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Katz and the Origins of the "Reasonable Expectation of Privacy" Test

Peter Winn*

Why should we care about the history of *Katz v. United States*?[1] The 1967 Supreme Court case, of course, formulated the "reasonable expectation of privacy" test that is used to decide when a governmental intrusion constitutes a "search" under the Fourth Amendment.[2] But the test extends beyond the confines of the Constitution; it has found its way into common law and statutes, and even the laws of other countries. In short, *Katz v. United States* represents a great touchstone in the law of privacy, and Judge Schneider's memoir of his experience as the lawyer for Charles Katz gives us a glimpse into the origins of an important legal doctrine and a rare peek into the human side of the development of law.

The result in *Katz* was not inevitable. It came about in a world of contingency and chance, and in spite of the egos, agendas, and careless mistakes by those on the Court. In *Katz*, we can see a process, albeit terribly flawed, that could allow a young lawyer, who had caught a rare glimpse of something significant in the law, to present the idea to the Supreme Court. And on that Court, politicized as it was, we can see one justice who had the capacity to listen and to learn.

As a matter of legal history, *Katz* was the culmination of a long legal debate about whether the Fourth Amendment covered government initiated electronic surveillance—a debate that began early in the twentieth century with the invention of the telephone, microphone, and dictograph. Such devices enabled law enforcement officers to eavesdrop with much greater secrecy, efficiency, and accuracy. In 1928, the question of the constitutionality of electronic surveillance finally reached the Supreme Court in *Olmstead v. United States*, a challenge to a conviction based on evidence obtained through the use of warrantless wiretaps.[3] The Court affirmed the conviction by adopting a narrow reading of the Fourth Amendment.[4] Because the government did not physically trespass on the

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1. 389 U.S. 347 (1967).

2. *See, e.g.*, Smith v. Maryland, 442 U.S. 735, 739-41 (1979) (discussing *Katz* and subsequent decisions). *See generally* Peter P. Swire, Katz *Is Dead. Long Live* Katz, 102 MICH. L. REV. 904 (2004).

3. 277 U.S. 438, 455-56 (1928).

4. *See id.* at 469.

defendants' property, the Court held that there was no "search" in a constitutional sense by the government.[5]

The *Olmstead* decision was very divisive, and the government's use of wiretaps continued to be controversial.[6] In 1967, after a series of cases had begun to cast doubt on the continued constitutional viability of governmental wiretapping,[7] the Supreme Court granted *certiorari* in *Katz v. United States*.[8] In *Katz*, the Ninth Circuit affirmed a conviction obtained through the use of FBI interceptions of the defendant's telephone conversations involving interstate betting.[9] On the initial petition for *certiorari*, Chief Justice Warren and Justices Brennan, Fortas, and Douglas voted to grant review of the lower court's decision, while Justices Stewart, Clark, Harlan, White, and Black opposed it.[10] Justice Clark resigned on June 12, 1967 and was replaced by then Solicitor General Thurgood Marshall. Marshall recused himself from the case because, in his former role as Solicitor General, he had submitted the brief for the United States.[11] When the eight remaining justices conferred after oral argument on October 20, 1967, they split 4-4 along the same lines as their votes on *certiorari*—a split which would ordinarily mean that the underlying decision would be summarily affirmed.[12] However, two weeks later, Justice Stewart changed his mind and joined the justices voting to reverse.

Justice Stewart circulated a proposed draft opinion and a short memorandum to explain his change of mind,[13] both of which appear to have been initially composed by Professor Laurence Tribe who at the time was one of Justice

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5. *Id.* at 466.

6. The decision itself drew four separate sharply worded dissents from Justices Holmes, Stone, Butler, and, most famously, from Brandeis. In 1934, Congress made wiretapping a federal crime when it passed Section 605 of the Federal Communications Act, 47 U.S.C. § 605 (1934). On December 25, 1935, Franklin D. Roosevelt granted Roy Olmstead a full presidential pardon, restoring all of his constitutional rights, and remitting the $8,000 fine assessed against him, in addition to $2,288 in court costs. *See The Roosevelt Week*, TIME, Jan. 6, 1936, *available at* http://www.time.com/time/magazine/article/0,9171,755551,00.html (on file with the *McGeorge Law Review*). For a general discussion of the legal controversy over the practice of wiretapping, see Berger v. New York, 388 U.S. 41, 45-49 (1967).

