Law Quadrangle (formerly Law Quad Notes)

Volume 32 | Number 3 Article 8

Spring 1988

In Search of Common Sense: A Lingustic Approach to Fourth Amendment Law

Clark D. Cunningham
University of Michigan Law School

In Search of Common Sense:

A Linguistic Approach to Fourth Amendment Law

Clark D. Cunningham

Professor Cunningham was the winner of the 1988 Scholarly Paper Competition sponsored by the Association of American Law Schools. The following article is an abridged version of that winning paper, adapted from a transcript of his presentation to the 1988 AALS Annual Meeting. His thesis is that semantic analysis of "common sense" meanings of the word "search" can provide an approach to interpreting the scope of the Fourth Amendment which is both faithful to the text and flexible enough to meet the demands of changing times. In a much longer article appearing in 73 Iowa Law Review No. 3 (March 1988) he supports his "common sense approach" with a detailed analysis of the amendment's legislative history and its relation to pre-Revolutionary events and, picking up where this paper ends, applies the semantic analysis to the Supreme Court's major cases of the last 20 years which have interpreted the scope of the Fourth Amendment.

> "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.

What is the meaning of the word "searches" in the first clause of the Fourth Amendment to the Constitution? Answering this question has proven to be one of the most difficult tasks of modern constitutional interpretation. For example, in the past four years the Supreme Court has been asked 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, *United States v. Karo* (1984); (2) entering private fenced farmland to find a hidden marijuana garden, *Oliver v. United States* (1984); (3) viewing the backyard of a home from 1000 feet in the air, *California v. Ciraolo* (1986); (4) taking high resolution aerial photographs of an open air chemical plant, *Dow Chemical Co. v. United States* (1986); (5) picking up a stereo turntable and looking at the serial number on the bottom, *Arizona v. Hicks* (1987); and (6) peering into a barn interior with a flashlight to see an illicit drug laboratory, *United States v. Dunn* (1987).

The decisions in these six cases provoked startling dissension among the members of the Court. No one justice joined the majority opinion in all six cases and all but three joined harsh dissents in at least one case. The inability of the current Court to agree consistently 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.

The problems we have today can be traced back 60 years ago to the famous Supreme Court case of *United States v. Olmstead* (1928). Federal agents had listened to Olmstead's telephone conversations by placing a wiretapping device on the telephone wire at a point outside Olmstead's property. The question presented to the Supreme Court was whether that activity was a search and therefore fell within the warrant requirements of the Fourth Amendment. In a 5-4 decision the Court held that no search warrant was required because no search took place.

The Court was split between two dramatically opposed positions expressed in the majority opinion by Chief Justice Taft and a famous dissent by Justice Brandeis. Taft said:

> The amendment itself shows that the search is to be of material things — the person, the house, his papers or his effects. . . . The language of the amendment does not forbid what was done here. There was no searching. . . . 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.

Taft's opinion is the exemplar of what I call the "search of" interpretation of "search" in the Fourth Amendment, an approach which purports to be based simply on the "plain language" of the text. Justice Brandeis's dissent exemplifies an interpretation at the other extreme:

> The makers of our Constitution . . . 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.

Justice Brandeis not only expanded the textual "right to be secure" into a more general right of privacy; he also effectively removed the limiting phrase "against unreasonable searches and seizures" by insisting that the means employed were irrelevant. His "interpretation" could therefore be fairly characterized as an amendment, illustrated by superimposing the language of his dissent on the constitutional text using the style of statutory drafting:

> The right of the people [to be secure in their persons, houses, papers and effects] TO BE LET ALONE [against unreasonable searches and seizures] shall not be UNJUSTIFIABLY violated . . .

Brandeis argued that this interpretation of the Fourth Amendment was necessary to keep its essential policies vital through changing times. Because of this willingness to change or abandon textual language to implement underlying policy, I have called the interpretation exemplified by Brandeis's dissent the policy interpretation.

From 1928 to the present day debates over constitutional interpretation continue to be polarized between the positions typified by the Taft and Brandeis opinions. Thus the explicit overruling of *Olmstead* by the Supreme Court's seminal 1967 decision in *Katz v. United States* has taken on doctrinal significance beyond the confines of Fourth Amendment law. Many commentators assume that *Katz* represents the ultimate victory of the policy interpretation of the scope of the Fourth Amendment.

