

CONCRETENESS DRIFT AND THE FOURTH AMENDMENT

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INTRODUCTION

Katz v. United States was expected to reorient interpretations of the Fourth Amendment.¹ This was not simply because *Katz* repealed the constitutional rules governing electronic eavesdropping established in *Olmstead v. United States*.² Rather, it was because *Katz* called for doctrinal reform across a broad swath of cases—the entire catalogue of “search” issues—and it supplanted a mechanical rule with an open standard based on contextual and evolving societal expectations.³

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¹ *Katz v. United States*, 389 U.S. 347 (1967); see also Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 538 (2011) (“[I]t was expected that the new test would have a major impact on how the Fourth Amendment applied.”) [hereinafter Kerr, *An Equilibrium-Adjustment Theory*]; Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U. L. REV. 968 (1968) (describing *Katz* as a “landmark” case); *id.* at 981 (“[T]he *Katz* decision has pointed the way towards a complete re-orientation in the analysis of problems relating to governmental intrusion into individuals’ private affairs.”).

² *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (holding that wire tapping did not constitute a search under the Fourth Amendment).

³ Albert W. Alschuler, *Interpersonal Privacy and the Fourth Amendment*, 4 N. ILL. U. L. REV. 1, 6 n.12 (1983) (stating that *Katz* links the right to privacy to “changing cultural expectations of privacy”); Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 247 (1993) (stating that

Of course the hope of *Katz* would prove hollow. In forty-five years, *Katz* has had only a marginal impact on the Court's "search" decision-making.⁴ Put more directly, *Katz* has failed to direct judges to evaluate the term "search" based on contextual and evolving privacy norms. Explanations for *Katz*'s failure come in many forms: some point to the resilience of the justices' personal juridical and policy preferences;⁵ others to the vagueness of the *Katz* opinions themselves;⁶ and still others to the inaccessibility of good empirical data regarding "reasonable expectations of privacy."⁷ I agree, more or less, with each of these

the Court was "employing a test that rests upon pragmatist theories and methods") [hereinafter Cloud, *Pragmatism, Positivism, and Principles*].

⁴ WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 128 (Thomson West 2004) ("The full potential of the *Katz* approach (which certainly has not in all respects been realized) can thus be seen only by consideration of various police investigative practices . . ."); Peter P. Swire, *Katz is Dead. Long Live Katz*, 102 MICH. L. REV. 904, 931 (2004) ("*Katz* has already had two lives. The first was as the protector of privacy envisioned by Justice Brennan and celebrated in the 'reasonable expectation of privacy' test. The second has been as an invader of privacy."); Jonathan Simon, *Katz at Forty: A Sociological Jurisprudence Whose Time Has Come*, 41 U.C. DAVIS L. REV. 935, 959 (2008) ("Commentators have long appreciated that something potentially revolutionary to at least Fourth Amendment jurisprudence was embedded in *Katz* but had failed to develop."); David A. Sklansky, *Back to the Future: Kyllo, Katz, and Common Law*, 72 MISS. L.J. 143 (2002) ("The [holding] in *Katz* seemed to promise a Fourth Amendment that was less tied to specific locations, and therefore somehow more modern. The Justices keep renewing that promise, but they have never figured out how to make good on it.")

⁵ Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1512-13 (1996) (explaining that deviation from *Katz*'s foundation is attributed to "knowing exposure" moves made consciously though never expressed); Kathryn Urbonya, *A Fourth Amendment "Search" in the Age of Technology: Postmodern Perspectives*, 72 MISS. L.J. 447, 477 (2002) ("With . . . diverse and contrasting rhetorical arguments, the Court gets to choose how to frame and resolve a decision.")

⁶ See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 382-88 (1974) (stating that *Katz* fails to offer a comprehensive test for applying the amendment); Morgan Cloud, *Rube Goldberg Meets the Constitution: The Supreme Court, Technology and the Fourth Amendment*, 72 MISS. L.J. 5, 27 (2002) ("[E]ven this . . . standard did little to constrain judicial discretion.") [hereinafter Cloud, *Rube Goldberg Meets the Constitution*]; Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-first Century*, 65 IND. L.J. 549, 562 (1990) ("A seminal case should provide a framework for its later application. However, the seminal quality of *Katz* lies in its understanding of what the [F]ourth [A]mendment is about rather than in the clarity of its rule.")

⁷ I describe these contending explanations in some detail in a recent article. Luke M. Milligan, *The "Real" Rules of "Search" Interpretations*, 20 WM. & MARY B. RTS. J. 1 (2012); see also Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511,

explanations. Yet I believe that the prevailing explanations are somewhat incomplete. This essay seeks to offer a fuller picture of *Katz's* failure.

