10

<Police Power> to Stop-and-Frisk

A Pattern for Persuasion

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On a warm evening in late August 2008, Leroy Downs arrived home from work to an encounter like others he had experienced many times – a humiliating and dangerous encounter, which stripped him of his liberty and constitutional rights to be let alone and equally protected under the law. Standing there, in front of his own home, Downs spoke to a friend on his cellphone. Holding the mouthpiece of a headset connected to the phone by a cord, Downs watched as a black Crown Victoria drove by, stopped, reversed, and then double-parked directly in front of Downs and his home. Some people might hurry inside or prepare to call the police in this situation, but Downs, being all too familiar with this sort of thing, recognized that this *was* the police.

Officers Scott Giacona and James Mahoney, white men in plainclothes, aggressively approached Downs, saying it appeared he was smoking marijuana and forcing him to "get the fuck against" his own fence.[1] Downs explained that he was holding the mouthpiece connected to his phone, he was not smoking marijuana, and he is, in fact, a drug counselor. For unknown reasons, this response did not satisfy Giacona and Mahoney, who patted down the outside of Downs's clothes, reached into and emptied his pockets, and searched through his wallet. Downs neither consented to this search, nor was he asked for permission. Having found nothing with which to charge Downs, Giacona and Mahoney started toward their vehicle. Aware of his purported rights, Downs asked for the officers' badge numbers, a request which was "laughed off" with one officer saying Downs was fortunate not get locked up and the other saying, "I'm just doing my fucking job."

In this situation, only two people broke the law, and neither of them was punished. In fact, Officer Mahoney has since been promoted. Downs, the only innocent party, was, however, disciplined from the very moment Officers Giacona and Mahoney saw him standing in front of his home that evening. Indeed, Downs had been disciplined in this way, in his words, "many times" before. His neighbor

[1] The quotes and facts described throughout my introduction derive from *Floyd v. City of New York* (2013).

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witnessed part of this demeaning encounter. The New York Police Department (NYPD) gave him the run-around when he tried to file a complaint. And when the officers were finally called to account for their actions – in *Floyd v. City of New York* (2013; hereafter *David Floyd*) – they feigned no recollection, an artifice which United States District Court Judge Shira Scheindlin did not find credible.[2]

The *David Floyd* case is a bright spot in New York's sullied history of stop-and-frisk. In this landmark case, twelve Black and Hispanic individuals, including Leroy Downs, succeeded in a class action lawsuit against the city, alleging that the NYPD's use of its stop-and-frisk policy violated their Fourth Amendment right to be free from unreasonable searches and seizures and their right to equal protection of the laws under the Fourteenth Amendment. Judge Scheindlin found that NYPD officials acted with deliberate indifference to unconstitutional stops, frisks, and searches, affirming that "suspicious blacks and Hispanics may not be treated differently by the police than equally suspicious whites" (*Floyd v. City of New York*, 2013, p. 667).

Sadly, the gross violations the *David Floyd* plaintiffs experienced are not uncommon, in New York and across the country, and this outcome might have been much less likely prior to 2013, when the case was decided. The cultural, political, and legal histories surrounding stop-and-frisk practices reveal discourses designed to privilege police power in the name of crime control and public safety and restrict liberty, particularly for Black and Hispanic Americans. The terms <police power>[3] and <liberty> can be understood as ideographs – links between rhetoric and ideology. These terms, alongside others, transform the legal landscape of stop-and-frisk across time. They emerge as evolving legal, political, and social terms within and beyond the opinion; and, indeed, a careful analysis of *David Floyd*'s contemporary rhetorical culture might have predicted the outcome.

This chapter first describes a method for that analysis: an ideographic analysis of <police power> and related ideographs in stop-and-frisk jurisprudence, specifically examining *David Floyd* as a textual archive of the times. First, I define and describe the ideograph and its intersection with legal texts, using Michael Calvin McGee's (1980) characterization of the ideograph as a link between rhetoric and ideology as my framework (Section 10.1). Following that framework, I identify some of the prevalent ideographs of stop-and-frisk, briefly tracing their use diachronically before turning to examine their synchronic use both within and outside *David Floyd* (Section 10.2). Finally, I highlight how Judge Scheindlin engages this vocabulary of ideographs and the law consequently changed in response to an evolving American rhetorical culture (Section 10.3). Ultimately, I argue that ideographic

[2] Because of legal citation conventions, this case is listed in the references as *Floyd v. City of New York*. The plaintiff's first name, David, is omitted. However, because of the more recent events surrounding the murder of George Floyd in Minneapolis, I have chosen to use David Floyd's full name when referring to his case in this chapter.

[3] Angle brackets (< >) conventionally indicate ideographs.

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inquiry offers more than a useful tool for education and analysis or a method for predicting societal beliefs and behaviors. Ideographs are a *force* for persuasion.

10.1 IDEOGRAPHS AND RHETORICAL CULTURE

When we look at stop-and-frisk jurisprudence (or any text) ideographically, we consider the power of terms imbued with meaning through historical, social, and political use to influence related beliefs and behaviors. In "The 'Ideograph': A Link between Rhetoric and Ideology," Michael Calvin McGee wrote:

> The falsity of an ideology is specifically rhetorical, for the illusion of truth and falsity with regard to normative commitments is the product of persuasion. Since the clearest access to persuasion (and hence ideology) is through the discourse used to produce it, ... ideology in practice is a political language, preserved in rhetorical documents, with the capacity to dictate discussion and control public belief and behavior. Further, the political language which manifests ideology seems characterized by slogans, a vocabulary of "ideographs" easily mistaken for the technical terminology of political philosophy. (McGee, 1980, pp. 4–5)

That is, the language of ideology – or of the systems of ideas that influence behaviors and beliefs – is recorded textually and has the ability to influence what people think and how they act presently and in the future. This language of ideology, texts imbued with influence, is stamped with what McGee (1980, p. 5) described as "a vocabulary of 'ideographs.'" Consequently, the ability to view this embossed vocabulary imparts upon the spectator the ability to predict and describe ideology.

