

# A Linguistic Analysis of the Meanings of “Search” in the Fourth Amendment: A Search for Common Sense

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## I. INTRODUCTION

This article offers a new technique for analyzing and evaluating competing interpretations of a legal text and applies that technique to one of the most debated questions of modern constitutional interpretation: the meaning of “searches” in the first clause of the fourth amend-

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ment.<sup>1</sup> This technique is called the "common sense" approach because it begins with a semantic analysis of the text in terms of the senses that the key words have in everyday speech. Such analysis reveals a complex of interlocked concepts that underlies the ability of speakers to recognize meaningful uses of these words. The common sense approach then examines competing interpretations of the legal text in terms of their selection, modification, or rejection of these conceptual elements, which linguists call semantic features. Differing interpretations can thus be evaluated by comparing the meaningfulness of each to the meaning generated by common sense understanding of the text.

This article does not claim that the common sense approach will lead to the Grail sought by so many constitutional scholars: the "right answer" to the question of what contested constitutional provisions mean. The quest for the right answer focuses on the problem of authority: What, other than the sheer assertion of power, makes a given interpretation authoritative? The common sense approach asks a different question: Is the interpretation meaningful, does it make sense? We can and must answer this question before addressing issues of authority. If we cannot understand what an interpretation means, we can hardly debate its correctness. Even more fundamentally, law that cannot be understood well enough to apply prospectively to order social action ceases to be law at all and becomes merely the ad hoc dictates of persons who occupy positions of authority at a particular point in time.

The current state of fourth amendment law is a powerful example of the need for meaningful interpretation. In the past four years the Supreme Court has had to decide whether the following government actions were searches for purposes of the fourth amendment: (1) tracking the movements of a drum of chemicals by monitoring radio signals from a transmitter hidden within the drum;<sup>2</sup> (2) entering private fenced farmland to find a hidden marijuana garden;<sup>3</sup> (3) viewing the backyard of a home from 1000 feet in the air;<sup>4</sup> (4) taking high resolution aerial photographs of an open-air chemical plant;<sup>5</sup> (5) picking up a stereo turntable and looking at the serial number on the bottom;<sup>6</sup> and (6) peering into a barn interior with a flashlight to see an illicit drug laboratory.<sup>7</sup>

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1. The fourth amendment provides:

The right 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.

U.S. CONST. amend. IV (emphasis added).

2. See *United States v. Karo*, 468 U.S. 705 (1984).

3. See *Oliver v. United States*, 466 U.S. 170 (1984).

4. See *California v. Ciraolo*, 476 U.S. 207 (1986).

5. See *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986).

6. See *Arizona v. Hicks*, 107 S. Ct. 1149, 1152 (1987).

7. See *United States v. Dunn*, 107 S. Ct. 1134, 1137-38 (1987).

These six cases provoked startling dissension among the members of the Court. No one Justice joined the majority opinion in all six cases,<sup>8</sup> and all but three joined harsh dissents in at least one case.<sup>9</sup> The inability of the current Court to agree consistently on what "search" means in the fourth amendment is mirrored by a universal complaint from the scholarly community that this area of fourth amendment law does not make sense.<sup>10</sup>

A semantic analysis of "search" reveals three distinct senses with differing conceptual structures: (1) to make a search *of* something, (2) to search *for* something, and (3) to search *out* something.<sup>11</sup> The text of the fourth amendment is ambiguous as to which of these senses is the appropriate meaning of "search," although "search of" at first appears to be the most obvious choice. A series of cases involving electronic eavesdropping, beginning in 1928,<sup>12</sup> first forced the Supreme Court to confront this ambiguity, because listening cannot be described as a search *of* something. Using the conceptual categories derived from semantic analysis, four competing interpretations can be identified that developed out of these "just listening" cases and continue to dominate fourth amendment law today.<sup>13</sup> These four interpretations are (1) the search of interpretation; (2)

8. Former Chief Justice Burger did join all four majority opinions issued while he was on the Court. See *Dow Chemical Co.*, 476 U.S. at 229; *Ciraolo*, 476 U.S. at 209; *Karo*, 468 U.S. at 706; *Oliver*, 466 U.S. at 172. Justice Scalia authored one of the two decisions issued since his appointment, see *Hicks*, 107 S. Ct. at 1151, and joined the second with only a minor concurring objection, see *Dunn*, 107 S. Ct. at 1141.

9. Dissents were authored by Justice Stevens in *Karo*, 468 U.S. at 728, Justice Marshall in *Oliver*, 466 U.S. at 184, Justice Powell in *Ciraolo*, 476 U.S. at 215, and *Hicks*, 107 S. Ct. at 1155, Justice O'Connor in *Hicks*, 107 S. Ct. at 1157, and Justice Brennan in *Dunn*, 107 S. Ct. at 1142.

10. See, e.g., Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 349 (1974) ("For clarity and consistency, the law of the fourth amendment is not the Supreme Court's most successful product."); Ashdown, *The Fourth Amendment and the "Legitimate Expectation of Privacy,"* 34 VAND. L. REV. 1289, 1310 (1981) ("The [Court's] approach is at best confusing . . ."); Burkoff, *When Is a Search Not a "Search?" Fourth Amendment Doublethink*, 15 U. TOL. L. REV. 515, 523, 525 (1984) ("[T]here is, in 1984, unceasing, often vitriolic, controversy among and between the justices of the Supreme Court over . . . the interpretation and application of fourth amendment principles. . . . [J]udicial doublethink is becoming commonplace in the Supreme Court in this setting . . ."); Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 329 (1973) ("The fourth amendment cases are a mess!"); Goldberger, *Consent, Expectations of Privacy, and the Meaning of "Searches" in the Fourth Amendment*, 75 J. CRIM. L. & CRIMINOLOGY 319, 323-24 (1984) ("Today, it is common to find scholarly discussion of Supreme Court 'search' cases that is highly alarmist in tone."); Grano, *Supreme Court Review: Forward—Perplexing Questions About Three Basic Fourth Amendment Issues: Fourth Amendment Activity, Probable Cause, and the Warrant Requirement*, 69 J. CRIM. L. & CRIMINOLOGY 425, 462, 463 (1978) ("A frustrated court once lamented that it would take the mind of a medieval scholastic to unwind the Supreme Court's search and seizure cases. . . . [A] radical overhaul is required, unless we choose to accept the inconsistencies and forego the goal of analytic coherence.").

11. See *infra* text accompanying notes 28-48.

12. See *Olmstead v. United States*, 227 U.S. 438 (1928); *Goldman v. United States*, 316 U.S. 129 (1942); *On Lee v. United States*, 343 U.S. 747 (1952); *Silverman v. United States*, 365 U.S. 505 (1961); *Katz v. United States*, 389 U.S. 347 (1967).

13. The development of these four interpretations is discussed in Part V, *infra* text accompanying notes 99-167, and the continued influence of these competing interpretations in modern fourth amendment law is explored in Part VII, *infra* text accompanying notes 257-389.

the search out interpretation; (3) the intrusion interpretation; and (4) the policy interpretation.

The search of interpretation assumes that "searches" in the first clause of the amendment can only mean a search of a person, house, papers, or effects. If a challenged government action, such as just listening, cannot be described literally in these terms, then it is not a search.

The search out interpretation allows "search out" to be one of the senses of "search" if the object of the verb is a secret that is disclosed and thereby affected by the searching out. Under this interpretation the object of searching out must not merely be hard to find; it must have been deliberately secret prior to the successful government search.

The intrusion interpretation modifies the semantic features of "search of" to replace "search" with "intrusion." If a challenged action can be described as an intrusion into a sacred area, such as a house or personal effects, then it is a search.

Finally, the policy interpretation does not make use of any of the common senses of "search" and instead says that any action that violates the policy underlying the fourth amendment is a search.<sup>14</sup>

An important difference between the first two and the last two interpretations listed above is that the first two continue to use "search" in a sense that is consistent with the semantic expectations of native speakers, while the latter two depart from such semantic common sense.<sup>15</sup> Within the first set, the difference between the search of and the search out interpretations is that they use different common senses of search.

Using the common sense approach, the pivotal 1967 Supreme Court decision in *Katz v. United States*,<sup>16</sup> which extended the fourth amendment to cover most kinds of electronic eavesdropping, can be explained as a semantic decision—a decision to include "search out" as a possible meaning of "search" for fourth amendment purposes.<sup>17</sup> None of the opinions in *Katz*, however, made this semantic choice explicit, nor has any judge or commentator since explained *Katz* in terms of precise semantic analysis.

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14. A number of commentators have proposed some kind of dichotomy of privacy interests protected by the fourth amendment that corresponds roughly to my distinction between the intrusion and search out interpretations. See Goldberger, *supra* note 10, at 341-44 (security in houses limits access to specifically important locations while security in papers reflects protection of privacy of communications and record-keeping); Grano, *supra* note 10, at 430 (property privacy v. informational privacy); Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 173-76 (seclusion v. secrecy); Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 52-54 (1974) (privacy of place v. privacy of presence); Note, *The Concept of Privacy and the Fourth Amendment*, 6 U. MICH. J.L. REF. 154, 174 (1972) (private areas v. private affairs).

Some readers may find my distinction between the search of and policy interpretations reminiscent of Bruce Ackerman's "Ordinary Observer" and "Scientific Policymaker." See B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 10 (1977). One important difference is that Ackerman's Ordinary Observer relies not only on his semantic competence, *id.* at 10, but also upon his knowledge of societal norms derived from socialization, *id.* at 15.

15. I deliberately have placed quotation marks around "search" in describing the intrusion and policy interpretations to indicate that the word as used in those interpretations has a sense different from that expected by the native speaker.

16. 389 U.S. 347 (1967).

17. See *infra* text accompanying notes 136-53 (discussing the majority opinion in *Katz*).

The post-*Katz* confusion in fourth amendment law that plagues us today can be attributed to a failure to expand the meaning of “search” beyond “search of” by using semantic common sense. I suggest that a common sense approach allowing “search” to be interpreted either as search of or search out can explain most of the Court’s important cases on the meaning of search while retaining the inherent meaningfulness of everyday language.

I am deliberately using the phrase “common sense” with a double meaning. At one level I am using “sense” the way a linguist would: to refer to the portion of a word’s meaning that controls its ability to combine with other words to produce a meaningful expression.<sup>18</sup> For communication to succeed, the hearer must understand the words in an expression as having the same senses as the speaker understands them to have.<sup>19</sup> Thus, communication among the members of the Court and between the Court and the nation may fail if “search” does not have this shared linguistic understanding. But, of course, “common sense” itself has another sense. More commonly the phrase suggests a kind of practical wisdom shared by people generally that enables them to manage and solve life’s problems. This kind of common sense is often opposed to intellectual learning, usually with the observation that common sense is sufficient, or even superior, for navigating through the world in a sound and stable way.

At one level the current confusion—and tangled history—of fourth amendment law can be explained, at least in part, as a struggle to find a common linguistic sense for “search” that describes the wide variety of activities already regulated by the amendment and that can enable meaningful discussion about whether as-yet-uncategorized forms of government action should be brought within the amendment’s scope. But at another level this article suggests that it may be possible to understand both the amendment and its history of interpretation by the Court in a “common sense” way—that is, in a way that relies more on knowledge and experience shared by citizens generally than on specialized legal learning. The common sense knowledge we can employ is our native semantic competence in the use of the word “search” in ordinary English discourse.

Part II of this article briefly reviews some basic principles of semantic analysis and then applies these principles to construct a semantic structure of search which distinguishes its three different common sense meanings: search of, search for, and search out.<sup>20</sup> In Part III the results of this semantic analysis are applied to the text of the fourth amendment to reach the conclusion that the text is ambiguous as to whether “searches” in the first clause means search of, search out, or both.<sup>21</sup> Part IV turns to the historical events which gave rise to the enactment of the fourth amendment

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18. See *infra* text accompanying note 30.

19. For example, consider the following request as an effort at communication: “Please bring me the file.” The hearer may bring a metal tool with an abrasive edge when the speaker wanted a manila folder containing legal papers. The communication would then have been unsuccessful because “file” has two different senses; the speaker and hearer did not understand the expression with a common sense in mind.

20. See *infra* text accompanying notes 28-48.

21. See *infra* text accompanying notes 49-59.

to help resolve this ambiguity and suggests that the pre-Revolutionary struggles to protect security of both houses and papers indicate both search of and search out as possible interpretations of the text.<sup>22</sup>

In Part V, the article begins the application of semantic analysis to the Supreme Court's major fourth amendment decisions by focusing on the formative period from 1928 to 1967 when the Court was occupied with the question whether "just listening" could be a search. The culmination of this period in the landmark case of *Katz v. United States*<sup>23</sup> is explained in light of the common sense approach as the semantic expansion of search to include search out as well as search of in the meaning of the constitutional text.<sup>24</sup> Part VI explains how this radical expansion was limited and confused by the Court's subsequent requirement that the person claiming fourth amendment protection have a "legitimate" expectation of privacy.<sup>25</sup> Finally, Part VII analyzes the Court's critical decisions of the last four years to show how the vagueness of the legitimacy requirement has led the Court to mingle a variety of conflicting meanings of search in an effort to restore common sense to fourth amendment law.<sup>26</sup> The conclusion, Part VIII, proposes that the approach implicitly created by *Katz* of including both search of and search out as meanings of search provides the best basis for developing a meaningful and flexible understanding of what activities are searches for fourth amendment purposes.<sup>27</sup>

## II. THE SEMANTICS OF SEARCHING

Semantics is the discipline within linguistics devoted to the study of the meanings of words and the combination of words.<sup>28</sup> A semanticist constructs a theory of what a word means by examining how a native speaker of the relevant language uses that word in combination with other words. Speakers will agree whether an expression is semantically "correct" even if they cannot articulate or agree on definitions of the words in the expression. By semantically correct I mean that the speaker can identify an expression as well formed in a given context and as a semantically appropriate description of a particular state of affairs. These abilities, which the semanticist possesses for his or her own native language, provide the central analytical tools for semantics. Thus, at many points in this article I will invite the reader, as a fellow speaker of English, to test my semantic analysis by posing expressions that the semantic analysis predicts native speakers will identify as "wrong." The convention I will use to signal such test expressions is a (?) preceding the expression.<sup>29</sup> For example, I would

22. See *infra* text accompanying notes 60-98.

23. 389 U.S. 347 (1967).

24. See *infra* text accompanying notes 99-167.

25. See *infra* text accompanying notes 168-256.

26. See *infra* text accompanying notes 257-389.

27. See *infra* text accompanying notes 390-402.

28. See G. DILLON, *INTRODUCTION TO CONTEMPORARY LINGUISTIC SEMANTICS* 1 (1977); J. HURFORD & B. HEASLEY, *SEMANTICS: A COURSEBOOK* 1 (1983).

29. For some semanticists "?" marks expressions viewed as merely questionable by competent speakers while "\*" marks those immediately perceived as unacceptable. I am using "?" to cover both types of speaker response.

predict that if I were to say, (?)“the detective searched the smell of garlic,” most readers would feel that sentence somehow does not make sense. Yet I could rephrase that sentence using both “search” and “smell of garlic” so it would make sense. I could say, “the detective searched *for* the smell of garlic,” or “the detective searched *out* the smell of garlic.”

Semantic theory seeks to predict speaker behavior in response to a given expression in part by hypothesizing a conceptual structure for the words in the expression. This conceptual structure is called a *sense* of the word. The sense is a description (often partial) of the place the word occupies in a system of relationships with other words in the same language.<sup>30</sup> In my semantic analysis I will use a notation of brackets ([ ]) and angles (< >). Thus, the terms that appear in brackets will represent conceptual characteristics of “search,” while the terms in angles indicate conceptual characteristics that must be present in another word, such as the direct object of search, if both words are to combine into a meaningful expression. I will follow the practice of many common semantic theories and call both types of characteristics “semantic features.”<sup>31</sup>

A convenient way to begin semantic analysis is with the semantic intuitions expressed in dictionaries. Both *Webster's Dictionary* and the *Oxford English Dictionary* identify three major distinct senses for “search” when used as a verb:<sup>32</sup> (1) “to look into or over carefully or thoroughly in an effort to find or discover;”<sup>33</sup> (2) “to look or inquire diligently and carefully;”<sup>34</sup> (3) “to uncover, find, or come to know by diligent persevering inquiry or scrutiny.”<sup>35</sup>

The first sense of search can be identified in the verb form by the absence of any preposition: “search X.” The dictionary examples include: search the countryside, search the apartment, search the suspect, and search the records.<sup>36</sup> I call this first sense “search of” because it can be paraphrased “to conduct a *search of* X.” Although very different physical activities are described by the four examples, semantic analysis indicates that all four share the feature: [movement through X]. The first example given in the *Oxford English Dictionary* definition of “search of” is “to go about” a country or place in order to find something,<sup>37</sup> a usage that seems most closely related to the etymological roots of “search” in Middle French (“cerchier”—to travel through, traverse, survey, search”) and Late Latin

30. J. HURFORD & B. HEASLEY, *supra* note 28, at 28.

31. Some theories term the bracketed features “markers” or “components” and the angled features “selectional restrictions.” See, e.g., G. DILLON, *supra* note 28, at 124, 128; J. KATZ, *SEMANTIC THEORY* 39, 43 (1972).

32. Search in the noun form is understood in terms of the verb, *i.e.*, the act of searching. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2048 (1976).

33. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2048 (1976). The *Oxford English Dictionary* definition is “to explore, examine thoroughly.” IX OXFORD ENGLISH DICTIONARY 333 (2d printing 1961).

34. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2048 (1976). The *Oxford English Dictionary* adds “seek” and “to try to find” to the definition. See IX OXFORD ENGLISH DICTIONARY 334 (2d printing 1961).

35. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2048 (1976).

36. See IX OXFORD ENGLISH DICTIONARY 333-34 (2d printing 1961).

37. See IX OXFORD ENGLISH DICTIONARY 333 (2d printing 1961).

("circare"—to travel through, traverse").<sup>38</sup> Although this sense of movement seems most obvious in the first dictionary example of searching a countryside, it is also present in other dictionary examples of searching an apartment, a suspect, or records.<sup>39</sup> To search a person is to move one's hands through the person's clothes and across his body. To search records is to "go through" a collection of documents or pages.

A second feature of search of describes "X": <X is affected object>. A third related semantic feature is: <X has surface or interior>.<sup>40</sup> A fourth feature indicates that the movement must be taken with a certain purpose: [purpose to find Y]. This feature predicts that in every "search of" expression there is an assumed or hidden prepositional phrase using "for." A speaker must be able to express what he is searching for, even if at a high level of generality (for example, searching the apartment for evidence).<sup>41</sup>

This semantic analysis correctly predicts that one cannot insert "smell of garlic" into "search X" because "smell" has neither a surface nor an interior. Therefore, "search the smell of garlic" does not make sense.

The second sense of "search" is marked in the verb form by the preposition "for," as in the example "search for the smell of garlic." Unlike "search of" this second sense does not contain an affected object feature (<x is . . . >) because the verb describes merely the activity of the subject and not the impact of that activity on some object. Accordingly, the semantic features relating to "X" disappear. One remaining semantic feature is shared by both senses: [purpose to find Y]. Unlike the features pertaining to "X," no restrictive feature blocks the insertion of "smell of garlic" for "Y"; hence, the analysis correctly predicts that a meaningful expression can be constructed using "search for" with "smell of garlic."

The third sense is identified by the preposition "out": to search out the smell of garlic. This third sense shares with "search of" both [purpose to find Y]<sup>42</sup> and <X is affected object>. In place of the [movement] feature,

38. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2048 (1976).

39. The *Oxford English Dictionary* contains the following examples:

to look through, examine internally (a building, an apartment, a receptacle of any kind) in quest of some object concealed or lost; to examine (a person) by handling, removal of garments, and the like, to ascertain whether any article (usually, something stolen or contraband) is concealed in his clothing; to peruse, look through, examine (writings, records) in order to discover whether certain things are contained there

IX OXFORD ENGLISH DICTIONARY 333-34 (2d printing 1961).

40. The conceptual structure of "search of" will force us to imagine even an apparently intangible direct object as an area with a surface or interior as illustrated by the following expression: "The police searched Smith's conversation." I do not mark this expression with a "?" because some speakers may "make sense" of this expression by assuming that "conversation" refers to something other than vibrations which fade into thin air, such as: "The police searched the transcript of Smith's conversation for a reference to the murder victim."

41. This feature distinguishes search from a similar term, look through. As a result, only the first of the following two sets of expressions concludes with a meaningful statement:

I looked through your diary. What were you looking for? Oh, nothing—I was just looking.

I searched through your diary. What were you searching for? (?) Oh, nothing—I was just searching.

42. Note that in "search out" different variables are used in [find X] and [purpose to find



however, is a different description of the effect on X: [find X]. "X" no longer need have a surface or interior; instead, the semantic analysis indicates: <X is hard to find>. "Search out" affects "X" not by contact or intrusion but, more subtly, by destroying its hidden or elusive character. The presence of the [find X] feature in "search out" but not "search for" explains why only the first of the following sentences makes sense:

- James Bond searched for the Russian code without finding it.  
 (?) James Bond searched out the Russian code without finding it.

A final common sense experiment using two different prepositional phrases identifies yet another way in which the three senses are distinct from each other. "Search for" can combine with the phrase "for \_\_\_time," but not with "in \_\_\_time":

- I searched for his motive for two months.  
 (?) I searched for his motive in two months.

Semantic analysis explains this phenomenon by categorizing "search for" as an activity verb, a verb that describes action over time without entailing the achievement of a goal.<sup>43</sup> The phrase "in \_\_\_time" can combine only with an achievement verb, like search out, that entails achievement of a goal *within* the time period described by the phrase. In contrast, "search out" cannot combine with "for \_\_\_time" because it does not entail durational activity:

- I searched out his motive in two months.  
 (?) I searched out his motive for two months.

"Search of" can combine with both phrases because it entails both a durational activity and the achievement of a goal within a definite period:

- I searched the house for ten minutes.  
 (?) I searched the house in ten minutes.

The following partial semantic description of the three senses of "search" summarizes the preceding analysis:

- |   |  |
|---|--|
| (1) SEARCH X ("search of")<br>[purpose to find Y]<br>[activity]<br><X is affected object> | [movement through X]<br>[achievement]<br><X has surface or interior> |
| (2) SEARCH FOR Y<br>[purpose to find Y]<br>[activity]                                     |  |
| (3) SEARCH OUT X<br>[purpose to find Y]<br><X is affected object>                         | [find X]<br>[achievement]<br><X is hard to find>                     |

[Y] to indicate that one can search out something different from what one is searching for, e.g.: "The police were only searching the house *for* marijuana [Y] but also searched *out* a cache of automatic weapons [X]."

43. See G. DILLON, *supra* note 28, at 122-23 (glossary: achievement verbs).

Before moving on to make use of this semantic analysis, it will be helpful to include in our kit of linguistic tools four terms that parse out different aspects of what is loosely called "meaning." Three of these terms describe different ways in which an expression can lack meaning: ambiguity, vagueness, and incoherence. An expression is ambiguous if it uses a word with one or more senses without identifying which sense is meant.<sup>44</sup> A word is vague if it fails to contribute a sufficiently detailed sense to make an expression meaningful.<sup>45</sup> An incoherent expression is caused by the combination of words with incompatible senses.<sup>46</sup> The words may be meaningful in isolation, but the expression does not make sense. The expressions marked with a "(?)" above are incoherent.

The final term is "connotation," which indicates a concept that is not part of the sense of a word, but frequently is associated with its use. Words often acquire new senses when connotations become sufficiently strong to create a distinct, new meaning. "Search of" carries a connotation of forcible entry or invasion, which has contributed to a specialized sense in fourth amendment vocabulary,<sup>47</sup> as has the connotation that the object of searching out is not only hard to find but deliberately secret.<sup>48</sup>

### III. THE AMBIGUITY OF THE TEXT

The word "search" appears in two different places in the text of the fourth amendment. It first appears in the first clause's familiar "unreasonable searches and seizures" phrase, which has been the focus of so much attention and controversy: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable *searches* and seizures, shall not be violated . . . ."<sup>49</sup> It also appears in the second clause, usually called the warrant clause: "and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing *the place to be searched*, and the person or things to be seized."<sup>50</sup>

In the warrant clause, "search" appears in the verbal form without the preposition "out" or "for." This syntactic structure clearly indicates that "search of" is the sense of search in "place to be searched." The kind of

44. The example used previously about a file, *see supra* note 19, shows ambiguity at work. Often the semantic features of other words in an expression remove potential ambiguity, as in the following examples using "file":

Please smooth the plank with the file. Please read the file carefully.

45. A classic example of a vague word is "thing." The following expression does not convey much information standing alone: "I dislike that thing." As in the case of ambiguity, the semantic features of other words in an expression can help cure vagueness: "I dislike the odor of that red thing." In this expression we at least know that "thing" is an object which can project both color and odor.