The purpose of my paper is to demonstrate that there is a viable interpretive approach between these extremes, which I call the "common sense approach." This interpretation retains the textual language much more than the policy interpretation yet expands the meaning of search beyond the limitations of Taft's opinion. The Common Sense Approach is grounded in semantic analysis of the word "search" as used in everyday language. This analysis draws on the linguistic competence shared by all English speakers to reveal that "search" has three distinct senses with differing semantic structures: (1) to make a search *of* something, (2) to search *for* something, and (3) to search *out* something. First I will describe the semantic features which constitute and distinguish these three senses. I will then use this semantic analysis to describe the transition from *Olmstead* to *Katz*, and I will claim that the *Katz* decision most accurately is described as an application of the common sense approach. (In my Iowa Law Review article I have explained the textual and historical reasons for concluding that "searches" in the Amendment can mean *both* "search of" and "search out," but not "search for," and have applied the common sense approach to the Court's post-*Katz* cases, including the six recent cases which provoked such dissension on the Court.)

Some readers may suspect at this point that my ultimate goal is to make a normative claim: that semantic analysis will produce the authoritative interpretation of "search" in the Fourth Amendment. I am not making the claim that semantic analysis will lead to the Grail of constitutional scholars: the "right answer" to what given constitutional provisions mean. The common sense approach is at best a plausible interpretation of "search," not necessarily the "correct" interpretation.

I will confess, however, that there is a normative component to my project but it is not addressed to the question of authority. I believe that the common sense approach deserves serious consideration because it gives coherent shape to the developing case law and provides a basis for reasoned debate. The Supreme Court's current interpretation of "search" is that "a 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." This formulation, usually referred to as the "legitimate expectation of privacy" test, has produced an incoherent body of decisions and has deprived the country of a meaningful vocabulary to use in discussing the scope of the Fourth Amendment. One can say with some certainty that the Court's interpretation is so vague as to be literally meaningless, without regard to whether or not the interpretation is "correct." Indeed, we can not even discuss its correctness unless we are able to understand what it means.

The demand that a key legal term like "search" be meaningful is such an obvious normative claim that we tend to ignore its importance. The fundamental value of a common sense interpretation of a legal text is that its meaning draws on the enormous existing semantic resources of everyday language. We lose these resources whenever we disregard the common sense meaning of a legal text. I am not saying that a court should never move away from the common sense interpretation of a text, but only that there are substantial costs incurred when a court does so. The current state of Fourth Amendment law is powerful evidence of these costs. Semantic analysis suggests that these costs need not be incurred by revealing within the "common sense" meaning of even a seemingly simple word like "search" much of the flexibility that advocates of the policy interpretation seek and despair of finding in the too-narrow literalism represented by Taft's opinion.

I have been 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 a discreet meaning of a word that can be described in terms of what linguists call semantic features. "Common sense" at this level means that the senses of the words used by the speaker are the same as the senses understood by the hearer. If the hearer and speaker interpret the words as having different senses then communication will fail. The current confusion of Fourth Amendment law can be explained as caused by the lack of this kind of common sense. Different members of the Court at the same time or at subsequent points in time have used the word "search" with different meanings. But of course, "common sense" has a different meaning than this technical linguistic definition. More commonly, the phrase implies a kind of practical wisdom shared by people generally which 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.

My approach combines both meanings of common sense because semantic analysis is in a very real way a matter of everyday common sense. Scholars might disagree vigorously over definitions of search, yet all of us as speakers of English could immediately recognize that certain uses of search sound wrong. For example, I would predict that if I were to say, "the detective searched the smell of garlic," most hearers would say that sentence somehow does not make sense. Yet I could rephrase that sentence using both the words "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." From experiments like these which simply test the reaction of native speakers of English, a partial semantic analysis of search can be constructed.

My semantic analysis begins with the first sense of "search," which can be identified in the verb form by the absence of a preposition: "search X." Common dictionary examples include: search the countryside, search the apartment, search the suspect, and search the records. I have called 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]. A second feature describes "X": < X affected object >. (Brackets ([ ]) are used to identify semantic features of the word itself while angles (< >) mark features which must be found in specified accompanying words, such as direct objects.) A third related semantic feature is: < X has a surface or interior >. A fourth feature indicates that the movement must be taken with a certain purpose: [purpose to find Y]. This semantic analysis correctly predicts that one cannot insert "smell of garlic" for "X" because "smell" has neither a surface nor an interior; therefore, "search the smell of garlic" does not "make sense."

The second sense for "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 because the verb describes merely the activity of the subject and not the impact of that activity on some object. Accordingly the three semantic features relating to "X" disappear. One semantic feature remains which 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] and < X affected object >. In place of the [movement] feature, however, is a different description of 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.