Katz's failure cannot be fully understood without reference to the *concreteness* of the word “search.” Concreteness is a prevalent concept in the literature on psycholinguistics.⁸ Psycholinguistics tells us that concrete words are more rapidly learned, better recalled, and defined with more precision than abstract words.⁹ This has two implications for “search” decision-making. First, the interpretation of a concrete word is guided by the interpreter’s previous interpretations of that word and, in those cases where evolution of meaning is necessary to adapt to changing values and circumstances, analogical reasoning. Second, the redefinition of a concrete word by reference to a less concrete (i.e., more abstract) word can be, at best, only partially successful, for subsequent interpretations will drift back toward the interpreter’s understanding of the underlying, concrete word. Because the word “search” is relatively concrete, and *Katz's* “reasonable expectations of privacy” is relatively abstract,¹⁰ one gets the sense that *Katz's* failure can be explained by a *concreteness drift*. Concreteness drift, in the “search” context, works as follows: (1) a judge charged with

1521-22 (2010) (explaining that the Court has never cited to empirical evidence to analyze whether an expectation of privacy is reasonable); Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society,”* 42 DUKE L.J. 727, 738-39 (1993); Christopher Slobogin, *Proportionality, Privacy, and Public Opinion: A Reply to Kerr and Swire*, 94 MINN. L. REV. 1588, 1607 (2010) (“In fairness to the courts . . . [empirical] facts are not easy to come by.”) [hereinafter Slobogin, *Proportionality, Privacy, and Public Opinion*]; Joelle Anne Moreno, *Beyond the Polemic Against Junk Science: Navigating the Oceans that Divide Science and Law with Justice Breyer at the Helm*, 81 B.U. L. REV. 1033, 1081 (2001) (“Legal scholars and practitioners . . . are often confounded by the principles of statistical analysis, risk assessment, probabilistic attribution, and attendant mathematical jargon.”).

⁸ Psycholinguistics “is that field of study concerned with psychological aspects of language studies.” JOSEPH F. KESS, *PSYCHOLINGUISTICS: PSYCHOLOGY, LINGUISTICS, AND THE STUDY OF NATURAL LANGUAGE* 1 (1992).

⁹ See, e.g., Allan Paivio, *Dual Coding Theory: Retrospect and Current Status*, 45 CAN. J. PSY. 255, 261 (1991) [hereinafter Paivio, *Dual Coding Theory*]; Shi Feng et al., *Simulating Human Ratings on Word Concreteness*, ASS’N FOR THE ADVANCEMENT OF ARTIFICIAL INTELLIGENCE 245, 249 (2011), available at <http://aaai.org/ocs/index.php/FLAIRS/FLAIRS11/paper/view/2644/3035>.

¹⁰ See *infra* note 30 and accompanying text.

interpreting the abstract standard “reasonable expectations of privacy” reverts, in part, to interpreting the underlying, concrete word “search”; (2) the judge’s interpretation of “search,” like all relatively concrete words, is colored by previous interpretations of that word and, when the judge has made no previous judgment regarding the application of the word in the given context, analogical reasoning; and, therefore, (3) the judge’s interpretation of “reasonable expectations of privacy” is largely insulated from her assessment of evolving and objective understandings of privacy. The first part of this essay describes the concreteness drift, and the second demonstrates how the concreteness of the term “search” has affected the Court’s post-*Katz* decision-making.

I. *KATZ*’S FAILURE: A NEW EXPLANATION

There is little question that *Katz* has failed to incorporate a contextual privacy doctrine into Fourth Amendment interpretations. To support this claim, scholars cite to the post-*Katz* ratifications of pre-*Katz* rules,¹¹ the regularity with which post-*Katz* “search” holdings cut against public expectations of privacy,¹² and the Court’s continued reliance on property

¹¹ Kerr, *An Equilibrium-Adjustment Theory*, *supra* note 1, at 538 (internal citations omitted); WAYNE R. LAFAYE, 1 SEARCH AND SEIZURE § 2.7(e), at 161 n.107.7 (Supp. 1986) (“[A] *Smith-Knotts* type of analysis could well have produced the result that *Katz* lacked an expectation of privacy because what he said could have been determined by a lipreader some distance away or by a hypothetical bystander immediately adjacent to the booth.”); Cloud, *Pragmatism, Positivism, and Principles*, *supra* note 3, at 253 (observing that the open fields doctrine, “first announced during the [F]ourth [A]mendment’s formalist era, seemed an unlikely candidate to withstand scrutiny when expectations analysis was applied”); Tracey Maclin, *Informants and the Fourth Amendment: A Reconsideration*, 74 WASH. U. L. Q. 573, 620-21 (1996) (“Although *Katz* announced that the Court would no longer be controlled by rigid and antiquated concepts when formulating the scope of the Fourth Amendment, the *White* plurality read *Katz* as having no impact on the secret spy cases.”).

