

Abstract

“SURPRISE! YOU’RE DEAD!” THE DEEPWATER HORIZON DISASTER AND  
OPENING STATEMENTS IN THE COURT OF PUBLIC OPINION

by

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This dissertation explores the ways in which various powerful groups used different genres of opening statements to create and control the version of the reality of a high stakes situation, namely, the April 20, 2010 Deepwater Horizon disaster. Specifically, in the dissertation I identify and analyze the features and rhetorical moves that typify the genres of legal and non-legal opening statements, and focus on the communicative dynamics that define interactions between speakers and audiences in court opening statements, Congressional opening statements, and public press conference statements. I use critical discourse analysis and genre analysis to pinpoint the rhetorical moves used in each genre of opening statements. I make the claim that legal court opening statements use epideictic rhetoric to convince decision makers to act in a particular way. I also make visible the connections that exist between technical and professional communicators and the development of corporate business texts, focusing particularly on positive changes needed in the field, including increased participation in the *construction* of texts for businesses, and need for using their experience, expertise and ethics to also advocate for the common good.

*Keywords:* opening statements, epideictic rhetoric, technical and professional communication, primacy, critical discourse analysis, genre theory



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by

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## CHAPTER 1: INTRODUCTION AND BACKGROUND

*“In a word, the goal is to ‘civil-ize’ technical communication by disengaging it from its origins in, and bondage to, industrial-bureaucratic practice and recuperating it under the aegis of rhetoric as deliberative discursive practice, democratic in spirit and practice and focused on human needs and concerns” (Ornatowski and Bekins, 2004, p.252).*

The epigraph above is from Ornatowski and Bekins’ 2004 article “What’s Civic about Technical Communication? Technical Communication and the Rhetoric of ‘Community’” which appeared in *Technical Communication Quarterly*. The authors’ theme was that of our field’s growing interest in the relationship between technical communication and the “quality of public life” (p. 251). In particular, the authors quote David Donnison’s (2001) thoughts on the realization that through science and technology, people have a “greater capacity to create—and destroy—their own communities, along with the values that govern their development and the environment in which they survive” (p. 221). I forward these concerns and others to my own study in this dissertation about the ways various groups struggled to control the reality of the Deepwater Horizon (DWH) disaster, the worst oil spill in the history of the United States.

This dissertation examines the genre of opening statements. In the legal context, an opening statement<sup>1</sup> is given by an advocate (attorney<sup>1</sup>) of a party at the beginning of a trial as a preview of the evidence to be presented to fact finders (decision makers) at trial. Other statements commonly referred to as an opening statements include public press conference statements such as a presidential press conference (Covello, 2003; The White House, 8/28/14), or

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<sup>1</sup> The words “attorney” and “lawyer” are often used interchangeably, but according to the American Bar Association, an “attorney” is the term used for one who passed the Bar exam. A “lawyer” is defined as one who has completed law school, but has yet to pass the Bar exam (LaMance, (2014). In this dissertation, I will refer to the parties’ legal counsel in the DWH trial and in general as “attorneys.”

Congressional opening statements, such as those made by Congressional members or individuals at the start of an inquiry to introduce a subject or outline an approach to an issue (Sachs, 2003).

My research is from the perspectives of my position as both a doctoral candidate in technical and professional discourse and as a legal professional with twenty years of experience in civil litigation, as well as the disciplinary and theoretical perspectives that structure my dissertation. Initially, I planned to look at various opening statements relevant to one event in order to examine the ways in which various speakers in this case used the power of constitutive rhetoric over time to win over a questioning and possibly hostile public, both in the early days after a disastrous event, and up to the time of presenting value-laden opening statements in a civil trial.

I came to understand that each type of opening statement was bounded by rules, professional and social, and that these rules necessarily affected the content, delivery and goals of the statements. Therefore, each type of opening statement had to be understood as a distinct genre despite sharing a common name. It also became more important to include a critical discourse analysis approach to my analysis in order to understand the motivations behind the ways the statements were created for particular audiences, and the social context of their delivery.

It is also essential to understand the rhetorical concept of *kairos*, as it relates to the appropriateness and timeliness of the opening statements. Although *kairos* is an essential component to rhetoric, Kinneavy (2002) uses Aristotle's explanation that "its function is not so much to persuade as to find out in each case the existing means of persuasion" (p. 66).

According to Kinneavy (2002), law is *kairotic* "when it is applied in particular circumstances, at

specific times, to specific situations” (p. 66). Kairos is part of the importance of primacy, which I will discuss later in this chapter.

I also realized during my analysis that court opening statements in the DWH trial demonstrated the characteristics (form, structure, purpose and delivery) of *epideictic* rhetoric. Legal opening statements are part of every trial process, criminal and civil, and have been traditionally categorized as forensic rhetoric. But opening statements do not constitute evidence and trial attorneys cannot use them to argue the merits of their client’s case. Instead, attorneys use their legal and rhetorical skills to not only preview the evidence in a trial to decision makers but also to frame it in the light most favorable for their clients.

Courtroom pleadings<sup>2</sup> and speeches involving accusations and defenses of individuals are traditionally associated with Aristotle’s conception of forensic rhetoric (Herrick, 2009, p. 84). However, I argue in this dissertation that an epideictic court opening statement balances an emotional appeal with a logically constructed framework. Further, the literature has traditionally associated epideictic rhetoric with the goal of encouraging others to form or revise their beliefs and opinions, but not with the goal of action (Herrick, 2009; Kennedy, 1994). Yet as I will discuss later in this chapter, studies have consistently shown that jurors make up their minds about cases *immediately after* [emphasis added] they hear the opening statements. According to *Black’s Law Dictionary* (2001), a “jury” is defined as “a group of persons selected according to law and *given the power* [emphasis added] to make a formal finding of fact” [verdict] (p. 387). Hence, I argue that epideictic legal opening statements also motivate decision makers to *act* in the context of their only purpose/duty at a trial: to decide on a verdict (or *not* to decide as in the case of nullification).

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<sup>2</sup> A “pleading” is a “formal document in which a party to a legal proceeding (especially a civil lawsuit) sets forth or responds to allegations, claims, denials, or defenses” (*Black’s Law Dictionary*, 1996, p. 531).

Subsequently, if trial opening statements do not operate in the ways that we usually believe courtroom discourse works, and given the ways that these trial opening statements attempt, through epideictic moves, to establish a shared reality for jurors/decision makers to ratify, I wondered if these texts might have more in common with the other non-legal genres of opening statements such as public presidential press conference opening statements (what I am calling “public statements”) and opening statements made before Congress (“Congressional opening statements”). For example, the use of certain legal rhetorical moves in a text is often considered to be limited to the professional legal community whose members create them. However, these moves may actually be thought of instead as common *rhetorical* moves that happen to have a particular significance in legal settings, but can be also be thought of as symmetries that appear in other, less specialized contexts of public understanding.

For example, Shermer (2006) reported on a 2006 study conducted at Emory University by psychologist Drew Weston on confirmation bias as it applied to politics. He quoted Weston as follows:

Essentially, it appears as if partisans twirl the cognitive kaleidoscope until they get the conclusions they want, and then they get massively reinforced for it, with the elimination of negative emotional states and activation of positive ones. (n.p.)

In my case study, both BP and a U.S. governmental agency, the Minerals Management Service, used their opening statements to skew interpretations of what was fair, just, and legally required, in order to fit their own agenda. BP gained power by paying large amounts of money to the U.S. government for leases of areas in which they could establish drilling operations. The government accepted the money and then relegated its powerful responsibility of oversight to the U.S. agency, MMS, to ensure rules and regulations for deep water drilling activities were enforced.



The MMS agency was not adequately supervised, and BP was able to use its enormous power to bribe employees with money, gifts, and favors from BP in exchange for eliminating burdensome reporting requirements, safety controls, and spill contingency plans. In turn, MMS officials used their power to alter the rules so that BP could have special treatment. The public was unaware of these powerful relationships, but they also benefitted from jobs that BP and the other defendants provided, and had been convinced that drilling for oil in its own waters would reduce dependence on foreign oil.

As I discuss in Chapter 4, confirmation biases represent cultural constructs carrying powerful meanings, not just for legal decision makers, but also for those who use them for many types of everyday public transactions (Merry, 1990, p. 9). After reviewing Weston's study results, Shermer (2006) contended that "The implications of the findings reach far beyond politics. A jury assessing evidence against a defendant, a CEO evaluating information about a company or a scientist weighing data in favor of a theory will undergo the same cognitive process" (n.p.). Although the DWH trial provided a space where opening statements could be analyzed by opposing parties, decision makers and the public, the pervasive significance of the law in society and the nature of its language calls for a deeper analysis of the competing, non-legal opening statements.

The purpose of court opening statements is to create and control a certain version of reality for each of the parties in a trial. I argue that public statements and Congressional opening statements have a similar purpose: to frame its values in socially accepted manner. In fact, because public and Congressional opening statements are made soon after high-stakes situations occur, and typically years before any trial of the matter is held (if warranted), the version of reality they create can be even more prevailing because they have the power of the rule of

primacy with the court of public opinion. The rule of primacy is the principle that states that what is heard first tends to be the most difficult to dislodge from a person's mind (Cooley & Lubet, 2003; Johnson, 2011; Kearney, 2001; Krosnick, 1998; Miller, J.M.; Mayo & Crockett, 1964; Miller, N. & Campbell, 1959; Nations, n.d.; Vinson, 1986; Weinberg, 2000; and Wyer, 1989). The stakes are very high for public statements and Congressional opening statements, especially if future legal actions are anticipated. Potential defendants like BP have an advantage if they can use their power to get their version of reality quickly out to the public. Conversely, not everyone has the power or the resources to make these public statements expediently, and sometimes less powerful parties do not establish primacy and must wait until trial for the opportunity to state their own versions of reality in their own representative court opening statements. In Chapter 4, I examine the ways power and value are framed by various stakeholders in the court opening statements from the DWH event.

My study analyzes a complete communicative event, one specific trial, officially named *In Re: Oil Spill By the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010*, Civil Action No. 10-MD-2179 "J" and related public statements. The DWH event, including the explosion, fire and resulting deaths and injuries and environmental damage, sparked a demand by government and the public for changes needed in the ways corporations communicated and collaborated with each other and with sovereign governmental entities. Investigations in the aftermath of the tragic event exposed conflicts of interest and criminal behavior by British Petroleum (BP), Transocean Holdings (Transocean) and the Minerals Management Service (MMS), a United States governmental agency charged by Congress with enforcing the safety and environmental standards of deep water drilling practices. The 2013 DWH trial was the space where these and other parties and their versions of the event converged.

A court opening statement in a trial acts a critical device that 1) demonstrates how external collective voices and behavior fit together in the case story, and 2) asks what relationship(s) exist between the non-legal and legal accounts. Trial attorneys do this in their court opening statements by pointing out the hidden assumptions and implications of the opposing party's position. They can point out irrational or coercive ways of thinking, or critique their opponent's ideology. For example, according to Herrick (2009) "technological thinking becomes an ideology [if] it closes off certain possibilities in a society's discourse" (p. 242). As I will discuss later in this dissertation, BP had a monopoly on knowledge of off shore, deep water drilling practices and processes because this was a relatively new procedure. Therefore, federal and state governments and the public had to rely on BP for information on important issues such as estimates of the amount of oil spilled into the Gulf and the options for cleaning up the oil spill, and for an effective spill contingency plan. According to McLernon (2014), the National Commission on BP Deepwater Horizon Oil Spill and Offshore Drilling (2011), and Ocean Science and Data Limits... (2010), investigations later showed that the information from BP was either incorrect or self-serving, leading to an uncontrolled and devastating effects. Further, BP's press conferences, web posts and public statements created the reality of the DWH as an unforeseen "accident" which had no precedent and therefore, could not have been predicted or prepared for fully. These statements were intended to create, among other things, a legal reality meant to protect the corporation from possible later legal charges of negligence. In the courtroom, however, BP used their opening statement to defend and rationalize their earlier decisions, actions and statements against charges of having willfully lied and defied the law.

Because they are the presented at the very beginning of a trial and give a preview of the evidence to come, court opening statements are subjects worthy of close analysis. I analyze the

genre of court opening statements, and then examine other opening statement genres such as public statements and Congressional opening statements to draw broader conclusions about the nature of discourses in the face of a disastrous event. In particular, I examine the rhetorical ways that BP and the other defendants frame their power and value their court opening statement at trial. I examine the Plaintiffs' Steering Committee's (PSC) court opening statement for the Plaintiffs as an example of a representation of a less powerful group of persons who were injured by BP's negligence and whose values include justice and equity. I also look at two presidential press conferences made by President Obama about the DWH disaster as examples of the power and value of public opening statements, and one Congressional opening statement presented by BP CEO Tony Hayward.

I have attached copies of President Obama's two public statements (Appendix A and Appendix B) and Hayward's Congressional opening statement (Appendix C) as appendices to this dissertation. I have not attached copies of the two court opening statements because of their length, but I have provided a full context for each of the analysis sections.

This dissertation examines the ways in which people from different and competing discourse communities interpret and mitigate others' opinion formation, and how this affects the acts of deliberation and decision-making in the areas of law and public policy. Referring to Van Dijk (2001) and others' research, I consider the significance of those issues in the context of a bounded group of texts to demonstrate how the different contexts outside the courtroom affect the types of language used. I also discuss the relevancy of these issues to technical and professional communicators (TPC), especially post-DWH disaster. Governmental, environmental, and other investigative commissions have examined the facts of this case and the actions of every level of personnel who had an opportunity to prevent or mitigate the tragedy.

Their purpose was to find causation and breakdowns in communication in the hope of lessening the chances of the tragedy happening again.

TPCs have the potential for acting at higher levels of accountability in corporate business and for “developing dialogic codes of conduct for corporations, industries and professions” (Dragga, 2011, p. 4). In this dissertation, I explain why technical and professional communicators should be concerned with the sources of ethical values in global corporate practices and the social consequences of dominant corporate values. I consider how the powerful demands of technology, economic power, government and the public can “be reconciled with a democratic ethos” (Ornatowski & Bekins, 2004, p. 267). Disasters such as the DWH explosion and oil spill stimulate compelling arguments for a renegotiated role of technical communicator “as someone who is *in* the institution but not *of* it” (Hopton, 2013, p. 66).

Although conscious that no single analysis or its findings will resolve the ongoing legal, social, and ethical dilemmas related to this tragic event, I use a critical discourse analysis (CDA) approach and genre theory (which I explain in detail in Chapters 2 and 3) to contribute to a better understanding of how and why certain characteristics of legal rhetorical moves such as establishing primacy, creating a lens, demonstrating credibility, developing a theme, and simplifying relevant issues, also appear in other specific communicative events, yet can be dissimilar in purpose. My goal was not to investigate the disparities among the types of statements, but to show the roles played by each genre, legal and non-legal, and the power by which they create different “realities” for the public.

I critically analyze each type of opening statement (court opening statement, public statement and Congressional opening statement) relevant to the DWH trial, guided by the following research questions:

1. How are power and value framed in the court opening statements from the BP civil trial by various stakeholders in the DWH event?
2. What are the social consequences of this framing?
3. What are the representations and strategies visible in the texts written or spoken – in all of the opening statements (both legal and colloquial) related to the DWH disaster?
4. In what ways do critical discourse analysis and genre analysis expand/challenge our understanding of what is different and what is similar among the various “genres” of opening statements exemplified by the DWH event?

In this Chapter, I outline the problem under discussion using the three types of opening statements as examples of the ways in which texts can dominate or resist power and social action, especially in the areas of business, law and public policy. The trial offers a good model of a cross-disciplinary negotiation of genre across a network of “discourse communities” and is a productive area for research (Swales, 1990, pp. 24-27). I conclude Chapter 1 by forecasting the remaining chapters of this dissertation.

### **Research Context**

My research spans the range of time from the date of the DWH event, April 20, 2010, to Day 1 of the February 25, 2013 civil trial held in the United States District Court for the Eastern District of Louisiana.

### **Deepwater Horizon Disaster Background**

The disaster and the legal events leading up to the trial were unprecedented, involving the largest oil spill in the history of the United States, and resulting in the largest ever criminal fines levied by the U.S. Department of Justice (USDOJ) against a corporation. The trial concerned the April 20, 2010 blowout, explosion and fire on the mobile offshore drilling rig, known as

“Deepwater Horizon,” as the crew was preparing to temporarily abandon the deep water Macondo well beneath the Gulf of Mexico. That disaster took the lives of eleven men, injured many others, and caused the migration of natural gas and oil into the Gulf, killing migratory birds and other wildlife and sea life. In fact, according to the USDOJ, the amount of oil that flowed from BP’s well “was the equivalent of 16 Exxon Valdez oil spills” (Brady, 2013, n.p.).

The plaintiffs in this case are The United States of America (Civil Division, Environment & Natural Resources Division Enforcement Section, and the Fraud Section of the Commercial Litigation Branch), the State of Louisiana, the State of Alabama and the Plaintiff’s Steering Committee (PSC) which represents the class action for individual plaintiffs. Corporate defendant BP and other defendant corporations (see Table 4.3) had been engaged in extracting oil and natural gas from the deep water well since March, 2010. On April 20, 2010, two of BP’s highest ranking representatives on the DWH oil rig carelessly supervised a particular safety test and deemed it to be a success. In doing so, they failed to recognize a pending perilous situation and failed to alert engineers on the shore. Their actions resulted in a blowout of the well, multiple explosions and a fire on the rig. On April 22, 2010, after burning for two days, the oil drilling rig sank into the Gulf, breaking the connection to the underwater well (Barbier, 2013; Barbier & Allums, 2012). During the next three months (approximately 84 days), 4.9 million barrels (206 million gallons) of crude oil flowed up the well and into the Gulf of Mexico, and eventually spread to the coasts of five Gulf Coast States (Barbier, Trial Opening Remarks, 2013; Barbier & Allums, 2012). An enormous response effort, involving the U.S. government and its agencies, BP and other private actors, coordinated and led by the U.S. Coast Guard, attempted to seal the well, contain the spill and remove the oil and keep it from spreading further. The disaster is recognized

as the worst oil spill in U.S. history, and in fact, years later, “the Gulf is still not oil free” (Waters, 2012, n.p.).

### **The Criminal Case and Trial**

The USDOJ charged BP with several criminal acts (discussed in later chapters), which culminated in a November 2012 plea agreement signed by BP executives, that included the penalty payment of the largest fines for criminal acts by a corporation in U.S. history. According to the USDOJ’s 2012 *Guilty Plea Agreement (Agreement)*, BP, as the leaseholder and operator of the Macondo Well, pleaded guilty to charges of failing to conduct drilling operations “in a way that ensured the safety and protection of personnel, equipment, natural resources and the environment,” and guilty to eleven felony counts of manslaughter related to the deaths of eleven workers on the rig (*Agreement*, p. 15). Further, BP pleaded guilty to the charge of improperly endeavoring to “influence, obstruct, and impede the due and proper exercise of the power of inquiry” of Congress by withholding information and documents about the spill, making false representations of facts, and “inserting language [into their testimony] that falsely stated BP’s worst case discharge estimate” (*Agreement*, 2012, p. 16). On November 15, 2012, defendant BP was ordered to pay criminal fines to the U. S. government in the amount of \$4 billion, the largest such criminal penalty ever levied in the history of the United States, and Halliburton, BP’s concrete contractor, was fined \$1.4 billion (USDOJ, 2013, n.p.).

The next section provides context for the civil trial in which the plaintiffs and defendants’ court opening statements were given.

### **The Civil Case and Trial**

The civil trial consisted of three parts: Phase 1 in which the court heard evidence from all parties, focused on the apportionment of blame for the disaster among BP and the other



defendants. Phase I is the part of the trial that included the court opening statements that I analyze for this dissertation. Phase II of the trial ended in March 2014, and concerned the determination of the number of barrels of oil that were spilled into the Gulf of Mexico. The U.S. government's calculation of 5 million barrels matches the "emerging consensus of the scientific community" while BP's estimate is approximately half that number (McLernon, 2014, n.p.). That number will determine the total amount of fines the defendants will have to pay under the Clean Water Act. Phase III (the penalty phase) will begin January 20, 2015, and will determine the total amount of damages BP owes for damages caused by the disaster. The judge will also decide whether BP and the other defendants engaged in "gross negligence" or "willful misconduct" while directing the work on the DWH rig (Larina, 2014, n.p.). If any of the defendants are found guilty of either of these types of negligence, the fines under the Clean Water Act (CWA) will nearly quadruple.

Phase I of the civil trial began on February 25, 2013, in Louisiana's Eastern District Federal Court and lasted eight weeks (February 25, 2013–April 17, 2013). A massive number of documents were generated by BP, other parties, governmental entities, experts and the media as a result of the investigation into the U.S.'s largest ever environmental disaster. In this dissertation, I look specifically at the PSC and the BP opening statements in order to examine the strategies of the primary opposing parties.

### **Multi-District Litigation (MDL)**

All of the individual plaintiff and state civil cases filed in the U.S. naming BP and the other defendants were consolidated before the Federal District Court of Louisiana. Also known as "class actions," multi-district litigation (MDL) is defined by 28 U.S.C. §1407 as a process created for civil actions that involve one or more *common questions* of fact that are pending in

different district courts around the country. The purpose of the consolidation is for the “convenience of parties and witnesses,” and to “promote the just and efficient conduct of such action” (28 U.S.C. § 1407 (a)). In the DWH case, Louisiana’s federal district court was chosen because, as the Judicial Panel stated: "Without discounting the spill's effects on other states, if there is a geographic and psychological 'center of gravity' in this docket, then the Eastern District of Louisiana is closest to it" (Kunzelman, 2010, n.p.). According to section (h) of the MDL federal statute, the judicial panel may consolidate and transfer cases into the MDL *with or without* the consent of individual parties, for both pretrial purposes and for the actual trial.

In the DWH trial, as in most MDL cases, a Plaintiffs’ Steering Committee (PSC) was appointed to represent *all* individual United States citizens who filed claims for damages against the corporate oil company defendants. The consolidated cases in this trial were similar to the claims made by the States of Alabama and Louisiana, including “claims for the deaths of eleven individuals, numerous claims for personal injury, and various claims for environmental and economic damages” (“Actions,” 2011, p. 5). All of the consolidated individual claims represented by the PSC were represented in trial by one attorney with one opening statement. Individual actions were also filed by the USDOJ, and the States of Alabama and Louisiana (“States”), and they were consolidated into the MDL as well. However, the U.S. government and the States were also represented by their own DOJ and State Attorney Generals who were each allowed to make an opening statement at trial. Each of the defendant oil companies also had their own individual attorneys and court opening statements. All in all, there were four plaintiff and five defendant court opening statements in the DWH trial.

According to Federal District Court Judge Carl Barbier, a considerable number of legal issues in MDL 2179 involved maritime law, a legal cause of action which is typically tried in a

bench trial setting, or a trial in which there is no jury and the judge is the sole decision maker. According to Judge Barbier, the trial involved issues that were unprecedented, or “partially or entirely novel,” thus offering another reason for using a bench trial in this case (Barbier & Allums, 2012, p. 47). Many observing attorneys and other experts considered a bench trial to be an advantage for BP and the other defendants:

Corporate defendants like BP tend to prefer bench trials because of a common belief that judges are more conservative about liability and damage awards than the average juror, to Carl Tobias, a law professor at the University of Virginia in Richmond. (Talbot, 2013, n.p.).

However, in an unusual move, Judge Barbier *also* ordered processes to be put in place to ensure the transparency of the trial proceedings for the public. One news reporter explained the innovations implemented by Judge Barbier, including lifting the ban on reporters’ laptops, providing Internet access inside the courtroom, and order the “real time” court transcripts to be made available to the public on a daily basis by way of a public website (Bridges, 2013, n.p.). These innovations made it possible for the public to read the recontextualized versions of the facts of the disaster by each party via their opening statements at trial, in addition to reading and listening to the media’s interpretations of them.

This dissertation focuses on the power relationships and rhetorical moves made among business, government, and the public. It also looks at the ways that public access to the trial transcripts created an additional audience for the DWH trial attorneys, and how that affected the construction of their court opening statements. Further, I argue that these processes expanded the audience for this trial from legal professionals only in a bench trial, to the court of public opinion

and corporate shareholders, and changed the way the parties prepared and presented their opening statements in the DWH trial.

### **Opening Statements**

The importance of court opening statements in legal procedures is well-settled in legal literature. They act as the attorney's "moment of maximum command over the trial narrative" (Holland, 2009, p. 209). It is the attorney's opportunity to set out a version of the case and try to appeal to decision makers. But trial attorneys approach bench trials (no jury) differently. Unlike non-legal persons, trial judges are not "trial novices, eagerly awaiting the entertaining lawyer story-telling characteristic of an effective opening" (Holland, 2009, p. 209). Cartwright (2004) argued that attorneys need to "deliver a concise, logical and organized presentation [as] the Court is likely to be less tolerant of a rambling, storytelling approach to an opening statement" (n.p.). Holland (2009) concluded that "the *manner* in which stories are told can be even more significant than its content (p. 210). In Chapter 4 I will discuss and demonstrate these and other ways in which the legal professional community has established certain rhetorical moves for achieving success with their opening statements.

In the DWH trial, court opening statements were presented during kairotic moments in time, when legal and public spaces intersected and objectivity could be distorted by individual and collective values (Papke, 1991). The court opening statements in the DWH trial reflect the contested estimates of oil that was spilled, charges of corporate negligence, gross negligence and shared responsibility for the unprecedented disaster. For example, BP stated their version of the events that occurred in the days preceding the disaster:

All of the drilling activity that was to occur had been completed. What needed to occur after that is that the well needed to be logged, the geologist needed to understand what the conditions were in the hole, and what the possibilities were for coming back, and the well needed to be cemented and temporarily abandoned. Those were the things that were left to do after the drilling operations were complete on April 9. Unfortunately, in that period of time between April 9 and the blowout that took place on the evening of the 20<sup>th</sup>, there were a number of mistakes and errors in judgment that were made by BP, Transocean, and Halliburton. These are the things what we will be discussing today and in our presentation during trial. (Court Transcript, BP Opening Statement by Mr. Brock).

As I will discuss in Chapter 4, BP's attorney Mr. Brock used the rhetorical move of establishing a lens, (Move 2: Create a lens) using physical facts and actual evidence to infer that these tasks, and his version of the sequence of events in the DWH disaster, were common knowledge and part of the general public's everyday experiences (Cooley & Lubet, 2003; Machin & Mayr, 2012). Further, Brock followed almost all of the recommended rhetorical moves in this passage alone from his opening statement. He simplified the complex issues (Move 6: Simplify the issues) in the DWH trial by arranging his version of the facts into a simple story theme (Move 4: Develop a theme/type) to imply BP's credibility (Move 3: Establish credibility) with decision makers. In doing so, Brock was also following the techniques advocated by other rhetorical scholars for enhancing his persuasive statement. People expect genuine stories to be delivered in a traditional story format, with the events ordered such that they signal an acceptable ending, and

causal linkages are made throughout the narrative (Bennett & Feldman, 1981). Opening statements given in this form are perceived as being more rational, logical and believable.

In contrast to Brock's style, the PSC's attorney Mr. Roy used his primacy move (Move 1: Establish primacy) to jump immediately into a blow-by-blow, chronological account of what the evidence in the trial would show that culminated in a "terrible tragedy" (Court Transcript, Opening Statement for the PSC by Mr. Jim Roy). His pared-down style had the effect of creating a lens (Move 2: Create a lens) of law and precedent and a demand for justice for all of the unnamed plaintiffs in this action. The following excerpt is from the first sentences of his court opening statement:

Why did this terrible tragedy happen? That's why we're gathered. Let's begin with Transocean, the owner and the operator of the Deepwater Horizon. They seek limitation of their liability. The evidence is going to show Transocean failed to discover a major gas kick and shut in the well on April 20, 2010. A critical part of the temporary abandonment procedure from Macondo was a negative pressure test. This was a shared responsibility between BP and Transocean. The test was misinterpreted. This led to the mistaken belief that this well was secure and that it was safe to go forward with displacement of the heavy drill mud with much lighter seawater. Richard Heenan, an expert petroleum engineer, will describe the failure to interpret this test correctly as a gross and extreme departure from the standards of good oilfield practice. (Court Transcript, 2013, Opening Statement of Jim Roy).

Roy used an ordered, logical format for his opening statement. His straightforward language (naming the event "a tragedy"), direct assignment of shared responsibility for the disaster to all of the defendants, and claim that evidence "markers" would corroborate the truth of his statement all added to Roy's credibility (Move 3: Establish Credibility). Further, Roy kept complexities of the case to a minimum. He eliminated confusion and reduced the facts and issues

to their simplest terms (Move 5, Simplifying the Issues), letting decision makers know at the outset that the case was really not difficult or confusing. By keeping it simple, Roy directed the legal responsibility for plaintiffs' injuries towards *all* of the named defendants and away from defendants' arguments about single versus joint liability.

Phase I of this trial was brought by defendant (and plaintiff) Transocean who wanted the court to significantly limit its liability for the DWH disaster, despite having hired and managed the crew for the oil rig. Unlike Brock, who implied and later claimed that all of the defendants *shared* responsibility for the disaster, Roy immediately brought the court's attention back to the actual reason for the trial: Transocean's claim and demand for limited liability (Move 4: Establishing a Theme). Roy wanted to establish that the egregious nature of this case demanded that all of the defendants be held accountable for Plaintiffs' damages. Even though there was legal precedent (previously decided cases that furnish a basis (example) for determining subsequent cases with similar facts), Roy argued that the *unprecedented* nature of the DWH event gave the Judge the authority to overrule that precedent and order Transocean to be held liable for more than just the value of the rig. Later I will show how Brock also argued against following precedent, but for a completely different reason. Both attorneys recognized and took advantage of the kairotic moment during which the meaning potential of precedent could actually be reconsidered by the Judge and shape the way others would perceive the DWH event and its circumstances.

I will continue to analyze these two opening statements, as well as President Obama's May 2, 2010 and June 15, 2010 public statements, and Hayward's June 17, 2010 Congressional opening statement in Chapter 4. I consider not only the rhetorical elements of the genre of

opening statements, but also use a critical discourse approach to outline the ways in which my research will add to the discussions about these activities in this and other chapters.

### **The broad uses of the term “opening statement”**

According to Bawarshi and Reiff (2010), “genres can be understood as both habitations and habits: recognizable sites of rhetorical and social action as well as typified ways of rhetorically and socially acting” (p. 59). I apply the authors’ concept of genre to the legal and non-legal persons who are qualified to participate in the procedures of the legal event of a trial. The form and function of legal texts are governed by and found in the Federal Rules of Civil Procedure and in case precedents. Understanding the language and the meaning of legal texts, their context, form, and terminology can be difficult for a non-legal person, especially when the language is taken out of context. The courts assume that attorneys are familiar with legal terms and processes needed to draft and present court opening statements. However, judges and trial attorneys also know that non-legal persons may be less familiar with legal texts and processes, and may not understand the purpose of court opening statements in the trial process. Non-legal persons must rely on the trial attorneys, judges, or the media to “interpret” legal terms, concepts and processes and explain conflicting claims in court opening statements for them. In this way, attorneys are faced with a communication challenge much like that faced by technical communicators. In fact, one of my contentions in this project is that technical writers can learn from studying attorneys’ rhetorical practices. Attorneys are required to induct a non-legal group of decision-makers (jurors) into a trial setting, using specialized language to explain complex laws and to help the jury to apply them to sets of facts in a short amount of time, both quickly and soundly. These same concepts can be learned and used by technical and professional communicators for writing predictive analyses, product and service (marketing) analysis, and for



successfully communicating professional ideas from specialized knowledge domains (legal, medical, engineering science, computer science, political, etc.) to end users.

Not all the opening statements I consider are delivered in court or subject to the same rules and conventions. Tony Hayward, Chief Executive Officer of BP was called by Congress to testify about the actions surrounding the disaster. The information he provided is considered testimony and is, therefore, subject to the laws of perjury. I also look at presidential press conference opening statements (public statements) which have no legal standing and are generally for relaying information. While all three types of opening statements are useful in bridging the gap between a professional and a general audience, only court opening statements serve a legal purpose. They are not testimony, but they will affect a legally binding ruling in court. On the other hand, the other two types of opening statements typically testify, announce, inform, or warn. Therefore, researching this event is also valuable because it provides a rich source of data for studying the social discursive nature of language that seeks to cross from one discourse to another in various configurations. I discuss these and other ideas further in Chapter 2.

### **The MDL opening statement**

The plaintiffs' court opening statement in the civil trial, presented by PSC counsel, was a values-centered statement of facts, structured upon the prevailing beliefs possessed by society. As I discuss later in this chapter, the plaintiffs' court opening statement embodied the concepts of epideictic rhetoric and its usefulness in creating an argument grounded in "the working standards of reasonableness that provide a political community with its ongoing frame of reference" (Hauser, 1999, p. 6). In other words, in the trial of this event plaintiffs' case was represented using a recounting of unembellished and non-disputed facts that would appeal to

decision maker's sense of what is fair and what is unfair. There was no need for more detailed persuasion other than to ask Judge Barbier to overrule the maritime law precedent with regard to Transocean's claim for reduced liability, and to find all of the defendants guilty of gross negligence. Although responsibility for the negligent acts had already been proven and admitted by BP and Halliburton in the criminal proceedings, the criminal proceedings could not be brought up in court. All of the other defendants, however, marshalled together and claimed that the responsibility for the negligent acts leading to the DWH disaster belonged to BP alone. Further, the significance of plaintiffs' opening statement was that they finally had an opportunity to be heard on the first day of a highly publicized trial. The DWH trial acknowledged the plaintiffs and provided time, the legal mechanism, and the place for their voices to be heard via their opening statement.

As I discuss in Chapter 4, the PSC's opening statement acted as a kairotic moment for plaintiffs who had waited for three years to tell their story to the court and the public, and to demand justice and accountability from the defendant corporations. The objective of defendant corporations' court opening statements, however, was primarily to limit their liability in the penalty phase of the trial, especially if their actions were later found to be grossly negligent in the disaster. This was a highly contested matter since the potential for fines was in the billions of dollars.

### **Importance of Ethical Knowledge Transfer to TPC Professionals**

Miller, C. (1979) argued that traditional technical writing instruction had historically been based on the "windowpane" theory of language, a theory that framed technical and scientific writing as "just a series of maneuvers for staying out of the way" (p. 613). Miller

(1979) argued, however, that technical writing pedagogy could be more than teaching a set of skills; it could be a “kind of enculturation” that helped students understand how to belong to a community” (p. 617). Hayhoe (2002), agreed, stating that “One of the most crucial tasks of the technical communicator is to provide information that users need by carefully selecting the right mix of content, and then developing, arranging and presenting it effectively for the audience” (p. 398). Miller and Hayhoe’s theories are standards in the field of technical communication. In this trial, the USDOJ agreed that the texts of BPs of corporate warnings, procedures, and processes were unfair, insufficient, and sometimes completely irrelevant because BP failed to select and produce content *appropriate* for the activity and location of offshore deep water drilling.

A debate exists over the role TPCs play in relaying technical facts. Andrus (2010) asks the questions of whether good technical communication is “simply to deliver clearly the facts that exist in the world to an audience who needs to know? Or does good technical communication help to *construct* the messages it delivers?”(p. 73). According to Dragga (2011), professional members of TPC are “skilled in rhetoric, studied in ethics, and experienced in writing policies and instructions and in soliciting information from sources of knowledge and power” (p.4). Therefore, he argued that TPC was “uniquely qualified to develop dialogic codes of conduct for corporations, industries and professions” (p. 4). Steven Katz’s “The Ethic of Expediency: Classical Rhetoric, Technology, and the Holocaust” (1992), also argued the need for making ethics central to technical communication pedagogy.

The basis upon which the USDOJ brought criminal charges against BP in the disaster was BP’s unethical codes of conduct, incomplete or inappropriate policies, plans, and procedures in their manuals, and business practices that included a lack of hiring and adequate training of personnel to work on offshore drilling projects. I believe that cases like this one are similar to

those that are tackling current trends such as “marketing-based medicine”<sup>3</sup> (Spielmans and Parry, 2010; Moffatt & Elliott, 2007) and “cause marketing”<sup>4</sup> (Chansky, 2010; Schneiderman, 2012).

These are the ethical challenges that will be facing TPCs and will require them called to a higher level of accountability and ethical work product. TPCs will need to be ready to participate more fully in ethical corporate document construction (Bryan, 2009; Spielmans & Parry, 2010).

Certainly one of the most critical issues in the trial stemmed from ethical issues related to the poor, inadequately, or entirely inappropriate written and verbal communications, policies and procedures between levels of management at BP, its contractors and employees. This is a subject that is also relevant to the discipline of technical and professional communication, especially since the discipline’s interests are in specialized discourse and its members are capable of carrying out research in this area. This dissertation can make a significant contribution to TPC’s understanding of the changes needed in communication processes, participants and their roles, their objectives and goals, and the communication contexts within which knowledge-based professional practice takes place (Bhatia et al., 2009, p. 8). In the next section I talk about some additional topics that are related to the TPC discipline.

### **Corporate culture and technical communication**

The title of this dissertation comes from a November 23, 2010 interview of Nancy Leveson, Ph.D., Professor of Aeronautics and Astronautics at MIT, concerning her views on the dynamics of human-made catastrophes in general, and the BP oil spill disaster in particular.

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<sup>3</sup> Pharmaceutical and other corporations’ practice of hiring ghostwriters and communications companies to write papers in support of their product and then forwarding their work to a well-known academic to publish it under his/her name without disclosing the paper’ true origins.

<sup>4</sup> Partnerships between non-profit companies and corporations link social causes with marketing. This type of marketing is being scrutinized by states’ attorneys general under the Commercial Co-venturer Laws which are triggered when representations are made to the public that a purchase will benefit a charitable organization.