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

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

Through the kinds of common sense experiments used above semantic analysis develops a description of the sense of a word by setting forth necessary conditions for acceptable usage expressed with maximum generality and accuracy. Such a description obviously does not fully convey the meaning of a word, but it does distinguish among different meanings and enables us to predict how a word can combine with other words to form a meaningful expression.

If we employ this semantic analysis to Taft's *Olmstead* opinion, it is clear that he assumed that "search of" was the only possible meaning of "search" in the first clause of the Fourth Amendment. He cited exclusively the semantic features of "search of":

"the search is to be of material things"	< X has surface or interior >
"There was no entry of the houses or offices"	[movement through X]

Given Taft's semantic assumption, he was correct to conclude that "search of" cannot be used to described "the use of the sense of hearing and that only." Just listening does not involve movement through an area, and the objects of listening — sounds — are not areas with interiors or surfaces. Just as one can not search the smell of garlic, one can not search Olmstead's conversation.

The semantic analysis, however, reveals that Taft's "search of" interpretation is actually narrower than the literal meaning of the text, because common sense interpretation of the text would allow us to use "search out" as well as "search of." The government searched out Olmstead's secrets by listening to his telephone conversations. Therefore, it was not necessary for Brandeis to conduct radical surgery on the text, and make the move to the policy interpretation, to apply the Fourth Amendment to this particular case. It would have been enough to take the "common sense" approach of allowing "search" to mean *both* "search of" *and* "search out," thereby broadening the meaning of the text while remaining faithful to its language.

Before leaving the *Olmstead* case I want to look at a much less famous dissent, by Justice Butler. His dissent exemplified an interpretation which also sought to preserve the textual language while broadening the Amendment's scope, but did so in defiance of common sense. Butler said,

> . . . the communications belong to the parties between whom they pass during their transmission. Exclusive use of the wire belongs to the person served by it. Wiretapping involved interference with the wire while being used.

Justice Butler was trying to make "search of" fit by imagining the telephone wire as a tube and the conversation as if it were a tangible message being sent through the tube, then describing the wiretapping as if the government "searched" the wire for the conversation by entering the tube and "grabbing" the messages as they went through. This approach I call the intrusion interpretation, because it focuses on the semantic feature [movement through X] with the result that "search X" becomes paraphrased as "intrude into X." For Justice Butler, the mere intrusion of the tapping device into the telephone wire somehow made the activity a search. The intrusion interpretation dominated the Supreme Court's jurisprudence all the way up to the *Katz* decision 40 years later.

The problem with the intrusion interpretation was that it led to decisions which defied common sense, as best illustrated by comparing the Supreme Court's *Goldman* decision in 1942 and its 1961 *Silverman* decision. In *Goldman v. United States*, the government used a surface microphone from an adjoining office; by placing it against the partition wall and picking up the vibrations on the surface of the partition wall, the agents were able to hear the conversation going on next door in Goldman's office. The Supreme Court said no search took place because there was no entry into the office, no movement into that area.

By 1961 the Supreme Court was eager to extend the Fourth Amendment to cover some forms of electronic eavesdropping and thus found that a search occurred in *Silverman v. United States*. The only difference between the two cases was the location of the microphone. In *Silverman* the government used a spike mike, which was inserted through the partition wall and happened fortuitously to go into a heating duct, enabling the government to pick up conversations throughout the house. Explicitly adopting the intrusion interpretation, Justice Stewart said for the Court that there was an actual intrusion into a constitutionally protected area. *Goldman* was not overruled, rather the Court said it was (literally) distinguishing *Goldman* "by an inch."

This "one inch" distinction, based entirely on the placement of the microphone, surely made very little sense. The physical intrusion of the microphone into the partition wall had nothing to do with any plausible meaning of "search." If the government had pounded a nail into the wall, there likewise would have been an

actual intrusion into a constitutionally protected area, yet no one would think that the Fourth Amendment applied it to that activity. What made the action in *Silverman* different from pounding a nail into the wall? Not the fact of movement into an area, the distinctive semantic feature of "search of." If there was a search at all, it was because the FBI searched *out* the conversations that were taking place in Silverman's home by the use of this microphone. The fact that there was an actual physical intrusion really was irrelevant. This unsatisfactory state of Fourth Amendment law after *Silverman* led to the Court's famous 1967 decision in *United States v. Katz*.