7. *See Berger*, 388 U.S. 41; Silverman v. United States, 365 U.S. 505 (1961); Rios v. United States, 364 U.S. 253 (1960).

8. 389 U.S. 347 (1967).

9. United States v. Katz, 369 F.2d 130, 130-31, 135 (9th Cir. 1967), *rev'd*, 389 U.S. 347 (1967).

10. William W. Greenhalgh & Mark J. Yost, *In Defense of the "Per Se" Rule: Justice Stewart's Struggle to Preserve the Fourth Amendment's Warrant Clause*, 31 AM. CRIM. L. REV. 1013, 1070 (1994).

11. *See id.* at 1070 n.360.

12. *Id.* at 1070.

13. *Id.* at 1070-71. Justice Stewart wrote:

> In this case a $300 fine was imposed upon an obviously guilty gambler, and no injustice will be done if the conviction is affirmed by an equally divided Court. On the other hand, the case falls in an area of considerable current activity and interest in the other two Branches, and an area in which the Court's past constitutional guidance has been somewhat less than surefooted. This case, therefore, offers at least an opportunity for a clarification of the Court's views. For that reason, I have set down my own views in the perhaps unrealistic hope that they may provide the basis for a Court opinion.

Id. (quoting Justice Stewart's Memorandum, Nov. 7, 1967).

Stewart's law clerks.[14] According to the memorandum, Justice Stewart's change of mind appears to have come about in part because of the Wiretap Act that was debated in Congress at the time.[15] If the tie vote had persisted, the Court's views on the constitutionality of electronic surveillance would not have been available to Congress as it worked on this important legislation. Justice Stewart also appeared to have been concerned that the Court's recent decision in *Berger v. New York*[16] cast some doubt on the constitutionality of electronic surveillance, even when authorized by a warrant. In *Berger*, the Court struck down a state wiretapping statute on the ground that the wiretapping constituted a "general search." The facts of *Katz* were close, and reasonable people could argue it either way.

Accordingly, Justice Stewart appears to have changed his vote so the Court's views about the constitutional parameters of electronic surveillance could help inform the legislative debate. In response to Justice Stewart's memo, the justices who initially voted in favor of reversal signed onto the draft opinion. Justices White and Harlan, initially voting for affirmance, followed Stewart's lead and changed their positions. This left Justice Black as the lone dissenter in a 7-1 decision to reverse. Although several minor changes were made to the draft opinion, the final opinion of the Court appears to have remained substantially as it was when Justice Stewart's law clerk originally drafted it.

The majority opinion adopts the magisterial language, "the Fourth Amendment protects people, not places,"[17] and at first glance, appears to sweep away *Olmstead*'s property-based regime, replacing it with a regime based on a right of privacy. But at the same time, the opinion has a reassuring conservative side, rejecting the view that wiretapping constituted an illegal "general search"; the Court explicitly held that under the facts of the *Katz* case, where the agents took extensive steps to minimize the interception of non-relevant conversations, the electronic surveillance would have passed constitutional muster if only the

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14. *See* Laurence H. Tribe, The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier, Prepared Remarks at the First Conference on Computers, Freedom and Privacy (1991), *available at* http://www.sjgames.com/SS/tribe.html (last visited March 16, 2008) (on file with the *McGeorge Law Review*). Professor Tribe recollects that he believed the case should be reversed and managed to persuade Justice Stewart to that effect with the arguments in the memorandum and the draft opinion. After reading the memorandum and draft opinion, Stewart circulated them to the full Court, in substantially the same form as when written by his law clerk. Interview with Laurence H Tribe, Professor, Harvard Law School, in Cambridge, Mass. (Mar. 13, 2008) [hereinafter Tribe Interview].

15. Congress and the Administration had begun consideration earlier that year on a bill that eventually was to become Title III to the Omnibus Crime Control and Safe Streets Act of 1968. *See* Berger v. New York, 388 U.S. 41, 112-13 (1967) (White, J., dissenting) (noting that, at the time of the case, Congress was considering several bills that would regulate the use of electronic surveillance and specifically referring to H.R. 5386, 90th Cong., 1st Sess. (1967), and S. 928, 90th Cong., 1st Sess. (1967)); *see also To Protect the Right of Privacy by Prohibiting Wire Interception and Eavesdropping and For Other Purposes: Hearing on S. 928 Before the Subcomm. on Administrative Practice and Procedure of the Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967). This legislation was still pending before Congress on October 17, 1967, when *Katz* was argued. *Status of Major Legislation in the House and Senate*, N.Y. TIMES, Oct. 23, 1967, at A59.