According to interviewer Steve Maich (2010), Leveson claimed that human beings have a talent for not seeing things that they don't want to see. According to Leveson (2008),

[this phenomenon is] a culture of denial that persists in big operations where large sums of money are on the line like space programs, oil drilling companies and financial institutions. ... It's a culture that views risk as a constant, not a variable... it confuses long periods without incident as indications of safety... This mindset breeds complacency, and an arrogance that is incredibly tough to pierce. (p. 12)

Interviewer Maich (2010) summed up Dr. Leveson's interview: "our minds play tricks on us, we misread the probabilities and engage in willful self-delusion. *Then, one day, surprise! You're dead*" (p 11).

Leveson, who was also a member of the investigative panel for BP's Texas refinery explosion, taught safety classes to BP executives. She claimed that "They [BP] were producing a lot of standards, but many were not very good, and many were irrelevant" (McAlister, 2010, n.p.). For example, Leveson claimed:

BP had strict guidelines barring employees from carrying a cup of coffee without a lid but no standard procedure for how to conduct a 'negative-pressure test,' a critical last step in avoiding a well blowout. If done properly, that test might have saved the Deepwater Horizon. (McAlister, 2010, n.p.)

Likewise, Leveson (2008) pointed out that "despite a sincere effort" to fix this kind of problem after the Challenger loss, investigations of the Columbia accident thirteen years later concluded that the same "management and organizational factors" were root causes of the disaster (p. 238).

She stated that:

(In most of the) major accidents in the past 25 years (in all industries, not just aerospace), technical information on how to prevent the accident was known and often even implemented. But in each case, the potential engineering and technical solutions were negated by organizational or managerial flaws. (p. 238)

According to Sandman, organizations are “much more capable of self-deception than they are of outright evil ... What usually happens is they have the information that shows the problem is serious, but they look at that information and don’t see it ...” (Kendall, 2003, p. 4). In all of the above conclusions the safety and risk management experts agree that it is important to examine the ways in which organizational knowledge “is translated into action *at the level of the individual actor*” (Harrison, 2004, p. 257). Writing about the 1977 incident at Three Mile Island and the 1986 Shuttle Challenger Disaster, Herndl, Fennell, and Miller, T. (1991) found that both of these technological disasters involved “small mishaps with grotesque consequences” (p. 280). One of the reasons for the “small mishaps” is that technical people tend to be detached from the rest of the organization, forming a distinct group with its own writing practices:

[They] tend to distinguish themselves from managers linguistically by preferring certain structures in their writing (superfluous nominalizations and narratives), even after demonstrating themselves capable of recognizing and using other structures preferred by managers. (p. 280)

According to Herndle, Fennell, and Miller (1991), that “social differentiation often creates differentiated discourse which can lead to miscommunication and misunderstanding” (p. 303). In fact, NASA investigators concluded that while structural factors in NASA’s decision procedures were “impeccable,” there was an “unwillingness ... to violate perceived role boundaries” (p. 303). Again, as Hopton (2013) stated earlier, TPCs must be willing to become a part of the entity for which they are working and not just “in it.” Like the engineering profession, the role of a TPC career is at a turning point. It is evolving from an occupation that provides employers/clients with competent technical documents to a profession that can also serve the public good.

Technical writing leads to actions being taken by others. If TPCs accept this premise, then whenever our writing urges action on an issue, product or practice that has the potential for harming others, personal and social ethics must *both* be considered. Thirty-three years after Three Mile Island, and twenty-four years after the Challenger disaster, investigators inside and outside of the BP organization were discussing similar failures in the communication systems among levels of management leading to the 2010 disaster. Now, in the BP case the same concerns arise as those described earlier by Herndl, Fennell, and Miller (1991); that is, that these disasters were not solely caused by mechanical/design failures, but also by management and engineers' concerns with "questions of authority and public status that interfered with the recognition of the technical problem that was ostensibly at issue (p. 285). Investigation results are often made public, bringing about greater public scrutiny into the workings of corporate businesses and government agencies. As a result, there is a greater demand from the public and from business *stockholders* for accountability and transparency in all communications. In the BP disaster and subsequent criminal and civil proceedings, corporate contractors are also being held civilly and criminally liable for this conduct. Unfortunately, accountability and transparency do not usually become a priority until there is a disaster or scandal in the industry or organization, questions from stockholders who want to know if their money is being well invested, or pressure from regulators who want assurances that the public's interests are being considered.

In the next section, I briefly discuss former characterizations of corporate criminal acts as 'benign neglect' are less acceptable today in our society, and the legal and social changes this new understanding will have on technical and professional communicators and society.

## **Corporate criminal acts**

The full cost to society for corporate criminal acts committed by BP and its contractors is still unknown. Although BP pleaded guilty to 11 counts of manslaughter, lied in a Congressional inquiry, and failed to comply with its own industry standards, the defendant oil and gas corporations contextualize their actions differently. BP's website posts continue to state that the disaster was unforeseeable and therefore, that they not could not have been prepared adequately to handle it. Some people think that these kinds of corporate actions/inactions are "simply not seen as comprising the same kind of social burden as conventional crime and [are] therefore, largely absent from debates about the 'crime problem' (Machin, 2013). After the DWH disaster, another opinion arose, saying that "... there is a current tendency to find a crime in every headline-grabbing accident ... Nobody went to prison for the sinking of the Titanic, or the explosion of the Challenger or Three-Mile Island" (Elkin, 2010, n.p.). BP and the other defendants' attorneys asserted in their court opening statements that their clients' actions were "merely 'aberration'[s] from the routine and otherwise legitimate activities of corporations" (Tombs & Whyte, 2007, p. 68).

But as we learned more about the DWH disaster, there was a clear chain of calamitous events in facilities owned and operated by BP. According to Mauawad (2010), there had already been an explosion in BP's Texas City, Texas refinery, resulting in 15 casualties and injuries to another 180 persons in 2005; followed by the worst oil spill ever on land in Alaska in 2006. The DWH disaster was judged to be criminal because it *was* foreseeable it was not the first incident of its kind. Second, the blow out preventer (BOP) that was designed to warn everyone on board of dangerous drilling conditions began its alert signal *eleven* days before the DWH explosion occurred. U.S regulations required off-shore deep water drillers to cease drilling *immediately* if there was a BOP warning, to inform the Minerals Management Agency, and not to resume



activity until the problem was fixed. BP knew about the BOP warnings but made the conscious decision to go forward with the drilling because their production was behind schedule (Hoffman, 2010; McCormack, 2010; Su, 2012; USDOL, 2013). Robert Bea, one of the experts at the DWH trial and a professor at the University of California, Berkeley stated “It’s clear that the problem is not technology, but people” (Hoffman, 2010, p. 3).

Despite all of the above, BP and its contractors continue to do business with the U.S. government today, continue their deep water drilling operations in other parts of the Gulf of Mexico and have expanded into other areas of U.S. coastlines. For example, on July 18, 2014, President Obama approved the use of sonic cannons to explore for oil and gas off the coast of North Carolina (“Obama opens” ... 2014). Newspaper articles indicated a somewhat conflicted public who needed jobs that the oil and gas companies provided, but were confused and expressed a lack of trust in both the oil companies *and* the U.S. government for past failures to ensure corporate compliance with relevant offshore deep water drilling laws. For example, an editorial in the Pitt County, North Carolina newspaper *The Daily Reflector* warned North Carolina citizens to look at the lessons learned in the DWH disaster before voting to allow offshore deep water drilling off of their coastlines, and recognize that any potential for economic benefits of energy exploration also included the real potential for environmental disaster. The editorial pointed out that there are no guarantees that “oil added to the world market actually will lower the price of gasoline,” and that although job creation is a “needed reality for continued economic recovery,” citizens should remember that the “risk reality” should also mean that “any potential rewards will be realized by all residents” (“Offshore drilling,” 2013, p. A12).

Machin (2013) claims that corporate crime “is made invisible by the careful planning and execution of those involved in it, the relative lack of law enforcement and prosecution, and the

lenient legal and social sanctions imposed on those who stand accused of it” (p. 64). In this case, BP was charged with eleven counts of felony manslaughter, misleading U.S. regulatory agencies about their ability to handle potential oil spills in the Gulf, and lying to Congress about the extent of the oil spilled. BP signed a criminal plea agreement and paid \$4.5 billion dollars in fines to the U.S. and its agencies; none of which went to any of the injured crew members or the families of the dead crew members from the DWH oil rig disaster.<sup>5</sup> The case study in this dissertation is important because it analyzes and brings to light the results of a powerful ideology that allows and enables certain favored practices over others.

### **Research Gap**

In this dissertation, I argue that a gap exists related to case studies that use critical discourse analysis to explore the dynamic of the social discursive nature of legal language. To explain, Schiffrin, Tannen and Hamilton (2001) argued that the terms “discourse” and “discourse analysis” have different meanings to scholars in different fields” (p. 1). Specifically, they point out that linguists in particular define “discourse” as anything “beyond the sentence” (p. 1). Schiffrin et al. (2001) pointed out that “critical theorists and those influenced by them” refer to “discourse” not only as a noun, “but further refers to a broad conglomeration of linguistic and nonlinguistic social practices and ideological assumptions that together construct power ...” (p. 1). I look for examples of the ways government, legislative and judicial groups struggled to define and produce information transfers to the public about the DWH disaster that were also aligned with each groups’ purposes over a three-year time span. These information transfers occurred in the forms of court opening statements, public statements, and Congressional opening

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<sup>5</sup> BP and other defendants’ liability for damages to the dead and injured seaman aboard the Deepwater Horizon are limited under the Death on the High Seas Act (DOHSA) to paying burial costs and lost wages that would have supported the deceased’s dependents.

statement. The public statements (in the form of Presidential press conferences), and the Congressional opening statement occurred very soon after the DWH disaster. Two court opening statements, one from the PSC and one from BP, did not occur until the first day of trial February, 2013. They are all rhetorical statements about the same event and were presented in various formal venues with accompanying rules of process and procedure. Each used the opportunity to convince regulators, stockholders, legal decision makers and the public court of opinion to believe their version of the facts of the DWH disaster.

Stygall's (1991) case study concerned the "curious reluctance" of rhetorical scholars to examine legal texts because they are written by "members of a well-defined social context [and] bound by their membership and participation in a discourse community" (p. 234). Using the example of jury instructions in an Indiana civil trial, Stygall (1991) argued that even if a legal text failed in an information transfer to non-legal persons, it "can still be successful by educating and socializing a nonprofessional audience" (p. 235). Stygall also advocated for the need for more studies in this area that took place "outside the experimental setting and into the normal arena of their practice" (p. 251). Fahnestock (2005) defined the "language of science" as an "enclosed system...heavily criticized for features such as the passive voice or the absence of personal pronouns (agents)" (p. 281). In this dissertation, I examine both of these "enclosed systems" of the languages of law and science to examine the language used by BP, the other defendants, and the U.S. government to create and propagate perceptions of reality that were favorable to themselves following the DWH disaster.

Paradis (1991) presented a case study about two separate trials in which he was an expert witness in a trial concerning a product manual's inadequate instructions for the use of a construction tool (stud gun). His stated purpose in this study was to examine the way language

was converted into human action and to explore the “blending of human purpose with mechanical devices” (p. 365). Paradis’ (1991) case study about what he calls “written operational discourse,” also informs my work in this dissertation because BP and other defendants discuss their management and employees’ interpretations and applications of rules and industry standards in their court opening statements. However, Paradis’ (1991) case study involved questions about a product manufacturer’s “failure to warn” in their operations manuals. In my study, industry standards for the relatively new activity of offshore deep water drilling were available, but those standards were consciously ignored and disregarded by BP management and personnel, leading to the disaster. Once they came to trial, however, BP and the other defendants recontextualized the entire disaster, concentrating on its unprecedented nature as a defense for not following their own industry standards.

Finally, much of the literature regarding trials and trial documents is based upon psycholinguistic studies and observations of legal language as they were applied to the context of jury instructions (Charrow & Charrow (1979), or that advocate for the use of Plain English as part of a “reform” of legal language (Diamond, 1995; Engberg, 2004; Tiersma, 2005). I explain what Plain English is, and what debates surround it in TPC in more detail in Chapter 2.

My dissertation offers discussions on the ways in which corporate actors use technical communication in their various opening statements, an analysis of the impact of opening statement genres on multiple audiences, an analysis of the social impact of court opening statements, introduction of court opening statements as epideictic rhetoric, and a discussion of the ideological underpinnings of such rhetorical acts. A number of case studies inform my own dissertation, and in terms of critical discourse analysis, genre theory and rhetoric, this study is not unique. However, previous studies in these areas have not addressed the ways corporate and

institutional actors use rhetoric and technical and professional writing in their court opening statements in a real case involving an unprecedented event. My dissertation also looks at the impact of the different genres of public statements or Congressional opening statements on multiple audiences both within and outside the courtroom, and the social consequences of the ways they are framed.

Finally, none of the studies in the literature consider a court opening statement in a trial as a form of epideictic rhetoric. I research and analyze the ways in which an court opening statement, composed and presented using epideictic rhetoric, can serve a powerful purpose of reminding and reinforcing decision makers' of their own community standards and identify with their values as they prepare to hear and act upon evidence in a civil or criminal matter.

### **Opening statements and constitutive rhetoric**

This dissertation examines actual court opening statements relevant to the DWH disaster, mindful of the intracommunity demands of professional legal discourse (Lindroos-Hovinheimo, 2009; Stygall, 1991). Other studies in the literature such as Charrow & Charrow (1979); Diamond, (1995); and Engberg, (2004), do not indicate this context of analysis. Analysis of legal language requires one to discover the balance, or what Glover (1990) called a “kind of double vision,” between the abilities of the attorneys and the demands/rules of the trial court process (p. 159). Considering the immense influence court opening statements have on non-legal decision making audiences, attorneys must find a way to initiate non-legal jurors and other decision makers into the trial process, and connect with them meaningfully using simple and memorable rhetorical messages.

Eades (2003), emphasized that the major contribution made by sociolinguists “is the explanation of the role that cultural differences play in intercultural communication and

miscommunication” (p. 1109). This is an important point when I consider a global corporate community of practice that operated according to its own interpretations of the language of accepted industry standards. James Boyd White (1985), a law professor who is credited with founding the “Law and Literature” movement, also devised the theory of constitutive rhetoric, defined as the capacity of language to create a collective identity for an audience, especially by using symbols, literature and stories (White, 1985). In my study, I look at court opening statements from the DWH trial to examine the ways in which the defendant parties attempted to create a collective identity that included themselves, the U.S. government, and the public at large by appealing to the public’s need for jobs and desire for domestic oil production.

### **Language and social practice**

The following research contributions are especially relevant to my dissertation because the relevant portions of the defendants’ corporate discourse practices had to be molded into court opening statements in an institutional (judicial) context. Fairclough (1992) made explicit the crucial role of social practice for discourse analysis and claimed discourse is *more* than just language use: it is language use, whether speech or writing, seen as a type of social practice” (1992, p. 28). Fairclough and Wodak (1997) explained the indivisible nature of discourse and context, and emphasized that the intrinsic needs of any discourse that should not be overlooked (p. 277). Van Dijk (1997) outlined the role of contextual features as being fundamental to analysis because they “not only influence discourse, but also vice versa” and this reciprocal influence is at the core of any interpretation of discourse (p. 19). In a trial, where legal decisions are based on precedent, the dialectic relationship between discourse and its users, notwithstanding the social constraints and formal Federal Rules of Civil Procedure,

“contribute[s] to, construe[s] or change[s] that context” (Van Dijk, 1997, p. 20). I discuss this relationship between discourse and social practice further in Chapter 2.

### **Kairos**

The enormity of the DWH disaster presented a compelling need for groups to communicate from fundamentally opposed positions. Herrick (2009) defined kairos as “a consideration of opposite points of view, as well as attention to such factors as time and circumstances. Kairos is an opportune moment or situation” (p. 53). My dissertation advances an understanding of how court opening statements associated with the DWH disaster acted as kairotic moments, each with its own social consequences and repercussions.

The time and circumstances for both types of statements was both immediate and ongoing—from the time of the destruction of the rig to the environmental damage to the Gulf Coast states. Groups of people impacted by the disaster ranged from those who were killed and injured by the explosion, harmed by exposure to the oil spill and subsequent use of a dispersant, to those whose livelihoods depended upon fishing, tourism, and to large numbers of oil rig workers who were out of work without pay during President Obama’s six month moratorium on offshore drilling. State and local leaders and environmentalists called for legal action against BP and the other defendants, and the public had the opportunity and motivation to respond to the disaster by agreeing to speak freely to the media, write editorials, and speculate about their damages that were the consequences of the disaster. Each speaker had a specific goal that needed to be attained, whether it was to minimize responsibility, reassure the public, apportion blame, or hold someone responsible for actions or demand restitution. These contextual forces combined to create a situation in which multiple individuals and groups could take advantage of a timely issue and had the material components necessary for communicating their concerns to a vast audience

through mass media (Bitzer, 1966). Together, all of these events presented the circumstances that produced the rhetorical situations for all three types of opening statements. The trial, however, became the moment and place where the “sometimes-sudden conjunction of issues with their appropriate audiences appears” (Crowley & Hawhee, 2012, p. 45). The non-legal public and Congressional opening statements were made with a view towards future legal action while the court opening statements could not be presented until three years after the event, and were focused on the past actions by the defendants. I continue to discuss the application of kairos and its importance to this case study in the next chapter.

### **Epidictic vs. Forensic Rhetoric**

Attorneys are trained to craft their court opening statements such that they reframe the facts, documents and testimony in cases in a light most favorable to their clients. Attorneys do this in ways that conform not only to legal precedent, but also to fit with decision-makers’ own stories. But setting up court opening statements with this structure can be difficult when the facts of the case do not match up with community values and identity.

A principle objective of forensic rhetoric is to reproduce past events, “rather than arguing about the future good of the city-state” (Herrick, 2009, p. 87). Further, forensic rhetoric is predicated upon a *reasoned hypothesis* based upon the available evidence that will be produced at trial. However, as I will discuss in Chapter 2, the majority of decision makers make up their minds about the disposition of a case *before* any evidence is subsequently produced in the trial (Johnson, 2011; Waters and Hans 2009; Butler 2005; McElhaney, 2005; Kearney 2001; Diamond, 1997; Vinson et al. 1986; Becton & Stein, 1990). As this and other research has shown, decision makers are not so much concerned with the veracity of evidence as they are about their conceptions of what would make *themselves* safer first, and *then* how their decisions



would affect all persons, not just the person accused of a crime (Friedman & Malone, 2010; Ball & Keenan, 2009). Further, cognitive science tells us that “people tend to blame the lead character in the [situation] for causing the bad outcome because that person is perceived as having control over the situation” (Metzger, 2011, n.p.). Accordingly, all of the defendants and the U.S. government focused on BP, using the corporation in their own public opening statements and keeping attention directed there until court of public opinion attributed blame. Once the public was angry, it was difficult to get them to reconsider who was to blame or shared it. According to Metzger (2011), emotions limit our ability to consider contradictory evidence. That is where the court opening statement comes into play.

Moreover, these strategies do not only affect the jurors. Trial attorneys also transfer their own motivating anger to the construction of their court opening statements, “which helps focus and energize their judgment” (Metzger, 2011, p.4). Using new cognitive and neuroscience research, trial attorneys have found that by understanding how jurors become angry versus empathetic their arguments can be most effective if they can show that:

the danger [of the disputed act] was not an inadvertent "mistake" or "error"—but was, rather, a knowing and volitional act. As a result, a verdict against the defendant is seen to decrease the chances that other people or companies will violate the same rules. This is an unlikely result when the bad act is seen as inadvertent, which creates impotent *not* motivating anger, because you ‘you can't fix inadvertent’ so there's nothing to be motivated to do. (Metzger, 2011, p. 46)

In my later analysis of court opening statements in the DWH trial, BP’s counsel can be seen using this theory of “inadvertent” error to avoid a finding of gross negligence. The

corporate oil company defendant urged decision makers<sup>6</sup> to accept that it could not have planned for the consequences of an unprecedented event.<sup>7</sup>

The recognition that the epideictic rhetoric used in court opening statements *does* have a pragmatic goal is a new argument that I am basing upon both my experience in polling jurors after a trial, and the most recent neuroscientific research. According to Lehrer (2009), “all judgments are a blend of emotion and reason and that without input from our unconscious, emotional ‘primitive brain,’ people are unable to make the most mundane decisions” (p. 46). For example, Metzger (2011) explained the effect of anger on decision making:

Anger tells us that something needs to change. Anger is energy directed outward when there is interference with a goal, an unfair loss, mistreatment, a threat, social norms are violated, a lack of justice, a sense that something shouldn’t happen, etc. Anger drives us to overcome obstacles and control our environment *so we can reach our goals* ... Long ago, anger protected us from threats of physical harm, but today it usually protects threats to our ego, i.e., our sense of self and our values. (p.2)

The opposite is also true: jurors are “less inclined to punish a defendant when no action is required, i.e., when expending energy will not return a benefit” (Metzger, 2011). For these reasons, trial attorneys are taking decision makers’ emotions seriously into consideration as well as making a logical presentation of facts in a legal opening statement. While they speak in terms of approaches that will “activate cognitive appraisals for anger” and will motivate jurors to “punish and exert control over their

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<sup>6</sup> Even though this is a bench trial, in which Judge Barbier is the sole decision maker, the general public and BP’s shareholders, were getting daily transcripts of the trial. Shareholders in both the U.S. and in the U.K. had also filed lawsuits against BP.

<sup>7</sup> BP’s contingency plan *did* conceptualize a spill ten times larger than the DWH disaster.

environment,” my argument in this study is that these tactics are forms of epideictic rhetoric, not forensic (Lerner & Tiedens, 2006, p. 116).

Kennedy (1994) argued that forensic, not epideictic rhetoric determined how “other people’s affairs are to be decided” (p. 7). But I argue that there is another possibility: that an epideictic opening statement balances an emotional appeal with a logical argument. Given that jurors are making decisions primarily upon the presentations of court opening statements, trial attorneys are constructing their openings using this hybrid form. Trial attorneys are aware, and verdicts have proven, that the new model is effective (Friedman & Malone, 2010, Ball & Keenan, 2009).

This project examines the ways that trial attorneys, corporate management, governmental officials and the media constructed three types of opening statements using epideictic rhetoric to:

evince a conservative style that draws upon customary symbols, topics and rituals, making them appear to present decision-makers with alternative possibilities through an appealing presentation of the public virtues of an individual or deed. (Richards, C., 2009, p. 7)

As my analysis will later show, the defendant oil companies’ court opening statements, public statements and Congressional opening statement relied upon popular political scare tactics, such as national job shortages and the public’s desire for reduced dependence on foreign oil, as defenses for, or mitigation of, their behavior while at the same time trying to tie these arguments to elements of law that favored their arguments. The transformative potential of epideictic rhetoric fits the definition of court opening statements particularly because they have the capacity to bring social/public norms back into focus, particularly when powerful people have been controlling discourses to their own advantage. In this project I examine the court opening statements, public statements and Congressional opening statements to discern the types of

rhetorical moves used, and in what capacity epideictic rhetoric was employed to engage audiences in the process of “visualizing and actualizing alternative public norms” (Richards, C. 2009, p. 1). In Chapter 4, I compare the traditional Aristotelian definition of epideictic rhetoric with the genres of court opening statements in a ceremonial setting (a trial or Congress); in an institutional site that is symbolic of power and justice (Federal Court); with speakers who communicate with each other and the public (Presidential press conferences); and who are “members of a well-defined social context” (Stygall, 1991, p. 234).

### **Content, Organization and Analytical Approach**

I examine my data using the rhetorical theory of genre and a critical discourse analysis approach. Berkenkotter and Huckin (1993) claim that genre is a “dynamic embodiment of a community’s way of knowing, being and acting” (p. 477). According to the authors, genres are “... inherently dynamic rhetorical structures that can be manipulated according to the conditions of use” and are therefore, “best conceptualized as a form of situated cognition embedded in disciplinary activities ...” (p. 477). This definition fits the three types of opening statements that I will be analyzing. According to Bawarshi and Reiff (2010), “Within disciplinary contexts, for instance, genres normalize activities and practices, enabling community members to participate in these activities and practices in fairly predictable, familiar ways in order to get things done” (p. 79). Court opening statements are constructed in specific ways, presented at certain times, and must conform to specific rules and accepted processes. Researching the interconnections between rhetoric, genre and critical discourse analysis is not meant to lead to a complete definition of court opening statements as epideictic rhetoric. However, Villadsen (2008) argued the merits of the “interpretive component of rhetorical criticism that could act as a sort of “conceptual thickening’ that Leff observes ... when ‘theoretical precepts [...] are vibrated

against the particular case and are instantiated in an explanation of it' (p. 347)" (p. 29). Court opening statements act as critical devices that demonstrate how external collective voices and behavior fit together in a story. This dissertation will use critical tools of analysis to reveal the hidden and/or neglected connections, representations and strategies of court opening statements, public statements, and Congressional opening statements connected with an unprecedented disaster, a subject worthy of close analysis. Critical discourse analysis (CDA) is an approach that allows engagement in the current debates that address the abuse of social power. This dissertation contributes to those debates by analyzing the written content of the three types of opening statements. I use examples from the sample documents to support my analysis to answer my research questions numbered 1-3, and I address research question 4 in the conclusion of this project. The subsequent chapters of this dissertation examine how stakeholders legitimate themselves in an institutional setting after a disaster. Chapter 2 provides an overview of how critical discourse analysis and genre studies situate my study in the ongoing conversations about these qualitative methods of analysis. Chapter 3 describes the rationale I use for my data collection and analysis. Chapter 4 presents the actual data I collected and my analysis of that data. Chapter 5 is a discussion of my research findings and suggests further research in the areas of legal and political language, decision making, and social action.

## **CHAPTER 2: REVIEW OF LITERATURE**

This dissertation stems from an interest in investigating the complex interactions of different professional discourses within a highly institutionalized event, namely a federal bench trial concerning the DWH disaster. In particular, my dissertation project builds upon the research of Fairclough, Bazerman, Van Dijk; Wodak, Machin and Mayr and others whose work with genres of writing in the workplace and use of critical discourse analysis to uncover power inequities in relationships across discourses, helps us to contextualize connections between law, social action, and public policy. Critical Discourse Analysis (CDA) and genre theory are used by those concerned with disciplines as diverse as law, psychology, sociology, economics, science, organizational behavior and others. This dissertation draws from many of these fields as part of examining the relationships among large corporations, government, law, and society.

The primary purpose of this review is to provide an overview of existing literature that discusses the ways in which critical discourse analysis (CDA) and genre theory contribute to an understanding of writing in the professions. In this case specifically, I use CDA and genre theory to examine the construction of court and other opening statements following a disastrous event, and their connections to social action and public policy.

### **Critical Discourse Analysis (CDA)**

CDA is a respected methodological approach for analyzing relationships across discourse conventions (Fairclough 2001; Fairclough & Holes, 1995; Habermas 1982; Van Dijk, 1990, 1993, 2008; Wodak & Reisigl, 2009). Its purpose is to “reveal connections between language, power and ideology that are hidden from people” (Machin & Mayr, 2012, p. 219). I use Machin and Mayr’s (2012) approach of using CDA because their method also pulls from the research of several of the respected authors in this field.

My analysis describes the lexical choices made by the authors of all three types of opening statements, with the goal of drawing out features in the texts that might not be obvious to the casual reader. All of the researchers that I mention in this chapter have a common view of language as a means of social construction. Therefore, I analyze all three types of opening statements by using CDA to identify social and cultural processes and structures. In the practical sense, I employ a micro-analysis of the language structures authors used in the three types of opening statements, such as quoting verbs to present speech and speakers; transitivity and verb processes to represent action or non-action; rhetoric and metaphor to persuade with abstraction and other lexical choices.

Despite some criticism, CDA has “brought to light important issues concerning ideology and power” and has “certainly helped to contribute to our understanding, among other things, of racism and sexism” (Machin & Mayr, 2012, p. 215). Further, according to Simpson and Mayr (2010), CDA has “encouraged people, especially the young, to interrogate the discourses that surround them in their everyday lives” (Machin & Mayr, 2012, p. 215). In other words, CDA can help those in professional communication by going beyond a description of the language to teaching professionals how to find the hidden problems in their language and thereby find ways of overcoming the negative consequences of their language.

Fairclough is one of the chief authorities on CDA and studies the relationship between power and discourse. His well-known book, *Language and Power* (2001) is considered a foundational work in the field of CDA. The preface to Fairclough’s (2001) book notes that its purpose is to “examine the ways in which we communicate are constrained by the structures and forces of those social institutions within which we live and function” (p. vi). Further, Fairclough notes that his purpose is also a practical one: “to help increase consciousness of how language

contributes to the domination of some people by others, because consciousness is the first step towards emancipation” (p. 1). He points out that the “exercise of power in modern society is increasingly achieved through the ideological workings of language. Fairclough (2001) is also concerned about the “struggle *over* language” because it is in this sense that “discourse which occurs in the course of social struggle [is] a *stake* in as well as a *site* of social struggle” (p. 172). His understanding of language as having an investment in social problems is especially appropriate for studying a legal case, where the interpretation of words can decide who prevails at trial. If a party can use discourse to achieve power, then the party in power can also set the agenda for what is discussed, how it can be discussed, who has a voice and who is silenced (Machin & Mayr, 2012). Setting the agenda means the party’s message also becomes a “common sense” assumption that society adopts and reproduces, and then frames and controls discourse and effectively silences less powerful groups.

In Wodak and Meyer’s (2009) book, *Methods for Critical Discourse Analysis*, Fairclough’s (2009) chapter “A Dialectical-Relational Approach to Critical Discourse Analysis in Social Research” details his analytical framework for CDA, the stages of which are listed here:

1. focus on a social problem that has a semiotic aspect;
2. identify obstacles to addressing social wrongs;
3. consider whether the social order “needs” the social wrong;
4. identify possible ways past the obstacles; and
5. reflect critically on the analysis (pp. 163-171).

Fairclough’s (2012) framework in this chapter proposes to make a connection between a discourse in a community and the prevailing power structure. In his words, “If a social order can



be shown to inherently give rise to major social wrongs, then that is a reason for thinking that perhaps it should be changed” (p. 8).

Van Dijk (1993) has a similar concept of CDA but concentrates more on the sociocognitive aspects of language. His aim is to use CDA to reveal social relations of power that are present in texts, both explicitly and implicitly (Van Dijk, 1993, p. 249). He describes CDA as being linked to the ways “social power abuse, dominance, and inequality are enacted, reproduced, and resisted by text and talk in the social and political context” (p. 352). But he also recognizes some of the inherent problems in CDA. According to Van Dijk (2001), CDA must fulfill a number of conditions in order to effectively realize its aim:

- CDA research must be ‘better’ than other research in order to be accepted;
- It focuses primarily on social problems and political issues, rather than on current paradigms and fashions;
- [It should be an] “empirically adequate” critical analysis of social problems [that]is usually *multidisciplinary*;
- Rather than merely describing discourse structures, it explains them in terms of properties of social interaction and especially social structure;
- More specifically, CDA focuses on the ways discourse structures enact, confirm, legitimate, reproduce, or challenge relations of *power* and *dominance* in society. (p. 353)

Further, Van Dijk (2008) asserts that CDA does more than just describe discourse and genre forms. It also tries to explain them in terms of social interaction and social structure. CDA scrutinizes communications for evidence of inequity and abuse of power and also helps to explain why the functions of texts created in one particular genre are not necessarily constant

when moved into a context different from the one in which they were developed. This changing nature of texts from one context to another is an important part of this dissertation as I look at the ways “opening statement” texts differ from each other in some ways, but are quite similar in others.

Wodak and Meyer (2009) also reminds analysts to be aware of the potential for bias in their readings of texts. In an effort to both limit my bias and fulfill the call for more multi-disciplinary work in CDA, I gathered and reviewed research, commentary and editorial information from a broad variety of texts, including experts in economics (Read, 2011); psychology (Biggerstaff, 2012 ; Borgida &Fiske, 2008); philosophy (Butler, 2005); biology, and medicine (Moffatt & Elliott, 2007); behavioral science (Sylves & Comfort, 2012); chemical engineering (Pilkington, 2011); bioethics (Spielsman & Parry, 2010); and law (Holland, 2009; Johnson, 2011; Linz, Penrod & McDonald, 1986; Lubet, 2004; Marriott & Sullivan, 2011; Mauet, 2005; McElhaney, 2005; Prakash, 2014; Sinclair, 2004; Tanford, 2009; Tiersma, 2009, 2006, 2005, 2000; Vinson, 1986; and others); in addition to texts from technical and professional communication, rhetoric, writing in the workplace and ethics. Van Dijk (2009) also balanced concerns with researcher bias with his own argument that “critical discourse scholars want to make a more specific contribution [and get more insight] into the role of discourse in the reproduction of dominance and inequality” because one of the goals of CDA is to align itself with the dominated (p. 253). In Van Dijk’s (2001) words, I attempt to look beneath the surface of the DWH event in order to “take an explicit position, and thus ... understand, expose and ultimately resist social inequality” (p. 352).

This project analyzes various types of opening statements relevant to the 2010 DWH disaster event. One of the aspects I look at is the language used by corporate cultures to see how

it reflects the general attitude of its members. According to Bhatia, Cheng, Du-Babcock, and Lung (2009): This research will inherently become ... an interdisciplinary undertaking privileging a broad view of language and communication... all linkable to organizational studies of institutional and professional structures (p. 8).

Further, Bhatia et al., (2009) pointed out that understanding the “professional communication-oriented perspective can not only build on the cumulative insights gained from discourse-based studies, ... it can also foreground problem-orientated approaches so that research outcomes are made practically relevant” (p. 8).

Other researchers have taken the tenets of CDA and applied them to other specific genres or cultures. In his book *Discourse Power Address: The Politics of Public Communications*, Price (2007) wrote about “assessing the moral status of commercial messages” (p. 141). He investigates the “role of advertising, promotional and corporate texts to establishing their role in the circulation of public meanings” (p. 141). But he also asks “how some [messages] resonate in the ways they do, and what mechanisms are used to recirculate ideas with texts ... ‘propose’ to audiences” (p. 142). Price (2007) defined terms such as ‘directive’ (a communication with a strategic goal), ‘rhetorical gesture’ (a speaker paying lip service to alternative views), and ‘implicature’ (act of suggesting meaning without stating outright) as three ways to categorize and explain how public communications from corporations, advertisers and other businesses use discourse for their own ends. Price (2007) reiterates Habermas’ (1989) identification of the difficulty in categorizing the space or location context in which the messages take place. Price (2007) described Habermas’ (1989) observation that the difficulty arises when events are deemed “public” or “open to all,” but that this designation is ambiguous since it doesn’t always really mean there is “general accessibility” for everyone (p. 142). An example referred to was that of

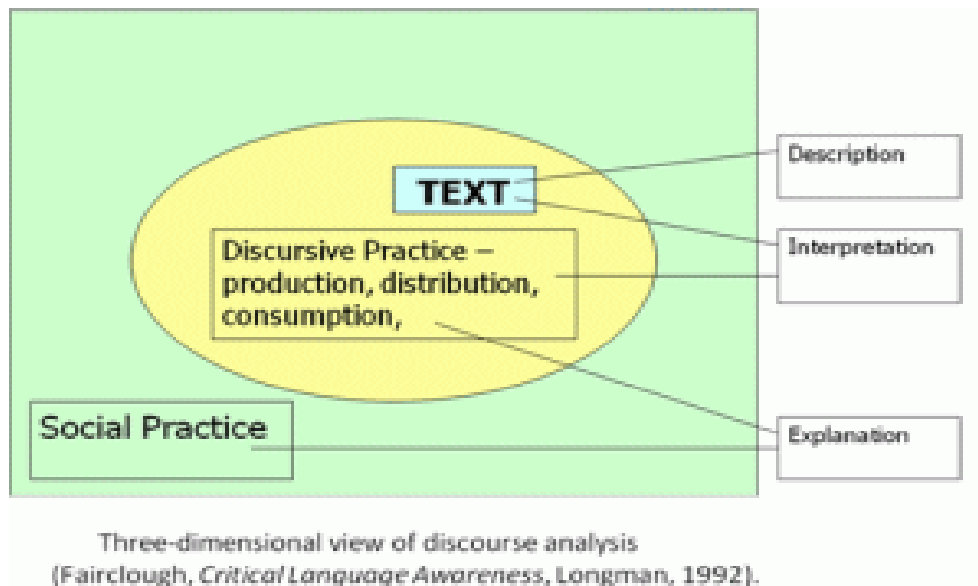
“public buildings” that were not actually open to citizens, but housed state institutions (such as the White House) and therefore represented public authority. I address these critical points when I consider that the DWH case was situated in a federal bench trial versus a trial by jury, and that all individual plaintiffs were represented in a class action. Judge Barbier states only that this procedure is typical for an admiralty case:

This is a bench trial. As everyone can see, we have no jury, which is customary in admiralty cases such as this. (Trial Transcript, Day 1, Morning Session, 14:5-7)

Finally, Price (2007) discusses the division between “officially constituted bodies” and a “citizenry that periodically sanctions their function through the electoral process;” even though the people are “formally and physically separated from the seat of such power,” which is nonetheless exercised in their name (p. 142). I consider these points when I analyze court opening statements from the DWH trial, President Obama’s opening statement to the public about the DWH disaster, and British Petroleum (BP) Chief Executive Officer Tony Hayward’s Congressional opening statement about the facts surrounding the disaster.

In his book, *Critical Discourse Analysis: The Critical Study of Language* (1995), Fairclough maps out a framework for studying discourse as a form of social practice and focuses on the ways social and political domination are reproduced by text and talk. The image in Figure 1 represents his “three-dimensional framework” for analysis.

