situational restrictions, as the postmodern critique suggests, subjects are still able to identify and engage with rhetorical opportunities, and in doing so can still subvert the state.

## DEDICATION

For Roberto--and the thousands of other human beings abandoned and discarded  
for profit.

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## PREFACE

During the spring of 2009, I volunteered with No More Deaths (NMD), a humanitarian group that provides food, water, and medical attention to migrants crossing the southern Arizona desert during the hottest months of the year. NMD mission is to end the suffering, and ultimately the deaths, of migrants crossing the US/Mexico border. I had been attending their weekly meetings during the year and finally had the opportunity to volunteer with them for a week in the desert. Toward the end of that week, while hiking about 50 miles south of Tucson and about eight miles north of the border, I and three other volunteers found a man sitting alone on a desert trail. His face was worn. His jeans were dirty. He looked exhausted. We offered some of our water, and he accepted, immediately. He had been hiking for 10 hours and had brought only enough water to cover such a journey. That was how long he was told it would take to hike from the border to Tucson. He was misled. Most of the time, they are.

His name was Roberto. When he was 24, he crossed the border near Tijuana into California. He had been living in Los Angeles for the past 26 years with his wife, three children, and four grandchildren, when two months earlier, he was arrested for public intoxication. Once the police discovered that he was an “undocumented immigrant,” an “illegal alien,” he was deported to Nogales, Mexico--a place where he had never been; a place where he knew no one; a place 500 miles away from his family. Motivated to return to the place where he had lived for more than half of his life, Roberto looked for the fastest way to return to the United States. He found a *coyote*, a guide, who, for a few thousand dollars

(US), would take him and several others through some of the most remote and dangerous terrain of the southern Arizona landscape. It was the *coyote* who told Roberto that it would only take 10 hours to hike from the border to Tucson. He did not mention that Roberto would need to scale two mountain ranges, cross several canyons, and endure multiple days in the heat in order to complete the 60 mile trek to Tucson.

We found Roberto in the mid-afternoon. The day was hot, in the upper-80s, cloudless and breezeless. He was not only dehydrated, but soon revealed that he was diabetic. One of the volunteers I was with was an EMT and had wilderness first-responder training. He checked Roberto's blood sugar level, and it was very low. The four of us shared with him the fruit, trail mix, and energy bars we had in our packs. As he took each item, Roberto told us that the night before, during the 10-hour hike, he struggled to keep up with the rest of his group, a struggle he attributed to his diabetes. In the morning he woke up to discover that he was alone, left behind by the group. He had been walking and resting with no food and little water, ever since, alone.

I'm not sure what ever happened to Roberto. He planned to walk the remaining 50 miles to Tucson and phone a friend, who would then pick him up and drive him the rest of the way to LA. But that was not likely to happen. The desert and his condition would probably not permit it. After sharing with him the remainder of our water and food, we had to leave. It was getting dark. There was nothing else we could legally do to help. Perhaps another group of migrants that night passed by and picked him up. Perhaps the Border Patrol found him, arrested



him, and sent him back to Nogales, where he knew no one, and where he told us, if that were to happen, he would merely cross again. He had to get back to his family. Or perhaps he wandered alone and exhausted his supplies, never to be seen again. In 2009 alone, over 200 remains of bodies were found in the desert. That number does not include the hundreds of bodies that were never found.

This dissertation is about Roberto and the thousands like him suffering and dying in the desert; the polices and enforcement procedures in place that produce and perpetuate these circumstances; the publics and counterpublics which seek to uphold or change these circumstances; and the rhetorics circulating among them, competing for space in the public sphere. At its core, this story is about a group of ordinary people seeking extraordinary change. Because of the group's radical acts of compassion under extraneous conditions in the desert, NMD has earned a reputation as a moral authority among local publics in the Tucson area, one that gives the group a distinct perspective and position within immigration debates and an ethos for constructing a subjectivity of the migrant in the desert as a victim of unethical US immigration policy. It is through this construction of the subjectivity of the migrant that I focus my scholarly gaze, for it is here that NMD attempts to discursively make social change.

My text for this dissertation is the trial of Walt Staton, a NMD volunteer who was cited for littering after placing bottles of water on a desert trail slightly north of the US/Mexico border but within the boundaries of the Buenos Aires National Wildlife Refuge (BANWR). My data includes three main types of materials: first, official texts, the court transcripts and court documents from USA

v. Staton; second, NMD texts, the press releases issued by NMD and compiled on their website; third, public texts, the newspaper articles and editorials from both local (*Arizona Daily-Star* and *Tucson Citizen*) and national (*New York Times* and *LA Times*) media outlets, in addition to the public responses to the trial via online public discussion boards and blogs. The parameter of my archival research is from December 4, 2008, the date of the littering fine, to September 1, 2009, three weeks after Staton's sentencing to encompass the public response.

Obviously this one trial cannot possibly be treated as indicative of any larger-scale phenomenon; instead, I use it as an individual case study for the purpose of understanding how NMD discursively can affect the public sphere and state power. (After the trial and sentencing, for instance, there was an explosion of media coverage, covering and commenting on Staton's actions and US immigration policy; moreover, BANWR changed how it negotiates humanitarian aid on their refuge). This one trial was chosen because it attracted the highly-charged and competing arguments surrounding migrant subjectivity, state power, and humanitarian aid. This event allows me to observe the rhetorical situation of the littering fine from a variety of perspectives: state-sponsored publics (the prosecution, the Border Patrol, BANWR officials), counterpublics (NMD, the defense), and local publics (respondents to online news articles and blogs).

With these materials, I compose a narrative of the events on December 4, 2008 (the issuing of the littering fine), June 1-3, 2009 (USA v. Staton trial), and August 11, 2009 (Staton's sentencing). I analyze these events through a postmodern lens, namely Barbara Biesecker's productive postmodern framework

of the rhetorical situation imbued in *differánce*, where rhetorical agents negotiate rhetorical agency. I examine in particular how the subjects in the rhetorical situations perceive and construct the subjectivity of the migrant vis-á-vis the contested definition of water/litter (as life-saving or environmentally destructive); how that perception and construction shapes their own and other subjects' subjectivity and the temporary relations between them; and how NMD seeks to disarticulate previous unproductive discourses, such as racist and xenophobic discourses, for the purpose of rearticulating new and productive ones, such as humanitarian and human rights discourses.

This dissertation offers a concrete instance of Biesecker's postmodern rhetorical situation. Butler via Derrida demonstrates for us the problem with the attempt to nail down a definition, freeze language, or censor speech. Too often in the current postmodern agential debates, scholars argue so abstractly that I question if the debate of definitions is even productive. This concrete example will serve as a touchstone for theorists concerned with rhetorical agency. For public sphere and community-literacy theorists, this dissertation provides yet another example of how ordinary people "go public" but do so in a creative way. Lastly, this study may contribute to an ever-growing need for NMD. The stories of NMD volunteers intervening in migrants' lives and challenging state power enter academic discourse with this study. Year after year, NMD volunteers discuss ways to make their actions more visible to local and national publics in hopes of changing US immigration policy and attracting more volunteers. The turnover rate of NMD volunteers, however, is extremely high; with the exception

of about fifteen people, NMD is a revolving door of temporary volunteers. This dissertation will make the work of NMD more visible and credible to a new audience and may inspire students and academics alike to volunteer with NMD, as I have, in the future.

## CHAPTER 1

### THE RHETORIC OF “ILLEGAL” AND ITS VIOLENT CONSEQUENCES FOR “ILLEGAL” IMMIGRANTS

Not a week goes by in Tucson without a news story about “illegal” immigration. Take, for instance, a given week in April 2010 when local stories included “Human Smugglers Busted in Tucson” (Kelley), “KGUN9 Viewers Debate Border Policy and Gun Control” (Carr), “Arizona May Crack Down Hard on Illegal Immigrants” (Fonseca), “Immigration Agents Raid Tucson Shuttle Businesses” (Jun), “Guilty Verdict for Tucson Drop House Hostage Taker” (Herschler). But on April 23, 2010, a local news story became a national news story when Jan Brewer, governor of Arizona, signed the highly controversial Senate Bill 1070 into law (Archibold).

The new law permits police officers with “reasonable suspicion” the power to detain anyone they “perceive” to be an “illegal” immigrant. If the detained subject does not produce immigration papers, he or she will be charged with a misdemeanor. Critics claim that SB 1070 legalizes racial profiling, as anyone who “looks illegal” is subject to police questioning (Kreutz and Villarreal). Supporters argue that the law is a much needed safety measure against the violence that “illegal” immigrants bring to the US. At the bill signing, Brewer said, “We cannot sacrifice our safety to the murderous greed of drug cartels. We cannot stand idly by as drop houses, kidnappings and violence compromise our quality of life. We cannot delay while the destruction happening south of our international border creeps its way north” (Evans).

This theme, that “illegal” immigrants bring violence, is a common one, repeated and reified in local and national news stories; it breeds racism, unfairly casts an entire group of people as deplorable, and justifies discriminatory laws such as SB 1070. What allows the state<sup>1</sup> to make such an unjust association is the rhetorical marker “illegal.” The marker has the connotation of “criminal activity,” which implicates the subject as a “criminal,” even though, ironically, the subject has committed no crime<sup>2</sup> (Unruh). As a perceived criminal, the subject is treated like one. Agamben argues that subjects in this state are stripped of political life and reduced to “bare life” (Agamben, *Homo Sacer*), which can then be disregarded or killed without consequence. The marking of undocumented immigrants as “illegal” has directly influenced the construction of US immigration policies, which has resulted in the extraordinary violence upon “illegal” immigrants.

In 1993, the Clinton administration implemented a border enforcement policy which sought to deter “illegal” immigrants from crossing the US/Mexico border by “funneling” them into the most remote and dangerous areas of the Arizona desert. The policy failed to decrease the number of border crossers while increasing the number of “illegal” immigrant deaths (Corneilus 284). It is

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<sup>1</sup> The state is a structural effect of perceived sovereign power and the arrangement of space and bodies. The state is not “the government” but rather the effect of the perception of “the government.”

<sup>2</sup> The mere act of crossing the border without documentation or authorization from the state is illegal but not a crime. If one is deported and crosses again, without documentation, then he or she has committed a felony. With Arizona’s new state law (SB 1070), however, it is a misdemeanor—a crime—to be in the state without documentation.

estimated that over five thousand “illegal” immigrants have died attempting to cross the US/Mexico border since 1993 (Rodriguez, *Arizona*). That is one death a day, every day, for almost two decades (Jimenez 18). In the Tucson sector alone, the number of deaths has doubled from 1995 to 2005 (“Border-Crossing Deaths” 52). Despite the violent consequences from having marked immigrants as “illegal,” the Bush administration continued this immigration policy and its “funnel effect” (Jimenez 23), and thus far so has the Obama administration.

The reason for this continuation has to do with a much larger set of conditions that the state perceives as necessary to maintain because it directly relates to the US economy. Desperate economic conditions in Mexico, often created by US trade policies, have historically pushed laborers from the south to migrate north. And since these extreme conditions of poverty usually produce desperate people with urgent material needs, the option for following legal channels of immigration, which take between eight to 10 years (Litwin), is not normally taken. This set of poor economic conditions and its production of desperate people, who in turn cross the border and are then marked by the state as “illegal,” has been maintained for nearly 75 years. The production of “illegal” immigrants benefits the state; it guarantees a cheap labor force that is easily controlled. Having the ability to deport labor, at any time for any reason, allows the state to regulate labor, and ultimately have control over a large portion of its economy. However, part of this maintenance includes restricting the production of “illegal” immigrants, so as not to saturate the labor market. Border enforcement

policies, even ones with violent consequences for border crossers, are implemented and continued, thus revealing the state's priority of capital over life.

In this first chapter, I examine the historical construction of the “illegal” marker, how it came into being in the 1930s and how it has evolved into a tool used by the state to manage its economy and how it is responsible for the deaths of thousands of undocumented immigrants. This chapter is not meant to be an exhaustive history of the US/Mexico border nor of “illegal” immigration in the US. It is also not meant to be a thorough analysis of the US economic system and its relations to undocumented labor. Instead, this chapter is meant to be a rhetorical analysis of the “illegal” marker: how it came into circulation, how it has been used, and how it is implicated in the deaths of thousands of “illegal” immigrants.

### **When Immigration Became “Illegal”**

It was not “illegal” to enter the United States without documentation until the Immigration Act of 1917. This act was mainly designed to eliminate the flow of Asian immigration but it also included other “undesirables” as deemed by the US, such as “idiots” and “epileptics” (Stat. 39.875). US employers along the US/Mexico border lobbied for temporary Mexican laborers to be exempt from this act and concessions were made by Congress (Lorey 71). In 1921 and 1924, even stricter immigration laws were made, emphasizing quotas, but again Mexican laborers were excluded. It was not until 1929 that it became “illegal” to enter the United States from Mexico (Lorey 162). The US economy crashed during the Great Depression, and many white, native-born US citizens struggled



to find work. The once desired low-cost, temporary Mexican laborers were blamed for “taking jobs,” so the state officially “encouraged” all Mexicans to return to Mexico, thereby relinquishing their jobs to whites. Nearly half a million Mexicans—60 percent of whom were Mexican-American, i.e. US citizens, the children of Mexican laborers born in the US—either “voluntarily” returned or were forcibly deported to Mexico by the end of the 1930s (Flores). If they were to recross the border, they were deemed “illegal” by the state, no longer having the support of lobbyists or Congress.

### **Establishing the Pathway for Exploitable Labor**

A few years later, when the US became involved in World War II, the need for temporary laborers surged. When white, native-born US citizens left the country to fight in the war, it caused an immediate labor shortage on farms across the southwest. Growers lobbied federal officials to import temporary workers from Mexico (Lorey 89), and the government responded in 1942 with the creation of the Bracero Program, a systematic legal pathway for Mexican immigrants to enter the country temporarily in order to meet the temporary demands of US labor.

The Bracero Program, which literally means “one who works with his arms,” temporarily imported 4.8 million Mexican laborers from 1942 to 1964 (Akers-Chacon and Davis 140). Each Mexican laborer signed an individual contract (to prevent collective bargaining and unionizing) that guaranteed work, minimum wage, transportation, and housing, while each laborer’s food and health care expenses were deducted from his paycheck. As a “guest worker,” Mexican

laborers were to uphold their contracts, work continuously until the end of the harvest season, and then return home. If this contract was breached in any way (the laborer stopped working), the bracero was deported.

This system of temporary, legal, immigrant labor economically benefited both countries. During the 1950s, the Bracero Program was the third largest “industry” in Mexico as braceros remitted about 30 million dollars each year (Akers-Chacon and Davis 145). Since braceros were not permitted to bring wives and children, US growers did not need to provide schooling, year-round housing or healthcare, which was usually provided to white, native-born American workers in order to produce and maintain a stable year-round workforce (Akers-Chacon and Davis 141). In addition, US social services were not strained because once the harvest season ended there were structures in place to ensure braceros would return home. Besides the motivation to reunite with wives and families, braceros had 10 percent of their wages held until the end of their contracts, which could then be retrieved in Mexico (Akers-Chacon and Davis 143). If these two “motivations” were not enough, the state directed the Border Patrol, which was under the auspices of the Department of Labor, to ensure braceros returned home.

While the demand for braceros seemed insatiable, the supply also never seemed to cease. Part of the reason why Mexico seemingly had an unlimited supply of laborers for export had to do with a certain set of circumstances that were co-constructed by the US and Mexico. When the US engaged in WWII, its goods that were normally exported to Mexico were instead directed toward the war effort. This redirection by the US created a space for Mexican goods to be

sold in the US market, so the Mexican government invested in what came to be known as the “Green Revolution,” a large-scale agricultural operation, aimed solely at export, mainly to the US in hopes of high capital return. The Green Revolution resulted in the “Mexican Miracle,” an expansion of Mexico’s economy by 6 percent per year for almost 20 years (Akers-Chacon and Davis 109, Lorey 86), but the “revolution” and “miracle” came with consequences for the Mexican working class. Small farmers were unable to compete with the large-scale state-sponsored farms. Many were bankrupted and flooded urban centers for work. While some found employment early on, many found the cities already saturated. The only place that had viable work options for these former farmers was the United States via the Bracero Program.

### **Sustaining the Production of the Desperate**

This set of circumstances—the war, the US’s desire for cheap goods, Mexico’s shift from domestic needs to foreign trade—produced desperate people, willing to work any job, anywhere, for any amount of money, and it was the desperate, the manufactured poor, who became braceros. Both countries quickly recognized that in order for the Bracero Program to be sustained, a program that both countries greatly benefitted from financially, the production of the desperate would also have to be sustained. As time went on and the set of circumstances changed, the US and Mexico did everything they could—designing and implementing trade and immigration policies—to still sustain the conditions for the production of the desperate. Maintaining desperate conditions was the only way to be certain desperate people were produced and willing to travel hundreds

of miles, leave their families for months at a time, and perform backbreaking labor.

For example, in 1951, the US Congress enacted “Public Law 78,” which essentially gave the US government full control over the Bracero Program (Lorey 90). Leading up to the passage of this law, Mexico was accepting foreign loans in order to maintain its “miracle” economy. The country’s foreign debt increased to 500 percent, to over a half billion dollars, and the majority of it was owed to the US (Akers-Chacon and Davis 110). At the mercy of the US and bracero remittances, Mexico relinquished control over the Bracero Program. Without any Mexican oversight, US growers were not pressured to uphold contract payments to their braceros, and the state in collusion with the growers did not feel obliged to enforce them: “[I]n 1959, 182,000 braceros were brought into California and Arizona alone, but only 22 field agents were made available to address [contract] grievances” (Akers-Chacon and Davis 141-2). This lack of enforcement compelled many growers to not uphold bracero contracts, which resulted in a steady decline in agricultural wages on a large scale. When white, native-born Americans returned from the Korean War, many did not return to the fields because the wages were so low. Instead, they turned to urban and industrial centers for higher paying jobs. This absence of full-time labor from white, native-born Americans only created more space for labor from Mexico.

In other words, while the circumstances changed, both countries maintained the conditions for the production of the desperate. The Mexican government continued to focus its attention and investments toward the US in

order to pay down loans debts, and the US with Public Law 78 effectively opened up more room for braceros. More working class Mexicans became the desperate poor and applied to be braceros in droves. By the end of the 1950s bracero labor soared, making up the majority of the agricultural workforce in the US; however, “[f]or every bracero selected, another five to seven were not” (Akers-Chacon and Davis 145). Those who did not meet the requirements still needed to work, still had families to feed, still could not find employment in the saturated city-centers. They were still desperate, so they still migrated—only, without the approval of the Bracero Program. They migrated “illegally.”

### **The Production of the “Illegal” Immigrant**

The border transformed these desperate people rejected by the Bracero Program into “illegal” subjects. Ironically this land where the border is situated was Mexican land for quarter of a century. California, Nevada, and Utah and parts of Colorado, Arizona, New Mexico, and Wyoming were considered part of Mexico until 1848 with the signing of the Treaty of Guadalupe-Hidalgo, marking the end of the Mexican-American War (Lorey 29). A few years later, in 1853, the southern portion of Arizona (where Tucson is located) and part of New Mexico was acquired by the United States with the Gadsden Purchase. The border is still a contested space, where subjectivities are transformed. But during the 1950s, it was US employers who took these transformed subjects and used their new “illegal” status as a tool for economic gain.

Even though “illegal” laborers were not official braceros, US growers hired them anyway; in fact, “illegals” were preferred by growers. Growers could

pay them less. Without an official contract, growers could set wages as low as the laborers were willing to work and were not legally obliged to keep them employed for any duration of time. “Illegal” laborers were also extremely vulnerable. A grower could have them deported at anytime. Braceros were contracted through the end of the growing season, but “illegals” could be fired, i.e. deported, at any time. The mere threat of deportation had enough persuasive force to make “illegal” laborers work longer or accept lower wages. US growers took advantage of this immigration status and used it for their capital gain, whereby constructing a new class of laborers, one that was cheaper and easier to control.

US growers were not the only ones to exploit the vulnerability of “illegal” laborers. Both the US and Mexico approved of this system because it meant higher profits for their countries. Mexico was relieved of providing any social services to “illegal” laborers (they would have, had the Mexican citizens “chose” to stay in Mexico) and thus, received more remittances by having more Mexicans working in the US, which helped pay down the country’s foreign debt. The US did not have to pay to transport or house “illegal” laborers, as they did for the braceros. “Illegal” laborers crossed and paid for their own transportation to farms across the southwest, using the same routes and networks established by the Bracero Program. The “illegal” arrangement seemed to benefit everyone.

However, unlike braceros, “illegal” laborers had no “motivation” to return to Mexico. They brought their wives and families; ten percent of their earnings were not held until the end of the growing season; they were not legally

contracted to return. So they stayed, which redefined them from ones who temporarily stayed without official documentation, “illegal migrants,” to ones who permanently stay without official documentation, “illegal immigrants.” After growing seasons, many “illegal” immigrants found work with the railroads, in factories, restaurants, hotels, and hospitals (Akers-Chacon and Davis 146). No industries seemed to mind if a laborer from Mexico did not have papers, if an immigrant was “illegal.” They were hired for the same reason: they were cheap labor and could be easily controlled and easily fired and deported. While the Bracero Program officially ended in 1964, it provided a pathway for poor desperate Mexican laborers to become “illegal immigrants” and work year-round in the US at the insistence of US employers.

### **Post-Bracero**

After the Bracero Program, the US and the elites of Mexico still sought to replicate the conditions which produced the desperate poor, just like they had throughout the program, because doing so still produced cheap, exploitable labor, economically benefitting both countries. Only this time, without a fast and legal option in place, all of the desperate who were produced were transformed into “illegal” immigrants.

For example, in 1965, the Mexican government established the Border Industrialization Program (BIP) in hopes of absorbing the displaced workers from the Bracero Program and stimulating the depressed economy in the manufacturing sector along the border (Lorey 104). The BIP permitted the construction of *maquiladoras*, assembly plants run by US companies but employed by Mexicans.

US companies were incentivized by the Mexican government to use *maquiladoras*. They could import the raw materials, supplies, even machinery to Mexico duty-free, assemble new finished products, and export them back to sell in the US market for a minimum fee, merely the added value of the assembly (Lorey 106). US companies could pay Mexican laborers roughly 75 percent less than what a US worker performing the same job was paid in the US (Akers-Chacon and Davis 116), yet was still 25 percent higher than many other manufacturing jobs throughout the rest of Mexico (Lorey 109). US companies using *maquiladoras* could also prohibit Mexican laborers from unionizing. Many US companies took advantages of these incentives, and the number of *maquiladoras* grew rapidly, from twelve in 1965 to 2,200 in 1996, and the number of employees jumped from 3,000 to 700,000 during the same period (Lorey 107).

These incentives, however, were responsible for and led to the conditions which produced the desperate poor. Without the pressure from unions, US employers allowed wages to remain low or drop. From 1977 to 1982, wages dropped 20 percent, and from 1980 to 1990 wages fell another 66 percent (Akers-Chacon and Davis 117). The wage of a *maquiladora* employee in the 90s ranged between three to four dollars a day (Lorey 109, Akers-Chacon and Davis 117). There were no wage increases, no possibility for promotions, and no guarantee of job security. Many Mexican families could no longer live on these wages, and many heads of households, usually men, were compelled to find higher paying jobs. Women then became the majority workers at *maquiladoras* (Lorey 109), and



men usually migrated north (Akers-Chacon and Davis 119). Just as in the decades before, poor, desperate Mexicans were compelled to cross the border, and because the pathway to employment in the US was already worn and established by the Bracero Program, “illegal” immigrants usually found employment quite quickly, at jobs which paid much higher than the *maquiladoras*.

In the early 90s the circumstances changed again, although the conditions for the production of the desperate remained the same. In 1994, the North American Free Trade Agreement (NAFTA) was reached by the US, Mexico, and Canada. In doing so, the US fruits and vegetables market opened its doors to Mexico, while Mexico permitted US grain imports into its grain market. Mexico again, as during WWII, became export-focused, tying its economy to the US. In ten years, the new arrangement of trade bankrupted 1.3 million small farmers in Mexico (Akers-Chacon and Davis 121). The price of US grain was simply too cheap for small Mexican farmers to compete in this market. Unemployed and desperate, like the bankrupted farmers of the 1950s as a result of the “Green Revolution,” former farmers turned their attention north, migrating “illegally” en masse.

### **“Deportability”**

What began as a labor shortage during WWII has become a profitable industry for the US and Mexico. By maintaining the conditions that produce the desperate, even as circumstances between the two countries have changed over time, poor Mexican laborers continue to migrate north, using the pathways and networks established by the Bracero Program, and once they cross the

international border, they are transformed into the “illegal.” The “illegal” marker under the category of immigration is used merely to separate immigrants with authorization from the state from those without authorization. Undocumented or “illegal” immigrants are not criminals (Unruh) but they are deportable, a unique characteristic embedded within the “illegal” immigration status, one that the state and US employers covet and have appropriated into the category of labor.

“Deportability” under the category of labor means having the ability to terminate laborers and deport them at anytime for any reason. This ability effectively allows employers full control over their workforce (De Genova). Employers can put all laborers at all times under surveillance, with the justification that they are searching for “illegal” immigrants among them. With the mere threat of deportation, employers can effectively pay “illegal” immigrants less and offer no benefits. The drop in wage effectively lowers the wage for all laborers, as employers have no obligation or incentive for paying other laborers a higher wage for the same work. If laborers choose to organize or strike, employers simply hire more “illegal” immigrants as scabs.

The state also highly desires the “deportability” feature of the “illegal” marker. It allows for a “flexible” workforce, one that can be attracted and retracted easily. During times of economic booms and busts, the state can use “illegal” labor to help stabilize the market, loosening and tightening border enforcement, dismissing or conducting deportation raids on businesses, according to the needs of the labor industry and US economy. The state has gone to great lengths to maintain its high labor profits since the Great Depression. That is why

it has sought to maintain and manage the conditions for the production of the desperate in Mexico: to ensure a steady supply of subjects to be transformed into “illegal” immigrants.

Maintaining the conditions for the production of the desperate is a two-fold process. First, the state must attract labor; it must create a situation so restrictive and so desperate that the only seemingly reasonable option is to migrate north to the US. The BIP permitted the construction of *maquiladoras* with many economic incentives. Many US corporations took advantage of the *maquiladoras*, especially the restriction of unions. With the extreme drop in wages, more and more desperate laborers were produced and compelled to migrate north in hopes of higher wages to remit. With the passing of NAFTA, small grain farmers were put out of work, and like their fellow farmers during the “Green Revolution,” could not find jobs in Mexico that could support their families. Consequently, the bankrupted and desperate farmers migrated north in hopes of a better life.

Second, the state must limit labor. It cannot accommodate a seemingly endless supply of labor without risking saturation, so it appropriates the “illegal” marker from the category of immigration to the category of labor. The state uses the “illegal” marker in the category of labor for its flexible feature, to deport when the need has been fulfilled and to enforce the border when the market determines. Enforcement falls on the Border Patrol, which originally operated under the Department of Labor, but now does so under the Department of Homeland Security. The restriction of “illegal” immigrants by the Border Patrol during times

of economic depression serves the state economically; fewer laborers mean fewer labor costs which translates into higher profits.

Limiting labor through enforcement and deportation as well as producing the conditions for the production of the desperate would not be possible without the “illegal” marker. And without the rhetorical power of the “illegal” marker, the US would be unable to maintain its economic power as it currently desires. The state’s use and maintenance of the “illegal” marker under the category of labor come at great expense for undocumented immigrants, especially in recent years, when the state’s priority of capital has resulted in the violent deaths of thousands of “illegal” immigrants.

### **The Violent Consequences of the “Illegal” Marker**

In 1993 anti-immigration sentiments were high, especially in California where Proposition 187 passed with an overwhelming majority. The measure would have excluded undocumented immigrants from attending public schools and using public services but was deemed unconstitutional by a federal court (Cornelius 778). President Clinton, critically needing California for his re-election bid in 1996, decided to take advantage of the zeitgeist and take on “illegal” immigration. The result was an immigration policy that nearly tripled the budget for border enforcement by the end of Clinton’s tenure as president, from 750 million in 1993 to 2 billion dollars in 2000 (Cornelius 778). (The spending continued to climb to 3.8 billions dollars in 2004 with the Bush administration.)

The majority of the resources was directed at four of the nine border sectors where it was believed that the majority of the “illegal” crossing took place.

Operation Hold-the-Line was launched in El Paso in 1993, Operation Gatekeeper in San Diego in 1994, Operation Rio Grande in south Texas in 1997, and Operation Safeguard in Tucson in 1998. The “concentrated border enforcement strategy” was deemed by the US Border Patrol to be an overwhelming success. In California and Texas, the Border Patrol followed a “line-watch duty.” Agents sat in their vehicles, 100 yards apart, one or two miles from the border, and waited for undocumented immigrants to cross (Cornelius 780). Thousands were apprehended. As a result, fewer and fewer undocumented immigrants crossed in California and Texas, and by 2004, apprehensions fell by a combined 64 percent in those sectors (Cornelius 783); however, during that same time, the apprehensions in Tucson jumped to 43 percent of the total apprehensions across the border. In other words, while the “concentrated strategy” seemingly fortified San Diego, El Paso, and Rio Grande, it effectively “funneled” a greater number of undocumented immigrants into the Tucson sector, which also happens to be the most treacherous terrain on the border. This “funnel effect” was anticipated and intended as part of the overall border enforcement strategy. The Clinton administration calculated that the extreme natural hazards of the Arizona desert would discourage and deter potential crossers from attempting the perilous journey. Doris Meissner, Clinton’s Immigration and Naturalization Service Commissioner, said during an interview in 2000 that, “We did believe that geography would be an ally to us. It was our sense that the number of people crossing the border through Arizona would go down to a trickle once people realized what it was like” (Borden A1).