46. "Incoherent" is not, strictly speaking, a semantic term of art, but I have adopted it instead of graceless phrases like "selectional restriction violation" or "anomalous," which more commonly are used in linguistics. *See G. DILLON, supra* note 28, at 2, 123, 128; J. KATZ, *supra* note 31, at 49. It is the absence or conflict of angled (< >) semantic features that make an expression incoherent.

47. *See infra* text accompanying notes 71-74.

48. *See infra* text accompanying notes 83-87.

49. U.S. CONST. amend. IV (emphasis added).

50. *Id.* (emphasis added).

warrant described by the text typically would authorize the government to conduct a *search of* a particular place *for* particular persons or things, which then would be seized. In light of the kind of warrants that concerned the framers,<sup>51</sup> it is not surprising that the warrant clause addressed warrants authorizing searches of places for persons or things.

The first clause contains fewer contextual clues. "Search" appears in a nominal form without even a suggested object within the phrase in which it is used. The modifier "unreasonable" contains no semantic features that would select out one from the three possible senses. Syntactically, the first and the second clauses are independent; they could have been written as separate sentences. Still, the limitation of "search" in the second clause to "search of" might be more suggestive of the meaning of "search" in the first clause if not for the little history we do know about the drafting of the amendment. The Congressional sponsor of the fourth amendment, James Madison, introduced the amendment in the form of this single clause:

The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.<sup>52</sup>

Madison's version would have equated the right to be secure against unreasonable searches and seizures solely with a prohibition of warrants issued without probable cause or particular description, thereby making what is now the first clause little more than a rhetorical preamble to the substantive warrant clause.<sup>53</sup> When Madison's version was introduced on the floor of the House of Representatives, Representative Benson moved to replace the phrase "by warrants issuing" with the phrase "and no warrant shall issue."<sup>54</sup> The House Journal records as Benson's only explanation that Madison's "declaratory provision was good as far as it went, but he thought it was not sufficient."<sup>55</sup> Benson's motion lost on the floor, but Benson had the last word. He chaired a committee of three that was charged with preparing for the House a final draft of the Bill of Rights. The draft reported out by the committee contained Benson's previously unsuccessful proposal.<sup>56</sup> That revised version of two independent clauses passed the House apparently without comment<sup>57</sup> and eventually became the fourth amendment.

Benson's admittedly brief recorded comment is consistent with the obvious effect of his revision. By splitting Madison's sentence into two

51. See *infra* text accompanying notes 60-74.

52. 1 ANNALS OF CONG. 434-35 (J. Gales ed. 1834), *quoted in* N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 100 n.77 (1937).

53. Cf. N. LASSON, *supra* note 52, at 100 n.77 ("The observation may be made that the language of [Madison's] proposal did not purport to *create* the right to be secure from unreasonable searches and seizures but merely stated it as a right which already existed.")

54. See 1 ANNALS OF CONG., *supra* note 52, at 754.

55. See *id.*; N. LASSON, *supra* note 52, at 101.

56. See N. LASSON, *supra* note 52, at 101.

57. See *id.* at 101-02.

independent clauses, he created two constitutional mandates where only one had existed before. Not only would the fourth amendment ban certain types of warrants, but it also would *generally* prohibit unreasonable searches and seizures that violated the right of the people to be secure. Benson took Madison's insufficient "declaratory" statement about a right to be secure and made it "go far enough" by transforming it into a statement of positive constitutional law. His revision thus would seem to exemplify a famous view of the role of constitutional law: "a principle to be vital must be capable of wider application than the mischief which gave it birth."<sup>58</sup> If abuse of warrants was the mischief that gave birth to the fourth amendment, Representative Benson succeeded in transforming that impetus into a principle capable of wider application.

If we therefore assume that the text as revised frees the first clause from the more narrow scope of the warrant clause, we must be cautious about limiting "searches" in the first clause to the meaning of "to be searched" in the warrant clause.<sup>59</sup> Of course the list of "persons, houses, papers, and effects" in the clause still seems to parallel the respective objects of search and seize in the warrant clause. But the first clause does not allocate the items in its list between "search" and "seize" as does the warrant clause. Although the framers probably were not concerned about protecting the people against the government searching for or searching out their houses, if the first clause is read in isolation, "unreasonable searches" could include searching for or searching out persons, papers, and effects.

The first clause does contain, however, a strong indication that "unreasonable searches" does *not* include merely searches for. Even after Benson's revision, the fourth amendment is not a direct prohibition of unreasonable searches. Rather, the first clause describes a "right of the people" that shall not be violated. This right has two limiting modifiers: (1) it is a right "to be secure in . . . persons, houses, papers, and effects," and (2) it is a right "against unreasonable searches and seizures." "Search" thus appears literally as a partial description of a kind of right, not as a prohibited practice *per se*. Therefore, one of the features of an unreasonable search is that it must be capable of affecting the people's right to be secure in their persons, houses, papers, and effects.

Both search of and search out have among their semantic features an <affected object>, although each affects its object differently. Search for, on the other hand, is an intransitive verb that neither achieves a goal nor affects an object. Search for merely describes the activity of the subject, the searcher. It cannot function semantically to affect an object such as a house, person, paper, or effect. As usual, our semantic common sense corresponds with our pragmatic common sense. Mere curiosity or inquiry by a governmental official does not seem to pose a substantial threat to our security in

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58. *Weems v. United States*, 217 U.S. 349, 373 (1910), *quoted with approval in Olmstead v. United States*, 277 U.S. 438, 472-73 (1928) (Brandeis, J., dissenting).

59. At least one modern scholar maintains that the phrase "unreasonable searches" in the first clause should be understood as referring explicitly and solely to searches conducted pursuant to warrants not complying with the procedural requirements of the warrant clause. See T. TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 41-44 (1969).

ourselves, our homes, papers, and effects, nor does it seem reasonable to think that the framers intended the fourth amendment to regulate every governmental effort to find a person, place, paper, or effect.

Having come this far, we seem to have exhausted the potential of the text, standing alone, to indicate either search of or search out, or both, as the appropriate sense for “unreasonable searches.” The next step is to turn to the larger historical context of the Bill of Rights for some clues to resolve this ambiguity.

#### IV. LOOKING TO HISTORY TO HELP RESOLVE AMBIGUITY

Most scholars agree that the fourth amendment grew directly out of specific historical events preceding the American Revolution: the colonial struggle against writs of assistance and the contemporaneous British protests against general warrants.<sup>60</sup> Writs of assistance were judicial orders empowering customs officers of the Crown to summon peace officers to protect and assist them while they entered and searched buildings for smuggled goods.<sup>61</sup> The general warrant was used primarily to enforce seditious libel laws by authorizing royal officers to search out and seize publications critical of the Crown.<sup>62</sup> Both the writs of assistance and general warrants failed to describe particularly the places to be searched and the items to be seized.<sup>63</sup>

##### A. *To Be Secure in One's House: The Writs of Assistance*

In 1761 the Superior Court of Massachusetts heard arguments on the petition of Thomas Lechmere, Surveyor General of Customs, for the granting of writs of assistance.<sup>64</sup> The case created great controversy and, according to no less an authority than John Adams, sowed the seeds of the Revolution.<sup>65</sup> James Otis, opposing the writs, argued in a famous passage:

Now one of the most essential branches of English liberty, is the freedom of one's house. A man's house is his castle; and while he

60. See, e.g., J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 19-20 (1966).

61. See *id.* at 31-32.

62. See *id.* at 20-30.

63. See *id.* at 31.

64. The case sometimes is referred to as *Paxton's Case* because the surveyor of the Port of Boston, Charles Paxton, was the initial petitioner. Lechmere later intervened on behalf of the Crown. See 2 *LEGAL PAPERS OF JOHN ADAMS* 113 (L. Wroth & H. Zobel ed. 1965).

65. In a letter to William Tudor, Adams wrote: “Then and there was the first scene of the first Act of Opposition to the arbitrary Claims of Great Britain. Then and there the child Independence was born. In fifteen years, *i.e.*, in 1776, he grew up to manhood, declared himself free.” Letter from John Adams to William Tudor (March 29, 1817), *quoted in id.* at 107. On the morning of July 3, 1776, John Adams wrote to his wife:

When I look back to the year 1761 and recollect the argument concerning writs of assistance, in the superior court, which I have hitherto considered as the commencement of the controversy between Great Britain and America, and recollect the series of political events, the chain of causes and events, I am surprised by the suddenness of the revolution.

Letter from John Adams to Abigail Adams (July 3, 1776), *quoted in* N. LASSON, *supra* note 52, at 61.

is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom house officers may enter our houses when they please—we are commanded to permit their entry—their menial servants may enter—break locks, bars and every thing in their way—and whether they break through malice or revenge, no man, no court can inquire—bare suspicion without oath is sufficient.<sup>66</sup>

Otis's language was echoed ten years later in the Boston "Declaration of the Rights of Colonists," which included among its lists of grievances against the Crown that "our Houses and even our Bed-Chambers are exposed to be ransacked . . . by Wretches, whom no prudent Man would venture to employ even as Menial Servants."<sup>67</sup>

Powerful memories of the writs of assistance influenced events when opponents of the proposed constitution expressed fears of a strong federal government unrestrained by a Bill of Rights. At the Virginia convention, Patrick Henry rose to oppose a resolution to ratify the proposed constitution, saying:

The officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. . . . They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack and measure, every thing you eat, drink, and wear.<sup>68</sup>

As a result of the arguments of Henry and others, the influential Virginia convention agreed to ratify only on condition that a proposed Bill of Rights be forwarded to the first Congress for addition to the Constitution by amendment.<sup>69</sup> One of the proposed provisions in the Virginia bill of rights was a longer version of Madison's draft of the fourth amendment.<sup>70</sup>

66. 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 64, at 142. We have no transcript of the argument and must rely on Adams' account, based on notes he took in the courtroom.

67. J. LANDYNSKI, *supra* note 60, at 38 n.90.

68. 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 448-49 (J. Elliot 2d ed. 1881). Similar statements were made by Henry at other times during the Virginia convention. *See id.* at 588.

69. New York and North Carolina followed Virginia's lead and recommended similar bills of rights when they ratified. 13 JOURNAL OF CONGRESS 173-84 (1801); *see also* Stengel, *The Background of the Fourth Amendment to the Constitution of the United States: Part Two*, 4 U. RICH. L. REV. 60, 70 n.37 (1969) (discussing conditional ratification of the Constitution).

70. The Virginia proposal stated:

That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, and property; all warrants, therefore, to search suspected places, or seize any freeman, his papers, or property, without information on oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend any suspected person without specially naming or describing the place or person, are dangerous, and ought not to be granted.

3 DEBATES, *supra* note 68, at 658. It is interesting to note that the Virginia proposal, like Benson's, and unlike Madison's, version of the amendment, stated the right to be secure in a separate independent clause from the prohibition on general warrants. Madison, of course, was a representative from Virginia in the first Congress.

Obviously, the hated writs of assistance were examples of warrants prohibited by the warrant clause: warrants issued without probable cause and particular description that authorized entry of private homes to search for and seize persons, papers, and effects. This historical background also provides insight into the relationship between the right to be secure and the semantic features of search of. Henry's speech at the Virginia convention of course involved the feature [movement through an area] ("go into your cellars and rooms"), but added the connotation of forceful intrusion: "fortified with the terrors of paramount federal authority . . . [they will] search [and] ransack."<sup>71</sup>

At another point during the Virginia convention Henry again paired "search" with "ransack": "Every thing the most sacred may be searched and ransacked by the strong hand of power."<sup>72</sup> In this context of protecting domestic life, "sacred" did not mean holy, but rather "[s]ecured by religious sentiment, reverence, sense of justice, or the like, against violation, infringement, or encroachment."<sup>73</sup> The forced entry and subsequent ransacking affected one's home particularly because a house that could be so searched had lost to a degree its sacred character.<sup>74</sup>

These connotations of forcible intrusion and violation of a sacred place have had a powerful influence on the Court's interpretation of search, as will be seen below. At this point, though, it is important to remember that the background context of the controversy over writs of assistance is helpful, but not decisive, in interpreting the ambiguous first clause of the fourth amendment. Benson's revision to Madison's version of the amendment had the effect of making such abuses of the warrant procedure an important *example*, rather than the definition, of unreasonable searches. In addition, the fourth amendment may well have at least one other parent—the British controversy over general warrants, the history of which suggests a "right to be secure" that is distinct from protection against forcible invasion of sacred places.

### B. *To Be Secure in One's Papers: General Warrants*

The language of the first clause of the fourth amendment suggests that there may be a difference between the right to be secure in papers and the right to be secure in effects, since both are listed separately.<sup>75</sup> "Effects"

71. *Id.* at 448. See *supra* text accompanying note 68.

72. 3 DEBATES, *supra* note 68, at 588.

73. IX OXFORD ENGLISH DICTIONARY 16 (2d printing 1961).

74. The point is clearly made in a passage from Blackstone no doubt familiar to the framers:

Burglary . . . has always been looked upon as a very heinous offense; not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion and disturbance of that right of habitation which every individual might acquire even in a state of nature. . . . And the law of England has so particular and tender a regard to the immunity of a man's house, that it styles it his castle, and will never suffer it to be violated with impunity; agreeing herein with the sentiments of ancient Rome, as expressed in the words of Tully: ["For what is more sacred, more inviolate than the house of every citizen."]

4 W. BLACKSTONE, COMMENTARIES 223.

75. See *supra* text accompanying note 49. The warrant clause merges the two together by referring to "things to be seized." See *infra* text accompanying note 76.

appears to refer to personal property, in contrast to real property.<sup>76</sup> If so, "papers" might seem redundant, since one's papers would be included in one's effects. If we pause, however, to consider the famous general warrants litigation that occurred in England at about the same time as the writs of assistance controversy began in the colonies, the historical context may reveal why security in papers was considered different than security in effects generally.

In 1762 John Wilkes, an obstreperous member of the British House of Commons, began publishing a series of anonymous pamphlets criticizing government policies.<sup>77</sup> The following year one of these pamphlets particularly offended the Secretary of State, Lord Halifax, who issued a general warrant to four of his messengers "to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper . . . and them, or any of them, having found, to apprehend and seize, together with their papers."<sup>78</sup> In three days these messengers arrested forty-nine persons as they searched for the pamphlet's publisher. Finally discovering that Wilkes was the author, they seized him and all his private papers. Wilkes spent several days in the Tower of London before being released under his privilege as a member of Parliament.<sup>79</sup>

A barrage of litigation ensued as Wilkes and a number of the printers subjected to the search filed trespass and false imprisonment actions.<sup>80</sup> The plaintiffs won substantial damages, as the courts held that the general warrants were illegal and refused to overturn the awards as excessive.<sup>81</sup> Another pamphleteer, John Entick, who earlier had been subjected to a Lord Halifax general warrant, was emboldened by Wilkes's success and filed what became the most famous case of the lot, *Entick v. Carrington*.<sup>82</sup>

Although the restrictive forms of pleading forced Entick to file an action in trespass, the heart of his complaint was the allegation that "the secret affairs, & c. of the plaintiff became wrongfully discovered and made public."<sup>83</sup> In opening argument his counsel compared the execution of the general warrant to the techniques of the Spanish Inquisition:

ransacking a man's secret drawers and boxes to come at evidence against him, is like racking his body to come at his secret thoughts.

76. The Supreme Court takes this view: "The Framers would have understood 'effects' to be limited to personal, rather than real, property." *Oliver v. United States*, 466 U.S. 170, 177 n.7 (1984). Madison's draft used "other property" where "effects" now appears. See *ANNALS OF CONG.*, *supra* note 52, at 434-35; see also *supra* text accompanying note 52.

77. See N. LASSON, *supra* note 52, at 43.

78. *Id.*. Ironically, one of the pamphlet's criticisms was that the excise collectors had unbridled power to search private homes. See *id.* at 43 n.108.

79. See *id.* at 43-44.

80. See *id.* at 44-46.

81. See *Leach v. Money*, 19 Howell's State Trials 1002, 1023, 96 Eng. Rep. 320, 323 (1765); *Huckle v. Money*, 2 Wilson's King's Bench 205, 206, 95 Eng. Rep. 768, 769 (1763); *Wilkes v. Woods*, 19 Howell's State Trials 1153, 1166, 98 Eng. Rep. 489, 498 (1763). Wilkes eventually obtained a verdict against Lord Halifax himself for 4,000 pounds. See *Wilkes v. Halifax*, 19 Howell's State Trials 1406, 1407, 95 Eng. Rep. 797, 797 (1769). The Crown bore all the expenses in the cases, which were reported to exceed 100,000 pounds. See N. LASSON, *supra* note 52, at 45.

82. 19 Howell's State Trials 1030, 95 Eng. Rep. 807 (1765).

83. *Id.* at 1030, 95 Eng. Rep. at 807.



. . . Has a Secretary of State right to see all a man's private letters of correspondence, family concerns, trade and business? This would be monstrous indeed; and if it were lawful, no man could endure to live in this country.<sup>84</sup>

Entick's arguments struck a responsive chord in the judge, Lord Camden. In his judgment for Entick, Lord Camden made it clear that the wrongful uncovering of the plaintiff's personal secrets was one of the most substantial harms caused by the use of the general warrant:

Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they *will hardly bear an inspection*; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the *secret nature* of those goods will be an aggravation of the trespass and demand more considerable damages in that respect.<sup>85</sup>

We can sense Lord Camden struggling within the semantic limitations of his legal vocabulary. Entry to Entick's house was a trespass as was seizure of his personal property.<sup>86</sup> The agents of the Crown, however, not only *seized* Entick's papers, they *read* them. Even though the eye cannot commit a trespass, it was the peculiar character of papers that they could not "bear an inspection." Although Lord Camden could give legal significance to this loss of secrecy only by increasing the damages awarded, his common sense told him that the "secret nature" of the papers was the heart of the case. The claim vindicated was not merely that the government intruded into Entick's house and deprived him of his property; by reading his personal papers the government searched out his secrets and thus caused the greatest harm to Entick's fundamental right of security.<sup>87</sup>

If, as is widely assumed, the framers had the Wilkes affair and the *Entick* decision in mind when they drafted and adopted the fourth amendment,<sup>88</sup> the right to be secure in papers should include the right to

84. *Id.* at 1035, 95 Eng. Rep. at 812.

85. *Id.* (emphasis added).

86. *Id.* ("every invasion of private property, be it ever so minute, is a trespass").

87. The year after Lord Camden rendered his judgment in *Entick*, Parliament demonstrated a similar understanding that papers deserved special protection distinct from the general right to preserve private property from intrusion and seizure. In 1766 the House of Commons passed *two* separate resolutions in response to the Wilkes affair. One condemned the use of general warrants in libel cases; the other declared the seizure of papers in a libel case to be illegal. Editor's note following *Entick*, 19 Howell's State Trials at 1074-75. Parliament evidently felt the need for a separate provision to protect the secrecy of personal papers, however obtained by the government.

88. *See, e.g., Boyd v. United States*, 116 U.S. 616, 626-27 (1886).

As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, [*Entick*,] and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures.

*Id.* Wilkes himself was a popular figure among colonists because of his outspoken criticisms of the Crown, and he maintained a considerable correspondence with such leading Americans as James Otis, Samuel Adams, John Adams, Josiah Quincy, and John Hancock. *See* N. LASSON,

protect the secret contents of private papers as well as the right to prevent intrusive rummaging and seizures. In *Boyd v. United States*,<sup>89</sup> the only major Supreme Court decision of the 19th century interpreting "search" in the fourth amendment, the *Entick* decision provided the basis for such an interpretation by the Court.

In 1874 Congress enacted a customs revenue act<sup>90</sup> that contained a provision carefully crafted in an attempt to avoid the warrant requirements of the fourth amendment. The provision authorized the U.S. Attorney to issue to a civil defendant in a forfeiture action a subpoena to produce "any business book, invoice, or paper," setting forth by allegation the facts expected to be proved by the materials. If the defendant failed to produce the materials, the allegations would be taken as true. The act carefully specified that the defendant who complied by presenting the materials to the U.S. Attorney for examination would still retain custody of them.<sup>91</sup> In spite of this careful drafting, the Court held in *Boyd* that the subpoena procedure violated the fourth amendment.<sup>92</sup>

Because the defendant retained possession of his papers at all times, he could not claim that the government had seized them. And, as the Court recognized, the government's action defied characterization as a search of: "It is true that certain aggravating incidents of *actual* search and seizure, such as *forcible entry* into a man's house and *searching amongst* his papers, are wanting. . . ."<sup>93</sup> What was "wanting" was the semantic feature [movement through an area], which is present in both "forcible entry" and "searching amongst." The Court noted an important semantic distinction by using the preposition "amongst." Had the procedure resulted in the production of several boxes of records that the customs officers then went through, one *could* say that the officers searched the defendant's papers, by imagining papers as a total area. In fact, though, the procedure caused the defendant to produce only the single invoice the government wanted to see.<sup>94</sup>

Although the *Boyd* opinion did not use search out to express the conclusion that the procedure was a search, the semantic features identified and relied upon by the Court are those belonging to search out:

It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment . . . because it is a material ingredient, and effects the sole

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*supra* note 52, at 46 n.114.

89. 116 U.S. 616 (1886).

90. Act of June 22, 1874, ch. 391, 18 Stat. 186.

91. *Id.* § 5, 18 Stat. at 187.

92. *Boyd v. United States*, 116 U.S. 616, 638 (1886).

93. *Id.* at 622 (emphasis added).

94. *See id.* at 619-21. The presence of [movement through an area] had enabled the Court to avoid this problem of interpretation in an earlier case involving examination of personal mail while in transit through the postal service. *See Ex Parte Jackson*, 96 U.S. 727 (1877). Because the government already had lawful custody of the letters, the Court could not say that a seizure occurred. *See id.* at 733. The *opening* of the envelopes, however, provided sufficient movement to enable a literal application of search of. The government "searched the envelopes." Nonetheless, the Court's opinion seemed to recognize that the true object of the search was not the envelopes but "the secrecy of letters." *Id.*

object and purpose of search and seizure.<sup>95</sup>

The object effected by the procedure directed against the papers was “obtaining the information therein contained.”<sup>96</sup> The Court then turned to *Entick* as authority for the proposition that the right to be secure in papers extended beyond the prevention of physical acts of searching:

It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense [in *Entick*]; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . . [I]t is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden’s judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man’s own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment.<sup>97</sup>

Like *Entick*, *Boyd* successfully claimed that his “secret affairs . . . became wrongfully discovered and made public.”<sup>98</sup>

The unarticulated semantic implication of *Boyd* was that “the right to be secure in papers” could be protected to the full extent contemplated by the framers only if search out as well as search of was a possible sense of “unreasonable searches.” *Boyd* stood as evidence that a search out interpretation was sufficiently plausible to potentially command a majority on the Supreme Court. Thus, as the nation entered the 20th century, a latent ambiguity lurked in the fourth amendment, waiting for the problem of the “just listening” cases, which tortured and ultimately altered the shape of fourth amendment law.

#### V. FOUR INTERPRETATIONS OF “SEARCH”: THE JUST LISTENING CASES

For almost forty years, from 1928-1967, the Supreme Court struggled with cases involving various kinds of technologically aided listening—wiretapping,<sup>99</sup> hidden microphones,<sup>100</sup> and ultra-sensitive listening devices.<sup>101</sup> In each case the government took the position that no search had occurred because its agents were “just listening.”<sup>102</sup> These cases brought to the surface the latent ambiguity of “search” in the first clause of the fourth amendment. Any conversion of a sentence using “listen” into one using “search of” was incoherent because listen does not contain the key semantic feature, [movement through an area], required for search of:

95. *Boyd*, 116 U.S. at 622.

96. *Id.* at 624.

97. *Id.* at 630.

98. *Entick v. Carrington*, 19 Howell’s State Trials 1029-30, 95 Eng. Rep. 807, 807 (1765).

99. See *Olmstead v. United States*, 277 U.S. 438, 444-45 (1928).

100. See *Katz v. United States*, 389 U.S. 347, 348 (1967); *On Lee v. United States*, 343 U.S. 747, 749 (1952).

101. See *Silverman v. United States*, 365 U.S. 505, 506 (1961); *Goldman v. United States*, 316 U.S. 129, 131-32 (1942).

102. See *Katz*, 389 U.S. at 352; *Silverman*, 365 U.S. at 511; *On Lee*, 343 U.S. at 751; *Goldman*, 316 U.S. at 135; *Olmstead*, 277 U.S. at 464-65.

The police listened to my phone call.