16. 388 U.S. 41.

17. Katz v. United States, 389 U.S. 347, 351 (1967).

FBI had obtained a warrant from a judge before beginning surveillance.[18] The opinion also rejected the argument that the lack of notice inherent in the wiretapping presented an insurmountable hurdle to its lawfulness.[19] *Katz* thus bears the marks of a quintessential *political* compromise, with both sides getting something they wanted—one side, the overthrow of the overly restrictive *Olmstead* decision; the other, a clear statement of the essential legality of electronic surveillance.

Although the majority opinion is a masterful example of judicial politics, and presents a reasoned defense of the result, it is not without its flaws. It begins with a highly unusual attack on counsel—both the petitioner's attorneys as well as the government's—criticizing them for framing the issue as "whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth."[20] However, this judicial "frame" was not invented by the lawyers, but had been used explicitly by the Court itself in numerous earlier Fourth Amendment cases—many of them written by some of the very justices who signed the majority opinion.[21] Furthermore, when the Court granted *certiorari*, it framed the issues in precisely this manner, presumably because it was comfortable with the issues in the petition for *certiorari* and saw no need to reformulate them. Once the Court accepted this formulation, the parties would be expected to address only those issues in their briefs and argument.[22] Thus, it was more than surprising for the Court to utter the disdainful: "We decline to adopt this formulation of the issues. In the first place the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area.' Secondly, the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'"[23]

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18. *See id.* at 354 ("[I]t is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place.").

19. *Id.* at 355 n.16.

20. *Id.* at 349.

21. *See, e.g.*, *Berger*, 388 U.S. at 44, 52, 56, 57, 59; Lopez v. United States, 373 U.S. 427, 438-39 (1963); Silverman v. United States, 365 U.S. 505, 510, 512 (1961).

22. Irvine v. California, 347 U.S. 128, 129-30 (1954) ("We disapprove the practice of smuggling additional questions into a case after we grant certiorari. The issues here are fixed by the petition unless we limit the grant, as frequently we do to avoid settled, frivolous or state law questions."); Gen. Talking Pictures Corp. v. W. Elec. Co., 304 U.S. 175, 179 (1938) ("One having obtained a writ of certiorari to review specified questions is not entitled here to obtain decision on any other issue."). This settled practice by the Court has now been codified in current Supreme Court Rule 14.1(a). *See* Izumi Seimitsu v. U.S. Philips Corp., 510 U.S. 27, 32 (1993).

23. *Katz*, 389 U.S. at 350.

The opinion goes on to further criticize the attorneys:

> Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. The petitioner has strenuously argued that the booth was a "constitutionally protected area." The Government has maintained with equal vigor that it was not. But this effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. For the 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.[24]

As explained above, the Court's criticism is unfair because counsel addressed the precise issues on which the Court accepted *certiorari*. Moreover, the Court's criticism is surprisingly inaccurate. Katz's attorneys specifically argued in their opening brief that the old trespass test had been discredited and needed to be replaced with a test based not on property but on a right of privacy.[25] Furthermore, the passage from the opinion quoted above appears to have borrowed the specific language it used to make this point from the petitioner's brief.[26] And one can find other echoes of the petitioner's briefs in the text of the majority opinion.[27] Of course, it is not unusual for a court to borrow, without attribution, arguments, ideas, and even explicit passages from a brief filed by counsel. The practice exemplifies the fundamental collaborative nature of the legal process. Lawyers usually consider it a high compliment when a court borrows directly from their briefs, for it shows the court's respect for the quality of their work product. What is unusual is to see such borrowings accompanied by criticism of counsel for missing the point.

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24. *Id.* at 351 (internal citations omitted).

25. Brief for Petitioner at 11-12, *Katz*, 389 U.S. 347 (No. 35), 1967 WL 113605 ("Assuming the undeniable premise that the primary concern of the Fourth Amendment is the individual's right to privacy, it can at once be seen that the inquiry as to whether or not a physical trespass has occurred is no longer relevant in discussing a search and seizure issue and, to the extent that *Goldman v. United States*, *supra*, stands for such a proposition, it must be overruled.").