But the number did not go down. The people were not deterred. They were desperate. And so they attempted to cross the Arizona desert through the searing heat in record numbers. And thousands died. From 1994-2009, it is estimated that between 3,861 to 5,607 “illegal” immigrants have died (Jimenez 8). Despite these deaths, the immigration policy continues today, indicating that the state prioritizes capital over life, submits immigration policy to economic policy, and uses the rhetoric of the “illegal” to do so.

### **The Rhetoric of the “Illegal”**

It would seem as though the deaths of thousands of people on US soil would cause alarm throughout the country. But it does not. The deaths of hundreds of undocumented immigrants usually go unnoticed each year because they typically are unreported, and even when they are reported and circulated in public discourse, there still is not a public outcry. This lack of response may have to do with what Agamben calls “a state of exception” (Agamben *State*).

A state of exception is “a state of necessity” (Agamben *State* 1), a time in which there is no juridical form, when legislative power is absorbed into executive power (Agamben *State* 18), when the sovereign suspends law in order to use the “force of law” without consequence (Agamben *State* 40). The US Civil War is a classic example of a state of exception. The state could no longer handle extreme internal conflict, and so it suspended law—*habeas corpus*—called an emergency state, extended military power into the civil sphere, and created war. The US/Mexico border is a modern example of a state of exception, a place where anything goes, where the border is being remade back into the frontier (Alonso).

Law is suspended, while the “force of law” or the performance of law is enacted (Agamben *State* 39); for instance, the Border Patrol as the de facto sovereign conducts extreme measures of surveillance and enforcement, often using military equipment, such as helicopters and drones, and detaining subjects for unspecified amounts of time without access to legal representation.

A subject in a state of exception is what Agamben calls “homo sacer” (Agamben *Homo Sacer*), “a legally unnamable and unclassified being” (Agamben *State* 3), which can be killed but not sacrificed, meaning that a subject in the state of exception is no longer within the system of law and order because there is no law and order; law is suspended, and without the protection of the law, a subject is reduced to “bare life,” a being that the sovereign can kill without punishment because there is no law. Or another way to put it: in the state of exception, subjects are no longer valued as humans. Humans when killed by the state, such as Pat Tillman and other American soldiers in 2004, are considered “sacrificed” because their life has worth. But “homo sacer,” such as Iraqi civilians and “terrorists” in Guantanamo Bay, are stripped of political life and reduced to “bare life,” where they can be killed or disregarded without consequence. On the border, undocumented immigrants have been stripped of political life and reduced to “bare life.” They are homo sacri, left to die in the desert by the sovereign. There would not be a state of exception on the border with undocumented immigrants as homo sacri if the “illegal” marker were not constructed and circulated by the state.

It is imperative that the state continues to maintain this state of exception—continue to fund border initiatives, expand the size and autonomy of the Border Patrol, implement new technologies for surveillance, report simultaneously on the “successes” of apprehensions and the continuous threats of violence, drug cartels, kidnappings and smuggling—because it allows the state to have ultimate control over this group of subjects. The state craves this control because “illegal” immigrants make up a huge portion of the US labor force. Having the ability to manage this population, specifically, having the ability to deport this group, allows the state to manage its economy. The apprehension and deportation of “illegal” immigrants on the border or in the work place can be regulated, increased or decreased, at any time, depending on the needs of the economy. Consistently, the state has “cracked down” on “illegal” immigration during times of economic hardship. Immigrants are deported. Borders are enforced, ensuring that the white working class maintain their jobs while providing a scapegoat for the country to blame (Akers-Chacon and Davis, DeGenova, Lorey).

The state’s use of the rhetorical marker “illegal” to identify undocumented immigrants works discursively to strip border crossers of political life and maintain its state of exception on the border. Simultaneously, it also works discursively to justify the state’s actions on the border. In other words, if the Border Patrol perceives, as informed by the state, that undocumented immigrants are “criminals,” and if the state, through the repetition of the rhetorical marker “illegal” in public discourse, can persuade the public via local and national news



stories to also perceive that undocumented immigrants are “criminals,” then the actions of the state—abandoning border crossers to the geography of the Arizona desert—can also be more readily accepted and justified. In short, the rhetorical marker “illegal” kills and continues to kill undocumented immigrants everyday in plain sight without notice.

### **Subverting the State**

The state has been replicating the conditions for the production of “illegal” immigrants for the last 75 years. Immigration and labor policies are in place to ensure the maintenance of this production continues. But in the last fifteen years, the use of these policies, and its shorthand, the rhetorical marker “illegal,” is responsible for the deaths of thousands of manufactured undocumented immigrants. There seems to be little that can be done to subvert a state so entrenched and resolute in maintaining this system of profits and deaths; however, a small group of ordinary people in Tucson has identified a way to undermine the state, expose this nefarious system, by saving the lives of undocumented immigrants in the desert. Their rhetorical act of providing food, water, and medical attention—direct humanitarian aid—to undocumented immigrants suffering in the desert disrupts the discourse of the state; it shows through rhetorical action that the state’s use of the rhetorical marker “illegal” abandons border crossers to die in the desert. Chapter 2 examines the humanitarian and rhetorical actions of this group, aptly named “No More Deaths,” and the state’s discursive response to their actions.

## CHAPTER 2

### DISRUPTING THE DISCOURSE: RHETORICAL AGENCY, COUNTERPUBLICS, AND SUBVERTING THE STATE

On July 9, 2005, Shanti Sellz and Daniel Strauss, volunteers for the humanitarian group No More Deaths (NMD), found nine undocumented immigrants in the southern Arizona desert. For the preceding forty days, temperatures had exceeded 100 degrees, and during that particular week in July, a record 78 lifeless bodies were found in the desert (Goodman). The immigrants that Sellz and Strauss encountered had been traveling in the deadly heat for four days, the last two of which were without food or water. Three of the nine immigrants were extremely ill. One of them found blood in his stool and had been vomiting for days, a sign of severe dehydration, which is perilous in the desert (Goodman), and the other two had acute blisters, preventing them from walking any further, another common cause of death in the desert<sup>3</sup>.

Sellz and Strauss decided to call a medical professional. The phone call was a part of an “emergency evacuation protocol” that NMD established with the US Border Patrol. The agreement was that if volunteers encountered and suspected immigrants who needed immediate emergency care, they were to call a medical professional. If the medical professional determined that the immigrants were extremely ill and in need of immediate emergency care, then the volunteers

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<sup>3</sup> Border crossers usually travel in groups, and those who are unable to keep up with their group members are usually left behind by their *coyote* (paid guide) and have difficulties surviving on their own. Many of the undocumented immigrants that NMD volunteers find in the desert have been left behind and are usually in extremely poor health.

were to transported the sick immigrants to a Tucson medical facility. After confirming with two doctors and a nurse that the three immigrants were in severe medical distress, Sellz and Strauss helped the undocumented immigrants into their vehicle and began driving north to Tucson.

Shortly thereafter, the two humanitarians were pulled over by the Border Patrol. The “illegal” immigrants were seized and detained, while Sellz and Strauss were arrested. The two were charged with two felonies apiece: one, aiding and abetting and furtherance of illegal presence in the United States and two, the conspiracy to do so. They each faced up to 15 years in prison and \$500,000 in fines (“Humanitarian Aid”). After the incident, Strauss recalled, “We really don't know exactly what changed from the day before, when we passed Border Patrol completely in the open, waved to them, waved back, to the day that we were arrested. Something changed politically, a change in policy, and they wanted to shut down our organization and the work that we did” (Strauss qtd in Goodman).

Metaphorically, the “day before” lasted about a year, and during that time, NMD volunteers provided humanitarian aid to undocumented immigrants suffering and dying in the desert; they took their experiences with the immigrants suffering and circulated them as narratives, to friends and family, to schools and churches, on NMD’s website, and with the local media. The stories spread, and the listeners often asked, “why?” Why were so many undocumented immigrants crossing the US/Mexico border? Why were so many of them dying in the desert? Why wasn’t the state doing anything about it? The search for these answers often lead to an exposure of the state’s history of inhumane immigration, economic, and

border enforcement policies and its rhetoric of the “illegal” that sought to cover them up<sup>4</sup>. The day that Sellz and Strauss were arrested something did change politically. The state attempted to stop NMD volunteers from circulating their counterhegemonic narratives in order to re-cover its rhetoric and power.

This chapter explores the interactions, the exposures and re-coverings, of NMD and the state. Specifically, it details the formation and operation of NMD as a counterpublic engaging rhetorical agency and examines the counterarguments and strategies of the state to suppress the discursive disruptions of NMD.

Rhetorical agency is the power to persuade, and in recent years, rhetoric scholars have been challenged to articulate theories of rhetorical agency that take into account the postmodern critique (Geisler “How Ought”). Agents in postmodern theories are not free from context as they are in modernist-humanist theory, but they still have agency, the ability to make change and have rhetorical effect, despite these contextual restrictions. They negotiate agency with the rhetorical situation. This chapter showcases the operations of NMD as a concrete example of postmodern rhetorical agency where agents attract and reflect the effects of state power.

### **The Roots and Formation of NMD**

In order to understand how NMD exposed and subverted the effects of state power, it is important to know from where and what context NMD grew. In the 1970s and 80s, El Salvador and Guatemala were both in the midst of bloody civil wars. It is estimated that 70,000 people were killed and 30,000 were

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<sup>4</sup> See Chapter 1 for details.

disappeared in El Salvador from 1980 to 1992 (Gibb), and 100,000 were killed and 40,000 were disappeared in Guatemala from 1960 to 1996 (“Guatemala’s Future”). Countless Salvadorans and Guatemalans fled their home country at this time, fearing for their lives. Many crossed the international border into the United States without any immigration documentation; they sought political asylum yet were not granted political refugee status.

The United States secretly backed the governments of El Salvador and Guatemala (Gibb, “Guatemala’s Future”). It wanted to keep the governments in power, so that their trade policies that favored the US were maintained. If the US had recognized Central Americans as political refugees, it would have indicated that the governments of El Salvador and Guatemala were committing human rights abuses—crimes that the US was funding. Since the US Congress cannot publicly support states who violate international human rights laws, it decided not to grant Central Americans refugee status in the US. In other words, rather than end their funding and arming of the military-led governments of El Salvador and Guatemala, US lawmakers decided to keep supporting them in hopes of maintaining their favorable trade policies. As a result, the state rhetorically marked the fleeing Central Americans into the US as “illegal aliens” instead of “political refugees,” and if the “illegal aliens” were caught crossing the US/Mexico border by the US Border Patrol, they were immediately deported back to their home countries, where they almost certainly faced death for fleeing their home country (Fife).

Jim Corbett, a Quaker, and John Fife, a Presbyterian minister, felt compelled in 1981 to do something. Corbett began secretly hiding the fleeing Central Americans in his southern Arizona home and in the homes of fellow Quakers around the Tucson area, while Fife secretly hid Central Americans in his Tucson church, Southside Presbyterian. The two continued hiding and helping the unofficial political refugees, providing food, water, shelter, clothes, money, employment, and legal counsel, for about six months, in total, helping about 60-70 people, 10-12 a month, until the Border Patrol found out and ordered them to stop or be indicted (Fife).

Instead of stopping, Corbett and Fife went public. On March 24, 1982, the second anniversary of the assassination of Archbishop Oscar Romero, shot while conducting mass by the US-backed military of El Salvador, Fife called a press conference at Southside Presbyterian and declared the church a “sanctuary.” The day before, Fife sent letters to the US Attorney General, US Border Patrol Chief, and Director of Immigration, announcing that the church would “publicly violate the Immigration and Nationality Act, Section 274(A)” (Corbett qtd in Coutin 289). Other churches and synagogues quickly followed, declaring themselves sanctuaries and offering “safe haven” and material aid to Central Americans. The religious leaders of these congregations talked to one another and soon organized networks to transport refugees from one house of worship to another. This system of transportation which guided refugees to safety has often been compared to the underground railroad of the 19th century (Gzesh).

Corbett, Fife and 14 other religious leaders of the “sanctuary movement” were eventually indicted on smuggling charges in 1986. The trial generated national attention and publicized the movement. All the defendants were convicted but received no jail time (Gzesh). By the end of the 1980s, 213 churches and synagogues and 17 cities across the US declared themselves sanctuaries (Fife.)

Early on, those who were involved in the sanctuary movement believed that their actions were consistent with the principle of civil disobedience, where one publicly violates an unjust law and receives the consequences for breaking it, in hopes of changing that unjust law, but later on they learned that they were following a different principle, one that legally justified their actions. According to Fife, once the sanctuary movement received national attention, he received an angry phone call from Ira Golabin, a human rights lawyer from New York. Golabin told Fife to stop using the term “civil disobedience” with the media because it was an inaccurate description of the sanctuary movement’s actions. The movement was not violating an unjust law; in fact, according to Golabin, the US had just refugee laws, which conformed to international human rights laws. Saying that the sanctuary movement followed the principle of civil disobedience implied that the US not only had unjust refugee laws but that they needed changing. That was problematic for Golabin and human rights lawyers who needed those laws to uphold human rights. Instead, Golabin pointed out to Fife, it was the US that was in violation of its own refugee laws, namely the 1980 Refugee Act, which claimed that the US would not deport refugees back to places of

persecution, and it was the sanctuary movement that was bringing that violation to the nation's attention (Fife). In other words, the US should have granted political refugee status to the fleeing Central Americans because the embattled governments of Guatemala and El Salvador were committing countless human rights abuses on its people; instead, the US broke international human rights laws and sent countless Guatemalans and Salvadorians back to their home countries in the midst of civil wars.

While Fife and Corbett were acting in good conscience, they were not aware until Golabin's phone call that they were following a new civil principle. Corbett decided to call it "civil initiative," and located its legal precedent in the outcome of the Nuremberg trials. The Nazis officers who were on trial in 1946 argued that during WWII they were merely "following orders." Civil initiative maintained that citizens were no longer excused from following the orders and actions of the state; instead, citizens in a post-WWII world have the moral responsibility to follow international human rights laws when the state directly violates human rights. According to Corbett, this legal precedent justified the sanctuary movement's actions and networks of safe haven throughout the country. In 1990, with the pressure of the sanctuary movement, the US Congress passed legislation which allowed President Bush to grant "temporary protection status" to fleeing Central Americans (Gzesh).

By 1993, however, the state drastically changed directions, implementing a militarized border enforcement strategy. As described in fuller detail in Chapter 1, President Clinton, seeking to be "tough on immigration," a position designed to



boost his chances for reelection in 1996, enacted Operation Hold-the-Line, Operation Gatekeeper, and Operation Rio Grande. These aggressive border enforcement strategies seemingly fortified the porous border sectors in California and Texas, but they also effectively “funneled” border crossers into the Tucson sector, which has the harshest terrain and temperature of the sectors on the US/Mexico border. The “funnel effect,” nonetheless, was intentional and part of the enforcement strategy, designed to deter border crossers from crossing. However, instead of deterring, it caused the deaths of thousands of undocumented immigrants coming from Central America and Mexico.

From 1990 to 1998, approximately 40-45 bodies were found each year in the Tucson sector (“Border-Crossing” 57), but after Operation Safeguard was implemented in 1998, which effectively pushed border crossers further into the most remote and extreme areas of the desert, in combination with the “funnel effect,” the number jumped to 55 in 1999, then to 120 in 2000, and then to 190 in 2002 (“Border-Crossing” 57). The intentional use of geography for deterrence, directly resulting in a spike in deaths, placed the state again in direct violation of international human rights laws. Seeing no change in immigration or border enforcement policy with the new Bush administration, Corbett and Fife were compelled once again to follow civil initiative. Shortly before his death in 2001, Corbett argued, “When a government uses the crucifixion of entire peoples in the desert as a border enforcement strategy, we have no middle ground between collaboration and resistance. We can take our stand with the oppressed or we can

take our stand with organized oppression, but cannot, we can never, do both”  
(Corbett qtd in Fife).

In 2003, a record 205 human remains were found in the Tucson desert (Rodriguez), and by early the next year it was clear that unless something changed 2004 would be worse<sup>5</sup>. Fife met with the religious leaders in the Tucson area to discuss what could be done. There were already well-established and well-organized humanitarian groups working on the border, such as Humane Borders who maintained over 100 water tanks in the desert and provided maps to these water tanks to potential border crossers in Mexico or the Samaritans who drove through the desert offering water, food, and medical treatment to anyone they saw in need, but none of them offered humanitarian aid full-time in the desert. Catholic bishop Gerald Kicanas and Fife decided to form a new humanitarian group that would be a “constant presence” in the desert. Volunteers would camp in the desert during the hottest months of the year, rotating in new people every week; they would hike the desert trails into the most remote areas, precisely where the border crossers were funneling and dying; and they would bring with them water, food, and medical packs, offering the life-saving aid to anyone in need. Kicanas and Fife decided to call the new group “No Mas Muertes” or “No More Deaths” as both a declaration and a goal. In the summer of 2004, the group launched, carrying on the tradition of the sanctuary movement and following the principle of civil initiative.

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<sup>5</sup> It was. In 2004, 234 human remains were recovered, but the following year was the deadliest in Tucson history when 282 remains were found in the desert (Derechos Humanos).

The constant presence of NMD volunteers providing direct humanitarian aid, arguably saved lives, but it also worked as an argument which challenged the state's immigration and border enforcement policy as evidenced by Sellz's and Strauss' arrests—the state's response to the challenge. The humanitarian act begged the question: why is humanitarian aid needed? The answer exposed the state's deadly enforcement strategy. In this regard, Sellz and Strauss did not simply provide humanitarian aid but rhetorically disrupted the discourse of the state. NMD volunteers would not have been able to subvert the state without having engaged and negotiated their rhetorical agency.

### **Postmodern Rhetorical Agency**

A great debate within the field of rhetorical studies in recent years turns on the concept of rhetorical agency, and the operations of NMD contributes to the debate. At the Alliance of Rhetoric Societies (ARS) conference in 2003, rhetoricians gathered to discuss “How ought we to understand the concept of rhetorical agency?” (Geisler, “How Ought” 9). In 2004, *Rhetoric Society Quarterly* published Cheryl Geisler's synthesis of the position papers at the ARS conference. Geisler begins her report by noting how the majority of rhetoricians acknowledge in their position papers that the postmodern critique “severely assaults” former notions of the humanist autonomous agent. Susan Wells asserts that “very little is left of the concept” after this critique, and Carl Herndl claims that “theorists typically struggle with the dilemma of how to understand the postmodern subject's ability to take purposeful political action without merely recuperating the humanist individual” (qtd in Geisler, “How Ought” 10). Geisler

then posits that agency is usually studied in political contexts where humanist agency is often justified. Nan Johnson argues, consequently, that rhetoricians need to move their studies to new locations to gain a different understanding of agency. John Campbell concurs, furthering that our problem is not in understanding agency but rather the varieties of agency. Geisler offers those varieties of agency by pointing out the theorists who discuss agency in new or different locations. Dan Brouwer, Jerry Blitefield, Renu Dube, and Kirt Wilson examine subaltern groups, John Louis Lucaites, Susan Wells, and Barbara Biesecker explore the media, and Geisler, herself, studies digital technology.

Next, Geisler synthesizes papers which question the reality of agency, those that hold onto humanist models, and those that identify the constraints and conditions of agency within postmodernism. Joshua Gunn and Celeste Condit argue that agency is an illusion. Gunn suggests that instead of kidding ourselves that rhetoric has efficacy in postmodernism, we should accept our own irrelevance as a field. Condit claims that while agency may be an illusion, it may be a “necessary illusion” (qtd in Geisler, “How Ought” 12) for rhetorical functionality. Geisler argues that “[p]erhaps more productive was the insight that agency can be understood as a resource constructed in particular contexts and in particular ways” (Geisler, “How Ought” 12). James McDaniel, for instance, argues that “agency seems a fundamental fantasy to the democratic ethos,” which he acknowledges is a site for studying how agency operates in society.

Then, Geisler recognizes the papers that discuss the skills of the agent, those that give more agency to the agent, and the papers that discuss the

conditions of the scene, those that give more agency to the situation. John Campbell claims that a skilled agent identifies the desires of the audience and shapes his/her message accordingly to maximize the possibility of persuasion, while James Jasinski argues that agents have agency when they demonstrate their skill of assessing and managing a situation. Lenore Langsdorf, gesturing toward “practice,” theorizes ways for the agent to retain skill while recognizing that agency is embedded in discourse. Janet Atwill, using Bourdieu’s habitus, looks to practice as well, as a way to show agency within the agent and the scene. At last, Geisler turns to the conditions in which the agent must act. Michael Leff asserts that constraints are “historically situated,” thus agency has limits (Geisler, “How Ought” 14). Both Nan Johnson and Kirt Wilson agree, claiming that agency is constricted by discursive conventions and generic forms. Julia Carpenter and Carl Herndl posit that agency resides in the arrangement and constellation of social contexts, whereas John Logie identifies agency as “the complex process by which a communicative act materializes out of a combination of individual will and social circumstances” (qtd in Geisler, “How Ought” 14). Geisler nearly synthesizes all of the forty position papers. Her work alone indicates just how diverse and complex the positions and conceptualizations of rhetorical agency are in the field of rhetorical studies at this time.

*Philosophy and Rhetoric* published, in the same year as Geisler’s report, a special issue on rhetorical agency. Gerard Hauser, in the introduction to the edition, compares the current debate over rhetorical agency with the historical strife between philosophers and sophists over “what constituted responsible

speech and who had responsibility for the consequences of moving the demos to public actions” (Hauser 181). The philosophers saw the sophists’ move to explore language as an abandonment of the quest for Truth and the abandonment of responsibility at large. In terms of agency, according to Hauser, the ancient philosophers argued that agency resides in the self-aware person, while sophists claimed it permeates in discourse. Hauser argues that the ancient debate continues today in the form of modern versus postmodern rhetorical agency: “The originating debates between the Sophists and philosophers of ancient Greece remain unsettled and continue as a central problem in philosophy of rhetoric because they lie at the center of the dialectic between doctrines of reason, structure, and identity that mark the modern/postmodern divide” (Hauser 183).

Theorists in this special issue take an even wider range of perspectives on agency than those at the ARS conference, locating agency as communicative labor, the property of questioning, within texts, and within the performative. Ronald Walter Greene argues that rhetorical agency is usually associated with political action, as Geisler and Johnson mention, which leaves the field of rhetoric with three options: to critique the super-structures in hegemony, to enlarge rhetoric to the spheres of the visual and the corporeal, or to design new ways to activate subjects. All of these strategies, Greene claims, are problematic because each turns rhetoricians into moral critics. Instead, Greene argues, we should replace this political model that conceptualizes agency as the intermediary between structure and change for a materialist model that places rhetorical agency into notions of labor and production. Nick Turnbull perceives logic as having no

agency, being fixed and structured, while observing rhetoric as having agency, being fluid and open (Turnbull 209). Thus, he looks to reject the Aristotelian separation of logic and rhetoric through the principle of questioning. “Rhetoric is an intrinsic property of reason in the form of questioning rather than a residual factor that accounts for the problematicity that is externalized by the logic of propositional necessity. Reason becomes flexible, and rhetorically rich, without being relativist” (Turnbull 219). Every question provides an alternative, Turnbull argues, decentering the one who questions, releasing an agency to debate possible answers (Turnbull 221). Andrew Hansen’s thorough textual analysis of President Lincoln’s second inaugural address reveals a lasting agency. Hansen argues that due to its rhetorical construction, its language, its style, its form, and the ideologies within them, the speech shapes and pulls at audiences’ values and interests (Hansen 252). Finally, Dana Anderson negotiates Burke’s pentad with Bourdieu’s habitus. She first clarifies Burke’s seemingly firm position that conscious action is dramatism, while unconscious motion is behaviorism, but then, she argues that for Burke, it is really “purpose” not “consciousness” that motivates one to act. Thus, Anderson is able to carve out a space for Bourdieu’s “unconsciousness” practice to operate within Burke’s dramatism:

[W]hereas Burke’s *hermeneutic* of motive sees the consistency between scenes and acts or scenes and agents as a sort of natural principle of unity in interpretation, Bourdieu’s *anthropology* of action isolates the specific mechanism by which scenes, agents, and actions dialectically constitute or “contain” each other, the means by which such consistency between

agents, actions, and scenes is maintained. Bourdieu terms this mechanism the *habitus*, the seat of human practice and the concept that challenges the conscious or purposive character of action in Burkes' approach to motive. (Anderson 263, original emphasis)

In short, Anderson argues that agency is shared between agents and structures—the structures that agents activate through their bodily practices within these structures (Anderson 271-2).

A year after *Philosophy and Rhetoric's* special edition, Christian Lundberg and Joshua Gunn published their critique of Geisler's ARS report in *RSQ*. Through the metaphor of a Ouija Board, the two scholars suggest a non-relationship between agents and agency, claiming that while agency exists, it is impossible to locate an agent from agency. Agency is unstable and unfixed, while agents are a function of language they argue; thus agents are not intrinsically linked to agency. Lundberg and Gunn contend that Geisler presented agency in her report as something an agent can possess. They claim quite the opposite, that agency possesses agents. Geisler responds to Lundberg and Gunn's critique a few pages later. While she does recognize that indeed her use of "post-modernism" was too broad (that she did not differentiate it with post-humanism), she does assert that she did not label Gunn's position, that agency is an illusion, as postmodern, and also did not single out Gunn for this position, as she also mentioned Condit (Geisler, "Teaching" 108). Finally, in 2008, Lisa Storm Villadsen examined rhetorical agency through official apologies for *RSQ*. Like Hansen, Villadsen thoroughly examines texts and the rhetorical situation of a



state's official apology to measure the amount of rhetorical agency a state has after circulating such an apology.

There has been a wide array of theories within this debate on rhetorical agency. Some rhetorical theorists argue to abandon the concept of agency altogether, call it an illusion (Gunn, Lundberg, Condit), a fantasy (McDaniel), while others (J. Campbell, Jasinski) posit agents have agency and control over situations. Then there are those who theorize that agency is shared between agents and structures (Anderson, Langsdorf, Atwill), that agents may act but their actions are embedded in discourse. While many of the arguments are abstract, definitional, and argumentative, limiting the overall potential for future invention, I find that the theories which articulate a shared sense of agency, where agents negotiate agency with the situation, the most accommodating to the postmodern critique. The rhetorical performance of NMD is a concrete example of this postmodern rhetorical agency, where agency is shared and negotiated, and an understanding of the humanitarian group's operation serves the field as a rhetorical site from which rhetoricians could invent and develop a better understanding of agency.

### **Rhetorical Agency and State Power**

What makes the operation of NMD unique is that it does not engage rhetorical agency as an individual or even as a group but rather as a space in discourse that counters the effects of state power. Rhetorical agency is deeply implicated with state power. According to Foucault, power is a productive network that runs through the whole social body. It's embodied through acts,

attitudes, and modes of everyday behavior. But power is not a matter of consent. It is exercised by some on others, inscribed in a field of sparse available possibilities, which is supported by permanent structures (Foucault).

This postmodern perspective of state power begs the question that is central to the debate over rhetorical agency: Can subjects, subjected by the state, constructed in ideology, positioned in a series of power relations, act in a rhetorically effective way? Bourdieu, through theorizing of the habitus, suggests that while subjects are not transcendently free, they are socialized in practice to act according to socially constructed organizing principles (Bourdieu 137). The social world inscribes itself in subjects and the subjects embody it, the habitus, and then react to these inscribed principles. In other words, rhetorical agents are never free from context but are also not controlled by it, and so thus, still have the ability to create, be rhetorically effective. NMD volunteers are rhetorically effective. Despite the restrictions from rhetorical situations, NMD volunteers are able to identify and engage the opportunities for change. These opportunities are normally found when NMD negotiates agency with the state.

The state determines what is sayable and what is not through the construction of censorship (Butler), much in the way ideology functions, but that construction must continuously be reproduced, renegotiated, and reconstructed. Language is constantly changing because it is imbued with *differance* (Derrida). Hegemonic definitions seek to freeze words, keep language in place, but words always wiggle out from under them. The contexts in which words are spoken/heard or written/read are constantly changing, and so the contexts are

constantly changing those words no matter how hegemonic discourses try to tie them down with definitions and divisions (Derrida). The state's obsession to make something true, create a correct definition, determine a permanent presence, make language stable through censorship, inevitably and always fails. This failure points to the destabilizing forces of *differance*. *Differance* alters the temporary constraints of discourse and hence the agency of rhetorical agents. In this regard, the constant citation and iteration of a word or phrase opens language and pathways for subjects to subvert the effects of state power.

For example, as described in Chapter 1, when the state uses its rhetoric of the "illegal" to mark undocumented immigrants as "illegal" immigrants, as it has for the past 75 years to control and exploit immigrant labor for extraordinary profit, it is vulnerable to subversive rhetoric. The contexts in which the term is used continuously change, destabilizing the definition of "illegal." In the 1950s, the term "illegal immigrant" meant an immigrant without documentation or authorization to live in the United States, but in the early 1960s, toward the end of the Bracero Program, the state reconstructed "illegal" to mean "deportable labor," so as to entice US growers to recruit and hire undocumented immigrants, use their labor, and then either deport them without pay or to threaten them with deportation so that the immigrants would work more for less pay. The rhetoric of the "illegal" exploited immigrants for maximum profit. Recently, the state has reconstructed "illegal" to mean "terrorist" or "violent drug smuggler" so that the economic exploitation could continue (and be justified) through its current contexts. The state must always reproduce, renegotiate, and reconstruct its

rhetoric for each altering context, but when it does, when it attempts to stabilize its unstable rhetoric that is imbued with *differance*, discursive opportunities arise for postmodern rhetorical agents to subvert the hegemony of the state.