(?) The police searched my phone call.<sup>103</sup>

A second semantic feature blocks conversion of "listen" into "search of." Listen does not take an affected object while search of must. Listening has no effect on either the sound waves received or the source of those waves; listening only describes an activity of the listener.<sup>104</sup>

In the first case of the forty year struggle, *Olmstead v. United States*,<sup>105</sup> federal prohibition officers had tapped the telephone lines leading from the homes of four defendants and from Olmstead's office without entering the homes or office.<sup>106</sup> The officers monitored calls for many months, disclosing "a conspiracy of amazing magnitude to import, possess, and sell liquor unlawfully."<sup>107</sup> Chief Justice Taft, writing for a bare majority of five, implicitly assumed that search can mean only search of, by relying on the absence of [movement through X] and <X has surface or interior> to conclude that no search took place:

The Amendment itself shows that the *search* is to be of *material things*—the person, the house, his papers or his effects. . . . The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. *There was no entry* of the houses or offices of the defendants. . . . [Previous cases have said that the Fourth Amendment was] to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty. But that cannot justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers and effects, or so to apply the words search and seizure as to forbid hearing and sight.<sup>108</sup>

One of the dissenters, Justice Butler, planted the seeds of the intrusion interpretation:

The communications belong to the parties between whom they pass. During their transmission the exclusive use of the wire belongs to the persons served by it. Wire tapping involves *interference with* the wire while being used. Tapping the wires and

103. See *supra* note 40 (discussion of searching a conversation).

104. Of course search out also has the feature <affected object>. The direct object of search out is affected by being disclosed. Conversion of expressions built around listening to searching out requires identification of something hidden that was disclosed by means of listening. See *infra* note 149.

105. 277 U.S. 438 (1928).

106. *Id.* at 444-45.

107. *Id.* at 455-56.

108. *Id.* at 464-65 (emphasis added). Taft's opinion often is treated as an example of the intrusion interpretation. For example, James Boyd White suggests that even under Taft's interpretation the wiretapping could have been viewed as a search because the tap was a trespass under the common law. See White, *Judicial Criticism*, 20 GA. L. REV. 835, 850-51 (1986). A close reading of Taft's opinion, however, shows that he held consistently to the semantic features of search of. Even when he included "physical invasion" of the house or curtilage in the definition of search, he added that the invasion had to be "for the purpose of making a seizure," *Olmstead*, 277 U.S. at 466, thus recognizing the [purpose to find] component that distinguishes a search from a mere trespass or other physical invasion.

listening in by the officers literally constituted a search for evidence. As the communications passed, they were heard and taken down.<sup>109</sup>

Justice Butler evoked an image of the telephone wire as a tube, belonging to the defendants, through which tangible messages passed. The tap intruded into the wire and seized the passing messages, thus “searching” the defendants’ telephone lines.<sup>110</sup>

A few paragraphs after the above passage, Justice Butler apparently invoked the policy interpretation: “This Court has always construed the Constitution in the light of the principles upon which it was founded. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions.”<sup>111</sup> Yet it was Justice Brandeis’s famous dissent that fully developed the policy interpretation only suggested by Butler:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, *whatever the means employed*, must be deemed a violation of the Fourth Amendment.<sup>112</sup>

Justice Brandeis’s response to the semantic limitations of search of was to remove “search,” in any of its senses, from the first clause of the fourth amendment. The text of the amendment protects against violation of the *limited* right “to be secure . . . against unreasonable searches and seizures.”<sup>113</sup> Under Justice Brandeis’s policy interpretation the right to be secure (or in his terms, “the right to be let alone” or the right to privacy<sup>114</sup>) would be protected against any kind of governmental violation. Noticeably absent from the *Olmstead* decision, and from the ensuing decisions of the next forty

109. *Olmstead*, 277 U.S. at 487 (Butler, J., dissenting) (emphasis added).

110. *Id.* Note how this metaphoric use of search of not only requires imagining the wiretapping as going into the wire, but also imposes on the wire the character of a container. Significantly, Justice Butler still did not actually say that the government *searched the telephone wire*. Rather, he fell back on search for, which contains none of the troubling semantic restrictions. He seemed aware that his description of the wire as a tube through which tangible messages passed was only a metaphor that could not support a literal use of search of.

111. *Olmstead*, 277 U.S. at 487-88 (Butler, J., dissenting).

112. *Id.* at 478-79 (Brandeis, J., dissenting) (emphasis added). Justice Holmes stated in his separate dissent that while he was not prepared to say that the “penumbra” of the fourth amendment covered wiretapping, he did “fully agree that courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them.” *Id.* at 469 (Holmes, J., dissenting). He went on to argue that the evidence obtained by the wiretapping should have been excluded under the Court’s supervisory powers. *See id.* at 470-71 (Holmes, J., dissenting).

113. U.S. CONST. amend. IV (emphasis added).

114. *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

years, was the search out interpretation.

The Court next had occasion to debate whether listening can be a search in *Goldman v. United States*.<sup>115</sup> The defendants in *Goldman* challenged evidence obtained by eavesdropping from an adjoining office using a "detectaphone" placed against the partition wall.<sup>116</sup> The detectaphone was used after federal agents had entered the defendants' office the previous night to install a listening device, which failed to operate.<sup>117</sup> The Court found that this prior intrusion did not distinguish the case from *Olmstead* because the entry did not aid in the subsequent use of the detectaphone, which itself involved no intrusion into the office.<sup>118</sup> The majority's emphasis on the trespass issue suggested some movement from Taft's search of interpretation to the intrusion interpretation. In dissent, Justice Murphy merged the intrusion and policy interpretations by contending that the agents had conducted "a search of [defendant's] private quarters" because the use of the detectaphone constituted "a direct invasion of the privacy of the occupant."<sup>119</sup>

The defendant in *On Lee v. United States*<sup>120</sup> hoped to distinguish both *Olmstead* and *Goldman* because his incriminating statements had been overheard by means of a *physical* entry into his place of business. One of On Lee's old friends, Chin Poy, who had agreed to be an undercover agent, sauntered into the defendant's laundry and engaged him in conversation. A government agent outside listened to the conversation through a radio transmitter worn by Chin Poy.<sup>121</sup> The search of interpretation was noticeably absent from the majority opinion as well as the several dissents.<sup>122</sup>

115. 316 U.S. 129 (1942).

116. *Id.* at 131-32.

117. *Id.* at 131.

118. *See id.* at 135.

119. *Id.* at 141 (Murphy, J., dissenting). He conceded that the agents did not literally conduct a search of the office because the [movement] needed for search of was absent: "if the language of the Amendment were given only a literal construction, it might not fit the case now presented for review. The petitioners were not *physically* searched. Their homes were not *entered*. Their files were not *ransacked*. Their papers and effects were not *disturbed*." *Id.* at 138 (Murphy, J., dissenting) (emphasis added). He sought, however, to merge the intrusion and policy interpretations by tacitly equating invasion of privacy with invasion of the office:

[W]e must give mind not merely to the exact words of the Amendment, but also to its historic purpose, its high political character, and its modern social and legal implications. . . . [T]he search of one's home or office no longer requires physical entry, for science has brought forth far more effective devices for the invasion of a person's privacy than the direct and obvious methods of oppression which were detested by our forebears and which inspired the Fourth Amendment.

*Id.* at 138-39 (Murphy, J., dissenting). Chief Justice Stone and Justice Frankfurter concurred saying they felt bound by *Olmstead*, but gladly would join in overruling *Olmstead* for the reasons expressed in *Olmstead's* dissenting opinions. *See id.* at 136 (Stone, C.J., & Frankfurter, J., concurring).

120. 343 U.S. 747 (1952).

121. *Id.* at 749-53.

122. None of the opinions ever used "search" as a verb, thus suppressing the important semantic features such as [movement] that are revealed only in the verb form. An interesting contrast is found in Judge Jerome Frank's dissent from the lower court decision in which he argued at length that "listening to the sounds in a room is searching" because the "every-day meaning of 'search' " is "the act of seeking." *United States v. On Lee*, 193 F.2d 306, 313 (2d Cir. 1951) (Frank, J., dissenting), *aff'd*, 343 U.S. 747 (1952). Of course Frank's argument

Instead, all eyes were on the question of intrusion. The majority wrote that the fourth amendment was inapplicable because there was no trespass: Chin Poy entered by implied consent and the listening government agent did not enter at all.<sup>123</sup> Justice Burton in dissent also relied on the intrusion interpretation by asserting that the agent “entered” through the hidden transmitter.<sup>124</sup> Justice Douglas, on the other hand, wrote that the absence of intrusion was irrelevant and adopted the policy interpretation of the Brandeis *Olmstead* dissent,<sup>125</sup> as did Justice Frankfurter.<sup>126</sup>

By 1961, when *Silverman v. United States*<sup>127</sup> reached the Court, a majority of the Justices clearly were ready to apply the fourth amendment to at least some kinds of technologically aided listening. The facts in *Silverman* were almost identical to those in *Goldman*.<sup>128</sup> The only distinguishing fact was that the police listened to the defendants’ conversations in their row house by driving a “spike mike” into the partition wall from an adjoining unit rather than by merely placing the microphone against the wall.<sup>129</sup> Fortuitously, the spike contacted a heating duct, “thus converting [defendants’] entire heating system into a conductor of sound”<sup>130</sup> and making conversations throughout the house audible. A unanimous Court held that a search had occurred.<sup>131</sup> The opinion by Justice Stewart explicitly adopted the intrusion interpretation,<sup>132</sup> distinguishing *On Lee*, *Goldman*, and *Olmstead* on the ground that listening in those cases had not been accomplished by “an actual intrusion into a constitutionally protected area.”<sup>133</sup> The Court refused to overrule *Goldman*, but instead said it declined “to go beyond it, by even a fraction of an inch.”<sup>134</sup>

*Silverman* shows how the intrusion interpretation could lead to incoherence. The Court’s reasoning would seem to have made the fourth

assumed that search for (the “act of seeking”) is a possible sense for search. For explanation why search for is not a plausible sense in the fourth amendment context, see *supra* text following note 59.

123. See *On Lee*, 343 U.S. at 751-52.

124. Justice Burton stressed that “Chin Poy . . . took with him the concealed radio transmitter to which agent Lee’s receiving set was tuned. For these purposes, that amounted to Chin Poy surreptitiously bringing Lee with him.” *Id.* at 766 (Burton, J., dissenting).

125. After quoting the Brandeis dissent at length, Justice Douglas stated that “the decisive factor is the invasion of privacy.” *Id.* at 765 (Douglas, J., dissenting).

126. *Id.* at 761-62 (Frankfurter, J., dissenting).

127. 365 U.S. 505 (1961).

128. For a discussion of *Goldman*’s facts, see *supra* text accompanying notes 115-19.

129. See *Silverman*, 365 U.S. at 506.

130. *Id.* at 507.

131. See *id.* at 511.

132. Stewart began by saying “the record in this case shows that the eavesdropping was accomplished by means of an unauthorized *physical penetration* into the premises occupied by the petitioners.” *Id.* at 509 (emphasis added). After discussing the facts of *On Lee*, *Goldman*, and *Olmstead*, Stewart concluded, “This Court has never held that a federal officer may without warrant and without consent *physically entrench* into a man’s office or home, there secretly observe or listen, and relate at the man’s subsequent criminal trial what was seen or heard.” *Id.* at 511-12 (emphasis added).

133. *Id.* at 512; see also *id.* at 510 (in both *Goldman* and *On Lee* “the eavesdropping had not been accomplished by means of an unauthorized physical encroachment within a constitutionally protected area”); *id.* (the “absence of a physical invasion of the petitioner’s premises was also a vital factor in” the *Olmstead* decision).

134. *Id.* at 512.

amendment applicable had the officers driven a nail, instead of a spike mike, into the heating duct. But obviously an intrusion by a nail is not a search, as shown by the incoherence created in the following attempt to transform "nailing" into "searching":

The government intruded into my house by driving a nail into my wall.

(?) The government searched my house by driving a nail into my wall.<sup>135</sup>

In 1967 the Court decided *Katz v. United States*,<sup>136</sup> which generally is regarded as one of the most important fourth amendment cases in American history.<sup>137</sup> Mr. Katz had been convicted of making interstate bets by telephone in violation of a federal statute.<sup>138</sup> The key evidence against him was a recording of his end of several telephone calls made from a public telephone booth. The agents recorded Katz's statements by attaching an electronic listening device to the outside of the booth.<sup>139</sup> The Court of Appeals had found that no search took place because there "was no physical entrance into the area" occupied by Katz.<sup>140</sup>

Understandably, in light of *Silverman*, the parties presented their arguments to the Court in terms of the intrusion interpretation. The two issues framed on certiorari were: (a) whether a public telephone booth is a constitutionally protected area, and (b) whether physical penetration of a constitutionally protected area is necessary for the fourth amendment to apply.<sup>141</sup> Writing for the majority, Justice Stewart declined "to adopt this formulation of the issues," saying that the parties had framed the issues in a "misleading way."<sup>142</sup> Justice Stewart then proceeded to reject unambiguously the intrusion interpretation that he himself had adopted six years earlier in *Silverman*: "the reach of that Amendment cannot turn upon the

135. The suggestion in *Silverman* that the intrusion into the heating duct "usurp[ed] part of the [defendants'] house" only added an unpersuasive metaphor that the agents "seized" the house. *See id.* at 511. In any event, the Court made it clear that the "usurpation" of the heating duct was not a controlling factor when it subsequently summarily reversed *Clinton v. Commonwealth*, 204 Va. 275, 130 S.E.2d 437 (1963), giving as the only explanation a citation to *Silverman*. *See Clinton v. Virginia*, 377 U.S. 158, 158 (1964). The Virginia Supreme Court in *Clinton* had held that no search occurred, distinguishing *Silverman* because the police in *Clinton* had only "stuck" the microphone into the wall rather than "intruding" through the wall into defendant's apartment. 204 Va. at 281-82, 130 S.E.2d at 442. The Virginia Supreme Court assumed that the "penetration" of the microphone "was very slight such as one made by a thumb tack to hold the small device in place." 204 Va. at 281-82, 130 S.E.2d at 442.

136. 389 U.S. 347 (1967).

137. As Professor LaFave maintains, "[I]t is no overstatement to say, as the commentators have asserted, that *Katz* 'marks a watershed in fourth amendment jurisprudence . . .'" W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.1(b), at 307 (2d ed. 1987) (quoting Amsterdam, *supra* note 10, at 384).

138. *Katz*, 389 U.S. at 348. Katz was convicted under 18 U.S.C. § 1084 (1961). *Id.* at 348 & n.1.

139. *Id.* at 348.

140. *Katz v. United States*, 369 F.2d 130, 134 (9th Cir. 1966), *quoted in Katz*, 389 U.S. at 349.

141. *Katz*, 389 U.S. at 349-50.

142. *Id.* at 350-51.



presence or absence of a physical intrusion into any given enclosure.”<sup>143</sup> He also rejected the policy interpretation of Brandeis’s dissent in *Olmstead*, which would have applied the fourth amendment to “every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed”:<sup>144</sup>

the Fourth Amendment cannot be translated into a general constitutional “right to privacy.” That Amendment protects individual privacy *against certain kinds of governmental intrusion*, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person’s *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.<sup>145</sup>

As made clear by Justice Black’s heated dissent, discussed below, the majority also did not use the search of interpretation.<sup>146</sup>

What interpretation *did* Justice Stewart adopt in holding that the government’s actions in listening to Katz’s conversations constituted a search? The heart of his opinion consisted of the following three oft-quoted sentences:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.<sup>147</sup>

Read from a linguistic perspective, these three key sentences of Stewart’s opinion identified the semantic features of search out. The “people not places” comment had the effect of excluding search of with its semantic feature [movement through an *area*]. Thus, Justice Stewart declined to describe the government’s action as a *search of* the booth. The next two sentences made clear that the fourth amendment protects not simply “people,” but rather “*what* [people] seek[] to preserve as private.”<sup>148</sup> By making the new direct object of search “my secret” instead of “my place,” Justice Stewart indicated that an additional sense of “search” was

143. *Id.* at 353. For a discussion of Justice Stewart’s *Silverman* opinion, see *supra* text accompanying notes 127-35. Justice Stewart also had explicitly relied on the intrusion interpretation in *Hoffa v. United States*, 385 U.S. 293, 301 (1966), written only a year before *Katz*.

144. *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

145. *Katz*, 389 U.S. at 350-51 (first emphasis added) (footnotes omitted).

146. Justice Black unsuccessfully argued that only the “search of” interpretation was legitimate:

A conversation overheard by eavesdropping, whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized. . . . Rather than using language in a completely artificial way, I must conclude that the Fourth Amendment simply does not apply to eavesdropping.

*Id.* at 365-66 (Black, J., dissenting).

147. *Id.* at 351-52 (citations omitted).

148. *Id.* at 351 (emphasis added).

search out.

For Katz, his secrets were the bets he placed.<sup>149</sup> The government searched out those secrets by surreptitiously listening to his phone calls. It was the secret character of the direct object that made the government's actions a search: Katz did not expose his bets to the public, but instead took reasonable steps to keep his bets secret.<sup>150</sup> Because his bets were secret, the government's discovery of those bets was a search. The *means* used by the government were irrelevant because the semantic component of search out is the achievement of a goal (uncovering secrets), without requiring the concurrent accomplishment of an action, [movement through an area].

Unfortunately, Justice Stewart did not express the semantic implications of his opinion by using search out to describe the actions that he found to violate the fourth amendment. Because he never used "search" as a verb in the opinion, he never syntactically removed the ambiguity among the three literal senses of search, nor did he identify by use of "search" itself the protected direct object of the search. In fact, his opinion employed the phrase "search and seizure" instead of the word "search" without ever indicating whether the government's action was a search, a seizure,<sup>151</sup> or both.<sup>152</sup> Justice Stewart's semantic intuitions were sound, but by not *using* a

149. Justice Stewart's opinion said that what Katz sought to preserve as private were "the words he utter[ed] into the mouthpiece." *Id.* at 352. From a semantic perspective, however, it is a bit shortsighted to view the utterance itself as the affected object of searching out. What was searched out was the secret information—the bets—contained within that utterance, just as the object of searching in *Entick* and *Boyd* was the secret information contained within the papers. Thus, as suggested above, *see supra* note 104, the absence of <affected object> in listening is corrected by shifting attention from the utterance to the secret information contained within the utterance, thus redescribing "just listening" as searching out.

150. Katz was "surely entitled to assume that the words he utter[ed] into the mouthpiece [would] not be broadcast to the world." *Id.* at 352.

151. In *Berger v. United States*, 388 U.S. 41, 51 (1967), the Court did suggest that electronic eavesdropping could be viewed as a seizure of words. The Court, however, has not pursued the possibility of applying the fourth amendment to just listening through the word "seizure." In contrast, when Congress enacted comprehensive provisions regulating wiretapping and similar forms of electronic eavesdropping in the Crime Control Act of 1982, 18 U.S.C. § 2510 (1968), it used the metaphor of seizure. The Act prohibits "interception" of "oral communications" and defines "intercept" as "the aural *acquisition* of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." *Id.* at § 2510(4) (emphasis added).

152. Justice Stewart said that "electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied . . . and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Katz*, 389 U.S. at 353. His use of quotation marks around the phrase suggests an awareness that he was using the phrase in a nonliteral way. Stewart did not use "search" until the last paragraph of his opinion: "These considerations [supporting the warrant requirement] do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth." *Id.* at 359. This single use failed to resolve the opinion's ambiguity not only by using "search" in the noun form but also by failing to identify the direct object of the search, referring instead to the "setting" of the search.

After finishing his discussion of whether the government's action was a "search and seizure," Justice Stewart closed his opinion by holding that the warrant requirement should have been followed. *See id.* at 357-59. Throughout this entire latter part of his opinion, Justice Stewart referred to the government's action neither as a search nor a seizure, but as "surveillance" or "electronic surveillance." *See id.* at 354-59. Surveillance is not a good synonym for search out because, unlike search out, surveillance does not require that the government's action uncover secrets. Webster's defines surveillance as "close watch kept over one or more persons." *See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY* 2303 (1976). Thus, surveillance can discover what one "knowingly exposes to the public" just as well as "what he seeks to preserve as private." Indeed, the semantic features of surveillance are closer to search for than search out.

common sense of “search” he failed to articulate them unambiguously.<sup>153</sup>

The ambiguity of Justice Stewart’s opinion is demonstrated by the varying interpretations his fellow justices gave it. In his dissenting opinion, Justice Black accused the majority of abandoning the common sense meaning of “search” entirely by adopting the policy interpretation:

I simply cannot in good conscience give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage. . . .

With this decision the Court has completed, I hope, its rewriting of the Fourth Amendment, which started only recently when the Court began referring incessantly to the Fourth Amendment not so much as a law against *unreasonable* searches and seizures as one to protect an individual’s privacy. . . . Thus, by arbitrarily substituting the Court’s language, designed to protect privacy, for the Constitution’s language, designed to protect against unreasonable searches and seizures, the Court has made the Fourth Amendment its vehicle for holding all laws violative of the Constitution which offend the Court’s broadest concept of privacy.<sup>154</sup>

Justice Harlan began his concurring opinion by interpreting the majority decision as a variation on the intrusion interpretation:

I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is *an area* where, like a home, and unlike a field, a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic as well as physical *intrusion into a place* that is in this sense private may constitute a violation of the Fourth Amendment; and (c) that *the invasion of a constitutionally protected area* by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.<sup>155</sup>

While agreeing that the fourth amendment “protects people not places,” Justice Harlan added the caveat that defining such fourth amendment protection nonetheless generally “requires reference to a ‘place.’ ”<sup>156</sup> It would thus appear that Justice Harlan missed the central holding of the

not require success in achieving the goal. Compare the following expressions:

For five days the police conducted a surveillance to discover the identity of my houseguest, without success.

For five days the police searched for the identity of my houseguest, without success.

(?) For five days the police searched out the identity of my houseguest, without success.

153. Justice Stewart’s unarticulated reliance on his semantic intuition in *Katz* is perhaps reminiscent of his famous concurrence in *Jacobellis v. Ohio*, 378 U.S. 184 (1964) concerning “hard-core” pornography: “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . .” *Id.* at 197 (Stewart, J., concurring).

154. *Katz*, 347 U.S. at 373 (Black, J., dissenting).

155. *Id.* at 360-61 (Harlan, J., concurring) (emphasis added) (citations omitted).

156. *Id.* at 361 (Harlan, J., concurring). Harlan also stated, “The point is . . . that the booth . . . is a temporarily private place whose momentary occupants’ expectations of freedom from intrusion are recognized as reasonable.” *Id.* (Harlan, J., concurring).

majority's opinion: that fourth amendment protection was being extended not to the booth, but to the secrets disclosed by listening to the words spoken in the booth. Yet in the most frequently cited portion of his concurrence, Justice Harlan, apparently realizing that the search consisted of overhearing the conversation, not invading the booth, stated:

[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or *statements that he exposes* to the "plain view" of outsiders are not "protected" because no intention to keep *them* to himself has been exhibited. On the other hand, *conversations* in the open would not be protected against being *overheard*, for the expectation of privacy under the circumstances would be unreasonable.<sup>157</sup>

Justice Harlan's reliance on the intrusion interpretation and Justice Black's harsh criticism of what he viewed as the substitution of policy for constitutional text might have been prevented in *Katz* had Justice Stewart expressly resolved the ambiguity of "search" by *using* the word itself in a meaningful way. His failure to do so perhaps explains the seeming paradox that the result in *Katz* is universally praised<sup>158</sup> while the majority opinion either is ignored or deprecated. Telford Taylor disposes of *Katz's* famous "protects people not places" epigram with one almost equally memorable: "The only merit in this comment is its brevity."<sup>159</sup> Wayne LaFave, our leading commentator on the fourth amendment, has concluded that "the *Katz* opinion offers little to fill the void it has thus created."<sup>160</sup>

The Court itself, however, has rendered the ultimate judgment on the force and clarity of Justice Stewart's opinion. Although the Court almost always begins any discussion of whether a given action is a search with citation to *Katz*, often acknowledged as the "lodestar" of fourth amendment law,<sup>161</sup> the Court consistently cites Harlan's *concurrence* as the holding of the case.<sup>162</sup> The Court's gradual but profound reworking of Harlan's concurrence has enabled various justices to cite *Katz* as authority for reliance on the search of,<sup>163</sup> intrusion,<sup>164</sup> policy,<sup>165</sup> and search out<sup>166</sup> interpretations.

157. *Id.* at 361 (Harlan, J., concurring) (emphasis added). Justice Harlan further stated that the Court implicitly overruled *Olmstead* because *Olmstead* "essentially rested on the ground that conversations were not subject to the protection of the Fourth Amendment." *Id.* at 362 n.\* (Harlan, J., concurring).

158. See, e.g., Amsterdam, *supra* note 10, at 382, 385; Kamisar, *The "Police Practice" Phases of the Criminal Process and the Three Phases of the Burger Court in THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT, 1969-1986*, at 143, 158 n. 70 (H. Schwartz ed. 1987).

159. T. TAYLOR, *supra* note 59, at 112.

160. W. LAFAVE, *supra* note 137, § 2.1(b), at 307 (quoting Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U. L. REV. 968, 976 (1968)).

161. See, e.g., *Smith v. Maryland*, 442 U.S. 735, 739 (1979).

162. See, e.g., *California v. Ciraolo*, 476 U.S. 207, 211 (1986); *Hudson v. Palmer*, 468 U.S. 517, 525 (1984); *Oliver v. United States*, 466 U.S. 170, 177 (1984).

