Legal Communication & Rhetoric: JALWD

Fall 2018 / Volume 15

ARTICLES & ESSAYS

Standing (Near)by Things Decided: The Rhetorical and Cultural Identifications of Law

Lindsay Head

ARTICLE

Standing (Near)by Things Decided

The Rhetorical and Cultural Identifications of Law

Lindsay Head*

I. Introduction

On August 22, 2009, officers stopped David Leon Riley because the tags on his vehicle had expired.[1] After learning of Riley's suspended license and preparing to impound the vehicle, the officers discovered two loaded weapons and arrested Riley for unlawfully possessing the firearms. Incident to the arrest, the officers found Riley's cell phone in his pocket and proceeded to search through its contents. They noticed that some of the names in the contacts or on text messages began with the letters "CK" and took this to indicate gang affiliation. Two hours later, another detective more thoroughly searched the cell phone's contents and, based on photographs stored there, the State of California conducted further investigations, ultimately convicting Riley of firing at an occupied vehicle, assault with a semiautomatic firearm, and attempted murder; he was sentenced to fifteen years to life in prison.

Fifteen-to-life seems like quite a leap from expired tags and concealed weapons. But if we begin this story just twenty days earlier, when Riley, and other members of San Diego's Lincoln Park gang, noticed the vehicle of a rival gang approaching them and blatantly and unashamedly opened fire upon it as it drove by, we would likely find some support for his conviction and sentence. After all, he committed a crime, and the "rule of law" is predicated in "justice," meaning that—at some very basic level for most Americans—criminals should have to pay for the crimes they

* Instructor of Writing and Rhetoric, Florida International University.

1 These and the general facts that follow stem from the case of *Riley v. California*. 573 U.S. ___, 134 S. Ct. 2473 (2014).

2 Boyd v. United States, 116 U.S. 616, 630 (1886).

commit. Many would argue that "justice" demands that Riley not be allowed to get away with this crime and, more fundamentally, not be allowed to roam the streets, disturbing the peace and endangering the public at large.

But, in fact, when we think about protecting the public, at least if we ascribe to the American ideal that we are "endowed by [our] Creator with certain unalienable Rights," including the "right to privacy," or the right to be free from unreasonable intrusions into "the privacies of life,"[2] we know that this case has very little to do with David Leon Riley. From this vantage point, it makes little difference whether Riley was guilty or a gang affiliate, to say nothing of the race and class implications potentially underlying his arrest. In fact, it makes no difference at all whether Riley is a "good guy" in this story because "when the rights and freedoms of the worst among us are respected, then, too, the rights and freedoms of the best will also be observed."[3] Or, as Ira Glasser, an executive director of the ACLU once remarked, "Our fundamental civil rights often depend on defending some scuzzball you don't like."[4] Indeed, if there is any intent to uphold the integrity of the Constitution, many would say—and on June 25, 2014, the Supreme Court agreed—that this case is not about that scuzzball.

Rather, this case is about the Fourth Amendment and how our constitutional "right to privacy" is interpreted and reshaped to account for cultural changes in the United States and the ubiquitous presence of technology in our daily lives. The Fourth 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.[5]

This single sentence, which was first crafted through a burgeoning American culture, becomes increasingly significant over time, particularly with technological growth that affords ever-evolving opportunities for governmental intrusion and surveillance. In fact, the Supreme Court of the United States perpetually redefines important aspects of our privacy rights while interpreting an amendment drafted over two hundred years ago, long before many of these technologies left the realm of science

3 ADAM CARLYLE BRECKENRIDGE, THE RIGHT TO PRIVACY 130 (1970).

4 Tamar Lewin, *ACLU Boasts Wide Portfolio of Cases, but Conservatives See Partnership*, N.Y. TIMES, Oct. 2, 1988, at 24, *quoted in* JOHN DURHAM PETERS, COURTING THE ABYSS: FREE SPEECH AND THE LIBERAL TRADITION 6 (2005).

5 U.S. CONST. amend. IV.

fiction or were even conceived. Yet, the "right to privacy" does not even appear in the language of the Fourth Amendment. In fact, to the great surprise of many Americans, the "right to privacy" never even appears in the Constitution. Instead, the right has been extrapolated from the Constitution and from beliefs deeply rooted in American rhetorical culture.[6]

Lawyers and other legal professionals should not resist the sort of rhetorical and cultural analyses that expose these cultural roots. Although we know that "law and rhetoric have a common cultural and historical heritage," [7] we tend to look to seemingly finite paradigms (rules and precedents that purport to offer applicable standards) to understand and interpret the law—and for some very good reasons. Still, legal constructions like the "right to privacy" are first culturally made. Law, in fact, is first culturally and discursively derived, and while we often tend to overlook this fact, attention to the entanglements of legal discourse and rhetorical culture can equip the legal practitioner and scholar to better interpret, predict, and argue about the law. This sort of analysis is, of course, the subject of much rhetorical theory and criticism.

I am not the first to ask, "What does the field of rhetoric have to offer those who do law?"[8] The full answer to that question constitutes another project entirely, if not a lifetime of projects, but one of the goals of this piece is to shed light on a small part of the answer. For those who prefer the wide angle, Justice Stephen Breyer might offer an answer to the broader question. He writes, "Serious complex legal change is often made in the context of a national conversation . . . ."[9] Put another way, the law is first defended, abolished, or transformed, not by the legislator or the judiciary, but by cultural discourse. In her 2004 memoir, former Justice Sandra Day O'Connor agrees: "[T]he Constitution," she writes, "is interpreted first and last by people other than judges."[10] She goes on to describe the relationship between the public and the Supreme Court as "more of a

6 The concept of "rhetorical culture" derives from several works by Marouf Hasian Jr., Celeste Michelle Condit, and John Louis Lucaites, and is further unpacked later in this essay. It refers to the collection of discrete discourse communities—identifiable groups and subgroups characterized, in part, by the way in which they communicate among themselves and with others—that use language to address, identify, and situate themselves within the larger public sphere.