¹² See, e.g., Slobogin, *Proportionality, Privacy, and Public Opinion*, *supra* note 7, at 1593 (“My findings with respect to the various surveillance scenarios can be summarized as follows: virtually all forms of transaction surveillance as well as overt public camera surveillance are viewed, on average, as more intrusive than a roadblock, and government efforts to access records from websites, ISPs, pharmacies, and banks are perceived to be as intrusive as a search of a car.”); Christopher Slobogin, *Government Data Mining and the Fourth Amendment*, 75 U. CHI. L. REV. 317, 335 (2008); Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213, 277 (2002); Slobogin & Schumacher, *supra* note 7, at 738; Solove, *supra* note 7, at 1526 (providing as

concepts.¹³ Explanations for the failure of *Katz* are varied. Some blame the vagueness of the *Katz* opinions, some the inaccessibility of empirical data on “privacy expectations,” and some the juridical or policy preferences of the interpreting judges.¹⁴ To date, none—and no combination—of these explanations has emerged as the prevailing account of *Katz*’s failure.

I believe that a full and complete explanation of *Katz*’s failure must take into account psycholinguistics. Psycholinguistics studies how human beings acquire, use, and comprehend language.¹⁵ It emphasizes, among other things, the distinction between concrete and abstract words.¹⁶ This divide rests on the existence of “perceptual referents.”¹⁷ “[T]erms like *horse* and *wagon*” are “concrete,” explains Professor Paivio, because they have “direct, observable referents.”¹⁸ Such words are different from “terms like *truth* and *beauty* that have no direct referents.”¹⁹ Psycholinguistics moreover emphasizes that concreteness matters.

illustration that “under current Fourth Amendment law, a little squeeze of a bag on a bus is fully regulated whereas systematic surveillance is not”); see also JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 63 (2000) (“In many cases, people have an objectively valid expectation of privacy that the Court, by judicial fiat, has deemed unjustifiable.”).

¹³ Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801 (2004); see also Orin S. Kerr, *Technology, Privacy, and the Courts: A Reply to Colb and Swire*, 102 MICH. L. REV. 933, 934 (2004) (“Even when purporting to protect privacy, judges have proven reluctant to deviate from rules based on principles of property law.”); Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503 (2007) [hereinafter Kerr, *Four Models*]. But see Slobogin, *Proportionality, Privacy, and Public Opinion*, *supra* note 7, at 1603-04 (explaining that the “positive law” model is “an occasionally good proxy for assessing societal expectations” in that it “is, of course, the result of a survey, albeit one mediated through the democratic process”).

¹⁴ See *supra* notes 5-7.

¹⁵ See KESS, *supra* note 8, at 1.

¹⁶ See, e.g., Paivio, *Dual Coding Theory*, *supra* note 9; Shi Feng et. al., *supra* note 9, at 249.

¹⁷ ALLAN PAIVIO, *MENTAL REPRESENTATIONS: A DUAL CODING APPROACH*, 123 (Oxford University Press 1986) (“[C]oncrete and abstract words are semantically differentiated by the degree of availability of referential [connections].”) [hereinafter PAIVIO, *MENTAL REPRESENTATIONS*]; see also Shi Feng et. al., *supra* note 9, at 245 (“[C]oncrete words such as house, poodle, and tiger evoke mental images quickly and easily in contrast to less concrete words such as *causality*, *evolution* and *mortal*.”).

¹⁸ PAVIO, *MENTAL REPRESENTATIONS*, *supra* note 17, at 11.

¹⁹ *Id.*

Concrete words tend to be (1) more rapidly learned,²⁰ (2) better recalled,²¹ and (3) defined with more precision—i.e., humans are relatively disciplined in their evaluations of whether a “particular” falls within a “general definition.”²²

This third distinction between concreteness and abstraction deserves further explanation. Discipline affects interpretations in at least two ways. First, particulars of a definition, once established, tend to be maintained. So if an interpreter reaches a decision about whether a particular is covered by the definition of a given word, the interpreter can be expected to treat that decision as permanent. Second, assessments of particulars are relatively mechanical. Interpreters, even when engaged in an initial assessment of a particular, will not feel comfortable ignoring their assessments of related words, but will likely rely on analogies to either established particulars (i.e., those already deemed to be subsumed within the word) or established non-particulars (i.e., those already deemed to be not subsumed within the word).²³ Take, for example, a person charged to interpret whether the candidate-particular “wrench” is a “tool.” Most likely the

²⁰ *Id.* (“[I]mages represent a separate component of meaning, at least somewhat independent of the verbal associations given to a word” and “high imagery words are more rapidly learned and better recalled than low imagery words, even when the two sets of words are equated for meaningfulness and familiarity.”); see also THOMAS H. LEAHEY & RICHARD J. HARRIS, HUMAN LEARNING 141-44 (1989) (discussing the benefits of imagery in learning and comprehending language, in encoding information for transfer to long-term memory, and in performing different types of mental rotation operations); Shi Feng et. al., *supra* note 9, at 245 (“Words with higher concreteness are easier to imagine, comprehend, and memorize.”).