Katz was a bookie. He went into a telephone booth to place his bets and, unfortunately for him, made his call over state lines in violation of federal law. Even more unfortunate for him was the fact that he did so while there was a hidden radio transmitter microphone attached to the top of the booth, which picked up what he said into the mouthpiece of the telephone. In light of the *Silverman* case, it is not surprising that the parties in *Katz* framed the question on *certiorari* in terms of the intrusion interpretation: 1) whether a public telephone booth is a constitutionally protected area and 2) whether physical penetration into a constitutionally protected area is necessary for the Fourth Amendment to apply. As in *Silverman* Justice Stewart wrote the majority opinion, yet he criticized this formulation of the issues as "misleading" and specifically rejected the intrusion interpretation that he had used only six years before. He said, "the reach of the amendment can not turn upon the presence or absence of a physical intrusion into any given enclosure." He also rejected the policy interpretation exemplified by Justice Brandeis's opinion: "the Fourth Amendment can not be translated into a general constitutional right to privacy."

What interpretation *did* Justice Stewart use? The best known part of his opinion is the ringing and sweeping phrase, "the Fourth Amendment protects people not places." Our leading Fourth Amendment commentator, Wayne LaFave, has said that this statement offers little to fill the void it created. Telford Taylor was more blunt: "the only merit in this comment is its brevity." But if we look at that quote in context, it then begins to make more sense. Justice Stewart went on to say:

> What a person knowingly exposes to the public even in his own home or house 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.

The Fourth Amendment does not simply protect people, but it protects *what* they seek to preserve as private. What did Katz seek to preserve as private? Not the phone booth. He would not have cared if the government had searched the phone booth before he went into or after he left it. What he sought to preserve as private were the bets he was placing, and that of course is what the FBI searched *out*. The affected object of the searching was not an area; it was an "X" which was secret. Thus semantic analysis reveals that the foundation of the *Katz* decision is an interpretation of "search" as "search out."

Unfortunately Justice Stewart failed to communicate his semantic insight unambiguously by actually using "search out." Indeed, he did not actually use "search" as a verb at all. Throughout the opinion he simply used the combination phrase "search and seizure." He thus failed to employ the semantic resources which, I believe, actually informed his opinion. As a result, his fellow justices seemed not to understand what he was doing. Justice Black, for example, assumed that he was adopting the policy interpretation and accused the majority

> . . . of giving a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage. . . . thereby changing the Fourth Amendment from a law against unreasonable searches into a general protection of privacy.

That attack misses the mark if we read Stewart's opinion as using a common sense meaning of search: search out. Perhaps even more interesting, Justice Harlan, who concurred, interpreted the decision as an example of the intrusion interpretation. This is particularly significant because Justice Harlan's concurrence has been more influential than Justice Stewart's opinion for the majority and is now consistently quoted as the holding of *Katz*. This following part of Harlan's concurrence which is not so frequently quoted, however, is very telling:

> 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 authority is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.

Harlan was really still engaged in the same enterprise as Justice Butler: he was trying to imagine this electronic eavesdropping metaphorically as a "search of," an intrusion into, an area, the phone booth.

Justice Harlan's confusing 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 had Justice Stewart expressly resolved the ambiguity of "search" in *Katz* by *using* the word itself in a demonstratively meaningful way. His failure to do so perhaps explains the seeming paradox that the result in *Katz* is universally praised while the majority opinion is either ignored or deprecated.

The ultimate judgment on the force and clarity of Justice Stewart's opinion, though, has been rendered by the Court itself. 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, the Court consistently cites Harlan's *concurrence* as the holding of the case. The Court has used that concurrence to obscure the semantic implications of *Katz* by interpreting it in terms of the vague "legitimate expectation of privacy" test. As a result the lodestar decision is often found shining over a case in which almost all the interpretations are tangled into the same opinion. Thus the ambiguity and vagueness of Justice Stewart's opinion in *Katz* has spawned the incoherence of today's Fourth Amendment law.

One can praise the *Katz* decision as good constitutional doctrine and public policy and still regret the semantic confusion that has surfaced in its wake. Semantic analysis, of course, does not eliminate the need for interpretation in light of doctrine and policy but it can protect against interpretations which do not "make sense." This is not an unimportant service. If we cannot understand the law, its underlying doctrine and policies will be frustrated. Indeed law which cannot be understood well enough to apply prospectively to order social experience ceases to be law at all and becomes merely the ad hoc dictates of the persons who occupy positions of authority at a particular point in time.

Clark D. Cunningham is a clinical assistant professor of law at Michigan. He has also written in the area of comparative constitutional law, based on research accomplished in 1986 while a visiting scholar at the Indian Law Institute, New Delhi, and on the subject of legal ethics. A photo of Professor Cunningham appears on page 1.