**Figure 1: Fairclough’s Three-Dimensional Framework**



The “three dimensional” framework depicted above charts three forms of analysis onto one another: description of the text, interpretation of the discursive practice (production, distribution, consumption), and explanation of the social practice. The analysis process also looks at the grammatical and rhetorical devices in a text, which Fairclough calls the “micro” level, followed by studying the ways in which power relations are enacted (the “meso” level), and finally, tries to understand the broader social context(s) that affect the text (the “macro” level). Huckin (1997), characterizes this framework as a “democratic approach which takes an ethical stance on social issues with the aim of improving society” (p. 1). Machin and Mahr’s book, *How To Do Critical Discourse Analysis* (2012), operationalizes Fairclough’s three-dimensional framework, primarily at the micro level. The authors present a model for examining texts for the ways they make meaning by looking for evidence of semiotics, presenting speech and speakers (quoting verbs), language and identity, representing action (transitivity and verb processes), nominalization, presupposition, and truth, modality and hedging. Machin and Mayr’s stated goal is to guide researchers in a more detailed analysis of texts for the purpose of revealing ideologies (p. 1). This approach complements the theory that power comes from privileged access to social

resources such as education, knowledge and wealth, which in turn enables those with access to dominate, coerce and control subordinate groups and dominate the conversations. But the authors go a step further to explain that language is not simply a vehicle of communication or persuasion, but a means of social construction and domination (Machin & Mayr, 2012, p. 24). They point out that power can also be “jointly produced when people believe or are led to believe that dominance is legitimate in some way or another” (p. 24). The authors use examples such as people giving doctors the power to diagnose and prescribe care for them, or they elect politicians who they “believe have the authority to govern a country” (p. 24). In this sense, Machin and Mayr assert that ideology both dictates the way “certain discourses become accepted” and “obscures the nature of our unequal societies and prevents us from seeing alternatives” (p. 25).

Bazerman and Paradis (1991) edited a collection of studies in their book, *Textual Dynamics of the Professions: Historical and Contemporary Studies of Writing in Professional Communities*. Collectively, the studies expound upon the concept that writing is social action, and, “more than socially embedded: it is socially constructed” (p. 3). The value of this collection is in the theories and studies about the contextual constructions of writing in professions such as natural philosophy, models of literacy, engineering (operators’ manuals), sociology (meaning attribution), and law (jury instructions). Most importantly, the authors’ goal was to argue that texts should be studied in their social contexts and recognized as “transactions that make institutional collaboration possible” (p. 4). The value of textual analysis is in its ability to construct versions of reality. Considerable research has been done on this subject of the contextual nature of texts and genres in addition to Bazerman and Paradis’ work (which was also reprinted in 2014), by such researchers as Bhatia et al., (2009) (genre theory), Bhatia and Bhatia

(2004) (specialized and global communications); Engberg (2004) (legal language); Hodge and Kress (1993) (language and ideology); Kress and Van Leeuwen, (1996) (semiotics); Miller, C. (1984) (genre and social action); and Swales (2004, 1990) (negotiation of genre across discourse communities), to name a few. It is an important reminder of the need to analyze my research in the context in which it was created.

Like the preceding scholars, Huckin, Andrus and Clary-Lemon's (2012) article "Critical Discourse Analysis and Rhetoric and Composition" also discussed the aims and goals of CDA, but added the context of rhetoric and composition. The authors stated that CDA has taken a "public turn," acknowledging that it is concerned with the importance of the way language can be used to persuade audiences about important public issues. They stated that CDA aligns itself with traditional rhetoric and composition variables such as situation, genre, diction, and style but also supplements these with the above-noted tenets of CDA. They also added that CDA "systematically grounds its analyses in both quantitative and qualitative attention to linguistic details" (Huckin, Andrus, & Clary-Lemon, 2012, p. 109). The authors argued that CDA matched writing studies' goal to "understand the impacts of writing as a cultural practice" (p. 110). Like Machin and Mayr, Huckin, Andrus and Clary-Lemon assert that CDA looks systematically at the details of grammar and word choice, and rhetorical processes; for example the textual effects such as persuasion, the performance of *ethos*, "the reinterpretation of *topoi* in new contexts," and the rhetorical functions of institutions such as medicine and the law (p. 118). According to Huckin, Andrus, and Clary-Lemon, CDA also enhances *explanations* of events by routinely engaging a wide range of texts that reflect abuses of power, and a variety of scholarly disciplines, concepts and research methods.

Other literature focuses specifically on CDA as a social action or on rhetorical practices that serve similar purposes and provide additional insight for analysis:

- CDA not only describes and interprets genre in its social contexts, it also proposes reasons for why and how those discourses work (Chouliaraki & Fairclough, 1999).
- CDA empowers people to examine texts using a framework for analysis developed from theories regarding power imbalances, exclusion and equity (Foucault, 1972); to identify manipulation or transformation of reality for the achievement of political goals (Edleman, 1988, 2001), reinterpretation of words depending upon who used them (Pecheux, 1995), and alteration of perceptions according to the language used, shaped by relations of power, and invested with ideologies (Fairclough 1992; Hauser 1999; Murphy 2003; Richards, C., 2009).
- CDA demonstrates that language is not neutral and will therefore affect social justice and civic engagement (Fairclough 1992; Huckin, Andrus, & Clary-Lemon, 2012; Murphy 2003; Richards, C., 2009).
- CDA has an ideological purpose and can provide a helpful lens for revealing conflicting and unequal relations of power that exist among groups (Fairclough & Wodak, 1997).
- CDA is historical work in that it connects us to previous, present and future discourses, thus providing us with a foundation for studying the past and present modes of discourse as part of the intertextuality situated within a network of social, political and cultural matters (Bakhtin, 1986).

Fairclough, Mulderrig, and Wodak (2011) explain CDA's relationship with social action: "CDA sees discourse as "a form of social practice. This implies a two-way (dialectical) relationship: the discursive event is shaped by situations, institutions, and social structures, but it also shape



them” (p. 357). CDA constitutes social action with an “emancipatory agenda” because it assists in transforming social practice (Fairclough et al., 2011, p. 358).

### **Evolving Views of Genre in the Literature of Rhetoric and Professional Communication**

Genre-based research has been conducted in academic and professional discourse fields of inquiry for decades (Bhatia, 2004, 1993; Swales, 2004, 1990; Dudley-Evans, 1994). Rhetoric and technical and professional communication literature suggest that genre theory is dynamic, based in activity, focused on specific purpose, directed by community discursive practices and shaped by accepted conventions (Berkenkotter & Ravotas, 1997; Dias et al., 1999; Orlikowski & Yates, 1994; Schryer, Campbell et al., 2008; Schryer & Spoel 2005; Stam, 2000). People come into contact with various genres of documents in their everyday activities such as filling out medical history forms, apartment leases, insurance forms, and learning how to use them when needed. However, our understanding of genre has expanded beyond the *forms* of genre to examining the sophisticated and socially based processes behind its creation and use (Swales, 1990). In his book, *Analyzing Genres* (1993), Bhatia suggested a definition of genre: “Most often it is highly structured and conventionalized with constraints on allowable contributions in terms of their intent, positioning, form and functional value” (p. 13). An example of highly structured conventions is legal texts. The language is specialized and requires special knowledge to both write and use it. The form of legal texts is often statutorily defined, leaving little room for change because each word has come from case precedent. The rules for this kind of language can be found in legal texts, but they are more commonly found in law libraries, courthouse libraries, or subscription online services (example: LexisNexis). Even searching for particular legal terms is a skill outside of most people’s experience. Consequently, many people must seek out a legal professional to assist them in situations involving law such as contracts, bills of sale, etc.

## **Discourse communities/communities of practice and genre use**

I use the term “discourse communities” in this project because it appears to be the term most commonly used in the literature. The term “discourse communities” focuses on texts, language, and genres that enable group members throughout the world to maintain their goals, regulate their membership, and communicate efficiently with one another (Swales, 1990). Examples of these texts in the law include wills, subpoenas, and workers’ compensation forms. Miller (1984) declared that a definition of genre should “be centered not on the substance or the form of discourse, but on the action it is used to accomplish” (1984, p. 151). Genres are socially constructed, and according to Hodge and Kress (1988), “genres only exist in so far as a social group declares and enforces the rules that constitute them” (p. 7). Smart (1993) claims that a review of literature “suggests a reinterpretation of genre as a broad rhetorical strategy enacted, collectively, by members of a community in order to create knowledge essential to their aims” (p. 124). Myers’ (1991) study of the genre of biologists’ writing is an example of how participants in discourse communities establish their professional membership by demonstrating their ability to practice the genre conventions that are important to a community of practice. However, for people to adopt the genre knowledge of a community, they must first gain membership and learn the intricacies of the genres required for participation. According to Bazerman (2013), “texts attempt to enlist participants into communities of shared knowledge, thinking and activity—so that the text becomes an object of co-orientation and shared knowledge” (p. 188). Further, Bazerman (2013) pointed out that “each text is surrounded by complex social, historical, and cultural apparatuses that bring people together in common projects and experiences, that have made them familiar with what is pointed to in each text, and have facilitated shared attitudes towards those things indexed” (p. 188). Exploring the ways people develop the ability to use genre has provided additional insights into the ways genre

function. Becoming skilled in using genres entails more than memorizing a set of guidelines or rules. Prospective members must also absorb the traditional content of a culture and assimilate its practices and values.

The legal profession consists of a group of qualified members who have graduated from vetted law schools, and also passed an extensive written examination. But they are also required to intern as law clerks in various law firms, or institutions that include a legal component. These social environments provide models of expected professional behavior and practices and assimilate prospective members into the conventions “which are regarded as belonging to them” (Chandler, 1997, p. 3). With respect to legal documents, Tiersma (2006), argues that with written documents, “the subject matter poses severe restraints on how creative and eloquent lawyers can be” (p. 39). Working within these restraints, and demonstrating the knowledge and ability to participate in legal activities by using the accepted genres of communication in that profession, attorneys build credibility in their community of practice.

The legal discourse community is especially careful to adhere to traditional language and forms. As a historical example, Tiersma (2006) related that Thomas Jefferson recommended that the newly independent state of Virginia retain English law and English legal language. Tiersma (2006) states that Virginia representatives “explicitly decided not to modernize the language, because ‘the text of these statutes has been so fully explained and defined by numerous adjudications, as scarcely ever now to produce a question for our courts’” (p. 28). This reverence for traditional forms of language is a hallmark of members of the legal discourse community.

Defining a formal genre structure and activity method that is both appropriate for a situation, and can provide guidance for sound decision making is important for ensuring fairness in areas of society. The law relies upon its predecessors’ decisions of other actual controversies,

not just abstract statutes and codes. The legal profession has a dynamic relationship with texts and the situations in which they were produced as evidenced by the profession's reliance upon precedent for developing or maintaining processes and forms, and for implementing public policies to ensure equity.

Further, according to Bhatia (2004), members of other professional discourses “often mix socially accepted communication practices conventionally served by two different genres to create a hybrid (both mixed and embedded) genres” (p. 87). This is true with the other genres of opening statements such as the Congressional opening statement and the public press conference statements that I analyze in Chapter 4. Later in this chapter I also discuss the concepts of epideictic rhetoric and *kairos* and their particular suitability for analyzing the language conventions of genres “in relation to creating, maintaining or questioning communal values” (Villadsen, 2008, p. 31).

### **Opening Statements and Genre**

In the case of genres of opening statements, the similar naming of the genres can lead people to believe that they are all equivalent in nature and in purpose. Generally, the most popular use of the term ‘opening statement’ implied the beginning of some kind of legal or governmental process or event (court opening statements). In a general Google search, using the query of ‘opening statement,’ the first 21 search results were about opening statements in a legal setting. Four images also resulted, all in courtroom settings. These were followed by search results consisting of one press conference opening statement and five Congressional opening statements (June 17, 2014). Therefore, it is not surprising that when a corporate announcement or a quasi-legal occasion begins with an ‘opening statement,’ people may believe either that the presenter is speaking truthfully or is under oath, or that the presenter is legally compelled to

answer questions truthfully or provide accurate information, whether or not the statement is occurring outside of an institutional or judicial setting. When the term “opening statement” is used indiscriminately or without further modifiers, it ignores the “intracommunity demands of a professional discourse and trivializes the nature of [its language and texts]” (Stygall, 1994, p. 250).

Opening statements before a legislative body (Congress) or court proceeding are generated both for the institutional needs and for the *ultimate benefit of a society* (Papke, 1991; Rawls, 1999; Stygall, 1991; Tanford, 2009; Tiersma, 2006; 2000). Ultimately, the goal for the court opening statement is to convince a decision-maker(s) to come to a verdict or make a decision (a jury’s *binding* decision or a judge’s *binding* resolution), which will not only benefit one of the parties but also has far-reaching effects on all of the parties.

Court opening statements are critical to a party’s success in trial because *60-80% of jurors* make up their minds about who they will vote for immediately after the court opening statements (Becton & Stein, 1990; Butler 2005; Diamond, 1997; Hirschhorn, 1991; Johnson, 2011; McElhaney, 2005; Vinson et al. 1986; Waters & Hans 2009). Others, like Linz, Penrod and McDonald (1986), stated their belief more generally in their study of fifty trials, but just as effectively:

Trial practice experts also generally believe it important to establish an initial impression of expertise and good rapport with the jury. ... According to one such text: ‘Jurors cannot remove from their minds the assessments or opinions of lawyers they have stored away. . . When the jurors like one side and dislike the other, they will without hesitation resolve every doubt in favor of the [side] that they like. If the infatuation is strong enough they may even consciously stretch a point or two with moral insensibility.’ (p. 282)

Others claim have claimed variously:

- I try cases on the theory that the place to win a case is in the opening statements (Connolly, 1982, p. 159);
- An opening statement can win the trial of a lawsuit ... Jurymen, in cases tried by effectual advocates, have been prone to say that once the opening statements were made there was nothing left to the case. (Julien, 1980, p. 2);
- You cannot avoid leaving an impression in the minds of the jurors when you make your opening statement. They will begin to lean one way or the other, even before the evidence is presented. (Sams, 1982, p. 22).

While these are anecdotal comments, they are also all made by trial lawyers. Genevie and Cooper (n.d.) state the findings from their work as complex tort jury researchers as follows:

Our research indicates that in most large commercial cases 60-80% of the jurors have settled on their resolution of central issues in the case after the opening statements. Typically, this percent is closer to 75% with the remainder – the undecided and the ‘flippers’ – splitting relatively evenly between those who move towards the defense and those who move towards the plaintiff. (p. 1)

Court opening statements have a critical function for the legal community and the public. They are influential and well-documented examples of the primacy effect (what is heard first is remembered best) and act as a framework that can guide jurors through the remainder of the trial.

### **Genre, Legal Jargon and Plain English**

In this section about the genre conventions of court opening statements, I quote author, professor, and lawyer Peter Tiersma often. Tiersma is considered to be a pioneer in research about the intersection of linguistics and the law. He was a respected member of the jury instruction advisory committees for the California Judicial Council when the state was at the forefront of a movement to produce standardized jury instructions that were not only legally

accurate statements of law, but also understandable to jurors who were charged with following them. In 2003, a comprehensive set of civil jury instructions were released and California's example has since been followed by other states. Tiersma's concern with legal language is reflected in his prolific publications, including co-writing *The Oxford Handbook of Language and Law* (2012) (co-written with L. Solan), *Parchment, Paper, Pixels: Law and the Technologies of Communication* (2010), *Speaking of Crime: The Language of Criminal Justice* (2005), and *Legal Language* (1999). Tiersma also wrote multiple articles and gave presentations around the world on legal language, technologies of communication, and jury instructions. His research on the dual responsibilities of legal language makes him a well-respected authority in this area.

Court opening statements use language conventions of a particular discourse or adapt jargon for a general audience. Although most lawyers believe that legal language is a relatively precise mode of communication, Plain English advocates argue that even if legal language is precise, ordinary language would do the job just as well (Mellinkoff, 2004; McThenia, 1990; Paine, 2012; Tiersma, 2005). The reality is that laypersons remain dependent on lawyers for creating and translating effective legal texts and this makes it hard for lawyers to abandon their distinctive language (Tiersma, 2006). Critics of the legal profession claim that its language is not precise at all and suggest that the law "maintains its distinct speech and writing style mainly to mystify the public and to justify the fees that lawyers charge their clients" (Tiersma, 2005, p. 4). Stygall (1991) argued, however, that while some groups like the Plain English movement, may at first try to 'improve' legal texts, it is "problematic to attempt to improve a text that serves powerful purposes within a community" (p. 235). The same can be also be said of other professional discourses such as medicine, engineering, science, technical communication,

physics and astronomy that provide services, knowledge and advice to the public, some of which cannot be readily understood by the average person.

Tiersma (2005) agreed, calling the opposing Plain English views “myths,” because they acted as “received wisdom without much investigation” and presented simplistic explanations for the legal profession’s preservation of their own language (pp.4-5). He added that myths also tends to present simple explanations for things that are actually more complex and that they persist because “they seem plausible to the people who believe in them and fit in well with their view of the world” (2005, p. 4).

Once a word or phrase has been authoritatively interpreted by the courts, lawyers “will be inclined to continue using it even if it may have changed in meaning or become obsolete in ordinary speech” because it benefits the client to follow precedent (Tiersma, 2006, p. 30). For example, the language in a legal document (for example, a “deed”), “whose function has remained essentially unchanged for centuries,” verifies its stability (p. 30). Tiersma (2000) argued that lawyers did not devise today's forms of legal language for the purpose of monopolizing the profession. Instead, Tiersma (2000) argued that: “the increasing linguistic complexity of Anglo-Saxon laws led to more complicated legal language, suggesting that the complexity of legal language may to some extent simply reflect an increasingly complicated society” (Summary, p.1).

His conclusion was that legal language was influenced by diverse languages and cultures, and the growing complexity of the legal system. Society learns to recognize genres of legal discourse because they display certain consistent features or forms, and these have become even more common due to the proliferation of fictional legal television shows. But the history of the literal language *translation* of the conventions, rules and policies established for the genre is not



as well-known. Therefore, the origins of precedent can sometimes be manipulated by political and societal pressures, so that the intersection of law and public policy “is not always obvious or transparent” (Borgida & Fiske, 2008, p. 293; Tiersma, 1999; Winsor, 1996).

Tiersma’s (2005) works on the “myth of legal language” will apply to my analysis of court opening statements in this dissertation. In Chapter 3, I identify additional conventions and contexts of different types of opening statements, and then analyze them as a group as part of my analysis in Chapter 4.

### **Kairos and the Importance of Primacy**

As I discussed earlier in this chapter, court opening statements are critical to a party’s success in trial because the majority of jurors decide cases for themselves after hearing court opening statements and before hearing the evidence. This fact corresponds to the rule of primacy, that what is heard first tends to be the most difficult to dislodge from someone’s mind (Johnson, 2011). According to Hirschhorn (1991), “Many lawyers believe that summation is where your case is won or lost. Social scientists have taught us that this belief is erroneous” (p. 605). Vinson (1986) agreed, arguing that trial lawyers must also consider the role of preexistent cognitive structures and attitudinal values in jurors’ deductive decision making (pp. 1-15, 173-75). Lubet (2004) wrote about the critical importance of the court opening statement:

Opening statement, the advocate’s first opportunity to speak directly to the jury about the merits of the case, marks the beginning of the competition for the jury’s imagination. This moment is crucial since the mental image that the jurors hold while hearing the evidence will directly influence the way they interpret it. The attorney who is successful in seizing the opening moment will have an advantage throughout the trial because the jury will tend to filter all of the evidence through a lens that she has created. (p. 387)

Lubet's conclusion is consistent with human behavior; Hirschhorn (1991) also notes that "human beings have a natural tendency to be judgmental and to draw quick initial conclusions" (p. 605). In trial attorney James Johnson's (2011) article, "Persuasion in Opening Statement: Generating Interest in a Convincing Manner," Johnson cautions trial attorneys that they "are dealing with the modern jury, a sophisticated group of citizens with preconceptions and expectations for compelling presentations" (p. 42). One of the most effective ways of controlling people's conception of truth is through the use of timing, since putting the "truth" on the table first means all others must work not only to prove their own statement of the facts, but also to *disprove* that first declaration. The problem with persuasion is that "the story may be more compelling than the proof and thus may confuse the jury by misleading them about what 'actually happened'" (Cohen, 2000, p. 68).

The trial process provides an advantageous "window of time," a kairotic moment at the beginning of trial for attorneys to present a preview of the evidence to decision makers. According to Herrick (2009), kairos is "rhetoric's search for relative truth rather than absolute certainty; a consideration of opposing points of view, as well as attention to such factors as *time and circumstances* (p. 53). Bizzelle and Herzberg (2001) provided a history of the emergence of kairos from the time of classical philosophers to the Sophists. Gorgias and other Sophists argued that a "clash of views" was "closely related to the concept of kairos, the belief that truth is relative to circumstances," thus breaking with Plato's traditional search for 'absolute truth' (cited in Herrick, 2009, pp. 25, 45). While Plato censured Sophists for employing 'manipulative' rhetoric instead of searching for and conveying truth, Gorgias argued that audiences should *know* and be aware of the ways language was being used *on* them. An interest was forming in the use of rhetoric for practical purposes. In particular, kairos was becoming a "prompting toward

speaking, a moment of crisis or urgency to fill the void created by conflicting ideas, a seizing of an opportunity to speak in a moment of decision” (Glover, 1990, p. 158). The phrase “kairos consciousness” was formed based upon the idea of responding accurately to moments of opportunity (Glover, 1990, p. 158).

According to Glover (1990), Protagoras argued that a kairotic moment was justification for rhetoric: a search for truth would lead to a social contract, meaning that the people would agree to follow laws if opposing viewpoints were tolerated. Bizzelle and Herzberg (2001) stated that the Sophists saw:

the possibility of communities uniting, not on grounds of a common (Greek) culture, but on grounds of a common recognition that humanity could express itself in many ways and was not subject to an absolute standard that could mark some ways for annihilation. (p. 25)

Kairos is the rhetorical element that joined opposing forces and acted as a generative element “because all matter in the universe springs from this harmony of opposing forces ... [it could] also unite individuals in harmony and justice ... (Glover, 1990, p. 157). Empedocles’ belief that “all knowledge is probable because it is attained only through the senses, which are unreliable” meant essentially that no two people experienced an event in the same way (Glover, 1990). The Sophist conception of kairos, however, claimed that a “relativistic epistemology” could maintain a “balance among sense perceptions necessary for evaluating probable knowledge” (Glover, 1990, p. 158). Therefore, kairos could be situational and practical while maintaining neutrality. When I use the term “Kairos” in this dissertation, I mean that real truth is not created by an individual person, corporation or government but, as Bakhtin (1986) stated, by the “people *collectively* searching for truth in the process of their dialogic interaction” (p. 110).

### **Opening statements and epideictic rhetoric**

In their article, “Classical Rhetoric and the Modern Trial Lawyer,” published in the legal journal, *Litigation*, Sandler, Epps, and Waicukauski (2010) claimed that learning the art of successful argument in trial should begin with an understanding of the principles in Aristotle’s *Rhetoric* (p. 16). In particular, the authors pointed out that Aristotle’s “timeless” techniques and “steadfast beliefs in the rule of law” are “continually instructive and inspiring for modern trial lawyers” (p. 16). They argued that trial attorneys learn “the hard way” what Aristotle observed: that “audiences differ in attitudes, beliefs, and preconceived notions about the matter at hand” and that each “receiver” should be addressed by a unique argument (p. 16). To do so, however, required a “sophisticated understanding of human nature, habits, desires, and emotions” (p. 17).

According to Garver (2009), Aristotle defined rhetoric as a process of identification, a form of conscious, purposeful human communication. (See also, Hamilton 2005; Walzer & Gross 1994; Burke, 1992; Foss, et al., 1991). In Book 1 of the *Rhetoric*, Chapters 4-15, Aristotle conceived a system of division of types of speech, dividing them into three categories that reflected both the different settings in which they occurred and the three corresponding rhetorical purposes for which they were made (Herrick, 2009, p. 84). The first category was deliberative oratory, defined as speeches that were presented in the legislative settings to debate civic laws. Next was epideictic rhetoric, defined as ceremonial speeches given at funerals (eulogies or epitaphs), to celebrate victories, or to praise or condemn someone. The final category was forensic oratory or courtroom pleading. The consensus in the literature about legal genres has typically been discussed in the context of forensic rhetoric, in an adversarial context. But I argue that epideictic discourse goes further and plays an important role in the public realm, beyond just simple commemoration or ceremony, because it facilitates opportunities to “address fundamental values and beliefs that made collective political action within the democracy more than a

theoretical possibility” (Hauser, 1999, p. 5). These values and beliefs also comprise a genre of *social action* because of their capacity to “reinforce traditional values, sustain orthodoxy and preserve social order” (Richards, C., 2009, p. 2).

I maintain that the opening statement in a trial process demonstrates the characteristics of *epideictic* rhetoric and that these characteristics are well-matched to the form, structure, purpose and delivery of court opening statements. In this dissertation I refer to the expanding character of epideictic rhetoric to include more than the traditionally defined “classical funeral orations” (Hauser, 1999, p. 5), to one which, according to Villadsen (2006), Perelman and Olbrechts-Tyteca described as the “rituals praise and blame maintain collective values upon which future actions are justified” (p. 2). As forms of epideictic rhetoric, court opening statements provide a frame appropriate for functions that have cognitive and contemplative goals. They prompt decision makers to think, to reflect and, and to embrace a new idea (Herrick, 2009, p. 86).

I argue that court opening statements are not forms of forensic or deliberative rhetoric. Court opening statements do not weigh evidence, establish policy, or address questions concerning expediency or the best use of resources. Instead, using epideictic rhetoric helps set a tone in a court opening statement that promotes reflective equilibrium in a trial, by which I mean the mutual accommodation of deeply held, but abstract, moral principles on one hand and considered judgments of justice on the other (Rawls, 1999<sup>8</sup>). The transformative potential of epideictic rhetoric fits the definition of the genre of court opening statements because they have the capacity to bring social/public norms back into focus when the powerful have been controlling discourses. Gorgias argued that ceremonial oratory could be used as a type of

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<sup>8</sup> Rawls' complete argument in *A Theory of Justice* is powerful and complicated, and the brief comments offered here are selected only to make a point of emphasis. Rawls' book contains many complete discussions of his important theory.

empowerment that could be taught to those in Greece's changing society because it "dealt with virtue and vice" and "provided opportunities to reinforce important values having to do with right behavior, or to uphold virtues such as courage, honor or honesty" (Herrick, 2009, p. 86).

The goals of epideictic speech are not merely to commemorate, but also to encourage audience members to form opinions, to revise their existing beliefs and attitudes on a topic, and are preparatory to action (Perelman & Olbrechts-Tyteca, 1991; Walker, 2000). Ethics can be subjective and legal precedent is often contradictory, and both can result in a conflict of values. Court opening statements provide the space in juridical institutional settings to generate normative knowledge for the purpose of guiding human action in institutional settings (Walzer & Gross, 1994). Court opening statements can be the most critical moment in a trial.

In the next chapter, I describe my methods of collecting and analyzing data related to the three types of opening statements about the DWH tragedy. My focus is on the ways actual speakers make use of language, not claiming generalizability, but a deeper awareness of the dynamics of this single event.

### **CHAPTER 3: METHODOLOGY**

In this dissertation, I analyze the genres of opening statements surrounding one case—the unprecedented DWH disaster that resulted in a significant multi-district litigation civil trial. Decisions made in the trial will shape public policy and modify corporate behavior.

I chose this case for my research because of my interest in the influence large corporations have over the public, government, and politics. I worked on two other multidistrict litigation cases in the capacity of a certified paralegal specializing in litigation of complex tort cases. One concerned the representing the State of California who was suing large tobacco corporations, and the other concerned the Phentermine-Fenfluramine (Phen-Fen) drug combination litigation. In both of these cases, I observed the ideologies of the parties through document inspections, discovery questions and responses, expert witness testimony, and depositions of corporate management. I was also able to observe a portion of the proceedings in the Phen-Fen MDL trial in Philadelphia. These experiences allowed me to observe the representations made by large corporations, physicians, experts and government as they each worked to preserve their reputations and avoid blame and responsibility for restitution.

In the previous chapters, I explained my intention of using critical discourse analysis and genre analysis to gain insight into the discursive elements of opening statements and to develop a framework for analysis. While my study begins with the genre of court opening statements, I also refer to and critically examine other statements relative to the DWH event to expand my understanding of the representations and strategies speakers use to create a first impression. My purpose in this chapter is to explain what data were collected and why, and to describe the methods I used to analyze them.

In this chapter I first provide my rationale for choosing a qualitative, case-study approach and describe the benefits and challenges inherent in that choice. Then I describe my data collection and explain my analytical framework to show how and why my methods function to answer my research questions related to the social consequences of framing power and value in different genres of opening statements.

### **Qualitative Research**

Qualitative research is a broad term for a variety of approaches that include case studies, critical discourse analysis (CDA), genre analysis, participant observation, field studies, and other methods (Richards, K., 2003). Choosing a method for any study depends on research goals that are comparable and generalizable. Qualitative analysis, particularly of a unique case, has been used to study language in legal context in a number of research areas. For example, textual analysis was used to study the defense of legal language as a professional discourse (Tiersma 2009, 2006, 2005, 1995; Stygall, 1991); the structure, semantics and pragmatics of legal language (Engberg, 2004); the rhetoric and poetics of law (Constable, 2007; White, 1983), empirical legal studies (Eisenberg et al., 2005); and religion and law (Sullivan, 2004). Qualitative research involving observation of human subjects was used in psycholinguistic studies of jury instructions (Charrow & Charrow (1979); psychology and the use of Plain Language as a ‘reform’ of legal language (Diamond, 1995); law and human behavior (Diamond (1995, 1997); Butler, K., 2011); philosophy, trials and social institutions (Burns et al, 2008); and many others. The three methods I chose to use in this study were textual analysis, critical discourse analysis, and genre theory. I use a case study and textual analysis approach to examining the court opening statements from the DWH trial, public statements and a Congressional opening statement.



I consider my work a case study because I'm focusing on one specific situation. The purpose of case studies in general is to closely examine a context, in this case an event in which legal, political, and corporate business principles and practices came under intense public scrutiny. In my analysis, I employ critical discourse analysis (CDA) to suggest what the statements reveal about BP's message to the public, the U.S. President's messages to the public, as well as the power dynamic that existed between BP, the U.S. government, and the public. I use genre theory to compare and contrast early public statements and a Congressional opening statement with later court opening statements made at trial to see whether they contain similar rhetorical moves. These methods are suitable for gaining a deeper understanding of the discourse of specific organizations or events.

Using CDA I can place all three types of opening statements in context with the legal, political and cultural conditions at a particular time or in a particular context. I also consider the areas in which law and contemporary social life intersect and where awareness-raising is especially needed to encourage opportunities for change (Jaworski & Coupland, 2008). That awareness is based upon the idea that texts do not occur in isolation and are not fully understood unless we look at the history, social and political background of the texts and the wider context they appear in.

### **Data Collection and Rationale**

I began my research by looking for the types of opening statements that had been presented in the context of an official capacity relative to the DWH disaster. I decided to use President Obama's public opening statement to the Gulf States on May 2, 2010, and his public statement to Americans from the Oval Office on June 15, 2010; BP CEO Tony Hayward's Congressional opening statement at a Subcommittee investigative hearing on the DWH disaster

that occurred on June 17, 2010; and two of the opening statements from Phase I of the DWH civil trial that began February 23, 2013. I chose these statements because, as I describe below, they were all significant artifacts recorded and transcribed on the record with transcriptions available for the public. All were presented in institutional settings: the Oval Office, Congress, and a federal courtroom.

I looked for transcripts of these statements by first doing a general Google search, and then a search on LexisNexis, a legal database, but I was unable to find official trial transcripts on either site. I did, however, find a partial copy of Judge Barbier's Order regarding the daily posting of court transcripts from the trial, which contained the official trial name and docket number. With that information I searched the U.S. District Court website for the DWH trial, located the name of the Court Reporter Coordinator for this jurisdiction, and emailed the Clerk of Court asking for information on obtaining official transcripts of the trial. The Clerk replied with a link to the multi-district litigation (MDL) trial website repository that contained all of the court opening statements presented at the trial. I located the transcript of BP CEO Tony Hayward's statement to Congress on the Government Printing Office (GPO) website. Official transcripts of President Obama's press conference statements were located on the White House Press Office website.

I collected and reviewed several other documents relevant to the DWH disaster, the BP criminal plea agreement and official White House press conference statements. The disaster and its aftermath also generated significant media attention, both locally and world-wide. Therefore, I also looked at multiple newspaper articles, editorials, news clip videos and transcripts of news radio broadcasts, such as *National Public Radio*, (Brady & Block, 2013) to get a better understanding of the context of conversations, criticisms, and support for the framing of event by

BP, its contractors, and state and federal government. Altogether, I reviewed eight court opening statements, a Congressional opening statement, and several presidential press conference public statements. I read dozens of media accounts of the DWH disaster, selecting twelve external and alternative media accounts of the event. The data described in this chapter were explicitly gathered to answer the following focused research questions:

1. How are power and value framed in the court opening statements from the DWH civil trial by various stakeholders the DWH event?
2. What interpretations of framing for the public are evident?
3. What are the representations and strategies visible in the texts— written or spoken—of three types of opening statements (both legal and colloquial) related to the DWH disaster?
4. In what ways do critical discourse analysis and genre analysis expand/challenge our understanding of what is different and what is similar among the various “genres” of opening statements as exemplified by the DWH disaster?

The following is a list of the texts I collected, followed by more detailed descriptions of the data, the data collection process, and the rationale for collecting the data:

### **Court Documents**

I accessed certified transcripts from The United States District Court, Eastern District of Louisiana for the case of *IN RE: OIL SPILL BY THE OIL RIG DEEPWATER HORIZON IN THE GULF OF MEXICO ON APRIL 20, 2010*, Civil Action No. 10-MD 2179 “J,” New Orleans, Louisiana; Monday, February 25, 2013 (hereafter known as “DWH”). Data described in the following sections was collected from the official website.

### **Judge's Amended Pre-Trial Order**

I obtained a transcript of the court document named *Amended Order [Regarding Access to Trial by Press and Public]* (hereinafter "Order") prepared and signed by Judge Barbier and dated January 18, 2013. The Amended Order is important to my analysis because it clarifies the rules of procedure to be used in the federal trial. In particular, the Order include provisions for overflow courtrooms for the press and public with live audio feed and evidence presentation screens of the trial, permission for the press to access the internet either through their own means or through a provider contracted by the court, and arrangements for the press and the public to have access to "real time" transcripts of court proceedings and communications as they occurred via a website managed by the certified court reporters who provided transcripts daily. The certified copies of the transcripts constitute the official court record. In this Order, Judge Barbier also ordered the parties in the trial to "arrange to have depositions, expert reports and exhibits made available to the press and public on a weekly basis" (Order, 2013, p. 3).

### **Trial Transcripts**

The official transcript of the trial is named the "*Transcript of Nonjury Trial Proceedings Heard before the Honorable Carl J. Barbier, United States District Court Judge*" (hereinafter "Transcript"). I accessed the full and accurate trial transcripts via the court-designated official public website. The website provided links to transcripts of the proceedings and represents all of the communication that took place in the courtroom each day of this trial. All of the transcripts were created in accordance with statutory processes and procedures set by the U.S. District Court for the Eastern District of Louisiana and the Federal Court Reporting Statute 28 U.S.C. §753 (United States Courts, n.d.). Judge Barbier allowed the Certified Court Reporter (CCR) to post the transcript portions to the website at the end of each day of the trial on a free public website sponsored by the PSC. All of the court opening statements and Judge Barbier's opening remarks

occurred on February 25, 2013, Day 1 of the trial. The trial transcript for Day 1 of the trial includes the following data:

***Judge Barbier’s Opening Remarks and Court Rules.*** On Day 1 of the trial, Judge Barbier repeated and expanded upon his Order concerning the rules that would govern the DWH trial process. A transcript of these opening remarks is included in my data.

***Court Opening Statements.*** Trial attorneys represented each of the eight parties and each presented a court opening statement on their clients’ behalf on Day 1 of the trial. Transcripts for all court opening statements from Phase I of the DWH trial were available on the court website<sup>9</sup>.

**Criminal Documents.**

I accessed the November 15, 2012, transcripts of portions of the criminal file against BP Exploration and Production, Inc. including the criminal case document titled *Information for Seaman’s Manslaughter, Clean Water Act, Migratory Bird Treaty Act and Obstruction of Congress*, Criminal No. 12-292 (E.D. La.). This file contains a summary and rationale for the felony charges brought against BP by the U.S. Department of Justice (USDOJ). It also contains the subsequent *Plea Agreement* entered into by BP and the USDOJ. This data was important because even though the corporation pleaded guilty to the felony criminal charges brought by the USDOJ, *only* the criminal charges and the plea agreement (or “allocution”) from this trial could be brought up at the civil trial. Past evidence of prior similar bad acts by BP was excluded from the civil trial. This is a typical occurrence because that knowledge may unduly prejudice decision makers’ decisions<sup>10</sup>. Although none of the opening statements reference this data, it is important to my analysis as I examine the ways BP frames power and value in their opening statement.

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<sup>9</sup> Rule 80 of the Federal Rules of Evidence applies to stenographic transcripts used as evidence.

<sup>10</sup> According to Federal Rule of Evidence 404(b)(6), evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in

### **Congressional Testimony**

I accessed transcripts of official statements made by individuals before Congress in the Congressional Hearings Subcommittee on Energy and Commerce (CHCEC) regarding the DWH event from May 2010 to October 2011. I collected this data from Congress' official website at [www.gpo.gov](http://www.gpo.gov). I reviewed six certified transcripts of statements made before Congressional Hearings that were relevant to the BP DWH April 20, 2010 event, including BP Chief Executive Office Tony Hayward's Congressional opening statement dated June 17, 2010. This data is important because opening statements before Congress are considered testimony made under oath and the speaker's statements are subject to perjury laws. Court opening statements in a *trial*, however, are not. Therefore, comparing this data to court opening statement data will assist me in my analysis of the ways critical discourse analysis and genre activity expand/challenge/change our understanding of what is different and what is similar among various "genres" of opening statements as exemplified by the DWH event.