Ideographs are, in the plainest articulation, terms that conceptualize collective social commitments toward a practice or belief. They are not propositions because ideographs are "more pregnant than propositions ever could be," and they display an elasticity of meaning (McGee, 1980, pp. 6–7). They identify with and about an idea or ideal, but their interpretation is not fixed. We commonly recognize ideographs as slogans or key terms that defined a culture. McGee provided <property>, <religion>, <right to privacy>, <freedom of speech>, <rule of law>, and <liberty> as examples of ideographs, though there are many more (p. 7).

Within McGee's framework, ideographs are both "the building blocks of ideology" and "one-term sums of an orientation" because they form our beliefs and position us temporally and culturally (McGee, 1980, p. 7). Put another way, ideographs take on meaning and reflect societal beliefs in relation to both their historical use and contemporary context, particularly in the way they relate to other elastic terms within a rhetorical culture.

As "building blocks of ideology," ideographs reflect social commitments; "they exist in real discourse, ... They are not invented by observers; they come to be as part of the real lives of the people whose motives they articulate" (McGee, 1980, p. 7). McGee intended the ideograph as "purely descriptive of an essentially social

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condition. Unlike more general conceptions of 'Ultimate' or 'God' terms, attention is called to the social, rather than rational or ethical, functions of a particular vocabulary" (McGee, 1980, p. 8). In this way, ideographs define what it means to be part of a culture and how one should behave within that culture.

In this chapter, I examine a specific rhetorical culture – stop-and-frisk law – within a broader rhetorical culture – the American public – with attention to the social function of a vocabulary of ideographs in *David Floyd*. I'll borrow from Condit and Lucaites to explain the concept of rhetorical culture, which described "the range of linguistic usages available to … a group of potentially disparate individuals and subgroups who share a common interest in their collective life" (Condit & Lucaites, 1993, p. xii). We might describe a broad American rhetorical culture or a more discrete rhetorical culture, such as a group of civil rights advocates, a church congregation, or the legal profession. The law, like any other collective with shared interests and language uses, "exists as part of an evolving rhetorical culture" (Hasian et al., 1996, pp. 326). There we find "commonly used allusions, aphorisms, characterizations, ideographs, images, metaphors, myths, narratives, and … common argumentative forms," vocabularies that mark discursive and ideological boundaries within which members of the collective operate (Condit & Lucaites, 1993, p. xii).

Just as the law represents a discrete rhetorical culture, it often comprises a set of discrete ideographs – terms of art specific to legal practitioners. However, our social vocabulary can never be apart from our legal vocabulary because the law is a textile stitched primarily of social stories. To be sure, popular ideographs pop up within the discursive space of the law, but some change meaning after the courts continuously employ them within the constraints of that rhetorical culture. Ideographs specific to the law appear when courts and other legal practitioners use a term or phrase that turns in meaning, style, and manner over time and through repeated use. Some ideographs reach far back into the earliest foundations of the law. Others work their way in from broader or tangential rhetorical cultures. On some occasions, meanings neatly overlap; while on others, the distinctions are more palpable.

<Police power>, for example, is a term with elastic meaning – an ideograph – used both popularly and legally and reflective of a collective commitment to a practice (e.g., stop-and-frisk) and a belief or ideology (e.g., that this practice is necessary to deter criminal activity despite infringements upon personal liberty). The term's meaning is elastic because it depends upon when and where it is used. Today, in some segments of American rhetorical culture, <police power> takes on one elastic, often pejorative, meaning. In legal discourse environments – the rhetorical culture of law – it takes on a similarly elastic, though perhaps less pejorative, meaning. These connotations are subject to the evolutions of the rhetorical culture upon which the term is inscribed. The connotations are also reflective of the ideology of that rhetorical culture.

Ideographs are also "constantly sites of struggle, as those who successfully lay claim to [them] enjoy a significant persuasive advantage" (McCann, 2007, p. 385).

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Examining the legal intersections of Black lives and <police power>, Carbado explained that we "would be right to wonder whether it is at all unusual for the Supreme Court to invent constitutional doctrine," although this, in fact, is common because "terms like 'due process' and 'equal protection' and 'liberty' require Courts to give them meaning" (Carbado, 2022, p. 113). The terms Carbado highlighted are ideographs, which have varied or elastic meanings in the law depending upon who is using them, when and how they are being used, and for what purpose. It might even be argued that these terms operate in tandem with the principle of *stare decisis* to give the law meaning *and* force, affording it the ability define and inform, but also to both act upon individuals and cause them to move or to act (Head, 2018). Ideographs have the potential to highlight social similarities or expose tensions in changing beliefs in evolving rhetorical cultures.

So, we see ideographs as the "building blocks of ideology" in rhetorical culture. People are "'conditioned,' . . . to a vocabulary of concepts that function as guides, warrants, reasons, or excuses for behavior and belief," rather than to belief or behavior itself (McGee, 1980, p. 6). We become inured to the ideology presented to us through ideographs. Thus, if the vocabulary available offers a reason for a belief or behavior, then we can predict how people will behave or what they will believe by examining the vocabularies they use. By viewing a rhetorical culture's textual archive (e.g., a judicial opinion) stamped with a vocabulary of ideographs, we can make such predictions and adjust our own language use accordingly.

The description of ideographs as "one-term sums of an orientation" offers an analytical framework for this sort of investigation: ideographic analysis as a means to predict and describe behaviors or beliefs. This analysis uncovers "interpenetrating systems or 'structures' of public motives" revealed in "'diachronic' and 'synchronic' patterns of political consciousness, which have the capacity both to control 'power' and to influence (if not determine) the shape and texture of each individual's 'reality'" (McGee, 1980, p. 5). In texts, the terms align with structures of social motives in order to persuade, influence, and control. The vocabularies evolve in meaning depending upon their positionality.

The patterns run diachronically reaching back into history and synchronically stretching out into rhetorical culture. McGee explained: "Chronological sequences are provided by analysis, and they properly reflect the concerns of theorists who try to describe what [the ideograph] *may* mean, potentially, by laying out what the term *has* meant" (McGee, 1980, p. 12). But when considering ideographs "as *forces*" to be used rhetorically in order to persuade others to action, we must view ideographs horizontally in conflict with other ideographs where meaning arises out of synchronic confrontations (p. 12). Ideographs are "connected to all others as brain cells are linked by synapses, synchronically in one context at one specific moment" (p. 16). Where the synchronic conflict happens, there you will find the "force and currency" of an ideograph and other terms in its cluster or "vocabulary" (p. 14). The complete ideological description, according to McGee, "will consist of (1) the

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isolations of a society's ideographs, (2) the exposure and analysis of the diachronic structure of every ideograph, and (3) characterization of synchronic relationships among all the ideographs in a particular context" (p. 16).