7 Kurt M. Saunders, *Law as Rhetoric, Rhetoric as Argument*, 44 J. LEGAL EDUC. 566, 566 (1994).

8 This journal, in fact, has housed many such inquiries before. *E.g.*, Melissa H. Weresh, *Morality, Trust, and Illusion: Ethos as Relationship*, 9 LEGAL COMM. & RHETORIC: JALWD 229 (2012) (discussing aspects of persuasive rhetorical appeals related to ethos). Moreover, legal rhetoricians (lawyer and nonlawyer alike) often consider this question to be the very seat of their scholarship. I recently spent an invigorating collection of days dedicated to this question with a handful of legal rhetoricians at the Rhetoric Society of America's 2017 Summer Institute in Bloomington, Indiana.

9 STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 70 (2005).

10 SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 41 (Craig Joyce ed., 2003).

dialogue than a series of commands."[11] In fact, the law is first upended, upheld, or uprooted in our minds—and in our homes, our academic journals, the media, and other institutions. On the other hand, Marianne Constable describes law as "too discursive to leave to social scientists who have only limited use for language."[12] It is essential to the project of legal rhetoric to inquire into the language of those conversations, particularly ones with such a strong capacity to *move*. ("Move" here indicates the rhetoricity or affectability of language, particularly that of contested terms. The 'right to privacy' *moves* individual subjects by altering their existence, by categorizing and defining them (and the parameters of their privacy rights) and by imagining and correcting them (or suggesting when and where their privacy expectations are reasonable or not). When contested terms, or ideographs, affect us by producing something in, for, or about us, they *move* us rhetorically.)

And, whether we recognize it or not, we are all already doing law and rhetoric—we are already a part of the ongoing conversation that determines and describes the boundaries of law. We are already interrogating the rhetorical strategies of judges, clients, and other legal practitioners while engaging in the practice of law. We produce and ask questions about spaces of legal discourse every single day. Finally, being attentive to the power to effectuate legal, political, and social change through discourse has long been the calling of rhetoricians and lawyers alike, which ought to be reason enough to bracket distinctions between the two.

In this essay, I argue for greater attention to the many ways in which rhetoric affords legal practitioners and scholars the ability to critically engage legal texts and analyze their relationship to the rhetorical culture from which those texts emerge. Using the Fourth Amendment "right to privacy" as fodder, I outline two theories in particular—Michael Calvin McGee's ideographic approach and Kenneth Burke's theory of identification—to show how rhetorical methods can provide professionals engaged in the many facets of lawyering a way of seeing the law and its rhetorical constructs anew, through a lens capable of revealing the intricate liaison between law and culture so often overlooked by those so deeply and discursively entrenched in both.

Consequently, what follows can first be described as an endeavor in legal rhetoric, outlining the parameters for a rhetorical inquiry into the Fourth Amendment's "right to privacy" and considering, among other things, the "reasonableness" of its expectation in American rhetorical

11 *Id*. at 44.

12 Marianne Constable, *On Not Leaving Law to the Lawyers*, *in* LAW IN THE LIBERAL ARTS 69, 81 (Austin Sarat ed., 2004).

culture. I will unearth along the way some of the vertical and horizontal structures[13] of our "right to privacy" and uncover the utility in this approach. This analysis further reveals a pattern of dual identifications where these structures manifest in written opinions through citation to precedent as well as through legal dicta. In the first, the Court identifies with a People or public of the past—including the Framers, as judges often say—along with prior iterations of the "right to privacy" in the law. In the second, the Court identifies with its contemporary American rhetorical culture—a public and a discourse surrounding this "right to privacy" at the time the opinion is written.

How the "right to privacy" has been treated rhetorically permits inquiry into what appears to be the steady erosion of the discursive and material spaces in which one may reasonably expect privacy, particularly in the face of technological innovation. Simultaneously, it encourages a critique of who, precisely and increasingly, is afforded this expectation, understanding that "reasonableness" is always already[14] raced and gendered. In other words, examining "right to privacy" in this way highlights the critical role of legal discourse—and members of the legal discourse community—in the rhetorical management of subjects. The rhetorical methods and theories suggested and applied here are, however, applicable across a vast range of legal and social constructs; privacy is just one of the many dusty roads down which we might trot accompanied by rhetorical theorists. As the pages turn, I hope my reader will keep in mind that rhetoricians are uniquely positioned to investigate and interpret legal discourse and communication because of rhetoric's profound investment in—and the law's inescapable entanglement with—culture. Below, I outline just some of the critical rhetorical frameworks that illuminate how and why this is so.

II. An Ideographic Analysis of a Polysemic Rhetorical Construct

In 1980, Michael Calvin McGee promoted the idea that "ideology in practice is a political language, preserved in rhetorical documents, with the capacity to dictate decision and control public belief and behavior." What's more, this political language of ideology "seems characterized

13 Vertical structures refer generally to historical uses of a term—how it is employed throughout time. Horizontal structures refer to contemporary uses of a term—how it is employed across cultures today.