### **Presidential Press Conference Transcripts**

I accessed President Barack Obama's first comments on the disaster made April 29, 2010; his public statement on May 2, 2010 while on a brief visit to inspect the damage in Louisiana; and his much longer public statement to the nation from the Oval Office on June 15, 2010. This data assisted me in identifying the distinguishing properties for each of these statements and benefited my analysis of language used as a social practice in a particular social context.

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accordance with the character.

## **Peripheral Media Data**

I accessed peripheral documents about the DWH event and trial from other sources such as white papers, newspapers, and editorials to reach a better understanding of the complex relationships, connections, and contexts between legal and social events and practices. Reviewing twelve relevant news items over a span from April 20, 2010 until April 29, 2014 provided context to the trial and also indicated what issues were important to BP, the U.S. government and individuals (Plaintiffs) involved in the DWH event. They gave me a sense of what I would be looking for in later in my analysis. The point was to explore whether the versions of the news items published would reveal different audiences' points of view, not just the legal or political perceptions. I collected nine articles (seven of them were from American newspapers and two were from United Kingdom newspapers); one editorial, one whitepaper, and one BP web post, for a total of twelve pieces of peripheral data. The point was to see what issues were worthy of attention from the media in contrast to the rhetorical statements that were made in the statements I analyze.

## **Analytical Framework**

In this study I review and describe the production of the court opening statements and other statements that created meanings for individuals and groups who responded to those statements (Wodak, 2001, p. 3). I use critical discourse analysis (CDA) to look at language and genre theory to look at certain rhetorical moves speakers made to create a version of reality that speakers want audiences to believe.

## **Coding the Data: Critical Discourse Analysis**

The existence of inequities is often perpetuated by the language of the powerful (Wodak & Meyer, 2009, p. 9). Using CDA, I identify and describe linguistic, grammatical, and rhetorical

choices made by authors when constructing the three types of opening statements so that I can see how they reflect, produce, and reproduce social processes and structures (e.g. the ways courts work, the ways corporations operate, and the ways the government function). I also examine the texts to see how authors make use of semiotic choices in language to achieve their communicative goals in subtle ways. The focus of my methods is to understand how the authors' court opening statements interacted in their judicial setting, and how the defendant corporations intended them to be received by audiences. Using Machin and Mayr's (2012) strategies for conducting critical discourse analysis, I identify micro-moves such as using quoting verbs and transitivity and verb processes; presupposition; and figurative language, including metaphor, personification, and synecdoche. I chose two of the court opening statements from the DWH trial, Plaintiffs' and defendant BP's, both of which are based upon the same facts from the DWH disaster but in diametrically opposed ways.

### **Lexical Choices and Analytical Word Groups**

Fowler (1991) asserts that lexical choices are "like a map an author is creating for us ... a 'symbolic' representation of ... areas of interest and salience" (p. 82). Word choices can also indicate "levels of authority and co-membership with the audience" (Machin & Mayr, 2012, p. 42). My study uses these principles to help me to draw out the broader discourses in the court opening statements to reveal the ideologies communicated and to analyze the ways the authors use lexical strategies as described in Table 3.1.



<b>Table 3.1: CRITICAL DISCOURSE ANALYSIS: LEXICAL STRATEGIES<sup>11</sup></b>	
<b>Concept</b>	<b>Definitions</b>
<b>Using Quoting Verbs</b>	<p><u>Metapropositional Verbs</u> Author's interpretation of a speaker  <u>Assertives</u>: Remark, declare, explain, agree, assent, accept, correct, counter  <u>Directives</u>: Urge, instruct order  <u>Expressives</u>: Accuse, grumble, lament, confess, complain, swear,  <u>Reliability</u>: claim, not factual, can be contested, invites doubt.  <u>Speech Reporting Words</u> Neutral Structuring Verbs. Say, said, tell, ask, inquire, reply, answer. Adds to credibility.</p> <p><u>Metalinguistic Verbs</u> Descriptive. Categorizes the interaction  <u>Emotion</u>: cry, intone, shout, yell, scream. evokes empathy  <u>Voice Qualifier</u>: whisper (lack of power), murmur, mutter  <u>Transcript Verbs</u> Relates to other parts of discourse. Repeat, echo, add, amend  <u>Discourse Signaling</u> Discourse process. Pause, go on, hesitate, continue.  Speakers appear "authoritative or subservient, legitimate or non-legitimate, define Roles.</p>
<b>Transitivity and Verb Processes</b>	<p>Who does what to whom (goal) and why? Agency, participants, and circumstances.  Who plays the important role and who receives the consequences of that action?  What is <i>in</i> texts and what is <i>absent</i> from them? Asks whether participants are represented as actors, goals or beneficiaries.</p> <p>Process types:  <u>Material</u>-processes of doing, concrete actions with consequences  <u>Mental-Senses</u>:  Cognition: thinking, knowing, understanding  Affection: liking, disliking, fearing  Perception: seeing, hearing, perceiving  <u>Behavioral</u>: psychological or physical behavior, in part they are about action.  <u>Verbal</u>: to say, and its synonyms; explains, alleges.  <u>Relational</u>: states of being, things are stated to exist in relation to other things.  <u>Existential</u>: something exists or happens: to be, exist, arise, occur (can only have <u>one</u> participant).</p>
<b>Presupposition</b>	What kinds of meanings are assumed as given, as not requiring definition in a text?
<b>Rhetoric and Metaphor</b>	Metaphor Thinking of things in reference to other things in order to understand them. Metaphors can obscure what has actually happened and can dramatically simplify processes. Persuading with abstraction.
<b>Hyperbole</b>	Exaggeration
<b>Metonymy</b>	Substitution of one thing for another which is closely associated. Strategy to conceal the actual people behind an organization/institution and their actions.
<b>Personification</b>	Human qualities or abilities assigned to abstractions or inanimate objects. This obscures actual agents and processes.
<b>Synecdoche</b>	The part represents the whole. Allows the speaker to avoid being specific. "
<b>Metaphor Signaling</b>	Linguistic devices in texts that draw attention to the use of metaphor.

<sup>11</sup> Categories in Table 3.1 are from Machin and Mayr (2012).

From my data, I reviewed and coded two presidential public statements, one Congressional opening statement, and two court opening statements from the DWH civil trial. I used footnotes and colors to indicate and illustrate each time I identified micro-moves or lexical choices in the documents. I included references to experts in the literature, connections to other data, uses of legal words and phrases that may not be clear in other non-legal contexts or that presume special knowledge, and my own observations as I worked through the documents.

### **Coding Complex Data-Genre Analysis**

The three genres of opening statements carry with them the need to conform to professional rules, timing, process, and etiquette. Although attorneys may improvise the organization of their court opening statements, many also want a “formula” for a successful court opening statement that has been “tested” by other trial attorneys or experts in other disciplines.<sup>12</sup> Legal literature contains multiple articles on this subject in addition to blogs, legal education seminars, professional books and jury consultants who instruct on the topic. Consequently, I analyze court opening statements using the seven rhetorical moves and an organizational structure recommended across the board. I use these same features to analyze the rhetorical moves used in BP CEO Tony Hayward’s Congressional opening statement and President Obama’s public statements.

### **Rhetorical Moves in the Genre of Court Opening Statements**

In this section, I briefly define the seven moves attributed to the prevailing wisdom among members of the legal community (Butler K., 2011; Johnson, 2011; Kearney, 2001; National Legal Research Group, 2013).

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<sup>12</sup> One of these consultants is David Ball, Ph.D. (<http://malekpourball.highimpact.com/>) who has been successful in teaching his strategies to trial attorneys for several years. Ball specializes in workshops that promise to teach trial attorneys how to “frame your case into *David Ball on Damages, Reptile*, and *Rules of the Road* principles [and how to] develop the optimum case narrative and positioning.” Ball’s doctorate is in theater and communication.

Trial attorneys have multiple perspectives to consider when constructing their court opening statements. First are the Federal Model Rules of Professional Conduct. While attorneys are usually given latitude in creating and delivering their court opening statements to decision makers, their remarks must be limited to previewing the evidence and making “reasonable inferences therefrom” (see, e.g. Model Rules of Professional Conduct Rule 3.4(e):

Counsel shall not ‘in trial, allude to any matter that the attorney does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.’

Apart from this and other professional rules, this section discusses the rhetorical moves trial attorneys can use to make their court opening statements compelling and more likely to persuade decision makers, including judges, jurors, and the public at large. Trial attorneys must insure that non-legal persons be initiated into the trial process and the applicable law(s) explained. The most important goal for the trial attorneys is to understand the audience, whether it is a judge only (in a bench trial), a jury trial, or a hybrid trial like the DWH trial where the judge makes the final decisions, but also gave full access to the trial transcripts to the public to ensure transparency of the proceedings.

What works rhetorically for one group of decision makers may not work for all. Bench trial judges have no less bias than non-legal jurors, based upon other cases they have tried, personal convictions, or mindsets. Some jurors rely on their “gut reactions” for making decisions rather than from listening to a logical presentation of evidence (Wilcox, 2014). Realizing their dilemma, members of the legal community consistently recommend that trial lawyers use seven rhetorical moves to frame the facts of their cases in the best possible light within the law

(National Legal Research Group, 2013, 2012; Federal Bar Association, 2012; Butler, K., 2011; Johnson, 2011; Tanford, 2009; Kearney, 2001). The moves require trial attorneys to connect with their audiences of decision makers from the beginning, and to engage and build a rapport with them. The attorneys must consider the external cues that decision makers may use to form fixed opinions about the cases early in the trial proceedings. Trial attorneys must be familiar with words and phrases generally familiar to decision makers, and the experiences consistent with the values of their communities. The following is a list and brief description of each of these seven moves:

Move 1: Establish primacy. In a trial, an opening statement is presented in a kairotic moment when decision makers (jurors, judges) are most willing to listen to attorneys. This is critical for court opening statements because, as Wyer (1989) asserted, the “first information given to a person has the primary influence on judgments” (p. 289), remembered and believed (Weinberg, 2000; Miller, J. & Krosnick, 1998; Wyer, 1989; Mayo & Crockett, 1964; Miller, N. & Campbell, 1959; Nations, n.d.). The rhetorical move of primacy should be readily available in the first few paragraphs of an opening statement.

Move 2: Create a Lens. Court opening statements are the lens through which decisions makers view the evidence ahead and establish a context for the facts of the case using their own perceptions of reality.

Move 3: Establish Credibility. Trial attorneys establish credibility and accuracy in court opening statements by referring to verifiable source materials and by making connections to physical facts and actual evidence that will be offered at trial, and assure decision makers that they are making a correct decision.

Move 4: Develop Theme. While a lens helps one to understand through context, a theme prepares decision makers to make connections between fragments of testimony and evidence later in the trial. Attorneys use themes to identify the issues and tell the story of why their client deserves to win (Mauet, 2005). Attorneys also use themes to help decision makers assess the opposing representations of a particular set of facts, by persuading them that their facts are relevant (Gerwitz, 1996). Themes should be simple, straightforward, and memorable. An effective theme ties all meaningful facts together, consistent with the evidence, and logically explains all of the facts.

Move 5: Simplify Issues. Court opening statements should be clear, concise, and use rhetoric to create simple word pictures that decision makers can relate to in their own everyday lives.

Move 6: Explain the Law. Court opening statements cannot argue because argument cannot precede evidence in a trial. However, this rule still leaves room for trial attorneys to show how their clients' actions were in accordance with elements of the applicable law so that decision makers will be able to link facts to the evidence presented in trial. To be believable, the client's actions must have occurred in contexts that embody familiar ideologies that echo socially accepted ideas and goals. By laying out the general principles of an applicable law(s), court opening statements help to enculturate decision makers into the legal system.

Move 7: Motivate Decision Makers to Act. Motivating decision makers to act requires trial attorneys to create a sense of urgency. In an opening statement, if an attorney issues a challenge to decision makers, that challenge can motivate and empower decision makers to acknowledge the persistence of a problem or injustice, and confront it with their decision to act

(Greene & Lidinski, 2012). To accomplish this, trial attorneys must present their court opening statements in a language style familiar to decision makers, and easy to remember and act upon.

As I noted in the beginning of this chapter, I use critical discourse analysis and genre theory to analyze court and non-legal opening statements. I look for the connections among the statements, examine the ways the different authors represent themselves, and analyze how these representations frame various kinds of power. These issues are important because, despite all three are referred to as opening statements, the public should know the important differences and similarities between them. For example, only court opening statements serve a *legal* purpose, and affect legally binding rulings in court that will influence public policy.

In the next two chapters, I use my data collection to analyze how trial attorneys, corporate management, and government leaders negotiated their use of genre to craft texts that they believed would address the needs and perspectives of their various audiences.

## CHAPTER 4: CREATION AND CONTROL OF REALITY

In this chapter, I used critical discourse analysis (CDA) and genre analysis to discuss the three types of opening statements related to the DWH disaster. Here, I focus on the communicative dynamics that define interactions between the speakers and audiences in court opening statements, public statements and Congressional opening statements.

In previous chapters I drew attention to the features that typify the genre of legal and non-legal opening statements. For example, in Chapter 2, I discussed the rhetorical move of primacy which creates a powerful opportunity for a speaker to control people's conception of reality because the first things presented to an audience are most likely to be remembered and believed (Miller, J. & Krosnick, 1998; Mayo & Crockett, 1964; Miller, N. & Campbell, 1959; Nations, n.d.; Weinberg, 2000; and Wyer, 1989). Establishing primacy is one of seven strategies understood by the legal community as conventional rhetorical moves employed in successful court opening statements. My analysis explores this and other observable moves in the texts of all three types of opening statements.

I begin my analysis with an explanation of the significance of kairos in this matter; briefly define and discuss the phenomenon of "confirmation bias;" and explain how it relates to the kairotic significance of the timing of court opening statements. A brief analysis of the President's first remarks about the DWH disaster on April 29, 2010 is presented, followed by a discussion of the context for the different genres of statements relative to this event. I present my analysis of two court opening statements presented in the DWH civil trial to see how issues are made salient to decision makers, including the public at large. Finally, I analyze the rhetorical moves made in two of President Obama's public press conference statements and a Congressional opening statement given by BP CEO, Tony Hayward. To help introduce the

context in which the statements about the disaster were presented, I include a brief timeline (Table 4.1) which demonstrates the temporal relationship between the three types of statements and the events that I discuss in my analysis.

	<b>Date</b>	<b>Event</b>
	6/9/09	Minerals Management Services (MMS) granted BP a license exemption (categorical exclusion) because it had concluded that the 'impacts associated with the proposed action are minimal or non-existent' (BP). MMS did not require BP to file a contingency spill scenario for a potential blowout of the well.
A	3/31/10	President Obama proposes to expand deep water drilling to the Gulf, Atlantic, and the Arctic.
B	<b>4/20/10</b>	<b>Deepwater Horizon Disaster</b>
C	4/23/10	-White House: "I doubt this is the first accident that has happened and I doubt it will be the last." -Homeland Security risk analysis: DWH "poses a negligible risk to regional oil supply markets and will not cause significant national economic impacts."
D	4/24/10	BP found first two leaks of oil from well.
E	4/28/10	BP found third leak of oil from well.
F	<b>4/29/10</b>	<b>President first brief public remarks about the disaster. Oil reached LA coastline</b>
G	<b>5/2/10</b>	<b>President's statement at Venice, LA</b>
H	<b>5/4/10</b>	<b>BP's Hayward speaks to press</b>
I	5/10/10	-BP testified its contingency plan worked. -BP, Halliburton and Transocean admit to Senate no research being conducted re deep water spills. -Senate charged MMS with being too cozy" with BP.
J	5/11/10	BP, Transocean, and Halliburton officials testify before Congress, blaming each other for disaster.
K	5/13/10	Hayward claims oil spill is "tiny" vs. "very big ocean" (The Gulf of Mexico).
L	5/16/10	BP met with President to create \$20billion fund for victims of the disaster.
M	5/18/10	Hayward: Environmental impact of the spill was "very, very modest."
N	5/19/10	EPA ordered BP to cease using the dispersant, Corexit and find a safer alternative. BP refused.
O	5/28/10	President's press conference after briefing on BP oil spill.
P	6/9/10	Release of BP Gulf Oil Spill Response Plan included plans to protect "walrus, etc." in waters near LA.
Q	<b>6/15/10</b>	<b>President's Remarks to Nation from the Oval Office</b>
R	<b>6/17/10</b>	<b>Hayward Congress testimony</b>
S	2/25/13	Phase I of civil trial began—opening statements presented by all parties
T	7/18/14	Obama approved the use of sonic cannons to explore for oil and gas off the Eastern Shore.

### **Context and Kairos**

Government officials and BP CEO Tony Hayward began making statements about the DWH disaster from the time it occurred on April 20, 2010. Both held press conferences and



made statements to the press, often on the same day or within a few days of each other, each with a different spin on facts, causation, responsibility, and apportionment of blame. The choice of the timing of these statements, which I discuss in terms of kairos and kairotic moments, and the choice of their first words and ideas, which I discuss in terms of establishing primacy, are both critical opportunities for speakers to develop credibility and to create a convincing “reality” for their audiences.

Kairos means having an understanding about what is appropriate, timely, and balanced when communicating in a particular moment (Benedikt, 2002; Bitzer, 1966; Kinneavy & Eskin, 2000; Swales, 1990). Court opening statements are presented to decision makers by all parties at the beginning of a trial, immediately after the judge’s opening remarks. Trial attorneys have a limited amount of time to establish themselves as credible, to persuade decision makers to see the evidence from their clients’ point of view, and to encourage them that deciding to believe their client’s account of the facts will advance justice for all of society. In Congressional inquiries, each senator has a limited time to make a brief opening remark to the witness (in this case had three minutes) that will establish the appropriate context of the questions they intend to ask. The witness responds to questions in their own opening statements, but they speak second, after the senators’ remarks. Presidential public press conference statements constitute “the performance of a role of the president in a situationally appropriate fashion” (Campbell & Jamieson, 2008, p. 12). The purpose of the public press conference statements is to make a favorable connection with the public with regard to an important national issue. Similar to the trial, an announcement is made to the public in advance of event so that they can attend. Presidential press conference public statements are delivered during times of optimum audience availability (publically or televised), and at a time when their messages are most likely to be

accepted in a favorable light. Like court opening statements, the President delivers the public statement first, typically followed by a question and answer session with a select group of invited journalists. Jurors cannot ask questions during or after a court opening statement. While the venue (or location) of the trial is dictated generally by statute, a *change* of venue can be requested by the defendants if they fear, among other things, an unfair result or undue hardship for witnesses or parties (Hammond, 1941; Spiro & Mogul, 2009). Thus, like the public statement, the location of a trial is critically important. All three statements are recorded and transcripts are typically made available for public access.<sup>13</sup>

Providing the necessary information and making a connection with decision makers at the very beginning of a trial can determine which party prevails. As I stated previously, a number of studies have shown that jurors decide who they will “vote” for immediately after the conclusion of opening statements. I argue that their decision making constitutes an *act*, inasmuch as they take a position and begin to rationalize a verdict in that party’s favor, “*working* to prove it right” instead of remaining impartial (Kanasky, 2014, p. 35). According to Bill Kanasky, Ph.D. (2014), an expert in litigation psychology, jurors “simply stop listening” without necessarily intending to be biased (p. 35). During and after opening statements, they:

give preferential treatment to evidence and testimony supporting their existing belief; ... tend to better recall evidence and testimony supporting the side they favor; [and] ... entrench themselves deeply into their stance, before the trial is complete. (Kanasky, 2014, p. 35)

This behavior phenomenon is called “confirmation bias,” and it results in jurors who actively “*seek* information that confirms their existing attitudes and beliefs,” and will “set

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<sup>13</sup> “Even with the presumption of openness in our courts, a judge has the ability to close a court proceeding” *Globe Newspaper Co. v. Superior Court*, 457 US 596 (1982).” Retrieved from <https://dps.mn.gov/divisions/ojp/forms-documents/Documents/Access%20to%20courts%2011-09.pdf>.

higher standards for arguments that go against their current expectations” (Kanasky, 2014, p. 35). Further, according to Kanasky (2014), confirmation bias “actively keeps jurors from arriving at the truth” (p. 35). Accordingly, court opening statements are presented at a kairotic moment in a trial, and trial attorneys are consciously aware of the need to make the necessary connections with decision makers in that moment.

Presidential press conference public statements are also susceptible to confirmation bias, particularly because they are given by a member of a political party. Writing for *Scientific American*, columnist Michael Shermer (2006) stated that with regard to members of opposing political parties, he “had observed the following: no matter the issue under discussion, both sides are equally convinced that the evidence overwhelmingly supports their position” (n.p.).

Some statements also fail at kairos. For example, President Obama’s first official statement about the DWH disaster did not occur until April 29, 2010 nine days after the initial explosion, causing some to wonder why he had delayed in addressing the public. Further, his brief remarks were made in the context of a ceremony in the White House Rose Garden to honor the 2010 “National Teacher of the Year.” His entire remarks regarding the DWH disaster were as follows:

Good afternoon, everybody. Hello, everybody. Please have a seat. Welcome to the White House. Welcome to the Rose Garden. This is an extraordinary occasion, a beautiful day—appropriately so. I hate to intrude on it, but before we begin I do want to speak briefly to the American people about the recent BP oil spill in the Gulf of Mexico.

I’ve been receiving frequent briefings from members of my Cabinet and White House staff, including an update last night on the additional breach and another update this morning. And while BP is ultimately responsible for funding the cost

of response and cleanup operations, my administration will continue to use every single available resource at our disposal, including potentially the Department of Defense, to address the incident.

Earlier today, DHS Secretary Napolitano announced that this incident is of national significance and the Department of Interior has announced that they will be sending SWAT teams to the Gulf to inspect all platforms and rigs. And I have ordered the Secretaries of the Interior and Homeland Security as well as Administrator Lisa Jackson of the Environmental Protection Agency to visit the site on Friday to ensure BP and the entire U.S. government is doing everything possible, not just to respond to this incident, but also to determine its cause. And I've been in contact with the governors of the states that may be affected by this accident.

Now, earlier this week, Secretaries Napolitano and Salazar laid out the next steps for a thorough investigation into what precipitated this event. I am sure there may be a few science teachers here who have been following this issue closely with their classes, and if you guys have any suggestions, please let us know.

(Laughter).

The President began his remarks on the disaster by first apologizing for the *intrusion* into the “extraordinary occasion” of the award event, making it somewhat of a primacy move because, as explained previously in this chapter, the remark was given in the beginning of the statement, when people are most willing to listen to a speaker, and it will be remembered because it was unexpected. He changed the lens of the award speech from a pleasant and dignified award ceremony to a statement announcing a scenario that required sending out SWAT teams and Homeland Security to inspect other oil rig platforms and rigs in the Gulf, and implied that the DWH disaster could have been the result of a terrorist attack. The President then shifted the tone of this brief statement about the disaster into one of humor by characterizing the disaster as something teachers and students were watching, and by joking that science teachers might have

answers as to the disaster's cause or how to contain of the oil spill. Although humor may not always divert the public's attention and demand for additional details about the disaster and how it had been handled to date, "it has an immediate appeal and more direct political consequences than pessimism" (Edleman, 1988, p. 128). The President used humor to shift the topic back to its original purpose of presenting the "Teacher of the Year" award.

Although the President may surely use his status to interrupt a planned speech event for an unrelated statement of national importance, there is also an element of recontextualization here as well. His statement, "I've been receiving frequent briefings from members of my Cabinet and White House staff," highlights the DWH disaster occurred nine days earlier and yet he was only just now remarking upon it. Further, the President made no mention of the eleven American citizens who had been killed in the disaster, and no sympathy was offered to their families on behalf of the White House. Finally, no mention was made of the oil spill that had reached the shoreline of the State of Louisiana, and that Governor Jindal had issued a State of Emergency.

To give further context to this and the other statements, I interject a brief history of the events from April 20 to April 29, 2010 regarding the DWH disaster. Investigations into the explosion and its causes were underway, and there were disagreements about how much oil was leaking from the well each day. Between April 20 and April 29, the framing of the incident had changed from tragic accident to a preventable disaster caused by negligent conduct (Hoffman, 2010; Kunzelman & Pienciak, 2010; Mufson & Shear, 2010). According to the National Commission on BP Deepwater Horizon Oil Spill and Offshore Drilling (2011), processes and procedures as well as communications back and forth between the rig and land-based management operations were being reviewed. The undersea well was not only leaking thousands of gallons of crude oil into the Gulf daily, that oil was traveling towards Gulf states' coastlines,

creating a new sense of urgency (Mufson & Shear, 2010). According to the Ocean Science and Data Limits in a Time of Crisis... (2010), satellite pictures showed the world the enormity of the oil spill and its proximity to land. The Coast Guard and other U.S. government agencies led response teams, laying miles of boom to stop the oil from reaching land, but they were hampered by high winds (Casselman, Power, & Campoy, 2010).

It was in this context that the President made his public statement about the disaster during the “Teacher of the Year Award” on April 29, 2010 (White House Press Office, 2010). He wore an immaculate dark suit, stood behind an imposing podium fronted with the Presidential Seal, backed by the American flag, and supported by all the power vested in him by the United States of America. In this sense, and in stark contrast to the media’s near panic mode about the escalating DWH disaster, the President delivered his first remarks to the public in a calm, matter-of-fact manner. The timing of the President’s remarks in the Rose Garden, in contrast to news reports and other statements delivered by the media that day might have served to amplify the impression of an unruffled President who had the situation well in hand. His remarks were made between a 9:00 a.m. CBS News report claiming that BP’s CEO Tony Hayward was already blaming one of BP’s contractors for the disaster, and a 6:00 p.m. CNN live interview with Hayward. In this interview, Hayward was introduced by reporter Wolf Blitzer, using words and phrases such as “frantic efforts,” “environmental nightmare,” and an explosion that “ripped a hole” in the oil rig (“BP CEO Tony Hayward,” 2010). In contrast to the President’s appearance and demeanor at his televised speech, BP’s CEO was interviewed in an open collared blue shirt, looking rumpled and exhausted, stating that he was “shocked” and wondering “how the hell could this have happened?” The video images of Hayward making these remarks seemed candid, but in contrast to the President, Hayward was certainly not calm and in charge. On the other

hand, Hayward's statements and his agitated disbelief could also have been part of laying the foundation for protecting BP from later legal liability, especially with regard to the defense of unforeseeability.

The President's delay in speaking to the public about the DWH disaster was a failure of kairos. In this dissertation I have argued that decision makers in trials make important decisions based upon the rhetorical move of primacy made in legal opening statements. If we consider the President's first remarks about the DWH, made nine days after the disaster and in the context of another speech event, the public may agree that the disaster is just an "intrusion" into their daily lives, but that the situation was well in hand with the President's administration. As I conclude later in this chapter, opening statements are epideictic rhetoric that inspire listeners to act. The President's opening statement fails in this kairotic moment because it gave the public no directive, no preparatory advisory, no warning as to how their lives would be impacted, particularly residents of the Gulf States. Instead, he ended the opening statement with a joke about BP and his administration's inability to find the cause of the leak, and stop the flow of oil into the Gulf of Mexico. Hayward's opening statement also demonstrates a failure of kairos. The President stated more than once that BP was responsible and in charge of stopping the oil leak and cleaning up a spill of unprecedented proportions. Hayward, however, left no doubt that he didn't know how the disaster and oil leak happened and therefore, did not know how to fix it. The kairotic moment for BP to earn the trust of the American public passed.

As the weeks and months went on, hundreds of clean-up workers were either hired by BP or volunteered to clean up the oil spill, both in the Gulf waters and on the land. Fourth generation fishermen were out of work, hampered at first by moratoriums on fishing, and then by the fact that few or no fish, shrimp, oysters or crabs were to be found (Adams, 2010) Other businesses

were forced to shut down as tourists cancelled vacation reservations. News programs showed daily footage of the deep water well using underwater cameras, and people watched as millions of gallons of oil gushed into the Gulf of Mexico. BP tried multiple methods to cap the underwater well, some of them never before attempted. In an attempt to encapsulate the spreading oil, U.S. military planes were used to spray a hazardous chemical dispersant, Corexit, over the slick that covered 68,000 square miles of the Gulf of Mexico (Robertson and Schwartz, 2014). Eighty-seven days passed and approximately 4.2 million barrels of oil (206 million gallons) were spilled before the well was finally capped using remotely operated underwater vehicles (ROV) (Aguirre, 2010, Cleveland, 2010; Hall et al., 2010; Waters, 2012).

Investigations into the disaster led the United States Department of Justice (USDOJ) to file criminal charges against BP, including eleven counts of manslaughter and multiple violations of the federal Clean Water Act. President Obama put a six-month ban on deep water drilling until an independent commission could ensure the safety of other oil rigs in the Gulf.

Lawsuits against BP and its contractors were filed by individuals, businesses, and BP shareholders here and abroad, and BP's CEO Tony Hayward was asked to testify before a Congressional Subcommittee inquiry as to the causes of the disaster. This is the context at the time when the President's next two public statements (following his brief remarks in the Rose Garden) and Hayward's Congressional opening statement took place as shown in Table 4.1.R.

In the next section, I analyze the statements presented before the DWH civil trial and in the courtroom. All three types of opening statements discuss the same event, and all use a similar rhetorical moves, but they differ in purpose and delivery. I also consider the ways the speakers used the terms "precedent," and "unprecedented," to their advantage.



## Rhetorical Moves in the Genre of Court Opening Statements

In this section, I analyze statements made during the DWH civil trial, as well as in those made in the early days of the disaster and its aftermath, to examine the ways each speaker attempted to frame the event. Since my genre analysis used a series of rhetorical moves recommended by the professional legal community for successful court opening statements, I trace those moves first in two court opening statements. Then I compare them to the rhetorical moves made in public statements and a Congressional opening statement. Table 4.2 below shows the seven rhetorical moves that I will be referring to in my analysis.

Move 1	Primacy
Move 2	Create a lens
Move 3	Establish credibility
Move 4	Develop a theme/type
Move 5	Simplify the issues
Move 6	Explain the law
Move 7	Motivate decision makers to act

As I detailed in Chapter 3, according to the literature, trial attorneys are instructed to make the following moves in court opening statements: 1) establish primacy; 2) create a lens; 3) establish credibility; 4) develop a theme or type of story; 5) simplify the issues; 6) explain the law; and 7) empower/motivate decision-maker(s) to act. I look for evidence of these moves that define the genre for legal professionals in all three types of statements. I also refer to Machin and Mayr's CDA framework to evaluate the speakers' language choices. I recognize the importance of understanding the speaker's audience and that what works rhetorically for one may not work for all. Some decision makers trust their "gut reactions" for making decisions rather than remaining neutral while listening to a logical presentation of evidence (Wilcox, 2014). It is for

this reason that I analyze all of the statements equally, using the same criteria regardless of the audiences being addressed.

### **Analysis of Court Opening Statements**

In this section I analyze two court opening statements from the DWH trial. The first was presented by the PSC and the second was presented by BP's counsel. Both are analyzed using the seven rhetorical moves identified by legal professionals as necessary elements of a successful opening statement. I chose to analyze the PSC's opening statement because there is only one to represent an entire class of individual plaintiffs in this trial. I chose to analyze BP's opening statement because BP was the DWH lease-holding corporate defendant in charge of the entire operation, including all of its contractors and the contractors' employees. BP hired and directed all of the other defendant contractors in the DWH drilling project. BP's opening statement describes each of the other parties' responsibilities during the DWH project, and each of the other defendants make the claim of immunity from any wrongdoing under certain agency laws. Finally, BP's opening statement is characteristic of all of the defendants' court opening statements in this case, using typical legal language, similar rationales, case law, and precedent to defend their positions.

### **Parties**

In large complex civil cases with multiple parties, decision makers may hear about and see a jumble of names, dates and associations with other businesses in the court opening statements. There is an especially confusing aspect in this case given that Transocean is technically one of the *plaintiffs* because it brought this case to trial to ask the Court to limit its liability in the DWH disaster. The other plaintiffs are the USDOJ, the State of Alabama and the

State of Louisiana, and the PSC. The PSC represented *individual* persons as a group (not corporations or the government) from across the United States as plaintiffs.

In his opening remarks, Judge Barbier took the time to explain to the media and the public at large the complicated issues of the case. He stated in his opening remarks, that Transocean could be granted a limitation of its liability “only if it shows that the fault causing the loss occurred without its privity or knowledge” (Transcript: 18:20-22). Privity means “the connection or relationship between two parties (the other party being BP), each having a legally recognized interest in the same subject matter ... [or] mutuality of interest” (*Black’s Law Dictionary*, 2001, p. 556). The burden of proving the negligence or unseaworthiness of the Transocean rig or its crew is on the claimants (Plaintiffs). Judge Barbier recognized that the situation might cause confusion and therefore, he tried to simplify the procedure:

Although Transocean is technically the plaintiff in the limitation action, to simplify matter during this trial, I will typically refer to the United States, the States and the private plaintiffs as the plaintiffs, and I will refer to Transocean and BP, Halliburton, Cameron and M-I as the *defendants*.

As a result of Judge Barbier’s changes, the trial language was much simpler to follow.

There are other ways in which trial attorneys can make it easier for decision makers to competently participate in a trial. Trial attorneys often use charts and tables to help overcome confusion, to help decision makers retain information, and to make important connections. Considering the complexity of Transocean’s standing in this trial, Table 4.3 on the following page is offered here to present a list of the defendants in the DWH civil case, their respective roles in the drilling operations, and plaintiffs’ allegations against each of them.

<b>Table 4.3: Defendant Parties in the Deepwater Horizon Civil Trial</b>		
<b>Corporation</b>	<b>Role</b>	<b>Allegations</b>
<b>BP Exploration &amp; Production, Inc.</b>	Chartered the DWH rig to drill the Macondo well in the Gulf of Mexico.	<ul style="list-style-type: none"> <li>• Rushed the completion of the Macondo well due to financial pressure by its shareholders, choosing speed and profits over safety.</li> <li>• Failed to insure adequacy of the DWH for offshore drilling</li> <li>• Failed to ensure the competence of the crew and safety systems</li> <li>• Failed to perform effective safety audits on safety equipment.</li> <li>• Exhibited conscious disregard of human safety of the DWH crew</li> <li>• Intentionally misled MMS by failing to disclose and falsely reporting information</li> </ul>
<b>Transocean Holdings, LLC;</b>	Owner and operator of the DWH rig leased to BP. Hired and trained personnel on board the DWH.	<ul style="list-style-type: none"> <li>• Chronic failure to adequately train crew and the captain, leading to their inability to recognize and react to an emergency situation</li> <li>• Misinterpreted tests, willfully overrode automatic functions of the integrated alarm and control systems, and willfully refused to upgrade and maintain the blowout preventer (BOP), all leading to a failure to protect human life.</li> <li>• Commissioned the BOP be built to specifications by Cameron International Corp.</li> </ul>
<b>Cameron International Corp.</b>	Owner and developer of the blowout preventer	<ul style="list-style-type: none"> <li>• Failed to design the BOP to work under common and foreseeable situations for which it was sold</li> <li>• Failed to test the BOP under the conditions for which it would be used</li> <li>• Knew or should have known that rig personnel could not monitor the batteries controlling the automatic emergency functions of the BOP leading to a false assumption that everything was “ok” with the system</li> </ul>
<b>Halliburton Energy Services, Inc.</b>	Cementing services, responsible for the design, testing and execution of cementing the production casing from the oil rig to the well.	<ul style="list-style-type: none"> <li>• Failed to design and test the cement used in the Macondo well</li> <li>• Failed contractual obligations, including sole responsibility for pressure testing and pumping the cement</li> <li>• Failed in its responsibility in a safety leadership role</li> <li>• Negligently chose the wrong type of cement mixture without notifying BP or Transocean</li> <li>• Failed to supervise cement engineer and other employees, despite history of inadequate performance</li> <li>• Failed to provide accurate and updated risk assessments.</li> </ul>
<b>M-I, L.L.C.</b>	Drilling fluids contractor for the DWH and 5 members of the crew	<ul style="list-style-type: none"> <li>• Named in suit, but no allegations were made other than that they supplied and monitored drilling fluids. 2 employees killed; 2 injured.</li> </ul>

The next two sections explain my analysis of the PSC and BP’s court opening statements.

## **Context and Purpose of Court Opening Statements**

Whether it is a jury trial or a bench trial, the process for presenting court opening statements is very similar. Court opening statements begin after the judge's opening remarks; all parties are allowed to present one; they occur before any witnesses testify, and before any evidence is presented. Since the burden of truth is on the plaintiff, the plaintiff's court opening statement comes first (Becton, 1990; Burke, 1992; Butler, 2011; Lubet, 2004; Maravich, 2012; Marriott & Sullivan, 2011; Sinclair, 2004; U.S. Courts, n.d.). Therefore, I will begin my analysis with the PSC opening statement.

## **Analysis of the PSC's Court Opening Statement**

Attorney James (Jim) P. Roy presented the opening statement for the PSC. Roy is a partner in the Domengeaux, Wright, Roy & Edwards law firm in Lafayette, Louisiana and was one of fifteen appointed attorneys assigned to represent all injured individuals in trial as one collective class. The PSC was created for expediency—it represented a consortium of attorneys across the country, each of whom represented individual plaintiffs as their clients. As discussed in previous chapters, individual plaintiffs had no choice in the matter of their cases being transferred into the class action, except to opt out and file their own private actions. However, even if they wanted to do this, they would not be allowed to file in their state until the federal class action was completed.