When specifically analyzing legal discourse, we identify ideographs in precedent cases, the Constitution, and statutory law. As McGee noted, "Formally, the body of nonstatutory 'law' is little more than a literature recording ideographic uses in the 'common law' and 'case law'" (McGee, 1980, p. 11). Notably, significant diachronic vocabularies lie in "'popular' history" whether we are analyzing legal discourse or not (p. 11). Popular history includes the sort of texts we might find in popular culture: songs, films, plays, and novels, for example. The diachronic analysis would also equally include political history and public discourse. "The significance of ideographs is in their concrete history as usages, not in their alleged idea-content," so a variety of sources should be considered (McGee, 1980, pp. 9–10). For these reasons, I chose to examine news and popular media sources, presidential speeches, and historical and critical commentary in my cursory diachronic analysis of <police power> below.

Indeed, McGee's methodology has proven quite useful to critics invested in cultural communication, argumentation, and rhetoric broadly. Since McGee first published his article in 1980, a vast literature of ideographic analysis has been produced by scholars identifying ideographs in the media (McDaniel, 2013), public address (Potter, 2014), legislation (Cuomo, 2020), legal opinions (Sinsheimer, 2005) (as I discuss here), related legal discourse (Langford, 2015), and public health policies (Allgayer & Kanemoto, 2021) – just to name a few. In keeping with McGee's description, the ideograph necessarily crosses a variety of contexts. Moreover, the persuasive impact of visual ideographs (Jones, 2009) represents yet another descendant of McGee's work. In fact, so much scholarship exists on ideographs that many simple examples that come to mind have already been subjected to rich scrutiny.

Some scholars employing McGee's ideographic method explore single terms diachronically, tracing their historical roots and uses. Others focus on a synchronic methodology, identifying how the term is presently situated or situated within a particular text to persuasive effect at a specific moment in time. McGee (1980, p. 14) explained that understanding and describing both the diachronic and synchronic patterns creates a theoretically accurate account of an ideology. So, this chapter proceeds first as a demonstration of that method, discussing some (certainly not all) diachronic patterns of <police power>, before narrowing in on the surrounding rhetorical culture and language use synchronous with *Floyd v. City of New York*.

In the process, I identify what we call a "vocabulary of ideographs" surrounding <police power> because ideographs do not exist in isolation; they exist in relation to other ideographs. If we charted all the ideographs used to justify a position, "they would form groups or clusters of words radiating" from original uses (McGee, 1980, p. 13). Some of the terms I highlight in the vocabulary of <police power> include

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<liberty>, <high crime area>, <furtive movements>, and especially as it relates to *David Floyd*, <justice>.

With that said, my purpose is not solely demonstrative, nor is it to provide an exhaustive mapping of <police power>. Ideographs are *forces*, with rhetorical potential, bound up in their synchronic clusters (or vocabularies) – they offer more than mere description and analysis. Ideographs are influential, causing us to move and to act in response to the energy and ideas that they convey. I aim to show how McGee's historical text can intersect with a contemporary text (e.g., a legal opinion) in a way that is valuable not only for descriptions and revelations about a term's *prior* use and impact, but also for persuading and predicting *present* and *future* audiences – a valuable instrument in the practice of law or for any rhetorical purpose.

10.2 THE IDEOGRAPHIC PATTERNS OF <POLICE POWER>

Contemporary scholars look back on the last fifty years or so as a period when "the Supreme Court has interpreted the Fourth Amendment to allocate enormous power to the police: to surveil, to racially profile, to stop-and-frisk, and to kill" (Carbado, 2022, p. 11). While it is impossible to discuss a detailed history of <police power> to stop-and-frisk in every detail here, an ideographic analysis of *David Floyd* would be incomplete without examining the term's meaning and evolution – as well as its relationship to other related terms or vocabularies – diachronically.

In response to British soldiers searching their homes without restraint via general warrants and writs of assistance, the American colonists sought to include the Fourth Amendment in the United States Constitution to curb <police power>. Ratified in 1791, the Amendment provides:

> The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Amendment connotes personal <liberty> and a <right to privacy>. But let us not forget that personal <liberty> was denied to Black Americans until 1865 with the ratification of the Thirteenth Amendment. The law is riddled with disconcerting examples of a long history of racial disparity in its application, which is unmistakably apparent in stop-and-frisk practices – arising long after the Fourth Amendment's ratification – empowered by arguments for the necessity of <police power>.

What is stop-and-frisk? Generally, when officers suspect a crime has been or is about to be committed, stops are initiated. In *Florida v. Bostick* (1991, p. 437), the Supreme Court established the test for determining a stop as "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." That encounter advances to a frisk when suspicion is strengthened through the initial contact. Reasonable suspicion that criminal activity is afoot is

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enough to justify the stop. Reasonable suspicion that "the person stopped is armed and dangerous" is enough to justify the frisk (*Floyd v. City of New York*, 2013, p. 566).

"*Terry* stops," as they have come to be called, fluctuate in meaning over time. The foundational case is *Terry v. Ohio* (1968, p. 1), in which "rapidly unfolding and often dangerous situations on city streets" purported to necessitate expanded <police power>. The officer in *Terry* observed two unfamiliar men who appeared to be casing a store for a "stick-up." The officer approached the men, asked their names, spun one man around, and patted his clothing; the officer found a revolver. While the Court stated that personal security could not be violated, it saw tension between the rights of individuals and the role of police: "reflective of the tensions involved are the practical and constitutional arguments pressed with great vigor on both sides of the public debate over the *power of police* to 'stop and frisk' – as it is sometimes euphemistically termed – suspicious persons" (*Terry v. Ohio*, 1968, p. 9). Here, the Court homes in on the ideograph as a site of struggle. The Court places weight on the fact that the officer had a great deal of experience and the defendants were clearly suspicious persons. Sadly, the subjectivity of suspicion preordained that stop-and-frisk would open the door to state-sanctioned discrimination by the NYPD because the standard "promotes background social biases to normative status" (Gray, 2017, p. 280).