26. *See id.* ("[T]he degree of privacy afforded by a facility would be one criterion in determining the degree of privacy protection. For example, a conversation held in a telephone booth having a door would be entitled to more privacy, and thus more constitutional protection, than a conversation held in an open booth in a crowded building or area.").

27. *Compare, e.g.*, *Katz*, 389 U.S. at 352 ("The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear.") *with* Reply Brief for Petitioner at 5, *Katz*, 389 U.S. 347 (No. 35), 1967 WL 113607 ("[The Government] misinterprets the purport of the Fourth Amendment. It is not the right to be free from visual scrutiny which the Fourth Amendment protects, but rather the right to have one's private oral communications free from interception.").

There is an even more surprising mistake in the majority opinion: When one listens to the oral argument[28] or reads the transcript, one recognizes that it was counsel for the petitioner who first took the position that the manner in which the issues had been framed (by reference to a "constitutionally protected area") needed to be altered, and who reformulated the issues into exactly the manner ultimately adopted by the Court. It appears that the oral argument persuaded the Court to reformulate the issues. However, instead of acknowledging flaws in the earlier cases and correcting the analysis, the Court's opinion blames *counsel* for getting it wrong.

The Justices, of course, did not intentionally make what we now can see was a highly embarrassing mistake. The erroneous criticism of counsel first appears in the draft opinion prepared by Stewart's law clerk, who likely never attended the oral argument.[29] The criticism of counsel for missing the point, after adopting arguments from the brief, is more difficult to explain. But whatever the explanation, no one appears to have noticed the problem before the opinion was published.

In addition to its embarrassing attack on counsel, the majority opinion contains an important weakness in its legal analysis. The opinion creates the impression of a revolutionary upheaval of the previous regime, while using criticism of counsel to sidestep the otherwise difficult job of addressing prior inconsistent case law with candor. By dismissing precedent without adequate analysis, it loses the ballast of history. While announcing a new understanding of the Fourth Amendment based on a right of privacy, it says nothing about how this newfound right is to be determined. In eliminating the trespass standard of *Olmstead*, it offers nothing by way of a standard to replace it. How then, has a Supreme Court case, which contains so many mistakes and which promised a legal revolution that it ultimately could never deliver, come to occupy such an unchallenged position in the modern legal Pantheon? The short answer is that the majority opinion has been largely ignored. Instead, most courts cite to the following concurring opinion by Justice Harlan:

> As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person has 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

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28. The oral argument is now easily accessible on the internet at OYEZ.com. *See* Oyez, Katz v. United States—Oral Argument, http://www.oyez.org/cases/1960-1969/1967/1967_35/argument/ (last visited Sept. 1, 2008).

29. When the mistake was pointed out to him, Professor Tribe stated that it was not customary at the time for clerks to attend oral arguments. *See* Tribe Interview, *supra* note 14.

> 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.[30]

Within a year, the Supreme Court started to use Harlan's "reasonable expectation of privacy" test as the standard in its Fourth Amendment jurisprudence.[31] Within a decade, Harlan's test became so familiar that the Court officially recognized it as the essence of the *Katz* decision—a rare instance where a concurrence effectively replaced a majority opinion.[32]

Before we go on, we should take a moment to analyze Harlan's concurrence, because, at first blush, its greatness is not at all obvious. Harlan characterizes the reasonable expectation of privacy test as "the rule which has emerged from prior decisions,"[33] but at the same time he expressly joins the Court in overruling *Olmstead*'s prior "trespass" regime.[34] Because the Court's prior decisions follow the trespass rule, Harlan's position appears to be self-contradictory. Furthermore, as many academic commentators have pointed out, if a constitutionally cognizable "search" takes place when there is an expectation of privacy that "society is prepared to recognize as reasonable," but judges ultimately determine which expectations of privacy are objectively "reasonable," then Harlan's famous test appears to be circular.[35] Specifically, if a court strikes down a search, the expectation perforce must have been reasonable; if the court upholds the search, the expectation must have been, for that reason alone, unreasonable. According to this criticism, the famous test appears to boil down to "whatever the judges say it is." How, in spite of this apparent contradiction and circularity, and the endless criticism of the academy, has Harlan's test come to occupy such a central place in the law? The answer is that there is more to the test than its critics seem to realize.