Roy used the pronoun “we” early on in his court opening statement for the purpose of aligning plaintiffs and the public with his persuasive argument. The lens of his argument (Move 2) is the combined group of individual plaintiffs, all harmed by the negligence of the oil corporations, and who want justice from this court. Roy began his court opening statement as follows:

Why did this terrible tragedy happen? That's why we're gathered. (Transcript: 26:20-21)

Roy immediately established primacy (Move 1) by explaining the reason why all plaintiffs were in court—what happened to them was a “tragedy.” If the PSC, USDOJ, and the States of Alabama and Louisiana can find out why and how the disaster happened, then the Judge can determine the distribution of fault among the defendants.

Roy did not spend time building his own personal credibility with decision makers (Move 3: Establish credibility) because in this type of action (MDL) it is the credibility of the representative clients that will be in question (Prakash, 2014, n.p.). However, he did build the credibility of their *case* (Move 3) by using physical facts, references to actual evidence, and connections of the elements of applicable case law with regard to accountability and responsibility. In fact, Roy moved through sequences of facts, times, dates, names and titles of persons involved in a seemingly tedious chronological manner. However, his court opening statement on behalf of the class of plaintiffs was meant to be “for the record,” and preserved until the time of the class action settlement phase. According to Cooley and Lubet (2003), time and topical references are important functions for a “higher degree of acceptability” of a story, acting later as “a set of cues or prompts, each of which introduce an area of questioning” (p. 149).

Another point to consider here is that this is a bench trial (where the judge is the sole decision maker) and an opening statement often takes a different form than one presented to a jury. The court opening statement is an opportunity to outline the legal issues that the judge must decide, and to provide a framework for the evidence to come in the trial. A judge, unlike a jury, is obviously familiar with the manner in which evidence is produced and offered at trial. Nor would a judge require an explanation that Transocean is the plaintiff in this case. But, Roy also made his court opening statement to the public in addition to the judge so that it reflected and

revealed the discursive agreements among the social group of legal professionals in a bench trial. Roy's linear presentations of events and facts act as cues and markers to corroborate the truth of his court opening statement. Roy began by introducing his case as follows:

Let's begin with Transocean, the owner and the operator of the Deepwater Horizon. They seek limitation of their liability. (Transcript: 26:21-23)

Roy used concise language to establish his deductive reasoning and logic in this very complex trial. In this first sentence he named the defendant party, its association with the DWH rig, and under what theory they were litigating in this case. Roy argued against Transocean's interpretation of the law (Move 6: Explain the law). Transocean was not claiming innocence or even fighting the extent to which the plaintiffs were harmed. But it wanted the court to uphold a very old maritime case law precedent and limit their liability. Roy's theme (Move 4: Develop a theme) was that Transocean's liability should *not* be limited because it would be unfair for Transocean to pay anything less than their full share of what was awarded to the plaintiffs for their collective damages.

In the next passage from Roy's court opening statement, Roy used the phrase "the evidence will show" often, despite the fact that it is typically discouraged in a bench trial. Allison (1988) calls phrases like these "tortured" and "stilted" (n.p.). Trial judges do not need to be instructed in the rules of evidence or elements of proof. However, in the following passage Roy may have been using this phrase as a metonymy for 'true.' His court opening statement was based on evidence that had been gathered pre-trial (such as depositions of witnesses and experts under oath, and governmental investigations) and therefore, had a reasonable expectation of credibility (Move 3: Establish credibility).

The DWH disaster had many causal factors, including the lack of oversight by the U.S. Minerals Management Service (MMS) agency. But that fact could have diluted Roy's case against Transocean if something/someone else was also at fault besides the corporate defendants. Therefore, Roy moved on to predict what the other defendants would say in the trial:

The evidence will show this blowout preventer failed partly due to the serious neglect of Transocean with knowledge of BP, but also due to the willful decisions of Cameron. Cameron will blame the men on the drill floor who died for not trying to close the BOP shear rams fast enough because they will say the blowout preventer rams were not designed to close after the flows begins to go up into the riser.  
(Transcript, 49:4-11)

In this quote, Roy described the “finger pointing” that had taken place after the disaster, including during their testimony before Congress, and continued to go on during the trial. His remark was meant to preempt arguments from Transocean, BP, and the other defendants by foregrounding their misrepresentations and manipulations of facts (“serious neglect” and “knowledge”); their practices of profit over people (“blame the men ... who died”); and their conscious lack of regard for both people and the environment (“neglect of Transocean;” “willful decisions of Cameron”). His goal was to “signify a specific discourse which would be a threat to the moral order” (Machin & Mayr, p. 79). Roy “downplayed the significance” of the defendants’ line of reasoning that would be presented in this trial, and cast doubt on the defendants’ credibility by using the phrase, “they will say” (Gee, 2011, 92). He characterized the defendants’ speech in this manner six times in his court opening statement for a strategic reason. According to Machin and Mayr (2012), “say” is a neutral structuring/ reporting verb (i.e. say, tell, ask) that “introduces a [statement] without evaluating it specifically” and has less credibility compared to words such as “prove” or phrases such as “the evidence will show” (p. 59). In fact, “speakers



who are represented as only using these kinds of speaking verbs can appear disengaged or even less personalized” (Machin & Mayr, 2012, p. 59). Roy’s strategy for his court opening statement was to show the defendants’ disengagement and depersonalized attitude towards their crews and the public. The next passage demonstrates the way Roy began to lay out his theme (Move 4) of his case:

The evidence is going to show Transocean failed to discover a major gas kick and shut in the well on April 20, 2010. (Transcript, 26:23-5)

The phrase “failed to discover” is an example of a transitivity and verb process (Machin & Mayr, 2012, pp. 104-6). Transitivity affects the way we see people and is “simply the study of what people are depicted as doing ... to whom, and how” (Machin & Mayr, 2012, p. 104). By placing Transocean in the beginning of his sentence, Roy indicated the corporation’s agency, or *active participation* in doing or preventing harm in this case. Roy indicated that Transocean was an “actor” and profit was their “goal” (Machin & Mayr, 2012, p. 106). Roy claimed that Transocean’s “factual concrete actions” had a disastrous “material result or consequence” (Machin & Mayr, 2012, p. 106). Further, Roy claimed that Transocean’s failures were an act of commission (purposely doing harm), not omission (failing to do an act as reasonably expected) and therefore constituted gross negligence against the plaintiffs in this case. Because corporations are legally defined as ‘persons’ (corporate personhood), Roy can use the transitivity and verb process to allege that Transocean should then also be judged against standards associated with persons, such as honesty, responsibility, culpability and blame. The normative standards helped Roy to implicitly define the nature of the willful and wanton negligence of the corporation in a personal way for his audiences.

Transocean's goal was to limit the amount of money it would have to pay in this case by proving it was unaware of any negligent conduct on the DWH rig. The PSC had the burden of proving that Transocean *did* know and *deliberately* ignored the bad practices on the rig, thereby contributing significantly to the DWH disaster. Roy's specific allegation that Transocean failed to discover or interpret the danger signs and shut down the Macondo oil well, is a form of presupposition or "pre-constructed element" (Fairclough, 1995, p. 107). Roy's purpose was to show the court and public at large that Transocean's strategy was to shift their attention from their negligent acts by appealing to an archaic law that would significantly reduce their liability, and that this was a faulty application of the law. Roy's assertion first assumed that everyone knew what a "major gas kick" was and what it had to do with limiting Transocean's liability. He used the presupposition move to build a basis for his own legal argument, thus layering presuppositions in terms of law *and* fairness *and* moral choice. This approach allowed Roy to "strategically avoid being explicit about what he mean[t]" (Machin & Mayr, 2012, p. 156) at that moment, while creating a legal basis for what he planned to offer as evidence in the trial. Roy employed the transitivity and verb process in his opening statement to foreground Transocean's negligent acts in order to negate the corporation's claim for a limitation of liability.

According to Van Dijk (2006), ideologies form the "basis of a social group's self-image" and its relationship with other social groups (p. 115). In this context, Van Dijk (2006) did not mean the shared beliefs and knowledge of "cultural communit[ies]" (p. 115). Instead, he was referring to ideologies that are "are expressed and generally reproduced in the social *practices* [emphasis added] of their members," and "perpetuated through discourse" (p. 115). I forward Van Dijk's concept to the context of Roy's court opening statement in this trial. The form, timing and content of the opening statement operated according to accepted legal standards and norms

that have been collected and perpetuated through precedent for the purpose of applying equal justice under the law. In the culture of oil corporations such as BP and Transocean, power was more than simple domination of its employees who were ordered to set warning mechanisms to “passive mode.” Power was also “jointly produced when people believed or are led to believe that the dominance was legitimate in some way or other” (Machin & Mayr, 201, p. 24). In other words, inexperienced workers on the rig believed that the negligent culture of work on the Deepwater Horizon rig was the legitimate pattern for them to follow. In his opening statement, Roy argued that decision makers should be aligned with this definition of power in our social belief system because we value justice, fairness and responsibility for protecting those under our supervision. In the following passage, Roy argued that the disaster was preventable and that the defendants knowingly continued operations in spite of the dangerous conditions:

Kevin Lacy, the former vice-president of Drilling ... summed up the Macondo disaster best when he said, ‘It was entirely preventable.’ In conclusion, Your Honor, we respectfully suggest that the evidence will prove the Deepwater Horizon was unseaworthy on April 20 of 2010, and had been for many months, if not years, before. And Transocean and BP both knew it. It will also prove the negligence ... of BP, Transocean, Halliburton and Cameron. And finally, the evidence will prove the defendants’ gross negligence and willful and reckless conduct. The limitation should be denied. The evidence in this trial will demonstrate to Your Honor why this tragedy occurred and who is responsible.

(Transcript: 70:11-23)

Roy reminded decision makers that our system of justice requires that those who fail to perform a duty that they had accepted will be held liable for any damages. He argued that the defendants were not only negligent, but grossly negligent, and their acts demonstrated “willful and reckless conduct.” Finally, the defendants had continued to claim the DWH disaster was an accident and unforeseeable. But Roy argued that the evidence to the contrary was available to “prove the

negligence.” Transocean wanted its liability to be limited to the value of the rig, relying upon a very old maritime law. Roy argued that Transocean and the other defendants’ knowingly and deliberately committed acts of willful and reckless conduct that could be proved by evidence, and that the evidence should overrule precedent in this case (Move 6: Explain the law). He gave an explicit example of the defendants’ push for completion of the project despite their awareness of danger:

Macondo was described variously by BP personnel as the “well from hell,” a “nightmare” well, and a “crazy” well. ... The push to complete the “nightmare” well caused so many last-minute changes to the temporary abandonment procedure plan that BP’s John Guide told David Sims just three days before the disaster, “David, over the past four days, there has been so many last-minute changes to the operation, that the well site leaders have finally come to their wits’ end.”

Continuing with his theme (Move 4), Roy began to describe Transocean’s negligent acts using words and phrases that would meet the burden of proof for a finding "of gross negligence, such as “abandonment,” “shared responsibility,” “mistaken belief,” “failure,” “willful failure,” “gross and extreme departure,” “off the charts and unprecedented” to characterize Transocean’s negligent conduct. As he moved towards the end of his statement, Roy continued to delegitimize or “head off” the opposing arguments that the defendants would make after the conclusion of his own opening statement. In this next passage, he pointed out despite its knowledge of the dangerous physical state of the rig, Transocean’s made deliberate decisions not to inspect or even perform maintenance on it:

The unfortunate reality is that since the Deepwater Horizon was first put into service in 2001, the evidence is going to show it had never, ever been to port for

maintenance, repairs, refitting. Not one single time; nine years. (Transcript: 48:12-16)

He implied that the negligence among the defendants was so blatant and deliberate that any fair decision maker could not dispute the PSC's demand for a denial of Transocean's request for limited liability, and would find the defendants guilty of willful and wanton conduct. The problems were known in the industry to be so serious that U.S. law mandated they be reported immediately to MMS, and the rig was not to continue working until MMS had cleared them to continue safely. The next passage shows that Roy had already elicited the expert testimony of a witness that would back up his claims:

Dr. Allen Huffman, a geophysicist, will testify that BP failed to disclose information to MMS that it was required to disclose on an ongoing basis. The evidence will show that on multiple occasions BP falsely reported its fracture gradients and pressure integrity results to the MMS by drilling ahead without a safe drilling margin and without seeking MMS approval. (Transcript: 60:7-13)

Roy followed this passage with a statement about the law regarding the responsibility for making such decisions:

The evidence will show the ultimate responsibility at Transocean for this gross and extreme departure from good oilfield practice rests with the management of Transocean.

In the quote above, Roy used the word "ultimate" to make an important legal move to tie the responsibility for negligent acts to the corporations, not individual crew members, so that liability rested with the defendant corporations. Roy's statement was consistent with the federal investigation into the cause of the explosion. According to the *Wall Street Journal* (2011), a report by a risk-management company commissioned by the U.S. government found the blowout

preventer failed as a result of a design flaw, not because of misuse or poor maintenance” thereby negating any wrongdoing by members of the crew (n.p.).

In the passage above, Roy simplified the important legal elements required for a judicial finding of gross negligence (“gross and extreme departure from good oilfield practice”) (Move 5: Simplify the issues). It is important to interject here that Roy’s language in this passage was not merely hyperbole. It is language that mirrors case law language on findings of gross negligence (Move 6: Explain the law), which requires a showing of willful and wantonly negligent, and “gross and extreme departure” from the norm, and if proven, quadruples a damages award. It is also important that Roy alleged that the defendants’ negligent acts were *not* part of an industry practice. If defendants’ actions had consisted of normal responses and expected procedures that would have been taken by any oil rig in a same or similar situation, then the defendants could not be found grossly negligent for following established industry guidelines. (Both of these points would be argued extensively in BP’s court opening statement which I will discuss later in this Chapter).

In the next passage, not only did Roy point out the unlawful acts by the defendants, he also specifically described the simple actions that would have averted the disaster: a ten-second phone call and a thirty-second walk to the rig deck:

The evidence will show that at 8:52 p.m., on April 20, less than an hour before oil and gas exploded in a fireball aboard that rig ... BP Senior Drilling Engineer in Houston, Mark Hafle, and its Senior Well Site Leader on the rig, Don Vidrine, had a telephone conversation. Both men subsequently took the Fifth Amendment in this case. That conversation, we will show, should have prevented the tragedy, the need for any of us to be in this courtroom today ...They had a conversation that could have saved eleven lives, saved the Gulf, saved the people of the Gulf from a catastrophe, despite all of the BP failures that had happened before that

day on April 20 and in the days before. ... The evidence and testimony will show that with as little as a ten-second phone call from Mr. Vidrine to the toolpusher or the driller, as little as a 30-second walk down to the rig floor to those two men ... we could have avoided all of this, all of this. The evidence will show, Your Honor, that BP's failure to take that action, that simple action, that act alone constituted willful misconduct. (Transcript: 74:4-75:5)

Up to this point, Roy referred to legal concepts and used specialized legal and engineering language that was appropriate for a bench trial. However, Judge Barbier had created a “hybrid” trial for this case. He remained the sole decision maker, but the public had daily access to the transcripts of the trial proceedings, and this public included the defendant corporations’ *shareholders and competitors*. The passage above clearly shows that even with all that was wrong with the DWH rig (“despite all the failures that had happened before that day”), a simple brief phone call or walk to the rig floor would have prevented the disaster. Roy emphasized that the senior decision makers on the rig had decided against doing so *knowingly*, and alluded to the fact that they had claimed their Fifth Amendment right during this case. The public is familiar with this defense, and knows the purpose of the Fifth Amendment is to avoid making self-incriminating statements increasing the credibility of Roy’s statement (Move 3: Establish credibility). Finally, in this passage Roy made it clear that there were no other causes other than these men’s deliberate inactions (“that simple action, that act alone constituted willful misconduct”).

### **Metaphor**

Unlike elites who use metaphors to “hide underlying power relations” (Gee, 2011, p. 48), Roy used a metaphor to help him appeal to the kinds of knowledge that public audiences already had, thereby simplifying his points (Move 5- Simplify the issues) (Machin & Mayr, 2012, p. 162). Metaphors, however, do not only “illuminate” complex issues, they can also “blind us to

things they leave out of the picture, things like context and doing and not just saying” (Gee, 2011, p. 48). They and other rhetorical tropes provide resources for “those who wish to replace actual concrete processes, identities and settings with abstractions” (Machin & Mayr, 2012, p 164). Roy provides us with an example of this use of metaphor in the next passage in which he provides the following quote by a Transocean Vice-President:

And then McMahon (a Transocean executive) prophetically concluded, ‘if we do not change the way we operate, we will continue to have these train wrecks.’

Here, the metaphor “train wrecks” was not just about the use of language, but also “the image it embodied of a human experience” (Machin & Mayr, 2012, p. 165). The metaphor revealed that corporate defendant Transocean was forewarned about the consequences of their negligent operations. McMahon, Transocean’s Vice-President of performance, wrote and emailed this quote to a fellow Transocean executive, describing having to deal with repeated accidents he described as “train wrecks” (Machin & Mayr, 2012, p. 165). The metaphor reflects Transocean’s corporate culture status quo, referring to the deadly consequences of continuing to do business as usual. More importantly, it showed Transocean’s *awareness* of the problem and its *deliberate* failure to correct problems in their operation systems. Roy used the metaphor to “transport processes of understanding from one realm or conceptual domain to another” (in this case, a “train wreck”) (Machin & Mayr, 2012, p. 165). McMahon’s own metaphor of colliding objects is an important concept for decision makers because it provided a visually rhetorical image of the catastrophic consequences of Transocean’s neglect. Roy also accused BP for its lack of oversight of Transocean and the DWH rig contractors. To be fair, metaphors can also contribute to reductionist thinking and oversimplifying complex processes (Goatley, 1997). The “colliding trains” metaphor may have been too simplistic in that a train is controlled by a few persons,



while an off-shore drilling oil rig is run by large groups of people, both onsite and off. But instead of lessening the risks the corporation was taking, these large groups bought into and perpetuated the negligent activity as the norm.

### **Negligent disregard and power**

Language is not simply a vehicle for communication or persuasion, but is also a means of social construction and domination (Fairclough & Wodak, 1997; Machin & Mayr, 2012). The discursive event of the defendants' negligent disregard of the safety of their crew in this case was shaped by situations, institutional dominance, and power. In the culture of oil corporations, power was more than simple domination of its employees who were ordered to set warning mechanisms to "passive mode." Power was also jointly produced by members of the crew who believed that the operational procedures were typical (Machin & Mayr, 2012). In other words, inexperienced workers on the rig believed that the negligent culture of work on the Deepwater Horizon rig was the legitimate pattern for them to follow.

Conversely, Transocean was also shaped *by* these factors in return. In the next passage, Roy described a similar incident that had occurred with Transocean just prior to the DWH event:

Just five months before the [Deepwater Horizon] disaster, in December of 2009, another well control incident occurred aboard the Transocean Sedco 711 ... the Transocean investigation of this incident prophetically revealed that Transocean's *mindset* [emphasis added] is certainly less vigilant regarding well control preparedness.

Roy used the quoting verb "revealed," to show a lack of agency or, in other words, that the Court should believe that Transocean had something to hide in the first place, and it had taken an investigation to bring it to light. Transocean, BP and the other defendants' actions displayed a pattern of recklessness and haphazard attention to detail, but the corporations were so large and

each sector so specialized that they had the opportunity and power to continue acting this way without repercussions. Errors and bad judgment were easily concealed:

In fact, on March 8, 2010, just a month before this disaster, the Transocean crew on the Deepwater Horizon failed to catch a gas kick for some 35 to 40 minutes. Once again ... that lack of training ... was no isolated incident with Transocean rigs, but rather was a chronic problem, allowed by Transocean management to go uncorrected.

Roy described a hegemonic corporate mechanism through which the dominant corporate defendant Transocean succeeded in persuading its subordinate employees to accept its business norms and ethical values (Move 4: Developing a theme). Roy described how the corporate discourse had constructed the hegemonic attitude and beliefs in such a way as to make them appear natural and common sense (Machin & Mayr, 2012). He also emphasized again that the negligent acts were executed not just by a particular employee, but by corporate management:

Transocean management knew about the widespread nature of well control problems on its vessels, and that the time spent on well control events had increased in 2009. The failure of Transocean drill crews to know and follow basic well monitoring kick detection ... was well known to upper level management at Transocean and continued unabated and uncorrected, despite their knowledge, up to and including this tragedy.

“Continued” is a quoting verb used above to imply guilt for known transgressions. In legal terms, the corporation “knew or should have known” about the failures and inadequate training of the crew and they should have corrected them. “Continued” implied Transocean’s foreknowledge of the error and their willful choice to ignore it. On the other hand, as the next passage described, the crew members were *not* fully aware of the problems:

This [well control problem] clearly demands attention, as frontline crews are potentially working with the mindset that they are fully aware of all the hazards when it's *highly likely* [emphasis added] that they are not.

Roy must use the epistemic modality of “highly likely,” in the passage above since the actual investigative report did not make this conclusion with full certainty (only “highly likely”), and therefore, Roy could not imply otherwise. In the passage below, Roy made the rhetorical move to simplify the issues (Move 5) regarding the foreseeability of the defendants’ corporate decisions:

Transocean’s safety culture was broken, and the evidence will show that management’s willful refusal to fix it led directly to the Deepwater Horizon disaster. The Deepwater Horizon kept drilling, and BP kept hiring.

The defendants would follow Roy’s court opening statement with their own narratives, pointing fingers at each other and obscuring causation and responsibility with a “high level of abstraction” (Fairclough, 2003, p. 137). To cut through all the smokescreen, Roy used the above passages of his court opening statement to make visible the corporations’ negligence so that his audiences could “see clearly what processes were being carried out, with what kind of causality, by which social actions, and in which times and places” (Move 5: Simplify the issues) (Machin & Mayr, pp. 94-5). Roy represented the events of the DWH disaster at a low level of abstraction in his court opening statement so that decisions makers would have no doubts about a finding of gross negligence against the defendants (Move 7: Motivate decision makers to act).

The next passage shows that Roy went one step further in his opening statement to capture the defendants’ corporate decision making mindset for the court and the public:

The evidence will show that doing [the job] right and redoing it with a new cement job could have cost delays worth millions of dollars to BP. Instead, the evidence will show that only days before the blowout and eleven deaths, another BP engineer in Houston, Brett Cocalles ... made the infamous,

unforgiveable statement that by the end of this trial will stand as the summation of BP's safety culture at Macondo: 'But who cares, it's done, end of story, will probably be fine, and we'll get a good cement job.' (Transcript: 79:9-15)

Roy used the quote above to demonstrate that Transocean would most likely not make any real changes in their unsafe procedures ("who cares?"). The decision not to do the right thing came down to BP and Transocean's priority, which was to avoid "cost delays worth millions of dollars."

To further make his point that the negligence was not something new, Roy gives an example in the next passage of other members of BP and Transocean management who had already declined to continue acting as if corporate management had "learned their lessons." In the passage below, Roy quoted a member of Transocean's management as she refused to participate in a "learning" exercise following an unrecognized kick in the pipeline only weeks prior to the DWH disaster:

Kate Payne, who being requested to participate in a "lessons learned" inquiry in a March 8, 2010 kick, .... stated, 'I know you've got to get something out there to make it look like we won't do this again. I don't see us really learning.'

Payne was correct. Six weeks later the same fatal "kick" occurred, this time on the DWH rig, causing it to explode, kill eleven men, injure many others, and cause the largest oil spill in U.S. history. Payne's quote above also reflected another important piece of Transocean and BP's corporate culture: symbolic exercises that were meant only to back up their public ideology.

### **Analysis of BP's Court Opening Statement**

In this section I analyze BP's court opening statement in the DWH trial. The general context, purpose, parties, discourse communities and ideological assumptions discussed above, apply to BP's court opening statement as well. The next section provides a brief context that is specific to BP and its legal relationship to the other defendants.

The nature of BP's involvement in this lawsuit has some similarities and some differences from that of the Plaintiffs and Transocean. Like Transocean, BP is one of the defendants sued by the PSC, USDOJ and the States of Louisiana and Alabama. As Table 4.2 previously established, Transocean owned the DWH rig and leased it to BP. Transocean also provided the oil rig crew, which the PSC alleged was both inadequately trained, and regrettably acclimated to Transocean's negligent corporate ideologies and belief systems. Transocean commissioned the blow-out preventer (BOP) to be built by defendant Cameron for the rig. Nevertheless, by law it was BP's ultimate legal responsibility as leaseholder and manager of the well project to be sure that training by Transocean was accurate and that the BOP safety device worked.

BP filed suit lawsuits against Transocean and Cameron, accusing them of the negligence that led directly to the DWH disaster. Transocean countersued, claiming the rig and its crew were "endangered by BP's cost-cutting measures, including the well design and last-minute changes to operational plans that created confusion" (Gold & Gonzales, 2011, n.p.). Transocean also asserted that its contract with BP indemnified it against all claims related to pollution and environmental damage (specifically referring to the fines potentially levied under the federal Clean Water Act). BP argued that Transocean should be held to paying a portion of the fines because BP paid for and relied upon Transocean's expertise.

Defendant BP was represented by trial attorney Mike Brock. Brock was assigned by Judge Barbier to give his court opening statement in the afternoon of the first day of trial, which meant Brock had a tactical advantage by hearing the PSC and Transocean's court opening statements first. Court opening statements can be modified up until the time they are presented and this order of appearance worked in BP's favor.

Brock began his opening statement by greeting Judge Barbier and other counsel in the courtroom. In the next passage, Brock then moved to establish primacy (Move 1), claiming that unlike the other defendants who were blaming each other for the disaster, BP was presenting the court with *facts* so that the Judge could make an informed decision about apportionment of responsibility:

There have been a good number of statements made today that BP has been *pointing fingers* at its contractors. I hope that Your Honor will see what we have to present today as pointing out facts that will be helpful to the Court and not pointing fingers. (Transcript: 191: 7-11)

Brock used the element of privacy to try and improve BP's credibility with the court (Move 3: Establish credibility) by pointing out that BP would demonstrate its blamelessness by relying upon the facts of the case to clear itself of the claims made against it. Brock used quoting verbs to make an impression on the Judge, to shape the events for the public and BP's shareholders (Move 2: Create a lens), and to boost BP's credibility (Move 3). In the passage above, Brock used quoting verbs to criticize or judge the other defendants *implicitly*, use the "pointing finger" phrase as a subjective modality. Finally, Brock used his opening statement to attempt to transform past negative connotations of BP to a positive ones. Machin and Mayr (2012) described this tactic in which some "aspects of identity are foregrounded and others backgrounded," so that an advantageous image can be presented to "the social world" (p. 87). For example, in the next passage, BP foregrounded the economic importance of deep water drilling industry to the Gulf of Mexico region, while backgrounding its history of ignoring the safety and welfare of the people working in those jobs:

This is a Gulf of Mexico MMS lease map, Your Honor, and it just basically shows how active drilling is in the Gulf of Mexico, how important it is to this region (Transcript: 197:8-10). ... So these people, the folks that work for these

companies have been successfully doing this for a long time in the Gulf of Mexico. (Transcript: 197:24-198:1)

Brock also used rhetoric to paint BP as a corporation that cared about the residents of the Gulf States (Move 2: Create a lens). He demonstrated the corporation's ethos and credibility by claiming BP knew how important active drilling jobs were to the people and industries of the Gulf region. He attempted to make a connection of good will between BP and the public at large, reminding them of BP's status as a largest employer in the area. In this sense, Brock's statement joined the survivor narratives from the Gulf community with BP's own history of experience, expertise, and corporate goodwill. This strategy was part of Brock's theme in his court opening statement (Move 4: Develop a theme): that BP cared about safety, and had industry standard safety barriers in place to protect them. The real problem (as Brock presented it) was the other defendants' failures to comply with their own industry standards that triggered a breach in BP's safety barriers. To make his point, the passage below shows Brock describing the scenario on the rig just before the disaster occurred:

All of the drilling activity that was to occur had been completed. What needed to occur after that is that the well needed to be logged, the geologist needed to understand what the conditions were for coming back, and the well needed to be cemented and temporarily abandoned. Those were the things that were left to do after the drilling operations were complete on April 9. (Transcript: 191: 15-22)

Brock laid out the process that should have occurred after drilling was completed, using a simple list of steps consistent with industry procedures on an oil rig (Move 5: Simplify the issues). He also intimated that BP's part of the process, the drilling, was completed (Move 2: Create a lens) and it was time for the other corporate contractors to complete their own customary responsibilities. The theme (Move 4) is reinforced in the passage above as Brock described BP as having completed its responsibilities safely, and depended on the defendants to do the same.

Brock used discursive strategies such as visualization, imagery, topical references and semiotic choices because they functioned to create a higher degree of acceptability of his court opening statement by decision makers.

In the next passage, Brock concedes that everyone made some mistakes:

Unfortunately . . . there were a number of mistakes and errors in judgment that were made by BP, Transocean and Halliburton. Those are the things that we will be discussing today and in our presentation during trial. (Transcript: 191:23-192:3)

Brock's use of the word "discussing" in the previous passage is a quoting verb of assertion which is used "not simply to communicate *how* a person relates to events, but the very character and nature of the events" (Machin & Mayr, 2012, p. 58). In the context of a trial, Brock's use of the word "discussing" implied a sort of informal, back-and-forth verbal exchange among people with equal power or standing during trial. By claiming that "we" will be "discussing things" at trial Brock represented the trial in abstraction. "Discussing things" glosses over what actually occurs in trial, along with all of the "micro-processes that might comprise these actions" (Machin & Mayr, 2012, p. 115). Using his opening statement, Brock created the image of himself as a relaxed attorney, who admitted his client made a mistake, but also argued that there was certainly "no intention to harm," and "no lack of due care" on the part of BP. He did this by signaling BP's admission of "errors" using the word "Unfortunately." In the passage above, Brock characterized the actions/inactions of the oil company contractors, and BP itself, as having made regrettable mistakes and errors of judgment, but not deliberate acts of negligence.<sup>14</sup> By positioning his client alongside defendants Transocean and Halliburton, Brock attempted to hedge his bets for BP by offering an argument that placed all of the oil corporations into one

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<sup>14</sup> These were the same words used by Tony Hayward in his statement before the Congressional inquiry.



group, all representative of the larger oil drilling industry. If it was proved that all of the defendants were following industry standards, the best case scenario for BP was that it would not be found grossly negligent and could escape paying quadruple punitive fines in the billions of dollars. The next best scenario would be that all of the defendants would have to *share equally* in paying damages and fines. The worst scenario was that BP would be responsible for all damages pursuant to the precedent of principle-agency law. In very general terms, principle-agency law occurs when a principal can be held liable for the physical torts of an agent, actual or apparent<sup>15</sup>. Brock tried to establish the fairness of placing all of the defendants together, including BP, as liable defendants. This is the lens (Move 2: Creating a lens) that he used throughout the opening statement (and trial), that is, that all of the oil corporations were equally liable for the disaster if they all were following industry standard procedures.

Legally, Brock's theme (Move 4: Develop a theme) was to rely upon the 'industry standard' defense, (which he indeed referred to eight times in his court opening statement), and to minimize the principle-agency law which assigned ultimate legal responsibility for the acts of their agents/contractors to BP. Repeating over and over that the industry standard law should apply to this case, Brock was not explaining the law (Move 6) in his opening statement so much as making another, more favorable law appear reasonable in this case. He did *not* point out the elements of the law on negligence or gross negligence, presumably because he was arguing before a judge; but by not doing so the public audience would not know the important difference between the two theories. Instead, as the next passage shows, he asserted repeatedly that at the time of the disaster, BP had in industry-standard safety systems in place:

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<sup>15</sup> For a more in-depth definition see *Eads v. Borman, LLC*. 234 Or. App. 327, 227P.3d 826 (2010). See also, *Vaughn v. First Transit, Inc.*, 346 Or. App. 128, 135, 206 P.3d 181 (2009).

*Industry-standard*, [emphasis added] redundant systems, equipment, and people to prevent the very kind of accident that occurred at the Macondo well. This is what's in place in terms of *industry standard* [emphasis added]. (Transcript: 192:7-10)

Brock reiterated the phrase “industry-standard” twice, trying to expand his theme (Move 4) of a corporation that had met all of its legal requirements, and should be judged only as a peer member of the industry, not solely responsible for an unprecedented disaster.

Brock's opening statement argument is important, not only for the Court and this trial, but also for BP's shareholders. Read (2011), an industry expert who wrote the book *BP and the Macondo Spill* about the DWH disaster, maintained that it was important to understand the ethical perspective in the business world. According to Read (2011), BP's ethical duty was to its *shareholders*, not to the public. He based this opinion on Nobel Prize laureate Milton Friedman's (2002) “Shareholder (or Stockholder) Theory” agreed:

The view has been gaining widespread acceptance that corporate officials and labor leaders have a ‘social responsibility’ that goes beyond serving the interest of their stockholders or their members. This view shows a fundamental misconception of the character and nature of a free economy. In such an economy, there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud. (Chapter 8)

Using this lens of corporate ethical responsibility (Move 2), Brock tried to sooth skittish shareholders, many of whom had already filed lawsuits alleging that BP was guilty of fraud. This situation made it even more critical for Brock to make a plausible case for BP's credibility (Move 3: Establish credibility).

Brock continued to argue his chief theme (Move 4) that BP had followed industry standards and that BP had exercised due care on the rig. He also tried to spin the USDOJ

attorney (Mr. Underhill) theory of the “Swiss Cheese Model” by providing his own favorable interpretation of its meaning:

You have heard a number of comments about these barriers today. Mr. Underhill showed you the barriers that were penetrated in the Swiss cheese model and advanced to the Court that that shows that BP was grossly negligent. We say that demonstrates precisely the opposite. Because BP had in place industry-standard barriers, it shows their due care.

BP’s claim that they had used “industry-standard barriers” was a repeated and over-simplified legal defense (Move 5: Simplify the issues) that BP hoped would overcome the charge of its sole liability in this lawsuit. In other words, BP had operated according to industry standards and could not be legally held to anything higher. Brock directed the quote towards “You” without identifying who “you” was. It could have meant the judge, the other defendants, the plaintiffs, BP’s shareholders, etc. Using the vague term “you” may be his use of synecdoche, or “the part that represents the whole and allows the speaker to avoid being specific” (Machin & Mayr, 2012, p. 172). He could be directing his remark to the plaintiffs, but it is more likely that he is addressing just the Judge and opposing counsel since he is making a strictly legal argument. This is a transitivity process that represents the participant “you” in a passive role. The “actor” is “missing” or “lost” (Fairclough, 2000, p. 163).

The “Swiss cheese” metaphor transports process of understanding from one realm (food) to another (mechanical processes) (Chilton, 1996; Chilton, 1996; Hart, 2008; Lakoff & Nunez, 1997; Semino, 2008). While the metaphor presumably is intended to act as a semiotic device to facilitate understanding of a complex oil industry process, it also oversimplified the complex system that required collaboration between management and employees. Brock is trying to delegitimize his opposing (USDOJ) counsel’s argument, using the word “advanced” to the

Court” instead of just “said.” “Said” is a speech reporting word, a neutral structuring verb that Brock changed to “advanced” to simply that the USDOJ counsel’s prior speech was not credible, but he could not imply that his opponent’s opening statement was untrue. “Advanced” is a metapropositional verb that marks Brock’s interpretation of the USDOJ’s prior speech as unprofessional, making himself seem more assertive and confident (Machin & Mayr, 2012, p. 60). On the other hand, Brock characterized his assertions to the court as “we *say*” because it uses the neutral structuring verb to *add* credibility. In other words, the USDOJ counsel “advanced” their characterization of the evidence, but BP is putting forth the facts “candidly, honestly” (Machin & Mayr, 2012, pp. 64-5). Throughout the statement, part of Brock’s theme (Move 4) was to claim that BP had always candidly acknowledged its fault in the disaster from the beginning; had been sincere and forthcoming; and had not only cooperated in the initial investigation of the disaster, but had also been truthful with their shareholders.

In the next passage of Brock’ statement, he continues to build upon his theme that BP’s processes were consistent with those found in the oil industry and that the responsibility for the disaster should be with the other defendants. He then listed specifically the failures of the other defendants to comply with their *own* industry standards, thereby breaching BP’s safety barriers.

So what are the events that had to take place in the presence of these industry-standard barriers for this accident to occur? First, there is cement that is pumped to the bottom of the hole ... The idea is to pump the right kind of cement, to get it in the right place so that the well will not flow. In this case, Halliburton was expected to design a cement, test the cement, and pump the cement. ... That bad slurry that was pumped to the bottom of the hole is what caused this well initially to flow. The second barrier that’s in place—industry standard barrier that’s in place is well integrity testing. ...

In the first sentence of the quote above, Brock uses a spatial reference “in the presence of” to create visualization and imagery to help set up the reference again to BP’s “industry-standard barriers.” Then he gave a list of the other defendants’ failures (“events”) that “had to take place in the presence of these industry-standard barriers for this accident to occur.” Throughout his statement, Brock used this tactical rhetoric to paint BP as the victim in this disaster, the same as the Gulf residents, and that it was the other defendant contractors who were the real parties responsible for safety systems.

Brock also argued that everyone knew about the risks of deep water drilling, thereby offering another legal defense, the “assumption of the risk.” In other words, those who worked on a drill rig were well aware of the possibilities of explosions and oil spills, but chose to work there regardless. If this were true, the workers could not recover from any injuries they suffered as a result of the disaster. By playing up both sides of the the argument, Brock sought to elicit solidarity and fellow feeling with the other defendants (Move 2: Create a lens), again implying that they all faced external forces that they had to combat together.

All of this rhetoric flew in the face of applicable case law and precedent, but the disaster had been labeled an *unprecedented* event and perhaps Brock thought that the law should be applied in unprecedented ways as well. However, Brock couldn’t go too far in this argument, since BP had admitted to elements of criminal negligence in their Plea Agreement with the USDOJ in the criminal case. By couching his overall court opening statement amidst a chronological details of the disaster, Brock tried to get credibility (Move 3) mileage out of it.