NMD volunteers look for these opportunities as rhetorical agents of change. Despite the contextual restrictions that postmodern theory articulates, NMD volunteers are still able to identify and engage with these opportunities, acting creatively and purposefully at strategic turns. Specifically, NMD operates as/from a space in discourse and is able to subvert the state because it operates as a counterpublic engaging rhetorical agency in a field of state-sponsored publics.

### **NMD as Counterpublic**

A society is made up of a variety of publics. A “public” is a space in discourse that brings people together. It could physically bring people together, how a passion for an athletic team draws a crowd to cheer, but in most cases it discursively organizes people (Warner 67), meaning a public is an invented notion or idea, that once addressed, comes into existence and serves as a relation among strangers (Warner 74). A public is rhetorical. It requires participation for membership (Warner 77-8) and attention for it to be sustained (Warner 87). Without participation and attention, publics tend to disappear. The circulation of texts as a result keeps publics active and effective (Warner 90).

NMD is an example of a public. It holds a place in discourse for strangers—sympathetic to undocumented immigrants, social justice, and humanitarianism—to relate and organize. Membership could range from reading their website or participating on their listserv to attending weekly meetings or

volunteering in the desert. In addition, NMD is also an example of a “counterpublic,” one that is in tension with or directly counters a larger public (Warner 56). NMD is in direct tension with the state, and specifically, the state-sponsored public of the US Border Patrol.

The Border Patrol, an animation of state hegemony, embodies and enacts the rhetoric of the “illegal.” The rhetorical marker “illegal” is used by the state to demarcate undocumented immigrants from documented immigrants, but it is also used to establish and maintain a “state of exception” (Agamben) on the border, where “illegal” immigrants are not perceived as valued humans, but rather as disposable criminals, which may be abandoned to the extreme conditions of the Arizona desert to die. The Border Patrol’s physical enforcement of the border serves rhetorically to circulate the rhetoric of the “illegal,” discursively reinforcing that undocumented immigrants are indeed “criminals” that need to be apprehended.

The state-sponsored public of the Border Patrol is powerful and works rhetorically to reiterate the rhetoric of the “illegal” in the face of various destabilizing contexts over the years. However, while the state via the Border Patrol attempts its reiterations of its rhetoric that the contexts destabilize, a counterpublic, such as NMD, has the opportunity to subvert the state. Since its launch in 2004, NMD has engaged rhetorical agency and disrupted the discourse of the state in the following two ways:

First, NMD volunteers in the desert who provide direct humanitarian aid to undocumented immigrants are counterhegemonic texts; their physical actions

counter the Border Patrol's physical enforcement on the border. Instead of abandoning border crossers to die, like the state's rhetoric permits, NMD volunteers attempt to keep them alive. In other words, the humanitarian actions of NMD volunteers make visible the effects of state power, that "illegal" immigrants are suffering and dying and are in need of emergency medical care.

Second, NMD volunteers take those experiences of encountering and attending to undocumented immigrants suffering in the most remote and extreme locations in the Arizona desert, suffering because of state-sponsored immigration and border enforcement policies, and circulate them as narratives through NMD's website or newsletter, on speaking tours at college campuses or houses of worship, or in newspapers online or in print as letters-to-the-editor or feature stories (Haynes, Ortiz). These narratives work rhetorically, engage rhetorical agency, and have powerful rhetorical effects because of their relations to state power. The narratives' common theme, that "illegal" immigrants are not "criminals" but instead are "abused humans," abused by the effects of an inhumane border policy, is an alternative to state hegemony; it counters the state.

### **Humanitarians as Criminals**

The arrest of Sellz and Strauss in 2005 is evidence of NMD's powerful rhetorical effect on the state. It no longer could remain silent on NMD's discursive disruption and so countered back, redirecting the discourse away from the suffering immigrants and to the "criminal behavior" of Sellz and Strauss. The result was (momentarily) catastrophic for the state.

Seizing the opportunity to circulate their story and the story of immigrants in the desert, NMD engaged rhetorical agency and launched a local campaign called “Humanitarian Aid is Never a Crime.” Yard signs were created and purchased and placed all around Tucson by those who supported Sellz and Strauss and demanded that the charges brought against them be dropped. Proceeds from the yard signs went to the production of postcards that were sent by supporters of NMD to US state attorney of Arizona Paul Charlton’s office, demanding again that the charges against Sellz and Strauss be dropped. The campaign discursively organized people, served as a relation among strangers, and brought the alternative discourse of NMD to a wider range of publics. The campaign gained national attention when the Associated Press picked up the story (Rotstein) and Amnesty International publicly supported Sellz and Strauss (“Humanitarian Aid”).

On September 1, 2006, District Judge Raner C. Collins dropped all the charges brought against Sellz and Strauss by the state, “declaring that the U.S. Attorney does not have a credible enough case against the two young volunteers to go to trial” (Ufford-Chase). In a press conference on September 7, 2006, Sellz and Strauss’ lawyer explained that “we should be clear that this decision was based on Judge Collin’s assessment that Daniel and Shanti were acting on their belief that the Border Patrol had either explicitly—or implicitly—approved of the protocol developed by Samaritans and No More Deaths volunteers over the previous three summers, which called for medical transport in cases of extreme

medical danger” (Ufford-Chase). Even though the charges were dropped, the competing discourses on “illegal” immigration circulated on a national scale.

One of the reasons why NMD has been so successful engaging rhetorical agency and subverting the state is because it is not merely a group of humanitarians collecting and circulating counterhegemonic texts from the desert. It is precisely because NMD is a public and a counterpublic. As a public, NMD is a space in discourse that attracts attention and participation from those sympathetic to human rights. As a counterpublic, that specifically counters the state, NMD is in relation (albeit confrontational) to state power. This relation provides NMD the unique opportunity to attract and reflect the effects of state power.

NMD’s simultaneous act of saving lives and circulating texts is a meaningful one for the field of rhetorical studies because the group may provide a better understanding for how rhetors are to engage state power and negotiate their postmodern rhetorical agency.

### **The State’s Counterargument**

Since 2006, the state has taken a different approach to refute the counterhegemonic actions of NMD. Instead of arresting humanitarians for their life-saving work, which only brings attention to the state’s inhumane border enforcement policy, the state has been ticketing NMD volunteers for littering.

In addition to hiking the desert trails, NMD volunteers drive to specific remote locations where undocumented immigrants cross the border in high numbers. At these locations, volunteers “drop water,” leave multiple one-gallon



jugs of water and return on a later date to pick up the empty containers. Each jug is marked with a location number and the date in which the water was dropped. NMD uses a sophisticated tracking system of maps and GPS to monitor how much water is taken, how much more is needed, and where the immigrants are leaving the empty jugs. This information is recorded in log books and left in NMD vehicles so that any volunteer can pick up where the previous volunteer left off.

On February 22, 2008, Dan Millis, a volunteer for NMD, and two other NMD volunteers were on a routine water supply drop in a remote area of the desert called Brown Canyon. This area is known for its heavy “foot traffic” but is also a part of federal land, the Buenos Aires National Wildlife Refuge. BANWR is a 118,000 acre habitat for native plants and animals that lies precisely along the US/Mexico border. Millis and the two others had finished dropping 22 gallons of water and were in the midst of picking up empty containers when they were stopped by Fish and Wildlife officers. After explaining their purpose and actions, Millis was cited for littering and was given a \$175 ticket. He decided to challenge the ticket in court, pleading NMD’s unofficial motto, “humanitarian aid is never a crime.” Seven months later, a federal magistrate judge issued a ruling, that Millis was guilty of littering but would receive no sentence. Upon hearing the ruling, Millis said, “I feel like this is a passive-aggressive message from the government. It says that what we were doing—in essence saving lives—is illegal, but that there’s no punishment for it.” (“Humanitarian Found”).

The state's new strategy of distributing littering fines instead of making arrests shifts the discourse between NMD and the state. If the state continued to retain its counterargument within the realm of humanitarian aid, as per the case of Sellz and Strauss, it risked further exposure of its rhetoric of the "illegal." Yet by shifting the discourse to "litter," a clear cut definition that is not vulnerable to civil initiative and already holds a place in discourse—the desert, especially in BANWR, is increasingly being covered in debris that undocumented immigrants discard on their journey, such as backpacks, clothes, food, and empty containers of water—the state could rearticulate NMD's humanitarian aid as "pollution." In other words, this shift overtime would mark humanitarians as criminals (litterers) and humanitarian aid as criminal activity (littering), preventing NMD volunteers from effectively doing their work and circulating their counterargument. The strategy while worrisome at first quickly became a new opportunity for NMD to subvert the state.

On December 4, 2008, another NMD volunteer was cited for littering, but this time NMD was prepared. Walt Staton and three other NMD volunteers had just completed a routine water supply drop when they were stopped by a Border Patrol agent and a Fish and Wildlife officer. The officer asked the four humanitarians if they had left any water bottles on the trails and if they were willing to show them where. Staton responded that they had and took the authorities with the other humanitarians to retrieve the water. Once the six returned, the water was confiscated, and Staton was cited for littering.

Staton, following in Millis' footsteps, refused to pay the \$175 fine, opting for a trial instead. A trial provided NMD with a public opportunity to recount the state, to expose the rhetoric of the "illegal," to show that undocumented immigrants were suffering and dying in the desert as a direct result of the state's inhumane border enforcement policy. A trial gave NMD an opportunity to argue that borders crossers needed humanitarian aid and so were given water—not litter—to survive. Nevertheless, a trial gave the state a chance to further mark NMD's "humanitarian aid" as "garbage" and to re-cover its rhetoric of the "illegal." In short, the trial would come down to the definition of "litter," and like any definition or any word, "litter" is imbued with differ<sup>ance</sup>. The state as well as NMD would have to reproduce, renegotiate, and reconstruct its definition of "litter" to include or exclude water in this new context. The trial, in other words, marks an exact moment when rhetorical agency is engaged and negotiated, when publics and counterpublics compete for rhetorical space in discourse, when differ<sup>ance</sup> is revealed.

Staton's trial, which garnered national attention, took place on June 1-3, 2009, and it will serve as the main focus of Chapter 3, an examination into the complexities of rhetorical agency.

## CHAPTER 3

### THE TRIAL: NEGOTIATING RHETORICAL AGENCY AND POWER WITH THE STATE

During Labor Day weekend, 2009, I accompanied three No More Deaths (NMD) volunteers into the southern Arizona desert. We took a red beat-up pick-up truck known among volunteers as “the Roja.” After a bumpy but beautiful ride through rocky canyon floors and stunning hillsides of ocotillos, we arrived at our location, about 10 miles north of the US/Mexico border. We drove to this remote location to collect and replace empty water jugs with full new ones. Each of us grabbed four one-gallon jugs of water from the bed of the Roja and walked down a trail. One volunteer led us with a hand-drawn map, while another followed closely behind with a hand-held GPS device. Their collaboration suggested that our trail would shortly intersect with another, a place where, I was told, migrants frequently passed, a perfect place for a water drop. Under the slight but welcomed shade of a nearby mesquite tree, we dropped the water and labeled each jug with the date and the waypoint, the designated number on the GPS that corresponded with this location. NMD used this labeling system to determine if a trail was active, slow, or inactive. For example, if in three days, when another group of volunteers checked this same waypoint, all the water jugs marked with our date were empty, a NMD volunteer would record in a logbook that the trail was “active” and might be in need of more water on the next water drop.

But on this morning in early September, there were no empty water jugs. One of the volunteers hiked back to the Roja to check the logbook and read how

many jugs were left by the previous group and when. According to the last entry, 16 one-gallon jugs of water had been left three days prior. One volunteer speculated that a group of migrants might have picked up the water and carried it with them. Another suggested that migrants are often suspicious of water sites, believing it to be a trap laid out by the Border Patrol for an ambush, and so migrants quickly take the water, hike a short distance and hide, before consuming the water and leaving behind the empty containers. She suggested that we hike north up the trail to find the empty jugs. We hiked for nearly half an hour without seeing any sign of the empty containers, such as their blue plastic caps and binding. Needing to drop more water at different locations that afternoon, we decided to give up the search and hike back to the Roja.

However, once we make it back to the mesquite tree, the same volunteer who suggested that we hike north said that she had one more idea. About 50 meters east of the mesquite tree was a steep ravine, and sure enough, about 20 meters down was a pile of 16 empty water jugs. One volunteer carefully climbed down to retrieve the empties from the wash, but when he returned with the bottles strung together on a rope, he was not pleased. Laying down the bottles before us, we saw the problem. Each bottle was empty but still had its cap on. Across the center of each jug was a gaping hole. The bottles had been slashed.

It was not clear as to who was doing the slashing, the Border Patrol, local ranchers, both, but what was clear to NMD volunteers was the message: Stop leaving water for “illegal” aliens. The “slashings” had become a common occurrence ever since the trial of Walt Staton. Staton, a NMD volunteer, was cited

for littering after completing a water drop on a wildlife refuge along the US/Mexico border. His trial in June 2009 gained local and national attention because the focus shifted away from the crime (littering) and onto a debate about upholding US immigration policy and criminalizing those who sought to disrupt it.

NMD and the state argued relentlessly within this complex rhetorical situation. Each side competed for the opportunity to change the discourse on immigration policy in Arizona and throughout the nation. The state introduced environmental and criminal arguments, revealing photos of the once beautiful desert now covered in the trash of “illegal” aliens and the plastic water jugs of NMD. The humanitarian group posited moral and ethical arguments, describing the desert as a site of crisis where many die of dehydration, need life-saving water, and aid should be provided regardless of citizenship status. The arguments are not clear cut, the witnesses are not always trustworthy, and the social impact is extremely high. NMD’s ability to act is on the line. Deemed criminal, the charge would severely restrict if not altogether end their humanitarian aid. Deemed heroic would change the way immigration policy is understood on the border.

NMD’s persuasive power rests in its rhetorical agency. Throughout the trial NMD must negotiate what agency it has with the state to push and expand and strengthen its arguments. Barbara Biesecker’s rhetorical situation provides a framework for understanding how rhetorical agency operates in this trial. Her postmodern theory allows us to see how subjectivities are constructed and reconstructed, how the relations between subjects effect their subjectivity

(re)construction, and how these negotiations provide the rhetorical agency to make change.

In this chapter, I examine the rhetorical agency produced and negotiated in *USA v. Staton*. But first, I rearticulate the debate over rhetorical agency through the debate over the rhetorical situation.

### **The Rhetorical Situation**

The debate over rhetorical agency, the construction of subjects and subjectivities, the ability to act/speak in rhetorically effective ways, can be located in rhetorical studies through the debate over the rhetorical situation. Rhetoricians have been arguing over agency for years, mainly, where agency lies: within the situation (Bitzer), within the rhetor (Vatz), or somewhere between the two (Consigny). However, these interpretations of rhetoric in action are problematic for postmodern theory because they suggest that the subjects within the rhetorical situation are static, not in constant flux. Barbara Biesecker fills this gap with her rearticulation of the rhetorical situation through Derrida's thematic of *differance*. But before I explain Biesecker's productive framework, it is necessary to explain the arguments of Lloyd Bitzer, Richard Vatz and Scott Consigny to fully understand the context from which Biesecker theorizes.

Bitzer argues that a rhetorical situation has three main constituents: exigence, audience, and constraints. Not all exigences are rhetorical, only those which can be modified by rhetoric, not all audiences are rhetorical, only those which are capable of being influenced by rhetoric and can do what the rhetoric calls for, yet all constraints are within the rhetor and within the situation (Bitzer

8). Thus, when a rhetor is invited by the situation to elicit a response, the rhetor enters and provides a response that is within the constraints of the situation. For example, after Japan attacked Pearl Harbor, FDR addressed Congress, within his constraints and the constraints of the situation, and urged them to declare war. In other words, according to Bitzer, the situation dictates, constrains and controls the response, and hence, the rhetorical agency of the rhetor. Rhetoric, then, comes into existence as the prescribed “fitting response” to that situation (Bitzer 5).

Vatz takes issue with Bitzer’s rhetorical situation. He claims that Bitzer falsely identifies an “intrinsic nature” in events, from which rhetoric follows, which theoretically, Vatz posits, does not allow rhetors to interpret a situation (Vatz 155-6). Vatz argues that facts (situations) are not publicly observable, i.e. are not objective. Facts are learned through others. Rhetors “sift and choose” how to present facts and translate facts; hence, the meaning of an event is not in the situation, but is in the interpretation of the rhetor (Vatz 156-7). Locating rhetorical agency with the situation, as Bitzer does, is ethically problematic for Vatz. In fact, according to Vatz, the rhetor in Bitzer’s rhetorical situation has no responsibility or the motivation to act in an ethical manner, for it is the situation which retains the rhetorical agency for the rhetor. In other words, the rhetor could claim that “The situation made me do it” or “Don’t blame me; I had to say it.” Vatz by contrast locates rhetorical agency within the rhetor so as to put the onus on rhetors to make responsible choices in the moment and to be responsible for their actions afterward. In short, Vatz aligns his theories with a more traditional humanist-



modernist interpretation of rhetorical agents, rhetorical agency, and the rhetorical situation.

For Consigny, Bitzer and Vatz are the extremes of the debate on how rhetoric works. Yet instead of dismissing their theories entirely, Consigny keeps what he considers to be the productive elements from both and contributes necessary caveats: from Bitzer—the situation has particularities but is not determinate, from Vatz—the rhetor is creative but is not completely free (Consigny 175-6). Theoretically, then, according to Consigny, the rhetorical situation is “an indeterminate context marked by troublesome disorder which the rhetor must structure so as to disclose and formulate problems” (Consigny 178). In other words, the role of a rhetor within a rhetorical situation is to reorder the disorder, to make sense of the competing discourses. Rhetors may not always be effective in this role because they are always constrained by the particularities of the situation; thus, rhetors must acknowledge the particularities to themselves and to their audiences or, hence, run the risk of being dismissed by their audiences. But if the rhetor does acknowledge the limitations, if the rhetor poses questions and exposes problems, and if the rhetor “orders the disorder,” then, theoretically, the audience will take action (Consigny 183).

The problem with Consigny as well as Bitzer and Vatz is that all three of their theories operate under a “logic of influence” (Biesecker 110), meaning that they perceive a rational exchange between the rhetor and the audience, an assumption that fixes, or marks a place of origin on either the rhetor or the audience. This causal relationship is problematic for Biesecker, who through

Derrida's thematic of *differance*, contends that subjects have no origin; they are becoming; they are not fixed. Biesecker, referencing Derrida, argues that every subject is different from another while at the same time keeps dividing itself. A rhetor, then, cannot accurately assess a rhetorical situation because the situation is continually changing and the rhetor, too, is continually changing. Biesecker contends that through Derridean deconstruction rhetoricians would be able to see that all texts have non-originary origins, i.e. *differance*, and that *differance* is, in fact, "covered up" by rhetors, who seek to make unities out of the divisions, make a non-identical identifiable. Rhetoricians should conceive of the rhetorical situation, not as a place for rhetors to persuade an audience to act, but rather, as an event that makes the production of subjects and subjectivities and power relations possible (Biesecker 126).

In this chapter, I use Biesecker's logic of articulation as the theoretical tool for analyzing NMD's rhetorical situation, the trial of *USA v. Staton*, a site that makes visible the history of decentered subjects and the continued production of their subjectivities. Through this analysis, the following sections recognize the rhetorical situation as a space open to connections, disconnections, and reconnections; I identify how NMD seeks to find the "radical possibility" Biesecker promises rhetoric can offer, the agency to move, shift, destabilize meanings and ideas in new and promising directions. Through Biesecker's theory of the rhetorical situation, I identify how NMD dismantles discourses which have always been xenophobic and criminalizing in order to usher in new discursive possibilities—discourses surrounding a migrant's humanity, how a US citizen of

conscience should act, how an ethical government should construct and enforce laws—can be invented anew. Biesecker’s theory of rearticulation, in sum, is critical for analyzing how rhetorical agency works and for NMD, how to develop a rhetorical disruption of migrant deaths and the power relations that support it.

### **The Trial**

The trial of USA v. Staton begins on June 1, 2009 in Tucson, Arizona. The defendant, NMD volunteer Walt Staton, is charged with “knowingly littering or disposing of garbage or other debris on a national wildlife refuge.” The charge becomes an important piece of the trial. It is constantly contested by the state, represented by prosecuting attorney Lawrence Lee, and NMD, represented by defense attorney William Walker. There are two aspects to the charge that the state must prove beyond a reasonable doubt, the *knowingly* and the *littering*. Did Staton *know* that he was littering or did he think that he was providing humanitarian aid? Is a bottle of water *litter* or is it life-saving humanitarian aid? These two aspects, the *knowing* and the definition of *litter* become two spaces of negotiation throughout the trial where rhetorical agency is contested.

In addition, there are three other spaces where rhetorical agency is negotiated. One is a negotiation over what the trial “is really about.” Several times Lee and Walker accuse the other of making the trial “something that it is not.” Both agree—at different times—that the trial is about littering on BANWR; however, the issues of “illegal” immigration, US immigration policy, and humanitarian aid is used several times to emphasize guilt or innocence. It becomes obvious that the trial is not simply about litter. The larger issues and how

they are used play a big role in shaping the outcome of the trial. The next space of agential negotiation involves the witnesses' subjectivity of credibility. In other words, the ethos of each witness is constructed and challenged and reconstructed and re-challenged. Different techniques are used by the lawyers to shape/undercut the subjectivity of the witnesses. Credibility is tied to agency. In this trial, the one who is believable, has a desired ethos, has a greater ability to negotiate his/her rhetorical agency and persuade the jury of Staton's guilt or innocence. Finally, the space of context becomes a space of negotiation. Should the littering charge be understood within the context of the law or the context of the humanitarian crisis on the border? This space shares arguments with the definition of litter, what the trial is really about, and if Staton *knew* he was littering or not. Shaping and controlling the context from which this trial should be assessed becomes critical toward the end of the trial. These contested spaces are where rhetorical agency is negotiated and shifts, where meaning is made and remade, and where subjectivities and relations form and break.

### **Jury Selection**

Before the trial begins, the jury is selected. Potential jurors are asked a series of questions to procure information that might render them unfit to be jurors on the case. Magistrate Judge Jennifer Guerin wants to make sure the jury is fair and impartial, and so she asks the potential jurors, "Do any of you have strong feelings about providing humanitarian assistance for undocumented migrants? In other words, for aliens" (USA v. Staton 1:55). Two potential jurors say that they do, a Catholic woman that says her church goes on walks in the

desert and provides water to migrants and another who says she has taught bilingual education for years and feels like the migrants in the desert could have been her students. Then three more speak up and say that they also would have a problem being impartial—all believing that aid should be given (USA v. Staton 1:56-7). Then one potential juror says that he is “personally in support of any human aid” but would be able to follow the instructions of the court (USA v. Staton 1:58). [He was later dismissed (USA v. Staton 1:90).] Then, another speaks, saying that he was a missionary in South America and Mexico and thus, believes strongly in providing water to migrants in the desert.

Walker then approaches the bench and says,

I think that the question [that] has been posited to these potential jurors is that if they are in favor of humanitarian assistance or aid, that is an issue in this case, and they might not be able to get past that issue. This is not a case that involves an issue over whether you are for or against humanitarian aid. Humanitarian aid is not a crime. The question in here is whether or not the defendant violated the law by distributing litter and garbage on the Buenos Aires National Wildlife Refuge. And what I would respectfully ask is that I be allowed to ask the general panel a question or ask those particular jurors a question and preface it by saying that humanitarian aid is not on trial here and whether or not the defendant favors humanitarian aid or not is not the issue here. (USA v. Staton 1:59)

Already, before the trial has even begun, questions about the true nature of the trial are raised.

Judge Guerin asks to clarify what Walker's question is, and Walker states, "What I would say is that there is no issue here before the court as to whether or not humanitarian assistance is a crime. There will be evidence that the defendant is a humanitarian. This issue is whether or not he littered by littering and disposing of garbage and other debris on the national wildlife refuge" (USA v. Staton 1:60). Lee responds: "Humanitarian aid is exactly what Mr. Walker wants to put on trial here" (USA v. Staton 1:60). Judge Guerin decides to dismiss all the potential jurors who said that they could not follow the law because of their feelings about humanitarian aid but to ask follow-up questions to those who said they could put those feelings aside and still follow the law.

During the follow-ups, one potential juror initially says that he could put his feelings aside but then admits that he would have some difficulty being impartial. Then, Walker asks a follow-up, firstly stating that the case is not about humanitarian aid but is about "the very narrow question of whether or not the defendant littered garbage" (USA v. Staton 1:63) and then asking if the potential juror could follow the law of the court regarding litter. The potential juror responds, "For just littering, yes, I think I would be able to." Then, Judge Guerin interjects, "As I heard you say earlier, you feel uncomfortable with that, that you feel—" (USA v. Staton 1:63), but then the potential juror interrupts, "If it were just littering. I guess there is more to it than that" (USA v. Staton 1:63). It is clear, from this sequence and this potential juror's response, that this littering trial is not just about littering. It is about humanitarian aid, undocumented migrants, and the crisis on the border. Both Judge Guerin and Walker negotiate their rhetorical

agency, push for retaining or dismissing a potential juror that would favor her/his agenda, an impartial trial, one that identifies with the constructed subjectivity of Staton.

Judge Guerin then finally clarifies to a new juror,

[T]his case does not involve the issue of whether or not providing humanitarian assistance is a crime, but it does address whether or not this defendant knowingly littered on the Buenos Aires National Wildlife Refuge by placing water bottles there. In being presented with the issue, in trying to decide as a juror whether or not the defendant is guilty or not of that offense, would your beliefs about humanitarian assistance affect your ability to be fair and impartial? (USA v. Staton 1:64).

The new juror says she thinks so, but then Judge Guerin qualifies, “You think you could follow the law even if you were to be instructed that placing litter is a crime?” The new juror says yes. Judge Guerin thanks her but before she can move on to question the next potential juror, Walker interjects: “Did you say if you were instructed that placing water was the crime?” Judge Guerin responds, “She said she could be fair and impartial. I think she should remain on the jury” (USA v. Staton 1:64). [She ends up not being on the jury (USA v. Staton 1:95).] Then Lee interrupts, “I object to her being on the jury. The question is he’s equating placing water bottles as humanitarian aid. [...] The whole defense position is that a water bottle on the wildlife refuge is humanitarian aid and therefore is not a crime” (USA v. Staton 1:65). Judge Guerin responds to Lee, “I think he is saying that it’s not garbage.” Lee counters, “But I think the way Your Honor is asking

the question is that couching it in terms of humanitarian aid is exactly what defense wants this whole trial to be about. [...] My suggestion is that when we ask them it's whether or not you believe right off the bat that placing a full water jug on the national wildlife refuge is humanitarian aid and would color your ability to be fair and impartial at this point" (USA v. Staton 1:65). Judge Guerin answers Lee, "I think that is addressing the issue which you said you didn't want to be asked. It's tricky. It's a fine line."

This sequence that began with Judge Guerin's phrase "placing litter," which marked water as litter, demonstrates just how critical the definition of litter is to this trial. Equating water with humanitarian aid favors Walker, while equating water with litter favors Lee. The negotiation of this definition strikes right at the heart of this trial. Is it about litter or is it about humanitarian aid? Both Lee and Walker have attempted to deny the humanitarian aspect of the trial, but have done so in ways that favor his own position.

The questioning of potential jurors continues; each juror that answered Judge Guerin's initial question about having feelings about humanitarian aid but being able to put those feelings aside are each asked to come forward and answer follow-up questions. Once complete, Judge Guerin, Walker and Lee decide which potential jurors to strike and which to keep on the jury. The three agree on all of their choices but still need to question potential juror 32. When Judge Guerin reexamines her, a candid and revealing scene unfolds, marking the complexities of this case and the complexities of negotiation. The Judge Guerin asks, "In deciding whether or not the defendant knowingly committed the offense, would



your views regarding humanitarian assistance affect your ability to follow the instructions of the law as to what littering is and to make an impartial decision?” (72). Juror 32 responds, “In other words, it wouldn’t really be a migrant issue?” Judge Guerin clarifies, “The defendant might have interests in providing water because of migrants, but my question to you is whether you could follow the law in making a decision as to whether or not he knowingly littered by placing water bottles on that refuge?” Juror 32 responds, “I am trying to decipher. Probably, yes.” Judge Guerin, “Probably?” Juror 32, “Yes.” Lee objects to having her on the jury saying she hesitated and didn’t give “an equivocal, ‘Yes, I can’” (USA v. Staton 1:73). Judge Guerin replies, “Given the way that we are phrasing each one of these questions, I take the witness’ hesitation as a hesitation as she could be fair, as hesitation thinking through the different descriptions of the questions that were being asked, and I thought that was reasonable for her too” (USA v. Staton 1:73). Juror 32 stays on the jury.

A recess is taken before the trial begins. Once the selected jury returns Judge Guerin provides them with “the information”—“the description of the charges made by the government against the defendant” (USA v. Staton 1:102). The government must prove beyond a reasonable doubt that “on or before December 4, 2008 the defendant knowingly littered or disposed of garbage or other debris on a national wildlife refuge” (USA v. Staton 1:102). After the information is given, Lee begins his very brief opening statement.

### **Lee’s Opening Statement**

He argues that Staton was seen leaving about 20 one-gallon jugs of water on a national refuge, which Lee defines as a place that Congress established “for animals, plants, and wildlife” (USA v. Staton 1:108). Lee claims that Staton was confronted and admitted to leaving the jugs “purposely and intentionally” and then asks the jurors to use “common sense” when determining if plastic is garbage or not. “Leaving plastic on a wildlife refuge, plastic water jugs, plastic tops, plastic binding that holds those tops together, is littering” (USA v. Staton 1:108). Albeit brief, Lee establishes that Staton purposely left litter on BANWR. Walker is not as brief.