Consider Harlan's allegedly paradoxical claim that the reasonable expectation of privacy test is "the rule that has emerged from prior decisions."[36]

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30. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

31. *See* Mancusi v. DeForte, 392 U.S. 364, 368 (1968) (applying the "reasonable expectation of privacy test" in the Court's majority decision).

32. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 33 (2001) ("As Justice Harlan's oft-quoted concurrence described it, a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable."); Minnesota v. Carter, 525 U.S. 83, 97 (1998) (commenting on "the *Katz* test (which has come to mean the test enunciated by Justice Harlan's separate concurrence in *Katz*)"); Smith v. Maryland, 442 U.S. 735, 740 (1979) (expressly adopting Justice Harlan's "reasonable expectation of privacy" formula as the rule of *Katz*).

33. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

34. *Id.* at 362.

35. *See, e.g.*, Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503 (2007) ("Treatises and casebooks struggle to explain the test. Most simply announce the outcomes in the Supreme Court's cases, and some suggest that the only way to identify when an expectation of privacy is reasonable is when five Justices say so." (citations omitted)).

36. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

As Harlan takes pains to point out in his concurrence, except for *Olmstead* and *Goldman*, *Katz* does not overrule any other prior cases—even though all the former cases (including *Weeks* and *Hester* cited by Harlan) were based on the old trespass model.[37] Harlan then points out something obvious—the reasonable expectation of privacy test *is entirely consistent with these former trespass decisions.*[38]

In fact, in overruling *Olmstead*'s narrow trespass test, the Court made only an incremental change in the old trespass standard—it removed the requirement that one hold a possessory interest to assert a claim under the Fourth Amendment. Since there is no property interest in a voice communicated over electric wires, and thus nothing to possess, the Court had to abandon *Olmstead*'s possessory interest requirement. The distinction between a *Goldman* set of facts (where there was no technical crossing of a property boundary) and a *Silverman* set of facts (where there was a technical crossing of a property boundary) had simply become untenable.

Harlan recognized that although it was appropriate to reject *Olmstead*'s technical and artificial possessory interest test, much of the old trespass doctrine, as reflected in prior case law, was still intact. Fourth Amendment violations before and after *Katz* still involved challenges to government intrusion into an area where a person had a legally protected interest—the essence of the traditional trespass concept.[39] Thus, because Harlan's reasonable expectation of privacy test represents an essential continuity with prior law, the accusation of circularity misses the point. Harlan addressed this issue explicitly when he wrote: "As the Court's opinion states, 'the Fourth Amendment protects people, not places.' The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a 'place.'"[40]

In this passage, Harlan pointed out the obvious—that our intuitions of privacy are essentially context-specific. In the context of the Fourth Amendment, they generally involve reference to a place. Places have well defined pre-existing legal rules—determined in large part by the law of trespass—which govern our socially recognized and accepted expectations of privacy.

Thus, an objectively reasonable expectation of privacy necessarily must reference *other* norms independent of the idea of privacy itself. The test is not *just* what the judge says it is; the test must also incorporate a long tradition of what other judges and lawmakers have declared the law to be in the past. This tradition includes as an important aspect those norms underlying society's objective expectations of privacy—among which a central place is held by the law of property.

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37. *Id.* at 360.

38. *Id.* at 362.

39. Or, as counsel for both the petitioner and the government argued in their briefs, whether there was an unpermitted intrusion into a "constitutionally protected area."

40. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

In a later search and seizure case, the Supreme Court explicitly made this point:

> [I]t would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in criminal cases. Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.[41]

Of course, broadly speaking, the circle remains; for, strictly speaking, *all* law rests on other law. However, that is only to recognize, as the German philosopher Hans-Georg Gadamer said, that it constitutes a "circle which is fundamental to all understanding."[42]