Brock continued to hammer at the other defendants’ credibility throughout his statement. Brock legitimized BP’s reliance on good contractors, proven technology, and a long-term history of safe machinery. He followed this assertion with a qualification. He agreed that the BOP was a

“good and safe product,” but then added: “But it was a blow out *preventer*... not a blowout *stopper*” [emphasis added] (Transcript, 241:18-23, 248: 15-16, and 249:1-4). Brock was hedging and tempering his claim (Machin & Mayr, 2012, pp. 187, 192-194) that it was reasonable for BP to rely upon the BOP’s long-term safety history; but that even if it didn’t work correctly it would not be reasonable for anyone to claim it should have done more than it was intended to do.

Finally, Brock metaphorically claimed that deep water drilling was a “team sport,” amplifying the supportive relationships between the corporations and their crews:

Now, Your Honor, as we have learned about drilling in the deep water environment over the past two-plus years in working in this case, one of the things that we have learned is that the men on the rig have very close relationships, and the drilling is termed what they call a team sport. (Transcript: 195:9-14)

Brock implied that doing a test, interpreting it, and acting upon it with a phone call or walk to the rig deck was a collaborative effort. Team sport metaphors call for a “set of allegiances and actions,” and “imply the necessity of commitment to a hierarchy” (Bineham, 1991, p. 35). But, they can also be used as a power device that establishes and reinforces “moral and social control” (Edge, 1974, p. 142). The power of Brock’s sports metaphor, however, can also backfire as it did here in the Deepwater Horizon disaster, because the crew *did* question the wrong procedures and dangerous practices, but were forced by the management hierarchy to “organize their world ... so as to facilitate or make inevitable certain scenarios” (Fernandez, 1972, p. 58). Unsurprisingly, Brock later also claimed in his court opening statement that there were “no dictators” in the deep water drilling process, implying here that even if BP had given an improper directive—or no directive at all—Transocean *and its crew* could have overruled or changed it. Brock argued

against the very hierarchy that he implied earlier, and claimed that BP had put into practice a *shared* responsibility with contractors, including the making a collaborative mistake (Move 7: Motivate decision makers to act). His purpose here was to again ask the Court to rule that *all* of the defendants should share in the penalties for this disaster.

Brock eventually ended his opening statement by arguing disingenuously his last two defenses: that the charges BP faced were really against the “men and women of BP,” rather than against the BP corporation; and that it was extremely difficult for the plaintiffs to prove the elements of willful misconduct and gross negligence:

Well, I guess I will just say this with my one minute left: One of the important issues here, as we understand it, is this issue of willful misconduct and gross negligence. These are very high standards. We do not believe that the men and women of BP acted in a way that demonstrates willful misconduct, that they were doing things voluntarily, intentionally, recklessly. We do our jobs well. We hope we are able to get that over to you during the course of this trial. It was a multi-party, multicausal event. There are a number of different reasons that we have this horrific outcome, but the standards are very high.

In the passage above, the “high standard” Brock mentions twice is the legal standard necessary for finding a defendant guilty of gross negligence.<sup>16</sup> Brock addresses BP’s real fear that Judge Barbier will rule that BP’s actions/inactions constitute gross negligence which brings with it an Order to pay quadruple damages.<sup>17</sup> Brock may be intimating that BP will appeal any rule against them on the basis of proving willful and wanton misconduct (which they have indeed done).

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<sup>16</sup> BP was found to have acted with gross negligence. It is appealing Judge Barbier’s ruling, stating: “BP believes that the finding that it was grossly negligent with respect to the accident and that its activities at the Macondo well amounted to willful misconduct is not supported by the evidence at trial,” the company said in an e-mailed statement. “The law is clear that proving gross negligence is a very high bar that was not met in this case.”

<sup>17</sup> On September 4, 2014, Judge Barbier ruled that BP acted with gross negligence. The Judge apportioned blame as follows: BP: 67%, Transocean: 30%, and Halliburton: 3% (Fisk et al., 2014, n.p.)

Then Brock shifted the blame to the DWH crew. Even if Judge Barbier finds against BP, Brock claimed that it will be the crew that he is finding grossly negligent, not the BP corporation.

Brock is putting forth BP's "solidarity" ("We do our jobs well with the crew. His posture is that of arguing on their behalf ("We do not believe that the men and women of BP acted in a way that demonstrates willful misconduct"). He deliberately redirected attention from the BP corporation to the Deepwater Horizon crew (made up of both BP and Transocean employees).

Brock never changed the theme of his court opening statement. He kept to the theme of joint liability established by BP CEO Tony Hayward three years earlier in his Congressional opening statement that had laid the basis for all future defenses: "We and the *entire industry* will learn from this terrible event and emerge stronger, smarter and safer."

### **Analysis of Two Public Statements**

In this section, I examine two of President Obama's public statements addressed in press conferences to the American people. I chose these because they were interrelated, but delivered in different contexts: one in person to residents of Louisiana, and one to the nation from the Oval Office. Both were presented shortly after the DWH disaster.

#### **President Obama's May 2, 2010 statement to the public**

The President's next public statement (after his brief April 29, 2010 remarks) about the disaster was made on May 2, 2010 (Table 4.1.G). It was delivered during the President's first visit to the Gulf since the disaster began twelve days earlier. Speaking to the American people about the disaster was becoming a recurring situation for the President and his statements were evolving with it. Media photos show that this occasion was informal, outdoors, with everyone wearing jackets and shirt sleeves. The President's podium was makeshift, and the American flag flying on a U.S. Coast Guard ship visually filled the background of the setting. The May 2 public



statement was presented four days after the President's brief remarks in the Rose Garden, but the mood of the occasion was very different.

Despite the state of emergency in Louisiana, with the oil spill already on Louisiana's shores, the President once again began his speech by referencing a different event in a different location<sup>18</sup> (Move 1: Establish primacy). He made a similar choice on April 29, 2010 when he led with comments on the DWH disaster at the Teacher of the Year Award Ceremony. Here, on May 2, 2010 in Louisiana, he first talked about an incident that had occurred in New York City the day before. This is a noteworthy choice if the first priority of a statement is to establish primacy. If the purpose of the President's public statement was to talk to and reassure the people of Louisiana who were suffering from the aftermath of the disaster, then rhetorical move of primacy seems inappropriate here.

Two paragraphs into his public statement, the President did begin speaking about the situation in Louisiana:

Now, we just finished a meeting with Admiral Thad Allen, our National Incident Commander for this spill, as well as Coast Guard personnel who are leading the response to this crisis. And they gave me an update on our efforts to stop the BP oil spill and mitigate the damage. They gave me a sense of how this spill was moving. It is now about nine miles off the coast of southeastern Louisiana.

And by the way, we had the governor of Louisiana, Bobby Jindal as well as parish presidents who were taking part in this meeting, because we want to emphasize the importance of coordinating between local, state and federal officials throughout this process.

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<sup>18</sup> The President spoke concerning an incident that happened in New York on the previous day in which a car bomb was detected in the center of Times Square on a busy evening. The crude bomb had begun the detonation countdown when it was seized by police, but failed to go off (Baker, A. & Rashbaum, 2010, n.p.)

The President created a lens of authority (Move 2: Create a lens) when he listed the steps that the federal government had already taken. He assured his audience that the U.S. government was in charge and leading the response to the disaster (Move 3: Establish credibility). The President established the hierarchy of command for the DWH disaster, from federal to state to local authority and took ownership of the process. However, the oil spill had already reached the southern Louisiana shore early that morning, April 30, 2010 and scientists from Fort Jackson were already treating oiled birds (Walsh, 2010). The oil spill may not have reached the southeastern side of the Louisiana, but it was already onshore in other areas. The President's specific naming of a location in which the oil spill had not yet arrived, gave the impression that his public statement acted as a kairotic moment in which he had arrived to speak to the people of Louisiana just before the oil did. Backed by his reputable source of information, Admiral Allen, the President was able to state the location of the oil as given, yet which was actually highly contested.

The President acknowledged the need Gulf Coast citizens' had for assistance in general, but he did not address their immediate or future needs specifically. He characterized the oil that was already on parts of their shores as "this spill," a metonymy that acted to conceal or downplay the reality of the huge, uncontrolled oil spill and its devastating consequences. By characterizing the emergency situation so generally (he only had a "sense of how the spill was moving), and not even acknowledging that the oil was already on Louisiana's shores (It is now about nine miles off the coast of southeastern Louisiana), the President's words acted as the rhetorical move of simplifying the issues (Move 5), but to the point that it minimized the enormity of the disaster.

Rhetors repeat lexical choices with the goal of reinforcing themes in statements. Trial attorneys try for simplicity and clarity when communicating with non-legal persons in their court

opening statements, but repetition has a tactical use as well. Repeating the most important concepts increases their chances that a greater number of people in the audience would focus on those particular points (Rose & McPherson, n.d.). On the one hand, the repetition contributes to expressive and comprehensible communication. On the other hand, it helps negotiate meaning between groups by “build[ing] on and creat[ing] interpersonal involvement (Tannen, 1987, p. 576).

In the May 2, 2010 statement, the President repeated the two words, ‘coordinate’ and ‘cooperate’ several times throughout his full speech. The choice to so may have been meant to encourage a sort of banding together to fight the oil’s encroachment upon U.S. shores (Move 4: Develop a theme). The words “cooperate” and “coordinate” may also have been used to suggest the need for collaboration among the different levels of government and this may be the President’s actual theme (Move 4: Develop a theme).

As I discuss in more detail below, on April 29 and 30, 2010 the Gulf State governors each proclaimed a state of emergency, taking themselves out from under the federal coordinated response and directing their own disaster centers. This caused confusion and delays since local governments and volunteer residents were unable to communicate with the Coast Guard on their radio channels or coordinate their responder efforts. Speaking about federal and state cooperation, the President invoked a related military concept in the passage below:

And that's why the federal government has launched and coordinated an all-hands-on-deck, relentless response to this crisis from day one. After the explosion on the drilling rig, it began with an aggressive search-and-rescue effort to evacuate 115 people, including three badly injured. And my thoughts and prayers go out to the family of the 11 workers who have not yet – who have not been found.

First, this is the President’s first recognition of the killed and injured oil rig workers and their families. The President’s speech represents a dynamic modality by indicating that the federal

government was committed to its “relentless” response “from day one.” The “all hands on deck” phrase is an idiom, a Navy/Coast Guard term that means everyone below the deck of a vessel needs to get on the top deck. The term is typically used for emergencies, or for an event that everyone must be part of. It is clear that the President had a concern with interagency cooperation, and with good reason. The laws concerning oil spills come under the Federal National Contingency Act (FNCA), rather than the Stafford Act that gives the states jurisdiction in national emergencies. The guiding concept of the National Contingency Plan (NCP) is a “unified command system” that “brings together the functions of the Federal Government, the state government, and the responsible party to achieve an effective and efficient response” (40 CFR§300.105). However, the enormity of the response necessary for the DWH disaster “necessitated the build-out of an elaborate organizational structure with accompanying delegation of responsibilities” (Cleveland, 2010, n.p.). Retired Coast Guard Admiral Thad Allen was appointed National Incident Commander. After assessing the spill, Allen designated the DWH disaster a “Spill of National Significance,” in accordance with 40 CFR §300.5 as:

a spill which due to its severity, size, location, actual or potential impact on the public health and welfare or the environment, or the necessary response effort, is so complex that it requires extraordinary coordination of federal, state, local, and responsible party resources to contain and cleanup the discharge.

However, the mobilization of resources to combat the spill lagged for about nine days, and the response was categorized as being still “largely regional in nature—the President had not been to the region, the Cabinet had not yet become involved, ... there was little regulatory guidance... and the responders were from the local area” (Cleveland, 2010, n.p.).

In the next passage, the President sought to overcome these questions and criticisms:

When the drill unit sank on Thursday, we immediately and intensely investigated by remotely operated vehicles the entire 5,000 feet of pipe that’s on the floor of

the ocean. In that process, three leaks were identified ... As Admiral Allen and Secretary Napolitano have made clear, we've made preparations from day one to stage equipment for a worse-case scenario. We immediately set up command center operations here in the Gulf and coordinated with all state and local governments. And the third breach was discovered on Wednesday.

Recognizing that the press and members of his own administration questioned his delay in commenting on the disaster or traveling to the scene, the President reminded them that a great deal had been done from the moment the government had word of the disaster. He used the phrase "from day one" again, and other words such as "immediately" and "intensely" to describe the government's timely and tremendous response to the disaster. The President's repetition invoked a sense of routine; in other words, the President and his administration had reacted, and would continue to act expediently to the situation. What he did not say, however, was that during the first ten days of the spill, responders almost uniformly noted that while they understood that they were facing a major spill, they believed BP would get the well under control, and that the oil would not come ashore. Therefore, responders "hesitated to open additional command posts and viewed the event as an 'incident'" (Cleveland, 2010, n.p.).

Nevertheless, regardless of BP's inability to get control of the disaster, the President reassured his critics in the passage below that while they may not have seen the efforts of his administration, his administration had been "prepar[ing] and react[ing] aggressively."

So I want to emphasize, from day one we have prepared and planned for the worst, even as we hoped for the best. And while we have prepared and reacted aggressively, I'm not going to rest – and none of the gentlemen and women who are here are going to rest – or be satisfied until the leak is stopped at the source, the oil on the Gulf is contained and cleaned up, and the people of this region are able to go back to their lives and their livelihoods.

Once again, the President hedges his statement that the government had been on top of the disaster from the beginning. The phrase “So I want to emphasize, from day one ...” serves the important role of giving the public the impression that while the opposite might have been supposed, the President was here to “increase the level of explanation and clarification, rather than obfuscating it” (Machin & Mayr, 2012, p. 193). His administration was “prepared” and had “planned,” but they also “hoped,” that BP had the situation under control. Further, the President stated “we aggressively reacted,” but that aggressive reaction included insisting that BP get the oil spill under control. President Obama’s public statement is meant to give the impression of being detailed and precise, given by the President of the United States who represented the collective “we,” but which also evokes a collective “other” that may be in opposition to these shared characterizations of the DWH events (Machin & Mayr, 2012, p. 84).

Because local officials did not have a clear role in the Deepwater Horizon response, many felt ignored by federal responders and according to the National Commission Report (2010), “this contributed to their empowerment... to go directly to BP for response funding” (n.p.). This problem seemed to be exacerbated in Louisiana, “where the unique parish structure and home rule provisions gave a great deal of autonomy to local governments” (Cleveland, 2010, n.p.). State and local officials in the Gulf States were accustomed to using their own emergency response structures, using federal funds and assistance and they “chafed” under federal control of response efforts (National Commission ... 2011, p. 138). The NCP structure had not considered the roles of state or local officials, and therefore, on April 29, 2010 (Table 4.1.F), Louisiana Governor Jindal declared a state of emergency using the language in the Stafford Act which authorized an overwhelmed state in an emergency to bypass the federal command. The Governors of Mississippi, Alabama, and Florida followed suit and each declared a state of

emergency the next day. Each parish in Louisiana used BP money to purchase their own equipment; each had its own command center; and local decisions regarding the oil spill were taken out of the hands of federal career oil-spill responders. In this context, the rhetorical moves used by the President in the May 2 public statement represented his frustration with the lack of collaboration between the federal versus state government roles in the disaster (Simon, 2010, n.p.).

The first portion of President Obama's public statement represented a kairotic moment in which he used the opportunity to reinforce the federal government's authority over directing oil spill activities (Move 3: Establish credibility), and to encourage collaboration and cooperation among federal government and state agencies (Move 7: Motivate decision makers to act). Unfortunately, he did not use this public statement to inform or explain to the public the different laws and systems and how they interacted. (Move 6: Explain the law). Explaining the emergency incident structure might have helped him to motivate the residents (Move 7: Motivate decision makers to act) of the Gulf States towards a more efficiently coordinated action.

### **President Obama's June 15, 2010 Public Statement from the Oval Office**

The President chose to make his address to the nation from the Oval Office on June 15, 2010 (Table 4.1.T). Choosing to speak from the Oval Office heightened the importance of the President's message, especially since it was the first time he had spoken from the Oval Office since being elected. The President was formally dressed and sat behind a large desk, elements emblematic of power (Move 3: Establish credibility). He was positioned between two flags in the background and a table that held various photographs of the President's family. This was a

formal setting, but characterizing the President's public statement as "remarks" gave the message a more friendly tone.

The context of the President's public statement included informing the public of BP's continuing inability to cap the well or stop the flow of oil after 56 days. He confirmed that efforts to stop the flow of the oil from reaching the Gulf coastline had also failed. But the President's speech from the Oval Office also presented a kairotic moment in that a cluster of events was about to take place. First, he brought to mind the images of the disastrous oil spill that had impinged upon private citizens, and the image of himself as managing efforts to both cope with the ongoing disaster and "defend the public against external and internal enemies" (Edleman, 1988, p. 120). Second, the President was scheduled to meet with BP's CEO, Tony Hayward, and other BP officials the following day, June 16. As a result of that meeting, BP deposited \$20 billion dollars into a trust fund on June 17, designated for the victims of the disaster. Third, on that same day, Hayward gave his Congressional opening statement before a Subcommittee inquiry into the DWH disaster, confirming BP's commitment to paying all of the costs associated with the disaster and its cleanup (Table 4.1.U).

The President began his Oval Office statement by listing his three top priorities for Americans (Move 1: Establish primacy):

Good evening. As we speak, our nation faces a multitude of challenges. At home, our top priority is to recover and rebuild from a recession that has touched the lives of nearly every American. Abroad, our brave men and women in uniform are taking the fight to al Qaeda wherever it exists. And tonight, I've returned from a trip to the Gulf Coast to speak with you about the battle we are waging against an oil spill that is assaulting our shores and our citizens.

The President continued to make it evident that the DWH disaster was not our nation's first priority (Move 2: Create a lens). His move to establish primacy (Move 1) placed the oil spill



disaster within the context of the “multitude” of other problems America faced. By consistently placing the disaster after other concerns or events, President Obama appeared to minimize its importance to the federal government.

His public statement appealed to America’s history and tradition as a form of hedging, allowing his statement to “sound more authoritative and persuasive” (Machin and Mayr, 2012, p. 196). To begin his ‘battle’ rhetoric, the President assigned problems to one of two categories: those that were either *at home* (recession) or related to fighting *away* from home (fighting “al Qaeda). The “battle” metaphor was extended to the DWH disaster, characterized as a “battle” that the United States was waging against an oil spill (Move 4: Develop theme). On this day before his meeting with BP executives, the President described the oil as the enemy “assaulting our shores.” The day after this speech, the President demanded that BP set up a \$20 billion dollar fund for the victims of the disaster. BP became the part of the enemy that had unleashed the oil upon U.S. territory and hence, it also became the target for the “battle.”

On April 20<sup>th</sup>, an explosion ripped through BP Deepwater Horizon drilling rig, about 40 miles off the coast of Louisiana. Eleven workers lost their lives.

Seventeen others were injured. And soon, nearly a mile beneath the surface of the ocean, oil began spewing into the water.

The President retold the way the oil spill began with an explosion that “ripped” through the drilling rig, and reminded his audience of the proximity of the “enemy” to our country. This also provided a kairotic opportunity for the President to mention the number of casualties and injuries sustained by rig workers in the disaster. The President laid out the information he most wanted remembered (Move 1: Establish primacy), and the lens (Move 2) which was that of himself as a Commander in Chief, making public his battle plan against the unprecedented oil spill.

Because there has never been a leak this size at this depth, stopping it has tested the limits of human technology. That's why just after the rig sank, I assembled a team of our nation's best scientists and engineers to tackle this challenge ...

Robertson (2010), writing for *The New York Times*, described the situation as it was on this same night of the President's public statement from the Oval Office:

...the focus of the response to the Deepwater Horizon explosion has been a mile underwater, 50 miles from shore, where successive efforts involving containment domes, "top kills" and "junk shots" have failed, and a "spillcam" shows tens of thousands of barrels of oil hemorrhaging into the gulf each day.(n.p.)

After all BP's ideas had failed, the President moved to establish credibility (Move 3), by initiating his plan to bring in experts to help cap the underwater well. Most inspiring was that he was willing to go beyond BP and the government to find a solution. According to Edleman (1988), a "public spectacle" helps to keep the public both "apprehensive and hopeful" (p. 120). Edleman (1988) asserted that leaders "achieve and maintain their positions by focusing on fashionable or feared problems" (p. 120).

As a result of these efforts, we've directed BP to mobilize additional equipment and technology. And in the coming weeks and days, these efforts should capture up to a 90 percent of the oil leaking out of the well. This is until the company finishes drilling a relief well later in the summer that's expected to stop the leak completely.

The President also made it clear that the U.S. was "directing" the spill response, including his demand that BP use *all* of its available resources and manpower to contain the well<sup>19</sup>.

The President had not actually called BP an "enemy" and for all the figurative language invoking a battle, did not condemn the corporation. However, it was clear that BP owned the problem.

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<sup>19</sup> By "all," the President was insisting that BP not make its planned \$7 billion dollar payout to shareholders

Let me be clear: BP is responsible for this leak; BP will be paying the bill. But as President of the United States, I'm going to spare no effort to respond to this crisis for as long as it continues.

His clear assignment of liability would be important for setting the atmosphere for the meeting the following day between the President and the highest levels of BP management, including CEO Hayward. The President admitted that the problem was not solved and he did not know when it would be. The President disclosed that it would be some time before mechanisms were in place to stop it completely and audience's patience was needed in a time of uncertainty.

The word "leak," used since the April 20, 2010 oil rig explosion, in the President's May 2<sup>nd</sup> public statement, and here is a misnomer. BP discovered oil was coming out of the well on the second day after the explosion, supposedly at a slow rate. However, as the days went by, the "leak" became a surging quantity of thousands of gallons of oil from the underwater well. Terms used by the press included "gushing" (Gold, Chazan & Casselman, 2010) or "streaming" (Hoffman, 2010). By April 28, 2010, it was public knowledge that 210,000 gallons of oil per day were flowing from the deep water well, forming a 5,000 square mile oil slick ("100 days ...," 2010). President Obama used this information to make his rhetorical Move 4 (Creating a theme) part of his evolving theme of battle.

Already this oil spill is the worst environmental disaster America has ever faced. And unlike an earthquake or a hurricane, it's not a single event that does its damage in a matter of minutes or days. The millions of gallons of oil that have spilled into the Gulf of Mexico are more like an epidemic, one that we will be fighting for months and even years.

The President used similes to simplify the complex issues referenced in his opening statement (Move 5: Simplify the issues). He explained the long term problems the country faced by comparing and contrasting the oil spill to examples of natural disasters, including the hurricanes

that were very familiar to Gulf Coast residents. He chose the word “epidemic” to describe the scope of the problem which suggested that the timeframe, spreading consequences, and lack of a “cure” for capping the well were analogous to the conditions of a contagion. The “epidemic” metaphor may also have resulted in a type of ‘quarantining’ of the people of Louisiana and other Gulf States from the rest of the country. By characterizing the oil spill as an epidemic, an inanimate substance (oil) was given a virus-like quality, one that frightened people from visiting or vacationing in the Gulf states and reluctant to buy or consume seafood from Gulf waters. Not only had the oil spill landed on our shores, it was invading the Gulf Coast’s protected marshlands and coastlines, killing or altering the seafood and wildlife habitats, all of which made residents of the affected/infected Gulf Coast areas possibly ‘contagious.’

Reports of these problems were published nationally, adding to the problem. For example, an article in the *Tampa Bay Times* explained how worldwide viewing of the daily spewing oil from the well on the ocean floor “scared customers” from ordering fish or shrimp caught anywhere near the Gulf,” and caused restaurants to “take them off their menus and grocery chains to remove it from their coolers, even though it had been caught in “areas declared safe” (Pittman, 2013, n.p.). Gulf Coast fishermen reported that “many of the oyster reefs are still barren (Smith, 2013, n.p.). Finally, the tourist industry was affected negatively. People “cancelled reservations and did not make new ones. People were staying away” (Anderson, 2011, n.p.). A report from Tourism Economics concerning the Gulf Coast area stated that “Visitor perceptions initially recover slowly” (Anderson, 2011, n.p.). The entire Gulf Coast and its industries were ‘wounded’ and ‘infected’ by the onslaught of the oil spill and people’s reactions to it.

As the President continued his speech about the Gulf Coast's difficulties, he did not present or explain any of the laws, state or federal, that were already in place relevant to the disaster (Move 6: Explain the law). He did "lay down the law" though, using his familiar warning phrase, "But make no mistake" as a rallying cry (Move 7: Motivate decision makers to act):

But make no mistake: We will fight this spill with everything we've got for as long as it takes. We will make BP pay for the damage their company has caused. And we will do whatever's necessary to help the Gulf Coast and its people recover from this tragedy.

The President's rancor towards BP was evident. His use of the synecdoche "with everything we've got," allowed the President to avoid being specific about actual resources the U.S. actually *did* have in place. This phrase created an impression that the government had the means of dealing with the disaster, but the President did not share the tangible details of what those were or make clear what "whatever's necessary" meant (Machin & Mayr, 2012, p. 174). At the time of the President's public statement, all attempts to stop the flow of oil had failed. BP began using U.S. Airforce planes to spray a neurotoxic pesticide oil dispersant, Corexit, on the Gulf of Mexico. BP's use of the chemical on the Gulf was met with "an angry chorus of lawmakers" for BP's "lack of transparency" (Powers, Cart & Boxall, 2010, n.p.). The *UK News Network* (2010) reported that the neurotoxic pesticide used on the oil spill in the Gulf of Mexico totaled "more than 1,021,000 gallons" ("The Amount of Neurotoxic," n.p.). According to Quinlan (2010), Corexit is owned by Nalco Company and managed by "BP and Exxon executive leadership" (n.p.) Public confidence in the federal government's ability to handle the disaster had dwindled (Rosenthal, 2010, n.p.). The Environmental Protection Agency's (EPA) gave direct orders to BP on May 20 and May 25, 2010 to cease, reduce its use or use a less toxic chemical, but BP

claimed it was the best product and could be bought (from one of its own subsidiary companies) in large enough quantities and these were the priorities.

Finally, the President's phrase for fighting the problem "for as long as it takes" may have been more alarming than reassuring to the people in the Gulf who were without jobs and would continue to be unemployed for at least the duration of the President's six-month moratorium on offshore drilling, along with the businesses who supported them.

The President began to give the specifics of his "battle plan" for dealing with the disaster, including the public as active participants in both fixing the problem and ensuring it would never happen again.

Tonight I'd like to lay out for you what our battle plan is going forward, what we're doing to clean up the oil, what we're doing to help our neighbors in the Gulf, and what we're doing to make sure that a catastrophe like this never happens again...  
Each of us has a part to play.

The President made the rhetorical move of motivating the public to act (Move 7) by encouraging them to rally around his plan, but he still did not specify any of the details. He repeatedly asserted all that the federal government was doing a great deal, but gave no specifics. The President told the public that each one had a "part to play," but did not elaborate on what those "parts" were. However, he did add the element of "faith" to his plan for the recovery of the nation from the disaster.

It's faith that sustains us as a people. It is that same faith that sustains our neighbors in the Gulf.

In this statement, the President used the inclusive pronoun "us" to represent a unit of "people." The first sentence implied that the President's intent was to unite the American public around the disaster, but not to give details on what his plan entailed. But by way of contrast, he added the second sentence characterizing the residents of the Gulf States as our "neighbors," "instead of

“fellow Americans” or “citizens.” This is a representational strategy (Fairclough, 2003, p. 145) that allows a speaker to “place people in the social world and to highlight certain aspects of identity we wish to draw attention to or omit” (Machin & Mayr, 2012, p. 77). Van Dijk (1993) referred to this as “ideological squaring,” a process by which we align ourselves alongside or against people using “referential choices” to simplify events and issues “in order to control their meaning” (as cited in Machin & Mayr, 2012, p. 78). It can also be the case of being generous towards one’s less fortunate neighbors, making this an ethical group designation rather than a social collectivization. We have a connection with neighbors, but also a division in that they are not family.

The President described the enormous cleanup efforts led by Admiral Allen, and 30,000 personnel, “thousands of ships and other vessels,” 17,000 National Guard members (designated “servicemen and women”), again using names, figures and facts to bolster credibility and the confidence (Move 3) in the government’s ability to handle the crisis. However, he tempers his description of resources with the truthful reality that additional damage would be done by the oil before the disaster was under control.

And sadly, no matter how effective our response is, there will be more oil and more damage before this siege is done.

This sentence above also represented familiar war/fighting rhetoric. The first part of the message was meant to encourage and motivate, but the President adds the sobering recognition that things will never go back to the way they were before the spill. Then President reverted to the use of combat language, such as “siege” (Move 4: Develop a theme).

The President’s public statement from the Oval Office was watched by over 32 million people. He recognized that their beliefs, prejudices, and values were varied. In his next words, he turned his attention back to the Gulf residents’ predicament, only this time with an appeal to

human values, using story to talk about his interviews with Gulf Coast residents and his own personal observations while in Louisiana:

You know, for generations, men and women who call this region home have made their living from the water. That living is now in jeopardy. I've talked to shrimpers and fisherman who don't know how they're going to support their families this year. I've seen empty docks and restaurants with fewer customers--even in areas where the beaches are not yet affected. I've talked to owners of shops and hotels who wonder when the tourists might start coming back. The sadness and the anger they feel is not just about the money they've lost. It's about a wrenching anxiety that their way of life might be lost.

The President described the citizens of the Gulf Coast states in passive verb sentences. They were portrayed as “receivers” or “reflectors” of tragic circumstances, but not actors. In fact, no actor is mentioned except a prior mention of a “siege.” The President’s words encouraged the public to have empathy with the victims of the disaster (Machin & Mayr, 2012, p. 107). The roles of the victims were reinforced in this passage, and described not only their actions and identities, but also their feelings (Van Leeuwen, 2008, p. 56). The President built a rapport with the victims using common human values and a commitment to help them, beginning the very next day:

I refuse to let that happen. Tomorrow I will meet with the chairman of BP and inform him that he is to set aside whatever resources are required to compensate the workers and business owners who have been harmed as a result of his company’s recklessness. And this fund will not be controlled by BP. In order to ensure that all legitimate claims are paid out in a fair and timely manner, the account must and will be administered by an independent third party.

The President made it clear that he was in charge and was in the position to make demands of BP (“he is to set aside whatever resources are required to compensate the workers and business



owners who have been harmed”). The President anticipated objections and conditions from BP’s highest officials, and therefore he used language to set out all of the conditions up front (“this fund will not be controlled by BP” and “the account must and will be administered by an independent third party”). The President used the strength and power of his position, from the Oval Office, to create a public image of compassion and strength. Finally, he sets the tone for the legal charges that are to come due to BP’s “recklessness.” As I discussed previously, BP is on alert that the USDOJ will go after gross negligence charges against them.

The word “legitimate” modifying “claims” became a bone of contention after Hayward repeated the President’s phrase in his own Congressional opening statement two days later. Asked by reporters what he meant by the term, “legitimate claims,” Hayward said: “I could give you lots of examples. This is America — come on. We’re going to have lots of illegitimate claims. We all know that” (Daugherty, 2010, n.p.). However, Hayward seemed to have missed the part of the President’s statement that BP would have no part in deciding who would be compensated and for how much.

The President did, however, make clear the legal hoops that would have to be jumped by Gulf Coast residents to prove that their losses were due solely to the DWH disaster and not to previous natural disasters:

Beyond compensating the people of the Gulf in the short term, it’s also clear we need a long-term plan to restore the unique beauty and bounty of this region. The oil spill represents *just the latest blow* to a place that’s already suffered multiple economic disasters and decades of environmental degradation that has led to disappearing wetlands and habitats. And the region hasn’t recovered from Hurricanes Katrina and Rita. That’s why we must make a commitment to the Gulf Coast that goes beyond responding to *the crisis of the moment*.

So, on one hand, the U.S. government is being encouraged to “make a commitment” to the restoration of the Gulf, but not every problem was directly correlated to the oil spill. Some are pre-existing conditions. By using the term “crisis of the moment,” the President has somewhat diminished the impact to the area by the oil spill, making it just one more problem in a troubled area. While there was the single reality of the disaster, it was experienced as several distinct entities (Edleman, 1988, p. 121).

Now nearing the end of his opening statement, the President changed the lens (Move 2) so that he could speak about previously unmentioned and unexplained parts of the disaster story that were directly related to his administration. In the passage below, the President acknowledged his role in opening up the Gulf of Mexico in March, 2010 to leases for offshore deep water drilling after he believed he had done his due diligence to insure the process’ safety.

A few months ago, I approved a proposal to consider new, limited offshore drilling under the assurance that it would be *absolutely safe* [emphasis added]—that the proper technology would be in place and the necessary precautions would be taken.

Again, the President spoke of himself in the passive mode, taking the stance that he was the beneficiary of the assurances of safety and someone else was the actor making them. He did not say *who* assured him, BP, the MMS agency, or someone else, but he was intimating a firm acknowledgment of the oil companies’ guarantee. At the same time, the President limited any details about the matter (Hodge & Kress, 1993). Therefore, even though the President approved the activity, there was an alternative way of focusing public attention back onto BP and other oil companies.

BP management was in charge of all its contractors and was enforcing its own independent standards. However, by law this industry was also answerable to the Minerals

Management Services (MMS), a U.S. agency specifically charged with oversight of the offshore, deep water drilling leases, feasibility of contingency plans, and regular on-board inspections of deep water oil rigs. Laws, statutes, codes, and rules already existed to ensure that basic procedures were not just in place, but known and understood by corporations and their employees. BP's spill contingency plans should have been reviewed, but they were waived by MMS administrators.

Again, the President did not say who assured him of "absolute safety," but his statement seems somewhat disingenuous, in that a highly educated professional would believe any process could be "absolutely safe" especially in light of BP's extensive, public, and recent history of repeated safety violations detailed in federal OSHA reports (U.S. Department of Labor, 2013). These violations had led to other well-known explosions and deaths in the Texas City, Texas and Toledo, Ohio refineries in the United States (Gruenberg, 2014; Olsen, 2005; U.S. Department of Labor, 2013). Further, BP's spill contingency plan for deep water drilling in the Gulf was obviously not reviewed by MMS since it listed "walruses, sea otters, sea lions, and seals as 'sensitive biological resources' in the Gulf of Mexico, national wildlife expert had died in 2005, and contact information for several Texas A&M University marine life offices in Louisiana and Florida were no longer in service (Mohr, Pritchard, & Lush, 2010, n.p., National Commission ... 2011, BP's Gulf Spill ... n.d.).

Further, in its DWH contingency plan, BP stated that it had "the capability to respond, to the maximum extent practicable, to a worst case discharge, or a substantial threat of such a discharge" (Mohr, Pritchard, and Lush, 2010, n.p.; National Commission ... 2011; BP's Gulf Spill ... n.d.). Even in their projections for a leak ten times worse than the DWH disaster, BP's plan stated that all wildlife would "escape serious harm," beaches remained untouched and water

quality was a “temporary problem”(Mohr, Pritchard & Lush, 2010, n.p. National Commission ... 2011, BP’s Gulf Spill ... n.d.). According to the *Homeland Security News Wire* (2010, May 18):

BP’s 582-page emergency response never anticipated an oil spill as large as the one now gushing on the floor of the Gulf of Mexico ... was not much than a boilerplate, cut-and-paste job used by BP from region to region ... and the plan was approved in July by the federal Minerals Management Service (MMS), a toothless agency accused by lawmakers of being in the pocket of the oil industry. (BP’s Emergency ‘plan’ ... n.p.)

Since states’ jurisdiction over the continental shelf is for the limited purposes of “exploration and exploitation of natural resources of the seabed and subsoil” (Posner & Sykes, 2010, p. 569), the MMS agency was exclusively charged with providing the crucial oversight for the offshore deep water drilling activities. MMS was also responsible for conducting U.S. compliance inspections of deep water drilling rigs and verifying the adequacy of spill contingency plans. Because the process is so intricate and requires specialized skills, the plans should have detailed the *processes* by which BP could *stop* an oil leak, no matter how remote the prospect was of having one. According to a 2010 *New York Times* piece:

Deepwater repairs have been described as “open-heart surgery at 5,000 feet, in the dark ... ‘MMS completely overlooked the possibility of a major spill’ said Miyoko Sakashita, Oceans Director for the Center for Biological Diversity, which has sued MMS to block 49 offshore drilling projects. ‘They just take it on a smile and a handshake.’ (Soraghan, 2010, n.p.)

In the portion of his statement, President Obama addressed the MMS agency which was located in the Department of the Interior, overseen by Ken Salazar, Secretary of the Department of the Interior and in the President’s administration. However, despite all of the evidence stated above, he placed responsibility for the errors on other administrations in the “last decade” and their “failed philosophies.”

One place we've already begun to take action is at the agency in charge of regulating drilling and issuing permits known as the Minerals Management Service (MMS). *Over the last decade*, this agency has become emblematic of a failed philosophy that views all regulation with hostility—a philosophy that says corporations should be allowed to play by their own rules and police themselves. At this agency, industry insiders were put in charge of industry oversight. Oil companies showered regulators with gifts and favors, and were essentially allowed to conduct their own safety inspections and write their own regulations.

What is missing from a text is just as important as what is in a text (Fairclough, 2003). In the paragraph above, the President redirected blame, but an agent is missing. “Failed philosophies” and opposing political ideologies do not have the power to corrupt or change things. This speaking strategy is a form of suppression, a theory which attempts to describe a perceived process/practice, carried out by particular agents, and also obscures meaning and responsibility for the public (Machin & Mayr, 1012, p. 85). In the above paragraph, MMS, Salazar, and the President’s own actions and inactions are presented to the public as being inevitable, rather than rebuking them. President Obama had been in office since January, 2009, during which time he appointed Salazar to the Department of the Interior. In September, 2008, the Inspector General had already submitted his report of an investigation of the MMS agency, including all of the allegations later detailed by the President (Smith, 2008). Despite listing the allegations for the public in his June 15 speech from the Oval Office, the President said nothing about his own knowledge of the problems and why his administration had failed to deal with the agency before the DWH tragedy. Instead, the President used a “well-trodden” political opponent frame and implied outrage typical for this kind of situation<sup>20</sup>.