### **Walker’s Opening Statement**

Walker begins by pointing out to the jurors the two precise areas where agency is being negotiated, “whether or not he [Staton] put something on the wildlife refuge that was garbage or debris, not whether somebody else turned it into garbage or debris later” (USA v. Staton 1:109) and if he “knowingly [put] garbage or debris on the wildlife refuge” (USA v. Staton 1:110). Then Walker makes a quick qualifier, “You are not going to be told ever in this case that humanitarian assistance is a crime or against the law or it’s against the law to give water to a migrant because it’s not. That is not what this defendant is charged with. He’s only charged with littering garbage and other debris on the national wildlife refuge” (USA v. Staton 1:111). Already, Walker is attempting to shape how the jury should perceive and comprehend the events of December 4, 2008.

He then works to establish Staton’s ethos, i.e. construct Staton’s subjectivity as credible: “He’s an Arizona boy and he’s been an Arizona boy all of

his life,” “he attended the Prescott Unitarian Universalist Fellowship,” “[h]e was a Boy Scout,” “received an Eagle Scout award,” “[h]e is a certified wilderness first responder,” graduated from high school “with a 4.0 grade point average, a perfect grade point average,” “began attending the University of Arizona [...] with a full tuition scholarship,” (USA v. Staton 1:112), “graduated from the University of Arizona in the summer of 2004 with a 3.7 grade point average, close to perfect, not perfect, but pretty close, with a degree in urban planning,” (USA v. Staton 1:113). The several references to “Arizona” is intentional. Arizona is known as a “state of transplants.” Every year thousands of Americans make Arizona their new home, and in the winter, “snow birds,” or people residing in cold climate states, temporarily migrate to and reside in Arizona for the season. “Local Arizonans,” those who were born and raised in Arizona, are somewhat rare. They are often perceived as understanding the culture of Arizona more than “outsiders” or “transplants.” In short, a local Arizonan is respected by other Arizonans. By Walker emphasizing that Staton is “an Arizona boy all of his life” who attended the local Arizona university, which is revered in Tucson, to a jury who most likely is composed of local Arizonans, Walker is attempting to construct Staton’s subjectivity as respectable, likable, and thus believable.

Then Walker changes courses. He moves to construct NMD’s subjectivity. In the morning session, he had argued that humanitarian aid had nothing to do with this case, but now, needs to frame the narrative of the case as a humanitarian from a humanitarian group providing humanitarian aid. The distinction between aid and litter is critical to Staton’s innocence or guilt. Walker says, “And in the

summer of 2004, he began spending time with No More Deaths. Some of you may have heard of that organization. You will hear in the evidence that No More Deaths is an organization that is dedicated to stopping migrant deaths in the desert. No More Deaths does not engage in smuggling people across the border. They don't engage in illegal activities of that sort, but they believe that every human life is sacred—" (USA v. Staton 1:113).

Lee objects, and the court overrules. Walker continues:

"They believe that every life is sacred. And Walt is going to testify that the reason, the motive, the intent of the acts he committed on December 4 was to save human lives [...]" (USA v. Staton 1:113).

Next, Walker continues to define what NMD is *not* in order to clarify what it is.

[W]hat he did on December 4 when he went out to the national wildlife refuge was part of a plan to strategically place water in locations where a majority, at least a large concentration of migrants, crossed on trails, not to help them enter the United States, not to help them violate the law in any respect, but merely to leave life-sustaining water so that they would not die in the desert. [...] And you're going to hear that he and No More Deaths got feedback from migrants that it was life-sustaining water in the desert that saved many migrant deaths, saved many migrants from death, after they were returned to Mexico, they would have died in the desert otherwise (USA v. Staton 1:114).

Then Walker goes back to shaping Staton's subjectivity as someone who is credible, honest and open: "You will hear when he was approached by the border patrol agents and Bureau of Fish and Wildlife, he immediately told them exactly what he was doing. He didn't view it as against the law. He didn't view that he was littering or putting garbage out. He viewed this as putting out life-sustaining water for migrants. He was proud of it. He did it openly. He did it pursuant to a plan" (USA v. Staton 1:115).

Next, Walker moves to establish the difference between "life-sustaining water" and "garbage or debris." He says, "You will hear the government seized from him not only full water jugs that he was placing out but also empty water jugs that were debris, that were garbage, that someone else had made garbage and debris, picked up the full water jugs, drank from them, and some of the people instead of taking the empty water jugs with them and putting it in a proper receptacle would throw it in the desert" (USA v. Staton 1:115). This argument is unique because Walker does not merely say that what Staton put out is not garbage at all, but rather has the potential to become garbage. He implies that the migrants *make* that garbage out of Staton's humanitarian aid. This careful distinction puts blame on the migrants for littering but also somewhat implicates Staton in the littering for providing the materials to create litter.

Again, Walker attempts to establish what garbage is in order to show that what Staton put on the refuge was not garbage: "[Staton and the three other NMD volunteers] systematically when walking the same trails they put the water out before collected all the garbage found, collected the empty bottles that they found,

empty jugs they found, so they were not garbage, so they could do their best to make sure they weren't garbage" (USA v. Staton 1:115). "They were doing their best to preserve the refuge for animals, for other humans, for the enjoyment of anyone and anything that was out there" (USA v. Staton 1:116).

Then, Walker looks to establish the credibility of NMD's actions, mentioning that the University of Arizona gives college credit to students who place water in the desert:

[H]e was not arrested by himself [...but] with three other people, one was another member of No More Deaths and two of them were university students who were getting credit from the University of Arizona who recognized the value of this program to their university education and gave them approval for going out into the desert and putting these water bottles out for migrants, two university students, undergraduates, who were earning credit for doing this" (USA v. Staton 1:116).

In other words, Walker is taking the strong reputation of the University of Arizona and transferring it onto the actions of NMD and Staton.

In sum, Walker uses various rhetorical strategies to negotiate Staton's rhetorical agency with the jury: One, Walker establishes that empty jugs of water is litter, and since Staton did not put out empty water jugs—he put out full ones—he did not litter. Moreover, Staton collected the empty jugs of water (the garbage) after dropping the full jugs, which helps boost his ethos and establish that he "knew" the difference between garbage and aid. Two, Walker establishes that Staton was "putting out something of value" (USA v. Staton 1:117). Staton had to

buy the water at the grocery store. Garbage, on the other hand, has no value. Also, water, in the context of the desert has value; it is life-sustaining. Finally, the University of Arizona values the actions of Staton and NMD. Students receive college credit. Thus, providing water in the desert is valuable; it is not trash.

### **Border Patrol Agent Collins**

After Walker finishes his opening statement, Thomas Collins of the US Border Patrol is called as Lee's first witness. Lee uses Collins' testimony to rearticulate Staton's subjectivity that Walker constructed. According to Collins, he was patrolling the border on December 4, 2008. When Lee asks what his duties were for that day, Collins responds that his job was to patrol the border, "looking for terrorist weapons, terrorists, illegal aliens, smugglers, drug smugglers" (USA v. Staton 1:122). This description is important because it helps construct the rhetorical situation of that day. The expectation of Collins' narrative is that he will find one or more of these subjects, and what he finds is Staton and three other volunteers for NMD. Thus, his description helps construct the subjectivity of Staton and the others, that they are "terrorists" or "drug smugglers." If they were not, Collins would not pursue them. But he does. The implication is that Staton and NMD are at the very least suspicious people if not criminals, equivalent to the subjects he lists.

Collins was standing on a hill "looking for a group of aliens [that he] believed was coming through the area" (USA v. Staton 1:123). He was watching a vehicle track and waiting for cars to drive down it. Some did. From his location overlooking rolling hills, cars would dip down and disappear for a moment and

then reappear and pass his location, but one car disappeared and did not reappear. Lee asked, “Based upon that observation, what were your thoughts?” Collins responded, “At that time I was thinking that the vehicle that I saw was going to stop to pick up illegal aliens. That’s common practice in that area for smugglers to stop and pick up aliens” (USA v. Staton 1:124). This description again suggests that Collins will find “illegal aliens” or “smugglers,” but instead finds Staton and NMD volunteers. Collin’s narrative implies that Staton is associated with these groups.

Collins ends up calling for back-up, for more agents, anticipating an arrest. He waits for about a half an hour and then saw the vehicle reappear and pass his location. It’s Staton’s silver Jeep and he sees the No More Deaths sticker-sign on the side of it. Collins says he didn’t follow Staton “immediately” because he “was still looking for the group of illegal aliens that [he] suspected was coming through the area” (USA v. Staton 1:125). Lee asks if he ended up finding that group and Collins responded he did “later” (USA v. Staton 1:125). It is unclear then if there ever was a group of undocumented immigrants, but the suggestion of the possibility is enough to rearticulate Staton’s subjectivity as one who associates with “smugglers.”

A Border Patrol helicopter arrives to explore the area via Collins request. Then, Collins contacts Fish and Wildlife Officer Casey and leaves his location “to look for the group of illegal aliens” (126). Lee asks what the results were of the search and Collins responds, “I made contact with four aliens that were able to



evade me.” Lee counters, “And how were they—just got a jump on you?” To which Collins responds, “They saw me coming” (USA v. Staton 1:127).

Walker objects, stating that the line of questioning is “totally irrelevant to the charges in this case or to any relevant issue in this case” (USA v. Staton 1:127). To a degree, Walker is correct. Lee’s questions takes Collins’ narrative in a different direction, away from the littering fine and to the phantom “illegal aliens.” The move is purposeful. Lee’s questions help construct a certain rhetorical situation, one that expands the jury’s imagination, frames the subjects in the story as either associating with “illegal aliens” or participating in “illegal” activity with “illegal aliens.” The details that Collins provides is unnecessary to the crime in the case, which is littering. Lee via Collins keeps the focus on “illegal aliens.” In other words, if this case really is about littering, Collins’ testimony would have started when Collins met Staton, when Collins talked with Staton, and when Collins collected evidence from Staton. But the story doesn’t start here. It starts much early, constructing a scene in which the rhetorical agents’ subjectivities are articulated to be in association with “illegal aliens” or “illegal” activity.

Finally, Collins begins to tell of his encounter with Staton; that once he arrives at the location, he sees water bottles and footprints around them. He follows the footprints to the road, the same road that he saw Staton’s jeep go by. Collins gets back in his vehicle and contacts Officer Casey again. He drives down the road to where Casey is and meets Staton and the three others in the silver Jeep.

Walker steps forward and begins his cross-examination of Collins. His goal is to undo or reconstruct Staton's subjectivity back to what he articulated in his opening statement, that Staton is caring and noble and was knowingly providing valuable aid, not garbage, to people in need. In order for him to rearticulate Staton's subjectivity he first must challenge the subjectivity—both the authority and credibility—of Collins.

Walker begins by having Collins confirm that he has no “technical enforcement activities on the wildlife refuge relating to littering” and is only “interested in catching people who have crossed the American border illegally” (USA v. Staton 1:130). Then, Walker asks, “[O]n this day you don't observe or see any activities by this man or the other people that he is with that have anything to do with border enforcement?” (USA v. Staton 1:131). To which Collins answers, “That's true” (USA v. Staton 1:131). Walker is trying to disassociate Staton from “illegal aliens,” precisely the opposite of Lee's strategy. Lee has constructed at least a suspicion that Staton is involved in the illegal activities that the Border Patrol is looking for. Walker's needs to establish that Staton was not engaging in any of these activities to reconstruct Staton's subjectivity as ethical, honorable, and, of course, law-abiding.

Collins admits that he “come across these No More Deaths vehicles in the desert before,” that Staton was forthcoming about what he and the three other NMD volunteers were doing, and that he saw the No More Deaths sticker-sign on the side of Staton's vehicle.

Then Walker shifts his line of questioning to the definition of litter. He points to Exhibit 3, a photo of the water that was confiscated on December 4, 2008. Collins agrees that the jugs of water in the photo are full, “like you might get at the grocery store” (USA v. Staton 1:134). Then Walker asks, “And did you see—did you ever see any of these people putting it out or throwing out or dispensing on the wildlife refuge any discarded jugs that contained no water?” Collins responds, “No.” Walker is having Collins make the distinction between full bottles and empty bottles, and by association between humanitarian aid and litter, and to what Staton left in the desert and what Staton did not leave in the desert.

Finally, Walker pulls out a page from Collins’ report of events on December 4, 2008 and reads it in open court. Collins writes (Walker reads), “In previous weeks I had located numerous full water bottles consistent with those left by humanitarian organizations that work in the area. I have also encountered these plastic bottles discarded as garbage further north along these trails” (USA v. Staton 1:136). Collins’s log entry fits with Walker’s definition of litter. Humanitarians leave “full water bottles” and someone else discards them “as garbage.”

In the cross-examination of Collins, Walker effectively reconstructs Staton’s subjectivity, but he does so by rearticulating Collins’ subjectivity. Walker repositions Collins’ authority of having nothing to do with litter but instead only having to do with “illegal” border-crossings. He then has Collins admit that Staton had nothing to do with “illegal” border-crossings or “illegal” activity.

Then, ironically, Walker calls upon Collins' perceived authority, as an agent of the state, to help construct his definition of litter. Collins distinguishes the difference between full bottles and empty bottles and writes in his logbook that NMD leaves full bottles, not garbage, in the desert. Walker's rearticulations are effective.

### **Border Patrol Agent Baron**

Lee calls his next witness, another Border Patrol agent, Blake Baron. His story corroborates with Collins'. Baron describes his job as "being down in remote areas south of Tucson for 10, 12 hours a day. Everything from looking for illegal immigrants to drug smugglers" (USA v. Staton 1:139). Baron was in the area when he received a call from Collins, who told Baron that "[h]e was working what he believed to be a group of four to five illegal aliens in the area" (USA v. Staton 1:140). Baron mentions remembering the Border Patrol helicopter circling above and then spotting Staton's Jeep. When Baron sees the Jeep, he attempts to get the license plate number as per Collins' request but is unable to. He continues driving down the road and eventually spots the Jeep with the back hatch open (thus, the license plate could not be seen) and sees Staton and the three others talking with two gallons of water in each hand. Baron calls Agent Collins and Officer Casey. In this sequence, Lee attempts to reassociate Staton with "illegal" activity and undo Walker's rearticulations during Collins' cross-examination. During the cross-examination of Baron, Walker must, again, reconstruct the subjectivity of Staton.

Since, the framework of Baron's narrative mirrors Collins, casting Staton and the NMD volunteers as the "catch" in an "illegal alien" hunt narrative, Walker must reframe the story. He begins, as he did with Collins, by asking Baron of the parameters of his authority. Walker asks, "You guys have nothing to do with enforcement of crimes by American citizens or alleged crimes by American citizens upon the wildlife refuge, do you?" Baron responds, "It depends on the crime, sir" (USA v. Staton 1:144) Walker, surprised by the response, adjusts, "Yes, of course, thank you. I appreciate that clarification. If they are connected with smuggling aliens, then you do?" (USA v. Staton 1:145). Baron answers, "Yes, sir." Walker continues, "You saw nothing that day that indicated that the humanitarians that were connected with No More Deaths were doing anything in connection with aliens that you were investigating, did you?" Baron responds, "No, sir." Walker continues, "No. In fact that was a whole separate incident, was it not?" Baron answers, "Yes, sir." Walker pushes further, "So when you come in contact with these people, and not this direct contact, but when you see them, you see them doing nothing with aliens, do you?" Baron responds, "No, sir."

What is important in this sequence is that not only is Walker reframing the story, disconnecting the discourse that frames Staton and the NMD volunteers in the same light as "criminals" and reconnecting it with one that frames and shapes the subjectivities of the subjects as noble and ethical, but he is using the language of the state, the Border Patrol, to undo the state's argument, that Staton and NMD are criminals. He juxtaposes the Border Patrol's phrase "smuggling aliens" right

before using the word “humanitarians” and then shortly thereafter reemphasizes the separation between what criminals do, “smuggling aliens,” with what “humanitarians” do by asking, “you see them doing nothing with the aliens, do you?” (USA v. Staton 1:145). By recouping the rhetoric of the “illegal” from the state, using the word “alien,” and reordering it in this juxtaposition, Walker effectively argues that “humanitarians” are not “illegal,” are not criminals, or are not engaging in criminal behavior. (Later in the cross-examination, Walker emphasizes this point further by having Baron articulate what he saw the humanitarians doing, namely, taking water from the Jeep, not “smuggling aliens.”) Once Walker makes this point, which reconstructs the subjectivity of Staton and the NMD volunteers as non-criminals, he attempts to use the subjectivity of Baron (like Collins) to help construct the definition of litter:

First, he reasks Lee’s question: “Now, you have been a border patrol agent there on the border two and a half years?” (USA v. Staton 1:145). Walker reasks this question to recall Baron’s perceived credibility for the jury, that as a border patrol agent he has specialized knowledge of the issues in the desert. Then, Walker asks, “You know the value of water in the desert, do you not?” (USA v. Staton 1:146). Baron answers, “Yes sir” (146). Walker pushes, “It’s an extremely valuable commodity, isn’t it?” Baron agrees, “It is” (USA v. Staton 1:146). And then one more push, “In fact, it’s life saving for many people, is it not?” Lee objects and the objection is sustained. Walker takes Baron’s subjectivity as an authority of the state and Baron’s specialized relation to the desert and turns it into an asset for rearticulating the definition of litter. Baron helps define water as

valuable and since garbage is not valuable, water is not garbage—especially not in the desert. This rhetorical move helps expand the rhetorical agency of Staton, that he acted appropriately in the desert, not as a criminal.

Lee needs to regain the lost rhetorical agency of the state and so redirects Baron, asking him how often he sees NMD on BANWR dropping water. Baron answers that he sees NMD volunteers about once or twice a week (USA v. Staton 1:150). Then Lee asks how often does Baron see NMD come back to pick up the empties—or full jugs. Baron answers: Never. Baron admits to seeing “hundreds” of empties while seeing only “dozens” of full water jugs. Then, oddly, Lee asks the same question, perhaps to emphasize that NMD does not pick up the empty water jugs, but this time, Baron answers differently: “I’ve seen when they do. When they hold the trash cleanups out there and invite area residents and the sportsmen that use the area for hunting to come down, they will clean it up” (USA v. Staton 1:151). Recognizing Baron’s inconsistency, Lee quickly steers the next question away from Baron’s admission, that NMD does indeed “clean up trash” and encourages others to do so, to how Baron has never seen Staton—specifically—do the clean up.

Then, Walker jumps in, seeking to undo Lee’s redirect. He snaps, “You don’t have any earthly idea whether this guy went out and picked up trash?” (USA v. Staton 1:151). Baron responds, “I’ve never seen him, sir.” “If he were to testify that he was out there on occasions picking up trash and garbage, you wouldn’t dispute that, would you?” Lee objects, saying that the objection “goes to credibility” (USA v. Staton 1:151), but is overruled. Baron responds, no. Walker

concludes, asking Baron if he knows whether or not NMD regularly goes out to BANWR to collect trash, to which Baron again answers that he does not know.

Through this sharp line of questioning, Walker is able to halt the reconstruction of Baron's credibility and shed doubt on Baron's testimony overall. Lee and Walker negotiate—construct and reconstruct—Baron's subjectivity as a un/reliable voice in this case. At times Walker uses Baron's authority to Staton's advantage, specifically to prove that Staton was not engaged in any "illegal smuggling" activities (Since the Border Patrol are "authorities" in this area, Baron helps prove Staton's innocence even though Baron via Lee was attempting to imply or at least associate Staton with criminal behavior as a way to lower Staton's character.), and then at other times discredits Baron for having no authority, to expose that Baron does not really know what Staton did or did not do.

### **Fish and Wildlife Officer Casey**

Lee's next witness is Fish and Wildlife Officer James Casey. After Lee has Casey detail his long list of experience working at various national wildlife refuges, Casey explains that the difference between national parks and wildlife refuges is that parks are for the enjoyment of the people while refuges are for the protection of plants and animals (USA v. Staton 1:155-6). Then, Lee shows Casey a series of photographs, all of BANWR at various locations, all with debris and garbage.

Then, Walker interrupts: "May I voir dire the witness on these photographs, Your Honor?" (USA v. Staton 1:164). ("Voir dire" means "to say



what is true.” In legalese, it means to determine the competence of an alleged expert witness). Judge Guerin permits Walker’s interruption, and Walker asks, “Agent, it appears as if these photographs were taken in July of 2007. Is that correct?” Casey replies, “I’m not sure if all of them are. This one here we are currently looking at is.” Walker continues, “14 has that date on it, does it not?” (USA v. Staton 1:164). Casey responds, “Yes, it does.” Then Walker goes on, asking the exact same question for photograph 15 and 16 and 17 and 18 and 19. Casey continues to respond in the affirmative, but the repetition of Walker’s questions and Casey’s “Yes, sir” answers builds a momentum, which casts Casey’s hesitation over the first photograph as suspicious. Finally, Walker asks where on the refuge the photographs were taken, to which Casey provides the details. More pointedly, Walker asks if the photographs “were taken on the specific trails that water was put out that day” (USA v. Staton 1:165), to which Casey responds that he does not know.

Then Walker pushes. “I am asking, do you know whether these photographs, Exhibits 14 through 19, are specific locations where this defendant and others put out water on December 4, 2009, two and half years later (sic)?” (USA v. Staton 1:166). Casey replies, “They are south of that location. They are in the general area.” “So they are not in the same locations?” Walker continues. Casey responds, “Not the same location.” Again, Casey’s testimony and subjectivity becomes suspicious. At first, he says that he does not know if the photos were taken on the specific trails but then after being pushed admits that they were indeed not taken on the trails but rather south of the trails.

Then, Walker asks Casey if he knew who took the photographs and Casey said he did, so then Walker asks, naturally, “Who took the photographs?” and Casey responds, “I took the photographs, sir” (USA v. Staton 1:166).

In this sequence Walker first attempts to challenge the relevance of the photographs, which were taken in July 2007 while the alleged crime took place in December 2008. Instead, in addition to determining that the photos were taken a year and a half earlier, he discovers that they were not even taken at the same location of the alleged crime. Moreover, Casey took the photos himself, which raises questions about his credibility, considering when first asked if the photos were taken in 2007 he says, “I’m not sure if all of them are” (USA v. Staton 1:164). He took the photos, he knew where they were taken, and thus he knew when they were taken. Casey seems to construct his own subjectivity—with the help of Walker—as a suspicious rather than an expert witness.

Lee allowed to direct his witness again quickly works to reconstruct Casey’s subjectivity as reliable and authoritative. Lee asks, “[...] even though [the photographs] were taken some time ago, are they still fair and accurate representative of locations on the Buenos Aires National Wildlife Refuge?” (USA v. Staton 1:167). Casey concurs. This one question seems to undercut Walker’s interruption. Casey is able to continue his testimony and his photographs are admitted as evidence, over Walker’s objection.

In the next sequence, Lee asks Casey to describe what he sees in the photos and how the garbage smells—“You can smell feces, urine. Body odor that is actually trapped in the clothing tends to accumulate there. Also the smell of

rotting food is very common” (USA v. Staton 1:167)—but then, Casey further describes one photo of empty water bottles as being along “illegal” trails: “This is a trail. This is an illegal trail. This is not maintained. This is—these are water bottles and other types of trash left along the trail” (USA v. Staton 1:167). Lee interjects, “When you say ‘illegal trail,’ are there only certain trails authorized on the refuge?” (USA v. Staton 1:168). Casey continues, “There are several maintained trails that are recognized by the refuge as hiking-type trails or nature walking trails” (USA v. Staton 1:168).

It’s critical that the state use the term “illegal” with regards to the trail. The rhetoric of the word “illegal” in this context relates to the “illegal” immigrants which have created them. Both are “illegal” or not “authorized on the refuge” as Lee puts it. In addition, water bottles and trash are along the “illegal” trails in the photographs, thus associating the litter with the water bottles and the water bottles to the “illegal” trails and the “illegal” trails to the “illegal” immigrants.

This sequence in particular which Casey describes in photograph 15 and then continues to describe in photograph 16, 17, 18, and 19 articulates the constellation of relations between the subjects in this rhetorical situation. Because of these relations and the use of the rhetorical marker “illegal,” the subjectivities of the immigrants and NMD are implicated as criminal. The implied argument is as follows: The “illegal” immigrants created “illegal” trails on the refuge. Both do not belong. Moreover, litter and water bottles do not belong on the refuge. “Illegal” immigrants use the water bottles. NMD supplies the water bottles. By

association—by relation—NMD’s subjectivity is shaped by Lee as engaging in “illegal” activities, even though humanitarian aid is not a crime.

Earlier, Border Patrol agent Baron admitted seeing “trash cleanups” by NMD on BANWR. While Lee cannot argue that NMD does not perform trash cleanups, he can make an argument regarding the frequency of those cleanups. After asking Casey to describe the components of each water bottle—the plastic tops, the plastic binding, and the plastic bottle itself—Lee asks Casey, in reference to a bottle in a photograph, if they are “in a sturdy condition or brittle?” (USA v. Staton 1:169). Casey responds, “Brittle condition, sir.” And Lee follows-up, “What would that indicate to you?” “They have been left on the refuge for quite some time” (USA v. Staton 1:170).

It is common knowledge in southern Arizona that the scorching hot desert sun could turn any inorganic material brittle. Discussing the condition of the discarded bottles indicates to the jury that the “garbage” left by NMD has been left out in the desert for quite some time, so while NMD volunteers may indeed organize trash cleanups, they must not do so on a frequent basis. This careful construction of logic by Lee restructures NMD’s subjectivity from a responsible humanitarian group to an irresponsible one.

Lee continues to push that not only are “brittle” bottles and “fresher” ones (USA v. Staton 1:170) found along the refuge, but so are the plastic tops and bindings. The jury is shown a paper bag Casey uses to collect the plastic tops and binding that he encounters “very frequently” (USA v. Staton 1:172) on BANWR. He even states that 60 to 70 percent of the refuge is covered with these plastic

tops and bindings (USA v. Staton 1:172). Then, in a similar move to Walker, Lee ask a series of quasi-repetitious questions and Casey responds with repetitious answers: “When you are on the refuge, how often do you see water jugs?” “Every day, sir” “How often do you see the tops of the water jugs?” “Every day, sir.” “What about the bindings?” “Every day, sir” (USA v. Staton 1:173). The rhetorical effect of Lee and Casey’s repetition is an attention paid to the volume of garbage left on BANWR.

Finally, Lee directly questions Casey about the events of December 4, 2008. Casey received a call over the radio from Collins. He left and went to milepost seven on Arivaca Road. There, he found Baron waiting by Staton’s empty Jeep. The two waited about ten minutes when Staton and the three other NMD volunteers arrived carrying approximately 10 empty water jugs. Casey asked Staton how many full water jugs Staton left on the trail. Staton said eight. Casey asked to see them and Staton complied, but before they walked down the trail, Collins arrived to inform Casey that he found 20 full water bottles that he thinks Staton and his group also left. Then, Staton and the others took the agents and Casey to retrieve the eight bottles. Casey seized the water as evidence and cited Staton for littering (USA v. Staton 1:174-8).

Before leaving, Casey took a binder from Staton’s Jeep (USA v. Staton 1:179). Inside the binder were maps and descriptions of water drops and where water should be left on different locations. Lee shows the jury a picture of the water bottles left by Staton and his group. On the water bottles there are markings, the number “577” and the date “12-4-08” (USA v. Staton 1:181).

Walker begins his cross-examination the following day, by having Casey look at one of the pictures Casey took of the full water bottles on the trail. Walker asks Casey if Casey sees any debris in the photo. Casey replies that there “appears to be a can or a bottle, toward the top middle of the photo” (USA v. Staton 2.1:20) to which Walker responds, “And that’s the only debris that you see on that photograph, isn’t it?” “Yes, sir,” Casey follow.

Walker is attempting to make two arguments. One, the definition of litter excludes water. Walker’s questions seeks to make Casey unknowingly construct a definition of debris that favors the defense. Casey, while looking for “debris” in the photo, could have answered, “the full bottles of water,” but does not. Instead, Casey mentions a can or a bottle, not the 20 full bottles of water. Two, the photos are inaccurate. Walker seeks to establish that on December 4, 2008, there was not much trash on the refuge, but perhaps during July of 2007, when the photos were taken a year and a half earlier, BANWR was covered in trash. Moreover, NMDs trash cleanups in 2008 might have helped reduce the litter. In short, the 2007 photographs are misrepresentations of BANWR.

Walker next recalls the binder of maps and instructions that Casey seized from Staton’s Jeep. Walker reads what is written at the top of the map and has Casey confirm it. It says, “Route, AW. Description, Arivaca West supply drop driving and hiking route” (USA v. Staton 2.1:31). Casey confirms that the map says this and that they indeed found water bottles in this location, on December 4th, and that Staton admitted to doing so (USA v. Staton 2.1:31), but then Walker reads on what is written on the map: “That last three drop points are on the

Buenos Aires Wildlife Refuge. If you drop here, you risk being ticketed for littering by US Fish and Wildlife, regardless of how much trash you pick up. You can be ticketed for that too” (USA v. Staton 2.1:31-2). So then Walker asks Casey, “Is it true that you can be ticketed for picking up trash?” And Casey says, “Yes” (USA v. Staton 2.1:32). (It is never clear as to why this rule is in place nor is it explained on BANWR’s official website.) This instruction, written on the NMD water drop map, presumably written by a NMD volunteer will come back to haunt Staton, but for now Walker is using it to construct his definition of litter. However, in the following sequence Walker has trouble negotiating the definition with Casey.

Walker asks Casey if when he first encountered Staton and the others, if they were carrying full bottles of water. Casey says they were not, so Walker asks, “They were carrying empty bottles back to their vehicle, off of the wildlife refuge, were they not?” (USA v. Staton 2.1:33). Casey answers, “They were still on the wildlife refuge, yes, sir.” Walker clarifies, “Yes, but they were picking up trash, were they not?” Casey answers, “They had water jugs in their hands yes, sir.”