163. See, e.g., *Oliver*, 466 U.S. at 177.

164. See e.g., *Ciraolo*, 476 U.S. at 211 (relying on fact that observations were "physically nonintrusive" while simultaneously denying any repudiation of *Katz*).

165. See, e.g., *Hudson v. Palmer*, 468 U.S. 517 (1984) (holding that literal search of

Sometimes one finds the lodestar shining over a case in which almost all the interpretations are tangled into the same opinion.<sup>167</sup> Thus, the ambiguity and vagueness of Justice Stewart's opinion in *Katz* has spawned the incoherence of today's fourth amendment law.

## VI. LIMITING THE SEARCH OUT INTERPRETATION: THE REQUIREMENT OF LEGITIMACY

One possible result of Justice Stewart's ambiguity was that *Katz* could be interpreted as including search for in the meaning of "unreasonable searches."<sup>168</sup> Edmund Kitch, for example, seemed to come to that conclusion in an early comment: "[*Katz*] extends the Fourth Amendment prohibition to every nonconsensual government investigation . . ." <sup>169</sup> Given the obvious ramifications of such an inclusive interpretation of "search," it is not surprising that the Court's first important reworking of *Katz*, *United States v. White*,<sup>170</sup> dealt with this issue.

*White* presented facts similar to the pre-*Katz* case of *On Lee v. United States*.<sup>171</sup> Both cases involved what has come to be called participant monitoring: government agents overhear a conversation through a microphone voluntarily worn by one of the participants in the conversation.<sup>172</sup> In *White* the agents overheard a total of eight conversations between White and the informant, Jackson. Four conversations were in Jackson's home, two were in Jackson's car, one was in a restaurant, and the other was in White's home.<sup>173</sup> Because the prosecution was unable to produce Jackson at trial, the trial court allowed the agents to testify to the conversations they overheard by use of the concealed microphone worn by Jackson.<sup>174</sup> The court of appeals, assuming *On Lee* was overruled by *Katz*,<sup>175</sup> reversed the trial court.<sup>176</sup>

prisoner's cell was not a "search" within meaning of fourth amendment by balancing privacy interests of prisoners against security needs of prison officials). The court's explicit policy interpretation began by citing *Katz* as authority for the need to determine whether "a 'justifiable' expectation of privacy is at stake." *Id.* at 525.

166. *See, e.g.*, *United States v. Karo*, 468 U.S. 705, 712-15 (1984); *cf. id.* at 733-735 (Stevens, J., concurring in part and dissenting in part).

167. For example, see *Dow Chemical Co. v. United States*, 106 S. Ct. 1819 (1986), discussed at *infra* text accompanying notes 318-46, and *United States v. Karo*, 468 U.S. 705 (1984), discussed at *infra* text accompanying notes 271-86.

168. Indeed, as discussed above, *see supra* note 152, his reliance on "surveillance" to describe the government's activity suggested (probably inadvertently) a search for interpretation.

169. Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CR. REV. 133, 134.

170. 401 U.S. 745 (1971).

171. *On Lee v. United States*, 343 U.S. 747, 749-50 (1950). For a discussion of *On Lee*, see *supra* notes 120-26 and accompanying text.

172. *See White*, 401 U.S. at 746-47 (White, J., plurality opinion).

173. *Id.* at 747 (White, J., plurality opinion).

174. *Id.* (White, J., plurality opinion).

175. *Katz* was decided by the Supreme Court between the close of White's trial and the court of appeals decision. *See United States v. White*, 405 F.2d 838, 848 (7th Cir. 1969) (en banc).

176. *See id.*

The Supreme Court reversed the court of appeals,<sup>177</sup> holding that no search occurred, but no single opinion commanded a majority. Writing for a plurality that included Chief Justice Burger and Justices Stewart and Blackmun, Justice White was preoccupied with the task of reconciling *Katz* with a trilogy of cases decided shortly before *Katz* that had exempted the use of undercover informants from the scope of the fourth amendment: *Hoffa v. United States*,<sup>178</sup> *Lopez v. United States*,<sup>179</sup> and *Lewis v. United States*.<sup>180</sup> Each of these three cases, like *On Lee*, had been decided in terms of the intrusion interpretation; the informants had not "intruded" into what were admittedly constitutionally protected areas<sup>181</sup> because in each case they entered with the occupant's consent. Beneath this rather mechanical application of the intrusion interpretation was the concern, explicitly stated in *Lewis*, that also seemed to underlie the decision in *White*: "Were we to hold the deceptions of the agent in this case constitutionally prohibited, we would come near to a rule that the use of undercover agents in any manner is virtually unconstitutional *per se*."<sup>182</sup>

After reaffirming the *Katz* rejection of the intrusion interpretation,<sup>183</sup> Justice White proceeded to apply what at first appeared to be search out analysis to hold that no search occurred in the earlier trilogy or in *White* itself. His starting premise was that "one contemplating illegal activities must realize and risk that his companions may be reporting to the police."<sup>184</sup> If Justice White meant that the contents of a conversation cease to be secret the moment that a government spy participates in the conversation, then from the perspective of the search out interpretation he was correct in refusing to distinguish *White* from the *Hoffa-Lopez-Lewis* trilogy. If what the defendant in *White* said to Jackson was not secret, then the agent's additional listening did not search out anything, just as covertly listening to the President's State of the Union address would not be a search. Viewed in this light, Justice White's opinion seems to rest on one of the connotations of search out in the fourth amendment: <X is secret>.

Justice White realized, however, that he had a problem using the search out interpretation. After all, information shared in a conversation does not, from a common sense perspective, automatically cease to be secret; otherwise, the phrase "secret conversation" would be a contradiction in terms. Indeed, *Katz* itself would be undone since what the government heard also was revealed to the person at the other end of the telephone line.

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177. See *White*, 401 U.S. at 754 (White, J., plurality opinion).

178. 385 U.S. 293, 301-03 (1966).

179. 373 U.S. 427, 439-40 (1963).

180. 385 U.S. 206, 210-11 (1966).

181. In *Lewis* the agent entered the defendant's home, see *Lewis*, 385 U.S. at 206-07; in *Hoffa* the informant entered Jimmy Hoffa's hotel suite, see *Hoffa*, 385 U.S. at 296-98; and in *Lopez* the agent entered the defendant's private office, see *Lopez*, 373 U.S. at 429-32.

182. *Lewis*, 385 U.S. at 210. Indeed such a rule could extend even further, as Kitch feared, see *supra* text accompanying note 169, so that *all* searching for evidence of crime could come under the warrant requirements of the fourth amendment.

183. Justice White noted, "*Katz* . . . swept away doctrines that electronic eavesdropping is permissible under the Fourth Amendment unless physical invasion of a constitutionally protected area produced the challenged evidence." *United States v. White*, 401 U.S. at 748 (White, J., plurality opinion).

184. *Id.* at 752.

Why, then, could Katz reasonably expect the words he uttered into the telephone to be secret while White could not have the same expectation regarding his conversations with Jackson in the privacy of a car or his own home? Justice White found his answer by exploiting yet another ambiguous word found in Justice Harlan's *Katz* concurrence.

Justice Harlan insisted in his *Katz* concurrence that an actual subjective expectation of privacy was not sufficient to invoke fourth amendment protection: "the expectation [must also] be one that society is prepared to recognize as 'reasonable.'"<sup>185</sup> This distinction between subjective and "reasonable" expectations simply seemed to be an expansion on the majority's comment that Katz had "justifiably" relied on the expected privacy afforded by the telephone booth.<sup>186</sup> Both Justices Stewart and Harlan seemed to have the same reasonableness requirement in mind: the person claiming fourth amendment protection must have taken the steps any reasonable person would have taken in order to expect privacy.<sup>187</sup> This requirement that an expectation of secrecy be objectively reasonable is consistent with interpreting *Katz* as an example of the search out interpretation, which requires that the direct object of search out must in fact have been secret prior to the searching out.<sup>188</sup>

Justice Harlan's two-pronged test thus objectifies a claim of secrecy. The first prong requires that the defendant exhibit behavior demonstrating his expectations of secrecy.<sup>189</sup> The second prong applies a reasonable person standard to those expectations. Both prongs of the test can be applied by the police officer in the street. She can tell whether secrecy is sought by observable signals, such as a drawn curtain, a closed door, or a lowered voice. She can then test that exhibited expectation against her own common sense knowledge of how reasonable people protect secrets.

However, "reasonable" can be ambiguous. In the two following expressions, "reasonable" has different senses:

185. *Katz v. United States*, 389 U.S. 348, 361 (1967) (Harlan, J., concurring).

186. *Id.* at 353.

187. LaFave, for example, has acknowledged that this is a plausible interpretation of the Harlan concurrence:

Sometimes the Court has referred to the *Katz* rule as the "reasonable 'expectation of privacy' " test. From this, it might be assumed that police investigative activity constitutes a search whenever it uncovers incriminating actions or objects which the law's hypothetical reasonable man would expect to be private, that is, which as a matter of statistical probability were not likely to be discovered.

W. LaFAVE, *supra* note 137, § 2.1(d), at 311 (footnote omitted). Justice Harlan's example of an unreasonable expectation—that "conversations in the open would not be . . . overheard," *Katz*, 389 U.S. at 361 (Harlan, J., concurring)—seems consistent with this reasonable person standard.

188. See *supra* text accompanying notes 85-98, 147-50. The semantic features of "secret" also seem to indicate that secrecy is treated semantically as an objective fact, as illustrated by this expression: "I thought my motive was a secret, although I later found out it was not."

189. I use "expectation of secrecy" rather than "expectation of privacy" to describe the holding of *Katz* because privacy is both broader and narrower than secrecy. For example, something that is not private property may nonetheless be exposed to public view. On the other hand, privacy connotes a *right* to be private, whereas secret has no normative implications one way or the other.

It was reasonable for Katz to expect that no one could hear his end of the telephone conversation.

It was reasonable for Katz to refuse to talk to the police until his lawyer arrived.

In the first expression, Katz's expectation is reasonable because it is normal, typical. In the second expression, Katz's refusal is reasonable because it is normative, that is, legitimate.<sup>190</sup> Justice Harlan's reference to expectations that "society is prepared to recognize as 'reasonable'"<sup>191</sup> opened the door to interpreting "reasonable" as legitimate, since society is usually the source of normative judgments. In *White* Justice White slid through that door and, as we shall see, most of the other Justices eventually joined him.

Justice White said he was *not* concerned with "what the privacy expectations of particular defendants in particular situations may be, or the extent to which they relied on the discretion of their companions."<sup>192</sup> Rather, the determinative issue was whether an "interest *legitimately* protected by the Fourth Amendment is involved."<sup>193</sup> For Justice White, the defendant's interest in keeping his conversations with Jackson secret could not be legitimate because, as already held in *Hoffa*, "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it" is not a legitimate interest.<sup>194</sup> Legitimate expectations of privacy were thus defined as those expectations that society will protect by law, specifically the fourth amendment.<sup>195</sup> Justice White thus reinterpreted *Katz*, applying Justice Stewart's own word for "reasonable," "justifiable": "Our problem, in terms of the principles announced in *Katz*, is what expectations of privacy are constitutionally justifiable—what expectations the Fourth Amendment will protect in the absence of a warrant."<sup>196</sup>

As Anthony Amsterdam has pointed out, this reformulation of *Katz* turns its holding into a question-begging tautology: "the fourth amendment protects those interests that may justifiably claim fourth amendment protection."<sup>197</sup> Thus, the requirement that privacy expectations be legitimate has transformed what at first appeared to be a semantic question—is a given government action a search—into a value judgment—should a given government action be regulated by the fourth amendment. Reinterpreting *Katz* in terms of legitimate expectations of privacy has fulfilled Justice Black's prophecy that *Katz* would open the door to the policy interpretation, but in an unexpected way: the policy interpretation has

190. These two senses are obviously closely related because we often judge whether behavior is normatively correct by whether it is typical. *Webster's Dictionary* reveals this interrelationship of meaning when it offers as a definition of "reasonable" the following subtle shift from typical to legitimate: "not extreme . . . moderate . . . rational." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1892 (1976).

191. *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (emphasis added). It is interesting that this phrase is the only point in his opinion where Justice Harlan put quotation marks around "reasonable," perhaps signalling that he was using the words in an unusual or specialized sense.

192. *White*, 401 U.S. at 751.

193. *White*, 401 U.S. at 749 (quoting *Hoffa*, 385 U.S. at 302) (emphasis added).

194. *Id.* (quoting *Hoffa*, 385 U.S. at 302).

195. *Id.* at 752 ("the law permits the frustration of actual expectations of privacy").

196. *Id.*

197. Amsterdam, *supra* note 10, at 385.



been used to *restrict* rather than expand the meaning created by the use of a literal sense of search (search out). Even if a reasonable person in White's shoes would not have expected his conversation partner to be relaying his words to anyone else, no search occurred because the Court has made a value judgment in favor of the use of government informers.

Justice Harlan assumed that Justice White's opinion was founded on the policy interpretation and joined battle on those terms in his oft-cited dissent:

The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present.

Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them on society. The critical question is whether under our system of government, as reflected in the Constitution, we should impose on our citizens the risks of the electronic listener without at least the protection of a warrant requirement.

This question must, in my view, be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement.<sup>198</sup>

Justice Harlan thus made explicit Justice White's tacit adoption of the policy interpretation and then articulated his view of the underlying policy of the fourth amendment: a warrant should be required before undertaking an investigative practice if the practice's threat to the individual's sense of security outweighs its utility as a law enforcement tool. Thus, to say that a challenged practice is a search under the fourth amendment is merely to state in a shorthand way that the practice is more threatening to personal security than it is useful for law enforcement. In a conversation based on Justice Harlan's policy interpretation, speakers will agree that a given action is a search only if they understand, share, and identically balance the same values. In contrast, semantic analysis only requires common sense for meaningful communication.

Viewed in terms of the policy interpretation, the debate between Justices White and Harlan seems to have turned on the potential impact on the individual's sense of security if fleeting conversations are made indelible. Justice White assumed that the fact a spy was wearing a microphone added no additional threat to personal security.<sup>199</sup> Justice Harlan, on the

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198. *White*, 401 U.S. at 786 (Harlan, J., dissenting).

199. Justice White asserted: "Given the possibility or probability that one of his colleagues is cooperating with the police, it is only speculative to assert that the defendant's utterances would be substantially different or his sense of security any less if he also thought it possible that the suspected colleague is wired for sound." *Id.* at 752.

other hand, felt confident that "words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed."<sup>200</sup> A decision to leave participant monitoring outside the constraints of the fourth amendment "might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious and defiant discourse—that liberates daily life."<sup>201</sup>

Justice Harlan also responded to what he suspected was a hidden thumb on the scale in Justice White's analysis: that the person complaining of the participant monitoring was, in Justice White's words, a person "contemplating illegal activities,"<sup>202</sup> a "wrongdoer."<sup>203</sup> As Justice Harlan pointed out, the result in *White* did not sanction participant monitoring only of criminals. By exempting participant monitoring totally from the fourth amendment, the Court explicitly licensed the government to engage in the practice even where it has no suspicion that the subject of the practice is engaged in illegal activities.<sup>204</sup>

The *White* decision thus demonstrates a serious problem with using the policy interpretation to interpret "search" as an operative word in the fourth amendment. If the justification for the outcome in *White* was that the participant monitoring served a valuable law enforcement purpose,<sup>205</sup> we would expect a different outcome whenever the government used it for a different purpose, such as spying on political strategy sessions in the headquarters of the opposing political party.<sup>206</sup> Yet *White's* precedential authority is that participant monitoring for *any purpose* falls outside the protections of the fourth amendment.<sup>207</sup> Thus, all the subtle identification and weighing of values contemplated by the policy interpretation is lost when the Court uses that approach to declare that a generic category of

200. *Id.* at 787 (Harlan, J., dissenting).

201. *Id.* (Harlan, J., dissenting).

202. *Id.* at 752.

203. *Id.* at 749 (quoting *Hoffa*, 385 U.S. at 302).

204. *Id.* at 789 (Harlan, J., dissenting) (the result does "not simply mandate that criminals must daily run the risk of unknown eavesdroppers prying into their private affairs; it subjects each and every law-abiding member of society to that risk."). A thorough criticism of the concept of a "wrongdoer's exception" is found in Grano, *supra* note 10, at 432-38. Grano, however, took the position in his article that a government investigative practice that only revealed a person's propensity to crime, like a sting operation, should not be considered a search because the ultimate purpose of the fourth amendment is to preclude conduct that *might* intrude upon innocent privacy expectations. *Id.* at 437; *see also* Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983). In considering this argument, it is perhaps worth recalling that John Wilkes was eventually judged guilty of seditious libel, *see* N. LASSON, *supra* note 52, at 49, and that some of the colonial leaders who most vigorously opposed the writs of assistance were undoubtedly smugglers. For example, John Hancock's sloop, "The Liberty," was seized in 1768 by the British for bringing in Madeira wines without payment of duties, provoking a substantial colonial riot. *Id.* at 72.

205. *See White*, 401 U.S. at 753-54 (plurality opinion) (value of participant monitoring for producing accurate and reliable trial testimony not dependent on availability or credibility of informant).

206. Perhaps in 1971 such a possible abuse of governmental power might not have seemed as likely as it would have four years later.

207. *White*, 401 U.S. at 752 (plurality opinion). Justice White's opinion has come to be treated as an authoritative holding even though it commanded only four votes. *See, e.g.*, *United States v. Miller*, 425 U.S. 435, 443 (1976) (citing *United States v. White*, 401 U.S. 745, 752 (1971)).

governmental activity never can be considered a search. However, the opposite use of the policy interpretation, to weigh each challenged instance of governmental action on its facts, presents equally serious problems, as pointed out by Amsterdam:

The ultimate question, plainly, is a value judgment. . . . [But] it is a perfectly impossible question for the Supreme Court to put forth as a test of fourth amendment coverage.

It is impossible because, in the first and most important instance, the fourth amendment speaks to the police and must speak to them intelligibly. How in the devil is a policeman engaged in an investigation supposed to decide whether the form of surveillance that he proposes to use, if not restricted by the fourth amendment, would curtail the liberties of citizens to a compass inconsistent with a free society?<sup>208</sup>

As used in *White*, the policy interpretation seemed to have transformed “search” into a specialized legal term that was vague at exactly the moment when clarity was most needed. For either Justice White or Justice Harlan to use the word “search” added no information to explain the conclusion reached; it merely stated the conclusion. For each, his conclusion was not based on a sense of “search” common to him and the other Justice (or to anyone else, such as the parties), but instead was explained by expressions that did not use the word “search.” By abandoning semantic common sense, the justices also missed an opportunity to use the semantic potential of the search out interpretation to understand and resolve the issue before them in a different way.

Despite their disagreements, neither Justice White nor Justice Harlan questioned the soundness of the underlying *Lewis* and *Hoffa* cases.<sup>209</sup> Yet the possibility of police infiltration and spying has an impact on one’s sense of security and spontaneity possibly greater even than wiretapping.<sup>210</sup> As mentioned earlier,<sup>211</sup> one suspects that both Justices were unwilling to subject all undercover police work to the restrictions of the warrant clause. When Kitch observed that *Katz* appeared to apply fourth amendment prohibitions to all searching for, he suggested that the Court would need to

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208. Amsterdam, *supra* note 10, at 403-04. Amsterdam characteristically added: “And, even if that were a question that a policeman could practicably answer, I would frankly not want the extent of my freedom to be determined by a policeman’s answer to it.” *Id.* at 404. For an eloquent demonstration of how the fourth amendment can and should be considered as the basis for an idealized conversation—not in a courtroom between two lawyers—but on the street between the police officer and the citizen, see generally White, *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165 (1975).

209. Justice Harlan did seriously question *Lopez*, which he had authored, because in retrospect he thought that the fact the agent in *Lopez* had a tape recorder in his pocket (although no other agents were monitoring the conversation) threatened spontaneous speech as did the participant monitoring in *White*. See *United States v. White*, 401 U.S. 745, 788 n.24 (1971) (Harlan, J., dissenting).

210. Amsterdam makes this point in a telling way with an anecdote about a civil rights group that feared the presence of a government spy because of leaked secret information. To resolve the crisis, the group’s leader falsely told the members that the police had obtained the information through a wiretap. Amsterdam, *supra* note 10, at 407-08 (“It had to be the bug. If it was a spy, the movement would have torn itself apart.”).

211. See *supra* text accompanying note 182.

“seek a limiting principle to replace that of *Olmstead*.”<sup>212</sup> The search out interpretation does utilize a more limited sense of “search” than search for, because the government must in fact uncover information that was objectively secret. Our semantic common sense about the meaning of “secret” can help distinguish between police investigation generally and the use of spies, and even between different types of spying.

To determine whether information shared in a conversation was secret, common sense tells us to ask questions about the nature of the relationship between the two participants in the conversation. “Shared secret” is a coherent expression but it assumes a social world divided in two between “we few” and “the others.”<sup>213</sup> In this world, information remains secret as long as the others do not know it. Of course the division of the social world will vary according to the context of usage. We few may be a family, a circle of close friends, top management of a company, a political leader’s closest advisors, or a criminal conspiracy. Common to all shared secrets, however, is an assumption of trust and confidentiality among the few. Indeed, we probably feel that if secrecy is to be maintained, the level of trust and confidentiality must increase as the number of persons included in the few increases.<sup>214</sup> A secret society like the Ku Klux Klan is secret not only because its membership is known only to the few, but also because strong bonds among its members, reinforced by pledges and rituals, allow the members to feel secure in sharing their secrets within the society.

Under the search out interpretation, then, activity of an undercover agent, including participant monitoring, is not a search if it was objectively unreasonable for the one giving the agent information to consider that information secret. For example, in *Lewis* the agent was a total stranger who called Lewis, identified himself as “Jimmy the Pollack [*sic*],” and asked if Lewis could sell him narcotics. Lewis answered affirmatively and invited “Jimmy” to his house to conduct the transaction.<sup>215</sup> It seems under these circumstances Lewis would have defied common sense if he tried to

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212. See Kitch, *supra* note 169, at 134.

213. *Webster’s Dictionary* defines “secret” as “something kept from the knowledge of others or shared only confidentially with a few.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2052 (1976). The disjunctive nature of this definition suggests that an expression using just the word “secret” is somewhat vague and requires an answer to the question “secret from whom?” to be fully meaningful.

214. In *Marshall v. Barlow’s, Inc.*, the Court held that a warrantless government inspection of a corporation’s plant violated the fourth amendment. See *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 324 (1978). The Court rejected the government’s argument that the corporation could not expect privacy as to the discovered safety violations because its own employees could see the violations. See *id.* at 314-15. Grano interprets this decision as making clear “that there is a constitutional difference between disclosing information . . . to select individuals and making information . . . available to any member of the general public.” Grano, *supra* note 10, at 432 n.70. One wonders whether a group as large as a work force could be considered as “we few.” For an example of a corporation’s efforts to preserve secrecy by limiting employee access and controlling employee disclosure of information, see the discussion of *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986), *infra* note 321. Of course, as held in *Marshall*, the warrantless entry into a corporation’s plant is also a search of the plant prohibited by the fourth amendment even if no secrets are searched out. *Marshall*, 436 U.S. at 314-15.

215. See *Lewis v. United States*, 385 U.S. 206, 207 (1966).

describe his narcotics peddling as a secret. On the other hand, the *Hoffa* case involved the then-Teamsters president's trusted confidant, whom the government persuaded to spy in exchange for leniency.<sup>216</sup> Thus, it seems that Hoffa's alleged plan to tamper with a jury was objectively secret and would have remained so but for the government's conduct.<sup>217</sup>

A simple "sting" operation, such as when the police set up a front as a fencing operation, is unlikely to search out secrets because the thief who deals with an unknown fence cannot plausibly claim that he expected the transaction to be secret.<sup>218</sup> The defendant in *Lopez* also could not claim that the government searched out his criminal plan to bribe an IRS agent.<sup>219</sup> Although the agent did deliberately appear receptive to the bribe attempt in several meetings while he carried a hidden tape recorder, the "cat was let out of the bag" at the first meeting between the agent and Lopez when a bribe offer was made.<sup>220</sup> Certainly at that point Lopez had no reason to believe that the agent would either accept the bribe, and thus join a conspiracy of two, or keep quiet about the offer.