14 The adverbial construction "always already" (or "always-already") has a rich history in literary and philosophical discourse. In this context, it suggests a state of being that is in process and discoverable. For example, Louis Althusser maintained that "an individual is always-already a subject, even before he is born" because "it is certain in advance that it will bear its Father's Name, and will therefore have an identity and be irreplaceable." LOUIS ALTHUSSER, LENIN AND PHILOSOPHY AND OTHER ESSAYS 164 (Ben Brewster transl., 1971).

by. . . a vocabulary of 'ideographs.'"[15] Ideographs are terms that have disputable meanings depending upon how they are rhetorically situated. Their meanings are determined in relation to the history of their usage and in their relationship to other ideographs and the surrounding rhetorical culture. Ideographs are more than just words; they are contested terms—terms that vary in meaning depending upon how they are rooted and situated. Take the term, "marriage." The meaning of "marriage" is based in part upon its historical constructs and uses (its vertical structures) and partly based upon its contemporary constructs and uses (horizontal structures). While "marriage" was once (vertically) described as "between a man and a woman," and this meaning remains in use, the term's meaning has evolved in response to cultural change. The term is contested because its meaning is contestable. What's more, the meaning of "marriage" shifts even further when we examine its use in cultures outside the United States; wherever you may go, the meaning of the term shifts in response to its historical and actual, present use. McGee provides other examples of ideographs, such as "'property,' 'religion,' '*right of privacy*,' 'freedom of speech,' 'rule of law,' and 'liberty,'" which are "more pregnant than propositions ever could be."[16] McGee calls ideographs both "the building blocks[] of ideology" and "one-term sums of an orientation."[17] Both of these denotations will prove quite useful in unpacking the concept of the ideograph, and, as a result, I use each signification as a point of departure below, before delving into the notion of rhetorical culture and briefly assessing the value in this approach.

A. "Building Blocks of Ideology"

As a building block of ideology, the ideograph manifests as a link between ideology and rhetoric. We "behave and think differently" when we are in collectivity with others.[18] When contested terms, or ideographs, are deployed through collective discourse by the masses, they seem to reveal a mass consciousness and a system of beliefs. In other words, when an ideograph becomes common in society, it reveals to us what "we" as a collective public believe about that term and its role in the surrounding culture. When we say that we have a "right to privacy" when it comes to our cell phones, we demonstrate an ideology. Similarly, if we say, we do not have a "right to privacy" when it comes to information exposed to third-party vendors online, we, again, demonstrate an ideology. These examples

15 Michael Calvin McGee, *The "Ideograph": A Link Between Rhetoric and Ideology*, 66 Q. J. SPEECH 1, 5 (1980).

16 *Id.* at 6–7 (emphasis added).

17 *Id.* at 7.

18 *Id.* at 2.

expose our belief systems as they relate to our privacy rights. Whether these ideologies reflect a mass consciousness can be determined by examining how we use these contested terms—how we use ideographs. McGee maintains that "[i]f a mass consciousness exists at all, it must be empirically 'present,' itself a thing obvious to those who participate in it, or, at least, empirically manifested in the language which communicates it."[19] This emphasis on language as a sort of container for mass consciousness leads us, of course, to his exposition of the ideograph.

Within this exposition, McGee identifies a "rhetoric of control" or "a system of persuasion presumed to be effective on the whole community."[20] We are "'conditioned,' not directly to belief and behavior, but to a vocabulary of concepts that function as guides, warrants, reasons, or excuses for behavior and belief," so when a claim is warranted by a term, say the "reasonable expectation of privacy," we can presume that "human beings will react predictably and automatically."[21] If my "right to privacy" does not extend to my internet browsing history because I have no "reasonable expectation of privacy" online, then you can expect that I will not object when I find specific advertisements related to my search history periodically popping up on my computer's screen. Uncovering ideographs presently at work in American rhetorical culture would allow us, then, to predict shifts in the beliefs and behaviors of the public, which manifest in legal discourse through the identification patterns discussed below. Moreover, the impact is bidirectional. When we make a rhetoric of "reasonableness," for instance, to persuade the whole community as to what limits a "right to privacy" in the law, we often "forget that it is a rhetoric," and regard those who disagree as misguided or "unpatriotic."[22] We might find this persuasive effect when, for instance, our "right to privacy" is juxtaposed with "national security" interests. Indeed, when deployed by certain legal-discourse communities, the public is "[not] permitted to question the fundamental logic of ideographs," for "[e]veryone is conditioned to think of 'the rule of law' as a *logical* commitment."[23] The ideograph reveals the ways in which discourse regulates and governs society both inside and outside of legal contexts. As we consider the "right to privacy" under the Fourth Amendment ideographically and investigate its capacity to *move* and rhetorically manage subjects, we see this "rhetoric of control" reverberating.

19 *Id.* at 4.

20 *Id.* at 6 (emphasis omitted).

21 *Id.*

22 *Id.*

23 *Id.* at 7.

B. "One-term Sums of an Orientation"

As one-term sums of an orientation, ideographs relay a complex assembly of alignments, which expose "interpenetrating systems or 'structures' of public motives."[24] The structures are revealed in vertical and horizontal patterns of social or political consciousness which, as we have already seen, "have the capacity both to control 'power' and to influence (if not determine) the shape and texture of each individual's 'reality.'"[25] The vertical and horizontal structures reach back into history and out into the surrounding rhetorical culture. So, in reference to our "right to privacy," a vertical analysis might reveal the origins of the Castle Doctrine in *De Domo Sua*.[26] Or it might bring us to James Otis' now famous argument before the Massachusetts court in 1761 when, representing the interests of businessmen who wanted to limit the broad authority of the Crown to search private dwellings, he passionately argued in part: "A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle."[27] Along the way, we would be certain to find *The Right to Privacy* by Louis Brandeis and Samuel Warren,[28] which some consider "the most influential article ever published" in identifying privacy as a right.[29] And, of course, we have mountains of precedent in the law to consider as part of this vertical structure, as well.