Walker is trying to get Casey to help construct the definition of litter, but Casey does not cooperate. Casey does not clarify in this sequence if the “water jugs” were empty or full, even though the day before in his testimony to Lee, Casey says Staton and his group had approximately 10 empty water bottles when he first encountered them (USA v. Staton 1:176). He does not use the word “trash” in relation to the empty water bottles; he again, merely calls them “water

jugs.” By refusing to negotiate, establish the relation between these words and Walker’s words, Casey avoids reconstructing a definition of litter that means “empty bottle” and keeps it under his own definition of litter as “empty or full bottle.”

Walker grows frustrated with Casey’s lack of compliance with regards to this definition reconstruction. After Casey says that Staton and the others merely had “water jugs in their hands” rather than “empty water jugs” or “trash,” Walker attempts again: “And they were bringing them back to the truck to take them off the wildlife refuge?” Casey responds, “I don’t know if that was their intention. They were holding empty water jugs” (USA v. Staton 2.1:33). Casey finally says, “empty water jugs,” and so Walker pushes some more, “And they were taking them toward their truck weren’t they, sir?” “Yes,” Casey responds. “Well, what do you think their intentions were?” Lee objects and the objection is sustained. So then Walker modifies the question to, “Well, did you ask them what their intentions were?” Casey replies, “No, sir, I didn’t.” Then Walker snaps, “Well, you didn’t think their intentions were to throw them out into the wildlife—” Lee objects and is sustained again.

This sequence marks a moment of restricted agency for Walker. Rhetorical agency is a negotiation, and Casey is not negotiating, or at least not in the way that Walker wants him to. Casey knows that if he does negotiate, use the language of litter or relate empty water jugs to litter, his definition—the one that he used to give and justify the citation he gave to Staton—will be reconstructed. His power and his agency will depreciate. And so Casey is careful when



answering Walker's questions and is precise with his words—or sometimes lack of words.

Walker continues the cross-examination and reminds Casey of his testimony from the day before when Casey said that he smelled rotten food and feces in the littered areas of the refuge. Then Walker asks Casey if Staton and his group brought food and left it out. Lee objects but is overruled. Casey says that they did not. Walker then asks if he saw them defecate (USA v. Staton 2.1:35), and again Casey said that he did not (USA v. Staton 2.1:36). So then Walker asks, “What you saw them leaving was nothing more than full sealed bottles of pure, clean water; true?” Casey carefully responds, “I was told they left full sealed bottles on the refuge, sir.” Walker asks a slightly different question, “And the bottles that you retrieved and took pictures of were bottles of sealed pure, clean water; true?” Casey answers, “Yes, sir, that day.”

Walker departs from this line of questioning in order to construct a new argument, the value of water and its role in the definition of litter. The logic Walker hopes to build is the following: litter has no value, so it is trash, but water has value (costs money), so it cannot be trash. Casey admits that the bottles of water had a “Fry's label” (a label of a local grocery store in Tucson). The key word that Walker often uses to construct this relation between water and value is “identification.” “[I]t had identification on them, that they were actually bought at a store in Tucson” (USA v. Staton 2.1:36). He uses the word again with regards to Staton, asking Casey if he had asked Staton for his identification. (Casey said he did, and Stanton complied.) Walker then uses “identification” again with regards

to Staton's Jeep, asking Casey if he saw the big sticker-sign which said "No More Deaths" on the Jeep. (Casey said he did.) What Walker wants to construct, of course, is a definition of litter, which is contested constantly in this case. What is not contested, however, is the value of the bottle of water, the identity of Staton, and the identity of the Jeep as a NMD's vehicle—all have been identified as such. The transparent identifications of these three help lay the foundation of what is and what is not, moving the subjectivities of things and people from ambiguous areas to distinct areas. Building relations to those already "agreed upon" definitions is the goal of Walker's value arguments.

Toward at the end of Walker's cross-examination of Casey, he asks the Fish and Wildlife officer, "[Y]ou asked Mr. Staton what he was doing, and you asked him how many empty water bottles did you pick up? You asked him that question, didn't you?" Casey replies, "Yes, sir, I did" (USA v. Staton 2.1:37). Finally, Casey admits to "empty" water bottles. But then Walker asks, "And you, in fact, asked him, did you not, did he usually pick up empties?" (USA v. Staton 2.1:37). Casey says "I do not recall, sir, if I asked him that" (USA v. Staton 2.1:38).

As it turns out, Casey records the entire exchange with Staton in the desert without Staton knowing. When Walker points this out, Lee objects to relevance. Judge Guerin sustains. Walker knows it is not relevant but knows that recording without permission hurts Casey's character (USA v. Staton 2.1:38). Nevertheless, Walkers pulls out the transcript of Casey's recording and points to page 13 when Casey asks, "Do you guys usually pick up empties when you come out too?"

(USA v. Staton 2.1:40). Casey then confirms that he did ask that question. Walker then goes through the transcript when the NMD volunteers say that they brought out garbage cans that day to pick up litter and Casey says to them “Well, we appreciate you picking them up on your way out.” (USA v. Staton 2.1:40).

What Walker is trying to do here is two-fold. One, discredit Casey, for first tape-recording without permission and second for lying by not admitting he asked this question. Two, that while picking-up garbage is a different act from littering (to do one act does not undo the other), it helps lend credibility to Staton that he “knew” what the difference was between litter and water. Thus, the crime of “knowingly littered” should be dismissed. In other words, he picked up garbage, but he left water.

### **Walt Staton**

After the morning break, Walker calls Staton to the stand. He makes allusions to his opening statement, constructing Staton’s ethos as credible and honest. He has Staton mention his clean criminal record, his status as a “pure” Arizonan, his 4.0 high school GPA, his involvement with EcoBears (an environmental club at his high school that would perform trash clean-ups), his Boy Scout experience and Eagle Scout award, his full-tuition scholarship to all three Arizona universities, and his choice to attend the U of A in Tucson (the favorite among Tucsonans), his knowledge of map making and map reading via his geography and regional development degree, his volunteer work with the Sonoran Institute (a Tucson non-profit that seeks to preserve wildlife), his

Wilderness First Responder training and certification, and his recent acceptance to seminary school (USA v. Staton 2.1:78-83).

Next, Walker has Staton discuss NMD and his involvement in the group. During the discussion, Staton says that NMD does not “engage in any smuggling activities” nor “helping people, undocumented migrants in crossing the border” (USA v. Staton 2.1:84). The articulation is noted because several times Walker has argued that Staton’s case has nothing to do with “illegal” immigration and should solely focus on the crime of littering, but here Staton speaks directly to immigration and “smuggling,” a preemptive defensive posture to indicate to the jury the legitimacy of NMD.

Then, Staton is given his chance to recount the events of December 4th: He was out on a supply water drop with one other volunteer from NMD and two U of A students. Before Casey stopped them, they had already put out over 50 water jugs. He was following a system, established by himself, a retired dean of geosciences at the U of A, and other NMD volunteers. They mapped trails used by immigrants and put the water where trails converged. Instead of placing water on one trail, they would place it at the convergency of several “high traffic” trails (USA v. Staton 2.1:86-87).

Staton then looks at Casey’s photos of the refuge and says that the plastic bottles in the pictures are not from NMD but from Mexico (USA v. Staton 2.1:89). Walker and Staton go through each photo, and Staton points out the difference in shape and size between the Mexican water jugs and the ones left by NMD, relieving him of the responsibility of the trash in the photos (USA v. Staton

2.1:91). Then, Walker asks Staton if he tried to hide anything from Casey, withhold any information about his actions from the officer (USA v. Staton 2.1:93). This question about Staton's transparency, his forthcoming admission of what he was doing, is brought up several times by Walker. Staton's transparency not only lends credibility to his testimony, that he is telling the truth, but that he is innocent, that he has nothing to hide, that what he did was right and he thought it was right.

Next, Walker brings up the cost of the water, the value argument. Staton admits to purchasing the water from a grocery store in Tucson. Walker then asks a key question: "On December 4th, when you were putting out the bottles of water, did you believe that putting out full bottles of fresh pure water, as you did, was littering or disposing of garbage or other debris?" Staton's response, "Absolute not" (USA v. Staton 2.1:93). "A full jug of water is what we put out. We intend that to be something that migrants who, if they're dehydrated or whatever, if they need water, that's what the water's for [...] I know there has been thousands of deaths along the border over the last several years. Many of the deaths occur from symptoms starting with dehydration" (USA v. Staton 2.1:94). Walker asks, "How do you know that?" Staton continues, "It's my personal experience. I have come across migrants in the desert who are dehydrated. I know that because of my Wilderness First Responder training. We can do patient assessments in the field" (USA v. Staton 2.1:94).

Not only does Walker have Staton reveal his background early on in the cross-examination, which helps construct Staton's subjectivity as honest and

credible, but uses that background to help express Staton's "knowing" in this case. In other words, his certified training helped Staton "know" he was providing water to prevent dehydration—not littering.

Staton then explains the training he received from NMD. He discusses the "limited manpower" and how they need to figure out exactly where to put this water to help as many migrants as possible. He says that NMD's mission is to save lives and they do so in a "strategic," in a "scientific," and in a "systematic" way (USA v. Staton 2.1:96). Those key words remove Staton's perceived subjectivity out of the realm of "personal experience" (ethos), or acting emotionally as an individual (pathos), or even out of politics, and temporarily into a neutral, logical, space (logos). Of course NMD's desert activities are political and personal, but reconstructing it as "science" suspends momentarily those other elements and helps view Staton's actions as scientific.

Then, Walker gets to the maps confiscated from Staton's Jeep and says, "Okay. This says, 'If you drop here, you risk being ticketed for littering by U.S. Fish and Wildlife.'" Staton, "That's correct." Walker, "'Regardless of how much trash you pick up.'" Staton, "Yes." Walker, "So if you know that you might be cited, doesn't that indicate you knew this was a violation of the law, what you were doing?" (USA v. Staton 2.1:99).

This question speaks directly to the "knowing" part of Staton's crime, that he "knowingly littered." Staton provides a technical answer, but it is rather weak. "I was aware that we could be given a ticket for it. That doesn't mean that I thought it was a violation of the law or that I thought I would be guilty of this. We

knew that the tickets were issued but that there was outstanding cases, and a ticket doesn't mean you're guilty" (USA v. Staton 2.1:99-100). True, but not convincing. It is clear that Staton "knew" but tries to maneuver around it. This key admission or lack thereof will be exploited by Lee in the cross-examination.

After the lunch break, Lee is given the chance to cross-examine Staton. He begins by asking Staton if the plastic tops and binding are good for the environment (Staton says no) and then asks if they belong on the refuge (USA v. Staton 2.2:3-4). Staton answers that he doesn't like to see those things on the refuge.

Next, Lee directly attacks Staton's ethos, the one that Walker spent so much time constructing to showcase Staton's credibility and knowledge. Lee uses the constructed subjectivity against Staton to reduce Staton's agency. He asks Staton if he was a member of the Eco Bears, the Boy Scouts, an Eagle Scout, and the Sonoran Institute, to which Staton answers yes. Then, Lee asks if Staton has planned to go out and drop water on December 4th and if he "knew" what he was going to do. Staton said yes. But then Lee asks, "But prior to going there on December 4, 2008, you didn't notify the refuge manager that you were going there, did you?" Staton answers, "No" (USA v. Staton 2.2:5). This question directly challenges Staton's transparency and cooperation, which has been constructed by Walker as forthcoming so many times. Staton's subjectivity shifts to someone doing something sneaky instead of out in the open.

Then, Lee turns his questioning to authorization, to authority, to state power. He asks if the trail that Staton dropped water on was an "authorized trail"

(USA v. Staton 2.2:6). Staton says that he has no idea if it was or was not but that the chosen trail is something that NMD determines, if it is used by lots of undocumented immigrants, then water is put out (USA v. Staton 2.2:6-7). This sequence pinpoints a primary clash between a public (the state) and a counterpublic (NMD). Each is negotiating agency, fighting over who has the authority to act and who does not. The state suggests that it has the power to define these trails, while NMD claims to have the same naming power. Who has this authority? Who has this power? By “not checking” with state authorities or “not knowing” if a trail is “authorized,” NMD via Staton is effectivity subverting the state, acting autonomously with their own perceived agency and power.

Next, Lee makes two moves. First, he ask Staton if he leaves the water jugs for “distressed illegal aliens” (USA v. Staton 2.2:8). Staton says he does but he rarely sees them since they travel at night. So then Lee notes that Staton didn’t see anyone when he dropped off the water, asking, “You didn’t get a chance to use your wilderness first responders skills [...] [Y]ou basically abandoned them at drop point 577. Is that right?” (USA v. Staton 2.2:8).

The quick questions allows Lee to implicate Staton with “illegal” aliens, associate Staton with perceived “criminals,” and makes headway into the second part of the crime, that Staton “abandoned” the water or disposed of it, by leaving water in the desert with no one there to pick it up. Then, Lee’s argument that Staton did not use his wilderness responders training skills shifts the rhetorical situation: Earlier Walker constructs Staton’s subjectivity as a medical expert in a medical crisis in the desert. But Lee does not let this constructed medical situation



play out—sick patients (dehydrated migrants), medics (Staton) giving out medicine (leaving water), healed patients (migrants drinking water). Instead Lee isolates the precise moment when Staton leaves the water (medicine) but before the distressed migrant (sick patient) picks it up as a way to show that Staton is not a medic but a litterer. Isolating this moment makes it look like Staton just dropped the water and left. It looks like he littered. It does not look like he provided life-saving humanitarian aid.

Staton attempts to refocus the rhetorical situation with his response, “Those jugs were left at point 577 with the intention of saving people lives” (USA v. Staton 2.2:8), that this was a medical situation and that his “intention”—he “knowingly” understood the situation to be—was medical. So Lee tries again, “You left these jugs at 577 with no intention of coming back to get them. Is that correct?” Staton fires back, “No, that’s not absolutely correct.” Lee adjusts and argues that Staton didn’t have a specific plan to pick them up and Staton agrees. In Walker’s direct examination Staton was able to construct NMD as systematic and scientific, with a calculated plan and follow through. But here it’s clear that NMD did not have a plan, not a systematic nor scientific one, to “clean up.” Lee argument turns NMD strength into a weakness.

Lee keeps pushing to show that NMD has no “clean up” plan but Staton finally has an answer. Lee says, “In fact, you had no idea of when, if ever, these jugs would have ever been collected back, do you?” Staton, “I do. These water drop routes are usually done on a weekly basis. Whether it would be myself

personally or another volunteer within the organization, usually within a week we check up on all these spots” (USA v. Staton 2.2:9).

But Lee pushes back, and Staton’s response is important because it exposes the state’s attempt to construct clear articulations, that NMD has no plan, that NMD littered. Staton’s response uncovers the heart of this case, that this rhetorical situation is gray and articulations must be negotiated. Lee asks, “You don’t have any idea of whether or not you could have recovered these 20 water jugs when you dropped them off on December 4, 2008, do you?” Staton says, “I’d say it’s a little more complicated than that.” Lee counters, “That’s a yes or no question.” Staton, “I understand it’s a yes or no question. I don’t think I can give you a yes or no answer” (USA v. Staton 2.2:9).

Staton like Casey is very careful with his answers. Any movement could expand or restrict the opportunities for his agency and persuasive power to grow, take away NMD’s power, or could give power back to the state. By not giving clear yes/no answers, Staton keeps the opportunities open, temporarily.

Then, Lee gets to the question of full bottles of water and empty bottles of water and what is litter and what is not litter. It is clear that Staton believes empties are litter and full bottles are not, so then Lee shifts and asks if Staton is aware of Dan Millis’s littering case and ruling. (Millis another volunteer for NMD put full water bottles out on BANWR months earlier and was cited for littering. On September 22, 2009 he was convicted of littering but received no sentence and his case during the time of Staton’s trial was still under appeal.) Staton says he is aware of both (USA v. Staton 2.2:14), but Lee looks to clarify: “You knew that he

was convicted, a judgement was found where he was guilty on September 22, right?” Staton responds, “My understanding is that is an ongoing case that hasn’t had a final resolution to it yet.”

His response is smart. Lee is trying to expose Staton’s “knowing” and rearticulate the definition of litter. Staton clearly knew of the case, but defines litter as empty containers. If Millis left full bottles of water in the desert for migrants, was ticketed and convicted of littering for the full bottles, then Staton “knew” that leaving full bottles could result in guilt, i.e. that full bottles of water were defined as litter by the state. But Staton dodges this admission by saying that the conviction was not final but “ongoing.” In other words, Staton uses the authority of the state on the state. If the state defines what is litter and what is not, and the state identifies when definitions are set and when they are not (until the cases are final, through the appeals process), then Staton is correct.

Lee attempts to expose Staton again, “You knew he was found guilty by a U.S. Magistrate Judge on September 22, right?” (USA v. Staton 2.2:15). Staton responds, “I am aware of the ruling. I know it is still an ongoing case.” Staton in particular uses the word “know” to directly counter what Lee is trying to get at, that Staton *knew* he was littering, but instead, Staton argues that he knew it was an ongoing case, the definition of litter was not yet finalized. Staton is fighting to continue to negotiate this definition of litter and Lee is trying to end it. Their rhetorical agencies are directly competing in this moment.

Seeing that Staton is not budging in this direction, Lee attempts to push Staton in another direction, using Staton’s strong credibility against him. “Let me

ask you this. You are a straight A student, right?” Staton answers “Yes.” Lee continues, “When there is a ruling, until it’s overturned, it is still good law?” Walker objects and the judge sustains it. Using this strategy, Lee is trying to push Staton to stop dodging, to answer intelligently and honestly, like his character portrayal suggests.

Then, Lee pulls out a newspaper article and asks Staton, “On October 22, 2008 [a month after Millis was found guilty of littering], did you make a statement to the Presbyterian news service, words to the effect of: I vow that the organization will continue its humanitarian aid work in the desert regardless of the outcome of the Millis case?” Staton confirms that he did.

The evidence and affirmation seriously damages Staton’s case. It is clear that he “knew” that setting water out was considered littering by the state. Lee continues to push the point while Staton tries to hedge. Again, Staton and Lee are negotiating their rhetorical agency. Lee: “In other words, you were just going to ignore the judge’s ruling and continue dropping off water jugs like Exhibit 39 despite the ruling from Judge Velasco?” Staton: “I wouldn’t say ‘in other words.’ The words I said: We were going to continue our—did I say ‘humanitarian’?—what was quoted, humanitarian efforts in the desert to save the lives of people that are dying. That’s what our commitment is.” Lee qualifies, “That was despite Judge Velasco’s ruling?” Staton clarifies, “It’s not despite his ruling. It’s a responsibility that I feel we have when thousands of people are dying is to do humanitarian aid” (USA v. Staton 2.2:19).

Then, something unusual happens. Lee tells Judge Guerin that he objects to Staton's answer. He calls it "non-responsive" and "moves to strike." This sequence highlights the rhetorical space between the state and NMD and Staton's unwillingness to negotiate his agency on Lee's terms. Staton is essentially saying that this situation is about humanitarian aid, while Lee is saying it is about breaking the law. Judge Guerin orders that Staton's response "be stricken" (USA v. Staton 2.2:19) and then Walker objects, requesting that the judge reconsider (USA v. Staton 2.2:20). The judge has the court reporter reread the question, Staton asks that it be read again, and then he finally answers, "The words I would say is we were going to continue our humanitarian efforts in the desert—" Lee objects, stating that it's a yes or no question. The judge asks Staton to give a yes or no answer. Staton says, "I don't feel like I could give a yes or no answer and be fully honest" (USA v. Staton 2.2:20).

Staton's is trying not to be constructed as outwardly breaking the law, but by not answering Lee's question with a "yes" or "no," Staton is indirectly constructing an argument, exposing to the jury (and the state) that the law is a bad law, that the law does not follow humanitarian law, that the law does not take into account the context of the desert or the hundreds of undocumented immigrants suffering and dying on a yearly basis. Staton directly or indirectly is turning Lee's question into his argument.

Finally Judge Guerin asks Staton, "Were you going to continue to drop off the water jugs or were you not? And Staton answers, "Yes, we were going to continue doing water drop routes, yes" (USA v. Staton 2.2:20-1).

Lee now understands Staton's argument and belief and rearticulates it. The rhetorical move relocates the context from the desert to the law and in doing so effectively convicts Staton. Lee asks, "Would it be fair to say that you just disagree with what the law is and not that you don't know what the law is?" Staton responds, "I believe it would be more fair to say there is a humanitarian crisis on the border, and as a person of faith and conscience, I'm reacting to that more than what law has to say in this regard" (USA v. Staton 2.2:21).

Staton uses the words "faith and conscience" which comes directly from NMD's roots and founding in the principle of civil initiative<sup>6</sup>. The implied argument here is that there's the law created by humans and then there's the law created by God. God's law is above human law. Staton follows God's law and thus in his mind is excused from following human law. Lee's job is to make sure Staton is held accountable to breaking human law, regardless of Staton's spiritual beliefs or adherence to civil initiative.

Lee continues, "Would you agree with me when I say that it's just—that you just merely disagree with the law and it's not your misunderstanding of the law?" Lee wants to show that Staton "knew" he was breaking the law. To disagree is to know; in other words, in order to disagree one must "know" what he/she is disagreeing about. Staton responds, "I would disagree with the application of the law. I believe if you are out picnicking and you were to throw beer cans everywhere, a littering ticket would be completely appropriate. I believe that if thousands of people are dying and you are putting gallon jugs of water out

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<sup>6</sup> See Chapter 2 for a fuller explanation.

with the intention of helping save lives, it's a ridiculous charge, littering is a ridiculous charge" (USA v. Staton 2.2:21-22).

Staton perfectly articulates what he believes, which is noble and consistent with the subjectivity that Walker helped construct, but at the same time, his articulation seals his fate. Using the words "ridiculous charge" proves that he knew the law and merely thought it was "ridiculous." Still Lee wants to be sure that Staton clearly "confesses" that he knew and disagreed with (disobeyed, i.e. broke) the law.

"Mr. Staton, yes or no, do you disagree with the law?" Staton answers, to Lee's dissatisfaction, "No, I disagree with the enforcement and interpretation of the law." Staton makes one last effort with this answer to make a caveat to the law and rearticulate the definition of litter. He is arguing that the law is not wrong and that he does not disagree with the law. He believes that littering is wrong and that those who litter should be punished, like the beer can example. However, he believes that this littering law should not be applied to this situation, to this humanitarian crisis on the border. Humanitarian aid is never considered litter in other contexts, thus a littering law should not be applied to it, should not be enforced, and should not be interpreted in this way. In other words, Lee and Staton are in a tug-of-war over context. Lee is trying to pull Staton into the context of the law and Staton is trying to pull Lee back into the context of the desert. Staton knows that if he is dragged into context of the law, he will lose his case, but also he hopes that by articulating the context of the desert, the application and enforcement of the law will change. Staton recognizes that at this

point in the trail, the case is no longer about him; it's about the state criminalizing humanitarian aid. If humanitarian aid is reconstructed and redefined as litter then the life-saving aid cannot be given and that humanitarians who continue to provide the aid will be considered criminals.

Lee tries one last approach. He pulls up the NMD map again that has the following written on it, "If you drop here, you risk being ticketed for littering by U.S. Fish and Wildlife. [...] The last three drop points are on the Buenos Aires National Wildlife Refuge" (USA v. Staton 2.2:23). Lee asks Staton if he understands the meaning of these sentences. He says he does. So then Lee asks, "And despite knowing the contents of those two sentences that I mentioned, you dropped off these 20 or so gallon water jugs similar to Exhibit 39 [photo of Staton's water that Casey took] on the wildlife refuge that day, right?" Staton responds, "Yes that is correct." Staton reveals that he "knew" the law.

In Walker's redirect, he tries to recover Staton's subjectivity and begins by differentiating litter from water. He goes through Casey's pictures again, asking Staton what he left on the refuge. For the pictures of empty jugs of water and other trash like the tops and bindings, Staton says that he did not leave those, but when he saw them, he picked them up to throw out, and for the photos of the filled jugs of water, he says he did leave those on BANWR (USA v. Staton 2.2:24-5). For the picture of full water jugs in a cluster, Walker asks Staton if the arrangement is how NMD leaves the water. Staton says that it is and that NMD volunteers also then go back regularly and clean up the empties. "It is definitely



part of our regular practice to minimize the impact of the discarded bottles as much as possible” (USA v. Staton 2.2:27).

In his opening sequence, Walker attempted to reconstruct the definition of litter, away from full containers and toward empty containers. He also placed Staton in association with the full containers, thus, not the empties or trash. Moreover, he looked to reconstruct NMD’s subjectivity as a group that does care about the environment, that does regularly go out and clean up the empty containers. Lee exposed that NMD does not have a strategic plan for clean-up like it does for putting out the water, but Walker attempted to show that while they do not have a systematic plan, they do still go out there on a regular basis and clean-up.

Walker then shifts the line of questioning to rearticulate Staton’s “knowing” when it comes to littering. He asks, “Did you believe or did you not believe that it was litter to put out these groups of water as per this exhibit that is on the monitor?” Staton responds, “I did not and I do not believe it is litter. I believe it is water to save people’s lives” (USA v. Staton 2.2:27). The response is helpful and hurtful to Staton’s case. On the one hand, his answer reiterates the difference between water and litter and reenforces the argument that he provided water and not litter. On the other hand, it shows that Staton knows the law and that he “believes” in something that is different from the law. That “belief” does not change the fact that he broke the law. Thus, he knowingly littered.

Then, Walker turns directly to Judge Velasco’s ruling. He asks Staton if he read the ruling or know what the ruling says, or if the ruling was ever submitted to

a jury. Staton says no to all three, so Walker attempts to undo Lee's exposure of Staton's belief: "You were asked by the prosecutor whether it was just that you disagreed with the law? [...] Do you think you were littering garbage or debris that day?" Staton responds, "No, I do not believe I was littering garbage or refuse or debris or any of the words we have heard" (USA v. Staton 2.2:31). Walker again tries to rearticulate that Staton did not "know" that he was littering but fails to do so because both the question and the answer are housed in terms of belief. Staton "believes" he was not littering and "belief" is different from knowing. It's the same distinction Lee made, and it reiterates that Staton knew the law but disagreed with it, proving again that he is guilty of littering. Walker is unable to recover Staton's rhetorical agency or subjectivity.

### **Closing Statements**

Staton is dismissed, and the jury is given "the instructions," the framework they are to use and only use to determine the verdict of the case. Judge Guerin reads Staton's charge, "The defendant is charged with knowingly littering in violation of Title 50, Code of Federal Regulations, Section 27.94 on December 4, 2008" (USA v. Staton 2.2:46), and notes that the government must prove beyond a reasonable doubt that the defendant knowingly littered what he knew to be garbage on a national wildlife refuge (USA v. Staton 2.2:46). Interestingly, Judge Guerin closes with her definition of "knowingly" for the jurors: "An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake or accident" (USA v. Staton 2.2:47).

Then Lee and Walker give their closing statements. Lee begins by stating “what this case is not about” (USA v. Staton 2.2:50). He argues that it’s not about water but rather about “abandoning, dumping or disposing of plastic” (USA v. Staton 2.2:50). He asserts that it’s not about saving lives, that Staton was not near anyone who needed water or dying from dehydration, and that the trial is not a “balancing act,” (USA v. Staton 2.2:50) not about leaving some trash and taking away other trash. In other words, if one litters, one litters, regardless of how much trash one picks up.

Next Lee moves to what he terms to be “not in dispute” (USA v. Staton 2.2:51), such as Staton went to BANWR on December 4th with a purpose, a plan, and instructions. He reminds the jurors of the evidence which supports the “undisputed facts,” such as the maps with the instructions written on them. Thus, he argues that Staton “purposely, intentionally, and knowingly littered” (USA v. Staton 2.2:51). To reiterate his point, Lee asserts that the plastic water jugs did not simply fall out of the Jeep. “They thought that, hey, we might be able to get some illegal aliens to pick up these water jugs if we leave it at drop point 577. So it certainly was done knowingly” (USA v. Staton 2.2:52). In this statement, Lee both reconstructs Staton’s subjectivity as one who assists “illegal aliens” and one who leaves water in the desert. Ironically, this statement has nothing to do with littering. The point of Lee’s closing statement is to reiterate that Staton knowingly littered, but this statement indicates that Staton knowingly provided water for undocumented immigrants. Of course Lee doesn’t use the term “undocumented immigrants” but rather the rhetoric of the “illegal,” the term “illegal aliens” which

connotes “illegal” or “criminal” activity. In other words, Lee momentarily slides out of the littering argument and into an argument about “illegal” immigration, attempting to associate Staton, again, with the “criminal” perception of “illegal aliens” retain. It is effective even though it is irrelevant.

Lee then argues that Staton had no clear-cut plan to clean up the litter, to pick-up the empty water bottles. He notes that Staton admitted that he had no real way of tracking where the plastic water jugs go nor a set plan in place for picking them up. In short, the jugs “are just abandoned out there to the wind” (USA v. Staton 2.2:52).

Lee then moves on to the second element of the crime, that Staton knew that the water was indeed garbage. He mentions the magistrate’s ruling on Millis’ case which found water on the refuge to indeed be litter, and that Staton knew about this ruling. “And when I confronted him about that, he basically said I just disagree with the ruling. I just disagree with that law. That is fine for someone to disagree with it, but it is the law and he did know” (USA v. Staton 2.2:53). Lee makes a strong point and I think it’s what nudges the jury to find Staton guilty. In closing Lee posits, “He knows the law. He just doesn’t want to follow it. And you will see that your jury instructions state on the first page ‘You will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not.’ This what we have here, ladies and gentlemen” (USA v. Staton 2.2:54). Lee articulates Staton clearly as guilty.