At the same time the Court was deciding *Terry*, it was also deciding *Sibron v. New York*, a case directly challenging the constitutionality of New York's stop-and-frisk statute, under which an officer could stop a person "whom he reasonably suspects is committing, has committed or is about to commit a felony [or other specified offense]" (*Sibron v. New York*, 1968, p. 43). There was no concern with the officer's safety specified in this statute, and the Court in *Sibron* sidestepped the question by noting that the officer suspected that the defendant was armed, so further inquiry into whether the statute permitted unconstitutional conduct was unnecessary.

New York defined <police power> further in *People v. De Bour*, determining that officers may approach individuals unengaged in "suspected criminal activity" and ask for information if "the encounter [does] not subject [them] to a loss of dignity, for where the police degrade and humiliate their behavior is to be condemned" (*People v. De Bour*, 1976, p. 210). The permissiveness in *De Bour* was clearly accepted; the prohibitions took a bit longer to sink in – after all, one person's interpretation of degradation might look different from another's. The Court noted that expanding <police power> in this way is supported by the fact that police play a multifaceted role in society, which includes acts of public service (*People v. De Bour*, 1976, p. 218). Essentially, police officers cannot do their jobs without these expanded powers. As we will later see in *David Floyd*, this emphasis on "suspected criminal activity" opens courts up to a new elastic term: <furtive movements>.

De Bour exposed even more complexity in the vocabulary of <police power>. For example, when does this "encounter" become a full-blown stop? *INS v. Delgado* attempted to clear things up by suggesting that <ordinary citizens> should know

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that they can "simply refuse to answer" or "disregard a police request" (*INS v. Delgado*, 1984, p. 218). Many in our contemporary culture would view this characterization of the <ordinary citizen> as severely misguided, which further illustrates the evolution of language use in our society. Then, however, concepts like "deterrence" and the balancing of "social costs" were woven throughout judicial history in apparent response to political and cultural cries for crime control and a brewing war on drugs.

The 1980s gave us "yuppies," MTV, and the first female Supreme Court Justice, Sandra Day O'Connor. The decade also gave us a revolution in the ideological predilections of Americans and the Supreme Court, now centering on a jurisprudence of crime control and engaged in a war on drugs. Embracing a "new conservatism" in response to the counterculture revolution of the 1960s and 1970s, the "Moral Majority" blamed permissiveness and welfarism of the 1960s for the deterioration of the country (Weiss, 2011 p. 90). Most legal and political critics blamed the Warren Court in significant part, arguing it was "too soft on crime" and its decisions were injurious to society because they limited the scope of <police power> (Merriman, 2011, p. 66). These critics lamented the substantial social cost of allowing criminals to go free, and they countered with a rhetoric of deterrence.

Two *Atlantic Monthly* articles in particular highlight the country's concerns at the time. The first, "Broken Windows: The Police and Neighborhood Safety," by Kelling and Wilson, appeared in March 1982. Kelling and Wilson (1982, p. 38) argued the "importance of maintaining, intact, communities without broken windows." Basically, the police have two major functions – fighting crime and maintaining order – and the latter stems from the belief that "if a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken" (Kelling & Wilson, 1983, p. 30).

This "Broken Windows" policy was not their own (the policy predates stop-and-frisk and tees up the practice nicely), but Kelling and Wilson (1982, pp. 32–35) used it to suggest that a vivid police presence, and deterrence practices more broadly, can impact and, ultimately, curb criminal activity. They argued that "serious street crime flourishes in areas in which disorderly behavior goes unchecked," so society "must return to our long-abandoned view that the police ought to protect communities as well as individuals" (pp. 33, 28). If police keep obstreperous people in check, it will prevent an increase in harmful or serious criminal activity. The emphasis on communities rather than individuals reflects a prioritizing of social costs over individual privacy protections running through interpretations of <police power> that eventually reach *David Floyd*.

The second influential *Atlantic Monthly* piece, "Thinking about Crime," more directly examines the question of deterrence. Wilson acknowledged the potential for deterrence efforts to have less of an impact than sociologists expect, but he nevertheless argues that "justice requires that we use [both deterrence and job-creation] because penalizing wrong conduct and rewarding good conduct are right polices in

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themselves" (Wilson, 1983, p. 88). For Wilson (1983, p. 72), the <police power> debate comes down to weighing "the costs and benefits of crime" because that supports an ideal policy. What's more, he noted that "experiments in deterrence have involved changes in police behavior rather than changes in the behavior of judges and prosecutors," and the consequence of changing police behavior seems "to indicate that the more focused and aggressive the police effort, the greater the chance it will make a difference" (Wilson, 1983, p. 79). As we have begun to see, similar language saturates the diachronic structures of <police power> in stop-and-frisk practices.

Of course, this conversation expanded far beyond the *Atlantic Monthly* at the time. These articles are only meant as representations of the rhetorical culture. Supporting the expansion or extension of <police power>, attention to crime control (and a resulting drug enforcement prerogative) can be seen in the other aspects of popular rhetorical culture as well. *Paste Magazine* describes the decade as "the coming of age period for TV crime dramas" (Jackson, 2014). Shows like *Magnum P.I.*, *Knight Rider*, *Miami Vice*, and *Hill Street Blues* topped the charts in the early 1980s, and even other popular shows seemingly unrelated to crime – such as *Cheers*, *The Facts of Life*, *Diff'rent Strokes*, and *Family Ties* – began systematically tackling the related issue of drug abuse, bringing these concerns to the forefront of the nation's cultural consciousness (Jackson, 2014). Concerns over rising crime rates and drug use pervaded American culture, and not without reason. The country was reeling in response to the fact that crime rates had increased sharply since the late 1960s, but "between 1980 and 1993 most FBI Index crimes declined and violent crime stabilized, while incarceration (especially Black) skyrocketed" (Weiss, 2011 n. 8).