The *White* case appears to present the more difficult situation in which the undercover agent deliberately insinuates himself into the suspect's confidences. White and Jackson met at least eight times, including in each other's home.<sup>221</sup> Under a reasonable person approach to expectations of secrecy, the test would be whether their relationship had developed to the point at which it was reasonable for White to assume that Jackson would honor his confidences. Perhaps one appeal of the search out interpretation is that it would bring fourth amendment protections to bear only on insidious forms of spying that destroy trusting relationships, either by corrupting an existing relationship or creating trust only with the intent of abusing it.<sup>222</sup>

One of the striking ironies of fourth amendment law is the continuing force of Justice Harlan's opinions in *Katz* and *White*, even though neither

216. See *Hoffa v. United States*, 385 U.S. 293, 296-98 (1966).

217. The conversation in question took place in Hoffa's hotel suite during a criminal trial. Had the friend voluntarily turned informant *after* the conversation, we would not say that the government searched out the information conveyed by the informant because there would have been no action by the government with the necessary [purpose to find]. The lower courts apparently concluded that the government had not placed the informer in Hoffa's councils, and Justices Clark and Douglas, dissenting, would have dismissed the writ of certiorari as improvidently granted for that reason. See *Hoffa*, 385 U.S. at 321 (Clark, J., & Douglas, J., dissenting). For Grano, as well, "the distinction between tattletales and spies is constitutionally significant." Grano, *supra* note 10, at 437 n.110.

218. Of course such a thief would probably like the transaction to be secret, but therein lies the useful distinction made in Harlan's *Katz* concurrence between subjective and reasonable expectations.

219. See *Lopez v. United States*, 373 U.S. 427, 429-32 (1963).

220. See *id.* at 429-30.

221. See *United States v. White*, 401 U.S. 745, 747 (1971).

222. Cf. *United States v. Cole*, 807 F.2d 262, 264-66 (1st Cir. 1986), *cert. denied*, 107 S. Ct. 2461 (1987) (due process not violated when government agent initiated sexual liaison with defendant's live-in girl friend solely to gain information against defendant). John LeCarre's splendid spy thriller, *The Little Drummer Girl* (1983) (subsequently made into a movie starring Klaus Kinski and Dianne Keaton), is built on the premise that a spy who plays a role to gain trust will, if successful, tend to so sympathize with the intended victim as to ultimately deserve the trust confided in him or her.

commanded any votes but his own. All courts now cite *Katz* as the standard authority for the current "definition" of "search" as a violation of a "legitimate expectation of privacy."<sup>223</sup> Scholars such as LaFave praise Harlan's *White* dissent as the best articulation of the policy interpretation, which is seen as the interpretation underlying the legitimate expectation of privacy rule: "the great virtue of the *Katz* decision is that it . . . permits a reasoned value judgment to be made concerning what types of police surveillance are not to go unregulated by constitutional restraints."<sup>224</sup> Given such wide acceptance of the policy interpretation, another irony is that when the Court employed that approach in its next two major interpretations of "search" after *White*, the two decisions drew almost universal scholarly criticism, including from LaFave.<sup>225</sup>

Although Justice White used the word "legitimately" in his *White* opinion,<sup>226</sup> the phrase "legitimate expectation of privacy" seems to have first entered the Court's vocabulary five years after *White* in the much-criticized case of *United States v. Miller*.<sup>227</sup> The defendant in *Miller* challenged the government's subpoena of copies of his cancelled checks, statements, and other records from his bank.<sup>228</sup> Writing for the Court, Justice Powell held that no search took place because of the "lack of any legitimate expectation of privacy concerning the information kept in bank records."<sup>229</sup> Whether *Miller* actually expected his bank records to be kept secret was not the point, Justice Powell reasoned, because the Court already had decided in *White* and the *Hoffa-Lopez-Lewis* trilogy that it was not *legitimate* to expect privacy in information voluntarily conveyed to another person:

This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party

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223. See, e.g., *supra* note 162.

224. W. LAFAVE, *supra* note 137, § 2.3(c), at 401; see also *id.* § 2.1(d), at 310-14. One would think from reading LaFave's treatise that Amsterdam joins him in praising the use of the policy interpretation. In fact, Amsterdam's assessment is more complex, almost paradoxical. Immediately after declaring that *Katz*, and indeed the fourth amendment itself, demands an answer to a question based on values (What extent of unregulated surveillance can be permitted without diminishing too greatly the privacy and freedom needed in a free and open society?), he goes on to say that this is "a devastating question to put to a committee [*i.e.*, the Supreme Court]" and "a perfectly impossible . . . test of fourth amendment coverage." Amsterdam, *supra* note 10, at 403.

225. For LaFave's criticism of *United States v. Miller*, 425 U.S. 435 (1976), see *infra* note 227. For his criticism of *Smith v. Maryland*, 442 U.S. 735 (1979), see *infra* note 241. See also Kamisar, *supra* note 158, at 158.

226. See *United States v. White* 401 U.S. 745, 749 (1971) (White, J., plurality opinion).

227. 425 U.S. 435 (1976). Some critical commentaries on *Miller* are collected by LaFave, see W. LAFAVE, *supra* note 137, § 2.7(c), at 511. LaFave himself abandons the restraint customary to his treatise and terms *Miller* "dead wrong" and the Court's reasoning "woefully inadequate." *Id.* For another critique of *Miller*, see Grano, *supra* note 10, at 438-44.

228. *Miller*, 425 U.S. at 436. The subpoena clearly did not comply with the warrant requirement since it was issued by the prosecutor rather than an impartial magistrate. *Id.* at 439.

229. *Id.* at 442. His opinion also was a harbinger of what hindsight now reveals to be Justice Powell's attraction to the intrusion interpretation; he described the Court's decision as finding "there was no intrusion into any area in which respondent had a protected Fourth Amendment interest." *Id.* at 440.

and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.<sup>230</sup>

Of course *Miller* differs from the spying cases in at least two major ways. First, the customer's expectation that the bank will treat his records as confidential is clearly legitimate in some sense inasmuch as state law generally requires such confidentiality.<sup>231</sup> Second, the information searched out by the government is not knowingly revealed to the bank in the same way that information is given to the spy. The government in *Miller* was not really searching out the individual records, but rather information about business dealings and relationships that can be deduced only by studying a range of records. Bank customers do not knowingly reveal that kind of information to their banks because they hardly expect bank employees to assemble and study their records. Rather, they expect the bank to look at each document only in the course of processing it.<sup>232</sup>

The Court apparently invoked the policy interpretation to overrule these objections, but failed to articulate the policies that were being weighed and resolved. Instead, Justice Powell simply referred to a prior decision, *California Bankers Association v. Shultz*,<sup>233</sup> as authority for the assertion that there is no legitimate expectation of privacy in bank records.<sup>234</sup> *California Bankers* was a decision upholding the constitutionality of the Bank Secrecy Act of 1970<sup>235</sup> against a variety of challenges by a variety of plaintiffs.<sup>236</sup> The Act laid the groundwork for the procedure used in *Miller* by requiring banks to retain microfilm copies of all cancelled checks and other customer documents.<sup>237</sup> The *California Bankers* decision merely held that the government did not conduct a search simply by requiring banks to keep certain types of depositor records, specifically reserving judgment on the fourth amendment implications of an effort by the government to compel production of those records.<sup>238</sup> *California Bankers* offered neither the

230. *Id.* at 443.

231. See Note, *Government Access to Bank Records*, 83 YALE L.J. 1439, 1464 (1974) (law of agency imposes qualified legal duty of confidentiality on banks); see also *Miller*, 425 U.S. at 449 (Brennan, J., dissenting) ("Representatives of several banks testified . . . that information in their possession regarding a customer's account is deemed by them to be confidential." (citing *Burrows v. Superior Court*, 13 Cal. 3d 238, 243, 529 P.2d 590, 593, 118 Cal. Rptr. 166, 169 (1974))).

232. For this reason LaFave places *Miller* in the category of "surveillance of relationships and movements." See W. LaFAVE, *supra* note 137, § 2.7(c), at 508-17.

233. 416 U.S. 21 (1974).

234. *Miller*, 425 U.S. at 440-41.

235. 12 U.S.C. §§ 1730d, 1829b, 1951-1959 and 31 U.S.C. §§ 1051-1062, 1081-1083, 1101-1105, 1121-1122 (1970).

236. See *California Bankers*, 416 U.S. at 77-78.

237. See *id.* at 30-31.

238. See *id.* at 54 n.24. The Court, however, through imprecise language, created the broad dicta used later in *Miller* when it said that the required record keeping "neither searches nor seizes records in which the depositor has a Fourth Amendment right." *Id.* at 54 (emphasis added). In semantic terms, the act of a bank in keeping records is: (1) not a search in any of the three senses because it is not action taken with a [purpose to find]; (2) not a searching out because it does not uncover anything (at that point there is no disclosure to anyone outside the confidential relationship); and (3) not a search of because it does not entail [movement

opportunity nor the justification for deciding categorically that bank records are outside the scope of the fourth amendment.<sup>239</sup> Yet that is precisely how the *Miller* Court used *California Bankers* to avoid wrestling with the difficult policy issues directly, employing the vagueness of "legitimate" to cover the absence of either semantic common sense or reasoned policy judgment.

By the time the Court decided *Smith v. Maryland*,<sup>240</sup> which along with *Miller* tops the chart of most-criticized fourth amendment cases,<sup>241</sup> the "legitimate expectation of privacy" phrase had become solidly entrenched in fourth amendment vocabulary.<sup>242</sup> It was *Smith*, however, that explicitly

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through an area]. The Court in *California Bankers* alluded to the absence of the [movement] feature when it pointed out that the Act and its implementing regulations "do not authorize indiscriminate rummaging among the records of the plaintiffs." *Id.* at 62 (emphasis added). For the difference between a search of papers and searching out information contained in papers, see the discussion of *Boyd v. United States*, *supra* note 94 and accompanying text. In a different part of the *California Bankers* opinion than that cited in *Miller*, the Court also held, on grounds solely of policy, that required reporting of certain types of large fund transfers did not violate the fourth amendment. See *California Bankers*, 416 U.S. at 63.

239. *California Bankers* presented a fairly ideal opportunity to use the policy interpretation. Congress had conducted extensive hearings on the pros and cons of the procedures at issue and the Court had the benefit of that legislative record as well as the participation in the litigation by the Secretary of the Treasury, major banking organizations, and the ACLU. See *id.* at 27, 41. But even then, the policy interpretation could only have validated the specific procedures of the Act, which themselves represented the careful balancing of competing values. This application of the policy interpretation would not have resulted in a decision that bank records never are protected by the fourth amendment, but only that the fundamental policy underlying the amendment was not violated by the specific procedures authorized under the Act.

240. 442 U.S. 735 (1979).

241. Without canvassing the criticism of *Smith*, I note again LaFave's atypically harsh critique: "[*Smith* is] a crabbed interpretation of the *Katz* text [which] makes a mockery of the Fourth Amendment." W. LaFAVE, *supra* note 137, § 2.7(b), at 507; see also J. CHOPER, Y. KAMISAR & L. TRIBE, *THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1978-1979*, at 134-45 (1979) (remarks of Kamisar).

242. Much of the credit for this entrenchment is due to Justice Rehnquist's opinion for the Court in *Rakas v. Illinois*, 439 U.S. 128 (1978), and in particular one long footnote devoted to the subject of "legitimacy," *id.* at 143 n.12. *Rakas* merged standing doctrine and substantive fourth amendment law by holding that the "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Id.* at 143. In both *Rakas* and a subsequent standing case, *Rawlings v. Kentucky*, 448 U.S. 98 (1980), Justice Rehnquist used "legitimate" to obscure the difference between search of and search out. *Id.* at 104-06. In both cases, evidence that incriminated the defendant was found in a search of an area belonging to another. In *Rakas* the evidence was found in the glove compartment of a car in which the defendant was a passenger. See *Rakas*, 439 U.S. at 130. In *Rawlings* the defendant deposited illegal drugs in a friend's purse moments before the police arrived on the scene. See *Rawlings*, 448 U.S. at 100-02. Justice Rehnquist concluded that neither defendant had a legitimate expectation of privacy in relation to the evidence uncovered because neither had such an expectation as to the area searched. See *id.* at 104-06; *Rakas*, 439 U.S. at 148-49. But of course the Court in *Katz* had insisted on protecting people, and their secrets, not merely places. See *Katz v. United States*, 389 U.S. 349, 351 (1967). Justice Rehnquist silently undermined *Katz* by ignoring the possibility of a search out interpretation, which would have forced the question: Under what circumstances can a reasonable person expect to keep something secret if it was placed in a friend's glove compartment or purse? The answer, as in the spying cases, probably would depend significantly on the relationship between the defendant and the friend.



redefined “search” in terms of legitimacy.<sup>243</sup> At issue was the pen register, a device used by the telephone company at the request of the police to record all telephone numbers dialed from a particular telephone.<sup>244</sup> The *contents* of the phone calls were not recorded.<sup>245</sup> By use of a pen register the police identified Smith as the man who was making certain threatening and obscene phone calls to a particular person.<sup>246</sup> Although Justice Blackmun, writing for the Court, doubted that Smith had even a subjective expectation that the numbers he dialed were private, he concluded that Smith’s expectations were irrelevant because of the legitimacy factor:

petitioner in all probability entertained no actual expectation of privacy in the phone numbers he dialed, and . . . even if he did, his expectation was not “legitimate.” The installation and use of a pen register, consequently, was not a “search.”<sup>247</sup>

If Smith did expect that the government would not know the telephone numbers dialed from his home, that expectation would not have been legitimate according to Justice Blackmun because the Court already had decided in *Miller* and *White* “that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”<sup>248</sup> Of course, by relying on these precedents the Court adopted their flaws, which were equally, if not more, present in the pen register situation. Customers do not “knowingly” expose their relationships with others to telephone companies when they dial a number—or to banks when they use checks. Justice Blackmun acknowledged that local calls no longer are handled by potentially nosy human operators, but rather are processed by computers that will not “remember” the numbers dialed unless programmed to do so.<sup>249</sup> His statement that Smith “assumed the risk that the company would reveal to police the numbers he dialed”<sup>250</sup> not only ascribed an implausible state of mind to the defendant, but also ignored the total lack of choice for Smith or any citizen. The only way to avoid revealing the identity of the people one chooses to talk with by telephone, under *Smith*, is to forgo telephone communication.

Justice Marshall, dissenting, correctly interpreted the majority opinion as resting on the policy interpretation: “whether privacy expectations are legitimate within the meaning of *Katz* depends not on the risks an individual can be presumed to accept when imparting information to third parties, but on the risks he should be forced to assume in a free and open

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243. It is interesting to note that Justice Stewart, the author of *Katz*, dissented in *Smith* in an opinion that clearly used the search out interpretation. *See Smith v. Maryland*, 442 U.S. 735, 748 (1974) (Stewart, J., dissenting) (the information obtained by use of the pen register was protected under *Katz* because “it easily could reveal the identities of the persons and the places called and thus reveal the most intimate [*i.e.*, secret] details of a person’s life.”).

244. *See id.* at 737.

245. *Id.* at 741.

246. *Id.* at 737.

247. *Id.* at 745-46.

248. *Id.* at 743-44.

249. *See id.* at 744-45. He also was aware that the current billing practice of telephone companies was not to record local calls. *See id.* at 745.

250. *Id.* at 744.

society.”<sup>251</sup> Once again the majority and dissent joined battle on the grounds of the policy interpretation, and, once again, the majority failed to respond with a reasoned policy argument. All that Justice Blackmun had to say was that perhaps in some cases, but not this one, a value judgment would have to be made:

if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects. Similarly, if a refugee from a totalitarian country, unaware of this Nation's traditions, erroneously assumed that police were continuously monitoring his telephone conversations, a subjective expectation of privacy regarding the contents of his calls might be lacking as well. In such circumstances, where an individual's subjective expectations had been “conditioned” by influences alien to well recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was. In determining whether a “legitimate expectation of privacy” existed in such cases, a normative inquiry would be proper.<sup>252</sup>

Justice Blackmun simply assumed that a police practice of monitoring phone numbers was not an “influence alien to well-recognized Fourth Amendment freedoms,” but he neither admitted to making what was obviously a value judgment, nor did he attempt to defend his assumption. He thus demonstrated the weakness of his proposed method for protecting American society from transformation into a totalitarian state. In *Smith* the Court made *no* normative inquiry because the majority refused to consider the possibility that the practice might be “alien” to basic fourth amendment policies. By exploiting the ambiguity of the word “reasonable,” the Court spoke as if it were merely evaluating the state of mind of the reasonable telephone user—a proper standard under the search out interpretation—while in fact making an unarticulated and undefended policy decision that the identity of persons called by telephone was not an interest worthy of fourth amendment protection.<sup>253</sup>

After the Court decided *Smith* in 1979 it appeared that the preliminary inquiry in most fourth amendment cases—whether the challenged action is a search—no longer depended on the meaning of any word, but on a rule of legitimacy that subsumed the entire analysis. Prosecutors, defendants, the lower judiciary, and, most important, the police were in a quandary.

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251. *Id.* at 750 (Marshall, J., dissenting). Justice Marshall then quoted Justice Harlan's dissent in *White* in support of his contention that “courts must evaluate the ‘intrinsic character’ of investigative practices with reference to the basic values underlying the Fourth Amendment.” *Id.* at 751 (Marshall, J., dissenting).

252. *Id.* at 740 n.5. Justice Blackmun apparently failed to consider that freedom from police monitoring of telephone conversations had been a “well-established” fourth amendment right for only twelve years. (*Katz* was decided in 1967; *Smith* was decided in 1979.)

253. Yale Kamisar has made a similar criticism of the “voluntariness” terminology in confession cases obscuring underlying and poorly articulated policy choices. See Kamisar, *What is an “Involuntary” Confession?: Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728, 759 (1963).

The post-*Katz* cases had failed to provide either semantic or policy guidance in applying this newly unfamiliar word: “search.” Something was a search only if it infringed a legitimate privacy interest, and it seemed the only way to find out if an interest was legitimate was to obtain a ruling from the Supreme Court.

The result of this intolerable situation<sup>254</sup> has been two-fold. First, the Court has added new categories of searches conducted without a warrant that are nonetheless “reasonable,” thus employing the policy interpretation to interpret the second rather than the third word in the fourth amendment phrase “against *unreasonable* searches and seizures.”<sup>255</sup> The implications of this development are beyond the scope of this article. The second consequence has been a partial return to reliance on the search of and intrusion interpretations, apparently in an almost unconscious effort to restore some degree of certainty and common sense to the task of deciding whether a given action by the government is a search.<sup>256</sup>

## VII. RENEWED CONFUSION OVER INTRUSION

### A. *Unprotected Areas*

The Court’s 1984 decision in *Oliver v. United States*<sup>257</sup> applied the legitimacy rule in a way not heretofore discussed: to exclude from the meaning of “search” actions that clearly were searches *of* from a common sense point of view. *Oliver* involved two factually similar consolidated cases in which police trespassed onto fenced and posted private property looking for marijuana cultivation and found the illicit crops in wooded areas away from any house.<sup>258</sup>

In the first part of the *Oliver* opinion, authored by Justice Powell, the Court appeared to rely on a plain language approach, saying that because the “explicit language of the Fourth Amendment . . . indicates with some precision the places and things encompassed by its protections,”<sup>259</sup> a search that is not *of* one of the enumerated four protected areas—houses, persons,

254. One practical way in which the situation was intolerable was the institutional burden placed on the Court of answering the ever increasing and ever varying questions from the lower courts about whether a particular investigative action or procedure was a search.

255. Justice O’Connor may be the primary force behind this development. See *United States v. Place*, 462 U.S. 696, 702, 706-07 (1983) (O’Connor, J.) (subjecting luggage to “sniff test” by detection canine does not constitute an *unreasonable* “search” within meaning of fourth amendment); *Hudson v. Palmer*, 468 U.S. 517, 538 (1984) (O’Connor, J., concurring) (“all searches . . . of the contents of an inmate’s cell are reasonable”); *Arizona v. Hicks*, 107 S. Ct. 1149, 1157 (1987) (O’Connor, J., dissenting) (moving stereo in order to record serial numbers considered reasonable); *O’Connor v. Ortega*, 107 S.Ct. 1492, 1502 (1987) (O’Connor, J.) (public employer’s search of hospital supervisor’s office should be judged by reasonableness standard).

256. Amsterdam predicted this development as early as 1974, saying that the vagueness of the legitimate expectation of privacy definition of search would lead the Court to reemphasize simple factors such as whether the police officer was located in a public place and whether technological aids were used. See Amsterdam, *supra* note 10, at 403-04.

257. 466 U.S. 170 (1984).

258. See *id.* at 173.

259. *Id.* at 176.

papers, and effects—is beyond the scope of the amendment. The only areas the officers moved through were “open fields,”<sup>260</sup> which could neither be considered houses nor effects. Justice Powell was willing to expand the fourth amendment meaning of “house” slightly to include the curtilage, what common sense speakers would call the yard.<sup>261</sup> His semantic justification for this interpretation of “houses” in the text appeared to be that the house and the curtilage shared an important semantic feature; both were [lived in] places. This semantic feature was of constitutional significance because it entails the connotation of being a sacred place,<sup>262</sup> which, we recall, connected the textual “right to be secure in houses” to the historical origins of the amendment in the colonists’ protests against writs of assistance.<sup>263</sup>

Justice Powell could have ended the *Oliver* opinion with this search of interpretation because the areas searched were neither houses nor curtilage. However, recognizing that *Katz* had expanded fourth amendment protections beyond mere searches of, he went on to invoke the legitimacy rule.<sup>264</sup> Without the narrowing effect of the legitimacy rule, from the standpoint of *Katz*, the police conduct in *Oliver* could have violated the fourth amendment even if it had not involved entry into a protected area: “[W]hat [a person] seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected.”<sup>265</sup> Justice Powell was not interested, however, in whether the defendants sought to keep their marijuana cultivation secret, even if that expectation was objectively reasonable. Instead, he invoked the legitimacy rule to turn *Katz* on its head: “the test of legitimacy is not whether the individual chooses to conceal assertedly ‘private’ activity. Rather, the correct inquiry is whether the government’s intrusion infringes upon the personal and societal values protected by the Fourth Amendment.”<sup>266</sup> For Justice Powell, an expectation of privacy could be legitimate only if it related to activities taking place in an area protected against *searches of* under the fourth amendment.

*Oliver* presents a striking example of the confusion and overbreadth caused by the vagueness of the legitimacy rule combined with the mingling of different semantic approaches. Once again the Court generically characterized a type of governmental action—apparently any kind of entry onto private property short of crossing the invisible line of the curtilage—as “not

260. “Open fields” was used by Justice Powell as a specialized legal term rather than with a common sense meaning. “An open field need be neither ‘open’ nor a ‘field’ as those terms are used in common speech. For example . . . a thickly wooded area nonetheless may be an open field as that term is used in construing the Fourth Amendment.” *Id.* at 180 n.11.

261. *See id.* at 180.

262. Powell argued that “only the curtilage . . . warrants the Fourth Amendment protections that attach to the home. At common law, the curtilage is the area to which extends the intimate activity associated with the ‘sanctity of a man’s home and the privacies of life.’ ” *Id.* at 180 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)); *see supra* text accompanying note 97.

263. *See supra* text accompanying notes 64-74 .

264. *Oliver*, 466 U.S. at 177. Justice White thought that at this point Justice Powell went too far. “There is no need to go further and deal with the expectation of privacy [under *Katz*]. However reasonable a landowner’s expectation of privacy may be, those expectations cannot convert a field into a “house” or “effect.” *Id.* at 184 (White, J., concurring).

265. *Katz v. United States*, 389 U.S. 347, 351-52 (1967) (emphasis added).

266. *Oliver*, 466 U.S. at 182-83.

a search," with the result that the fourth amendment apparently cannot protect any information discovered through such action, regardless of its secrecy. The distinction between searches of and searching out was blurred entirely. The implications of the *Oliver* decision for permitting the government to search out secrets as long as protected areas were not physically entered became apparent in the next three years when the Court turned to a new variation on the just listening problem: other forms of perception that did not involve [movement through an area].

### B. *Just Tracking*

The year before *Oliver* was decided the Court first encountered the fourth amendment problem created by the growing use of "beepers," primarily in the war against drug trafficking. A beeper is a radio transmitter, typically planted in a container of illegal drugs or chemicals that can be used to manufacture such drugs, that emits periodic signals enabling a monitoring radio receiver to track its movements with fair accuracy. In *United States v. Knotts*<sup>267</sup> all nine Justices agreed that under the particular facts of that case, "just tracking" did not constitute a search.<sup>268</sup> The common ground of agreement appeared to be the search out interpretation: the tracking searched out no secrets because it only revealed the movements of an automobile on public highways.<sup>269</sup> As the Court itself characterized *Knotts* a year later, the tracking of the beeper signals "revealed no information that could not have been obtained through visual surveillance."<sup>270</sup>

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267. 460 U.S. 276 (1983).

268. *See id.* at 285-88.

269. *See id.* at 285.