In Walker’s closing statement, he attempts to resurrect the arguments he made in his opening statement and undo the points that Lee successfully made in

his closing statement. The first point that Walker makes deals with the jury instructions. The instructions state that the defendant is only on trial for what he is charged with. In other words, Walker argues that Staton cannot be convicted for what others did. Walker is implying that “others” took the water and made it into garbage, not Staton (USA v. Staton 2.2:56).

Then, Walker directly counters Lee. He posits, “When the prosecutor tells you this is not a case about water, he’s wrong. When he tells you this is not a case about saving lives, he’s wrong about that too” (56-7). Walker is attempting to redirect the focus of the case away from litter and back to humanitarian aid. He reminds the jury that in order to convict Staton, the jury must conclude that Staton dropped litter, not water. If they have any doubt, a reasonable doubt, that what Staton put out was not garbage, then he should be acquitted.

Next, Walker gets directly to the definition of litter. “What does he have to litter, dispose or dump? Garbage. Is this garbage? This is not garbage? This is life-sustaining water [...]” (USA v. Staton 2.2:57). The definition of litter is important for Walker because one cannot be convicted of litter if what one is putting out in the desert is not litter. Walker mentions the value argument again, saying that the water that Staton placed on the refuge “was bought at a store for money” (USA v. Staton 2.2:57) and thus cannot be considered “debris.” His goal is to redefine and rearticulate what litter is and if Staton indeed littered.

After making these distinctions above, Walker makes a new argument by analogy. He asks the jury to imagine the bailiff telling them that inside their jury room is a lunch for them of McDonald’s burgers. The burgers are wrapped, the

fries come in a container, and everything comes in a bag. He then asks them to imagine entering the jury room and eating the McDonald's. Some eat it and throw the wrappers away, but others do not. Some leave it on the table or on the floor, and one takes the food and eats it in his/her car and tosses the wrappers out his/her window. Walker then asserts that if there was a crime called "littering in the jury room" then some would have littered and the one who threw the wrappers and bags on the street definitely littered. Then he asserts, "But does that mean that the person who set the burger out committed littering of garbage? No. Somebody else did that. It was a choice" (USA v. Staton 2.2:59). Walker connects the analogy to the case. "And in this case, this is what was set out, and if someone else picked up that bottle of water and took that cap and carried it two miles north and took that cap off of it and threw it down, who is guilty of littering? It would be the person that threw that cap away, wouldn't it? It would be the person who threw that empty bottle away, wouldn't it?" (USA v. Staton 2.2:59).

Walker makes a good point, but it's quite a shift from his previous argumentation. Before he was trying to define what litter is and what litter is not and with the presumed conclusion that water is not litter and thus what Staton did, put out water, is not littering. But this argument by analogy is different. It articulates who a litterer is and what a litterer does. While he makes a strong point, that the McDonald's corporation would not be given a citation for littering if someone else chooses to take its product and litter it, it also puts into question responsibility. It is clear that the migrants are to blame but it also seems to place some responsibility on Staton.

Next, Walker moves to the date of December 4th, reminding the jurors that Staton is on trial for his actions on December 4th, not before or after that date. He mentions the photos used in the trial, that they were taken in 2007 and were taken of a different area. And also that Staton is not responsible for what happens after December 4th. Again, Walker reiterates, what Staton put out was water on December 4th, “life-sustaining water” (USA v. Staton 2.2:60).

Then, Walker makes an odd move—like the argument by analogy. He spends a lot of time discussing what “reasonable doubt” is and repeatedly telling the jurors that if they have any doubt they must acquit Staton. “So if you go back to the jury room and you say, you know what, in my mind I’m not sure that this is garbage, I’m not sure, I don’t know, because in my mind there are two stories here, you know, I kind of buy what the defendant says but I kind of buy what the government says too, your duty is to acquit him. No doubt. You have a reasonable doubt and it’s your duty to come back and acquit this man” (USA v. Staton 2.2:62). On the surface, Walker makes a good point and perhaps taps into the feelings of wavering jurors. But on the other hand, it seems desperate, like Staton is somewhat guilty, and Walker is conceding that and knows he cannot fully convince the jury that Staton is completely innocent, so he shoots for reasonable doubt, not total innocence.

Then Walker seems to reach again with the claim, “By finding him not guilty, you are not saying I agree with what he did, you are not saying I think what he did is right, what you are saying is I have a doubt as to whether or not he committed this crime” (USA v. Staton 2.2:62-3). Again, Walker aims low. He

seems desperate, begging, and almost scolding. He even says, “The question is not even whether he’s innocent. The question is whether the government has proven him guilty of all the elements beyond a reasonable doubt” (USA v. Staton 2.2:63).

Next, Walker directly speaks to Staton’s character, his ethos, his “truthfulness and honesty.” He reconstructs Staton’s subjectivity by calling him a “humanitarian” and a “truthful person” (USA v. Staton 2.2:63). Then, he asserts that “When he sits on that stand and he says I didn’t know this was garbage, didn’t think it was garbage, still don’t think it’s garbage, it goes to the element of knowing” (USA v. Staton 2.2:64). Walker directly argues that the shaping of Staton’s subjectivity was intentional by him to make a case for his innocence to the first part of his crime.

Then, Walker circles back and reiterates his argument. Showing the pictures of the littered refuge and then showing the pictures of Staton’s water bottles, he says, “And, A, it isn’t garbage. It’s this. It’s not this. This is garbage. This was done in mid-2007. This is not garbage. This is what the defendant did on December 4. So they can’t prove that” (USA v. Staton 2.2:65). He recalls and reiterates the point about the burger wrapper and how Staton didn’t litter but others did. Walker even argues that “I wish they wouldn’t have. Everybody wishes that they would pick up the bottles and toss it away after they drink the life-sustaining water” (USA v. Staton 2.2:66). And then Walker goes directly to Staton’s intention, as a way to argue that Staton didn’t “know” he littered. “But



his intent and purpose was for them to drink the water, not to litter, and you would have to find him not guilty of this one” (USA v. Staton 2.2:66).

Then, in an interesting twist, Walker reintroduces the evidence of border patrol agent Collins. Collins wrote up a report about his experiences on December 4th. Walker rereads two sentences from the report.

Quote, “in previous weeks,” that is before December 4, “I had located numerous full water bottles consistent with those left by humanitarian organizations that work in the area.” Listen to this. “I have also encountered these plastic bottles discarded as garbage further north.” You hear the difference? This is the government’s witness. What he is saying, he is making the distinction between full bottles of water that he found left by humans, that is these, and those bottles which were discarded as garbage further north, that’s these. (USA v. Staton 2.2:67-8)

Walker not only uses this quote to redefine what litter is—full bottles of water versus empty plastic containers—but he also is able to show, once again, that Staton was the one who put out the water not the garbage. Moreover, Walker emphasizes how this quote is from the government, is from the border patrol. By turning the state against the state, Walker makes a powerful counterclaim. He continues, “My client didn’t discard these as garbage further north. What he did on December 4 was set these out and these are not garbage. And the government’s own witness made a distinction between full bottles of water and garbage” (USA v. Staton 2.2:68). This reiteration is strong for Walker.

Walker reminds the jurors of the McDonald's analogy again, stating that "the McDonald's meal isn't the garbage when it has a burger in it and the fries in it" (USA v. Staton 2.2:69). He then shifts to an argument by narrative. He brings up the Lincoln-Douglas debates. He says that during one debate Lincoln asked Douglas how many legs a horse has and Douglas says four, but then Lincoln asks him, how many legs does a horse have if he calls the tail a leg? Douglas says five and Lincoln says that was wrong. Walker explains, "Calling a tail a leg doesn't make it one. And calling this garbage doesn't make it garbage either. This is not garbage. This is pure, clean drinking water to save lives" (USA v. Staton 2.2:69). Walker uses this narrative to reconstruct a firmer definition of what is litter and what is not litter. Ironically, Walker is implicated in what he is trying to argue again. The entire case is about the definition of litter. Both Walker and Lee have negotiated, argued, fought over what this definition is. Walker claims that this definition does not need to be argued. Water is water and litter is litter. It is an interesting tactic to push these definitions into a black and white area. Lee attempted to do the same. It's a part of the negotiation.

Finally, Walker addresses the ruling by Judge Velasco, probably the most damaging piece of evidence against Staton, which reconfigured Staton's subjectivity as dishonest and wavering. Walker argues that the Velasco ruling was brought up, but the ruling was never explained, or explained how it has any effect on the case, or even precisely what the ruling was. Instead, it was merely stated as something Staton knew about. Then, Walker counters the government directly. He argues, "[Staton] didn't say, as the government claims he said, that he wanted to

ignore the ruling. What he said was that he didn't think that that ruling was final on the law. He believed that despite that ruling this wasn't litter. He has every right to say that" (USA v. Staton 2.2:70). This argument is brief and somewhat rearticulates Staton's subjectivity, but it more goes to discrediting the government. It seeks to cast doubt on the argumentation of the government, reshape the subjectivity of the state, imply that they lied or at least misrepresented Staton.

Walker leaves the jury with one last impression of Staton as honest and trustworthy and uses that subjectivity in combination with his "humane intentions" to have the jurors follow their emotions. Walker states that Staton was able to "take the witness stand and tell you that he did what he did honestly, that he did it with an honest belief that he wasn't in violation of the law, that he did it for humane purpose, and the humane purpose is not to prejudice you, it's not to have you vote with your heart, but there was evidence in this courtroom of the value of what he did" (USA v. Staton 2.2:71). The implication is that an honest person would not litter and that argument is not very strong.

Lee then makes one brief rebuttal argument. He claims, "I believe that the defendant is confusing motive versus knowingly doing something" (USA v. Staton 2.2:72). Lee counters Walker's analogy with an analogy of his own: a bank robber who says he robbed a bank to get money for his dying grandmother. That is a motive for committing a crime, but the robber is still committing a crime. "Motives," Lee argues, "are irrelevant" (USA v. Staton 2.2:72). He asks the jury to look at the context: BANWR. The water was left on BANWR. The purpose of

BANWR is to have a refuge for plants and animals. Finally, Lee makes another analogy, critiquing Walker's value argument. Lee describes a couch on the side of a road. It has value to a college kid but once it is left on the street, on city property, it becomes garbage. Lee undercuts Walker's definition of water and litter, his separation of what is life-sustaining and what is trash. Lee posits, in short, that context defines. Once the context switches from house to street, the couch becomes garbage. The street, the context, defines the couch as garbage. Thus, the water purchased from a grocery store, once placed on BANWR, becomes garbage.

It's a brief rebuttal but it is effective. Had Walker argued from context, refocused the attention of the jury on the context of migrants dying in the desert, he might have had more rhetorical agency. But by keeping the attention on BANWR and the refuge's purpose and mission, it's clear that water bottles do not belong on it.

### **The Conviction**

The next day by noon, the jury is deadlocked. The judge gives them the Allen charge, encouraging them to reach a decision, and the jury goes back into the jury room to deliberate. After a recess, the jury gives a note to the judge asking for the precise charge that Staton is charged with. The judge in agreement with Walker and Lee refuses to give the precise code violation and instead writes back to the jurors that they should use the instructions that were given to them. After another recess, the jury reconvenes and reaches a verdict. The courtroom is full to capacity with volunteers from No More Deaths. The judge tells the

volunteers “that this is a courtroom and no matter what the verdict is to please respond in accordance with that” (USA v. Staton 3:7). The clerk reads the verdict: “We, the jury, find the defendant, Walter E. Staton, guilty of knowingly littering, disposing or dumping in any manner that which he knew to be garbage, refuse, sewage, sludge, earth, rocks or other debris on the Buenos Aires National Wildlife Refuge” (USA v. Staton 3:7-8).

Throughout the trial Walker and Lee negotiated their rhetorical agency for their client. Each side constructed and reconstructed subjectivities, examined and exposed relations between subjects, showed the jury the complexities of the case, what the case was really about and what it was not about, pulled the witnesses into frameworks which upheld contexts that favored their client’s agency. The trial of USA v. Staton read through Biesecker’s rhetorical situation offers a way of understanding how rhetorical agency operates that is consistent with postmodern theory. The field of rhetorical studies which seeks a deeper understanding of agency can continue to implement Biesecker’s productive framework in analyses of rhetorical situations. The implementation will not only advance the field in rhetoric and postmodern theory but will also teach us how to negotiate power with the state and make change in our local communities.

### **The Sentencing**

Lee made a strong case against Staton. He rhetorically pushed Staton’s humanitarian efforts into the realm of litter, and in this realm where water is defined as litter, Staton lost. However, Staton’s guilty verdict was not the end for

Staton or NMD. In fact, the guilty verdict, perhaps more so than a not-guilty one, provided NMD with an opportunity.

During the weeks leading up to and after Staton's sentencing, NMD contacted and was contacted by several local and national media outlets. As opposed to inside the context of the courtroom, the law can be socially questioned and critiqued. NMD, already proficient in collecting and circulating narratives of injustices from the desert, decided to construct and circulate a narrative of Staton's courtroom injustice, and a local and national conversation on immigration policy and humanitarian aid begins.

In Chapter 4, I examine the rhetorical effect of *USA v. Staton*, local publics' responses and national publics' responses. I also examine how as a public and counterpublic NMD uses this opportunity to disarticulate discourses which have always been in order to rearticulate new discursive possibilities. They discursively develop a rhetorical disruption of migrant deaths and the power relations that support it. In difference, the argument is always shifting.

## CHAPTER 4

### THE SENTENCING: RHETORICAL EFFECTS AND DISCURSIVE REARTICULATIONS

On August 11, 2009, Brady McCombs of the *Arizona Daily Star* reported:

At 4:30 a.m. Saturday, a resident called the Border Patrol to report a dead person off Arivaca Road, about nine miles west of Interstate 19, said Omar Candelaria, Border Patrol Tucson Sector spokesman. Agents found the body of a man south of the road, he said. The man was wearing blue jeans, hiking shoes and a short-sleeved button-down shirt, Candelaria said. They found a Mexican identification card on him. From Oct. 1 through July 31, Border Patrol agents in the Tucson Sector had recovered the bodies of 161 illegal immigrants, an 18 percent increase from the 137 bodies found during the same time last year, agency figures show. (A12)

On that same morning of August 11th, while on his way to the courthouse, Walt Staton read McCombs' article. He knew of the location off Arivaca Road. No More Deaths (NMD), the humanitarian group that he volunteers for, which provides food, water, and first aid to undocumented migrants in the southern Arizona desert, patrols there quite frequently. When he entered the courthouse for his sentencing and Judge Guerin gave him a chance to speak, Staton referenced the article (*USA v. Staton Sent. 6*), explaining that the jugs of water he left in the desert on the Buenos Aires National Wildlife Refuge (BANWR) for dying and

dehydrated migrants should not be considered garbage by the state but life-saving aid. In short, humanitarian aid should not be a crime.

He argued that the crisis on the US/Mexico border warranted humanitarian action and that his intention on December 4, 2008 was not to challenge US littering laws but to prevent needless death and suffering in the desert. He posited that “[M]any of us will probably never fully understand the complexities of immigration, of what drives people to come and what drives the United States to enforce the border in such a way as to push people into these remote areas [...]” (USA v. Staton Sent. 6), but many would agree that the current immigration policies need fixing. Staton confessed that his dream was to wake up one day and have US immigration policies reformed in such a way that people would no longer need to cross the desert; and on that day, Staton continued, “many of my friends would gladly take as many trash bags as needed to clean up the entire Wildlife Refuge and all the areas along the border” (USA v. Staton Sent. 9). The cost of “littering” does not outweigh the cost of human life. “[B]ut,” Staton concluded, “by necessity and by our faith and by our conscience, we’re going to keep doing humanitarian aid in whatever way, responsible way we can see” (USA v. Staton Sent. 9). Staton made it very clear to Judge Guerin that neither he nor other NMD volunteers would be deterred from providing necessary humanitarian aid in the desert so as long as the state continues to uphold unjust immigration and border enforcement policies.



The courtroom was silent, despite being filled to capacity, volunteers for NMD and other Tucson humanitarian organizations on the left and representatives from BANWR, the Border Patrol, and Fish and Wildlife on the right.

Judge Guerin, in her response to Staton, said that while “[...] your motives were good and humanitarian assistance is commendable, the more that individuals involve themselves in that community and the issues that we face, the better we can make our community and the world, when you seek to reach those objectives by destroying other objectives and other valid goals, then that does cause harm as well” (USA v. Staton Sent. 39-40). Judge Guerin then sentenced Staton to one-year of unsupervised probation and 300 hours of community service, specifically directed at trash removal, a steep sentence for a first-time littering offender with no prior criminal record.

But Judge Guerin was not finished.

She continued, “Those were the only conditions I had intended or considered imposing. However, based on your comments earlier that you were not committed or could not say that you would not engage in this same conduct, I am also going to order as a condition of your probation that you not be permitted to go on the Buenos Aires National Wildlife Refuge during that year of probation” (USA v. Staton Sent. 42-3). In short, Staton was banned from BANWR.

Judge Guerin was sending a message to Staton and to NMD:

Humanitarian aid, leaving jugs of water in the desert for undocumented migrants, is a crime, and anyone indicating that he or she would continue to commit this crime would be punished and banned from doing so again.

Immigration and border enforcement policies in the US are highly contentious issues. Often, politicians frame border issues as a national security issue, where migrants are depicted as drug smugglers and human traffickers who enter the country “illegally” and must be stopped with military-like force. This framing and depiction conjures a fear (and hatred) of foreigners, and since this population of border crossers is also non-white, there is routinely a racist undercurrent in its discourse. NMD, on the other hand, offers an alternative discourse that frames the issues on the border as a humanitarian crisis, where undocumented laborers are funneled into the most remote and dangerous areas of the southern Arizona desert, abandoned by the state to die of dehydration and heat exhaustion, and relies on humanitarian and human rights ideographs, such as <humane> and <life-saving><sup>7</sup> to construct its framework.

The news of Judge Guerin’s sentencing of Staton spread quickly, from local to national media, and with it came NMD’s alternative discourse. The humanitarian and human rights discourse, which frames issues on the border as a humanitarian crisis, challenges the state’s immigration and border enforcement policies, and calls into question the effectiveness of racist and xenophobic discourses. It nudges the often unidirectional response to US immigration problems (more border patrol agents, more surveillance technology, more border fence) to consider reforming the currently destructive immigration and border enforcement policies.

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<sup>7</sup> Using <angle brackets> is the “standard notation style for ideographs” (Cloud 288).

NMD volunteers are aware of the media attention they garner from their actions, and they use that attention to circulate their humanitarian and human rights discourse. They believe that the more publics hear their discourse and circulate it, the greater the possibility that the immigration debate in the US will be reframed, from an invasion to a crisis, and once reframed as a humanitarian crisis, immigration reform would follow.

Staton's littering fine and trial and sentencing drew media attention and provided NMD with public opportunities to circulate their discourse through the press. This chapter measures the rhetorical effectiveness of that circulation strategy. It measures how NMD volunteers take advantage of these opportunities and remain newsworthy, if other publics are indeed adopting and recirculating this alternative discourse, and if those publics are challenging the racist and xenophobic discourse dominant in immigration debates. This chapter examines the specific ideographs that NMD volunteers use in their humanitarian and human rights discourse and compares them with the ideographs used in online discussion forums that follow newspaper articles and blogs entries that cover the actions of NMD in order to measure if a humanitarian and human rights discourse is being circulated and/or challenging the dominant racist and xenophobic discourse. In short, this chapter examines the rhetorical effect of NMD's actions before and after Staton's sentencing. It investigates how NMD as a public and counterpublic uses these rhetorical situations as opportunities to disarticulate discourses which have always been—racist and xenophobic—in order to rearticulate new discursive possibilities.

## **Ideographs**

Michael McGee argues that “[s]ince the clearest access to persuasion (and hence to ideology) is through the discourse used to produce it, I will suggest that ideology in practice is a political language, preserved in rhetorical documents, with the capacity to dictate decision and control public belief and behavior” (McGee, “Ideograph,” 4-5). That political language, which captures ideology and controls the beliefs and behaviors of publics, circulates in discourse as ideographs. McGee defines an ideograph in several different ways:

An ideograph is an ordinary-language term found in political discourse. It is a high-order abstraction representing collective commitment to a particular but equivocal and ill- defined normative goal. It warrants the use of power, excuses behavior and belief which might otherwise be perceived as eccentric or antisocial, and guides behavior and belief into channels easily recognized by a community as acceptable and laudable. (McGee, “Ideograph,” 15)

<World peace> is an example of an ideograph. It is an abstract term that circulates in political discourse, which cues and permits certain beliefs (e.g. equality, non-violence) and behaviors that are easily recognized by the community in which it is used. While the definition of <world peace> is not agreed-upon, it is used in political discourse as if it is.

Ideographs are also bound by culture. Each member of a public, for instance, belongs because he or she is shaped and conditioned by the vocabulary of ideographs. McGee argues that “[a] degree of tolerance is usual, but people are

expected to understand ideographs within a range of usage thought to be acceptable” (McGee, “Ideograph,” 15). If some members do not understand ideographs, use them in unacceptable ways or do not respond to them in the expected manner, then other members of the public will correct them. In other words, the agency of ideographs permits members to police and enforce the boundaries of the public (McGee, “Ideograph,” 15-16).

Since <world peace> is an abstraction, we have come to understand its meaning through its applications (McGee, “Ideograph,” 10). For example, if the term is used to describe a time when all wars cease across the globe, we understand a meaning of the term. However, a meaning is accepted to be true only if it is believable, and the believability of a meaning is dependent upon the history of the term’s references. When deciphering whether a meaning is believable or not, we compare the currently proposed meaning to the meanings the term had in the past. If the currently proposed meaning coincides with previously proposed meanings, then the usage of the term is believed and accepted. McGee calls this historical analysis “vertically structured.”

In addition to understanding ideographs through its historical references, we also understand its meaning through its current situation. Within any given situation, there is a leeway for how a term could be used, an available means that a rhetor has to construct a meaning. The leeway is restricted by the historical references (Since <world peace> has never included <injustice> or another similar term within its meaning, rhetors cannot use it in a current situation), but there are still opportunities for “new” applications in a new situation. If the

currently proposed meaning is reasonably germane to its new situation as well as its historical use, then the usage of the term is believed and accepted. McGee calls this rhetorical analysis “horizontally structured.” Understanding both of these structures—vertical and horizontal—enables us to locate ideology operating through a public’s discourse.

After Staton’s conviction, several media outlets ran stories, and local publics responded to these articles through online discussion boards. At first, the overwhelming majority of respondents used phrases such as “illegal invaders,” “build the wall,” and “go back to Mexico.” These phrases function as ideographs, clearly capturing racist and xenophobic ideology. However, after the strategic and rhetorical actions of NMD volunteers, the online discussion shifted. Phrases, such as “humane,” “human beings suffering,” and “saving lives” appeared in more posts. These phrases, functioning as ideographs, capture humanitarian and human rights ideology. A change in the use of ideographs is a way to measure a shift in ideology. Below, I trace the racist and xenophobic ideographs used in the online discussion forums as well as the humanitarian and human rights ones and analyze how a group of ordinary people shift the dominant discourse of the immigration debate.

### **After the Trial**

On June 4, 2009, the day after Staton’s trial, NMD released the following statement:

This is a sad day for human rights and for all of us in southern Arizona. By penalizing life-saving work, the United States is showing callous

disregard for the lives of our neighbors to the south, whose only crime is to seek a better life. No More Deaths will continue to provide life-saving aid to those in need, and to do our part to clean up the desert. The era of border enforcement that uses death and human rights abuses as a deterrent must come to an end. (“Humanitarian”)

In this brief statement, NMD effectively articulates a humanitarian and human rights discourse. Ideographs such as, <human rights>, <life-saving work>, and <human rights abuses> dominate the text. NMD volunteers value life over citizenship status, and whenever they discuss issues regarding undocumented immigration or border enforcement, they frame them with a humanitarian and human rights discourse. By framing them in this way, NMD volunteers hope others will at least consider if not fully conclude that US immigration policy needs reform. Of course, publics normally do not debate immigration and border enforcement issues in this way. The dominant discourse mainly deploys racist and xenophobic ideographs.

KOLD-Tucson, a local television station, published a news report on their website the same day as NMD’s press release inaccurately<sup>8</sup> entitled “Man Gets Jail Time for Littering on Federal Land.” After the article, three readers posted their responses to the story. “Robert” said that Staton should have been charged with a lot more than littering such as “aiding and abetting fugitives, human smuggling, [and] drug trafficking.” He also argued that these “so-called human rights groups” are “only inviting more illegals to put their lives at risk,” and that it

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<sup>8</sup> Staton never received jail time, although he had the potential of receiving a sentence of one-year in prison.

is about time we show these “bleeding heart liberals” that their actions “will not be tolerated.” After “Robert,” “peaceful” responded that “there will be border crossers, legal or illegal...rather deal with live ones than deal with bones...water in the desert??? less costly than body bags.” Finally, “Allen Legatzke” posits that “[i]t’s about time these trash dumpers are prosecuted,” and “[i]f these so-called do-gooders want them so bad let them go across the border and live there with them.”

The discourse that Robert and Allen Legatzke engage in is biting. They use ideographs such as <illegals> and strongly dislike NMD volunteers for associating with them, calling the group a “so-called” human rights group, “so-called” do-gooders, and “bleeding heart liberals.” By contrast “peaceful,” using the ideograph <border crossers>, values saving lives over citizenship status, yet argues curtly. This online discussion is brief but lays out common positions.

*Tucson Citizen* blogger “Rynski” also covered Staton’s conviction. She posted a story called “Leaving Water Jugs in the Desert is Littering,” which attracted 16 posts from readers. Again, the majority of readers expressed their disgust with NMD, calling Staton “arrogant,” “flaunting Immigration law,” and “arrogantly flaunt[ing] the law.” One inflamed the discussion by saying that Staton should be <deported> and <waterboarded>. Others suggested that those siding with NMD are <aiding and abetting lawbreakers> and “need to move to Mexico.” These respondents clearly use a xenophobic discourse. On the other hand, a few respondents, only three, circulated a humanitarian discourse. “RH” extensively used religious rhetoric, comparing the actions of Staton to Jesus, the



minutemen to the KKK, and the Border Patrol to the Pharisees. “Liz Guiles” called Staton “kind and gentle,” “a person who has empathy and understands that we all have a responsibility to aid other human beings,” and repeated used the ideograph <human being> rather than <illegal alien>. “Danielito” mentioned “the value of water in the desert” and used “undocumented migration” to describe the phenomenon in southern Arizona. Nevertheless, the clear majority of respondents strongly disapproved of Staton, his actions, and the people he sought to help, but more importantly, the way in which they wrote their posts, with anger and disgust, and especially using the ideograph <waterboarded> is alarming, particularly for NMD volunteering who wish to change how publics frame the immigration debate in America. It would take time, careful planning, and strategic action.

### **In 10 Weeks**

On June 17, 2009, two weeks after Staton’s conviction, NMD called a press conference at Southside Presbyterian Church in Tucson, where several local humanitarian, environmental, human rights, and religious organizations gathered. This coalition publicly requested a meeting with Secretary of the Interior Ken Salazar and BANWR manager Mike Hawkes to determine alternative ways to save lives on federal lands. The *Arizona Daily Star* among others covered the event. *Star* reporter Marisa Gerber’s article, “Immigrant Backers Demand Action to Save Lives” attracted a staggering 134 posts, which used the article as a point of entry to debate immigration and border enforcement policy. The overwhelming majority of responses again circulated a racist and xenophobic discourse.

For example, one respondent, “Bob B.” wrote, “there are plenty of unemployed people that would love to have a job that pays real good at building the wall. where do I sign up. I will do anything a mehican [sic] won’t, like get it right the first time.” Ten different times readers either used the ideograph <build the wall> or <close the border>, and another ten times respondents focused their posts directly at border crossers, writing “stay home” or “go back to Mexico.” “PJ,” for instance wrote, “Stay in your own d\*\*\* country. Clean it up and don’t come over here and mess ours up,” while “Mike G.” succinctly combined both, “step 1: build a wall. step 2: tell them stay home. step 3: repeat step 2 as necessary.”

The clearest evidence of a xenophobic discourse was when a form of the word <invade> was used as an ideograph. It was used in three different ways, <invaders>, <invasion>, and <invading>; and each time it expressed a fear (and indignation) toward foreigners. For example, “Arrest the <criminal invaders> and those that aid them!” “[T]he Democrats are pushing for amnesty for about 30 million illegal <alien invaders>.” “When an American citizen demands these <invaders> leave...we are called bigots and racists. [...] Illegal aliens do not deserve an iota of anything from our great country.” “[Staton]’s aiding and abetting <an invasion of America>.” “Mexico has encouraged this <invasion>.” “The current <border invasion> IS a threat and it should be handled like one. Now go drag your bleeding heart somewhere else” (original emphasis). “Illegals were openly <invading> this Country long before those two gifts [NAFTA and CAFTA] to Latin America were ever signed.” “We should DEMAND that

immigration laws are enforced so that those people are sufficiently *discouraged* from <invading America>” (original emphasis). A version of the word “invade” was used 13 times, two more times than the ideograph <illegal aliens> or <illegal immigrants> combined. Constructing undocumented immigrants as <invaders> or their actions as <invading> signals that border crossers are a threat that must be stopped. “Invasion” as a noun is normally used within a context of war, and the expected response to “an invasion” is a counterattack. Thus, it is not surprising that one respondent wrote, “I would have no issues with squeezing the trigger if we had a president that had the balls to put America and not his own selfish ambition first. It’s just like popping Taliban in Afghanistan, the hats are just different, that’s all.” Understanding the crisis on the border as <an invasion> produces a fear that induces violence against undocumented immigrants.