This is perhaps because, as Erin Leigh Frymire (Chapter 11 in this volume) argues, in response to a perceived "alarming rise in the crime rate," President Reagan and his administration "shift[ed] the focus of representative legislation and criminal prosecution away from crimes of the powerful . . . to crimes of the powerless" (Weiss, 2011, p. 90). During his presidency, Reagan instructed the FBI "to resume aggressive domestic spying . . . [u]nder the rubric of fighting 'terrorism,'" marking that term part of the diachronic vocabulary of our ideograph (Greenberg, 2011, p. 43). Reagan initiated a responsive agenda that moved public policy sharply rightward, "diminishing legal rights, enhancing the authority of police and prosecutors, and creating an enormous penal state targeting young black and Latino offenders," and the administration created a firm foundation for mixing national security with criminal justice, further extending <police power> (Weiss, 2011, p. 89). But it was Reagan's War on Drugs that served as the "principal rationale for expanding state repressive apparatuses" like stop-and-frisk practices, declaring it a "national security objective" and calling for "greater militarization of crime control domestically" (Weiss, 2011, p. 89).

Rhetors often cite these <national security> concerns, or other similar ideographs, to sway the public toward a preoccupation with crime control. In *The Mark*

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of Criminality, McCann (2017, p. 6) suggested that these concerns stemmed from "discourses [that] almost always appealed to racialized fears associated with criminality," and this "shift in political rhetoric came in direct response to the growing strength and militancy of the civil rights movement." McCann (2017, p. 6) further explained, "As large social movements began to make major gains in the public square . . . many prominent political figures began crafting messages that framed law and order as a matter of great national concern, arguing that crime control must be a federal priority to calm the tumult of the period." Reagan's political rhetoric certainly hit this mark and served to significantly bolster <police power>.

On October 2, 1982, Reagan pronounced on the radio, "We've taken down the surrender flag and run up the battle flag . . . and we're going to win the war on drugs" (Reagan, 1982a). He outlined the impending confrontation twelve days later from the White House Rose Garden, saying "those of you engaged in law enforcement have struggled long and hard in what must often have seemed like a losing war against the menace of crime" (Reagan, 1982b). In that Rose Garden address, he called crime an "American epidemic," empowered the police, and noted that "[n]ine out of ten Americans believe that the courts in their home areas aren't tough enough on criminals, and cold statistics do demonstrate . . . the failure of our criminal justice system to adequately pursue, prosecute, and punish criminals" (Reagan, 1982b).

Incidentally, Regan's ideographic identifications in this address are persuasive. If your audience thinks "a certain kind of conduct is admirable, then [you] might persuade the audience by using ideas and images [or ideographs] that identify . . . with that kind of conduct" (Burke, 1950, p. 55). Pursuing, prosecuting, and punishing dangerous criminals is, of course, commendable. By citing a majority of Americans and referencing their homes, he further identifies with them, and by mentioning a war and an epidemic, Reagan established the division necessary for the ideographic identifications to influence changes in his audiences' beliefs about <police power>.[4]

New York City continued its fight against crime well into the 1990s. Police began to delineate certain factors or considerations for stop-and-frisk encounters. They learned the vocabulary, and it informed their actions. It even populated their official forms. One such term is <high crime area>, which carries with it varied denotations and connotations depending on where you are in the history of stop-and-frisk. Being in a <high crime area> is one factor that informed the Court's decision in *Whren v. United States* (1996) that a traffic violation (failing to use a turn signal and delaying to proceed at a stop sign) could justify a stop even where the officers conceded that they would not have made the stop outside suspicions of more "serious criminal activity" characteristic of the area in which the stop took place.

[4] See K. Burke's (1950) theory of identification and division. Moreover, division has long been considered a necessary part of discourse; the *Rhetorica Ad Herennium* ([Cicero], 1954, 1. 3) indicated it is "[b]y means of the *division* we make clear what matters are agreed upon."

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However, in *Illinois v. Wardlow* (2000), the Court distinguished the <high crime area> factor as insufficient alone to justify a stop; the Court attended to the individual and his purpose for fleeing, and in doing so Justice Stevens appeared to be identifying with changes in his own rhetorical culture's altering image of <police power>:

> Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. (*Illinois v. Wardlow*, 2000, p. 132)

Here, Stevens connected legal ideographs to beliefs presented in the wider popular and political culture.

Uses and interpretations of <police power> emerge out of these historical vocabularies. The related terms in the ideograph's vocabulary are many and complex; they offer a variety of perspectives on the meaning of <police power> and, ultimately, the application of stop-and-frisk law. Indeed, the historical vocabularies of <police power> are too rich and detailed to fully cover here. For our purposes, it is enough to demonstrate how the term has expanded and contracted since its roots in the Fourth Amendment and now shift our focus to the synchronic vocabularies of <police power> in *David Floyd*'s contemporary rhetorical culture. It is in this that we find the most immediate persuasive value – the *force* of the ideograph.

10.3 A VOCABULARY OF IDEOGRAPHS IN *DAVID FLOYD*

As early as 1999, the City of New York was put on notice that "stops and frisks were being conducted in a racially skewed manner," but until 2013, it seems that "[n]-othing was done in response" (*Floyd v. City of New York*, 2013, p. 560). What changed in 2013? *David Floyd* was decided within a rhetorical culture attentive to the potency and pervasiveness of <police power>. In 2013, we ushered in the "Year of the Selfie." It was a time of over-exposure and rapid increase in technological growth. American culture entered a new "age of surveillance," made even more apparent with the 2013 Snowden Leaks. Many scholars mark the country's true turn toward unrestrained governmental surveillance on September 11, 2001; and, indeed, many American citizens had come to expect unfettered government surveillance in the years after 9/11, when the federal government made very real strides in obtaining the legal right to "engage in covert and overt surveillance" of its citizens (Hawkes, 2007, p. 344). By 2013, many Americans had become so desensitized to surveillance that they largely gave up concern and freely posted intimate details about their lives on the internet. Of course, coming to expect, or worse to ignore, surveillance intrusions creates firmer vocabularies that slowly erode privacy rights and expand <police power>.

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This is what it had come to on the streets of New York City: overt <police power> and eroding personal liberties. The need for this surveillance can be traced back to the *war on drugs* and the *war on terror*, to a *jurisprudence of crime control* and its connection to <national security>. Overt surveillance expanded in more ways than just technologically. There was a rapid rise in stops-and-frisks in the first decade of the twenty-first century. In New York in particular, the police conducted over 4.4 million *Terry* stops between January 2004 and June 2012. Only 6 percent of those stops resulted in an arrest, and in only 10 percent of cases was the individual who was stopped white (*Floyd v. City of New York*, 2013, p. 559). In the decade or so before *David Floyd*, the NYPD significantly pressured officers to increase stop activity, the number jumping from approximately 97,000 in 2002 to approximately 686,000 in 2011 (*Floyd v. City of New York*, 2013, p. 590).