270. *United States v. Karo*, 468 U.S. 705, 707 (1984). However, as LaFave has pointed out, the beeper monitoring in *Knotts* did disclose information that could not have been obtained through visual surveillance because only an "army of bystanders" posted along the entire route could have connected each sighting of the car with the presence of the drum in the car's trunk and thereby traced the drum to its ultimate destination. W. LaFAVE, *supra* note 137, § 2.7(d), at 523. The efforts of Justice Rehnquist, writing for the majority, to bring in the concept of protected areas may have distracted the *Knotts* Court from conducting a careful search out analysis. The Court previously had held that the fourth amendment provided only diminished protection against searches of an automobile because "its function is transportation and it seldom serves as one's residence or as the repository of personal effects." *Caldwell v. Lewis*, 417 U.S. 583, 590 (1974) (Blackmun, J., plurality opinion). Justice Rehnquist cited these cases as evidence that a "person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Knotts*, 460 U.S. at 281. Yet, the policy justifications for allowing warrantless searches of cars stopped on the highway have very little to do with *searching out* the secret destination of a driver. Nonetheless, as would be the case in *Oliver*, secrecy of information lost fourth amendment protection because the *area* connected with the information was not fully protected against *searches of*. *See supra* text accompanying notes 264-66.

Justice Rehnquist carried his interest in protected areas even further when he indicated that the location of the drum once unloaded from the automobile remained unprotected from government searching because the drum was found outside the cabin "in the 'open fields.'" *Knotts*, 460 U.S. at 282. This deliberate foreshadowing of *Oliver* caused Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, to refrain from joining Justice Rehnquist's opinion and only concur in the judgment. *See id.* at 287 (Blackmun, J., concurring).

When the Court next encountered the beeper issue a few months after *Oliver*, in *United States v. Karo*,<sup>271</sup> it came close to using the search out interpretation to provide a clear answer but became tangled in strands of the intrusion interpretation. In *Karo* the information disclosed by tracking a beeper concealed in a drum of chemicals was the ultimate location of the drum—a secret drug processing laboratory.<sup>272</sup> The defendants clearly had exhibited an expectation that this information would remain secret by taking the drum through a labyrinth course that repeatedly removed the drum from public view for unpredictable and occasionally extended periods.<sup>273</sup> They deliberately chose hiding places that were not publicly connected with them and, hence, would not be under surveillance.<sup>274</sup> Their repeated success at evading surveillance established the reasonableness of their expectation. The Court, however, was unable to assemble a majority around any of the three opinions it issued because of the confusion that reliance on the intrusion interpretation caused. Indeed, the cacophony that these clashing opinions caused may mark *Karo* as the crescendo of contemporary fourth amendment incoherence.

All nine Justices agreed that a search occurred at least at some points during the monitoring process.<sup>275</sup> They could not agree, however, on which events constituted searches and whose rights those searches violated. The hand of the intrusion interpretation was at work in all three *Karo* opinions, although passages of search out analysis can be found throughout once the imagery of intrusion is stripped away. The temptation to use intrusion analysis was so strong because, after all, something did intrude into both the drum and the various places the drum was stored: the government's beeper. This intrusion, however, cannot be described as a search of:

(?) The beeper searched the house.

(?) The agent searched the home with the beeper.

As in the *Silverman* just listening case, the Court used the intrusion interpretation to describe an action as a search merely because it contained *one* of the semantic features of search of: [movement through an area]. Although the beeper moved into or intruded into the drum and subsequently accompanied the drum into various homes and storage locations, the beeper could not be described as searching those areas.

Justice White used the intrusion interpretation to argue that the use of the beeper was simply "a search of a house,"<sup>276</sup> emphasizing that "private residences are *places* in which the individual normally expects privacy free of governmental *intrusion*."<sup>277</sup> Beeper monitoring searched each house because it revealed "a critical fact about the interior of the premises," namely, that the drum was within the house.<sup>278</sup>

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271. 468 U.S. 705 (1984).

272. *Id.* at 708-10.

273. *Id.*

274. *See id.*

275. *See id.* at 719; *id.* at 728 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 734-35 (Stevens, J., dissenting).

276. *Id.* at 718.

277. *Id.* at 714 (emphasis added).

278. *Id.* at 715.

Justice O'Connor's concurrence at first seemed to identify the object of the search as a piece of information—the location of the drum—rather than a place.<sup>279</sup> Indeed, at one point she used the exact language of the search out interpretation to describe why some defendants might have no fourth amendment claim: “It is simply not *his* secret that the beeper is disclosing.”<sup>280</sup> She too, however, became mired in the intrusion interpretation by repeatedly describing the beeper monitoring as if it were a search of the drum.<sup>281</sup>

Justice O'Connor thus equated a defendant's right to prevent searches of his container with the right to prevent searching *out* a secret by tracking the movements of the container.<sup>282</sup> This equation, based on the intrusion interpretation, obscures an underlying insight relevant to the search out interpretation. If one assumes that the object of searching out was the presumably secret location of the drum, Justice O'Connor is probably right that a person who had no control over the drum could not reasonably claim that its location was *his* secret. But the search out analysis changes if the secret disclosed by searching is the location of the laboratory, rather than the location of the drum per se. Then, as in the just seeing cases discussed below,<sup>283</sup> the source of the perception (the beeper) would not be the secret, but only a clue to the secret. If the location of the laboratory was a secret, it was surely a secret belonging to the owner of the laboratory even if that person neither owned nor controlled the drum prior to delivery.

Justice Stevens employed his own version of the intrusion interpretation to formulate a much broader view of how the use of the beeper constituted a search. Although the government clearly was not discovering any secret information when it was not monitoring the beeper, Justice Stevens insisted that the beeper's mere presence in a defendant's home constituted a search:

I find little comfort in the Court's notion that no invasion of privacy occurs until a listener obtains some significant information by use of the device. . . . [The expectation of privacy] is

279. *Id.* at 727 (O'Connor, J., concurring in part and concurring in the judgment).

280. *Id.* (O'Connor, J., concurring in part and concurring in the judgment).

281. Indeed, she became so enamored of the intrusion interpretation that she suggested that *Katz* also be understood as a case involving the search of a “container”:

[t]wo people who speak face to face in a private place or on a private telephone line both may share an expectation that the conversation will remain private, [as *Katz* held] . . . . One might say that the telephone line, or simply the space that separates two persons in conversation, is their jointly owned “container.” Each has standing to challenge the use as evidence of the fruits of an unauthorized search of that “container . . . .”

*Id.* at 726 (O'Connor, J., concurring in part and concurring in the judgment) (citations omitted). Justice O'Connor seemed to have come full circle back to Justice Butler's unsuccessful suggestion in *Olmstead* that wiretapping be viewed as a search of the telephone wire. See *Olmstead v. United States*, 277 U.S. 438, 487 (1928) (Butler, J., dissenting).

282. Justice O'Connor reasoned, “A defendant should be allowed to challenge evidence obtained by monitoring a beeper installed in a closed container only if . . . the defendant had an interest in the container itself sufficient to empower him to give effective consent to a search of the container.” *Karo*, 468 U.S. at 727 (O'Connor, J., concurring in part and concurring in the judgment).

283. See *infra* text accompanying notes 287-346.

compromised the moment the *invasion* occurs. A bathtub is a less private area when the plumber is present even if his back is turned.<sup>284</sup>

Justice Stevens noted that “[p]resumably the Court would also conclude that no privacy interest would be infringed by the *entrance* of a blindfolded plumber.”<sup>285</sup>

His example shows how different intrusion can be from searching. If the plumber blunders into my bathroom while I am lathered up in the tub, perhaps I would say that my bathroom, and my privacy, have been invaded. But surely I would not say that the plumber searched the bathroom, particularly if he were blindfolded. The key semantic component [purpose to find] would be missing and [movement through an area], even a very private area, is not sufficient to make an action a search. The intrusion of an unmonitored beeper would be no more a common sense search than the intrusion of a nail into the wall would have been in *Silverman*.<sup>286</sup>

### C. Just Seeing

#### 1. The Problem of Describing Seeing as Searching

The challenge of describing the act of seeing as a search is similar to the problem presented by listening, but is even more subtle. If the action is described just as “seeing,” that description cannot be converted into an expression using search of. “The detective saw the house” cannot entail “the detective searched the house” because see does not contain the features [movement through an area] and <X is affected object>. However, expressions which use the near-synonym, “looking,” can sometimes be converted into search of statements:

The detective looked over the outside of the briefcase, trying to find fingerprints.

The detective searched the outside of the briefcase for fingerprints.

This conversion is made possible by the metaphoric implication of movement created when look is combined with over. Even if both subject and object remain stationary, we metaphorically imagine the focus of vision, like the beam of a spotlight, moving over the exterior surface of the briefcase.<sup>287</sup>

284. *Karo*, 468 U.S. at 735 (Stevens, J., concurring in part and dissenting in part) (emphasis added).

285. *Id.* at 735 n.10 (Stevens, J., concurring in part and dissenting in part) (citation omitted) (emphasis added).

286. See *supra* text following note 134. Despite the dissonance among the *Karo* opinions caused by the varying mixtures of the intrusion and search out interpretations, the nine Justices unanimously avoided relying on the policy interpretation. No one argued that it was illegitimate to expect that movements of chemicals to manufacture cocaine, or the location of a cocaine laboratory, should be secret from the government. Justice White said concisely: “Those suspected of drug offenses are no less entitled to [fourth amendment] protection than those suspected of nondrug offenses.” *Karo*, 468 U.S. at 717.

287. An expression using “look through” can be converted to a search of statement only if it likewise evokes the metaphor of a glance moving through an area. Compare the following



This metaphoric assumption permits the attribution of the following semantic features to both look over and search in the two expressions above: [movement through an area], [purpose to find Y], [activity], [achievement],<sup>288</sup> and <X has surface>. However, it is less clear that the feature <X is affected object> can be attributed to look over, because it does not seem that the briefcase has been affected, unless in looking the detective also generated actual movement, for example by turning the briefcase over in his hands. Because search in the fourth amendment context does require that the government's action somehow affect the object of the search, we might expect a court to be reluctant to treat "just seeing" as a search under the search of interpretation unless the action could be described as looking over accompanied by actual movement.<sup>289</sup> This expectation is fulfilled in the recent Supreme Court decision of *Arizona v. Hicks* discussed below.<sup>290</sup>

Application of the search out interpretation is also different in cases of seeing as contrasted to listening. The factors that cause things to be hidden from sight are more variable and subtle than the factors that prevent listening. People are usually consciously aware of whether others can hear their conversations, and act accordingly.<sup>291</sup> Thus, if one's conversation was so difficult to hear that a third party who overheard it searched it out, the speaker almost certainly expected the conversation to be secret. Further, overhearing a conversation inevitably results in the disclosure of some information, thereby at least creating the possibility that searching out a conversation will disclose secrets.

On the other hand, people are usually less conscious and certain of what others can see. At present, the government cannot search out secrets by seeing through opaque barriers, even when its sight is technologically aided. Therefore, issues of searching by seeing typically arise when the government sees despite darkness or distance. Although people can rely with confidence on opaque barriers to protect them from the sight of others, they are less sure about darkness and distance. While the range of hearing for audible speech drops off sharply over a short distance, the

two pairs of expressions:

(1) The detective looked through the diary. The detective searched the diary.

(2) The detective looked through the window. (?) The detective searched the window.

"Search the window" might make sense if the detective looked *over* the surface of the window (e.g., for fingerprints), but not if the detective merely saw through the window.

288. Look over meets the test of both temporal prepositional phrases required for the features [activity] and [achievement]:

The detective looked over the outside of the briefcase for two minutes.

The detective looked over the outside of the briefcase in two minutes.

For further discussion of these features, see *supra* text accompanying notes 43-44.

289. The example used in the preceding note—"The detective looked through the diary"—could easily be treated as a fourth amendment search under the search of interpretation because the looking would be accompanied by physically turning the pages of the diary. For a discussion of the importance of "rummaging" to the search of interpretation, see *supra* text accompanying notes 71, 94.

290. See *infra* text accompanying notes 347-60.

291. Katz closed the door to the telephone booth. *Katz v. United States*, 389 U.S. 347, 352 (1967). Silverman chose to speak inside the four walls of his office. *Silverman v. United States*, 365 U.S. 505, 506 (1961). If we have no physical barriers to protect us, we place distance between ourselves and unwanted auditors or lower our voices with an eye to the existing distance.

range of effective sight can be considerable and unpredictable. Because people are less certain about the protections afforded by darkness and distance to begin with, they are less likely to rely only on them to protect a secret.<sup>292</sup>

Further, seeing covers a wide range of objects, many of which have limited informational content, unlike listening, which typically focuses on communication. Therefore, in converting expressions about seeing into statements using "searching out," we often will need to change the direct object from that which was seen to information disclosed by the seeing.<sup>293</sup>

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292. In two cases, *United States v. Lee*, 274 U.S. 559 (1927), and *Texas v. Brown*, 460 U.S. 730 (1983) (plurality opinion), the Court has held, in passing, that illumination of something previously hidden by darkness was not a search. In *Lee* a Coast Guard patrol boat pulled alongside a motorboat at night and shone a searchlight, illuminating bootleg liquor on deck. *Lee*, 274 U.S. at 560-61. In *Brown* a police officer, after lawfully stopping a car at night, shined a flashlight into the interior and saw in an open glove compartment plastic vials, loose white powder, and balloons, giving probable cause to conduct a further search and seizure of narcotics. *See Brown*, 460 U.S. at 733-34 (plurality opinion). Under the search out interpretation it seems unlikely that the government searched out secrets in either case by using illumination to see. Neither *Lee* nor *Brown* seemed to have been relying on darkness to protect their secrets. *Lee* relied on the isolation of the open seas; *Brown* on the seclusion of a car interior. The government lawfully defeated those expectations. (Well-established warrant exceptions allowed the investigatory stop on the high seas in *Lee* and the driver check point stop in *Brown*.) The Court has not yet considered a claim that the government violated privacy expectations deliberately based on darkness.

Although lower court decisions are split on this issue, those decisions that hold that a search occurred can be explained as instances in which the person claiming fourth amendment protection reasonably expected that what was seen would not be illuminated because it was located within an area over which he controlled the light. *See, e.g.*, *Commonwealth v. Williams*, 494 Pa. 496, 499-500, 431 A.2d 964, 966 (1981) (police used infra-red sensitive optical device to view activities at night in a darkened apartment). The preference of commentators such as LaFave for the dissenting opinion in *United States v. Wright*, 449 F.2d 1355 (D.C. Cir. 1971), which contended that peering through a half inch slit between two garage doors with a flashlight was a search can also be explained by search out analysis. *See id.* at 1367 (Wright, J., dissenting); W. LAFAVE, *supra* note 137, § 2.2(b), at 333-36. It was reasonable for Wright to expect the contents of his garage to remain secret despite the slight opening between the doors because the opening could not, under normal circumstances, admit enough light to illuminate the garage interior. The fact that people can expect darkness only in interior spaces under their control also may create a temptation to use the intrusion interpretation by imagining the glance as penetration into a protected area: *e.g.*, "the detective looked into the darkened apartment."

293. The modifications to the search of, intrusion, and search out interpretations caused by the semantic features of "seeing" are apparent in what LaFave calls the "exceedingly difficult" issue of whether techniques using ultraviolet sensitive tracing powder constitute searches. *See W. LAFAVE, supra* note 137, § 2.2(d), at 352. In the typical case a suspect has handled contraband or stolen money that had been treated with a powder or grease that glows under ultraviolet light, but is not otherwise noticeable. While questioning the suspect, the police shine an ultraviolet light on his hands causing a fluorescent glow, usually under fingernails or in creases where the powder has remained. The lower courts are divided on whether the use of the ultraviolet light is a search. For a discussion of the lower court cases, see W. LAFAVE, *supra* note 137, § 2.2(d), at 350-55. The Supreme Court recently passed up the opportunity to address the issue by denying certiorari from a 4-3 decision of the Colorado Supreme Court holding that use of the light was a search. *People v. Santistevan*, 715 P.2d 792 (Colo. 1986), *cert. denied*, 107 S. Ct. 468 (1986). Search out analysis would indicate that a search takes place if the illumination reveals information a suspect objectively considers to be secret, such as the fact that he handled stolen money. Under this interpretation, neither the suspect's hands nor even the powder itself are the relevant objects of the searching. Indeed, the suspect does not even know the powder is present so the powder itself could hardly be *his* secret. Rather, the

The Court has confronted most directly the problem of just seeing in two cases in which the seeing took place from an aerial perspective: *California v. Ciraolo*<sup>294</sup> and *Dow Chemical Co. v. United States*.<sup>295</sup> Although the Court wrote separate opinions, both cases were argued and decided at the same time. In each case Chief Justice Burger, writing for a majority of five, held that no search occurred,<sup>296</sup> while Justice Powell authored a vigorous dissenting opinion joined by Justices Brennan, Marshall, and Blackmun.<sup>297</sup> The opinions in both cases exhibit a confused mixture of interpretations.

## 2. *California v. Ciraolo*

In *Ciraolo*, the simpler of the two cases, two police officers flew a fixed-wing aircraft at an altitude of 1000 feet over the defendant's home to verify an anonymous tip that he was cultivating marijuana in his backyard.<sup>298</sup> The officers took to the skies because a ten-foot-high fence around the backyard blocked their sight from ground level.<sup>299</sup> From their aerial vantage point the officers saw with their naked eyes a fifteen by twenty-five foot garden plot and "readily identified marijuana plants eight feet to ten feet in height."<sup>300</sup> Clearly adopting the intrusion interpretation, the California Court of Appeals held that the police officers had conducted a search because their action was "a direct and unauthorized intrusion into the sanctity of the home."<sup>301</sup>

The Supreme Court reversed, rejecting the lower court's intrusion interpretation by emphasizing that the police action consisted of simple visual "observations from a public vantage point" that were "physically non-intrusive."<sup>302</sup> The dissent, on the other hand, embraced the lower court's view that seeing is an intrusion, insisting that the Court was sanctioning "warrantless intrusions into the home."<sup>303</sup> The intrusion interpretation thus functioned as an unfortunate red herring for the Court, obscuring the more meaningful grounds of disagreement between the majority and dissenters.

Justice Powell's reliance on the intrusion interpretation led him into an incoherent description of the challenged police action:

(?) [The police officers] use[d] an airplane . . . to intrude visually into respondent's yard.<sup>304</sup>

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object of sight, aided by ultraviolet illumination, is only a clue to the true object of the searching out, the suspect's secret contact with the stolen money.

294. 476 U.S. 207 (1986).

295. 476 U.S. 227 (1986).

296. See *Ciraolo*, 476 U.S. at 212-15; *Dow Chemical Co.*, 476 U.S. at 239.

297. See *Ciraolo*, 476 U.S. at 215-26 (Powell, J., dissenting); *Dow Chemical Co.*, 476 U.S. at 240-52 (Powell, J., dissenting).

298. *Ciraolo*, 476 U.S. at 209-10.

299. *Id.* at 209.

300. *Id.*

301. *People v. Ciraolo*, 161 Cal. App. 3d 1081, 1089-90, 208 Cal. Rptr. 93, 98 (1984).

302. *Ciraolo*, 476 U.S. at 213.

303. *Id.* at 226 (Powell, J., dissenting).

304. *Id.* at 222 (Powell, J., dissenting). The full sentence is: "The Court concludes, nevertheless, that [the officer] could use an airplane—a product of modern technology—to intrude visually into respondent's yard." *Id.*

It seems that Justice Powell insisted on using the intrusion interpretation, despite the semantic incoherence it caused, because it gave him the opportunity to exploit an ambiguity in "intrusive." "Intrusive" can mean both "forcing or projecting inward"<sup>305</sup> and "impertinent or offensive."<sup>306</sup> The officer's aerial observation could have been intrusive only in the latter sense, as illustrated by the following coherent use of "intrusive" from Justice Powell's dissent: "Aerial surveillance is nearly as intrusive on family privacy as physical trespass into the curtilage."<sup>307</sup>

Thus, when Justice Powell said the police intruded into the privacy of the defendant's home, he really was asserting that their actions intruded *onto*, or offended, "personal interests in privacy and liberty recognized by a free society,"<sup>308</sup> rather than intruded *into*, or searched, a home. The effect of this ambiguous use of "intrusive" was to clothe with the disguise of the intrusion interpretation an argument essentially based on the policy interpretation.<sup>309</sup> But Justice Powell himself was beguiled by that disguise. Rather than mount a reasoned policy argument for regulating aerial observation under the fourth amendment, Justice Powell simply assumed his conclusion by labelling aerial observation of a curtilage as intrusive. When Chief Justice Burger chose to take him literally and pointed out that there was no intrusion (*that* would be a different case),<sup>310</sup> the conversation between the majority and dissent broke down and the policy differences between the two positions never were articulated or defended.

Behind the abortive intrusion and policy interpretations undertaken in *Ciraolo* were arguments on both sides that employed search out analysis. The Chief Justice stated at the outset that the case turned on whether the defendant reasonably expected privacy "in the object of the challenged search."<sup>311</sup> He then said that *Ciraolo* was claiming privacy "as to his unlawful agricultural pursuits."<sup>312</sup> In other words, *Ciraolo's* fourth amendment claim was that the police discovered a secret fact: that he was growing marijuana in his backyard. Under the search out interpretation, the validity of this claim is tested, not by consideration of the means used by the police to discover this fact, but by whether the fact was objectively secret prior to the police discovery. Accordingly, from the standpoint of the search out interpretation, the heart of the majority opinion was this statement: "Any member of the public flying in this airspace who glanced down could have

305. WEBSTER'S NEW THIRD INTERNATIONAL DICTIONARY 1187 (1976).

306. *Id.* Compare "Surgery is an intrusive medical procedure" with "That surgeon is an intrusive fellow."

307. *Ciraolo*, 476 U.S. at 225 n.10 (Powell, J., dissenting).

308. *Id.* at 220 n.5 (Powell, J., dissenting).

309. Justice Powell's semantic strategy also is revealed by his choice of words in the following two different restatements of the legitimacy rule: "if police surveillance has *intruded* on an individual's reasonable expectation of privacy," *id.* at 218 (Powell, J., dissenting) (emphasis added); "whether the surveillance in question had *invaded* a constitutionally protected reasonable expectation of privacy," *id.* (Powell, J., dissenting) (emphasis added). The more usual formulation uses the verb "infringe," *see, e.g.,* O'Connor v. Ortega, 107 U.S. 1492, 1497 (1987), which does not so vividly suggest an alternate sense connoting physical entry.

310. *Ciraolo*, 476 U.S. at 214.

311. *Id.* at 211.

312. *Id.*

seen everything that these officers observed.”<sup>313</sup> Likewise, the heart of the dissent was Justice Powell’s denial of the above statement:

[T]he actual risk to privacy from commercial or pleasure aircraft is virtually non-existent. Travelers on commercial flights, as well as private planes used for business or personal reasons, normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass. The risk that a passenger on such a plane might observe private activities, *and might connect those activities with particular people*, is simply too trivial to protect against.<sup>314</sup>

Justice Powell identified the direct object of the claimed searching out with greater precision than did the Chief Justice. What the police *saw* was a large garden plot; what they *searched out* was specific information, that a particular person, Ciraolo, at a particular location was growing a particular kind of plant, marijuana. Justice Powell plausibly argued that the “member of the public” flying over the backyard would not have discovered this complex of facts.<sup>315</sup> The aerial observer that a reasonable person might expect would not gaze at any backyard long enough to identify the type of plants, or to connect the yard with a particular street address.<sup>316</sup> Without these particular pieces of information, Ciraolo’s secret remained safe. The police were unexpected observers not only because their aerial vantage point defeated Ciraolo’s ground level attempts to protect his garden from observation, but also because they observed with unusual intensity and were armed with important foreknowledge: the address of the location observed and the identifying features of marijuana viewed from the air.<sup>317</sup>

313. *Id.* at 213-14.

314. *Id.* at 223-24 (Powell, J., dissenting) (emphasis added).

315. Unfortunately, this telling point was deflected when Justice Powell concluded his paragraph by writing as if the issue were whether defendant had exposed his *yard* to the public instead of his claimed secret. *Id.* Thus, Justice Powell’s preoccupation with the intrusion interpretation obscured his sound semantic insights under the search out interpretation.

316. This distinction is similar to the point made in the discussion of *Miller and Smith*, see *supra* text accompanying notes 232, 249. LaFave has developed this concept of secrecy through anonymity with some care. See W. LaFAVE, *supra* note 137, § 2.7, at 499-538; LaFave, *The Forgotten Motto of Obsta Principiis in Fourth Amendment Jurisprudence*, 28 ARIZ. L. REV. 291, 295-304 (1986).

317. Clarifying the object of searching out illuminates an otherwise puzzling part of the lower court’s opinion in *Ciraolo*. The California court said it was “significant that the aerial surveillance of his backyard was not the result of a routine patrol conducted for any other legitimate law enforcement or public safety objective, but was undertaken for the specific purpose of observing this particular enclosure within defendant’s curtilage.” *Ciraolo*, 161 Cal. App. 3d 1081, 1089, 208 Cal. Rptr. 93, 97 (1984). The Chief Justice found this “novel analysis” both irrelevant and inexplicable. *Ciraolo*, 476 U.S. at 214 n.2. Of course, from a semantic perspective, a “casual, accidental observation,” *id.* at 212, would not be a search in any of the three senses because it would lack the component [purpose to find]. A purpose to find, however, is only a necessary, not sufficient condition for either search of or search out. Therefore, the Chief Justice was correct that the mere fact that the police observation was made with the purpose of finding marijuana was not sufficient to make the observation a search.