While an overwhelming majority of the posts were racist and xenophobic, there were some that focused on NMD. Twice NMD volunteers were accused of treason, four times they were called “bleeding heart liberals” and twice as “do-gooders.” Five respondents were tired of NMD’s “demands” and three argued that if NMD volunteers really wanted change, they should “change Mexico” first. There were a few that argued that NMD should be guilty not only of littering but also guilty of murder since volunteers “lure illegals to their deaths” with the water jugs in the desert. One respondent took Staton’s actions personally, blaming NMD for the loss of her job: “[H]ow many of you work at already low paying jobs and have lost your job to an ‘immigrant’ or have had to accept a lower job to keep it rather than having it taken over by a hard working ‘immigrant’? [...] Yes,

keep up your good work helping ‘immigrants’ to undercut the pay on already desperate American workers” (original emphasis).

Out of the 134 posts, there were only six (6) that somewhat subscribed to a humanitarian discourse, using ideographs such as <human>, <humane>, and <humanitarian>. One wrote, “I think we can be <human and compassionate> enough to pick them up and deport them rather than see them die if that’s possible. [...] But they are still illegal. [...] Illegal is illegal. [But w]e can be <humane>.” Another wrote, “This is about being <humanitarian>. Yes, people are choosing to enter the US illegally, but they should not have to die as a result.” A third, responding to a previous respondent, wrote, “[Y]es, Mexico should do more to help its own citizens [...but i]f we become a country that discourages its own citizens from helping dying people in the desert, then we are no better than Mexico.” The discourse is perhaps not as empathic as NMD’s but it is still retains humanitarian features nonetheless. The most combative post subscribing to a humanitarian and human rights discourse, however, came from “Karl O.” He wrote:

Some of you need to get your heads out of your behinds, and realize that crossing the border illegally is a civil crime. Nothing worse than say, not coming to a complete stop, or being over the speed limit by 1 mph, or failing to yield, or failing to signal (all of which are civil infractions). Would you so harshly marginalize someone who commits any of the about civil infractions? No, you wouldn’t. Let’s cut the crap and let your true xenophobic colors show once and for all. Stop using this immigration

debate as a vehicle for your hate. [...] How can you deny water to a  
<fellow human being>, just for breaking a civil law?

At this point, the dominant discourse circulating among local publics through this online medium is racist and xenophobic, out numbering the humanitarian and human rights discourses 149 to 10. NMD volunteers were aware of this disparity in mid-June but were still determined to make change. Over the course of the next several weeks, NMD volunteers made conscious and strategic decisions in an attempt to change the dominant immigration and border enforcement discourse.

At the press conference on June 17th at Southside Presbyterian, NMD showed an open letter that was written and sent to Salazar and Hawkes requesting a meeting before July 1st. Hawkes was not in attendance, but took an interview from the *Arizona Daily Star*, saying that even though he thinks that BANWR is already adequately equipped with water tanks, he is open to meeting with NMD, but added that “the meeting ‘may not be within the next two weeks, since we have the (July 4) holiday coming up,’” (Hawkes qtd. in Gerber). He concluded by saying that he anticipated a meeting in early July.

One week later, June 24, 2009, NMD had still not heard from Hawkes, so the humanitarian group sent a follow-up letter. The letter was sent to Hawkes but carbon copied to Salazar, Rowan Gould, head of the US Fish and Wildlife Service, Robert Gilbert, Border Patrol Chief of the Tucson sector, and Diane Humetewa, US District Attorney for Arizona. In the letter, NMD references the *Arizona Daily Star* article in which Hawkes says that he’s open to meeting with humanitarian groups but to date has not contacted any of them. The letter also

acknowledges that July is normally the deadliest month of the year and how urgent it is for a meeting to be scheduled. The letter concludes with nearly 70 signatures of humanitarian, human rights, environmental, and religious group members.

Two days later, on June 26th, Hawkes contacted NMD. He requested a proposed meeting agenda and list of participants. NMD provided the materials and waited. And waited. Another week past, then the 4th of July weekend, and Hawkes still did not contact NMD to schedule a meeting. Then, on July 7th, Hawkes responded with a letter, saying that he preferred “a virtual meeting by email.” On July 8th, NMD held another press conference at Southside Presbyterian Church in Tucson. The humanitarian group announced that on July 9th, volunteers would distribute gallon jugs of water on BANWR along known migrant trails. With temperatures already in the 100s, NMD argued that they could not wait for Hawkes any longer. The July 1st deadline had passed and no meeting was scheduled. NMD needed to act.

The action was purposeful and rhetorical. It drew media attention as well as the attention of the US Fish and Wildlife Service. Officers issued 13 littering tickets to NMD volunteers. According to the *Arizona Daily Star*, “Thursday’s arrests marked the latest incident involving the Tucson-based group, which says distributing water on the refuge is a humanitarian act aimed at preventing deaths of illegal immigrants, and US Fish and Wildlife officials, who see it as littering” (Refuge). The rhetorical actions of NMD enabled their humanitarian discourse to circulate through the media. The *Tucson Weekly* that morning printed a story

called, “The Activist Question: Tensions Between Humanitarians and Federal Officials Are on the Rise Along the Border.” A few days later on July 13, 2009, the *Arizona Daily Star* wrote an editorial calling for NMD and BANWR to meet and settle their differences:

We believe an agreement could bolster both organizations’ missions and improve their public images. As it stands, both sides look bad. Refuge officials are coming across as heartless bureaucrats for confiscating water bottles that could potentially save lives. They also seem petty, citing volunteers for littering on the refuge. [...] No More Deaths, meanwhile, is coming off as a bunch of activists who refuse to follow the law. They mean well and are trying to save lives, but a couple of judges and a jury have deemed the water-bottle project illegal. (“Accord”)

Even though *Star* editors criticized NMD, they legitimized the group’s position by discussing it on par with the state’s. Moreover, the discussion uses a humanitarian and human rights discourse, including ideographs such as <save lives>. Inserting this alternative discourse into an immigration conversation is one of NMD’s goal; volunteers believe that the more the humanitarian and human rights discourse circulates, the more the discourse community will grow; and with more publics recognizing the problems on the border as a humanitarian crisis, the greater chance there will be for immigration reform.

The editorial continued, quoting Hawkes and Staton, and concluded with this: “The refuge’s cries of litter may be overblown. [...] In the end, the volunteers probably take out more trash than they are accused of taking in. [...] We agree that

keeping the refuge litter-free is important. But it's even more imperative to make sure everything possible is being done to prevent deaths along the border" ("Accord"). With this statement the humanitarian and human rights discourse of NMD entered into the mainstream media and began to circulate.

The day after 13 NMD volunteers received littering tickets for placing gallon jugs of water on BANWR, the group received a phone call from the Secretary of the Interior Ken Salazar's office, inviting volunteers to meet with Salazar in Washington DC. Seven volunteers flew out to see Salazar, and they talked with him personally and members of his staff for over an hour. Upon their return, Hawkes and regional US Fish and Wildlife director Chis Pease asked to meet with NMD volunteers. The groups finally began discussing over the course of multiple meetings how to prevent deaths in the desert while still preserving the land on the refuge. About a week before Staton's sentencing, NMD constructed a "memo of understanding," aimed at resolving the differences between NMD and BANWR. (See Appendix A.) The memo positions NMD and sister organization Tucson Samaritans as experts "uniquely qualified" to provide humanitarian aid to migrants in the desert and requests that NMD and the Samaritans provide this aid with the understanding and that they will remove twice as much trash as they put out; however, BANWR would need to provide the trash receptacles and trash bags and dismiss the pending littering citations against humanitarians.

While BANWR officials considered the memo, NMD volunteers turned their attention to Staton's upcoming sentencing. They reached out to national environmental organizations, requesting letters of support for Staton to be sent to



Judge Guerin. Both the Center for Biological Diversity (Appendix B) and the Sierra Club (Appendix C) wrote letters of support on Staton's behalf. The Center for Biological Diversity wrote:

The last thing we wish to see is human rights pitted against environmental concerns in this matter. What is needed is a reformed policy that manages immigration from Mexico in an orderly and legal fashion, a policy that protects the environment as well as the lives of migrants. We support the work of humanitarian groups and determined volunteers such as Walt Staton who work to save human lives in the midst of the failure of the federal government to produce such a policy reform. [...] Trash is ephemeral—it can be cleaned up, as No More Deaths volunteers demonstrate—and it really is just a small part of the damage being done to our nation's natural resources as a result of a misguided and failed federal policy.

The Sierra Club wrote:

[W]e do not believe that preserving imperiled species and the lands that support them is at odds with the efforts of border humanitarian groups such as No More Deaths. Flooding, erosion, sedimentation, habitat loss and fragmentation all pose a legitimate and serious threats to those species we seek to protect. We do not regard individuals leaving jugs of clean water as a comparable threat, or frankly, as much of a threat at all. [...] The Sierra Club supports the actions of Walt Staton and other humanitarian groups who attempt to save the lives of undocumented migrants in the

desert by leaving jugs of clean water at strategic locations along known migrant trails. They later return to check on the water and to remove garbage. These life-saving actions do not constitute a threat to the environmental integrity of the Buenos Aires National Wildlife Refuge, but rather are a benefit to it.

These two environmental organizations adopt a humanitarian and human rights discourse. They use ideographs such as <human rights>, <save human lives>, <save the lives of undocumented migrants>, and <life-saving actions>, which aligns with a humanitarian and human rights discourse. They also use the discourse in precisely the way that NMD volunteers hope they would: as a justification for immigration reform. Phrases such as, “[w]hat is needed is a reformed policy,” “the failure of the federal government to produce such a policy reform,” and “a misguided and failed federal policy” calls attention to the need for change, and especially the need to value human life over citizenship status.

In addition to these two letters, Judge Guerin also received a sentencing memo from Assistant US Attorney Lawrence Lee. In it, he argues that Staton should receive a \$5,000 fine to be paid within one year, five years of unsupervised probation, and a five-year ban from BANWR. For several pages, Lee justifies this sentence, referencing biologists and wildlife officers who argue that the plastic jugs NMD leaves out in the desert kill vegetation and harms animals. He argues that Staton “does not care about the environmental impact of his actions, nor has he explored alternatives to leaving plastic water jugs on the refuge” (USA v Staton, Sent. Memo 4). He also contends that “[t]he defendant left full, plastic

water jugs on the Refuge with the intent to aid illegal immigrant traffic” (USA v Staton, Sent. Memo 4). Lee concludes the sentencing memo by quoting Staton in the *Arizona Daily Star*. He mentions that the day after the trial Staton said, “We’re committed to our humanitarian efforts [...] We’re not asking permission from the United States to save people’s lives. We never have, because we know they’d say no” (USA v Staton, Sent. Memo 5-6). In short, Lee argues that what Staton is doing is harmful to the environment, aiding “illegal immigrant traffic,” and has not been deterred thus far, so a harsh sentence, as he proposes is justified and necessary.

During the 10 weeks between Staton’s conviction and sentencing, NMD volunteers remained rhetorically active. They organized a collective of humanitarians, environmentalists, and faith-driven community members to uphold, spread, and strengthen their humanitarian and human rights discourse. They took action, performed their rhetoric in the desert, which forced the state to respond with littering tickets. They flew across the country to meet with national officials, followed by meetings with regional and state officials to negotiate a good faith resolution to the issues of water/litter in the desert. And all the while, they used the media as an amplifier to circulate their humanitarian and human rights discourse. At the end of the 10 weeks, there is some evidence that their discourse has disarticulated some of the well-worn discourses surrounding the immigration debate, namely racist and xenophobic discourses. While the overwhelming majority of online posts to NMD news stories used racist and xenophobic discourses, there were some that deployed humanitarian and human

rights ones. Also, the editors of the *Arizona Daily Star* inserted NMD's alternative discourse into the immigration and border enforcement debate, and the support letters from the Center for Biological Diversity and the Sierra Club show that those organizations have adopted and will most likely circulate a humanitarian and human rights discourse to its members. After Staton's sentencing there is local as well as national media coverage, providing NMD with the opportunity to circulate a humanitarian and human rights discourse that challenges a racist and xenophobic one.

### **After the Sentencing**

After Judge Guerin sentenced Staton to one-year of unsupervised probation, 300 hours of community service, and a one-year ban from BANWR, NMD volunteers were inundated with phone calls and emails from local and national media outlets. The story of Staton's trial and sentencing ran in the *Arizona Daily Star*, the *Associate Press*, the *LA Times*, the *New York Times*, and on CNN. NMD took advantage of the media blitz to circulate their humanitarian and human rights discourse. The *LA Times* interviewed Danielle Alvarado, a NMD volunteer, who said, "It's a human rights issue, from our perspective. We have people crossing and dying in our desert" and Staton who argued, "I wanted to make a point that humanitarianism is not a crime, and water's not littering" (Powers). CNN reported that "Although the case involved only a misdemeanor charge, both sides used the divisive issue of illegal immigration in their arguments; Staton's lawyer argued that Staton's actions were humanitarian, but the government said otherwise"

(Gandossy). The editorial in the *New York Times*, however, took a different approach. It argued that littering in the desert does not begin to capture the issues surrounding border enforcement in the southern Arizona desert and that littering (and deaths) along the border is not the fault of Staton but that of the state:

Plastic litter is a threat to the environment, but so is the strategically dubious border fence, which disrupts migration and feeding for rare and endangered animals along hundreds of miles of remote wilderness. [...] When the government cracks down on illegal crossings while refusing to establish a safe, sane alternative, funneling people into the remotest stretches of a burning desert, it shares responsibility for the awful results. One of those results is plastic bottles. Another is corpses. (“Water”)

The media attention generated by NMD’s strategic and rhetorical actions permitted their alternative discourse to circulate and compete with the commonplace immigration discourse on a national scale.

The article that generated the most responses was by conservative blogger Debbie Schlusel. The blog entry on her website, complete with a YouTube clip of local TV station KOLD’s news coverage of Staton’s sentencing, was entitled “Walt Staton Gets (Almost) What He Deserves for Helping Illegal Aliens.” It garnered 57 responses from local publics. Schlusel in the brief blog entry wrote, “In my view, the guy should have gotten jail time for helping along the alien invasion of America, and he should have

received a ban from the refuge for far more than a year, perhaps a lifetime. [...] We need to put our foot down against these liberal illegal alien activists who commit what is tantamount to treason” (Schlussel). As expected, many of her respondents engaged in a similar discourse, using ideographs such as <illegal invaders/invasion> (six times), <liberal/commie/do-gooder/bleeding heart> (six times) and <treason> (once). In addition, the ideograph <illegal aliens/illegal immigrants/illegals> was used fifteen times, the phrase “it’s the immigrant’s fault/it’s their choice to cross” was used four times, and the ideograph <terrorist> was used three times. One respondent though seemed to capture the attention of many of the other respondents with his unapologetic racist and xenophobic post:

As I have told many people, this illegal alien invasion of our country is unacceptable and should be enforced ruthlessly. What I advocate on the U.S. Mexico border is land mines and automated machine guns. Anything that crosses our border triggers a motion sensor and sprays it with a few hundred rounds. [...] Border problem solved, and our problem with drug smugglers, terrorists and law breaking South Americans would be taken care of. (“Jarhead” qtd in Schlussel)

Jarhead’s post was the second of the online discussion, and the one immediately after his was from “goldenmike4393” who wrote, “Jarhead: Your plan is an effective one. I support you 100%.”

The extremely racist, xenophobic, and violent rhetoric is alarming but not new. However, what does come as a surprise is how many respondents

“called out” Jarhead and denounced his and others rhetoric. Eight weeks earlier, in the 134 posts after Gerber’s *Arizona Daily Star* article, only one respondent denounced such rhetoric; the overwhelming majority either ignored or repeatedly praised it. But not this time. Thirteen different posts used a humanitarian and human rights discourse and eight times respondents directly denounced the racist and xenophobic rhetoric.

“Joe Unger” wrote, “Yes, ‘Jarhead’ is a horrible human being. Obviously a racist too. He claims to be against illegal immigration but he only wants land mines and machine guns on the Mexican border. What about the Canadian border?” “Mike” wrote, “Are you guys on crack? These are humans we’re talking about.” “John Swinburn” wrote, “[Staton] deserves accolades for his humanitarian actions, not punishment by an unforgiving government gone haywire.” “John” wrote, “Do you think if he stops leaving water in the desert for dying human beings (coincidentally not white human beings of course) that less will cross or less will survive crossing?” “Gerald Scarfe Fan” wrote, “This article is a wonderful example of compassionate conservatism at work. ‘Let us squash like bugs all people trying to stop hundreds of deaths that occur each year because we have to maintain our xenophobia.’ Yeah, that’ll teach him.” Gerald Scarfe Fan in another post wrote directly to Jarhead, “You have sacrificed your rationality and your empathy on the altar of xenophobia and scapegoating. [...] [You think] it’s those brown persons! How dare those brown persons! \*spray bullets into air madly\* Kill some brown persons, that’ll solve everything!” For a conservative blog to have so many

posts using a humanitarian and human rights discourse and critiquing and condemning the normative discourse was significant and noteworthy.

Jarhead eventually responded to these racist and xenophobic accusations later in the discussion. He wrote, "So now I am a racist because I want to keep illegals out of the U.S.? [...] Sounds like liberal talking points to call people racists because they oppose illegal immigration." He then responded to those who did not find his resolution "logical." "[M]y solution is very logical. Once a few illegals get blown away on U.S. territory, they will think twice before entering the U.S. illegally. I am actually saving lives by keeping these illegals from crossing into sovereign U.S. territory." Jarhead concluded by writing directly to his critics, "Do you like supporting through your hard earned tax dollars these menaces to our society? Do you want to enable terrorists to come into our country, perhaps with nuclear, biological or chemical weapons? Wake up America! We are at war, or at least should be, with these illegal aliens."

Jarhead frames the crisis on the border in terms of warfare, complete with enemy invaders, who threaten Americans with weapons, who need to be stopped and deterred with violence. A humanitarian discourse works precisely to reconstruct this frame, disarticulate the racist, xenophobic, and sometimes violent discourse, and replace it with one that emphasizes human rights. Some respondents maintained their disapproval of "illegal immigration" while emphasizing the need for the humane treatment of all people. "John L." writes, "[O]f course illegal immigration is wrong. But leaving



water for a thirsty human being is not the same as supporting immigration.” “Luis from Mexico” wrote, “Deb, I usually agree with your opinions but not this one. I think this guy is only trying something very simple to alleviate the suffering of those immigrants. [...] [G]iving them some water is just a good action as they might be dying from dehydration and it’s only human to do it. They are humans. Repeat, illegals suffer as any of us can.” Luis continued in another post, “[Y]ou [cannot] justify denying a human being in peril of dying that most basic of human needs, water. [...] I am not advocating here that they should be allowed to stay in the US but simply for the border patrol and other US officials to do their job and humanely get them back where they belong.”

This online discussion shows a marked difference from the previous online discussions, and it is, at least in part, attributed to the strategic and rhetorical actions of NMD. The efforts that NMD volunteers made to organize coalitions, conduct press conferences, illicit letters of support, take meaningful and mindful actions in the desert, negotiate with local and national officials, and use the media as an amplifier to circulate a humanitarian and human rights discourse proved to make a difference. More respondents were disarticulating the racist and xenophobic discourses and using the humanitarian and human rights discourses than at any time over the past 10 weeks. In short, NMD volunteers had a rhetorical effect as their humanitarian and human rights discourse circulated with publics.

### **Resisting and Resentencing**

On November 2, 2009, three months after leaving the courthouse, Staton sent a letter to Judge Guerin (Appendix D), informing her that he would no longer be completing his 300 hours of community service. Staton writes in the letter that during the trial and sentencing the state mischaracterized his actions as “civil disobedience.” He claims that he was not challenging US littering law or attempting to expose the law as unjust by deliberately breaking it. Instead, he was following the principle of civil initiative<sup>9</sup>. “When a government fails to respect and protect basic human rights—or, worse, is itself a violator—it is the responsibility of citizens to act in defense of those rights” (Staton Letter 1). He continues: “Working within the framework of civil initiative, my decision to place sealed gallon jugs of water along trails used by migrants to cross remote areas of the Sonoran desert should be understood as an attempt on my part to uphold international human rights law, specifically the right to life” (Staton Letter 2). In closing, Staton argues that because of this moral and philosophical belief, he no longer feels it is appropriate for him to complete the 300 hours of community service. Judge Guerin petitioned Staton to return to Tucson for a resentencing hearing.

On December 4, 2009, exactly one year from when Staton received the littering ticket on BANWR, he entered the courtroom again. This time, he asked Judge Guerin to modify or suspend his sentence while awaiting appeal from the Ninth Circuit Court. Judge Guerin rejected the request. She told Staton that if he no longer felt that it was appropriate for him to complete the 300 hours of

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<sup>9</sup> Civil initiative is the moral and legal justification of NMD’s actions as well as the foundation of the sanctuary movement. For further explanation, see Chapter 2.

community service, then he could serve double the amount of time behind bars. Six hundred hours equates to 25 days in prison. She quickly adjourned court by scheduling a probation violation hearing on December 21, 2009.

Shortly thereafter, on December 6, 2009, Staton sent out an email to the NMD coregroup listserv. He wrote:

[...W]e again packed the courtroom and asked the judge to re-consider its harsh punishment for my humanitarian community service. I presented the judge with evidence that the United States violates international law by employing strategies of deterrence to enforce the border. I told her that another 206 bodies were recovered from the Arizona desert this year. And I clearly said that this is an issue of international importance. I hoped we could soften the court. The court fired back that it didn't care about moral concerns for human rights and Magistrate Guerin denied my motion to postpone the community service until after the appeal. Not only was the court unyielding on the community service, but she added the extra threat of 25 days in prison if I don't do it. It was a clear message, and I take it seriously from a court that readily criminalizes and punishes thousands of migrants each year. From what I've heard, we are very close to getting some kind of agreement with the Department of the Interior that would allow us to put out water without the threat of littering tickets. This is no small achievement, and we should count it as a victory earned through out perseverance. The mission of No More Deaths is to end death and suffering in the desert. That's hard to do from a jail cell. I would rather

spend my winter break down along the border, putting out water and picking up trash like I've done in years past. So my answer to the judges' [sic] offer of prison time is simple: "No, but thanks anyways." My battle for human rights is not in the marble hallways of federal courts, or in the privately run prison in Florence, Eloy, and everywhere else along the border, but out among the yucca, ocotillo, and jackrabbits. (Staton "A Hard Decision")

Staton decided not to serve prison time, but his moral and philosophical objection to the sentencing did not go unnoticed: The Department of Interior put pressure on BANWR to come to an understanding with NMD, the "Basura 13" (the NMD volunteers who received littering tickets on July 9, 2009) had their trial date set for January 2010, but then had it postponed to April 2010, and Dan Millis, the NMD volunteer who received the first littering ticket, received news that the Ninth Circuit Court would finally hear his appeal in March 2010.

In Chapter 5, NMD volunteers learn the results of Millis' appeal hearing, BANWR's decision to permit one-gallon jugs of water for migrants, and once and for all, if humanitarian aid is still never a crime.

## CHAPTER 5

### LOCATING THE OPPORTUNITIES WITHIN THE RESTRICTIONS: MAKING CHANGE IN POSTMODERNISM

While Dan Millis, a No More Deaths (NMD) volunteer who was convicted of littering on September 21, 2008 for leaving one-gallon jugs of water on the Buenos Aires National Wildlife Refuge (BANWR), prepared for his second appeal hearing on March 2, 2010, NMD volunteers met and exchanged letters with BANWR officials. Over six months, from July 2009 to January 2010, the two sides met three times and nearly reached an agreement for how to prevent deaths in the desert while keeping the refuge clean. It was proposed that NMD volunteers could leave multiple one-gallon jugs of water on known migrant trails if the jugs were tethered together or tied to trees. That way migrants could fill up their own water bottles with the one-gallon jugs but could not take and discard them later, whereby reducing the amount of waste on the refuge. But then the talks stalled when BANWR officials published a map on their website, which showed that the refuge already had 55 “water sources.”

Several NMD volunteers, who were familiar with the area and were surprised to learn of the availability of water, printed off the map and drove to BANWR in search of the “water sources.” They were able to locate 26 of the sites and found that 22 of them were bone dry. On the map, there were 39 sites which were identified as stock tanks. The medical advisors that accompanied the NMD volunteers refused to consider those “water sources,” meant for roaming cattle

from nearby ranches, as potable water since the tanks contained giardia, cryptosporidium, and cattle feces.

In an interview with the *Arizona Daily Star*, refuge manager Mike Hawkes said that BANWR was “doing enough” to keep undocumented immigrants safe and had plenty of water for migrants, including the stock tanks. “That will save their life. It might make them sick. It might give them kidney failure or something later down the road. But it will save their life for the time being until they get to a road or something and get rescued” (Hawkes qtd. in McCombs “Water Drops”).

In mid-March of 2010 Arizona state Republicans pushed for a bill in the state legislature that would (officially) criminalize undocumented immigrants for their immigration status. Instead of deporting them for entering the United States without authorization, undocumented immigrants would be arrested for trespassing, a misdemeanor in Arizona punishable up to six months in jail (“Targeting”). The bill would allow police officers throughout the state to arrest anyone they deemed “suspicious,” i.e. lacked immigration papers.

A political firestorm raged across the state, with opponents suggesting that the bill would legalize racial profiling—arrests would be made solely on “skin color and accent” (“Targeting”)—and with a large population of Latinos living in Arizona, many “legal” US citizens would be harassed. Supporters of the bill suggested that the federal government had failed to deter and keep out undocumented immigrants from the state and thus, something needed to be done. On April 23, 2010, the controversial bill SB1070 passed. Protests erupted all over the state. Amidst the politically charged climate, the Basura 13 (thirteen NMD

volunteers who received littering tickets for leaving one-gallon jugs of water on BANWR on July 9, 2009) had their trial, which was already postponed to April 6, 2010, postponed again, indefinitely. Also, negotiations with BANWR came to a halt.

BANWR officials seized the moment to issue a press release on their website, in local newspapers, libraries and post offices, asking local citizens to determine “whether placement of water stations by humanitarian organizations on the Refuge will materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission” (Hoffman). BANWR ran what is called a “compatibility determination” and asked for public review. Throughout the highly combative month of April, letters and emails poured in. BANWR received over 1,100 comments from 811 people (McCombs “US”), 360 of which were a form letter created by NMD that suggested the one-gallon jugs of water placed strategically on migrant trails were necessary and life-saving (Hoffman). BANWR officials promised to review the comments and reach a conclusion by the end of the summer.

On September 2, 2010, Dan Millis received word that his littering conviction had been overturned. In a vote of 2-1 the Ninth Circuit Court of Appeals ruled that it was “ambiguous as to whether purified water in a sealed bottle intended for human consumption meets the definition of ‘garbage’” (Lacey). The successful appeal was a huge victory for NMD volunteers, validating their claim that clean water within the context of the Arizona desert is life-saving and not garbage. But the court’s decision over the definition of

garbage was so limited that if someone else left one-gallon jugs of water for migrants in the desert she or he might still be convicted of littering (Cohen). Millis was accused of the “disposing of garbage,” but had he been accused of “abandonment of property” he might not have won the appeal.

Two days later, on September 4, 2010, BANWR officials finally released the results of their compatibility determination. They decided that permitting 55-gallon drums of water to be placed near designated roads was compatible with their mission. The humanitarian group Humane Borders was granted permission by the refuge in 2001 to place three such drums but had not been allowed to place anymore since. The one-gallon jugs that NMD volunteers strategically placed along migrant trails were rejected. BANWR officials said that the jugs even if tethered together or tied to a tree could still be cut, carried, and discarded later. And, they argued that putting water on remote migrant trails “may actually promote passage through the refuge” (McCombs “US”).

William Walker, who defended Staton as well as Millis, contacted Staton. Because of Millis’ successful appeal, Staton and the Basura 13’s littering charges could be dropped. On January 11, 2011, 25 months after receiving a littering ticket for leaving humanitarian aid for migrants on BANWR, Staton’s charges were “vacated.” He sent an email to the NMD Coregroup listserv thanking everyone for their support and encouraging them to continue providing life-saving humanitarian aid. In closing he wrote:

Even though these littering tickets provided a good opportunity to bring more attention to the crazyness (sic) taking place at the border, I’m glad to



be done with it. I'm aware that we're still being threatened by BANWR—they want to use other laws, like abandonment of property, to mess with humanitarian efforts. I'm far more interested in continuing our efforts to make sure people are not treated like garbage, and that there's not a complete abandonment of human rights on the border. (Staton)

The struggle for social justice on the border is on-going. The racist and xenophobic law passed by the Arizona state legislature was later blocked by a federal judge. BANWR officials have yet to allow Humane Borders to place a new 55-gallon drum on the refuge. US Fish and Wildlife officers continue to threaten humanitarians with abandonment of property littering tickets. But at least for now, humanitarian aid is and continues to be not a crime.

This study has focused on several areas important to the field of rhetorical studies: postmodern rhetorical agency, publics and counterpublics, the rhetorical situation, and rhetorical effect. In this final chapter, I summarize the most significant points from this study, examine possible contributions to the field, and propose new areas of inquiry that would help develop a better understanding of postmodern rhetorical agency.

### **The Power of Rhetoric**

The first significant point from this research comes in Chapter 1 when I explore the rhetoric of the word “illegal” within the context of US immigration. The word “illegal” on its own connotes “criminal activity,” and when applied to the word “immigrant” suggests that a person, an “illegal” immigrant, is a criminal. However, an “illegal” immigrant has not committed a crime. He or she

can be deported for not being authorized to immigrate into the United States and not having the proper immigration documentation as proof of authorization, but he or she cannot be arrested for a crime solely on immigration status. SB1070 made living in Arizona without immigration documentation a misdemeanor but was later blocked in federal court. Nevertheless, the rhetorical marker “illegal” implies criminality, and regardless of the law, “illegal” immigrants are treated like criminals.