By 2013, police officers, once depicted as *crime fighters* in popular rhetorical culture, had increasingly exposed a tendency toward violence against Black and impoverished Americans. While much police work is service rather than fighting crime – offering assistance, negotiation, and peacekeeping – the image of "blue on Black" violence began to regularly appear in the synchronic structures of society, in the news and on the streets. So, rhetorical culture shifted further, resulting in changing narratives, vocabularies, and ideologies about <police power> and how stop-and-frisk practices were actually applied. People like Leroy Downs stood up to the existing structures and persisted toward changing them. The culture was ripe for a correction, and tensions were mounting.

<Justice> topped the list of social and political ideographs at the time, particularly in terms of *racial justice*. Recently, political science professor Juliet Hooker spoke on National Public Radio reflecting that in "the past 10 years, some of the moments where you see that the most amount of democratic energy and activity has been in movements for racial justice" (Baldwin, 2022). And she goes on, "These are the moments where you see ordinary citizens engaged in politics, trying to change policy, trying to address past wrongs." The collective social narrative concerning <police power> had certainly evolved.

This was the rhetorical culture of *David Floyd* – a strong specific example of which would be the Black Lives Matter (BLM) movement. BLM is committed to fighting racism, anti-Black violence, and police brutality. The vocabularies of BLM served to diminish societal beliefs about the necessity for broad <police power>. Most of that discourse appeared in the public sphere (though, as we will see, it made its way to the legal sphere in *David Floyd*). The BLM movement began in 2013 with the hashtag #BlackLivesMatter on social media after George Zimmerman was acquitted in the shooting death of Trayvon Martin, which occurred in February of 2012 (HUSL, 2023). The rhetorical culture pushed back hard against Florida's Stand Your Ground Law. Attorney Ben Crump described the public's swift reaction:

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> More than 3.5 million people signed a Change.org petition. Basketball superstar LeBron James and the entire Miami Heat team tweeted a picture of themselves wearing Trayvon-style hoodies printed with the words: "We are all Trayvon," which was retweeted more than 5 million times. Thousands of young people occupied New York's Times Square for the Million Hoodie Rally. In a White House speech President Obama said, "This could have been my son." Trayvon Martin's story was the number-one news story in the world in 2012. (Crump, 2019, pp. 57–58)

It would be difficult to overestimate the importance of BLM and the Trayvon Martin case in the synchronic vocabularies of *David Floyd*. As we will see, Trayvon's name is embossed on the pages of the opinion itself, as are the words of President Obama's now famous speech.

President Obama spoke from the White House Press Room on July 19, 2013, concerning Trayvon's case. *David Floyd* was decided less than a month later on August 12. The Obama presidency (2009–2017) surrounds Trayvon's (and *David Floyd*'s) rhetorical culture; the President had been sworn in for his second term earlier that year. In his speech, he describes "a woman clutching her purse nervously" when a Black man joins her on the elevator, remarking, "That happens often" (National Archives, 2013). This and other experiences inform how the Black community views Trayvon's case, he says, and that "community is also knowledgeable that there is a history of racial disparities in the application of our criminal laws" (National Archives, 2013). This community and the hearers of these words create and operate within the social, synchronic vocabularies of *David Floyd*. The sordid history that led to this moment, and the contemporary cries for change in interpreting <police power> reverberating within it – all are imprinted on the pages of *David Floyd*.

* * *

> New Yorkers are rightly proud of their city and seek to make it as safe as the largest city in America can be. New Yorkers also treasure their liberty. Countless individuals have come to New York in pursuit of that liberty. The goals of liberty and safety may be in tension, but they can coexist – indeed the Constitution mandates it. (*Floyd v. City of New York*, 2013, p. 556)

These four sentences introduce Judge Scheindlin's opinion in *David Floyd*, which held the city liable for Fourth Amendment and Fourteenth Amendment violations arising out of the police department's widespread discrimination practices in the use of stop-and-frisk. In just these four sentences, an ideographic analysis reveals both diachronic and synchronic structures connected to American rhetorical culture, creating a persuasive vocabulary used to evolve <police power> to stop-and-frisk in response to evolutions in the culture that surrounds it.

The ideograph <liberty> is ever evolving in response to its meaning in contrast to other terms, such as <safety>. These terms necessarily connect to specific

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identifications with New York residents: "New Yorkers" coming to the "city in pursuit of liberty" mandated under the Constitution, "New Yorkers" wishing to "coexist" in "the largest city in America," where "New Yorkers" are said to "treasure their liberty." Sheindlin highlights New York's history as a safe haven of <liberty>, long protected by the Constitution, and she connects with a vibrant contemporary rhetorical culture of New Yorkers who are proud of their city and their freedoms under that Constitution. Of course, those are just the first four sentences.

The remainder of the introduction distances the opinion from the historical emphasis on "fighting crime," mentioning the term just once throughout the entire case (*Floyd v. City of New York*, 2013, p. 557). And, in a subsequent paragraph, Scheindlin distances her opinion from the remnants of *Whren* and <high crime areas>, writing "[t]here is no basis for assuming that an innocent population share the same characteristics as the criminal suspect population in the same area" (p. 560). Scheindlin's initial privileging of <liberty> and distancing from vocabularies previously used to expand <police power> signals a shift in legal and cultural discourse surrounding stop-and-frisk jurisprudence. The remainder of the opinion does not disappoint that expectation.

Admittedly, the opinion becomes more persuasive with citation to legal precedent, which we have already seen to be riddled with ideographs. This is necessary to the practice of law. Others interrogating legal texts through an ideographic analysis similarly recognize that "when a significant change in the rhetorical culture occurs, the legal system … must adhere to old vocabularies that inadequately encompass new situations" (Hasian et al., 1996, pp. 326). For example, identifying with the historical goals of <police power> centered on deterrence, Scheindlin acknowledges that "police will deploy their resources to high crime areas," and that there are "benefits [to] communities where the need for policing is greatest" (*Floyd v. City of New York*, 2013, pp. 562–563). The legal precedent in *David Floyd* traces through the early vocabularies of <police power> and stop-and-frisk jurisprudence described previously. Beginning with the Fourth Amendment and working quickly through *Terry*, Scheindlin employs *Bostick*, *Warlow*, and *De Bour* to define stop-and-frisk law under the Fourth Amendment – just as we did before.