The lower court’s point, however, has relevance for search out analysis. If Justice Powell is correct, a casual aerial observer would *not* discover Ciraolo’s secret because he would not give that particular yard the requisite attention, nor would he be forearmed with the necessary knowledge. On the other hand, if while making a routine traffic patrol by air the police

### 3. *Dow Chemical Co. v. United States*

The *Dow Chemical Co.*<sup>318</sup> case had its origins in an Environmental Protection Agency (EPA) investigation of emissions from two coal-burning power houses located within the 2000 acre Dow Chemical Company plant in Midland, Michigan.<sup>319</sup> Dow had voluntarily permitted the EPA to make an on-site inspection of the power houses and supplied schematic drawings.<sup>320</sup> Dow refused a second inspection request, however, when it learned that the EPA inspectors planned to take photographs of the plant.<sup>321</sup>

Following the refusal, the EPA did not seek an administrative search warrant under the Clean Air Act,<sup>322</sup> but instead employed a private aerial survey company to take high resolution aerial photographs of the entire plant.<sup>323</sup> The contractor took approximately seventy-five high resolution photographs using a sophisticated, floor mounted aerial mapping camera. The airplane made at least six passes at altitudes of 12,000, 3,000, and 1,200 feet, staying within navigable air space.<sup>324</sup> Dow sought to recover the prints and negatives obtained through this photography and enjoin any future warrantless aerial photography by the EPA as violative of the fourth amendment.<sup>325</sup> The Court held that no search had taken place even though

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discovered that Ciruolo was growing marijuana, that very discovery would tend to contradict Justice Powell's assumption and would suggest that Ciruolo's expectation of secrecy was objectively unreasonable.

This discussion points out a potential flaw in Justice Powell's dissent. The risk that a reasonable person in Ciruolo's position should have considered was discovery by the police. LaFave's analysis of the aerial surveillance cases also fails to make this distinction, as he would use a "curious passerby" standard. See 1 W. LaFAVE, *supra* note 137, § 2.7, at 499-538; LaFave, *supra* note 316, at 299; see also Note, *The Fourth Amendment in the Age of Aerial Surveillance: Curtains for Curtilage?*, 60 N.Y.U. L. REV. 725, 746-59 (1985) (pre-Ciruolo analysis using same test). A police officer on routine traffic patrol, unlike the commercial traveler imagined by Justice Powell, is expected to be alert to evidence of crime in the passing scene below, see *People v. Superior Court (Stroud)*, 37 Cal. App. 3d 836, 839, 112 Cal. Rptr. 764, 765 (1974), can pinpoint sites seen from the air to street level locations, and may well be routinely trained in marijuana identification. Therefore, under a careful application of the search out interpretation, a remand might have been needed to supplement the record as to the frequency and nature of law enforcement overflights in Ciruolo's neighborhood. Cf. *United States v. Allen*, 633 F.2d 1282, 1290 (9th Cir. 1980) (aerial observation was not search in part because defendant's ranch, although located in secluded coastal region, routinely was overflown by Coast Guard helicopters for both training and law enforcement purposes).

318. *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986).

319. *Id.* at 229.

320. *Id.*

321. *Id.* This refusal apparently was based on a long-standing company policy prohibiting the use of camera equipment by anyone other than authorized Dow personnel and subjecting the release of any photographs of the facility to prior management review and approval. *Id.* at 241 (Powell, J., concurring in part and dissenting in part).

322. 42 U.S.C. §§ 7413-7414 (1983). Administrative inspections are authorized in section 114 of the Act, 42 U.S.C. § 7414. If entry is refused, the EPA can enlist the assistance of the local U.S. attorney in seeking a warrant from the appropriate district court. See *Dow Chemical Co. v. United States*, 536 F. Supp. 1355, 1362 n.14 (E.D. Mich. 1982), *rev'd*, 749 F.2d 307 (6th Cir. 1984), *reversal aff'd*, 476 U.S. 227 (1986).

323. *Dow Chemical Co.*, 476 U.S. at 229.

324. *Id.*

325. *Id.* at 230.

just seeing was aided by high resolution photography that preserved detailed images for later study and enlargement.<sup>326</sup>

Tacked on to the end of the majority opinion in *Ciraolo* is a footnote that specifically referred to the Court's concurrent decision in *Dow Chemical Co.* and then suggested that "[a]erial observation of curtilage may become invasive . . . through modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens."<sup>327</sup> LaFave interprets this footnote as suggesting that had the police in *Ciraolo* used the EPA's camera, the Court would have found *that* action to be a search.<sup>328</sup> This interpretation assumes that the only reason the aerial photography in *Dow Chemical Co.* was not a search was because the area photographed was not a home or its curtilage. Admittedly, this interpretation finds support in a *Dow Chemical Co.* footnote: "We find it important that this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened."<sup>329</sup>

The flaw in this interpretation is that the Court not only held that the area photographed in *Dow Chemical Co.* was not curtilage, but also concluded that the high resolution photography did *not* constitute use of "modern technology which discloses to the senses otherwise imperceptible intimate associations, objects or activities . . . ." <sup>330</sup> Although the photographs showed greater detail than naked-eye views, the Chief Justice emphasized that the images were "limited to an outline of the facility's buildings and equipment. . . . [No] identifiable human faces or *secret* documents [were] captured in such a fashion as to implicate more serious privacy concerns."<sup>331</sup>

In the Court's view, the more detailed vision made possible by the high resolution photographs did not significantly increase the information revealed to the aerial observer. Like *Ciraolo's* ten foot high marijuana plants, the outline of Dow's buildings and equipment was plainly visible to the naked-eye observation of expected aerial observers.<sup>332</sup> On the other hand, the Court implied that if photographic techniques had enabled the EPA to identify faces or read the text of documents located 1000 feet below navigable airspace, fourth amendment concerns *would* have been implicated because Dow reasonably could expect such details to be "otherwise imperceptible to police or fellow citizens," <sup>333</sup> that is, secret.

326. *Id.* at 238-39.

327. *California v. Ciraolo*, 476 U.S. 207, 215 n.3 (1986). This suggestion was made by quoting, with apparent approval, the cited language from the state's brief in *Ciraolo*.

328. W. LaFAVE, *supra* note 137, § 2.2(c), at 346-47.

329. *Dow Chemical Co.*, 476 U.S. at 237 n.4.

330. *Ciraolo*, 476 U.S. at 215 n.3 (quoting Brief for Petitioner, 14-15). The photographs were "not so revealing of intimate details as to raise constitutional concerns." *Dow Chemical Co.*, 476 U.S. at 238.

331. *Id.* at 238, 238-39 n.5 (emphasis added).

332. To illustrate the visual magnification made possible by the high resolution photography, Dow pointed out that power lines as small as one-half-inch in diameter could be seen in the photographs. *Id.* at 243. The majority opinion dismissed this point by characterizing this detail as a mere "outline" observable only because of the contrast between the lines and a stark white background. *Id.* at 238 n.5.

333. *Ciraolo*, 476 U.S. at 215 n.3 (quoting Brief for Petitioner at 14-15).

The majority discussion of whether the plant area was more like open fields than curtilage, therefore, was largely irrelevant from the standpoint of the search out interpretation and was due to the confusion caused by *Oliver*. The curtilage doctrine should function solely to *extend* the fourth amendment's prohibition against searches of homes to the yard area surrounding the home. As demonstrated by *Ciraolo*, the curtilage doctrine does not say that objects or activities located in a backyard are secret per se and thus protected against searching out. If *Ciraolo*'s marijuana patch was located in an unfenced lot fully visible from the street, the police would still be required to comply with the fourth amendment before conducting a search of the yard by entering it. Yet, just seeing marijuana plants would not be a searching out if they were visible from the street, even if they were located in the curtilage, or for that matter in the house on a window sill. Just as the curtilage doctrine cannot automatically make things located within a yard secret, neither should the doctrine take away the reasonableness of one's expectation that some things located outside the environs of a home are secret.

It thus appears that the Court's decision in *Dow Chemical Co.* rested on the search out interpretation despite misleading references to the nature of the area observed. If so, the stated holding of *Dow Chemical Co.* is dangerously overbroad: "We hold that the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment."<sup>334</sup> This holding is inconsistent with the Court's strong suggestion that taking aerial photographs of an industrial plant from navigable airspace *would* be a search if it revealed the text of a secret document.<sup>335</sup> Neither the location of the camera (in navigable air space) nor the location of the document (within an industrial plant complex) would then exempt such a search from fourth amendment regulation.

The dissent, like the majority, mingled together the intrusion and search out interpretations. Justice Powell plausibly pointed out that business premises like the Dow plant are as fully protected against searches of as are private homes, even though a 2000 acre chemical plant is obviously not like a backyard.<sup>336</sup> The Chief Justice rejoined by agreeing that business premises enjoy some fourth amendment protection, but pointed out there was no search of the plant. He said: "The narrow issue raised by Dow's claim of search and seizure, however, concern[ed] aerial observation . . . without physical entry."<sup>337</sup> Justice Powell then treated this distinguishing of cases involving physical entries of business places as a repudiation of *Katz* and accused the majority of holding that the fourth amendment only protected Dow against actual physical entry into an enclosed area.<sup>338</sup> Having branded

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334. *Dow Chemical Co.*, 427 U.S. at 239.

335. *See id.* at 238-39.

336. *Id.* at 252 (Powell, J., dissenting).

337. *Id.* at 237. Unfortunately, the Chief Justice could not resist dropping a footnote at this point saying it was important that the plant was "not an area immediately adjacent to a private home," *id.* at 237 n.4, thus suggesting a misplaced reliance on the curtilage distinction and playing back into Justice Powell's argument.

338. *Id.* at 246-48 (Powell, J., dissenting).



the majority as retrograde adherers to the *Olmstead* search of interpretation, Justice Powell further muddied the waters by saying that the "EPA's aerial photography *penetrated* into a private commercial enclave."<sup>339</sup>

As in *Ciraolo*, once the intrusion interpretation, with its baggage of curtilage and open fields doctrine, is culled out of the majority and dissenting opinions, one can see that Justice Powell engaged in a more subtle search out analysis than did the Chief Justice. In at least part of the dissent, Justice Powell applied the search out interpretation with clarity:

As long as Dow takes reasonable steps to protect its secrets, the law should enforce its right against theft or disclosure of those secrets. . . . Dow has taken every feasible step to protect information claimed to constitute trade secrets from the public . . . [T]he aerial photography captured information that Dow had taken reasonable steps to preserve as private.<sup>340</sup>

When one identifies trade secrets as the object of the claimed searching out, the reason why a particularly subtle searching out analysis was required in *Dow Chemical Co.* becomes evident. Although the plant as an area was not the object of the challenged search, the *details* of Dow's plant and equipment disclosed in the photographs were, in the company's view, a critical clue to the secrets of its proprietary manufacturing processes.<sup>341</sup> As pointed out by Justice Powell, the photographic technique used by the aerial photographer not only recorded minute details, but also permitted "stereoscopic examination, a type of examination that permits depth perception."<sup>342</sup> Therefore, Dow plausibly could claim that the EPA photographs were "the functional equivalent of technical process drawings and

339. *Id.* at 252 (Powell, J., dissenting) (emphasis added).

340. *Id.* at 248-49 (Powell, J., dissenting). The second elision marks the omission of a sentence in which Justice Powell momentarily slipped back into the intrusion interpretation: "Accordingly, Dow has a reasonable expectation of privacy *in its commercial facility* in the sense required by the Fourth Amendment." *Id.* (Powell, J., dissenting) (emphasis added). Thus, the semantic confusion caused by mingling interpretations led Justice Powell to describe the object of the search as information, then an area, and again as information, within three consecutive sentences.

341. According to one of Dow's employees:

[F]rom aerial photographs enlarged to the scale of one (1) inch to about fifty (50) feet or less the size of motors and drives, types of control instrument employed, position and type of agitation used in reactors, and like detailed information concerning process equipment would be revealed; . . . given such information . . . a competent chemical engineer, using basic engineering calculations, could determine with reasonable accuracy the type of styrene resin process being employed, the solids levels and viscosity levels of the materials being handled, the overall through-put rate and manufacturing costs which information would be particularly valuable to a competitor of The Dow Chemical Company . . . .

Joint Appendix at A-66 to A-67, *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986) (No. 84-1259) (affidavit of Robert R. Bumb, Production Manager of Dow's Styrene Plastics Department). While this affidavit speaks in terms of enlargement to a scale of 1 inch to 50 feet, the EPA photographs were of such high resolution that enlargement to a scale of 1 inch to 20 feet or greater was possible without significant loss of detail. See *Dow Chemical Co.*, 476 U.S. at 243 (Powell, J., dissenting).

342. *Id.* at 242 n.4 (Powell, J., dissenting).

blueprints revealing the details of Dow technology . . . —the very heart of Dow's business."<sup>343</sup>

The majority opinion consistently sought to describe the EPA action as "observation" and thus was misled into equating the common sense object of seeing—the plant viewed at a glance—and the object of the claimed searching out—trade secrets revealed by studying the precise sizes, shapes, and layout of Dow's equipment.<sup>344</sup> Justice Powell persuasively argued that these trade secrets are not imperiled by the routine overflights of commercial and passenger airplanes: "it is not the case that '[a]ny member of the public flying in this airspace who cared to glance down' could have obtained the information captured by the aerial photography of Dow's facility."<sup>345</sup>

Dow reasonably relied not only on the distance of the expected aerial observer, but also on the brevity of her passing view; such an observer never could obtain sufficient information about the plant structure to duplicate Dow's proprietary manufacturing processes. One can best appreciate the impact of the high-resolution aerial photography by imagining it as the functional equivalent of stationing an engineer for several days at a drafting table located 50 feet above the plant (or alternatively at 1000 feet above the plant—navigable airspace—as long as she is equipped with good binoculars).<sup>346</sup>

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343. Petitioner's Brief on the Merits at 39, *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986) (No. 84-1259).

344. *Dow Chemical*, 476 U.S. at 238-39.

345. *Dow Chemical Co.*, 476 U.S. at 249 (Powell, J., dissenting) (quoting *California v. Ciraolo*, 476 U.S. 207, 212 (1986)).

346. As in *Ciraolo*, see *supra* text accompanying notes 298-317, however, a thoughtful application of the search out interpretation to Dow cannot end with the straw man of the disinterested commercial air traveller. One must further ask whether a reasonable company in Dow's position could expect the details of an open-air plant to remain secret given that, as pointed out by the Court, these alleged secrets were in fact captured by "a conventional, albeit precise, commercial camera commonly used in map-making." *Id.* at 242 n.4. The Court felt confident that Dow acted unreasonably by taking "no measure for aerial security," *id.* at 237 n.4 (quoting *Dow Chemical Co. v. United States*, 749 F.2d 307, 312 (6th Cir. 1984), whereas the dissent asserted "that Dow had taken reasonable and objective steps to preserve" the secrecy of its trade secrets from aerial surveillance. *Id.* at 252 (Powell, J., dissenting).

Again, this disagreement stems from confusion over the relevant direct object for searching. If Dow sought to keep its open-air plant, as an entire area, from being seen by an aerial observer, it obviously failed to take the only available effective steps: covering the plant with an opaque roof or installing anti-aircraft guns. See LaFave, *supra* note 316, at 399. If, however, Dow's goal was to protect its trade secrets, not the view of the plant per se, then it may well have taken reasonable steps to prevent aerial observers from converting their view (via photography) into meaningful information about Dow's manufacturing processes. As explained by Justice Powell, Dow had a long-standing security procedure for identifying planes whose aerial behavior over the plant suggested they were taking photographs. Using a working relationship with state police and local airports, Dow then could locate the pilot to determine if he had photographed the plant. If the suspicion proved true, Dow would request the photographer to turn over the film prior to development so that Dow could make an initial review to determine if trade secrets were revealed. If secrets were disclosed in the photographs, Dow would keep the photographs and negatives. If the photographer refused to cooperate, Dow would commence litigation. *Dow Chemical Co.*, 476 U.S. at 242 n.3 (Powell, J., dissenting).

The very case decided by the Court was proof of the efficacy of these safeguards. Dow's monitoring procedure identified the suspicious EPA overflight and within six weeks Dow filed a lawsuit. The photographs were promptly sealed under a protective order and apparently remained protected thereafter. See Joint Appendix at A-iii, *Dow Chemical Co. v. United States*,

### D. Confusing Intruding with Seeing

During the 1986-87 term the Supreme Court confronted two cases of claimed searching that involved both seeing and physical intrusion: *Arizona v. Hicks*<sup>347</sup> and *United States v. Dunn*.<sup>348</sup> In each case the majority focused on whether a search of a protected area had taken place, to the exclusion of a possible search out interpretation based on the seeing aspect of the government's action. In *Hicks* the majority used the search of interpretation to justify holding that a search had occurred, at the price of a potentially too narrow decision based solely on the presence of [movement]. *Dunn* used both the search of interpretation and a host of post-*Katz* decisions to decide that no search took place, in apparent defiance of both common sense and the search out interpretation represented by *Katz*.

In *Hicks* the police had entered the defendant's apartment in response to a report that a bullet had been fired through the floor of Hicks's apartment into the unit below, where it struck and injured someone.<sup>349</sup> They entered to search for the shooter, for other victims, and for weapons. One officer became curious upon observing two sets of expensive stereo equipment in what appeared to be a "squalid and otherwise ill-appointed" apartment. Suspecting that the equipment was stolen, he picked up a turntable and read the serial number engraved on the bottom. While still in the apartment, he called the number into headquarters and was advised that it matched a turntable reported stolen in an armed robbery.<sup>350</sup>

The central question presented on certiorari was whether the police were exempted from obtaining a warrant before examining the turntable, pursuant to the exception permitting the warrantless search and seizure of contraband or other evidence of a crime when viewed by the police in the course of an otherwise lawful search.<sup>351</sup> Before deciding whether to grant an exception to the warrant clause, however, the Court first had to decide if the actions that led to discovery of the serial number constituted either a search or a seizure. Writing for the Court, Justice Scalia made quick work of both issues: "the mere recording of the serial numbers did not constitute a seizure. . . . [The officer's] moving of the equipment, however, did constitute a 'search' . . ."<sup>352</sup> Justice Scalia defended the latter conclusion by a forthright invocation of semantic common sense: "A search is a search . . ."<sup>353</sup>

476 U.S. 227 (1986) (No. 84-1259) (table of contents refers to "Exhibits 2-5 (under seal)" and to "Sealed Joint Appendix"). Therefore, only *after* the Court's adverse decision could one confidently say that it was unreasonable for Dow to expect to prevent disclosure of its secrets through post-overflight litigation.

347. 107 S. Ct. 1149 (1987).

348. 107 S. Ct. 1134 (1987).

349. *Hicks*, 107 S. Ct. at 1151-52.

350. *Id.* at 1152.

351. *Id.* at 1152-53. The defendant did not dispute that the initial warrantless entry into the apartment and the subsequent search for a shooter, victims, and weapons were justified by both probable cause and exigent circumstances. *See id.* at 1152.

352. *Id.* at 1152. The Court then held that this search exceeded the scope of the permissible prior search of the apartment for weapons and thus required a warrant. *Id.* at 1153-55.

353. *Id.* at 1153. The balance of this sentence, omitted here, is discussed at *infra* notes 359-60.

In dissent, Justice Powell attacked the majority opinion as defining "search" solely in terms of movement:

[the Court] perceives a constitutional distinction between reading a serial number on an object and moving or picking up an identical object to see its serial number. . . . With all respect, this distinction between "looking" at a suspicious object in plain view and "moving" it even a few inches trivializes the Fourth Amendment.<sup>354</sup>

Justice Scalia could have responded to Justice Powell by employing both search of and search out interpretations. As explained above,<sup>355</sup> under the search of interpretation, the distinction between just "looking at" an object and "moving it even a few inches" is not trivial in semantic terms. The officer did not merely look *at* the turntable. He looked *over* its surface while turning the turntable in his hands, thus supplying the necessary features [movement through an area] and <X is affected object> for conversion to the expression: "The officer searched the turntable." However, in addition to the search *of* the turntable, the officer's actions also resulted in searching *out* a fact Hicks reasonably believed was secret: that he had possession of stolen goods. Obviously it was this latter searching out that primarily concerned Hicks rather than the searching of the turntable per se. This distinction seemed to have eluded Justice Scalia, who said: "A search is a search, even if it happens to disclose nothing but the bottom of a turntable."<sup>356</sup> The search *of* the turntable would not have also been a searching out if it disclosed nothing but the bottom.

Justice Scalia's apparent sole reliance on the search of approach becomes troubling in light of a hypothetical raised in Justice Powell's dissent. Justice Powell pointed out that the officer would have been able to read the serial numbers of some of the other equipment (which later also proved to be stolen) without touching or moving that equipment, although he would have had to squeeze into a foot-wide space between the back of the equipment and the wall to do so.<sup>357</sup> Justice Scalia had a potential rejoinder to Justice Powell when he said that "taking action . . . which exposed to view concealed portions of the apartment or its contents . . . produce[d] a new invasion of respondent's privacy unjustified by the exigent circumstance[s] that validated the entry."<sup>358</sup> If one reads "taking action" broadly, then snooping between the stereo and the wall, as Justice Powell hypothesized, would have been at least a searching out, even if the officer "just saw" the back of the stereo, because it had been concealed during his prior lawful search of the apartment for people and weapons. But Justice Scalia's choice of words when concluding that a search occurred—"Officer Nelson's *moving of the equipment* . . . did constitute a

354. *Hicks*, 107 S.Ct. at 1156-57 (Powell, J., dissenting). Justice Powell's dissent seemed to suggest that the Court was returning to the dismal days of *Silverman v. United States*, 365 U.S. 505 (1961), when fourth amendment protections depended literally upon "inches." See *id.* at 512; *supra* text accompanying note 134.

355. See *supra* text accompanying notes 289-90.

356. *Hicks*, 107 S. Ct. at 1153.

357. *Id.* at 1156 & n.3.

358. *Id.* at 1152.

'search' ”<sup>359</sup>—combined with his epigram—“[a] search is a search”<sup>360</sup>—raises some doubt about whether he would have found that seeing the number without moving the object on which it appeared constituted a search. If Justice Scalia intended to refute the dissent’s criticism by showing that the police invaded privacy (or better, destroyed secrecy) when examining the turntable, then he should have added a search out analysis to his very narrow application of the search of interpretation.

*Dunn*, decided the same day as *Hicks*, involved an energetic team of government agents who used seemingly every investigative technique that no longer constitutes a search to weave a net around the defendant.<sup>361</sup> The procedural history of the case shows the enormous confusion the incoherence of current fourth amendment law has created in the lower courts; the same appellate panel, in three different opinions, changed its mind twice on the reason why the government’s action was a search.<sup>362</sup> The *Dunn* decision demonstrates the serious dangers the Court creates when it is not fully aware of the semantic implications of the language it uses.

The story in *Dunn* began when government agents learned that one of the defendants, Carpenter, had ordered large quantities of equipment and chemicals of the type manufacturers of illegal drugs often use.<sup>363</sup> The agents obtained a warrant to install beepers in an electric hot plate stirrer and two chemical containers, which Carpenter had ordered and subse-

359. *Id.* at 1152 (emphasis added).

360. *Id.* at 1153.

361. The case would have been a wonderfully challenging final examination question for an advanced criminal procedure class. Perhaps, though, it would have been an unfairly difficult question. After all, our leading fourth amendment commentator, Wayne LaFave, only months before *Dunn* was reversed, praised the Fifth Circuit’s decision in *Dunn* in his 1987 treatise edition as “quite correct[ ],” W. LAFAVE, *supra* note 137, § 2.3(e), at 409, and “[f]ully consistent with *Oliver*,” *id.* § 2.4(b), at 429.

362. The district court had denied the defendants’ motion to suppress evidence obtained pursuant to the search warrant on the grounds that the warrant was based on a prior illegal search. *Dunn*, 107 S. Ct. at 1138. The Court of Appeals for the Fifth Circuit reversed, finding that the agents conducted an illegal search because they entered the curtilage of *Dunn*’s house when they walked up to the barn. *United States v. Dunn*, 674 F.2d 1093, 1100 (5th Cir. 1982). As if anticipating the future history of the case, the court entitled its discussion of this issue “The Fourth Amendment Conundrum.” *Id.* at 1098.