Still, the more noteworthy account of vertical structures can be found "in what might be called 'popular' history."[30] Popular history includes the sort of texts we find in popular culture: songs, films, plays, and novels, in addition to "grammar school history," which can be described as "the truly influential manifestation."[31] These are the ideas that have been relayed to us through language since childhood. They have become so entrenched in

24 *Id.* at 5.

25 *Id.*

26 MARCUS TULLIUS CICERO, *De Domo Sua* xlii, 109, *in* THE SPEECHES OF CICERO 132, 263 (E. Capps, T.E. Page & W.H.D. Rouse eds., N.H. Watts trans., 1923) ("What is more sacred, what more inviolably hedged about by every kind of sanctity, than the home of every individual citizen?").

27 NAT'L HUMANITIES INST., *James Otis: Against Writs of Assistance (Feb. 1761)*, THE CENTER FOR CONSTITUTIONAL STUDIES: SOURCE DOCUMENTS (1998), http://www.nhinet.org/ccs/docs.htm. Otis lost this day in court, and the writs were renewed. Still, the heart of his argument lives on today. John Adams, who was present in court that day, would later mark this speech as the beginning of the Revolution, writing to William Tudor in 1817, "American Independence was then and there born." WILLIAM TUDOR, LIFE OF JAMES OTIS, OF MASSACHUSETTS (1823); *see also* M.H. SMITH, THE WRITS OF ASSISTANCE CASE 253 (1978) (describing correspondence from John Adams to William Tudor). And according to most, so, too, was the Fourth Amendment.

28 *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). While this article concerns itself more with an individual's "right to privacy" in the domestic sphere, particularly from intrusions by the media and private individuals, it also reinforced the "right to privacy" as extolled by the Fourth Amendment.

29 BRECKENRIDGE, *supra* note 3, at 132.

30 McGee, *supra* note 15, at 11.

31 *Id.*

our vocabulary that they seem to depict only reality. Therefore, an ideographic inquiry into the Supreme Court decision in the case of David Leon Riley, for example, would necessarily entail viewing more than just Chief Justice Roberts' past and contemporary uses of the "right to privacy," looking also to popular history and recording the vertical structures of the contested terms found there as well.

The horizontal structures are just as many and, perhaps, even more complex than their vertical counterparts. McGee insists that "[b]oth of these structures must be understood and described before one can claim to have constructed a theoretically precise explanation of a society's ideology,"[32] and, consequently, a full ideographic analysis in our "right to privacy" example would take up an exploration of both the vertical and horizontal structures of that term as well as related terms, examining, for instance, among other contested notions, what has come to be understood as the "reasonable expectation of privacy" in Fourth Amendment jurisprudence. After we have examined both the historical and contemporary uses of the "right to privacy" and other related ideographs, we can better predict and describe when and where individuals and society as a whole—including both our courts and our clients—will reasonably expect privacy.

The horizontal analysis is essential because the vertical structure of the ideograph offers "no ideally precise explanation of how ideographs function *presently.*"[33] Rather, McGee identifies the horizontal structure of ideographs as necessary to account for their present function. We need both structures in order to fully understand the role the ideograph plays in forming beliefs and carrying those beliefs forward through society today, but the horizontal structure offers the most in terms of potential to predict contemporary interpretations of the law—a benefit for the legal practitioner who is in the business of evaluating how the law might evolve in the face of cultural and societal change. If we attend to how these contested terms presently function in society, as well as how they have evolved from their historical functions, we can begin to imagine how clients, judges, and other lawyers will interpret them in the future. According to McGee, some "structural changes in the relative standing of an ideograph are 'horizontal' because of the presumed consonance of an ideology . . . . But when we engage ideological argument, [causing] ideographs to *do work* in explaining, justifying, or guiding policy in specific situations, the relationship of ideographs changes."[34] This is often the case when we apply

32 *Id.* at 14.

33 *Id.* at 12.

34 *Id.* at 13.

this method in analyzing Supreme Court opinions in particular. Through identification, or the highlighting of a shared substance ("consubstantiality") with the surrounding rhetorical culture, the Court calls upon the ideograph to explain or justify the decision, changing its relationship, its horizontal structure, and, ultimately, the law. As, under this view, an ideograph is "always understood in its relation to another,"[35] our "right to privacy" example necessarily proceeds by inquiring into the ideographs that operate in relation to that term. These would include terms like "freedom" and "liberty" more generally, as well as specific or discrete terms like "reasonable expectation" or the "good faith" exception.