However, the notable synchronic interpretations of key terms in *David Floyd* significantly outnumber interpretations emphasizing their historical meanings. This is evident throughout Scheindlin's introduction, such as when discussing the "constitutionality of police behavior," referencing the Supreme Court's concern for "community resentment" and "personal security," espousing that "no one should live in fear," and when acknowledging the need for improvements in fostering a community that is less "distrustful of the police" (*Floyd v. City of New York*, 2013, pp. 556–557). This language indicates to the contemporary reader a clear connection with the surrounding rhetorical culture – where BLM has begun to take shape, after Trayvon's killer was set free, and there is a strong sentiment among many in the

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Black community that their children are not safe on the streets, not in spite of but because of <police power>.

While we read *David Floyd*, Scheindlin's antipathy for the stop-and-frisk practices of the NYPD becomes clear as she questions historical vocabularies that once supported expanding interpretations of <police power>. At times, she even seems incredulous. For example, when she remarks:

> One NYPD official has even suggested that it is permissible to stop racially defined groups just to instill fear in them that they are subject to being stopped at any time for any reason – in the hope that this fear will deter them from carrying guns in the streets. The goal of deterring crime is laudable, but this method of doing so is unconstitutional. (*Floyd v. City of New York*, 2013, p. 540)

At the time she is writing, the surrounding rhetorical culture is erupting with a similar incredulity that the law can be so devoid of racial <justice>. Scheindlin gives voice to these beliefs, and, by questioning deterrence practices that American rhetorical culture once praised, she creates a more persuasive demand for change.

The remainder of the case highlights many terms ("a vocabulary of ideographs"), including <liberty>, <high crime area>, and <furtive movements>. Stop-and-frisk opponents often home in on these terms in their critiques, noting the "ready vocabulary of rote platitudes that courts routinely accept as sufficient to show reasonable suspicion" (Gray, 2017, p. 279). These are the terms officers learned to incorporate into their vocabularies to bolster their authority to stop-and-frisk.

Some terms were even provided in a checklist on official forms, for example NYPD's Unified Form 250, which includes "furtive movements," "high crime area," "appropriate attire," and a "suspicious bulge" (Gray, 2017, p. 279). Officers need only check the correct term to justify their behavior. In *David Floyd*, Scheindlin posits that the number of NYPD stops from 2004 to 2012 that lacked reasonable suspicion is likely higher than 200,000 based upon that fact that "'furtive movements,' 'high crime area,' and 'suspicious bulge' are vague and subjective terms" (*Floyd v. City of New York*, 2013, p. 559). These terms, with elastic meanings, sometimes inhibit the clear articulation and implementation of the law, even if they also provide the law room to grow.

The trouble with <furtive movements> is particularly illustrative. <Furtive movements> can purportedly indicate criminal activity is afoot. While exemplifying inadequacies in NYPD training, Scheindlin describes one officer's testimony that "furtive movement is a very broad concept" (*Floyd v. City of New York*, 2013, p. 561). The ideographic nature of <furtive movements> is itself described in this portion of the opinion, as Scheindlin seems to question the law's commitment to this language. Language once customary and supportive of expanding <police power> to stop-and-frisk is viewed within the context of an evolving rhetorical culture and has lost nearly all meaning. According to officers, the term can include:

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> a person "changing direction," "walking in a certain way," "[a]cting a little suspicious," "making a movement that is not regular," being "very fidgety," "going in and out of his pocket," "going in and out of a location," "looking back and forth constantly," "looking over their shoulder," "adjusting their hip or their belt," … "hanging out in front of [a] building, sitting on the benches or something like that" and then making a "quick movement," such as "bending down and quickly standing back up," "going inside the lobby … and then quickly coming back out," or "all of a sudden becom[ing] very nervous, very aware." (*Floyd v. City of New York*, 2013, p. 561)

The unsettled meaning of the term perhaps explains why there is a disconnect in the NYPD's application of stop-and-frisk law and a need for evolution in the law; the vocabulary of <police power> seems to have expanded into obscurity. As Scheindlin bemoans, "it is no surprise that stops so rarely produce evidence of criminal activity" (*Floyd v. City of New York*, 2013, p. 561).

David Floyd further provides descriptions of <furtive movements> as vague, subjective, and potentially "affected by unconscious racial biases" (*Floyd v. City of New York*, 2013, p. 578). Similarly, the term "fits description" is found troubling because it can be used to describe a large part of the population, "such as black males between the ages of 18 and 24" (*Floyd v. City of New York*, 2013, p. 579). A <high crime area> is similarly problematic because it might include all of Queens or Staten Island, according to Scheindlin, who employs voices outside the legal community to help demonstrate unconscious biases, citing a research study in psychology, with "evidence that officers may be more likely to perceive a movement as indicative of criminality if the officer has been primed to look for signs that 'crime is afoot'" (*Floyd v. City of New York*, 2013, p. 581). Scheindlin's opinion systematically questions the vocabulary of <police power> to stop-and-frisk, highlighting inconsistencies between interpretations in American rhetorical culture and the law.

While discussing the notion that Black individuals are more suspicious looking somehow, Scheindlin makes more synchronic connections, quoting President Obama's personal experiences with stereotyping in his Trayvon Martin speech and Ekow Yankah's op-ed in the *New York Times* (*Floyd v. City of New York*, 2013, p. 587). The portion of Yankah's piece that Scheindlin chooses to include reads in part: "Mr. Martin's hoodie struck the deepest chord because we know that daring to wear jeans and a hooded sweatshirt too often means that the police or other citizens are judged to be reasonable in fearing you" (*Floyd v. City of New York*, 2013, p. 588). The image of "Mr. Martin's hoodie," which takes on its own ideographic nature, embosses a rich rhetorical identification within the opinion, and the pejorative use of "reasonable" demonstrates a clear shift in the term's typical connotation in legal discourse. Ultimately, this language transforms stop-and-frisk practices, reflecting a shift in the surrounding rhetorical culture's beliefs about <police power> and demonstrating the power of the ideograph at work.