We have seen that the reasonable expectation of privacy test incorporates the old trespass standard, more broadly understood. However, the test also provides something more; something that trespass, restricted to traditional rights of property, could not do by itself. By explicitly basing the protections of the Fourth Amendment on a right of privacy, the test gave courts more flexibility to protect a broader concept of human dignity at a time when information technology had outstripped what property rights alone could protect. However, even when applying the test to new facts, courts do not declare law in a vacuum; they search for new rules by analogistic reasoning from old ones. When engaged in such analogistic reasoning, a balancing process usually takes place. While there existed a very similar balancing process in the old trespass cases as well, under the guise of implied licenses and legal privileges,[43] *Olmstead*'s strict reading of the Fourth Amendment had become too narrow. Nevertheless, while the new test freed courts from the stranglehold of the technical elements of trespass pleading, the old trespass standard was left basically intact. It is in this sense that Harlan correctly speaks of the test as "the rule that has emerged from prior decisions."[44]

Where, then, did the reasonable expectation of privacy test come from? The test is not mentioned in the record of the lower courts, or in the pleadings and briefs filed in the Supreme Court. Until recently, most observers treated the test as if Harlan made it up out of thin air. However, as the few who have taken the time to read the transcripts or listen to the oral arguments know, the idea came from the lawyers—specifically one lawyer—Harvey (now Judge) Schneider who, with Burton Marks, represented the petitioner, Charles Katz.

In his accompanying article, Judge Schneider explains how, after the Court issued its decision in *Berger v. New York*, he realized that the days of the

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41. Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978).

42. HANS-GEORG GADAMER, TRUTH AND METHOD 294 (2nd ed. Trans. Weinsheimer & Marshall 1995).

43. *See generally* Peter A. Winn, *The Guilty Eye: Unauthorized Access, Trespass and Privacy*, 62 BUS. LAW. 1395, 1422-29 (2007).

44. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

Olmstead trespass standard were numbered. In the days leading up to the oral argument, the young lawyer began to rethink his strategy. He suddenly realized that expectations of privacy should be based on an objective standard, one that could be formulated using the reasonable man standard from tort law. In an act of great courage, he decided to focus all of his energy during oral argument on articulating the new standard for the Court. As we have seen, the test had not been articulated in the briefs, and presenting it at oral argument arguably constituted a breach of protocol. Only a young and inexperienced lawyer would ever have tried such a thing.[45] But even today, more than forty years later, when we listen to the recording of the argument, now available for the first time on the Internet, one cannot help but sense the electricity in the air as he presented the test for the first time to the public. The justices seized on the test like children with a new toy, ran through various hypothetical fact situations, and then tested it against common intuitions of privacy norms. Over and over in his argument, Schneider emphasized the *objective* nature of the test. He explained how it could be used to protect privacy rights and account for prior case law. He also explained how electronic surveillance could be regulated appropriately in a fair and balanced manner under the test he proposed.

And, as evidenced by the initial vote in conference, Schneider nearly lost his case. Justice Stewart's change of heart appeared to occur not because of anything Schneider said in oral argument, but because of the Justice's own separate concerns and the efforts of Stewart's new law clerk, who had not even heard the oral argument. Needless to say, Stewart's majority opinion makes no reference to the reasonable expectation of privacy test. On the other hand, Harlan, who always recognized the importance of oral argument,[46] appears to have listened carefully to what the young lawyer said and recognized his point.

Accordingly, Judge Schneider's retrospective article brings us, for the first time, a wonderful explanation of where Harlan got the test from in the first place—an honor for which the young attorney Harvey Schneider fully deserves the credit. There is also an important lesson regarding the makings of a great judge—the ability to be a good listener.

Given how impressed Justice Harlan seems to have been by Schneider's exposition of the reasonable expectation of privacy test at oral argument, why did he not intervene to stop his colleagues from unfairly criticizing counsel in the majority opinion? More importantly, why should we care about the majority's

45. And perhaps only a fearless and daring older lawyer such as Burton Marks would have ever permitted his young associate Harvey Schneider to take such a risk.