²¹ See PAIVIO, MENTAL REPRESENTATIONS, *supra* note 17.

²² *Id.* at 170-71 (“[I]t is known that semantic or associative overlap is generally higher among abstract than among concrete words.”); *id.* at 233 (“Analysis of the definitions showed that the concrete words, relative to the abstract ones, elicited longer definitions . . . and fewer nonfluencies of other types.”); *id.* (summarizing studies, observing that abstract words are often confused with each other and thus liable to differing interpretations by the speaker and listener, and discussing how concrete words are subject to “fewer nonfluencies of other types”).

²³ David E. Rumelhart, *Toward a Microstructural Account of Human Reasoning*, in SIMILARITY AND ANALOGICAL REASONING 298, 301 (Stella Vosniadou & Andrew Ortony eds., 1989) (“Most everyday reasoning probably does not involve much in the way of manipulating mental models. It probably involves even less in the way of formal reasoning. Rather, it probably involves assimilating the novel situation to other situations that are in some way similar—that is, reasoning by similarity.”); see Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993) (discussing analogical reasoning).

interpreter will conclude that a “wrench” is in fact a “tool” by analogizing to one or more of the established particulars of “tool” (e.g., “hammer”). The reasoning might look like this: Although a “wrench” is different from a “hammer” in that it is flat and used to turn and loosen, the “wrench” is sufficiently close to a “hammer” in that it shares with the “hammer” the characteristics of being designed to carry out a specific function and being held in the hand.

In the course of their official duties, justices will, of course, interpret words. Some of these words are relatively abstract (e.g., “excessive,” “process,” “equality”); some are more concrete (e.g., “days,” “bail,” “war,” and “houses”). Based on psycholinguistics studies, the word “search” is relatively concrete. The MRC Psycholinguistics Database, for example, scores the word “search” at 371 (out of 700) in the category of concreteness.²⁴ As a result, one can reasonably assume that “search” will be defined with more discipline than many of the other words in the Constitution.²⁵ This means that the term “search” is marked by interpreters’ tendencies to (1) maintain previous commitments; and (2) use analogical reasoning to evaluate new candidate-particulars.²⁶

A psycholinguistics assessment of “search” decision-making must, of course, take into account the fact that *Katz* formally linked the definition of “search” to different terminology (i.e.,

²⁴ See *STFC e-Science: MRC Psycholinguistics Database*, SCI. & TECH. FACILITIES COUNCIL, <http://www.psych.rl.ac.uk/> (last visited Feb. 26, 2013). The MRC Psycholinguistic database is one of the leading sources for measuring words based on “concreteness.” Shi Feng et. al., *supra* note 9, at 245. The database reflects surveys of individuals asked to score concreteness and imagery of words along on a scale from one to seven. *Id.* at 246. The database contains 150,837 words, and it provides concreteness scores for 8228 words. *Id.*; see also MICHAEL P. TOGLIA & WILLIAM F. BATTIG, *HANDBOOK OF SEMANTIC WORD NORMS* (1978) (observing that words referring to objects, materials, or persons generally received the highest concrete scores). To offer some perspective, “day” is scored at 477, “effort” at 296, and “best” at 282. *Id.*

²⁵ The concreteness of the term “search” does not necessarily cause justices to turn to common-sense interpretations of the term “search.” See Clark D. Cunningham, *A Linguistic Analysis of the Meanings of “Search” in the Fourth Amendment: A Search for Common Sense*, 73 IOWA L. REV. 541, 542 (1988) (advocating a “common sense” approach to interpretation of “search”). Analogical reasoning will oftentimes sufficiently disrupt common sense reasoning.

²⁶ This does not mean to suggest that the meanings of terms do not evolve, but simply that a particular interpreter will be reluctant to redefine terms. See Rumelhart, *supra* note 23, at 301.