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The opinion closes with a final cultural reference: Charles Blow's article, "The Whole System Failed Trayvon Martin," from the *New York Times*. Blow writes: "The idea of universal suspicion without individual evidence … is pervasive in policing policies … regardless of the collateral damage done to the majority of innocents. It's like burning down a house to rid it of mice" (*Floyd v. City of New York*, 2013, p. 667). Employing this cultural language bolsters the opinion's persistent questioning and condemning of pervasive <police power>. The vocabulary of ideographs and related language use in *David Floyd* results in a transformation in how our legal system applies a lengthy and complex legal history surrounding stop-and-frisk practices. But the opinion reveals more than changes in the law; it reflects changes in the surrounding rhetorical culture. Turning the last page of the opinion feels something like walking on fresh-cut grass. The world is familiar and changed all the same. After cursorily mapping the ideographic structures, we are left with the sense that some ideographs – <police power>, <liberty>, <justice> – are forever changed with the inclusion of *David Floyd* in the textual archive of our rhetorical culture.

Yet, even with *David Floyd* now in rearview, some would argue that "stop and frisk programs leave citizens more vulnerable to police than to criminals" even today (Gray, 2017, p. 277). Undoubtedly, *David Floyd*'s vocabulary of ideographs responds to changes in the surrounding rhetorical culture. The introduction of stop-and-frisk practices and expanding <police power> once intimated increased protections and security for the public in efforts to curb crime and wage war on drugs. Years later, just as *David Floyd* came before the court, there had been profound shifts in American rhetorical culture, where people began to truly question the costs of these practices – costs related to terms with fluctuating meanings: ideographs, such as <liberty>, <privacy>, and <police power>.

The concerns of the rhetorical culture transformed as the evolving vocabulary of ideographs informed cultural beliefs and behaviors, and so the law's discursive identifications with that rhetorical culture adjusted to align. The plaintiffs in *David Floyd* did not oppose the constitutionality of the NYPD's stop-and-frisk law as a tool. Rather, they opposed inflexible interpretations of <police power> and the constitutionality of how the tool is used by the NYPD. Judge Scheindlin's opinion adjusts and aligns the law in this landmark stop-and-frisk case, but perhaps that is not enough, and the tool (stopping and frisking) itself is unreasonable.

10.4 CONCLUSION

In the end, the law, like any other discourse object, is constantly in a state of flux. Legal ideographs ebb and flow with meaning, just as their cultural counterparts do. In *David Floyd*, the pendulum of stop-and-frisk swings away from <police power> and toward personal <liberty>. Although the data may still be underreported (Center for Constitutional Rights, 2020), the NYPD recorded just 8,947 stops

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(61 percent innocent, 10 percent white) in 2021 compared with 532,911 (89 percent innocent, 8 percent white) in 2013 (New York Civil Liberties Union, 2023). Despite a reverberation of racial <justice> running vibrantly through American rhetorical culture, "the hard truth is that under Fourth Amendment law, Black life is [still] undervalued" (Carbado, 2022, p. 20). Notwithstanding, the reduction in stops is significant. *David Floyd* offers hope, but discursive and cultural changes can nudge the pendulum stealthily backward. When people identify with repeated calls for <public safety> and <national security>, they begin to form warranted beliefs about <police power>; they are more easily persuaded to limit the scope of <liberty>, for example, in the name of <necessity> (Hasian, 2012). This is the delicate, powerful, and essential tension imbedded in the Fourth Amendment.

Ideographic analysis illuminates embedded tensions in any rhetorical situation. When we extend beyond that analysis and begin to deploy ideographs ourselves, we no longer merely *see*, we *do*; we generate productive tensions rather than simply highlight them. Ideographic analysis would be particularly useful in legal writing education and for the professional legal practitioner, whose purpose is to persuade by identifying long-standing precedent (a diachronic analysis) and arguing for change in a present circumstance.[5] Knowledge of contemporary social commitments to evolutions in legal discourse, coupled with a rich understanding of the history of their use, results in the most effective advocate.

Of course, advocacy extends well beyond the courthouse. Ideographs in the public sphere, in community writing, and, as we saw with BLM, on social media platforms are perhaps the most apparent in terms of changing social beliefs. Employing ideographs in these contexts could significantly change the landscape of American rhetorical culture. What's more, ideographic analysis provides similar benefits in the private sphere. A term (e.g., <family>) may take on an elastic meaning within a personal relationship. Describing the ideograph diachronically and synchronically would show whether extending or limiting the term's use is likely to create a collective commitment within that relationship.

McGee understood the ideograph's present importance. He saw that "even a complete [historical] description … leaves little but an exhaustive lexicon understood etymologically and diachronically – and no ideally precise explanation of how ideographs function *presently*" (McGee, 1980, p. 12). After all, persuasion is kairotic – it is fit for a particular occasion, aimed at an opportune and decisive moment rather than for just any general context. While the most effective rhetor will not ignore the historical lexicon of ideographic uses, they must understand the present function of

[5] I am not the first to promote ideographic analysis in educational and professional capacities. Sinsheimer (2005) models an ideographic analysis that would develop a lawyer's critical thinking skills and develop legal writing skills.

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ideographs to employ them persuasively. Here, we recognize ideographs as *forces*, because they move us to act, rather than as merely tools for analysis.

McGee's process provides a theoretical framework for describing and explaining material and symbolic environments, as well as their latent rhetorical tensions. He efficaciously crafted this framework, as evident in spans of ideographic analyses following the publication of his piece. Still, we can do more with ideographs than analyze and explain. Mapping ideographs provides a lens of awareness, but also an educational tool, a pattern for persuasion, and perhaps even an apparatus for change. The value of attending to evolutions in a vocabulary of ideographs expands beyond mere academic musings on the intersections of law and rhetoric across time (although that can be diverting). People identify with this vocabulary in such a way that it influences what they think and how they act. That's powerful in any situation. Yet, despite several decades of ideographic inquiry, many simply gloss over the ideograph's potency in favor of the <safety> of analysis. Perhaps it is time to recirculate the argument that ideographs are *forces* of social commitment, conflict, and control.

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