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<sup>20</sup> However, in a June 10, 2010 interview with *Rolling Stone* contributor, Tim Dickinson, President Obama “acknowledged that his administration had failed to adequately reform the Minerals Management Service. ‘There wasn't sufficient urgency,’ the president said. ‘Absolutely I take responsibility for that.’ He also admitted that he had been too credulous of the oil giants: ‘I was wrong in my belief that the oil companies had their act together when it came to worst-case scenarios.’”

The President disbanded the MMS after the DWH disaster and created three smaller sections to make it easier to oversee for compliance. But there is nothing in his speech to indicate that the President and his administration had allowed MMS practices to continue unhindered by appropriate oversight for over two years. Instead, the next paragraph of the speech indicated that just the opposite was true: Salazar and the President were heroes in this story.

When Ken Salazar became my Secretary of the Interior, one of his very first acts was to clean up the worst of the corruption at this agency.

The President structured this language once again such that he was not the actor. Ken Salazar didn't just "become" his Secretary of the Interior, the President appointed him. In the President's version statement above, an unnamed "other" was responsible, along with BP, for the disaster. He gave no details of what "the worst of the corruption," was or when and how it was cleaned up. In his speech, it is only the President and Salazar who are named. The President used transitivity verb processes to represent agency, participants, and consequences and to show who played the important role and who receive the consequences of that action (Van Dijk, 2001). Transitivity verb processes were also used to designate participants as actors, goals, or beneficiaries. Here we can see how the President attributes action:

- we've already *begun* to take action
- this agency *has become* emblematic
- industry insiders *were put* in charge
- Ken Salazar *became* my Secretary of the Interior

In all of the above examples, the President does not designate himself as an actor. He is represented merely as a recipient or beneficiary of the actions. But on closer inspection, the phrases above actually represent existential verb processes. In other words, things just happen, exist, or occur, and the actions really only have *one* participant—someone other than the President. The use of transitivity verbs of the process reveals the way speakers encourage us to evaluate them and what they say (Machin & Mayr, 2012, p. 12). They use the verb “to be” or synonyms such as “exist, “arise, or “occur” to obscure agency and responsibility (Machin & Mayr, 2012, p. 110). Using passive sentence constructions, it allows an actor to be omitted completely. The manipulation of agency is significant in terms of power (Machin & Mayr, 2012, p. 111). In the President’s public statement, it occurs most often when there is a negative situation. Accordingly, BP was the sole wrongdoer and fully responsible for all damages incurred in the DWH disaster.

In the alternative, the President clearly identified himself as the agent when actions were positive, powerful, or progressive. For example, the President reiterated in this statement the sense of urgency that ran through all three of his speeches. In the above quote the phrase was “one of his very first acts.” This phrase is congruent with other phrases in this public statement, such as “From the very beginning of the crisis,” or “just after the rig sank.” The President’s May 2 speech in Louisiana demonstrated this use of powerful language construction.

Yet problems with the MMS agency were not brought to public attention until *after* the disaster, when independent and governmental investigations were in full swing. As stated above, Devaney (2008) the Office of Inspector General (OIG) made a full report about MMS wrongdoings, mismanagement, and understaffing to the Department of Interior on September 9, 2008. President Obama’s first year in office began in January, 2009. On May 24, 2010, *The New*

*York Times* published an article detailing the 2008 report, and chronicled the Obama administration's response to the OIG Devaney's (2008) findings. The article stated that Secretary Salazar, found the report "deeply disturbing," and that he responded, "during the first 10 days of becoming secretary of the interior," by "direct[ing] a strong ethics reform agenda to clean house of these ethical lapses at M.M.S." (Urbina, 2010, n.p.) Later, Mary Kendall, the acting OIG in 2010, stated, "Of greatest concern to me is the environment in which the inspectors operate—particularly the ease with which they move between industry and government" (Urbina, 2010, n.p.). There were other multiple reports about MMS and its relationship with BP and other offshore drilling companies, that were published up to *at least a month* prior to the President's Oval Office statement. For example, the knowledge that the MMS gave BP's lease a "categorical exclusion" from the National Environmental Policy Act (NEPA) on April 6, 2009 (Ellperin, 2010, n.p.). BP continued to lobby for the expansion of those exemptions just eleven days before the explosion (Ellperin, 2010, n.p.). On May 5, 2010, *Boston .com* published an article alleging MMS did not require BP to file a plan for handling a major oil spill caused by an uncontrolled blowout. According to AP reporters Kunzelman and Pienciak (2010), the exemption was allowed because, "... under its rules, the BP project was exempt ... Since the spill began, investigations have uncovered numerous issues with the performance and requirements of the blowout preventer, the last line of defense against an uncontrolled oil leak" (n.p.).

On May 10, 2010, the *McClatchy-Tribune* reported on the "nearly 100 industry standards set by the American Petroleum Institute" (API) [that] are included in the U.S.' offshore operating regulations. The API asserted that "its standards are better for the industry's bottom line and make it easier to operate offshore than if the Minerals Management Service set the rules" (Blumenthal & Bolstad, 2010). The May 13, 2010 edition of *The Washington Post* reported that



in September, 2009, the National Oceanic Atmospheric Administration (NOAA) made the following complaints against MMS:

[The agency] systematically skewed its assessment of offshore oil drilling to emphasize safety and overlook recent safety lapses, routinely overruled its staff biologists and engineers who raised concerns about the safety and the environmental impact of drilling proposals in the Gulf and in Alaska... and regularly pressured those scientists to change the findings of their internal studies if they predicted that an accident was likely to occur or if wildlife might be harmed. (Urbina, 2010, n.p.)

There is no mention of the information published in these and other relevant and *recent* news reports in the President's Oval Office statement. In the next paragraph of his statement, the President does concede that the problems in the MMS agency were more complex and that Salazar's response was not as timely or complete as it needed to be.

But it's now clear that the problem there ran much deeper, and the pace of reform was just too slow. And so Secretary Salazar and I are bringing in new leadership at regulations, better safety standards, and better enforcement when it comes to offshore drilling.

Nonetheless, despite all that could be done by the government to monitor offshore drilling activity, there was still one more obstacle to overcome if the lessons of the DWH were to be effective: America's "addiction to oil."

So one of the lessons we've learned from this spill is that we need better regulations, better safety standards, and better enforcement when it comes to offshore drilling. But a larger lesson is that no matter how much we improve our regulation of the industry, drilling for oil these days entails greater risk.

Essentially, the President is stating that even if he and Salazar had cleaned up MMS earlier, the oil spill disaster could have still happened. This statement paves the way for

the President to once again, redirect or to at least demand that the American public share the blame as the price of greed:

After all, oil is a finite resource. We consume more than 20 percent of the world's oil, but have less than 2 percent of the world's oil reserves. And that's part of the reason oil companies are drilling a mile beneath the surface of the ocean – because we're running out of places to drill on land and in shallow water.

... For decades we've talked and talked about the need to end America's century-long addiction to fossil fuels. And for decades, we have failed to act with the sense of urgency that this challenge requires. Time and again, the path forward has been blocked – not only by oil industry lobbyists, but also by a lack of political courage and candor.

Speakers have choices that allow them to place people in the social world and to highlight certain aspects of identity they wish to draw attention to or omit (Fairclough, 2003; Fowler, 1991; Machin & Mahr, 2012; Van Dijk, 1993). In the passage above, the President states that despite knowing about energy alternatives, Americans have been unwilling to break their “addiction to oil,” even if it meant a continuing reliance upon Middle Eastern countries. Americans selfishly consume a disproportionate amount of oil, and they have lacked the courage to insist on a new kind of energy. Before holding the President or his administration to blame for the DWH disaster, Americans would have to admit their own complicity in the tragic moment.

The consequences of our inaction are now in plain sight. Countries like China are investing in clean energy jobs and industries that should be right here in America. Each day, we send nearly \$1 billion of our wealth to foreign countries for their oil. And today, as we look to the Gulf, we see an entire way of life being threatened by a menacing cloud of black crude.

The President continued to use visual rhetoric to depict oil as the entire country's enemy, describing it previously as one who was "assaulting our shores," and now as a threatening "menacing cloud." Metaphors "can be quite deliberately persuasive, particularly when used in political discourse" (Machin & Mayr, 2012, p. 168). According to Edleman (1988), "metaphors, other tropes and ambiguity encourage people in disparate social situations to define themselves, others, and the conditions of their lives through a spectacle that normally rationalizes those conditions" (p. 103). This metaphor suggests that the big problem of using fossil fuels has "exploded" (as did the Deepwater Horizon oil rig), has had a substantial impact, and now the country has to deal with long-term and complex consequences (Machin & Mayr, 2012, p. 168). The "menacing cloud" rhetoric conjures up images of threatening weather (tornados, hurricanes, dust clouds) or natural disasters (volcanic eruptions, wildfires) that are neither rational nor purposeful. Aerial photographs of the enormous spill clearly showed its scope and proximity to land and it does resemble a "cloud." The metaphor suggests rampant situations that cannot be controlled or conquered by man, and may involve evacuations and devastation. It is a relentless condition that will most likely last for a while. This was the perfect metaphor for the DWH oil spill disaster: for the corruption in the MMS agency, the spectre of the oil companies coming to drill in areas close to American coastlines, and the physical attributes of the oil spill itself. Or the

President may have also meant for the “menacing cloud” to represent the repercussions of America’s continued dependence on oil for energy.

In the next paragraph of the speech, the President called for solutions to the disaster and advocated for anything other than defeat.

...the one approach (to solutions) that I will not accept is inaction... [or] the idea that this challenge is somehow too big and too difficult to meet.

The President does not say who would be a possible advocate for doing nothing, but he uses the term “inaction” again. The President does not bring up his earlier June 10, 2010 interview with *Rolling Stone* in which he claimed that although he was aware of what the MMS agency was doing/not doing, “there wasn’t sufficient urgency” to intervene before the oil spill distaste (Dickinson, 2010, n.p.). Now, however, urgency *was* required. According to the President, even China was investing in clean energy while Americans were seeing the consequences of their delay or refusal to do likewise. The statement positions the President as an advocator against “others” who objected to his green energy proposals.

All of this rhetoric, however, also portrayed the DWH disaster as a collective act, and that obscures what really happened, on whose watch, and how it could have been avoided. The American public was not a causal factor in this disaster. The problems at the MMS agency could have been dealt with in a more timely and thorough manner by the incoming administration in 2008. Enforcement of the requirement for relevant and accurate contingency oil spill reports, and performing the required non-scheduled site inspections could have spotted the lack of training of personnel, including the captain of the Deepwater Horizon rig and problems with rig equipment. Acting upon the results of investigations from years prior that contained reports of problems from MMS agency scientists and government officials who had refused to ignore the illegal behavior would have given the U.S. a better chance of avoiding the disaster.

The President now gave his own solution to the problem and motivated the audience to act by joining him on a “national mission” (Move 7: Motivate decision makers to act):

...the time to embrace a clean energy future is now. Now is the moment for this generation to embark on a national mission to unleash America’s innovation and seize control of our own destiny.

The underwater well was still gushing oil when this speech was given, but this part of the statement acted as a positive “high note” that could inspire new resolve to push through clean energy legislation. However, although the President’s solution in the paragraph above may be a good idea in the long run, it did not solve the immediate problem. Nonetheless, the statement from the Oval Office did occur in a kairotic moment that allowed the President to make a push for his clean energy agenda.

As the President began to wind down his speech, he reminded Americans of past challenges they had overcome, perhaps placing the DWH disaster in the same positive context. He may have also been addressing clean energy naysayers by convincing them that the events in the disaster necessitated a focus on alternatives to the dangerous processes of obtaining oil.

You know, the same thing was said about our ability to harness the science and technology to land a man safely on the surface of the moon... Instead, what has defined us as a nation since our founding is the capacity to shape our destiny—our determination to fight for the America we want for our children.

The framework of the President’s speech expanded in the statement above to add a new emotional undercurrent and appeals to human values. The President continued to appeal to the public with his theme (Move 4) of the “fighting” image of Americans who were being controlled by their dependence on the oil corporations and their product. In the statement below, the President referred to his earlier plans for moving the country towards clean energy.

When I was a candidate for this office I laid out a set of principles that would move our country towards energy independence.

The President used the story (Move 4) as an allegorical lead-in and as a rhetorical device to divert the audience's attention away again from the MMS debacle and the U.S. government's shared responsibility for the DWH. However, there was another implication by the President that Americans must take partial blame for this disaster because they had not embraced his vision for clean energy in a timely manner.

The President finished his speech in the paragraph below by rallying Americans to collaborative and cooperative action by reminding them of their strengths and using visual imagery to inspire their receptiveness to new ideas.

The oil spill is not the last crisis America will face. This nation has known hard times before and we will surely know them again. What sees us through—what has always seen us through—is our strength, our resilience, and our unyielding faith that something better awaits us if we summon the courage to reach for it.

The President finished on a high note meant to inspire Americans to remember the enormous problems faced in the past and how they were overcome (Move 7: Motivate decision makers to act). Unfortunately, the list of things that “sees us through” tough times did not include trusting in our own government and its regulatory agencies. It is not clear if the “something better” that awaits citizens is the President's clean energy plan, a cleanup of agency corruption, a government that enforces its own laws—or if the American public takes up the charge to courageously move forward towards clean energy policies.

The President used all but one of the rhetorical moves found on court opening statements, although they were not given in the specific order that attorneys recommend. His statement was somewhat confusing to follow, even jarring at times, especially given that his primacy move encompassed three top priorities, the last of which was the DWH disaster.

## **BP's CEO Tony Hayward's Opening Statement to Congress**

June 16, 2010, the day after President Obama's speech from the Oval Office (Table 4.1.M), BP's CEO Tony Hayward, and other BP executives met with President Obama and agreed to pay \$20 billion dollars into a "special cleanup fund" (Webb & Hill, 2010, n.p.). As part of that agreement, Chairman Carl-Henric Svanberg also announced the company would not pay the \$2.5 billion dollar dividend that was due to its shareholders for 2010. The \$20 billion dollar sum was paid into an escrow account, administered by a third party administrator authorized to pay Gulf residents' claims, independent of both BP and the U.S. government. Additionally, BP established a \$100 million dollar fund to compensate unemployed oil rig workers affected by President Obama's six-month off shore drilling moratorium. Tony Hayward pointed out that the "agreements" made between the U.S. and BP were good faith restitution offers, and not an admission of guilt in any action.<sup>21</sup>

The day after the meeting with the President, Hayward testified before the Congressional Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, House of Representatives, One Hundred Eleventh Congress, Second Session on June 17, 2010 (Table 4.1.U), a little over two months after the DWH disaster. Hayward used his Congressional opening statement to send a message to several audiences in addition to the Subcommittee, including BP's shareholders, the American people, competitors in the oil and gas industry, and the global audience.

Nineteen senators were each allowed to make three minute opening statements, directed towards Hayward before he was allowed to make his opening statement testimony. Most of them

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<sup>21</sup> This a common rule in the U.S., see for example, § 33 of the Code of Civil Procedure and California Code of Evidence §§1150-1161.

made known their frustration with BP's conduct to that point, to which Hayward was not allowed to reply. Following these Congressional opening statements, Chairman, Hon. Bart Stupak (State of Michigan) advised Hayward that it was the policy of the subcommittee to take all testimony under oath, including the Congressional opening statement (p. 47). He also advised Hayward that he had the right "under the rules of this House" to be advised by counsel during his testimony. Hayward declined. Finally, Rep. Stupak reminded Hayward that he could have a technical person with him "so you could consult if we have some questions that you want to run it by." Hayward stated that he did have such a person with him. Hayward's statement *is* called an opening statement, and is referred to as such.

When comparing the features of the genre of court opening statements with Congressional opening statements, it is important to note that court opening statements in trial are not testimony, and they are not made under oath. Trial attorneys would not have "legal counsel" to guide them in making their statements, although a trial judge has the right to question, advise, or censure that attorney if necessary. Trial attorneys do have the right to bring in qualified experts to help explain technical or complex matters to decision-makers during a trial, but not in an opening statement. Therefore, the comparison between court opening statements and Hayward's Congressional opening statement begins with significant differences between the genres. Hayward is not an attorney, but is in the position technically as an expert witness for the Congressional Subcommittee inquiry. But he is also treated like a defendant in a trial. This is an important point, because he is *not* a defendant in this hearing—and this hearing is not a legal proceeding. However, because the press and media were present, and his remarks would be on the official public record, Hayward responded to questions as if he *were* a defendant in order to preserve BP's legal strategies for trial.



The genre of court opening statements has the communicative purpose of advocating for another person or entity in a disputed matter before decision makers.<sup>22</sup> In this particular opening statement, Hayward is advocating not for himself but for BP (as is typical, all BP corporate executives' personal assets are protected from civil liability). However, as CEO, Hayward was being asked to answer for his and his company's actions/inactions. Therefore, Hayward was asked to respond to questions about the attitudes, beliefs and rationale that reflected BP as a corporation. The lens (Move 2) Hayward used here in his Congressional testimony was that of a corporation that had made terrible mistakes and errors in judgment, and that he was making a statement of contrition to the American public on their behalf. Further, he stated that he was "personally devastated," and that it was a "shattering moment" when he attended the memorial service for the eleven men killed in the DWH explosion. Hayward's remarks sought to set the stage for making amends.

Hayward's first sentence established primacy (Move 1):

The explosion and fire aboard the Deepwater Horizon and the resulting oil spill in the Gulf of Mexico never should have happened, and I am deeply sorry that it did.

It is a short statement that gives the impression of making an important admission because he stated it "never should have happened." It intimates that if processes had been done correctly, the explosion would not have happened. However, Hayward continued to maintain that no one knew *what* actually caused the explosion and that an internal review was still ongoing. He denied foreseeability, causation, or liability on the part of BP. Hayward then shifted to establishing his credibility (Move 3). He narrowed his audience first to the Gulf States' residents:

I want to speak directly to the people who live and work in the gulf region. I know that this incident has had a profound impact on your lives and caused great turmoil,

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<sup>22</sup> Of course, citizens can represent themselves, but I am referring only to MDL civil cases where this is rarely the case.

and I deeply regret that. I also deeply regret the impact the spill has had on the environment, the wildlife and the ecosystem of the gulf.

Hayward's goal was to present himself and BP as trustworthy, compassionate, sincere, believable and reliable as he turned his attention to the reason why he was present at the hearing (Move 2: Create a lens):

I want to acknowledge the questions that you and the public are rightly asking. How could this happen? How damaging is the spill to the environment? Why is it taking so long to stop the flow of oil and gas into the gulf?

His lens is that he is there to represent BP, and to empathize with Americans. But his acknowledgement was also a hedging comment because he does not have or does not intend to give, any answers to the questions everyone wanted answered. Hayward is blending his desire for credibility with the development of his theme (Move 4) that his audiences can trust him to get those answers for them as expressed in the following quote.

We don't yet have all the answers to these important questions, but I hear and understand the concerns, frustrations and anger being voiced across the country, and I know that these sentiments will continue until the leak is stopped and until we prove through our actions that we are doing the right thing.

The DWH civil trial did not occur until almost three years after this hearing (Table 4.1.S). When evaluating the language in the two court opening statements from that trial, an analysis must keep in mind the "legal relationships between principal corporations and their agents" (Read, 2011, p.138). Documents, statements, images, processes and procedures are created by businesses from the start with legal liability and shareholders' interests in mind. Therefore, all of Hayward's comments are directed towards the positive belief in BP's ability to prevail in any criminal or civil proceedings.

Hayward's next sentence implied that his first "action" towards rebuilding a relationship with the American people was his meeting with President Obama on June 16, 2010, the day before he testified before the Congressional Subcommittee. According to Hayward, BP executives, and the President and his advisors discussed how BP could "bring more comfort and assurance to the people of the Gulf Coast beyond the activity we have already done." BP agreed to pay \$20 billion into a claims fund to compensate the affected parties and to pay for the costs of the cleanup and environmental mitigation. He reassured Congress that the American people could now be confident that BP's word was good.

Hayward's theme in this Congressional opening statement (Move 4: Develop a theme) is BP's reliability and its promises to clean up the disaster, pay the costs of restoring the environment, and to pay damages to injured victims. The activities BP had "already" done were to lay boom along the coastline, to hire and pay people to clean up the oil and tar balls from the beaches and to keep looking for solutions to cap the leaking well. But there had been no word on how and when BP intended to compensate affected people for the days ahead. Up until this point, the corporation was offering fisherman one-time payments of \$5,000 for their business loss only if they signed a promise not to sue (Talbot, 2010). BP was putting money in the fund to "bring more comfort and assurance to the victims," without admitting any legal liability. Hayward also pointed out that BP continued to make good on its promises to help, in a move to gain credibility (Move 3) by using familiar words, phrases and sayings in a manner consistent with human values in a framework of justice, such as "I'm deeply sorry," "never should have happened," "profound impact on your lives," and "I deeply regret." Hayward returned to the move of establishing his credibility (Move 3) and also moved to simplify the issues (Move 5):

I am here today because I have a responsibility to the American people to do my best to explain what BP has done, is doing and will do in the future to respond to this terrible accident.

This was a simple statement regarding his accountability to Americans, but only in the sense that of the actions BP had and would take. Hayward also continued to refer to the disaster as an “accident.” Hayward listed the steps BP would take next, but modified them with vague disclaimers such as “we believe” and “we expect.” His next point was to reiterate BP’s commitment to paying for cleanup costs, but the next half of the message is more controversial:

...as I have made clear from the beginning, we will pay all legitimate claims for losses and damages caused by the spill. Those are not just words. We have already paid out more than \$95 million ...

Hayward modified the word claims with the adjective “legitimate.” As I stated earlier, how that word would be defined by BP would be the subject of much discussion in the following days and weeks. But it was also a misleading remark, because according to President Obama’s statement the previous day, June 16, neither BP nor the U.S. government would be involved in deciding what claims the \$20 billion would pay for and how much. BP forfeited its right to make *any* decisions about where and how the \$20 billion dollars was to be spent in exchange for foregoing the costly litigation of hundreds of cases.

Hayward’s final point was to state that BP’s and his own interest was in finding out the cause of the disaster, but he continued to state that it was still too early to know. Like President Obama’s speeches, Hayward did not address, suggest, or explain the laws involved in this matter (Move 6) although this may not have been appropriate, nor did he seek to motivate anyone to act other than to ask them to be patient and trust him and BP (Move 7: Motivate decision makers to act). Finally, Hayward ended on somewhat of a high note:

I give my pledge, as the leader of BP, that we will not rest until we make this right. We are a strong company, and no resources will be spared. We and the entire industry will learn from this terrible event and emerge stronger, smarter and safer. Thank you.

Hayward reiterated BP's resolve to repair and pay for what had been harmed by the disaster. He uses the same language that President Obama used regarding "no resources will be spared" but also like the President, Hayward did not define what those resources were.

Despite other oil and gas industry leaders who earlier blamed BP for acting outside of industry standards—an important point when it came to making criminal charges and winning civil cases—Hayward claimed that "everyone" would learn from the disaster. BP made no concessions to letting the contracted oil corporations off the hook in terms of taking part of the blame and responsibility for the disaster and for paying their share of any fines. Apportionment of responsibility for the disaster is eventually the matter that brought this case to federal court on February 23, 2013 (Table 4.1.V).

Notwithstanding the above comments, Hayward's opening statement before Congress did act as a corporate apology from BP to the American public. Although such an apology can help leaders and companies regain the trust of various stakeholders and create conditions for constructive change, contrition may not always have the intended consequences across cultures and politics (Stamato, 2008). As the CEO of BP, Hayward demonstrated a key element in effective business communication—he gave the corporate apology himself instead of delegating it to someone else. The Congressional opening statement provided a critical kairotic moment for the apology, because the longer the time between the disaster and the apology, the less likely it will be that the public will accept it (Stamato, 2008). Of course, in the DWH matter, there was a trifecta of communications to the public at this time: President Obama's June 15 statement from

the Oval Office, the June 16 meeting between the President, Hayward and BP's executive management, and finally, Hayward's June 17 statement before Congress, all of which worked together in an attempt to assuage the American public and lessen legal liability.

However, the announcements concerning BP's agreement to deposit \$20 billion dollars into a fund for cleanup and victims of the disaster did not appear to stem the anger and hostility towards Hayward by members of Congress. According to Tannen (1995), men tend to regard apologies from the perspective of a power dynamic and believe apologies can diminish status and undermine authority. However, in this instance the apology may have acted more as a power ploy. Hayward's contrition appeared to be sincere, and he was willing to submit to a Congressional Subcommittee and sit in silence as Committee members vilified him and BP, but the power actually remained with him and BP since their goal was to separate the harm from the liability. In other words, since an apology is not an admission of guilt in a tort case, Hayward could satisfy the public's need in this regard. But that was as far as he would go as he repeatedly failed to answer a single question put to him in the seven and one-half hour session by the Committee.

## **Conclusion**

In this chapter, I discussed the results of my inquiries into three different types of opening statements to see how they compared to each other in form, purpose and delivery. I also looked for the ways in which the three types of statements revealed social relationships of power in their messages about the same event. In particular, I analyzed two public speeches from Presidential press conferences, one Congressional opening statement by BP's CEO Tony Hayward, and two court opening statements presented by the PSC and BP on the first day of the DWH trial. The

speakers of all three types of statements communicated their messages about the disaster in specific settings, and all were recorded, transcribed, and archived.

All three statements used many of the same genre moves, although not always in the same order, but they had different goals. The following are the representations and strategies that were visible in the opening statement texts, written or spoken, both legal and colloquial, related to the DWH disaster (Research Question No. 3). All three court opening statements concerned a disaster caused by corporate negligence, and which had repercussions for thousands of people, birds, wildlife and sea life, and a devastating effect on the land and sea area of the Gulf of Mexico. Multiple oil and gas corporations and their contractors were involved in causing the disaster, and each placed blame on one another in order to avoid criminal and civil charges. Hayward's Congressional opening statement and BP's later court opening statement were concerned with ameliorating their actions before, during and after the disaster. Further, President Obama made a brief public statement about the disaster at the beginning of another unrelated event, to acknowledge his awareness of the disaster and to give a brief overview of what the government was doing to help minimize the damage. He later made two official, scheduled press conference public statements: one on May 2, 2012 in Louisiana to reassure the residents and fishermen in the Gulf area of the government's involvement and direction in the disaster, and another one almost 60 days later, on June 15, 2012 from the formal venue of the President's first ever Oval Office. In that statement, the President also revealed that the MMS agency in his administration was also partly to blame for the DWH disaster. The PSC represented the interests of all individuals who had been damaged by the DWH disaster in their court opening statement of the trial of the matter.

I concluded that each of the three types of statements belonged to different genres, each with a different goal and type of message, Hayward made his formal Congressional opening statement in the form of a public apology with the message that BP's promises to pay for all costs of the remediation were sincere, and indeed, the corporation would also set up a fund for those injured in the disaster. BP argued a legal defense for its actions in its court opening statement, stating that it depended upon the expertise of its contractors to use correct procedures on the oil rig. In the alternative, BP also claimed that management could not have foreseen the unprecedented disaster, and therefore could not be held negligent for not being adequately prepared to deal with it effectively. The President made two public statements using political rhetoric. One of the statements was given in an informal setting in Louisiana as a message of reassurance that the government was committed to standing by the Gulf residents who were suffering the direct consequences of the disaster. The other was presented formally from the Oval Office to all of the American people, and included the President's "battle plan" against the onslaught of the oil spill.

As I will discuss further in Chapter 5, these five different statements required a multidisciplinary critical analysis in addition to an analysis of their discourse structures. Therefore, in order to effectively realize my goal in this dissertation, I focused on the ways each of the opening statement genres enacted, legitimated, reproduced or challenged the relationships between corporate business, law, government, and the public at large in terms of power and dominance. In Chapter 5, I will discuss how discourses in our society can act as the underlying causes of change or activity that give rise to prevailing power structures and reproduce inequalities. Finally, I consider the ways in which text and talk in social and political contexts



could help resist some of the obstacles to addressing social wrongs and suggest further research that could be done in these areas.

## CHAPTER 5: DISCUSSION

In this chapter, I discuss my final research question: “In what ways do critical discourse analysis and genre analysis expand/challenge our understanding of what is different and what is similar among the various “genres” of opening statements as exemplified by the DWH event?” My focus in this study was on groups of powerful people and how their messages created reality using multiple and changing meanings depending on their audiences and their goals. Using genre theory, I identified, defined and described the rhetorical moves used in all five of the statements I analyzed, finding surprising similarities among them and one dissimilarity: only legal statements explained the relevant law of the situation to the public. To answer this research question, I also used critical discourse analysis to examine each opening statement in order to identify the representations and strategies that the speakers used to produce different versions of reality imbued with their own values.

I analyzed the communicative dynamics that defined interactions between speakers and audiences in genres of opening statements, including court opening statements, Presidential public statements, and a Congressional opening statement, all of which represented discourses that surrounded one particular event. When I use the term “dynamic,” I am referring to the definitions provided by the *Merriam Webster’s Dictionary* (2009), such as power, force or energy, continuous and productive activity, all of which can be the underlying catalyst for of change or growth. I asserted that the communicative interactions that occurred in the three types of statements I analyzed were kairotic because they were transformative and each created influential moments that instigated reflection, decision and action in the listeners. For example, Roy’s court opening statement for the plaintiffs was given in a plain, simple style, with little

ambiguity or circular rhetoric sometimes seen, especially in high profile cases. The only emotions Roy exhibited were indignation and anger at the careless and cold regard that the Defendants showed for human life and the environment in the DWH disaster. Roy's simple and balanced delivery found favor with the Judge and with the public as he advocated for individuals and spoke truth to the powerful corporations.

Judge Barbier's decision to allow free daily public access to the trial was also transformative. The enormously powerful corporate defendants, used to having their close relationship with the U.S. government, were forced into a public display of their attempts to spin the DWH disaster into an "unforeseeable accident." Through the open access to the trial, the public was able to weigh the reality of evidence, testimony and witnesses delivered by the plaintiffs against the *interpretation* of reality put forward in the media by the defendants.

I suggested that technical communicators have the potential for functioning at higher levels of accountability in businesses and organizations by understanding the ethics of global corporations and the social consequences of dominant corporate values. I argued that it was time for technical communicators to learn to construct information in addition to creating deliverables. I also agreed with Dragga (2011) that technical communicators should be taught to solicit information from knowledgeable sources in order to create usable and safe instructions and manuals. Finally, I argued that court opening statements constituted epideictic rhetoric that motivated decision makers to action, not solely forensic rhetoric as they are typically described in the literature, and I will resume that discussion later in this chapter.

In this chapter, I will first provide a brief analysis of Judge's Barbier's recent (September 4, 2014) findings for Phase I of the trial that came in as I was finishing this dissertation. I will follow this by discussing my research question about CDA and genre analysis and how they

changed my perception of various genres. I will talk next about the social consequences of the framing of the five opening statements and then expound further on opening statements as forms of epideictic rhetoric. Finally, I will provide some suggestions for how to apply what I learned in this study, and how my conclusions might inform technical communication, corporate communication and the teaching of these topics and suggest possible future research projects.

### **Summary of Analyses**

Because the DWH event and the various opening statements took place over a three year period, it was often a difficult analytic challenge because people and entities are not static while they are being studied. They continue to evolve and change. Additionally, I experienced my own kairotic moment when, near the end of this project, the Judge's holdings in Phase I of the DWH trial were made public on September 4, 2014. I had been working on an analysis of a trial whose resolution was yet to come and now I was slightly beyond that moment.

On September 4, 2014, the Court published Judge Barbier's 153-page "Findings of Fact" (Findings) on Phase I of the trial. Judge Barbier held that BP was indeed grossly negligent (their actions constituted reckless and extreme behavior) instead of simple negligence (failure to take reasonable care). That decision means that BP faces fines and penalties amounting to as much as \$4,300 per barrel of oil spilled into the Gulf of Mexico, adding up to a number in excess of \$18 billion dollars. According to the September 4, 2014 edition of the *Wall Street Journal*, Judge Barbier declared that BP's decision to continue drilling a "dangerously unstable oil well in April 2010" [and] its decision to "drill an additional 100 feet into a fragile rock formation thousands of feet beneath the Gulf of Mexico" was the direct cause of the DWH disaster (Gilbert & Scheck, 9/4/2014). The Judge apportioned a percentages of blame to BP, Transocean and Halliburton for their part in the disaster as follows: 67% to BP, 30% to Transocean, and 3% to Halliburton

(“Findings,” 2014, p. 152). However, both contractors had argued that since they had previous contracts with BP that protected them from certain liabilities, they should be exempt from the gross negligence penalties. Judge Barbier held that these agreements are “valid and enforceable,” meaning that the corporate defendants will not have to pay the quadruple fines (Gilbert & Scheck, 9/4/2014, n.p.). In Chapter 4, I discussed BP’s attempts to argue that the other corporate contractors involved in the DWH disaster should be held jointly liable for damages, an argument that did not follow legal precedent. Judge Barbier disagreed with BP’s argument and followed the case law. However, he also disagreed with Transocean’s claim that BP *directed all* of their actions:

Furthermore, while the Court agrees that BP ultimately controlled and directed all operations at Macondo, the Court views Transocean as more than one who merely performed “mechanical activation of pumps and valves.” Instead, Transocean “conduct[ed] operations specifically related to pollution, that is operations having to do with the leakage or disposal of [oil].” For example, Transocean’s drill crew did not need direction or approval from the BP Well Site Leader to activate the BOP and shut in the well. And, as the Court has found, the failure to do so timely actually resulted in oil pollution from the offshore facility.

In this excerpted quote, Judge Barbier specifically words his decision on this issue with a continued appreciation of the public at large. His reasoning is not only based on law, but also on policy and social consequences. He uses a tone of assurance, which is suited to his rhetorical purpose of generating prospective agreement that he is deciding the legal questions with equity. His justification in the body of his opinion are what gives his final Order authority.

Transocean, whose action began the initial trial process, and who escaped a gross negligence finding “praised the ruling for affirming an *industry standard* [emphasis added] in which the owners of oil wells, rather than drilling contractors, shoulder most of the liability” (Gilbert & Scheck, 2014, n.p.). According to the *Wall Street Journal* (2014), Transocean settled separately with the Plaintiffs “last year” for \$1 billion, and on Tuesday, September 2, Halliburton settled with “Gulf

Coast residents, businesses and local governments that were damaged by the spill for \$1.1 billion” (Gilbert & Scheck, 2014, n.p.). Consequently, not only did BP lose its “joint and several liability” argument, it is solely responsible for all gross negligence fines.

There are several examples in the 153 page “Findings of Fact” (2014) that indicate the overall tone of the Judge Barbier’s evaluation of BP’s arguments at trial, but that analysis is beyond the scope of this dissertation. In this study I analyzed the parties’ arguments using a framework that was informed by scholarship in rhetoric, professional communication, law and other disciplines, as well as perspectives presented in news media and professional commentary as the events unfolded. I include below a few broad examples of Judge Barbier’s perspective for comparison.

Writing a judicial opinion has been called “the moral artistry of the judge” (Weisberg, 1996, p.66). Weisberg (1996) argued that the task required skills “in devising rhetoric to capture appropriate moral outcomes or to craft fair legal results” (p. 66). Judges, of course, are aware that attorneys create opening statements using rhetorical moves that are supportive of their clients, and improve their own credibility. But as we can see from the excerpts above, a good legal decision is written by a judge who also looks for the true story underneath the legal moves. Weisberg (1996) uses the example of cognitive psychology to describe writing a judicial opinion, suggesting that a judge’s expertise requires “not just skill at picking relevancies—a skill learned largely through experience—and that it includes nonintuitive articulation of interpretations” (Weisberg, 1996, p. 67). Judge Barbier’s interpretation of BP’s arguments at trial is immediately apparent in his Findings. For example, several sections begin with the header “the Court is not persuaded by BP’s theories regarding ...” (Findings, 2014, p. 43). Commenting on BP’s legal argument that that the disaster on the DWH was “unforeseeable,” Judge Barbier stated that,

“BP’s theory... regarding flow path, etc., ignores or dismisses the data recorded after circulation was achieved ...” (Findings, 2014, p. 45). “Ignored” and “dismisses” are quoting verbs that Judge Barbier used to shape how readers should interpret BP’s defenses. BP claimed the disaster was not foreseeable, but the Judge argued back that it may have been seen if BP had not ignored or dismissed the evidence before them.

BP’s assertions flew in the face of the facts from day one of the disaster until Day One of the trial, yet BP’s attorney, Brock, continued to argue them in his opening statement. Judge Barbier leaves no doubt in his “Findings” that he is representing BP’s arguments as being less than credible. Further, by using the two verbs “ignores” and “dismisses” in his opinion, the Judge’s showcases his estimation of the power BP believed it had, including the right to ignore evidence and create its own version of reality. After all, as BP’s rhetoric reminded the public often, the corporation “provided jobs,” lessened our nation’s dependence on foreign oil, and cleaned up its own mess in the Gulf of Mexico. Brock presented BP’s defense using the lens of a powerful corporation that was not used to being questioned about its decisions, methods, or versions of truth.

Experts testifying on BP’s behalf stuck with the defense’s theme that there were many unforeseen circumstances that *could* have caused the disaster, but even they were unable to make BP’s version credible. The following is Judge Barbier’s assessment of a report on the cause of the disaster by one of BP’s experts, Dr. Beck:

BP’s theory also requires a succession of failures. While there is ample evidence to support the idea that the foamed cement was unstable, and therefore probably would have failed even if properly placed in the annulus, *there is less evidence* to support the notion that the tail cement in the shoe track also failed, and *even less evidence* that the float collar, if converted, would not have stopped pressure from communicating during the negative pressure test. Yet all of these things must occur in order for BP’s theory to be correct.