46. *See, e.g.*, John Marshall Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?*, *in* THE EVOLUTION OF A JUDICIAL PHILOSOPHY, SELECTED OPINIONS AND PAPERS OF JUSTICE JOHN M. HARLAN, 296 (David L. Shapiro ed., 1969) ("[Y]our oral argument on an appeal is perhaps the most effective weapon you have got if you will give it the time and attention it deserves. Oral argument is exciting and will return rich dividends if it is done well. And I think it will be a sorry day for the American bar if the place of the oral argument in our appellate courts is depreciated and oral advocacy becomes looked upon as a pro forma exercise which, because of tradition or because of the insistence of his client, a lawyer has to go through.").

unfair criticism of counsel in the first place? Of course, it temporarily deprived Judge Schneider of the credit he deserved for originating the famous test, but having now corrected the historical record, should we continue to be concerned about an instance of unfairness that took place more than forty years ago and at a time when no one reasonably could have foreseen the impact, if any, of the *Katz* decision on legal history? I would respectfully submit, however, that *that* is exactly the point. Such unfairness indeed would be of no consequence if the legitimacy of an opinion rested solely on the immediate obviousness of its legal analysis. However, no such obviousness exists at the time a decision comes down, since the legal ideas are in dispute between the parties, and usually the members of the Court, as well. Even after a decision is made, there is no guarantee it will pass the test of time. Instead, the Court's legitimacy comes from its perception by the public as an institution that simply tries to be fair. That public perception of fairness, in turn, depends to a great extent on the manners that the Court displays. It is for precisely this reason that Supreme Court proceedings are steeped in ritual and ceremony. Accordingly, the Court's criticism of counsel in *Katz* continues to be relevant today not only for its *unfairness*—but also for what at the time should have been recognized as an appalling display of bad *manners*.

Why then did Justice Harlan, universally regarded as a man of tremendous courtesy and tact, not step in to protect the reputation of the Court? One immediately thinks of Mr. Knightly's famous statement to Emma Woodhouse, "It was badly done, indeed!" after she made an ill considered remark at the expense of an impoverished woman of lower social rank.[47] For whatever reason, however, Justice Harlan never intervened to prevent the majority opinion's breach of judicial etiquette. Perhaps Harlan would have perceived such a conversation to be a breach of the social decorum itself; a decorum he insisted on maintaining with his colleagues. But for whatever the reason, the result was a diminution of the Court's reputation for fairness.

Returning once again to Justice Harlan's concurrence on its merits, we have seen that in working on the reasonable expectation of privacy test, he refined the test in his own way, adding both a subjective and an objective component. Perhaps he thought that the subjective component was needed to clarify that, although an objective expectation of privacy might exist, a subjective expectation might not, as when a person in his (objectively private) home is overheard intentionally speaking in a loud voice out of on open window. However, as Judge Schneider correctly pointed out, all the work here takes place on the objective side of the ledger. Perhaps Justice Harlan felt the subjective component of the test was still needed to mirror the old trespass element that an intrusion lack permission. However, when applying the test in subsequent cases, even Harlan himself only referenced the objective component.[48] Thus, for all practical purposes, Harlan's and Schneider's formulations of the test

47. *See* JANE AUSTEN, EMMA 353 (Frederick A. Stokes & Bros. 1889) (1815).

48. *See* Mancusi v. DeForte, 392 U.S. 364, 368 (1968) ("[T]he protection of the [Fourth] Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion.").

appear to be one and the same. While it can be said that Schneider's formulation is simpler and more elegant, subsequent decisions continue to recite the two part structure, and, for better or worse, that formulation appears to have endured the test of time.

The virtue of either formulation of the test is that it can be used to address virtually all different contexts in which our intuitions of privacy seem to call for legal protection.

The test does not, of course, dictate what a reasonable expectation of privacy is, or what results should be reached. Rather, it provides the structure in which the debate can take place, thus allowing courts to engage in a process of common law rulemaking. As such, the flexibility of the test is not a shortcoming, but a strength. If the test always determined a particular outcome, it would cease to capture the very complex and context-specific nature of our intuitions of privacy. Of course, as the Supreme Court has moved in a more conservative direction, the test has been flexible enough to move with it. But the test was never intended to provide a fixed answer to the legal question of privacy under the Fourth Amendment. It was intended to provide a neutral framework to use in evaluating *both sides* of any particular dispute. It gives structure to the arguments; it does not determine the outcome.

The credit for the reasonable expectation of privacy test thus belongs to two men: one of them, a bright, young, and relatively inexperienced lawyer who nevertheless had great talent and nerve; the other, a wise old judge who knew how to listen. To their lasting credit, both men saw the significance of an important legal idea when few others did, and had the courage to follow through with that idea, resulting in what is now universally recognized as the great cornerstone of Fourth Amendment jurisprudence.