“reasonable expectations of privacy”).²⁷ The interpretive implications of a redefinition of a concrete term (like “search”) are contextual. When the redefinition is concrete, then the meaning of the underlying, redefined term will have very little influence on the interpretation. Yet when the redefinition is abstract, the meaning of the underlying, redefined term will continue to have a significant influence on new interpretations. In such cases the interpreter will be uncomfortable evaluating candidate-particulars of the redefinition without regard to her preexisting understandings of the underlying, redefined term. To illustrate, assume that a legislature redefined the concrete term “jewelry” with the abstract terminology, “an item that pleases people.” Further assume that an interpreter is charged to assess whether the term “sports car” is subsumed by this new abstract definition of “jewelry.” With this broad grant of interpretive discretion (from the abstract redefinition), the new interpretation can be expected to drift back to the meaning the interpreter associates with the concrete, underlying term (“jewelry”). The interpreter will likely cabin the new definition of “jewelry” (“an item that pleases people”) to something along the lines of “an item, having the elements of jewelry, that pleases people.” As these elements do not include “modes of transportation,” it is far from certain whether the interpreter will hold a “sports car” to be “jewelry.” But if, on the other hand, the legislature linked “jewelry” to a more concrete definition such as “an item made of metal,” the new interpreter would be left with far less discretion. As a result, the interpreter would find it easier to fully separate the new interpretation of “jewelry” from her previous understandings of the term “jewelry.” In sum, abstract redefinitions of concrete terms are unlikely to have a substantial impact on interpretations (i.e., the resulting interpretation will be colored by the interpreter’s understanding of the underlying concrete term).

Because the word “search” is relatively concrete, and *Katz*’s “reasonable expectations of privacy” standard is relatively abstract,²⁸ one gets the sense that *Katz*’s failure might be largely

²⁷ *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurrence).

²⁸ See *STFC e-Science: MRC Psycholinguistics Database*, *supra* note 24. The MRC imagery score for “Reasonable” is 305. *Id.* The terms “expectations” and “privacy” were

attributable to a *concreteness drift*. Concreteness drift, in the “search” context, works as follows:

- (1) A judge charged with interpreting the abstract standard “reasonable expectations of privacy” reverts, in part, to interpreting the underlying concrete word “search”;
- (2) The judge’s interpretation of “search” (like all relatively concrete words) is colored by previous interpretations of that word, and, when the judge has made no previous judgment regarding the application of the word in the given context, analogical reasoning; and, therefore,
- (3) The judge’s interpretation of “reasonable expectations of privacy” is largely insulated from her assessment of evolving and objective understandings of privacy.

Not surprisingly, this concreteness drift has led to post-*Katz* decisions that are often inconsistent with the justices’ understandings of contextual and evolving “reasonable expectations of privacy.” The following section briefly suggests how concreteness drift has impacted “search” decision-making in the post-*Katz* years.

II. DEMONSTRATING CONCRETENESS DRIFT

Concreteness drift has very likely altered post-*Katz* decision-making. The drift manifests itself through jurists’ recommitment to their previous, individual votes on a given issue, and, when no previous vote had been cast, the use of analogical reasoning. While “commitment-and-analogy” may be an expected form of legal reasoning in some areas of constitutional law, they seem out of place in the modern interpretation of “search,” which purports to rest on the justices’ assessments of contextual and evolving “reasonable expectations of privacy.” The prevalence of commitment-and-analogy reasoning in post-*Katz* decision-making

not scored for “concreteness” or “imagery.” *Id.* There is almost certainly a compounding effect when a term contains more than one abstract word. PAIVIO, MENTAL REPRESENTATIONS, *supra* note 17, at 123 (stating that abstract terms depend on contextual clues from concrete terms). The definition “anything made of metal,” for example, would be less abstract than “anything *reasonably* made of metal” which would be less abstract than “anything *expected* to be *reasonably* made of metal.”

seems at least suggestive of concreteness drift. The following paragraphs illustrate how the reasoning of commitment-and-analogy colors judicial interpretations of “search” in the post-*Katz* era.

A. Informants

As referenced in the Introduction, the failure of *Katz* can be seen in the ratification of pre-*Katz* doctrinal rules. The Court’s tendency to ratify had manifested clearly in the line of cases involving government informants.

In the years prior to *Katz*, the Court had repeatedly held that the warrant requirement did not apply to voluntary communications with undercover agents or government informants.²⁹ The first informants case after *Katz* was *United States v. White*.³⁰ *White* involved a government informant who used a radio to transmit his conversations with a target of an investigation.³¹ Instead of an earnest analysis of “reasonable expectations of privacy,” the justices seemed to engage in commitment-and-analogy reasoning. In other words, each justice (except Harlan) seemed to have reasserted their individual vote from past informants cases or, when such vote had not been cast, turned to analogical reasoning.

The majority in *White* held that there had been no “search.”³² One of the five justices in the majority, Justice Black, stated that *Katz* was wrongly decided and that it did not impact the pre-*Katz* informants decision of *On Lee*.³³ In effect, Black remained committed to his previous vote regarding informants. The others in the majority—Burger, Stewart, White, and Blackmun—cited

²⁹ See generally *Hoffa v. United States*, 385 U.S. 293, 302-03 (1966); *Lopez v. United States*, 373 U.S. 427, 439-40 (1963); *On Lee v. United States*, 343 U.S. 747, 751-52 (1952).