While the term "right to privacy" is certainly pregnant with meaning and constructed in relation to popular history, some ideographs are not likely to be found there. Rather, they are constructed within a specific community or discourse environment. Some scholars more closely consider ideographs in discrete discourse communities[36]—spaces that may be specific to certain environments, isolated locales, marginalized groups and identities, or highly individualized institutions, for instance, the Law. The discrete ideograph has the potential to, in turn, reveal formations constitutive of society and authority within that discrete community. The "reasonable expectation of privacy" emerging out of Fourth Amendment jurisprudence is an example of a discrete ideograph, and its relationship to the popular ideograph, "right to privacy," is rich with potential. Specific to the legal community, this discrete ideograph has vertical and horizontal structured relations, but they are mostly found within the law and not necessarily in popular history. Still the law can never break free from culture, so our analysis must consider the "reasonable expectation of privacy" as tangentially related to the popular ideograph—the "right to privacy" found in the layperson's general understanding of the term. That is, the "reasonable expectation of privacy," though a discrete ideograph, is structured horizontally in relation to the "right to privacy" as understood popularly and culturally. What's more, it emerged out of discourse within the legal community surrounding the "right to privacy," so interrogating the "reasonable expectation of privacy," along with similarly structured ideographs, such as a "good faith" exception and a "reasonable suspicion" standard, would constitute a vital current in any study of the "right to privacy" under the Fourth Amendment.

Contemporary discussions of other ideographs promise a potential to deepen this study as well. Apart from obvious connections to the

35 *Id.* at 14.

36 *E.g.,* Fernando Pedro Delgado, *Chicano Movement Rhetoric: An Ideographic Interpretation*, 43 COMM. Q. 446 (1995).

underlying terms "reasonable" and "privacy," we see the "right to privacy" connected to notions like "property," "beneficially," "the rule of law," "national security," and even "foreign influence." McGee sparked a litany of ideographic analyses since he published his work on ideographs nearly forty years ago. Consider Marouf Hasian's description of how "the 'elastic' nature of the concept of 'necessity' means the term 'can be stretched to include many things that aren't really necessary.'"[37] The relationship between ideographs, then, can be viewed as consubstantial with their production. When lawyers and judges start to see legal constructs ideographically, they uncover these structures and their capacity to effectuate changes in the law. We begin to see that the law is, in fact, culturally derived.

C. What is Rhetorical Culture? And Why Ideographs?

The vertical and the horizontal structures inherently link ideographs to rhetorical culture.[38] In fact, the connections between culture and law rest at the base of many rhetorical interventions similar to my own. James Boyd White, for instance, sees law "as a set of literary practices that at once create new possibilities for meaning and action in life and constitute human communities in distinctive ways."[39] As such, law constructs part of the vocabulary of a rhetorical culture. Celeste Michelle Condit and John Louis Lucaites, whose text influences Hasian's work as well, explain the concept of "rhetorical culture" in this way:

> By rhetorical culture we mean to draw attention to the range of linguistic usages available to . . . a group of potentially disparate individuals and subgroups who share a common interest in their collective life. In this rhetorical culture we find the full complement of commonly used allusions, aphorisms, characterizations, ideographs, images, metaphors, myths, narratives, and *topoi* or common argumentative forms that demarcate the symbolic boundaries within which public advocates find themselves constrained to operate.[40]

37 Marouf Hasian Jr., In the Name of Necessity: Military Tribunals and the Loss of American Civil Liberties 5 (2005) (footnote omitted). Hasian's project is similar to our example in that we can see our "right to privacy" under the Fourth Amendment as similarly "elastic." We might ask if, while the ideograph once stretched to include a wider scope, it has since contracted to account for, among other things, the "necessity" Hasian interrogates in his generative analysis.

38 McGee says that ideographs "are bound within the culture which they define," McGee, *supra* note 15, at 9, and he sets ideographs apart from "'Ultimate' or 'God' terms" because of ideographs' attention to "the social, rather than rational or ethical, functions of a particular vocabulary," *id.* at 8.

39 James Boyd White, Heracles' Bow: Essays on the Rhetoric and Poetics of the Law 107 (1985).

40 Celeste Michelle Condit & John Louis Lucaites, Crafting Equality: America's Anglo-African Word xii (1993).

In a later publication, Hasian, Condit, and Lucaites together offer something more succinct: "By 'rhetorical culture' we mean to draw attention to the range of linguistic usages available to those who would address a historically particular audience as a public."[41] They further maintain that "the law exists as part of an evolving rhetorical culture"[42] and argue that significant changes in the rhetorical culture indicate that the legal system "must adhere to old vocabularies that inadequately encompass new situations."[43] This results in a sort of tension that is ultimately quite generative. David Zarefesky describes this tension as "productive," writing that "[s]ustaining these general tensions while reaching conclusions about specific matters enables culture to change while remaining cohesive."[44] This is the function or *work* of the ideograph. It holds fast to our roots while simultaneously clearing the way for evolution. Indeed, Hasian, Condit, and Lucaites find this tension to be productive as well, suggesting that it results in "the older, technical/legal vocabulary, [being] adapted simultaneously . . . to the new public vocabulary, and to the new rhetorical culture."[45] When we study the interaction between new and old vocabularies, we study the process of, and subsequent response to, cultural change; this, of course, remains true in legal-discourse environments. An ideographic inquiry not only reveals changes in the surrounding culture, but also in the predispositions of courts.

Ideographs "have either positive or negative valence, and they . . . gain their rhetoricity[46] when they are used with other political units in concrete situations."[47] For example, ideographs gain their rhetoricity—their affectability and capacity to *move*—when used discursively to determine a specific rule of law. As a consequence of a societal structure where the "rule of law" is developed by and through rhetorical culture, "any interest group dissatisfied with the public arrangement may work to change either the legal system or the rhetorical culture in which it

41 Marouf Hasian Jr., Celeste Michelle Condit & John Louis Lucaites, *The Rhetorical Boundaries of "the Law": A Consideration of the Rhetorical Culture of Legal Practice and the Case of the "Separate But Equal" Doctrine*, 82 Q. J. SPEECH 323, 326 (1996).