In Chapter 1, I analyze the complex history of the “illegal” immigrant. For nearly 150 years, it was not “illegal” to enter the United States without documentation, but with the passage of key immigration laws in 1917, 1921, and 1924 and the crash of the US economy in 1929, entering the US from Mexico without authorization became “illegal.” However, once the US became involved in World War II and white, native-born US citizens left the country to fight overseas, there was a need for temporary laborers. In 1942, Congress created the Bracero Program where growers could import temporary laborers from Mexico “legally” to fill the labor shortage. The “braceros” signed a contract that guaranteed work, minimum wage, transportation, and housing but also required that once the growing season was over that they immediately return to Mexico. The United States and Mexico both economically benefited from the Bracero Program, the former receiving cheap labor, the later receiving millions in remittances.

In addition to US laborers being redirected to the war effort, so were US goods. The redirection opened a space for imports, and again, the US turned to

Mexico. The Mexican government launched a large-scale agricultural operation, aimed directly at the US for export, and sparked the “Green Revolution,” which resulted in the “Mexican Miracle,” where the Mexican economy grew by six percent every year for twenty years. While seemingly successful for the Mexican government, the Green Revolution had devastating effects on small farmers. They could not compete with the state-run operations, went bankrupt, and flooded the urban centers for work. Once the cities were saturated, these poor and desperate farmers had no other choice but to sign-up for the Bracero Program, taking them hundreds of miles away from their families, for months at a time, to perform backbreaking labor.

This set of circumstances, the US’s need for cheap labor and cheap goods and Mexico’s desire to meet those demands for quick economic gain, manufactured a poor, desperate population that was willing to work any job, anywhere, for any amount of money. Their labor generated easy capital for the US and Mexico, and both countries wanted to maintain this strong source of revenue, so they worked to maintain the conditions that produced this desperate population over time. The problem was that circumstances changed. Wars ended. Needs shifted. But both countries were determined to sustain the conditions that produced the desperate poor. By the end of 1950s, the majority of the US agricultural workforce were braceros, yet for the first time, many of the poor and desperate who applied in Mexico for the program were turned away. There were simply not enough positions. However, they were still desperate, still in need of work and so decided to cross the border anyway, on their own, without

authorization or documentation from the Bracero Program. They were “illegal” immigrants.

The “legal” system that manufactured the desperate poor for the US and Mexico’s economic gain produced “illegal” immigrants. And once “illegal” immigrants entered the United States “illegally,” they were welcomed by growers. Unlike braceros, growers were not obliged to uphold any contract for “illegal” immigrants, did not have to pay a set wage, did not have to pay for transportation or housing. Growers could pay “illegal” immigrants as little as laborers would accept and could fire them (deport them) at any time. Often times, the mere threat of deportation could generate higher production for less pay. The drop in pay lowered the wage for all laborers and increased the profits of growers. The United States benefited from the profits and Mexico continued to benefit from the remittances. However, unlike braceros who were required to leave after the growing season, “illegal” immigrants stayed, brought their family and supported them by working other odd-jobs throughout the year.

After the Bracero Program officially ended in 1964, the US and Mexican governments still continued to maintain the conditions that produced the desperate poor. Mexico launched the Border Industrialization Program in 1965, which permitted the construction of *maquiladoras*, assembly plants run by US companies but employed by Mexicans on the Mexican side of the border. US companies could import materials, supplies, and machines duty-free, have goods assembled for 75 percent less of the labor costs, and then ship the finished product back into the US for a nominal fee to sell in the US market for a huge profit.

Initially, both sides again profited greatly, but throughout the 70s and 80s wages for Mexican workers' wages began to drop. Heads of households could no longer support their families on such plummeting wages, so in turn traveled north, "illegally," desperate for higher paying jobs. Then, with the passage of NAFTA in 1994, when the US fruits and vegetables market opened its doors to Mexico, while Mexico permitted US grain imports into its grain market, over a million small farmers in Mexico went bankrupt. Without anywhere else to turn, just like the bankrupted farmers during the 1950s, they migrated north, "illegally," desperate for work.

Maintaining the conditions for the production of the desperate poor was two-fold. First, the US needed to attract cheap labor, so it created a situation with the help of Mexico so restrictive and that the only seemingly reasonable option would be for the desperate to migrate north. Second, the US needed a mechanism to limit labor in order not to saturate the market; it appropriated the "illegal" marker from the category of immigration to the category of labor. An "illegal" immigrant can be deported, and when the "illegal" marker is placed on a laborer, he or she too can be deported. This instant firing (deporting) without repercussion or fall out from unions was extremely valuable for maintaining high levels of capital gain. The Border Patrol was tapped, naturally, to enforce these deportations. During times of economic downturn the Border Patrol could "crack down" on "illegal" immigration. The deportation of a large labor force, cut labor costs and provided jobs for native-born US citizens. The rhetoric of "illegal" used in this way translates into high profits for the state.

During the early 90s a border enforcement policy was put into place to severely limit “illegal” immigrants (and their cheap labor) from entering into the US. The policy funneled border crossers who would normally enter through California and Texas into the harsh geography of the Arizona desert. The “funnel effect” promised that the harsh conditions would deter “illegal” immigrants from crossing, but it did not. The desperate poor continued to cross, and the number of deaths in the desert continued to climb. However, despite these deaths, the Clinton, Bush, and Obama administrations continued to maintain the policy without a public outcry.

The border is what Agamben calls a “state of exception,” where law is suspended and anything goes. The rhetorical marker “illegal” permits this state of exception. It reduces the desperate poor from Mexico to “bare life,” disposable laborers who are not Americans, who perform the backbreaking jobs that “no one else will do” for little pay, and who can be replaced easily. They are expendable. Moreover, the “illegal” marker constructs the desperate poor as criminals, as undesirables, and so if they die, succumb to the perilous conditions of the Arizona desert, it is without consequence. Their lives have little worth.

The rhetoric of “illegal” within the context of immigration in the US hides the truth that undocumented immigrants are humans who have been made poor and desperate by a 75-year-old system put into place and maintained by the United States and Mexico for the sake of higher profits. These humans are sacrificed for capital gain. The rhetoric of “illegal” is powerful and when corrupted and unchecked can do considerable harm and even kill.

## **People are Powerful**

The second significant point from this research comes in Chapter 2, when I explore the roots and early beginnings of NMD. NMD volunteers are ordinary people. Their ages range from 18 to 80. They are medics and ministers, teachers and nurses, students and retirees, computer programmers and social workers. They volunteer for NMD for a variety of reasons, but the one that binds them together is the belief that all humans should be treated fairly and with respect and should not suffer and die because of immigration status. This stance on social justice and human rights holds a space in discourse and serves as a relation among strangers that draws people together, making NMD a public. Every year, hundreds of people traveled from all around the nation to volunteer with NMD during the spring and summer months.

The US Border Patrol is a larger state-sponsored public that ranks immigration status as its top priority. Agents are persuaded by and reinforce the rhetoric of “illegal.” They act upon the notion that “illegal” immigrants are disposable criminals, not valued humans, who could be abandoned to the extreme conditions of the Arizona desert to suffer and die or should be apprehended and treated like criminals to deter them from crossing again. The Border Patrol is well-funded and supported heavily by both political parties. Their actions have been instrumental in maintaining cheap labor for high profits. Nevertheless, NMD, a group of ordinary people, has subverted the state through their rhetorical actions in two ways.

One, NMD volunteers, who provide direct humanitarian aid to undocumented immigrants suffering in the desert, are counterhegemonic texts; their physical actions counter the physical enforcement of Border Patrol agents. Instead of abandoning border crossers to die, like the rhetoric of “illegal” permits, NMD volunteers attempt to keep them alive. In other words, the humanitarian actions of NMD volunteers make visible the effects of state power, that “illegal” immigrants are suffering and dying and are in need of emergency medical care.

Second, NMD volunteers take their experiences of encountering and attending to the needs of undocumented immigrants suffering in the Arizona desert, suffering because of destructive US immigration and border enforcement policies, and circulate them as narratives through NMD’s website or newsletter, on speaking tours at college campuses or houses of worship, or in newspapers online or in print as letters-to-the-editor or feature stories. These narratives have agency and powerful rhetorical effects because they challenge the reified discourse of state power. The narratives’ common theme, that “illegal” immigrants are not “criminals” but instead are “abused humans,” abused by the effects of an inhumane border policy, is an alternative to state hegemony; it counters the state.

Even though subjects are more restricted than previously thought, as per the postmodern critique, they can still act and effect change. NMD as a group of ordinary people operates as a public and a counterpublic, subverting the state with their physical and rhetorical actions.

**There are Opportunities for Change**



The third significant point from this research comes in Chapter 2 and Chapter 3. In Chapter 2, I explore Derrida's postmodern theory that language is unstable, that no matter how much we attempt to keep language stable with definitions and meanings, it shifts. Words are imbued with difference and contexts are always changing, so with each citation and iteration in a new context, an utterance is slightly different.

Nevertheless, we attempt to stabilize language by reinforcing definitions through each context shift. The state, for instance, has been reinforcing the rhetoric of "illegal" for the past 75 years. With each context shift, the state renegotiates the definition of "illegal" so that the system which produces the desperate poor continues to be maintained. In the 1950s, during the Bracero Program, "illegal" immigrant meant "a bracero without a contract," but in the 1960s it shifted to "deportable labor," which encouraged US growers to pay workers at a lower wage and fire (deport) them without union oversight. In recent years, the system has been maintained by reinforcing that an "illegal" immigrant is a "criminal," a "drug smuggler," a "human trafficker," or even a "terrorist." However, with each one of these iterations, there is an opportunity to challenge and change the definition. NMD volunteers, as rhetorical agents, have been able to identify those opportunities and reconstruct those definitions in order to disrupt the state's dominant discourse and oppressive system of death and profit.

During Walt Staton's littering trial in Chapter 3, both lawyers, William Walker for the defense and Lawrence Lee for the state, negotiated and renegotiated definitions. Barbara Biesecker's logic of articulation allowed me to

analyze this postmodern rhetorical situation, a site which made visible the history of decentered subjects and the continued production of their subjectivities. The subjectivities of the Border Patrol agents, US Fish and Wildlife officers and Walt Staton himself, were constructed and reconstructed several times by Walker and Lee. The credibility and ethos of these witnesses were challenged and strengthened numerous times. Meanings were deconstructed and reconstructed only to be rearticulated in new contexts.

For example, the definition of the one-gallon jugs of water was hotly contested. If the jugs were defined as litter, then Staton and NMD were considered to be litterers and criminals and the state as protectors of the environment. But if the jugs were defined as water, then Staton and NMD were considered to be heroes for trying to save undocumented immigrants from dehydration in the desert and the state as criminal for upholding such a destructive border enforcement policy. Since contexts are constantly changing and impacting how words are cited and reiterated in difference, both lawyers tried to control the context of the case. Walker framed his questions within the context of a humanitarian crisis, where migrants were suffering, where the desert was unrelenting, and where death by dehydration and exposure was common. Framing his questions in this way cued answers which helped define the jugs as water, as life-saving material, and thus not litter. Lee redirected these questions, stripped the context of the desert away, and provided a new context, one which illustrated the polluted refuge that was meant for wildlife and plants. In this context, the jugs

were seen as plastic garbage contributing to the already trashed-filled environment.

The failure of Walker to “win” the case is not nearly as important as his attempt to do so. He identified the rhetorical opportunities when the state needed to reinforce its rhetoric. He stepped in and negotiated his (Staton and NMD’s) rhetorical agency with the state. He was severely restricted in his rhetorical ability, though. He was not allowed to call certain witnesses (other humanitarians who would have been able to establish the context of the crisis in the desert), not allowed to present certain evidence (state officials and local hunters littering on the refuge), and was not allowed—objected by Lee and sustained by Judge Guerin—to expose the true nature of this trial (to maintain the system of deportable labor and to penalize those who attempted to disrupt it). Yet, within those restriction, he still found rhetorical opportunities, a concrete example of a postmodern rhetorical agency.

### **People Can Make Change**

The fourth and final significant point from this research comes in Chapter 4, when despite Staton’s guilty verdict, NMD volunteers were still able to make a change. I examined how the dominant discourse within the immigration debate was racist and xenophobic and circulated widely among local publics before (and immediately after) Staton’s trial. However, the rhetorical actions of NMD volunteers in the 10 weeks after Staton’s trial contributed to an increase of alternative discourses after his sentencing. NMD volunteers had this rhetorical effect because they made several rhetorical moves.

Knowing that their rhetorical agency was restricted with Staton's conviction—being marked a criminal does not generate a strong ethos—they created a coalition of humanitarians and faith-based citizens. NMD was able to circumvent the guilty verdict and appear strong, having the support of others credible publics. Next, they positioned BANWR to respond to the humanitarian crisis. In the courtroom, Walker was in a constant context tug-o-war with Lee. Outside the courtroom, NMD could control the context. They could define the issue as a humanitarian one, where water is life-saving humanitarian aid, and where the state-sponsored organization that restricts that life-saving aid (BANWR) needed to respond. Calling for a meeting with BANWR officials forced BANWR to act on NMD's terms and making this call during a press conference held BANWR and NMD accountable for their actions.

NMD volunteers could have perceived the inability to establish a meeting with Hawkes as a failure, but they recognized an opportunity through this restriction. Backing up their words with actions, providing humanitarian aid on BANWR in July, one of the deadliest months of the year, strengthened their position and ethos. And Hawkes' failure to meet with NMD created the perception, which circulated through the media, that NMD volunteers had no other choice but to act; their actions were seemingly justified. Once they acted, placed jugs of water in the desert, US Fish and Wildlife officers, wanting to maintain their position and ethos, needed to ticket the humanitarians. The rhetorical performance attracted the media, and the visual footage of religious leaders and school teachers and nurses having their water confiscated was

compelling, so compelling that the Secretary of the Interior asked NMD volunteers to meet with him in Washington DC. Not only did Hawkes publicly look bad, his ethos was damaged by having his boss meet with NMD volunteers instead of him, but NMD's alternative discourse circulated on a national scale.

During this time, NMD volunteers were also able to gain letters of support for Staton from high-profile, credible organizations. Not only did the credibility of the Sierra Club and the Center for Biological Diversity help strengthen NMD's ethos, but it allowed NMD's humanitarian and human rights discourse to circulate through these organizations. Environmentalists who may have previously recognized Staton's actions as polluting would now reconsider their position. Ecoconscious individuals would begin to see the border and the immigration debate through NMD's humanitarian framework.

Warner tells us that publics are sustained through attention, and even though Staton's sentence was not initially dismissed, his actions and the actions of other NMD volunteers garnered considerable local and national attention. National publications like the *New York Times*, the *LA Times*, and CNN picked up Staton's story, including NMD's alternative discourse and circulated it again on a large scale. That attention helped bring more people to NMD's space in discourse. Thus, it was not surprising to see so many local publics utilizing a humanitarian and human rights discourse after Staton's sentencing. However, as Derrida argues, the destabilizing forces of differ $\acute{a}$ nce will not keep this alternative discourse anchored. It must be, just like the rhetoric of "illegal," continuously

reinforced, and the state will seek to disrupt it, most likely in the form of more littering tickets via an abandonment of property charge.

### **New Areas of Inquiry**

This study attempted to fill a gap in the rhetorical agency debate. The contemporary debate, which I covered extensively in Chapter 2, has revolved around abstractions and definitions. This study sought to provide a concrete example of rhetorical agency after the postmodern critique. There are many examples in the literature of modernist and humanist agency (Kneupper, Birdsell, Ling) to support and expand these respective theories but not a postmodern one. The example of NMD, negotiating their rhetorical agency with the state to subvert the state—despite restrictions in the form of resources, power, and influence—is compelling and worthy of rhetorical theorists' attention. This study of postmodern rhetorical agency was not meant to resolve the agency debate but to move the discussion to a more productive space where scholars articulate theory and practice by examining the operation of power in tangible, complex and fluid rhetorical situations.

With any study, there are limitations. While I feel as though I have provided an extensive example for how agency works, how publics and counterpublics interact and negotiate power, I was unable to provide an in depth analysis of how NMD volunteers invent their rhetorical strategies, construct their narratives for public consumption, and circulate their counterhegemonic discourse through the media. I have attended meetings and volunteered for NMD for over two years. Yet I have been unable to attend every strategy meeting in every

working group. To compliment this study, which mainly documented the operations and effects of NMD negotiating their rhetorical agency, it would be appropriate and useful to the field to research NMD's invention activities. NMD works by consensus. At every Monday night meeting, there are lively discussions with regards to strategy. While on the surface, it may seem as though the plans of action come about organically, the process is much more complicated. There is a considerable amount of negotiation of agency within the group. Articulating and evaluating this invention process would be difficult but worthwhile and would provide insight into how rhetors can better identify the opportunities within the restrictions of postmodernity and engage audiences at the right moments in the right contexts.

Another area I was unable to examine but wish to do so in the future deals with how NMD volunteers collect, craft, and circulate narratives. Since immigration in the US and particularly Arizona is so politically explosive, NMD steers clear from traditional "rational" argumentation. Instead, they tell stories. They don't theorize about the border or observe the border from a distance; they walk through the desert and experience the gruesome, frightening, and raw injustices that constitute the borderlands. They then collect those experiences and craft them into narratives. They tell these stories of migrants suffering and struggling to survive to college students, the religiously inclined, and journalists. The rhetoric of their narratives is never overt is always compelling. The stories bring people in—regardless of where they stand on immigration—and challenge them. People listen. And those stories shift the focus from immigration status to

human life. Ultimately, the narratives are conversion stories; listeners are in one place politically before the story, hear the challenging narrative in which they must choose to remain in their position or undertake a new position, and are changed in the way they think about immigration issues. A study focusing on “the writing process” of these rhetorical narratives would be a rich and beneficial to public rhetoric scholars and compositionists who are looking for ways to make change in their local communities with their students.



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APPENDIX A  
MEMO OF UNDERSTANDING

**MEMORANDUM OF UNDERSTANDING  
BETWEEN THE UNITED STATES  
DEPARTMENT OF THE INTERIOR, NO  
MORE DEATHS AND TUCSON SAMARITANS**

**WHEREAS, hundreds of children, women and men die every year crossing the Arizona desert; and,**

**WHEREAS, the United States Department of the Interior acknowledges that this is an extraordinary situation which warrants extraordinary intervention strategies which are designed to reduce unnecessary human suffering and death; and,**

**WHEREAS, No More Deaths and Tucson Samaritans are uniquely qualified to provide food and water to persons in distress on shifting migrant trails; and,**

**WHEREAS, the United States Department of the Interior, No More Deaths and Tucson Samaritans are committed to removing trash from public lands;**

**THEREFORE, the United States Department of the Interior agrees that No More Deaths and Tucson Samaritans shall place water and food on public lands critical to human safety; and,**

**THEREFORE, No More Deaths and Tucson Samaritans agree to remove no less than twice the aggregate amount of food and water left on public lands through an organized trash removal plan; and,**

**THEREFORE, the United States Department of the Interior will provide a suitable receptacle and disposable bags wherein No More Deaths and Tucson Samaritans volunteers will place trash; and,**

**THEREFORE, the United States Department of the Interior agrees to dismiss all pending citations against No More Deaths and Tucson Samaritans volunteers for activities conducted in association with providing food and/or water for persons in distress; and,**

**THEREFORE, the United States Department of the Interior agrees to issue no more citations for activities conducted pursuant to the Memorandum of Understanding; and,**

**THEREFORE, No More Deaths and Tucson Samaritans agree to report in writing on a quarterly basis, commencing 90 days from the signing of this document, the number of water bottles left and the number of bags of trash removed per week; and,**

**THEREFORE, the United States Department of the Interior, No More Deaths and Tucson Samaritans will each designate a representative to serve as a point of contact for communication and management of this emergency effort.**

## **SIGNATURES OF AUTHORIZED PARTIES**

**This Memorandum of Understanding is signed this \_\_\_\_\_ day of August, 2009 by the authorized persons whose names appear below. This Memorandum of Understanding shall take effect upon signature by authorized persons from the United States Department of the Interior, No More Deaths and Tucson Samaritans.**

\_\_\_\_\_  
**For the United States Department of the Interior**

\_\_\_\_\_  
**For No More Deaths**

\_\_\_\_\_  
**For Tucson Samaritans**



APPENDIX B

LETTER FROM CENTER FOR BIOLOGICAL DIVERSITY



July 27, 2009

The Honorable Jennifer Guerin  
Magistrate Judge  
United States District Court  
405 W Congress St #3180  
Tucson, AZ 85701

Dear Judge Guerin,

The Center for Biological Diversity is very concerned with environmental issues in the Arizona-Mexico border region. Over the last twenty years, we have advocated and litigated on behalf of various species and their borderlands habitats, including jaguar, cactus ferruginous pygmy owl, Sonoran pronghorn, and numerous others.

The Center has been particularly alarmed in recent years at the impacts of activities in the borderlands related to illegal immigration. However, we see the problem of trash left along migrant trails to be a relatively minor problem in the grand scheme of things. The pernicious effects of border wall construction and other enforcement activities threaten to sacrifice the integrity of our precious border ecosystems for a policy that not only fails to solve the problem, but in fact demonstrably worsens it. Migrants continue to be pushed further into remote, environmentally sensitive areas such as the Buenos Aires National Wildlife Refuge, and enforcement activities follow, with disastrous results for border species and habitats.

The last thing we wish to see is human rights pitted against environmental concerns in this matter. What is needed is a reformed policy that manages immigration from Mexico in an orderly and legal fashion, a policy that protects the environment as well as the lives of migrants.

We support the work of humanitarian groups and determined volunteers such as Walt Staton who work to save human lives in the midst of the failure of the federal government to produce such a policy reform. We are intimately familiar with the work of No More Deaths, and it is our understanding that they regularly remove more discarded materials from the areas they patrol than they leave behind in the form of life-saving water bottles.

We urge you to carefully consider the context of this situation in deciding Mr. Staton's fate. Trash is ephemeral—it can be cleaned up, as No More Deaths volunteers demonstrate—and it really is just a small part of the damage being done to our nation's natural resources as a result of a misguided and failed federal policy.

Sincerely,

Randy Serraglio  
Conservation Advocate

APPENDIX C

LETTER FROM SIERRA CLUB



Friday, July 24, 2009

The Honorable Jennifer Guerin  
Magistrate Judge  
United States District Court  
405 W Congress St #3180  
Tucson, AZ 85701

Dear Judge Guerin,

As the oldest and largest environmental conservation organization in the United States, the Sierra Club has a particular interest in the integrity of protected areas such as the Buenos Aires National Wildlife Refuge. The preservation and protection of endangered species such as the masked bobwhite quail, for which the Refuge was founded, is of utmost importance.

However, we do not believe that preserving imperiled species and the lands that support them is at odds with the efforts of border humanitarian groups such as No More Deaths. Flooding, erosion, sedimentation, habitat loss and fragmentation all pose legitimate and serious threats to those species we seek to protect. We do not regard individuals leaving jugs of clean water as a comparable threat, or frankly, as much of a threat at all.

The Sierra Club has organized a Borderlands Team on a national level that stays abreast of border issues. Tragic, unnecessary migrant deaths, as many as 124 of which may have occurred in Arizona's borderlands this fiscal year alone, are a serious problem. The Sierra Club supports the actions of Walt Staton and other humanitarian groups who attempt to save the lives of undocumented migrants in the desert by leaving jugs of clean water at strategic locations along known migrant trails. They later return to check on the water and to remove garbage. These lifesaving actions do not constitute a threat to the environmental integrity of the Buenos Aires National Wildlife Refuge, but rather are of benefit to it.

Mr. Staton is a first-time offender who sought no personal gain in his attempts to save life and remove trash from the Buenos Aires National Wildlife Refuge and surrounding areas. A lifelong Arizona resident, longtime humanitarian volunteer and former employee of an Arizona environmental conservation organization, Mr. Staton understands the environmental and humanitarian crisis facing our borderlands. As much leniency as possible would be appropriate when considering a sentence.

Sincerely,

Athan Manuel  
Director of Lands Protection  
Sierra Club

APPENDIX D

LETTER FROM WALT STATON

November 2, 2009

Honorable Jennifer Guerin:

I am writing to inform the court that I will not be completing the 300 hours of community service and to request a modification in the sentence given to me on August 13, 2009.

To explain my decision, I would like to provide clarification to the court about the intent of my actions. The court characterized my actions as “civil disobedience” at the August 13th sentencing, and also used similar language during the proceedings of the trial. This is inaccurate, as civil disobedience refers to actions that intend to expose an unjust law by deliberately breaking that law. On December 15, 2008, I had no intention to violate the laws of the United States. As I testified on June 4, 2009, I do not believe the federal statute regarding littering is unjust, and I do not wish to challenge or change that law, as civil disobedience would suggest.

Instead, my actions are better classified as “civil initiative:” When a government fails to respect and protect basic human rights—or, worse, is itself a violator—it is the responsibility of citizens to act in defense of those rights.

It is my belief that the United States is currently in violation of international human rights law. In a petition put before the Inter-American Commission on Human Rights in February of 1999, the United States was accused of being responsible for violating Article I of the American Declaration of the Rights and Duties of Man. “The Petitioners claim in particular that the United States has organized and implemented its immigration and border control policies in a way that has knowingly led to the deaths of immigrants seeking to enter the United States, in violation of Article I of the American Declaration and the principle good faith and the abuse of rights doctrine.”<sup>i</sup>

A report released by the American Civil Liberties Union on October 1, 2009 titled “Humanitarian Crisis: Migrant Deaths at the U.S.-Mexico Border” outlines the development of U.S. border policy from Operation Gatekeeper in 1994 to its current status. They summarize the issue in the introduction:

Under international law, the right to life has to be guaranteed at all times and under all circumstances. This right is violated not only when a life is deprived due to the arbitrary actions of a State, but also when actions are not taken to protect life. In enacting border and immigration policies, nations have the sovereign prerogative to protect their territorial integrity and defend their citizenry. That power, however, is restricted and constrained by international obligations to respect fundamental human rights. Unfortunately, these restraints have not precluded the U.S. government from deploying deadly border enforcement policies and practices that, by design and by default, lead to at least one death every day of a migrant crossing the border.<sup>ii</sup>

An advisory opinion issued by the Inter-American Court of Human Rights in 2003 strongly condemned the United States’ inhumane border policy:

The death of almost two thousand Mexican and some Central American migrants is the strongest evidence that the United States has violated and continues to violate human rights by maintaining the so-called “Operation Guardian [Gatekeeper].” This thesis is strengthened by the fact that a report of the United States General Accounting Office expressly recognized the link between “Operation Guardian” and the deaths of migrants.<sup>iii</sup>

Working within the framework of civil initiative, my decision to place sealed gallon jugs of water along trails used by migrants to cross remote areas of the Sonoran desert should be understood as

an attempt on my part to uphold international human rights law, specifically the right to life. At the close of the 2008-09 fiscal year on September 30, 2009, the number of bodies recovered along the U.S.-Mexico border in Arizona increased, while the number of Border Patrol apprehensions dropped. This increase in death also occurred with an increase in agents and infrastructure along the border during those 12 months. The simple truth is that US border enforcement strategy intentionally leads to the suffering and death of migrants—a clear violation of human rights—and it is getting worse.

In addition to the human rights perspective, I am called as a person of faith and conscience to participate in the humanitarian efforts of groups like No More Deaths. Our activities over the past six years have helped prevent the deaths of hundreds of individuals. The locations where I placed the jugs of water are serviced at regular intervals in order to replenish any water taken, clean up discarded jugs and other trash, and to continually assess the usefulness of that location. The evidence presented at the June trial showed that I was doing all three of these things in good faith and that my actions were intended to provide humanitarian assistance to individuals in the desert, not to “knowingly” break any laws.

Given the above philosophical and moral reasons, I do not believe it is appropriate for me to undertake the task of completing the 300 hours of community service assigned by the court. At this point, I will not complete any amount of community service, nor pay any amount of fines.

I invite the court to re-consider its sentence in light of the undeniable humanitarian crisis unfolding along the U.S.-Mexico border. My hope is to finish out my seminary education and become ordained as a minister to serve faith communities, which in my view is a lifelong commitment to community service. I also hope to see the United States change its border enforcement policy to, at the very least, come in compliance with fundamental human rights. I will continue working with humanitarian organizations until that shift in policy occurs and the death and suffering ends.

Thank you for your time and consideration in this matter. The court’s compassion and understanding would go a long way in helping end this human rights crisis.

Sincerely,

Walter E Staton

#### Endnotes

i Inter-American Commission on Human Rights, Report No. 104/05, Petition 65/99, p.1, paragraph 2, <http://www.scm.oas.org/pdfs/2006/CIDH%20REPORT/67.USA.65.99INADM.ENG.doc>.

ii American Civil Liberties Union of San Diego and Imperial Counties, “Humanitarian Crisis: Migrant Deaths at the U.S.-Mexico Border,” (October, 2009), <http://www.aclu.org/immigrants/gen/41186pub20091001.html>, 7.

iii Inter-American Court of Human Rights, “Juridical Condition and Rights of the Undocumented Migrants,” Advisory Opinion OC-18/03, September 17, 2003, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003).

## BIOGRAPHICAL SKETCH

Steven Accardi was graduate student at Arizona State University from 2006-2011 in the Department of English, specializing in Rhetoric and Composition. Starting in the fall of 2011, he will be an Assistant Professor at Pennsylvania State University-Hazleton.