The Supreme Court vacated the judgment and remanded for further consideration in light of *Oliver v. United States*, 466 U.S. 170 (1984). *United States v. Dunn*, 467 U.S. 1201 (1984). Following remand, the Fifth Circuit decided that the barn was outside the curtilage of the farmhouse, *United States v. Dunn*, 766 F.2d 880, 884 (5th Cir. 1984), but that *Dunn* had a reasonable expectation of privacy in the barn itself and its contents, which the agents violated when they looked through the netting into the barn. *Id.* at 886. After the Fifth Circuit duly denied its petitions for rehearing and rehearing en banc, the government again petitioned the Supreme Court for certiorari. Five weeks after the certiorari petition was filed, the Fifth Circuit took the extraordinary step of vacating its own judgment sua sponte without any explanation. *United States v. Dunn*, 781 F.2d 52 (5th Cir. 1986). A few weeks later the Fifth Circuit issued a three paragraph opinion in which it stated:

We again have examined painstakingly the facts reflected in this record . . . Upon studied reflection, we now conclude and hold that the barn was inside the protected curtilage. Accordingly, we reinstate the opinion rendered on May 7, 1982, reported at 674 F.2d 1093 (5th Cir. 1982), as our disposition of this appeal by Ronald Dale Dunn.

*United States v. Dunn*, 782 F.2d 1226, 1227 (5th Cir. 1986).

363. *Dunn*, 107 S. Ct. at 1137.

quently purchased. The beeper signals revealed that the two drums were on Carpenter's truck when he arrived at Dunn's ranch a week or so later. Aerial photographs of the ranch that the agents took showed Carpenter's truck backed up to a barn behind the ranch house. The agents made a warrantless entry onto the ranch that evening.<sup>364</sup>

A perimeter fence completely encircled the 198 acre ranch.<sup>365</sup> The agents crossed the perimeter fence and another interior fence. They approached the barn where the truck was parked, crossing two barbed wire fences and climbing over a wooden fence that enclosed the front portion of the barn.<sup>366</sup> They still could not see into the barn because a fishnet type material covered the space between the top of waist-high gates and the barn ceiling.<sup>367</sup> Even when the agents walked up to the netting, they had to use a flashlight to peer through the netting.<sup>368</sup> They then saw the defendants' drug laboratory inside the barn. The next day a magistrate issued a warrant based on the agents' observations, and government officials executed the warrant two days after its issuance.<sup>369</sup> The officials seized chemicals, equipment, and amphetamines.<sup>370</sup>

The Court, in an opinion by Justice White, held that the agents conducted no search because they neither entered a curtilage nor violated a reasonable expectation of privacy.<sup>371</sup> The Court directed most of its attention to the problem of defining the outer limits of curtilage.<sup>372</sup> The

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364. *Id.*

365. *Id.*

366. *Id.* The agents had first walked around the back and sides of the barn, which were not enclosed by the wooden fence, but could not see inside. *Dunn*, 766 F.2d at 883.

367. As the Court of Appeals described the view: "To see inside the barn it was necessary to stand immediately next to the netting. From as little as a few feet distant, visibility into the barn was obscured by the netting and slatting." *Id.*

368. *Dunn*, 107 S. Ct. at 1137-38.

369. *Id.* at 1138. The agents entered the ranch two more times before they obtained the warrant. *Id.* They made a fourth warrantless entry the day *after* they obtained the warrant before finally executing the warrant. *Id.* It would seem that the warrant should perhaps have been called only a seizure warrant since the agents felt free to do all the searching they wanted without using it.

370. *Id.*

371. *Id.* at 1140-41.

372. Rejecting the government's proposed bright line rule that would have limited curtilage to the area within the nearest fence to the house —although the agents crossed a number of fences to reach the barn, there was yet another fence between the barn and the ranchhouse that remained uncrossed—Justice White promulgated a four-factor analysis for determining whether an area was within curtilage: (1) the proximity of the area to the home, (2) whether the area is within a fence around the home, (3) "the nature of the uses to which the area is put," and (4) the steps taken to protect the area from observation by people passing by. *See id.* at 1139. He then dealt a fatal blow to Justice Powell's optimistic prediction in *Oliver* that the "clarity of the open fields doctrine" would prevent the need for case-by-case definition because "the conception defining the curtilage . . . is a familiar one easily understood." *Oliver v. United States*, 466 U.S. 170, 182 n.12 (1984). Having set forth these four factors, Justice White admitted that even these "analytical tools" do not necessarily yield a "correct" answer to what is curtilage. *See Dunn*, 107 S. Ct. at 1139. Rather, the ultimate decision turns on "whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Id.* at 1139. The Court thus succeeded in making "curtilage," an archaic word with little "common sense" to begin with, even more vague. *See W. LaFAVE, supra* note 137, § 2.3(d), at 403 (curtilage a "curious concept . . . originally taken to refer to the land and buildings within the baron's stone walls").

Court's assumption that the case was about a search of the environs of a home caused this struggle to define curtilage. The agents' just seeing into the barn, however, independent of their physical entry into the barnyard, deserved separate consideration under the search out interpretation. After all, Dunn certainly was complaining about the discovery of his laboratory, not merely the fact that the agents were tramping around his barnyard. Justice White refused, however, to consider using a search out interpretation as revealed by his simplistic search of interpretation:<sup>373</sup> no search took place because "the officers never entered the barn, nor . . . any other structure on respondent's premises."<sup>374</sup>

Justice White needed the search of interpretation to deflect the force of the dissent's argument that a search took place even if the barn was not part of the curtilage of the ranchhouse.<sup>375</sup> Unlike *Oliver* and *Dow Chemical Co.*,<sup>376</sup> the area viewed in *Dunn* was not visible from any public vantage point, but instead was the interior of a private commercial structure that was protected by the fourth amendment regardless of its proximity to a home, or the absence of domestic activities within. Justice White appeared to concede this point, but limited such protection to literal searches of: "We may accept, for the sake of argument, respondent's submission that his barn enjoyed Fourth Amendment protection [as an essential part of his business] and could not be *entered* and its contents seized without a warrant."<sup>377</sup>

Justice White, to support his reliance on search of analysis, then employed a medley of precedents in which the Court had obscured the search out interpretation with an overlay of search of or intrusion interpretations. He interpreted *Oliver* as holding that an observation is not a search unless the observer in taking his vantage point has already violated the fourth amendment.<sup>378</sup> He invoked *Ciraolo* as authority for the proposition that the nature of what is observed, even if located within a structure protected by the fourth amendment against entry, is irrelevant: "the fact that the objects observed by the officers lay within an area that we have assumed, but not decided, was protected by the Fourth Amendment does not affect our conclusion."<sup>379</sup> Finally, Justice White confidently stated that the use of flashlights to see through the netting did not transform the observation into a search.<sup>380</sup>

373. Justice White only concurred in *Oliver v. United States*, 466 U.S. 170 (1984), because he thought the case could be resolved on plain language grounds without reference to expectations of privacy. *See id.* at 184 (White, J., concurring).

374. *Dunn*, 107 S. Ct. at 1141.

375. *See id.* at 1146 (Brennan, J., dissenting).

376. *See supra* text accompanying notes 257-66 and 318-35.

377. *Dunn*, 107 S. Ct. at 1140 (emphasis added).

378. Justice White stated, "Under *Oliver* and *Hester*, there is no constitutional difference between police observations conducted while in a public place and while standing in open fields." *Id.* at 1141.

379. *Id.* Justice White blithely quoted the passage from *Ciraolo*, saying the fourth amendment "has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares," *id.* at 1141 (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)), without acknowledging that the agents in *Dunn* were hardly on a public thoroughfare when they declined to shield their eyes at Dunn's barn gates.

380. *See id.* (citing *Texas v. Brown*, 460 U.S. 730 (1983), and *United States v. Lee*, 274 U.S. 559 (1927)); *see also* discussion of *Brown* and *Lee*, *supra* note 292.

*Dunn* seems to represent a repudiation of *Katz* that is far more profound than any of the Court's other post-*Katz* decisions. Although many previous cases distorted and limited *Katz* by notions of legitimacy, standing, and protected areas, the Court always had felt obliged to defend its decisions in terms of at least an arguable absence of privacy expectations.<sup>381</sup> Perhaps Hoffa should have expected his friend to be a spy. Perhaps Smith should have known that the numbers he dialed on his telephone were no secret. Perhaps Miller should have expected that using a bank was equivalent to giving the government his financial records. Perhaps Oliver<sup>382</sup> and Ciraolo should have known the police could see their marijuana gardens from the air. Perhaps Dow should have realized that the design of its plant could be obtained by anyone willing to hire an aerial mapping company. But surely "society" would recognize as reasonable Dunn's expectation that no one would be standing at his barn gates looking through that deliberately placed netting without his permission.

Even assuming that Dunn knew the fourth amendment did not prohibit government agents from trespassing on his ranch and crossing four fences to reach his barn, he was entitled to rely on his well-established state law rights to keep uninvited people off his land, especially fenced land. The contents of his barn simply were not visible from any point where the government had a right to be, including an aerial perspective from any angle or proximity. The combination of the translucent netting and interior darkness presumably would have defeated even an attempt to look into the barn from a distant point outside his fenced property using binoculars or more sophisticated technological aids.<sup>383</sup>

The only way the *Dunn* decision "makes sense" is to assume that searching out no longer is a possible meaning under the fourth amendment, unless perhaps the secret is located within the four walls of a home.<sup>384</sup> Only an entry to a protected area would seem to be a search, since that was the only factor missing in *Dunn*. Under Justice White's reasoning, the fourth amendment would not have been implicated had the agents overheard an incriminating conversation in the barn when they ap-

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381. *Oliver v. United States*, 466 U.S. 170 (1984), is perhaps the strongest example of the Court's former need to pay at least lip service to *Katz*. Even after concluding in two concise paragraphs that the plain language of the fourth amendment resolved the case, *id.* at 176-77, Justice Powell felt obliged to demonstrate over the next seven pages that any expectation of privacy Oliver expected was not legitimate. *See id.* at 177-84.

382. One argument used by Justice Powell in *Oliver* was that Oliver conceded the government could have lawfully viewed his marijuana garden from the air and hence could have had no reasonable expectation that the garden was secret. *See id.* at 179 n.9.

383. Justice Scalia at oral argument raised this hypothetical variant, asking Dunn's lawyer, "Would it have been okay for the police to look into the barn with binoculars from outside the fence?" 40 Crim. L. Rep. (BNA) 4162-63 (Feb. 11, 1987). The response is an intriguing example of one person's perception of the disparity between society's normative judgments and "legitimate" expectations of privacy: "I wouldn't say it was okay, but it would probably pass constitutional muster." *Id.*

384. The presence of a secret within the curtilage is no protection against searching out, *see Dunn*, 107 S. Ct. at 1141 (relying on *Ciraolo* for proposition that even curtilage not protected from police observation), and being concealed from observation by the four walls of a structure on private property is no protection if the structure is nonresidential. *Id.* (relying on *United States v. Lee*, 247 U.S. 559, 563 (1927) to validate flashlight search of barn).



proached the gates.<sup>385</sup> The same conclusion would follow if they left a listening device at the gate and later overheard people at work in the laboratory.<sup>386</sup> Yet, does not this last hypothetical come back full circle to the very facts of *Katz*: use of a listening device without actual invasion of a protected area to defeat reasonable privacy expectations?

The *Dunn* decision contains no clue that the Court saw itself making such a radical shift in fourth amendment doctrine. Indeed, the Court seemed more harmonious than on prior occasions. Justices Blackmun, Powell, and Stevens joined the majority opinion without a single concurring reservation.<sup>387</sup> Only Justices Brennan and Marshall dissented.<sup>388</sup> Even their dissent lacked, for example, the harsh accusations made by Justice Powell in *Dow Chemical Co.* and *Ciraolo* about the repudiation of *Katz*.<sup>389</sup> Once again the Court seemed unaware of the effect caused by relying on one semantic approach rather than another. Thus, *Dunn* powerfully demonstrates how important it can be for judges to be conscious and precise in the way they use language.

### VIII. CONCLUSION

The Court's shift in the last eight years from the vagueness of the legitimacy rule, represented by cases such as *Miller*<sup>390</sup> and *Smith*,<sup>391</sup> to the incoherence of its most recent decisions can be seen paradoxically as a potentially healthy development in fourth amendment jurisprudence. *Katz*<sup>392</sup> marked the end of a struggle to discuss and decide the just listening cases within the conceptual limitations generated by the semantic features of search of. When the Court decided in *Katz* to include at least some kinds of listening within the scope of the fourth amendment, it needed new language to explain and apply the decision. But in its post-*Katz* decisions the Court evaded rather than met that challenge by reinterpreting *Katz* through use of the "legitimate expectation of privacy" rule. As Edward Levi has pointed out, when a traditional legal concept breaks down under the pressure of change, often "there will be the attempt to escape to some overall rule which can be said to have always operated and which will make the reasoning look deductive."<sup>393</sup> The redefinition of "search" as "the

385. That is, the amendment would not have been implicated unless the presence of people within the barn holding a conversation is the kind of "intimate activity" that would have made the barn a sufficient extension of Dunn's home life to temporarily convert the barnyard into curtilage. Compare *Dunn*, 107 S. Ct. at 1140 (White, J.) with *id.* at 1141-42 (Scalia, J., concurring).

386. This is hardly an extravagant extension of the facts. On one of the return visits after the initial evening reconnaissance (while the warrant application was being prepared), the agents covertly installed an "electronic surveillance device" on the barn gate. *Dunn*, 674 F.2d at 1097. The device only detected the passage of vehicles and persons past the gate, however, and was "not designed to intercept conversations." *Id.* at 1097 n.3.

387. See *id.* at 1136.

388. See *id.* at 1142-49 (Brennan, J., dissenting).

389. See *supra* text accompanying notes 304-17 and 336-45.

390. *United States v. Miller*, 425 U.S. 435, 440 (1976).

391. *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

392. *Katz v. United States*, 389 U.S. 347 (1967).

393. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 9 (1948).

infringement of a legitimate expectation of privacy" is just such a rule. But, as Levi wrote, this turn to an "overall rule" is often a pathological development: "The rule will be useless. It will have to operate on a level where it has no meaning."<sup>394</sup>

The challenge of expanding or altering a legal concept such as "search" must be met with a legal vocabulary that is *more*, and not less, meaningful. However, the process of infusing new meaning into words resembles organic growth—like nurturing a seed into a tree or raising an infant into adulthood. Change is gradual and subtle; apparent halts and setbacks mask underlying progress. The mature result is more vast and complex than the beginning point, yet the very nature of the growth process provides identity and continuity.<sup>395</sup>

Vagueness creates the illusion of expanded meaning, hence the temporary appeal of "overall rules" like the legitimacy rule. But like the biblical seeds that fell into shallow soil and sprouted rapidly only to wither and die, rules that are not based on a sound foundation of meaning will neither bear fruit nor endure. When the Court said that using spies, examining bank records, and employing pen registers infringed no legitimate expectation of privacy, no one could really understand what the Court was saying without knowing what was meant by legitimate. If, as the Court has sometimes explicitly stated, legitimacy turns on a balancing of privacy and law enforcement interests, nonetheless, that balancing must be expressed in language we can understand and apply to new situations.<sup>396</sup> Perhaps if the legitimacy rule was supported by a wealth of decisions clearly and consistently articulating a coherent body of fourth amendment policy, the phrase "legitimate expectation of privacy" would have developed into a legal term of art with an established meaning, albeit phrased inelegantly.<sup>397</sup> The very development of such a body of policy, however, has been blocked by unreflective reliance on the vagueness of "legitimate" as a substitute for articulated policies.

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394. *Id.* (footnote omitted).

395. The metaphor of organic growth lies at the heart of the most famous aphorism in American legal scholarship: "The life of the law has not been logic: it has been experience." O.W. HOLMES, *The Common Law*, in *THE COMMON LAW* 1 (1881).

396. See White, *supra* note 208, at 171 (balancing "can only work if we have some prior language to define what is to be subjected to that process"). Of course, the fourth amendment itself is the result of such balancing, but it is vastly more meaningful than a mere statement that "the people's right of legitimate privacy shall not be unreasonably infringed." Compare the clarity of the fourth amendment text with the vagueness of Justice Powell's paraphrase in *Dow Chemical Co.*, 106 S. Ct. at 1827 (Powell, J., dissenting) ("The Fourth Amendment protects private citizens from arbitrary surveillance by their government.").

397. For example, the framers intentionally chose the vague word "unreasonable" in drafting the first clause of the fourth amendment. Yet, at least until recently, most competent speakers of American legal language had a good understanding of what made a warrantless search unreasonable: absence of exigent circumstances, consent, or an administrative inspection scheme justifying the search. In turn, the terms "exigent circumstances," "consent," and "administrative search" have developed well-understood specialized meanings in the fourth amendment context. This growth of meaning was made possible by the articulation of clear policies underlying the warrant requirement which have infused meaning into the previously vague word "unreasonable." One of the ironies of current fourth amendment law is that in the phrase "unreasonable searches," the meaning of "searches" is now less clear than "unreasonable."

The incoherence of the Court's more recent decisions may be a sign of returning vitality because they signal an effort to fill the vacuum left by the legitimacy rule with common sense meanings. As the preceding section demonstrates, at least incoherent opinions like *Dow*<sup>398</sup> and *Ciraolo*<sup>399</sup> may be rendered potentially meaningful by eliminating excess, inconsistent meanings. Perhaps the Court only needs the tools of semantic analysis to transform the current tangle of fourth amendment law into healthy growth.

One function of semantic analysis is to identify sloppy and confusing speech and thus ward off vagueness, ambiguity, and incoherence. Merely clearing our fourth amendment law of such clutter aids a return to healthy growth. But semantic analysis can nurture as well as prune. Language is the vital fiber of the law, giving its abstract concepts substance and the potential for growth. The pathological use of the policy interpretation to produce the sterile and vacuous legitimacy rule demonstrates that insensitivity to semantics can deprive legal reasoning of vitality. Great judges are not only wise policymakers and learned scholars; they are also masters of language. Semantic analysis makes such mastery more accessible to all by rendering explicit native understanding of our own language.

The task now before the Court is to revive the meaning of "search"—to resolve the current confusion without retreating to vagueness or ambiguity. Unless the Court chooses to overrule *Katz*, it is clear that the meaning of "search" cannot be limited to "search of" or "intrude." Thus, the approach that seems to offer the best articulation of *Katz* as well as a principled way of analyzing the decisions made in its wake would combine both search of and search out interpretations in a common sense way. This common sense approach would indicate that a government action was a search *either* if agents conducted a search of houses, persons, papers, or effects<sup>400</sup> *or* if they search out objectively secret information. Thus, semantic common sense would clarify the textual ambiguity, resolve vagueness by tapping the vast resources of everyday meaning, and prevent incoherence caused by distorting the common sense meaning of "search" or confusing its different senses in a single expression. The common sense approach would not exclude policy discussions from constitutional interpretation. Rather, the semantic features and connotations of "search" can provide a structure for discussing policy implications as well as furnishing an understandable medium for communicating the decision made.<sup>401</sup>

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398. *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986).

399. *California v. Ciraolo*, 476 U.S. 207 (1986).

400. This approach would also use common sense to interpret "houses, persons, papers, and effects," for example, by including yards (not "curtilages") within the right to be secure in houses, on the ground that the common semantic feature [lived in place] was more important than the feature a yard lacks [has a roof]. See *supra* text accompanying notes 261-63 (discussion of curtilage).

401. Justice Harlan's concurrence in *Katz* can be viewed as a skilled expression of constitutional policy through the use of common sense language. The decision to deny fourth amendment protection to merely subjective expectations of secrecy obviously had significant policy justifications, yet Harlan expressed his decision with common sense notions of secrecy. Thus, the object of search out under his *Katz* concurrence must be more than hard to find; it must be objectively secret as measured by the steps the reasonable person would take to

A semantically sophisticated reworking of "search" may eventually go beyond the common sense approach. Few of our operative legal terms rely entirely on common sense; some, like "tort" and "due process," are built entirely from purely legal contexts of use. But if "search" in the fourth amendment is to become such a specialized legal term of art, then the courts have an enormous creative task before them. As Owen Barfield, a lawyer and literary critic, once noted, "there is all the difference in the world between the propagation of a doctrine and the creation of a meaning."<sup>402</sup> The enormity of the task will be lessened—and fourth amendment law rendered more comprehensible to the average citizen—if semantic analysis enables courts to use common sense meanings of "search" as at least the raw material for a newly refined and powerful meaning of "search" in the fourth amendment.<sup>403</sup>

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preserve secrecy—a standard that conforms to our common sense understanding of "secret."

402. O. BARFIELD, *Poetic Diction and Legal Fiction*, in *ESSAYS PRESENTED TO CHARLES WILLIAMS* 106, 121 (C.S. Lewis ed. 1947); cf. E. LEVI, *supra* note 393, at 9 (legal system "does not work with the rule but on a much lower [*i.e.*, fundamental] level").

403. As this article was going to press, the Supreme Court decided that the fourth amendment does not prohibit warrantless searches of garbage left for collection outside the curtilage of a home, *California v. Greenwood*, 108 S. Ct. 1625, 1627 (1988). Both the majority opinion by Justice White and the dissent by Justice Brennan in *Greenwood* are flawed by failure to distinguish clearly between the two different types of searches that occurred: the search of defendant's garbage bag and the consequent searching out of specific information (that defendant had discarded items indicative of narcotic use). See 108 S. Ct. at 1627. Under the common sense approach, the mere physical activity of rummaging through the discarded garbage bag (the search of) did not implicate Greenwood's fourth amendment rights because the only affected object was the garbage bag, which was not a sacred area such as a house, a person's body, or a repository of personal effects. (The dissent's attempted analogy to cases involving containers of personal effects, *id.* at 1632-33, failed to recognize this distinction.) However, the searching out of information regarding narcotic use would fall within the fourth amendment if that information was objectively secret.

Whether a reasonable person would expect information to remain secret if examination of discarded garbage could reveal the information is a more subtle and variable issue than either the majority or dissent acknowledged. Was it reasonable for Greenwood to believe that his drug use was a secret even though he discarded narcotics paraphernalia in his trash? The answer turns on the likelihood that whoever might find the paraphernalia would have both the interest and ability to trace it back to Greenwood. The curbside scavenger or nosy child hypothesized by the majority, *id.* at 1628-29, would lack the interest, while anyone who found the paraphernalia after the trash was mixed into the truck bin would be unable to make the connection between it and Greenwood. The only real risk to his secret was what actually happened: a deliberate surveillance of his trash achieved by intercepting garbage collection before the bag was dumped. Unlike the risk that routine police helicopter patrols would discover a large marijuana plot in an urban backyard, see discussion of *Ciraolo*, *supra* text accompanying notes 311-17, the risk of trash surveillance does not seem sufficiently likely to make Greenwood's secrecy expectations objectively unreasonable.

By holding that discovery of information through examining discarded trash could never be a fourth amendment search, the majority in *Greenwood* made the same error found in *Oliver* and *Dunn*, discussed *supra* text accompanying notes 264-66 and 384-89: it assumed simply because the area affected by the search of was not protected that any information searched out by that activity was likewise unprotected. The implications of the Court's generic exclusion of "trash searches" from the fourth amendment meaning of search are very troubling. Imagine, for example, a far more sophisticated form of trash surveillance, that went to the extent of reconstructing shredded documents. This would be a daunting but achievable task, as proved by the Iranian reconstruction of shredded documents from the American embassy during the 1979 hostage incident. Surely it is reasonable to expect the contents of confidential shredded documents to be as secret as words uttered into a telephone mouthpiece, yet the holding in

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*Greenwood* would allow the government to destroy this expectation without *any* justification or limitation. (The trash surveillance could be directed against the offices of a lawyer opposing the government in a case, of a civil rights leader, or of an opposing political party, and be motivated by entirely improper purposes.) Perhaps the Court would have reached a different result if presented with such facts, but unfortunately semantic confusion makes it impossible to limit the holding in *Greenwood* so as to still exert fourth amendment control over such an Iranian-style "trash search."

One can only hope that the Court does not make an error of even greater potential gravity by holding that urine analysis and other drug testing techniques are not "searches" and therefore entirely beyond the scope of fourth amendment controls in the two drug testing cases set for argument during the 1988-89 term. See *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988), *set for oral argument*, 57 U.S.L.W. 3246 (U.S. Oct. 4, 1988) (No. 87-1879) (argument scheduled for Nov. 2, 1988); *Railway Labor Executives Ass'n v. Burnley*, 839 F.2d 575 (9th Cir.), *cert. granted*, 108 S. Ct. 2033 (1988), *set for oral argument*, 57 U.S.L.W. 3246 (U.S. Oct. 4, 1988) (No. 87-1555) (argument scheduled for Nov. 2, 1988). The key first step in the drug testing cases is to distinguish between whether there has been a search *of* the person's body and whether objectively secret information has been searched *out*. If testing were done by physicians bound by a confidential professional relation to the government employee and the only mandate imposed on the employee was to obtain that doctor's certificate of a drug-free state, it might well be that the government would engage in *neither* a search of or a searching out, thus accomplishing its objective of assuring a drug-free work force while avoiding the dangerous enterprise of trying to create a drug testing exception to the fourth amendment.