42 *Id.*

43 *Id.* at 336.

44 David Zarefsky, *Reflections on Making the Case*, *in* MAKING THE CASE: ADVOCACY AND JUDGMENT IN PUBLIC ARGUMENT 1, 13 (Kathryn M. Olson, Michael William Pfau, Benjamin Ponder & Kirt H. Wilson eds., 2012).

45 Hasian Jr. et al., *supra* note 41, at 336.

46 Given the proximity of this term to the word "valence" in Hasian's text, I take Hasian to mean something akin to affectability, or Diane Davis's notion of rhetoricity, which emphasizes the web of relations that create the conditions of affectability or state of persuasion. *See* Eric Detweiler, Rhetoricity: What Isn't Rhetoricity? (podcast Mar. 17, 2015), http://rhetoricity.libsyn.com/what-isnt-rhetoricity (transcript on file with author).

47 HASIAN JR., *supra* note 37, at 13.

operates."[48] The legal community is even better equipped to effectuate such a change. Being afforded the opportunity to explore, identify, and predict the development of ideographs that have a capacity to *move* American rhetorical culture is just one of the many advantages of taking an ideographic approach to, among other things, the "right to privacy" under the Fourth Amendment. Another advantage is that an ideographic approach "emphasizes the ways that speakers and communities make compromises when they interpret these various political units of analysis."[49] If we explore the vertical and horizontal structures of public motives in relation to our "right to privacy," along the way, we will begin to better understand the rhetoricity of that ideograph and the compromises judicial actors have made when interpreting and applying the law.

The objects of study in an ideographic analysis are many. Critics taking an "ideographic turn" engage in "genealogical investigations" that describe how universal concepts came to be and how they "recirculate as 'fragments' in other apparently finished texts," like judicial opinions.[50] Hasian is careful to point out that scholars who take this "turn" are not called to abandon "analyses that dissect arguments that appear in legislative documents or judicial opinions," but they must be considered only part of "much larger conversations."[51] Indeed, the opinions are only portions of the ideographic analysis, but they are hugely impactful because of their immediate power over subjects and because of their enduring capacity to influence later iterations of the law. Moreover, if examining the constitutive structures of privacy rights under the Fourth Amendment requires that we ask questions about "the motivations of the social agents who are making decisions"[52] about them, then legislative documents and judicial opinions undoubtedly embody a compelling point of departure.

An ideographic analysis in legal communication reveals terms or concepts, such as the Fourth Amendment's "right to privacy," as first and fundamentally rhetorical. When lawyers and judges examine these cases and make a call about when and where one might reasonably have an expectation of privacy, they are engaged in a similar analysis. They are looking to both precedential delineations of privacy rights in the United States—the vertical structure of the ideograph—and contemporary, social understandings of privacy rights in the surrounding rhetorical culture—the horizontal structure of the ideograph. This approach manifests specifically in the language of judicial opinions through a pattern of dual identifications which, of course, is eminently rhetorical.

48 Hasian Jr. et al., *supra* note 41, 338.

49 HASIAN JR., *supra* note 37, at 14.

50 *Id.* at 15.

51 *Id.*

52 *Id.* at 12.

III. Dual Identifications of Law

Identification, which Kenneth Burke suggests is more powerful than persuasion, is created in law through relational language and citation to precedent. When you employ identification to persuade someone you do so "only insofar as you can talk his language by speech, gesture, tonality, order, image, attitude, idea, identifying your ways with his."[53] Lawyers and judges use identification in nearly all aspects of their professional (and personal) lives. When we meet with a client, we identify with her circumstance in her own terms, to persuade her that we are equipped to, and invested in, resolving her case. When we meet with opposing counsel, we identify with her through language that carries a tone and an attitude that demonstrates our professionalism and congeniality, as well as our similar goals in representing our individual client's best interests. Through identification, the court or counsel highlights a shared substance and, in doing so, brings legal discourse "to the edge of cunning."[54] When one identifies with another, it "does not deny their distinctness," but they are "at once a distinct substance and consubstantial with another."[55] This "consubstantiality" stems from "sensations, concepts, images, ideas, [and] attitudes" that people have in common.[56] It is generated in judicial opinions when courts identify these commonalities within vocabularies of a rhetorical culture, both past and present, producing a pattern of dual identifications that mimics the structures of public motives in McGee's ideographic approach.

Burke further suggests that identification is affirmed because there is division.[57] If we "put identification and division ambiguously together, so that you cannot know for certain just where one ends and the other begins, . . . you have the characteristic invitation to rhetoric."[58] McGee makes similar claims about the ideograph's capacity for unity and division: "Insofar as usages both unite and separate human beings, it seems reasonable to suggest that the functions of uniting and separating would be represented by specific vocabularies, actual words or terms . . . [which] would consist of ideographs."[59] That is, one can establish an identification while still highlighting a division. In fact, we can use identification to persuade our audience—client, counsel, or court—that division is necessary. By first identifying with our audience through a shared language of ideographs, we can better persuade it that a proposed change

53 KENNETH BURKE, A RHETORIC OF MOTIVES 55 (Univ. of Calif. Press California ed. 1969) (emphasis omitted).

54 *Id*. at 36.

55 *Id*. at 21.

56 *Id*.

57 *Id.*at 22.

58 *Id*. at 25.