To be fair, Dr. Beck also proposes what could be viewed as an unlikely chain of failures (production casing buckled, float collar clogged, auto-fill tube ruptured, shoe track breached). This comes as little surprise, though, given that BP's entire explanation for this tragedy and overarching theme at trial was that there was a series of failures. The difference is that there is more support for Dr. Beck's chain of failures than there is for BP's chain of failures. (Transcript, p. 45)

Unlike PSC Roy's opening statement, which previewed his clients' position in the trial using a step-by-step presentation of facts backed by evidence, BP's attorney, Brock relied much more heavily on what was *possible* rather than *probable*. It is interesting to examine the Judge's choice of words in describing BP's general version of facts in its opening statement and how decision makers were "encouraged to make particular interpretations about them" (Machin and Mayr, 2012, p. 58).

CDA helps to show exactly "how texts communicate their ideologies in ways that are not necessarily overt" (Machin & Mayr, 2012, p. 61). According to the previous excerpt from the Judge's "Findings," BP's theory "*requires*" a succession of failures; there is "*less evidence*" to support the "*notion*"; "*Yet*" all of "*these things*" must occur; BP's "*entire*" explanation; and [BP's] "*overarching theme*" at trial. All of these descriptive words and phrases signify Judge Barbier's detection of a weakness or lack of veracity in BP's trial theories, less likelihood of truth, and therefore, less authoritative (Machin & Mayr, 2012, p. 60). The Judge's use of the word "Yet" acts as a metapositional expressive that infers a low level of "implicitly ascribed reliability" (Machin & Mayr, 2012, p. 61). The word "notion" implies that BP's theory was not based on facts at all, but on suggestions and suppositions.

As far as Brock's continued assertions that BP acted within the scope of industry standards, Judge Barbier's ruling declared that the misinterpretation of the last test on board the Deepwater Horizon, "*even after* a second BP official found fault with it, 'constitutes an extreme



departure from the care required under the circumstances'" (Gilbert & Scheck, 2014, n.p.). Judge Barbier went further to characterize BP's "profit-driven decisions" as being the cause of the tragedy (Gilbert & Scheck, 2014, n.p.). He concluded succinctly:

BP's conduct was reckless. Transocean's conduct was negligent. Halliburton's conduct was negligent.

BP will appeal Judge Barbier's ruling while it continues business as usual. The *Wall Street Journal* (9/4/2014), reported that BP CEO Bob Dudley said in July, 2014, that BP was "pumping the equivalent of 250,000 barrels of oil a day in the Gulf, up 32% from the average last year... [BP is] drilling with 10 rigs in the Gulf of Mexico, more than it ever has" (Gilbert & Scheck, 2014, n.p.). Despite Judge Barbier's findings, BP is back to business as usual.

### **CDA, Genre Theory and Understanding Genres**

Genre analysis looks for the similarities and disparities between items in a category. In this case, "opening statements" are most familiar to the public as legal constructs. Those who give opening statements in a courtroom or mediation are held to certain statutory and procedural rules, including limiting their content to previewing the evidence to come. But the term "opening statement" does not always have the same meaning or purpose or legal responsibilities that an opening statement has in the context of a trial.

First, a court opening statement can only be heard in a judicial proceeding, at a particular time, and in a particular location. Legal opening statements cannot argue. Attorneys are officers of the court and cannot misstate or exaggerate evidence, nor can they disparage opposing counsels' opening statements. As I discussed in other chapters of this dissertation, there are important differences between legal and non-legal opening statements. Presidential press conference public opening statements are not given under oath. Congressional opening

statements are given under oath and penalties of perjury apply. In this study, I found the rhetorical moves to be very similar in all three genres of opening statements. All three genres of statements were required to be recorded and transcribed for the public to read. Both the press conference public statements and the Congressional opening statement were followed by a question and answer period. But a court opening statement does not, thereby putting much more pressure on attorneys to choose their words carefully to provide clarity.

But there was also one very important difference in the genres of opening statements and that is that only the court opening statement provided the laws applicable to the issue at stake. The other two genres, press conference public statements and Congressional opening statements are not required to inform listeners of their legal rights in a given situation. This one requirement sets the genre of court opening statements apart from the others. While court opening statements may have “borrowed” the rhetorical moves of press conference and Congressional statements in order to more successfully persuade non-lawyer decision makers in a trial, the context of the court opening statements is quite different. The facts presented in court opening statements are judged against the evidence that will be introduced at trial and there is accountability for the attorney/speakers.

The form of the various statements is similar, but the purposes are different and according to Miller (1984) this is the distinguishing component between genre types. In the DWH case, Tony Hayward’s opening statement was similar to a public apology and provided a somewhat self-serving statement regarding his and BP’s actions in the situation. The statement did not respond to any of Congressional committee’s questions, but it did set the tone for BP’s defenses in the eventual criminal and civil proceedings. Presidential press conference public statements do not have to be factual. They can contain assumptions, generalities, and hubris. But,

as Bhatia (2004) stated, people are often deceived by those who manipulate familiar generic conventions from other professions for their own purposes (p. 87). The similarities are there, but their purpose may be quite different.

### **Epidictic Rhetoric, Law and Politics**

The percentages of jurors who make up their minds after opening statements, regardless of the evidence later shown to them, is enough reason to study court opening statements. It also seems reasonable that, like the courts, the solemnity of the Congress, its venue, purposes, and requirement that speakers take an oath, would all conspire to give us confidence in the truth of witnesses' opening statements. The public also wants to trust and believe the President's public statements, especially concerning the government's handling of a disaster of this magnitude. But while I still believe that our trust is not too far afield of the truth in these genres of statements, my analyses of the five statements demonstrates the many ways that speakers can appear to announce, inform, calm or rally public audiences, they still withhold any information that is less than favorable to their own values.

Discovering that court opening statements were also epidictic rhetoric and not solely forensic rhetoric was significant and surprising. The threads of epidictic rhetoric tie into forensic rhetoric, meaning that in the case of court opening statements, forensic rhetoric is assimilated by epidictic and is no longer the dominant style. This is an important concept because microanalysis of the words used in all of the statements resulted in my conclusion that linear and rational legal arguments can sometimes fail to capture the essence of human reasoning. Therefore, in addition to a purely "scientific rationality" type of persuasion, epidictic rhetoric can also reflect a primary way of "knowing" especially when "translation may be impossible in the absence of stories" (Abrams, 1991, p. 1028). Rhetoric may be the answer to

Wittgenstein's (1973) reiteration of Aristotle's philosophical question of where do we go when rules don't work? Farber and Sherry (1997) ask what we can do "when language bypasses the process of rational consideration" and creates instead "the mindset" which *society* calls rationality" (p. 41). Logical, linear arguments may not be enough to change societal views on basic matters such as personal responsibility, right to life, equality and the common good, because what needs to be changed is the mindset that controls which arguments are persuasive and which are rejected (Farber & Sherry, 1997). For example, Abrams (1991) argued that "the entire point of the feminist epistemology reflected in narrative is to argue that there are forms of knowledge that may not be generated or validated by scientific objectivity, through which we may nonetheless learn critical things about ourselves and our world" (p. 1028). In the DWH case, the epideictic rhetoric in Brock's court opening statement depended upon the decision makers' agreement, or mindset, with the same values that BP had. Perelman and Olbrechts-Tyteca (1991) argued that epideictic rhetoric is important because it could "strengthen the disposition toward action by increasing adherence to the values it lauds" (p. 50). Brock argued the fairness of a judicial decision that would hold all of the defendants equally responsible for the DWH disaster instead of just BP since Transocean and Halliburton's acts had contributed to the tragedy. His epideictic argument may have been persuasive, because fairness and responsibility are recognized as basic societal values. However, Brock did not admit until later in the trial that BP had previously signed contracts with its defendant contractors, absolving them from any gross negligence penalties. Therefore, in this case the legal precedent had more value and was in agreement with our society's mindset of honoring contracts.

### **The starting points of argumentation**

After writing this dissertation, it is apparent that rhetoric works closely in all three parallel contexts of law, politics and public policy. Even considering that the law is a formalized rhetorical performance, the contexts of the three types of statements are closer than we thought. Law is rhetorical and even though it is bounded by rules, it is not bounded by tone. Court opening statements and Presidential public statements are more permeable to competing discourses than I had expected, and it is rhetoric that facilitates the intersection of more than one content.

It is in the art of a rhetor to manage and test the content of various statements made at different times and to various audiences. An example of content management was the example of President Obama's April 29, 2010 short remarks made about the DWH disaster in the context of a "Teacher of the Year" award. While the subject of content management is another research project altogether, I apply it to this public statement and consider how the President may have been testing public perceptions of his handling of the DWH crisis up to that point (Pullman & Baotong, 2009; "Digital Government," 2013). Criticism of his silence on the issue by the public and members of his administration was growing and the potential audience for the Teacher of the Year award was likely to be small. The President gave his unexpected short speech on the DWH crisis after greeting guests assembled in the Rose Garden for the award presentation.

Apologizing for having to comment on an "intrusive" subject, the President Obama's short speech was a test of the public response to his first remarks on the crisis. He gave a lot of content about the details of his administration's response to the tragedy, but the order of presenting it in the context of the award speech may have been wrong. However, public approval may also have been gauged to be higher if they responded to his voice, tone, and the matter of fact delivery of a

message that was deemed important enough to interrupt a planned speech. Regardless, the media immediately picked up on the President's first remarks and disseminated the message quickly.

Traditionally used to manage database content, the concept of content management has spread to other areas of public information services. The federal government now uses social content management to "conduct research" to understand its "customer's" (the "American people" and "Employees") needs ("Digital Government," 2013, n.p.). My research recognizes the growing complexity of managing the content of various genres of information in numerous contexts, which of course leads to increased opportunities for technical communicators.

### **Application of Findings**

As rhetorical scholars, we have an interest in analyzing a text and then asking what we want to do with the analysis. In my case, it was important to understand that social inequities, power and dominance can only be changed if we understand them, and are able to explain how they came to be, why they continue to be maintained, and how to resist them. This is the whole idea behind CDA and its importance as a research method. Genre theory is also a critical component in that people are often deceived by those who manipulate familiar generic conventions from other professions for their own purposes, such as the term "opening statement."

Therefore, my findings could be used to inform the pedagogy of technical communication by encouraging the implementation of courses in personal and professional ethics. As stated earlier in this dissertation, I argue for expanding the scope of technical and professional pedagogy to include the development of dialogic codes of conduct for the purposes of handling ethical conflict in corporate/non-profit mergers. My study indicated a gap in ethical

knowledge in the training of professional technical communicators who typically write safety manuals, communication practices, and disaster/crisis communication documents as dictated by employers. If technical communicators are to be considered professionals, they must also take responsibility and “ownership” of their work. This, in turn, will establish technical communicators as important mediators between corporations, managers, and their employees with regard to their safety processes, and create opportunities for technical communicators to prevent or mitigate a tragedy like the DWH. By understanding the genres of opening statements and rhetoric of profit-making expediency, technical communicators can identify breakdowns in communication and help fill those gaps. With additional training in ethics, rhetoric and genre, technical communicators have the potential for acting at higher levels of responsibility and accountability in corporate businesses.

I also hope that this research will encourage the U.S. federal and state courts to follow Judge Barbier’s example of opening access to the public in large complex trials like the DWH trial in order to foster a policy for transparency. This is especially important in the instance of class actions wherein individuals harmed by the defendants are represented only collectively as one voice. In this case, opening access to the DWH trial also allowed BP and the other defendants’ shareholders to hear the facts and evidence presented in trial by many different voices and in different contexts. This was an uncomfortable situation for the defendants as they watched the value of their stock drop dramatically, followed by the filing of shareholder lawsuits alleging fraud. The rhetoric of opening statements in complex business/risk management/corporate communication cases needs to be displayed to the public often so that they can see/hear for themselves the ways that the powerful can use language to foster a certain significance for particular words and their situated meanings.

### **Suggestions for Further Research**

I recognize that my conclusions are limited by the fact that this case was argued before a judge in a bench trial and not a lay jury. I also recognize the limitation of using one case study in my project and suggest that a comparison analysis might provide additional clues about the importance of genre and epideictic rhetoric in opening statements. Because I concentrated my analysis using only written transcripts, a future study might also include observation of an actual trial. While studying transcripts provides important insight into opening statements, trials are meant to be seen and heard by the public. Research including actual observation of a trial would reveal the visual and aural cues that are missed when studying the court transcripts only.

Judge Barbier's ability to understand the complex science put forth by both parties' experts also helped him to discern the validity of the various legal arguments and supporting evidence in trial. He certainly understood the elements of the legal concepts of negligence/gross negligence, joint and several liability, and the importance of businesses acting in accordance with industry standards. North Carolina, for example, established business and specialty courts in 1996 so that special judges could hear cases concerning complex litigation, tax issues and environmental issues. Applebaum (2011) discussed the rise in specialty courts across the country, growing from "3 pilot dockets in 1993 to over 40 court programs within 22 states in 2010" (p. 75).

More genre and CDA research could be done concerning the effectiveness of epideictic rhetoric in complex cases in which lay juries were the decision makers, and what those results might mean to our system of justice. Legal scholars have been arguing this question about the need for specialized jurors for quite some time, and many are even of the opinion that specialized *judges* are required in cases involving more and more complexities. These questions are



extremely important in our judicial system and its provision for the right to be heard by juries of *peers*.

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## **APPENDIX A: Remarks by the President on the Oil Spill**

The White House

Office of the Press Secretary

For Immediate Release  
May 02, 2010

# **Remarks by the President on Oil Spill**

## **Venice, Louisiana**

3:25 P.M. CDT

THE PRESIDENT: Good afternoon, everybody. First let me say a few words about the incident in New York City. I want to commend the work of the NYPD, the New York Fire Department, and the FBI, which responded swiftly and aggressively to a dangerous situation. And I also want to commend the vigilant citizens who noticed this suspicious activity and reported it to the authorities.

I just got off the phone on the way down here with Mayor Bloomberg to make sure that state and federal officials are coordinating effectively. Since last night my national security team has been taking every step necessary to ensure that our state and local partners have the full support and cooperation of the federal government. We're going to do what's necessary to protect the American people, to determine who is behind this potentially deadly act, and to see that justice is done. And I'm going to continue to monitor the situation closely and do what it takes at home and abroad to safeguard the security of the American people.

Now, we just finished a meeting with Admiral Thad Allen, our National Incident Commander for this spill, as well as Coast Guard personnel who are leading the response to this crisis. And they gave me an update on our efforts to stop the BP oil spill and mitigate the damage.

By the way, I just want to point out, I was told there was drizzling out here -- (laughter) -- is this Louisiana drizzle right here? (Laughter.)

They gave me a sense of how this spill is moving. It is now about nine miles off the coast of southeastern Louisiana. And by the way, we had the Governor of Louisiana, Bobby Jindal, as well as parish presidents who were taking part in this meeting, because we want to emphasize the importance of coordinating between local, state, and federal officials throughout this process.

Now, I think the American people are now aware, certainly the folks down in the Gulf are aware, that we're dealing with a massive and potentially unprecedented environmental disaster. The oil that is still leaking from the well could seriously damage the economy and the

environment of our Gulf states and it could extend for a long time. It could jeopardize the livelihoods of thousands of Americans who call this place home.

And that's why the federal government has launched and coordinated an all-hands-on-deck, relentless response to this crisis from day one. After the explosion on the drilling rig, it began with an aggressive search-and-rescue effort to evacuate 115 people, including three badly injured. And my thoughts and prayers go out to the family of the 11 workers who have not yet -- who have not been found.

When the drill unit sank on Thursday, we immediately and intensely investigated by remotely operated vehicles the entire 5,000 feet of pipe that's on the floor of the ocean. In that process, three leaks were identified, the most recent coming just last Wednesday evening. As Admiral Allen and Secretary Napolitano have made clear, we've made preparations from day one to stage equipment for a worse-case scenario. We immediately set up command center operations here in the Gulf and coordinated with all state and local governments. And the third breach was discovered on Wednesday.

We already had by that time in position more than 70 vessels and hundreds of thousands of feet of boom. And I dispatched the Secretaries of the Interior and Homeland Security; the Administrator of the EPA, Lisa Jackson, who is here; my Assistant for Energy and Climate Change Policy; and the Administrator of NOAA to the Gulf Coast to ensure that we are doing whatever is required to respond to this event.

So I want to emphasize, from day one we have prepared and planned for the worst, even as we hoped for the best. And while we have prepared and reacted aggressively, I'm not going to rest -- and none of the gentlemen and women who are here are going to rest -- or be satisfied until the leak is stopped at the source, the oil on the Gulf is contained and cleaned up, and the people of this region are able to go back to their lives and their livelihoods.

Currently, the most advanced technology available is being used to try and stop a leak that is more than 5,000 feet under the surface. Because this leak is unique and unprecedented, it could take many days to stop. That's why we're also using every resource available to stop the oil from coming ashore and mitigating the damage it could cause. And much of the discussion here at the center was focused on if we, and when we have to deal with these mitigation efforts.

Thus far, as you can tell, the weather has not been as cooperative as we'd like on this front. But we're going to continue to push forward.

I also want to stress that we are working closely with the Gulf states and local communities to help every American affected by this crisis. Let me be clear: BP is responsible for this leak; BP will be paying the bill. But as President of the United States, I'm going to spare no effort to respond to this crisis for as long as it continues. And we will spare no resource to clean up whatever damage is caused. And while there will be time to fully investigate what happened on that rig and hold responsible parties accountable, our focus now is on a fully coordinated, relentless response effort to stop the leak and prevent more damage to the Gulf.

I want to thank the thousands of Americans who've been working around the clock to stop this crisis -- whether it's the brave men and women of our military, or the local officials who call the Gulf home. They are doing everything in their power to mitigate this disaster, prevent damage to our environment, and help our fellow citizens.

During this visit, I am hoping to have the opportunity to speak with some of the individuals who are directly affected by the disaster. I've heard already that people are, understandably, frustrated and frightened, especially because the people of this region have been through worse disasters than anybody should have to bear.

But every American affected by this spill should know this: Your government will do whatever it takes, for as long as it takes, to stop this crisis.

This is one of the richest and most beautiful ecosystems on the planet, and for centuries its residents have enjoyed and made a living off the fish that swim in these waters and the wildlife that inhabit these shores. This is also the heartbeat of the region's economic life. And we're going to do everything in our power to protect our natural resources, compensate those who have been harmed, rebuild what has been damaged, and help this region persevere like it has done so many times before.

That's a commitment I'm making as President of the United States, and I know that everybody who works for the federal government feels the exact same way.

Thank you very much, everybody. (Applause.)

END 3:33 P.M. CDT

## **APPENDIX B: Remarks by the President to the Nation on the BP Oil Spill**

The White House

Office of the Press Secretary

For Immediate Release

June 15, 2010

# **Remarks by the President to the Nation on the BP Oil Spill**

**Oval Office**

8:01 P.M. EDT

THE PRESIDENT: Good evening. As we speak, our nation faces a multitude of challenges. At home, our top priority is to recover and rebuild from a recession that has touched the lives of nearly every American. Abroad, our brave men and women in uniform are taking the fight to al Qaeda wherever it exists. And tonight, I've returned from a trip to the Gulf Coast to speak with you about the battle we're waging against an oil spill that is assaulting our shores and our citizens.

On April 20th, an explosion ripped through BP Deepwater Horizon drilling rig, about 40 miles off the coast of Louisiana. Eleven workers lost their lives. Seventeen others were injured. And soon, nearly a mile beneath the surface of the ocean, oil began spewing into the water.

Because there has never been a leak this size at this depth, stopping it has tested the limits of human technology. That's why just after the rig sank, I assembled a team of our nation's best scientists and engineers to tackle this challenge -- a team led by Dr. Steven Chu, a Nobel Prize-winning physicist and our nation's Secretary of Energy. Scientists at our national labs and experts from academia and other oil companies have also provided ideas and advice.

As a result of these efforts, we've directed BP to mobilize additional equipment and technology. And in the coming weeks and days, these efforts should capture up to 90 percent of the oil leaking out of the well. This is until the company finishes drilling a relief well later in the summer that's expected to stop the leak completely.

Already, this oil spill is the worst environmental disaster America has ever faced. And unlike an earthquake or a hurricane, it's not a single event that does its damage in a matter of minutes or days. The millions of gallons of oil that have spilled into the Gulf of Mexico are more like an epidemic, one that we will be fighting for months and even years.



But make no mistake: We will fight this spill with everything we've got for as long as it takes. We will make BP pay for the damage their company has caused. And we will do whatever's necessary to help the Gulf Coast and its people recover from this tragedy.

Tonight I'd like to lay out for you what our battle plan is going forward: what we're doing to clean up the oil, what we're doing to help our neighbors in the Gulf, and what we're doing to make sure that a catastrophe like this never happens again.

First, the cleanup. From the very beginning of this crisis, the federal government has been in charge of the largest environmental cleanup effort in our nation's history -- an effort led by Admiral Thad Allen, who has almost 40 years of experience responding to disasters. We now have nearly 30,000 personnel who are working across four states to contain and clean up the oil. Thousands of ships and other vessels are responding in the Gulf. And I've authorized the deployment of over 17,000 National Guard members along the coast. These servicemen and women are ready to help stop the oil from coming ashore, they're ready to help clean the beaches, train response workers, or even help with processing claims -- and I urge the governors in the affected states to activate these troops as soon as possible.

Because of our efforts, millions of gallons of oil have already been removed from the water through burning, skimming and other collection methods. Over five and a half million feet of boom has been laid across the water to block and absorb the approaching oil. We've approved the construction of new barrier islands in Louisiana to try to stop the oil before it reaches the shore, and we're working with Alabama, Mississippi and Florida to implement creative approaches to their unique coastlines.

As the cleanup continues, we will offer whatever additional resources and assistance our coastal states may need. Now, a mobilization of this speed and magnitude will never be perfect, and new challenges will always arise. I saw and heard evidence of that during this trip. So if something isn't working, we want to hear about it. If there are problems in the operation, we will fix them.

But we have to recognize that despite our best efforts, oil has already caused damage to our coastline and its wildlife. And sadly, no matter how effective our response is, there will be more oil and more damage before this siege is done. That's why the second thing we're focused on is the recovery and restoration of the Gulf Coast.

You know, for generations, men and women who call this region home have made their living from the water. That living is now in jeopardy. I've talked to shrimpers and fishermen who don't know how they're going to support their families this year. I've seen empty docks and restaurants with fewer customers -- even in areas where the beaches are not yet affected. I've talked to owners of shops and hotels who wonder when the tourists might start coming back. The sadness and the anger they feel is not just about the money they've lost. It's about a wrenching anxiety that their way of life may be lost.

I refuse to let that happen. Tomorrow, I will meet with the chairman of BP and inform him that he is to set aside whatever resources are required to compensate the workers and business owners who have been harmed as a result of his company's recklessness. And this fund will not be

controlled by BP. In order to ensure that all legitimate claims are paid out in a fair and timely manner, the account must and will be administered by an independent third party.

Beyond compensating the people of the Gulf in the short term, it's also clear we need a long-term plan to restore the unique beauty and bounty of this region. The oil spill represents just the latest blow to a place that's already suffered multiple economic disasters and decades of environmental degradation that has led to disappearing wetlands and habitats. And the region still hasn't recovered from Hurricanes Katrina and Rita. That's why we must make a commitment to the Gulf Coast that goes beyond responding to the crisis of the moment.

I make that commitment tonight. Earlier, I asked Ray Mabus, the Secretary of the Navy, who is also a former governor of Mississippi and a son of the Gulf Coast, to develop a long-term Gulf Coast Restoration Plan as soon as possible. The plan will be designed by states, local communities, tribes, fishermen, businesses, conservationists and other Gulf residents. And BP will pay for the impact this spill has had on the region.

The third part of our response plan is the steps we're taking to ensure that a disaster like this does not happen again. A few months ago, I approved a proposal to consider new, limited offshore drilling under the assurance that it would be absolutely safe -- that the proper technology would be in place and the necessary precautions would be taken.

That obviously was not the case in the Deepwater Horizon rig, and I want to know why. The American people deserve to know why. The families I met with last week who lost their loved ones in the explosion -- these families deserve to know why. And so I've established a National Commission to understand the causes of this disaster and offer recommendations on what additional safety and environmental standards we need to put in place. Already, I've issued a six-month moratorium on deepwater drilling. I know this creates difficulty for the people who work on these rigs, but for the sake of their safety, and for the sake of the entire region, we need to know the facts before we allow deepwater drilling to continue. And while I urge the Commission to complete its work as quickly as possible, I expect them to do that work thoroughly and impartially.

One place we've already begun to take action is at the agency in charge of regulating drilling and issuing permits, known as the Minerals Management Service. Over the last decade, this agency has become emblematic of a failed philosophy that views all regulation with hostility -- a philosophy that says corporations should be allowed to play by their own rules and police themselves. At this agency, industry insiders were put in charge of industry oversight. Oil companies showered regulators with gifts and favors, and were essentially allowed to conduct their own safety inspections and write their own regulations.

When Ken Salazar became my Secretary of the Interior, one of his very first acts was to clean up the worst of the corruption at this agency. But it's now clear that the problem there ran much deeper, and the pace of reform was just too slow. And so Secretary Salazar and I are bringing in new leadership at the agency -- Michael Bromwich, who was a tough federal prosecutor and Inspector General. And his charge over the next few months is to build an organization that acts as the oil industry's watchdog -- not its partner.

So one of the lessons we've learned from this spill is that we need better regulations, better safety standards, and better enforcement when it comes to offshore drilling. But a larger lesson is that no matter how much we improve our regulation of the industry, drilling for oil these days entails greater risk. After all, oil is a finite resource. We consume more than 20 percent of the world's oil, but have less than 2 percent of the world's oil reserves. And that's part of the reason oil companies are drilling a mile beneath the surface of the ocean -- because we're running out of places to drill on land and in shallow water.

For decades, we have known the days of cheap and easily accessible oil were numbered. For decades, we've talked and talked about the need to end America's century-long addiction to fossil fuels. And for decades, we have failed to act with the sense of urgency that this challenge requires. Time and again, the path forward has been blocked -- not only by oil industry lobbyists, but also by a lack of political courage and candor.

The consequences of our inaction are now in plain sight. Countries like China are investing in clean energy jobs and industries that should be right here in America. Each day, we send nearly \$1 billion of our wealth to foreign countries for their oil. And today, as we look to the Gulf, we see an entire way of life being threatened by a menacing cloud of black crude.

We cannot consign our children to this future. The tragedy unfolding on our coast is the most painful and powerful reminder yet that the time to embrace a clean energy future is now. Now is the moment for this generation to embark on a national mission to unleash America's innovation and seize control of our own destiny.

This is not some distant vision for America. The transition away from fossil fuels is going to take some time, but over the last year and a half, we've already taken unprecedented action to jumpstart the clean energy industry. As we speak, old factories are reopening to produce wind turbines, people are going back to work installing energy-efficient windows, and small businesses are making solar panels. Consumers are buying more efficient cars and trucks, and families are making their homes more energy-efficient. Scientists and researchers are discovering clean energy technologies that someday will lead to entire new industries.

Each of us has a part to play in a new future that will benefit all of us. As we recover from this recession, the transition to clean energy has the potential to grow our economy and create millions of jobs -- but only if we accelerate that transition. Only if we seize the moment. And only if we rally together and act as one nation -- workers and entrepreneurs; scientists and citizens; the public and private sectors.

When I was a candidate for this office, I laid out a set of principles that would move our country towards energy independence. Last year, the House of Representatives acted on these principles by passing a strong and comprehensive energy and climate bill -- a bill that finally makes clean energy the profitable kind of energy for America's businesses.

Now, there are costs associated with this transition. And there are some who believe that we can't afford those costs right now. I say we can't afford not to change how we produce and use energy -- because the long-term costs to our economy, our national security, and our environment are far greater.

So I'm happy to look at other ideas and approaches from either party — as long they seriously tackle our addiction to fossil fuels. Some have suggested raising efficiency standards in our buildings like we did in our cars and trucks. Some believe we should set standards to ensure that more of our electricity comes from wind and solar power. Others wonder why the energy industry only spends a fraction of what the high-tech industry does on research and development — and want to rapidly boost our investments in such research and development.

All of these approaches have merit, and deserve a fair hearing in the months ahead. But the one approach I will not accept is inaction. The one answer I will not settle for is the idea that this challenge is somehow too big and too difficult to meet. You know, the same thing was said about our ability to produce enough planes and tanks in World War II. The same thing was said about our ability to harness the science and technology to land a man safely on the surface of the moon. And yet, time and again, we have refused to settle for the paltry limits of conventional wisdom. Instead, what has defined us as a nation since our founding is the capacity to shape our destiny — our determination to fight for the America we want for our children. Even if we're unsure exactly what that looks like. Even if we don't yet know precisely how we're going to get there. We know we'll get there.

It's a faith in the future that sustains us as a people. It is that same faith that sustains our neighbors in the Gulf right now.

Each year, at the beginning of shrimping season, the region's fishermen take part in a tradition that was brought to America long ago by fishing immigrants from Europe. It's called "The Blessing of the Fleet," and today it's a celebration where clergy from different religions gather to say a prayer for the safety and success of the men and women who will soon head out to sea — some for weeks at a time.

The ceremony goes on in good times and in bad. It took place after Katrina, and it took place a few weeks ago — at the beginning of the most difficult season these fishermen have ever faced.

And still, they came and they prayed. For as a priest and former fisherman once said of the tradition, "The blessing is not that God has promised to remove all obstacles and dangers. The blessing is that He is with us always," a blessing that's granted "even in the midst of the storm."

The oil spill is not the last crisis America will face. This nation has known hard times before and we will surely know them again. What sees us through — what has always seen us through — is our strength, our resilience, and our unyielding faith that something better awaits us if we summon the courage to reach for it.

Tonight, we pray for that courage. We pray for the people of the Gulf. And we pray that a hand may guide us through the storm towards a brighter day. Thank you, God bless you, and may God bless the United States of America.

END

8:18 P.M. EDT

**APPENDIX C: Statement of Tony Hayward, CEO, BP Oversight Hearing**

Statement of Tony Hayward, Chief Executive Officer, BP PLC.

Oversight Hearing Before the Committee on Natural Resources,

U.S. House of Representatives, One Hundred Twelfth Congress

So, let's move on with our first witness.

Our first witness is Mr. Tony Hayward, who is the chief executive officer of BP PLC.

Mr. Hayward, it's the policy of this subcommittee to take all testimony under oath. Please be advised that you have a right under the rules of the House to be advised by counsel during your testimony.

Do you wish to be represented by legal counsel?

I'm sorry. You're going to just have to press that button there, sir.

TONY HAYWARD, CEO, BP: I do not.

STUPAK: Do not.

OK. We also asked -- the committee asked if you would have a technical person with you so you could consult if we have some questions that you want to run by your technical person.

Do you have a technical person with you?

HAYWARD: I do.

STUPAK: Could you state his name and position for the record, please?

HAYWARD: Mike Zangy (ph), drilling engineer.

STUPAK: OK. During your testimony, any time if asked a question you want to consult with that individual, please let us know. We'll give you a moment to do so before you answer, but you'd be the only one who could answer the question.

Is that clear?

Thank you.

And, Mr. Hayward, I'm going to ask you to please rise, raise your right hand, and take the oath.

UNIDENTIFIED MALE: Do you swear or affirm the testimony you are about to give to be the

truth, the whole truth, nothing but the truth, in the matter pending before this committee?

HAYWARD: I do.

STUPAK: Let the record reflect the witness answered in the affirmative. Mr. Hayward, you are now under oath. We would like to hear an opening statement from you. You may submit a longer statement if you wish, for the record.

But, if you would, please begin your opening statement. And let me, again, on behalf of all members of the committee, we appreciate your willingness to appear here today.

HAYWARD: Chairman Waxman, Chairman Stupak --

UNIDENTIFIED FEMALE: (INAUDIBLE)

STUPAK: OK.

Suspend, please, sir.

UNIDENTIFIED FEMALE: (INAUDIBLE)

STUPAK: Ma'am --

UNIDENTIFIED FEMALE: (INAUDIBLE)

KING: You are watching the back of the committee hearing room. Tony Hayward had just begun his opening statement. It was perhaps inevitable. We knew there were protesters in the room as the committee hearing was getting under way a little more than an hour ago.

We saw them holding signs. A woman with her hands darkened, as if with oil, raising them and shouting at Tony Hayward just as he began his opening statement.

Chairman Stupak suspended -- asked Mr. Hayward to suspend. And now you see Capitol Police and other committee staffers trying to escort the protesters out of the room.

Again, it was inevitable, perhaps, given the emotions on this issue. You see a large media contingent in there as well.

Once these protesters are escorted out of the room -- you see others still in the room with signs -- the hearing will get back under way. Tony Hayward will begin.

He was just words, seconds into his opening statement. Mr. Hayward will resume momentarily, and we will keep an eye out for further demonstrations.

You see the large hearing room here, and you see Mr. Hayward sitting alone in the middle of that table, surrounded -- he does have staff and attorneys with him.

The chairman, Bart Stupak.

STUPAK: Those viewers in our audience, emotions run high on this issue. But we have a hearing to conduct here. We're going to conduct our hearing. It's going to be done with proper decorum. Mr. Hayward, when you're ready, we are going to start the clock over.

You may begin.

HAYWARD: Chairman Waxman, Chairman Stupak, Ranking Member Barton, Ranking Member Burgess, members of the committee, I'm Tony Hayward, chief executive of BP.

The explosion and fire aboard the Deepwater Horizon and the resulting oil spill in the Gulf of Mexico --

UNIDENTIFIED MALE: Excuse me, Mr. Hayward. I'm going to ask you just to pull that up. Some of the members are having trouble hearing, probably over the clicking of the cameras. But we're having a little trouble hearing you. If you could just pull it a little closer.

Thanks.

HAYWARD: The explosion and fire on board the Deepwater Horizon and the resulting oil spill in the Gulf of Mexico never should have happened, and I'm deeply sorry that it did.

When I learned that 11 men had lost their lives, I was personally devastated. Three weeks ago, I attended a memorial service for those men, and it was a shattering moment.

I want to offer my sincere condolences to their friends and families. I can only begin to imagine their sorrow.

I understand how serious this situation is. It is a tragedy. I want to speak directly to the people who live and work in the Gulf region.

I know that this incident has had a profound impact on your lives and caused great turmoil, and I deeply regret that. I also deeply regret the impact the spill has had on the environment, the wildlife and the ecosystem of the Gulf.

I want to acknowledge the questions that you and the public are rightly asking. How could this happen? How damaging is the spill to the environment? Why is it taking so long to stop the flow of oil and gas into the Gulf?

We don't yet have all of the answers to these important questions, but I hear and understand the concerns, frustrations and anger being voiced across the country. And I know that these sentiments will continue until the leak is stopped and until we prove through our actions that we are doing the right thing.

Yesterday, we met with the president of the United States and his senior advisers. We discussed how BP could be more constructive in the government's desire to bring more comfort and assurance to the people of the Gulf Coast beyond the activity we've already done.

We agreed in that meeting to create a \$20 billion claims fund to compensate the affected parties and pay for the costs to federal, state and local governments of the cleanup and environmental mitigation. We said all along that we would pay these costs, and now the American people can be confident that our word is good.

I've been to the Gulf Coast. I've met with fishermen, business owners and families. I understand what they're going through, and I promise them, as I'm promising you, that we will make this right. After yesterday's announcement, I hope that they feel we're on the right track.

I'm here today because I have a responsibility to the American people to do my best to explain what BP has done, is doing, and will do in the future to respond to this terrible accident.

First, we're doing everything we can to secure the well and, in the meantime, contain the flow of oil. We're currently drilling two relief wells. We believe they represent the ultimate solution. We expect this to be complete in August.

Simultaneously, we've been working on parallel strategies to minimize or stop the flow of oil. While not all have been met with success, it appears that our latest containment effort is now containing about 20,000 barrels a day. By the end of June, we expect to have equipment in place to handle between 40,000 and 50,000 barrels a day; and by mid-July, between 60,000 and 80,000 barrels a day.

Second, I've been clear that we will pay all necessary cleanup costs. We've mounted what the Coast Guard has recognized as the largest spill response in history. We've been working hard on the leadership of the Unified Command to stop the oil from coming ashore. And whilst we're grateful these efforts are reducing the impacts of the spill, any oil on the shore is deeply distressing. We will be vigilant in our cleanup.

Third, as I have made clear from the beginning, we will pay all legitimate claims for losses and damages caused by the spill. Those are not just words. We've already paid out more than \$95 million, and we've announced an independent claims facility headed by Ken Feinberg to ensure the process is as fair, transparent, and rapid as possible.

Fourth, we need to know what went wrong so that we as a company and we as an industry can do better. That is why less than 24 hours after the accident, I commissioned a non-privileged investigation. I did it because I want to know what happened and I want to share the results. Right now, it's simply too early to say what caused the incident. There is still extensive work to do. A full answer must await the outcome of multiple investigations, including the marine report.

To sum up, I understand the seriousness of the situation and the concerns, frustrations, and fears that have been and will continue to be voiced. I know that only actions and results, not mere words, ultimately can give you the confidence you seek. I give my pledge as the leader of BP



that we will not rest until we make this right. We're a strong company and no resources will be spared. We and the entire industry will learn from this terrible event and emerge stronger, smarter, and safer.

Thank you.

UNIDENTIFIED MALE: Thank you, Mr. Hayward.

One of the bad parts while conducting a hearing is we get interrupted every now and then by votes. And we have three votes pending right now. There's about 10 minutes remaining on this vote. I would suggest instead of trying to get into questions, we take a break right now. Let's stay in recess for 30 minutes. Let's come back at noon and continue the hearing. We'll start with questions from all of the members.

This committee will be in recess until 12:00 noon. (Statement of Tony Hayward, 2010)