³⁰ *United States v. White*, 401 U.S. 745 (1971).

³¹ *Id.* at 746-47.

³² *Id.* at 754 (Black, J., concurring).

³³ *Id.* Justice Black resolved *On Lee* based on the Court’s “supervisory powers,” which would have been unnecessary had he concluded there had been a search. *Id.* Black dissented in *Katz* and refused to sign the *White* plurality decision, which stated, “*Katz v. United States* . . . finally swept away doctrines that electronic eavesdropping is permissible under the Fourth Amendment unless physical invasion of a constitutionally protected area produced the challenged evidence.” *Id.* at 748 (plurality).

two lines of reasoning.³⁴ The justices first wrote that they saw “no indication in *Katz* that the Court meant to disturb that understanding of the Fourth Amendment or to disturb the result reached in the *On Lee* case, nor are we now inclined to overturn this view of the Fourth Amendment.”³⁵ The justices explained, alternatively, that “[i]f the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State’s case.”³⁶ It is likely that at least one of the four plurality justices was engaged in “commitment” reasoning: the mechanical reassertion of their individual vote from an earlier informant case. This is the best explanation for the plurality’s statement that the pre-*Katz* informants case of *On Lee* remained good law.³⁷ With that said, the plurality’s analogy to the “misplaced trust” doctrine almost certainly means that some number of justices had turned to “analogical” reasoning. In other words, they viewed *White* as constituting a new case where analogical reasoning was necessary.³⁸

The dissenting justices in *White* also utilized commitment-and-analogy reasoning. The circumstances surrounding the constitutional violation alleged in *White* were similar to those in the previous informant cases to which Justices Douglas and Brennan had attributed “search” content. Justice Douglas

³⁴ See *id.* at 748-49; see *id.* at 760 (Harlan, J., dissenting) (explaining alternative grounds for the majority’s reasoning).

³⁵ *Id.* at 750.

³⁶ *Id.* at 752; *id.* at 749 (“*Hoffa v. United States*, . . . which was left undisturbed by *Katz*, held that however strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities. In these circumstances, ‘no interest legitimately protected by the Fourth Amendment is involved,’ for that amendment affords no protection to ‘a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.’”) (quoting *Hoffa*, 385 U.S. at 302) (internal citations omitted)).

³⁷ Of the plurality justices, White and Stewart are the most likely candidates, as each had been in the majority of the informants case, *Lopez*.

³⁸ *White*, 401 U.S. at 752 (“If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State’s case.”). The most likely candidates for this group were the Court’s two newest members—Chief Justice Burger and Justice Blackmun.

(dissenting in *On Lee*) and Justice Brennan (in *Lopez*) had previously made clear that the finding of “no-search” in *On Lee* was incorrect.³⁹ And Justice Marshall, while new to the Court, had likely committed “search” content to the informant issue through informal means.⁴⁰

With eight justices accounted for, we are left with the memorable dissenting opinion of Justice Harlan.⁴¹ “Third-party bugging” is a “search,” wrote Harlan, as it “goes beyond the impact on privacy occasioned by the ordinary type of ‘informer’ investigation upheld in *Lewis* and *Hoffa*.”⁴² This is striking in that, just eight years earlier, Harlan authored the majority opinion in *Lopez*, which held that the secret use of a pocket wire recorder by an undercover agent constituted a “non-search.”⁴³ By deviating from his previous vote on the issue of informants, Justice Harlan seemed to be the only justice whose conclusion did not turn on commitment-and-analogy reasoning.⁴⁴ It seemed he was engaged in an earnest application of *Katz*. In sum, all five of the majority justices, and three of the dissenting justices, likely engaged in commitment-and-analogy reasoning to form the post-*Katz* doctrine relating to government informants.

B. Dog Sniffs

As discussed in the Introduction, *Katz*’s failure is also demonstrated by post-*Katz* “search” holdings which are incongruent with social expectations of privacy. The dog sniff cases offer a good example. In the 1983 decision of *United States v.*

³⁹ *Lopez v. United States*, 373 U.S. 427, 447 (1963) (Brennan, J., dissenting) (“I believe that that decision was error, in reason and authority, at the time it was decided; that subsequent decisions and subsequent experience have sapped whatever vitality it may once have had; that it should now be regarded as overruled; that the instant case is rationally indistinguishable; and that, therefore, we should reverse the judgment below.”).

⁴⁰ The concreteness drift does not require that earlier attributions be formal attributes. And it would have been highly surprising, to say the least, had Justice Marshall not considered the *Olmstead* line of cases before joining the Court.