59 McGee, *supra* note 15, at 8.

in the interpretation of a law is in tune with its own ideological predispositions. Whether or not the lawyer or judiciary is aware of this pattern of identification, division, and consubstantiality (highlighting a "shared substance") with the past and contemporary rhetorical culture may not matter. Burke says that "the rhetorical motive, through the resources of identification, can operate without conscious direction by any particular agent."[60] We are already employing identification to persuade whether we recognize it or not. These persuasive identifications depict human capacity to use words "to form attitudes or to induce action."[61] The dual identifications, both vertical and horizontal, found throughout legal discourse excel in these capacities.

Many would argue that the principle of *stare decisis* gives the law force, but there is more at work here than merely "standing by things decided."[62] It is through a pattern of identifications that the law is given force. One of these identifications occurs most persuasively when the Court effectively employs ethos when citing precedent and reshaping the law for its own kairotic moment.[63] The "rule of law" defines the rights and boundaries of citizens, and the language of law is centered on rule application. That is, in the most basic sense, we identify rules and apply those rules to a present set of facts. McGee also highlights the connections between ideographs and precedent: "Earlier usages become precedent, touchstones for judging the propriety of the ideograph in a current circumstance. The meaning [of the ideograph] does not rigidify because situations seeming to require its usage are never perfectly similar: As the situations vary, so the meaning . . . expands and contracts."[64] If we could close our eyes while reading this, we might think McGee is describing how one goes about practicing, interpreting, and applying law. Despite these expansions and contractions, the term retains "a constant reference to its history as an ideograph."[65] By citing precedent, the Court maintains this reference and, among other things, retains its credibility.

60 BURKE, *supra* note 53, at 35.

61 *Id.* at 41.

62 The principle of *stare decisis*, literally "to stand by things decided," has long been understood as the primary mechanism giving the law force. *Stare decisis* is, according to *Black's Law Dictionary*, "[t]he doctrine of precedent, under which a court *must* follow earlier judicial decisions when the same points arise again in litigation." *Stare Decisis*, BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added). I argue that courts often ignore this imperative, opting instead to establish dual identifications through which the courts' rhetorical power ultimately manifests.

63 In ancient Greece, the word "kairos" (καιρός) is generally denoted as "time," but it connotes, more specifically, the right or proper time or a fitness for a particular occasion. For example, Susan Jarratt simply defines the term as "timeliness" or "the moment of an oration." Susan C. Jarratt, REREADING THE SOPHISTS: CLASSICAL RHETORIC REFIGURED xv (timeliness), 11 (the moment of an oration) (S. Ill. Univ. paperback ed. 1998). When rhetoricians employ the term "kairotic moment," they do so with the intention of suggesting a specific moment in time that is "fit" for a particular rhetorical context, comprised of author, audience, text, and purpose.

64 McGee, *supra* note 15, at 10 (discussing the ideograph "equality").

65 *Id.*

This first identification functions as a general description of how most understand the process of doing law. It is also shamefully inept though it seems to suggest that the rules are stable and finite and implies that past precedent is directly applicable to present-day circumstances. As Stanley Fish writes, "The law . . . is always in the business of constructing the foundations on which it claims to rest and in the business too of effacing all signs of that construction so that its outcomes can be described as the end products of an inexorable and rule-based necessity."[66] The notion of law as finite and substantially lacking ambiguity is a myth constructed by the thing itself. In fact, the "rule of law" is perpetually in a state of flux, and it often more closely reflects the ideological predilections of the culture interpreting it than it does any original intention upon initial construction. For this reason we see (and need) another identification—with contemporary rhetorical culture—in any given case. By establishing this pattern of dual identifications through rhetorical vocabularies of the ideograph in past and contemporary American rhetorical culture, written opinions demonstrate the rhetoricity of the ideograph itself.

Consider ideographically, by way of example, the "good faith" exception to the exclusionary rule set forth in *United States v. Leon*.[67] We can think of this discrete ideograph as relationally connected to the "right to privacy" arising out of the Fourth Amendment. Writing for the majority, Justice White acknowledges that the Court had "not recognized any form of good-faith exception to the Fourth Amendment exclusionary rule" prior to this case.[68] But he points to "the balancing approach that has evolved during the [Court's] years of experience" interpreting and applying that rule.[69] Here, White makes a vertical identification, which also occurs throughout the opinion in numerous references to prior decisions that identify previous iterations of "good faith" and other discrete ideographs, such as a "balancing approach" and an "appreciable deterrence."[70] Recall that ideographs come to meaning in their relationship to other ideographs; "good faith," then, gains its rhetoricity partly through these vertical identifications.

Ideographs also come to meaning in their relationship to the surrounding rhetorical culture. That culture produces a "situationally []defined" horizontal synchronic structure of "ideograph clusters," which,

66 STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING TOO 21 (1994) (emphasis omitted).

67 468 U.S. 897 (1984).

68 *Id.* at 913.

69 *Id.*

70 *See, e.g., id.* at 909, 911, 913.

as McGee proposes, is "constantly reorganizing itself to accommodate specific circumstances."[71] In *Leon*, White makes his horizontal identification with the Court's contemporary American rhetorical culture by determining that concerns over the "substantial social costs" of allowing that "some guilty defendants may go free or receive reduced sentences"[72] provide "strong support" for crafting the "good faith" exception.[73] In doing so, the Court "reframe[s] the Fourth Amendment into one that could best be understood through the lens of a jurisprudence of crime control."[74] At the time the opinion was written, American culture was particularly invested in ensuring that law enforcement officers possess all the necessary tools to combat growing crime rates.[75] Nixon had "campaigned on a law and order platform" and named four justices to the Court who would promote this purpose.[76] It would seem that, at least in the realm of criminal procedure, the Burger Court was "very successful in accomplishing" Nixon's resolve for law and order.[77] Through White's use of identification in *Leon*, the exclusionary rule lost the battle with the "substantial social costs" articulated throughout discrete and popular discourses of "law and order" and forever changed the shape of our "right to privacy" under the Fourth Amendment. This resulted in what some scholars have come to describe as a "well-meaning effort of the Court to dilute Fourth Amendment requirements in the interest of preventing major crime."[78] To be sure, all of this is accomplished, at the level of language itself, through identification.