⁴¹ *White*, 401 U.S. at 768 (Harlan, J., dissenting).

⁴² *Id.* at 787.

⁴³ *Lopez*, 373 U.S. at 439-40.

⁴⁴ This is one of two deviations from “commitment and analogy” reasoning that I have identified in my research. The other, earlier deviation came in Justice Douglas’s reattribution between *Goldman v. United States*, 316 U.S. 129 (1942), and *On Lee v. United States*, 343 U.S. 747 (1952).

Place, a six-justice majority—Burger, White, Powell, Rehnquist, Stevens, and O’Connor—held that “[t]he investigative procedure of subjecting luggage to a ‘sniff test’ by a well-trained narcotics detection dog does not constitute a ‘search’ within the meaning of the Fourth Amendment.”⁴⁵ The majority’s analysis was, by all appearances, based on commitment-and-analogy reasoning. The majority treated *Place* as a new “search” case, and then analogized the facts to the pre-existing public-vantage-point doctrine.⁴⁶ While a dog sniff can be distinguished from the public-vantage-point cases in certain ways, the majority took efforts to emphasize the many similarities: dog sniffs do not require the opening of a physical effect, do not look to expose non-contraband items, and do not cause any collateral exposure.⁴⁷ For the six justices in the *Place* majority, these similarities justified attributing “non-search” content from the public-vantage-point cases to the new issue of dog sniffs. For the three concurring justices—Brennan, Marshall, and Blackmun—the issue before the Court was not yet ripe.⁴⁸

The Court decided *Kyllo v. United States*⁴⁹ nearly two decades after *Place*. *Kyllo* presented the Court with the question of whether thermal-imaging surveillance on a home constituted a “search.”⁵⁰ Each of the nine justices determined the issue to be new.⁵¹ All three of the justices who remained from the *Place* Court—Rehnquist, Stevens, and O’Connor—attributed “non-search” content to the thermal imaging issue by analogy to dog sniffs.⁵²

⁴⁵ *United States v. Place*, 462 U.S. 696, 697 (1983).

⁴⁶ The respondent in *Place* asked the Court to analogize to the search of luggage in *United States v. Chadwick*, 433 U.S. 1 (1977).

⁴⁷ *Place*, 462 U.S. at 707 (“A ‘canine sniff’ by a well-trained narcotics detection dog . . . does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer’s rummaging through the contents of the luggage. . . . Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited.”).

⁴⁸ *Id.* at 710 (Brennan, J., concurring); *id.* at 720 (Blackmun, J., concurring).

⁴⁹ 533 U.S. 27 (2001).

⁵⁰ *Id.* at 29.

⁵¹ *Id.*

⁵² *Id.* at 47 (Stevens, J., dissenting). For these justices, the *Kyllo* facts were either an “old issue” governed by *Place* or a “new issue” analogous to *Place*.

[I]n *United States v. Place*, we held that a dog sniff that “discloses only the presence or absence of narcotics” does “not constitute a ‘search’ within the meaning of the Fourth Amendment,” and it must follow that sense-enhancing equipment that identifies nothing but illegal activity is not a search either.⁵³

Justice Kennedy, who was not on the *Place* Court, joined the three carry-over justices from *Place* in their dissenting view that *Kyllo* had not been searched.⁵⁴ It seems likely, with the benefit of hindsight, that Kennedy attributed “non-search” content to the thermal-imaging in *Kyllo* by analogy to his established, but yet to be formally announced, views on dog sniffs.⁵⁵ Thus all four dissenting justices in *Kyllo* engaged in commitment-and-analogy reasoning.

Five justices concluded that the use of thermal imaging on *Kyllo*’s home constituted a “search.”⁵⁶ Justice Scalia, writing for the majority, observed that:

Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a “search” and is presumptively unreasonable without a warrant.⁵⁷

Commitment-and-analogy reasoning influenced the votes of the five majority justices in *Kyllo*.⁵⁸ The first faction of the majority

⁵³ *Id.* at 47-48. These justices put forth an additional justification based on an analogy to their “informants” analysis. *Id.* at 43 (Stevens, J., dissenting) (“[A]ny member of the public might notice that one part of a house is warmer than another part or a nearby building if, for example, rainwater evaporates or snow melts at different rates across its surfaces.”); Tracey Maclin, Katz, *Kyllo*, and *Technology: Virtual Fourth Amendment Protection In The Twenty-First Century*, 72 MISS. L.J. 51, 98 (2003) (“Indeed, the court of appeals, the Solicitor General’s office, and Justice Stevens all endorsed the notion that *Kyllo* assumed the risk that someone located outside might detect the heat emanating from his home.”).

⁵⁴ *Kyllo*, 533 U.S. at 41.