This pattern of dual identifications can also be found in the case of David Leon Riley, with which we began our endeavor.[79] In *Riley*, the Court confronted a new need for division—for evolving the "right to privacy" to account for the ubiquitous use of modern smart phones in today's society. While courts might previously have permitted a search of one's person and belongings incident to lawful arrest, the search of the cell phone necessitated a dissection of sorts, a partitioning off of the search of one's

71 McGee, *supra* note 15, at 14.

72 468 U.S. at 907.

73 *Id.* at 913.

74 Michael C. Gizzi & R. Craig Curtis, The Fourth Amendment in Flux: The Roberts Court, Crime Control, and Digital Privacy 11 (2016) (discussing the Burger Court's interpretation of the Fourth Amendment).

75 *See generally id.* at 59.

76 *Id.*

77 *Id.*

78 Samuel Dash, The Intruders: Unreasonable Searches and Seizures from King John to John Ashcroft 144 (2004).

79 Riley v. California, 573 U.S. __, 134 S. Ct. 2473 (2014).

cell phone. Specifically, the Court determined that today's cell phones are "now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."[80] Moreover, Chief Justice Roberts writes in the Court's opinion that cell phones "place vast quantities of personal information literally in the hands of individuals."[81] Because cell phones have the capacity to store "[t]he sum of an individual's private life,"[82] permitting their warrantless search, even incident to a lawful arrest, would result in "a significant diminution of privacy."[83]

To establish this new division in the law, the Court constructed persuasive identifications, with both precedent and the surrounding rhetorical culture. That is, the Court identifies, through relational language, with vertical and horizontal structures of the "right to privacy." For example, in response to the Government's proposition that "law enforcement agencies 'develop protocols to address' concerns raised by cloud computing," Roberts writes, "Probably a good idea, but the Founders did not fight a revolution to gain the right to government agency protocols."[84] This vertical identification with the Founders gives the opinion persuasive force. Roberts identifies with his legal audience, one that expects him to make historical connections to the Fourth Amendment itself, and, in doing so, he simultaneously establishes both his own and the Court's ethos, making the opinion even more persuasive. We can analyze similar instances throughout this (or any) opinion to better determine what the Court values—here, the Founders' original intent. We can utilize identifications within judicial opinions to better craft our own persuasive identifications within the broader legal discourse community, as well as when addressing courts directly.

Still, Roberts does more than merely identify with the Founders or cite to existing precedent in *Riley*. In order for the opinion to reach its full persuasive potential, it needs the second identification—the horizontal identification with the surrounding rhetorical culture. We find these identifications littered throughout: when Roberts speaks of "frequent visits to WebMD,"[85] or when he asks, "Is an e-mail equivalent to a letter?"[86] or when he pens, "[T]here's an app for that."[87] These are horizontal, cultural identifications, without which the opinion loses its rhetorical effect. The recitation of time-honored rules of law is never enough because the Court must also establish division in order to produce some intended alteration

80 *Id.* at 2484.
81 *Id.* at 2485.
82 *Id.* at 2489.
83 *Id.* at 2493.
84 *Id.* at 2491.
85 *Id.* at 2490.
86 *Id.* at 2493.
87 *Id.* at 2490.

in its interpretation of the law. The law, after all, is in motion, expanding and contracting in response to changes in our rhetorical culture.

IV. Conclusion

The "right to privacy" persists in a state of constant flux. It expands and contracts in response to social, political, and technological change. As a principle of law, the "right to privacy" moves us through its own discursive movements, although it presents itself as unmovable and inviolable. The foundations of our legal system, however, often require that we view laws as finite, stable, and unmoving. Otherwise, how could we be expected to abide by them—to let them imagine and punish us? Our legal system also necessitates that laws be seen as intrinsically correct or otherwise justified by longstanding, universally accepted moral foundations and traditions. The "rule of law," then, as passed down through the generations, is stripped of those moral or ethical justifications and replaced with precedential case law and statutory law, in many ways operating as artificially constructed casings for imagined foundations detached from their true discursive relations.

In the end, teachers, writers, and doers of law—all those invested in "[t]he art of practicing law well"[88]—participate in this process. We participate in the formation of ideographs. We engage in the process of dual identification. And we perpetuate productive tensions in legal and social discourse communities. Throughout this piece, I have intimated what others have stated quite directly, that "rhetoric provides a strong counter to the constrained view of the life of lawyers offered by popular depictions of formalism or realism."[89] If we search for a "rhetorical place to stand, between reason and power,"[90] in however we choose to take part in legal communication and practice, we disentangle ourselves from formalism's chokehold and are better—advocates, counselors, teachers, writers, and scholars—for it.

88 Stephen Paskey, *The Law Is Made of Stories: Erasing the False Dichotomy Between Stories and Legal Rules,* 11 LEGAL COMM. & RHETORIC: JALWD 51, 81 (2014).

89 Linda L. Berger, *Studying and Teaching "Law as Rhetoric": A Place to Stand*, 16 LEGAL WRITING 1, 4 (2010).

90 *Id.* at 4.