⁵⁵ See *Illinois v. Caballes*, 543 U.S. 405 (2005) (holding, with Justice Kennedy in the majority, that a dog sniff is a “non-search”).

⁵⁶ *Kyllo*, 533 U.S. at 40.

⁵⁷ *Id.*

⁵⁸ The *Caballes* opinion, written four years after *Kyllo*, gives us insight into the justices’ individual reasoning regarding dog sniffs. This is particularly helpful to assess

included Justices Scalia, Thomas, and Breyer. For these three, the analogy between the facts of *Kyllo* and “home entry” (i.e., a “search”) was superior to that between *Kyllo*’s facts and “dog sniffs” (i.e., a “non-search”).⁵⁹ Justice Scalia observed that “in the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*.”⁶⁰ For the second faction of the *Kyllo* majority—comprised of Justices Souter and Ginsburg—it is not clear whether their “search” votes were based on the analogy to “home entry” or to that of “dog sniffs” (either of which constituted a “search” as far as these justices were concerned).⁶¹

Several years later the Court revisited the *Place* rule regarding dog sniffs in *Illinois v. Caballes*.⁶² Again, the justices were dependent on commitment-and-analogy reasoning. Six justices reaffirmed *Place*. Two of these justices, Stevens and O’Connor, simply reapplied their “non-search” votes from *Place*.⁶³ None of the other four justices in the majority—Scalia, Kennedy, Thomas, and Breyer—had been on the Court at the time of *Place*. It seems that they assigned the content of “non-search” to “dog sniffs” through analogy to either the thermal-imaging (probably Kennedy) or public-vantage-point cases (probably Scalia, Thomas, and Breyer).⁶⁴ Dissenting in *Caballes*, Justices Souter and Ginsburg treated dog sniffs as a new issue for them, and then assigned dog sniffs “search” content through analogy to their

the reasoning of those justices who were not on the Court at the time of *Place*. *Caballes*, 543 U.S. 405.

⁵⁹ See Maclin, *supra* note 53, at 72 (“In answering this inquiry, Justice Scalia saw a direct link between thermal imaging and the intrusions that writs of assistances and general warrants authorized, which prompted the Framers to adopt the Fourth Amendment.”).

⁶⁰ *Kyllo*, 533 U.S. at 34.

⁶¹ See *Caballes*, 543 U.S. at 410 (Souter, J., dissenting); *id.* at 418 (Ginsburg, J., dissenting).

⁶² *Id.* at 405.

⁶³ Justice Rehnquist abstained. *Id.*

⁶⁴ See Maclin, *supra* note 53, at 106 (stating that by upholding dog sniffs as non-searches “the ‘right’ announced in *Kyllo* will most likely be confined to a privilege against the use of a thermal imager directed at one’s home.”).

previous assessment of home entry and thermal imaging.⁶⁵ In sum, the development of the Court's post-*Katz* dog sniff doctrine has been dependent on commitment-and-analogy reasoning, and, in turn, suggestive of a concreteness drift in "search" interpretations.

CONCLUSION

A prevailing explanation for *Katz*'s failure has long eluded search-and-seizure commentators. Drawing from the psycholinguistics literature, this essay looks to complete the story regarding the failure of *Katz*. This overlooked account is one I call the concreteness drift. Concreteness drift works as follows: (1) a judge charged with interpreting the abstract standard "reasonable expectations of privacy" reverts, in part, to interpreting the underlying concrete word "search"; (2) the judge's interpretation of "search," like all relatively concrete words, is colored by previous interpretations of that word and, when the judge has made no previous judgment regarding the application of the word in the given context, analogical reasoning; and, therefore, (3) the judge's interpretation of "reasonable expectations of privacy" is largely insulated from her assessment of evolving and objective understandings of privacy. The concreteness drift manifests itself when judges in a "search" case recommit to their earlier votes on a given issue, or, when no such vote occurred, turn to analogical reasoning. While such reasoning is to be expected in many areas of constitutional law, it seems out of place in an analysis of contextual and evolving "reasonable expectations of privacy." The prevalent use of commitment-and-analogy reasoning in "search" decision-making suggests that concreteness drift has inhibited, at least in part, the justices' application of *Katz*'s "reasonable expectations of privacy" test.

⁶⁵ *Caballes*, 543 U.S. at 412 (Souter, J., dissenting); *id.* at 419 (Ginsburg, J., dissenting). "[A]n uncritical adherence to *Place*," wrote Justice Souter, "would render the Fourth Amendment indifferent to suspicionless and indiscriminate sweeps of cars in parking garages and pedestrians on sidewalks." *Id.* at 411 (Souter, J., dissenting) ("The infallible dog . . . is a creature of legal fiction."); *id.* at 418 (Ginsburg, J., dissenting) (stating her view that *Caballes* was searched).